THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Opinion No. 2017-CP-002
Heard November 17, 2016 – Filed January 4, 2017

Woodruff Road SC, LLC, ... Petitioner,

v.

SC Greenville Hwy 146, LLC, ... Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Woodruff Road SC, LLC, Appellant,

v.

SC Greenville Hwy 146, LLC, Respondent.

Appellate Case No. 2015-000107

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2017-UP-002
Heard November 17, 2016 – Filed January 4, 2017

AFFIRMED

Robert L. Widener, of McNair Law Firm, PA, of Columbia; and Bernie W. Ellis, of McNair Law Firm, PA, of Greenville, for Appellant.

James H. Cassidy and Joseph Owen Smith, both of Roe Cassidy Coates & Price, PA, of Greenville, for Respondent.

PER CURIAM: Woodruff Road SC, LLC (Appellant), owner of commercial property identified as Tract B, brought a declaratory judgment action to determine

the scope of an easement granted to the owners of property identified as Tract A. The current owner of Tract A is SC Greenville Hwy 146, LLC (Respondent). The circuit court determined Respondent could utilize the easement as part of a drive-thru for one of its tenants. We affirm.

1. We find the language of the easement permits Respondent to operate a portion of a drive-thru window within the easement that indicates Tracts A and B shall have a right of way in common for ingress and egress. *See 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)); *Ingress*, Black's Law Dictionary (10th ed. 2014) (defining ingress as "the act of entering" or "the right or ability to enter; access"); *Egress*, Black's Law Dictionary (10th ed. 2014) (defining egress as "the act of going out of leaving" or the right or ability to leave; a way of exit"); *Ballington v. Paxton*, 327 S.C. 372, 379, 488 S.E.2d 882, 886 (Ct. App. 1997) ("A 'right of way' means what those words imply; it does not mean a way always open; it does not mean a way without any obstruction. . . . The right reserved, is to pass and repass; and in the absence of express language, that means to pass and repass in a reasonable manner." (quoting *Watson v. Hoke*, 73 S.C. 361, 362, 535 S.E. 537, 537, (1906)). Because the record demonstrates invitees to Tract A enter the easement, pause to place their order, and then exit the easement, their activity falls within the meaning of ingress and egress and does not create a new burden on Appellant. Additionally, the record reflects Tract B invitees are currently able to enter and exit the easement in a reasonable manner, and therefore, Appellant's right to a common right of way for ingress and egress, as reserved by the language in the grant of the easement, is not impaired.[1]

AFFIRMED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

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[1] Based on our determination above, we need not address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the appellate court need not address remaining issue when disposition of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

S.C. App. Case No. 2015-000107
S.C. App. Op. No. 2017-UP-002

Woodruff Road SC, LLC, ...Appellant,

v.

SC Greenville Hwy 146, LLC, ...Respondent.

PETITION FOR REHEARING

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INTRODUCTION

This is a declaratory judgment action for a declaration of the parties' respective rights under an express, written commercial easement for the ingress and egress of two-way commercial traffic to, from, and between two commercial tracts. There being no factual disputes, the questions presented in this appeal were questions of law and, therefore, this Court's ruling was a declaration of law. Respectfully, this Court's declaration of South Carolina law was in error for the reasons set forth below, and for the additional reasons later set forth in this petition.

First, as a matter of South Carolina law under this Court's ruling, it is now reasonable to require two-way commercial traffic to travel on the wrong side of the roadway, *i.e.*, "wrong-way" commercial traffic is now reasonable as a matter of South Carolina law. Respectfully, it is not and can never be "reasonable" to intentionally create wrong-way commercial traffic. The attending dangers to the travelling public are obvious and should never be countenanced by any court as a matter of public policy. We won the American Revolutionary War – we drive on the American side of the road, not the English side of the road. It is therefore inconceivable that any American easement for two-way commercial traffic envisions driving on the English side of the road. At the very least, any wrong-way (English side) use of a two-way commercial traffic easement must be expressly granted in the language of the easement or demonstrated conclusively to have been the intent of the parties at the time of creating the easement. Here, nothing in the language of the easement, nothing in the circumstances that existed at the time of the creation of the easement, and nothing in the record shows any intent that the easement be used for wrong-way commercial traffic.

