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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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
2016-UP-138 (S.C. Ct. App. filed March 23, 2016)

Appellate Case No. 2014-001519

McGuinn Construction Management, Inc., ... Respondent,
v.
Saul Espino and Mara Espino, ... Petitioners.

And
Saul Espino and Mara Espino, ... Petitioners,
v.
Gates Commons, LLC, S. Wade McGuinn,
Individually, and Town of Lexington, ... Defendants,

Of whom
Town of Lexington, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

SOUTH CAROLINA

OTHER JURISDICTIONS

STATUTES

RULES

MISCELLANEOUS

INTRODUCTION

Pursuant to Rules 224 and 226, SCACR, Petitioners Saul Espino and Mara Espino petition this Court to issue a Writ of Certiorari to the Court of Appeals to review the Court's rulings in *McGuinn Construction Management, Inc. v Espino*, 2016-UP-138 (S.C. Ct. App. filed March 23, 2016). Petitioners assert this matter involves novel questions of law, and that the Court of Appeals' decision is in conflict with prior decisions of this Court. Rule 226 (b)(1), (3), SCACR. The grounds for this Petition are discussed below.

RULE 226 (D)(1), SCACR, CERTIFICATION

Counsel for Petitioners certifies that a Petition for Rehearing was made to the Court of Appeals on April 7, 2016 and denied by the Court of Appeals on May 20, 2106.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in reversing the grant of summary judgment in favor of Petitioners on the basis that there existed a "potential latent ambiguity" in the language of the subject easement?

II. Did the Court of Appeals err in reversing the circuit court's grant of summary judgment in favor of Petitioners on Respondent McGuinn's claims for slander of title and tortious interference with contract?

III. Did the Court of Appeals err in refusing to dismiss the appeal by the Town of Lexington?

CONCISE STATEMENT OF THE CASE

The following procedural history 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." (R. p. 42).

The Espinos answered, counterclaimed, and brought a third-party case against the Town of Lexington. The Town moved to dismiss and Judge James Johnson granted the motion on October 31, 2007. Judge Johnson denied the Espinos' motion for reconsideration on December 20, 2007. Accordingly, the Town was not a party to the action after 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 dismissed the Espinos' 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. 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 moved for reconsideration of Judge Johnson's order. On July 13, 2008, Judge Johnson died from a sudden illness.

On October 10, 2008, the Espinos filed suit 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 complex and assigned to Judge McMahon, pursuant to Rule 63, SCRCP (Disability of a Judge) and an administrative order of this Court.

On November 25, 2009, Judge McMahon filed an order incorporating the facts and conclusions of law from Judge Johnson's order. Judge Keesley later 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, noting several status conferences were held prior to the 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 entering 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 second 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 and 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 (R. pp. 9-13);

(6) There was 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 denied the Rule 59 motion and ordered the parties to schedule a status conference "so that a plan of action can be implemented." (R. 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.

The parties briefed the matter and appeared for oral arguments on February 1, 2016. The Town's lawyer argued on behalf of both the Town and McGuinn Construction Company. On March 23, 2016, the Court of Appeals filed a memorandum opinion pursuant to Rule 220, SCACR. The Court held (1) the circuit court erred in granting summary judgment regarding the scope of the easement because of the existence of a "potential latent ambiguity" in the easement so that further inquiry into the facts is necessary; (2) the circuit court erred in dismissing McGuinn's claims for slander of title and tortious interference with contract because the circuit court's ruling was based on its conclusion with regard to the scope of the easement, and the Court reversed that ruling without addressing any additional sustaining grounds; and (3) the Court did not need to reach the Town's argument that summary judgment should be vacated because the Town did not have an opportunity to be heard regarding the scope of the easement.

Petitioners timely sought rehearing but the Court of Appeals denied the motion. This Petition follows.

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....

(R. p. 132). 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. (R. p. 140 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...." (R. p. 132).

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 conditions are deplorable.

