THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000107
Lower Court Case No. 2013-CP-23-3989

Woodruff Road SC, LLC,..Appellant,

v.

SC Greenville Hwy 146, LLC,..Respondent.

FINAL BRIEF OF THE RESPONDENT

ROE CASSIDY COATES & PRICE, P.A.

James H. Cassidy, S.C. Bar #1160
Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
Attorneys for Respondent
SC Greenville Hwy 146, LLC

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(864) 349-2600
(864)-349-0303 fax
Attorneys for Respondent
SC Greenville Hwy 146, LLC

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Did the Appellant properly preserve the issue of whether the Easement Agreement limits the scope and use of the easement to two-way traffic for ingress and egress?
2. Did the trial court properly interpret the scope and purpose of the easement pursuant to the Easement Agreement's express terms and correctly find that the use of the Starbuck's drive-thru running over a portion of it was a permitted use?
3. Was the trial court's consideration of whether use of the Starbucks drive-thru impermissibly overburdened the easement or obstructed or interfered with the servient estate's use of its land beyond the imposition allowed under the Easement Agreement appropriate?
4. Did Respondent convert and take exclusive title to a portion of the easement by the construction and use of the Starbucks drive-thru running over a part of the easement?
5. Did the trial court's ruling unlawfully impact or alter the public record?

II. STATEMENT OF THE CASE

Woodruff Road SC, LLC (*hereinafter* "Appellant" or "Woodruff") filed a Motion for Temporary Injunction and Complaint against the Respondent, SC Greenville Hwy 146, LLC (*hereinafter* "Respondent" or "Greenville Hwy") on July 24, 2013 alleging a cause of action for trespass and seeking an injunction. Greenville Hwy filed an Answer and Counterclaim on October 10, 2013 seeking a declaratory judgment that its tenant's (Starbucks) construction and use of a drive-thru running in part over a right of way easement upon Appellant's property did not exceed the scope and permissible use of it. (R. pp. 38-41). Appellant then filed an Amended Complaint on November 13, 2013 without a trespass claim and sought a declaratory judgment concerning the construction of the Easement Agreement and determination of whether Respondent's use of that easement was permissible. (R. pp. 31-37).

A non-jury trial was held before The Honorable Letitia H. Verdin on November 4, 2014 solely on the issue of whether the construction of a paved portion of the easement, for the purpose of accessing the Starbuck's drive-thru window, fell within the scope of the easement's intended use. Following trial, the Court issued a December 16, 2014 Order (*hereinafter* the Order) holding that (1) the easement in question is appurtenant, and runs with the land; (2) the easement in question is designed to provide access to the businesses located on Tract A by way of ingress and egress; (3) the tenants of the Respondent, the owner of Tract A, are permitted to operate a drive-thru lane on the paved portion of the 25 ft. easement; and (4) the Respondent may not increase the use of its easement to such an extent that traffic is impeded on the 45 ft. portion. (R. p. 6). On December 29th Appellant filed a Motion to Alter or Amend the Court's Order. (R. pp.

57-62). Respondents filed a Return to that motion soon after. (R. pp. 63-65). The circuit court denied the Motion to Alter or Amend by Order dated January 1, 2015. (R. p. 10). This appeal followed.

III. STATEMENT OF THE FACTS

This case involves two tracts of commercial property located at the intersection of I-85 and Woodruff Road in Greenville, South Carolina. Tract A is owned by the Respondent, SC Greenville Hwy 146, LLC, who currently leases its premises to three tenants: Zoe's Kitchen, Mattress King and Starbucks. Tract B is owned by the Appellant, Woodruff Road SC, LLC who currently leases its property to Trader Joe's and Academy Sports.

Respondent has an easement running with the land on Appellant's property, conveyed by virtue of a properly recorded Agreement ("Easement Agreement"). The Easement Agreement granted a right of way easement in favor and for the benefit of Respondent, as the owner of Tract A, its tenants and their business invitees, licensees and employees for the purpose of ingress and egress to their businesses. The Easement Agreement states:

> Subject to the limitations set forth in paragraph 3 below, [Respondent] and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have a right of way at all times, in common with the owner of Tract B and all tenants and licensees of Tract B or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of Tract B...for the purpose of ingress and egress to Tract A from Woodruff Road (SC Hwy 146). Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof.

