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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
In the Court of Common Pleas

SC SUPREME COURT

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

Appellate Case No. 2014-001519

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

v.

Saul Espino and Mara Espino,.....Respondents,

and

Saul Espino and Mara Espino,.....Respondents,

v.

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

Of whom Town of Lexington is.....Appellant.

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INDEX

Order on Reconsideration of the Order of the Honorable James W. Johnson, Jr. as the Successor Judge Under Rule 63, filed June 9, 2014.....	1
Order of the Honorable James W. Johnson, Jr. filed June 16, 2008.....	15
Order of Consolidation filed March 27, 2012	27
Order Concerning Status, filed September 6, 2011	31
Order issued of the Honorable Judge James W. Johnson, Jr., filed October 31, 2007.....	35
Order issued of the Honorable Judge James W. Johnson, Jr., December 20, 2007.....	39
Complaint, Civil Action Number 2005-CP-32-2712, filed August 11, 2005.....	40
Answer and Counterclaim of Defendants/Respondents Saul and Mara Espino, Civil Action Number 2005-CP-32-2712 filed November 18, 2005	43
Reply of Plaintiff/Appellant, Civil Action Number 2005-CP-32-2712 filed November 30, 2005	53
Amended Answer, Counterclaim, and Third Party Complaint of the Defendants/ Respondents Saul and Maria Espino, Civil Action Number 2005-CP-2712, filed May 23, 2007.....	55
Answer to Third Party Complaint of Town of Lexington, Civil Action Number 2005-32-2712.....	67
Second Amended Complaint, Civil Action Number 2008-CP-32-4192, filed May 26, 2009	71
Answer of Defendant Town of Lexington to Second Amended Complaint, Civil Action Number 2008-CP-32-4192	107
Motion for Summary Judgment and Motion to Dismiss Defendant's Counterclaims, Civil Action Number 2005-CP-32-2712 filed October 5, 2007.....	115
Memorandum in Opposition to Plaintiff/Appellant's Motion for Summary Judgment and Motion to Dismiss Counterclaims filed November 2, 2007.....	117
Defendants/Respondents Notice of Motion and Motion for Summary Judgment, Civil Action Number 2005-CP-32-2712 filed April 3, 2008	150

Motion for Summary Judgment on Defendants' Counterclaims, Civil Action Number 2005-CP-32-2712 filed May 21, 2008	152
Motion for Summary Judgment on Defendants' Fourth Counterclaim, Civil Action Number 2005-CP-32-2712, filed June 26, 2008	153
Notice of Motion and Motion for Reconsideration, Civil Action Number 2005-CP-32-2712, filed July 10, 2008	154
Plaintiff's Response to Order of the Court Concerning Status with Attachments filed September 28, 2011	156
Memorandum in Opposition to Plaintiff/Appellant's Motion for Reconsideration filed October 7, 2013	176
Affidavit of Wade McGuinn (and Exhibits) filed November 7, 2007 and November 29, 2007	197
Deed Filed April 11, 1988, as recorded at Book 1064, pp. 302-36, Lexington County RMC	233
Transcript of Hearing dated April 14, 2008	238
Transcript of Hearing dated October 7, 2013	278
Notice of Appeal filed July 8, 2014	316
Notice of Appeal dated July 15, 2014	319
Certificate of Counsel	347

STATE OF SOUTH CAROLINA } FILED
COUNTY OF LEXINGTON } IN THE COURT OF COMMON PLEAS
2014 JUN -9 P 12:51

McGuinn Construction Mgmt., Inc.)

Plaintiff,)

-vs-)

Saul Espino, et al.,)

Defendants.)

Saul Espino, et al.,)

Plaintiffs,)

-vs-)

Gates Commons, LLC, et al.,)

Defendants.)

BETH A. CARFEGG
CLERK OF COURT
LEXINGTON, SC

Case Number 2005-CP-32-02712

ORDER ON RECONSIDERATION OF
THE ORDER OF THE HONORABLE
JAMES W. JOHNSON, JR., AS THE
SUCCESSOR JUDGE UNDER RULE 63

Case Number 2008-CP-32-04192

WPK
#1

The court's understanding is that the attorneys assert that there are two issues before it: (1) a motion by Saul and Mara Espino (the Espinos) challenging the jurisdiction of the court to rule upon the motion for reconsideration filed by McGuinn Construction Management, Inc. (McGuinn Construction) under Rule 59, SCRCP; and, (2) the motion for reconsideration and to alter or amend under Rule 59. Both motions are denied. The court has certified familiarity with the record and determined that the proceedings may be completed without prejudice to the parties. The court agrees that the parties to the lawsuit at the time that the matter was presented to Judge Johnson (2005-CP-32-02712) are bound by his ruling. However, the court is not determining in this

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order whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling.

The attorneys are directed to schedule a status conference with the undersigned judge so that a plan of action can be implemented.

BACKGROUND

This case presents a most difficult procedural history. It has been made more difficult by the fact that the files had been jumbled, which necessitated the court having to spend many hours trying to get the files in proper order.

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The original lawsuit was brought by McGuinn Construction against the Espinos in August 2005. In its most basic form, this is a dispute over an easement. The Espinos filed counterclaims, and they also filed a third-party complaint against the Town of Lexington (Lexington). Lexington filed a motion to dismiss the third-party complaint, and that was granted by The Honorable James W. Johnson, Jr. through a memorandum order filed September 18, 2007, and a final order filed October 31, 2007. So, Lexington was a party to the initial lawsuit, but successfully sought and obtained dismissal from that suit.

In the interim between the memorandum order and the final order dismissing Lexington, the attorney for the Espinos filed a motion for reconsideration, and then filed two supplemental documents after the filing of the final order. Judge Johnson denied that motion to alter or amend by order filed December 20, 2007. As of that point, Lexington was not a party to the litigation.

After an attempt to mediate the case, the Espinos filed a motion for summary judgment on April 3, 2008. Judge Johnson issued an order that was filed on April 14,

2008, dismissing the fifth counterclaim. On June 13, 2008, The Honorable R. Knox McMahon designated the case as complex and assigned it to Judge Johnson.

A second attempt at mediation failed. A principal of McGuinn Construction (Mr. Wade McGuinn) filed an affidavit in support of upholding the actions of McGuinn Construction in tapping into the sewer line on the Espinos' property.

On May 21, 2008, McGuinn Construction filed a motion for summary judgment. It sought summary judgment on the second, third, fourth, sixth, and ninth counterclaims.

On June 16, 2008, Judge Johnson issued an order granting the Espinos' motion for summary judgment and granting McGuinn Construction's motion to dismiss the fifth counterclaim (the dismissal of the fifth counterclaim being included in the previous order filed on May 21, 2008). **This June 16, 2008 order is the order that prompted the filing of the motion to alter or amend that is the essence of the dispute before the court now.**

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In the June 16, 2008 order, Judge Johnson ruled: (1) that the Espinos were entitled to summary judgment and that no one, including McGuinn Construction, had the right to enter the Espinos' property to connect to sewer and drainage lines of Coventry Lake Subdivision; (2) that the Espinos were entitled to summary judgment against McGuinn Construction on the slander of title cause of action; (3) that the Espinos were entitled to summary judgment on the cause of action against McGuinn Construction for tortious interference; and, (4) that McGuinn Construction was entitled to dismissal of the fifth counterclaim which alleged breach of an implied covenant of good faith and fair dealing.

On June 26, 2008, the attorney for McGuinn Construction filed a motion for summary judgment regarding the fourth counterclaim (though it had already sought summary judgment on that and other counterclaims in the filing of May 21, 2008).

On July 10, 2008, McGuinn Construction filed its motion for reconsideration and to alter or amend the order of Judge Johnson that was filed on June 16, 2008. That motion recites that a copy of the order was received by counsel for McGuinn Construction on July 1, 2008, which would have been less than 10 days before the filing of the reconsideration motion. The certificate of service indicates that a copy of the motion was served on counsel for the Espinos by hand delivery on July 10, 2008. Part of the dispute here is that the Espinos challenge the authority of the court to entertain the Rule 59 motion because there is no indication that it was served on the court.

Judge Johnson died on July 13, 2008. He had been diagnosed with a rare, aggressive form of cancer in June 2008. The order in this case must have been one of the last he signed.

On October 10, 2008, the Espinos filed another lawsuit, which is designated as case number 2008-CP-32-04192. They sued Gates Commons, LLC (Gates Commons), S. Wade McGuinn, Individually (Wade McGuinn), and the Town of Lexington (Lexington).

On June 10, 2009, Judge McMahon filed an order dealing with the second case. That order ruled, as follows: (1) it denied on the grounds of being premature motions for summary judgment filed by Wade McGuinn and Gates Commons wherein they sought dismissal of the second, third, eighth, tenth and eleventh causes of action; (2) it granted Lexington's motion to strike the claim for punitive damages; (3) it granted Lexington's

motion to make more definite and certain; and, (4) it granted Lexington's motion to strike the claim for attorney's fees.

On June 25, 2009, an order was issued assigning the cases to Judge McMahon.

They were designated as complex litigation. Rule 63, SCRCP, provides as follows:

Disability of a Judge

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

In addition to Rule 63, Chief Justice Toal issues an order each time she designates the Chief Judges for Administrative Purposes. Those orders generally include the following language or the substantial equivalent:

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IT IS FURTHER ORDERED that if a trial or hearing has been commenced and the judge is unable to proceed, the chief judge for administrative purposes shall assign the trial or hearing to a successor judge. If the chief administrative judge has a conflict and is thereby prevented from performing this duty, the matter shall be referred to the Chief Justice to assign a successor judge. The successor judge may proceed with the trial or hearing upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may provide for the recall of any witnesses.

On November 25, 2009, Judge McMahon filed an order. It "incorporates the conclusions of facts and conclusions of law contained in Judge Johnson's Order." It provided that, "The Order and the transcript of the hearing are sufficient to negate the

need for a new hearing on these motions." It then stated, "The Court will schedule a hearing on Plaintiff's Motion to Reconsider Judge Johnson's Order."

The interpretation that this court gives to the November 25, 2009 order of Judge McMahon is that he determined that a *de novo* hearing was not needed. He was certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. The only hearing he determined to be necessary was the one that Judge Johnson had not ruled upon – the pending motion for reconsideration and to alter or amend filed July 10, 2008.

On December 22, 2009, counsel for the Espinos filed a counter-motion to McGuinn Construction's motion for reconsideration. The Espinos' motion sought to dismiss the pending Rule 59 motion by raising a challenge to the court's jurisdiction. The Espinos argued that there was no evidence that the presiding judge or the Chief Judge for Administrative Purposes was served with the motion. **The attorneys seem to be arguing the same issue again, though it appears to have already been ruled upon.**

On January 11, 2010, Judge McMahon filed an order denying the Espinos' challenge to the court's jurisdiction and their motion to dismiss the Rule 59 motion. Judge McMahon rejected the argument that a court cannot consider a Rule 59 motion when there was no evidence that the motion was served on the presiding judge or another judge. Though it is a Form 4 order, there is no indication that a more detailed order was to follow. It appears to this court to be a final order.

Judge McMahon's order of January 11, 2010 notes that several status conferences were held, and discussions took place between the litigants and the court, before there was a hearing on the Rule 59 motion on December 22, 2009. He stated that the court had

been on notice of the motion for at least a year, "so the spirit of the service requirement" had been met.

Subsection (g) of Rule 59, SCRCF was added to address the problem that judges were often unaware that reconsideration motions were filed. It reads:

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

The notes that accompany the rules explain the 1998 amendment adding subsection (g):

This amendment adds Rule 59(g). It is intended to help insure that the judge is promptly notified that the motion has been filed.

In addition to the reasoning expressed by Judge McMahon in his order filed January 11, 2010, the court believes that subsection (g) is a notice provision, which could be handled through sanctions (including dismissal of the motion), rather than a requirement of personal service that would be jurisdictional. Rule 59(e), states: "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(g) requires that a copy be provided to the judge promptly. Subsection (g) does not use the word "serve." It is this court's interpretation, if the issue is still active in the case, that the 10-day requirement under subsection (g) is not absolute and it can be extended by the court. In light of the unique circumstances here, the court agrees with Judge McMahon that it would be improper to dismiss the Rule 59 motion based on the lack of proof that a copy of the motion was sent to Judge Johnson or to another judge. In this court's view, good cause has been shown as

to why the motion for reconsideration should be heard.¹ Further, it being the court's view that it could sanction an offending party for failing to send notice to the judge of the motion to reconsider, including the sanction of refusing to hear the motion, the court declines to impose any sanction in this case.

Judge McMahon heard arguments on the motion. However, before he issued a final written order, Judge McMahon recused himself on February 11, 2011. The matter was sent back to the undersigned judge as Chief Judge for Administrative Purposes.

On September 6, 2011, an order was issued regarding the status of the case. The undersigned judge was designated as the successor judge under Rule 63, SCRCP, and Chief Justice Toal's administrative order.

At that point, the pending matter was the Rule 59 motion that was filed a few days prior to Judge Johnson's death. The attorneys indicated a desire to file a motion for consolidation of the two cases, but no motion had been filed. The order regarding status set up procedures to be followed. Two days later, on September 8, 2011, Lexington filed a motion to consolidate the cases.

On September 28, 2011, in response to the order regarding status, the Espinos filed a transcript of the hearing on the summary judgment motion before Judge Johnson, a copy of the order of Judge Johnson, a transcript of the hearing before Judge McMahon regarding the Rule 59 motion, and the proposed order that was submitted to Judge McMahon on January 19, 2010.

¹ Moreover, this court has previously stated in an order regarding status filed September 6, 2011, that Judge McMahon had determined that the Rule 59 motion was timely.

On March 27, 2012, the undersigned judge filed an order consolidating the two cases. On April 5, 2012, counsel for the Espinos filed a motion for reconsideration of the order consolidating the cases. That motion was denied by order filed August 20, 2012.

On September 24, 2013, the Espinos filed a counter-motion and motion to dismiss the Rule 59 motion that was filed shortly before Judge Johnson's death. For reasons discussed above, this court finds that the motion is duplicative and has already been ruled upon. Even if it were not deemed to be so, this court finds that the court has the authority under Rule 59(g) to extend the time for notifying the judge of the motion for reconsideration and, for the reasons stated above, finds that the unique circumstances of this case provide good cause for considering the notice to the court to be timely.

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The undersigned judge has reviewed the file and the written submissions. Similar to the determination of Judge McMahon, as set forth in his order filed November 25, 2009, the court has determined that a *de novo* hearing is not needed on the summary judgment motions that Judge Johnson ruled upon. The court has certified familiarity with the record and determined that the proceedings may be completed without prejudice to the parties. The only hearing determined to be necessary is the one that Judge Johnson had not ruled upon prior to his death – the pending motion for reconsideration and to alter or amend filed July 10, 2008.

ARGUMENTS ON THE MERITS OF THE RECONSIDERATION MOTION

The Rule 59 motion was heard by the undersigned judge on October 7, 2013. Over the objection of the Espinos, the other parties in both lawsuits were allowed to participate.

The parties opposing the Espinos assert that there are genuine issues of material fact related to the nature and scope of the easement in question. McGuinn Construction argues that the Espinos bought their property in a subdivision that makes reference to a plat. The plat shows an easement for a sewer line running across the Espinos' property. The plat was approved and filed before the Espinos purchased the real estate. It is argued that the Espinos obtained a deed that references the plat, and the deed reads that it is subject to easements of record and those that an inspection of the property would show. The sewer line runs underground.

The Espinos had their own plat done before they bought the property. It shows an easement, fifteen feet in width, for sewer, and it references the plat mentioned above. The predecessor in title to the Espinos had issued a deed in favor of Lexington, giving fee simple title to the sewer line. It is the contention of McGuinn Construction and those opposing the Espinos that the sewer line is clearly a spur line and that other property that was being developed was to be allowed to use the line. They note that the language of the easement states that Lexington has all easements necessary to maintain the lines.

It is argued that at least an ambiguity is created and that issues of fact exist. Those opposing the Espinos note that there are many ways to create an easement, and that the plats and deeds here raise a question of fact as to what was granted, what was reserved, and what the language means when it references the right to maintain the line. McGuinn Construction calls attention to the affidavit of Mr. Wade McGuinn that was filed on May 15, 2008, as creating an issue of fact. The affidavit has several attachments.

Lexington was not a party when the matter came before Judge Johnson. Lexington argues that the scintilla rule is not mentioned in Judge Johnson's order, it being

announced by the South Carolina appellate court in 2009, but made retroactive. The Espinos state that the law in 2008 was clear that the existence of an easement is a matter of law, but the scope of it is equitable. Lexington claims that Judge Johnson went ahead and decided the declaratory judgment action and determined that the easement was not sufficient to allow anyone else to tap onto the line on the Espinos' property. Lexington points out that the layout of the sewer lines clearly shows that this is a spur for development of the property behind the Espinos' land. It is Lexington's contention that reference to the plat itself creates issues of fact that go to the scope of the easement. According to Lexington, the intent of the parties was to allow a means to serve future use of lands that were undeveloped.

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Since it was not a party, Lexington maintains that it was not allowed to present evidence in the summary judgment motion. The complaint in the second action filed after Judge Johnson's death attached a copy of the summary judgment order and pleaded that Lexington is bound by it. Lexington insists that it is not bound by that order and that it should be allowed to present evidence. It is the contention of Lexington that a bench trial is needed to determine the scope of the easement.

In opposition to the motion to alter or amend, the Espinos argue that the question is not whether an easement exists. The question is the scope of the easement. According to the Espinos, Judge Johnson determined correctly that where there is clear and unambiguous language, there is no need to go beyond the language of the document. The easement was put in place in 1988. The deed to Lexington was to maintain the sewer lines and utilities for Coventry Lake Subdivision. No one raised issues about a prescriptive easement or easement by dedication to Judge Johnson. Even if the court

were to consider those issues, the Espinos maintain that the language of the easement was clear and unambiguous, as Judge Johnson found.

The Espinos feel that the parties opposing them are attempting to argue issues that they could have and should have raised before the summary judgment order was issued. They note the inconsistency of McGuinn Construction filing a declaratory judgment action to determine if it had the right to run the line versus the positions taken now. Moreover, they note that McGuinn Construction elected to go ahead and put the lines in place before the judge decided the issue. They assert that Lexington was brought into the case by the Espinos, but that Lexington filed a motion to be dismissed. That is why Lexington was not a party at the time Judge Johnson heard the motion.

As for the affidavit of Mr. Wade McGuinn, the Espinos challenge that the affidavit was properly before the court in 2008 since it was not filed with the motion, but some 30 days later. Nonetheless, Judge Johnson considered it.

Finally, the Espinos maintain that there is no need for a *de novo* hearing.

In response, McGuinn Construction and those aligned with it argue that the affidavit was not late, but was filed in response to the motion for summary judgment that the Espinos filed, which was heard at the same time by Judge Johnson. They point out that the language of the easement has several parts. Those parts include the rights of way to maintain the sewer lines. They assert that there is no prejudice to the Espinos by granting a *de novo* hearing. It is their contention that the sewer line was already in the ground, that it runs underground, and the Espinos are not in any way damaged by taps into the line. They want the matter referred to the Master-in-Equity for a full hearing.

Lexington responds that relief under Rule 59(e) is not limited to having the court correct an error of law or an abuse of discretion. Judges are allowed to take a fresh look at the evidence. The language of the easement specifically references as-built plans. Therefore, Lexington feels that the court cannot rule on the scope of the easement without considering those plans, and Lexington maintains that the as-built plans clearly show this as a spur line. Since Lexington did not present evidence in opposition to the summary judgment motion, Lexington argues that the most pragmatic thing to do is to let the parties file new cross-motions for summary judgment or allow a hearing on the merits.

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The Espinos response is that the as-built plans were not discussed or presented. They argue that Judge McMahon acknowledged that fact in the transcript of the hearing held before him. McGuinn Construction had to cross over the Espinos' property to get to the line. It is the view of the Espinos that the easement was only for the maintenance of Coventry Lake Subdivision and that the easement to maintain the line is limited to that purpose, not an extension into other areas. It is also argued that the facts of the case are clear that Lexington's engineers knew that private easements had to be obtained and that McGuinn Construction also knew. Otherwise, the engineers would not have responded as they did and McGuinn Construction would not have filed this lawsuit.

CONCLUSION

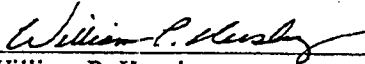
Having reviewed and reconsidered the matter, the court finds no basis for altering or amending Judge Johnson's rulings. His order is very thorough and well-stated. He ruled on what was presented to him. Nothing has been provided to this court indicating that Judge Johnson failed to consider any matters that were placed before him. The court

agrees that the parties to the lawsuit at the time that 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.

The attorneys are directed to schedule a status conference with the undersigned judge so that a plan of action can be implemented.

AND IT IS SO ORDERED.

June 2, 2014


William P. Keesley
Judge

#14

BEIR A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 JUN -9 P 12:51

FILED

JH

STATE OF SOUTH CAROLINA) FILED IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2005-CP-32-2712

McGuinn Construction
Management, Inc.,

Plaintiff,

vs.

Saul Espino and Mara Espino,

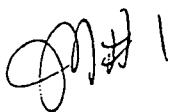
Defendants.

ORDER

THIS MATTER COMES BEFORE THE COURT on motion of Counsel for Plaintiff on all causes of action alleged by the Plaintiff, including its primary cause of declaratory judgment. Counsel for the Plaintiff further moved for dismissal of the Defendant's fifth counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing. The court also considered a countermotion of counsel for the Defendant for summary judgment as to the Plaintiffs entire case.

The matter was heard by the court on May 29, 2007, and supporting memoranda and affidavits were submitted by the Plaintiff and Defendant for their respective positions.

Upon hearing the arguments of counsel for the Plaintiff and the Defendant, and considering the facts, affidavits, memoranda and arguments submitted by the parties, the Court grants the Defendant's motion for summary judgment in that the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision. There is no authority for Gates Common Subdivision or any other subdivision to connect to the sewer and/or drainage located on the Defendant's property. Having reached this conclusion,



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Defendants' motion for summary judgment on the Plaintiff's slander of title cause of action and tortious interference with a contract cause of action must also be granted. The Court grants the Plaintiff's motion to dismiss the Defendant's fifth counterclaim for breach of implied covenant of good faith and fair dealing. No other motions were properly before the court, and so all other counterclaims of the Defendants are still pending.

I. STATEMENT OF FACTS

In 1992 Saul and Mara Espino purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company which is part of the Coventry Lake Subdivision. (Saul Espino Dep., pp. 7-8, ll. 7-4) The house was purchased as new construction, although the home was not custom built.

McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. This subdivision backs up to the Espinos' property in Lexington. For years the property, which is now known as the Gates Common Subdivision, was unimproved. However, McGuinn applied to have the property rezoned for a patio home subdivision, and was ultimately granted the zoning for which it had applied. Nonetheless, storm drainage, water and sewer infrastructure for the project had to be installed, and the provision of this infrastructure was designed by McGuinn to be accomplished by connecting to existing infrastructure of the Coventry Lakes Subdivision, where the Espinos owned their property. The installation of the appropriate lines would be required to run through the Espinos' property and connect to existing sewer and drainage installed in the Coventry Lake Subdivision.



The record clearly shows that it was McGuinn Construction Management's intention to install the infrastructure outlined above on the Espinos' property under an easement which purportedly grants the Town of Lexington, its successors and assigns the certain rights in sewer, water lines, and drainage easements for said lines. (See Exhibit 1). Further, it specifically provides an easement for the "maintenance of the aforesaid water and sewer lines..." (Id.) The language of the document purporting to be a deed does not grant any right or easement, express or implied, to the Town to allow for the connection by anyone other than Coventry Lakes to the lines.

II. FACTS IN CONTROVERSY

The Plaintiff asserts that it was operating under the authority of the easement, and that the Town Attorney approved the connection to the sewer based on the easement. The facts show otherwise, and indeed the Town Engineer at the time advised McGuinn that the easement was questionable, and legal authority would be needed to proceed. (Gene Edwards Dep., p. 5, ll. 18-23 and pp. 25-26, ll. 10-14). The Defendants anticipate testimony of the Town Attorney that at no time was he asked to opine as to the legal authority granted to the Town on the easement in question, and what authority, if any, the developer would have derived therefrom.

In his testimony, Edwards indicated that the plans submitted for approval showed that the lines and the manhole were outside of the easement which purportedly existed. (Id. pp. 22-23, ll. 22-14). Mr. Edwards, however, retired from the Town of Lexington prior to the final approval of the plans, which ultimately came from Rosemarie Nuzzo, an engineer with the Town of Lexington who had minimal qualifications at the time. (Id. pp. 23, ll. 12-22). Prior to his retirement, Gene Edwards discussed with Nuzzo the three

gm # 3

issues of concern about the project in question – (1) runoff once developed, (2) location of how water would be connected, and (3) sewage. (Id. at p. 23, ll. 5-11). Importantly, he indicated that he had discussed the uncertainty of the easement issue relating to the sewer lines with Nuzzo, and advised her that “it was not definitive enough for me [him] to tell them to go ahead at that time.” (Id. at ll. 12-19). Edwards further indicated that he never saw or reviewed a final legal opinion as to McGuinn’s purported authority to connect to the existing sewer lines on the Espino property. (Id. at p. 25, ll. 4-9).

The testimony of Nuzzo indicates that when the plans were submitted to her for approval, she did not keep the issues Edwards had notified her of in mind in her consideration, and in fact, assumed them away, by giving McGuinn the “benefit of the doubt” in his subcontractor’s installation of the sewer lines on the Espinos’ property. When asked in her review of the plans whether the Town of Lexington approved the plans which were to show the location of infrastructure before allowing connection to existing infrastructure, Nuzzo replied:

No. Because in that ... if there’s ... if the lines exist, then you, you almost have to assume there’s an easement to it. Nobody’s going to want to take care of a public sewer or a public water in there, you know, on their property. (Nuzzo Dep. P. 6, ll. 8-15).

Nuzzo goes on to acknowledge that she reviewed plans which showed the infrastructure installation being within the property boundaries of the Defendants, and that she would have approved the installation of the infrastructure (manhole). (Id. pp. 8-9, ll. 24-21). She then indicates in her testimony that she did not have the authority state where to install infrastructure like the manhole. (Id. at 10, ll. 6-14). Significantly, she



indicated that the developer, in this case McGuinn, would have had to secure easements for the installation. (Id.)

Her further testimony indicates that she did not review the easement under which McGuinn was purportedly operating to determine whether it granted McGuinn the authority to install the lines. Further, there is no testimony from the field engineers hired by McGuinn, HB Engineering, that they made any determination of the authority of the easement being offered by McGuinn as authority. Indeed, the authority under which they testified to be operating to install the sewer lines was the approval of the Town of Lexington.- Tom Britt, the President of HB Engineering indicated the following in his testimony:

Q. Okay. And at no time did you opine or give any type of certification that the easement was valid and could be used outside of what authority you thought you already had from the Town?

A. No. Our plans were solely based on the Town telling us they had an easement and approving our plans. (Britt Dep. at p. 41, ll. 16-22).

Further, Britt indicates that the approval of the plans was an indirect approval of the installation of the sewer lines. (Id. at p. 52, ll. 5-8). Therefore, the approval of the plans is a significant issue, and it appears that the manhole and the infrastructure noted on the most recent plan were outside the scope of any easement shown on the plan, and certainly not validated as being installed in accordance with the easement used by McGuinn as the basis of the authority.

There is also an issue about the negligence of the developer in the development of this project, which has a significant portion of wetlands involved, and which flows directly onto the Espinos property. There is a contention that the developer has been

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sensitive to ensure that the post construction flow from the development has not exceeded the pre construction flow.

III. LEGAL ISSUES

McGuinn sued the Espinos and alleged in its complaint a Declaratory Judgment action, Slander of Title and Tortuious Interference with Contract. The Espinos answered, and counterclaimed alleging Violations of the South Carolina Unfair Trade Practices Act, Negligent Misrepresentation, Constructive Fraud, Negligence, Breach of Implied Covenant of Good Faith and Fair Dealing, Fraud, Conversion, Slander of Title and Trespass. Defendants also amended the Answer and Counterclaim to allege Third Party actions against the Town of Lexington, which was subsequently dismissed.

1. **Summary Judgment Motions Of Plaintiff and Defendants**

Summary Judgment Standard

In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law...In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party...If triable issues exist, those issues must go to the jury.

Summary judgment is appropriate if 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 judgment as a matter of law...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. (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law...Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be



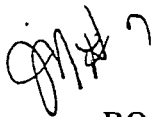
drawn from them, summary judgment should be denied... When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted... The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact... Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. ..The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.

Joseph H. Moore v. M. M. Weinberg, Jr. and Weinberg, Opinion No. 4209, Court of Appeals of South Carolina, Filed February 20, 2007.

The Plaintiff has alleged causes of action involving (1) declaratory judgment on the easement document in question, (2) slander of title and (3) tortuous interference with contract. Plaintiff now moves for summary judgment on all issues associated with the complaint. In the alternative, the Defendants have filed a countermotion on all issues associated with the Plaintiff's complaint specifically including the following in their countermotion:

1. That the allegations of slander of title are not valid as the title to the property alleged to be owned by the Plaintiff was never slandered;
2. That the work conducted by the Plaintiff in the development and construction of the project was never tortuously interfered with, and in fact, the Plaintiff never ceased construction or progress in the development;
3. That the Plaintiff had been advised that it needed to receive a private easement to connect to any existing sewer lines on the Defendant's property, but never obtained said private easement when it in fact connected without authority or



permission from the Defendants, thereby trespassing on the Defendant's property and converting Defendant's property to its own; and

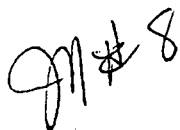
4. That the easement which serves as the basis of authority for the Plaintiff to have connected to sewer allegedly located on the Defendant's property does not allow for contiguous subdivisions to connect to any sewer, and is in fact limited in the scope to on the maintenance, repair and improvement for the sewer system of Coventry Lakes, not Gates Common Subdivision which is the project sought to receive the benefit by the Plaintiff

A. Declaratory Judgment

As indicated, the Plaintiff brings a declaratory judgment cause of action based on a document it asserts should serve as the basis for allowing the installation of sewer and drainage on the Espinos' property. (See Exhibit 1). As the Court in Pond Place Parners v. Poole, 351 S.C. 1, 16 (Ct. App. 2002), 567 S.E.2d 881 stated:

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham, 319 S.C. at 71, 459 S.E.2d at 845 (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a contract or franchise may have determined any question of construction or validity arising under the instrument, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30 (1977); see also Rule 57, SCRPC. Id at 16.

Here, the Plaintiff claims that it had the right to go onto and install drainage and sewer lines on the Espinos' property and to the Coventry Lake Subdivision infrastructure system under this document. However, the document does not allow for connection to



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the sewer lines and existing infrastructure on its face. This was noted by the Town of Lexington's engineers who were charged with considering this issue as outlined above.

Here, the easement in question does not specifically allow for the connection by any other subdivision to the existing lines.

For these reasons, ruling on the Declaratory Judgment Action, the Court finds and Rules that the Plaintiff had no authority under the easement in question to enter the Espinos' property and/or to connect to drainage and/or sewer lines in the Coventry Lake Subdivision. The Defendants' countermotion for summary judgment on the issue of the Declaratory Judgment Action is granted.

B. The Slander of Title

The Court also denies the Plaintiff's Motion for Summary Judgment as to its Slander of Title cause of action and grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's claim for Slander of Title. The Court has held that "[] to maintain an action for slander of title in South Carolina, the plaintiff 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." Id. (citing TXO, 419 S.E.2d at 879). Pond Place Partners v. Poole, 351 S.C. 1, 22-23 (Ct. App. 2002), 567 S.E.2d 881. As the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Motion for Summary Judgment as to the Plaintiff's Slander of Title allegation.

C. Tortious Interference with Contract

[Handwritten signature]

The Court also denies the Plaintiff's Motion for Summary Judgment as to its Tortious Interference of Contract cause of action and grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's claim for Tortious Interference of Contract. The elements of this cause of action are (1) the existence of the contract; (2) the wrongdoer's knowledge of the contract, (3) the intentional procurement of the contract's breach; (4) the absence of justification; and (5) resulting damages. South Carolina Requests to Charge, Anderson, p. 485.

As with the Plaintiff's Slander of Title cause of action, because the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's Tortious Interference with Contract cause of action.

2. Plaintiff's Motion to Dismiss

The Plaintiff also files a motion to dismiss the Defendants' fifth counterclaim for breach of implied covenant of good faith and fair dealing. For the reasons outlined below, this motion is granted.

Standard For Motion To Dismiss

In Overcash v. South Carolina Electric and Gas Company, 25990 (S.C. 2005), the court held:

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be

gm # 10

construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties. Stroud v. Riddle, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973).

Under this standard, the facts of the complaint should be construed liberally and considered "true" when considering whether the motion should be granted. The Defendant alleged the following facts:

As the Court has noted, "there exists in every contract an implied covenant of good faith and fair dealing." Williams v. Riedman, 339 S.C. 251, 267 (Ct. App. 2000). Here, considering the facts under the appropriate standard, the Court finds that there is no genuine issue of material fact as to the fact that the Plaintiff did not have a contract with the Defendants. Therefore, the Plaintiff's motion to dismiss is hereby granted.

Based on the foregoing **IT IS HEREBY ORDERED, THAT:**

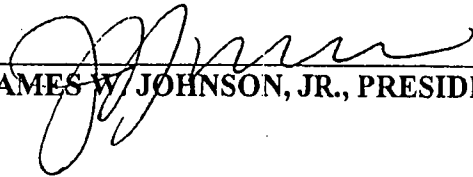
1. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Declaratory Judgment action filed, and therefore rules that the easement in question does not provide legal authority for the Plaintiff or anyone else to enter the Defendants' property and/or to connect to any sewer and/or drainage lines of Coventry Lake Subdivision;
2. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Plaintiff's Slander of Title cause of action;
3. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in



reference to the Plaintiff's Tortious Interference with Contract cause of action;
and

4. The Court GRANTS the Plaintiff's Motion to Dismiss the Fifth Counterclaim of the Defendants for Breach of Implied Covenant of Good Faith and Fair Dealing.

AND IT IS SO ORDERED.



JAMES W. JOHNSON, JR., PRESIDING JUDGE

Date: June 16, 2008

12

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

McGuinn Construction Management, Inc.,

Plaintiff,

v.

Saul Espino and Mara Espino,

Defendants.

Civil Action Nos. 2005-CP-32-2712
2008-CP-32-4192

ORDER OF CONSOLIDATION

Saul Espino and Mara Espino,

Plaintiffs,

v.

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

Defendants.

FILED
2012 MAR 27 A 10:53
J. A. CARRIGS
CLERK OF COURT
LEXINGTON SC

This matter is before this Court on the Motion to Consolidate filed by the Defendant Town of Lexington. A hearing was held on October 24, 2011, with counsel for all parties present.

The Town of Lexington is currently a Defendant in Civil Action Number 2008-CP-32-4192 (hereafter referred to as the "2008 action"). The Town was formerly a Third-Party Defendant in Civil Action Number 2005-CP-32-2712 (hereafter referred to as the "2005 action"). The Third-Party Complaint brought by Saul Espino and Mara Espino was dismissed in the 2005 action by Order issued by Judge James Johnson on the basis that the Espinos were unable to

pursue their direct claims for damages against the Town by means of an impleader under Rule 14, SCRPC. That precipitated the filing of the 2008 action in which the Espinos are pursuing heir direct claims against the Town.

Rule 42(a) of the South Carolina Rules of Civil Procedure provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

See, Rule 42(a), SCRPC. Thus, in accordance with Rule 42(a), consolidation may be ordered whenever actions involving common questions of law or fact are before court. *Ellis v. Oliver*, 307 S.C. 365, 415 S.E.2d 400 (1992).

W. H. #2
This Court finds that the procedural history of these two actions favors the consolidation of these actions for discovery, pre-trial proceedings, and trial. Both actions involve the same or similar claims, the same or similar parties, and the same set of circumstances giving rise to the respective lawsuits. Moreover, there are several common issues of law and fact that will be tried in these two actions. As a result, strong notions of judicial economy favor the consolidation of these cases for further adjudication.

As indicated, both actions arise from the same common operative facts. In 1992, the Espinos purchased their residence at 108 Coventry Court within the Town of Lexington. The residence is in the Coventry Court subdivision. In approximately 2005, McGuinn Construction Management, Inc. began the development of Gates Commons which is a townhouse development adjacent to Coventry Court and located directly behind the Espinos' property. In order to provide water and sewer for the Gates Commons development, McGuinn sought to tie into the Town's system using a sanitary sewer easement across the Espinos' property. In April 1988, an easement

was granted to the Town by Coventry Associates, Inc. (a predecessor in interest to the Espinos). The easement, a copy of which is attached to the Second Amended Complaint in the 2008 action, is described as follows:

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.

When McGuinn attempted to tie into the Town's system using this easement across the Espinos' property, the Espinos objected. Ultimately, the sanitary sewer easement was used, and that has triggered the Espinos' counterclaims against McGuinn in the 2005 action seeking monetary relief for slander of title, negligent misrepresentation, constructive fraud, trespass, fraud, conversion, and violation of the South Carolina Unfair Trade Practices Act.

Wade #3
As indicated, the Espinos, who are Defendants in the 2005 action, attempted to bring their direct claims for damages against the Town in that action by way of a Third-Party Complaint. However, the Third-Party Complaint was dismissed by Judge Johnson as an improper impleader action under Rule 14, SCRCP. The Espinos then commenced the 2008 action in which they have pursued the following causes of action against the Town: slander of title, negligence, gross negligence, regulatory taking, trespass, and conversion. In the 2008 action, the Espinos have also brought claims against Gates Commons, LLC and S. Wade McGuinn individually, and those claims appear to be identical to the counterclaims asserted in the 2005 action.

Importantly, both the 2005 and 2008 actions will turn, in part, on the meaning and scope of the sanitary sewer easement granted to the Town by Coventry Associates, Inc. Without question, the sanitary sewer easement is a critical part of both cases. By Order filed June 16, 2008 in the 2005 action, Judge Johnson granted the Espinos' counter motion for summary judgment on the declaratory judgment component of the 2005 action and ruled that "the easement in question does

not provide legal authority for [McGuinn Construction] *or anyone else* to enter the [Espinosa] property and/or connect to any sewer and/or drainage lines of Coventry Lake Subdivision." (Emphasis added). Because the Town was not a party to the 2005 action when Judge Johnson made that ruling, it is not binding on the Town despite the use of the language "or anyone else." Nonetheless, the Espinosa referenced that ruling by Judge Johnson in the Second Amended Complaint in the 2008 action and even attached a copy of Judge Johnson's Order as an exhibit. Thus, the overlap or inter-relationship of the two actions is obvious.

#4 In sum, this Court concludes that there is a sufficient basis under Rule 42(a) to consolidate the 2005 and 2008 cases. The consolidation will enable 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. That will foster judicial economy and prevent a potential inconsistent result in the two suits. The Court finds that to be a valid basis for the consolidation of the two suits.

IT IS, THEREFORE, ORDERED that the Motion to Consolidate filed by the Defendant Town of Lexington is hereby granted. Civil Action Numbers 2005-CP-32-2712 and 2008-CP-32-4192 are consolidated for all future discovery, pre-trial proceedings, and trial.

AND IT IS SO ORDERED.


WILLIAM P. KEESLEY
Presiding Judge,
Eleventh Judicial Circuit

Edgefield, South Carolina

March 26, 2012

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

McGuinn Construction Mgmt., Inc.,)

Plaintiff,)

-vs-)

Saul Espino, et al.,)

Defendants.)

ORDER CONCERNING STATUS

Case Number 2005-CP-32-02712

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LEXINGTON, SC

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This order is being issued following a status conference to memorialize the court's understanding of the status of this case and to establish directives to move the case forward.

On June 16, 2008, The Honorable James W. Johnson, Jr. issued an order ruling on various summary judgment motions and motions to dismiss. A motion for reconsideration was filed. This must have been one of the last orders issued by Judge Johnson before his death on July 13, 2008. The court believes that Judge Johnson was diagnosed with a rare form of aggressive cancer during the week of June 2, 2008, and was not able to hold court after that date and not able to go to his office. Apparently, he signed this order at home or in the hospital. So, there was no ruling on the reconsideration motion.

Rule 63, SCRCP, provides as follows:

Disability of a Judge

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon

certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

In addition, Chief Justice Toal issues an order each time she designates the Chief Judges for Administrative Purposes. Those orders generally include the following language or the substantial equivalent:

IT IS FURTHER ORDERED that if a trial or hearing has been commenced and the judge is unable to proceed, the chief judge for administrative purposes shall assign the trial or hearing to a successor judge. If the chief administrative judge has a conflict and is thereby prevented from performing this duty, the matter shall be referred to the Chief Justice to assign a successor judge. The successor judge may proceed with the trial or hearing upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may provide for the recall of any witnesses.

A status conference as held by the undersigned judge as Chief Judge for Administrative Purposes after Judge Johnson's death, and the case was assigned to The Honorable R. Knox McMahon as complex litigation. A motion to dismiss the reconsideration motion was filed, based on the assertion that the moving party failed to comply with the procedure for a Rule 59 motion, claiming that a copy of the motion was not sent to the judge. Judge McMahon issued an order on January 8, 2010, denying the motion to dismiss and holding that the Rule 59 motion was timely.

He heard arguments on the motion. However, before he issued a final written order, Judge McMahon recused himself on February 11, 2011. The matter is now

brought back to the undersigned judge as Chief Judge for Administrative Purposes.

Based on the current situation, the court designates itself as the successor judge under Rule 63, SCRCP, and Chief Justice Toal's administrative order.

There is a case that involves the Town of Lexington, which had previously been a party to this action. That case, *Espino, et al. v. Gates Commons, LLC, et al.*, is Case Number 2008-CP-32-04192. Andrew Lindemann, Esquire, represents the Town of Lexington and intends to file a motion to consolidate these cases.

The court gives the following directions, which have been distributed to the attorneys by email today:

- 1) Mr. Lindemann's motion to consolidate the cases should be filed right away and scheduled for hearing during the week of October 10.
- 2) As soon as possible, but by September 30, the attorneys are to file and provide a copy to the court of the record that they want reviewed to see if the court can certify familiarity with the record and determine that the proceedings may be completed without prejudice to the parties. If that is insufficient time, the attorneys are to notify the court; but, the time should be sufficient because these same materials presumably were provided to Judge McMahon before he recused himself. The court will then notify the attorneys of the preliminary determination on this issue.
- 3) If the court is satisfied that it can rule on the motion to reconsider the order issued by Judge Johnson, the attorneys will be notified either that the court will decide the reconsideration motion on written submissions, pursuant to the last sentence

. . . .
of Rule 59(f), SCRCF, and establish deadlines; or, that the court wishes to schedule a hearing on the reconsideration motion.

- 4) If the court decides that it is not comfortable deciding the reconsideration motion based on the record submitted, the attorneys will be consulted about whether or not they wish to argue the Rule 63 issues on the record. The court's understanding, however, is that the determinations under Rule 63 are largely in the court's discretion.
- 5) Whatever hearings are necessary will be scheduled and there will be an attempt to set them in the next available term of court after the determinations above are decided. That may involve a *de novo* hearing on all the motions that were originally decided by Judge Johnson.
- 6) THE CLERK OF COURT SHALL SEND A COPY OF THIS ORDER TO ALL THE ATTORNEYS, AS WELL AS TO THE ATTORNEYS IN 2008-CP-32-04192.

AND IT IS SO ORDERED.

September 2, 2011

/s/
William P. Keesley
Chief Judge for Administrative Purposes

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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

McGuinn Construction Management, Inc.,)
Plaintiff,)

Civil Action No. 05-CP-32-2712

v.)

Saul Espino and Mara Espino,)
Defendants.)

ORDER

Saul Espino and Mara Espino,)
Third-Party Plaintiffs,)

v.)

Town of Lexington,)
Third-Party Defendant.)

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

2007 OCT 31 A 8:42

FILED

This matter is before this Court on the motion to dismiss filed by the Third-Party Defendant, Town of Lexington. A hearing was held on September 17, 2007, with counsel for the Third-Party Plaintiffs and the Third-Party Defendant present. After a review of the Town of Lexington's motion, the written submissions by the parties, and the oral arguments of counsel, this Court hereby grants the Town's motion to dismiss.

By way of background, the Third Party Plaintiffs, Saul Espino and Mara Espino, impleaded the Town of Lexington under Rule 14, SCRCF, to seek recovery for damages sustained to their own property. In their Third-Party Complaint, the Espinos have asserted causes of action for gross negligence, inverse condemnation, and trespass against the Town. They seek damages for

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the diminution in value of their property, the loss of use of their property, and physical damage to their property.

Rule 14(a), SCRCPP, provides that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." It is well settled that "Rule 14 may be used only when the substantive law permits the defendant to shift some or all of his liability to the impleaded party." *Guthings v. Robertson Brokerage Co., Inc.*, 295 S.C. 112, 367 S.E.2d 423, 426 (Ct. App. 1988). The South Carolina Supreme Court further explained the proper use of Rule 14, SCRCPP, as follows:

Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability. The outcome of the principal claim must impact the third-party defendant's liability; however, no right exists to implead a third-party defendant who is directly liable to the plaintiff.

First General Services of Charleston, Inc. v. Miller, 314 S.C. 439, 445 S.E.2d 446, 447 (1994).

"Rule 14(a) does not allow the defendant to assert a separate and independent claim even though the claims arises out of the same general set of facts as the main claim." *Laughlin v. Dell Financial Services, L.P.*, 465 F. Supp. 563, 567 (D.S.C. 2006). "[T]hird-party practice may not be used to maintain an entirely separate and independent claim against a third party even though arising from the same factual situation." 59 A.Jur.2d "Parties" § 294 (2007). "[T]he only instances providing a predicate for third-party practice are where the third-party plaintiff has a claim for indemnification, contribution, or subrogation." *Id.*

In carefully reviewing the Third-Party Complaint, the Court concludes that the Espinos' causes of action against the Town of Lexington for gross negligence, inverse condemnation and trespass are not based on any theory of derivative liability. There is no claim alleged for indemnity,

contribution or subrogation. The Plaintiff's claims against the Espinos are for slander of title and tortious interference with prospective contractual rights and pertain only to the Plaintiff's rights to use a *drainage easement* across the Espinos' property. The Espinos are either liable or not on those claims. They have not and cannot allege that, if liable, the Town is secondarily liable to them for any judgment awarded to the Plaintiff. Further, the Espinos' third-party claims make no mention of the drainage easement; instead, they pertain only to a *sanitary sewer easement*, an entirely different easement, which is further proof that the Espinos' third-party claims are not tied to the Plaintiff's claims.

This Court finds that the Plaintiff's claims are unrelated to a sanitary sewer easement which is the subject of the Espinos' third-party claims. The Court thus concludes that the Espinos are seeking by way of the Third-Party Complaint only to recover their own injuries and damages. Obviously, the claimed damages for the diminution in value of the Espinos' property, the loss of use of their property, and physical damage to their property are not damages that may be owed to the Plaintiff by way of derivative liability.

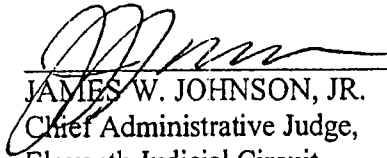
The Court further notes that in seeking to amend to assert a third party complaint against the Town, the Espinos did not mention any derivative or secondary liability for the Plaintiff's claims. Instead, the Espinos were concerned *only with the Plaintiff's defenses to their counterclaims*. The Espinos argued that "the Plaintiff has relied on the defense of the Town since the inception of the litigation." *See*, Memo in Support of Defendant's Motion to Amend, p. 8. The Espinos further claimed that "[t]o deny the motion however, is to allow the Plaintiff to establish an 'empty chair' defense for the jury, allowing them to blame the Town during trial with the Town absent as a party." *Id.* Hence, the whole purpose for the Third-Party Complaint was to make the Town a party to prevent the Plaintiff from using an "empty chair" defense as a tactic in defending the Espinos'

counterclaims against the Plaintiff. It was unrelated to the Espinos' defense of the Plaintiff's claims against them.

As a result, this Court concludes that the Third-Party Complaint is not proper under Rule 14, SCRCF, and should be dismissed.

IT IS, THEREFORE, ORDERED that the Town of Lexington's motion to dismiss is granted, and the Third-Party Complaint against the Town is hereby dismissed.

AND IT IS SO ORDERED.



JAMES W. JOHNSON, JR.
Chief Administrative Judge,
Eleventh Judicial Circuit

Lexington, South Carolina

@ Jan 29, 2007

#4

ROA000038

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

MCGUINN CONSTRUCTION)
MANAGEMENT, INC.)

Plaintiff,)

vs.)

SAUL ESPINO AND MARA)
ESPINO)

Defendant.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CASE NO.: 2005-CP-32-2712

ORDER

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

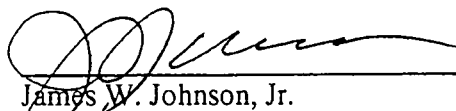
2007 DEC 20 3 28

FILED

This matter is before the Court on Third Party Plaintiffs' Motion to Reconsider the dismissal of the Third Party Complaint. The Court granted Third Party Defendant's Motion to Dismiss in an Order dated October 29, 2007.

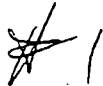
After reviewing all Memoranda and supporting cases, this Court denies Third Party Plaintiffs' Motion to Reconsider. Plaintiff failed to present any new arguments on which to overturn the court's previous decision to grant Defendant's Motion to Dismiss. Accordingly, Third Party Plaintiffs' Motion to Reconsider is denied.

AND IT IS SO ORDERED.



James W. Johnson, Jr.
Chief Judge for Administrative Purposes-Common Pleas
Eleventh Judicial Circuit

December 20, 2007



COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

McGuinn Construction Management, Inc.,)
Plaintiff,)

C.A. No.:

2005-CP32-2712

vs.)

COMPLAINT

Saul Espino and Mara Espino,)
Defendants.)

Plaintiff above-named Complaining of the Defendants herein alleges that:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a South Carolina corporation.
2. Defendants are residents and citizens of Lexington County, South Carolina.
3. The property which is the subject of this action is located Lexington County, South Carolina.
4. This cause of action is a cause of action for declaratory relief pursuant to the South Carolina Declaratory Judgments Act.
5. The Defendants own a parcel of land in the Town of Lexington, South Carolina which is adjacent to a parcel of land owned by the Plaintiff.
6. The Defendants are successors in title to Coventry Associates, Inc. which deed filed April 11, 1988, conveyed a drainage easement across the Defendants' property to the Town of Lexington, South Carolina, it successors and assigns.

7. The Town has a legitimate drainage easement across the Defendants' property and has had such an easement since 1988. The easement has been maintained since 1988 and the Town of Lexington has every right to maintain and utilize the drainage easement.
8. The Plaintiff's property is adjacent to that of the Defendants and the Plaintiff has plans to create a first class development adjacent to the Defendants' property.
9. The Defendants do not want the development and have done everything in their power to see to it that the development does not move forward.
10. The Town of Lexington has approved the drainage easement to be used by the Plaintiff in connection with its development.
11. The Plaintiff is informed and believes this it is entitled to a declaration of its rights declaring that the Plaintiff has the full right to make use of the drainage easement across the Defendants' property, and declaring that the Plaintiff has the full right to improve the easement by an underground pipe which will enhance the overall value of the Plaintiff's property and the value of the Defendants' property.

FOR A SECOND CAUSE OF ACTION

12. Plaintiff hereby reasserts and realleges each and every allegation set forth above as fully as if set forth verbatim.
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.

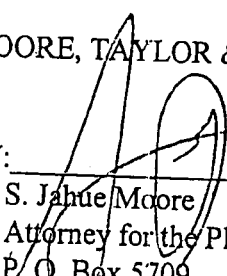
15. The conduct on the part of the Defendants amounts to a slander of title and to an unlawful interference with the Plaintiff perspective contractual rights.

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.

17. Plaintiff is informed and believes that it is entitled to judgment against the Defendants for actual and punitive damages.

WHEREFORE, Plaintiff prays for a declaration of the rights of the parties one to another; for actual damages; for punitive damages; and for such other and further relief as this Court might deem just and proper.

MOORE, TAYLOR & THOMAS, P.A.

BY: 

S. Jahue Moore
Attorney for the Plaintiff
P. O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina
August 8, 2005

COPY

STATE OF SOUTH CAROLINA

FILED

COUNTY OF LEXINGTON

2005 NOV 18

P 3: 38

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 05-CP32-2712

MCGUINN CONSTRUCTION
MANAGEMENT, INC.

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Plaintiff,

-vs.-

SAUL ESPINO AND MARA ESPINO
Defendants.

ANSWER AND COUNTERCLAIM
OF DEFENDANTS
(Jury Trial Demanded)

The Defendants, SAUL ESPINO AND MARA ESPINO (hereinafter Defendants),
answer the Plaintiff's complaint and complain as follows:

FOR A FIRST AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION

1. That each and every allegation contained in the Plaintiff's Complaint that is not expressly admitted, qualified, modified or explained is expressly denied and strict proof is required thereof.
2. The Defendants are without sufficient information to either admit or deny the allegations of paragraph 1 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
3. Upon information and belief, the Defendants deny the allegations of paragraph 2 of the Plaintiff's complaint, and require strict proof thereof.
4. Upon information and belief, the Defendants admit to the allegations of paragraph 3 of the Plaintiff's complaint to the extent the property described as the "subject property" is that which is located at 108 Coventry Court, Lexington, SC and owned by the Defendants.

5. Upon information and belief, the allegations of paragraph 4 of the Plaintiff's complaint call for legal conclusions which the Defendants are not required to answer. To the extent an answer is required, Defendants deny the allegations and require strict proof thereof.
6. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 5 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
7. Upon information and belief, the allegations of paragraph 6 of the Plaintiff's complaint call for legal conclusions which the Defendants are not required to answer. To the extent an answer is required, Defendants deny the allegations and require strict proof thereof.
8. Upon information and belief, the allegations of paragraph 7 of the Plaintiff's complaint call for legal conclusions which the Defendants are not required to answer. To the extent an answer is required, Defendants deny the allegations and require strict proof thereof.
9. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 8 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
10. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 9 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
11. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 10 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
12. Defendants deny the allegations of paragraph 11 of the Plaintiff's complaint.

13. Defendants deny the allegations set forth in paragraph 12 of the Plaintiff's complaint to the extent inconsistent with allegations set forth in this pleading.
14. Defendants deny the allegations of paragraph 13 of the Plaintiff's complaint and require strict proof thereof.
15. Defendants deny the allegations of paragraph 14 of the Plaintiff's complaint and require strict proof thereof.
16. Defendants deny the allegations of paragraph 15 of the Plaintiff's complaint and requires strict proof thereof.
17. Defendants deny the allegations of paragraph 16 of the Plaintiff's complaint and requires strict proof thereof.
18. Defendants deny the allegations of paragraph 17 of the Plaintiff's complaint and requires strict proof thereof.

FOR A SECOND AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
(Motion to Dismiss - Rule 12(b)(6)
Failure To State Sufficient Facts To Constitute A Cause)

19. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
20. Defendants assert that the Plaintiff has not alleged sufficient facts to constitute a cause of action upon which relief can be granted, because it has failed to show: (1) the easement allegedly granted to the Town of Lexington gives authority or rights to the Plaintiff as it contemplates, and (2) that the work contemplated and envisioned to be performed by the Plaintiff is outside of the scope of the easement allegedly granted.

FOR A THIRD AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
(Truth In Ownership - Privilege)

21. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.

22. That the Plaintiff claims for slander of title fail because the ownership of the property lies with the Defendants and the use contemplated by the Plaintiff of the alleged easement is out the scope of the easement.
23. That the allegations of slander of title are not valid as the claim in that it affects the property owned by the Defendants which is privileged.

FOR A FOURTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF FIRST COUNTERCLAIM
(Slander of Title)

24. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
25. Plaintiff is a corporation duly organized under the laws of the State of South Carolina and doing business with its principal place of business in Lexington, South Carolina.
26. That jurisdiction and venue are proper for the counterclaims asserted herein.
27. That upon information and belief by both the filing of this action and the trespass on the Defendant's property, Plaintiff has encumbered the marketability of the property with malice and the specific intent to gain ownership interest in portions of Defendants' property.
28. As a direct and proximate cause to this slander of title, the marketability of the Defendants' property has been adversely affected, and they have and/or will suffer damages to include attorneys fees in the defense of this action, and a diminishment in the value of its property.
29. Defendant should therefore be awarded any and all damages to include consequential, actual and punitive for the deliberate slandering of title to the Defendants' property.

FOR A FIFTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF SECOND COUNTERCLAIM
(Negligent Misrepresentation)

30. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.

31. That the Defendant made false and misleading representations to Plaintiff relating to both the rights of the Plaintiff to the Defendants' property and the intent for use of said property.
32. That the Plaintiff had a pecuniary interest in making these statements.
33. The Plaintiff owed a duty of care to see that it communicated truthful information to Defendant, and therefore, owed a duty of care to follow through to ensure that the purpose and intent of the project was consistent with what had been conveyed to the Defendants.
34. The Plaintiff breached its duty by attempting to proceed without authority.
35. That Defendants justifiably relied upon these misrepresentations made by the Plaintiff.
36. That Defendants have suffered pecuniary loss as a proximate and direct result of their reliance on the false and negligent representations made by the Plaintiff.
37. That as a result of these negligent misrepresentations made by the Plaintiff, Defendants have suffered significant damages to be shown at trial to include punitive damages from the Defendant.

FOR A SIXTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF THIRD COUNTERCLAIM
(Constructive Fraud)

38. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
39. The Plaintiff made false representations to the Defendants, with full knowledge of their falsity, that the property would not be occupied and used without authority and would only then be used in a way consistent with what had been represented and agreed to be the parties.
40. The representations were material, and the Plaintiff should have known that the Defendants would rely upon them.
41. The Defendants were unaware of the falsity of these representations and relied on the truth of the representations, having the right to rely thereon.

42. Due to the Plaintiff's fraudulent representations to the Defendant, Defendants have suffered actual and consequential damages including.
43. That the representations of the Plaintiff amount to constructive fraud, and Defendants seek actual, incidental and consequential damages along with punitive damages.

