THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

RECEIVED
NOV 07 2014
SC Court of Appeals

Case No. 2005-CP-32-2712

McGuinn Construction Management, Inc., ... Appellant,

v.

Saul Espino and Mara Espino, ... Respondents.

Case No. 2008-CP-32-419

Saul Espino and Mara Espino, ... Respondents,

v.

Gates Commons, LLC, S. Wade McGuinn, Individually,
and Town of Lexington, ... Defendants,

Of whom, Town of Lexington, is .... Appellant.

INITIAL BRIEF OF APPELLANT
TOWN OF LEXINGTON

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant
Town of Lexington

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in allowing the summary judgment ruling on the scope of the easement at issue to stand and in failing to remand for a trial in equity on the issue which would allow the Town of Lexington, as an interested party, the opportunity to be heard?

II. Did the Circuit Court err in granting summary judgment to the Espinos and in determining that the easement was limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision, where issues of fact in dispute should have precluded summary judgment?

STATEMENT OF THE CASE

This is an appeal involving two consolidated actions in which the Respondents Saul Espino and Mara Espino are parties. This appeal is from an Order filed June 16, 2008, when the late Circuit Court Judge James W. Johnson, Jr. granted summary judgment on a declaratory judgment cause of action to the Espinos regarding the scope of an express easement granted to the Appellant Town of Lexington by Coventry Associates, Inc. (a predecessor in interest to the Espinos). This appeal is also from a subsequent Order filed June 9, 2014, issued by Circuit Court Judge William P. Keesley which adjudicates a motion for reconsideration filed by the Appellant McGuinn Construction Management, Inc. ("McGuinn"). Shortly after McGuinn filed its motion for reconsideration, Judge Johnson died. In accordance with Rule 63, SCRCP, Judge Keesley heard and adjudicated the motion for reconsideration as the successor judge.

By way of brief factual background, in 1992, Saul Espino and Mara Espino purchased their residence at 108 Coventry Court within the Town of Lexington. The residence is in the Coventry Lake Subdivision. In approximately 2005, McGuinn began the development of Gates Commons which is a townhouse development adjacent to Coventry Lake Subdivision and located directly behind the Espinos' property. In order to provide sewer for the Gates Commons development, McGuinn sought to tie into the Town of Lexington's system using an easement across

the Espinos' property. The easement at issue, which was granted in April 1988 to the Town, provides as follows:

> All easements and rights of way necessary for the maintenance of the aforesaid water and sewer lines, said easements being 15' and 30' in width, reference being made to the "as-built" plans referenced above for a more complete and accurate description of said easements.

(R. ___). The easement specifically makes reference to the "as-built plans" for "a more complete and accurate description of said easements." (R. ___). The Espinos have objected to the use of the easement across their property to tie in the sewer line from the Gates Commons development, and as a result, two lawsuits have been filed.

The initial suit bearing Civil Action Number 2005-CP-32-2712 (hereafter the "2005 action") was filed on August 11, 2005, by McGuinn against the Espinos. Almost two years later, on May 23, 2007, the Espinos amended their answer to include a third-party complaint against the Town of Lexington. The Espinos impleaded the Town of Lexington under Rule 14, SCRCP, to seek recovery for damages sustained to their own property based on causes of action for gross negligence, inverse condemnation, and trespass against the Town. The Town moved to dismiss the third-party complaint, and by Order filed October 31, 2007, Judge Johnson granted that motion finding that the third-party complaint was not proper under Rule 14, SCRCP. (R. ___).

On October 10, 2008, the Espinos filed a second lawsuit against the Town of Lexington. That action, which bears Civil Action Number 2008-CP-32-419

(hereafter the "2008 action"), includes causes of action for negligence, gross negligence, regulatory taking, slander of title, trespass, and conversion against the Town.