(R. pp. 221-22). This easement is comprised of a 45 ft. wide portion connecting directly to Woodruff Road and a 25 ft. wide portion abutting the back of Track A. (R. pp. 231-

32). Since the easement was first recorded in 1986, both Tract A and B underwent extensive development. Appellant acquired Tract B in 2010, and its rights were specifically made subject to the terms of the recorded Easement Agreement. (R. pp. 237, 241-42, ¶ 6). Respondent acquired Tract A on June 14, 2013, and its rights were also specifically made subject to the terms of the recorded Easement Agreement. (R. pp. 233-34). Soon after acquiring Tract A, Respondent entered into a lease agreement with Starbucks. (R. pp. 249-59). The Starbucks' lease referenced the recorded Easement Agreement and made Starbuck's the "beneficiary of easement rights" granted by it. (R. p. 253, ¶ 1.1). That agreement also required Respondent to build a drive-thru lane along the rear property line of Tract A. (R. pp. 249-59). A portion of the drive-thru runs through the 25 ft. section of the easement. (R. pp. 256-58; R. pp. 245-48). In 2013 Respondents repaved the portion of the 25 ft. wide easement that lies directly adjacent to their building. (R. pp. 245-48). The newly paved area is used, in part, by business invitees to access a drive-thru window installed by Starbucks. The Starbuck's drive-thru window is located on the side of the building squarely on Tract A. (R. p. 246). The building on Tract A has rear doors in all three businesses which open to the 25 foot portion of the easement. (R. pp. 247-48).

Testimony and the evidence presented at trial demonstrated that vehicles utilizing the Starbucks drive-thru drive across the 25 ft. portion of the easement to pull in behind the building to a menu board to place their order. The menu board itself lies outside the easement. (R. pp. 95-96, lines 1-6). The customer then continues to drive across the easement and around the side of the building, exiting the easement to access the drive-thru window on Tract A. (R. pp. 245-48, Plf. Exh. 10). Vehicles sometimes queue and

idle on the newly-paved portion of the easement in the process of accessing the drive-thru window. Witnesses for both parties testified that use of the drive-thru, even throughout two busy holiday seasons, has not created any issues with Tract B tenants being able to access their property or utilize the easement. (R. pp. 82, lines 11-15; p. 90, lines 9-24; pp. 93-94; p. 96, lines 12-15; pp. 114-16; pp. 144-45; p. 166, lines 7-19; pp.172-73). Prior to Respondent's improvements to the 25 ft. portion of the easement it sat abandoned and unused by the Appellant. (R. pp. 260-61; R. p. 163, lines 21-25; p. 164, lines 12-22).

The parties never disputed the existence of the easement in question. Their only dispute concerned the scope of the easement and whether use of the Starbucks' drive-thru exceeded it. The parties sought a determination as to whether the construction of a paved portion of the easement, for the purpose of accessing the Starbucks drive-thru window on Tract A, fell within the scope of the easement's intended use. The trial court found that the easement was designed to provide access to the businesses located on Tract A by way of ingress and egress and Starbucks' operation of its drive-thru lane running in part over and upon the paved portion of the 25 ft. easement was a permitted use. (R. p. 6).

IV. LEGAL ARGUMENTS AND AUTHORITIES

A. Appellant failed to properly preserve its primary and overarching argument that the Easement Agreement requires two-way traffic flow

As an initial matter, Appellant raises its argument that the easement requires two-way traffic for the first time on appeal and therefore it is not properly before the Court. *State v. Sheppard*, 391 S.C. 415, 423, 706 S.E.2d 16 (2011)(Argument made for the first time on appeal is not properly preserved for appellate review.). The South Carolina Supreme Court in *I'on, LLC v. Town of Mt. Pleasant* stated the recognized preservation rule and principle underlying it that:

> The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000); *see also Holy Loch Distrib., Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000)("In order to preserve an issue for appellate review, the issue must have been raised to, and ruled upon by the trial court."). Appellant did not raise the two-way traffic argument at trial or in its Motion to Alter or Amend the Judgment.[1] (*See* R. pp. 66-194; R. pp. 57-62). Without raising this argument to the court below and obtaining a ruling upon it, the Appellant cannot present it to this Court for review. Lacking the "two-way" traffic requirement argument, many if not all of Appellant's arguments on appeal necessarily fail as they are reliant upon this Court's

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[1] Raising the argument for the first time in its Motion to Alter or Amend would still fail to preserve the issue for appellate review.

consideration and acceptance of it. Should the Court determine the issue is properly before it, the argument fails to undermine the trial court's holding.

B. The trial court properly interpreted the scope and purpose of the easement pursuant to the Easement Agreement's express terms and correctly found that the use of the Starbucks drive-thru running over a portion of it was a permitted use

The scope of an easement is an equitable matter in which a reviewing court may take its own view of the preponderance of the evidence. *Pendarvis v. Cook*, 391 S.C. 528, 706 S.E.2d 520 (Ct. App. 2011).[2] The determination of the extent of a grant of an easement is an action in equity; accordingly, the Court of Appeals may review the trial court's findings *de novo*. *Sheppard v. Justin Enter.*, 373 S.C. 518, 646 S.E.2d 177 (Ct. App. 2007). "This requirement does not, however, command [the Appellate Court] to ignore the findings of the trial judge who heard the witnesses." *Thomas v. Mitchell*, 287 S.C. 35, 38, 336 S.E.2d 154, 155 (Ct. App. 1985).

