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

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.

REPLY BRIEF OF APPELLANT TOWN OF LEXINGTON

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I. The Town of Lexington qualifies as an aggrieved party with respect to the two orders on appeal.

As an initial argument, the Respondents Saul Espino and Mara Espino take the position that the appeal filed by the Appellant Town of Lexington should be dismissed because the Town is not an "aggrieved party" and therefore lacks standing to appeal. The Town respectfully disagrees.

Rule 201(b), SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." *See*, Rule 201(b), SCACR. This Court has explained that "[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Shaw v. City of Charleston,* 351 S.C. 32, 567 S.E.2d 530, 532 (Ct. App. 2002). "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." *Id.* Moreover, "[a] party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests." *Id.* This Court has further explained that "[t]here is no material distinction in general standing principles juxtaposed to the ability of an 'aggrieved party' to appeal pursuant to Rule 201(b) of the South Carolina Appellate Court Rules." *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237,

242 (Ct. App. 2008). *See also, Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

There are two orders on appeal. The most recent order issued by Circuit Judge William P. Keesley filed June 9, 2014, denied the motion for reconsideration, and in doing so, rejected the Town's position that the prior declaratory ruling regarding the scope of the easement should be vacated and the Town be given the 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. Judge Keesley had previously issued an Order of Consolidation which "enable[d] 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. 30). The Town has been clearly aggrieved by Judge Keesley's rejection of the relief sought by the Town. As its first issue on appeal, the Town asserts as follows: "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?" That issue is properly asserted, and the Town has standing to pursue relief on appeal with respect to that issue.

The second order on appeal includes the declaratory judgment awarded by late Circuit Court Judge James W. Johnson, Jr. thereby establishing the scope of an

express easement granted to the Town of Lexington by Coventry Associates, Inc. (a predecessor in interest to the Espinos). The Town believes that it is an aggrieved party as to that order for two reasons.

First, the Town submits that it is an interested party (and likely a necessary party) for any adjudication regarding the scope of the easement in accordance with 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). The Town holds that easement and therefore a judicial determination interpreting the easement instrument and establishing the scope of the easement clearly affects the property rights of the Town. Consequently, based on the prevailing case law defining an "aggrieved party," as discussed above, the Town meets that definition.

Second, the Town explained in the court below that it was not a party to the 2005 action at the time that Judge 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. The Town sought a ruling that the declaratory judgment entered 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. Judge Keesley, however, declined to state whether the Town will be bound by Judge Johnson's ruling. 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." (R. 14). Without that determination, the potential remains for the Town to be held bound to the decision made by Judge Johnson without any opportunity to be heard on that issue. The Town cannot predict what will be the ultimate result after remand. The Espinos appear to take the position that the Town should be bound by the ruling by Judge Johnson, and in fact, Judge Johnson's order is attached as an as an exhibit to the Espinos' complaint in the 2008 action and the rulings are incorporated by reference. (R. 73).

In short, the Espinos cannot have it both ways. They cannot argue that the Town is not an aggrieved party that cannot participate in this appeal and also argue that the Town is bound by Judge Johnson's declaratory judgment as to the scope of the easement. If the Town is not permitted to join McGuinn Construction in arguing that summary judgment was incorrectly granted, then the Town is entitled to a 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.

The Town further notes that the Espinos have failed to address the merits of its first issue on appeal. The Espinos have not disputed the Town's assertion that it was an interested or even necessary party to the determination regarding the scope of the easement. Moreover, the Espinos take no position in their brief on whether

the proper course of action for Judge Keesley to have taken was to vacate the declaratory ruling by Judge Johnson and allow for a full adjudication of the issue with all interested parties joined and having the opportunity to be heard. As the Town argues, that would allow for all interested and affected parties to be bound by the ultimate decision.

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.

As an initial matter, the Espinos' discussion of the standard of review is in error. The Espinos correctly point out that Judge Johnson heard cross motions for summary judgment. Because there were cross motions pending, the Espinos take the position that the parties conceded that there were no material issues of fact in dispute and that the court could make a ruling as a matter of law. The Espinos rely on two cases which are inapposite. Cross motions for summary judgment are often filed to determine an issue of law. The parties have either stipulated to the required facts, the material facts are not in dispute, or the issue is purely a question of law such as the construction of a statute. For instance, in *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), as cited by the Espinos, the Supreme Court found that the parties had stipulated to the facts and

in doing so conceded that "further development of the facts was unnecessary." 731 S.E.2d at 872, n.2. The Supreme Court concluded that "the summary judgment inquiry was purely one of law." *Id.* Further, in that case, the Supreme Court was called upon to decide an issue of statutory construction which is a question of law appropriate for consideration on cross motions for summary judgment.