Second, as a matter of South Carolina law under this Court's opinion, it is now permissible to use a mutual right of way for two-way commercial traffic, and to interrupt the free flow of that commercial traffic, by constructing and operating a "drive-thru" lane in the easement for the

benefit of a particular business, *i.e.*, it is permissible to make a "business transaction use" of a commercial traffic easement for conducting business while actually in the access easement as a matter of South Carolina law. Respectfully, nothing in the language of the easement, nothing in the circumstances that existed at the time of the creation of the easement, and nothing in the evidentiary record indicates any intent that anyone could use the easement as a location for actually transacting business rather than as simply the means for reaching one or both of the commercial tracts so that the traveler could thereafter conduct business on the commercial tracts themselves.

Third, as a matter of South Carolina law under this Court's opinion, despite the use of standard terms to create a two-way commercial traffic easement in a commercial setting, and despite the absence of any intent to do so at the time of creating the commercial traffic easement, "wrong way" traffic in and "business transaction use" of a commercial traffic easement is now reasonable and permissible unless expressly excluded by the language of the easement, *i.e.*, deviations from the standard and ordinary use of a two-way commercial traffic easement, created by standard and ordinary language, must now be expressly excluded from rather than expressly allowed by the language of an easement as a matter of South Carolina law. Respectfully, this Court has turned the law on its head. The interpretation of a written easement, and the extent of that easement, is governed by the plain and ordinary meaning of the language used in the easement by the parties at the time of creating the easement. Nothing in the language of the easement, nothing in the circumstances that existed at the time of the creation of the easement, and nothing in the evidentiary record indicates any intent that anyone could use the easement for wrong-way commercial traffic or as a physical location for transacting business. Any such use is beyond the plain and ordinary meaning and understanding of a two-way commercial traffic easement for the free flow of commercial traffic to, from, and between two commercial tracts. Thus, any such use

must be specifically included in, rather than excluded by, the easement. Otherwise, the plain and ordinary meaning of the language used in the easement becomes meaningless. The parties have to engage in the impossible task of imagining and listing all uses that are excluded rather than rely on the use actually granted as limiting any potential future use not in the contemplation of the parties at the time of creating the easement and not having any basis in the easement's language.

Pursuant to Rules 221 and 240, SCACR, Appellant (the plaintiff) respectfully petitions this Court for rehearing and respectfully submits that this Court should grant rehearing and issue a substitute opinion that reverses the trial court and remands for the entry of judgment in favor the plaintiff. This petition is based upon the grounds set forth above and hereafter.

Absent the relief of reversing the trial court, the plaintiff respectfully submits that this Court should publish its opinion, because it announces new and important principles of South Carolina law on commercial traffic easements specifically, and easements generally. The bench and bar, and more importantly the citizens of this State who own, sell, and buy real property, have a compelling need to know that South Carolina law now provides that wrong-way commercial traffic in a commercial traffic easement is reasonable as a matter of law unless expressly excluded by the easement, even though we live in America, and even though nothing in the easement's language even hints at any right to drive on the wrong side of the commercial traffic right of way. The bench, bar, and citizens also have a compelling need to know that a standard commercial traffic easement for ingress and egress now allows the dominant estate to actually conduct business operations in the easement itself with stop-wait-go traffic that interferes with the free flow of ingressing and egressing commercial traffic unless specifically excluded by the easement, even though nothing in the easement's language even hints at any right to do so.

