THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Case No. 2005-CP-32-2712
Case No. 2008-CP-32-4192

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

v.

Saul Espino and Mara Espino, ... Respondents.

And

Saul Espino and Mara Espino, ... Respondents,

v.

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

Of whom

Town of Lexington, ... Appellant.

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COUNTER-STATEMENT OF THE CASE

The procedural history of this case is long and complex. The following derives from Judge Keesley's order denying the motion for reconsideration.

McGuinn Construction Mgmt, Inc. (McGuinn) filed an action against the Espinos in August 2005. (Case No. 05-CP-32-2712). The Complaint sought declaratory relief and claimed damages for slander of title and interference with "perspective contractual rights." (Complaint).

The Espinos answered and counterclaimed. They also brought a third-party case against the Town of Lexington. The Town moved to dismiss and Judge James Johnson granted the motion by final order filed October 31, 2007. The Espinos sought reconsideration but Judge Johnson denied the motion on December 20, 2007. Accordingly, the Town was not a party to the action at that time.

The parties attempted to mediate the case but were not successful. The Espinos moved for summary judgment on April 3, 2008. On April 14, 2008, Judge Johnson entered an order dismissing the Expinos' Fifth Counterclaim. The parties attempted a second mediation but it also failed. On May 21, 2008, McGuinn moved for summary judgment on the Espinos' Second, Third, Fourth, Sixth and Ninth Counterclaims.

On June 13, 2008, Judge Knox McMahon designated the case as complex and assigned it to Judge Johnson. On June 16, 2008, Judge Johnson entered an order granting the Espinos' motion for summary judgment and granting McGuinn's motion to dismiss the Fifth Counterclaim (even though the prior order had already dismissed that counterclaim). Judge Johnson ruled:

(1) the Espinos were entitled to summary judgment and that no one, including McGuinn, had the right to enter the Espinos' property to connect the sewer and drainage lines of Coventry Lake Subdivision;

(2) the Espinos were entitled to summary judgment against McGuinn on the slander of title cause of action;

(3) the Espinos were entitled to summary judgment against McGuinn on the cause of action for tortious interference; and

(4) McGuinn was entitled to dismissal of the Fifth Counterclaim which alleged an implied covenant of good faith and fair dealing.

On June 26, 2008, McGuinn moved once again for summary judgment as to the Fifth Counterclaim.

On July 10, 2008, McGuinn filed a motion for reconsideration and to alter or amend Judge Johnson's order of June 16.

On July 13, 2008, Judge Johnson died from a sudden illness.

On October 10, 2008, the Espinos filed a lawsuit against Gates Common, LLC, S. Wade McGuinn, individually, and the Town. (Case No. 08-CP-32-04192).

On June 10, 2009, Judge McMahon filed an order in the second case denying motions for summary judgment filed by Wade McGuinn and Gates Common, granting the Town's motion to strike the claim for punitive damages, granting the Town's motion to make more definite and certain, and granting the Town's motion to strike the claim for attorney fees.

On June 25, 2009, the cases were designated as complex and assigned to Judge

McMahon, pursuant to Rule 63, SCRCP (Disability of a Judge) and an administrative order issued by Chief Justice Toal regarding Chief Judges for Administrative Purposes.

On November 25, 2009, Judge McMahon filed an order incorporating the conclusions of fact and law from Judge Johnson's order. Judge Keesley determined this order found no *de novo* hearing was required, Judge McMahon was certifying familiarity with the record, and a hearing would be held only upon the pending motion for reconsideration.

On December 22, 2009, the Espinos moved to reconsider a prior ruling denying their motion to dismiss the motion for reconsideration for failure to comply with Rule 59(g), SCRCP. On December 22, 2009, Judge McMahon held a hearing on McGuinn's motion for reconsideration of Judge Johnson's order.

On January 11, 2010, Judge McMahon denied the Espinos' motion. Judge McMahon noted several status conferences were held prior to the December 22, 2009, hearing and the spirit of Rule 59(g) had been met. Judge Keesley agreed.

