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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Case No.: 2020-CP-10-00209
Appellate Case No.: 2020-001030

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

Maybank 2754, LLC,Respondent,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe Petitioners.

JOINT REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONERS EUGENE ZURLO, INDIVIDUALLY AND AS CO-TRUSTEE OF THE EUGENE J. ZURLO LIVING TRUST DATED DECEMBER 11, 1997; 1776, LLC; BENCH FENWICK, LLC; THE BEACH COMPANY [SIC]; & PENNY CREEK ASSOCIATES, LLC

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ARGUMENTS IN REPLY¹

A. Both Respondent's and the Court of Appeals' Views of South Carolina Easement Law and the Resolution Language Are Wrong.

i. *South Carolina Easement Law Requires the Location of an Easement to be Sufficiently Defined.*

Respondent Maybank 2754, LLC (“Respondent”) alleges Petitioners “erroneously assert that ‘location’ is an explicit requirement in easement law in South Carolina.” (Return to Petitions, p. 13.) Likewise, the Court of Appeals held “[w]e note [Respondent] also argued the circuit court erred in concluding the Resolution could not create an easement because it did not include the ‘essential elements’ necessary to create a property right, specifically duration, scope, nature, and location. We agree with [Respondent].” (Ct. App. Order of Aug. 7, 2024, n.9.) Both the Court of Appeals and Respondent are in error.

South Carolina law requires the location of an easement to be sufficiently identifiable. The Court of Appeals in *Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 72, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting *Allen v. Duvall*, 311 N.C. 245, 316 S.E.2d 267, 270 (1984)), explicitly held the “description of an easement in a recorded document is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is ‘capable of being rendered to a certainty [by reference] to something extrinsic . . . to which it refer[s].’” The South Carolina federal district court in *Rogers v. River Hills Limited Partnership*² cited to *Binkley* and held that South Carolina easement law requires an

¹ All capitalized terms used herein, unless otherwise defined in this Reply in Support of Joint Petition for Writ of Certiorari by Petitioners Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Bench Fenwick, LLC; The Beach Company [sic]; and Penny Creek Associates, LLC, shall have the same meanings as those provided in the Joint Petition for Writ of Certiorari.

² Respondent also argues *Rogers* does not constitute binding precedent. (Return to Petitions, p. 13.) Respondent’s point is correct as far as it goes, but *Binkley* does constitute binding precedent,

“easement *must* be sufficiently defined to indicate the location of the easement on the property.” No. 4:09-CV-01540-JMC, 2011 WL 4808207, at *4 (D.S.C. Oct. 7, 2011) (emphasis added), *aff’d*, 514 F. App’x 276 (4th Cir. 2013). Despite this clear requirement of sufficient location identification in South Carolina easement law, Respondent brazenly argues “there is not” any such requirement. (Return to Petitions, p. 14.) Further, to the extent Respondent attempts to distinguish recorded versus unrecorded easements relative to the essential location element, *Binkley* and *Rogers* demonstrate location information is required regardless of whether the purported easement is recorded or unrecorded. After all, *Binkley* concerned a recorded easement, while *Rogers* concerned an unrecorded easement; both cases, though, required sufficient location information to be defined in order for an easement to be created.

ii. Comparing the Resolution’s Language with Case Law Mandates the Overturning of the Court of Appeal’s Decision.

Respondent argues that even if such location information is required, the Resolution’s “inclusion of Pitch Fork Road . . . acts as a guide to the location of the easement,” such that the purported easement met this essential element and was created. (Return to Petitions, p. 14.) However, Respondent’s conclusory argument falls flat when comparing the Resolution’s language to the cases cited by Petitioners. For example, in *Binkley*, the instrument setting forth the easement “included the elevation of the dam, a map showing the approximate location of a contour line corresponding to the elevation of the dam, and an acreage table listing the number of acres affected by the easement,” such that a “surveyor armed with this information could have located the easement on a homeowner’s property.” *Binkley*, 348 S.C. at 72, 558 S.E.2d at 909. The purported easement in this case offers no similar type of information as in *Binkley*. In fact, Respondent offers

and it is significant that a South Carolina federal district court viewed *Binkley* to require sufficient location identification for an easement to be created.

no explanation for how the reference to Pitch Fork Road acts as a guide. The purported easement language—i.e. “the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road”—does *not* indicate *any* position or direction relative to Pitch Fork Road. Instead, the reference to Pitch Fork Road is merely used as a condition precedent for the execution of the contemplated easement agreement. For Respondent to claim the inclusion of this reference “acts as a guide” amounts to nothing more than an unsupported conclusion.