FOR A SEVENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF FOURTH COUNTERCLAIM
(Constructive Fraud)

44. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
45. That the Plaintiff owed a duty to Defendants to perform the work on the project in a professional and diligent manner and in accordance with authority granted, if any.
46. That the acts and omissions of the Plaintiff include, but are not limited to the following:
- a. Failing to properly supervise the project;
 - b. Failing to obtain authorization from the Defendants before allowing individuals to occupy said property;
 - c. Failing to prevent trespass on Defendants' property by its crews and subcontractors; and
 - d. Failing to use due care under the circumstances.
47. That as a result of the Plaintiff's negligence, Defendants have suffered significant damages.
48. That given the reckless, careless, willful and intentional conduct of the Plaintiffs, the Defendants are informed and believe that they are entitled to all damages sought and punitive damages.

FOR AN EIGHTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF FIFTH COUNTERCLAIM
(Breach of Implied Covenant of Good Faith and Fair Dealing)

49. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.

50. That the Plaintiff in the construction of the project adjacent to Defendants' property was to comply with the implied covenant of good faith and fair dealing.
51. That the acts and conduct of Plaintiff in the misrepresentations made and the blatant abuse of authority with reference to the Defendants' property were negligent, careless and reckless and/or motivated by bad faith and/or malice and/or retaliation and were contrary to the best interests of our economic system and the public good and constituted a breach of said covenant.
52. That by reason of the Plaintiff's breach of the implied covenant of good faith and fair dealing, and as a direct and proximate result thereof, Defendants have suffered damages on account thereof which they are entitled to collect from Plaintiff.

FOR A NINTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF SIXTH COUNTERCLAIM
(Fraud)

53. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
54. That Plaintiff has made or caused to be made representations regarding the purpose and intent of the use of the Defendants' property and regarding the authorization to proceed with construction regardless of an absence of actual authority, legal or otherwise, to proceed.
55. That such representations were false and misleading to Defendants which relied on the same to prejudice their position.
56. That all such representations were material to the Defendants' decision with regard to their property.
57. That Plaintiff knew of the falsity or acted with reckless disregard to the truth or falsity of such representations.
58. That Plaintiff at all material times intended that the representations be acted upon by Defendants.
59. The Defendants were ignorant of the falsity of Plaintiff's misrepresentations.

60. That the Defendants relied upon the representations of the Plaintiff
61. That the Defendants had a right to rely upon the representations of the Plaintiff.
62. That on account thereof, Defendants have been damaged as set forth herein, and demands actual, consequential and punitive damages.

FOR A TENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF SEVENTH COUNTERCLAIM
(Conversion)

63. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
64. That by allowing the use of the property without the authority of the Defendant, Plaintiff converted the property.
65. That as a result, Defendants have suffered damages for the Plaintiff's intentional conversion of said real and personal property, and Plaintiff is entitled to recovery and punitive damages.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF EIGHTH COUNTERCLAIM
(Trespass)

66. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
67. That Plaintiff has committed actual trespass and/or aided and abetted in the trespass of the Defendants' property.
68. That as a result, Defendants have suffered damages for the Plaintiff's intentional trespass of said real property, and Defendants are entitled to recovery and punitive damages.

FOR A TWELVTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF NINETH COUNTERCLAIM
(Violation of SC Unfair Trade Practices Act)

69. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.

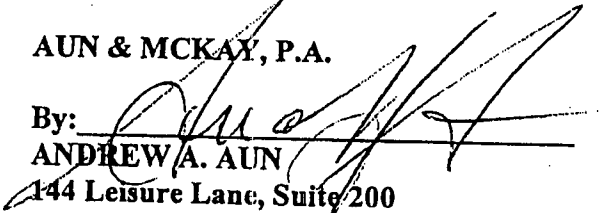
70. Plaintiff represented to the Defendants that it would be constructing a project, that it had authority to proceed to construction, that it would not exceed its authority and that it would not damage Defendants' property.
71. These representations had the capacity, effect and tendency to deceive Defendants and did in fact deceive the Defendants to their detriment.
72. Further, these representations by the Plaintiff and its subsequent actions and inaction adversely affect the public interest and have the potential for repetition.
73. As such, the Plaintiff's representations and actions are violations of the South Carolina Unfair Trade Practices Act, S.C. Ann. §39-5-10 et. seq. Therefore, the Defendants ask this court to grant treble damages along with attorney's fees and costs incurred in this action.

WHEREFORE, the Defendants pray that the court inquire into the above-referenced matter and, dismiss the Plaintiff's Complaint, with prejudice, and award it costs incurred in defending this action including a reasonable attorney's fee. Further, the Defendants ask this Honorable court to award judgment against the Plaintiff for the counterclaims alleged and award damages to include actual,

consequential, incidental damages, punitive damages and all other damages the court deems fit, and to treble such damages under the SCUPTA counterclaim alleged. In addition, the Defendants demand a jury trial on all issues so triable.

Respectfully submitted,

AUN & MCKAY, P.A.

By: 

ANDREW A. AUN

144 Leisure Lane, Suite 200

Columbia, SC 29210

(803) 744-0824

ATTORNEY FOR DEFENDANTS

November 17, 2005
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

FILED

2005 NOV 30 1:47

McGuinn Construction Management, Inc.,)

C.A. No.: 2005-CP-32-2712

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Plaintiff,)

vs.)

REPLY

Saul Espino and Mara Espino,)

Defendants.)

Plaintiff hereby Replies to the Counterclaims of the Defendants herein as follows:

FOR A FIRST DEFENSE

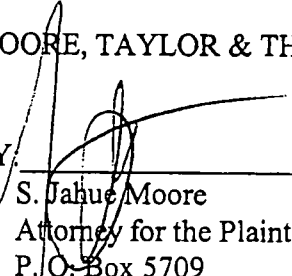
1. The Counterclaims fail to state a cause of action.

FOR A SECOND DEFENSE

2. The material allegations of the Counterclaims are denied.

WHEREFORE, having fully Replied to the Counterclaims of the Defendants the Plaintiff prays for judgment on the Complaint; prays that the Counterclaims be dismissed with costs; and for such other and further relief as this Court might deem just and proper.

MOORE, TAYLOR & THOMAS, P.A.

BY: 

S. Jahue Moore
Attorney for the Plaintiff
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina
November 28, 2005

AFFIDAVIT OF SERVICE BY MAIL FILED

BETH A. CARRIGG
CLERK OF COURT
PLYMOUTH, NC

Andrew A. Aun, Esquire
Attorney at Law
 144 Leisure Lane, Suite 200
 Columbia, SC 29210

~~S. Jahue Moore~~

SWORN to before me this 29th
day of November, 2005.

James L. Conley (SEAL)

Notary Public for South Carolina

My Commission Expires: 3-12-2008

**MCGUINN CONSTRUCTION
MANAGEMENT, INC.**

Plaintiff,

-vs.-

SAUL ESPINO AND MARA ESPINO

Defendants.

SAUL ESPINO AND MARA ESPINO

Third Party Plaintiffs

-VS.-

TOWN OF LEXINGTON

Third Party Defendants

FILED IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 05-CP32-2712
JUL 23 11 49 AM '05

DET. A. CARBON
CLERK COURT
LEXINGTON SC

**AMENDED ANSWER,
COUNTERCLAIM AND
THIRD-PARTY COMPLAINT
OF THE DEFENDANTS
SAUL AND MARA ESPINO
(Jury Trial Demanded)**

The Defendants And Third-Party Plaintiffs, **SAUL ESPINO AND MARA ESPINO**
(hereinafter Defendants and Third-Party Plaintiffs), answer the Plaintiff's complaint and complain as
follows against both the Plaintiff and the Third-Party Defendant:

FOR A FIRST AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION

1. That each and every allegation contained in the Plaintiff's Complaint that is not expressly admitted, qualified, modified or explained is expressly denied and strict proof is required thereof.
2. The Defendants are without sufficient information to either admit or deny the allegations of paragraph 1 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.

3. Upon information and belief, the Defendants deny the allegations of paragraph 2 of the Plaintiff's complaint, and require strict proof thereof.
4. Upon information and belief, the Defendants admit to the allegations of paragraph 3 of the Plaintiff's complaint to the extent the property described as the "subject property" is that which is located at 108 Coventry Court, Lexington, SC and owned by the Defendants.
5. Upon information and belief, the allegations of paragraph 4 of the Plaintiff's complaint call for legal conclusions which the Defendants are not required to answer. To the extent an answer is required, Defendants deny the allegations and require strict proof thereof.
6. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 5 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
7. Upon information and belief, the allegations of paragraph 6 of the Plaintiff's complaint call for legal conclusions which the Defendants are not required to answer. To the extent an answer is required, Defendants deny the allegations and require strict proof thereof.
8. Upon information and belief, the allegations of paragraph 7 of the Plaintiff's complaint call for legal conclusions which the Defendants are not required to answer. To the extent an answer is required, Defendants deny the allegations and require strict proof thereof.
9. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 8 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
10. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 9 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.

11. Upon information and belief, Defendants are without sufficient information to either admit or deny the allegations of paragraph 10 of the Plaintiff's complaint, and therefore, deny the same, requiring strict proof thereof.
12. Defendants deny the allegations of paragraph 11 of the Plaintiff's complaint.
13. Defendants deny the allegations set forth in paragraph 12 of the Plaintiff's complaint to the extent inconsistent with allegations set forth in this pleading.
14. Defendants deny the allegations of paragraph 13 of the Plaintiff's complaint and require strict proof thereof.
15. Defendants deny the allegations of paragraph 14 of the Plaintiff's complaint and require strict proof thereof.
16. Defendants deny the allegations of paragraph 15 of the Plaintiff's complaint and requires strict proof thereof.
17. Defendants deny the allegations of paragraph 16 of the Plaintiff's complaint and requires strict proof thereof.
18. Defendants deny the allegations of paragraph 17 of the Plaintiff's complaint and requires strict proof thereof.

FOR A SECOND AFFIRMATIVE DEFENSE

TO ALL CAUSES OF ACTION

(Motion to Dismiss - Rule 12(b)(6)

Failure To State Sufficient Facts To Constitute A Cause)

19. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
20. Defendants assert that the Plaintiff has not alleged sufficient facts to constitute a cause of action upon which relief can be granted, because it has failed to show: (1) the easement allegedly granted to the Town of Lexington gives authority or rights to the Plaintiff as it contemplates, and (2) that

the work contemplated and envisioned to be performed by the Plaintiff is outside of the scope of the easement allegedly granted.

FOR A THIRD AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
(Truth In Ownership - Privilege)

21. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
22. That the Plaintiff claims for slander of title fail because the ownership of the property lies with the Defendants and the use contemplated by the Plaintiff of the alleged easement is out the scope of the easement.
23. That the allegations of slander of title are not valid as the claim in that it affects the property owned by the Defendants which is privileged.

FOR A FOURTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF FIRST COUNTERCLAIM
(Slander of Title)

24. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
25. Plaintiff is a corporation duly organized under the laws of the State of South Carolina and doing business with its principal place of business in Lexington, South Carolina.
26. That jurisdiction and venue are proper for the counterclaims asserted herein.
27. That upon information and belief by both the filing of this action and the trespass on the Defendant's property, Plaintiff has encumbered the marketability of the property with malice and the specific intent to gain ownership interest in portions of Defendants' property.
28. As a direct and proximate cause to this slander of title, the marketability of the Defendants' property has been adversely affected, and they have and/or will suffer damages to include attorneys fees in the defense of this action, and a diminishment in the value of its property.

29. Defendant should therefore be awarded any and all damages to include consequential, actual and punitive for the deliberate slandering of title to the Defendants' property.

FOR A FIFTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF SECOND COUNTERCLAIM
(Negligent Misrepresentation)

30. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
31. That the Defendant made false and misleading representations to Plaintiff relating to both the rights of the Plaintiff to the Defendants' property and the intent for use of said property.
32. That the Plaintiff had a pecuniary interest in making these statements.
33. The Plaintiff owed a duty of care to see that it communicated truthful information to Defendant, and therefore, owed a duty of care to follow through to ensure that the purpose and intent of the project was consistent with what had been conveyed to the Defendants.
34. The Plaintiff breached its duty by attempting to proceed without authority.
35. That Defendants justifiably relied upon these misrepresentations made by the Plaintiff.
36. That Defendants have suffered pecuniary loss as a proximate and direct result of their reliance on the false and negligent representations made by the Plaintiff.
37. That as a result of these negligent misrepresentations made by the Plaintiff, Defendants have suffered significant damages to be shown at trial to include punitive damages from the Defendant.

FOR A SIXTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF THIRD COUNTERCLAIM
(Constructive Fraud)

38. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.

39. The Plaintiff made false representations to the Defendants, with full knowledge of their falsity, that the property would not be occupied and used without authority and would only then be used in a way consistent with what had been represented and agreed to be the parties.
40. The representations were material, and the Plaintiff should have known that the Defendants would rely upon them.
41. The Defendants were unaware of the falsity of these representations and relied on the truth of the representations, having the right to rely thereon.
42. Due to the Plaintiff's fraudulent representations to the Defendant, Defendants have suffered actual and consequential damages including.
43. That the representations of the Plaintiff amount to constructive fraud, and Defendants seek actual, incidental and consequential damages along with punitive damages.

FOR A SEVENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF FOURTH COUNTERCLAIM
(Negligence)

44. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
45. That the Plaintiff owed a duty to Defendants to perform the work on the project in a professional and diligent manner and in accordance with authority granted, if any.
46. That the acts and omissions of the Plaintiff include, but are not limited to the following:
- a. Failing to properly supervise the project;
 - b. Failing to obtain authorization from the Defendants before allowing individuals to occupy said property;
 - c. Failing to prevent trespass on Defendants' property by its crews and subcontractors; and
 - d. Failing to use due care under the circumstances.
47. That as a result of the Plaintiff's negligence, Defendants have suffered significant damages.

48. That given the reckless, careless, willful and intentional conduct of the Plaintiffs, the Defendants are informed and believe that they are entitled to all damages sought and punitive damages.

FOR AN EIGHTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF FIFTH COUNTERCLAIM
(Breach of Implied Covenant of Good Faith and Fair Dealing)

49. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
50. That the Plaintiff in the construction of the project adjacent to Defendants' property was to comply with the implied covenant of good faith and fair dealing.
51. That the acts and conduct of Plaintiff in the misrepresentations made and the blatant abuse of authority with reference to the Defendants' property were negligent, careless and reckless and/or motivated by bad faith and/or malice and/or retaliation and were contrary to the best interests of our economic system and the public good and constituted a breach of said covenant.
52. That by reason of the Plaintiff's breach of the implied covenant of good faith and fair dealing, and as a direct and proximate result thereof, Defendants have suffered damages on account thereof which they are entitled to collect from Plaintiff.

FOR A NINTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF SIXTH COUNTERCLAIM
(Fraud)

53. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
54. That Plaintiff has made or caused to be made representations regarding the purpose and intent of the use of the Defendants' property and regarding the authorization to proceed with construction regardless of an absence of actual authority, legal or otherwise, to proceed.
55. That such representations were false and misleading to Defendants which relied on the same to prejudice their position.

56. That all such representations were material to the Defendants' decision with regard to their property.
57. That Plaintiff knew of the falsity or acted with reckless disregard to the truth or falsity of such representations.
58. That Plaintiff at all material times intended that the representations be acted upon by Defendants.
59. The Defendants were ignorant of the falsity of Plaintiff's misrepresentations.
60. That the Defendants relied upon the representations of the Plaintiff
61. That the Defendants had a right to rely upon the representations of the Plaintiff.
62. That on account thereof, Defendants have been damaged as set forth herein, and demands actual, consequential and punitive damages.

FOR A TENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF SEVENTH COUNTERCLAIM
(Conversion)

63. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
64. That by allowing the use of the property without the authority of the Defendant, Plaintiff converted the property.
65. That as a result, Defendants have suffered damages for the Plaintiff's intentional conversion of said real and personal property, and Plaintiff is entitled to recovery and punitive damages.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF EIGHTH COUNTERCLAIM
(Trespass)

66. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
67. That Plaintiff has committed actual trespass and/or aided and abetted in the trespass of the Defendants' property.

68. That as a result, Defendants have suffered damages for the Plaintiff's intentional trespass of said real property, and Defendants are entitled to recovery and punitive damages.

FOR A TWELVTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF NINETH COUNTERCLAIM
(Violation of SC Unfair Trade Practices Act)

69. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
70. Plaintiff represented to the Defendants that it would be constructing a project, that it had authority to proceed to construction, that it would not exceed its authority and that it would not damage Defendants' property.
71. These representations had the capacity, effect and tendency to deceive Defendants and did in fact deceive the Defendants to their detriment.
72. Further, these representations by the Plaintiff and its subsequent actions and inaction adversely affect the public interest and have the potential for repetition.
73. As such, the Plaintiff's representations and actions are violations of the South Carolina Unfair Trade Practices Act, S.C. Ann. §39-5-10 et. seq. Therefore, the Defendants ask this court to grant treble damages along with attorney's fees and costs incurred in this action.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF FIRST CAUSE OF ACTION
AGAINST THIRD PARTY DEFENDANT
TOWN OF LEXINGTON
(Gross Negligence)

74. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
75. That the Town of Lexington is a municipality within the County of Lexington, State of South Carolina.
76. That this Honorable Court has subject matter jurisdiction over this matter and venue is proper.

77. That upon information and belief, the Plaintiff petitioned the Third Party Defendant for the necessary permits to construct a subdivision on property adjacent to the Defendants'.
78. That one of the necessary requirements for the Plaintiff to obtain prior to construction was the ability to provide water and sewer to the residents of the new community.
79. That as alleged, upon information and belief, the Plaintiff, without authorization, connected to sewer lines which apparently were installed on the Defendants' property under an easement which the Plaintiff asserts provided it with the authority.
80. That upon information and belief, the Third Party Defendant was aware of the easement in question, and had indicated that it had not provided authorization to the Plaintiff to proceed until the Plaintiff had obtained a legal connection to the sewer.
81. That upon information and belief, although the final plans submitted seem to indicate that the connection to sewer proposed would not have been placed within the alleged authorization of the easement, the Third Party Defendant did not issue a cease and desist order to the developer, and instead, assumed wrongly that the connection had been made legally, with no consultation with the Town Attorney, and with notice from the retired Director of Engineering that there were potential legal issues associated the sewer connection as proposed.
82. That the Third Party Defendant had a duty to ensure that no connection of the sewer lines were occurring until such time as the plans indicating placement were received, reviewed and approved, and until such time as verification of legal authority by the Third Party Defendant had occurred.
83. Further, the Third Party Defendant was aware of the fragile nature of the Defendants' property and had a duty to prevent development which would cause damage to contiguous property, and by allowing the development to occur as it has, the Third Party Defendant has created and

exacerbated a water intrusion and water flow issue that threatens to permanently devalue the Plaintiffs property and render it of no use.

84. That as a result of these breaches of duty, the Defendants have suffered significant damages to include loss of use of property, physical damage to property, and other damages to be shown at trial.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF SECOND CAUSE OF ACTION
AGAINST THIRD PARTY DEFENDANT
TOWN OF LEXINGTON
(Regulatory Taking)

85. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
86. That as a result of the gross negligence on the part of the Third Party Defendant by not properly reviewing and approving the conduct of the Plaintiff in development of the project in question, the Third Party Defendant has allowed a taking of the property by the Plaintiff, which would require compensation for the irreparable diminution in value of the property and other damages to be shown at trial.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE
TO ALL CAUSES OF ACTION
AND BY WAY OF THIRD CAUSE OF ACTION
AGAINST THIRD PARTY DEFENDANT
TOWN OF LEXINGTON
(Trespass)

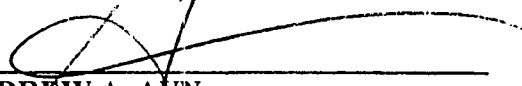
87. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
88. That as a result of the gross negligence on the part of the Third Party Defendant by not properly reviewing and approving the conduct of the Plaintiff in development of the project in question, the Third Party Defendant has allowed trespass on the property by the Plaintiff, which would require

compensation for the irreparable diminution in value of the property and other damages to be shown at trial, including punitive damages.

WHEREFORE, the Defendants pray that the court inquire into the above-referenced matter and, dismiss the Plaintiff's Complaint, with prejudice, and award it costs incurred in defending this action including a reasonable attorney's fee. Further, the Defendants ask this Honorable court to award judgment against the Plaintiff for the counterclaims alleged and award damages to include actual, consequential, incidental damages, punitive damages and all other damages the court deems fit, and to treble such damages under the SCUPTA counterclaim alleged. In addition, the Third Party Plaintiffs ask that the Court grant a judgment against the Defendants on the causes of action alleged. Finally, Defendants/Third-Party Plaintiffs demand a jury trial on all issues so triable.

Respectfully submitted,

AUN & MCKAY, P.A.

By: 

ANDREW A. AUN

144 Leisure Lane, Suite 200

Columbia, SC 29210

(803) 744-0824

**ATTORNEY FOR DEFENDANTS AND
THIRD PARTY PLAINTIFFS**

Dated 5/23/07
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

McGuinn Construction Management, Inc.,)
)
Plaintiff,)

Civil Action No. 05-CP-32-2712

v.)

Saul Espino and Mara Espino,)
)
Defendants.)

ANSWER TO
THIRD-PARTY COMPLAINT

Saul Espino and Mara Espino,)
)
Third-Party Plaintiffs,)

v.)

Town of Lexington,)
)
Third-Party Defendant.)

The Third-Party Defendant, Town of Lexington, reserving all rights pursuant to the Motion to Dismiss filed previously and remaining pending, answers the Third-Party Complaint herein as follows:

FOR A FIRST DEFENSE

1. The Third-Party Complaint, in whole or in part, fails to state a cause of action upon which relief may be granted. The Third-Party Defendant reserves the right to file a motion pursuant to Rule 12(b)(6), SCRCP.

FOR A SECOND DEFENSE

2. The Third-Party Defendant denies each and every allegation of the Third-Party Complaint not hereinafter specifically admitted, qualified, or explained.

3. As to the allegations set forth in Paragraph 74 of the Third-Party Complaint, the Third-Party Defendant lacks sufficient information to determine the truth of those allegations and, therefore, denies those allegations to the extent they implicate any claims against the Third Party Defendant. The Third-Party Defendant further objects to the jumbling of causes of action.

4. The allegations set forth in Paragraph 75 of the Third-Party Complaint are admitted.

5. The allegations set forth in Paragraph 76 of the Third-Party Complaint are jurisdictional matters to which no response is required.

6. The allegations set forth in Paragraph 77 of the Third-Party Complaint are admitted.

7. The allegations set forth in Paragraph 78 of the Third-Party Complaint are admitted.

8. As to the allegations set forth in Paragraph 79 of the Third-Party Complaint, the Third-Party Defendant admits that the Plaintiff connected sewer lines for Gates Commons to a sewer line existing across the Third-Party Plaintiffs' property.

9. The allegations set forth in Paragraph 80 of the Third-Party Complaint are admitted to the extent that the Third-Party Defendant was aware of the sewer easement across the Third-Party Plaintiffs' property and advised the Plaintiff to obtain and ensure that it had legal authority to use the subject sewer easement. All remaining allegations are denied.

10. The allegations set forth in Paragraph 81 of the Third-Party Complaint are denied, with the exception of the allegation that the Third Party Defendant did not issue a cease and desist order to the Plaintiff which is admitted.

11. The allegations set forth in Paragraphs 82, 83, and 84 of the Third-Party Complaint are denied.

12. As to the allegations set forth in Paragraph 85 of the Third-Party Complaint, the Third-Party Defendant repeats and reiterates its responses to Paragraphs 74 through 84 of the Third-Party Complaint as if fully repeated herein verbatim. The Third-Party Defendant further objects to the jumbling of causes of action.

13. The allegations set forth in Paragraph 86 of the Third-Party Complaint are denied.

14. As to the allegations set forth in Paragraph 87 of the Third-Party Complaint, the Third-Party Defendant repeats and reiterates its responses to Paragraphs 74 through 86 of the Third-Party Complaint as if fully repeated herein verbatim. The Third-Party Defendant further objects to the jumbling of causes of action.

15. The allegations set forth in Paragraph 88 of the Third-Party Complaint are denied.

16. The allegations and relief sought in the Prayer for Relief are denied.

FOR A THIRD DEFENSE

17. The Third-Party Plaintiffs' claims are, in whole or in part, not ripe for adjudication.

FOR A FOURTH DEFENSE

18. The Third Party Plaintiffs' claims are, in whole or in part, barred by their failure to exhaust administrative remedies.

FOR A FIFTH DEFENSE

19. The Third-Party Defendant asserts the defense of sovereign immunity, pursuant to the terms of the South Carolina Tort Claims Act, including but not limited to the damages caps and the punitive damages bar as set forth in S.C. Code Ann. § 15-78-120.

FOR A SIXTH DEFENSE

20. The Third-Party Defendant is immune from suit pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, specifically S.C. Code Ann. § 15-78-60(1), (2), (4), (5), (9), (12), (13), and (20).

FOR A SEVENTH DEFENSE

21. The Third-Party Plaintiffs have failed to mitigate their damages, thereby barring their recovery in whole or in part.

FOR AN EIGHTH DEFENSE

22. The Third-Party Defendant alleges that any damages must be apportioned between the Third-Party Defendant Town and all other potential tortfeasors pursuant to S.C. Code Ann. § 15-78-100(c).

WHEREFORE, having fully answered the Third-Party Complaint, the Third Party Defendant prays that the Third-Party Complaint be dismissed with prejudice; for the costs of this action; and for such other and further relief as the Court deems just and proper.

DAVIDSON, MORRISON AND
LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
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Columbia, South Carolina 29202
(803) 806-8222

*Counsel for Third-Party Defendant,
Town of Lexington*

Columbia, South Carolina

June 29, 2007

ROA000070

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

SAUL ESPINO AND MARA ESPINO

Plaintiffs,

-vs.-

GATES COMMONS, LLC., S. WADE
MCGUINN, INDIVIDUALLY and TOWN OF
LEXINGTON

Defendants.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 08-CP-32-4192

SECOND AMENDED COMPLAINT
(Jury Trial Demanded)

TO DEFENDANTS ABOVE NAMED:

The Plaintiffs, above named, complaining of the Defendants herein, would respectfully show unto this Court as follows:

GENERAL ALLEGATIONS

1. That this court has jurisdiction over the matters contained herein and venue is proper in Lexington County.
2. Upon information and belief, Defendant Gates Commons, LLC (Hereinafter "Defendant Gates Commons") is a corporation organized and existing under the laws of the State of South Carolina doing business in the County of Lexington, State of South Carolina.
3. Upon information and belief, the Defendant S. Wade McGuinn (Hereinafter "Defendant McGuinn") lives and resides in Lexington County, South Carolina.
4. That the Town of Lexington is a municipality within the County of Lexington, State of South Carolina.

5. That the Plaintiffs own property which is the subject of this litigation in the County of Lexington, State of South Carolina.
6. That upon information and belief, at all times relevant to the action, Defendant Gates Common, LLC was the owner of property located contiguous to the Plaintiffs' property.
7. That upon information and belief, at all times relevant to the action, Defendant Wade McGuinn was a principal with both Defendant Gates Common, LLC, McGuinn Construction Management, Inc., and other corporations and entities used and/or involved the development, oversight and implementation of a project in Lexington County known as Gates Common Subdivision.
8. That at all times relevant to the action in question, Defendant Town of Lexington was involved in the permitting and approval of plans, zoning and approval of implementation involved in the subject project.
9. That on or about August 8, 2005, McGuinn Construction Management, Inc. brought a declaratory judgment action seeking the courts determination on the legality of an easement which was allegedly central to providing sewer and stormwater service to the project known as Gates Common Subdivision.
10. That this action, known as McGuinn Construction Management, Inc. vs. Saul and Mara Espino (2005-CP-32-2712), was based on allegations that the easement, attached hereto as Exhibit A and incorporated herein by reference, provided McGuinn Construction Management, Inc. with the authority to enter onto the property and "tie in" by installation of sewer lines into the existing sewer system servicing the subdivision in which the Plaintiffs own property known as Coventry Lakes Subdivision.

11. That on or about November, 2008, although the court had not ruled on the declaratory judgment action brought had been ruled on by the court, and with no legal authority to proceed, the sewer lines which were needed for the implementation of the project were installed on, in and around the Plaintiffs' property.
12. That this installation took place without any legal authority from the Court, and in fact, in contravention to indications made by certain representatives of the Defendant Town of Lexington.
13. That on June 16, 2008, the Court filed its ruling that McGuinn Construction Management, Inc., to the extent it was responsible for the conduct involved with the installation of the sewer lines, had no authority to proceed as it did. The sum and substance of the order is attached hereto as Exhibit B, and incorporated herein by reference.
14. That Wade McGuinn owns and/or is part of and/or has interest in numerous corporations and business structures, and upon information and belief, in a scheme to deceive the public of the financial solvency of the very entities which should be financially liable and responsible for violations such as that determined in Exhibit B of this Compliant.
15. That as a result of this intentional pattern and practice designed to deceive the public and the governing authorities of its financial responsibility and solvency on a project such as Gates Common Subdivision, the public is left with no recourse against "shell corporations" established to avoid and evade liability for business misconduct and deceit.
16. That Wade McGuinn was and is the principle in the corporations involved in this scheme, and as such is involved and in fact, the driving force behind the civil conspiracy designed to deceive the public and governing authorities regarding the conduct involved.

17. That Gates Common, LLC, as owner of this property, was and is responsible for any and all trespass, conversion and other causes of action resulting from its use, benefit and violation of the property rights of contiguous property owners, and in the disruption, diversion and exacerbation of Federal Wetlands and/or stormwater post construction flow which has caused significant damage to the Plaintiffs property as more fully outlined herein.
18. That Defendant Town of Lexington had actual notice of the questionable legality of the easement being asserted for the benefit of Defendants Wade McGuinn and Gates Common, LLC., and notwithstanding this notice, upon information and belief, approved plans allowing the development of the Gates Commons Subdivision to proceed at a rapid pace, and with the knowledge that legal action as to the legality of the easement in question was pending.
19. As a direct and proximate cause to this slander of title, trespass, conversion and other allegations more fully set forth herein, Plaintiffs' property has been adversely affected, and they have and/or will suffer damages to include attorneys fees, a diminishment in the value of its property, physical damage to property and other damages to be set forth at the trial of this matter.
20. Defendant should therefore be awarded any and all damages to include, but not be limited to, consequential, actual and where applicable, punitive damages for the conduct of the Defendants in this action.

FOR A FIRST CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Slander of Title)

21. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
22. That Defendants Gates Common and McGuinn coordinated an effort to install sewer lines on the Plaintiffs' property without legal authority and with knowledge that there was questionable legality to the easement which was being used by McGuinn Construction Management, Inc., another entity in which Defendant McGuinn has either ownership and/or management authority and/or membership.
23. That Defendant Town of Lexington, without legal opinion on the questionable nature of the legality of the easement asserted, presumably either approved, or did not stop and deter the continued development of the property although it had actual knowledge of the questionable nature of the easement being asserted as authority.
24. That as a direct and proximate result of this deliberate and intentional trespass, Defendants have collectively slandered the title of the Plaintiffs' property significantly diminishing the value and marketability of the property, and Plaintiffs have and/or will suffer damages to include attorneys fees, and a diminishment in the value of its property, as well consequential, actual and where applicable, punitive damages.
25. Defendant should therefore be awarded any and all damages to include consequential, actual and where applicable, punitive for the deliberate slandering of title to the Plaintiffs' property.

FOR A SECOND CAUSE OF ACTION
AGAINST DEFENDANTS GATE COMMON AND MCGUINN
(Negligent Misrepresentation)

26. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
27. That the Defendants Wade McGuinn and Gates Common, LLC., as representatives for the development, made false and misleading representations to Plaintiff, its subcontractors and/or contractors and the public relating to the rights of the Defendants to the Plaintiffs' property, the legality of the easement being asserted, the nature of dealings with the Plaintiffs and the intent for use of said property.
28. That the Defendants Wade McGuinn and Gates Common, LLC. had a pecuniary interest in making these statements and/or representations.
29. The Defendants Wade McGuinn and Gates Common, LLC. owed a duty of care to see that it communicated truthful information to Plaintiffs, and therefore, owed a duty of care to follow through to ensure that the purpose and intent of the project was consistent.
30. The Defendants Wade McGuinn and Gates Common, LLC. breached their duty by proceeding without proper authority.
31. That the Plaintiffs justifiably relied upon these misrepresentations made by the Defendants Wade McGuinn and Gates Common, LLC.
32. The Plaintiffs have suffered pecuniary loss as a proximate and direct result of their reliance on the false and negligent representations made by the Defendants.
33. That as a result of these negligent misrepresentations made by the Defendants Wade McGuinn and Gates Common, LLC. Plaintiffs have suffered significant damages to be shown at trial to include punitive damages from the Defendants.

FOR A THIRD CAUSE OF ACTION
AGAINST DEFENDANTS GATES COMMONS AND MCGUINN
(Constructive Fraud)

34. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
35. That the Defendants Wade McGuinn and Gates Common, LLC., as representatives for the development, made false and misleading representations to Plaintiff, its subcontractors and/or contractors and the public relating to the rights of the Plaintiff to the Defendants' property, the legality of the easement being asserted, the nature of dealings with the Plaintiffs and the intent for use of said property.
36. The representations were material, and the Defendants Wade McGuinn and Gates Common, LLC. should have known that the Plaintiffs would rely upon them.
37. The Plaintiffs were unaware of the falsity of these representations and relied on the truth of the representations, having the right to rely thereon.
38. Due to the Defendants fraudulent representations, Plaintiffs have suffered significant damages and should recover for the all damages including actual, incidental and consequential damages along with punitive damages.

FOR A FOURTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Negligence)

39. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
40. That the Defendants Gates Common and Wade McGuinn owed a duty to Plaintiffs to perform the work on the project in a professional and diligent manner and in accordance with authority granted, if any.

41. That Defendant Town of Lexington owed a duty to the Plaintiffs to ensure that authority was not granted to enter and perform construction services on the Plaintiffs' property, where no legal basis existed to all for such permission to proceed.
42. That the acts and omissions of the Defendants Gates Common, LLC. and Wade McGuinn include, but are not limited to the following:
 - a. Failing to properly supervise the project;
 - b. Failing to obtain authorization from the Plaintiffs before allowing individuals to occupy said property;
 - c. Allowing for construction of the site in such a way which would increase the post construction flow of water onto the Plaintiffs property, causing significant damage;
 - d. Allowing for the diversion of water onto the Plaintiffs property causing significant damage to Plaintiffs' property;
 - e. Disrupting, impeding and disturbing Federal Wetlands and stormwater drainage in such a way as to cause significant damage to the Plaintiffs' property;
 - f. Failing to prevent trespass on Plaintiffs' property by its crews and subcontractors; and
 - g. Failing to use due care under the circumstances.
43. That the acts and omissions of the Defendant Town of Lexington include, but are not limited to the following:
 - a. Failing to commission a reliable opinion on the legality and scope of the easement in question prior to permitting the project to proceed;
 - b. Authorizing the project to proceed in the face of the Town Engineer's opinion and admonishment that there was questionable legality to install any lines, sewer,

stormwater, etc. by use of the asserted easement and that the runoff was a significant concern;

- c. Allowing the project to proceed over the objections of the Plaintiffs;
- d. Not verifying representations made by Wade McGuinn and Gates Common, LLC. as to the nature of the dealings with the Plaintiffs;
- e. Not properly verifying pre-construction flow versus post construction flow from the project;
- f. Failing to properly interpret and evaluate plans submitted, and basing permission to proceed on assumptions made with no basis;
- g. Not ensuring that properly qualified and licensed personnel and engineers were overseeing the project and the development;
- h. Not ensuring that the process was fair and equitable and took into consideration issues raised and acknowledged by the retired Town Engineer, but seemingly not considered prior to approval by the Town after his retirement;
- i. Not exercising due care in the granting of zoning and permitting for the development to ensure that the development was in the best interest of the Town and consistent with the rights of contiguous land owners;
- j. Allowing the development to proceed with permitting and occupancy with the knowledge that the easement under which the Defendants relied had questionable legal authority; and
- k. Allowing development in a known wetland area without further investigation and/or approval.

44. That as a result of the Defendants' negligence, Plaintiffs have suffered significant damages.
45. That given the reckless, careless, willful and intentional conduct of the Plaintiffs, the Defendants are informed and believe that they are entitled to all damages sought and where applicable, punitive damages.

FOR A FIFTH CAUSE OF ACTION
AGAINST DEFENDANT TOWN OF LEXINGTON
(Gross Negligence)

46. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
47. That as alleged, upon information and belief, the Defendant Town of Lexington, without authorization, allowed, authorized and/or permitted the connection of sewer lines on the Plaintiffs' property under the easement in question.
48. That the acts and omissions of the Defendant Town of Lexington include, but are not limited to the following:
- a. Failing to commission a reliable opinion on the legality and scope of the easement in question prior to permitting the project to proceed;
 - b. Authorizing the project to proceed in the face of the Town Engineer's opinion and admonishment that there was questionable legality to install any lines, sewer, stormwater, etc. by use of the asserted easement and that the runoff was a significant concern;
 - c. Allowing the project to proceed over the objections of the Plaintiffs;
 - d. Not verifying representations made by Wade McGuinn and Gates Common, LLC. as to the nature of the dealings with the Plaintiffs;

- e. Not properly verifying pre-construction flow versus post construction flow from the project;
 - f. Failing to properly interpret and evaluate plans submitted, and basing permission to proceed on assumptions made with no basis; and
 - g. Not ensuring that properly qualified and licensed personnel and engineers were overseeing the project and the development;
 - h. Not ensuring that the process was fair and equitable and took into consideration issues raised and acknowledged by the retired Town Engineer, but seemingly not considered prior to approval by the Town after his retirement;
 - i. Not exercising due care in the granting of zoning and permitting for the development to ensure that the development was in the best interest of the Town and consistent with the rights of contiguous land owners;
 - j. Allowing the development to proceed with permitting and occupancy with the knowledge that the easement under which the Defendants relied had questionable legal authority; and
 - k. Allowing development in a known wetland area without further investigation and/or approval.
49. Further, Defendant Town of Lexington was aware of the fragile nature of the Plaintiffs' property and had a duty to prevent development which would cause damage to contiguous property, and by allowing the development to occur in the face of these concerns acknowledged by the Town Engineer at the time, as it has, has created and exacerbated a water intrusion and water flow issue that threatens to permanently devalue the Plaintiffs property and render it of no use.

50. That as a result of these breaches of duty and gross negligence, the Defendants have suffered significant damages to include loss of use of property, physical damage to property, and other damages to be shown at trial.

FOR A SIXTH CAUSE OF ACTION
AGAINST DEFENDANT TOWN OF LEXINGTON
(Regulatory Taking)

51. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
52. That as a result of the gross negligence on the part of Defendant Town of Lexington by not properly reviewing and approving the conduct of the Plaintiff in development of the project in question, Defendant Town of Lexington has allowed a taking of the property by the Defendants Wade McGuinn and Gates Common, LLC, which would require compensation for the irreparable diminution in value of the property and other damages to be shown at trial, as well as attorneys fees.

FOR A SEVENTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Trespass)

53. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
54. That the conduct outlined herein amount to trespass on the part of all Defendants and/or the aiding and abetting of trespass and/or constructive trespass.
55. That as a result of the trespass, Plaintiffs have suffered significant damages and should be awarded all such damages, including, where applicable, punitive damages.

FOR AN EIGHTH CAUSE OF ACTION
AGAINST DEFENDANTS GATES COMMONS AND MCGUINN
(Fraud)

56. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
57. That Defendants McGuinn and Gates Common, LLC. have made or caused to be made representations regarding the purpose and intent of the use of the Plaintiffs' property and regarding the authorization to proceed with construction regardless of an absence of actual authority, legal or otherwise, to proceed.
58. That such representations were false and misleading to Plaintiffs and the public which relied on the same to prejudice their position.
59. That all such representations were material to the decision of the governing authority to provide authorization to proceed with the project.
60. That Defendants knew of the falsity or acted with reckless disregard to the truth or falsity of such representations.
61. That Defendants at all material times intended that the representations be acted upon by the parties controlling use of Plaintiffs property.
62. The Plaintiffs were ignorant of the misrepresentations or the falsity of the representations, as was the governing authority.
63. That the governing authority relied upon the representations of the Defendants McGuinn and Gates Common, LLC. to approve plans which presumably served as the basis of authority for the installation of the sewer lines on the Plaintiffs' property.
64. That the governing authority had a right to rely upon the representations of the Defendants McGuinn and Gates Common, LLC.

65. That on account thereof, Plaintiffs have been damaged as set forth herein, and demands actual, consequential and punitive damages.

FOR A NINTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Conversion)

66. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
67. That the conduct outlined herein amount to conversion of the Plaintiffs property on the part of all Defendants and/or the aiding and abetting of conversion and/or constructive conversion.
68. That as a result of the conversion, Plaintiffs have suffered significant damages and should be awarded all such damages, including punitive damages.

FOR A TENTH CAUSE OF ACTION
AGAINST DEFENDANTS GATES COMMONS AND MCGUINN
(Violation of SC Unfair Trade Practices Act)

69. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
70. Defendants represented to the Plaintiffs and to the public that it would be constructing a project, that it had authority to proceed to construction, that it would not exceed its authority and that it would not damage Defendants' property.
71. These representations had the capacity, effect and tendency to deceive Plaintiffs and public and did in fact deceive the Plaintiff and public to their detriment.
72. Further, these representations by the Defendants and their subsequent actions and inaction adversely affect the public interest and have the potential for repetition.

73. As such, the Defendants' representations and actions are violations of the South Carolina Unfair Trade Practices Act, S.C. Ann. §39-5-10 et. seq. Therefore, the Plaintiffs ask this court to grant treble damages along with attorney's fees and costs incurred in this action.

FOR AN ELEVENTH CAUSE OF ACTION
AGAINST DEFENDANTS GATES COMMONS AND MCGUINN
(Civil Conspiracy)

74. Each and every allegation above is re-alleged herein below as if set out herein below verbatim.
75. That Defendant Wade McGuinn owns and/or is part of and/or has interest in numerous corporations and business structures, and upon information and belief, in a scheme to deceive the public of the financial solvency of the very entities which should be financially liable and responsible for violations such as that determined in Exhibit B of this Complaint.
76. That as a result of this intentional pattern and practice designed to deceive the public and the governing authorities of its financial responsibility and solvency on a project such as Gates Common Subdivision, the public is left with no recourse against "shell corporations" established to avoid and evade liability for business misconduct and deceit.
77. That Wade McGuinn was and is the principal in the corporations involved in this scheme, and as such is involved and in fact, the driving force behind the civil conspiracy designed to deceive the public and governing authorities regarding the conduct involved.
78. That Gates Common, LLC, as owner of this property, was and is responsible for any and all trespass, conversion and other causes of action resulting from its use, benefit and violation of the property rights of contiguous property owners, and in the disruption, diversion and exacerbation of Federal Wetlands and/or stormwater post construction flow

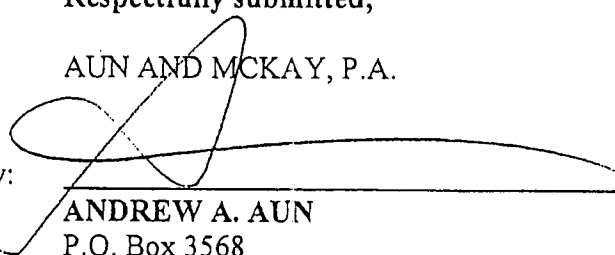
which has caused significant damage to the Plaintiffs property as more fully outlined herein.

79. As a direct and proximate cause to this civil conspiracy and other allegations more fully set forth herein, Plaintiffs' property has been adversely affected, and they have and/or will suffer damages to include attorneys fees, a diminishment in the value of its property, physical damage to property and other damages to be set forth at the trial of this matter.
80. Defendant should therefore be awarded any and all damages to include, but not be limited to, consequential, actual and punitive damages for the conduct of the Defendants in this action.

WHEREFORE, Plaintiff pray for judgment against the Defendants for actual, consequential and where applicable, punitive damages as well as attorneys fees and the costs of this action. Further, Plaintiff prays for any and all other relief deemed appropriate by the court and for jury trial on all issues so triable.

Respectfully submitted,

AUN AND MCKAY, P.A.

By: 

ANDREW A. AUN

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ATTORNEYS FOR PLAINTIFFS

Dated: 5/26/09

EXHIBIT A

The State of South Carolina,
COUNTY OF LEXINGTON

FILED

1988 APR 11 AM 9:35

JOANNE B. TRIBBLE
RMC
LEXINGTON COUNTY, S.C.

FORM NO. 118 — TITLE TO REAL ESTATE BY A CORPORATION
REVISED 1978
COLUMBIA OFFICE SUPPLY CO., COLUMBIA, S.C.

KNOW ALL MEN BY THESE PRESENTS, That

Coventry Associates, Inc.

in the State aforesaid, for and

in consideration of the sum of

Five Dollars Only

Dollars

to it in hand paid at and before the sealing of these presents, by The Town of Lexington, South Carolina

in the State aforesaid,

(the receipt whereof is hereby acknowledged)

has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said
THE TOWN OF LEXINGTON, SOUTH CAROLINA, ITS SUCCESSORS AND ASSIGNS:

All those certain water lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances to said water lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" water system of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the office of the Town Administrator at the Lexington Town Hall.

ALSO:

All those certain sewer lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances of the said sewer lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" sanitary sewer plan of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the Office of the Town Administrator at the Lexington Town Hall.

ALSO:

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 Lake 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, copies of which are on file in the Office of the Town Administrator of the Lexington Town Hall.

This being a portion of the property heretofore conveyed to the Grantor by deed recorded in Lexington County Deed Book 790 Page 297.

Grantee's Mailing Address: P.O. Box 397

Lexington, S.C. 29072

TMS# 4300-3-36 (Part of)

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said The Town of Lexington, South Carolina, its successors, Heirs and Assigns forever.

And the said Coventry Associates, Inc. does hereby bind itself and its successors, to warrant and forever defend all and singular the said premises unto the said The Town of Lexington, South Carolina, its successors, Heirs and Assigns, against itself and its successors and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF Coventry Associates, Inc. has caused these presents to be executed in its name by M. Stewart Mungo its President, and by (Insert name of Secretary or Treasurer) its Secretary or Treasurer, and its corporate seal to be hereto affixed this 6th day of April, and in the two hundred and twentieth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered in Presence of

Catherine A. Hammond
Witness

North B. Nissen
Witness

COVENTRY ASSOCIATES, INC. (Seal)
By M. Stewart Mungo President.

Secretary or Treasurer.

The State of South Carolina,

COUNTY OF LEXINGTON

PERSONALLY appeared before me Catherine A. Hammond
(Insert name of Witness)

who, in oath, says that he saw the within-named Coventry Associates, Inc.
(Insert name of Corporation)

by H. Stewart Mungo
(Insert name of President or Vice-President)

its

President and

its

(Insert name of Secretary or Treasurer)

sign the within Deed, and the said Corporation, by said officers, seal said Deed, and, as its act and deed, deliver the

same, and that he with

Martha R. Nissen

(Insert name of other Witness)

witnessed the

execution thereof.

Catherine A. Hammond
(Witness)

SUBORN to before me, this

7th

day of

April

, A. D. 19 88

Martha R. Nissen (Seal)
Notary Public, S. C.

My Commission expires:

5/20/90

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BOOK 1064 PAGE 305

FILED

FORM NO. 110 - TITLE TO REAL ESTATE OF A CORPORATION
REVISED 10-25
COLUMBIA OFFICE SUPPLY CO., COLUMBIA, S. C.

The State of South Carolina,

COUNTY OF LEXINGTON

1988 APR 11 AM 9:36

JOANNE B. TRIBBLE

RMC
- LEXINGTON COUNTY, S.C.

KNOW ALL MEN BY THESE PRESENTS, That

Coventry Associates, Inc.

in the State aforesaid,

for and

in consideration of the sum of

Five Dollars Only

Dollars

to it in hand paid at and before the sealing of these presents, by The Town of Lexington,
South Carolina

in the State aforesaid,

(the receipt whereof is hereby acknowledged)

has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said
THE TOWN OF LEXINGTON, SOUTH CAROLINA ITS SUCCESSORS AND ASSIGNS:

All those certain pieces, parcels, lots or strips of land, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Coventry Drive, Coventry Court, Teesdale Court, and Coventry Lake Drive, as shown on a plat of Coventry Lakes Subdivision by Whitworth & Associates, Inc. dated June 23, 1986, last revised September 26, 1986, and recorded in the Office of the R.M.C. for Lexington County in Plat Book 2106 Page 149; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

This being a portion of the property heretofore conveyed to the Grantor by deed recorded in Lexington County Deed Book 790 Page 297.

Grantee's Mailing Address: Town Of Lexington
Town Hall P.O. Box 377
Lexington, S.C. 29072

TMS# 4300-336

BOOK 1064 PAGE 305

ROA000091

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said The Town of Lexington, South Carolina, its successors ~~Heirs and Assigns~~ forever.

And the said Coventry Associates, Inc. does hereby bind itself

and its successors, to warrant and forever defend all and singular the said premises unto the said The Town of Lexington, South Carolina, its Successors Heirs and Assigns, against itself and its successors and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF Coventry Associates, Inc. has caused
(Insert name of Corporation)

these presents to be executed in its name by M. Stewart Mungo
(Insert name of President or Vice-President)

President, and by
(Insert name of Secretary or Treasurer)

and its corporate seal to be hereto affixed this 6th day of April
in the year of our Lord, one thousand nine hundred and eighty eight, and in the two
hundred and twelfth year of the Sovereignty and Independence of the United
States of America.

Signed, Sealed and Delivered
in Presence of

Catherine A. Hammond
Witness

Martha B. Kiser
Witness

COVENTRY ASSOCIATES, INC. (Seal)

By: M. Stewart Mungo
President.

Secretary or Treasurer.

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2005CP3202712

McGuinn Construction Management Inc vs. Saul Espino

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a),
SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Lexington, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the , and a copy mailed first class this 27th day of June 2008, to attorneys of record or to parties (when appearing pro se) as follows:

S Jahue Moore Moore Taylor & Thomas PA
PO Box 5709 West Columbia, SC 29171

Andrew A Aun ,
Bradford T Cunningham P.O.BOX 397
LEXINGTON, SC 29072
Andrew F Lindemann ,

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

RCP APP-24/FORM 4

Beth A. Carrigg - Clerk of Court

ROA000094

JH

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
McGuinn Construction)
Management, Inc.,)
Plaintiff,)
vs.)
Saul Espino and Mara Espino,)
Defendants.)

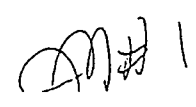
FILED IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2005-CP-32-2712
2008 JUN 16 3:31
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

ORDER

THIS MATTER COMES BEFORE THE COURT on motion of Counsel for Plaintiff on all causes of action alleged by the Plaintiff, including its primary cause of declaratory judgment. Counsel for the Plaintiff further moved for dismissal of the Defendant's fifth counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing. The court also considered a countermotion of counsel for the Defendant for summary judgment as to the Plaintiffs entire case.

The matter was heard by the court on May 29, 2007, and supporting memoranda and affidavits were submitted by the Plaintiff and Defendant for their respective positions.

Upon hearing the arguments of counsel for the Plaintiff and the Defendant, and considering the facts, affidavits, memoranda and arguments submitted by the parties, the Court grants the Defendant's motion for summary judgment in that the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision. There is no authority for Gates Common Subdivision or any other subdivision to connect to the sewer and/or drainage located on the Defendant's property. Having reached this conclusion,



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Defendants' motion for summary judgment on the Plaintiff's ~~slander~~ of title cause of action and tortious interference with a contract cause of action ~~must~~ also be granted. The Court grants the Plaintiff's motion to dismiss the Defendant's ~~fifth~~ counterclaim for breach of implied covenant of good faith and fair dealing. ~~No~~ other motions were properly before the court, and so all other counterclaims of ~~the~~ Defendants are still pending.

I. STATEMENT OF FACTS

In 1992 Saul and Mara Espino purchased property located ~~at~~ 108 Coventry Court in Lexington, South Carolina from the Mungo ~~Company~~ which is part of the Coventry Lake Subdivision. (Saul Espino Dep., pp. 7-8, ll. 7-4) The house was purchased as new construction, although the home was ~~not~~ custom built.

McGuinn Construction Management is the Developer of ~~the~~ neighborhood known as the Gates Common Subdivision. This subdivision ~~backs~~ up to the Espinos' property in Lexington. For years the property, which is ~~now~~ known as the Gates Common Subdivision, was unimproved. However, McGuinn applied to have the property rezoned for a patio home subdivision, and was ~~ultimately~~ granted the zoning for which it had applied. Nonetheless, storm drainage, ~~water~~ and sewer infrastructure for the project had to be installed, and the ~~provision~~ of this infrastructure was designed by McGuinn to be accomplished ~~by~~ connecting to existing infrastructure of the Coventry Lakes Subdivision, where ~~the~~ Espinos owned their property. The installation of the appropriate lines would ~~be~~ required to run through the Espinos' property and connect to existing sewer and ~~drainage~~ installed in the Coventry Lake Subdivision.

The record clearly shows that it was McGuinn Construction Management's intention to install the infrastructure outlined above on the Espinos' property under an easement which purportedly grants the Town of Lexington, its successors and assigns the certain rights in sewer, water lines, and drainage easements for said lines. (See Exhibit 1). Further, it specifically provides an easement for the "maintenance of the aforesaid water and sewer lines..." (Id.) The language of the document purporting to be a deed does not grant any right or easement, express or implied, to the Town to allow for the connection by anyone other than Coventry Lakes to the lines.

II. FACTS IN CONTROVERSY

The Plaintiff asserts that it was operating under the authority of the easement, and that the Town Attorney approved the connection to the sewer based on the easement. The facts show otherwise, and indeed the Town Engineer at the time advised McGuinn that the easement was questionable, and legal authority would be needed to proceed. (Gene Edwards Dep., p. 5, ll. 18-23 and pp. 25-26, ll. 10-14). The Defendants anticipate testimony of the Town Attorney that at no time was he asked to opine as to the legal authority granted to the Town on the easement in question, and what authority, if any, the developer would have derived therefrom.

In his testimony, Edwards indicated that the plans submitted for approval showed that the lines and the manhole were outside of the easement which purportedly existed. (Id. pp. 22-23, ll. 22-14). Mr. Edwards, however, retired from the Town of Lexington prior to the final approval of the plans, which ultimately came from Rosemarie Nuzzo, an engineer with the Town of Lexington who had minimal qualifications at the time. (Id. pp. 23, ll. 12-22). Prior to his retirement, Gene Edwards discussed with Nuzzo the three

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issues of concern about the project in question – (1) runoff once developed, (2) location of how water would be connected, and (3) sewage. (Id. at p. 23, ll. 5-11). Importantly, he indicated that he had discussed the uncertainty of the easement issue relating to the sewer lines with Nuzzo, and advised her that “it was not definitive enough for me [him] to tell them to go ahead at that time.” (Id. at ll. 12-19). Edwards further indicated that he never saw or reviewed a final legal opinion as to McGuinn’s purported authority to connect to the existing sewer lines on the Espino property. (Id. at p. 25, ll. 4-9).

The testimony of Nuzzo indicates that when the plans were submitted to her for approval, she did not keep the issues Edwards had notified her of in mind in her consideration, and in fact, assumed them away, by giving McGuinn the “benefit of the doubt” in his subcontractor’s installation of the sewer lines on the Espinos’ property. When asked in her review of the plans whether the Town of Lexington approved the plans which were to show the location of infrastructure before allowing connection to existing infrastructure, Nuzzo replied:

No. Because in that ... if there’s ... if the lines exist, then you, you almost have to assume there’s an easement to it. Nobody’s going to want to take care of a public sewer or a public water in there, you know, on their property. (Nuzzo Dep. P. 6, ll. 8-15).

Nuzzo goes on to acknowledge that she reviewed plans which showed the infrastructure installation being within the property boundaries of the Defendants, and that she would have approved the installation of the infrastructure (manhole). (Id. pp. 8-9, ll. 24-21). She then indicates in her testimony that she did not have the authority state where to install infrastructure like the manhole. (Id. at 10, ll. 6-14). Significantly, she

AM #4

indicated that the developer, in this case McGuinn, would have had to secure easements for the installation. (Id.)

Her further testimony indicates that she did not review the easement under which McGuinn was purportedly operating to determine whether it **granted** McGuinn the authority to install the lines. Further, there is no testimony from ~~the~~ field engineers hired by McGuinn, HB Engineering, that they made any determination **of** the authority of the easement being offered by McGuinn as authority. Indeed, the ~~author~~ity under which they testified to be operating to install the sewer lines was the **approval** of the Town of Lexington. Tom Britt, the President of HB Engineering indicated **the** following in his testimony:

Q. Okay. And at no time did you opine or give any **type** of certification that the easement was valid and could be used outside **of** what authority you thought you already had from the Town?

A. No. Our plans were solely based on the Town **telling** us they had an easement and approving our plans. (Britt Dep. at p. **41**, ll. 16-22).

Further, Britt indicates that the approval of the plans was an **indirect** approval of the installation of the sewer lines. (Id. at p. 52, ll. 5-8). Therefore, ~~the~~ approval of the plans is a significant issue, and it appears that the manhole and the **infrastructure** noted on the most recent plan were outside the scope of any easement **shown** on the plan, and certainly not validated as being installed in accordance with **the** easement used by McGuinn as the basis of the authority.

There is also an issue about the negligence of the developer **in the** development of this project, which has a significant portion of wetlands involved, and which flows directly onto the Espinos property. There is a contention that the **developer** has been

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sensitive to ensure that the post construction flow from the development has not exceeded the pre construction flow.

III. LEGAL ISSUES

McGuinn sued the Espinos and alleged in its complaint a Declaratory Judgment action, Slander of Title and Tortious Interference with Contract. The Espinos answered, and counterclaimed alleging Violations of the South Carolina Unfair Trade Practices Act, Negligent Misrepresentation, Constructive Fraud, Negligence, Breach of Implied Covenant of Good Faith and Fair Dealing, Fraud, Conversion, Slander of Title and Trespass. Defendants also amended the Answer and Counterclaim to allege Third Party actions against the Town of Lexington, which was subsequently dismissed.

1. Summary Judgment Motions Of Plaintiff and Defendants

Summary Judgment Standard

In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law...In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party...If triable issues exist, those issues must go to the jury.

Summary judgment is appropriate if 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 judgment as a matter of law...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. (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law...Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be

drawn from them, summary judgment should be denied... When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted... The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact... Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.

Joseph H. Moore v. M. M. Weinberg, Jr. and Weinberg, Opinion No. 4209, Court of Appeals of South Carolina, Filed February 20, 2007.