The present case is different. There were multiple causes of actions of action filed by both sides. Each party moved for summary judgment on numerous grounds. The standard under Rule 56, SCRCP, as well as prevailing authority, hold that the court was required to consider the facts in a light most favorable to the non-moving party. Thus, for the Espinos' motion, the court views the facts in a light most favorable to McGuinn Construction, and for McGuinn Construction's motion, the court views the facts in a light most favorable to the Espinos. The Supreme Court has clearly explained that to be the proper procedure for cross motions for summary judgment:

> The circuit court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *"[I]n considering cross motions, the court should draw all inferences against each movant in turn."* On appeal from an order granting summary judgment, the appellate court

> will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.

RWE Nukem Corp. v. ENSR Corp., 373 S.C. 190, 644 S.E.2d 730, 733 (2007). (Citations omitted) (Emphasis added). The highlighted language shows that cross motions are handled no differently. The same standard of review applies in such circumstances. This Court is in accord. *See*, *Bostic v. American Home Mortgage Servicing, Inc.*, 375 S.C. 143, 650 S.E.2d 479, 481 (2007), *citing RWE Nukem Corp.*, *supra*. The Supreme Court, in fact, recently reversed summary judgment in a case where cross motions had been filed by the parties on the very basis that a genuine issue of material fact precluded summary judgment on an equitable estoppel claim. *See*, *Springob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384, 388 (2014) ("[t]his is sufficient to create an issue of material fact as to whether Appellants suffered a definite, substantial, and detrimental change in reliance on these purported oral representations"). The fact that cross motions were filed did not preclude the Supreme Court from considering the evidence in the light most favorable to the non-moving party.

The same is true in the present case. The mere filing of cross motions does not change the standard of review. This Court should not view the filing of cross motions as a concession that there are no issues of fact in dispute. The Court should assess the facts "against each movant in turn" just as this Court and the Supreme Court have done in the past.

Moreover, 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). The record on appeal clearly shows that Judge Johnson was not provided sufficient factual information to determine the scope of the easement. The easement instrument specifically makes reference to the "as-built plans" for "a more complete and accurate description of said easements." (R. 233). The "as-built plans," which are needed for a "complete and accurate description" of the easement, however, were never submitted to nor considered by Judge Johnson when he ruled on the scope of the easement. While this very point was made in the Town's opening brief, it was entirely disregarded by the Espinos. They offer no explanation or excuse for the failure to submit the "as-built plans." They do not even attempt to argue that the "as-built plans" were not material. Their silence, it is submitted, reinforces the importance and necessity of consideration of that evidence which *by the very language of the easement instrument* provides for "a more complete and accurate description of said easements." (R. 233). The court should not have attempted to determine as a matter of law the meaning and scope of that easement without consideration of the "as-built plans." That alone warrants reversal and a remand for a trial in equity.

Instead of addressing important evidence such as the "as-built plans," the Espinos focus on a single word in the easement instrument itself – "maintenance."

The Espinos cite cases from other jurisdictions defining the meaning of the word "maintenance." That is their entire argument. They engage simply in a definitional analysis of a single word. They fail to consider the meaning of the word "maintenance" within the context and purpose of the easement instrument as a whole. And, as also discussed, they fail to consider the meaning of the word "maintenance" as further clarified and described by the explicit reference to the "as-built plans."

Moreover, as the Town previously pointed out, 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 even allow the Town to *operate* the sewer system. The term "maintenance," from a practical standpoint, cannot be limited to the "regular upkeep or repair" of the lines as the Espinos assert. That limited use would prevent the use of the easement for its obvious intended purpose of transporting sewage. Thus, as the Town has argued, the Espinos' position is untenable, and at the very least, reflects that the easement instrument itself is ambiguous and does not reflect the intention of the parties creating the easement.

Contrary to the Espinos' position, the scope of the easement at issue cannot be determined by simply defining a single word. It cannot be determined without considering the context provided by the instrument as a whole. And, it cannot be determined without consideration of the "as-built plans" which are explicitly referenced as providing for "a more complete and accurate description of said easements." (R. 233).

In sum, the evidence in the record – as well as the as-built plans which should have been considered by the lower court – constitute 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 renews its request 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,

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April 20, 2015

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant Town of Lexington certifies that the Final Reply Brief of Appellant Town of Lexington complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant Town of Lexington certifies that the Final Reply Brief of Appellant Town of Lexington complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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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 **Reply Brief of Appellant Town of Lexington** 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 20th day of April 2015:

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