Likewise, Respondent fails to confront the comparison with *Rogers* cited by Petitioners head-on. The *Rogers* court found a purported easement to be invalid because:

In describing the easement, the [extrinsic evidence] simply provide[d]: “This right of ingress and egress shall be large enough to meet the requirements of the Horry County Planning and Zoning Commission to enable said parcel to be made a part of River Hills Subdivision.” Nothing in the [extrinsic evidence] specific[d] the location of the easement or even how one is to determine the location of the easement; the document only indicates the size of the easement. These descriptions are far too vague to constitute an enforceable conveyance.

Rogers, No. 4:09-CV-01540-JMC, 2011 WL 4808207, at *4. The language used in the Resolutions is similarly far too vague. Rather than articulate how the Resolution language acts as a guide to language—which is impossible and why Respondent could not so articulate—Respondent pointed to two pieces of extrinsic evidence in order to determine the location of the easement, but these pieces of extrinsic evidence are also unavailing.

First, Respondent suggests the September 2020 affidavit of Laplante more fully describes the location of the easement. (Return to Petitions, p. 14; R. at 1943–51.) However, this affidavit is self-serving: it was executed approximately *seven years after* the Resolution was signed, which Respondent alleged created the purported easement, and more importantly, it was executed *after and as a part of* the underlying action. This is the same affidavit relied upon by the Court of

Appeals and which highlights yet another error of law committed by the Court of Appeals. (Ct. App. Order of Aug. 7, 2024, Sec. III(C).) For extrinsic evidence to be used to explain an arguably ambiguous instrument, the extrinsic evidence must be “contemporaneous with or prior to the execution of the written instrument.” *See, e.g., Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205–06, 687 S.E.2d 714, 718 (Ct. App. 2009) (“‘The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument.’ However, if a contract is ambiguous, parol evidence is admissible to ascertain the true meaning of the contract and the intent of the parties.”) (internal citations omitted). The Laplante affidavit simply does not bear the required indicia of reliability when it was executed well after the Resolution and after the underlying litigation began; instead, it is nothing more than a self-serving memory that does not suffice. *See, e.g., Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 630 (4th Cir. 1977) (noting “the policy of the parol evidence rule [] is grounded in the inherent reliability of a writing as opposed to the memories of contracting parties”). Further, even if the Laplante affidavit were to be considered as extrinsic evidence, the affidavit admits the easement was “not specifically located” and “the location and condition of the easement [was] conditioned upon completion of Pitchfork Road,” given that locating the easement at that time could have been “detrimental to the marketing of the Property for sale in divisible parcels.” (R. at 1948, ¶ 26.) Thus, Respondent’s resort to this affidavit actually makes Petitioners’ point: the location of the purported easement was never sufficiently defined to constitute a valid easement and neither the Resolution nor extrinsic evidence saves the deficient language from vagueness and unenforceability.