Prior to the filing of the 2008 action, the Espinos and McGuinn had filed cross motions for summary judgment in the 2005 action. The Town was not a party to that action at that point. Those motions were heard by Judge Johnson, and on June 16, 2008, he issued an order granting partial summary judgment to the Espinos. Specifically, he ruled in the Espinos' favor on the declaratory judgment cause of action and determined as a matter of law that "the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision." (Johnson Order, p. 1). McGuinn subsequently filed a motion for reconsideration, but sadly Judge Johnson died shortly thereafter and never ruled on that motion.

Subsequently, based upon the motion of the Town, in March 2012, the two actions were consolidated. In his Order of Consolidation, Judge Keesley explained that "[t]he consolidation will enable the Town of Lexington to address Judge Johnson's Order and participate in the currently pending Motion for Reconsideration and, if necessary, any appellate review that may result from that ruling." (R. ___).

McGuinn's motion for reconsideration was ultimately heard by Judge Keesley on October 7, 2003. Following that hearing, Judge Keesley issued an

order finding "no basis for altering or amending Judge Johnson's rulings." (R. ___). Judge Keesley left unanswered the question as to whether the Town will be bound by Judge Johnson's decision on the scope of the easement. He wrote: "The court agrees that the parties to the lawsuit at the time that the matter was presented to Judge Johnson (2005-CP-32-02712) are bound by his ruling. However, the court is not determining in this order whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling." (R. ___).

McGuinn subsequently filed an appeal to this Court. The Town of Lexington then filed its appeal.

ARGUMENTS

I. The Circuit Court erred in allowing the summary judgment ruling on the scope of the easement at issue to stand and in failing to remand for a trial in equity on the issue which would allow the Town of Lexington, as an interested party, the opportunity to be heard.

As an initial issue, the Appellant Town of Lexington contends that Judge William Keesley erred in ruling on McGuinn Construction's motion for reconsideration on the merits. The Town asserts that Judge Keesley should have vacated the prior declaratory ruling regarding the scope of the easement and allowed the Town an opportunity to be heard on the issue, including the opportunity to present evidence regarding the intention of the parties as to the scope of the easement.

The Town holds the easement, and therefore, it is clearly an interested party as to any judicial determination regarding the scope of that easement. The Town, however, was not a party to the 2005 action at the time that Judge James Johnson issued his declaratory ruling defining the scope of the easement. The Town therefore argued to Judge Keesley at the reconsideration stage that, as a non-party to the 2005 action, the Town cannot be bound by the declaratory ruling issued by Judge Johnson. In the interests of judicial economy and because the Town is an interested party on the scope of easement issue, the correct decision would have been to vacate the declaratory ruling by Judge Johnson and allow for a full adjudication of the issue

with all interest parties joined and having the opportunity to be heard. That would allow for all interested and affected parties to be bound by the ultimate decision. However, Judge Keesley declined to take that approach and instead affirmed Judge Johnson's ruling. He did leave undecided, however, whether the Town will be bound by Judge Johnson's ruling.[1]

The Espinos cannot dispute that the Town is impacted by a judicial determination as to the scope of the easement. In fact, in the 2008 action brought by the Espinos against the Town, the Espinos attached the June 16, 2008 Order of Judge Johnson as an exhibit to the complaint and incorporated the rulings by reference. The Espinos have therefore taken the position that the declaratory ruling by Judge Johnson as to the scope of the easement is a critical issue in the 2008 action and appear to further maintain that the Town is bound by that ruling. However, the Town cannot be bound by a ruling in the 2005 action when the Town was not a party to that action and had no opportunity to be heard when Judge Johnson issued his decision.