The language of an easement determines its extent. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001.). "Clear and unambiguous language in grants of easements must be construed

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[2] There were virtually no disputed facts presented in this case. The easement in question was entered into on May 5, 1986 and was of record prior to either party taking ownership of its respective parcels. Both parties acknowledge they purchased their respective parcels subject to the easement and do not challenge its existence. The trial court correctly noted that "while the determination of the existence of an easement is a question of fact in a law action, the question of the extent of the easement is an action in equity". *Murrels Inlet Crop. v. Ward*, 378 S.C. 225, 231, 662 S.E.2d 452, 454 (Ct. App. 2008); *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist.*, 355 S.C. 529, 532, 586 S.E.2d 146, 147 (Ct. App. 2003).

according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." *South Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). The Court "must first decide if the language used by the grant…is plain and unambiguous and, if so, what does that language mean." *Binkley*, 348 S.C. at 67, 558 S.E.2d at 906-07. "It is axiomatic that the language of an express easement strictly controls the permitted uses and purposes." *Morrow v. Dyches*, 328 S.C. 522, 531, 492 S.E.2d 420, 425 (Ct. App. 1997) (*internal citations omitted*). The character of an express easement is determined by the nature of the right and the intention of the parties creating it. *Plott v. Justin Enter.*, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App. 2007). If necessary, courts may look to the demonstrated intention of the parties for further clarity as to the scope of the easement. *Lighthouse Tennis Club Vill. Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist.*, 355 S.C. 529, 534, 586 S.E.2d 146, 148 (Ct. App. 2003). "Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted." *Proctor v. Steedley*, 398 S.C 561, 572, 730 S.E.2d 357, 363 (Ct. App. 2012)(*internal citations omitted*).

In this case, the Easement Agreement grants the owner of Tract A and its tenants a "right of way" easement for vehicles to travel onto and over the designated 45 ft. and 25 ft. portions of Tract B for the purpose of ingress and egress to Tract A from Woodruff Road. (R. pp. 221-22 ¶ 1, pp. 231-32). "A right of way is simply an easement across another's land along a particular line for a particular purpose, such as for ingress and egress…." 12 S.C. JUR. EASEMENTS § 18 (June 2015). "The term 'right of way' is often used both to refer to the easement itself, i.e. the legal right to the use of the other's land,

and to refer to the actual location of land which is occupied by the easement." *Id.* The Easement Agreement states that:

> Subject to the limitations set forth in paragraph 3 below, [Respondent] and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have a right of way at all times, in common with the owner of Tract B and all tenants and licensees of Tract B or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of Tract B as shown on the plat attached hereto on Exhibit "C", for the purpose of ingress and egress to Tract A from Woodruff Road (SC Hwy 146). Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof.

(R. pp. 221-22, p. 231).

Paragraph 3 of the Easement Agreement states:

> The right of way...easement described in paragraph 1...above and illustrated on Exhibit "D" as "easement" shall be appurtenant to and a covenant running with the land. The easement is to be within the existing driveway and parking area on Tract B and, as illustrated on Exhibit "D" shall be 25 feet along the rear property line of Tract A and shall be 45 feet along the western most property line of Tract A.

(R. p. 222 ¶ 3; p. 232).

The trial court, looking to the plain and ordinary meaning of the Easement Agreement's language, found that "the scope of the easement, as articulated in the original conveyance, is to provide a right of way for motor vehicles to travel onto or over the designated portion of Tract B, for the purpose of accessing Tract A from Woodruff Road." (R. pp. 4-5). The express language of the Easement Agreement supports this finding, and as the lower court noted, "[i]n the realm of commercial properties, the principal [*sic*] benefit of such an easement is clearly to provide access to the business located upon the property in question." (R. pp. 5). Thus, the trial court concluded "[t]herefore, this Court finds that the operation of a drive-through window using a portion of the easement in question falls within the scope of the easement's intended use." (R. p.

5). The Appellant attempts to assign error to the trial court's findings by relying upon a strained interpretation of the easement's language to impose additional conditions on its use that simply are not found in the Easement Agreement or supported by applicable authority.

Appellant contends that the terms "right of way" for "ingress and egress" of motor vehicles requires two-way traffic in the easement. (Ap. Br. at 10-11). To reach this conclusion, the Appellant extrapolates a restrictive meaning of "right of way" to only include "pass[ing] over another's land." (Ap. Br. at 10). "Pass over" it claims requires continuous movement over the easement. (Ap. Br. at 10-11). According to the Appellant, the easement must be used in a manner at all times that allows for the two-way flow of vehicular traffic across it and prohibits stopping upon it. (Ap. Br. at 10-11). Appellant fails to cite any authority in support of its position that the Easement Agreement's language has and should be interpreted to require two-way traffic flow at all times, mandates a specific direction of traffic flow, or prohibits temporarily stopping in the easement. These additional usage conditions are completely absent from Easement Agreement and cannot serve as grounds for reversing the lower court.