Second, Respondent avers a 2019 plat showing Northern Pitchfork Road. (Return to

Petitions, p. 14; R. at 1078.) Like the Laplante affidavit, the 2019 plat was *not* created contemporaneous with or prior to the Resolution; instead, it was created approximately *six years after* the Resolution was signed. Therefore, it simply cannot constitute reliable parol evidence. *See Plantation*, 386 S.C. at 205–06, 687 S.E.2d at 718; *Call Carl*, 554 F.2d at 630. Moreover, the plat was conducted on behalf of 1776, LLC, which was not a party to the Resolution and thus further diminishes any interpretive value it has for the intent of the actual parties to the Resolution. Lastly, and perhaps most importantly, the plat does not even depict the purported easement, only Northern Pitchfork Road. Respondent utterly fails to explain how this plat can be used to sufficiently identify the location of the purported easement, when the purported easement is not even depicted.³

Ultimately, it is telling Respondent is resorting to extrinsic evidence now, when the Court of Appeals did not even consider such evidence and instead held location was not an essential element to the creation of an easement. Respondent is having to grasp at straws to conjure identifiable location information, but unfortunately for Respondent, neither the Resolution language nor the extrinsic evidence supplied by Respondent are able to meet the essential location element required by South Carolina easement law. Based on the foregoing, this Court should grant certiorari and correct the Court of Appeals' decision that conflicts with established South Carolina property law.

B. Respondent's Analysis of Agreements to Agree is Without Merit and the Court of Appeals' Decision Directly Conflicts with this Court's Precedent on the Unenforceability of Agreements to Agree.

Respondent cites to a number of South Carolina cases in an unsuccessful attempt to save the Court of Appeals' opinion from directly conflicting with this Court's precedent on the

³ Perhaps Respondent is attempting to use the 2019 plat and the 2020 Laplante affidavit in tandem to somehow establish location information. However, even this assumption fails, because the 2020 Laplante affidavit does not mention the 2019 plat, only a 2005 plat. (R. at 1947.)

unenforceability of agreements to agree. (Return to Petitions, pp. 14–18.) Each case will be addressed in turn.

i. Ten Woodruff Oaks

First, Respondent quotes at length the case of *Ten Woodruff Oaks, LLC v. Point Development, LLC*, 385 S.C. 174, 683 S.E.2d 510 (Ct. App. 2009). Respondent provides no further analysis, leaving Petitioners and this Court to surmise the comparative value this case presents in favor of Respondent. However, a review of *Ten Woodruff Oaks* demonstrates the case favors Petitioners' position instead.

In that case, the respondent sought a declaration that it was the owner of an easement. *Id.* at 176, 683 S.E.2d at 511. The master-in-equity court held an express grant of an easement had occurred via a letter agreement, aided in part by the consideration of contemporaneous extrinsic evidence. *Id.* at 182, 683 S.E.2d at 514. On January 14, 1999, the respondent and the adjacent property owner over which the purported easement existed executed the aforementioned letter agreement. *Id.* at 177, 683 S.E.2d at 512. Under this letter agreement, the adjacent property owner “would grant an easement allowing travel from a new boulevard, later named Market Point Drive, to the Piedmont Natural Gas booster station. In return, [the respondent] would establish an ingress and egress easement between Woodruff Oaks Lane and the Piedmont Natural Gas booster station. The two easements were to overlap in front of the booster station.” *Id.* The adjacent property owner’s construction of Market Point Drive occurred in 1999 as well, and a “curb cut was included for the [] easement” at that time. *Id.* at 178, 683 S.E.2d at 512. Further, but a few months after executing the letter agreement, on April 30, 1999, the adjacent property owner recorded a plat of the property showing the easement for ingress and egress from Woodruff Oaks Lane to Market

Point Drive.⁴ *Id.* In a portion of the opinion not provided by Respondent, the Court of Appeals noted the “master found ‘that the letter evidenced [the adjacent property owner’s] express grant of an easement across its property allowing the adjoining landowners [like the respondent] to travel from Woodruff Oaks Lane to Market Point Drive.’” *Ten Woodruff Oaks*, 385 S.C. at 182, 683 S.E.2d at 514. Just as importantly, the Court of Appeals held “the master correctly relied on evidence outside the letter agreement in determining the effect of the agreement,” and that “this evidence supports the master’s interpretation of the agreement as one creating an easement interest rather than as an expression of the intent to do so upon the satisfaction of certain terms.” *Id.* That extrinsic evidence included the contemporaneous curb cut and, notably, recording of the plat depicting the easement.