ADDITIONAL GROUNDS and ARGUMENT

The easement was created in 1986 by the former owners of Tract A and Tract B under a written easement agreement that provides as follows:

> [Tract A – the defendant] shall have a *right of way* at all times, *in common with* [Tract B – *the plaintiff*] for motor vehicles to *travel onto and over* the asphalt parking area of Tract B as shown on the [attached plat] *for the purpose of ingress and egress to Tract A* from Woodruff Road (SC Hwy. 146).

(R. 0221-0222, ¶ 1) (all emphasis added). This "right of way" for ingress and egress was specifically made "[s]ubject to the limitations set forth below" (R. 0221):

> The *right of way* and parking easement described [above and shown on the attached plat] shall be an easement appurtenant to and a covenant running with the land. The easement is to be within the existing driveway and parking area on Tract B and, as illustrated on [the attached plat] shall be *25 feet along the rear property line of Tract A* and shall be *45 feet along the western most property line of Tract A*.

(R. 0222, ¶ 3) (emphasis added). The easement agreement later referenced this ingress and egress easement as a "permanent *right of way*" and as "the *right of way* hereby granted." (R. 0223-0224, ¶¶ 5 and 7) (all emphasis added). Exhibit "D" to the easement agreement depicted this easement as a hash-marked area on a plat of the property. (R. 0232).

"The character of an express easement is determined by the nature of the right and the intention of the parties creating it." *Tupper v. Dorchester County*, 487 S.E.2d 187, 191 (S.C. 1997). The right to use the easement is limited to the "specific purpose" for which it was created. *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012). The language of an express easement determines this purpose, as well as the extent and scope of the easement. *Martin v. Bay*, 732 S.E.2d 667, 672 (S.C. App. 2012); *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist.*, 586 S.E.2d 146, 148 (S.C. App. 2003); *Binkley v. Rabon Creek Watershed Conservation Dist.*, 558 S.E.2d 902, 906-907 (S.C. App. 2001). The "purpose and scope" inquiry is governed by the plain, ordinary, and popular meaning of the terms used by the

parties at the time of creating the easement. *Snow v. Smith*, 784 S.E.2d 242, 249 (S.C. App. 2016); *Martin*, 732 S.E.2d at 672; *Lighthouse*, 586 S.E.2d at 148; *Binkley*, 558 S.E.2d at 906-907. Any ambiguity in a written easement must be construed in an manner that "least restricts" the use of the servient estate (the plaintiff here), *i.e.*, any ambiguity must be construed against the dominant estate (the defendant here). *Tupper*, 487 S.E.2d at 191; *Snow*, 784 S.E.2d at 249.

The terms of an express easement are strictly enforced, even if the deviation from those terms is slight or does not impose any significant burden on the easement or the servient estate (Plaintiff here). *Plott v. Justin Enters.*, 649 S.E.2d 92, 97 (S.C. App. 2007); *Lighthouse*, 586 S.E.2d at 148; *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Property Regime*, 410 S.E.2d 580, 581 (S.C. App. 1991). An easement "is *limited to the least restrictive use* and [the dominant estate –defendant here] only has rights incident or necessary to its *proper* enjoyment *but nothing more*." *Snow*, 784 S.E.2d at 249 (emphasis added). If a use is not granted by the easement, it does not become permissible simply because it does not unduly burden or interfere with the use of the easement by others or the servient estate itself (Plaintiff here). *E.g.*, *Lighthouse*, 586 S.E.2d at 148.

I. The express, specific, and only purpose of the easement was to provide for two-way commercial traffic to, from, and between the commercial tracts, and nothing more.

