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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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

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

Appellate Case No. 2014-001519

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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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# PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Respondents Saul Espino and Mara Espino file this Petition for Rehearing with respect to this Court's decision in *McGuinn Construction Mgmt. v. Espino*, 2016-UP-138 (S.C. Ct. App. filed March 23, 2016). Respondents suggest the Court overlooked or misapprehended the following points in reversing the decision of the trial court.

I. The Court concluded that further inquiry into the facts surrounding the grant of the easement was necessary to determine the grantor's intent because the Court found the language "reveals a *potential latent ambiguity* rendering the grant of summary judgment as to the scope of the easement inappropriate." (Emphasis added). In so ruling, the Court overlooked or misapprehended the following points:

A. Neither appellant argued below that the easement created a "potential latent ambiguity." *See* Complaint, R. 40-42 (no mention of latent ambiguity); Answer of Town, R. 67-70, 107-114 (no mention of latent ambiguity); McGuinn Motion for Summary Judgment, R. 115-116 (asserting no issue of material fact); McGuinn Motion for Reconsideration, pp. 154-155 (no mention of latent ambiguity; actual assertion that express grant in easement was unambiguous). McGuinn's counsel argued that the easement unambiguously and "obviously" gave it the right to do what it did. (R. p. 249, ll. 13-23; p. 250, ll. 4-6; p. 251, ll. 6-18; p. 255, l. 24 - p. 256, l. 24; p. 257, ll. 17-22; p. 286, l. 18- p. 287, l. 22; p. 288, l. 17 - p. 289, l. 15; p. 307, ll. 1-17). In fact, counsel argued that "we believe that as

a matter of law" McGuinn had the right to tap into the lines through the easement. (R. p. 307, ll. 19-20; see also R. 308, ll. 10-12). At the hearing on the Rule 59 motion, McGuinn's lawyer argued for the first time that "at the very worst from our standpoint it gives rise to an ambiguity in regard to what does it mean to have a sewer line easement." (R. p. 290, ll. 5-7; l. 21 - p. 291, l. 8; see also p. 308, ll. 12-14). *E.g.*, *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993) (a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) (Rule 59 motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier). The Town's counsel argued this as well for the first time at the hearing on the Rule 59 motion. (R. p. 295, ll. 3-9). *C.A.H.*; *Hickman*. The Town then argued, however, that the grant of an easement in the manner McGuinn sought was "clearly" shown. (R. p. 310, l. 24 - p. 311, l. 4).

B. The trial court (Judge Johnson) did not rule on the issue of whether the easement created an ambiguity, even a "potential latent ambiguity." Likewise, in ruling on the motion for reconsideration, the court (Judge Keesley) made no such ruling.

C. Appellant McGuinn did not argue the existence of a "latent ambiguity" in his Brief of Appellant. Instead, McGuinn argued that the easement unambiguously permitted the use he sought, or an "easement by

dedication" existed. (McGuinn App. Br. pp. 7-9). McGuinn largely argued that the record supported judgment in its favor, but since the denial of summary judgment is not appealable the best McGuinn could hope for was the existence of a genuine issue of material fact. Importantly, McGuinn did not argue a "potential latent ambiguity" precluding summary judgment. McGuinn did not even explain how any purported "facts in controversy" were material facts precluding summary judgment for Respondents. (McGuinn App. Br. p. 10-12). It is true that McGuinn used its Reply Brief to assert, for the first time, that there was "ambiguity in the easement." (Reply Br. p. 4). *See McClurg v. Deaton*, 395 S.C. 85, 87 n. 2, 716 S.E.2d 887, 888 n. 2 (2011) (stating an issue may not be raised for the first time in a reply brief). Yet in that same brief McGuinn argues "the intent of the easement" is "obvious" (Reply Br. p. 5), belying any claim of ambiguity.