The Easement Agreement grants Respondent a "right of way" over and upon a portion of Tract B. (R. pp. 221-22, ¶ 1). The grant of a "right of way" does not mean constant and unfettered access and ability for two-way ingress and egress over the easement. Rather "[a] 'right of way' means what those words imply; it does not mean a way always open; it does not mean a way without any obstruction...The right reserved, is to pass and repass; and in the absence of express language, that means to pass and repass in a reasonable manner." *Ballington v. Pa*xton, 327 S.C. 372, 379, 488 S.E.2d 882, 886

(Ct. App. 1997)(Court of Appeals held that locked fence, for which plaintiffs had a key, was necessary to protect the property and did not unreasonably interfere with plaintiffs' rights of access over the easement) *citing Watson v. Hoke*, 73 S.C. 361, 53 S.E. 537 (1906)(South Carolina Supreme Court held gates allowed to be constructed so long as they did not constitute an unreasonable burden on the right of way). Therefore, absent any express language indicating otherwise and in light of the understood meaning of "right of way" in an easement, the "right of way" granted in this case does not require continuous two-way traffic flow as Appellant claims. So long as each party may pass and repass in a reasonable manner the use of the Starbucks drive-thru remains in accord with the scope of this "right of way" easement. 12 S.C. JUR. EASEMENTS § 20 (June 2015) *citing Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (1944)("The easement owner is limited to a use that is reasonable, necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated."). Such is the case here.

Testimony at trial indisputably established that the right of way to pass and repass in a reasonable manner for either party, including tenants of Tract B, has not been disrupted or usurped by use of the Starbucks drive-thru. (R. p. 94, lines 11-25; p. 116, lines 3-10; p. 144, lines 23-25 - p. 145, lines 1-15.). In fact one of Appellant's witnesses conceded that there is no obstruction or prohibition on vehicles traveling both ways across the 25 ft. easement. (R. p. 94, lines 11-25). Lacking any hindrance to Tract B tenants' use of the easement, much less an unreasonable one, operation of the Starbucks drive-thru running over a portion of the easement falls within the permissible scope and use of it.

The Appellant contends that the Easement Agreement's language limits the right of way for the specific purpose of "ingress and egress" of motor vehicles and that the qualifying language "ingress and egress of motor vehicle traffic" means and requires continuous two-way traffic in the easement. (App. Br. at 11). It also claims this language establishes and requires a certain directional flow of traffic over the easement. (App. Br. at 10). The plain language of the easement does not establish these additional conditions.

"Ingress" is defined as "the act of entering, or the right or ability to enter or access." BLACK'S LAW DICTIONARY 9th Ed. (2009). "Egress" is "the act of going out or leaving, or the right or ability to leave, or a way of exit." *Id.* The easement provides a right of way "for ingress and egress to Tract A from Woodruff Road." (R. pp. 221-22, ¶ 1). It does not state "*simultaneous* ingress and egress" or designate any particular direction for traffic flow. Acceptance of Appellant's position would require imposition of these additional restrictions absent language in the Easement Agreement to support them. Courts strictly interpret the terms of easements as they are restrictive covenants upon the use of land. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 269, 628 S.E.2d 284, 291-92 (Ct. App. 2006)("Courts tend to strictly interpret restrictive covenants and resolve any doubt or ambiguities in a covenant on the presumption of free and unrestricted land use."). The law requires strict construction and adherence to unambiguous terms of an easement, and therefore it follows that it would not condone imposing additional conditions that are absent from the language of the grant.

Appellant relying on "right of way" being restricted to "passing over" contends, again without citation to supporting authority, that the "plain, ordinary, and popular

meaning of a right to 'pass over' the land of another does not include the act of stopping in the easement to transact business while stopped in the easement." (Ap. Br. at 11). First, Starbucks patrons temporarily stop in the easement to place their orders at the menu board which is located outside of the easement on Respondent's property. (R. p. 95, lines 1-6). Secondly, the plain and ordinary meaning of "pass over" does not preclude stopping or require continuous movement. In fact, Appellant's own witness acknowledged at trial that this phantom prohibition on stopping in the easement does not exist. (*See* R. p. 95, lines 7-14).[3] Allowing vehicles to temporarily stop in either portion of the easement in the act of accessing the property is rightfully allowed under the terms of the easement. Thus, Appellant's argument that cars temporarily stopped in the easement exceeds its permissible scope and use necessarily fails.

As noted above an easement granting a "right-of-way" does not mandate continuous and unfettered movement across the easement. (*See supra* pp. 10-11). As long as Starbucks patrons use of the drive-thru does not unreasonably obstruct or hinder Tract B tenants from using the easement, such usage remains within the permissible scope of the grant. Due to the very nature of the possible "obstruction" in this case – occupied cars in a drive-thru – it cannot be said these temporarily present and readily moveable objects are unreasonable barriers or obstacles preventing Tract B tenants' use of the easement. *Contra Plott v. Justin Enterprises*, 374 S.C. 504, 649 S.E.2d 92, 94 (Ct.

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[3] Q: And even when people were accessing your property through the 45-foot easement, they can stop if they wanted to and decide which shop they would like to go to?

A: Yes.

Q: There is nothing that prohibits them from doing that, is there?

A: No.

