

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
In the Court of Common Pleas

William P. Keesley, Presiding Judge
James W. Johnson, Jr., Presiding Judge

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AUG - 9 2016

SC SUPREME COURT

Case No. 2005-CP-32-2712
Case No. 2008-CP-32-4192
2016-UP-138 (S.C. Ct. App. Filed March 23, 2016)

Appellate Case No. 2016-001291

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

v.

Saul Espino and Mara Espino,.....Petitioners,

and

Saul Espino and Mara Espino,.....Petitioners,

v.

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

Of whom Town of Lexington is.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This Petition for Certiorari arises out of an appeal involving two consolidated actions in which the Petitioners Saul Espino and Mara Espino are parties. (R. pp. 1, 27).

Respondent McGuinn Construction Management Inc., ("Respondent McGuinn") commenced an action pursuant to the South Carolina Declaratory Judgments Act for declaratory judgment against Petitioners Saul Espino and Mara Espino ("Petitioners Espinos") on or about August 8, 2005. (R. p. 40). Respondent Town of Lexington's ("Respondent Town") Complaint sought a declaration of its rights declaring that Respondent McGuinn had full rights to utilize and improve an existing easement across Petitioner Espinos' property, granted by Respondent McGuinn's predecessor in title to the Respondent Town on or about April 11, 2008. (R. pp. 40, 233). Respondent Town's Complaint also sought recovery of actual and punitive damages arising out of causes of action for slander of title and unlawful interference with Respondent McGuinn's contractual rights. (R. p. 40).

Petitioners Espinos answered and asserted various counterclaims against Respondent McGuinn (R. p. 43). Respondent McGuinn timely replied to these counterclaims. (R. p. 53). The parties then engaged in extensive discovery. Both parties named fact and expert witnesses. Numerous depositions were taken.

Respondent McGuinn filed a Motion for Summary Judgment and Motion to Dismiss the Petitioners Espinos' Counterclaim for Breach of Implied Covenant of Good Faith and Fair Dealing on October 2, 2007 (R. p. 115). Countermotions for Summary Judgment were filed by the Petitioners Espinos. (R. p. 150). A hearing was held before Judge James W. Johnson, Jr., Presiding Judge of the Eleventh Judicial Circuit on these outstanding motions on April 14, 2008. (R. p. 238). Judge Johnson signed and filed an Order on June 16, 2008, denying Respondent McGuinn's Motion for Summary Judgment and granting Petitioners Espinos' Cross Motion for Summary Judgment as to Respondent

McGuinn's Declaratory Judgment, Slander of Title, and Interference with Contractual Relations causes of action. (R. p. 15). Judge Johnson's Order also granted Respondent McGuinn's Motion to Dismiss the Fifth Counterclaim of the Petitioners Espinos for Breach of Implied Covenant of Good Faith and Fair Dealing. (R. p. 15).

Respondent McGuinn timely filed a Motion for Reconsideration on July 10, 2008. (R. p. 154). Sadly, Judge Johnson passed away before hearing arguments on this motion. Subsequent to Judge Johnson's death, this matter was designated as complex litigation and assigned to the Honorable R. Knox McMahon. Judge McMahon heard the Respondent McGuinn's Motion to Reconsider in December of 2009. However, prior to issuing a ruling on Respondent McGuinn's Motion, Judge McMahon recused himself from the case.

Respondent McGuinn's motion was eventually heard by the Honorable William P. Keesley, Rule 63 SCRAP Successor Judge, on October 7, 2013. (R. p. 278). On or about June 9, 2014, Judge Keesley issued his Order denying the Respondent McGuinn's Rule 59 Motion for Reconsideration (R. p. 1). Respondent McGuinn subsequently filed an appeal to the South Carolina Court of Appeals. The Town of Lexington then filed its own appeal.

On March 23, 2016, the Court of Appeals issued an unpublished per curiam opinion that reversed and remanded the question as to the scope of the easement. The Court of Appeals also reversed and remanded the grant of summary judgment as to the slander of title and tortious interference with the contract claims against Respondent McGuinn. The Court of Appeals did not find it necessary to rule on the Respondent Town's contention that it did not have an opportunity to be heard on the scope of easement issue. The Petitioners Espinos then filed a Petition for Rehearing which was denied by the Court of Appeals. (App. 13). This Petition for Certiorari followed.

STATEMENT OF THE FACTS

This case concerns the right of Respondent McGuinn to access and utilize a sewer easement owned by the Respondent Town across property owned by the Petitioners Espinos. There is no question as to the existence of valid easements owned by the Respondent Town running across the Petitioners Espinos' property. There is no question that there are sewage/drainage pipes owned by the Respondent Town running through and under these easements. The issue before the Court in this case and on this appeal was whether or not the Respondent McGuinn may tap into and/or utilize this easement and these pipes in the development of property located adjacent to and behind property owned by the Petitioners Espinos. The Lower Court, relying in part on its very narrow construction of the word "maintain" in the deed to the Respondent Town, found and ruled as a matter of law that Respondent McGuinn had no authority under the easement in question to enter Petitioners Espinos' property and/or to connect to drainage and/or sewage lines in Coventry Lake Subdivision. (R. p. 15). The Court of Appeals reversed the Lower Court's Order.