The decision of the South Carolina Supreme Court in *Spanish Wells Property Owners Association v. Board of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988), is instructive. In *Spanish Wells*, a planning commission had approved a preliminary development permit, and that decision was

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[1] Judge Keesley writes: "However, the court is not determining whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling." (Keesley Order, p. 14). (R. ___).

subsequently appealed to the Circuit Court and ultimately to the Supreme Court. The Circuit Court had dismissed the appeal because the development permittee had not been joined as a party to the appeal. In affirming the Circuit Court, the Supreme Court adopted the majority rule nationally and ruled that a development permittee is a necessary party to an appeal from a planning commission to the Circuit Court. The Supreme Court explained that "[d]esignating the permittee a necessary party insures the most vitally interested party's participation in the appellate process." 367 S.E.2d at 161. "Additionally, the majority rule insures that where a circuit court reverses a permit approval, the permittee will be bound because it is a party to the appeal." *Id.*

The same rationale applies in the present case. While neither McGuinn Construction nor the Espinos sought dismissal under Rule 12(b)(7) for the failure to name a necessary party, *Spanish Wells* is nonetheless instructive in demonstrating that the Town of Lexington, the possessor of the property right, i.e. the easement, is an interested party (and likely a necessary party) for any adjudication regarding that easement. As the Supreme Court explained in *Spanish Wells*, it is important to have the "most vitally interested party's" participation in the adjudicatory process, and the absence of that party in the process will result in that interested party not being bound by the ultimate decision. That is precisely what has occurred here. The Town is an interested party. The Town did not participate in the adjudicatory process before Judge Johnson. As a result, the Town is not bound by Judge Johnson's ruling. This further highlights the error committed by Judge Keesley. Judge Johnson's ruling

should have been vacated, and Judge Keesley should have allowed the scope of easement issue to be determined in a proceeding with the Town joined as an interested or necessary party, and thus, all parties would have an opportunity to be heard and be bound by the ultimate decision. This Court is, therefore, requested to vacate the declaratory ruling by Judge Johnson as to scope of the easement and remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue. Alternatively, the Town requests that the Court remand with direction that the declaratory judgment entered by Judge Johnson in the 2005 action shall have no preclusive effect on the Town in the 2008 action, leaving the scope of easement issue to be litigated *de novo* in that action.

II. The Circuit Court erred in granting summary judgment to the Espinos and determining that the easement was limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision, where issues of fact in dispute should have precluded summary judgment.

The Appellant Town of Lexington further contends that Judge James Johnson, as ultimately affirmed by Judge William Keesley in his Order denying reconsideration, erred in granting summary judgment on the scope of easement issue. The errors committed are both procedural and substantive.

In early 2009, the South Carolina Supreme Court issued its decision in *Hancock v. Mid-South Carolina Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d

801 (2009), which clarified that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." 673 S.E.2d at 803. When he granted summary judgment to the Espinos on the scope of easement issue in his Order filed June 16, 2008, Judge Johnson did not have the benefit of the *Hancock* decision. In his Order, Judge Johnson included a detailed explanation of the "summary judgment standard," but that recitation of the standard does not reflect whether he was applying the "mere scintilla" rule. (R. ___). Further, it cannot just be assumed that Judge Johnson applied the "mere scintilla" standard because, as the Supreme Court explains in *Hancock*, the appellate authority prior to 2009 had been unclear and inconsistent. *See*, *Hancock*, 673 S.E.2d at 802 ("We recognize that the court of appeals has been somewhat inconsistent on whether a mere scintilla of evidence will overcome a motion for summary judgment"). In fact, the Supreme Court specifically cited a decision of the Court of Appeals from 2007 that rejected the "mere scintilla" standard. 673 S.E.2d at 802, n.1.