There is no evidence that the parties creating the easement intended for the easement, or any part thereof, to be used as a drive-thru lane. There was no need for any such use at the time of its creation, and there is no evidence that the parties contemplated or intended any such use in the future. Given these undisputed facts and circumstances, and given the plain and ordinary meaning of the language used to create the easement, the only right of use granted was for the free flow of two-way commercial traffic to, from, and between the commercial tracts, and this identical right was granted to both tracts (the servient and dominant estates). The defendant's drive-thru business transaction operation in the easement itself has created stop and wait traffic in the

easement for the sole benefit of one of the defendant's current tenants, thereby interfering with the commercial traffic purpose of the easement and the plaintiff's right to so use the easement. Moreover, the defendant has created a manifest and utterly unreasonable danger to the travelling public by converting the two-way traffic easement into a roadway that requires travelers to drive on the wrong side of the road. This unduly burdens and destroys the plaintiff's absolute right to use the easement for its expressly intended purpose of two-way commercial traffic to, from, and between the commercial tracts. The defendant's erection and operation of the drive-thru lane has effectively converted that portion of the easement to the exclusive use of the defendant, and the defendant has thereby effectively taken ownership of and title to the land under the easement.

Assuming the drive-thru lane did not burden the plaintiff's use of the easement (and it manifestly does), this does not give the defendant the right to erect and operate the drive-thru lane in the easement. The defendant's right of use is limited to the purpose expressed in the easement, and it matters not that the defendant's drive-thru lane might be viewed, albeit erroneously, as only a slight deviation from the terms of the easement that does not impose any significant burden on the plaintiff's rights. The defendant's right to use the easement is limited to the specific use granted by the easement, even if it be assumed or proven that the drive-thru lane imposes no unreasonable burden on the servient estate or the plaintiff's mutual right to use the easement.

For the reasons set forth above and in the plaintiff's appellate briefs before this Court, which are incorporated herein by reference, it is respectfully submitted that this Court should grant rehearing and issue a substitute opinion that reverses the appealed order.

II. This Court erroneously held that the defendant's drive-thru lane was a permitted use under the terms of the easement.

This Court held that the defendant had the right to build and operate a drive-thru lane in the easement and use it for stop-and-go business transactions conducted in the easement itself.

(Op. at 1-2). This Court also held that the defendant's conversion of the two-way commercial traffic easement into a "wrong-way" commercial traffic easement was permissible under the terms of the easement. (*Id.*). This Court's ruling is set forth in three sentences and, as set forth below, it is respectfully submitted that this Court erred in not reversing the appealed order.

The first sentence of this Court's ruling states: "We find the *language of the easement permits* [the defendant] to *operate a portion of a drive-thru* window *within the easement* that indicates [the plaintiff and defendant] shall have a *right* of way *in common* for ingress and egress." (Op. at 2) (emphasis added). Nothing in the language of the easement even hints at using the easement for a "drive-thru" lane or any use other than the free flow of two-way commercial traffic to, from, and between the commercial tracts; and this Court does not identify any language in the easement to support its ruling. Nothing in the facts and circumstances surrounding the creation of the easement supports this Court's interpretation of the easement, and there is no evidence that the parties creating the easement had any intent to allow (or even contemplated) the erection and operation of a drive-thru lane in the commercial traffic easement itself.

The second sentence of this Court's ruling states: "Because the *record demonstrates* invitees to [the defendant's tract] enter the easement, *pause* to place their order, and *then exit* the easement, their activity falls *within the meaning of ingress and egress* and *does not create a new burden* on [the plaintiff]." (Op. at 2) (all emphasis added). This ruling is factually and legally incorrect. The undisputed evidence demonstrates that the defendant's invitees do not simply "pause" to place their order and then exit the easement. Rather, it is undisputed that cars line up in the easement, moving up one car length at time, until they finally exit the easement. This stop-wait-go traffic pattern manifestly interferes with the express purpose of the easement of providing for the free flow of two-way commercial traffic to, from, and between the commercial tracts.