On or about May 8, 1992, Petitioners Espinos, purchased property located at 108 Coventry Court in Lexington, South Carolina. This property consisted of a house and a building lot and was part of the Coventry Lakes Subdivision. (R. p. 284, ll. 1-6). The house was purchased as new construction, although the home was not custom built.

The property description on the deed by which Petitioners Espinos took title references and incorporates a plat prepared for Saul J. Espino and Mary Y. Espino by Belter

& Associates dated April 27, 1992. This plat, which is found at Deed Book 210-G, page 149, clearly shows a 15' sanitary sewer easement running into the Petitioners Espinos' property, along the side of the Petitioners Espinos' property and out of Petitioners Espinos' property into property then identified as "Heritage Hills Subdivision. (R. pp. 197, 213). In addition, the plat also showed the existence of a storm drainage easement running across and through Petitioners Espinos' property. (R. p. 213).

At the time they purchased their property, the Petitioners Espinos also received a deed. The Petitioners Espinos' deed clearly references the plat which shows the sewage easement. (R. p. 284, ll. 18-25). The clear and express language of the Petitioners Espinos' deed indicates that it was subject to easements of record and those easements which inspection of the property would show. (R. p. 7, ll. 18-25).

Prior to the purchases of their property, the Petitioners Espinos' predecessor in title constructed a sewage line following the sewage easement and running under the property that would eventually be purchased by the Petitioners Espinos. This spur line ran into and across the subject property and out of it onto other undeveloped property. On April 11, 1988, prior to the Petitioners Espinos' purchase of their property, their predecessor in title issued a deed in favor of the Respondent Town. (R. p. 233). In that deed, the Petitioners Espinos' predecessor in title gave fee simple title to all sewer lines located on property known as Country Lakes Subdivision along with the express right to maintain those lines to the Respondent Town. (R. pp. 233; 286 – 287).

Respondent McGuinn is the Developer of the neighborhood known as the Gates Common Subdivision. Respondent McGuinn is the successor in interest to Coventry Associates, Inc., in a deed filed April 11, 1988. (R. p. 197). Gates Common subdivision

backs up to the Coventry Lakes subdivision and the Petitioners Espinos' property in Lexington. Respondent McGuinn applied to have the property rezoned for purposes of developing a subdivision and was granted the zoning for which he had applied. (R. p. 197). Storm drainage, water, and sewer infrastructure needed to be installed for the Respondent McGuinn's project. This was to be accomplished by connecting the new underground infrastructure to the spur line running under the existing easement on Petitioners Espinos' property. The installation would require connecting the new infrastructure with the existing infrastructure located under the Petitioners Espinos' property. The Respondent Town approved the use of this drainage easement by the Respondent McGuinn. (R. p. 197). Respondent McGuinn obtained a building permit from the Respondent Town. (R. p. 201). All necessary permits were obtained to begin construction. (R. p. 200).

In 2005, Respondent McGuinn was in the process of completing this work. Respondent McGuinn obtained a building permit from the Respondent Town and had all building plans approved by the Respondent Town. (R. p. 197). With the Respondent Town's permission and after obtaining all necessary approvals, Respondent McGuinn began to use the sanitary system easement to connect Respondent McGuinn's housing development to the Respondent Town's sewer system. (R. p. 197.) Petitioners Espinos refused to allow Respondent McGuinn to perform this task, asserting, in part, that the easement in question is limited to the maintenance of the sewer system.

ARGUMENTS

I. The Decision of the Court of Appeals does not warrant the issuance of a Writ of Certiorari.

Rule 242(b) of the South Carolina Appellate Court Rules sets forth factors to be considered in determining whether or not a Grant of Certiorari is warranted or appropriate.

These factors include (1) whether or not there are novel questions of law; (2) whether or not there was any dissent in the Court of Appeals; (3) whether the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) whether substantial constitutional questions are directly involve; and finally (5) whether a federal question is included and the decision of the Court of Appeals conflicts with a prior decision of the United States Supreme Court. None of these factors are present in this case.

There were no novel questions of law involved in the unpublished opinion of the Court of Appeals. The decision of the Court of Appeals was unanimous. The decision is not in conflict with any prior decisions of the South Carolina Supreme Court. There are no constitutional questions involved, substantial or otherwise. Finally, there are no federal questions involved and the opinion of the Court of Appeals is not in conflict with any prior decisions of the United States Supreme Court. Therefore, based on Rule 242(b) there is no need for this Court to grant Certiorari to review the opinion of the South Carolina Court of Appeals in this case.