In addition, Judge Johnson's discussion and ruling on the declaratory judgment cause of action is extremely brief. The section in his Order that sets out his decision on the scope of easement issue includes no discussion of the evidence presented by the parties and certainly gives no indication that Judge Johnson correctly applied the "mere scintilla" standard. Earlier in the Order, there is a

section entitled "Facts in Controversy," which by that very description indicates an awareness by Judge Johnson that the facts are not undisputed but are indeed "in controversy." That characterization in itself weighs against the granting of summary judgment under a "mere scintilla" standard.[2]

More importantly, Judge Johnson failed to recognize that the record did include at least a "mere scintilla" of evidence that should have resulted in the denial of the Espinos' motion for summary judgment on the scope of easement issue. The evidence in the record reflects that in April 1988, an express easement was granted to the Town of Lexington by Coventry Associates, Inc. (a predecessor in interest to the Espinos). The easement was described as follows:

> All easements and rights of way necessary for the maintenance of the aforesaid water and sewer lines, said easements being 15' and 30' in width, reference being made to the "as-built" plans referenced above for a more complete and accurate description of said easements.

(R. ___).

The easement specifically makes reference to the "as-built plans" for "a more complete and accurate description of said easements." (R. ___). The "as-built plans," which are needed for a "complete and accurate description" of the easement, however, were apparently never submitted to nor considered by Judge Johnson when

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[2] Judge Johnson did not simply rely on the evidence presented, but he considered even what the Espinos' counsel described as "anticipated" testimony. Judge Johnson wrote: "The Defendants anticipate testimony of the Town Attorney that at no time was he asked to

he ruled on the scope of the easement. It is well settled that "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Simmons v. Berkeley Electric Cooperative, Inc.*, 404 S.C. 172, 744 S.E.2d 580, 584 (Ct. App. 2013). In the hearing before Judge Keesley, the Espinos' counsel confirmed that the "as-built plans" were never presented to Judge Johnson, but he then proceeds to make the curious statement that "the as-built plans have nothing to do with the language relating to the easements." (Tr. 36-37). He is clearly mistaken. The as-built plans are a significant and integral part of the description of the easement. To reiterate, the written language cites to the as-built plans "for a more complete and accurate description of said easements." Those as-built plans were contemplated by the parties to the easement as being critical to any understanding of the scope of the easement. Yet, those as-built plans are not in the record. The Town submits that summary judgment is not appropriate where further inquiry into the facts is needed. That is especially true where the court was called upon to determine the scope of an easement that makes specific reference to as-built plans to provide "for a more complete and accurate description of said easements", and yet, the moving party – the Espinos – who have the initial burden of production failed to produce the as-built plans for the court's consideration.[3]

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opine as to the legal authority granted to the Town on the easement in question, and what authority, if any, the developer would have derived therefrom." (Johnson Order, p. 3).

[3] Under Rule 56(c), the party seeking summary judgment has the initial

The importance of the "as-built plans" to a complete understanding of an easement is reflected in the case of *Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). In *Binkley*, the Court of Appeals addressed the scope of a water flowage easement. The Court found that the language in the written easement instrument was clear and unambiguous but nonetheless questioned whether "that language extend[s] the easement to the top of the dam as Rabon Creek claims." 558 S.E.2d at 907. The easement instrument made express reference to a "Sketch Map" which "by reference [is] incorporated in and made a part of this instrument." *Id.* The Court of Appeals then relied on that "Sketch Map" in determining the scope or extent of the easement. Citing information depicted in the "Sketch Map," the Court concluded that "under the unambiguous language of the flowage easement, Rabon Creek has the right to flood land surrounding the lake up to the 724.5 foot contour line, i.e., the top of the dam." *Id.*

Thus, in *Binkley*, the scope or extent of the flowage easement could not be determined on the written language of the easement alone; the Court needed to

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responsibility of demonstrating the absence of a genuine issue of material fact. Here, the Espinos were moving for summary judgment and requested declaratory relief from the court including a determination of the scope of the easement. The Espinos therefore had the burden under Rule 56(c) to present the court with the easement so that the court could make the determination sought. The Espinos presented the Court with the written easement instrument but failed to produce the as-built plans which are specifically referenced in that written instrument and provide "a more complete and accurate description of said easements." The Espinos thus failed to meet their initial burden under Rule 56(c), and as a result, summary judgment was erroneously granted. *See, Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

consider the information depicted on the "Sketch Map" to fully determine the scope of the easement. It was critical to review the "Sketch Map" because the parties had made specific reference to it in the written instrument, and without that information, the Court could not have determined the extent of the easement. The same is true in the present case. A complete and proper adjudication as to the scope or extent of the easement cannot be made on the written instrument alone, not when the easement instrument makes specific reference to the as-built plans as providing "a more complete and accurate description of said easements." Summary judgment should therefore be reversed and vacated to allow for the court to consider the as-built plans and the information contained therein.