The lawsuits followed as set forth in the Statement of the Case. The trial court held as a matter of law that the easement did not permit McGuinn, or anyone else, to expand the use of the easement apart from the Town's right to maintain the lines within the easement. The court dismissed McGuinn's other claims for slander of title and for tortious interference of contract. The court also held that the ruling would bind only those parties before the court (the Town had successfully gotten itself dismissed from the case). The Court of Appeals reversed those rulings and this petition follows.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN REVERSING THE GRANT OF SUMMARY JUDGMENT FOR PETITIONERS ON THE BASIS THAT THERE EXISTED A "POTENTIAL LATENT AMBIGUITY" IN THE LANGUAGE OF THE EASEMENT

The Court of Appeals found the circuit court erred in granting summary judgment for the Petitioners because the deed in the case demonstrates Coventry Associates, Inc. conveyed to the Town an easement for the maintenance of sewer lines located on property of the grantor known as Coventry Lake Subdivision, the deed specifically referenced the "as built" plans for further description of the easement, and the "undisputed testimony and plats presented at the summary judgment hearing" demonstrated "the as built plans show the sewer pipe at issue was an inactive spur line 'to nowhere.'" The Court concluded further inquiry into the facts surrounding the grant of the easement was necessary to determine the grantor's intent. The Court found the easement's language "when applied to the object it describes" revealed a "potential latent ambiguity" rendering summary judgment inappropriate. The Court should have affirmed Judge Johnson's initial order and Judge Keesley's order denying reconsideration.

A. 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 this 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) (construing 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).

In this case 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.

(R. p. 132)(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." (underline added) 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.* These definitions do not contemplate improvement, expansion, or any other kind of addition to the thing or property, but 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 agree. *See*, *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 of 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.

As noted above, the rights of one claiming an easement by express grant are limited within the scope of the privilege. *Forest Land Co. v. Black.* 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 the rights of the easement owner are paramount to those of the landowner to the extent of the easement, 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 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 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.

B. The Court of Appeals' Ruling is Based on a Point No One Properly Raised

As for the Court's reversal based upon its view that a "potential latent ambiguity" in the document against the backdrop of the record, this Court should consider the following points.

1. Neither Respondent argued below that the easement created a "potential latent ambiguity." *See* Complaint, R. pp. 40-42 (no mention of latent ambiguity); Answer of Town, R. pp. 67-70, 107-114 (no mention of latent ambiguity); McGuinn Motion for Summary Judgment, R. pp. 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 Rule 59 hearing, 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). However, an issue may not be raised for the first time by Rule 59 motion. *E.g.*, *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). 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).

2. 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.

3. 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. (App. pp. 24-26). 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 Petitioners. (App. pp. 27-29).

McGuinn did use its Reply Brief to assert, for the first time, that there was "ambiguity in the easement." (App. p. 88). *See McClurg v. Deaton*, 395 S.C. 85, 87 n. 2, 716 S.E.2d 887, 888 n. 2 (2011) (issue may not be raised for the first time in reply brief). Yet in that same brief McGuinn argued "the intent of the easement" is "obvious" (App. p. 89), belying any claim of ambiguity.

4. The Town also did not argue the existence of a "potential latent ambiguity." Instead, the Town argued that the meaning was clear once reference to the "as built" plans was had. (App. pp. 43-50). 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. (App. p. 51). 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," (App. p. 105), an argument which came too late. *McClurg v. Deaton.* Yet the Town *then* argued the meaning was clear, not ambiguous. (App. pp. 105-106). There never was any argument that the language resulted in a "potential latent ambiguity."

5. The Town contended that Judge Johnson could not have ruled without the "as-built" plans, but then noted that those plans were never submitted or offered. (App.

pp. 104-105). Neither Respondent 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 Respondents, submitted to him).

6. 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." Also, the term "as-built plans" is undefined, but infers the easement was subject to the *existing* structures, not later expansions. Cf. S.C. Code Ann. Regs. 72-301(4) (1992) (DHEC regulations setting forth standards for stormwater management and sediment reduction provide "'As-Built Plans or Record Documents' means a set of engineering or site drawings that delineate the specific permitted stormwater management facility as actually constructed."). In any event, neither McGuinn nor the Town submitted those "as-built plans" to Judge Johnson, Judge McMahon or Judge Keesley.