II. THE COURT OF APPEALS CORRECTLY REVERSED SUMMARY JUDGMENT AS TO THE SCOPE OF THE EASEMENT.

The Court of Appeals' opinion correctly recognized that there were multiple contested issues of fact with respect to the scope of the easement that precluded the Lower Court's granting of Summary Judgment in this case. (Op. No. 2016-UP-138, filed March 23, 2016). The Court correctly found (as argued by both Respondents) that further inquiry into the facts surrounding the grant of the easement was necessary to determine the scope of the easement and the grantor's intent. (Op. No. 2016-UP-138, filed March 23, 2016). The Court correctly determined (as Respondents' argue) that this was not a case in which summary judgment was appropriate. The Court correctly concluded (as argued by

Respondents) that further inquiry into the facts surrounding the grant of the easement was necessary in this case. This Court's decision is appropriate and the Petitioners Espinos' Petition for Rehearing should be denied.

The Petitioners Espinos argue in their Petition that the Court of Appeals decided an issue that was not first raised in the lower court or in the Court of Appeals. Secondly, they argue that the terms of the easement instrument were not ambiguous and only provide for "maintenance" and nothing else. However, the Court of Appeals correctly decided these issues and a writ of certiorari is not warranted in this case.

The Court of Appeals correctly held that when an instrument such as a deed or easement incorporates plans by reference (such as the easement before the Court), then those plans must be considered and read in conjunction with the deed or easement. *See, Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 558 S.E.2d. 902 (Ct. App. 2001); *Fuller-Ahrens Partnership v. South Carolina Dept. of Highways & Public Transportation*, 311 S.C. 177, 427 S.E.2d. 920 (Ct. App. 1993). In this case, the easement was construed by the Lower Court without reference to the "as built plans." The Court of Appeals found that a "potential latent ambiguity" exists, thereby warranting further fact-finding and proceedings.

The Petitioners Espinos' contention that the parties did not raise this issue in the Lower Court lacks merit. Respondents raised the issue that the "as built plans" and other evidence show that the sewer line at issue in this case is an inactive spur line, whose purpose was to provide for future development behind the Petitioners Espinos' property. The Court of Appeals agreed with this position, and concluded that the absence of the "as

built plans” created a “potential latent ambiguity” as to the parties’ intent with respect to the spur line at issue. The Petitioners Espinos are clearly incorrect in suggesting that the Court of Appeals decided this case on an issue that was not raised in the Lower Court.

The Petitioners Espinos repeat their position that the terms of the easement provide only for “maintenance.” The Court of Appeals correctly rejected this argument. To do anything to the contrary would have brought about an absurd result in this case. The evidence presented in this case clearly demonstrated that the sewer line across Petitioners Espinos’ property is a spur line. (R 248-249). It serves no function for the removal of sewage from Petitioners Espinos’ home or from any other residence in the Coventry Lakes Subdivision. Until Gates Common was developed, the spur line served absolutely no purpose. It did not hold or transport any sewage. There is no evidence that this particular spur line served any purpose other than to provide for the expansion of the system to provide service to the undeveloped property located behind that of the Petitioners Espinos. The Respondents presented ample evidence that the purpose of the line was to provide for future expansion into the development later named Gates Common. Clearly summary judgment as to this issue was inappropriate, as recognized correctly by the Court of Appeals.

III. THE RESPONDENT MCGUINN DID NOT ABANDON HIS ARGUMENTS REGARDING TORTIOUS INTERFERENCE AND SLANDER OF TITLE.

The Petitioners Espinos once again argue that Respondent McGuinn abandoned his argument regarding the Trial Court’s error in granting summary judgment as to the slander of title and tortious interference with contract. This argument is identical to their arguments previously raised with this Court and is based on an incorrect reading of the language contained in Respondent McGuinn’s brief and lacks merit.

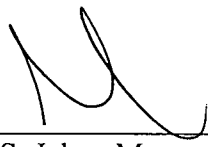
As argued by the Respondent McGuinn in his brief, Judge Johnson based his decision to grant summary judgment as to the claims *solely* on the grounds that, "...the Court has determined that the Plaintiff [Respondent] did not have the authority to occupy the Espinos' [Petitioners'] property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision." (R. p. 15). As argued by the Respondent McGuinn throughout his briefs filed with the Court of Appeals, this finding is clearly erroneous and should not and cannot be used as the sole basis to grant summary judgment as to the Respondent McGuinn's slander of title and tortious interference with contract causes of action. There was no need for the Respondent McGuinn to reassert each and every argument presented earlier in his brief that the sole grounds the trial court relied on in granting summary judgment as to these causes of action was fatally flawed. Therefore, the Respondent McGuinn did not abandon these arguments in his brief.

Once this Court reversed Judge Johnson's determination that Respondent McGuinn did not have the authority to occupy the Espinos' (Petitioners') property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision, there was nothing to support the grounds for summary judgment as to these causes of action and they should be remanded for further development and consideration by the lower court.

CONCLUSION

Based on the foregoing discussion, the Respondent McGuinn Construction Company respectfully requests that the Court deny the Petitioners Espinos Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I, Gina M. Nolasco, an employee of Moore Taylor Law Firm, P.A., certify that I have on this day effected service of Respondent McGuinn Construction Management, Inc.'s Return to Petition for Certiorari 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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