Although Judge McMahon heard arguments on the motion for reconsideration, before he entered a written order, Judge McMahon recused himself on February 11, 2011. The matter was then sent to Judge Keesley as Chief Judge for Administrative Purposes.

On September 6, 2011, an order was entered designating Judge Keesley as the successor judge pursuant to Rule 63 and the Chief Justice's administrative order.

Although the only matter pending at the time was McGuinn's Rule 59 motion, the parties indicated a desire to consolidate that case (Case No. 05-CP-32-2712) with the other case (Case No. 08-CP-32-04192). On September 8, 2011, the Town filed a motion

to consolidate.

On September 28, 2011, the Espinos filed a document with the court that included: (A) a transcript of the summary judgment hearing before Judge Johnson; (B) a copy of Judge Johnson's order; (C) a transcript of the hearing before Judge McMahon, regarding the Rule 59 motion; and (D) a proposed order submitted to Judge McMahon on January 19, 2010.

On March 27, 2012, Judge Keesley filed an order consolidating the two cases. On April 5, 2012, the Espinos moved to reconsider the consolidation order. On August 20, 2012, the court denied the motion.

On September 24, 2013, the Espinos once again sought dismissal of the Rule 59 motion and, once again, Judge Keesley denied the motion. On October 7, 2013, Judge Keesley held a hearing on the Rule 59 motion.

On June 9, 2014, Judge Keesley entered an order denying the Rule 59 motion. Judge Keesley ruled:

(1) No *de novo* hearing was needed on the summary judgment motions Judge Johnson ruled upon;

(2) Judge Keesley certified familiarity with the record and determined that the proceedings could be completed without prejudice to the parties;

(3) The only hearing necessary was to decide the pending motion to reconsider the July 10, 2008 order by Judge Johnson;

(4) The Town was not a party when the matter came before Judge Johnson;

(5) Judge Keesley outlined the various arguments made by all parties before

him (Order, pp. 9-13);

(6) There is no basis for altering or amending Judge Johnson's rulings.

(7) The parties to the lawsuit at the time that the matter was presented to Judge Johnson are bound by his ruling;

(8) Judge Keesley did not determine whether Judge Johnson's order was binding upon those who were not parties when Judge Johnson made his ruling.

Judge Keesley therefore denied the Rule 59 motion and ordered the parties to schedule a status conference "so that a plan of action can be implemented." (Order, p. 14).

On July 7, 2014, McGuinn served and filed its notice of appeal from Judge Keesley's order.

On July 15, 2014, the Town filed and served its notice of appeal from both Judge Keesley's order and from Judge Johnson's order.

FACTS

In April 1988, Coventry Associates, Inc., conveyed water and sewer lines on its property in Lexington, South Carolina to the Town of Lexington. The deed referenced "the record drawing of the 'as-built' water system of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc., dated November 9, 1987...." Coventry Associates also conveyed the following rights to the Town:

> 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.
>
> ALSO:
>
> All drainage easements located on property of Grantor known as Coventry Lakes Subdivision, and being more particularly shown on the record drawing of "as-built drainage" plan of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc., dated November 9, 1987....

(Defendants' Memo in Opp. to Plaintiff's Motion for Summary Judgment Fourth Counterclaim, Exh. 1). The deed was executed by M. Stewart Mungo for Coventry Associates, Inc.

In 1992, Mr. and Mrs. Espino purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company. (Saul Espino Dep. p. 7, l. 7 - p. 8, l. 14). McGuinn was the developer of Gates Common Subdivision that backed up to the Espinos' property.

For years the Gates Common property was unimproved. McGuinn ultimately applied for and received rezoning to build a patio home subdivision at the site. Storm

drainage, water and sewerage infrastructure had to be installed, and McGuinn designed this infrastructure to connect to the existing infrastructure of the Coventry Lakes Subdivision where the Espinos owned their property.

It is undisputed that McGuinn intended to install the infrastructure on the Espinos property under the easement that grants the Town, its successors and assigns the right to "maintenance of the aforesaid water and sewer lines...." (Dep. Of Joe Boles, Exh. 1).