The Plaintiff has alleged causes of action involving (1) declaratory judgment on the easement document in question, (2) slander of title and (3) tortious interference with contract. Plaintiff now moves for summary judgment on all issues associated with the complaint. In the alternative, the Defendants have filed a counter-motion on all issues associated with the Plaintiff's complaint specifically including the following in their counter-motion:

1. That the allegations of slander of title are not valid as the title to the property alleged to be owned by the Plaintiff was never slandered;
2. That the work conducted by the Plaintiff in the development and construction of the project was never tortuously interfered with, and in fact, the Plaintiff never ceased construction or progress in the development;
3. That the Plaintiff had been advised that it needed to receive a private easement to connect to any existing sewer lines on the Defendant's property, but never obtained said private easement when it in fact connected without authority or

permission from the Defendants, thereby trespassing on the Defendant's property and converting Defendant's property to its own; and

4. That the easement which serves as the basis of authority for the Plaintiff to have connected to sewer allegedly located on the Defendant's property does not allow for contiguous subdivisions to connect to any sewer, and is in fact limited in the scope to on the maintenance, repair and improvement for the sewer system of Coventry Lakes, not Gates Common Subdivision which is the project sought to receive the benefit by the Plaintiff

A. Declaratory Judgment

As indicated, the Plaintiff brings a declaratory judgment cause of action based on a document it asserts should serve as the basis for allowing the installation of sewer and drainage on the Espinos' property. (See Exhibit 1). As the Court in Pond Place Parners v. Poole, 351 S.C. 1, 16 (Ct. App. 2002), 567 S.E.2d 881 stated:

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham, 319 S.C. at 71, 459 S.E.2d at 845 (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a contract or franchise may have determined any question of construction or validity arising under the instrument, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30 (1977); see also Rule 57, SCRPC. Id at 16.

Here, the Plaintiff claims that it had the right to go onto and install drainage and sewer lines on the Espinos' property and to the Coventry Lake Subdivision infrastructure system under this document. However, the document does not allow for connection to

AM #8

the sewer lines and existing infrastructure on its face. This was noted by the Town of Lexington's engineers who were charged with considering this issue as outlined above.

Here, the easement in question does not specifically allow for the connection by any other subdivision to the existing lines.

For these reasons, ruling on the Declaratory Judgment Action, the Court finds and Rules that the Plaintiff had no authority under the easement in question to enter the Espinos' property and/or to connect to drainage and/or sewer lines in the Coventry Lake Subdivision. The Defendants' countermotion for summary judgment on the issue of the Declaratory Judgment Action is granted.

B. The Slander of Title

The Court also denies the Plaintiff's Motion for Summary Judgment as to its Slander of Title cause of action and grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's claim for Slander of Title. The Court has held that "[t]o maintain an action for slander of title in South Carolina, the plaintiff 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." Id. (citing TXO, 419 S.E.2d at 879). Pond Place Partners v. Poole, 351 S.C. 1, 22-23 (Ct. App. 2002), 567 S.E.2d 881. As the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Motion for Summary Judgment as to the Plaintiff's Slander of Title allegation.

C. Tortious Interference with Contract

The Court also denies the Plaintiff's Motion for Summary Judgment as to its Tortious Interference of Contract cause of action and grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's claim for Tortious Interference of Contract. The elements of this cause of action are (1) the existence of the contract; (2) the wrongdoer's knowledge of the contract, (3) the intentional procurement of the contract's breach; (4) the absence of justification; and (5) resulting damages. South Carolina Requests to Charge, Anderson, p. 485.

As with the Plaintiff's Slander of Title cause of action, because the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's Tortious Interference with Contract cause of action.

2. Plaintiff's Motion to Dismiss

The Plaintiff also files a motion to dismiss the Defendants' fifth counterclaim for breach of implied covenant of good faith and fair dealing. For the reasons outlined below, this motion is granted.

Standard For Motion To Dismiss

In Overcash v. South Carolina Electric and Gas Company, 25990 (S.C. 2005), the court held:

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be

gm# 10

construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties. Stroud v. Riddle, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973).

Under this standard, the facts of the complaint should be construed liberally and considered "true" when considering whether the motion should be granted. The Defendant alleged the following facts:

As the Court has noted, "there exists in every contract an implied covenant of good faith and fair dealing." Williams v. Riedman, 339 S.C. 251, 267 (Ct. App. 2000). Here, considering the facts under the appropriate standard, the Court finds that there is no genuine issue of material fact as to the fact that the Plaintiff did not have a contract with the Defendants. Therefore, the Plaintiff's motion to dismiss is hereby granted.

Based on the foregoing IT IS HEREBY ORDERED, THAT:

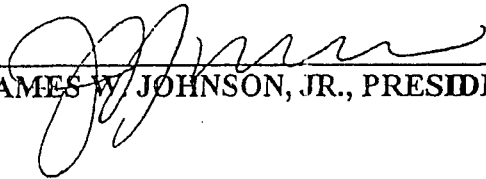
1. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Declaratory Judgment action filed, and therefore rules that the easement in question does not provide legal authority for the Plaintiff or anyone else to enter the Defendants' property and/or to connect to any sewer and/or drainage lines of Coventry Lake Subdivision;
2. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Plaintiff's Slander of Title cause of action;
3. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in

[Handwritten signature]

reference to the Plaintiff's Tortious Interference with Contract cause of action;
and

4. The Court GRANTS the Plaintiff's Motion to Dismiss ~~the~~ Fifth Counterclaim of the Defendants for Breach of Implied Covenant of Good Faith and Fair Dealing.

AND IT IS SO ORDERED.



JAMES W. JOHNSON, JR., PRESIDING JUDGE

Date: June 16, 2008

12

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
 Saul Espino and Mara Espino,	)	
	)	Civil Action No. 08-CP-32-4192
Plaintiffs,	)	
	)	
v.	)	ANSWER OF DEFENDANT
	)	TOWN OF LEXINGTON
Gates Commons, LLC, S. Wade McGuinn,	)	TO SECOND AMENDED COMPLAINT
Individually, and Town of Lexington,	)	(Jury Trial Requested)
	)	
Defendants.	)	
_____	)	

The Defendant Town of Lexington, reserving all rights pursuant to the Motion to Make More Definite and Certain and Motion to Strike previously filed and pending a filed order by Judge Knox McMahon memorializing his oral order on April 28, 2009, answers the Plaintiffs' Second Amended Complaint herein as follows:

FOR A FIRST DEFENSE

1. The Plaintiffs' Second Amended Complaint, in whole or in part, fails to state a cause of action upon which relief may be granted. The Defendant Town reserves its right to file a motion pursuant to Rule 12(b)(6), SCRPC.

FOR A SECOND DEFENSE

2. The Defendant Town denies each and every allegation of the Plaintiffs' Second Amended Complaint not hereinafter specifically admitted, qualified, or explained.

3. The allegations set forth in Paragraph 1 of the Plaintiffs' Second Amended Complaint are jurisdictional matters to which no response is required.

4. The allegations set forth in Paragraphs 2 and 3 of the Plaintiffs' Second Amended Complaint are, upon information and belief, admitted.

5. The allegations set forth in Paragraph 4 of the Plaintiffs' Second Amended Complaint are admitted.

6. The allegations set forth in Paragraphs 5 and 6 of the Plaintiffs' Second Amended Complaint are, upon information and belief, admitted.

7. As to the allegations set forth in Paragraph 7 of the Plaintiffs' Second Amended Complaint, the Defendant Town lacks sufficient information to determine the truth of those allegations and, therefore, denies those allegations at this time.

8. As to the allegations set forth in Paragraph 8 of the Plaintiffs' Second Amended Complaint, the Defendant Town admits only that it participated in the approval of plans and zoning for the Gates Commons subdivision consistent with state and local law.

9. As to the allegations set forth in Paragraphs 9 and 10 of the Plaintiffs' Second Amended Complaint, the Defendant Town craves reference to the pleadings, motions, orders, and other filings in the civil action captioned *McGuinn Construction Management, Inc. v. Espino*, Civil Action Number 2005-CP-32-2712, as the best evidence as to any allegations, defenses and rulings in that action.

10. The allegations set forth in Paragraphs 11 and 12 of the Plaintiffs' Second Amended Complaint are denied.

11. As to the allegations set forth in Paragraph 13 of the Plaintiffs' Second Amended Complaint, the Defendant Town craves reference to the pleadings, motions, orders, and other filings in the civil action captioned *McGuinn Construction Management, Inc. v. Espino*, Civil Action Number 2005-CP-32-2712, as the best evidence as to any allegations, defenses and rulings in

that action. The Defendant Town denies that the Order attached as Exhibit B has any preclusive effect as to the Town.

12. As to the allegations set forth in Paragraphs 14, 15, 16, and 17 of the Plaintiffs' Second Amended Complaint, the Defendant Town lacks sufficient information to determine the truth of those allegations and, therefore, denies those allegations at this time.

13. The allegations set forth in Paragraphs 18, 19, and 20 of the Plaintiffs' Second Amended Complaint are denied.

14. As to the allegations set forth in Paragraph 21 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein.

15. The allegations set forth in Paragraphs 22, 23, 24, and 25 of the Plaintiffs' Second Amended Complaint are denied.

16. As to the allegations set forth in Paragraph 26 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

17. The allegations set forth in Paragraphs 27 through 33 of the Plaintiffs' Second Amended Complaint are not directed against the Defendant Town. To the extent these allegations may be construed as asserting any liability or claim against the Defendant Town, the allegations are denied.

18. As to the allegations set forth in Paragraph 34 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

19. The allegations set forth in Paragraphs 35, 36, 37, and 38 of the Plaintiffs' Second Amended Complaint are not directed against the Defendant Town. To the extent these allegations may be construed as asserting any liability or claim against the Defendant Town, the allegations are denied.

20. As to the allegations set forth in Paragraph 39 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

21. The allegations set forth in Paragraph 40 of the Plaintiffs' Second Amended Complaint are not directed against the Defendant Town. To the extent these allegations may be construed as asserting any liability or claim against the Defendant Town, the allegations are denied.

22. The allegations set forth in Paragraph 41 of the Plaintiffs' Second Amended Complaint are denied.

23. The allegations set forth in Paragraph 42 of the Plaintiffs' Second Amended Complaint are not directed against the Defendant Town. To the extent these allegations may be construed as asserting any liability or claim against the Defendant Town, the allegations are denied.

24. The allegations set forth in Paragraphs 43, 44, and 45 of the Plaintiffs' Second Amended Complaint are denied.

25. As to the allegations set forth in Paragraph 46 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

26. The allegations set forth in Paragraphs 47, 48, 49, and 50 of the Plaintiffs' Second Amended Complaint are denied.

27. As to the allegations set forth in Paragraph 51 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

28. The allegations set forth in Paragraph 52 of the Plaintiffs' Second Amended Complaint are denied.

29. As to the allegations set forth in Paragraph 53 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

30. The allegations set forth in Paragraphs 54 and 55 of the Plaintiffs' Second Amended Complaint are denied.

31. As to the allegations set forth in Paragraph 56 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

32. The allegations set forth in Paragraphs 57 through 65 of the Plaintiffs' Second Amended Complaint are not directed against the Defendant Town. To the extent these allegations may be construed as asserting any liability or claim against the Defendant Town, the allegations are denied.

33. As to the allegations set forth in Paragraph 66 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

34. The allegations set forth in Paragraphs 67 and 68 of the Plaintiffs' Second Amended Complaint are denied. Further answering, the Defendant Town submits that the Court has already

stricken the prayer for punitive damages and that the Plaintiffs have improperly realleged such damages.

35. As to the allegations set forth in Paragraph 69 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

36. The allegations set forth in Paragraphs 70, 71, 72, and 73 of the Plaintiffs' Second Amended Complaint are not directed against the Defendant Town. To the extent these allegations may be construed as asserting any liability or claim against the Defendant Town, the allegations are denied.

37. As to the allegations set forth in Paragraph 74 of the Plaintiffs' Second Amended Complaint, the Defendant Town reiterates and realleges each corresponding paragraph of this Answer set forth herein. The Defendant Town further objects to the jumbling of causes of action.

38. The allegations set forth in Paragraphs 75 through 80 of the Plaintiffs' Second Amended Complaint are not directed against the Defendant Town. To the extent these allegations may be construed as asserting any liability or claim against the Defendant Town, the allegations are denied.

39. The allegations and relief sought in the Prayer for Relief are denied.

FOR A THIRD DEFENSE

40. The Plaintiffs' claims are, in whole or in part, not ripe for adjudication.

FOR A FOURTH DEFENSE

41. The Plaintiffs' claims are, in whole or in part, barred by their failure to exhaust administrative remedies.

FOR A FIFTH DEFENSE

42. The Defendant Town asserts the defense of sovereign immunity, pursuant to the terms of the South Carolina Tort Claims Act, including the damages caps set forth in S.C. Code Ann. § 15-78-120, the bar on the recovery of punitive damages and the prohibition on the recovery of attorney's fees.

FOR A SIXTH DEFENSE

43. The Defendant Town is immune from suit pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, specifically S.C. Code Ann. §§ 15-78-60(1), (2), (4), (5), (9), (12), (13), (17), and (20).

FOR A SEVENTH DEFENSE

44. The Plaintiffs have failed to mitigate their damages, thereby barring their recovery in whole or in part.

FOR AN EIGHTH DEFENSE

45. The Defendant Town alleges that any damages must be apportioned between the Defendant Town and all other potential tortfeasors pursuant to S.C. Code Ann. § 15-78-100(c).

FOR A NINTH DEFENSE

46. The Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

FOR A TENTH DEFENSE

47. The Plaintiffs' claims against the Defendant Town are barred by the comparative negligence of the Plaintiffs.

FOR AN ELEVENTH DEFENSE

48. The Plaintiffs' claims against the Defendant Town are barred by operation of the public duty rule.

FOR A TWELFTH DEFENSE

49. The Plaintiffs' claims are barred, in whole or in part, by operation of collateral estoppel or issue preclusion.

WHEREFORE, having fully answered the Second Amended Complaint, the Defendant Town of Lexington prays that the Second Amended Complaint be dismissed with prejudice; for the costs of this action; and for such other and further relief as the Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.

BY: 

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1611 Devonshire Drive
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(803) 806-8222

*Counsel for Defendant,
Town of Lexington*

Columbia, South Carolina

June 10, 2009

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

McGuinn Construction Management, Inc.,)

C.A. No.: 2005-CP-32-2712

Plaintiff,)

vs.)

Saul Espino and Mara Espino,)

Defendants.)

**MOTION FOR SUMMARY
JUDGMENT AND MOTION TO
DISMISS DEFENDANTS
COUNTERCLAIMS**

Saul Espino and Mara Espino,)

Third Party Plaintiffs,)

vs.)

Town of Lexington,)

Third Party Defendants.)

TO: Defendants, Third Party Plaintiffs and Third Party Defendants:

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof, or as soon thereafter as counsel can be heard, the undersigned, as counsel for Plaintiff, McGuinn Construction Management, Inc., will move before the Court for an Order granting Summary Judgment and an Order Dismissing Defendants' Fifth Counterclaim.

Motion for Summary Judgment on Plaintiffs Complaint

Plaintiff moves for summary judgment as there is no genuine issue of material fact concerning this matter, and Plaintiff is entitled to judgment as a matter of law. Plaintiff's oral argument will be supported by the attached affidavit of Mr. Wade McGuinn, The South Carolina Rules of Civil Procedure, and relevant case law.

Plaintiff also moves to Dismiss Defendants' Fifth Counterclaim for Breach of Implied Covenant of Good Faith and Fair Dealing pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure inasmuch as there is no recognized cause of action for Breach of Implied Covenant of Good Faith and Fair Dealing in tort, and there is no contract between the Plaintiff and the Defendants.

MOORE, TAYLOR & THOMAS, P.A.

BY: Barry L. Thompson II
Barry L. Thompson, II
Attorney for the Plaintiff
P. O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina
October 2, 2007

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

McGuinn Construction
Management Inc.,)

Plaintiff,)

vs.)

Saul Espino and Mara Espino,)

Defendants.)

Saul Espino and Mara Espino,)

Third Party Plaintiffs.)

Town of Lexington)

Third Party Defendant)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2005-CP-32-2712

MEMO IN OPPOSITION OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
MOTION TO DISMISS
COUNTERCLAIMS

BETH A. HARRIS
CLERK OF COURT
LEXINGTON, SC

2007 NOV -2 A 10: 18

FILED

NOTE: All deposition excerpts are found in Exhibit 4 of this Memo

This matter comes before the Court on motion by the Plaintiff for Summary Judgment on the Plaintiff's Complaint and a Motion to Dismiss the Defendants' fifth counterclaim. For the reasons outlined below, the Court should deny the Plaintiff's motions on both counts.

STATEMENT OF FACTS

In 1992 Saul and Mara Espino purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company. (Saul Espino Dep., pp. 7-8, ll. 7-4) The house was purchased as new construction, although the home was not custom built.

McGuinn Construction Management is the Developer of the neighborhood

known as the Gates Common Subdivision. This subdivision backs up to the Espinos' property in Lexington. For years the property, which is now known as the Gates Common Subdivision, was unimproved. However, McGuinn applied to have the property rezoned for a patio home subdivision, and was ultimately granted the zoning for which he applied. Nonetheless, storm drainage, water and sewer infrastructure for the project had to be installed, and the provision of this infrastructure was designed by McGuinn to be accomplished by connecting to existing infrastructure of the Coventry Lakes Subdivision, where the Espinos owned their property, and through which installation of the appropriate lines would be required.

The record clearly shows that it was McGuinn Construction Management's intention to install the infrastructure outlined above on the Espinos' property under an easement which purportedly grants the Town of Lexington, its successors and assigns the certain rights in sewer, water lines, and drainage easements for said lines. **(See Exhibit 1).** Further, it specifically provides an easement for the "maintenance of the aforesaid water and sewer lines..." (Id.) The language of the document purporting to be a deed does not grant any right or easement, express or implied, to the Town to allow for the connection by anyone other than Coventry Lakes to the lines.

McGuinn approached the Espinos for permission to come upon the property for the purpose of connecting to the sewer line and to install other infrastructure such as storm drainage. The Espinos rejected this request, and questioned the wisdom of developing the property where the post construction water flow would exacerbate an already existing water issue the Espinos had with the property, but were managing.

Ultimately, McGuinn chose not to locate the storm drainage on the Espinos' property, but without their permission, and with notice that litigation was pending involving the legality of the easement purportedly serving as the basis for his authority, McGuinn ordered his grading and infrastructure subcontractor to proceed with connecting to the sewer on the Espino property. This required the digging and destruction of the Espinos' back yard, and has allowed the development to proceed, although no authority was granted or adjudicated as being valid.

With the sewer and storm drainage installed, the Plaintiff has proceeded at a rapid pace to complete the development with no regard as to the elevation increases of construction, and the increased post construction water flow, which has continued to degrade the soil conditions of the Espinos' home, and which will negate any ability on their part to effectively market this property with disclosing the water issues which have been exacerbated to an unmanageable level by the reckless development of McGuinn. Further, the evidence will show that McGuinn has manipulated the water levels to skew the post construction flow calculations favorably for the development.

I. FACTS IN CONTROVERSY

The Plaintiff asserts that he was operating under the authority of the easement, and that the Town Attorney approved the connection to the sewer based on the easement. The facts show otherwise, and indeed the Town Engineer at the time advised McGuinn that the easement was questionable, and legal authority would be needed to proceed. (Gene Edwards Dep., p. 5, ll. 18-23 and pp. 25-26, ll. 10-14). The Defendants anticipate testimony of the Town Attorney that at no time was he asked to opine as to the legal

authority granted to the Town on the easement in question, and what authority, if any, the developer would have derived therefrom.

In his testimony, Edwards indicates that the plans submitted for approval showed that the lines and the manhole were outside of the easement which purportedly existed. (Id. pp. 22-23, ll. 22-14). Mr. Edwards, however, retired from the Town of Lexington prior to the final approval of the plans, which ultimately came from Rosemarie Nuzzo, an engineer with the Town of Lexington who had minimal qualifications at the time. (Id. pp. 23, ll. 12-22). Prior to his retirement, Gene Edwards discussed with Nuzzo the three issues of concern about the project in question – (1) runoff once developed, (2) location of how water would be connected, and (3) sewage. (Id. at p. 23, ll. 5-11). Importantly, he indicated that he had discussed the uncertainty of the easement issue relating to the sewer lines with Nuzzo, and advised her that “it was not definitive enough for me [him] to tell them to go ahead at that time. (Id. at ll. 12-19). Edwards further indicated that he never saw or reviewed a final legal opinion as to McGuinn’s purported authority to connect to the existing sewer lines on the Espino property. (Id. at p. 25, ll. 4-9).

The testimony of Nuzzo indicates that when the plans were submitted to her for approval, she did not keep the issues Edwards had notified her of in mind in her consideration, and in fact, assumed them away, by giving McGuinn the “benefit of the doubt” in his subcontractor’s installation of the sewer lines and the trespass on the Espinos’ property. When asked in her review of the plans whether the Town of Lexington approved the plans which were to show the location of infrastructure before allowing connection to existing infrastructure, Nuzzo replied:

No. Because in that ... if there’s ... if the lines exist, then you, you almost have to assume there’s an easement to it. Nobody’s going to want to take

care of a public sewer or a public water in there, you know, on their property. (Nuzzo Dep. P. 6, ll. 8-15).

Nuzzo goes on to acknowledge that she reviewed plans which showed the infrastructure installation being within the property boundaries of the Defendants, and that she would have approved the installation of the infrastructure (manhole). (Id. pp. 8-9, ll. 24-21). She then indicates in her testimony that she did not have the authority state where to install infrastructure like the manhole. (Id. at 10, ll. 6-14). **Significantly, she indicated that the developer, in this case McGuinn, would have had to secure easements for the installation.** (Id.) It appears, however, that Nuzzo, acting on behalf of the Town of Lexington, never objected to the installation even though on the most recent plan submitted to her for approval it appeared that McGuinn was trespassing on the property. In her testimony, she indicated as follows:

- Q. So based on your review of this plan, it appears that the manhole that was installed by McGuinn Construction Management was installed on the Espino's property without a proper easement?
- A. Yes, according to the plan because there was an easement shown on here. However, they wouldn't just stick a manhole that goes nowhere, so one would only have to assume that there is an easement on an existing sewer line, and that's what they were tying into, an existing sewer line. (Id. at p. 12, ll. 2-11).

Her further testimony indicates that she did not review the easement under which McGuinn was purportedly operating to determine whether it granted McGuinn the authority to install the lines. McGuinn claimed it had. Further, there is no testimony from the field engineers hired by McGuinn, HB Engineering, that they made any determination of the authority of the easement being offered by McGuinn as authority. Indeed, the authority under which they testified to be operating to install the sewer lines

was the approval of the Town of Lexington. Tom Britt, the President of HB Engineering indicated the following in his testimony:

Q. Okay. And at no time did you opine or give any type of certification that the easement was valid and could be used outside of what authority you thought you already had from the Town?

A. No. Our plans were solely based on the Town telling us they had an easement and approving our plans. (Britt Dep. at p. 41, ll. 16-22).

Further, Britt indicates that the approval of the plans was an indirect approval of the installation of the sewer lines. (Id. at p. 52, ll. 5-8). Therefore, the approval of the plans is a significant issue, and it appears that the manhole and the infrastructure noted on the most recent plan were outside the scope of any easement shown on the plan, and certainly not validated as being installed in accordance with the easement used by McGuinn as the basis of the authority.

There is also an issue about the negligence of the developer in the development of this project, which has a significant portion of wetlands involved, and which flows directly onto the Espinos property. There is a contention that the developer has been sensitive to ensure that the post construction flow from the development has not exceeded the pre construction flow. However, the evidence will show that there has been a concerted and deliberate effort to manipulate the data used for the determination of post vs. pre construction water flow, and this increased flow has exacerbated a previously manageable water flow issue for the Espinos.

II. LEGAL ISSUES

McGuinn sued the Espinos and alleged in its complaint a Declaratory Judgment

action, Slander of Title and Tortious Interference with Contract. The Espinos answered, and counterclaimed alleging Violations of the South Carolina Unfair Trade Practices Act, Negligent Misrepresentation, Constructive Fraud, Negligence, Breach of Implied Covenant of Good Faith and Fair Dealing, Fraud, Conversion, Slander of Title and Trespass. Defendants also amended the Answer and Counterclaim to allege Third Party actions against the Town of Lexington.

Argument

1. Motion For Summary Judgment Should Be Denied

Summary Judgment Standard

In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law...In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party...If triable issues exist, those issues must go to the jury.

Summary judgment is appropriate if 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 judgment as a matter of law...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. (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law...Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied...When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted... The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact...Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on

mere allegations or denials contained in the pleadings. ..The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.

Joseph H. Moore v. M. M. Weinberg, Jr. and Weinberg, Opinion No. 4209, Court of Appeals of South Carolina, Filed February 20, 2007.

The Plaintiff has alleged causes of action involving (1) declaratory judgment on the easement document in question, (2) slander of title and (3) tortious interference with contract. Plaintiff now moves for summary judgment on presumably all issues associated with the complaint.

A. Declaratory Judgment

As indicated, the Plaintiff brings a declaratory judgment cause of action based on a document it asserts should serve as the basis for allowing the installation of sewer and drainage on the Espinos' property. (See Exhibit 1). As the Court in Pond Place Parners v. Poole, 351 S.C. 1, 16 (Ct. App. 2002), 567 S.E.2d 881 stated:

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham, 319 S.C. at 71, 459 S.E.2d at 845 (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a contract or franchise may have determined any question of construction or validity arising under the instrument, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30 (1977); see also Rule 57, SCRPC. Id at 16.

Here, the Plaintiff claims that it had the right to go onto and install drainage and sewer lines on the Espinos' property under this document. However, the document does

not allow for connection to the sewer lines and existing infrastructure on the Espinos' property without the Espinos' specific authority. This was noted by the Town of Lexington's engineers who were charged with considering this issue as outlined above. Clearly, Gene Edwards viewed the document offered as authority for the Plaintiff to install the infrastructure as suspect, and indicated that proper authority from the Espinos would be necessary. This was never obtained. As the Court has consistently held:

It is well-settled that the rights of an easement holder depend upon the interpretation of the grant in the easement. *Patterson v. Duke Power Co.*, 256 S.C. 479, 183 S.E.2d 122 (1971)." *Gresette v. SC Elec. And Gas Co.*, 370 S.C. 377, 382 (2006). Indeed as the Court has noted, "alterations of easements expressly granted will be interpreted under contract law principles; permission to alter must be intended by words or meaning of grant." *Id.* (citation omitted). The court found prescriptive easements, because they are not fixed by agreement among the parties, should be handled differently than express easements. *Id.* We agree with this reasoning and conclude the same is true with easements created by necessity. *Goodwin v. Johnson*, 357 S.C. 49, 55, 591 S.E.2d 34 (Ct.App. 2003). *Id.*

The question of the extent of a grant of an easement is an action in equity. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Pub. Serv. Dist.*, 355 S.C. 529, 586 S.E.2d 146 (Ct.App. 2003); *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998); *Smith*, 312 S.C. at 465, 441 S.E.2d at 334. "Thus, this Court may take its own view of the evidence." *Tupper*, 326 S.C. at 323, 487 S.E.2d at 190; see also *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 558 S.E.2d 902 (Ct.App. 2001) (scope of easement is equitable matter in which reviewing court may take its own view of preponderance of evidence). *Id.* at 53.

Here, it is clear that the easement in question does not specifically allow for the connection by any other subdivision to the existing lines. As indicated in the document, the powers granted to the Town of Lexington specifically relate and are limited to the maintenance and improvement of the existing lines of Coventry Lake Subdivision, not the expansion of these lines to unrelated communities or subdivisions. Without such language, the Town, and therefore the Plaintiff, lacks the appropriate authority to do what has been done, and the connection amounts to trespass.

In addition, as has been established by the courts:

An "easement" is the right of one person to use the land of another for a specific purpose. Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944). The character of an express easement is determined by the nature of the right and the intention of the parties creating it. Tupper, *supra*. An easement may be created by reservation in a deed. Douglas v. Medical Investors, Inc., 256 S.C. 440, 182 S.E.2d 720 (1971).

Easements are divided into two classes: easements appurtenant and easements in gross. Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 542, 128 S.E. 724 (1925). "An appendant or appurtenant easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof." Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965). It passes with the dominant estate upon conveyance. Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1976). In contrast, an easement in gross is a mere personal privilege to use the land of another. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). The privilege is incapable of transfer. *Id.* An easement in gross is not, therefore, assignable or inheritable. *Id.*; Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965).

Easements in gross are not favored by the courts. An easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate. Thus, if an easement is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the parties as to its use, and there is nothing to show the parties intended it to be a mere personal right, it should be held to be an easement appurtenant and not an easement in gross. If doubt exists as to its real nature, an easement is presumed to be appurtenant and not in gross. 25 Am.Jur.2d Easements and Licenses § 12 (1996). Springob v. Farrar, 334 S.C. 585, 594, 514 S.E.2d 135 (Ct. App. 1999)

In construing a deed, it is elementary the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy. Sandy Island Corp., *supra*. The intention of the parties must be determined by a fair interpretation of the grant or reserve creating the easement. *Id.* If the language in the grant or reservation is uncertain or ambiguous in any respect, the court may inquire into and consider all surrounding circumstances, including the construction which the parties have placed on the language. See Smith v. Commissioners of Public Works, 312 S.C. 460, 441 S.E.2d 331 (Ct.App. 1994) (whether grant in written instrument creates easement and type of easement created are to be determined by ascertaining intention of parties as gathered from language of instrument; grant should be construed so as to carry out that intention). See also 25 Am.Jur.2d Easements and Licenses § 22 (1996) (if language is uncertain or ambiguous in any respect, all surrounding circumstances, including construction which parties have placed on language, may be inquired into and taken into

consideration by court, to end that intention of parties may be ascertained and given effect). Id at 595-596.

Given the nature of this easement, it appears to be an easement in gross, which allows it to be assignable. However, it was never assigned by the Town of Lexington to the Plaintiff, and more importantly, the authority granted to the Town under the easement would not have been adequate to accomplish what was done without authority by the Plaintiff. For these reasons, the Plaintiff's motion should be denied.

B. The Slander of Title

The Court has held that "[t]o maintain an action for slander of title in South Carolina, the plaintiff 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." Id. (citing TXO, 419 S.E.2d at 879). Pond Place Parners v. Poole, 351 S.C. 1, 22-23 (Ct. App. 2002), 567 S.E.2d 881. The property known as the Gates Common Subdivision is owned by Gates Common, LLC. (See Exhibit 2). Here, there is no evidence that there has been a publication of a false statement with malice that was derogatory to the title to the property. Indeed, as mentioned above, the question of the authority of the easement was raised by the Town's chief engineer to the Plaintiff. Further, the Plaintiff is not the record owner of the property it claims to have been slandered. (McGuinn Dep., p.10, ll. 11-16). Therefore, the Plaintiff lacks standing to assert the cause, and certainly, is not entitled to summary judgment on that basis. As to element 5 above, the Plaintiff claims that as a result of opposition to the installation of drainage lines, it was required to relocate the lines to another property. If this is true, this was the Plaintiff's decision to incur this damage, and indeed, it did not relocate the installation of the sewer lines –

rather it trespassed in order to accomplish the connection of the sewer lines even though it knew the Town had questioned the authority under the easement offered, and that litigation, filed by the Plaintiff was pending. Further, there is no evidence that this reduced or diminished the value of the property in a third party's eyes. The motion should be denied.

C. Tortious Interference with Contract

The Plaintiff has finally alleged tortious interference with contract. The elements of this cause of action are (1) the existence of the contract; (2) the wrongdoer's knowledge of the contract, (3) the intentional procurement of the contract's breach; (4) the absence of justification; and (5) resulting damages. South Carolina Requests to Charge, Anderson, p. 485.

Here, there is no evidence the elements of this cause of action have been established. Specifically, there is no evidence of the Defendant's knowledge of any contract at the time opposed use of their property. Further, there is no evidence that any alleged contract had been breached, or even the terms of the contract itself if it exists. Assuming there is evidence to support these elements, which the Defendants deny, there is no question that the Defendant's had a strong justification for the interference in that the easement, according to the Town, did not grant sufficient authority. Clearly, there is insufficient proof to grant summary judgment on this basis. Specifically, it would at a minimum be an issue of fact for the jury to determine whether a sufficient justification existed even if the other elements were established, which is denied. The motion should be denied.

2. **Motion To Dismiss Should Be Denied**

Standard For Motion To Dismiss

In Overcash v. South Carolina Electric and Gas Company, 25990 (S.C. 2005),

the court held:

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties. Stroud v. Riddle, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973).

Under this standard, the facts of the complaint should be construed liberally and considered "true" when considering whether the motion should be granted. The

Defendant alleged the following facts:

50. That the Plaintiff in the construction of the project adjacent to Defendants' property was to comply with the implied covenant of good faith and fair dealing.

51. That the acts and conduct of Plaintiff in the misrepresentations made and the blatant abuse of authority with reference to the Defendants' property were negligent, careless and reckless and/or motivated by bad faith and/or malice and/or retaliation and were contrary to the best interests of our economic system and the public good and constituted a breach of said covenant.

52. That by reason of the Plaintiff's breach of the implied covenant of good faith and fair dealing, and as a direct and proximate result thereof, Defendants have suffered damages on account thereof which they are entitled to collect from Plaintiff. (See Amended Answer, Counterclaim and Third Party Complaint).

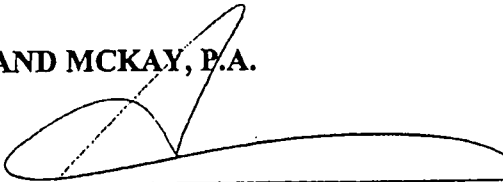
It is clear that McGuinn had made representations to the Town of Lexington indicating that he had reached an agreement with the Defendants on the issue with the easement, when in fact this was never done. (See Exhibit 3) It is the use of this alleged agreement and/or contract that serves in part as the basis for the breach of implied covenant of good faith and fair dealing.

As the has noted, "there exists in every contract an implied covenant of good faith and fair dealing." Williams v. Riedman, 339 S.C. 251, 267 (Ct. App. 2000). Here, considering the facts under the appropriate standard, there is no question that representing to the Town that an agreement existed, when in fact it did not, is a fact that demonstrates the bad faith the Plaintiff showed in its dealings and approach with the Defendant's on this issue, and is sufficient to sustain this cause of action.

CONCLUSION

For the foregoing reasons, the Plaintiffs Motion for Summary Judgment as to its complaint should be denied, and the Plaintiff's Motion to Dismiss the allegation relating to Breach of Implied Covenant of Good Faith and Fair Dealing should be denied.

AUN AND MCKAY, P.A.

By: 

ANDREW A. AUN

P.O. Box 3568

Irmo, South Carolina 29063

Phone (803) 744-0824

Fax (803) 744-0830

Email: andy@aunmckaylaw.com

ATTORNEY FOR PLAINTIFF

Dated: 11/1/07
Columbia, South Carolina

FILED

FORM NO. 115 - TITLE TO REAL ESTATE BY A CORPORATION
REVISED 1938
COLUMBIA OFFICE SUPPLY CO., COLUMBIA, S. C.The State of South Carolina,
COUNTY OF LEXINGTON

1988 APR 11 AM 9:35

JOANNE B. TRIBBLE
RMC
LEXINGTON COUNTY, S.C.

KNOW ALL MEN BY THESE PRESENTS, That

Coventry Associates, Inc.

in the State aforesaid, for and

in consideration of the sum of
Dollars

Five Dollars Only

to it in hand paid at and before the sealing of these presents, by The Town of Lexington, South Carolina
in the State aforesaid, (the receipt whereof is hereby acknowledged)has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said
THE TOWN OF LEXINGTON, SOUTH CAROLINA, ITS SUCCESSORS AND ASSIGNS:

All those certain water lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances to said water lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" water system of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the office of the Town Administrator at the Lexington Town Hall.

ALSO:

All those certain sewer lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances of the said sewer lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" sanitary sewer plan of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the Office of the Town Administrator at the Lexington Town Hall.

ALSO:

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 Lake 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, copies of which are on file in the Office of the Town Administrator of the Lexington Town Hall.

This being a portion of the property heretofore conveyed to the Grantor by deed recorded in Lexington County Deed Book 790 Page 297.

Grantee's Mailing Address: P.O. Box 397
Lexington, S.C. 29072

TMS# 4300-3-36 (Part of)

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said The Town of Lexington, South Carolina, its successors, Heirs and Assigns forever.

And the said Coventry Associates, Inc. does hereby bind itself and its successors, to warrant and forever defend all and singular the said premises unto the said The Town of Lexington, South Carolina, its successors, Heirs and Assigns, against itself and its successors and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF Coventry Associates, Inc. has caused these presents to be executed in its name by M. Stewart Mungo its President, and by (Insert name of Secretary or Treasurer) its and its corporate seal to be hereto affixed this 6th day of April in the year of our Lord, one thousand nine hundred and eighty eight, and in the two hundred and twentieth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered in Presence of

Catherine A. Hammond
Witness

Martha B. Nisser
Witness

COVENTRY ASSOCIATES, INC. (Seal)

By M. Stewart Mungo President.

Secretary or Treasurer.

The State of South Carolina,
COUNTY OF LEXINGTON

PERSONALLY appeared before me Catherine A. Hammond
(Insert name of Witness)
who, in oath, says that he saw the within-named Coventry Associates, Inc.
(Insert name of Corporation)

by M. Stewart Mungo its
(Insert name of President or Vice-President)

President and its
(Insert name of Secretary or Treasurer)

sign the within Deed, and the said Corporation, by said officers, seal said Deed, and, as its act and deed, deliver the
Martha R. Nissen witnessed the
(Insert name of other Witness)

execution thereof.

Catherine A. Hammond
(Witness)

SIVORN to before me, this 7th day of April, A. D. 19 88

Martha R. Nissen (Seal)
Notary Public, S. C.

My Commission expires: 5/20/90

08749

BOOK 1064 PAGE 305

FILED

FORM NO. 118 - TITLE TO REAL ESTATE BY A CORPORATION
REVISED 1932
COLUMBIA OFFICE SUPPLY CO., COLUMBIA, S. C.

The State of South Carolina,

COUNTY OF LEXINGTON

1988 APR 11 AM 9:36

JOANNE B. TRIEDBLE
RMC

LEXINGTON COUNTY, S.C.

KNOW ALL MEN BY THESE PRESENTS, That

Coventry Associates, Inc.

in the State aforesaid, for and in consideration of the sum of
Five Dollars Only Dollars

to it in hand paid at and before the sealing of these presents, by The Town of Lexington,
South Carolina
in the State aforesaid, (the receipt whereof is hereby acknowledged)

has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said
THE TOWN OF LEXINGTON, SOUTH CAROLINA ITS SUCCESSORS AND ASSIGNS:

All those certain pieces, parcels, lots or strips of land, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Coventry Drive, Coventry Court, Teesdale Court, and Coventry Lake Drive, as shown on a plat of Coventry Lakes Subdivision by Whitworth & Associates, Inc. dated June 23, 1986, last revised September 26, 1986, and recorded in the Office of the R.M.C. for Lexington County in Plat Book 210G Page 149; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

This being a portion of the property heretofore conveyed to the Grantor by deed recorded in Lexington County Deed Book 790 Page 297.

Grantee's Mailing Address: Town Of Lexington
Town Hall P.O. Box 377
Lexington, S.C. 29072

TAX 4300-336

BOOK 1064 PAGE 305

ROA000135

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said The Town of Lexington, South Carolina, its successors Heirs and Assigns forever.

And the said Coventry Associates, Inc. does hereby bind itself

and its successors, to warrant and forever defend all and singular the said premises unto the said The Town of Lexington, South Carolina, its Successors Heirs and Assigns, against itself and its successors and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF Coventry Associates, Inc. has caused
(Insert name of Corporation)

these presents to be executed in its name by H. Stewart Mungo its
(Insert name of President or Vice-President)

President, and by its
(Insert name of Secretary or Treasurer)

and its corporate seal to be hereto affixed this 6th day of April
in the year of our Lord, one thousand nine hundred and eighty eight, and in the two
hundred and twelfth year of the Sovereignty and Independence of the United
States of America.

Signed, Sealed and Delivered
in Presence of

Catherine A. Hammond By: Ms. J. F. COVENTRY ASSOCIATES, INC. (Seal)
Witness President.
Martha B. Visser Secretary or Treasurer.
Witness

2005064841 FILED, RECORDED, INDEXED
11/21/2005 11:47:47:937
Rec Fee:\$10.00 St Fee:\$0.00 EXEMPT
Co Fee:\$0.00 Pages:12
Lexington County ROD Debra M. Gunter
DEED Bk:Pg 10635:350

RECORDING INFORMATION:

STATE OF SOUTH CAROLINA

GENERAL WARRANTY DEED

COUNTY OF LEXINGTON

KNOW ALL MEN BY THESE PRESENTS THAT, MCGUINN CONSTRUCTION MANAGEMENT, INC., hereinafter referred to as Grantor, for and in consideration of the sum of FIVE DOLLARS AND 00/100 (\$5.00) DOLLARS AND MEMBERSHIP INTEREST IN GATES COMMONS, LLC to Grantor paid by GATES COMMONS, LLC, hereinafter referred to as Grantee, in the state aforesaid, the receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does hereby grant, bargain and release unto the said Grantee, Grantee's heirs, successors and assigns forever:

All that certain piece, parcel or lot of land, with improvements thereon, situate lying and being in the County of LEXINGTON, State of South Carolina and being more particularly shown as Parcels 1 & 2, containing 7.11 acres on a plat for Lonnie H. Gates by C.D. Caughman, RS, dated 3-16-62 and recorded in the Recorder's Office for the above named county in Plat Book 225 at page 883.

This being the property conveyed to MCGUINN CONSTRUCTION MANAGEMENT, INC. by deed of Eva Mae Gates, recorded 10-23-1990 in Deed Book 1702 at page 241.

Tax Map Number 004333-01-006

This conveyance is made subject to Easements, Restrictions, Covenants and Conditions of record.

Grantee's Address: 140 Whiteford Way
Lexington, SC 29072

TOGETHER WITH ALL AND SINGULAR, THE RIGHTS, MEMBERS, HEREDITAMENTS AND APPURTENANCES TO THE SAID PREMISES BELONGING, OR IN ANYWISE INCIDENT OR APPERTAINING.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the Grantee, Grantee's heirs, successors and assigns forever.

AND THE GRANTOR hereby binds Grantor's heirs, successors and assigns to warrant and forever defend all and singular, the said premises unto the Grantee, Grantee's heirs, successors and assigns against Grantor and Grantor's heirs, successors and assigns and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

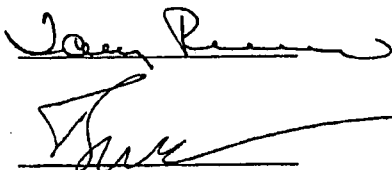
ROA000137

Any reference, in this instrument, to the singular shall include the plural and vice versa. Any reference to one gender shall include the others, including the neuter. Such words of inheritance shall be applicable as are required by the gender of the Grantee and/or Grantor.

WITNESS my hand and seal this 14th day of November, in the year 2005

WITNESSES:

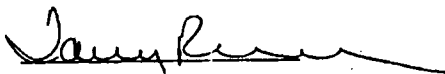
MCGUINN CONSTRUCTION
MANAGEMENT, INC.


By: S. Wade McGuinn
Its: President

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

PERSONALLY APPEARED BEFORE ME the undersigned witness and made oath that (s)he saw the within named Grantor sign, seal and deliver the within-written Deed for the uses and purposes therein mentioned and that (s)he, with the above signed witness witnessed the execution thereof.

SWORN TO BEFORE ME THIS
14th day of November, 2005


NOTARY PUBLIC FOR THE STATE
OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 6/17/12

ROA000138

Joe Boles

From: Joe Boles [jboles@lexsc.com]
Sent: Thursday, January 20, 2005 9:13 AM
To: Mara Espino (Ses1603110@aol.com)
Subject: McGuinn Project on Dreher

The Planning Commission did not approve the sketch plan for the project and has recommended to Council that the zoning not be changed. Since the developer has made application for a change, Council must consider the change. Council will have a public hearing at their 7 Feb meeting at 7pm.

At the meeting, Mr. McGuinn reported the drainage problem through your property and said that he had talked to you about it. And, he stated that both of you had reached an agreement about fixing the situation. At this point I spoke that you had contacted me about the problem.

Joe

ROA000139

Page 5

1 A: Since 1964.
 2 Q: Are you a United States citizen?
 3 A: Yes, sir.
 4 Q: In your life have you ever been arrested for
 5 anything?
 6 A: No, sir.
 7 Q: Have you ever been in any other lawsuits
 8 before?
 9 A: No, sir.
 10 Q: Where do you live?
 11 A: At 2301 Sunnett, S-N - S-U-N-N-E-T-T in
 12 Nashville 37211.
 13 Q: Do you work?
 14 A: Yes, sir.
 15 Q: What do you do for a living?
 16 A: I'm a United Methodist minister. I work for --
 17 Q: Go ahead.
 18 A: I work for the General of Higher Education; I'm
 19 a minister at a Methodist church in Nashville.
 20 Q: So you do not have an actual church?
 21 A: No, sir. I'm assigned by my Bishop to that
 22 job.
 23 Q: And the job is what?
 24 A: I'm Director of the Retreats, Recruitment and
 25 Specialized Ministries.

Page 6

1 Q: Where is your office located?
 2 A: It's across from Vanderbilt University in
 3 Nashville. I think it's Nineteen Avenue,
 4 South.
 5 Q: Well, do you live in South Carolina?
 6 A: No, sir. I don't live in South Carolina.
 7 Q: Do you come here on a regular basis?
 8 A: Yes, sir.
 9 Q: Are you married?
 10 A: Yes, sir.
 11 Q: Your wife's name is Mara?
 12 A: Yes, sir.
 13 Q: Is she from Cuba too?
 14 A: No. She's from Costa Rica.
 15 Q: Is she a United States citizen?
 16 A: Yes, sir.
 17 Q: How long has it been since you have lived in
 18 South Carolina?
 19 A: I never lived in South Carolina.
 20 Q: Are you and Mara happily married?
 21 A: Yes. Very happy.
 22 Q: How often do you see each other?
 23 A: We live together. I do a lot of traveling, but
 24 sometimes she travels with me, but --
 25 Q: Does she live in Tennessee?

Page 7

1 A: Yes.
 2 Q: Do you own a house in Lexington, South
 3 Carolina?
 4 A: Yes, sir.
 5 Q: What is the address of that house?
 6 A: 108 Country Court.
 7 Q: How long have you owned that home?
 8 A: Since 1992.
 9 Q: Who lives in that house?
 10 A: My daughter, my oldest daughter, Julie.
 11 Q: How long has she lived there?
 12 A: I think about three years.
 13 Q: Did you ever live in that house?
 14 A: No, sir.
 15 Q: Why did you buy it?
 16 A: I bought the house because my daughter was in
 17 great need of a house. My youngest daughter,
 18 Erin -- I mean, Maureen. So I bought the house
 19 for her in 1992.
 20 Q: So you never bought the house to live in
 21 yourself, but you bought the house for your
 22 children to live in?
 23 A: Yeah. The purpose of buying the house was
 24 because I wanted -- we were moving from place
 25 to place. I was in the Army and I was

Page 8

1 stationed in Hawaii and then we bought the
 2 house for her to live and they were in a bad
 3 economic situation, so we put the money
 4 together to help her out.
 5 Q: You have never lived in South Carolina?
 6 A: No, sir.
 7 Q: Now, do you know who you bought the property
 8 from?
 9 A: Yes, sir. The Mungo company.
 10 Q: Did you buy it from the Mungo company or from
 11 one of the Mungo company's affiliated
 12 companies?
 13 A: No. I think it was Mungo company; I believe it
 14 was -- my Realtor said it was Mungo.
 15 Q: Have you ever heard of a company known as
 16 Coventry Associates?
 17 A: No, I don't.
 18 Q: Did you buy the house new?
 19 A: Yes; yes, sir.
 20 Q: Do you know if Coventry Associates ever owned
 21 the property?
 22 A: I really don't know, no.
 23 Q: Are you familiar with the property that is now
 24 owned by McGuinn Construction Management,
 25 Incorporated?

Page 5

1 exist that for someone to develop a piece of
2 property, and once that was completed and they
3 decided to develop, then the plans were submitted to
4 my office and reviewed by my staff and myself, and
5 we determined at that time whether or not what they
6 had shown on the plans was feasible for the
7 connection of water and sewer, whether we had
8 capacity of water and sewer. We also looked at
9 storm drainage facilities as they were laid out.
10 Grading and streets, things of that nature, which,
11 things which the town would ultimately be
12 responsible for.

13 Q: Okay. And then after that review, a willingness and
14 capacity letter is sent?

15 A: Yes, sir. We would usually send a letter indicating
16 that we had capacity to serve them if they wanted to
17 develop.

18 Q: Is that willingness and capacity letter, does it
19 also indicate that there's been a determination that
20 proper legal authority to provide a tie-in exists?

21 A: No, sir. Usually at that time when that letter is
22 issued, it's just saying we have the capacity to
23 serve.

24 Q: Okay.

25 A: And it's not contingent upon a point of connection.

1 asked, and on a review certain things would come u.
2 well, what does this mean or what do you think this
3 is, it seems to be a little bit boarder line, and
4 we'd converse in that fashion, but generally as it
5 went out, I would get a report from her, which
6 project she had reviewed so if I got any calls, I'd
7 know, you know, which one and the status of the
8 projects.

9 Q: So even though you had gotten personal, you had had
10 personal contact from the homeowner who was affected
11 or felt that she was affected by this community, you
12 didn't do anything additional on this particular
13 project outside of what you'd normally do?

14 A: Yes, sir, I did. Ms. Espino brought up a number of
15 questions which I did some research on to try to
16 determine essentially what her subdivision involved
17 when it was developed, what this would involve when
18 it's developed, and tried to speak with her on our
19 next meeting in regard to the things which I had
20 been able to find in our files.

21 Q: What were those issues?

22 A: Well, those issues were of course one thing that I
23 understood at that particular point in time was the
24 runoff from this property once it's developed would
25 be increased above what it's been undeveloped, and

Page 6

1 Q: What was your, what was your involvement in the
2 Gates Common Subdivision?

3 A: Well, the plans were submitted to my office, and my
4 staff reviewed it, and secondarily I think when I
5 really got involved in it, this lady came to me and
6 was talking about the storm drain runoff from this
7 project into her property.

8 Q: You're talking about this lady being Ms. Espino?

9 A: That's correct.

10 Q: Okay. Tell me what you recall about that
11 conversation.

12 A: Well, the first time she had indicated that this
13 project was developed immediately behind the
14 property which she owned, and would I look at the
15 plans a little bit more closely and determine
16 anything that I could relating to the possibility of
17 damage or anything to her property.

18 Q: Are you aware that well, let me ask you this.
19 Ms. Nuzzo was under your supervision?

20 A: She was under my supervision, yes, sir.

21 Q: Okay. Did you ever supervise or, excuse me, did you
22 ever review or approve anything that she was
23 involved in in reference to this Gates Common
24 community?

25 A: Not initially. I had reviewed, and questions were

Page 8

1 how much effect would that have on her property, and
2 secondarily I saw a proposal where by that if she
3 agreed to it, that they would put in certain pipes
4 in the ditch and try to improve the situation above
5 what she currently has, and I assured her of course
6 that under the regulations of the runoff on this
7 property, that no more runoff could be turned loose,
8 no more additional runoff could be turned loose on
9 her property except that it be meted out the way it
10 was currently coming through. So they had provided
11 for that under the regulations for this subdivision,
12 and they proposed to, as I say, improve by changing
13 some pipes on the back of her property to get into
14 the ditch to better carry that water that currently
15 went through there.

16 Q: What was done by the town to verify that the post-
17 construction water flow had not exceeded the pre-
18 construction water flow?

19 A: Well, the calculations from the engineer, HB
20 Engineering, were reviewed by me and my staff, and
21 according to the way that it's outlined in the
22 regulations, they had conformed completely with all
23 the calculations and so forth on it to carry it
24 through essentially the same size pipe that was down
25 there.

Page 25

1 Q: of Defendants' Eight in the Ray deposition?
 2 A: Yes, sir.
 3 Q: Okay.
 4 A: And perhaps a draft, a preliminary draft even of the
 5 attorneys. Mr. McGuinn came in and brought I think
 6 a draft to me at that particular point in time, but
 7 it was not complete at that time.
 8 Q: Okay. So you never saw a final, legal opinion?
 9 A: No, sir.
 10 Q: Okay. And the opinion that was provided to you by
 11 Mr. McGuinn wasn't sufficient for you to grant
 12 authority for them to tie in?
 13 A: The authority to tie in is something that if we had
 14 the capacity of water and sewer, is not limited by
 15 the fact of how it gets there, we can only tell
 16 them, and this a DHEC regulation, that it is
 17 available, and once they start their development,
 18 then it's up to them to make the determination as to
 19 how to get there, whether they have to purchase an
 20 easement, whether it's one existing, and I think I
 21 had indicated to Mr. McGuinn initially when this
 22 issue came up that I would advise him to get a
 23 search on it to find out just exactly what, and I
 24 think this to be a result of that.
 25 Q: Okay. And based upon the review of this, it appears

Page 27

1 second.
 2 (Off the record)
 3 MR. AUN: Mr. Edwards, I have no further
 4 questions. I appreciate your patience with us
 5 today.
 6 MR. EDWARDS: Certainly.
 7 MR. THOMPSON: I have no questions.
 8 MR. CUNNINGHAM: No questions.
 9
 10 (There being no further questions, the deposition
 11 concluded at 4:55 p.m.)

Page 26

1 that the town owned an easement to certain lines?
 2 A: It appears that way, yes, sir.
 3 Q: Okay. The question that I now ask you is based on
 4 your review of this information, did you ever advise
 5 McGuinn that they had the authority to, to go on the
 6 Espino's property and to tie into any existing sewer
 7 lines that may have existed?
 8 A: No, sir, my, my position on that was, as it were
 9 from the beginning when I suggested that he get a
 10 title search on it, it's a legal situation, and I'm
 11 an engineer, and although I've dealt with much legal
 12 over the years, my, whatever opinion I come up with,
 13 it's not worth anything because I'm an engineer and
 14 not an attorney.
 15 Q: Okay.
 16 A: And it wouldn't be worth anything in court except as
 17 a fact to go before the court.
 18 Q: This was information you passed on to Ms. Nuzzo?
 19 A: Yes, sir.
 20 Q: Ms. Nuzzo had that information at the time you
 21 retired?
 22 MR. CUNNINGHAM: Object to the form.
 23 A: Yes, sir, I'm sure she did.
 24 MR. AUN: Let me take one quick break and get
 25 with my client and see if we're done. Hold on one

Page 21

1 Q: When it's referred to as 15-foot easement, is that
2 typically taken to mean 7.5 feet on each side of the
3 property?
4 A: Typically, typically so, yes, sir.
5 Q: So that is it unusual to show a 15-foot easement on
6 one side of the property and not where a 15-foot
7 easement is described?
8 A: Well, that, that 15-foot easement, again, just the
9 way you said it a moment ago, would be seven and a
10 half feet each side.
11 Q: Okay.
12 A: With a total width of 15 feet.
13 Q: But that's not what the plan shows, is it?
14 A: Well, the way I'm looking at it, yes, sir, I, I
15 would say so. These show an arrow here and an arrow
16 here and says 15-foot easement which would be
17 indicative to me that he shot half on each side of
18 this line here.
19 Q: Okay. Is there any, is there any indication of
20 sewer lines, existing sewer lines, shown on that
21 plan?
22 A: Yeah, this is proposed to here, and this is storm
23 drainage here, new storm drainage. Only thing I
24 see, I do not see the line itself. Now I see here's
25 a manhole here and perhaps one right there, and it

Page 23

1 recall, this was an ongoing question for
2 approximately a year prior to my retirement.
3 Q: The issue of the easement?
4 A: The issue of the easement and the storm water.
5 Q: So this issue of the easement was an ongoing issue
6 for a year prior to your retirement, and
7 A: Well, as I say, there are three, three things. One
8 being the runoff once developed, number two being
9 the location of how the water would reach from the
10 undeveloped property onto the other developed
11 property, and the third issue was the sewer.
12 Q: Okay. Dealing with, dealing with the sewer, do you
13 recall discussing with Ms. Nuzzo the issue of the
14 easement pertaining to the sewer?
15 A: As I recall, I think that I gathered up all the
16 information I had and gave it to HB Engineering and
17 told them this is what I found, and it was not
18 definitive enough for me to tell them to go ahead at
19 that time.
20 Q: So at this, at the time prior to your retirement,
21 you advised them, based on research that you had
22 conducted as to the easement for the sewer, that
23 they did not have a definitive position in going
24 forward without an independent easement from Ms.
25 Espino?

Page 22

1 says 15-foot sewer easement, so obviously what he's
2 trying to show here is that coming out of this
3 manhole would be a line to a point here which
4 Q: Is shown at the corner of lot 16.
5 A: Shown at the corner of the lot, yes, sir, and then
6 it indicates a 15-foot easement up through there.
7 Q: Okay. Connecting to a manhole that's not within the
8 easement?
9 A: Yes, sir. The manhole is not in the easement. I, I
10 frankly don't see how he's proposed here to connect.
11 It says sewer plan B, but.
12 Q: This was reviewed by Ms. Nuzzo, correct?
13 A: Obviously, yes, sir.
14 Q: Okay.
15 A: This was still ongoing at the time I retired.
16 Q: Okay. All right. So you were retired at the time?
17 A: Yes.
18 Q: Ms. Nuzzo would have had the final and ultimate call
19 in a situation like this?
20 A: I think that would be a correct statement, yes, sir,
21 because, as I say, it was still ongoing at the time
22 of my retirement.
23 Q: Okay. This would have been August 23rd of 2005.
24 When did you retire?
25 A: Well, this was dated that period in time, but as I

Page 24

1 A: Well, I, I told them, it, it might have been the
2 developer, it might have been their engineer, but
3 conversation, numerous conversations took place, and
4 it's been some time, so I can't say definitely who
5 it is, and also it seems that I may have written a
6 letter advising them to have someone look into it
7 legally.
8 Q: Okay. Did you receive the legal opinion prior to
9 retiring?
10 A: Not to my recollection. I may have, but not to my
11 recollection, no, sir.
12 Q: When did you retire again?
13 A: Well, actually I retired the 15th of October gone a
14 year ago which would have been 2005.
15 Q: I want to show you a document that's been marked as
16 Exhibit Eight to the Mike Ray deposition, Mike Ray
17 being one of the engineers with HB Engineering who
18 is involved in this project. I want you to take a
19 look at this, primarily focusing on page, on the
20 fourth page of that document.
21 A: All right, sir. I believe I perhaps have, have seen
22 this document.
23 Q: You're pointing, you're pointing to the fourth page
24
25 A: Yes, sir.