App. 2007)(Planted shrubs and fence blocking portions of an access easement as stationary objects ordered removed.). Witnesses for both parties acknowledged cars waiting in the drive-thru have not caused any obstruction or hindrance to Tract B tenants' use of the easement. (*See e.g.* R. pp. 93-94).

Acceptance of Appellant's position would require imposing additional terms and conditions upon the easement's use which are not contained in the language of the grant or in accord with the plain and ordinary meaning, use, and understanding of its terms. Therefore, the trial court properly found that the construction and use of the Starbucks drive-thru fell within the scope of the easement.

The trial court also properly found use of the drive-thru served the express purpose of the easement. (R. p. 5). The clearly stated purpose of the easement is to allow the fee owner of Tract A [Respondent] "and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees" to utilize the easement in order to access the property from Woodruff Road. (R. pp. 221-22, ¶1). These parties are the expressly intended beneficiaries of the easement – "Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any party thereof." (R. pp. 221-22, ¶1). The trial court properly found that the use of the Starbuck's drive-thru was in accord with the stated purpose of the easement because it is utilized by a tenant of Tract A's business invitees (Starbucks patrons) to access the property for the benefit of that business. (R. p. 5). Appellant argues the Starbucks drive-thru goes beyond the easement's stated purpose and therefore the trial court erred in finding it constituted a permissible use. (App. Br. at 11-13). Specifically, Appellant contends that "the plain language of the easement establishes that the sole purpose of the easement is to provide

direct, two-way access to and from Tract A and Tract B" and because operation of the drive-thru "renders two-way traffic impossible" it is not a permissible use. (App. Br. at 13).

First and foremost, this conclusion is contradicted by the language of the easement which plainly states the purpose of it is to allow the owner of Tract A, its tenants and their business invitees to access Tract A from Woodruff Road. (R. pp. 221-22, ¶ 1). As argued at length above, the "two-way traffic" condition Appellant is attempting to impose upon the easement's use is unsupported by the plain and ordinary meaning of its terms. Furthermore, evidence presented at trial established that use of the drive-thru did not render two-way traffic impossible as Appellant claims. (R. p. 94, lines 11-25).

Appellants cite to several cases in support of its position that the drive-thru is not a use provided for under the terms of the easement. (Ap. Br. at 11-13). Each of the cases cites is distinguishable from the one at hand and cannot serve as a basis for reversing the trial court.

First, in *Plott v. Justin Enterprises* deeds in a development granted the lot owners "a perpetual, non-exclusive appendant and appurtenant easement for ingress and egress upon, over and across" a roadway. 374 S.C. 504, 649 S.E.2d 92, 94 (Ct. App. 2007). Defendants in that case planted shrubs and constructed a wire fence blocking access across the roadway at several points. This Court affirmed the lower court's order requiring defendants remove the shrubs and fence even though the plaintiffs could still cross the roadway at other points. *Id.* The Court in *Plott* found that the placement of shrubbery and a fence interfered with the use and enjoyment of the easement. *Id.*

In *Plott*, defendants blocked a portion of the easement with permanent, non-moveable obstructions thereby permanently constricting its prescribed scope. Here there has been no placement of permanent structures or obstacles in the easement. In fact, Respondents actually improved the easement by revamping it so that it could be utilized to access Tract A as intended. (R. p. 94, lines 3-5; p. 141, line 25 – p. 42, lines 1-5). An occupied vehicle presumably in gear is a temporarily present and readily moveable object that does not permanently and impermissibly constrain the easement as the plants and fence in *Plott*. Furthermore, Appellant's witness recognized that use of the drive-thru did not prevent or prohibit Tract B tenants from utilizing the 25 ft. portion of the easement. (R. p. 94, lines 3-25; p. 115, lines 24-25 – p. 116, lines 1-10).

Second, in *Xanadu Horizontal Property Regime v. Ocean Walk Horizontal Property Regime*, the grantor conveyed a "perpetual non-exclusive easement of ingress and egress located on a portion of [its] property" to several grantees. 306 S.C. 170, 410 S.E.2d 580 (Ct. App. 1991). One grantee objected to another's plan to construct parking spaces on a portion of the easement. *Id.* This Court reversed the lower court and ordered removal of the parking spaces because the easement was "specific in its terms as to the easement's width, length and location" and therefore it "cannot be constricted to any degree by the placement of parking spaces." 306 S.C. at 172.

Starbucks patrons' use of the drive-thru does not constrict the easement as did construction of parking spaces in *Xanadu*. Unoccupied parked cars sitting within an easement are not readily moveable objects and therefore constrict, albeit for a temporary period of time, the usage of it. More importantly, dedicating a portion of an access easement for ingress and egress to parking spaces goes beyond the specific rights granted

by the easement and fails to serve the express purpose of it. In the case at hand, Respondent's tenant is using the easement for the express purpose articulated in the grant – for business invitees to access Tract A from Woodruff Road for the benefit of Starbucks as a Tract A tenant.