Contrary to Respondent’s contention that *Ten Woodruff Oaks* “is somewhat similar to the facts of this case,” the facts are different and highlight how the Resolution in this case merely amounts to an unenforceable agreement to agree. (Return to Petitions, p. 15.) As a quick aside, it is worth noting the location information in the *Ten Woodruff Oaks* letter agreement sets forth both termini points—i.e. from Market Point Drive to the Piedmont Natural Gas booster station, which was further established via a contemporaneous physical curb cut and recording of a plat—such that there was no guess work required for the length, direction, and relative position of the easement in question. That is *not* the information set forth by the Resolution or any other extrinsic evidence in this case; indeed, there is no termini information, length, direction, or relative position included with the Resolution’s plain language. Thus, the *Ten Woodruff Oaks* letter agreement further supports that the grant of an easement requires location to be sufficiently defined.

⁴ Two additional plats were also recorded, one on August 19, 1999 and another on March 15, 2001, both of which also depicted the easement. *Ten Woodruff Oaks*, 385 S.C. at 178, 683 S.E.2d at 512.

Further, and more to the point regarding the agreement to agree analysis, even Respondent recognizes that “the language [of the *Ten Woodruff Oaks* letter agreement] does **not** indicate the easement [the adjacent property owner] intended to grant to [the respondent] was contingent on the completion of the various tasks enumerated in the letter.” *Ten Woodruff Oaks*, 385 S.C. at 181, 683 S.E.2d at 514 (emphasis added). The lack of a condition precedent in *Ten Woodruff Oaks* is completely different than the contingency present in the Resolution here. The Resolution’s plain language establishes the contingency that must occur **prior to** the express grant of the easement: “the location and condition of [the purported easement] shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road.” By requiring this condition precedent and leaving an essential term to be determined later, there can be no enforceable agreement and therefore no granted easement. *See BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App’x 428, 435 (4th Cir. 2010) (“The parties merely agreed to enter into negotiations to reach an agreement, but subsequently failed to reach an actual agreement on essential terms pertaining to land allocations, divisions of parcels, and restrictive covenants for the property.”) (citing *Trident Constr. Co., Inc. v. Austin Co.*, 272 F.Supp.2d 566, 575 (D.S.C. 2003)).

ii. Smith and Douglas

To set the table, Petitioners cite to *Smith v. Commissioners of Public Works of City of Charleston*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994), and *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971), in their Joint Petition for Rehearing as well as the Joint Petition for Writ of Certiorari. Although Respondent failed to address *Smith* and *Douglas* in its Return to the Joint Petition for Rehearing, to its credit, Respondent does so now. Tellingly, however, Respondent addresses *Smith* and *Douglas* relative to the agreement to agree and parol evidence analyses **rather than** in the essential element analysis. Respondent’s attempts to sidestep the implications of *Smith* and *Douglas* are glaring and demonstrate its arguments are equivalent to

the proverbial house built on sand.

In both *Smith* and *Douglas*, the language used established sufficient location information:

Kittredge and all future owners of Dean Hall Plantation and Cypress Gardens shall have the right, and the same ***is hereby granted*** to them, of ingress, egress and regress ***to the banks of and across the canal about to be constructed, leading from the Cooper River to Back River, at any point contiguous to the lands being conveyed*** by Kittredge to the Authority.

Smith, 312 S.C. at 463, 441 S.E.2d at 333 (emphasis added).

The grantor herein reserves unto himself, his heirs and assigns, an easement or right-of-way over and across a strip of land, eighteen feet in width at all points, ***lying along the northern side of the lot above described and adjacent to the above mentioned property*** now or formerly of Whitworth and Wyatt. Said strip is reserved for use by the grantor, his heirs and assigns as a driveway ***leading to the grantor's adjacent property immediately to the west of the lot above described***