It is well settled that "[t]he general rule is that the character of an express easement is determined by the nature of the right and intention of the parties creating it." *Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Public Service District*, 355 S.C. 529, 586 S.E.2d 146, 148 (Ct. App. 2003). "To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the clear and unambiguous language in grants of easements must be construed according to terms which parties have used, taken, and understood in their plain, ordinary, and popular sense." *Id.* In addition, courts are required to "effectuate the parties' intention unless that intention contravenes some well-settled rule of law or public policy." *Id.* "The intent of the parties ... must be determined by a fair

interpretation of the grant or reserve creating the easement." *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803, 806 (1965). "If the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court." *Smith v. Commissioners of Public Works of City of Charleston*, 312 S.C. 460, 441 S.E.2d 331, 335 (Ct. App. 1994).

Judge Johnson, however, did not cite to nor follow these rules of construction. He did not consider nor address the intentions of the parties when the easement instrument was executed in 1988. He did not consider the impact of the as-built plans which by reference are a critical part of the grant creating the easement. Moreover, he made no express determination as to whether the easement instrument was clear and unambiguous, particularly in light of the as-built plans, or whether the parties' intent needed to be determined based upon extrinsic evidence. In fact, the analysis in which Judge Johnson did engage cannot be reasonably gleaned from his Order.

The Espinos seem to focus on the meaning of the term "maintenance" within the easement instrument. They argue that expanding the sewer flow through the pipe across their property is not the "maintenance" of the line. The restrictive meaning that the Espinos give to the term "maintenance," if true, shows that the easement instrument is, at the very least, ambiguous. The obvious purpose and intent of the easement was to grant the Town the right to operate the sewer system and to have its

sewer pipes in the ground traversing the Espinos' and other residents' properties. A construction that restricts the rights to "maintenance" alone, using the plain and ordinary meaning of that term, would not allow the Town to *operate* the sewer system. Judge Johnson obviously recognized some ambiguity existed because he ruled that "the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision." (Johnson Order, p. 1). Judge Johnson did not limit the easement to "maintenance," and thus he broadened its purpose beyond the "maintenance" of the water and sewer lines as stated in the written instrument. Yet, without then considering the "as-built plans" specifically referenced in the easement instrument, or the plats that were in the record or any other extrinsic evidence as may be available, he then limited the scope of the easement and did not allow for the use of the easement to carry sewage generated beyond the boundaries of Coventry Lake Subdivision. There is no basis for that limitation on the scope of the easement. It is an interpretation that is subject to reasonable debate and a difference of opinion, and for that reason, Judge Johnson's ruling that the easement does not allow the sewer line crossing the Espinos' property to carry sewage generated beyond the boundaries of Coventry Lake Subdivision should not be a ruling made on a summary judgment motion. That ruling clearly is based on disputed facts and disputed inferences to be drawn from the facts.