7. 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. The 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, as discussed below.

The Court of Appeals should have affirmed 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 Espino's property, damage the land, change the landscape, or otherwise expand the scope of the existing easement.

II. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF PETITIONERS ON MCGUINN'S CLAIMS FOR SLANDER OF TITLE AND TORTIOUS INTERFERENCE WITH CONTRACT

The Court of Appeals ruled that because the circuit court premised its rulings as to McGuinn's slander of title and tortious interference with contract claims on its conclusion regarding the scope of the sewer easement, and the Court reversed that ruling, the Court would reverse and remand as to these separate claims. The Court rejected Petitioners' additional reasons to affirm on the ground that these rulings were not fully developed in the circuit court. This Court should grant this petition and reverse these rulings.

First, McGuinn's argument on these points should be deemed abandoned. The argument was conclusory and was contained in one paragraph with no citation to authority. (App. p. 29). *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 depended upon McGuinn's assertion that there are "material" issues of fact regarding the scope of the easement held by the Town. 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 took unilateral action without regard to the existing rights of the Espinos as property owners.

Third, there was no issue of material fact regarding whether McGuinn could ever establish either cause of action as a matter of law. For slander of title, 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). Only one who possesses an estate or interest in the affected property may maintain the tort grounded in the tort of injurious falsehood. *Id.*

In its complaint, McGuinn asserted that the subject property was owned by the Espinos (R. p. 40, ¶ 5) and the easement was owned by the Town. (R. p. 40, ¶ 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 punitive.

(R. pp. 41-42, ¶¶ 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.

There is also 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. McGuinn does not explain 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 any 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 these arguments are not abandoned because of the conclusory manner in which the claims were pled and the arguments are presented in the brief, the Court of Appeals should have affirmed 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.

This Court should grant this petition, reverse the Court of Appeals, and affirm the circuit court's grant of summary judgment as to McGuinn's claims for slander of title and tortious interference with contract.

III. THE COURT OF APPEALS ERRED IN REFUSING TO DISMISS THE APPEAL BY THE TOWN OF LEXINGTON

The Town separately appealed, contending the trial court should not have granted the Espinos' motion for summary judgment against McGuinn. The Espinos contended the Court of Appeals should dismiss the Town's appeal. Because the Court of Appeals reversed the grant of summary judgment for the Espinos against McGuinn the Court of Appeals did not address this issue. This Court should take notice of the fact that the Town, who had gotten itself dismissed from the case and was not a party to the matter at the time Judge Johnson and Judge Keesley ruled, was not an aggrieved party who could bring an appeal of the order.

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.

(R. 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. (R. 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).

The Court of Appeals declined to address this issue despite its duty to do so. This Court should take notice of the issue and dismiss the separate appeal the Town filed in this case. *See Ex parte South Carolina Dept. of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010) (this Court dismissed appeal by SC Department of Motor Vehicles because the Department was not a party to the case the Department was trying to appeal).

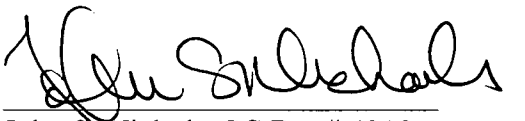
CONCLUSION

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 have been 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.

Petitioner requests that this Court grant this Petition and issue a Writ of Certiorari to review the Court of Appeals' decision in this case. Ultimately, the Court should reverse the Court of Appeals and reinstate the trial court's judgment.

Respectfully Submitted,



June 20, 2016

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JUN 20 2016

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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
2016-UP-138 (S.C. Ct. App. filed March 23, 2016)

Appellate Case No. 2014-001519

McGuinn Construction Management, Inc., ... Respondent,

v.

Saul Espino and Mara Espino, ... Petitioners.

And

Saul Espino and Mara Espino, ... Petitioners,

v.

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

Of whom

Town of Lexington, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Petition for Writ of Certiorari* and *Appendix* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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June 20, 2016
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