D. Appellant Town of Lexington also did not argue the existence of a "latent ambiguity." Instead, the Town argued that the meaning was clear once reference to the "as built" plans was had. (Town App. Br. pp. 9-16). In fact, the Town added "Judge Johnson did not need the [']as-built['] plans to reach" the conclusion that the easement was for use of the spur line across Respondent's property to connect to McGuinn's property. (Town App. Br. p. 17). The Town called this conclusion "obvious." (*Id.*). Again, it was not until the Reply Brief that the Town suggested the easement instrument was "at the very least, ambiguous," (Town Reply Br. p. 9), an

argument which comes too late. *McClurg v. Deaton*. Yet the Town *then* argued the meaning was clear, not ambiguous. (Town Reply Br. pp. 9-10). There never was any argument that the language resulted in a "potential latent ambiguity."

E. The Town contended that Judge Johnson could not have ruled without the "as-built" plans, but then contends that those plans were never submitted or offered. (Reply Br. pp. 8-9). Neither appellant argued below that Judge Johnson should have considered those plans, or that Judge Keesley should have granted reconsideration because Judge Johnson did not consider those plans (which no party, including the appellants, submitted to him).

F. The grant in the easement is not ambiguous. It is express and limited, and provides for maintenance, a term that has a distinct meaning in the law. Whether viewing it within the four corners of the document or even with reference to "as built" plans, the action permitted by the easement is specific, clear, and obvious (as McGuinn and the Town argued below). Had the grantor wished to provide more access beyond maintenance, it could have said so – it did not. There is no language such as "maintenance and expansion," "maintenance and enlargment," or "maintenance and connection to future lines." The easement contains no such language.

G. Any argument by the Town should be discounted since the Town's motion to dismiss it from the action was granted and it was not a party at the time of the judgment. Furthermore, the trial court's order expressly provided it

was not binding upon those who were not parties to the matter. The Town, therefore, was not an "aggrieved" party for purposes of Rule 201, SCACR.

II. In reversing the trial court's decision to grant summary judgment as to Appellant McGuinn's claims for slander of title and tortious interference with contract, the Court overlooked or misapprehended the following points:

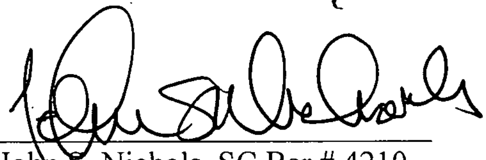
A. McGuinn's argument on this point is conclusory and should have been deemed abandoned. The argument in the principal brief is one paragraph long and cites to no authority. (McGuinn App. Br. p. 12). The argument in the reply brief is also one paragraph long and cites to no authority. (McGuinn Reply Br. Pp. 5-6). *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).

B. McGuinn's pleading on these two causes of action is conclusory, jumbled and incomplete, and there is no evidence McGuinn could produce to support either of these causes of action. At bottom, neither cause of action is appropriately pled, nor could they be, as Respondent's pointed out in

their Brief. (Resp. Br. pp. 19-22). Reversing summary judgment here is an act of futility, and this Court should affirm even if the Court believes the trial court based its decision on its ruling as to the first issue. *E.g.*, *Moorhead v. First Piedmont Bank and Trust Co.*, 273 S.C. 356, 256 S.E.2d 414 (1979) (a right decision upon a wrong ground will be affirmed); *Watkins Motor Lines, Inc. v. Span-America Medical Systems, Inc.*, 296 S.C. 175, 177, 371 S.E.2d 2, 3 (Ct. App. 1988) ("This court may affirm a trial court's decision on any ground appearing in the record and, hence, may affirm a trial judge's correct result even though he may have erred on some other ground."); *Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987) ("In this state it has long been recognized that a right decision based upon a wrong ground will be affirmed.").

For the reasons stated, the Court should grant this Petition, withdraw its prior opinion, and issue a new opinion affirming the trial court's decision.

Respectfully Submitted,



April 6, 2016

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Attorney for Respondents

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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 *Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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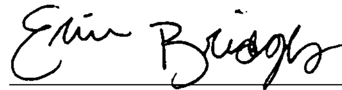

April 7, 2016
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

April 7, 2016

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**VIA HAND DELIVERY**
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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 the *Petition for Rehearing* in reference to this case. I have also enclosed a proof of service of this document upon counsel for Appellants and a check in the amount of $25.00 for filing this motion. Please return the additional filed copy 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
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