6 (Pages 21 to 24)

Page 25

1 Q: of Defendants' Eight in the Ray deposition?
 2 A: Yes, sir.
 3 Q: Okay.
 4 A: And perhaps a draft, a preliminary draft even of the
 5 attorneys. Mr. McGuinn came in and brought I think
 6 a draft to me at that particular point in time, but
 7 it was not complete at that time.
 8 Q: Okay. So you never saw a final, legal opinion?
 9 A: No, sir.
 10 Q: Okay. And the opinion that was provided to you by
 11 Mr. McGuinn wasn't sufficient for you to grant
 12 authority for them to tie in?
 13 A: The authority to tie in is something that if we had,
 14 the capacity of water and sewer, is not limited by
 15 the fact of how it gets there, we can only tell
 16 them, and this a DHEC regulation, that it is
 17 available, and once they start their development,
 18 then it's up to them to make the determination as to
 19 how to get there, whether they have to purchase an
 20 easement, whether it's one existing, and I think I
 21 had indicated to Mr. McGuinn initially when this
 22 issue came up that I would advise him to get a
 23 search on it to find out just exactly what, and I
 24 think this to be a result of that.
 25 Q: Okay. And based upon the review of this, it appears

Page 27

1 second.
 2 (Off the record)
 3 MR. AUN: Mr. Edwards, I have no further
 4 questions. I appreciate your patience with us
 5 today.
 6 MR. EDWARDS: Certainly.
 7 MR. THOMPSON: I have no questions.
 8 MR. CUNNINGHAM: No questions.
 9
 10 (There being no further questions, the deposition
 11 concluded at 4:55 p.m.)

Page 26

1 that the town owned an easement to certain lines?
 2 A: It appears that way, yes, sir.
 3 Q: Okay. The question that I now ask you is based on
 4 your review of this information, did you ever advise
 5 McGuinn that they had the authority to, to go on the
 6 Espino's property and to tie into any existing sewer
 7 lines that may have existed?
 8 A: No, sir, my, my position on that was, as it were
 9 from the beginning when I suggested that he get a
 10 title search on it, it's a legal situation, and I'm
 11 an engineer, and although I've dealt with much legal
 12 over the years, my, whatever opinion I come up with,
 13 it's not worth anything because I'm an engineer and
 14 not an attorney.
 15 Q: Okay.
 16 A: And it wouldn't be worth anything in court except as
 17 a fact to go before the court.
 18 Q: This was information you passed on to Ms. Nuzzo?
 19 A: Yes, sir.
 20 Q: Ms. Nuzzo had that information at the time you
 21 retired?
 22 MR. CUNNINGHAM: Object to the form.
 23 A: Yes, sir, I'm sure she did.
 24 MR. AUN: Let me take one quick break and get
 25 with my client and see if we're done. Hold on one

Page 5

1 exist that for someone to develop a piece of
 2 property, and once that was completed and they
 3 decided to develop, then the plans were submitted to
 4 my office and reviewed by my staff and myself, and
 5 we determined at that time whether or not what they
 6 had shown on the plans was feasible for the
 7 connection of water and sewer, whether we had
 8 capacity of water and sewer. We also looked at
 9 storm drainage facilities as they were laid out.
 10 Grading and streets, things of that nature, which,
 11 things which the town would ultimately be
 12 responsible for.
 13 Q: Okay. And then after that review, a willingness and
 14 capacity letter is sent?
 15 A: Yes, sir. We would usually send a letter indicating
 16 that we had capacity to serve them if they wanted to
 17 develop.
 18 Q: Is that willingness and capacity letter, does it
 19 also indicate that there's been a determination that
 20 proper legal authority to provide a tie-in exists?
 21 A: No, sir. Usually at that time when that letter is
 22 issued, it's just saying we have the capacity to
 23 serve.
 24 Q: Okay.
 25 A: And it's not contingent upon a point of connection.

Page 6

1 Q: What was your, what was your involvement in the
 2 Gates Common Subdivision?
 3 A: Well, the plans were submitted to my office, and my
 4 staff reviewed it, and secondarily I think when I
 5 really got involved in it, this lady came to me and
 6 was talking about the storm drain runoff from this
 7 project into her property.
 8 Q: You're talking about this lady being Ms. Espino?
 9 A: That's correct.
 10 Q: Okay. Tell me what you recall about that
 11 conversation.
 12 A: Well, the first time she had indicated that this
 13 project was developed immediately behind the
 14 property which she owned, and would I look at the
 15 plans a little bit more closely and determine
 16 anything that I could relating to the possibility of
 17 damage or anything to her property.
 18 Q: Are you aware that well, let me ask you this.
 19 Ms. Nuzzo was under your supervision?
 20 A: She was under my supervision, yes, sir.
 21 Q: Okay. Did you ever supervise or, excuse me, did you
 22 ever review or approve anything that she was
 23 involved in in reference to this Gates Common
 24 community?
 25 A: Not initially. I had reviewed, and questions were

Page 7

1 asked, and on a review certain things would come up,
 2 well, what does this mean or what do you think this
 3 is, it seems to be a little bit boarder line, and
 4 we'd converse in that fashion, but generally as it
 5 went out, I would get a report from her, which
 6 project she had reviewed so if I got any calls, I'd
 7 know, you know, which one and the status of the
 8 projects.
 9 Q: So even though you had gotten personal, you had had
 10 personal contact from the homeowner who was affected
 11 or felt that she was affected by this community, you
 12 didn't do anything additional on this particular
 13 project outside of what you'd normally do?
 14 A: Yes, sir, I did. Ms. Espino brought up a number of
 15 questions which I did some research on to try to
 16 determine essentially what her subdivision involved
 17 when it was developed, what this would involve when
 18 it's developed, and tried to speak with her on our
 19 next meeting in regard to the things which I had
 20 been able to find in our files.
 21 Q: What were those issues?
 22 A: Well, those issues were of course one thing that I
 23 understood at that particular point in time was the
 24 runoff from this property once it's developed would
 25 be increased above what it's been undeveloped, and

Page 8

1 how much effect would that have on her property, and
 2 secondarily I saw a proposal where by that if she
 3 agreed to it, that they would put in certain pipes
 4 in the ditch and try to improve the situation above
 5 what she currently has, and I assured her of course
 6 that under the regulations of the runoff on this
 7 property, that no more runoff could be turned loose,
 8 no more additional runoff could be turned loose on
 9 her property except that it be meted out the way it
 10 was currently coming through. So they had provided
 11 for that under the regulations for this subdivision,
 12 and they proposed to, as I say, improve by changing
 13 some pipes on the back of her property to get into
 14 the ditch to better carry that water that currently
 15 went through there.
 16 Q: What was done by the town to verify that the post-
 17 construction water flow had not exceeded the pre-
 18 construction water flow?
 19 A: Well, the calculations from the engineer, HB
 20 Engineering, were reviewed by me and my staff, and
 21 according to the way that it's outlined in the
 22 regulations, they had conformed completely with all
 23 the calculations and so forth on it to carry it
 24 through essentially the same size pipe that was down
 25 there.

Page 9

1 Q: It's my understanding that part of the determination
2 of whether the pre-construction water flow, or
3 excuse me, the post-construction water flow exceeded
4 the pre-construction water flow was, was determined
5 by calculations involving their detention pond.
6 A: That's correct.
7 Q: And reference and in fact study of water levels in
8 the detention pond may have some impact on their
9 determination in that regard, is that correct?
10 A: That's true.
11 Q: So that if there are issues well, strike that.
12 So that basically you're relying on the information
13 being provided by HB Engineering and their
14 calculations, correct?
15 A: That's correct.
16 Q: You're not doing any kind of independent
17 verification that what they're saying is true?
18 A: Reviewed all their calculations, yes, sir.
19 Q: Right. But you're not doing any kind of independent
20 verification of that? All you're doing is reviewing
21 their calculations?
22 A: No, I never would have went, went back. Everything
23 was laid out in the plans as required in that the
24 certain drainage areas drained certain directions,
25 and ultimately it would get to the detention pond,

Page 11

1 calculations.
2 Q: Uh-huh.
3 A: No, I did not, to answer you more directly, your
4 original question, I did not planimeter or calculate
5 these areas. We knew how much the whole area was,
6 and the whole is the sum of the parts which
7 essentially were shown on the drawing.
8 Q: So that if there was something manipulating the
9 amount of water that was going into that detention
10 pond and thereby manipulating the data that was used
11 to calculate post-construction flow, that would have
12 affected your determination, would it not?
13 A: Post-construction flow?
14 Q: Yes, sir.
15 A: Well, that was not something that we considered. I
16 mean post being after the fact. The plans were
17 submitted. It was supposed to be constructed
18 according to those plans and, and with no deviations
19 unless they were approved over and beyond the
20 original plans.
21 Q: Well, let me, let me be more specific with my
22 question.
23 A: So ah
24 Q: Let me be more specific with my question. I think
25 you previously testified that they had to provide

Page 10

1 and then the detention pond was sized to meter the
2 water at the rate originally determined.
3 Q: So that the detention pond was sized to meter the
4 water at the rate that it was coming in to determine
5 whether it's in conformity with what they expected
6 the post-construction flow to be?
7 A: That's correct.
8 Q: And if that water or if those, if, if those numbers
9 are wrong and they were submitted to the town, there
10 was no way for the town to independently verify
11 whether that was correct or not?
12 MR. THOMPSON: Object to form. Answer the
13 question.
14 MR. CUNNINGHAM: Object to the form.
15 A: I could not necessarily say that because when this
16 matter came up and Ms. Espino had visited my office
17 a number of times, as well as the fact that I was
18 there when she appeared before council on several
19 occasions, that we had looked into the situation and
20 found nothing that did not conform with the
21 regulations, and based on the regulations that are
22 presently in place for the construction of such
23 facilities, that we use the information, the runoff.
24 This is done by looking at the area and sizing the
25 area which they put on their chart, their

Page 12

1 data indicating that the post-construction flow did
2 not exceed what the pre-construction flow was,
3 right?
4 A: Oh, stated on that line, you're correct, yes, sir.
5 Q: All right. So that if there is something that was
6 affecting the amount of water that they, that they
7 made those calculations from, would that not have
8 affected their determination that the post-
9 construction flow was consistent with the pre-
10 construction flow?
11 A: If I understand your question, assuming that nothing
12 changed and they constructed according to the
13 approved plans, I believe is what I'm hearing you
14 say?
15 Q: Let me, let me rephrase it.
16 A: And
17 Q: Let me, let me rephrase it.
18 A: unless something else occurred during the
19 construction or after the construction that would
20 change the amount, is that the question?
21 Q: I'll tell you. Let me rephrase my question.
22 A: All right.
23 Q: I'm getting a little rusty here. Let's say that
24 they did something to divert water flow. Let's just
25 assume for the sake of argument they did something

Page 21

1 so it would be our you know, we were granted
 2 the pipes, fittings, manholes, etc., and then that
 3 includes an easement around it. Why it's not shown
 4 correctly, I do not know. I wasn't there in '87.
 5 Q: It includes an easement around it and right-of-way
 6 for the maintenance of the aforesaid water and sewer
 7 lines.
 8 A: That's not even terminology we use now.
 9 Q: I understand.
 10 A: Yeah.
 11 Q: But this was terminology used when the, when the
 12 pipes were granted, when the, when the rights were
 13 granted.
 14 A: Uh-huh.
 15 Q: And do you not believe that you have to stay within
 16 the authority granted by the easement?
 17 A: Yes, but I don't see how you can assume though that
 18 it doesn't mean someone else can tie onto a service.
 19 Q: Was there ever a legal opinion prepared on the
 20 easement issue by the town?
 21 A: Not that I know of. There never is for projects.
 22 Q: So we just assume that the developer's got a good
 23 heart and is doing the right thing? Is that what
 24 your testimony is?
 25 A: No. I mean I don't understand what you're getting

Page 23

1 A: No.
 2 Q: Okay.
 3 A: Not definitively, no. I do not know.
 4 Q: Gene Edwards was an engineer with the town at the
 5 time this project first came to you for review?
 6 A: I believe so, '05.
 7 Q: Was he involved in the review of this project?
 8 A: No.
 9 Q: He was not involved in the review of this project?
 10 A: No.
 11 Q: Was he involved in the approval process of any of
 12 the, the permits being sought?
 13 A: No.
 14 Q: Okay. Was he involved in any of the authorization
 15 given to proceed with construction on the project?
 16 A: No.
 17 Q: Does he have any role in reference to this project?
 18 A: I would have to say no.
 19 Q: Okay. It's my understanding from other employees of
 20 the Town of Lexington that Mr. Edwards did have a
 21 role. Would there be any reason for them to believe
 22 that he had a role in this project?
 23 A: He was the director of the department.
 24 Q: So anything you would have done would have been
 25 ultimately his, approved by him?

Page 22

1 at now.
 2 Q: Well, you're telling me, you're telling me that you
 3 are assuming that the developer has placed this
 4 within the easement that you believe that you have
 5 the right to do whatever you want to with, correct?
 6 A: Yes.
 7 Q: Okay. And even though it's not shown on their most
 8 recent plan as being in accordance with the easement
 9 marked in Exhibit Eight, and even though they don't
 10 show any sewer lines, existing sewer lines, on this
 11 plan, you believe that they're just doing the right
 12 thing?
 13 A: Yeah. I'm going to have to say yes.
 14 Q: What is Gene Edwards role with the town or was his
 15 role with the town?
 16 A: He was the engineer, excuse me, the director of
 17 engineering and planning. He was my boss.
 18 Q: Are the folks in Coventry Lake Subdivision in the
 19 Town of Lexington?
 20 A: I believe so.
 21 Q: Okay. And I mean they, they are part of the tax
 22 base of the Town of Lexington, correct? Do you
 23 know?
 24 A: Do you know?
 25 Q: Just asking a question. Do you know?

Page 24

1 A: No, that's not how it worked.
 2 Q: Okay.
 3 A: They may, they others may have assumed so, but
 4 that's not it worked.
 5 Q: So he was the director of the engineering department
 6 under which you, you worked?
 7 A: Correct.
 8 Q: So he was your boss?
 9 A: Correct.
 10 Q: So his role in the process would have been to,
 11 technically at least, approve and oversee the work
 12 that you did?
 13 A: If he so chose, yes.
 14 Q: So then there were times that he chose not to
 15 oversee your work?
 16 A: He never looked at anything I reviewed.
 17 Q: From the first day you came there till the day he
 18 left?
 19 A: I may have had a question or two here or there and
 20 asked him a specific, but as far as reviewing the
 21 plans, no.
 22 Q: So if you made a mistake, there was no check and
 23 balance in there?
 24 A: Not necessarily.
 25 Q: Okay.

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1 those lines notwithstanding those objections,
 2 correct?
 3 A We pursued, no.
 4 Q What was your recommendation in light of the
 5 objections?
 6 A Our plans always show a connection to the
 7 existing sewer line as the Town approves it from
 8 early on, before we knew there was a problem with
 9 the easement.
 10 Q Okay. Did you, were you asked any questions by
 11 the contractor, CBG, or by McGuinn and Associates
 12 or any of the companies relating to McGuinn in
 13 reference to the validity of that easement at
 14 that point?
 15 A Not that I can recall.
 16 Q Okay. And at no time did you opine or give any
 17 type of certification that the easement was valid
 18 and could be used outside of what authority you
 19 thought you already had from the Town?
 20 A No. Our plans were solely based on the Town
 21 telling us they had an easement and approving our
 22 plans.
 23 Q Okay. Do you recall whether the grading, whether
 24 CBG, the grading contractor, stopped work on the
 25 project at any point in time in reference to

1 these objections?
 2 A I don't recall.
 3 Q Okay. I'm going to take a quick break and meet
 4 with my client, and hopefully, we'll be able to
 5 wrap up here soon, okay?
 6 A Okay.
 7 (Off the record from 11:06 a.m. to
 8 11:13 a.m.)
 9 BY MR. AUN:
 10 Q Mr. Britt, just a couple more questions. Do you
 11 know if there's more than one spring on this
 12 property?
 13 A I'm only aware of one.
 14 Q You're only aware of one? Is there any
 15 determination that's made to see how many springs
 16 or whether there are other springs located on the
 17 property, or when you go to the property you have
 18 knowledge of a spring by some other
 19 determination? I mean, can you give me an
 20 example of what you do to make a determination of
 21 a spring?
 22 A Well, actually, this is the first job that I can
 23 recall that we ever had a spring surface on the
 24 property. Typically, springs we discover during
 25 construction, during excavation. This one was

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1 visible.
 2 Q Okay. I want to show you a memo which came from
 3 you dated October 26, 2005, okay? This actually
 4 was marked as Exhibit 3 to Mr. Godley's
 5 deposition, so I'm not going to remark it for
 6 purposes of this deposition. But if you would,
 7 take a moment and review that, and then tell me
 8 what you understand that document to be.
 9 A This is a memo from me to Wade McGuinn
 10 documenting my visit to the site concerning the
 11 spring being altered by the construction of the
 12 storm water system and presenting a corrective
 13 action for it.
 14 Q What was the corrective action?
 15 A In my memo, I'm calling for to excavate down to
 16 the drain where the seepage is occurring, seal
 17 the pipe joint, backfill, and install either a
 18 French drain or enough stone to allow the spring
 19 to drain to the original spring head.
 20 Q Okay. And was that work performed?
 21 A I don't know if it was done exactly like that,
 22 but something was done. To my knowledge, it was
 23 corrected.
 24 Q Okay. What determination did you make to ensure
 25 that it was corrected?

1 A Best I can remember, I received a phone call
 2 saying it was fixed.
 3 Q Okay.
 4 MR. AUN: Mark that.
 5 (Exhibit No. 1 was marked for
 6 Identification.)
 7 BY MR. AUN:
 8 Q Show you a document. Take a moment. Can you
 9 tell me what that document is that's been marked
 10 as Defendant's 1?
 11 A It is a small scale drawing of the Gates Common
 12 plan showing basically the lot lines and the
 13 units, proposed units.
 14 Q Okay. Was that the plan as ultimately submitted
 15 to the County as far as number of units, or did
 16 it change from that?
 17 A This project changed a lot. I don't know if this
 18 is, was actually built. I did bring with me a
 19 current drawing so I could compare the two if
 20 you'd like me to.
 21 Q Yeah. Can I take a look at that quickly?
 22 MR. AUN: If you'll go ahead and mark this
 23 as --
 24 MR. THOMPSON: Can we go off the record?
 25 MR. AUN: Sure.

49

1 A Correct. I can provide a copy of the sewer
2 permit if you'd like.
3 Q Yes. But these documents would not provide you
4 with the authority to proceed, correct?
5 A Correct. Those documents have nothing to do with
6 the sewer.
7 Q Who did you obtain the, specifically, I know
8 you're going to say the Town of Lexington, but
9 who did you obtain specifically the permit from,
10 the sewer permit from?
11 A Town of Lexington issues an approval letter that
12 would have come from Rose Marie Nuzzo.
13 Q When you say approval letter, is it an approval
14 letter for, is it a general approval letter for
15 the entire project, or is it an approval letter
16 specifically referencing sewer?
17 A It probably was the entire project.
18 Q Okay. So, it would have been an approval letter
19 as to the entire project?
20 A Yes.
21 Q Okay.
22 A I'd have to refer to the actual letter if it
23 actually calls out sewer specifically in the
24 language, but it probably does. And I know
25 there's a fee letter that is generated that

51

1 easement to tie in to the lines, correct?
2 A It indirectly makes a statement that they will
3 accept the system, and it would be inferred that
4 it's based on the construction plans that were
5 submitted which showed the connection in the
6 easement.
7 Q So then, this is the authority that you relied
8 upon?
9 A No. That's a piece of it.
10 MR. AUN: Okay. Mark this.
11 (Exhibit No. 4 was marked for
12 identification.)
13 BY MR. AUN:
14 Q Okay. I'll show you Defendant's Exhibit 4. Take
15 a moment and look at that document, if you will.
16 A Okay.
17 Q What is that document?
18 A It is basically the same document in a different
19 format, but it is a willingness letter, the Town
20 is stating a willingness and ability to serve the
21 project. It has more of the language that DHEC
22 requires than that Exhibit 3 letter has, but it's
23 serving the same purpose.
24 Q But again, there's nothing that specifically
25 states approval to use the easement on the

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1 specifically addresses the sewer fees.
2 Q Okay. I want to show you a letter, and let me
3 know if this is the letter you're referring to.
4 A That is one of the letters.
5 Q Okay.
6 MR. AUN: Let's mark this.
7 (Exhibit No. 3 was marked for
8 identification.)
9 BY MR. THOMPSON:
10 Q Okay. This is a letter dated September 7, 2005,
11 correct?
12 A That's the correct date.
13 Q Okay. What does that letter tell you?
14 A That letter tells me that the Town of Lexington
15 has capacity to accept, transport and treat
16 effluent from the above mentioned project, which
17 is Gates Common. It states that the project has
18 26 lots estimating 7,800 gallons per day
19 effluent.
20 Q Okay. Does not approve the use of the easement
21 to tie in to any existing lines, does it?
22 A This is a, what's referred to as a willingness to
23 serve letter that DHEC requires. This is one of
24 several documents that make up the approval.
25 Q Okay. But that does not approve use of the

52

1 Espino's property for purposes of tying into
2 existing sewer lines, is there?
3 A It's an indirect approval.
4 Q Nothing that specifically states that, correct?
5 A No, but they would not have issued this letter if
6 there was a problem with the plans.
7 Q Do you know that for a fact?
8 A Yes.
9 Q Okay. And do you know whether the issue of
10 easement was brought up at any point in time with
11 any of the folks that you would have had to get
12 approval from with water and sewer?
13 A No. To my knowledge, the town had full faith
14 that anything was valid.
15 Q And they were relying on whom for that full faith
16 that the easement was valid?
17 A I have no idea.
18 Q Okay. You never reviewed the easement, did you?
19 A No.
20 (Exhibit No. 5 was marked for
21 identification.)
22 BY MR. AUN:
23 Q See if you can identify for me Defendant's
24 Exhibit 5.
25 A This is the Schedule of Fees issued by the Town

STATE OF SOUTH CAROLINA FILED IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON ELEVENTH JUDICIAL CIRCUIT
2008 APR 3 3:17 CIVIL ACTION NO.: 2005-CP-32-2712

McGuinn Construction Management Inc.,

Plaintiff,

vs.

Saul Espino and Mara Espino,

Defendants.

NOTICE OF MOTION AND
MOTION FOR SUMMARY
JUDGMENT

TO: S. JAHUE MOORE, ESQUIRE, ATTORNEY FOR PLAINTIFFS:

Please take notice that within ten (10) days of the filing of this motion or as soon as a Court can consider such motion, the Defendants will move before the presiding judge at a time and place to be determined by the Court for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for Summary Judgment based on the fact that there is no genuine issue of material fact regarding the following:

1. That the allegations of slander of title are not valid as the title to the property alleged to be owned by the Plaintiff was never slandered;
2. That the work conducted by the Plaintiff in the development and construction of the project was never tortuously interfered with, and in fact, the Plaintiff never ceased construction or progress in the development;
3. That the Plaintiff had been advised that it needed to receive a private easement to connect to any existing sewer lines on the Defendant's property, but never obtained said private easement when

it in fact connected without authority or permission from the Defendants, thereby trespassing on the Defendant's property and converting Defendant's property to its own; and

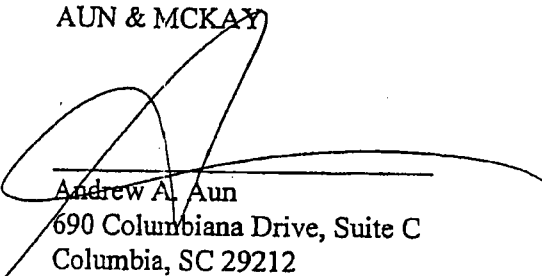
4. That the easement which serves as the basis of authority for the Plaintiff to have connected to sewer allegedly located on the Defendant's property does not allow for contiguous subdivisions to connect to any sewer, and is in fact limited in the scope to on the maintenance, repair and improvement for the sewer system of Coventry Lakes, not Gates Common Subdivision which is the project sought to receive the benefit by the Plaintiff

This motion shall be supported by memorandum of law, pleadings of record, and such other and further evidence as the Court may deem appropriate.

Based upon the foregoing, Defendants move for Summary Judgment as to all issues outlined above.

Respectfully Submitted,

AUN & MCKAY



Andrew A. Aun
690 Columbiana Drive, Suite C
Columbia, SC 29212
Telephone: (803) 744-0824
Attorneys Defendants

Date: 4/3/08
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) FILED IN THE COURT OF COMMON PLEAS

McGuinn Construction Management, Inc.) 2008 MAY 21 2 24 PM
C.A. No.: 2005-CP-32-2712

Plaintiff,

vs.

Saul Espino and Mara Espino,

Defendants.

**MOTION FOR SUMMARY
JUDGMENT ON DEFENDANTS'
COUNTERCLAIMS**

TO: DEFENDANTS, SAUL ESPINO, MARA ESPINO AND THEIR ATTORNEY,
ANDREW AUN, ESQUIRE.

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof,
or as soon thereafter as counsel can be heard, the undersigned, as counsel for Plaintiff,
McGuinn Construction Management, Inc., will move before the Court for an Order
granting Summary Judgment against the Defendant on Defendants' Second, Third,
Fourth, Sixth and Ninth Counterclaims.

Plaintiff moves for summary judgment as there is no evidence Defendants relied
on anything said by Wade McGuinn or any agent of McGuinn Construction. This
Motion is supported by the Affidavit of Wade McGuinn and testimony from the
Deposition of the Defendant, Mara Espino.

MOORE, TAYLOR & THOMAS, P.A.

BY: Barry L. Thompson, II

Barry L. Thompson, II
Attorney for the Plaintiffs
P. O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina
May 20, 2008.

ROA000152

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

FILED

IN THE COURT OF COMMON PLEAS

McGuinn Construction Management, Inc. 2008 JUN 26) 2:24 PM No.: 2005-CP-32-2712

Plaintiff,)
vs.)
Saul Espino and Mara Espino,)
Defendants.)

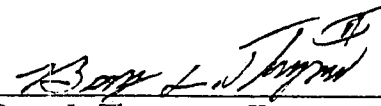
MOTION FOR SUMMARY
JUDGMENT ON DEFENDANTS'
FOURTH COUNTERCLAIM

TO: DEFENDANTS, SAUL ESPINO, MARA ESPINO AND THEIR ATTORNEY,
ANDREW AUN, ESQUIRE.

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof,
or as soon thereafter as counsel can be heard, the undersigned, as counsel for Plaintiff,
McGuinn Construction Management, Inc., will move before the Court for an Order
granting Summary Judgment against the Defendant on Defendants' Fourth Counterclaim
for negligence.

Plaintiff moves for summary judgment on the basis that Plaintiff owed no special
duty to the Defendants and is therefore not liable for negligence.

MOORE, TAYLOR & THOMAS, P.A.

BY: 

Barry L. Thompson, II
Attorney for the Plaintiffs
P. O. Box 5709
West Columbia, SC 29171
(803) 796-9160

West Columbia, South Carolina

June 24, 2008.

ROA000153

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

FILED

2008 JUL 10 P 2: 54

McGuinn Construction Management, Inc.,)
Plaintiff,)
vs.)
Saul Espino and Mara Espino,)
Defendants.)

C.A. No.: 2005-CP-32-2712

DETHA A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION**

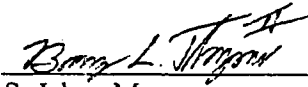
TO: DEFENDANTS, SAUL ESPINO, MARA ESPINO AND THEIR ATTORNEY, ANDREW AUN, ESQUIRE.

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof or as soon thereafter as counsel can be heard, the undersigned, as counsel for the Plaintiff, will move before the Court for reconsideration of its Order of June 16, 2008 granting partial Summary Judgment to the Defendants, which was served on Plaintiff's counsel July 1, 2008.

The grounds for this Motion are there is a genuine issue of material fact regarding the scope of the easement in this matter and the proper servient estates. South Carolina Law provides that the character of an express easement is determined by the nature of the rights and intentions of the parties creating it. Plaintiff's counsel in oral argument called the Court's attention to specific language in the easement, the ownership history of the properties, the physical layout of the sewer system, and the fact that installed sewer pipes, existing before this controversy arose, did not provide any services whatsoever to Coventry Lake Subdivision. The Court was also shown the relevant plats in this matter, which clearly indicate the easement across the Defendants' property was intended for expansion of the Town of Lexington's sewer system.

The Plaintiff's position is the easement across the Defendants' property was granted by Defendants' predecessor in interest for future expansion of the Town of Lexington's sewer system. As such, the Plaintiff, working as the Town's agent, was clearly within its rights to utilize the easements for its intended purpose. This position is well supported by evidence before this Court, and the Court erred in finding there was no genuine issue of material fact.

MOORE, TAYLOR & THOMAS, P.A.

BY: 
S. Jahue Moore
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Attorneys for the Plaintiff
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(803) 796-9160

West Columbia, South Carolina
July 10, 2008

ORIGINAL

SCANNED

JM

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
McGuinn Construction)
Management Inc.,)
Plaintiff,)
vs.)
Saul Espino and Mara Espino,)
Defendants.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2005-CP-32-2712

**PLAINTIFF'S RESPONSE TO ORDER
OF THE COURT CONCERNING STATUS**

1. Proposed Order submitted to Judge McMahon on January 19, 2010, after the hearing on the motion to reconsider;
2. Transcript from the Motion to Reconsider hearing with Judge McMahan on December 22, 2009;
3. Order issued by Judge Johnson and filed on June 16, 2008;
4. Transcript from the hearing on the summary judgment motions, countermotions and declaratory judgment heard by Judge Johnson on April 14, 2008.

Respectively submitted,

AUN AND MCKAY, P.A.

By:

ANDREW A. AUN
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Irmo, South Carolina 29063
Phone (803) 744-0824
Fax (803) 744-0830
Email: andy@aunmckaylaw.com
ATTORNEY FOR PLAINTIFF

Dated: 9/27/11
Columbia, South Carolina

ROA000156

CASE # 2005-CP-32-02712

**DOCUMENTS NOT
SCANNED
-
EXHIBITS**

ROA000157

EXHIBIT 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)
McGuinn Construction)
Management, Inc.,)
)
Plaintiff,)
)
)
vs.)
)
Saul Espino and Mara Espino,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2005-CP-32-2712

ORDER

THIS MATTER COMES BEFORE THE COURT on motion of Counsel for Plaintiff for an order altering and/or amending The Honorable James Johnson's order of June 16, 2008, pursuant to Rule 59(e). The motion seeks to overturn the order of the Court which granted the Defendants' motion for summary judgment on the Plaintiff's Declaratory Judgment action regarding the scope and nature of the easement, which is the central issue in this case and the related causes of action. Judge Johnson ruled that the easement in question was and is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision.

Further, in his order, Judge Johnson ruled that there was no authority for Gates Common Subdivision, the proposed development in question, or any other subdivision to connect to the sewer and/or drainage located on the Defendants' property. Having reached this conclusion, Defendants' countermotion for motion for summary judgment on the Plaintiff's declaratory judgment action, slander of title action and tortious interference with a contract cause of action was granted.

On July 10, 2008, the Plaintiff filed a Motion to Reconsider. The motion was heard by the court on December 22, 2009, and supporting memoranda and affidavits were submitted by the Plaintiff and the Defendants for their respective positions at the hearing. There were no affidavits filed with the Plaintiff's motion to reconsider, as required under the Rule 6 of the South Carolina Rules of Civil Procedure on either the underlying motion for summary judgment filed by the Plaintiff or the Motion to Reconsider. Further, the Plaintiff does not appear to have provided any evidentiary support from the record for its motion to reconsider outside of the affidavit submission previously filed.

Upon hearing the arguments of counsel for the Plaintiff and the Defendant, and considering the facts, affidavits, memoranda and arguments submitted by the parties, the Court denies the Plaintiff's motion for reconsideration.

I. STATEMENT OF FACTS

While the Court incorporates by reference the facts and evidentiary support for the facts outlined in Judge Johnson's order of June 16, 2008, it is important to restate some of the material facts for background purposes. In 1992 Saul and Mara Espino purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company which is part of the Coventry Lake Subdivision. (Saul Espino Dep., pp. 7-8, ll. 7-4).

McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. This subdivision backs up to the Espinos' property in Lexington. For years the property, which is now known as the Gates Common Subdivision, was unimproved. However, McGuinn applied to have the property rezoned for a patio home subdivision, and was ultimately granted the

zoning for which it had applied. Nonetheless, storm drainage, water and sewer infrastructure for the project had to be installed, and the provision of this infrastructure was designed by McGuinn to be accomplished by connecting to existing infrastructure of the Coventry Lakes Subdivision, where the Espinos owned their property. The installation of the appropriate lines would be required to run through the Espinos' property and connect to existing sewer and drainage installed in the Coventry Lake Subdivision.

The record clearly shows that it was McGuinn Construction Management's intention to install the infrastructure outlined above on the Espinos' property under an easement which purportedly grants the Town of Lexington, its successors and assigns certain rights in sewer, water lines, and drainage easements for said lines. Importantly, the language specifically provides an easement for the "maintenance of the aforesaid water and sewer lines..." (Id.) The language of the easement limits the Town of Lexington's rights to the property for the maintenance, repair and improvement of the sewer system of Coventry Lakes.

The Plaintiff asserts that it was operating under the authority of an easement, and the Town approved the connection of lines based on this easement. The facts show otherwise, and indeed the Town Engineer at the time advised McGuinn that the easement was questionable, and legal authority would be needed to proceed. (Gene Edwards Dep., p. 5, ll. 18-23 and pp. 25-26, ll. 10-14). In addition, there is no evidence that a legal opinion was ever obtained from the Town of Lexington in reference to this easement.

In his testimony, Edwards indicated that the plans submitted for approval showed that the lines and the manhole were physically located outside of the easement which

purportedly existed, so that even if it was determined that the right to connect did exist, the lines installed were outside the easement granted. (Id. pp. 22-23, ll. 22-14). Mr. Edwards, however, retired from the Town of Lexington prior to the final approval of the plans, which ultimately came from Rosemarie Nuzzo, an engineer with the Town of Lexington who had minimal qualifications at the time. (Id. pp. 23, ll. 12-22). Prior to his retirement, Gene Edwards discussed with Nuzzo the three issues of concern about the project in question – (1) runoff once developed, (2) location of how water would be connected, and (3) sewage. (Id. at p. 23, ll. 5-11). Importantly, he indicated that he had discussed the uncertainty of the easement issue relating to the sewer lines with Nuzzo, and advised her that “it was not definitive enough for me [him] to tell them to go ahead at that time.” (Id. at ll. 12-19). Edwards further indicated that he never saw or reviewed a final legal opinion as to McGuinn’s purported authority to connect to the existing sewer lines on the Espino property. (Id. at p. 25, ll. 4-9).

When asked in her review of the plans whether the Town of Lexington approved the plans which were to show the location of infrastructure before allowing connection to existing infrastructure, Nuzzo replied:

No. Because in that ... if there’s ... if the lines exist, then you, you almost have to assume there’s an easement to it. Nobody’s going to want to take care of a public sewer or a public water in there, you know, on their property. (Nuzzo Dep. P. 6, ll. 8-15).

Significantly, she indicated that the developer, in this case McGuinn, would have had to secure private easements for the installation of the lines. (Id. at 10, ll. 6-14.)

On August 11, 2005, the Plaintiff brought an action against the Defendants seeking primarily a declaratory judgment on the scope of the easement in question. Approximately two months later, and prior to the adjudication of this issue by the court,

the Plaintiff proceeded to install the sewer lines in question without obtaining a private easement from the Defendants. The Honorable James Johnson granted summary judgment to the Defendants on the Declaratory Judgment Action, and the Plaintiffs causes of action against the Defendants. Judge Johnson dismissed the Defendants' Fifth cause of action for Breach of Implied Covenant of Good Faith and Fair Dealing, but ruled that all other counterclaims were sustained as there was no proper motion before the Court on those issues.

STANDARD OF REVIEW

The Plaintiff is seeking relief from the judgment based on the contention that Judge Johnson erred in applying relevant legal standards to the determination made in reference to the easement in this case and the facts surrounding the allegations. This relief is sought through a motion for reconsideration, which is a post judgment motion and similar, if not tantamount, to an appeal of a trial court decision. In McClurg v. Deaton, 380 S.C. 563 (Ct. App. 2009), the Court of Appeals outlined the standard of review used on all post judgment motions. In *McClurg* the court held:

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *BB& T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). Thus, our standard of review limits this court to determining whether the trial court abused its discretion. *Id.* "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* at 551, 633 S.E.2d at 503.

The standard, therefore, to be used by the court in considering this motion for reconsideration is whether Judge Johnson in his ruling either (1) erred in the law in his analysis or (2) made factual conclusions not supported by the evidence. Further, South Carolina appellate courts have specifically held that "[a] party cannot use Rule

59(e) to present to the Court an issue the Party could have raised prior to the judgment but did not.” Hickman v. Hickman, 301 S.C. 455, 456 (1990) :

STANDARD APPLIED

The Plaintiff’s arguments are based on the following supporting legal and factual assertions:

1. **McGuinn Affidavit and Exhibits Not Considered**

As its only factual and evidentiary support for its legal positions on the easement at issue, the Plaintiff cites the Wade McGuinn affidavit and exhibits, which include a plat of the Espinos’ property, showing an easement. This affidavit and plat were submitted after the Plaintiff filed its motion for summary judgment.

Specifically, the affidavit and exhibits, purporting to support the Plaintiff’s motion for summary judgment, were filed on several occasions after both the filing of the motion and in fact notice of the ruling of the Court. Given the circumstances surrounding this motion to reconsider, and Judge Johnson’s untimely death, it is important to give a chronology of the important procedural facts:

- 10/2/07 – Plaintiff files its motion for summary judgment on its causes of action and to dismiss the Defendants’ Fifth Counterclaim.
- 11/2/07 – Defendants filed a Memo in Opposition to Plaintiff’s Motion for Summary Judgment
- 11/7/07 – Plaintiff files its McGuinn affidavit and supporting exhibits;
- 11/29/07 – Plaintiff re-files its McGuinn affidavit and supporting exhibits;
- 4/3/08 – Defendants file and personally serve their Motion for

Summary Judgment

- 4/14/08 – Court hears the parties’ motions
- 4/28/08 – 4/29/08 – Judge Johnson advises counsel of his ruling, and request the proposed order (See Exhibit A);
- 5/15/08 – Plaintiff re-files its McGuinn affidavit and supporting exhibits
- 6/16/08 -- Judge Johnson files his order
- 6/27/08 – Order served on all parties
- 7/10/08 – Plaintiffs Motion to Reconsider was filed
- 11/25/09 -- Judge McMahon’s ruling that sufficient record existed to proceed to motion to reconsider without necessity of a de novo hearing

It appears that while objection was raised by counsel for the Defendants at the hearing on the submission and consideration of the supporting McGuinn affidavit (Transcript, pp. 9-10, ll. 13-8), Judge Johnson accepted the affidavits under advisement, and ultimately considered the affidavits in his ruling. On page 1 of his order, he states “[u]pon hearing the arguments of counsel for the Plaintiff and the Defendant, and considering the facts, *affidavits*, memoranda and arguments submitted...” (Emphasis Added) (Johnson Order, p.1). Further, it appears that the affidavits and exhibits submitted on each of these occasions were the same, or substantially the same information. Importantly, each of the submissions appears to have included the Espino plat dated May 8, 1992, which the Plaintiff relies on heavily in its arguments.

While the contention of the Plaintiff is that Judge Johnson failed to consider the information before the court, it is clear from the affidavit submissions, arguably made untimely, that the affidavit submission was not only considered and discussed, but was submitted repeatedly to the court. The order of Judge Johnson is therefore sustained.

2. Easement By Survey/Plat

The Plaintiff's Complaint primarily seeks a declaration of rights regarding a written easement of record dated April 11, 1988. The contention in the Complaint is that the Plaintiff has rights by virtue of this easement. At no time in the complaint does the Plaintiff allege easement by prescription, implication, law, necessity or dedication. Indeed, no where in the Complaint is there any assertion that the easement was either created and/or expanded by the Espino plat, as suggested in oral argument by Plaintiff's counsel, and this complaint has never been amended. Instead, the allegations of the Complaint relating to the easement are based simply on the easement language itself. Furthermore, this is arguably outside the scope of what can be considered on the Plaintiff's motion since it was not specifically raised in the underlying hearing. However, even if we assume that the matter was properly before Judge Johnson's court, and is therefore properly before this Court on the Plaintiff's Motion to Reconsider, the Plaintiff fails to establish a basis for overturning Judge Johnson's order.

It is important to note that the parties seem to agree that an easement exists (Johnson Hearing Transcript p. 39, ll. 18-24). However, it appears that the Plaintiff intends to broaden the scope and nature of the easement by reference to the Espino

plat and other documents and circumstances outlined in its affidavit submissions.

While this seemingly “easement by implication” approach and/or cause of action is not alleged in the Plaintiff’s Complaint, and was not discussed at the summary judgment hearing based on a review of the transcript, for purposes of this motion, it is instructive to review the law in South Carolina on this issue.

In Frazier v. Smallseed, 384 S.C. 56 (Ct.App. 2009) 682 S.E.2d 8, the Court of Appeals held:

The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). “However, the determination of the extent of a grant of an easement is an action in equity.” *Id.* As such, this court may take its own view of the evidence on the latter issue. *Id.* at p. 63.

Further, “[w]hile other authorities plainly identify easements by prior use, necessity, and prescription as three types of easements, South Carolina case law has not clearly distinguished between these types of easements. See 25 Am.Jur.2d *Easements and Licenses* 22, 30, 39 (generally describing easements by prior use, necessity, and prescription).” *Boyd v. Bellsouth Telephone*, 369 S.C. 410, 416 (2006). Easements by implication have been recognized in South Carolina, and as the Court in *Boyd* held:

The intent of the parties, as shown by all the facts and circumstances under which a conveyance was made, may give rise to an easement by implication. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 158, 263 S.E.2d 378, 381 (1980). Whatever easements are created by implication must be determined as of the time of the severance of the ownership of the tracts involved. *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 652, 197 S.E.2d 914, 920 (1973). Easements may be implied by necessity, by prior use, from map or boundary references, or from a general plan. 25 Am.Jur.2d *Easements and Licenses* 20-22, 30 (describing the different types of implied easements); Restatement (Third) Property: Servitudes §§ 2.11-15 (2000 & Supp. 2006) (same) *Id.* at 416-417.

One of the most important and instructive cases on easement law and the analysis

required in determining issues relating to easements is Harbour v. South Carolina, 377 S.C. 86 (2008). In Harbour, the Supreme Court was considering the existence of an implied easement and the State Of South Carolina asserted that the easement implied greater and more extensive rights than determined by the Trial Court. The Supreme Court disagreed. In its opinion, it stated the following:

The Department argues that the trial court erred in holding that the Department's easement over Inlet Harbour Drive is limited to environmental purposes associated with maintaining the navigability of Murrells Inlet. We disagree.

An easement is a right of use over another's property. BLACK'S LAW DICTIONARY 457 (5th ed. 1979). Easements can arise by both express creation and by implication. Implied easements are based upon the theory that whenever one conveys property, he intends to convey whatever is necessary for the property's use and enjoyment. 17A Am.Jur. *Easements* § 37 (1957). The purpose of an implied easement is to give effect to the intentions of the parties to a transaction, and because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements are not favored. *Id.*; see also 28A C.J.S. *Easements* § 61 (1996).

The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am.Jur.2d *Easements and Licenses* § 19 (2004); 28A C.J.S. § 62. Courts have, over time, developed various presumptions regarding the creation of implied easements in certain circumstances. One such presumption arises when an owner subdivides his land and has the land platted into lots and streets. This Court has recognized the general rule that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat. See, e.g., *Blue Ridge Realty Co.*, 247 S.C. at 118, 145 S.E.2d at 924-25. *Id.* at 91-92.

The Court went on to say that the “that the intentions of the parties to the transaction are the overriding focus when examining implied easements.” (Citing *McAllister v. Smiley*, 301 S.C. 10, 16, 389 S.E.2d 857, 862 (1990). *Id.* at 92. Therefore, as indicated above, the charge to Judge Johnson was not to determine whether an easement existed, but the scope and extent of the easement in question. As stated

previously, the Court may determine the scope of the easement by an examination of the facts and circumstances in "its own view" which is a very deferential evidentiary approach ("any evidence standard") Frazier v. Smallseed, 384 S.C. 56, 63. As such, Judge Johnson considered the language of the easement, and as indicated, the McGuinn affidavit and submissions. In Lighthouse v. South Island, 355 S.C. 529 (Ct. App. 2003), a case cited by Plaintiff's counsel at hearing, the Court held as follows:

The general rule is that the character of an express easement is determined by the nature of the right and intention of the parties creating it." *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct.App. 1994). To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the "[c]lear and unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken, and understood in their plain, ordinary, and popular sense." *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). Moreover, we must effectuate the parties' intention "unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). Id at 534.

Judge Johnson considered all the evidence, but in determining the intention of the parties, the language of the easement, as indicated in *Lighthouse*, was and is key to determining intention of parties. (See Also Smith v. Commissioners of Public Works, 312 S.C. 460, 441 S.E.2d 331 (Ct.App. 1994) for the notion that whether the grant in written instrument creates easement and the type of easement created are to be determined by ascertaining intention of parties as gathered from language of instrument; grant should be construed so as to carry out that intention). He therefore considered the evidence before him in making his determination as to the scope of the easement in question in accordance with established case law to ascertain the intention of the parties. (See Also Murrells Inlet v. Ward, 378 S.C. 225 (Ct.App. 2008) highlighting the distinction between determining the existence of an easement vs. the scope of an

easement). Plaintiff's counsel offered no testimony or supporting affidavit from a surveyor, engineer or developer that indicated the delineations on the Espino plat described "spurs" which were to be used for expansion of the use of the Coventry Lake infrastructure. Further, the only language on the Espino plat referring to the easement at all is "15 foot sanitary sewer easement as copied from reference plat" and as to the drainage easement the plat stated only "20 foot drainage easement." (See Espino Plat, McGuinn Submission). On page 11 of the transcript, Plaintiff's counsel indicates the following:

These easements show utility easements, sewer and water easements that are sticking out to places that at the time were sticking out in the middle of the woods, sticking out to no where. There are, for a lack of better words, spur lines, little spurs that join into the Coventry subdivision. They are designed to be tack on spots where you take the sewer system to one area and you join it to the sewer system of another area. (Johnson Hearing Transcript, p. 11, ll. 12-19).

There does not appear to be any supporting evidentiary testimony or documentation to allow the Plaintiff's counsel to make these conclusions.

Plaintiff also seemingly argues that the Espino plat, by virtue of the limited reference and/or description of the sewer and drainage easement, in someway altered or changed the scope of the easement in question, broadening its scope of use for the Plaintiff's conduct. Essentially, the Plaintiff argues that the Defendants' plat created greater rights for the Plaintiff as a successor and/or assign to the Town of Lexington. This was not specifically raised and/or argued at the Johnson hearing, and is not found in the transcript, and therefore, under Hickman v. Hickman, 301 S.C. 455 (1990), it is not subject to reconsideration. However, it is important to note even if we assume that this matter was properly before the court, the Courts have held that alterations of easements must be agreed to by the parties. In Goodwin v. Johnson, 357 S.C. 49, 55 (Ct. App.

2003), a case dealing with a physical relocation of an easement rather than, as here, the scope and extent of use of an easement, the Court of Appeals, citing Soderberg v. Weisel, 687 A.2d 839 (Pa.Super. 1997), indicated that:

Prescriptive easements are . . . quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest

[t]he court further expounded that "alterations of easements expressly granted will be interpreted under contract law principles; permission to alter must be intended by words or meaning of grant." Id. (citation omitted). The court found prescriptive easements, because they are not fixed by agreement among the parties, should be handled differently than express easements. Id. We agree with this reasoning and conclude the same is true with easements created by necessity. Id.

Here, there is an express easement, and the Court was charged with determining the scope and extent of this express easement. For the express easement to be altered or expanded, even if this issue had been properly before the Johnson Court, more was needed than was offered by the Plaintiff to evidence that the easement had been altered to allow the Town and the Plaintiff to connect sewer and drainage lines on the Defendants' property. The express easement the proper focal point for the Court. As the Court of Appeals ruled in Binkley v. Rabon Creek Watershed Conser., 348 S.C. 58, 67 (Ct. App. 2001)

The scope of an easement is an equitable matter in which a reviewing court may take its own view of a preponderance of the evidence. The language of an easement determines its extent. "Clear and unambiguous language in grants of easements must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." We must first decide if the language used by the grant here is plain and unambiguous and, if so, what does that language mean. Id.

A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." Id. at 71.

The order is therefore sustained, and the Plaintiff's motion is denied on this basis as well.

3. McGuinn As Town Of Lexington's Agent

While it is unclear from the Plaintiff's Complaint whether agency as to the Town of Lexington's rights to the easement exists for the Plaintiff, if we assume that agency is properly framed, Judge Johnson's order cites evidentiary support for his ruling in this regard as well. As he indicates in his order, he cited testimony from Town of Lexington Engineers when he reached the following factual conclusion:

That the Plaintiff had been advised that it needed to receive a private easement to connect to any existing sewer lines on the Defendant's property, but never obtained said private easement when it in fact connected without authority or permission from the Defendants, thereby trespassing on the Defendant's property and converting Defendant's property to its own; (Johnson Order, p. 7-8).

A review of the transcript and submission by the Plaintiff cites no evidence or testimony indicating that the Town had authorized the connection of the lines without the acquisition of a private easement. Indeed, the Plaintiff's own affidavit, which was considered by Judge Johnson in his ruling, cites a September 7, 2005 letter from the Town of Lexington stating that it had the willingness and capacity to serve the Gates Common Community with water and sewer, conditioned on "Town acceptance of deed and easements." It is clear, even in evidence offered by the Plaintiffs in oral argument and brief, that the Town of Lexington never believed it had the authority to utilize the lines in question without proper easements, and in fact, whether they could be used at all for any subdivision outside of Coventry Lakes. Any claim of agency in this regard is questionable given the testimony offered and considered by Judge Johnson that the Town of Lexington was requiring private easements in order to connect. Wade v. Berkeley County, 330 S.C. 311 (Ct.App. 1998) (Cited for the proposition that the agency must be in furtherance of

the principal's business).

4, **Public Policy Interest In Development**

Plaintiff's counsel also indicated that it was in the public's best interest to allow for the installation of the sewer and drainage lines. However, this public policy argument cannot supplant the law, and the law is clear that property rights cannot be encumbered or restricted unless it is the intention of the parties to do so. As the Court in *Harbour* stated, because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements *are not favored*. *Id.*; see also 28A C.J.S. *Easements* § 61 (1996) (Emphasis Added) *Harbour* at 91-92. For this reason, Judge Johnson's ruling was in accordance with the legal standards set down on easement cases, and is sustained.

5. **Summary Judgment Argument**

The Plaintiff argues that the Court should not have granted summary judgment in the Declaratory Judgment action. The Plaintiff contends that the summary judgment standard requires that the declaratory judgment action be based on additional evidence.

The case cited by Plaintiff's counsel is instructive in this regard and similar as in facts and application as well. In *Lighthouse v. South Island*, 355 S.C. 529 (Ct. App. 2003), the Court of Appeals held:

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "[T]he determination of the extent of a grant of an easement is an action in equity. Thus, this Court may take its own view of the evidence. . . ." *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997) (internal citation omitted). *Id.* at 532.

The Court considered the evidence in “its own view” and in a light most favorable to the Plaintiff as to the Defendants’ countermotion for summary judgment. The primary issue before the court was not the existence of an easement, which the Plaintiff’s legal theories seem to support, but rather the scope and extent of the easement in question. The best evidence available to the court in this regard was that which would help determine the intention of the parties – the easement, the plat and relevant testimony. The approach which has been consistently held to be appropriate in easement determinations is to consider the clear and unambiguous language first to ascertain the intention of the parties. The issues raised by Plaintiff, therefore, were not genuine issues of material fact which were in dispute. The parties (1) agree an easement exists, (2) that the language outlines the scope of the easement and that (3) the Espino plat describes and shows the easement. All of these material facts were considered, and are not in dispute. The Court notes the inconsistency of the Plaintiff’s contention that the declaratory judgment matter cannot be resolved by summary judgment in the face of having been the first party to file summary judgment this issue.

While not the role of this court based on the Plaintiff’s motion, it is also informative to look at the context in which the easement was granted. This easement was granted in 1988, when the Gates Common Property was unimproved, and the Plaintiff was not yet involved in its development. Even if we ignore the express grant easement, and consider only the context, it is difficult to see why Coventry Associates, Inc., the grantor of the easement in question, would have intended to allow the Town of Lexington rights to the infrastructure for anything other than to support Coventry Lakes

Subdivision. For the reasons outlined above, the Court sustains Judge Johnson's ruling and denies the Plaintiff's motion for reconsideration.

As indicated above, for the Plaintiff to receive post judgment relief, it must establish that the Court (1) erred in the law in his analysis or (2) made factual conclusions not supported by the evidence. This is not the case here. Further, it appears that some arguments raised by Plaintiff's counsel were not properly part of the record in the summary judgment motions hearing, and therefore, are not now available for reconsideration. Those matters are the assertion of an easement by implication. Nonetheless, even if allowed to be considered, the Court holds that Judge Johnson's ruling is sustained.

Based on the foregoing **IT IS HEREBY ORDERED, THAT:**

The Court **DENIES** the Plaintiff's Motion for Reconsideration.

AND IT IS SO ORDERED.

**THE HONORABLE KNOX MCMAHON
PRESIDING JUDGE**

Date: _____, 2010

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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

COURT OF COMMON PLEAS

Civil Action Numbers: 2005-CP-32-2712

2008-CP-32-4192

McGuinn Construction Management, Inc.,

Plaintiff,

v.

Saul Espino and Mara Espino,

Defendants.

DEFENDANTS/THRID PARTY
PLAINTIFFS' MEMORANDUM
IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
RECONSIDERATION

Saul Espino and Mara Espino,

Plaintiffs,

v.

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

Defendants.

THIS MATTER COMES BEFORE THE COURT on motion of Counsel for Plaintiff for an order altering and/or amending The Honorable James Johnson's order of June 16, 2008, pursuant to Rule 59(e). The motion seeks to overturn the order of the Court which granted the Defendants' motion for summary judgment on the Plaintiff's Declaratory Judgment action regarding the scope and nature of the easement, which is the central issue in this case and the related causes of action. Judge Johnson ruled that the easement in question was and is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision.

Further, in his order, Judge Johnson ruled that there was no authority for Gates Common Subdivision, the proposed development in question, or any other subdivision to connect to the sewer and/or drainage located on the Defendants' property. Having reached this conclusion, Defendants' countermotion for motion for summary judgment on the Plaintiff's declaratory judgment action, slander of title action and tortious interference with a contract cause of action was granted.

On July 10, 2008, the Plaintiff filed a Motion to Reconsider. This motion is scheduled to be heard by the court on October 7, 2013. Extensive submissions have been previously filed by Counsel for the Espinos, including the proposed order from Judge McMahon's consideration of the Motion to Reconsider before recusal and the transcripts from both the underlying hearing and the motion to reconsider by Judge McMahon. At no time, however, *at the time of the filing* of its original Motion for Summary Judgment or this Motion to Reconsider did McGuinn file any affidavits in support, as required under the Rule 6 of the South Carolina Rules of Civil Procedure. Further, the Plaintiff does not appear to have provided any evidentiary support from the record for its motion to reconsider outside of the affidavit submission previously filed in violation of the SCRP 6 after the original summary judgment filing, some 30 days after the filing of the Summary Judgment Motion which Judge Johnson considered.

I. STATEMENT OF FACTS

While the Defendants/Third Party Plaintiffs incorporate by reference the facts and evidentiary support for the facts outlined in Judge Johnson's order of June 16, 2008, it is important to restate some of the material facts for background purposes. In 1992 Saul and Mara Espino purchased property located at 108 Coventry Court in

Lexington, South Carolina from the Mungo Company which is part of the Coventry Lake Subdivision. (Saul Espino Dep., pp. 7-8, ll. 7-4).

McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. This subdivision backs up to the Espinos' property in Lexington. For years the property, which is now known as the Gates Common Subdivision, was unimproved. However, McGuinn applied to have the property rezoned for a patio home subdivision, and was ultimately granted the zoning for which it had applied. Nonetheless, storm drainage, water and sewer infrastructure for the project had to be installed, and the provision of this infrastructure was designed by McGuinn to be accomplished by connecting to existing infrastructure of the Coventry Lakes Subdivision, where the Espinos owned their property. The installation of the appropriate lines would be required to run through the Espinos' property and connect to existing sewer and drainage installed in the Coventry Lake Subdivision.

The record clearly shows that it was McGuinn Construction Management's intention to install the infrastructure outlined above on the Espinos' property under an easement which purportedly grants the Town of Lexington, its successors and assigns certain rights in sewer, water lines, and drainage easements for said lines. Importantly, the language specifically provides an easement for the "maintenance of the aforesaid water and sewer lines..." (Id.) The language of the easement limits the Town of Lexington's rights to the property for the maintenance, repair and improvement of the sewer system of Coventry Lakes.

The Plaintiff asserts that it was operating under the authority of an easement, and

the Town approved the connection of lines based on this easement. The facts show otherwise, and indeed the Town Engineer at the time advised McGuinn that the easement was questionable, and legal authority would be needed to proceed. (Gene Edwards Dep., p. 5, ll. 18-23 and pp. 25-26, ll. 10-14). In addition, there is no evidence that a legal opinion was ever obtained from the Town of Lexington in reference to this easement.