Finally, this Court's ruling in *Lighthouse* is readily distinguishable from to the present case. 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003). In *Lighthouse*, a developer granted the Public Service District an ingress and egress easement over its property for the purpose of accessing and maintaining the water and sewer systems, including a water tower and related equipment located on the District's adjoining property. This adjoining property was landlocked by Lighthouse's property and therefore only accessible via the easement. The granting document provided the District with an easement over Lighthouse's "open area[s], driveways, and parking lots...to service the said water and sewer lines and ingress and egress to all adjacent pump stations, wells, tanks, sites, etc." *Id.* at 531. Nearly 20 years later, the District began leasing space on its water tower to a telecommunications company (Telecom) for the installation of antennae, support equipment and emergency power generation. *Id.* at 532. To install and maintain the telecommunications equipment the District leased Telecom the use of the easement, permitting Telecom to travel over Lighthouse's property. *Id.* The Court found that the easement's use was limited to operating, maintaining, and servicing Lighthouse's water and sewer systems per its express terms. *Id.* at 534. Therefore, the Court concluded that Telecom's use of the easement to erect and maintain telecommunications equipment did not serve the stated purpose and constituted an impermissible use. *Id.*

In this case the expressly stated purpose of the easement is to provide Respondent, its tenants and their business invitees, a means to access Tract A from Woodruff Road "for the benefit of the [Respondent], any tenant, or licensee of Tract A." (R. pp. 221-22, ¶ 1). Use of the Starbucks drive-thru serves this very purpose. On the contrary, Telecom's use of the easement in *Lighthouse* served an entirely different purpose than the narrow one stated in the easement agreement and therefore fell outside the realm of permissible use.

Thus, none of the cases cited by the Appellant support a finding that use of the Starbucks' drive through exceeds the scope and purpose of the easement. Starbucks patrons' use of the drive-thru does not permanently or unreasonably restrict or constrict the easement. Nor does it serve a purpose entirely different from the one expressly stated in the Easement Agreement. Therefore, the trial court properly found that "the operation of a drive-through window using a portion of the easement in question falls within the scope of the easement's intended use." (R. p. 5).

C. The trial court's consideration of whether use of the drive-thru impermissibly overburdened the easement or obstructed or interfered with the servient estate's use of its land beyond the imposition allowed under the Easement Agreement was appropriate

The Appellant takes issue with the trial court's considerations of whether the drive-thru overburdens, obstructs or otherwise interferes with Tract B tenants' use of the easement or its property beyond the imposition allowed under the terms of the Easement Agreement. (Ap. Br. at 14-18). It claims that the trial court's ruling inappropriately relied upon these considerations rather than the express terms of the Easement Agreement. (Ap. Br. at 14-18). To make this line of argument appear credible Appellant isolates each of these factors, claims enforcement of the easement does not depend upon

that particular one and concludes the trial court failed to enforce the easement according to its express terms. (App. Br. at 14-18). Tellingly, Appellant's brief fails to cite to portions of the Order in which the trial court apparently relied on each of these considerations individually to find the drive-thru was a permitted use. Appellant's attempt to divide and conquer fails for multiple reasons.

First and foremost, the trial court relied upon the Easement Agreement's language to find that use of the drive-thru was in accord with the scope and purpose of the easement. The Order clearly states that:

> This court further finds that the scope of the easement, *as articulated in the original conveyance*, is to provide a right of way for motor vehicles to travel onto or over the designated portion of Tract B, for the purpose of accessing Tract A from Woodruff Road. The *granting document explicitly states*, "[s]aid right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof. (Pl. Ex. 1, ¶ 1).
>
> ***
>
> The easement was created for the purpose of enabling the owners and tenants of Tract A to access the property. The representation of the easement in County records and on plats further enables the public, as business invitees, to use the easement to access the businesses located on Tract A. *Therefore, this Court finds that the operation of a drive-thru window using a portion of the easement in question falls within the scope of the easement's intended use.*

(R. pp. 4-5)(*emphasis added*). The clear language of the Order fatally undermines the entire premise of Appellant's argument in this regard. The lower court's findings quoted above were made before it considered potential overburdening, obstruction or interference. (*See* R. pp. 4-5). Simply put, the trial court relied upon the language of the Easement Agreement, not its evaluation of potential overburdening, obstruction or interference, to find operation of the Starbucks drive-thru was in accord with the scope and purpose of the easement.

The trial court then went on to consider whether use of the drive-thru overburdened, unreasonably obstructed or otherwise interfered with Tract B tenants' use of the easement beyond the imposition allowed under the terms of the grant. (R. p. 5). Consideration of these factors served to ensure that what the trial court deemed a permitted use did not violate other applicable legal principles; namely the prohibition on use of an easement in a manner that unreasonably overburdens the servient estate or interferes or obstructs its use of the easement.

