

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

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

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**RECEIVED**

AUG 19 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

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

v.

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

And

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

v.

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

Of whom

Town of Lexington, ..... Respondent.

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REPLY

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## **I. The Court of Appeals' Decision Is Contrary to this Court's Precedent**

McGuinn contends this case is not appropriate for certiorari review because the decision does not meet the threshold requirements of Rule 242(b), SCACR. (McGuinn Return, pp. 6-7). However, as Petitioners Saul and Mara Espino pointed out in their Petition, the opinion is contrary to settled law from this Court regarding how restrictions on real property are construed. (Petition, pp. 9-10, 14-15). The Court of Appeals' decision also failed to follow this Court's settled law on error preservation, that is, the requirement that an issue raised on appeal be the same issue that was raised to and ruled upon by a trial court. (Petition, pp. 15-19). Furthermore, the case involves a novel question, that is, the meaning of the word "maintenance" when used as a limitation in an easement. Next, the Court completely ignored this Court's precedent on additional reasons to affirm in summarily refusing to address various arguments Petitioners made in their brief. (Petition, pp. 19-23). Finally, the Court failed to follow settled rules and precedent in declining to address Petitioners' argument that the Town of Lexington, which had obtained a dismissal from the action, was not an "aggrieved party" with respect to the orders on appeal. (Petition pp. 23-24).

Petitioners note that while the Town also argues review is not warranted under Rule 242, the reasons proffered should not persuade this Court to decline review. (Town's Return, pp. 8-9). The Town asserts Petitioners "made no reference to Rule 242(b)," which is a reference to Petitioners' erroneous cite to old Rule 226, SCACR, instead of Rule 242 – this was a scrivener's error that the Town would ask this Court to deem fatal to review. This argument also ignores the extensive discussion in the Petition

of the failure of the Court of Appeals to adhere to this Court's precedent.

The Town also points out that the opinion is unpublished and thus has no precedential value (Town's Return, p. 8) and that the Court of Appeals' decision "does not end this litigation." These facts provide no comfort to Mr. and Mrs. Espino, who must continue to expend resources to vindicate their property rights. Contrary to the Town's argument (Town's Return, p. 9), "judicial economy" counsels in favor of granting review, not against it.

Petitioners are requesting a complete and fair review of the arguments they presented to the Court of Appeals and to have this case decided in accordance with settled precedent of this Court. Respectfully, that did not happen before the Court of Appeals. Although this Court's review by writ of certiorari is discretionary, that review is Petitioners' best hope to obtain justice consistent with existing law set forth by this Court.

## **II. The Issue of Latent Ambiguity Was Not Fairly Before the Court**

Both Respondents contend the issue of the alleged "latent ambiguity" in the easement was fully and fairly presented below and before the Court of Appeals. (McGuinn's Return, pp. 8-9; Town's Return, pp. 10-13). Petitioners stand by their contention that both Respondents argued the plain and ordinary meaning of the easement permitted McGuinn to trespass onto Petitioners' property without reference to any "as built" plans, and that "latent ambiguity" was not the thrust of either Respondent's position before the Court of Appeals.

It is telling that both Respondents point to the Court of Appeals' reliance on the

lack of the “as built” plans mentioned in the easement, yet neither as an appellant included those plans in the Record on Appeal. Nor did they present these “as built” plans to Judge Johnson, in fact contending that such was unnecessary.

Respondent McGuinn continues to argue that the easement makes no sense as construed by Judge Johnson and Judge Keesly. (McGuinn Return, p. 9). This is an argument for an expansive reading of the easement’s language, which is contrary to the rules of narrow construction laid down by this Court.

### **III. The Easement is For “Maintenance” and Not Expansion**

McGuinn contends that applying a strict construction to the word “maintenance” would “bring about an absurd result” and that the evidence “clearly demonstrated that the sewer line across Petitioners Espinos’ property is a spur line.” (McGuinn Return, p. 9). This contention advocates an expansive reading of the easement’s language, which is contrary to this Court’s settled precedent. *See, e.g., Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980) (restrictions as to use of real estate should be strictly construed and all doubts resolved in favor of free use of the property); *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (“[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.”)(quoting 25 Am. Jur. 2d *Easements and Licenses* § 72 at 478); *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (2012) (citing *First Providence Corp.*).

Respondent Town also asserts the “obvious purpose” of the easement was to grant the Town the right to “operate the sewer system and to have its sewer pipes in the ground

traversing [Petitioners'] and other residents' properties." (Town Return, pp. 13-14). But that is *not* what the easement says. It would have been a simple matter for the grantor to have included this expansive use in the easement, but the grantor did not do so, nor did the Town insist upon it. The Town is advocating an expansive reading of the grant, which is contrary to this Court's settled precedent – precedent that both judges applied in the circuit court.

It may well be that the easement is a "spur line," as the Town contends. (Town's Return, pp. 15-16). But the Town would have the Court of Appeals and this Court read the word "maintenance" broadly to include expansion or addition to the existing structures. Neither the Town nor the grantor did so, and the Petitioners acquired their property with knowledge of the limited grant.

This Court should grant this Petition, reverse the Court of Appeals' decision, and permit the rulings of both circuit court judges to stand.

#### **IV. The Court of Appeals Should Have Affirmed the Dismissal of McGuinn's Tort Claims**

As pointed out to the Court of Appeals and in the Petition to this Court, McGuinn's entire argument seeking reversal of the order dismissing its claims for slander of title and tortious interference with contract was contained in one paragraph with no citation to authority. Settled precedent from this Court deemed that argument abandoned.

Furthermore, McGuinn does not address Petitioners' contention that neither McGuinn's pleading nor the facts of this case would *ever* support recovery under those

claims, so that the Court of Appeals should have affirmed. (McGuinn Return, p. 10). By sending these claims back all the Court of Appeals has done is kept alive specious claims that are inadequately pled and that the Petitioners will have to expend resources defending below. The Court of Appeals ignored settled precedent from this Court outlining the elements of each purported cause of action and requiring affirmance of a ruling if supported by the record.

This Court should grant the Petition, reverse the Court of Appeals on this point, and affirm the trial judges below, who dismissed these claims that McGuinn inadequately pled and upon which McGuinn can never recover under the facts or the law.

**V. The Town Is Not an Aggrieved Party for Purposes of this Appeal**

The Town asserts it will somehow be deprived of the opportunity to be heard on the issue of the scope of the easement unless it is declared to be an “aggrieved party” by the orders of Judge Johnson and Judge Keesley in the action on appeal. (Town’s Return, pp. 17-21). This argument simply begs the question as to why the Town insisted it be dismissed from the action in October 2007 if it felt the need to be heard on the issues. Furthermore, Judge Keesley made it plain that the order was binding only on those who were parties to the case at the time the order was entered. (R. pp. 1-2, 10, 13-14).

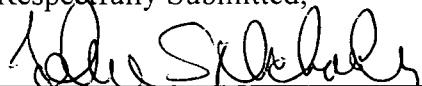
This Court should address this issue. *See Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014) (it is an appellate court’s duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court).

## CONCLUSION

For the reasons stated in the Petition and this Reply, Petitioners request that this Court grant this Petition and issue a Writ of Certiorari to review the Court of Appeals' decision in this case. Ultimately, the Court should reverse the Court of Appeals and reinstate the trial court's judgment.

August 18, 2016

Respectfully Submitted,



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**PROOF OF SERVICE**

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

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