In his testimony, Edwards indicated that the plans submitted for approval showed that the lines and the manhole were physically located outside of the easement which purportedly existed, so that even if it was determined that the right to connect did exist, the lines installed were outside the easement granted. (Id. pp. 22-23, ll. 22-14). Mr. Edwards, however, retired from the Town of Lexington prior to the final approval of the plans, which ultimately came from Rosemarie Nuzzo, an engineer with the Town of Lexington who had minimal qualifications at the time. (Id. pp. 23, ll. 12-22). Prior to his retirement, Gene Edwards discussed with Nuzzo the three issues of concern about the project in question – (1) runoff once developed, (2) location of how water would be connected, and (3) sewage. (Id. at p. 23, ll. 5-11). Importantly, he indicated that he had discussed the uncertainty of the easement issue relating to the sewer lines with Nuzzo, and advised her that “it was not definitive enough for me [him] to tell them to go ahead at that time.” (Id. at ll. 12-19). Edwards further indicated that he never saw or reviewed a final legal opinion as to McGuinn’s purported authority to connect to the existing sewer lines on the Espino property. (Id. at p. 25, ll. 4-9).

When asked in her review of the plans whether the Town of Lexington approved the plans which were to show the location of infrastructure before allowing connection to existing infrastructure, Nuzzo replied:

No. Because in that ... if there's ... if the lines exist, then you, you almost have to assume there's an easement to it. Nobody's going to want to take care of a public sewer or a public water in there, you know, on their property. (Nuzzo Dep. P. 6, ll. 8-15).

Significantly, she indicated that the developer, in this case McGuinn, would have had to secure private easements for the installation of the lines. (Id. at 10, ll. 6-14.)

On August 11, 2005, the Plaintiff brought an action against the Defendants seeking primarily a declaratory judgment on the scope of the easement in question. Approximately two months later, and prior to the adjudication of this issue by the court, the Plaintiff proceeded to install the sewer lines in question without obtaining a private easement from the Defendants.

The Honorable James Johnson granted summary judgment to the Defendants on the Declaratory Judgment Action, and the Plaintiffs causes of action against the Defendants. Judge Johnson dismissed the Defendants' Fifth cause of action for Breach of Implied Covenant of Good Faith and Fair Dealing, but ruled that all other counterclaims were sustained as there was no proper motion before the Court on those issues.

II. PLAINTIFF'S MOTION FOR RECONSIDERATION

On July 10, 2008, Plaintiff filed its motion for reconsideration with the court. Upon information and belief, Plaintiff never served Judge Johnson's office or the Chief Administrative Judge with a copy of the motion for reconsideration as required under Rule 59(g) of the South Carolina Rules of Civil Procedure to perfect the right to file a motion for reconsideration. The Plaintiff outlines essentially two bases for the motion to reconsider:

1. That the scope of the easement should have been determined by a broader review of the "nature" of the easement including ownership

history on the property, the physical layout of the sewer system other information; and

2. That the easement was meant to provide the Town of Lexington to provide expanded sewer and drainage services to other communities in the future.

In support of its contention, the Plaintiff offered an extensive affidavit with exhibits seemingly attempting to establish that taking all of the documents and testimony of the affidavit in totality would allow the court to reach a decision that the easement was meant to be used as the Plaintiff eventually used it. The court disagreed. Plaintiff filed its motion to reconsider, and the Court is now asked to determine whether Judge Johnson, now deceased, properly ruled in this case

III. STANDARD OF REVIEW

The Plaintiff is seeking relief from the judgment based on the contention that Judge Johnson erred in applying relevant legal standards to the determination made in reference to the easement in this case and the facts surrounding the allegations.

This relief is sought through a motion for reconsideration, which is a post judgment motion and similar, if not tantamount, to an appeal of a trial court decision. In

McClurg v. Deaton, 380 S.C. 563 (Ct. App. 2009), the Court of Appeals outlined the standard of review used on all post judgment motions. In *McClurg* the court held:

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *BB& T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). Thus, our standard of review limits this court to determining whether the trial court abused its discretion. *Id.* "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* at 551, 633 S.E.2d at 503.

The standard, therefore, to be used by the court in considering this motion for reconsideration is whether Judge Johnson in his ruling either (1) erred in the law in his analysis or (2) made factual conclusions not supported by the evidence. Further, South Carolina appellate courts have specifically held that “[a] party cannot use Rule 59(e) to present to the Court an issue the Party could have raised prior to the judgment but did not.” Hickman v. Hickman, 301 S.C. 455, 456 (1990), and prior to his self-imposed recusal from the action, Judge McMahon agreed that with this approach by the Court. (See p. 21, McMahon Motion To Reconsider Transcript)¹

IV. STANDARD OF REVIEW APPLIED

The Plaintiff’s arguments are based on the following supporting legal and factual assertions:

1. McGuinn Affidavit and Exhibits Not Considered

As its only factual and evidentiary support for its legal positions on the easement at issue, the Plaintiff cites the Wade McGuinn affidavit and exhibits, which include a plat of the Espinos’ property, showing an easement. This affidavit and plat were submitted after the Plaintiff filed its motion for summary judgment. Specifically, the affidavit and exhibits, purporting to support the Plaintiff’s motion for summary judgment, were filed on several occasions after both the filing of the motion and in fact notice of the ruling of the Court. Given the circumstances surrounding this motion to reconsider, and Judge Johnson’s untimely death, it is

¹ Mr. Aun: ... “At the end of the day, Judge, a 59(e) motion is to reconsider those items that were raised under the underlying case.”

The Court: “I agree with you in that regard, Mr. Aun.” (McMahon Transcript, p. 21, ll. 1-6)

important to give a chronology of the important procedural facts:

- 10/2/07 – Plaintiff files its motion for summary judgment on its causes of action and to dismiss the Defendants’ Fifth Counterclaim.
- 11/2/07 – Defendants filed a Memo in Opposition to Plaintiff’s Motion for Summary Judgment
- 11/7/07 – Plaintiff files its McGuinn affidavit and supporting exhibits;
- 11/29/07 – Plaintiff re-files its McGuinn affidavit and supporting exhibits;
- 4/3/08 – Defendants file and personally serve their Motion for Summary Judgment
- 4/14/08 – Court hears the parties’ motions
- 4/28/08 – 4/29/08 – Judge Johnson advises counsel of his ruling, and request the proposed order;
- 5/15/08 – Plaintiff re-files its McGuinn affidavit and supporting exhibits
- 6/16/08 – Judge Johnson files his order
- 6/27/08 – Order served on all parties
- 7/1/08 – Plaintiff’s counsel acknowledged receiving service of order from Judge Johnson
- 7/10/08 – Plaintiffs Motion to Reconsider was filed. No evidence that this Motion was ever served on Judge Johnson.

It appears that while objection was raised by counsel for the Defendants at the hearing on the submission and consideration of the supporting McGuinn affidavit

(Transcript, pp. 9-10, ll. 13-8), Judge Johnson accepted the affidavits under advisement, and ultimately considered the affidavits in his ruling. On page 1 of his order, he states “[u]pon hearing the arguments of counsel for the Plaintiff and the Defendant, and considering the facts, *affidavits*, memoranda and arguments submitted...” (Emphasis Added) (Johnson Order, p.1). Further, it appears that the affidavits and exhibits submitted on each of these occasions were the same, or substantially the same information. Importantly, each of the submissions appears to have included the Espino plat dated May 8, 1992, on which the Plaintiff relies heavily in its arguments.

While the contention of the Plaintiff is that Judge Johnson failed to consider the information before the court, it is clear from the affidavit submissions, arguably made untimely, was not only considered and discussed, but was submitted repeatedly to the court. The order of Judge Johnson should therefore be sustained on this basis.

2. **Easement By Survey/Plat Dedication**

The Plaintiff's Complaint primarily seeks a declaration of rights regarding a written easement of record dated April 11, 1988. The contention in the Complaint is that the Plaintiff has rights by virtue of this easement. At no time in the complaint does the Plaintiff allege easement by prescription, implication, law, necessity or dedication. Indeed, no where in the Complaint is there any assertion that the easement was either created and/or expanded by the Espino plat, as suggested in oral argument by Plaintiff's counsel, and this complaint has never been amended. Instead, the allegations of the Complaint relating to the easement are based simply on the easement language itself. Furthermore, this is arguably outside the scope of

what can be considered on the Plaintiff's motion since it was not specifically raised in the underlying hearing. However, even if we assume that the matter was properly before Judge Johnson's court, and is therefore properly before this Court on the Plaintiff's Motion to Reconsider, the Plaintiff fails to establish a basis for overturning Judge Johnson's order.

It is important to note that the parties seem to agree that an easement exists (Johnson Hearing Transcript p. 39, ll. 18-24). However, it appears that the Plaintiff intends to broaden the scope and nature of the easement by reference to the Espino plat and other documents and circumstances outlined in its affidavit submissions. While this seemingly "easement by implication" approach and/or cause of action is not alleged in the Plaintiff's Complaint, and was not discussed at the summary judgment hearing based on a review of the transcript, for purposes of this motion, it is instructive to review the law in South Carolina on this issue.

In Frazier v. Smallseed, 384 S.C. 56 (Ct.App. 2009) 682 S.E.2d 8, the Court of Appeals held:

The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). "However, the determination of the extent of a grant of an easement is an action in equity." *Id.* As such, this court may take its own view of the evidence on the latter issue. *Id.* at p. 63.

Further, "[w]hile other authorities plainly identify easements by prior use, necessity, and prescription as three types of easements, South Carolina case law has not clearly distinguished between these types of easements. See 25 Am.Jur.2d *Easements and Licenses* 22, 30, 39 (generally describing easements by prior use, necessity, and

prescription).” Boyd v. Bellsouth Telephone, 369 S.C. 410, 416 (2006). Easements by implication have been recognized in South Carolina, and as the Court in Boyd held:

The intent of the parties, as shown by all the facts and circumstances under which a conveyance was made, may give rise to an easement by implication. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 158, 263 S.E.2d 378, 381 (1980). Whatever easements are created by implication must be determined as of the time of the severance of the ownership of the tracts involved. *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 652, 197 S.E.2d 914, 920 (1973). Easements may be implied by necessity, by prior use, from map or boundary references, or from a general plan. 25 Am.Jur.2d *Easements and Licenses* 20-22, 30 (describing the different types of implied easements); Restatement (Third) Property: Servitudes §§ 2.11-15 (2000 & Supp. 2006) (same) Id at 416-417.

One of the most important and instructive cases on easement law and the analysis required in determining issues relating to easements is Harbour v. South Carolina, 377 S.C. 86 (2008). In Harbour, the Supreme Court was considering the existence of an implied easement and the State Of South Carolina asserted that the easement implied greater and more extensive rights than determined by the Trial Court. The Supreme Court disagreed. In its opinion, it stated the following:

The Department argues that the trial court erred in holding that the Department's easement over Inlet Harbour Drive is limited to environmental purposes associated with maintaining the navigability of Murrells Inlet. We disagree.

An easement is a right of use over another's property. BLACK'S LAW DICTIONARY 457 (5th ed. 1979). Easements can arise by both express creation and by implication. Implied easements are based upon the theory that whenever one conveys property, he intends to convey whatever is necessary for the property's use and enjoyment. 17A Am.Jur. *Easements* § 37 (1957). The purpose of an implied easement is to give effect to the intentions of the parties to a transaction, and because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements are not favored. *Id.*; see also 28A C.J.S. *Easements* § 61 (1996). [Emphasis Added]

The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am.Jur.2d *Easements and Licenses* § 19 (2004); 28A

C.J.S. § 62. Courts have, over time, developed various presumptions regarding the creation of implied easements in certain circumstances. One such presumption arises when an owner subdivides his land and has the land platted into lots and streets. This Court has recognized the general rule that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat. *See, e.g., Blue Ridge Realty Co.*, 247 S.C. at 118, 145 S.E.2d at 924-25. Id at 91-92.

The Court went on to say that the “that the intentions of the parties to the transaction are the overriding focus when examining implied easements.” (Citing *McAllister v. Smiley*, 301 S.C. 10, 16, 389 S.E.2d 857, 862 (1990). Id at 92. Therefore, as indicated above, the charge to Judge Johnson was not to determine whether an easement existed, but the scope and extent of the easement in question. As stated previously, the Court may determine the scope of the easement by an examination of the facts and circumstances in “its own view” which is a very deferential evidentiary approach (“any evidence standard”) *Frazier v. Smallseed*, 384 S.C. 56, 63. As such, Judge Johnson considered the language of the easement, and as indicated, the McGuinn affidavit and submissions. In *Lighthouse v. South Island*, 355 S.C. 529 (Ct. App. 2003), a case cited by Plaintiff’s counsel at hearing, the Court held as follows:

The general rule is that the character of an express easement is determined by the nature of the right and intention of the parties creating it.” *Smith v. Comm’rs of Pub. Works of City of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct.App. 1994). To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the “[c]lear and unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken, and understood in their plain, ordinary, and popular sense.” *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). Moreover, we must effectuate the parties’ intention “unless that intention contravenes some well-settled rule of law or public policy.” *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). Id at 534.

Judge Johnson considered all the evidence, but in determining the intention of the

parties, the language of the easement, as indicated in *Lighthouse*, was and is key to determining intention of parties. (See Also Smith v. Commissioners of Public Works, 312 S.C. 460, 441 S.E.2d 331 (Ct.App. 1994) for the notion that whether the grant in written instrument creates easement and the type of easement created are to be determined by ascertaining intention of parties as gathered from language of instrument; grant should be construed so as to carry out that intention). He therefore considered the evidence before him in making his determination as to the scope of the easement in question in accordance with established case law to ascertain the intention of the parties. (See Also Murrells Inlet v. Ward, 378 S.C. 225 (Ct.App. 2008) highlighting the distinction between determining the existence of an easement vs. the scope of an easement). Plaintiff's counsel offers no testimony or supporting affidavit from a surveyor, engineer or developer that indicated the delineations on the Espino plat described "spurs" which were to be used for expansion of the use of the Coventry Lake infrastructure. Further, the only language on the Espino plat referring to the easement at all is "15 foot sanitary sewer easement as copied from reference plat" and as to the drainage easement the plat stated only "20 foot drainage easement." (See Espino Plat, McGuinn Submission). On page 11 of the Judge Johnson transcript, Plaintiff's counsel indicates the following:

These easements show utility easements, sewer and water easements that are sticking out to places that at the time were sticking out in the middle of the woods, sticking out to no where. There are, for a lack of better words, spur lines, little spurs that join into the Coventry subdivision. They are designed to be tack on spots where you take the sewer system to one area and you join it to the sewer system of another area. (Johnson Hearing Transcript, p. 11, ll. 12-19).

There does not appear to be any supporting evidentiary testimony or documentation to allow the Plaintiff's counsel to make these conclusions.

Plaintiff also seemingly argues that the Espino plat, by virtue of the limited reference and/or description of the sewer and drainage easement, in someway altered or changed the scope of the express, written easement in question, broadening its scope of use for the Plaintiff's conduct. Essentially, the Plaintiff argues that the Defendants' plat created greater rights for the Plaintiff as a successor and/or assign to the Town of Lexington. This was not specifically raised and/or argued at the Johnson hearing, and is not found in the transcript, and therefore, under Hickman v. Hickman, 301 S.C. 455 (1990), it is not subject to reconsideration. However, it is important to note even if we assume that this matter was properly before the court, the Courts have held that alterations of easements must be agreed to by the parties. In Goodwin v. Johnson, 357 S.C. 49, 55 (Ct. App. 2003), a case dealing with a physical relocation of an easement rather than, as here, the scope and extent of use of an easement, the Court of Appeals, citing Soderberg v. Weisel, 687 A.2d 839 (Pa.Super. 1997), indicated that:

Prescriptive easements are . . . quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest

[t]he court further expounded that "alterations of easements expressly granted will be interpreted under contract law principles; permission to alter must be intended by words or meaning of grant." Id. (citation omitted). The court found prescriptive easements, because they are not fixed by agreement among the parties, should be handled differently than express easements. Id. We agree with this reasoning and conclude the same is true with easements created by necessity. Id.

Here, there is an express easement, and the Court was charged with determining the scope and extent of this express easement. For the express easement to be altered or expanded, even if this issue had been properly before the Johnson Court, more was needed than was offered by the Plaintiff to evidence that the easement had been altered to

allow the Town and the Plaintiff to connect sewer and drainage lines on the Defendants' property. The express easement is the proper focal point for the Court. As the Court of Appeals ruled in Binkley v. Rabon Creek Watershed Conser., 348 S.C. 58, 67 (Ct. App. 2001)

The scope of an easement is an equitable matter in which a reviewing court may take its own view of a preponderance of the evidence. The language of an easement determines its extent. "Clear and unambiguous language in grants of easements must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." We must first decide if the language used by the grant here is plain and unambiguous and, if so, what does that language mean. Id.

A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." Id. at 71.

Judge Johnson's order should therefore be sustained, and the Plaintiff's motion be denied on this basis as well.

3. **McGuinn As Town Of Lexington's Agent**

While it is unclear from the Plaintiff's Complaint whether agency as to the Town of Lexington's rights to the easement exists for the Plaintiff, if we assume that agency is properly framed, Judge Johnson's order cites evidentiary support for his ruling in this regard as well. As he indicates in his order, he cited testimony from Town of Lexington Engineers when he reached the following factual conclusion:

That the Plaintiff had been advised that it needed to receive a private easement to connect to any existing sewer lines on the Defendant's property, but never obtained said private easement when it in fact connected without authority or permission from the Defendants, thereby trespassing on the Defendant's property and converting Defendant's property to its own; (Johnson Order, p. 7-8).

A review of the transcript and submission by the Plaintiff cites no evidence or testimony indicating that the Town had authorized the connection of the lines

without the acquisition of a private easement. Indeed, the Plaintiff's own affidavit, which was considered by Judge Johnson in his ruling, cites a September 7, 2005 letter from the Town of Lexington stating that it had the willingness and capacity to serve the Gates Common Community with water and sewer, conditioned on "Town acceptance of deed and easements." It is clear, even in evidence offered by the Plaintiffs in oral argument and brief, that the Town of Lexington never believed it had the authority to utilize the lines in question without proper easements, and in fact, whether they could be used at all for any subdivision outside of Coventry Lakes. Any claim of agency in this regard is questionable given the testimony offered and considered by Judge Johnson that the Town of Lexington was requiring private easements in order to connect. Wade v. Berkeley County, 330 S.C. 311 (Ct.App. 1998) (Cited for the proposition that the agency must be in furtherance of the principal's business).

4, **Public Policy Interest In Development**

Plaintiff's counsel also seemingly argues that it is in the public's best interest to allow for the installation of the sewer and drainage lines. However, this public policy argument cannot supplant the law, and the law is clear that property rights cannot be encumbered or restricted unless it is the intention of the parties to do so. As the Court in *Harbour* stated, because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements *are not favored*. *Id.*; see also 28A C.J.S. *Easements* § 61 (1996) (Emphasis Added) Harbour at 91-92. For this reason, Judge Johnson's ruling was in accordance with the legal standards set down on easement cases, and should be

sustained.

5. **Summary Judgment Argument**

The Plaintiff argues that the Court should not have granted summary judgment in the Declaratory Judgment action. The Plaintiff contends that the summary judgment standard requires that the declaratory judgment action be based on additional evidence.

The case cited by Plaintiff's counsel is instructive in this regard and similar as in facts and application as well. In Lighthouse v. South Island, 355 S.C. 529 (Ct. App. 2003), the Court of Appeals held:

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "[T]he determination of the extent of a grant of an easement is an action in equity. Thus, this Court may take its own view of the evidence. . . ." *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997) (internal citation omitted). *Id.* at 532.

The Court considered the evidence in "its own view" and in a light most favorable to the Plaintiff as to the Defendants' counter-motion for summary judgment. The primary issue before the court was not the existence of an easement, which the Plaintiff's legal theories seem to support, but rather the scope and extent of the easement in question. The best evidence available to the court in this regard was that which would help determine the intention of the parties – the easement, the plat and relevant testimony. The approach which has been consistently held to be appropriate in easement determinations is to consider the clear and unambiguous language first to ascertain the intention of the parties. The issues raised by Plaintiff, therefore, were not genuine issues of material fact which were in dispute. The parties (1) agree an easement exists, (2) that the language outlines

the scope of the easement and that (3) the Espino plat describes and shows the easement. All of these material facts were considered, and are not in dispute. Indeed there seems to be an inconsistency of the Plaintiff's contention that the declaratory judgment matter cannot be resolved by summary judgment in the face of having been the first party to file summary judgment this issue.

While not the role of this court based on the Plaintiff's motion, it is also informative to look at the context in which the easement was granted. This easement was granted in 1988, when the Gates Common Property was unimproved, and the Plaintiff was not yet involved in its development. Even if we ignore the express grant easement, and consider only the context, it is difficult to see why Coventry Associates, Inc., the grantor of the easement in question, would have intended to allow the Town of Lexington rights to the infrastructure for anything other than to support Coventry Lakes Subdivision. For the reasons outlined above, the Court should sustain Judge Johnson's ruling and deny the Plaintiff's motion for reconsideration.

V. CONCLUSION

As indicated above, for the Plaintiff to receive post judgment relief, it must establish that the Court (1) erred in the law in his analysis or (2) made factual conclusions not supported by the evidence. This is not the case here. Further, it appears that some arguments raised by Plaintiff's counsel were not properly part of the record in the summary judgment motions hearing, and therefore, are not now available for reconsideration. Those matters are the assertion of an easement by implication. Nonetheless, even if allowed to be considered, the Court should sustain Judge Johnson's ruling and deny the Plaintiff's motion to reconsider.

The order signed and filed by Judge Johnson in this case is replete with evidence supporting the factual conclusions made and clearly outlines the law on how easements are to be construed based on established case law precedence. The plain and unambiguous language of the easement itself, coupled with the undisputed testimony of Gene Edwards, Town of Lexington Engineer at the time, indicating that the easement did not provide proper authority for the Plaintiff to do what it eventually did with the Defendants' property, was sufficient factual basis for the Court to conclude as it did factually that the Plaintiff had no authority to do what it did with the property. However, if there was still question, the Plaintiff's own affidavit, which was considered by Judge Johnson in his ruling, cites a September 7, 2005 letter from the Town of Lexington stating that it had the willingness and capacity to serve the Gates Common Community with water and sewer, conditioned on "Town acceptance of deed and easements." It is clear, even in evidence offered by the Plaintiffs in oral argument and brief, that the Town of Lexington never believed it had the authority to utilize the lines in question without proper easements, and in fact, whether they could be used at all for any subdivision outside of Coventry Lakes. Clearly, the Court did not reach factual conclusions unsupported by evidence. The evidentiary support offered by the Plaintiff at the hearing, and in brief consisted of a self-serving affidavit from Wade McGuinn with exhibits which require the Judge to presume what is not in evidence – that of what the "lay-out and/or design of the sewer system" meant. A noble attempt, but utterly lacking factual substance or support in testimony from any Town official or other witness other than the Plaintiff.

Secondly, the Plaintiff would have the court believe that Judge Johnson's ruling was inconsistent with established case law regarding construction of easements. The court ruled consistently that easements are to be construed in accordance with traditional rules of construction, and where the language is clear and unambiguous, as is the case here, the intention of the parties is to be effectuated. This was the Court's ruling, and the language of the easement indicates this certainty of intention. There was no error in the courts legal basis for its ruling.

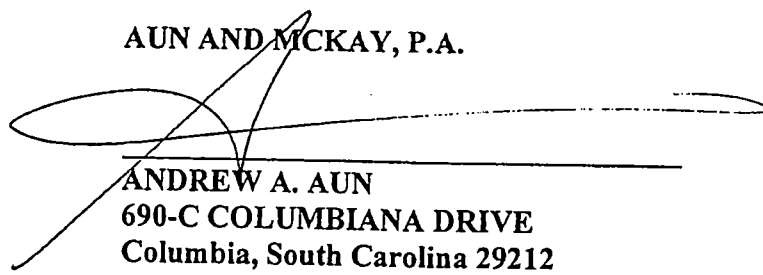
As Judge Johnson indicated in the hearing, the determination of the scope and nature of the easement is at the "heart" of all the issues in the case. He made that determination based on a review of the plain and unambiguous language of the easement, and there was no abuse of discretion as contemplated by the rule in allowing the court to reconsider the issues previously raised. . See Smith v. Commissioners of Public Works, 312 S.C. 460, 441 S.E.2d 331 (Ct.App. 1994) (whether grant in written instrument creates easement and type of easement created are to be determined by ascertaining intention of parties as gathered from language of instrument; grant should be construed so as to carry out that intention). It is clear from the ruling that Judge Johnson was convinced that:

1. The easement in question applied only to Coventry Lakes Subdivision, and no other subdivisions;
2. That the easement in question allowed only for rights of way and easements needed to "maintain" the existing lines serving the Coventry Lakes Subdivision, and not for the improvement of said lines;

3. That the language of the easement itself, being plain and unambiguous, provided sufficient basis for Judge Johnson to rule as he did without having to ascertain the intention of the parties, and that this approach was consistent with established case law in construing easements; and
4. That as a result of conduct of the Plaintiff in installing lines before the adjudication of its right to do so, the Plaintiff has now provided a sufficient basis for the trespass, conversion and other actions actions alleged.

For the foregoing reasons, the Plaintiffs Motion For Reconsideration should be denied.

AUN AND MCKAY, P.A.



ANDREW A. AUN
690-C COLUMBIANA DRIVE
Columbia, South Carolina 29212
Phone (803) 744-0824
Fax (803) 744-0830
Email: andy@aunmckaylaw.com
ATTORNEY FOR DEFENDANTS/
THIRD PARTY PLAINTIFFS

Dated: 10/7/13
Columbia, South Carolina

Lexington approved the use of this drainage easement by McGuinn Construction Management, Inc.

My company planned to use the easement to connect a housing development behind Defendants' property to the existing Town of Lexington sewer system.

Defendants have unlawfully interfered with my Company's attempted development of its property and have interfered with McGuinn Construction's contractual rights. Defendants' actions have resulted in a delay of construction and a significant and unnecessary expenditure of large sums of money for engineers and other experts. The actions of the Defendants have caused my company to lose a significant amount of income and profit and have obstructed my Company from taking advantage of significant business opportunities.

The permissive use of a Town's sewer easements is the standard and common manner of expanding a sewer system.

The use of and work planned to occur in the easement is within the scope of the easement, as the operation and maintenance of a sewer system. This was confirmed in a legal opinion obtained by my company and attached as Exhibit C.

The allegations made in Plaintiff's Complaint for slander of title are true and entirely legitimate.

My Company only intended to utilize the existing sewer easement and did not intend to gain further ownership of Defendants' property. We only wanted the use we are allowed under the Town of Lexington's easement.

I have not made false or misleading statements of representations to the Defendants.

2005 BUSINESS LICENSE

TOWN OF LEXINGTON
STATE OF SOUTH CAROLINA

No: 5433

The below named concern has been licensed to do business in Lexington, subject to the provisions of all ordinances of the town:

*For the period beginning on January 1, 2005 and ending on December 31, 2005.
(Exceptions apply to Class 8)*

Issued: October 3, 2005

Contractor Out of Town-Update

MCGUINN CONSTRUCTION
JOB:279 DREHER ST.

LEXINGTON SC 29072



Finance Director

This license must be conspicuously posted at the above address; change of location from the stated address requires a new application.

This license may be revoked if the licensee, or any person doing business hereunder, so conducts such business in violation of any provision of the Town of Lexington Municipal Code.

**A.L.T.A. COMMITMENT
CHICAGO TITLE INSURANCE COMPANY
Issued by: Sunrise Title Agency, 224 W. Butler Street, Lexington, SC 29072
SCHEDULE A**

Office File Number MCGUINN-4902

Commitment Number

Effective Date

Loan Amount \$238,500.00

12/28/04

MCGUINN-4902

at 09:00 AM

Owners Amount \$265,650.00

1. Policy or Policies to be issued:
ALTA LOAN POLICY, Form (10-17-92)
Proposed Insured:

RBC Centura Bank, its successors and/or assigns as their respective interests may appear.

ALTA OWNER'S POLICY, Form ALTA Own. Policy (10/17/92)
Proposed Insured:

McGuinn Construction Management, Inc.

2. The estate or interest in the land described or referred to in this Commitment and covered herein is fee simple, and title thereto is at the effective date hereof vested in:

Estate of Eva Mae Gates

3. The Land is described as follows:

See Exhibit A Attached

Note: This Commitment consists of insert pages labeled in Schedule A, Schedule B-Section 1, and Schedule B-Section 2. This Commitment is of no force and effect unless all schedules are included, along with any Rider pages incorporated by reference in the insert pages.

**ALTA COMMITMENT
CHICAGO TITLE INSURANCE COMPANY
SCHEDULE B - Section 1**

Commitment Number MCGUINN-4902

Requirements

The following are the requirements to be complied with:

1. Instrument(s) creating the estate or interest to be insured must be approved, executed and filed for record, to wit:
 - (a) Deed from Estate of Eva Mae Gates to McGuinn Construction Management, Inc., conveying subject property set forth under Schedule A, Item 3.
 - (b) Mortgage from McGuinn Construction Management, Inc., to RBC Centura Bank covering subject property set forth under Schedule A, Item 3.
2. Payment of the full consideration to, or for the account of, the grantors or mortgagors.
3. Payment of all taxes, charges, assessments, levied and assessed against subject premises, which are due and payable.
4. Satisfactory evidence should be had that improvements and/or repairs or alterations thereto are completed; that contractor, subcontractor, labor and materialmen are all paid.
5. Seller/Mortgagor Affidavit (Form 3049) must be executed and returned to the Company.
6. Disclosures required by the South Carolina Department of Insurance are to be made in writing on CTIC Form 2781 (Rev. 4/90) and copy thereof returned to the Company.
7. Recordation of signed Court Order to be filed in Lexington County Probate Court ordering the insured property to be sold.

The following ALTA endorsements will be attached to the final policy: 8-1

ROA000203

**ALTA COMMITMENT
CHICAGO TITLE INSURANCE COMPANY
SCHEDULE B - Section 2**

Commitment Number MCGUINN-4902

Exceptions

Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company.

- A. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereto but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
- B. Any owner's policy issued pursuant hereto will contain under Schedule B the standard exceptions set forth on the inside cover. Any loan policy will also contain under Schedule B thereof, the standard exceptions set forth on the inside cover of this commitment relating to the owner's policy.
- C. Standard Exceptions 2 and 3 may be removed from the policy when a satisfactory survey and inspection of the premises is made.
- D. Any lien, or right to a lien, for services, labor or materials heretofore or hereafter furnished, imposed by law and not shown in the public records. This exception may be deleted or altered when the Company receives its Form Number [3049/3053] completely executed.
- E. Rights or claims of parties in possession not shown by the public records. This exception may be deleted or altered when the Company receives its Form Number 3049 completely executed.
- F. Any conflicts, discrepancies, encroachments, access, easements, or shortages in area and boundaries that a current, accurate survey would show. This exception may be deleted upon examination by the Company of a current survey.

Special Exceptions

- 1. Taxes and assessments for the year 2005, and subsequent years, which are a lien but are not yet due and payable.
- 2. Exception is taken to a .23 acre tract as shown in Lexington County ROD Plat Book 225 page 883. This tract is part of the public right-of-way and mortgagor may use this tract for ingress and egress only. No structures of any kind may be erected on this tract and its use by the public cannot be interfered with in any manner.
- 3. Taxes for the year 2004 are a lien and are now due and payable (to be paid at closing).
- 4. Roll back taxes are a lien but are not yet due and payable.

NOTE: On loan policies, junior and subordinate matters, if any, will not be reflected in Schedule B.

Loan Number: 2790-016884

EXHIBIT "A"

All that certain piece, parcel or lot of land, situate lying and being in the County of Lexington, State of South Carolina, being shown and delineated as 7.11 Acre as shown on a plat prepared for Lonnie H. Gates prepared by C.D. Caughman, RS, dated 3-19-62 recorded in Plat Book 225 Page 883; said lot having such boundaries and dimensions as shown on said plat be all measurements a little more or less.

2003081016 FILED, RECORDED, INDEXED
12/04/2003 14:55:09:827
Rec Fee: \$18.00 St Fee: \$195.00
Co Fee: \$62.50 Pages: 2
Lexington County REC Debra H. Gunter
DEED bk: Pg 8876:24

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

DEED

KNOW ALL MEN BY THESE PRESENTS, that **REGINALD C. BARKER** and **REGINALD W. BARKER**, (hereinafter called "Grantor"), in the State aforesaid, for and in consideration of the sum of Seventy-Five Thousand and 00/100 (\$75,000.00) Dollars to the Grantor in hand paid at and before the sealing of these presents, by **PHOENIX RESOURCES, LLC**, (hereinafter called "Grantees"), in the State aforesaid, (the receipt of which is hereby acknowledged) has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto Grantee, its successors and assigns:

All that certain piece, parcel or lot of land, together with the improvements thereon, if any, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Lot 17, Block B, on a preliminary plat of Coventry Lake Subdivision by Whitworth & Associates, Inc., dated June 23, 1986, last revised September 26, 1986 and recorded in the Office of the RMC for Lexington County in Plat Book 210G at Page 149, and being more particularly shown on a plat prepared for Timothy M. Swofford and Sally S. Swofford by Belter & Associates, Inc., dated July 24, 1990; reference being made to the said plat which is incorporated therein by reference for a more complete and accurate description; all measurements being a little more or less.

DERIVATION: This being the identical property conveyed to Reginald C. Barker and Reginald W. Barker by deed of Sally M. Shuford f/k/a Sally S. Swofford dated September 30, 2003 and recorded in the Office of the Register of Deeds for Lexington County on September 30, 2003 in Book 8698 at page 170.

Grantees' Address: 384 Wildlife Road, Lexington, SC 29072

TMS No.: 004341-01-017

This conveyance is made subject to easements, conditions and restrictions of record and otherwise affecting the property.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the premises before mentioned unto the Grantee, and its, successors and assigns forever.

AND the said Grantors do hereby bind themselves and their heirs, successors, executors, and administrators to warrant and forever defend all and singular the said

Lexington County, Debra H. Gunter

Audited by Art Guerry

ROA000206

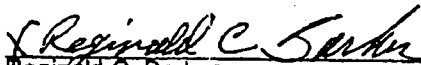
This Document is not to scale

premises unto the said Grantee, its successors and assigns, against themselves and their heirs, successors and assigns, and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

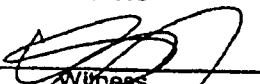
WITNESS my hand and seal this 3rd day of ^{NOV-5}~~October~~, 2003.

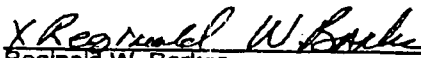
Signed, Sealed and Delivered
in the presence of:

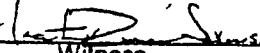

Witness

X  (L.S.)
Reginald C. Barker

X 
Witness


Witness

X  (L.S.)
Reginald W. Barker

X 
Witness

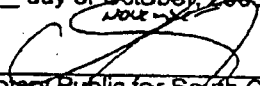
STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

} PROBATE

PERSONALLY APPEARED the undersigned witness and made oath that s/he saw the within named Reginald W. Barker and Reginald C. Barker sign, seal, and as their act and deed, deliver the within Deed and that s/he with the other witness subscribed above, witnessed the execution thereof.

SWORN TO before me this
3rd day of ^{NOV-5}~~October~~, 2003.



 (L.S.)
Notary Public for South Carolina
My Commission expires: _____

WARR & BENT

137.50
68.75

BK2147PG211

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

TITLE TO REAL ESTATE
92-240 MAY 8 1 31 PM '92

JOANNE B. TRIBLE
FMC
LEXINGTON COUNTY

KNOW ALL MEN BY THESE PRESENTS THAT

STONEHEDGE CONSTRUCTION
COMPANY, INC.

055231

in the state aforesaid for and in consideration of the sum of
SIXTY TWO THOUSAND FIVE HUNDRED DOLLARS (\$62,500.00) in hand paid
at and before the sealing of these presents by

SAUL J. ESPINO
AND MARA Y. ESPINO

STATE OF SOUTH CAROLINA
DOCUMENTARY
TAX
137.50
SOUTH CAROLINA TAX COMMISSION

In the state aforesaid, the receipt of which is hereby
acknowledged, has granted, bargained, sold and released and by
these presents do grant, bargain, sell and release unto Saul J.
Espino and Mara Y. Espino for and during their joint lives and upon
the death of either of them, then to the survivor of them, his or
her heirs and assigns, forever, in fee simple, together with every
contingent remainder and right of reversion, the following
described property:

All that certain piece, parcel or lot of land, with the
improvements thereon, if any, situate, lying and being in the
County of Lexington, State of South Carolina, being shown and
delineated as LOT 16 BLOCK B, on a preliminary
plat of Coventry Lake Subdivision by Whitworth & Associates, Inc.
dated June 23, 1986, last revised September 26, 1986 and recorded
in the Office of the R.M.C. for Lexington County in Plat Book 210G
Page 149, and being more particularly shown on a plat prepared for
Saul J. Espino and Mara Y. Espino by Belter & Associates, Inc.
dated April 27, 1992; reference being made to the said plat which
is incorporated herein by reference for a more complete and

FOR PLAT, SEE PLAT BK 210G, PAGE 216

18927

BK2147PG212

accurate description; all measurements being a little more or less.

Subject to easements and restrictions of record and those which an inspection of the property would disclose.

This being the property heretofore conveyed to the Grantor by Deed recorded in Lexington County ^{Record} Book 2147, at Page 205.

TMS NO: 4341-1-16

Grantee's Mailing Address: 108 Coventry Court
Lexington, S.C. 29072

Together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in any wise incident or appertaining.

TO HAVE AND TO HOLD, subject to easements and restrictions of record, all and singular the said premises before mentioned unto the said Saul J. Espino and Mara Y. Espino for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, and the Grantor does hereby bind itself and its successors, executors, and administrators to warrant and forever defend, subject to easements and restrictions of record, all and singular the said premises unto the said Saul J. Espino and Mara Y. Espino for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, against itself and its successors and assigns, and against any person whomsoever lawfully claiming or to claim the same, or any part thereof.

BK2147PG213

LIMITED WARRANTY: THE NOW LIMITED WARRANTY ISSUED TO THE GRANTEE(S) IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF, NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. GRANTEE(S) AGREE(S) TO ACCEPT THE SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. THE PROVISIONS OF THE CONTRACT ENTERED INTO BY GRANTOR AND GRANTEE(S) WITH RESPECT TO THE REAL PROPERTY HEREIN CONVEYED SHALL SURVIVE CLOSING AND SHALL NOT MERGE IN THIS DEED.

DEC MYG to DEC

IN WITNESS WHEREOF Stonehedge Construction Company, Inc. has caused these presents to be executed in its name by its duly authorized officer as designated below, and its corporate seal to be hereto affixed this 7 day of May, 1992.

HCC

STONEHEDGE CONSTRUCTION COMPANY, INC.

BY:

Sharon Bogard

ITS:

BOOK 252 PAGE 716

N/F HERITAGE HILLS SUBDIVISION

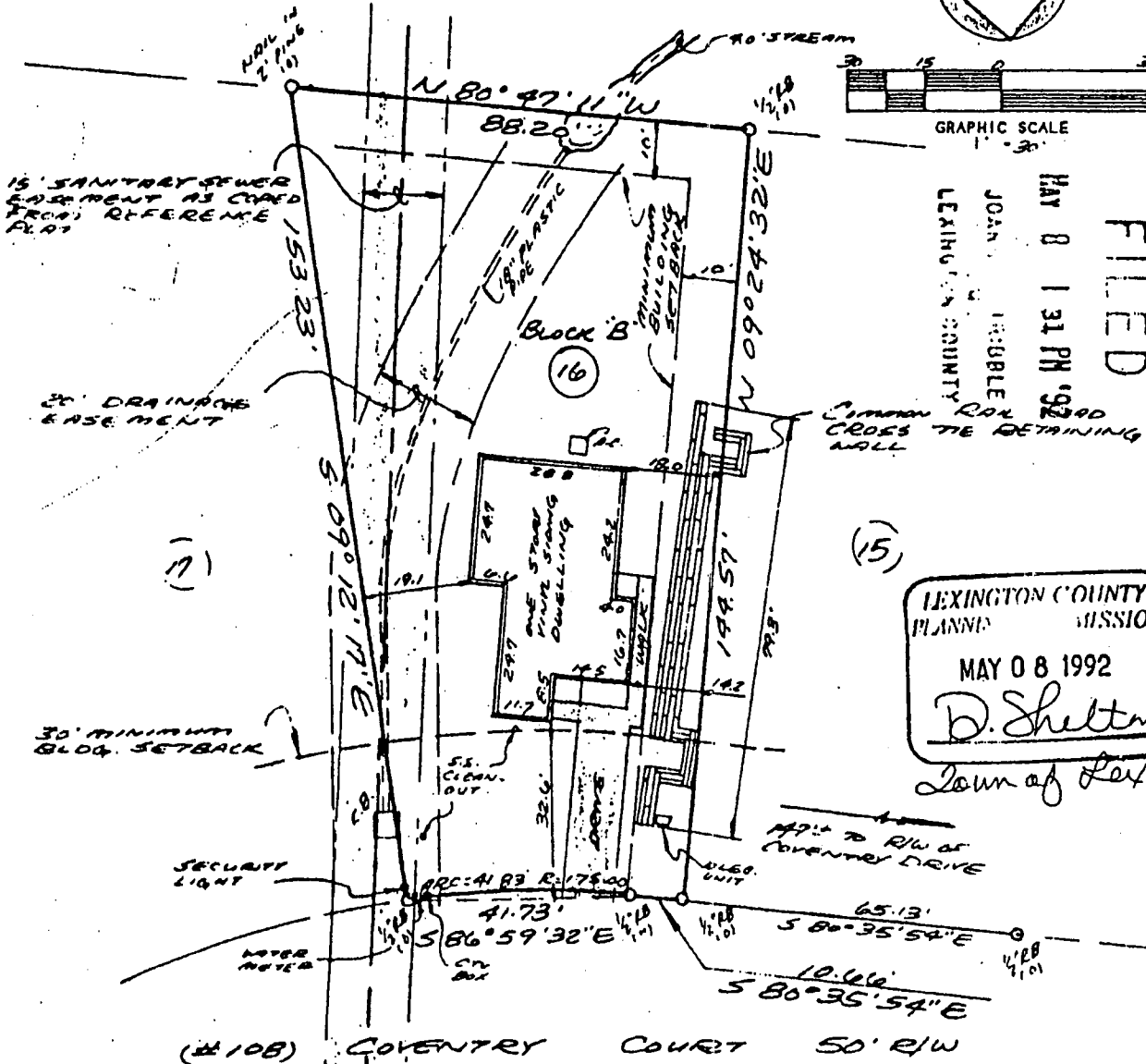


GRAPHIC SCALE
1" = 30'

FILED
MAY 8 1 31 PM '92
JOHN H. HUBBLE
LEXINGTON COUNTY

LEXINGTON COUNTY
PLANNING COMMISSION
MAY 08 1992
D. Shelton
Chairman of Lex.

144 FRIARGATE BOULEVARD
IRMO SOUTH CAROLINA 29063
PROFESSIONAL LAND SURVEYORS
BELTER & ASSOCIATES, INC.



LOT AREA: 10.316 SQ. FT. PLAT PREPARED FOR DATE: APRIL 27, 1992

SAUL J. ESPINO & MARIA Y. ESPINO

SHOWN AS LOT 16 BLOCK B
ON PLAT OF COVENTRY LAKE
BY HWITNORTH & ASSOC., INC. DATED 06-22-80
REVISED 09-16-86 AND RECORDED IN THE OFFICE OF RMC
FOR LEXINGTON COUNTY IN PLAT BOOK 2106 PAGE 149

F.I.R.M. MAP DATED: 18928

THE UNDERSIGNED STATES THAT TO THE BEST OF HIS KNOWLEDGE AND BELIEF
THE LOCATION OF THE SUBJECT PROPERTY HAS BEEN CHECKED AGAINST
F.I.R.M./FEMA MAPS OR OTHER FLOOD DATA AND FINISHED FLOOR (IS NOT)
OR PROPERTY (IS NOT) LOCATED IN A SPECIAL FLOOD HAZARD AREA.

CITY: NEAR LEXINGTON, S.C.
COUNTY: LEXINGTON

I HEREBY STATE THE SURVEY AS SHOWN WAS MADE IN
ACCORDANCE WITH THE REQUIREMENTS OF MINIMUM
STANDARDS FOR LAND SURVEYING IN SOUTH CAROLINA,
AND MEETS OR EXCEEDS A CLASS B SURVEY; ALSO
AFTER INSPECTION OF PROPERTY THERE ARE NO VISUAL
OR APPARENT ENCROACHMENTS OR EASEMENTS OTHER
THAN SHOWN ON MASTER PLAT REFERENCED.

MELVIN J. BELTER P.L.S. #3777

204090

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
IN THE MATTER OF EVA MAE)
SHEALY GATES)

IN THE PROBATE COURT
THE ELEVENTH JUDICIAL CIRCUIT
C/A #: 2002-ES-32-00820

ORDER

This matter came before me pursuant to a Petition to Sell the real estate in the Estate of Eva Gates, because there was not enough personal property to pay ongoing bills and there were ongoing expenses related to the sell of the real estate.

Present at the hearing were the Personal Representative and her attorney, W. Lisa Brink. Also present were Homer Gates, Sharon Wise, Steven Eargle and Kenny Eargle and their attorney Ray Hamm and Miriam Carter.

Prior to the commencement of the hearing, the parties announced their agreement, it is as follows:

1. The parties agree that the real estate will be sold at public sale with thirty (30) days notice to be given to the heirs of the sale date. The parties also agree that the Personal Representative shall hire an agent to sell the property. The parties acknowledge that there will be fees and costs involved in the sale of the real estate which shall be paid out of the proceeds of sale. The parties further agree that the minimum bid shall be \$245,000.00 and that anyone, either heir or otherwise, may bid at the public sale.
2. With respect to the personal property, the parties agree that it shall be divided by agreement at a date to be set among the heirs. If agreement as to division cannot be reached, before the sale of the real estate, then the personal property shall be sold at the same time that the real estate is sold at public auction. This time to disburse the personal property may be extended by agreement of the heirs.
3. The parties agree that all of the proceeds of sale shall be held in escrow and not disbursed to any heirs until the end of civil litigation pending in the Court of Common Pleas for Lexington County between the heirs Homer Gates, Sharon Wise, Kenny Eargle and Steven Eargle against Kathleen G. Smith and Miriam G. Carter. The parties do agree, however, that legal fees concerning the estate may be paid out of the proceeds as well as Mr. Homer Gates may be reimbursed upon showing a receipt for payment of same for real estate taxes that were paid on the property in 2004. Costs and expenses of sale shall also be paid from the proceeds.

I find that the agreement is fair and equitable and that the parties agree to same.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that paragraphs one through three as stated above be made an Order of this Court and incorporated herein as those stated verbatim and

IT IS SO ORDERED!


Julie Thompson, Probate Judge

December 29, 2004

FILED

DEC 29 2004

PROBATE JUDGE
LEXINGTON COUNTY, SC

“Exhibit B”

MAYOR
T. Randall Hattaway

MAYOR PRO-TEM
Harold Leggett-Tyndall

COUNCIL
Catherine Carpenter-Planning
Darryl Frazier
Kathy Minton
Ted Ashmole
Richard D. Thompson

TOWN OF LEXINGTON

111 Maiden Lane



P. 001/001

TOWN ADMINISTRATOR
L.C. GREENE

MAILING ADDRESS
Post Office Box 397
Lexington, SC 29071

INFORMATION
803-359-4164
www.lexsc.com

FAX
803-359-4360

September 7, 2005

DHEC Bureau of Water
Construction Permitting Section
2600 Bull Street
Columbia, SC 29201

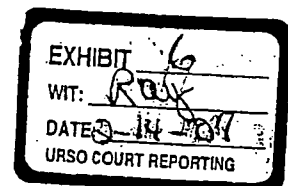
RE: Gates Commons
Water & Sewer

The Town has the willingness and ability to serve this project with water and sewer services. Upon completion of the project in accordance with Town of Lexington specifications and regulations, Town acceptance of deeds and easements, and DHEC final approval, the Town will own, operate, and maintain the water and sewer systems.

Sincerely,

Rosemarie Nuzzo
Engineering & Planning Department

Winner - 2003 Municipal Association of South Carolina Public Safety Program of the Year
 Winner - 2003 National League of Cities Model Cities Program



ROA000216

MAYOR
T. Randall Hulsace

TOWN OF LEXINGTON

111 Maiden Lane



MAYOR PRO-TEM
Hazel Leggett-Tyndall

TOWN ADMINISTRATOR
James W. Duckett, Jr.

MAILING ADDRESS
Post Office Box 397
Lexington, SC 29071

COUNCIL
Cassance Caracior Fleming
Daisy Frazier
Kathy Munro
Ted Stumholts
Richard D. Thompson

INFORMATION
803-359-4154
www.lexsc.gov

FAX
803-359-4460

March 29, 2006

DHEC Central Midlands EQC
PO Box 156
State Park, SC 29147

RE: Gates Commons Subdivision
Wastewater Const. Permit No. 31,810-WW
Water Const. Permit No. 31,810-W

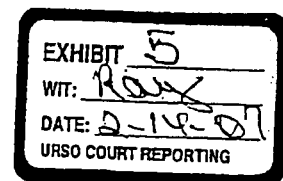
The sewer and water systems for the referenced project has been approved based on the as-built drawings dated March 02, 2006. These plans were prepared by HB Engineering, Inc. The Town has inspected the systems and they meet our regulations.

The Town will therefore accept the sewer and water systems for ownership, maintenance, and operation contingent upon SCDHEC approval. The 24-hour emergency number is (803) 359-2434.

Should you have any questions, please call me at 951-4646.

Sincerely,

Rosemarie Nuzzo
Utilities Department



Winner - 2003 Municipal Association of South Carolina Public Safety Program of the Year
 Winner - 2003 National League of Cities Model Cities Program

ROA000217

MAYOR
T. Randall Hutto

MAYOR PRO-TEM
Hazel Leggett-Tyrell

COUNCIL
Courtney Carver: Fleming
Daisy Frazier
Kathy Henson
Ted Stambolin
Richard D. Thompson

TOWN OF LEXINGTON

111 Mallard Lane



TOWN ADMINISTRATOR
Janet W. Duckert, Jr.

MAILING ADDRESS
P.O. Box 397
Lexington, SC 29071

INFORMATION
803-319-4164
www.lexsc.gov

FAX
803-319-4450

TAX COVER SHEET

UTILITIES DEPARTMENT

PHONE 803/359-2434

FAX 803/951-4648

Attention: Mike Ray
From: Donna Lee
Date: 3/20/06 Number of Pages: 1 Including cover sheet

Comments:

See flow test results from hydrant in Gates
Commons

Date - 3/17/06

Time - 2:20 pm

Static - 80

Residual - 42

GPM - 1090

Tested by Dan Crouch & Billy Hunter

Winner - 2003 Municipal Association of South Carolina Public Safety Program of the Year
Winner - 2003 National League of Cities Model Cities Program

TOWN OF LEXINGTON

BUILDING PERMIT

NO. 060093

NOTICE TO OWNER OR POSSESSOR
PURSUANT TO S.C. CODE SEC 15-3-640 YOU
HAVE THE RIGHT TO CONTRACT FOR GUARANTEE
OF THE STRUCTURE BEING FREE FROM DEFECTIVE
OR UNSAFE CONDITIONS BEYOND THIRTEEN YEARS
AFTER SUBSTANTIAL COMPLETION OF THE
IMPROVEMENT FOR WHICH THE PERMIT IS ISSUED

DESCRIPTION GRADING

LOCATION 279 DREHER ST

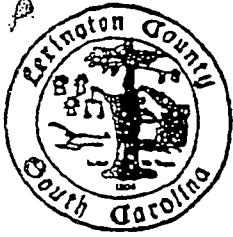
APPLICANT
OWNER M. GUINN

DATE 09/23/2005

ISSUED BY *C. N. Thomas*
Building Official

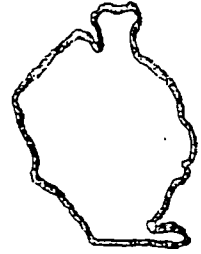
EXPIRES
SIX (6) MONTHS AFTER THE DATE OF
ISSUANCE UNLESS THE AUTHORIZED
WORK HAS BEEN COMMENCED, OR, AT
ANY TIME AFTER THE WORK HAS BEEN
COMMENCED, AND THE WORK HAS BEEN
ABANDONED FOR A PERIOD OF ONE (1)
YEAR

ROA000219



COUNTY OF LEXINGTON

PUBLIC WORKS DEPARTMENT
STORMWATER MANAGEMENT



August 31, 2005

Ms. Rosemarie Nuzzo
Town of Lexington
P.O. Box 397
Lexington, SC 29071

Reference: Gates Common Subdivision /SD/EA
Project Name/Type

004333-01-006
TMS #

Dear Ms. Nuzzo:

This letter is to advise the Town of Lexington, that Lexington County has reviewed the Engineering Plans and Specifications for the above referenced project, and hereby recommends for approval the Stormwater Management and Sediment Control. Any revisions of the Engineering Design should be submitted to the Department of Public Works Stormwater Management before any construction starts. This approval shall be valid for a period of one (1) year from the above date. If construction has not commenced within this period, a resubmission will be required.

The following are additions or corrections that will be considered as a part of the original Plans and Specifications. The Project Engineer will be responsible for adding these conditions to the original plans and/or specifications and make all necessary notification to the contractors involved.

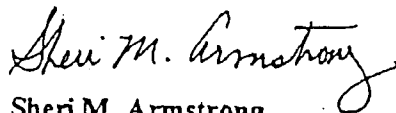
1. An encroachment permit shall be obtained prior to construction from the South Carolina Department of Highways and Public Transportation.
2. Sediment and erosion control measures depicted on these plans shall be installed prior to initiation of proposed grading/construction. These measures shall be adequately maintained through the development process. Additional measures, as required, shall be installed if it becomes evident that erosion is not being adequately contained and sedimentation of adjacent properties or streets is imminent.
3. Prior to Final Inspection by the Town of Lexington, or Lexington County, as its representative, all disturbed areas not covered by pavement or buildings must have an established stand of permanent vegetation, or an established stand of temporary vegetation and a letter from a professional seeding contractor guaranteeing an adequate stand of a permanent type of vegetation.

4. Lexington County approves on August 31, 2005, Engineering Advice for the Town of Lexington. Documentation has been provided showing a easement for the off-site proposed construction activity. The owner is aware if any work is performed outside of the proclaimed easement that a construction easement will be required of the property owner.

These recommendations are based on the Engineering Advice Agreement between Lexington County and the Town of Lexington and the standards adopted by Lexington County for Stormwater Management and Sediment Control.

IN ADDITION TO ANY REQUIREMENT BY LEXINGTON COUNTY, ALL LAND DISTURBING ACTIVITIES WITHIN THE MUNICIPAL LIMITS OF TOWN OF LEXINGTON MUST MEET THE REQUIREMENTS OF THE STORMWATER MANAGEMENT AND SEDIEMNT CONTROL REGULATIONS ADMINISTERED BY THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL (SCDHEC).

Respectfully,



Sheri M. Armstrong
Environmental Coordinator

cc: Mr. Wade McGuinn, Gates Common, LLC
Mr. Mike Ray, HB Engineering
Clarence Blakley, SCDOT
Kim Forston, SCDHEC
Charlie Crosby, Corp of Eng.
Gary Adkins, Lexington County
Inspector, Lexington County
Engineering File
Subdivision File

ROA000221

BOARD:
Elizabeth M. Hagood
Chairman

Edwin H. Cooper, III
Vice Chairman

L. Michael Blackmon
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

BOARD:

Carl L. Brazell

Steven G. Kisner

Paul C. Aughton, III

Coleman F. Buckhouse, MD

September 23, 2005

WADE MCGUINN
GATES COMMONS LLC
140 WHITEFORD WAY
LEXINGTON SC 29072

RE: File/Permit No. 32-05-04-01
GATES COMMONS, Lexington County

Dear Mr. McGuinn:

The site plan for the referenced project is approved. The total disturbed area for this site is 6 acres. In accordance with the Stormwater Construction NPDES General Permit SCR100000 (SC NPDES GP), this approval, along with the \$125 review fee for SC NPDES GP, serves as your Notice of Intent (NOI) for coverage under this general permit. This project's coverage number is SCR10A919. The enclosed agreement must be signed by all contractors and subcontractors.

A copy of SC NPDES GP may be downloaded at the following web address: www.scdhec.net/eqc/water/pubs/gr100000.pdf or you may request a copy from us. You are responsible for ensuring your contractor complies with the approved site plan and the minimum requirements of SC NPDES GP. Also, you are responsible for overall compliance with the Storm Water Management and Sediment Reduction Act of 1991 (1991 Act) and the Federal Clean Water Act (CWA).

You must notify the Region 3, Columbia EQC Office prior to starting any land disturbing activity. The address and telephone number of the EQC office are as follows:

Columbia EQC Office
BUILDING 5 PO BOX 156
STATE PARK SC 29147
803-896-0620

You should be aware that this approval is only applicable for the plans that were submitted for this project. Any additional construction or land disturbing activity beyond the scope of the approved plans is not authorized. Any future work for this project not shown on the stamped, approved plans will require that you submit another site plan for approval.

Further, you are responsible for obtaining any other federal, state, or local permit that may be required for this project. Please note we have not sent a copy of this letter to any county or city building official. You should send a copy of this letter to these agencies, as appropriate.

“Exhibit C”

ATTORNEY'S LIMITED REPORT ON TITLE

Prepared For: Town of Lexington, State of South Carolina - Attn: Gene Edwards
At Request Of: S. Wade McGuinn Construction Management, Inc.

This is to certify that based upon a search of the records of Lexington County, State of South Carolina, it is my opinion as follows:

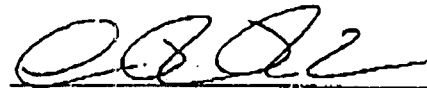
Title is vested in the Town of Lexington, State of South Carolina to all water and sewer lines and associated easements as set forth in Exhibit "A" attached hereto and incorporated herein by reference thereto. The document conveying said water/sewer lines and associated easements was recorded on 4/11/88 in Lexington County ROD Record Book 1064 at page 302 and said conveyance has not been revoked by any subsequent document purporting to revoke or cancel said conveyance. This Title Opinion is subject to the following exceptions:

1. This certificate is limited to matters disclosed by the records filed, and properly indexed, in the Register of Deeds for the County in which the property is located and exception is made to any matters or defects which are not disclosed by an examination of said records.
2. Any law, ordinance, and governmental regulation (including but not limited to truth in lending and consumer protection laws, building, and zoning ordinances, floodway and flood plain determinations) restricting the character, use, dimension, or location of any improvements now or hereafter erected on the land or prohibiting a separation in ownership or a reduction in the dimensions or area of land or the effect of any violation of such law, ordinance, or governmental regulation, or determination.
3. Judgment and proceedings filed only in Federal Court. (Note: Upon the filing of a petition in Bankruptcy title to real estate of the bankrupt vests in the Trustee in Bankruptcy and notice thereof is not required to be filed in the records in the County records; also, federal condemnation proceedings may vest property in the United States and notice thereof is not required to be filed in the county records.
4. Water, sewage and lot clearing charges from municipal authority, or public service district or private utility, unrecorded in the Office of the Register of Mesne Conveyance or Clerk of Court's Office.