The trial court's consideration of what increased burden, if any, use of the drive-thru put on the servient estate was necessary and appropriate. The owner of an easement cannot materially increase the burden on the servient estate as established by an express easement. *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973). Nor can an owner of the easement impose a new and additional burden upon the servient estate. *Id.* An easement may be used "only for the purposes of that tenement...[and it] cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate." *Rhett v. Gray*, 401 S.C. 478, 493, 736 S.E.2d 873, 881 (Ct. App. 2012). Where such activities occur, the servient estate owner is entitled to equitable relief. *Clemson Univ.*, 269 S.C. at 651. The lower court looked to decisions of this Court to evaluate and determine if use of the drive-thru impermissibly overburdened the easement by way of unreasonable obstruction, interference with the servient owner's use, or a use beyond the scope and purpose of the easement. (R. p. 5).

The lower court's consideration of these factors does not undermine the ultimate determination but rather informs and enhances it. Respondent recognizes and agrees with the Appellant in the broad sense that the plain meaning and usage of the Easement

Agreement's terms control the determination of its scope and purpose. However, considerations of increased burdens, obstruction and interference with the servient estates' usage of the easement serves to further protect that landowner's rights and inform a court's determination of whether a particular use runs afoul of the easement in question. It is perplexing that the owner of the servient estate would take issue with consideration of these factors as they ensure protection of its rights. Regardless, the lower court's brief consideration of obstruction, interference and overburdening were appropriate in this case and do not warrant reversal.

D. Respondent's did not convert and take exclusive title to a portion of the easement by its construction and use of the Starbucks drive-thru

Appellant claims Respondent's wrongfully converted a portion of the 25 ft. easement to its exclusive use by the construction and utilization of the drive-thru. (Ap. Br. at 13-14). For this argument to succeed there would have to be some evidence of Appellant's exclusion or inability to use the easement or its property as a result of the drive-thru. No such evidence was presented at trial or cited on brief.

In fact, the undisputed testimony and evidence presented to the trial court established that Appellant's tenants would have no reason to utilize the 25 ft. strip of the easement. (R. p. 91, lines 11-18). More to the point, testimony of Appellant's witnesses established that the drive-thru has not prevented their tenants from utilizing its land as claimed. Levi Johnson, the former Property Manager of Woodruff Road SC, LLC, testified:

Q: *The 25-foot strip is paved now where before it was grass, isn't that true?*

A: *That is correct.*

Q: *Has any of your owners or invitees been denied the right to use that?*

A: *To use the paved area?*

Q: *Yes.*

A: *No.*

***

Q: *But there is no prohibition for anybody to go that way. There is plenty of room, isn't that true?*

A: *Yes.*

(R. p. 94, lines 3-10, 22-25).

Q: *Nobody has complained about the use of the drive-thru impeding access to your property.*

A: *Correct.*

(R. p. 96, lines 12-15).

Pat Kelly, an employee of Kimco Realty of which Woodruff Road SC, LLC is a subsidiary testified:

Q: *If their trucks wanted to go 25 feet behind this building, they could not do it?*

A: *No, they would want to have the right to do it.*

Q: *Has anybody stopped them from doing it?*

A: *Not that I am aware of.*

Q: *Is there any barrier that prevents them from doing that?*

A: *Probably not for a truck, no.*

Q: *For anything. Anybody can go through the easement, can they not?*

A: *Sure, yes.*

(R. p. 115, lines 24-25 – p. 116, lines 1-10).

Therefore, it cannot be said that the construction and use of the drive-thru converted a portion of the 25 ft. easement to Respondent's exclusive use when Appellant's own

witnesses flatly conceded that their tenants have not used the easement, have no reason to do so, and most importantly, have not been denied the right or ability to use the easement.

E. The trial court's decision did not "unlawfully impact or alter the public record"

The lower court's ruling in this case did not "unlawfully impact" or alter the public record as Appellant claims. (Ap. Br. at 18-19). Rather, the trial judge interpreted the scope, purpose, and meaning of the easement filed in the public record. This claim of error is nothing more than a red herring, and an attempt to bypass substantive challenges to the Order by invoking fear that the lower court overstepped boundaries of judicial power and distorted the public record. That said, the trial court's order did not unlawfully alter or distort the easement, and therefore the public record, but rather it provided further clarity as to the scope and permissible use of it. Respondent contends, to the extent the lower court's ruling impacted the public record, it enhanced it.[4]

V. Conclusion

First, Appellant raises its primary argument that the Easement Agreement requires two-way traffic for first time on appeal and therefore failed to properly preserve it for review. Without this argument Appellant's opposition and claims of error based upon it necessarily fail.

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[4] On a practical level Appellant's institution and pursuit of this appeal seems nonsensical. Appellant's sought a declaration from the court as to whether the construction and use of the drive-thru violated the terms of the easement. The Appellant was clear that its motivation for filing this action was its concern/belief that allowing the drive-thru could result in Tract B tenants claiming their lease agreements, which were entered subject to the easement, were breached and vacate the property. (R. p. 121). The trial court found that construction and operation of the Starbucks drive-thru was a permitted use under the terms of the easement. Therefore, the Tract B tenants would have no grounds for claiming breach of their lease agreements entered into subject to the easement.