McGuinn approached the Espinos for permission to enter their property to connect to the sewer line and install other infrastructure such as storm drainage. The Espinos denied the request. McGuinn chose not to locate the storm drainage on the Espinos' property, but without their permission and with notice that litigation was pending as to whether the easement authorized McGuinn's activities, McGuinn instructed his subcontractor to proceed with connecting to the sewer on the Espinos' property.

The subcontractor proceeded to dig in the Espinos' back yard, destroying the yard. Once McGuinn installed its sewer and storm drainage, McGuinn proceeded to develop its property at a rapid pace without regard to the elevation increases of construction. This increased the post-construction water flow, which has continued to degrade the soil conditions at the Espinos' home.

The lawsuits followed as set forth in the Statement of the Case above.

ARGUMENTS

McGuinn asserts two things: (1) that the court should not have granted summary judgment regarding the scope of the easement because of the existence of material facts (McGuinn App. Br. pp. 8-15); and (2) that the circuit court should not have granted the Espinos' motion for summary judgment as to McGuinn's claims for slander of title and tortious interference with contract. (McGuinn App. Br. p. 15).

The Town contends the circuit court should have overturned its prior grant of summary judgment as to the scope of the easement and permitted the Town to be heard. (Town App. Br. pp. 6-18).

This Court should not be persuaded by the arguments of either appellant but, rather, should affirm the circuit court's rulings. The Court should also conclude that the Town lacks appropriate standing to appeal because it is not an aggrieved party with respect to the orders being appealed.

SCOPE OF REVIEW

At the hearing, McGuinn's lawyer described the proceeding as involving "competing motions for summary judgment in this matter." (Tr. 12/22/09. p. 6, ll. 7-17) Under the posture of cross-motions for summary judgment, the parties agreed that the case was before the court for its decision as a matter of law. *See, e.g., Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011) (where cross motions for summary judgment are filed, the parties concede the issue before the appellate court should be decided as a matter of law); *Alltel Communications v. S.C. Dep't of Revenue*, 399 S.C.

313, 319 n. 2, 731 S.E.2d 869, 872 n. 2 (2012) ("[T]he parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary.")(citing *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir.1981) ("[C]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties.")).

Even so, this case truly involves construction of the language of the grant in an easement. Although both appellants bottom their appeals on the claims that there are factual disputes, they overlook one important aspect of this rule: that the facts in dispute must be *material* facts. *See, e.g., Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) (when plain, palpable and undisputed facts exist on which reasonable minds cannot differ, summary judgment should be granted). Because the grant of the easement here is so specific and limited, there are simply no facts that either appellant may produce that will make a difference in the final outcome.

Lastly, the appeal involves a determination of the scope of the easement. That determination is a mater of equity. *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006).

I. THE TOWN'S APPEAL SHOULD BE DISMISSED

The Town has separately appealed, contending the trial court should not have granted the Espinos' motion for summary judgment. The Court should dismiss the Town's appeal.

In the order denying rehearing, Judge Keesley stated:

> The court agrees that the parties to the lawsuit at the time 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.

(Keesley Order, pp. 1-2, 10, 13-14). There is no challenge to this ruling. Furthermore, it is undisputed that by the time Judge Johnson entered the order on June 16, 2008, the Town had been dismissed from the case by order filed October 31, 2007. (Keesley Order, p. 2).

The Town is, therefore, not an aggrieved party with respect to the order, and should not be heard on appeal. *See* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) ("The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation."); *Burns v. Gardner*, 328 S.C. 608, 617–18, 493 S.E.2d 356, 361 (Ct. App.1997) (dismissing the portion of an appeal involving an issue raised in which the appellants were not aggrieved parties and thus could not pursue the issue on appeal). *See also Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014) (it is an appellate court's duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court).

This Court should therefore dismiss the separate appeal the Town filed in this case.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR THE ESPINOS

Both the Town and McGuinn argue that because there are issues of fact, summary judgment was not appropriate. The Court should affirm Judge Johnson's initial order and Judge Keesley's order denying reconsideration.