This examination of title covers the period of time from April 11, 1988 to March 11, 2005.

This Opinion has been prepared at the request of S. Wade McGuinn Construction Management, Inc. for the Town of Lexington, State of South Carolina and no fee has been charged for its preparation. This is an Opinion of Title and NOT Title Insurance. It is recommended that Title Insurance be obtained prior to using the easements and water/sewer pipes as set forth in Exhibit "A". Danny R. Pack, Attorney at Law, expressly disclaims all liability for any damages incurred as the result of the Town of Lexington, State of South Carolina and its successors and/or assigns' reliance upon this opinion. This liability is disclaimed, in part, due to the fact that no Attorney's Fee has been charged or paid in connection with the preparation of the Opinion.

Dated: March 16, 2005



Danny R. Pack
Attorney at Law
224 West Butler Street
Lexington, SC 29072
803-356-7000

Exhibit "A"

BOOK 1064 PAGE 302

08748

The State of South Carolina,
COUNTY OF LEXINGTON

FILED

1988 APR 11 AM 9:35

JOANNE B. TRIDDLE
RMC
LEXINGTON COUNTY, S.C.

KNOW ALL MEN BY THESE PRESENTS, That

Coventry Associates, Inc.

in the State aforesaid, for and

in consideration of the sum of

Five Dollars Only

Dollars

to it in hand paid at and before the sealing of these presents, by The Town of Lexington, South Carolina
in the State aforesaid,

(the receipt whereof is hereby acknowledged)

has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said
THE TOWN OF LEXINGTON, SOUTH CAROLINA, ITS SUCCESSORS AND ASSIGNS:

All those certain water lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances to said water lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" water system of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the office of the Town Administrator at the Lexington Town Hall.

ALSO:

All those certain sewer lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances of the said sewer lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" sanitary sewer plan of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the Office of the Town Administrator at the Lexington Town Hall.

ALSO:

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 Lake 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, copies of which are on file in the Office of the Town Administrator of the Lexington Town Hall.

This being a portion of the property heretofore conveyed to the Grantor by deed recorded in Lexington County Deed Book 790 Page 297.

Grantor's Mailing Address: P.O. Box 397
Lexington, S.C. 29072

TMSH 4300-3-36 (Part of)

BOOK 1064 PAGE 302

ROA000228

May 18 06 01:15p
12/23/2004 17:05
12/23/2004 17:05

Moguinn Construction
803-353-722
803-353-4543

3568660

PALM LAW OFFICE
WILLIAMS-HENDRIX

P. 5
PAGE 02/02
PAGE 02/02

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE MATTER OF EVA MAE
SHEALY GATES

IN THE PROBATE COURT
THE ELEVENTH JUDICIAL CIRCUIT
C/A #: 2002-ES-32-00820

ORDER

This matter came before me pursuant to a Petition to Sell the real estate in the Estate of Eva Gates, because there was not enough personal property to pay ongoing bills and there were ongoing expenses related to the sell of the real estate.

Present at the hearing were the Personal Representative and her attorney, W. Lisa Brink. Also present were Homer Gates, Sharon Wise, Steven Eargle and Kenny Eargle and their attorney Ray Hamm and Miriam Carter.

Prior to the commencement of the hearing, the parties announced their agreement, it is as follows:

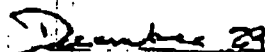
1. The parties agree that the real estate will be sold at public sale with thirty (30) days notice to be given to the heirs of the sale date. The parties also agree that the Personal Representative shall hire an agent to sale the property. The parties acknowledge that there will be fees and costs involved in the sale of the real estate which shall be paid out of the proceeds of sale. The parties further agree that the minimum bid shall be \$245,000.00 and that anyone, either heir or otherwise, may bid at the public sale.
2. With respect to the personal property, the parties agree that it shall be divided by agreement at a date to be set among the heirs. If agreement as to division cannot be reached, before the sale of the real estate, then the personal property shall be sold at the same time that the real estate is sold at public auction. This time to disburse the personal property may be extended by agreement of the heirs.
3. The parties agree that all of the proceeds of sale shall be held in escrow and not disbursed to any heirs until the end of civil litigation pending in the Court of Common Pleas for Lexington County between the heirs Homer Gates, Sharon Wise, Kenny Eargle and Steven Eargle against Kathleen G. Smith and Miriam G. Carter. The parties do agree, however, that legal fees concerning the estate may be paid out of the proceeds as well as Mr. Homer Gates may be reimbursed upon showing a receipt for payment of same for real estate taxes that were paid on the property in 2004. Costs and expenses of sale shall also be paid from the proceeds.

I find that the agreement is fair and equitable and that the parties agree to same.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that paragraphs one through three as stated above be made an Order of this Court and incorporated herein as those stated verbatim and

IT IS SO ORDERED!


Julie Thompson, Probate Judge

 December 29, 2004

FILED

DEC 29 2004

PROBATE JUDGE
LEXINGTON COUNTY, SC

FORM #032PC (1/89)
02-C-303, 02-B-407

Page 1 of 1

ROA000229

BOARD:
Elizabeth M. Hagood
Chairman
Edwin H. Cooper, III
Vice Chairman
L. Michael Blackmon
Secretary



C. Ead Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

BOARD:
Carl L. Brazell
Steven G. Kisner
Paul C. Aughey, III
Coleman F. Buckhouse, MD

September 23, 2005

WADE MCGUINN
GATES COMMONS LLC
140 WHITEFORD WAY
LEXINGTON SC 29072

RE: File/Permit No. 32-05-04-01
GATES COMMONS, Lexington County

Dear Mr. McGuinn:

The site plan for the referenced project is approved. The total disturbed area for this site is 6 acres. In accordance with the Stormwater Construction NPDES General Permit SCR100000 (SC NPDES GP), this approval, along with the \$125 review fee for SC NPDES GP, serves as your Notice of Intent (NOI) for coverage under this general permit. This project's coverage number is SCR10A919. The enclosed agreement must be signed by all contractors and subcontractors.

A copy of SC NPDES GP may be downloaded at the following web address: www.scdhec.net/eqc/water/pubs/gr100000.pdf or you may request a copy from us. You are responsible for ensuring your contractor complies with the approved site plan and the minimum requirements of SC NPDES GP. Also, you are responsible for overall compliance with the Storm Water Management and Sediment Reduction Act of 1991 (1991 Act) and the Federal Clean Water Act (CWA).

You must notify the Region 3, Columbia EQC Office prior to starting any land disturbing activity. The address and telephone number of the EQC office are as follows:

Columbia EQC Office
BUILDING 5 PO BOX 156
STATE PARK SC 29147
803-896-0620

You should be aware that this approval is only applicable for the plans that were submitted for this project. Any additional construction or land disturbing activity beyond the scope of the approved plans is not authorized. Any future work for this project not shown on the stamped, approved plans will require that you submit another site plan for approval.

Further, you are responsible for obtaining any other federal, state, or local permit that may be required for this project. Please note we have not sent a copy of this letter to any county or city building official. You should send a copy of this letter to these agencies, as appropriate.

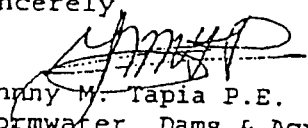
Three (3) sets of approved plans are being provided to your engineer. One is for your office, another set is for your engineer, and the last set is for your contractor. The contractor's set of stamped, approved plans must be available on-site during all phases of construction.

The Department may conduct periodic inspections of this site. Failure to comply with the approved site plan or the minimum requirements of the SC NPDES GP, 1991 Act, or CWA may subject you to applicable penalties.

Upon completion of this project (final stabilization), you must submit a Notice of Termination (NOT), DHEC form 2610, to cancel your coverage under SC NPDES GP. A copy of the NOT is enclosed for your use.

If you have any questions, please call me at 803-898-3982.

Sincerely,


Johnny M. Tapia P.E.

Stormwater, Dams & Agricultural Permitting Section

CC: Region 3, Columbia EQC Office
THOMAS R BRITT, HB Engineering

Water Supply Construction Permit Bureau of Water



Permission is Hereby Granted To: GATES COMMONS LLC
140 WHITEFORD WAY
LEXINGTON SC 29072

for the construction of a distribution system in accordance with the construction plans, specifications, design calculations and the SC DHEC Construction Permit Application signed by THOMAS R BRITT, Registered Professional Engineer, S.C. Registration Number: 12545.

Project Name: GATES COMMONS SUBDIVISION County: Lexington
Location: DREHER ST

Project Description: Installation of approximately 1038 LF of 6" PVC water line, 3 fire hydrants, and all necessary appurtenances to serve 26 services.

Service By: The water will be provided by Lexington Town Of (System Number: 3210001).

Special Conditions

None.

In accepting this permit, the owner agrees to the admission of properly authorized persons at all reasonable hours for the purpose of sampling and inspection.

This is a permit for construction only and does not constitute State Department of Health and Environmental Control approval, temporary or otherwise, to place the system in operation. An Approval to Place in Operation is required and can be obtained following the completion of construction by contacting the COLUMBIA EQC OFFICE at 803-896-0620. Additional permits may be required prior to construction (e.g., stormwater).

Permit Number: 21943-WS
Date of Issue: September 20, 2005
Expiration Date: Construction must be completed prior to September 20, 2008 or this permit will expire.

A handwritten signature in black ink, reading 'Jeffrey P. deBessonnet', is located in the middle right section of the document.

Jeffrey P. deBessonnet, P.E., Director
Water Facilities Permitting Division

SMT

The State of South Carolina,
COUNTY OF LEXINGTON

FILED

FORM NO. 110 — TITLE TO REAL ESTATE BY A CORPORATION
REVISED 1938
COLUMBIA OFFICE SUPPLY CO., COLUMBIA, S. C.

1988 APR 11 AM 9:35

JOANNE B. TRIDBLE
RMC
LEXINGTON COUNTY, S.C.

KNOW ALL MEN BY THESE PRESENTS, That

Coventry Associates, Inc.

in the State aforesaid, for and

in consideration of the sum of

Five Dollars Only

Dollars

to it in hand paid at and before the sealing of these presents, by The Town of Lexington, South Carolina

in the State aforesaid,

(the receipt whereof is hereby acknowledged)

has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said

THE TOWN OF LEXINGTON, SOUTH CAROLINA, ITS SUCCESSORS AND ASSIGNS:

All those certain water lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances to said water lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" water system of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the office of the Town Administrator at the Lexington Town Hall.

ALSO:

All those certain sewer lines, including but not limited to pipes, man holes, fittings, valves, equipment and appurtenances of the said sewer lines located on property of the Grantor known as Coventry Lake Subdivision, and being more particularly shown on the record drawing of the "as-built" sanitary sewer plan of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc. dated November 9, 1987, copies of which are on file in the Office of the Town Administrator at the Lexington Town Hall.

ALSO:

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 Lake 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, copies of which are on file in the Office of the Town Administrator of the Lexington Town Hall.

This being a portion of the property heretofore conveyed to the Grantor by deed recorded in Lexington County Deed Book 790 Page 297.

Grantee's Mailing Address: P.O. Box 397
Lexington, S.C. 29072

TMS# 4300-3-36 (Part of)

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said The Town of Lexington, South Carolina, its successors, Heirs and Assigns forever.

And the said Coventry Associates, Inc. does hereby bind itself and its successors, to warrant and forever defend all and singular the said premises unto the said The Town of Lexington, South Carolina, its successors, Heirs and Assigns, against itself and its successors and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF Coventry Associates, Inc. has caused these presents to be executed in its name by M. Stewart Mungo its President, and by its Secretary or Treasurer and its corporate seal to be hereto affixed this 6th day of April, in the year of our Lord, one thousand nine hundred and eighty eight, and in the two hundred and twentieth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered in Presence of

Catherine A. Hammond

Witness

Martha B. Nissen

Witness

COVENTRY ASSOCIATES, INC. (Seal)

By M. Stewart Mungo President.

Secretary or Treasurer.

The State of South Carolina,

COUNTY OF LEXINGTON

PERSONALLY appeared before me Catherine A. Hammond

(Insert name of Witness)

who, in oath, says that he saw the within-named Coventry Associates, Inc.

(Insert name of Corporation)

by M. Stewart Mungo

(Insert name of President or Vice-President)

its

President and

its

(Insert name of Secretary or Treasurer)

sign the within Deed, and the said Corporation, by said officers, seal said Deed, and, as its act and deed, deliver the

Martha R. Nissen

same, and that he with

(Insert name of other Witness)

witnessed the

execution thereof.

Catherine A. Hammond

(Witness)

SIVORN to before me, this 7th day of April

, A. D. 19 88

Martha R. Nissen (Seal)
Notary Public, S. C.

My Commission expires 5/20/90

08749

BOOK 1064 PAGE 305

FORM NO. 116 - TITLE TO REAL ESTATE BY A CORPORATION
REVISED 1938
COLUMBIA OFFICE SUPPLY CO., COLUMBIA, S. C.

FILED

The State of South Carolina,

COUNTY OF LEXINGTON

1988 APR 11 AM 9:36

JOANNE B. TRIDBLE
RMC
- LEXINGTON COUNTY, S.C.

KNOW ALL MEN BY THESE PRESENTS, That

Coventry Associates, Inc.

in the State aforesaid,

for and

in consideration of the sum of

Five Dollars Only

Dollars

to it in hand paid at and before the sealing of these presents, by The Town of Lexington,
South Carolina

in the State aforesaid,

(the receipt whereof is hereby acknowledged)

has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, unto the said

THE TOWN OF LEXINGTON, SOUTH CAROLINA ITS SUCCESSORS AND ASSIGNS:

All those certain pieces, parcels, lots or strips of land, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Coventry Drive, Coventry Court, Truesdale Court, and Coventry Lake Drive, as shown on a plat of Coventry Lakes Subdivision by Whitworth & Associates, Inc. dated June 23, 1986, last revised September 26, 1986, and recorded in the Office of the R.M.C. for Lexington County in Plat Book 2106 Page 149; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

This being a portion of the property heretofore conveyed to the Grantor by deed recorded in Lexington County Deed Book 790 Page 297.

Grantee's Mailing Address: Town of Lexington
Town Hall P.O. Box 377
Lexington, S.C. 29072

MSE 4300-336

BOOK 1064 PAGE 305

ROA000236

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said The Town of Lexington, South Carolina, its successors, Heirs and Assigns forever.

And the said Coventry Associates, Inc. does hereby bind itself

and its successors, to warrant and forever defend all and singular the said premises unto the said The Town of Lexington, South Carolina, its Successors Heirs and Assigns, against itself and its successors and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF Coventry Associates, Inc. has caused
(Insert name of Corporation)

these presents to be executed in its name by H. Stewart Mungo its
(Insert name of President or Vice-President)

President, and by (Insert name of Secretary or Treasurer) its

and its corporate seal to be hereto affixed this 6th day of April
in the year of our Lord, one thousand nine hundred and eighty eight, and in the two
hundred and twelfth year of the Sovereignty and Independence of the United
States of America.

Signed, Sealed and Delivered
in Presence of

Catherine A. Hammond By COVENTRY ASSOCIATES, INC. (Seal)
Witness Martha B. Visser President.
Secretary or Treasurer.

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT OF COMMON PLEAS
NON-JURY

2005-CP-32-2712

MCGUINN CONSTRUCTION)
MANAGEMENT)

VS.)

TRANSCRIPT OF RECORD

SAUL ESPINO AND MARA ESPINO)
DEFENDANT)

APRIL 14, 2008
LEXINGTON, SOUTH CAROLINA

B E F O R E:

HONORABLE JAMES W. JOHNSON, JR., JUDGE.

A P P E A R A N C E S:

BARRY L. THOMPSON, II, ESQ.
ATTORNEY FOR THE PLAINTIFF

ANDREW A. AUN, ESQ.
ATTORNEY FOR THE DEFENDANT

JOY E. HOLSTON
OFFICIAL COURT REPORTER

1 THE COURT: THE CASE IS MCGUINN CONSTRUCTION
2 MANAGEMENT VERSUS SAUL AND MARA ESPINO, 05-CP-32-2712.
3 AND THERE ARE SEVERAL MOTIONS THAT HAVE BEEN FILED IN THE
4 CASE. WE HAVE GOT THE PLAINTIFF'S MOTION FOR SUMMARY
5 JUDGMENT, IS THAT RIGHT?

6 MR. THOMPSON: CORRECT, YOUR HONOR. A MOTION FOR
7 SUMMARY JUDGMENT AND TO DISMISS COUNTERCLAIMS.

8 THE COURT: AND, MR. AUN, WHAT MOTIONS HAVE YOU FILED
9 THAT NEED TO BE HEARD?

10 MR. AUN: MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S
11 COUNTERCLAIMS AND ALSO TO THE DECLARATORY JUDGMENT ACTION.
12 YOUR HONOR, I WOULD ALSO NOTE THAT THE MOTION, THE WRITTEN
13 MOTION THAT WAS FILED BY THE PLAINTIFF INDICATES THAT THIS
14 WAS A MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CASE
15 AND FOR AN ORDER DISMISSING THE FIFTH COUNTERCLAIM, NOT AS
16 TO ALL COUNTERCLAIMS, THE MOTION DOESN'T SPEAK TO ALL
17 COUNTERCLAIMS, ONLY TO THE FIFTH COUNTERCLAIM.

18 THE COURT: ALL RIGHT.

19 MR. AUN: YOUR HONOR, I HAD ALSO RAISED TO OPPOSING
20 COUNSEL IN REFERENCE TO HIS MOTION AS TO THE DATE OF
21 FILING ON HIS MOTION. I HAD RECEIVED A COPY OF THE MOTION
22 BUT NOT A FILED COPY AND IT IS MY UNDERSTANDING THAT
23 PLAINTIFF'S COUNSEL HAS BEEN RELIED ON PART ON AN
24 AFFIDAVIT THAT WAS SUBMITTED IN SUPPORT OF HIS MOTION WELL
25 AFTER THE FILING OF THE MOTION. WE OBJECT TO THAT

1 AFFIDAVIT COMING INTO EVIDENCE.

2 THE COURT: I DON'T KNOW IF AN AFFIDAVIT HAS BEEN
3 FILED, I HAVE GOT A COPY OF THE CLOKED, WELL--

4 MR. AUN: YOUR HONOR, IT APPEARS WITH MY INFORMATION
5 HERE, THIS MOTION WAS FILED SOMETIME IN OCTOBER, MAYBE
6 EARLY OCTOBER.

7 THE COURT: WAIT JUST A SECOND, LET ME FIND IT. I
8 MAY BE WRONG AND I MAY JUST NOT BE ABLE TO PUT MY HANDS ON
9 IT. QUITE HONESTLY, I THINK THE MOTIONS, I DON'T FIND THE
10 MOTIONS THAT ARE TO BE HEARD IN THE FILE, IT MAY BE IN
11 HERE AND I JUST CAN'T FIND THEM, IT MAY BE MISFILED, IT
12 MAY STILL BE SOMEWHERE IN THE CLERK'S OFFICE. I HAVE GOT
13 MR. AUN'S MOTION, NANCY JUST BROUGHT ME A COPY OF IT, I
14 BELIEVE. IT WAS FILED, THE ONE THAT I HAVE GOT WHICH WAS
15 FILED ON APRIL THE 3RD, WHICH WAS 11 DAYS AGO. THAT IS
16 THE CORRECT MOTION THAT IS TO BE HEARD?

17 MR. AUN: THAT IS CORRECT, YOUR HONOR.

18 THE COURT: IT HAD NOT MADE ITS WAY INTO THE FILE BUT
19 NANCY FOUND IT AND BROUGHT IT TO ME. I AM NOT SAYING THE
20 OTHERS HAVEN'T BEEN, THEY ARE NOT IN THE FILE.

21 MR. THOMPSON: I WOULD ALSO SUBMIT TO YOU THAT EVEN
22 BEFORE MR. AUN FILED THE MOTION THAT THE COURT HAD ALREADY
23 ARRANGED FOR THE MOTION HEARING ON THIS AND THAT, I DON'T
24 SEE HOW THEY WOULD OF ARRANGED A MOTION HEARING IF THEY
25 DIDN'T HAVE A MOTION.

1 THE COURT: I AM NOT DOUBTING THAT IT HASN'T BEEN
2 FILED, I AM JUST TELLING YOU I DON'T HAVE THEM UP HERE.
3 OKAY.

4 MR. THOMPSON: I CAN SUBMIT TO YOU THAT THE MOTION
5 THAT WAS FILED DOES SAY COUNTERCLAIMS, A MOTION TO DISMISS
6 COUNTERCLAIMS. THAT DOES SPECIFICALLY REFERENCE THE FIFTH
7 COUNTERCLAIM, IT IS A MOTION TO DISMISS ALL OF THE
8 COUNTERCLAIMS.

9 THE COURT: IS THE CASE SET FOR TRIAL RIGHT NOW?

10 MR. AUN: IT IS, YOUR HONOR, SET FOR MAY 5TH. AND I
11 WILL JUST ADD, THE CAPTION OF THE MOTION SAYS
12 COUNTERCLAIMS. THE MEAT OF THE MOTION SAYS FIFTH
13 COUNTERCLAIM. OKAY. NOW, YOU KNOW, IF THAT IS AN
14 AMBIGUITY I THINK IT SHOULD BE CONSTRUED AGAINST HIM, I
15 PREPARED MY MEMO IN OPPOSITION BASED ON WHAT THE MEAT OF
16 THE DOCUMENT SAYS, NOT WHAT THE CAPTION SAYS. I HAVE
17 NEVER RELIED UPON THE CAPTION OF ANY CASE, YOUR HONOR.
18 AND I DON'T WANT TO DO IT AGAIN. QUITE HONESTLY, MY
19 CLIENTS HAVE HAD TO COME DOWN HERE FROM TENNESSEE FOR THIS
20 HEARING. I HAVE HAD TO PROVIDE YOUR HONOR WITH A COPY OF
21 THE MOTION FROM BARRY, YOU KNOW, THAT I HAVE. MY ONLY
22 QUESTION WAS THE FILING DATE ON IT, I PRESUME IT WAS FILED
23 SOMETIME IN OCTOBER WHICH MEANT THAT THE AFFIDAVIT
24 POSTDATED THE FILING WHICH IS IN VIOLATION OF THE RULE AND
25 I DON'T THINK THAT THE AFFIDAVIT SHOULD BE CONSIDERED.

1 THAT IS THE ONLY REASON FOR MY QUESTION. BUT ULTIMATELY,
2 YOUR HONOR, I HAVE COPIES OF EVERYTHING THAT YOU NEED HERE
3 IF YOU WOULD LIKE, A COPY, MY ONLY COPY OF EVERYTHING YOU
4 NEED HERE IF YOU NEED THAT.

5 THE COURT: I AM GOING TO HEAR ARGUMENTS OF WHATEVER,
6 IF WE NEED TO CARRY IT OVER TO NEXT WEEK, I HAVE GOT
7 NON-JURY NEXT WEEK AND WE CAN DO THAT BUT I WILL TRY TO
8 GET IT ALL DISPOSED OF RIGHT HERE.

9 MR. AUN: THANK YOU, YOUR HONOR.

10 THE COURT: WE WILL START IN ORDER OF THE FILING.
11 MR. THOMPSON, IT WILL BE YOUR MOTION FOR SUMMARY JUDGMENT
12 AT LEAST ON THE FIFTH COUNTERCLAIM AND MAYBE ALL
13 COUNTERCLAIMS.

14 MR. THOMPSON: AND, YOUR HONOR, IN SUPPORT OF MY
15 MOTION, DOES YOUR COPY OF THE FILE HAVE THE AFFIDAVIT?

16 THE COURT: I DON'T HAVE A MOTION, I CAN'T FIND THE
17 MOTION. IT DOESN'T HAVE ANY COPIES OF ANYTHING.

18 MR. AUN: AGAIN, JUDGE, I AM GOING TO OBJECT TO ANY
19 CONSIDERATION OF THIS AFFIDAVIT ON TWO BASIS. ONE THAT IT
20 IS NOT TIMELY FILED AND TWO, THAT IT CONTAINS EVIDENCE
21 THAT WOULD OTHERWISE BE INADMISSIBLE IN THE AFFIDAVIT
22 ITSELF DEALING WITH SPECULATION, LEGAL CONCLUSIONS BY
23 SOMEONE WHO IS NOT QUALIFIED AS A LEGAL, AS A LAWYER AND
24 OTHER ISSUES RELATED TO THE INTERPRETATION OF
25 DOCUMENTATION SUBMITTED. SO, THE AFFIDAVIT, REALLY EVEN

1 IF YOU ACCEPTED IT, IN OUR OPINION, IS BASED ON
2 SPECULATION AND CONCLUSORY INADMISSIBLE EVIDENCE. I DON'T
3 BELIEVE IT WAS SUBMITTED TIMELY.

4 THE COURT: IS IT IN SUPPORT OF THE SUMMARY JUDGMENT
5 OR THE DISMISSAL?

6 MR. THOMPSON: BOTH, YOUR HONOR.

7 THE COURT: AND WHEN WAS THE AFFIDAVIT SUBMITTED TO
8 MR. AUN?

9 MR. THOMPSON: YOUR HONOR, HERE IS WHAT HAPPENED.
10 YOUR HONOR, WE CAME, THIS IS AN IDENTICAL COPY OF THE ONE
11 THAT YOU HAVE HOWEVER PART OF THE ATTACHMENTS WERE NOT IN
12 THE RIGHT SIZES THEREFORE THEY WERE WITHDRAWN FROM FILING
13 AND I WAS ASKED TO GO AND MAKE LARGE BLOWN UP COPIES OF
14 THE ATTACHMENTS BECAUSE THIS HAS A NON-STANDARD SIZE
15 ATTACHMENT. AND I WAS ASKED TO GO AND MAKE EXTRA LARGE
16 COPIES OF THE ATTACHMENTS WHICH ARE IN THE BACK, YOUR
17 HONOR. IT IS MY UNDERSTANDING THAT THE FIRST MOTION THAT
18 WAS MADE IN THIS CASE WAS ORIGINALLY, WAS A MOTION FROM
19 THE TOWN OF LEXINGTON, TO HAVE THE TOWN OF LEXINGTON
20 DISMISSED FROM THIS CASE.

21 THE COURT: NO, THE FIRST MOTION WAS A MOTION BY MR.
22 AUN TO ADD THE TOWN.

23 MR. THOMPSON: THE TOWN OF LEXINGTON WAS ADDED AND
24 THEN THE TOWN OF LEXINGTON MADE A MOTION TO DISMISS.

25 THE COURT: I GRANTED THAT MOTION, IT WAS A MOTION TO

1 RECONSIDER AND I DENIED THAT MOTION.

2 MR. THOMPSON: AND WHEN THE TOWN OF LEXINGTON'S
3 MOTION WAS GRANTED THE CLERK'S OFFICE, THROUGH JUST AN
4 INNOCENT FILING MISTAKE, AT THAT TIME THEY HAD IT IN THEIR
5 RECORDS THAT THE ENTIRE CASE WAS DISMISSED. SO, MR. AUN
6 AND I SHOWED UP FOR A HEARING THAT BOTH BELIEVED TO BE FOR
7 MY MOTION FOR SUMMARY JUDGMENT AND IT WASN'T ON THE FILING
8 LIST. SO, WE WERE TOLD, LOOK, YOU NEED TO KIND OF GO BACK
9 AND WE NEED TO GET THIS ADDED TO THE DOCKET AGAIN BECAUSE
10 IT WAS IMPROPERLY WITHDRAWN. THAT IS THE DATE AT WHICH
11 THE AFFIDAVIT WAS FILED. AND SUBSEQUENTLY I MADE OTHER
12 COPIES OF THE AFFIDAVIT AND I HAVE GIVEN MR. AUN THE
13 ORIGINAL SIZED COPIES OF THE AFFIDAVITS ATTACHMENTS. AND
14 THAT IS THE DIFFERENCE IN THE TWO DATES.

15 MR. AUN: YOUR HONOR, I DON'T HAVE ANY DISPUTES OF
16 THE KIND OF FACTUAL CHRONOLOGY OF WHAT HAPPENED. AND
17 REALLY ALL OF THAT IS FINE, I DON'T KNOW HOW RELEVANT IT
18 IS TO THE ISSUE HERE. THE ISSUE HERE IS THAT THIS MOTION,
19 IF WE CAN EVER FIND IT IN THE FILE, WAS PROBABLY FILED IN
20 SOMETIME IN OCTOBER. BECAUSE THIS MOTION WAS SCHEDULED, I
21 BELIEVE THE DATE OF THE CLOCKED IN ERROR COPY WHICH WAS
22 NOVEMBER THE 7TH OF 2007. SO, IT WAS FILED SOMETIME IN
23 OCTOBER, THERE WAS A MOTIONS HEARING SCHEDULED THAT WE
24 SHOWED UP AND EVERYBODY SAID WE HAVE A SNAFU IN THE
25 SYSTEM. THAT IS WHEN THE FIRST, MY FIRST LOOK AT THE

1 AFFIDAVIT OCCURRED, SO THE AFFIDAVIT WAS FILED OVER 30
2 DAYS AFTER THE MOTION WAS PRESUMABLY FILED AND, YOU KNOW,
3 IN VIOLATION OF THE RULE. AND THEN A CORRECTED AFFIDAVITS
4 PRESUMABLY WITH THE RIGHT SIZED DOCUMENTS WERE FILED AGAIN
5 ON NOVEMBER THE 29TH AND I HAVE BOTH AFFIDAVITS WITH ME
6 TODAY. AND I WOULD JUST ASK THE COURT, IN ACCORDANCE WITH
7 THE RULE, NOT TO CONSIDER THIS AFFIDAVIT AS IT WAS NOT
8 TIMELY FILED. AND EVEN IF YOU ARE CONSIDERING CONSIDERING
9 THE AFFIDAVIT I WOULD ASK THAT THE COURT NOT GIVE ANY
10 WEIGHT TO THE EVIDENCE IN THE AFFIDAVIT AS IT SIMPLY, YOU
11 KNOW, IS SELF SERVING TESTIMONY TO CLARIFY HIS POSITION IN
12 THIS CASE IN SUCH A WAY, YOU KNOW, IT GIVES HIM AN
13 ADVANTAGE IN THE CASE. IT IS SELF SERVING TESTIMONY AND
14 INADMISSIBLE.

15 MR. THOMPSON: YOUR HONOR, I WOULD SUBMIT THAT IF
16 THIS WERE NOVEMBER SOMETIME WE MIGHT FIND IT INTERESTING
17 TO ARGUE WHETHER OR NOT HE WAS PREJUDICE BY NOT HAVING
18 THAT ADDED FOR FIVE MONTHS NOW. THIS CANNOT POSSIBLY BE
19 ANY TYPE OF SURPRISE.

20 MR. AUN: JUDGE, I THINK THAT THIS PARTICULAR RULE
21 WAS NOT DESIGNED TO PREVENT A SURPRISE. I THINK THAT THIS
22 RULE WAS DESIGNED AS MANY OTHER RULES THAT YOU HAVE
23 CONSTRUED IN THE PAST, IS DESIGNED TO KEEP AN ORDERLY
24 PROCEDURE IN THE CASE. I NEED TO KNOW WHAT THE BASIS FOR
25 HIS MOTION IS. HE HAS ALREADY INDICATED THAT HIS MOTION

1 FOR SUMMARY JUDGMENT CONTAINS AN AMBIGUITY IN IT THAT I AM
2 SUPPOSE TO ASSUME THAT THE MEAT OF HIS DOCUMENT IS NOT
3 WHAT IT IS. NOW, HE HAS GOT AN AFFIDAVIT THAT HE HAS GOT
4 THAT HE WANTS YOU TO CONSIDER THAT IS FILED 30 DAYS AFTER
5 THE FACT. THE RULE IS THE RULE, JUDGE. I HAVE BEEN
6 VICTIMIZED BY THESE RULES IN THE PAST AND THE RULE IS THE
7 RULE. AND I WOULD JUST ASK YOUR HONOR TO APPLY THE RULE
8 IN THIS CIRCUMSTANCE.

9 THE COURT: YOUR POSITION IS THAT ONCE THE SUMMARY
10 JUDGMENT MOTION HAS BEEN FILED IT CANNOT BE SUPPLEMENTED
11 WITH AFFIDAVITS THAT AREN'T FILED AT THE TIME. IS THAT
12 RIGHT?

13 MR. AUN: MY POSITION IS THAT IF YOU ARE FILING A
14 MOTION FOR SUMMARY JUDGMENT THAT IS BEING SUPPORTED BY AN
15 AFFIDAVIT THAT CLEARLY THAT HIS MOTION FOR SUMMARY
16 JUDGMENT INDICATED, OKAY, THEN YOU HAVE TO FILE THAT
17 AFFIDAVIT AT THE TIME THE MOTION IS FILED. HE DID NOT.
18 AND I AM JUST ASKING THAT THE COURT NOT CONSIDER THIS
19 AFFIDAVIT BASED ON THAT VIOLATION OF THE RULE. ULTIMATELY
20 IF YOU DO CONSIDER THE INFORMATION IN THE RULE OR IN THE
21 AFFIDAVIT I THINK IT IS INADMISSIBLE TESTIMONY, I CAN GO
22 THROUGH AND, YOU KNOW, RESPOND TO THE AFFIDAVIT IF WE GET
23 TO THAT POINT. BUT MY POSITION IS AND MY CLIENT'S
24 POSITION IS THAT THIS PARTICULAR FILING IS NOT TIMELY. MY
25 CLIENT'S POSITION IS IS THAT THIS PARTICULAR FILING WAS

1 NOT TIMELY.

2 MR. THOMPSON: YOUR HONOR, I DON'T BELIEVE THAT THAT
3 IS THE WAY THIS RULE IS CONSTRUED.

4 THE COURT: I AM GOING TO HEAR YOUR ARGUMENTS, I MAY
5 OR MAY NOT CONSIDER IT, I WILL HEAR YOUR ARGUMENTS ABOUT
6 THAT. BUT LET'S GET INTO THIS THING SO YA'LL CAN BE READY
7 TO GET IT TRIED AND DISPOSED OF ON MAY THE 5TH IF MOTION
8 FOR SUMMARY JUDGMENT OR TO DISMISS ARE NOT GRANTED.

9 MR. THOMPSON: YOUR HONOR, THIS CASE IS ABOUT A
10 UTILITY EASEMENT WHICH MY CLIENT CLAIMS IT HAS A RIGHT TO
11 USE. MY CLIENT IS MCGUINN CONSTRUCTION COMPANY. MR.
12 AUN'S CLIENT, THE ESPINO'S, OWN A HOUSE IN A NEIGHBORHOOD
13 IN THE TOWN OF LEXINGTON CALLED COVENTRY. AT THE TIME
14 COVENTRY WAS BEING DEVELOPED A WATER AND SEWER DRAINAGE
15 EASEMENT WAS DEEDED FROM THE DEVELOPER OF COVENTRY
16 SUBDIVISION TO THE TOWN OF LEXINGTON FOR PROPERTY
17 INCLUDING COVENTRY AND OTHER PROPERTY, AT THE TIME THESE
18 WERE CONTINUOUSLY OWNED PIECES OF PROPERTY THAT WEREN'T
19 SUBDIVIDED. YOUR AFFIDAVIT SHOULD HAVE A COPY OF THE
20 EASEMENT, THE PAPER EASEMENT DEEDING THE UTILITY RIGHTS.
21 THE PAPER EASEMENT IS IN THE COPY, IS AN ATTACHMENT TO THE
22 COPY THAT YOU HAVE. THE EASEMENT IS FURTHER SHOWN ON THE
23 PLAT TO THE ESPINO'S HOME. THERE ARE TWO PLATS THAT ARE
24 ATTACHMENTS TO THE AFFIDAVIT THAT YOU HAVE, BOTH OF THEM
25 ARE RECORDED AND THE DEED IS RECORDED HERE IN LEXINGTON

1 COUNTY, BOTH OF THE PLATS ARE RECORDED. THE ESPINO'S HOME
2 IS ACTUALLY LOT NUMBER 16, THEIR NEXTDOOR NEIGHBOR IS LOT
3 NUMBER 17. FOR THE SAKE OF CLARITY I HAVE GONE AHEAD AND
4 INCLUDED BOTH THE PLATS FOR LOT NUMBER 16 AND LOT NUMBER
5 17. ESSENTIALLY THERE ARE, THERE IS A 15 FOOT AND A 30
6 FOOT DRAINAGE EASEMENT AND A SEWER EASEMENT THAT COMES
7 INTO THE BACK OF THE ESPINO'S PROPERTY THAT KIND OF JOIN
8 ON THE ESPINO'S PROPERTY. THEY TRAVEL DOWN THE, IF YOU
9 ARE FACING THE HOME, WHAT WOULD BE THE LEFT HAND SIDE OF
10 THE HOME, COME TOWARDS THE STREET AND THEN PARTIALLY CROSS
11 A PIECE OF LOT 17. PHASE ONE OF THIS DEVELOPMENT WAS
12 COVENTRY SUBDIVISION. THESE EASEMENTS SHOW UTILITY
13 EASEMENTS, SEWER AND WATER EASEMENTS THAT ARE STICKING OUT
14 TO PLACES THAT AT THE TIME WERE STICKING OUT IN THE MIDDLE
15 OF THE WOODS, STICKING OUT TO NO WHERE. THERE ARE, FOR A
16 LACK OF BETTER WORDS, SPUR LINES, LITTLE SPURS THAT JOIN
17 INTO THE COVENTRY SUBDIVISION. THEY ARE DESIGNED TO BE
18 TACK ON SPOTS WHERE YOU TAKE THE SEWER SYSTEM TO ONE AREA
19 AND YOU JOIN IT TO THE SEWER SYSTEM OF ANOTHER AREA. THE
20 DRAINAGE ALL NATURALLY RUNS TO THIS AREA, THE ESPINO'S
21 HOME IS KIND OF A LOW SPOT, THIS NEIGHBORHOOD. THIS IS A
22 VERY NATURAL AND NORMAL WAY TO DO THIS. THIS IS THE WAY
23 YOU DESIGN AND CONSTRUCT SEWER SYSTEMS AND WATER SYSTEMS.
24 THE PROPERTY, THE DEVELOPER OF THE COVENTRY SUBDIVISION
25 ULTIMATELY SELLS WHAT WOULD OF BEEN PHASE II. HE

1 ULTIMATELY SELLS THAT PROPERTY TO MY CLIENT, MCGUINN
2 CONSTRUCTION. MCGUINN CONSTRUCTION MADE PLANS TO BUILD
3 ANOTHER SUBDIVISION BACK UP BEHIND THE ESPINO'S HOME, THIS
4 IS THE GATES COMMON SUBDIVISION IN THE TOWN OF LEXINGTON.
5 AND THEY DESIRE TO TIE INTO THE EXISTING SEWER SYSTEM SO
6 THEY SENT COURTESY NOTIFICATIONS TO A COUPLE OF THE FOLKS
7 IN THE OTHER NEIGHBORHOODS SAYING, HEY, THIS IS WHAT WE
8 ARE GOING TO DO, THIS IS THE WORK THAT IS JUST ABOUT TO BE
9 DONE, JUST WANT TO LET YOU KNOW WHAT IS GOING TO HAPPEN.
10 IMMEDIATELY THE ESPINO'S BEGAN TO DO EVERYTHING IN THEIR
11 POWER TO OBSTRUCT AND RESIST THE DEVELOPMENT AND USE OF
12 THESE EASEMENTS UP TO CALLING THE POLICE AND ROPING OFF
13 THE AREA AND CRIME SCENE TAPE, ETCETERA. THERE IS NO
14 GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER OR NOT THERE
15 IS AN EASEMENT HERE, THE EASEMENT THAT IS HERE, IT DOES
16 EXIST. THE SCOPE OF THIS EASEMENT, THE USE OF THIS
17 EASEMENT IS WITHIN THE SCOPE. THE PIPE THAT IS CURRENTLY
18 BEING USED BY THE GATES COMMON SUBDIVISION, IT IS ALREADY
19 PREEXISTING IN THE GROUND. ALL THEY HAD TO DO WAS GO AND
20 TAKE POSTHOLE DIGGERS AND LOCATE THE END OF IT AND THEN
21 THEY JUST TIE IT INTO A PREEXISTING PIPE THAT SPURS DOWN
22 THE SIDE OF THE ESPINO'S PROPERTY LINE AND IS DESIGNED TO
23 BE TIED INTO JUST LIKE IT WAS. THE STORM WATER, EVEN
24 THOUGH THEY HAD A RIGHT TO RUN IT INTO THE ESPINO'S YARD,
25 AT THE TIME THEY WERE PUTTING IN THE INFRASTRUCTURE, THEY

1 DIDN'T WANT TO SLOW DOWN THE WORK AS MUCH AS POSSIBLE SO
2 THEY HAD TO PAY THE EXTRA MONEY TO RUN THE STORM WATER
3 AROUND THE ESPINO'S PROPERTY, THE SANITARY SEWER DOES GO
4 THROUGH THE ESPINO'S PROPERTY. THE SCOPE OF THIS, I WOULD
5 SUBMIT TO THE COURT IS WELL WITHIN THE USE OF A PIPE THAT
6 IS ALREADY THERE, ALREADY IN THE GROUND AND AS FAR AS
7 WHETHER OR NOT THE EASEMENT RUNS TO THE BENEFIT OF THE
8 PLAINTIFF I WOULD SUBMIT TWO FACTS TO THE COURT. NUMBER
9 ONE IS THAT AT THE TIME THE PROPERTY THAT IS NOW THE GATES
10 COMMON SUBDIVISION WAS OWNED BY A COMMON LANDOWNER. THIS
11 EASEMENT WAS PUT ON BY THAT LANDOWNER AND IT WAS TO SERVE
12 THE PROPERTY THAT ULTIMATELY GETS SOLD TO MY CLIENT. THE
13 SEWER SYSTEM ACTUALLY BELONGS TO THE TOWN OF LEXINGTON,
14 WHEN YOU CONSTRUCT SEWER SYSTEMS YOU CONSTRUCT THEM
15 ESSENTIALLY AS AN AGENT OF THE TOWN. THIS IS THE WAY THAT
16 SEWER SYSTEMS ARE CONSTRUCTED ALL OVER THE STATE AND I
17 WOULD SUBMIT TO YOU ALL OVER THE SOUTHEASTERN UNITED
18 STATES, IN THAT TOWNS DON'T TYPICALLY GO OUT AND DEVELOP
19 INFRASTRUCTURE FOR A DEVELOPER. THEY ALLOW THE DEVELOPER
20 TO OPERATE AS THEIR AGENT TO WORK IN THEIR EASEMENTS, TO
21 CONSTRUCT SYSTEMS UP TO THEIR STANDARDS. AND THEN AS THEY
22 GET CONSTRUCTED UP TO STANDARDS THE TOWN OR THE
23 MUNICIPALITY OR THE GOVERNMENTAL ENTITY ACCEPTS THEM AS
24 DEEDED INTO THE TOWN OR THE COUNTY. SO, THEY ARE NOW NO
25 LONGER EVEN OWNED BY MY CLIENT. THEY ARE ACTUALLY OWNED

1 BY THE TOWN OF LEXINGTON. THE STATUS QUO AS IS IS THAT
2 THE GATES COMMON SUBDIVISION IS COMPLETED. YOU HAVE TO
3 SPEND A GOOD BIT OF MONEY DOING IT BUT IT IS COMPLETED.
4 THE SEWER SYSTEM THAT RUNS THROUGH THE EASEMENT IN THE
5 ESPINO'S YARD DOES RUN THROUGH THE GATES COMMON
6 SUBDIVISION, THAT IS THE WAY THEIR SEWER GOES. AND WE
7 WOULD SUBMIT TO YOU THAT THERE IS AN EASEMENT, THAT THE
8 USE THAT IS BEING MADE OF THE EASEMENT IS WITHIN THE SCOPE
9 OF THE EASEMENT, THAT THE PLAINTIFF HAD THE RIGHT BY
10 PERMISSION BY THE TOWN OF LEXINGTON, AS AGENT OF THE TOWN
11 OF LEXINGTON TO USE THE EASEMENT AND THAT SUMMARY JUDGMENT
12 FOR THIS ISSUE OF THIS EASEMENT OUGHT TO BE GRANTED IN
13 FAVOR OF MCGUINN CONSTRUCTION. BECAUSE THERE IS AN
14 EASEMENT, A DECLARATORY JUDGMENT PORTION SHOULD BE GRANTED
15 TO MCGUINN CONSTRUCTION BECAUSE THERE IS AN EASEMENT AND
16 THEY DO, BY LAW, WE SUBMIT TO YOU HAVE A RIGHT TO USE IT
17 FOR THE PURPOSES IT IS NOW BEING USED FOR. THAT IS WHAT
18 IT WAS DESIGNED TO DO. AND I WILL BE HAPPY TO GO ON TO
19 THE COUNTERCLAIMS AT THIS TIME.

20 THE COURT: LET ME HEAR OPPOSITION TO YOUR MOTION AND
21 THEN WE WILL MOVE ON, I WILL KEEP MY NOTES BETTER FROM
22 DOING THAT.

23 MR. AUN: YOUR HONOR, I HAVE PREVIOUSLY HAVE FILED A
24 MEMORANDUM IN OPPOSITION TO THE SUMMARY JUDGMENT.

25 THE COURT: THAT IS UP HERE.

1 MR. AUN: DO YOU HAVE THAT?

2 THE COURT: AND A SUPPLEMENT, IS THAT RIGHT?

3 MR. AUN: YES SIR, THE SUPPLEMENT JUST CLARIFYING
4 SOME FACTUAL INFORMATION. AND, YOUR HONOR, I TRY TO SET
5 OUT IN MY MEMORANDUM SPECIFICALLY WHY AS TO THE EASEMENT
6 THIS IS REALLY OUTSIDE THE SCOPE OF ITS INTENDED USE.
7 THIS EASEMENT WAS GRANTED BY COVENTRY ASSOCIATES TO THE
8 TOWN OF LEXINGTON, OKAY, ON A TAX MAP NUMBER THAT HAS
9 NOTHING TO DO WITH GATES COMMON SUBDIVISION AND IN
10 REFERENCE TO COVENTRY LAKE SUBDIVISION DEALING WITH
11 DRAINAGE, WATER AND SEWAGE. THE LANGUAGE OF THIS EASEMENT
12 IS PRETTY CLEAR. THE LAW STATES THAT WHEN YOU ARE
13 CONSTRUING AN EASEMENT YOU CONSTRUE AN EASEMENT MUCH AS
14 YOU WOULD A CONTRACT. WHERE YOU CAN GLEAM THE PLAIN
15 MEANING OF THE LANGUAGE YOU GLEAM THE PLAIN MEANING OF THE
16 LANGUAGE. AND IN THIS PARTICULAR CASE THE COURT HAS ALSO
17 SAID THAT IT IS VERY DIFFICULT TO ALTER THOSE RIGHTS
18 BECAUSE PROPERTY RIGHTS ARE TO BE STRICTLY CONSTRUED. YOU
19 HAVE GOT A SITUATION HERE WHERE MR. MCGUINN WAS TOLD BY
20 THE TOWN OF LEXINGTON, EDWARDS WHO WAS THE TOWN ENGINEER
21 AT THE TIME, THAT THE EASEMENT THAT HE PRESENTED, THIS
22 EASEMENT THAT HE IS OPERATING UNDER THE AUTHORITY ON WAS
23 QUESTIONABLE, HE WAS UNCERTAIN AS TO WHETHER OR NOT MR.
24 MCGUINN COULD USE THAT EASEMENT WITHOUT OBTAINING WHAT WE
25 CALL A PRIVATE EASEMENT FROM THE ESPINO'S. AND, JUDGE, I

1 ALMOST FEEL LIKE I AM INSULTING YOUR INTELLIGENCE BECAUSE
2 YOU HAVE HEARD THIS CASE SO MUCH BUT IF YOU WOULD, I ASK
3 YOUR INDULGENCE TO JUST GIVE YOU THE BACKGROUND.

4 THE COURT: THAT IS FINE, DON'T ASSUME THAT I
5 REMEMBER ANYTHING.

6 MR. AUN: I UNDERSTAND, YOUR HONOR. THE ESPINO'S
7 LIVE BEHIND THIS GATES COMMON SUBDIVISION. AND MR.
8 MCGUINN WAS TOLD BY BOTH GENE EDWARDS AND ROSIEMARIE NUZZO
9 THAT THERE WAS GOING TO HAVE TO BE A PRIVATE EASEMENT
10 OBTAINED. OKAY. GENE EDWARDS TESTIFIED THAT HE NEVER
11 APPROVED MR. MCGUINN TO GO FORWARD AND HE NEVER SAW A
12 FINAL OPINION INDICATING THAT HE COULD GO FORWARD UNDER
13 THIS EASEMENT. THE TOWN OF LEXINGTON'S LEGAL COUNSEL WAS
14 NEVER ASKED WHETHER OR NOT THIS EASEMENT WAS ACCEPTABLE
15 FOR MCGUINN TO GO ACROSS. ROSIEMARIE NUZZO, WHO WAS THE
16 ENGINEER AFTER GENE EDWARDS RETIRED, WHO WAS THE ENGINEER
17 WHO WAS ULTIMATELY WAS ON WATCH WHEN THIS CONNECTION WAS
18 MADE, SHE INDICATED IN HER TESTIMONY THAT IT APPEARS FROM
19 THE PLAT THAT THE CONNECTION WAS MADE WITHOUT A PROPER
20 EASEMENT. I HAVE CITED AN EXCERPT IN MY MEMORANDUM FOR
21 YOU ABOUT THAT TESTIMONY. ULTIMATELY, JUDGE, THE BOTTOM
22 LINE IS IS THAT THERE ARE PRIVATE EASEMENTS THAT ARE
23 NEEDED IN THESE DEVELOPMENTS. I WAS JUST INVOLVED IN ONE
24 WHEN WE HAD TO GET A SEWER LINE AND WE HAD TO OBTAIN
25 PRIVATE EASEMENTS. AND IN THIS PARTICULAR CASE MR.

1 MCGUINN FILED A LAWSUIT, I BELIEVE IN AUGUST OF 2005. HIS
2 UTILITY GENERAL CONTRACTOR, CBG, MIDDLE OCTOBER, OCTOBER
3 13TH, I BELIEVE OF 2005 SENT A LETTER TO THE RESIDENCE
4 SAYING THEY WERE GETTING READY TO DO SOME WORK IN THE
5 AREA. THIS WAS AFTER THE LAWSUIT. OKAY. THEY PROCEEDED
6 WITH THAT WORK NOTWITHSTANDING THE FACT THAT THEY HAD
7 KNOWLEDGE OF THE LAWSUIT, THAT THEY HAD KNOWLEDGE THAT MY
8 CLIENTS, TO THE INSTALLATION OF ANY LINES ON THEIR
9 PROPERTY WITHOUT THE ACQUISITION OF A PRIVATE EASEMENT AND
10 THEY DID SO BASED ON MR. MCQUINN'S REPRESENTATION TO THEM
11 THAT THEY HAD THE RIGHT TO GO FORWARD. NOW, THAT WAS HIS
12 REPRESENTATION WITHOUT BENEFIT OF THE CIVIL ENGINEERS
13 AUTHORIZATION, OF THE TOWN ENGINEERS AUTHORIZATION,
14 WITHOUT BENEFIT OF THE TOWN ATTORNEYS AUTHORIZATION AND IN
15 THE FACE OF OBJECTIONS THAT WERE MADE BY MY CLIENT AND
16 AFTER HE HAD FILED A LAWSUIT TO ASK THIS COURT TO MAKE
17 THIS VERY DETERMINATION AS TO WHETHER OR NOT HE COULD USE
18 IT. IT IS ALMOST LAUGHABLE THAT HE WOULD FILE A
19 DECLARATORY JUDGMENT ACTION ASKING FOR THE COURT TO FIND
20 OUT WHETHER HE COULD USE THIS EASEMENT TO INSTALL THE VERY
21 LINES HE WANTED TO INSTALL AND BEFORE THE COURT MAKES THE
22 DETERMINATION TO GO FORWARD AND INSTALL IT. SO, JUDGE, WE
23 FEEL LIKE THERE ARE MANY, MANY ISSUES OF FACT WITH
24 REFERENCE TO THIS CASE WHEN IT RELATES, WHEN IT RELATES TO
25 MR. MCQUINN'S POSITION IN THIS CASE. AS TO THE LANGUAGE

1 OF THIS EASEMENT, WE BELIEVE THE LANGUAGE OF THIS EASEMENT
2 WAS FOR THE BENEFIT OF COVENTRY LAKE SUBDIVISION, IT DOES
3 NOT SAY, CONTINUOUS COMMUNITIES, IT DOES NOT SAY GATES
4 COMMON, IT DOES NOT SAY IMPROVEMENT OF ANY OTHER
5 SUBDIVISION. IT ALLOWS THE TOWN TO MAINTAIN, MAINTAIN THE
6 OPERATION, THE WATER, SEWER AND DRAINAGE FOR COVENTRY LAKE
7 SUBDIVISION. IF WE ALTER THOSE RIGHTS THEN IN MY OPINION
8 THE COURT HAS NOTED, WE HAVE TO MEET A HIGH THRESHOLD AND
9 I DON'T THINK THAT THRESHOLD HAS BEEN MET HERE. SO, THAT
10 WOULD BE THE ESSENCE OF OUR ARGUMENT THERE AS TO THE
11 DECLARATORY JUDGMENT ACTION ON THE EASEMENT, YOUR HONOR,
12 AND WE PROVIDED OBVIOUSLY CASE LAW IN THE MEMO.

13 THE COURT: ALL RIGHT, MR. THOMPSON.

14 MR. THOMPSON: YOUR HONOR, I BEG TO DIFFER IN THE
15 ACTUAL WORDING OF THE EASEMENT.

16 THE COURT: IF YA'LL AGREED ON THAT YA'LL PROBABLY
17 WOULDN'T BE HERE.

18 MR. THOMPSON: YOUR HONOR, THE EASEMENT DOESN'T SAY
19 THAT THE TOWN CAN OPERATE A SEWER SYSTEM, IT JUST SAYS
20 MAINTENANCE. IF WE WERE TO, IF WE WERE TO INTERPRET THIS
21 EASEMENT IN AS RESTRICTED OF A FASHION AS THE DEFENDANT IS
22 TRYING TO GET US TO DO THE DEFENDANT WOULD HAVE TO GET
23 PERMISSION FROM ALL DOWNSTREAM NEIGHBORS BEFORE SHE
24 FLUSHED HER OWN TOILET. THIS IS AN EASEMENT THAT SAYS
25 MAINTENANCE OF SEWER SYSTEM, IT GOES ALL THROUGH AND IT

1 TALKS ABOUT ALL TYPES OF PIPE AND STUFF. AND IT IS VERY
2 OBVIOUS FROM LOOKING AT THE PIPES IN THE GROUND, WHAT IS
3 MEANT BY THESE EASEMENTS, THEY ARE ON PLATS. SOMETIMES IN
4 THIS COUNTY WE HAVE EASEMENT THAT ARE EVEN CREATED BY
5 REFERENCES TO PLATS THAT DON'T HAVE PAPER EASEMENT AT ALL.
6 BUT IT IS VERY OBVIOUS THAT THERE IS AN EASEMENT, THAT IT
7 IS A SPUR LINE THAT INCLUDES NOT JUST THE SEWER SYSTEM
8 THAT SERVE THE ESPINO'S PROPERTY BUT THE SEWER SYSTEM THAT
9 STICKS OUT INTO THE MIDDLE OF NOWHERE THAT BUT FOR THE USE
10 WE ARE PUTTING THEM TO WOULD HAVE NO LOGICAL SENSE AT ALL.
11 I WOULD ALSO SUBMIT TO YOU AGAIN THAT IF WE ARE AS
12 RESTRICTIVE AS THAT THE DEFENDANT CLAIMS THAT WE OUGHT TO
13 BE IN THIS EASEMENT, YOU CAN'T USE THIS SEWER SYSTEM. THE
14 MAINTENANCE OF A SEWER SYSTEM IS EXACTLY LIKE THE
15 DEFENDANT HAS ALREADY SAID. HE DOES IT AUTOMATICALLY.
16 THE MAINTENANCE OF A SEWER SYSTEM IMPLIES THE USE OF IT,
17 THE USE OF A SEWER SYSTEM IMPLIES THAT THERE IS WATER THAT
18 GOES THROUGH IT AND THAT IT GOES SOMEWHERE. ON ONE END IT
19 IS GOING TO BE CONNECTING TO WASTE WATER TREATMENT PLAN OR
20 WHERE EVER IT IS GOING TO GO DOWNSTREAM. ON THE OTHER END
21 DIFFERENT HOUSES CONNECT UP TO IT. AND IF IT HAS GOT A
22 SPUR LINE IT IS VERY VERY OBVIOUS THAT IT IS DESIGNED TO
23 HAVE OTHER SYSTEMS ATTACHED TO IT TOO. THAT IS WHY IT IS
24 CALLED A SEWER SYSTEM, IT IS A SYSTEM OF PIPES THAT IS ALL
25 DESIGNED TO WORK TOGETHER TO DO THIS JOB. AND I WOULD

1 SUBMIT THAT THE RESTRICTIVE LANGUAGE THAT WE ARE SEEKING
2 TO IMPOSE ON THIS EASEMENT, IT IS ABSOLUTELY NONSENSICAL.
3 I WOULD ALSO SAY THAT THE WAY THAT, IF YOU LOOK EVEN IN
4 THE DEFENDANT'S MEMO HE CITES VARIOUS SPOTS ON PAGE FOUR
5 WHERE HE ASKED MS. NUZZO ABOUT THIS EASEMENT AND SHE SAYS,
6 EVEN IN HIS MEMO THAT IN THE FIRST PARAGRAPH HALF WAY DOWN
7 THAT IT WAS OKAY WITH THE TOWN OF LEXINGTON WHEN TO GO
8 AHEAD. ALTHOUGH AT THE BOTTOM OF THE PAGE SHE IS ASKED
9 WHETHER OR NOT SHE KNOWS WHERE THERE IS AN EASEMENT OR
10 NOT. NOW, SHE WASN'T SHOWN THE EASEMENT AS THE COURT WAS
11 SHOWN SO SHE DIDN'T KNOW. BUT HER ANSWER IS, IF THE LINES
12 EXIST, IT ALREADY EXISTED, IF THE LINES EXIST THEN YOU
13 ALMOST HAVE TO ASSUME THERE IS AN EASEMENT TO IT, NOBODY
14 IS GOING TO WANT TO TAKE CARE OF PUBLIC SEWER, PUBLIC
15 WATER ON THEIR OWN PROPERTY. IT WAS NONSENSICAL TO HER IN
16 HER DEPOSITION TO THINK THAT WE ARE GOING TO BE TALKING
17 ABOUT A SEWER SYSTEM THAT GOES TO NO WHERE. I WOULD
18 SUBMIT TO YOU THAT IF YOU JUST LOOK AT THE PICTURE IT IS
19 VERY OBVIOUS WHAT THE EASEMENT IS FOR AND WHAT THE SCOPE
20 OF THE EASEMENT IS FOR. AND IT IS NOT IN CONFLICT WITH
21 THE WORDING OF THE PAPER EASEMENT, WITH THE WORDING OF THE
22 DEED OF THE EASEMENT. AND I HAVE NOTHING FURTHER ON THAT
23 ISSUE.