Secondly, the trial court relied upon the clear and unambiguous terms of the Easement Agreement to properly conclude that the construction and use of the Starbucks drive-thru was a permitted use. The plain and ordinary meaning of the easement's terms allow for the use of the drive-thru. The Easement Agreement gives Tract A tenants and their business invitees a right of way for ingress and egress in order to access the property for the benefit of those tenants. Therefore, Starbucks patrons' use of the drive-thru was rightfully found to be in accord with the scope and purpose of the easement pursuant to its express terms.

Third, the trial court's consideration of whether use of the drive-thru impermissibly overburdened the easement or obstructed or interfered with the servient estate's use of its land beyond the imposition allowed under the Easement Agreement was appropriate under the circumstances. The lower court relied upon the Easement Agreement's terms to determine its scope and purpose. It then properly considered whether that use overburdened, obstructed or interfered with Tract B tenants' use of the easement beyond the imposition allowed under the grant. This evaluation served to protect both parties' respective property rights and cannot act as the basis for reversal.

In addition, Respondent did not convert and take exclusive title to a portion of the easement by its construction and use of the Starbucks drive-thru as Appellant claims. There was no evidence presented at trial of Appellant's exclusion or inability to use the easement. In fact, the testimony showed that no such hindrances have occurred. Therefore Appellant's claim of unlawful conversion fails.

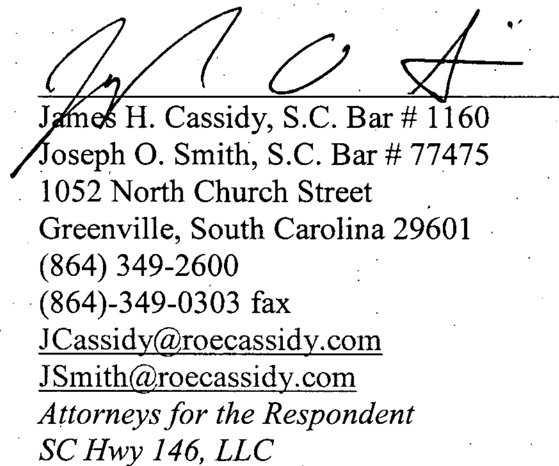
Finally, the lower court's ruling did not unlawfully alter the public record. Both parties sought a judicial determination of the scope and purpose of the easement and

whether use of the Starbucks drive-thru ran afoul of it. The trial court provided its findings which the Respondent contends clarified and enhanced the public record.

For the reasons set forth above, the Circuit Court's Order of December 16, 2014 should be affirmed.

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.



James H. Cassidy, S.C. Bar # 1160
Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
JCassidy@roecassidy.com
JSmith@roecassidy.com
Attorneys for the Respondent
SC Hwy 146, LLC

September 24, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas
The Honorable Letitia H. Verdin, Circuit Court Judge

RECEIVED
SEP 28 2015
SC Court of Appeals

Appellate Case No. 2015-000107
Lower Court Case No. 2013-CP-23-3989

Woodruff Road SC, LLC,..Appellant,

v.

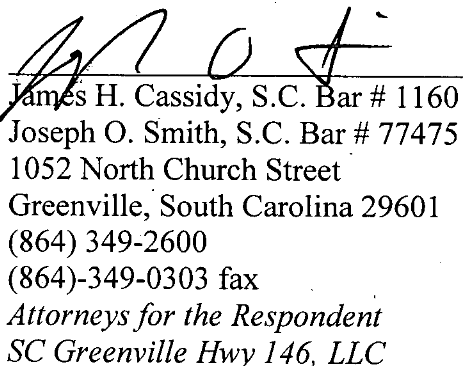
SC Greenville Hwy 146, LLC,..Respondent.

CERTIFICATE OF COUNSEL

The undersigned certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.



James H. Cassidy, S.C. Bar # 1160
Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
Attorneys for the Respondent
SC Greenville Hwy 146, LLC

September 25, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Greenville Hwy 146, LLC,..Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S FINAL BRIEF was served upon all counsel of record in the above-referenced action this 25th day of September, 2015, by depositing same in the United States Mail, sufficient postage affixed thereon, and addressed as follows:

Robert L. Widener
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

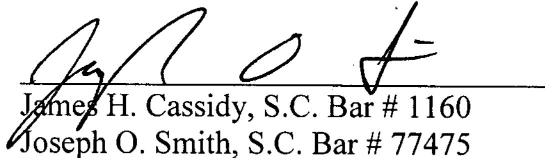
Bernie W. Ellis
McNair Law Firm, P.A.
Post Office Box 447
Greenville, South Carolina 29602
(864) 271-4940

Attorneys for Appellant

(signature page to follow)

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.



James H. Cassidy, S.C. Bar # 1160
Joseph O. Smith, S.C. Bar # 77475
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 fax
Attorneys for the Respondent
SC Greenville Hwy 146, LLC

Greenville, South Carolina