The Easement in this Case Is Limited to "Maintenance" of the Sewer Line

An easement is a right to use the land of another for a specific purpose. *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (2012); *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944). This right of way may arise by grant, from necessity, by prescription, or by implication by prior use. *Rhett*; *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006); *Steele*, 204 S.C. at 132, 28 S.E.2d at 647–48.

"A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Rhett*; *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App.2001). *See, e.g.*, *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003) (if a contract's language is clear and unambiguous, the language alone determines the contract's force and effect; a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense)(citing *C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988). As the Supreme Court has instructed:

> A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App.1997) (citing 17A Am. Jur.2d *Contracts* § 338, at 345 (1991)). It

> is a question of law for the court whether the language of a contract is ambiguous. *Id.* Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.* The determination of the parties' intent is then a question of fact. *Id.* On the other hand, the construction of a clear and unambiguous deed is a question of law for the court. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

South Carolina Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (applying these rules in construction of an unambiguous restrictive covenant).

The rights of one claiming an easement by express grant are limited within the scope of the privilege. *Marlow v. Marlow*, 284 S.C. 155, 325 S.E.2d 703 (1984). The extent of the servitude is determined by the terms of the grant. *Id.*, citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950); *Gordon v. Hoy*, 211 Va. 539, 178 S.E.2d 495 (1971).

Here, the easement expressly provided:

> 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.

(Def. Memo in Opp to Town's Motion to Dismiss, Exh. 1)(emphasis added). This is a limited grant, restricted by its terms. Whether McGuinn or the Town could *ever* prevail regardless of the facts depends on the construction of the phrase "necessary for the maintenance of the aforesaid water and sewer lines." Under the law, they cannot prevail.

The words "maintain" and "maintenance" are not defined in the document. Black's Law Dictionary provides the following definition for "maintain": "To care for

(property) for purposes of operational productivity or appearance; to engage in general repair and upkeep." Black's Law Dictionary 1039 (9th Ed 2009). Black's defines "maintenance" as "The care and work put into property to keep it operating and productive; general repair and upkeep." *Id.* Neither of these definitions contemplate improvement, expansion, or any other kind of addition to the thing or property. Instead, the definitions expressly limit themselves to maintaining the existing condition of the property.

Courts throughout the country use the ordinary and regular meaning of the terms "maintain" and "maintenance." As the New Jersey Superior Court explained:

> To "maintain" something, such as a roadway, means to "to keep in an appropriate condition, operation, or force; keep unimpaired." Random House Dictionary (2010 ed.). Moreover, the act of maintenance is commonly defined as "[t]he care and work put into property to keep it operating and productive; general repair and upkeep." Black's Law Dictionary 965 (7th ed.1999).

Township of White v. Castle Ridge Development Corp., 16 A.3d 399 (N.J. Super. 2011). Other courts are in agreement. *See, e.g., Stanford v. State Dept. of Highways and Public Transp.*, 635 S.W.2d 581 (Tx. Ct. App. 1982) (noting that to "maintain" has been defined as "to hold or keep in any particular state of efficiency or validity; to support, sustain or uphold; to keep up; not to suffer to fail or decline," and concluding that "maintenance" of an overpass "is that which is required to preserve the overpass as it was originally designed and constructed"); *El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 243 F.2d 927 (5th Cir. 1957) (noting the term "maintain" means "to hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up," and finding

contract required the United States to "maintain" existing bridges but not to construct new bridges under its agreement with the city of El Paso); *Wall v. Windmann*, 142 So.2d 537 (La. Ct. App. 1962) ("to 'maintain' means to preserve or keep in an existing state or condition and embraces acts of repair and other acts to prevent a decline, lapse, or cessation from that state or condition. In a wide variety of situations the word 'maintain' has been taken to be synonymous with 'repair.' This is the usual meaning, the dictionary meaning, and the meaning which must control in the absence of a clear expression of a contrary intention.")(citations omitted); *Polo/West Hartford, LLC v. Loring Realty Advisors, VII, LLC*, 2009 WL 1299099 (Conn. Sup. Ct. 2009) (noting Webster's Third New International Dictionary (3d Ed.1961) defines "maintain" as "To keep in a state of repair, efficiency, or validity: preserve from failure or decline" and the word "maintenance" means "the labor of keeping something (as building or equipment) in a state of repair or efficiency; care; upkeep." The Random House Compact Unabridged Dictionary (2d Ed.1996) defines "maintain" as "To keep in existence continuance; preserve; retain." The word "maintenance" means "care or upkeep, as of machinery or property.").