Douglas, 256 S.C. at 444, 182 S.E.2d at 721–22 (1971) (emphasis added). Respondent fails to confront the language in *Smith* and *Douglas*, because Respondent has no ability to convincingly analogize the vague language in the Resolution with the position and direction information sufficiently identifiable in the easements in *Smith* and *Douglas*. To be clear, Petitioners cite to *Smith* and *Douglas* as authority to support the requirement for sufficient location information to be identified. Respondent cites to these cases, not in rebuttal, but to establish that *Smith* remanded the case to further determine the exact number of access points and that *Douglas* allowed consideration of parol evidence. (Return to Petitions, p. 16.) While it is true *Smith* remanded the case for a further determination of the exact number of access points, the pertinent implication from *Smith* is that a granted easement will exist so long as sufficient information exists to identify the essential location element. In *Smith*, both position and direction of the easement were expressed, leaving only the “determin[ation of] the extent of the easement,” i.e. “the number of

access points.” *Smith*, 312 S.C. at 468, 441 S.E.2d at 336. Further, *Smith* contained an affirmative grant—i.e. “is hereby granted”—which is *not* similarly present in the Resolution’s language here. Likewise, while it is also true *Douglas* relied on contemporaneous parol evidence—i.e. the existing driveway that tracked the easement language—Respondent has no such similar parol evidence upon which to rely, as set forth more fully above. Neither *Smith* nor *Douglas* involved vague language or a condition precedent that amounted to an agreement to agree, because they both involved easements with sufficiently identifiable location information. Again, these cases support Petitioners’ position and are unavailing to Respondent.

iii. West

Lastly, Respondent analyzes the case of *West v. Newberry Electric Co-operative*, 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004), and appears to focus on the holding that the “exact location of the easement on the property [for power lines] is not described in the easement, but its possible relocation is contemplated.” Any argument that *West* stands for the proposition that an arguably unlocated easement does not amount to an agreement to agree is without merit. First, the full text of the easement language is not presented in the opinion, leaving its interpretive value diminished without an ability to analyze the language more fully. Second, there is no evidence the enforceability of the easement was ever contested by the Newberry Electric Co-operative, only whether the easement ran with the land, given the land passed from a prior owner to the Wests. Thus, the Court of Appeals never considered whether the easement was valid in the first instance, but only whether it ran with the land. Again, the interpretive value of this case is very limited. Third, having exact location information is not required by South Carolina law; only that the location of the easement is sufficiently defined. What is fatal to Respondent’s case is not that the *exact* location of the easement is not defined, but that Respondent cannot point to any language in the Resolution or other reliable extrinsic evidence setting forth any *sufficiently* defined location

for the easement.

Fourth and finally, the language cited by Respondent is taken out of context. Assuming *arguendo* the exact location of the power line easement on the property is not described (which could have otherwise been determined using contemporaneous parol evidence, such as the contemporaneous construction of said power line), the relocation of the easement that is contemplated by the easement sets forth that “at no time shall [the Newberry Electric Co-operative] be deprived of the privilege of crossing said property *at the general proximity of the same location*” as the power line that existed at the time of the contemplated relocation. *Id.* at 540, 593 S.E.2d at 501–02. Thus, the relocated easement’s location is sufficiently identifiable in that it will be at the general proximity of the same location as the power line that was existing at the time. Based on the foregoing, the *West* case is simply not analogous to the case at bar.

iv. Rogers

In conclusion, the language of the Resolution is not similar to the language in the above cases analyzed by Respondent. Tellingly, Respondent fails to re-analyze the *Rogers* opinion discussed in the preceding section relative to location being an essential element. The *Rogers* opinion is not only authority establishing the essential nature of the location element for an easement to be valid, but it is also authority illustrating why the language in the Resolution merely amounts to an unenforceable agreement to agree. In *Rogers*, the federal district court found “[the extrinsic evidence] provide[d] that ‘[t]his [easement] access shall becomes [sic] available’ at a later time.” *Rogers*, No. 4:09-CV-01540-JMC, 2011 WL 4808207, at *5. Based on that finding, the *Rogers* Court held “[t]his language does *not* suggest a present intention of conveyance, but only something to be completed upon the meeting of certain conditions.” *Id.* (emphasis added). The language in the purported easement here is similar in that there is no present intention of conveyance, given the inclusion of the condition precedent that Pitch Fork Road be completed

prior to the mutual agreement for the location and condition of the purported easement. And it bears repeating Laplante admitted on multiple occasions, via his affidavit and via testimony, that the location of the easement was intentionally undefined so as not to encumber the Property in an irrational manner prior to completion of Pitch Fork Road. As set forth more fully in the Joint Petition for Writ of Certiorari, the Court of Appeals' decision directly conflicts with this Court's precedent, which can be corrected by the grant of certiorari in this case.