The evidence in the record reflects, as argued by McGuinn's counsel at the

summary judgment hearing, that the sewer line across the Espinos' property is a spur line. It serves no function for the removal of sewage from the Espinos' home or from any other residence in the Coventry Lake Subdivision. Until Gates Commons was developed, that spur line served no purpose. It did not hold or transport any sewage. Frankly, Judge Johnson did not need the as-built plans to reach that conclusion; the plats in evidence depict the position of the easement on the Espinos property and show that the easement runs from the rear of the Espinos property, which is the outer boundary of the Coventry Lake Subdivision to the street in front of the Espinos' home. There is no evidence that that this particular sewer line served any purpose, with the exception of future expansion of the system to provide service for the parcel of undeveloped property located behind the Espinos' property. That information makes it obvious that the spur line across the Espinos' property was installed and the easement granted to allow for future expansion and a tie-in to the existing system when the adjoining property was developed, which subsequently occurred with the construction of Gates Commons. If that information does not make the intent of the easement obvious with respect to the spur line across the Espinos' property, at the very least, it constitutes a "mere scintilla" of evidence that should have precluded summary judgment in the Espinos' favor.

A fair consideration of the grant of easement, particularly when the written instrument is considered together with the as-built plans or at least the plats showing the location of the easement on the Espinos' property, warrants a conclusion that the

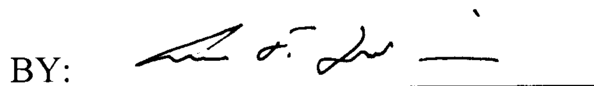
scope of that easement included a tie-in to the existing system after the adjoining property behind the Espinos' home was developed. At a minimum, the evidence in the record – as well as the as-built plans which should have been considered by the lower court – constitutes a "mere scintilla" of evidence that precludes summary judgment thereby requiring a remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Town of Lexington respectfully requests that this Court reverse the Order of late Circuit Court Judge James W. Johnson, Jr., filed June 16, 2008, and the Order of Circuit Court Judge William P. Keesley, filed June 9, 2014, and remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue. Alternatively, the Appellant Town of Lexington requests that the Court remand with direction that the declaratory judgment entered by Judge Johnson in Civil Action Number 2005-CP-32-2712 shall have no preclusive effect on the Town in Civil Action Number 2008-CP-32-419, leaving the scope of easement issue to be litigated *de novo* in that action.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant Town of Lexington

Columbia, South Carolina

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Gates Commons, LLC, S. Wade McGuinn, Individually,
and Town of Lexington, ... Defendants,

Of whom, Town of Lexington, is .... Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant Town of Lexington, does hereby certify that service of the **Initial Brief of Appellant Town of Lexington** and **Appellant Town of Lexington's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 5th day of November 2014:

Andrew A. Aun, Esquire
Aun & McKay, P.A.
Post Office Box 3568
Irmo, South Carolina 29063

John S. Nichols, Esquire
Bluestein Nichols Thompson
& Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202

S. Jahue Moore, Esquire
John Bradley, Esquire
Moore Taylor Law Firm, P.A.
Post Office Box 5709
West Columbia, South Carolina 2917

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DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

*Also Admitted In North Carolina
†Certified Mediator

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters
Steven R. Spreeuwers
Todd R. Flippin

Of Counsel
Kenneth P. Woodington

November 5, 2014

Writer's Email: alindemann@dml-law.com

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: McGuinn Construction Management, Inc. v. Saul Espino and Mara Espino
Civil Action Number: 2005-CP-32-2712

RE: Saul Espino and Mara Espino v. Gates Commons, LLC, S. Wade McGuinn, Individually, and Town of Lexington
Appellate Case Number: 2014-001519
Civil Action Number: 2008-CP-32-4192
Claim Number: 690001CO3151
Our File Number: 321.7443

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the **Initial Brief of Appellant Town of Lexington** and **Appellant Town of Lexington's Designation of Matter to be Included in the Record on Appeal** with regard to the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

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AFL/
Enclosures

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cc: (w/Enclosures)

Andrew A. Aun, Esquire
Aun & McKay, P.A.
Post Office Box 3568
Irmo, South Carolina 29063

John S. Nichols, Esquire
Bluestein Nichols Thompson
& Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202

S. Jahue Moore, Esquire
John Bradley, Esquire
Moore Taylor Law Firm, P.A.
Post Office Box 5709
West Columbia, South Carolina 29171

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e Jenny Abbott Kitchings

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