As the Connecticut Supreme Court explained:

> "Maintenance" in relation to property has been defined as "the upkeep or preservation of the condition of property"; Black's Law Dictionary; and "making repairs and otherwise keeping premises . . . in good condition"; Ballantine's Law Dictionary. It connotes a state of physical repair, upkeep, and preservation. *Frye v. Angst*, 28 Wis.2d 575, 582, 137 N.W.2d 430 (1965); 54 C.J.S. *Maintenance*, p. 905. It does not, in common parlance, encompass the expenditure of funds for the administrative or managerial purposes of a corporation. If the covenant here in question had been intended to authorize expenditures other than

> those related to the physical upkeep and repair of the roads, it could easily have so stated.

Saphir v. Neustadt, 413 A.2d 843, 851 (Conn. 1979). *Accord Holguin v. Fulco Oil Services L.L.C.*, 245 P.3d 42 (N.M. 2010) (Black's Law Dictionary 973 (8th ed. 2004) defines maintenance as "[t]he care and work put into property to keep it operating and productive; general repair and upkeep." Merriam-Webster's Collegiate Dictionary 702 (10th ed. 1996) defines maintenance as "the act of maintaining" and further defines maintain as "to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline."); *Maine Turnpike Authority v. Brennan*, 342 A.2d 719 (Me. 1975) (finding "maintenance" to include annual upkeep and, to a degree, repairs necessary to sustain the operation of the turnpike, and noting on other occasions, the court construed "maintenance" to mean a keeping in a state of efficiency or a refusal to suffer decline); *Coleman v. Portage Cty. Engineer*, 975 N.E.2d 952, 959-960 (Ohio 2012) (holding under Ohio's Tort Claims Act, a "complaint is properly characterized as a maintenance, operation, or upkeep issue when 'remedying the sewer problem would involve little discretion but, instead, would be a matter of routine maintenance, inspection, repair, removal of obstructions, or general repair of deterioration.")

The easement in this case is limited to one thing: maintenance of the *existing* line. Had the parties intended the easement to be for anything other than regular upkeep or repair of the "aforesaid water and sewer lines," they could have said so. They could have said "maintenance or the aforesaid water and sewer lines, as well as improvement of those lines or expansion to permit additional lines." They could have said "maintenance

as well as future additions or expansions." They did not say any of these things. Instead, the only thing the grantor agreed to allow was "maintenance," and only of the "aforesaid" lines (i.e., the existing lines). In the eyes of the law this means taking those steps to prevent decline of the existing lines, to provide upkeep on the existing lines, and to perform repairs on the existing lines; no less, but certainly no more.

The rights of one claiming an easement by express grant are limited within the scope of the privilege. *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950). The extent of the servitude is determined by the terms of the grant. *Id.* See also *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (2001) (the language of an easement determines its extent; clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in the plain, ordinary, and popular sense); *Ten Woodruff Oaks, LLC v. Point Development, LLC*, 385 S.C. 174, 683 S.E.2d 510 (Ct. App. 2009) (same).

"'[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.'" *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d *Easements and Licenses* § 72 at 478), cited in *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (2012). Although to the extent of the easement the rights of the easement owner are paramount to those of the landowner, the easement owner's rights are *not* absolute but are limited, so the owners of the easement and the servient tenement may have reasonable enjoyment. *Clemson Univ.*; *Rhett*. The owner of an easement has all rights incident or

necessary to its proper enjoyment, but nothing more. *Clemson Univ.*; *Rhett.*

An easement burdens the rights of the owner of real property and thus must be narrowly construed, and not construed in a way that unilaterally expands the rights contained therein without further agreement from the owner of the servient estate. *See, e.g.*, *Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980) (restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property). What McGuinn and the Town advocate here is a unilateral expansion of the narrow rights contained within the scope of the easement the Town possesses; the law does not support their view, nor should it.