C. **Respondent's Position, Upheld by the Court of Appeals, Threatens the Certainty of Future Foreclosure Actions in South Carolina.**

As set forth more fully in the Joint Petition for Writ of Certiorari, the foreclosure action extinguished the purported easement to the extent it even existed. (Joint Petition, pp. 14–19.) In response, Respondent first criticizes Petitioners for citing to case law from other states regarding the implications of the Court of Appeals' decision on future foreclosures in South Carolina. (Return to Petitions, p. 18; *see also* Return to Petitions, pp. 20–21.) However, Petitioners cited to case law from other states, because research reveals this particular issue is a novel one in South Carolina. (Joint Petition, p. 14.) Respondent's failure to contend with this case law supports the grant of certiorari here so that this Court can obtain more fulsome briefing on this issue.

Following Respondent's first criticism and rather than contending with the ample authority supporting Petitioners' arguments, Respondent's main substantive argument is that Petitioners have "downplay[ed] the importance of [Laplante] being expressly severed from the foreclosure claim." (Return to Petitions, p. 18; *see also* Return to Petitions, p. 20.) Respondent's quick retreat to this secondary position is without merit. As set forth in the Joint Petition for Writ of Certiorari, Laplante held a duty to make the purported easement a part of the record of the foreclosure action. (Joint Petition, p. 22.) Because this is a novel question for this Court, Petitioners presented the following authority in support of this duty, to which Respondent utterly failed to respond: *Kling v.*

Ghilarducci, 3 Ill. 2d 454, 463, 121 N.E.2d 752, 757 (1954) (finding preclusion when plaintiff failed to set up a claim during foreclosure, because “[i]f plaintiff had any easement or claim of easement in the premises not subject to the trust deed, it was incumbent upon her to set up her claim in the foreclosure proceedings”); *Littlebrook Airpark Condo. Ass’n v. Sweet Peas, LLC*, 2019 ME 3, ¶ 21, 199 A.3d 677, 682–83 (2019) (holding a junior encumbrance was extinguished upon foreclosure even if the various individual owners were not given written notice of foreclosure, because notice was given to agent and sole member of the organization holding the junior encumbrance). Further, it does not matter Laplante was severed or that his family members were never made parties to the foreclosure action, because Laplante, individually and/or as a member of Penny Creek, had implicit notice to assert the existence of a purported easement and his failure is imputed to Respondent as the purported assignee. Thus, Respondent is estopped from avoiding the implications of the foreclosure action in extinguishing the purported easement to the extent it even existed.

Next, Respondent argues Section 30-7-20 of the South Carolina Code only relates to liens, rather than other encumbrances like easements. (Return to Petitions, p. 19.) Setting aside the fact that this Section deals with “any contract in the nature of a subordination” and the purported easement constituting such a contract, the prior Section—i.e. Section 30-7-10 of the South Carolina Code—stands for the same proposition relative to easements, because “all instruments in writing conveying an interest in real estate” must be recorded in order to be enforceable on subsequent purchasers. As stated in the Joint Petition, these requirements from Sections 30-7-10 and -20 exist because the “purpose of the foreclosure is to fully determine the entire controversy . . .” *Gen. Plywood Corp. v. Richard Jones, Inc.*, 216 S.C. 322, 327, 57 S.E.2d 636, 638 (1950); *see also* Restatement (Third) of Property (Mortgages) § 7.1 (1997) (stating “the purpose of

foreclosure is to give the foreclosure purchaser the same title that mortgagor had when the foreclosed mortgage was executed”). In other words, the effect of a foreclosure is to address all encumbrances, such as easements, that are subsequent in time to the original mortgage being foreclosed. Based on the foregoing, and because Respondent failed to wrestle with the ample case law supporting Petitioners’ arguments, this Court should grant certiorari.