24 THE COURT: ANYTHING FURTHER, MR. AUN.

25 MR. AUN: YOUR HONOR, THERE IS NO QUESTION THAT THE

1 DEPOSITION TESTIMONY OF ROSIEMARIE NUZZO AND GENE EDWARDS
2 IS VERY TELLING AS TO THEIR POSITION WITH REFERENCE TO
3 PRIVATE EASEMENTS. AND I THINK A SUMMATION OF THAT IS
4 THAT THEY DON'T GET YOU FROM POINT A TO POINT B, THEY WILL
5 PROVIDE WATER AND SEWER IF THEY HAVE IT AND IF YOU CAN GET
6 THERE LEGALLY THEY WILL PROVIDE IT WHICH IS WHY THEY HAVE
7 AN EXHIBIT B WHICH MR. MCGUINN CITED IN HIS AFFIDAVIT
8 WHICH BY THE WAY WE OBJECT TO BUT WHICH IS ALSO HAS BEEN
9 AN EXHIBIT IN VARIOUS DEPOSITIONS. THEY SAY WE HAVE THE
10 WILLINGNESS AND ABILITY TO PROVIDE WATER AND SEWER WHICH
11 IS KIND OF THE OPERATING PROCEDURE IF THEY HAVE THAT
12 ABILITY TO DO THAT. OKAY. BUT IT DOESN'T MEAN THAT THEY
13 CAN AUTHORIZE THE CONNECTION TO THAT. IN THIS PARTICULAR,
14 IN THE FIRST PARAGRAPH IT TALKS ABOUT FITTINGS, VALVES AND
15 PERTINENCES LOCATED ON PROPERTY OF THE GRANTOR KNOWN AS
16 COVENTRY LAKE SUBDIVISION. THAT IS THIS PROPERTY, IT WAS
17 SPECIFICALLY AND EXCLUSIVELY FOR THIS PROPERTY, IT WAS
18 CONFINED TO THE BENEFIT OF THIS PROPERTY AND TO TRY TO
19 ALTER THAT IS, IN MY OPINION, IN VIOLATION OF LAW. ALSO,
20 YOUR HONOR, IF IT WAS SO CLEAR WHY DID THEY FILE A
21 LAWSUIT. SO, THERE ARE ISSUES OF FACT WITH REFERENCE TO
22 THIS DECLARATORY JUDGMENT AS TO THEIR POSITION AND I THINK
23 WE HAVE FILED A COUNTER MOTION BECAUSE WE BELIEVE THAT A
24 PLAIN MEANING OF THE STATUE AND APPLY THE LAW INDICATES
25 THAT THEY SHOULD OF OBTAINED A PRIVATE EASEMENT AND

1 INDICATES THAT THERE MAY HAVE BEEN NEEDED TO BE AN
2 AMENDMENT TO THIS EASEMENT TO ALLOW FOR THE GATES COMMON
3 TO UTILIZE THOSE RIGHTS.

4 MR. THOMPSON: YOUR HONOR, AT THE TIME GATES COMMON
5 WAS THE ONLY ENTITY MENTIONED BECAUSE GATES COMMON WAS THE
6 ONLY ENTITY THAT EXISTED. NOW, GATES COMMON OWNED ALL OF
7 THIS PROPERTY BUT GATES COMMON WAS THE ONLY ENTITY THAT
8 EXISTED AT THE TIME. IT WOULD OF BEEN, AGAIN, NONSENSICAL
9 FOR THEM TO BE ABLE TO MENTION IN THEIR DEEDS AN ENTITY
10 THAT DID NOT YET EXIST. HOWEVER, IF YOU WILL LOOK AT THE
11 PLATS, THE PLATS ARE VERY CLEAR AND INDICATE WHAT IS
12 INTENDED BY THESE EASEMENTS AND THEY DON'T RUN COUNTER TO
13 THE WORDING IN THE EASEMENT ITSELF. I WILL ALSO SUBMIT TO
14 YOUR HONOR THAT THERE ARE OTHER ATTACHMENTS TO MR.
15 MCQUINN'S AFFIDAVIT THAT INDICATE THAT, YOU CAN'T JUST PUT
16 PIPES IN THE GROUND. YOU JUST DON'T GO THROUGH AND BUILD
17 SEWER SYSTEMS IN A VACUUM. THEY ARE LOOKED AT AND YOU
18 HAVE TO PUT OUT PLANS AND THEY HAVE TO BE APPROVED AND
19 THEY LOOK FOR ALL OF THE DIFFERENT CONCEPTS THAT HAVE TO
20 DO WITH SEWER SYSTEMS AND WATER SYSTEMS. THIS THING WAS
21 APPROVED BY THE TOWN AND ACCEPTED BY THE TOWN AND ACTUALLY
22 NOW OWNED BY THE TOWN WAS APPROVED BY THE COUNTY, WAS
23 LOOKED AT BY DHEC, EVERYBODY THAT COULD OF LOOKED AT THIS
24 THING AND APPROVED IT LOOKED AT IT AND APPROVED IT. AND
25 AS FAR AS WHY WE FILED THE LAWSUIT, I WOULD SUBMIT TO YOU

1 THAT THAT WAS DONE OUT OF AN ABUNDANCE OF CAUTION BECAUSE
2 THERE WAS THE DEFENDANT OUT THERE CALLING THE POLICE EVERY
3 TIME WE WENT TO WORK IN THE SEWER EASEMENT WE HAD A
4 LEGITIMATE REASON TO BE IN. AND THAT IS THE EXTENT OF MY
5 ARGUMENT ON THAT ISSUE AND I WILL BE VERY HAPPY TO GO TO
6 THE COUNTERCLAIMS.

7 THE COURT: LET ME ASK A QUESTION. IS IT GATES
8 COMMON OR COVENTRY THAT ORIGINALLY DEVELOPED AND OWNED ALL
9 OF THE PROPERTY.

10 MR. THOMPSON: COVENTRY WAS THE ORIGINAL SUBDIVISION.
11 IT IS COVENTRY LAKES, COVENTRY IS THE ORIGINAL
12 SUBDIVISION. AND IT ESSENTIALLY, THE ESPINO'S HOUSE IS
13 ONE OF THE LAST ONES BUILT, IT IS KIND OF ON THE LOW SPOT
14 OF THIS PROPERTY. THERE IS A PIECE OF PROPERTY BACK UP
15 BEHIND IT, THERE IS A PIECE OF PROPERTY THAT ULTIMATELY
16 GETS DEVELOPED IN THE GATES COMMON SUBDIVISION.

17 THE COURT: AND THAT WAS THE SEWER THAT WAS TIED INTO
18 THIS SEWER.

19 MR. THOMPSON: THAT IS CORRECT, YOUR HONOR.

20 THE COURT: WOULD WE BE MAKING THE SAME ARGUMENT IF
21 IT WASN'T A DIFFERENT DEVELOPER?

22 MR. AUN: YOUR HONOR, MY VIEW OF THIS EASEMENT IS IS
23 THERE IS NOTHING TO ALLOW FOR IMPROVEMENT OF THE WATER,
24 SEWER AND DRAINAGE.

25 THE COURT: MAINTAIN WHATEVER IS THERE.

1 MR. AUN: MAINTAIN WHATEVER IS THERE. THAT IS KIND
2 OF THE ESSENCE OF IT AS IT IS. IT DOES NOT SPEAK TO
3 IMPROVEMENT AT ALL, YOUR HONOR.

4 THE COURT: AND IN ADDITION TO ANY IMPROVEMENT,
5 PIPES, THEY WEREN'T ACTUALLY CHANGED, JUST A HIGHER VOLUME
6 BECAUSE OF THIS ADDITIONAL USE OF THE SEWER.

7 MR. AUN: A HIGHER VOLUME, YOUR HONOR, AND OBVIOUSLY
8 I THINK THIS IS A 36 UNIT, 36 OR 40 UNIT SUBDIVISION. THE
9 HIGHER VOLUME AND THE DEVELOPMENT ITSELF, WE HAVE OTHER
10 ISSUES ASSOCIATED WITH THIS LAWSUIT SUCH AS INCREASED
11 ELEVATION WHICH HAS CAUSED A TREMENDOUS WATER FLOW AND
12 DAMAGE TO MY CLIENT'S PROPERTY. BUT ULTIMATELY THE, AS TO
13 THE SEWER AND DRAINAGE IT IS GOING TO INCREASE THE VOLUME
14 OF BOTH SURFACE WATER AND UNDERGROUND WATER THAT GOES
15 THROUGH THE DRAINAGE AND OBVIOUSLY SEWER USE.

16 MR. THOMPSON: AND I WOULD PARTLY AGREE AND PARTLY
17 DISAGREE WITH THAT STATEMENT. YOU ARE TALKING ABOUT A
18 PIPE THAT PRIOR TO THAT THE DEVELOPMENT THAT MCGUINN DID,
19 HAD ZERO FLOW IN IT, NO FLOW AT ALL. IT IS JUST A BIG
20 PIPE THAT STICKS THROUGH THE PROPERTY, IT IS CAPPED
21 WAITING FOR SOMEBODY TO CONNECT TO IT. IT DOESN'T HAVE
22 ANY FLOW AT ALL. SO, TO THE EXTENT THAT THERE IS AN
23 INCREASED FLOW IN THE PIPE, THAT IS TRUE BECAUSE FROM ZERO
24 FLOW TO SOME FLOW FROM THE EXISTING SUBDIVISION. THAT IS
25 FOR SANITARY SEWER, YOUR HONOR. I WOULD ALSO SUBMIT TO

1 YOU THAT EVEN THOUGH THERE IS A STORM WATER DRAINAGE
2 EASEMENT, THAT THAT EASEMENT IS NOT BEING UTILIZED. THAT
3 ALL OF THE STORM WATER FROM THE GATES COMMON SUBDIVISION
4 IS ENGINEERED TO GO INTO A DETENTION POND THAT IS BEHIND
5 THE ESPINO'S HOUSE AND THEN IT IS METERED INTO A SEPARATE
6 STORM DRAIN THAT GOES THROUGH THE NEXTDOOR NEIGHBORS YARD
7 IN ORDER TO BE ABLE TO GET THE INFRASTRUCTURE IN AND TO
8 KEEP THE DEVELOPMENT RUNNING AS BEST WE COULD, WE ACTUALLY
9 BOUGHT ANOTHER EASEMENT FROM THE NEXTDOOR NEIGHBOR TO RUN
10 THE STORM WATER THROUGH. AND FOR CLARITY SAKE, AND I
11 APOLOGIZE TO THE COURT THAT MAY BE AWARE OF THIS ALREADY,
12 THE DIFFERENCE BETWEEN A DETENTION POND AND A RETENTION
13 POND, A DETENTION POND IS ESSENTIALLY LIKE A BATHTUB, IT
14 IS DESIGNED TO HAVE FLOW COME INTO IT AND THERE IS A
15 LIMITED SIZE OF THE DRAIN ON THE BOTTOM, IT METERS OUT TO
16 A STEADY RATE REGARDLESS HOW MUCH RAIN IS THERE. SO, AT
17 THIS POINT AND TIME IT IS MY UNDERSTANDING THERE IS NO
18 EXTRA STORM WATER GOING ACROSS THE ESPINO'S PROPERTY. THE
19 ONLY WATER WE ARE TALKING ABOUT IS THE SANITARY SEWER
20 WATER THAT HAS TO GO UNDER THE GROUND IN A PIPE AND IS NOW
21 CURRENTLY GOING THROUGH THE PIPE THAT IS PREEXISTING ON
22 THEIR PROPERTY THAT WAS CONNECTED TO IT.

23 THE COURT: LET'S MOVE ON.

24 MR. THOMPSON: YOUR HONOR, AS FAR AS THE FIRST
25 COUNTERCLAIM GOES FOR A SLANDER OF TITLE, IN SO MUCH AS IF

1 THE COURT IS INCLINED TO GRANT SUMMARY JUDGMENT ON THE
2 ISSUE THAT THERE IS AN EASEMENT AND THAT MY CLIENT HAS THE
3 RIGHT TO WORK IN THE EASEMENT THEN THERE WAS NO SLANDER OF
4 TITLE BECAUSE ALL WE HAVE SAID IS THAT THERE IS AN
5 EASEMENT. IN SO MUCH AS THE SECOND COUNTERCLAIM FOR
6 NEGLIGENT MISREPRESENTATION, THE THIRD FOR CONSTRUCTIVE
7 FRAUD, THE FORTH FOR CONSTRUCTIVE FRAUD, ALL OF THESE
8 MISREPRESENTATIONS AND FRAUD TYPES OF CLAIMS, ONE OF THE
9 NECESSARY ELEMENTS, IS THAT THE ALLEGED VICTIM OF SUCH A
10 TORT HAS TO ACTUALLY BELIEVE YOU, HAS TO ACTUALLY TO BE
11 BELIEVED TO BE DECEIVED. THAT IS ONE OF THE THINGS THAT
12 WOULD OF BEEN AN ELEMENT, IS THAT THE ESPINO'S WOULD HAVE
13 HAD TO HAVE SAID, YES YOU ARE RIGHT, THERE IS AN EASEMENT
14 THERE, YOU CAN USE IT AND FOUND OUT LATER THAT THERE
15 WASN'T. THERE IS NO INDICATION THAT THE ESPINO'S AT ANY
16 TIME EVER AGREED THAT THERE WAS AN EASEMENT OVER THEIR
17 PROPERTY. IN FACT, THEY HAVE FOUGHT US THE ENTIRE TIME
18 AND I WILL CALL THE COURT'S REFERENCE A STATEMENT FROM MR.
19 MCGUINN WHO WAS IN A POSITION TO KNOW. AND HE SAYS IN HIS
20 AFFIDAVIT, HE SAYS THAT AT NO POINT AND TIME EVER BELIEVED
21 ME WHEN I SAY, HEY, THERE IS AN EASEMENT AND I HAVE A
22 RIGHT TO WORK HERE. THE FIFTH COUNTERCLAIM, WE DON'T
23 BELIEVE THAT SUCH CAUSES OF ACTION EXIST AND WE WOULD LIKE
24 TO ASK THAT THEY BE DISMISSED. THE SIXTH COUNTERCLAIM FOR
25 FRAUD, I BELIEVE FALLS INTO THE SAME CATEGORY. AND AGAIN

1 FOR FRAUD YOU HAVE TO ACTUALLY HAVE SOME TYPE OF RELIANCE
2 UPON STATEMENTS THAT ARE MADE BY THE PERSON WHO YOU
3 BELIEVE DEFRAUDED YOU. AND THERE IS NO INDICATION OF ANY
4 TYPE OF RELIANCE ON ANY OF THE STATEMENTS FROM MCGUINN OR
5 ANY OF THEIR AGENTS. THE SEVENTH COUNTERCLAIM,
6 APPROPRIATELY KIND OF FALLS INTO THE CATEGORY OF THE FIRST
7 ONE. AND THERE ARE SEVERAL OF THESE, IF THERE IS AN
8 EASEMENT AND IF THERE IS A RIGHT TO WORK IN THE EASEMENT
9 THEN THERE IS NO CONVERSION. SO, IF THE COURT BELIEVES
10 THAT THERE WAS AN EASEMENT, THAT MCGUINN HAD THE RIGHT TO
11 WORK IN THE EASEMENT AND THE RIGHT TO CONNECT THE PIPES IN
12 THE EASEMENT THEN THERE IS NO CONVERSION. THE SAME FOR
13 THE EIGHTH COUNTERCLAIM FOR TRESPASS, YOUR HONOR. THE
14 NINTH COUNTERCLAIM, THERE IS EVIDENCE OF ANY INTENT TO
15 DECEIVE ON BEHALF OF MY CLIENT, NO EVIDENCE THAT MY CLIENT
16 EVER DECEIVED THE DEFENDANTS AND THEY WEREN'T DECEIVED BY
17 HIS ACTIONS. THEY ARE NOT COUNTER TO THE INTEREST OF THE
18 PUBLIC. CONSTRUCTING SEWER SYSTEMS IS NOT AGAINST THE
19 PUBLIC INTEREST AND WE WOULD SUBMIT TO YOU THAT THAT
20 COUNTERCLAIM SHOULD FALL AS WELL. AND THAT IS THE EXTENT
21 ON WHAT I HAVE AS TO THE COUNTERCLAIMS, YOUR HONOR.

22 THE COURT: ALL RIGHT, MR. AUN.

23 MR. AUN: THANK YOU, YOUR HONOR. YOUR HONOR, AGAIN
24 INITIALLY MR. THOMPSON, A GOOD LAWYER, HAS TAKEN AN AWFUL
25 LOT OF POETIC LICENSE IN HIS FACTUAL OVERVIEW ON THESE

1 MISREPRESENTATION TYPE CLAIMS. I MEAN, IF WE LOOK AT JUST
2 THE ESSENTIAL MISREPRESENTATION IN THIS CASE WHICH WAS THE
3 LAWSUIT, FILING A DECLARATORY JUDGMENT IN THIS MATTER AND
4 THEN THE FACE OF THAT LAWSUIT PROCEEDING WITH NO ONES
5 AUTHORITY, NOT THE TOWN'S AUTHORITY, NOT THE COUNTY'S
6 AUTHORITY, NOT A LAWYER'S AUTHORITY, PROCEEDING WITH NO
7 ONES AUTHORITY TO INSTALL LINES AFTER REPRESENTING TO THIS
8 COURT AND REPRESENTING TO THE PUBLIC THAT THERE IS AN
9 ISSUE WITH REFERENCE TO THE VALIDITY OF THE EASEMENT THAT
10 HE WAS OPERATING UNDER IS A MISREPRESENTATION. BUT, YOUR
11 HONOR, THE DEPOSITION TESTIMONY THAT WE HAVE TAKEN
12 INDICATES THAT MR. MCGUINN MISREPRESENTED FACTS TO THE
13 TOWN OF LEXINGTON THAT MY CLIENTS RELIED UPON,
14 MISREPRESENTED TO MY CLIENTS IN REFERENCE THAT THE USE OF
15 THIS EASEMENT AND THE SCOPE OF THIS EASEMENT, HE
16 APPROACHED MY CLIENT'S DAUGHTER INITIALLY IN REFERENCE TO
17 THIS MATTER. AND ULTIMATELY, JUDGE, THOSE CAUSES OF
18 ACTION ARE FACTUAL BY NATURE. SUMMARY JUDGMENT, IN
19 LOOKING AT THOSE CAUSES OF ACTION SHOULD BE BASED ON
20 FACTUAL INFORMATION THAT SHOWS THAT THERE WAS NO GENUINE
21 ISSUE OF MATERIAL FACT. I HAVE NOT SEEN ANY SUPPORTING
22 FACTUAL INFORMATION, NO MEMO, NO DEPOSITION EXCERPTS TO
23 SUPPORT WHAT HE IS SAYING. SO, ULTIMATELY, JUDGE, WE
24 BELIEVE THAT THERE ARE MANY FACTUAL ISSUES THAT IS
25 RELATING TO WHETHER MISREPRESENTATION WAS MADE, WHETHER MY

1 CLIENTS HAD THE RIGHT TO RELY UPON THE MISREPRESENTATIONS
2 OF THE ABUSE OF THIS PROCESS AND WHETHER OR NOT MY CLIENTS
3 DID IN FACT RELY AND WERE INJURED AS A RESULT OF IT. WE
4 BELIEVE WE HAVE A STRONG ARGUMENT IN THAT REGARD, JUDGE,
5 AND WE WOULD ASK THAT YOU ALLOW THIS CASE TO GO FORWARD ON
6 THOSE COUNTERCLAIMS. THE SECOND ISSUE IS, JUDGE, HE ONLY
7 MENTIONED THE FIFTH COUNTERCLAIM IN THE MOTION. AND BY
8 THE WAY, HE MENTIONED IT TWICE IN THE MEAT OF THE
9 DOCUMENT. HE MENTIONED IT MAYBE, I THINK THREE TIMES.
10 YOU HAVE MY COPY, JUDGE, I THINK HE MENTIONED IT IN THE
11 OPENING PARAGRAPH, THE MIDDLE PARAGRAPH AND THE LAST
12 PARAGRAPH. SO, I APOLOGIZE FOR NOT PREPARING A MEMO IN
13 RESPONSE BUT I ASSUME I COULD RELY UPON THE MOTION. HE
14 CERTAINLY HASN'T MET HIS NOTICE REQUIREMENTS UNDER THE
15 MOTION AND THE SUMMARY JUDGMENT WOULD BE INAPPROPRIATE
16 BASED ON THAT FACT AND THAT FACT ALONE.

17 THE COURT: GOES SPECIFICALLY TO THE FIFTH CAUSE OF
18 ACTION BECAUSE THERE IS NO QUESTION THAT THERE IS A MOTION
19 TO DISMISS PURSUANT TO 12(B)(6) ON THAT COUNTERCLAIM.

20 MR. AUN: WELL, YOUR HONOR, THE BREACH OF IMPLIED
21 COVENANT OF GOOD FAITH AND FAIR DEALING, I THINK GOES TO
22 THE TRUE SITUATION HERE.

23 THE COURT: IS THAT NOT LANGUAGE THAT IS UTILIZED IN
24 CONTRACTS?

25 MR. AUN: IT IS.

1 THE COURT: AND THERE IS A CONTRACT BETWEEN THESE
2 FOLKS, RIGHT?

3 MR. AUN: WELL, YOU KNOW, I THINK THERE MAY OF BEEN
4 SOME ORAL REPRESENTATIONS THAT MY CLIENT RELIED UPON. I
5 UNDERSTAND THE POSITION OF THE COURT ON IT. BUT
6 ULTIMATELY, JUDGE, THE IMPLIED COVENANT OF GOOD FAITH AND
7 FAIR DEALING, I THINK, GOES BEYOND THAT AND CAPTURES IN
8 WHETHER OR NOT A BUSINESS PERSON IN THE COMMUNITY IS
9 ABUSING PROCESS IN SUCH A WAY TO GAIN AN ADVANTAGE OVER
10 INDIVIDUALS THAT MAY NOT BE IN THE SAME POSITION AND I
11 THINK IT IS AN APPROPRIATE CAUSE OF ACTION IN THIS REGARD.

12 THE COURT: ALL RIGHT. GO AHEAD, MR. THOMPSON.

13 MR. THOMPSON: I WOULD SUBMIT TO THE COURT AGAIN THAT
14 THERE IS NO SUCH THING AS COUNTERCLAIM NUMBER FIVE. YOU
15 ARE EITHER IN TORT OR CONTRACT BUT YOU CAN'T BE IN BOTH.
16 THERE IS NO EVIDENCE AT ALL THAT THERE WAS ANY TYPE OF
17 CONTRACT BETWEEN MY CLIENT AND THE ESPINO'S EVER. AND AS
18 FAR AS ME HEADED TO THE BURDEN OF PROOF OFF THESE ELEMENTS
19 OF COUNTERCLAIMS FOR RELIANCE, I WOULD SUBMIT TO YOU THAT
20 THE CLAIMANT HAS THE BURDEN OF PROOF TO GENERATE SOME TYPE
21 OF FACTUAL BASIS FOR HIS CLIENTS, FOR THE ESPINO'S RELYING
22 ON SOME TYPE OF STATEMENT OF MR. MCGUINN AND OF THE
23 MCGUINN CONSTRUCTION, THAT THESE ARE CRITICAL NECESSARY
24 ELEMENTS OF THESE CAUSES OF ACTION. YOU HAVE TO HAVE SOME
25 TYPE OF DETRIMENTAL RELIANCE ON WHAT PEOPLE SAY IN ORDER

1 TO JUSTIFY AN ACTION FOR FRAUD AND CONSTRUCTIVE FRAUD AND
2 MISREPRESENTATION.

3 THE COURT: ALL RIGHT. I WILL DELAY UNTIL I CAN DO
4 SOME MORE RESEARCH THE RULING ON THE MOTION FOR SUMMARY
5 JUDGMENT. IN LOOKING AT THE MOTION TO DISMISS, THE
6 NOTICE, YOU WILL PLEASE TAKE NOTICE ON THE 10TH DAY AFTER
7 SERVICE OR ASSUME THEREAFTER AS COUNSEL CAN BE HEARD, THE
8 OTHER SIDE, COUNSEL, THE PLAINTIFF WILL MOVE BEFORE THE
9 COURT FROM AN ORDER GRANTING SUMMARY JUDGMENT AND AN ORDER
10 DISMISSING DEFENDANT'S FIFTH COUNTERCLAIM. PLAINTIFF ALSO
11 MOVES TO DISMISS DEFENDANT'S FIFTH COUNTERCLAIM FOR BREACH
12 OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
13 PURSUANT TO RULE 12(B)(6) OF THE RULES OF CIVIL PROCEDURE
14 ON THE GROUNDS THAT THERE IS NO RECOGNIZED CAUSE OF
15 ACTION. THAT IS THE ONLY COUNTERCLAIM THAT I WILL
16 CONSIDER, THAT MOTION IS GRANTED. THE OTHER
17 COUNTERCLAIMS, THERE IS NO PROPER MOTION BEFORE THE COURT
18 DEALING WITH THEM AND QUITE FRANKLY I THINK IT IS BEST
19 HANDLED BY THE TRIAL COURT WHEN YOU GET TO THE TRIAL.

20 MR. THOMPSON: THANK YOU, YOUR HONOR.

21 MR. AUN: THANK YOU.

22 THE COURT: AND I DON'T KNOW IN GRANTING THAT MOTION
23 THAT IT NEEDS ANYTHING MORE THAN A FORM FOUR. IT IS A
24 12(B)(6) MOTION AND I AM JUST TAKING THE POSITION THAT IT
25 IS NOT A RECOGNIZED CAUSE OF ACTION. NOW, YOU HAVE A

1 MOTION FOR SUMMARY JUDGMENT.

2 MR. AUN: DO YOU HAVE A COPY UP THERE, IF YOU DON'T I
3 DO.

4 THE COURT: I DO HAVE A COPY, THAT IS THE ONE THAT
5 WAS FILED ABOUT TWELVE DAYS AGO, IS THAT RIGHT?

6 MR. AUN: THAT IS RIGHT, YOUR HONOR.

7 THE COURT: I DO HAVE THAT.

8 MR. AUN: YOUR HONOR, MAYBE OUT OF MY CONFUSION OVER
9 THE MOTION THAT WAS MADE BY THE PLAINTIFF'S COUNSEL, WHEN
10 HE SAID SUMMARY JUDGMENT AS TO THIS MATTER, I ASSUME THAT
11 HE WAS PURSUING SUMMARY JUDGMENT AS TO HIS SLANDER OF
12 TITLE CLAIM AGAINST MY CLIENT AND HIS TORTIOUS
13 INTERFERENCE OF CONTRACT AS TO MY CLIENT. I HAVE, IN MY
14 MEMORANDUM IN OPPOSITION TO HIS MOTION FOR SUMMARY
15 JUDGMENT RAISE THOSE ISSUES AND THAT OUTLINES THE LAW WITH
16 REFERENCE TO SLANDER OF TITLE AND TORTIOUS INTERFERENCE.
17 THE REASON I SAY THAT, IN REFERENCE TO MY MOTION IS THAT
18 WE HAVE ALSO FILED A MOTION FOR SLANDER OF TITLE SO I
19 WOULD LIKE FOR YOU, IF YOU NEED TO REFER TO LAW YOU CAN
20 REFER TO THE LAW IN THAT MEMORANDUM.

21 THE COURT: THAT IS FINE, I HAVE GOT IT RIGHT HERE.

22 MR. AUN: WE BELIEVE^{*} THAT THE SLANDER OF TITLE CLAIM
23 AGAINST YOUR CLIENT IS NOT VALID, OKAY AND WE WOULD MOVE
24 FOR SUMMARY JUDGMENT IN THAT REGARD. THE TITLE TO THIS
25 PROPERTY WAS NEVER SLANDERED, THERE WAS NEVER ANY LIS

1 PENDENS OF ANY LIEN OR ANY SLANDER AT ALL WITH REFERENCE
2 TO THE TITLE. ALL WE DID WAS OBJECT TO THIS TRESPASSING
3 ON OUR PROPERTY. THIS FILING OF SLANDER OF TITLE CLAIM WE
4 BELIEVE THAT THERE WAS NO SLANDER OF TITLE UNDER THOSE
5 CIRCUMSTANCES AND WE THINK THAT THE LAW IS PRETTY CLEAR IN
6 THAT REGARD. AS TO THE TORTIOUS INTERFERENCE OF CONTRACT,
7 ONE OF THE ISSUES THAT HAS TO BE NOTED OR THE ELEMENTS OF
8 THIS AND AGAIN IT IS ON PAGE 12 OF MY MEMORANDUM IN
9 OPPOSITION. IT SAYS, THE EXISTENCE OF THE CONTRACT, THE
10 WRONGDOERS KNOWLEDGE OF THE CONTRACT, THE INTENTIONAL
11 PROCUREMENT OF THE CONTRACTOR'S BREACHED, THE ABSENCE OF
12 JUSTIFICATION AND RESULTING DAMAGES. YOUR HONOR, THERE
13 ARE AT LEAST TWO OR THREE ELEMENTS THERE THAT THEY HAVE
14 OFFERED NO PROOF OF, NO EVIDENCE, NOT ESTABLISHED IN THE
15 RECORD. AND QUITE HONESTLY, JUDGE, I THINK THAT SUMMARY
16 JUDGMENT WOULD BE APPROPRIATE AS TO THEIR TWO CAUSES OF
17 ACTION. THE SLANDER OF TITLE AND TORTIOUS INTERFERENCE.
18 I UNDERSTAND YOUR HONOR'S POSITION ON THE DECLARATORY
19 JUDGMENT ACTION. WE HAVE ALSO, IN OUR SUMMARY JUDGMENT
20 MOTION, IT IS BASICALLY A COUNTER MOTION WITH REFERENCE TO
21 THE DECLARATORY JUDGMENT ACTION, JUDGE, ESSENTIALLY ASKING
22 THE COURT TO DECIDE THAT THE EASEMENT IN QUESTION IS IN
23 FACT SPECIFICALLY LIMITED TO WHAT IT SAYS WHICH IS
24 COVENTRY LAKE SUBDIVISION AND MAINTENANCE, MAINTENANCE OF
25 COVENTRY LAKE SUBDIVISION, WATER, SEWER AND DRAINAGE AND

1 IT DOESN'T APPLY TO CONTINUOUS COMMUNITIES AND WE PROVIDED
2 THE LAW IN THAT REGARD. SO, WITHOUT THE NECESSITY OF
3 REPLACING OLD GROUND, IT IS BASICALLY THE SAME ARGUMENT WE
4 MADE BEFORE EXCEPT AS A COUNTER MOTION, JUDGE.

5 THE COURT: MR. THOMPSON.

6 MR. THOMPSON: FOR THE SAKE OF BREVITY, I WOULD
7 AGREE, I BELIEVE THAT PARAGRAPHS THREE AND FOUR OF
8 DEFENDANT'S MOTION ARE ESSENTIALLY THE INVERSE OF
9 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE EASEMENT
10 ISSUE AND AGAIN I WILL REFRAIN FROM MAKING THE SAME
11 ARGUMENTS AT THIS TIME. BUT THEY WOULD BE THE SAME
12 ARGUMENTS AT THIS TIME. AS FAR AS THE SLANDER OF TITLE,
13 TORTIOUS INTERFERENCE WITH THE PROJECT, I BELIEVE THAT THE
14 AFFIDAVIT SUPPORTS THE FACT THAT, FROM THE VERY INCEPTION
15 OF THIS PROJECT, THAT THE DEFENDANTS HAVE OBSTRUCTED ON
16 SEVERAL OCCASIONS, THAT THEY HAVE CALLED THE POLICE ON
17 NUMEROUS TIMES, THEY HAVE RUN CONTRACTORS OUT OF THE YARD,
18 THAT THEY HAVE ON SEVERAL INSTANCES THAT THEY HAVE DONE
19 THINGS THAT HAVE SLOWED, RETARDED THE PROCESS AND PROJECT
20 OF THE DEVELOPMENT OF GATES COMMON SUBDIVISION AND HAVE
21 GREATLY INCREASED THE COST. I WOULD SUBMIT TO YOU THAT AS
22 FAR AS THE ACTUAL COST, I DO NOT HAVE AN AFFIDAVIT OF THE
23 ACTUAL COST AT THIS TIME BUT I CAN GET ONE AND I WOULD
24 LIKE TO RESERVE THAT FOR A DAMAGES HEARING IF THE COURT
25 FEELS, WELL, THIS IS NOT MY MOTION SO WE WOULDN'T BE

1 ENTITLED TO A DAMAGES HEARING. BUT THEY HAVE GREATLY
2 INCREASED THE COST AND THAT IS A STATEMENT THAT IS
3 REFLECTED IN THE AFFIDAVIT SO WE ARE NOT JUST RESTING ON
4 PLEADINGS, WE ARE, IN THE AFFIDAVIT IT IS STATED THAT THE
5 ACTIONS OF THE DEFENDANTS HAVE GREATLY INCREASED THE COST
6 OF DEVELOPMENT OF THE PROJECT AND THEREFORE WE BELIEVE
7 THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO
8 WHETHER OR NOT THAT THE PROJECT HAS BEEN TORTIOUSLY
9 INTERFERED WITH.

10 THE COURT: HOW DOES THAT GO TO THE SLANDER OF TITLE?

11 MR. THOMPSON: THE SLANDER OF TITLE, YOUR HONOR, IS
12 THAT, THROUGHOUT THIS PROCESS THEY HAVE MADE MULTIPLE
13 STATEMENTS TO TOWN, COUNTY, AUTHORITIES, I DON'T KNOW A
14 STATEMENT TO STATE AUTHORITIES BUT MULTIPLE STATEMENTS TO
15 TOWN AND COUNTY AUTHORITIES THAT THERE WAS NO EASEMENT.
16 THIS HAS CAUSED ALL KINDS OF DELAYS AND COMPLICATIONS TO
17 THE PROJECT. I DON'T THINK YOU HAVE TO ACTUALLY FILE A
18 LIS PENDENS IN ORDER TO HAVE SLANDER OF TITLE. IF YOU ARE
19 OUT THERE AND IF YOU ARE MAKING DEROGATORY STATEMENTS
20 ABOUT WHETHER OR NOT SOMEBODY IS ABLE TO WORK IN AND WAS
21 ABLE TO HAVE PROPERTY RIGHTS ON A SPECIFIC PIECE OF
22 PROPERTY THAT YOU ARE SLANDERING THEIR TITLE TO THAT
23 PROPERTY.

24 THE COURT: WELL, IT SEEMS TO ME THAT THAT CAUSE OF
25 ACTION ON BOTH SIDES IS PREMATURE. IT SEEMS TO ME, I

1 MEAN, IF I HAVE GOT A PIECE OF PROPERTY AND SOMEBODY TAKES
2 THE POSITION THAT THEY HAVE GOT AN EASEMENT ACROSS IT AND
3 I TAKE THE POSITION THAT THEY DON'T AND THERE ARE LEGAL
4 REASONS OR LEGAL ARGUMENTS THAT CAN BE MADE EITHER WAY, I
5 DON'T THINK IT IS PROPER TO SAY THAT ANYBODY HAS SLANDER
6 TITLE UNTIL IT HAS BEEN ESTABLISHED WHETHER OR NOT THERE
7 IS A VALID EASEMENT. BUT ONCE IT HAS BEEN ESTABLISHED, IF
8 YOU CONTINUE MAKING THOSE REPRESENTATIONS OR
9 MISREPRESENTATIONS, AS THE CASE MAY BE, THEN YOU HAVE A
10 PROBLEM. AND AS I UNDERSTAND, THE ORIGINAL FILING OF THE
11 WHOLE LAWSUIT WAS TO ESTABLISH THAT. THERE IS ALL OF
12 THESE DIFFERENT THINGS GOING ON.

13 MR. THOMPSON: I HAVE NOTHING FURTHER.

14 THE COURT: MR. AUN.

15 MR. AUN: YOUR HONOR, I INTEND TO AGREE WITH YOU ON
16 THE SLANDER OF TITLE ISSUE AND ENOUGH SAID ON THAT. AS TO
17 THE TORTIOUS INTERFERENCE, JUDGE, YOU KNOW, DOING WHAT YOU
18 ARE ENTITLED TO DO AS A CITIZEN, SHOWING UP TO TOWN
19 MEETINGS, GOING TO TOWN COUNSEL MEETINGS, GOING TO
20 PLANNING COMMISSION MEETINGS, DOING WHAT YOU BELIEVE IS
21 RIGHT TO KEEP YOUR PROPERTY, RESERVE THE INTEGRITY OF YOUR
22 PROPERTY. I DON'T THINK IT IS TORTIOUS INTERFERENCE. YOU
23 KNOW, ULTIMATELY WHAT WE HAVE HERE IS AGAIN, THE ELEMENTS
24 OF THIS ARE THE EXISTENCE OF THE CONTRACT, THE WRONGDOERS
25 KNOWLEDGE OF THE CONTRACT. I DON'T THINK IT HAS BEEN

1 ESTABLISHED AT ALL THAT MY CLIENTS KNEW OF ANY CONTRACT
2 BETWEEN MR. MCGUINN OR ANYBODY ELSE. THE INTENTIONAL
3 PROCUREMENT OF THE CONTRACTS BREACH, YOU KNOW, ULTIMATELY,
4 JUDGE, EVEN THAT IS IN QUESTION HERE. BUT THE ABSENCE OF
5 JUSTIFICATION, THERE IS NO QUESTION. MR. MCGUINN FILED
6 THIS LAWSUIT, HE FILED THIS LAWSUIT TO ASK THE COURT TO
7 LOOK AT WHETHER OR NOT HE COULD USE THIS EASEMENT TO
8 INSTALL DRAINAGE AND SEWER LINES, MY CLIENT OBJECTED.
9 CERTAINLY THAT IS JUSTIFIED IF THEY BELIEVE THEY HAVE THE
10 RIGHT TO DO THAT. I THINK THE TORTIOUS INTERFERENCE WITH
11 CONTRACT ACTION, JUDGE, IS JUST, SHOULD BE DISMISSED, WE
12 SHOULD GET SUMMARY JUDGMENT ON THAT, YOUR HONOR.

13 MR. THOMPSON: YOUR HONOR, THE COMPLAINT NEVER
14 ALLEGES ANY TYPE OF INTERFERENCE WITH CONTRACT BETWEEN THE
15 PARTIES. AND I WANT TO VERY CLEARLY FOR THE RECORD STATE
16 THAT WE ABSOLUTELY DENY THAT THERE IS ANY CONTRACT BETWEEN
17 THE ESPINO'S AND MR. MCGUINN. THE CONTRACTUAL RIGHTS THAT
18 ARE SPOKEN OF IN THE COMPLAINT HAVE TO DO WITH THE RIGHTS
19 BETWEEN MCGUINN AND OTHER CONTRACTORS AND FRANKLY OTHER
20 BUYERS OF THE GATES COMMON PROPERTY IN THE SUBDIVISION.
21 BECAUSE THE ACTIONS OF THE DEFENDANTS NEGATIVELY IMPACT
22 THE ABILITY OF MCGUINN CONSTRUCTION TO LEGITIMATELY
23 DEVELOP ITS PROPERTY AND TO LEGITIMATELY TO ENGAGE IN A
24 CONSTRUCTION BUSINESS. NOW, WE CAN TALK ABOUT HOW THEY
25 HAVE A RIGHT TO STAND UP AND OBJECT AND THAT MAY BE TRUE

1 IF THEY HAVE A REASONABLE BASIS FOR THIS ABILITY TO STAND
2 UP AND OBJECT. THERE IS NO REASONABLE BASIS FOR THAT
3 OBJECTION, THAT WHEN THEY BOUGHT THEIR PROPERTY, THAT THE
4 PLAT THAT WAS GIVEN TO THEM HAD THESE EASEMENTS ON IT.
5 THE PLAT ON THE BOTTOM OF IT SAYS, HAS THE ESPINO'S NAME
6 ON IT. WHEN THEY BOUGHT THE PROPERTY THEY KNEW THAT THE
7 EASEMENTS WERE THERE. JUST BECAUSE SOMEBODY WASN'T USING
8 THEM DOESN'T MEAN THAT THEY WEREN'T THERE. AND THAT ONCE
9 SOMEONE SEEKS TO USE A PROPERTY RIGHT THAT IS ACTUALLY
10 THERE THAT IT IS UNREASONABLE FOR THEM TO OBJECT TO
11 SOMETHING THAT THEY KNOW IS A LEGAL RIGHT RECORDED DOWN AT
12 THE COURT HOUSE FOR SOMEONE ELSE TO USE.

13 THE COURT: YES, SIR.

14 MR. AUN: YOUR HONOR, I AM NOT GOING TO BEAT A DEAD
15 HORSE. I WANTED TO STATE TO THE COURT THAT THIS LAWSUIT
16 WAS FILED IN AUGUST OF 2005. THE FIRST TIME THAT THE
17 UTILITY CONTRACTOR CAME TO THE SITE WAS AFTER THE LAWSUIT
18 WAS FILED. IF THEY ARE BASING THIS TORTIOUS INTERFERENCE
19 ON THEIR CONTRACTORS FROM BEING BARRED FROM COMING ON THE
20 SITE, THEY DIDN'T EVEN HAVE FACTS TO SUPPORT THAT. THEY
21 HAVE GONE OUT, THEIR ENGINEERS HAVE GONE OUT THERE AND
22 MARKED THE PROPERTY ALL UP AND DID EVERYTHING THEY WANTED
23 TO DO. SO, I MEAN, THE FACTS OF THIS IS THAT THE UTILITY
24 CONTRACTOR DIDN'T COME OUT UNTIL OCTOBER, AFTER THE
25 LAWSUIT WAS FILED. AND THEN WAS TOLD BY MCGUINN, GO

1 AHEAD, WE HAVE GOT AUTHORITY. SO, THAT IS THE ESSENCE OF
2 THAT. THIS TORTIOUS INTERFERENCE WITH FOLKS THAT ARE
3 GOING TO BE LIVING OUT THERE, MY CLIENTS HAS A RIGHT TO
4 SHOW UP AT ZONING MEETINGS, THEY HAVE THE RIGHT TO SHOW UP
5 AT PLANNING COMMISSION, THEY HAVE THE RIGHT TO DO ALL OF
6 THOSE THINGS, THOSE ARE ALL JUSTIFIABLE PRESENTATIONS AND
7 APPEARANCES BEFORE TOWN MUNICIPALITIES AND SUBDIVISIONS
8 THAT MAKE THOSE DECISIONS. SO, WE BELIEVE WE ARE ENTITLED
9 TO SUMMARY JUDGMENT ON THE TORTIOUS INTERFERENCE, JUDGE.

10 THE COURT: ALL RIGHT. WHICH LOT NUMBER.

11 MR. AUN: WE ARE LOT 16.

12 MR. THOMPSON: AND, YOUR HONOR, FOR THE RECORD, WE
13 WOULD OBJECT TO SOME OF THE TIMING REPRESENTED TO THE
14 COURT AS TO WHEN CONTRACTORS WERE THERE AND NOT THERE.
15 BUT I DON'T BELIEVE THAT THAT INFORMATION IS PROPER BEFORE
16 THE COURT BECAUSE I DON'T THINK THERE IS ANY EVIDENCE ON
17 THE TIME PROCESS.

18 THE COURT: IT IS ALL GOING TO BOIL DOWN TO WHETHER
19 OR NOT, I MEAN, WELL, NOT WHERE AN EASEMENT EXIST. THERE
20 IS NO QUESTION THAT THE EASEMENT EXIST. IT IS THE NATURE
21 AND THE EXTENT OF THE EASEMENT AND THE RIGHT FOR MCGUINN
22 TO USE THAT EASEMENT FOR THE PURPOSES THAT THEY HAVE USED
23 IT FOR. THAT IS ALL THAT IT IS GOING TO BOIL DOWN TO.
24 EVERYTHING ELSE FALLS IN AFTER THAT.

25 MR. THOMPSON: THAT IS RIGHT, YOUR HONOR.

1 THE COURT: I WILL TRY TO GET YA'LL A RULING EITHER
2 THIS WEEK OR NEXT WEEK, GIVE YA'LL PLENTY OF TIME TO GET
3 READY FOR YOUR TRIAL.

4 MR. THOMPSON: THANK YOUR, YOUR HONOR.

5 MR. AUN: THANK YOU, YOUR HONOR.

6 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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1 State of South Carolina

2 County of Lexington

Court of Common Pleas

3 McGuinn Construction
4 Management, Inc.,

)
) Transcript of Record

5 Plaintiff,

6 vs.

)
) 2005-CP-32-2712

7 Saul Espino and Mara Espino,

8 Defendants.

9 Saul Espino and Mara Espino,

10 Plaintiffs,

11 vs.

)
) 2008-CP-32-4192

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

14 Defendants.

15 October 7, 2013
Lexington, South Carolina

16 B E F O R E:

17 The Honorable William P. Keesley, Judge

18 A P P E A R A N C E S,

19 Andrew A. Aun, Esquire
20 Attorney for Saul Espino and Mara Espino

21 S. Jahue Moore, Esquire
22 Attorney for McGuinn Construction Management, Inc.

23 Andrew F. Lindemann, Esquire
Attorney for the Town of Lexington

24
25 ORIGINAL

Stacy S. Johnson, RPR
Circuit Court Reporter

I N D E X

PAGE

CERTIFICATE OF REPORTER

39

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NO EXHIBITS WERE INTRODUCED

P R O C E E D I N G S

1
2 **THE COURT:** All right. I have a motion to
3 reconsider. Let me hear from the moving party.

4 **MR. MOORE:** May it please Your Honor.

5 **MR. AUN:** Your Honor?

6 **THE COURT:** Yes.

7 **MR. AUN:** We also had a counter-motion to
8 dismiss the reconsideration. To dismiss the
9 motion to reconsider. I didn't know if you
10 wanted to take that up before.

11 **THE COURT:** Go ahead.

12 **MR. AUN:** Your Honor, may I approach?

13 **THE COURT:** Yes.

14 **MR. AUN:** Your Honor, we filed a
15 counter-motion to dismiss Plaintiff's motion
16 to reconsider based primarily on the fact that
17 Rule 59(g) was not complied with in the
18 Plaintiff's motion. In our memorandum, we've
19 outlined a chronology of filings that took place
20 at or around this time. On 7-10 of '08, July
21 10th of 2008, Plaintiff filed their motion to
22 reconsider. In that certificate of service,
23 they served me as opposing counsel. There's no
24 evidence that they ever served the -- served
25 Judge Johnson with a copy of the order -- or,

1 excuse me, a copy of the motion as they were
2 required to under 59(g) and, therefore, they did
3 not perfect their motion to reconsider and right
4 to bring their motion to reconsider on that basis
5 and for that reason we would argue that they --
6 that motion should be dismissed.

7 **THE COURT:** Any response to that?

8 **MR. MOORE:** May it please Your Honor, I
9 thought we had already settled this issue when
10 we had our discussions with Judge McMahon
11 regarding the case. It's my understanding that
12 by the certain actions taken by the Espinos
13 Judge McMahon may have disqualified or recused
14 himself, but my understanding is that those
15 issues had already been resolved and Judge
16 McMahon ruled it was to be heard. That being
17 said, I don't think that Judge McMahon was able
18 to file an order to that effect before Plaintiffs
19 say he recused himself, but I thought this issue
20 had been decided once.

21 Your Honor, if I speak a little slowly I'm
22 having a little bit of trouble respiratory-wise,
23 if the Court would excuse me.

24 **THE COURT:** That's fine.

25 **MR. MOORE:** Your Honor, my understanding was

1 at the time of Judge Johnson's death he was in
2 the process of considering the reconsideration.
3 I don't have in my file an actual copy where he
4 was actually served with the notice, but my
5 understanding is that he was on notice and knew
6 of and was in the process of scheduling the
7 reconsideration.

8 I would call the Court's attention to the
9 case -- the Court of Appeals case of Coon versus
10 Coon, which basically holds that -- the notes
11 to Rule 59 states the '98 Amendment adding
12 Subsection (g) was intended to help insure the
13 judge is promptly notified that the motion has
14 been filed. There's no indication that a failure
15 to transmit a copy of the motion in circuit court
16 affects the tolling provisions of 203(b)(1).

17 Basically what we have here is a situation
18 where Judge Johnson knew of, was notified of, was
19 in the process of scheduling a reconsideration
20 motion to the best of my memory. I believe the
21 issue has already been resolved or had -- this is
22 the second time, I think, we've discussed this
23 issue. My understanding is that's what this was
24 ordered to do by Judge McMahon was that the
25 matter was ordered to be reconsidered and he set

1 it for purposes of reconsideration after the
2 issues presently now being raised by counsel were
3 already heard and I thought decided, but, Your
4 Honor, we believe the motion is properly before
5 the Court. We believe that Judge Johnson was
6 certainly on notice of and was in the process of
7 doing a reconsideration at the time of his
8 untimely death and we believe the matter was
9 appropriately set by Judge McMahon for a hearing
10 on the motion to reconsider.

11 All of these issues were discussed. Judge
12 McMahon set the matter for reconsideration and
13 now I think last Thursday or sometime thereabout
14 we got this motion apparently attempting to
15 prevent the hearing on the motion to reconsider.
16 I would respectfully submit the matter is
17 properly before the Court and should be
18 considered.

19 **THE COURT:** Anything else?

20 **MR. AUN:** Your Honor --

21 **MR. LINDEMANN:** If I could just add one
22 thing, Your Honor. Andrew Lindemann for the
23 Town of Lexington. In addition to what
24 Mr. Moore said, I would point out the common
25 sense approach to this. Judge Johnson obviously

1 isn't hearing the motion for reconsideration
2 unfortunately and that Your Honor is hearing that
3 motion. Your Honor has notice of the motion.
4 That's the whole point as the Court of Appeals
5 indicates in that Coon versus Coon opinion; to
6 make certain that a motion for reconsideration
7 doesn't get lost in the shuffle and that the
8 judge is aware that that's pending before him.
9 Obviously you're aware that this motion is
10 pending before you, therefore, that moots the
11 whole issue of 59(g), I would submit.

12 **THE COURT:** Anything else?

13 **MR. AUN:** Your Honor, the motion to
14 reconsider that was heard previously by Judge
15 McMahon and the counter-motion that was made
16 arguably was not made timely according to Judge
17 McMahon's previous transcript, which is why it
18 was not considered. In this particular case, it
19 was made timely and -- may I approach, Judge?

20 **THE COURT:** Sure.

21 **MR. AUN:** I've got a copy of the motion
22 along with a hand-delivery receipt showing that
23 this was personally served on both counsel on the
24 24th of September and, Your Honor, our position
25 is that there is no ruling by Judge McMahon on

1 this issue. The Rule 59(g) is a mandatory rule.
2 It reads under the rules shall provide a copy of
3 the motion. It is a mandatory rule and while,
4 you know, I understand that the driving force or
5 the rationale behind this rule may be one that
6 provides a defense or, you know, at least an
7 excuse as to why it wasn't done by the
8 Plaintiffs, I don't think that we can pick and
9 choose which rules we want to comply with and
10 not comply with, so we would say that it's
11 jurisdictional and I don't think the Court has
12 jurisdiction at this point because the rule is
13 violated and, therefore, it affects the
14 perfecting of their ability to bring this motion.

15 **THE COURT:** What is the cite for Coon versus
16 Coon?

17 **MR. LINDEMANN:** It's 588 S.E.2d 624, Your
18 Honor. It's text coming under Headnote 1.

19 **THE COURT:** All right. The Supreme Court
20 heard the matter after the Court of Appeals,
21 but doesn't seem to deal with the issue of the
22 Rule 59 motion. The case is not precisely on
23 point, but it is -- does give the Court guidance.
24 I'll take it under advisement. Let me hear the
25 motion.

1 MR. MOORE: May it please the Court.
2 Thank you, Your Honor. Your Honor, Mr. and
3 Mr. Espino bought a parcel of land from
4 Stonehedge Construction Company May 8th of 1992.
5 They paid \$62,500 and it was a house and a
6 building lot. The property is located in a
7 residential neighborhood. It's a subdivision
8 known as Coventry Lakes. The deed makes
9 reference to a plat and that plat is found at D
10 Book 210-G, Page 149. That plat shows that
11 there is a sewage easement that runs across the
12 Espinos' property. The plat was approved and
13 filed before the Espinos ever bought their parcel
14 of land, so the easement for sewage that is the
15 subject of this action has been filed for quite
16 some while and was on record prior to the Espinos
17 taking title to their property.

18 The Espinos received a deed and that deed
19 clearly references the plat which shows the
20 sewage easement. The deed reads that it is
21 subject to easements of record and to those
22 easements which an inspection of the property
23 would show. Now the sewage easement is a sewage
24 pipe that runs underground on the side of the
25 Espinos' property. We have platted easements of

1 this nature which are all over the county, and I
2 would assume, all over the state. As someone who
3 used to search titles for a living before I got a
4 license to practice law, I have seen many such
5 easements shown on recorded plats and always
6 recorded such easements as an exception on any
7 title search.

8 The Espinos themselves had an actual plat of
9 their property done before they purchased the
10 property. Apparently their lender required that
11 the property be platted and they actually had a
12 plat prepared, which is also recorded for them.
13 The Espinos' plat shows a 15-foot easement for
14 sanitary sewer and makes reference to the plat
15 at 210-G 149 as the reference for the easement
16 showing on the Espinos' plat. So before there
17 was any transfer to the Espinos, the property
18 was platted showing a sewage easement, the
19 sewage easement was built and before the Espinos
20 purchased their property they knew of the
21 easement location because of the fact that it
22 was on their plat.

23 Now in addition to having notice of the
24 easement and having the easement referenced in
25 their deed and in their plat, also recorded of

1 record April 11, 1988, the Espinos' predecessor
2 in title actually issued a deed in favor of
3 the Town of Lexington and in that deed the
4 predecessor in title gave fee simple title to
5 the sanitary sewer line to the Town of Lexington.
6 So the Town of Lexington actually owns the sewer,
7 which is the subject of this action.

8 Now what basically happened is that the
9 sanitary sewer line -- the Espinos' property
10 adjoins other property which was about to be
11 developed. It's what would be known as a spur
12 line. If we look at the plat at Page 210-G,
13 Page 149, we see that the sanitary sewer line
14 runs basically to the property now and is
15 designed to be a spur so that other property can
16 eventually be developed and to use the line.

17 So we have in addition to -- in addition
18 to the plat which shows the sewer easement and
19 the deed to the sewer easement and then the
20 Espinos own plat to the sewer easement, there
21 was actually another piece of language wherein
22 April 11th of '88 the prior owner gave the Town
23 of Lexington an actual easement in writing. So
24 the easement exists by virtue of a plat, it
25 exists by virtue of a second plat, it exists

1 by a virtue of a deed and the actual lines
2 themselves are titled to the Town of Lexington.
3 The easement language which was given in addition
4 to the fee simple title says that the Town has
5 all easements necessary to maintain the lines,
6 which is basically what was given to the Town of
7 Lexington. So Lexington had fee simple title to
8 the sewer lines and they had a right to maintain
9 those lines.

10 The McGuinn Company built on the property
11 that adjoined the Espinos' property. They
12 received a permit from the Town of Lexington to
13 attach to the sewage line that belonged to the
14 Town of Lexington and it basically used the
15 easement as the plat obviously called for.

16 Now the Espinos have accused everybody in
17 the world of all sorts of things. They've
18 accused the Town of Lexington of being corrupt
19 and my client of being corrupt and judges of
20 being corrupt. I respectfully submit that that
21 probably has very little to do with what we're
22 here about today. The Town of Lexington simply
23 gave the developer the right to hook onto this
24 line, which is what my client did. My client
25 hooked sewer onto a line that belonged to the

1 Town of Lexington and the argument from our
2 adversary is that well, the right to maintain
3 does not give the right to hook onto another
4 line. Well, I'd respectfully submit that it
5 does, but at the very worst from our standpoint
6 it gives rise to an ambiguity in regard to what
7 does it mean to have a sewer line easement.

8 As the Court knows better than I, there
9 are many ways to create an easement. You can
10 dedicate it, you can create it by plat, you can
11 create it by deed, you can create it by deed and
12 by plat, you can create it by prescription, you
13 can create it by adverse possession. There are
14 many, many ways to basically create an easement.
15 I would respectfully submit in this case that
16 the easement is created by plat, by deed and at
17 worst, at the very worst from our standpoint,
18 there arises a question of fact in regard to what
19 was intended by the actual language of creation
20 which says the right to maintain.

21 I guess if you look up the right to
22 maintain, if you look up the word "maintain" in
23 the dictionary, one thing it basically means is
24 to keep up, to perform maintenance. The other
25 is if you perform maintenance, it basically

1 means to keep, to have, to own, to use. I'd
2 respectfully submit that at the very worst from
3 our standpoint there would be ambiguous language
4 in regard to a deed, but I would respectfully
5 submit as well when you add the clear drawing on
6 the plats that there is no doubt in the world but
7 that a sewage line was dedicated to the Town of
8 Lexington.

9 Your Honor, has the Court had the ability to
10 see the actual plats that we're talking about?

11 **THE COURT:** If I saw them, it was a long
12 time ago and I don't remember.