The Court should affirm the trial court's ruling that the Town's rights under the unambiguous language of the easement are limited to "maintenance," and as such McGuinn does not have the right to trespass onto the Espinos' property, damage the land, change the landscape, or otherwise expand the scope of the existing easement.

III. MCGUINN'S ARGUMENT REGARDING THE GRANT OF SUMMARY JUDGMENT FOR THE ESPINOS ON MCGUINN'S CLAIMS FOR SLANDER OF TITLE AND TORTIOUS INTERFERENCE WITH CONTRACT

McGuinn argues the circuit court erred in granting the Espinos' motion for summary judgment as to McGuinn's causes of action for slander of title or tortious interference with contract. (McGuinn App. Br. P. 15). This Court should affirm.

First, the Court should deem this argument abandoned. It is conclusory, and is contained in one paragraph with no citation to authority. As this Court and the Supreme Court have stated repeatedly, a conclusory argument may be deemed to be abandoned.

See, e.g., Brouwer v. Sisters of Charity Providence Hosp., 409 S.C. 514, 520 n. 4, 763 S.E.2d 200, 203 n. 4 (2014) (conclusory argument not supported by any authority deemed abandoned); *York v. Dodgeland of Columbia*, 406 S.C. 67, 96-97, 749 S.E.2d 139, 154 (Ct. App. 2013) (court deemed issue abandoned where appellants' brief failed to cite any law or authority that supported a particular proposition and, instead, relied upon an attenuated argument and a summary conclusion).

Second, this argument depends upon McGuinn's argument that there are "material" issues of fact regarding the scope of the easement held by the Town. However, as discussed above, the easement the Town holds is expressly limited in scope to "maintenance" of the existing line. McGuinn has presented no evidence to establish the existence of a material fact as to whether McGuinn's entry upon the Espinos' property was for "maintenance," nor can McGuinn do so. In fact, McGuinn admits repeatedly that its goal was to "tap into" the existing line, which is *not* maintenance, but is an expansion of the existing line.

Neither the Town nor McGuinn have the right to unilaterally increase the scope of the grant, and neither have presented any evidence that they negotiated for those expanded rights with the Espinos. Instead, McGuinn simply took steps it did without regard to the existing rights of the Espinos as property owners.

Last, there is no issue of material fact regarding whether McGuinn could ever establish either cause of action. To maintain an action for slander of title in South Carolina, McGuinn must establish: (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a

result of diminished value of the property in the eyes of third parties. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). The tort may only be maintained by one who possesses an estate or interest in the affected property. *Id.* It is grounded in the tort of injurious falsehood. *Id.*

In the complaint it filed in 2005, McGuinn asserted that the subject property was owned by the Espinos (Complaint, p. 1, ¶ 5) and the easement was owned by the Town. (Complaint, p. 1, ¶ 6). McGuinn then pled in jumbled fashion as a second cause of action:

> 13. The Defendants have unlawfully interfered with the Plaintiff's attempted development of its property.
>
> 14. The conduct of the Defendants has been unreasonable and totally beyond the bounds of improper conduct.
>
> 15. The conduct of the Defendants amounts to a slander of title and to an unlawful interference with the Plaintiff['s] perspective (sic) contractual rights.
>
> 16. As a direct and proximate result of the aforementioned wrongful conduct on the part of the Defendants, the Plaintiff has had a delay in its construction; has had to unnecessarily expend huge sums of money for engineers and other experts; has lost significant amounts of income and profit; has lost a significant business opportunity; has suffered an increase in interest rates; and has been damaged in its business reputation all to its damage both actual and punitve.