D. Respondent’s Perfunctory Analysis of Petitioners’ “Standard Form Language” Argument Emphasizes the Need for this Court to Grant Certiorari.

Petitioners argued in their Joint Petition for Writ of Certiorari that a novel question existed on whether standard form language in a foreclosure order overturns long-established authority regarding foreclosure orders or allows the purported easement in this case to avoid precedent upholding the extinguishment of easements via foreclosure orders. (Joint Petition, pp. 19–22.) In response, Respondent claims in a header that a novel question does *not* exist on this point. (Return to Petitions, p. 20.) However, Respondent fails to cite to any South Carolina precedent that undercuts the novelty of this issue and suggests this Court should “disregard case law” from outside of South Carolina, because it is not binding or applicable here. (Return to Petitions, p. 20.) Respondent goes on to describe that “[i]t is important to note that Petitioners do not cite to a single South Carolina case for this specific argument.” (Return to Petitions, p. 20.) *That’s because it is a novel question!* The burden is on Respondent to find South Carolina case law on this point, not on Petitioners.⁵ Respondent is making Petitioners’ point here. Petitioners were forced to present case law from outside of South Carolina because the impact of standard form language in foreclosure orders is a novel question of law that has never been addressed by a South Carolina court. Based on the foregoing, this issue should be accepted by this Court on certiorari review.

⁵ To be sure, Petitioners conducted a good faith search for South Carolina case law on this point, but research revealed no such authority, thereby supporting their initial contention that a novel question of law has been presented.

E. Respondent's Perfunctory Analysis of the Characterization of the Easement as In Gross or Appurtenant Also Emphasizes the Need for this Court to Grant Certiorari.

Respondent utterly fails to address Petitioners' argument as to how the Court of Appeals' decision directly conflicts with this Court's precedent in *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997), which sets forth the requirements for an easement to be appurtenant. Because the purported easement cannot establish the requisite elements for the purported easement to be appurtenant, it must be characterized as a mere easement in gross, which is incapable of transfer or assignment.⁶ Therefore, the Court of Appeals' opinion directly conflicts with *Tupper* and errs in reversing summary judgment in favor of Petitioners. Certiorari should be granted to correct this error. At minimum, this Court should require more fulsome briefing on this issue via the granting of certiorari here so that it can adequately assess whether the Court of Appeals did indeed err as Petitioners state.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request the Joint Petition for Writ of Certiorari be granted. The Court of Appeals' opinion threatens to upend fundamental aspects of property and contract law. Because there are many issues in which the Court of Appeals' decision is in direct conflict with prior decisions of this Court and there are other issues presented where there is not necessarily any binding South Carolina precedent on point, meaning novel questions of law are presented in the Joint Petition, this Court should grant certiorari. Further, the Court of Appeals' decision is sufficiently egregious and fundamental as to warrant correction on certiorari as well. Based on the foregoing, this Court should grant the Joint Petition.

⁶ Additionally, Respondent alleges the Laplante affidavit establishes that Respondent was assigned rights to the easement. (Return to Petitions, p. 21.) Be that as it may, no contractual document is a part of the record evidencing this assignment and it is improper to accept a self-serving and conclusory allegation in an affidavit as sufficient evidence of said assignment, even if the purported easement were transferable.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Case No.: 2020-CP-10-00209
Appellate Case No.: 2020-001030

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Bentley D. Price, Circuit Court Judge

Maybank 2754, LLC, Respondent,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe Petitioners.

PROOF OF SERVICE

I certify that I have served the foregoing Joint Reply in Support of the Petition for Writ of Certiorari on the following parties' counsel, at the addresses listed below by electronic mail on January 6, 2025.

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