13 **MR. MOORE:** If I might just hand up to the
14 Court -- this is all in Mr. McGuinn's affidavit,
15 but if the Court looks at the plat I've
16 highlighted in yellow the plat for the Espinos
17 basically talks about a 15-foot sanitary sewer
18 easement as copied from the reference plat and
19 it basically shows exactly what we're talking
20 about. I actually have it highlighted in yellow,
21 Your Honor.

22 **THE COURT:** Anything else?

23 **MR. MOORE:** Your Honor, that would be all.
24 Thank you for listening me.

25 **THE COURT:** Do you have anything,

1 Mr. Lindemann?

2 MR. LINDEMANN: Yes, a few matters, Your
3 Honor. As you'll recall, Your Honor, when this
4 motion was first heard by Judge Johnson, the
5 Town of Lexington had been dismissed from the
6 2005 case. The Plaintiff subsequently filed a
7 new lawsuit against the Town of Lexington, which
8 Your Honor has now consolidated, so at the time
9 the motion was heard or, number one, presented
10 to Judge Johnson and decided by Judge Johnson as
11 well as at the time this motion to reconsider was
12 filed, the Town of Lexington was not a party to
13 that 2005 case. They're still not technically a
14 party to it, but you have consolidated the two
15 actions and in your consolidation order you've
16 given us the opportunity to at least be heard on
17 the motion for reconsideration.

18 A couple of points that I would just add to
19 what Mr. Moore said, and this one, I think, is
20 very critical, is that back in 2008 when Judge
21 Johnson decided this motion, the law on summary
22 judgment in South Carolina -- and it's important
23 to recognize that this order was issued based
24 upon motions for summary judgment. It was not a
25 nonjury trial that was before Judge Johnson and

1 I would submit that that is probably the
2 appropriate way for this issue dealing with
3 the scope of the easement to be ultimately
4 decided. The law is clear that the existence
5 of an easement is a matter of law, but the
6 determination of the scope of an easement is a
7 matter in equity.

8 And the point I was gonna make, Your Honor,
9 is back in 2008 Judge Johnson didn't have the
10 benefit of the Supreme Court's decision in
11 Hancock versus Mid-South Management, which, of
12 course, has totally changed the way summary
13 judgment motions are heard and decided in South
14 Carolina since the Supreme Court adopted the
15 mere scintilla rule, and that decision came
16 down actually in January of 2009. And so since
17 this motion is still pending before Your Honor
18 now on a motion for reconsideration, I would
19 submit that Your Honor has to apply the law
20 which the Supreme Court explained obviously was
21 prospective -- I mean, was retroactive because
22 they're interpreting the application of the
23 rules in common law.

24 But, in essence, if you look at Judge
25 Johnson's order closely, he was not, in essence,

1 applying the scintilla rule. In fact, I don't
2 think the words "mere scintilla" appear in his
3 order, I may be mistaken, but what I think is
4 quite telling is starting on Page 3 of his order
5 the second section of the order is entitled facts
6 in controversy and then he goes through over the
7 course of four or five pages of laying out what
8 the facts in controversy are dealing with this
9 specific issue as to the scope of the easement
10 and despite finding a number of facts in
11 controversy between testimony that was offered
12 by the Plaintiff, the McGuinn affidavit and the
13 plat that was offered that's attached to it, he
14 went ahead and decided it was -- decided a
15 declaratory judgment issue and found that the
16 easement was not sufficient to allow for the
17 Gates Commons subdivision to -- and the
18 Plaintiffs in this case to hook into that
19 existing sewer easement.

20 And so on that basis alone, I would submit
21 to Your Honor that his decision should be with
22 all due respect overturned given the fact that
23 there is a scintilla of evidence in support of
24 the Plaintiffs' position that the easement does
25 allow for sewage from an adjoining property to

1 be flowing through that sewage -- existing sewage
2 pipe under that existing easement. And at the
3 very least, as Mr. Moore has argued, there's an
4 issue of ambiguity with the written easement that
5 would give rise to the denial of summary judgment
6 allowing that issue to be tried with a full
7 airing of the facts and ultimate findings of
8 facts and conclusions of the law by the Court
9 sitting in equity.

10 In addition to that, Your Honor, as
11 Mr. Moore has also argued, this is a spur. If
12 you look at the layout of the sewer pipes in
13 the Coventry Lakes subdivision, this particular
14 spur running from the street to the back of
15 the Espinos' property, and that's where that
16 particular subdivision ends, serves absolutely
17 no useful purpose. There's nothing hooking
18 into that line, there's no lines being tapped
19 into that line.

20 It is purely a spur that's been but in there
21 obviously for future development of the property
22 located behind it.

23 And I believe -- when that easement was
24 first given, I believe that the property -- the
25 contiguous property was owned by -- by the same

1 property owners, but at the very least the
2 reference to the plat itself I would suggest is
3 sufficient scintilla of evidence to support the
4 argument that the intent of the parties entering
5 into that easement was to allow for that
6 particular spur to be used to hook into -- to
7 hook future development behind the Espinos'
8 property into it and that should at the very
9 least if the Court doesn't rule in favor of the
10 Plaintiffs on their declaratory judgment action
11 based on that, that it at the very least presents
12 issues of facts in dispute that go to the scope
13 of the easement and should have precluded summary
14 judgment in favor of the Espinos on that
15 particular issue, the scope of the easement
16 issue, and I believe that the evidence shows in
17 this case and will show if we try it that the
18 intent of the parties to that easement, Your
19 Honor, were to do more than just provide for
20 the easement and its use in the Coventry Lakes
21 subdivision because it had no use in the Coventry
22 Lakes subdivision. The only way that line could
23 be used and have sewage flow through it was for
24 future use by the undeveloped property that was
25 behind the Espinos' property and contiguous to

1 it, which is the property that was then developed
2 into the Gates Commons subdivision.

3 So our position is, the Town of Lexington,
4 Your Honor, is we didn't have the ability to
5 present any evidence on this motion for summary
6 judgment, which is another reason why I think in
7 equity, before the Town of Lexington is held to
8 be bound by Judge Johnson's order. We didn't
9 have the ability to present any evidence on that
10 particular point because we weren't parties at
11 the time of that motion for summary judgment. We
12 are parties now by way of consolidation and, in
13 fact, attached to the 2008 complaint that the
14 Espinosa filed against the Town of Lexington they
15 attached a copy of Judge Johnson's order taking
16 the position that it was binding on the Town and
17 would, therefore, allegedly give rise to the
18 liability in an inverse condemnation plus have
19 some other theory against the Town of Lexington.

20 So in fairness and, of course, this is a
21 matter in equity because it's within the scope of
22 the easement, that would be the second prong to
23 my argument is that the town should not be bound
24 by Judge Johnson's order and should have the
25 ability to present evidence, which obviously we

1 don't have the ability to present new evidence on
2 a motion for reconsideration, but that would be
3 an additional basis we would argue in favor of
4 setting aside Judge Johnson's order and allowing
5 this matter to be heard through a bench trial
6 where the Court can get -- hear evidence from all
7 interested parties, all parties to be bound by
8 the decision of the Court, and then make findings
9 of facts and conclusions of law thereby. Thank
10 you.

11 THE COURT: Mr. Aun.

12 MR. AUN: Thank you, Your Honor. May I
13 approach, Judge?

14 THE COURT: Sure.

15 MR. AUN: I prepared a memorandum in
16 opposition to the Plaintiff's motion for
17 reconsideration and I'll address a couple of
18 things before I get into kind of the meat of my
19 argument. The question of whether an easement
20 exists or not is really not in question, okay,
21 so these references that are made to plats and
22 easements by adverse possession and easements by
23 prescription. There is an easement in place
24 here. The question is the scope of the easement
25 and that's really what Judge Johnson limited his

1 ruling to is the scope of the easement. I'm
2 disagreeing with what Mr. Moore or Mr. Lindemann
3 say with reference to what the law says about how
4 you have to glean the intent from the parties
5 from the easement, but where there is clear and
6 unambiguous language, okay, when you take the
7 meaning of the easement at its plain and ordinary
8 meaning, then there's no need to go outside the
9 document.

10 What you had here was an easement that was
11 put in place in 1988, okay, and I'm not real
12 sure where Mr. Moore's going with there was fee
13 simple title and then they also got all easements
14 necessary. The way the Court interpreted this
15 language and the way, I think, any reasonable
16 person would interpret this language is that
17 this was a deed to the Town of Lexington for
18 essentially the maintenance of Coventry Lakes
19 subdivision's sewer lines, drainage lines and
20 water lines. It's very specific about giving the
21 Town of Lexington -- and let's just look at the
22 sewer line section. All those certain sewer
23 lines, including but not limited to pipes,
24 manholes, et cetera, and being more particularly
25 shown on the record drawing as the as-built

1 sanitary sewer plan of Coventry Lakes prepared
2 by Palmetto Engineering. It was for Coventry
3 Lakes. Specifically for Coventry Lakes. That's
4 how Judge Johnson determined his ruling.

5 And quite honestly, Your Honor, when you
6 look at a Rule 59(e) motion, it is a
7 post-judgment motion and as a post-judgment
8 motion there has to be an error in the law or an
9 abuse of discretion. If you look at the order
10 from Judge Johnson, it's clear that he limited
11 his ruling to the issues at hand, which were the
12 scope of the easement and whether or not this
13 language gave any broader meaning, and it didn't.

14 Mr. Moore talks about these spur lines,
15 okay, and easement by dedication, easement by
16 prescription. One of the things that I raised
17 in my memo, Judge, is that these issues were
18 never raised. Easement by prescription or
19 easement by dedication were never raised in the
20 underlying motion and so under the Hickman case
21 it's unavailable to them to raise now. So all
22 these ideas about easement by deed, easement by
23 prescription, easement by dedication, one, they
24 were never mentioned in their pleadings so they
25 conceded to the fact in their pleadings that

1 the determination on whether the scope of this
2 easement gave them the right to install a sewer
3 was gonna be based on a reading of this April
4 2000 -- or this April 1988 easement. So it was
5 never raised in their pleadings, yet at this
6 motion for summary judgment that Judge Johnson
7 ruled it was never raised in the testimony. And
8 we've provided the Court with a copy of the
9 transcript and we've done a thorough review of
10 that transcript. Never mentioned at all.
11 Easement by dedication, easement by prescription,
12 easement by deed, none of what Mr. Moore has
13 talked about today, so we think all that argument
14 is inappropriate and unfounded.

15 Secondly, Judge, even if we take it into
16 consideration, again, under the law if the
17 easement that is of record is clear and
18 unambiguous, which in this case Judge Johnson
19 ruled that it was, then there's no need to go
20 to outside sources to glean any additional
21 information.

22 We object to the Town's involvement in this
23 motion. We had raised that objection previously.
24 Your Honor allowed them to be a part of this
25 proceeding, but we object to their being

1 involved. We don't believe they have standing
2 to be involved, but, again, they are presuming
3 that this is unambiguous language; that the word
4 "maintain" means something other than maintain.
5 Under all rules of construction we're not asked,
6 particularly when it comes to property rights,
7 which are gonna be strictly construed, Judge,
8 and we've cited that law in our memorandum, to
9 stretch meanings of words, to broaden the
10 meanings of words to suit a developer for their
11 convenience.

12 So, Judge, we feel like, you know, quite
13 honestly the arguments that are being made today
14 are not arguments that are appropriately made.
15 We object to all these arguments other than the
16 argument that maybe there was -- that the
17 determination needs to be made based on the
18 easement in question, which is the April 11,
19 1998, easement -- or 1988 easement, which Your
20 Honor should have a copy of it. If you don't, I
21 have a copy of it, Judge. Do you have a copy of
22 that easement up there?

23 **THE COURT:** They didn't bring the file.
24 They didn't bring the file up here.

25 **MR. AUN:** Let me provide you a copy of that

1 easement.

2 **THE COURT:** I'll look it before I decide,
3 but I don't have anything up here now.

4 **MR. AUN:** So that is the primary basis of
5 Judge Johnson's ruling. It's not rocket science.
6 He looked at the easement to determine whether
7 or not the scope of that easement allowed for
8 McGuinn to do what they did. And what's so
9 laughable about this case is that McGuinn filed
10 the action in August of 2005 seeking a
11 declaratory judgment on this case to make a
12 determination as to whether or not they had the
13 right based on the easement to install the lines.
14 They filed a lawsuit so the Court could make the
15 very determination you're being asked to make
16 today and before the Court ever ruled, they went
17 ahead and installed the lines. It's right by
18 might, Judge, on two elderly individuals whose
19 property they're running this line right across,
20 over their objection, over quite honestly the
21 confusion and objection of the Town engineering
22 office who never felt that they had a definitive
23 basis to use that easement language to do what
24 they wanted to do, and we provided the factual
25 information in the memorandum on that as well

1 that the Court also noted.

2 Judge, I mean, we -- this is a nine year old
3 case and I don't want to re-plow old ground. I
4 know that Your Honor listens to a lot of cases
5 and this is new information in some ways, but
6 we've outlined everything in the memo, we believe
7 that everything that the opposing counsel have
8 addressed today is addressed in the memo. This
9 issue of a different summary judgment standard,
10 Your Honor, it is a clarification in my opinion.
11 The Hancock is just a clarification of the
12 standard that was used by Judge Johnson. I
13 don't believe that there is anything that would
14 be materially different in Judge Johnson's ruling
15 under that new standard versus the old, but
16 quite honestly, again, the Court has to make a
17 determination as to whether he erred in law at
18 the time of his ruling; not whether the law has
19 somehow changed his ability -- or changed his
20 ability to make that ruling, but whether he erred
21 under the law that was in place at the time and
22 whether there was an abuse of discretion in his
23 determination of the facts that were presented.

24 The other thing is this affidavit by
25 Mr. McGuinn is referred to repeatedly. Again,

1 Judge, just to -- you know, I know maybe it's a
2 cliché at this point, but to talk about the
3 rules that affidavit was never submitted with
4 the motion for summary judgment that Mr. Moore's
5 office submitted. It was submitted thirty days
6 afterwards and as you now under Rule 6 all
7 supporting affidavits have to be submitted at
8 the time the motion was filed. That was never
9 done. Now I believe that in the judge's ruling
10 he still took it into account and to that extent
11 I don't believe that opposing counsel was
12 prejudiced in any way because in his order he
13 notes that he took into account affidavits and
14 in the transcript the judge -- Your Honor will
15 be able to see that Judge Johnson said that he
16 would take it under advisement, so obviously he
17 considered the affidavits, but we believe that
18 the affidavit and whatever the affidavit
19 purported to assert was not appropriately
20 considered by Judge Johnson, although he
21 considered it.

22 Having said all that, Judge, we think we've
23 outlined everything in our memorandum that
24 serves as the basis for the motion to reconsider.
25 Again, we think that the Court has -- you know,

1 having acknowledged that there is no de novo
2 hearing needed, having acknowledged that Judge
3 Johnson's order stands, the Court is now asked
4 to determine whether Judge Johnson's order needs
5 to be overruled or overturned and Your Honor has
6 a burden -- or Your Honor has a standard that
7 basically says unless there's an error in the
8 law or an abuse of discretion with the facts that
9 there's no basis for this and, Judge, we believe
10 that the order should stand on its own and should
11 be sustained and their motions to reconsider be
12 denied. Thank you, Your Honor.

13 **THE COURT:** Thank you, sir. Anything in
14 response?

15 **MR. MOORE:** Very briefly, Your Honor.
16 Obviously when we filed our motion for summary
17 judgment, they filed theirs and we filed our
18 affidavit in opposition to their motion for
19 summary judgment. Now we may not have been
20 entitled to rely upon our affidavit maybe in
21 support of ours, but we certainly had every right
22 in the world to supply our affidavit in response
23 to their motion.

24 It is refreshing to hear at this point in the
25 case that the Espinos do now acknowledge there to

1 have been an easement. If the Court looks at the
2 actual language of the easement, it is in four
3 parts. The first part starts off in giving to
4 the Town of Lexington, its successors and
5 assigns, so the language that is being used in
6 the deed is the classic fee simple language. The
7 first thing that is given is the water lines.
8 The next thing that is given is the sewer lines.
9 The next thing that's given is easements and
10 rights of ways for maintenance of the water and
11 sewer lines. The next thing that's given is the
12 drainage easements.

13 So it is clear that the deed makes a
14 distinction between an easement and an actual
15 line. The real question is very simple. Did
16 Mr. McGuinn have a right to tap onto lines that
17 belonged to the Town of Lexington?

18 Now with all due respect to my friend
19 Mr. Aun, we believe that as a matter of law they
20 did, but when the Court itself has indicated
21 there are all sorts of disputed facts here and
22 we're dealing with equity in regard to the
23 question of what is the scope of the easement,
24 we have a question of the scope of the easement,
25 but also the ability of a party to use property

1 which actually belongs to it. We respectfully
2 submit if we look at the easement or the deeds
3 in question, the sewer line belonged to the Town
4 of Lexington. The sewer line was already in the
5 ground. The sewer line ran under the ground.
6 There is absolutely no inconvenience, harm,
7 damage to anybody by simply allowing the Town
8 of Lexington to allow someone else to tap onto
9 property that belongs to the Town.

10 I would respectfully submit that if we look
11 at the deed it creates absolute ownership of the
12 line in favor of the Town of Lexington. If I'm
13 wrong about that, there at least exists an
14 ambiguity as to what actually was created. If
15 the Town of Lexington actually owns the line,
16 then it should be free to allow anybody to make
17 any use of its line it wants to. And it's not
18 even an easement, but it's ownership. But at the
19 very least there's a question of fact as to what
20 was created by virtue of the deed. On top of
21 that, we have the acknowledgment of the areas
22 and the easements by virtue of plats, so I'd
23 respectfully submit...

24 Again, I'm not sure how any of this impacts
25 the Town of Lexington because they're not a party

1 to these motions and if the cases have been
2 consolidated for trial, they're gonna have to be
3 tried anyway. I'd respectfully submit the best
4 thing to do with this case is to refer everything
5 out to the magistrate or someone and have a
6 trial, but I thank you for listening to me.

7 MR. LINDEMANN: Two quick points, Your
8 Honor.

9 THE COURT: Hold on one second.

10 MR. LINDEMANN: Thank you.

11 THE COURT: All right, Mr. Lindemann. Go
12 ahead.

13 MR. LINDEMANN: Two quick points on an issue
14 of law that Mr. Aun has said to the Court. He
15 contends that Rule 59(e) limits the Court to
16 either correcting an error of law or an abuse
17 of discretion. That is not the law in South
18 Carolina. That my be the law that the Federal
19 courts apply to their Rule 59(e), but the South
20 Carolina Supreme Court in the Elam versus South
21 Carolina Department of Transportation case, and
22 I don't have it in front of me, laid out in great
23 detail what a Rule 59(e) motion is, when it's
24 needed in order to preserve issues for appeal,
25 and they basically said, and I'll be happy to

1 get the exact language for you, that a motion --
2 that a 59(e) motion allows for a motion for
3 reconsideration; meaning it allows the ruling
4 judge to take a fresh look at the exact issues
5 that he or she has already ruled on. It can't
6 accept new evidence, but can make a new de novo
7 decision, and it happens frequently. Well, not
8 frequently, but motions such as that are filed
9 all the time, but there are instances where
10 judges do reverse themselves. It's happened
11 quite a few times to me. But you're not limited
12 to only correcting errors of law or an abuse of
13 discretion.

14 The second point that I would raise is when
15 you look at the language of the easement that's
16 at play here, it specifically references the
17 as-built plans. In fact, it says said easements
18 being 15 feet and 30 feet in width, reference
19 being made to the as-built plans referenced above
20 for a more complete and accurate description of
21 said easement. So you cannot make a ruling on
22 the scope of those easements without also
23 considering the as-built plans.

24 And not to beat a dead horse, but the
25 as-built plans clearly show this is a spur line.

1 It's not serving any properties whatsoever. It
2 would be totally worthless to put in that line
3 if it wasn't meant for future development of the
4 adjoining property. And at the very least the
5 as-built plans and the inferences that can be
6 reasonably drawn from those as-built plans at
7 the very least raise a scintilla of evidence
8 that withstands the motion for summary judgment
9 filed by the Espinos.

10 And, again, it's a little confusing how
11 this case has procedurally come about. I
12 understand that Mr. Aun says he objects to the
13 Town participating here today. Of course, your
14 order for consolidation allowed it, but at the
15 same time the Town is at a disadvantage because
16 we didn't get to present evidence on -- in
17 opposition to Mr. Aun's motion for summary
18 judgment. We're stuck now just participating
19 in front of this Court on a motion for
20 reconsideration. The Espinos can't have it both
21 ways. They can't say that the Town doesn't have
22 the right to be heard on this particular issue,
23 yet then take the position that the Town is
24 precluded from arguing against Judge Johnson's
25 rulings in the 2008 case.

1 By far the most pragmatic approach I would
2 submit for the Court to take in this matter given
3 the fact that the Town wasn't a party at that
4 time, given the fact that you now have the mere
5 scintilla rule governing motions for summary
6 judgment, the fact that Judge Johnson himself
7 identified four or five pages of what he himself
8 called facts in controversy, I would submit by
9 far the most pragmatic thing is to either let the
10 parties file cross-motions for summary judgment,
11 and that will be probably futile, but hold a
12 bench trial, whether it's referred or not that's
13 something we can talk about, where the Court
14 sitting in equity make findings of facts and
15 conclusions of law on the very critical issue
16 that ultimately will allow for appropriate review
17 if that's where this is going, and it probably
18 is. Thank you, Your Honor.

19 **THE COURT:** Anything else, Mr. Aun?

20 **MR. AUN:** Your Honor, as-built plans
21 weren't discussed or presented during the motion
22 for summary judgment. Again, you know, if
23 we're considering the way the motion for
24 reconsideration should be considered, they are
25 limited to what was presented earlier, and

1 Judge McMahon acknowledged that in his order --
2 or in his transcript. So, you know, I understand
3 what Mr. Lindemann's position is on that, but
4 Judge McMahon acknowledged that in his own
5 transcript. Having said that, Judge, looking at
6 this easement, you have to keep in mind that
7 McGuinn had to cross over the Espinos' property
8 to connect to whatever spur lines they were
9 suggesting he needed to connect to which meant
10 there was an easement that he had to -- that he
11 had to have had to get from the Gates Commons
12 property to the spur line. The easement is
13 only for the maintenance of Coventry Lakes
14 subdivision. That's the issue here. It's not
15 for the expansion of the sewer system, it's not
16 for the broadening of the sewer system. It's
17 not for anybody else to use other than Coventry
18 Lakes. I don't know that I disagree that the
19 lines are the Town's lines, okay, but I do
20 disagree that the easements to those lines can
21 be used for anything other than maintenance,
22 which is what this document says. So to that
23 extent, I agree with opposing counsel that the
24 determination should be made on this.

25 As to as-built plans, I mean the as-built

1 plans have nothing to do with the language
2 relating to the easements. I mean, if they're
3 suggesting that there were spur lines that
4 existed and obviously as Mr. Lindemann put it
5 this meant that they wanted to expand or improve
6 this sewer system, then there's no factual
7 evidence to indicate that. They haven't
8 submitted any kind of affidavit, there's no
9 expert to testify to that. And having said
10 that, this document, if you look at where Gates
11 Commons' property ended to where the spur on the
12 Espinos' property started, there was an amount
13 of property that they had to go over to connect
14 and that property was the Espinos' property,
15 which is why even the Town's own representatives
16 testified they had to have a private easement
17 and in their capacity of willingness to serve
18 letter that the Town issued to McGuinn, they
19 said we have the willingness to provide these
20 sewer lines, but you have conditions on deeds
21 and easements. So they knew that they had to
22 have that private -- that private easement in
23 place. Mr. McGuinn knew; otherwise, he wouldn't
24 have filed the lawsuit.

25 So, I mean, I understand what the arguments

1 are, but at the end of the day this is not --
2 this is not anything new that would serve as a
3 basis to overrule or overturn Judge Johnson's
4 ruling. So, Your Honor, we believe this motion
5 should be denied not only because it wasn't
6 perfected, but also because it's baseless.

7 THE COURT: Anything else?

8 MR. MOORE: No, sir, Your Honor.

9 THE COURT: I'll notify you of a decision
10 in writing. Thank you very much.

11 MR. MOORE: Thank you, Your Honor.

12 MR. AUN: Thank you, Your Honor.

13 (End of proceedings.)
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

FILED

2014 JUN -8 P 3 15

APPEAL FROM LEXINGTON COUNTY
CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT

CASE NO. 2005-CP-32-02712

McGuinn Construction Management, Inc. Appellants,

vs.

Saul Espino and Mara Espino Respondents,

CASE NO. 2008-CP-32-04192

Saul Espino and Mara Espino Respondents,

vs.

Gates Commons, LLC, S. Wade McGuinn, individually, and
Town of Lexington, ... Appellants,

NOTICE OF APPEAL

McGuinn Construction Management, Inc., LLC appeals the June 9, 2014 Order of the Honorable William P. Keesley, denying Rule 59 reconsideration alteration or amendment of the June 16, 2008 Order of the Honorable James W. Johnson, filed June 9, 2014, and served upon the parties by the Honorable Beth Carrigg, Clerk of Court for Lexington County on or about June 20, 2014. A copy of Judge Johnson's Order is attached hereto, along with a copy of Judge

Johnson's prior order, which is also being appealed from, and incorporated here. Appellants received written notice of entry of this Order on June 27, 2014.



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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.

NOTICE OF APPEAL

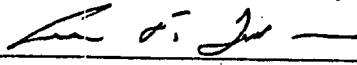
The Appellant Town of Lexington appeals the following Orders:

1. Order on Reconsideration of the Order of the Honorable James W. Johnson, Jr., as the Successor Judge under Rule 63 issued by Circuit Court Judge William P. Keesley, filed June 9, 2014

2. Order issued by the late Circuit Court Judge James W. Johnson, Jr., filed June 16, 2008

The Appellant Town of Lexington's counsel received written notice of entry of the Order on Reconsideration of the Order of the Honorable James W. Johnson, Jr., as the Successor Judge under Rule 63 on June 27, 2014.

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July 15, 2014

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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
2008 JUL 16 3:31)
McGuinn Construction)
Management, Inc.,)
Plaintiff,)
vs.)
Saul Espino and Mara Espino,)
Defendants.)

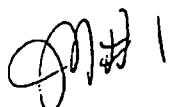
IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2005-CP-32-2712

ORDER

THIS MATTER COMES BEFORE THE COURT on motion of Counsel for Plaintiff on all causes of action alleged by the Plaintiff, including its primary cause of declaratory judgment. Counsel for the Plaintiff further moved for dismissal of the Defendant's fifth counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing. The court also considered a countermotion of counsel for the Defendant for summary judgment as to the Plaintiffs entire case.

The matter was heard by the court on May 29, 2007, and supporting memoranda and affidavits were submitted by the Plaintiff and Defendant for their respective positions.

Upon hearing the arguments of counsel for the Plaintiff and the Defendant, and considering the facts, affidavits, memoranda and arguments submitted by the parties, the Court grants the Defendant's motion for summary judgment in that the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision. There is no authority for Gates Common Subdivision or any other subdivision to connect to the sewer and/or drainage located on the Defendant's property. Having reached this conclusion,



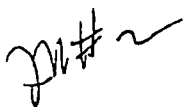
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Defendants' motion for summary judgment on the Plaintiff's slander of title cause of action and tortious interference with a contract cause of action must also be granted. The Court grants the Plaintiff's motion to dismiss the Defendant's fifth counterclaim for breach of implied covenant of good faith and fair dealing. No other motions were properly before the court, and so all other counterclaims of the Defendants are still pending.

I. STATEMENT OF FACTS

In 1992 Saul and Mara Espino purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company which is part of the Coventry Lake Subdivision. (Saul Espino Dep., pp. 7-8, ll. 7-4) The house was purchased as new construction, although the home was not custom built.

McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. This subdivision backs up to the Espinos' property in Lexington. For years the property, which is now known as the Gates Common Subdivision, was unimproved. However, McGuinn applied to have the property rezoned for a patio home subdivision, and was ultimately granted the zoning for which it had applied. Nonetheless, storm drainage, water and sewer infrastructure for the project had to be installed, and the provision of this infrastructure was designed by McGuinn to be accomplished by connecting to existing infrastructure of the Coventry Lakes Subdivision, where the Espinos owned their property. The installation of the appropriate lines would be required to run through the Espinos' property and connect to existing sewer and drainage installed in the Coventry Lake Subdivision.



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The record clearly shows that it was McGuinn Construction Management's intention to install the infrastructure outlined above on the Espinos' property under an easement which purportedly grants the Town of Lexington, its successors and assigns the certain rights in sewer, water lines, and drainage easements for said lines. (See Exhibit 1). Further, it specifically provides an easement for the "maintenance of the aforesaid water and sewer lines..." (Id.) The language of the document purporting to be a deed does not grant any right or easement, express or implied, to the Town to allow for the connection by anyone other than Coventry Lakes to the lines.

II. FACTS IN CONTROVERSY

The Plaintiff asserts that it was operating under the authority of the easement, and that the Town Attorney approved the connection to the sewer based on the easement. The facts show otherwise, and indeed the Town Engineer at the time advised McGuinn that the easement was questionable, and legal authority would be needed to proceed. (Gene Edwards Dep., p. 5, ll. 18-23 and pp. 25-26, ll. 10-14). The Defendants anticipate testimony of the Town Attorney that at no time was he asked to opine as to the legal authority granted to the Town on the easement in question, and what authority, if any, the developer would have derived therefrom.

In his testimony, Edwards indicated that the plans submitted for approval showed that the lines and the manhole were outside of the easement which purportedly existed. (Id. pp. 22-23, ll. 22-14). Mr. Edwards, however, retired from the Town of Lexington prior to the final approval of the plans, which ultimately came from Rosemarie Nuzzo, an engineer with the Town of Lexington who had minimal qualifications at the time. (Id. pp. 23, ll. 12-22). Prior to his retirement, Gene Edwards discussed with Nuzzo the three

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issues of concern about the project in question – (1) runoff once developed, (2) location of how water would be connected, and (3) sewage. (Id. at p. 23, ll. 5-11). Importantly, he indicated that he had discussed the uncertainty of the easement issue relating to the sewer lines with Nuzzo, and advised her that “it was not definitive enough for me [him] to tell them to go ahead at that time.” (Id. at ll. 12-19). Edwards further indicated that he never saw or reviewed a final legal opinion as to McGuinn’s purported authority to connect to the existing sewer lines on the Espino property. (Id. at p. 25, ll. 4-9).

The testimony of Nuzzo indicates that when the plans were submitted to her for approval, she did not keep the issues Edwards had notified her of in mind in her consideration, and in fact, assumed them away, by giving McGuinn the “benefit of the doubt” in his subcontractor’s installation of the sewer lines on the Espinos’ property. When asked in her review of the plans whether the Town of Lexington approved the plans which were to show the location of infrastructure before allowing connection to existing infrastructure, Nuzzo replied:

No. Because in that ... if there’s ... if the lines exist, then you, you almost have to assume there’s an easement to it. Nobody’s going to want to take care of a public sewer or a public water in there, you know, on their property. (Nuzzo Dep. P. 6, ll. 8-15).

Nuzzo goes on to acknowledge that she reviewed plans which showed the infrastructure installation being within the property boundaries of the Defendants, and that she would have approved the installation of the infrastructure (manhole). (Id. pp. 8-9, ll. 24-21). She then indicates in her testimony that she did not have the authority state where to install infrastructure like the manhole. (Id. at 10, ll. 6-14). Significantly, she

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indicated that the developer, in this case McGuinn, would have had to secure easements for the installation. (Id.)

Her further testimony indicates that she did not review the easement under which McGuinn was purportedly operating to determine whether it granted McGuinn the authority to install the lines. Further, there is no testimony from the field engineers hired by McGuinn, HB Engineering, that they made any determination of the authority of the easement being offered by McGuinn as authority. Indeed, the authority under which they testified to be operating to install the sewer lines was the approval of the Town of Lexington.- Tom Britt, the President of HB Engineering indicated the following in his testimony:

- Q. Okay. And at no time did you opine or give any type of certification that the easement was valid and could be used outside of what authority you thought you already had from the Town?
- A. No. Our plans were solely based on the Town telling us they had an easement and approving our plans. (Britt Dep. at p. 41, ll. 16-22).

Further, Britt indicates that the approval of the plans was an indirect approval of the installation of the sewer lines. (Id. at p. 52, ll. 5-8). Therefore, the approval of the plans is a significant issue, and it appears that the manhole and the infrastructure noted on the most recent plan were outside the scope of any easement shown on the plan, and certainly not validated as being installed in accordance with the easement used by McGuinn as the basis of the authority.

There is also an issue about the negligence of the developer in the development of this project, which has a significant portion of wetlands involved, and which flows directly onto the Espinos property. There is a contention that the developer has been

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sensitive to ensure that the post construction flow from the development has not exceeded the pre construction flow.

III. LEGAL ISSUES

McGuinn sued the Espinos and alleged in its complaint a Declaratory Judgment action, Slander of Title and Tortious Interference with Contract. The Espinos answered, and counterclaimed alleging Violations of the South Carolina Unfair Trade Practices Act, Negligent Misrepresentation, Constructive Fraud, Negligence, Breach of Implied Covenant of Good Faith and Fair Dealing, Fraud, Conversion, Slander of Title and Trespass. Defendants also amended the Answer and Counterclaim to allege Third Party actions against the Town of Lexington, which was subsequently dismissed.

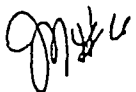
1. Summary Judgment Motions Of Plaintiff and Defendants

Summary Judgment Standard

In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law...In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party...If triable issues exist, those issues must go to the jury.

Summary judgment is appropriate if 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 judgment as a matter of law...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. (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law...Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be



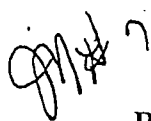
drawn from them, summary judgment should be denied... When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted... The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact... Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.

Joseph H. Moore v. M. M. Weinberg, Jr. and Weinberg, Opinion No. 4209, Court of Appeals of South Carolina, Filed February 20, 2007.

The Plaintiff has alleged causes of action involving (1) declaratory judgment on the easement document in question, (2) slander of title and (3) tortious interference with contract. Plaintiff now moves for summary judgment on all issues associated with the complaint. In the alternative, the Defendants have filed a countermotion on all issues associated with the Plaintiff's complaint specifically including the following in their countermotion:

1. That the allegations of slander of title are not valid as the title to the property alleged to be owned by the Plaintiff was never slandered;
2. That the work conducted by the Plaintiff in the development and construction of the project was never tortuously interfered with, and in fact, the Plaintiff never ceased construction or progress in the development;
3. That the Plaintiff had been advised that it needed to receive a private easement to connect to any existing sewer lines on the Defendant's property, but never obtained said private easement when it in fact connected without authority or



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permission from the Defendants, thereby trespassing on the Defendant's property and converting Defendant's property to its own; and

4. That the easement which serves as the basis of authority for the Plaintiff to have connected to sewer allegedly located on the Defendant's property does not allow for contiguous subdivisions to connect to any sewer, and is in fact limited in the scope to on the maintenance, repair and improvement for the sewer system of Coventry Lakes, not Gates Common Subdivision which is the project sought to receive the benefit by the Plaintiff

A. Declaratory Judgment

As indicated, the Plaintiff brings a declaratory judgment cause of action based on a document it asserts should serve as the basis for allowing the installation of sewer and drainage on the Espinos' property. (See Exhibit 1). As the Court in Pond Place Parners v. Poole, 351 S.C. 1, 16 (Ct. App. 2002), 567 S.E.2d 881 stated:

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Graham, 319 S.C. at 71, 459 S.E.2d at 845 (citing Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Graham, at 71, 459 S.E.2d at 845 (citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a contract or franchise may have determined any question of construction or validity arising under the instrument, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30 (1977); see also Rule 57, SCRPC. Id at 16.

Here, the Plaintiff claims that it had the right to go onto and install drainage and sewer lines on the Espinos' property and to the Coventry Lake Subdivision infrastructure system under this document. However, the document does not allow for connection to

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the sewer lines and existing infrastructure on its face. This was noted by the Town of Lexington's engineers who were charged with considering this issue as outlined above.

Here, the easement in question does not specifically allow for the connection by any other subdivision to the existing lines.

For these reasons, ruling on the Declaratory Judgment Action, the Court finds and Rules that the Plaintiff had no authority under the easement in question to enter the Espinos' property and/or to connect to drainage and/or sewer lines in the Coventry Lake Subdivision. The Defendants' counter-motion for summary judgment on the issue of the Declaratory Judgment Action is granted.

B. The Slander of Title

The Court also denies the Plaintiff's Motion for Summary Judgment as to its Slander of Title cause of action and grants the Defendants' Counter-motion for Summary Judgment as to the Plaintiff's claim for Slander of Title. The Court has held that "[t]o maintain an action for slander of title in South Carolina, the plaintiff 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.'" Id. (citing TXO, 419 S.E.2d at 879). Pond Place Parners v. Poole, 351 S.C. 1, 22-23 (Ct. App. 2002), 567 S.E.2d 881. As the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Motion for Summary Judgment as to the Plaintiff's Slander of Title allegation.

C. Tortious Interference with Contract

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The Court also denies the Plaintiff's Motion for Summary Judgment as to its Tortious Interference of Contract cause of action and grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's claim for Tortious Interference of Contract. The elements of this cause of action are (1) the existence of the contract; (2) the wrongdoer's knowledge of the contract, (3) the intentional procurement of the contract's breach; (4) the absence of justification; and (5) resulting damages. South Carolina Requests to Charge, Anderson, p. 485.

As with the Plaintiff's Slander of Title cause of action, because the Court has determined that the Plaintiff did not have the authority to occupy the Espinos' property or to connect to either sewer or drainage lines in Coventry Lake Subdivision, the Court grants the Defendants' Countermotion for Summary Judgment as to the Plaintiff's Tortious Interference with Contract cause of action.

2. **Plaintiff's Motion to Dismiss**

The Plaintiff also files a motion to dismiss the Defendants' fifth counterclaim for breach of implied covenant of good faith and fair dealing. For the reasons outlined below, this motion is granted.

Standard For Motion To Dismiss

In Overcash v. South Carolina Electric and Gas Company, 25990 (S.C. 2005), the court held:

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based solely on the allegations set forth on the face of the complaint. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). "[A] judgment on the pleadings is considered to be a drastic procedure by our courts." Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Therefore, pleadings in a case should be

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construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties. Stroud v. Riddle, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973).

Under this standard, the facts of the complaint should be construed liberally and considered "true" when considering whether the motion should be granted. The Defendant alleged the following facts:

As the Court has noted, "there exists in every contract an implied covenant of good faith and fair dealing." Williams v. Riedman, 339 S.C. 251, 267 (Ct. App. 2000). Here, considering the facts under the appropriate standard, the Court finds that there is no genuine issue of material fact as to the fact that the Plaintiff did not have a contract with the Defendants. Therefore, the Plaintiff's motion to dismiss is hereby granted.

Based on the foregoing **IT IS HEREBY ORDERED, THAT:**

1. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Declaratory Judgment action filed, and therefore rules that the easement in question does not provide legal authority for the Plaintiff or anyone else to enter the Defendants' property and/or to connect to any sewer and/or drainage lines of Coventry Lake Subdivision;
2. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in reference to the Plaintiff's Slander of Title cause of action;
3. The Court DENIES the Plaintiff's Motion for Summary Judgment and GRANTS the Defendants' Countermotion for Summary Judgment in

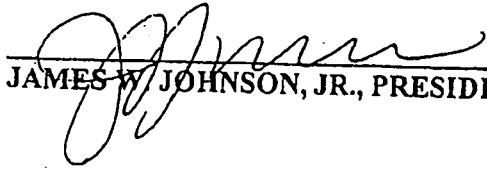


reference to the Plaintiff's Tortious Interference with Contract cause of action:

and

4. The Court GRANTS the Plaintiff's Motion to Dismiss the Fifth Counterclaim of the Defendants for Breach of Implied Covenant of Good Faith and Fair Dealing.

AND IT IS SO ORDERED.


JAMES W. JOHNSON, JR., PRESIDING JUDGE

Date: June 16, 2008

#12

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS

2014 JUN -9 P 12:57

McGuinn Construction Mgmt., Inc.,)

Plaintiff,)

BETRI A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

-vs-)

Case Number 2005-CP-32-02712

Saul Espino, et al.,)

Defendants.)

ORDER ON RECONSIDERATION OF
THE ORDER OF THE HONORABLE
JAMES W. JOHNSON, JR., AS THE
SUCCESSOR JUDGE UNDER RULE 63

Saul Espino, et al.,)

Plaintiffs,)

-vs-)

Case Number 2008-CP-32-04192

Gates Commons, LLC, et al.,)

Defendants.)

The court's understanding is that the attorneys assert that there are two issues before it: (1) a motion by Saul and Mara Espino (the Espinos) challenging the jurisdiction of the court to rule upon the motion for reconsideration filed by McGuinn Construction Management, Inc. (McGuinn Construction) under Rule 59, SCRCP; and, (2) the motion for reconsideration and to alter or amend under Rule 59. Both motions are denied. The court has certified familiarity with the record and determined that the proceedings may be completed without prejudice to the parties. The court agrees that the parties to the lawsuit at the time that the matter was presented to Judge Johnson (2005-CP-32-02712) are bound by his ruling. However, the court is not determining in this

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order whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling.

The attorneys are directed to schedule a status conference with the undersigned judge so that a plan of action can be implemented.

BACKGROUND

This case presents a most difficult procedural history. It has been made more difficult by the fact that the files had been jumbled, which necessitated the court having to spend many hours trying to get the files in proper order.

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The original lawsuit was brought by McGuinn Construction against the Espinos in August 2005. In its most basic form, this is a dispute over an easement. The Espinos filed counterclaims, and they also filed a third-party complaint against the Town of Lexington (Lexington). Lexington filed a motion to dismiss the third-party complaint, and that was granted by The Honorable James W. Johnson, Jr. through a memorandum order filed September 18, 2007, and a final order filed October 31, 2007. So, Lexington was a party to the initial lawsuit, but successfully sought and obtained dismissal from that suit.

In the interim between the memorandum order and the final order dismissing Lexington, the attorney for the Espinos filed a motion for reconsideration, and then filed two supplemental documents after the filing of the final order. Judge Johnson denied that motion to alter or amend by order filed December 20, 2007. As of that point, Lexington was not a party to the litigation.

After an attempt to mediate the case, the Espinos filed a motion for summary judgment on April 3, 2008. Judge Johnson issued an order that was filed on April 14,

2008, dismissing the fifth counterclaim. On June 13, 2008, The Honorable R. Knox McMahon designated the case as complex and assigned it to Judge Johnson.

A second attempt at mediation failed. A principal of McGuinn Construction (Mr. Wade McGuinn) filed an affidavit in support of upholding the actions of McGuinn Construction in tapping into the sewer line on the Espinos' property.

On May 21, 2008, McGuinn Construction filed a motion for summary judgment. It sought summary judgment on the second, third, fourth, sixth, and ninth counterclaims.

On June 16, 2008, Judge Johnson issued an order granting the Espinos' motion for summary judgment and granting McGuinn Construction's motion to dismiss the fifth counterclaim (the dismissal of the fifth counterclaim being included in the previous order filed on May 21, 2008). **This June 16, 2008 order is the order that prompted the filing of the motion to alter or amend that is the essence of the dispute before the court now.**

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In the June 16, 2008 order, Judge Johnson ruled: (1) that the Espinos were entitled to summary judgment and that no one, including McGuinn Construction, had the right to enter the Espinos' property to connect to sewer and drainage lines of Coventry Lake Subdivision; (2) that the Espinos were entitled to summary judgment against McGuinn Construction on the slander of title cause of action; (3) that the Espinos were entitled to summary judgment on the cause of action against McGuinn Construction for tortious interference; and, (4) that McGuinn Construction was entitled to dismissal of the fifth counterclaim which alleged breach of an implied covenant of good faith and fair dealing.

On June 26, 2008, the attorney for McGuinn Construction filed a motion for summary judgment regarding the fourth counterclaim (though it had already sought summary judgment on that and other counterclaims in the filing of May 21, 2008).

On July 10, 2008, McGuinn Construction filed its motion for reconsideration and to alter or amend the order of Judge Johnson that was filed on June 16, 2008. That motion recites that a copy of the order was received by counsel for McGuinn Construction on July 1, 2008, which would have been less than 10 days before the filing of the reconsideration motion. The certificate of service indicates that a copy of the motion was served on counsel for the Espinos by hand delivery on July 10, 2008. Part of the dispute here is that the Espinos challenge the authority of the court to entertain the Rule 59 motion because there is no indication that it was served on the court.

Judge Johnson died on July 13, 2008. He had been diagnosed with a rare, aggressive form of cancer in June 2008. The order in this case must have been one of the last he signed.

On October 10, 2008, the Espinos filed another lawsuit, which is designated as case number 2008-CP-32-04192. They sued Gates Commons, LLC (Gates Commons), S. Wade McGuinn, Individually (Wade McGuinn), and the Town of Lexington (Lexington).

On June 10, 2009, Judge McMahon filed an order dealing with the second case. That order ruled, as follows: (1) it denied on the grounds of being premature motions for summary judgment filed by Wade McGuinn and Gates Commons wherein they sought dismissal of the second, third, eighth, tenth and eleventh causes of action; (2) it granted Lexington's motion to strike the claim for punitive damages; (3) it granted Lexington's

motion to make more definite and certain; and, (4) it granted Lexington's motion to strike the claim for attorney's fees.

On June 25, 2009, an order was issued assigning the cases to Judge McMahon.

They were designated as complex litigation. Rule 63, SCRCF, provides as follows:

Disability of a Judge

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

In addition to Rule 63, Chief Justice Toal issues an order each time she designates the Chief Judges for Administrative Purposes. Those orders generally include the following language or the substantial equivalent:

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IT IS FURTHER ORDERED that if a trial or hearing has been commenced and the judge is unable to proceed, the chief judge for administrative purposes shall assign the trial or hearing to a successor judge. If the chief administrative judge has a conflict and is thereby prevented from performing this duty, the matter shall be referred to the Chief Justice to assign a successor judge. The successor judge may proceed with the trial or hearing upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may provide for the recall of any witnesses.

On November 25, 2009, Judge McMahon filed an order. It "incorporates the conclusions of facts and conclusions of law contained in Judge Johnson's Order." It provided that, "The Order and the transcript of the hearing are sufficient to negate the

need for a new hearing on these motions." It then stated, "The Court will schedule a hearing on Plaintiff's Motion to Reconsider Judge Johnson's Order."

The interpretation that this court gives to the November 25, 2009 order of Judge McMahon is that he determined that a *de novo* hearing was not needed. He was certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. The only hearing he determined to be necessary was the one that Judge Johnson had not ruled upon – the pending motion for reconsideration and to alter or amend filed July 10, 2008.

On December 22, 2009, counsel for the Espinos filed a counter-motion to McGuinn Construction's motion for reconsideration. The Espinos' motion sought to dismiss the pending Rule 59 motion by raising a challenge to the court's jurisdiction. The Espinos argued that there was no evidence that the presiding judge or the Chief Judge for Administrative Purposes was served with the motion. The attorneys seem to be arguing the same issue again, though it appears to have already been ruled upon.

On January 11, 2010, Judge McMahon filed an order denying the Espinos' challenge to the court's jurisdiction and their motion to dismiss the Rule 59 motion. Judge McMahon rejected the argument that a court cannot consider a Rule 59 motion when there was no evidence that the motion was served on the presiding judge or another judge. Though it is a Form 4 order, there is no indication that a more detailed order was to follow. It appears to this court to be a final order.

Judge McMahon's order of January 11, 2010 notes that several status conferences were held, and discussions took place between the litigants and the court, before there was a hearing on the Rule 59 motion on December 22, 2009. He stated that the court had

been on notice of the motion for at least a year, "so the spirit of the service requirement" had been met.

Subsection (g) of Rule 59, SCRCP was added to address the problem that judges were often unaware that reconsideration motions were filed. It reads:

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

The notes that accompany the rules explain the 1998 amendment adding subsection (g):

This amendment adds Rule 59(g). It is intended to help insure that the judge is promptly notified that the motion has been filed.

In addition to the reasoning expressed by Judge McMahon in his order filed January 11, 2010, the court believes that subsection (g) is a notice provision, which could be handled through sanctions (including dismissal of the motion), rather than a requirement of personal service that would be jurisdictional. Rule 59(e), states: "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(g) requires that a copy be provided to the judge promptly. Subsection (g) does not use the word "serve." It is this court's interpretation, if the issue is still active in the case, that the 10-day requirement under subsection (g) is not absolute and it can be extended by the court. In light of the unique circumstances here, the court agrees with Judge McMahon that it would be improper to dismiss the Rule 59 motion based on the lack of proof that a copy of the motion was sent to Judge Johnson or to another judge. In this court's view, good cause has been shown as

to why the motion for reconsideration should be heard.¹ Further, it being the court's view that it could sanction an offending party for failing to send notice to the judge of the motion to reconsider, including the sanction of refusing to hear the motion, the court declines to impose any sanction in this case.

Judge McMahon heard arguments on the motion. However, before he issued a final written order, Judge McMahon recused himself on February 11, 2011. The matter was sent back to the undersigned judge as Chief Judge for Administrative Purposes.

On September 6, 2011, an order was issued regarding the status of the case. The undersigned judge was designated as the successor judge under Rule 63, SCRCP, and Chief Justice Toal's administrative order.

At that point, the pending matter was the Rule 59 motion that was filed a few days prior to Judge Johnson's death. The attorneys indicated a desire to file a motion for consolidation of the two cases, but no motion had been filed. The order regarding status set up procedures to be followed. Two days later, on September 8, 2011, Lexington filed a motion to consolidate the cases.

On September 28, 2011, in response to the order regarding status, the Espinos filed a transcript of the hearing on the summary judgment motion before Judge Johnson, a copy of the order of Judge Johnson, a transcript of the hearing before Judge McMahon regarding the Rule 59 motion, and the proposed order that was submitted to Judge McMahon on January 19, 2010.

¹ Moreover, this court has previously stated in an order regarding status filed September 6, 2011, that Judge McMahon had determined that the Rule 59 motion was timely.

On March 27, 2012, the undersigned judge filed an order consolidating the two cases. On April 5, 2012, counsel for the Espinos filed a motion for reconsideration of the order consolidating the cases. That motion was denied by order filed August 20, 2012.

On September 24, 2013, the Espinos filed a counter-motion and motion to dismiss the Rule 59 motion that was filed shortly before Judge Johnson's death. For reasons discussed above, this court finds that the motion is duplicative and has already been ruled upon. Even if it were not deemed to be so, this court finds that the court has the authority under Rule 59(g) to extend the time for notifying the judge of the motion for reconsideration and, for the reasons stated above, finds that the unique circumstances of this case provide good cause for considering the notice to the court to be timely.

WPK
#9

The undersigned judge has reviewed the file and the written submissions. Similar to the determination of Judge McMahon, as set forth in his order filed November 25, 2009, the court has determined that a *de novo* hearing is not needed on the summary judgment motions that Judge Johnson ruled upon. The court has certified familiarity with the record and determined that the proceedings may be completed without prejudice to the parties. The only hearing determined to be necessary is the one that Judge Johnson had not ruled upon prior to his death – the pending motion for reconsideration and to alter or amend filed July 10, 2008.

ARGUMENTS ON THE MERITS OF THE RECONSIDERATION MOTION

The Rule 59 motion was heard by the undersigned judge on October 7, 2013. Over the objection of the Espinos, the other parties in both lawsuits were allowed to participate.

The parties opposing the Espinos assert that there are genuine issues of material fact related to the nature and scope of the easement in question. McQuinn Construction argues that the Espinos bought their property in a subdivision that makes reference to a plat. The plat shows an easement for a sewer line running across the Espinos' property. The plat was approved and filed before the Espinos purchased the real estate. It is argued that the Espinos obtained a deed that references the plat, and the deed reads that it is subject to easements of record and those that an inspection of the property would show. The sewer line runs underground.

The Espinos had their own plat done before they bought the property. It shows an easement, fifteen feet in width, for sewer, and it references the plat mentioned above. The predecessor in title to the Espinos had issued a deed in favor of Lexington, giving fee simple title to the sewer line. It is the contention of McQuinn Construction and those opposing the Espinos that the sewer line is clearly a spur line and that other property that was being developed was to be allowed to use the line. They note that the language of the easement states that Lexington has all easements necessary to maintain the lines.

It is argued that at least an ambiguity is created and that issues of fact exist. Those opposing the Espinos note that there are many ways to create an easement, and that the plats and deeds here raise a question of fact as to what was granted, what was reserved, and what the language means when it references the right to maintain the line. McQuinn Construction calls attention to the affidavit of Mr. Wade McQuinn that was filed on May 15, 2008, as creating an issue of fact. The affidavit has several attachments.

Lexington was not a party when the matter came before Judge Johnson. Lexington argues that the scintilla rule is not mentioned in Judge Johnson's order, it being

announced by the South Carolina appellate court in 2009, but made retroactive. The Espinos state that the law in 2008 was clear that the existence of an easement is a matter of law, but the scope of it is equitable. Lexington claims that Judge Johnson went ahead and decided the declaratory judgment action and determined that the easement was not sufficient to allow anyone else to tap onto the line on the Espinos' property. Lexington points out that the layout of the sewer lines clearly shows that this is a spur for development of the property behind the Espinos' land. It is Lexington's contention that reference to the plat itself creates issues of fact that go to the scope of the easement. According to Lexington, the intent of the parties was to allow a means to serve future use of lands that were undeveloped.

WMC
#11

Since it was not a party, Lexington maintains that it was not allowed to present evidence in the summary judgment motion. The complaint in the second action filed after Judge Johnson's death attached a copy of the summary judgment order and pleaded that Lexington is bound by it. Lexington insists that it is not bound by that order and that it should be allowed to present evidence. It is the contention of Lexington that a bench trial is needed to determine the scope of the easement.

In opposition to the motion to alter or amend, the Espinos argue that the question is not whether an easement exists. The question is the scope of the easement. According to the Espinos, Judge Johnson determined correctly that where there is clear and unambiguous language, there is no need to go beyond the language of the document. The easement was put in place in 1988. The deed to Lexington was to maintain the sewer lines and utilities for Coventry Lake Subdivision. No one raised issues about a prescriptive easement or easement by dedication to Judge Johnson. Even if the court

were to consider those issues, the Espinos maintain that the language of the easement was clear and unambiguous, as Judge Johnson found.

The Espinos feel that the parties opposing them are attempting to argue issues that they could have and should have raised before the summary judgment order was issued. They note the inconsistency of McGuinn Construction filing a declaratory judgment action to determine if it had the right to run the line versus the positions taken now. Moreover, they note that McGuinn Construction elected to go ahead and put the lines in place before the judge decided the issue. They assert that Lexington was brought into the case by the Espinos, but that Lexington filed a motion to be dismissed. That is why Lexington was not a party at the time Judge Johnson heard the motion.

As for the affidavit of Mr. Wade McGuinn, the Espinos challenge that the affidavit was properly before the court in 2008 since it was not filed with the motion, but some 30 days later. Nonetheless, Judge Johnson considered it.

Finally, the Espinos maintain that there is no need for a *de novo* hearing.

In response, McGuinn Construction and those aligned with it argue that the affidavit was not late, but was filed in response to the motion for summary judgment that the Espinos filed, which was heard at the same time by Judge Johnson. They point out that the language of the easement has several parts. Those parts include the rights of way to maintain the sewer lines. They assert that there is no prejudice to the Espinos by granting a *de novo* hearing. It is their contention that the sewer line was already in the ground, that it runs underground, and the Espinos are not in any way damaged by taps into the line. They want the matter referred to the Master-in-Equity for a full hearing.

Lexington responds that relief under Rule 59(e) is not limited to having the court correct an error of law or an abuse of discretion. Judges are allowed to take a fresh look at the evidence. The language of the easement specifically references as-built plans. Therefore, Lexington feels that the court cannot rule on the scope of the easement without considering those plans, and Lexington maintains that the as-built plans clearly show this as a spur line. Since Lexington did not present evidence in opposition to the summary judgment motion, Lexington argues that the most pragmatic thing to do is to let the parties file new cross-motions for summary judgment or allow a hearing on the merits.

WAL
#13

The Espinos response is that the as-built plans were not discussed or presented. They argue that Judge McMahon acknowledged that fact in the transcript of the hearing held before him. McGuinn Construction had to cross over the Espinos' property to get to the line. It is the view of the Espinos that the easement was only for the maintenance of Coventry Lake Subdivision and that the easement to maintain the line is limited to that purpose, not an extension into other areas. It is also argued that the facts of the case are clear that Lexington's engineers knew that private easements had to be obtained and that McGuinn Construction also knew. Otherwise, the engineers would not have responded as they did and McGuinn Construction would not have filed this lawsuit.

CONCLUSION

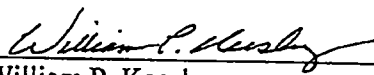
Having reviewed and reconsidered the matter, the court finds no basis for altering or amending Judge Johnson's rulings. His order is very thorough and well-stated. He ruled on what was presented to him. Nothing has been provided to this court indicating that Judge Johnson failed to consider any matters that were placed before him. The court

agrees that the parties to the lawsuit at the time that 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.

The attorneys are directed to schedule a status conference with the undersigned judge so that a plan of action can be implemented.

AND IT IS SO ORDERED.

June 2, 2014


William P. Keesley
Judge

#14

BEITH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 JUN -9 P 12:57

FILED

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
In the Court of Common Pleas
William P. Keesley, Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Appellate Case No. 2014-001519

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

v.

Saul Espino and Mara Espino,.....Respondents,

and

Saul Espino and Mara Espino,.....Respondents,

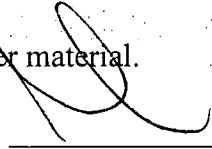
v.

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

Of whom Town of Lexington is.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material proposed
to be included by any of the parties and not any other material.


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March 23, 2015

ROA000347

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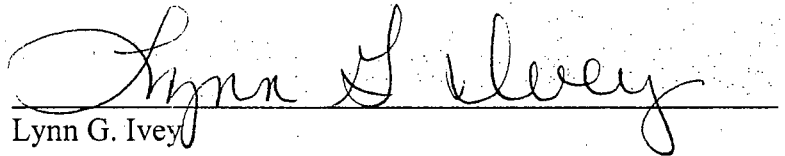
PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, P.A., certify that I have on this day effected service of the Record on Appeal upon counsel of record, by placing a copy of same in the United States mail in an envelope with sufficient postage affixed thereto, addressed as listed below.

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