(Complaint, pp. 2-3, ¶¶ 13-16). There is no assertion of a "publication," "malice," "a false statement," "a statement derogatory to [McGuinn's] title" or a "diminished value of the property in the eyes of third parties." Instead, there are simple, conclusory statements alleging slander of title in name only.

Further, there is no evidence (nor could there be) that McGuinn owns any portion or interest in the Espinos' property. Even so, there are no facts from which a trier of fact

could find the Espinos did anything to publish, with malice, a false statement derogatory to McGuinn's title to its own property.

The same is true regarding McGuinn's claims for tortious interference with contract. In its brief, McGuinn draws no distinction between whether it was claiming interference with existing contracts or prospective contracts. The complaint limited itself to "perspective" contracts, but the brief makes no distinction. Regardless, either claim fails as a matter of law.

To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. *Eldeco, Inc. v. Charleston County School Dist.*, 372 S.C. 470, 642 S.E.2d 726 (2007), citing *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). McGuinn has not pled nor proffered a scintilla of evidence that the Espinos knew of the existence of a contract McGuinn had with a third party and intentionally procured that third party's breach of its contract with McGuinn. This tort claim would fail as a matter of law.

To establish a cause of action for intentional interference with prospective contractual relations, a plaintiff must show: 1) intentional interference with prospective contractual relations; 2) for an improper purpose or by improper methods; and 3) resulting in injury. *Eldeco, Inc. v. Charleston County School Dist.*, citing *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). McGuinn has not pled nor proffered a scintilla of evidence that the Espinos interfered with

prospective contractual relations, that any such interference was intentional, that the Espinos used improper methods of interfering with those contracts McGuinn planned to enter into, that the Espinos had some improper purpose for interfering in those contracts, or that McGuinn suffered any resulting injury. Failure to plead or proffer evidence of any one element is fatal, but here there is a complete failure of pleading or proof.

Even if this Court does not deem these arguments abandoned because of the conclusory manner in which the claims were pled and the arguments are presented in the brief, the Court should affirm the dismissal of these claims on this record.

In light of the limited scope of the existing easement, there are no facts McGuinn can produce to establish any right to recover under either a cause of action for slander of title or for tortious interference with contract, existing or prospective. Accordingly, Judge Johnson properly granted summary judgment for the Espinos as to each of these claims and this Court should affirm that ruling.

CONCLUSION

The purpose of summary judgment is to obviate delay where there is no real material issue of fact. *Hammond v. Scott*, 268 S.C. 137, 232 S.E.2d 336 (1977). Here, there is no material issue of fact – the easement says what it says, and limits itself to "maintenance" of the existing line. It is plain, and it is unambiguous.

The Town's appeal should be dismissed because it is not an aggrieved party as to the orders being appealed. Further, there is no genuine issue of material fact regarding the scope of the easement in this matter, which is expressly limited. Next, McGuinn's argument regarding the dismissal of its other claims is conclusory and should be deemed abandoned. Furthermore, because the easement upon which McGuinn claims its rights does not support those rights, the dismissal of those other claims was proper.

Accordingly, the Court should affirm the orders in their entirety.

Respectfully Submitted,

Feb. 9, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Case No. 2005-CP-32-2712
Case No. 2008-CP-32-4192

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

v.

Saul Espino and Mara Espino, ... Respondents.

And

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 the, ... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellants with a copy of the *Motion for the Court to Accept the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal Out of Time* and the conditionally filed *Initial Brief of Respondents* and *Designation of*

Matter to be Included in the Record on Appeal by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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Erin Bridges

February 9, 2014
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

February 9, 2015

VIA HAND DELIVERY
Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: McGuinn Construction v. Saul Espino
Case Tracking No.: 2014-001519

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a Motion for the Court to Accept the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal Out of Time. Also, please find enclosed the conditionally filed original and one (1) copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal. I have also enclosed a proof of service upon counsel for the Appellants and a check in the amount of $25.00 for filing this motion. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,
Erin Bridges

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Andrew A. Aun, Esquire
S. Jahue Moore, Esquire
Andrew F. Lindemann, Esquire