Moreover, the defendant has directed this stop-wait-go traffic onto the wrong side of the two-way easement, and this completely destroys any reasonable use of the easement for its intended purpose of two-way commercial contract. As a result, the drive-thru imposes new burdens on the plaintiff's absolute and mutual right to use the easement, even though those burdens are not expressed in the easement and are not supported by any evidence that the parties creating the easement intended any such burden. And even if was true that the drive-thru did not do so, the defendant's use of the easement is nevertheless limited to the purpose expressly stated in the easement, and nothing more. In short, the defendant's construction and operation of the drive-thru lane in the easement is not within the plainly stated purpose of the easement. This ends any judicial inquiry into the matter, regardless of whether the drive-thru might be viewed (albeit erroneously) as being only a slight deviation from the easement's stated purpose, and regardless of whether the drive-thru might be viewed (albeit erroneously) as not imposing any new or unreasonable burdens on Plaintiff's right to use the easement for two-way commercial traffic to, from, and between the commercial tracts.

The third and final sentence of this Court's ruling states: "Additionally, the *record reflects* [the plaintiff's] invitees are *currently able to enter and exit* the easement *in a reasonable manner*, and therefore, [the plaintiff's] *right to a common right of way* for ingress and egress, *as reserved by the language in the grant* of the easement, is not impaired.". (Op. at 2) (all emphasis added). This ruling is factually and legally incorrect. It is not and can never be reasonable to intentionally create a stop-wait-go traffic pattern in an easement created for the express purpose of providing for two-way commercial traffic to, from, and between two commercial tracts. The manifest purpose of the easement is to allow invitees of both tracts to get to the commercial tracts and, upon arriving on the tract, to then conduct business on the tract itself. Nothing in the easement contemplates or allows any "business transaction" use of the easement. In addition, it is not and

can never be reasonable to direct traffic onto the wrong side of a two-way commercial traffic easement. Permitting the defendant to do so completely destroys the plaintiff's absolute and mutual right to use the easement for two-way commercial traffic. Moreover, creating wrong-way commercial traffic invites injury to the travelling public, and this Court should reverse its acceptance of that invitation.

III. The appellate decisions cited by this Court do not support its ruling in this case and, when considered in their proper context, these cases and the legal pronouncements therein support the plaintiff's argument that the defendant's construction and operation of a drive-thru lane in the easement is not a permitted use of the easement.

This Court cites two opinions in support of its ruling. (See Op. at p. 2, citing *Clemson Univ. v. First Provident Corp.*, 197 S.E.2d 914 (S.C. 1973) and *Ballington v. Paxton*, 488 S.E.2d 882 (S.C. App. 1997, *quoting Watson v. Hoke*, 53 S.E. 537 (S.C. 1906)). Respectfully, this Court has misread these cases and quoted them out of context to reach a result that is contrary to a proper reading and application of those cases and the legal principles set forth therein.

A. *Clemson Univ. v. First Provident Corp.*

In *Clemson*, the issue was whether the defendant had the right to enter upon the plaintiffs' lands to enlarge existing drainage ditches and thereby create sufficient drainage for the defendant's planned residential development of its land. 197 S.E.2d at 916. The existing drainage ditches ran through the property of numerous landowners. *Id.* at 917. The defendant negotiated a right of way with some but not all of these landowners and, it thereafter commenced construction operations despite not having negotiated a right of way from all landowners (including the plaintiffs). *Id.* The plaintiffs then filed an action to enjoin the defendant's construction operations. *Id.*

It was undisputed that the defendant had an existing right, acquired as an easement by prescription, to use the existing ditches to drain water from its land, *i.e.*, to use the drainage ditches as they existed. *Id.* at 918. It was undisputed that the defendant intended to "materially increase

and enlarge the [existing] drainage ditches by making them wider and deeper." *Id.* at 917. The defendant contended that it had the right to do so and thereby meet its new drainage needs for three reasons: (1) right granted by statute; (2) easement by prescription; and (3) easement by implication and right of way by necessity. *Id.* at 916.

The Court rejected the defendant's statutory claim, because allowing the defendant to use the statute would be an unconstitutional taking of private property for private uses. 197 S.E.2d at 918. The Court then turned to a discussion of an easement by prescription, finding that the trial court properly enjoined the defendant because the defendant sought to impose "an additional servitude upon the lands of the [plaintiffs]." (*Id.* at 918-919). It is from this discussion that this Court quoted *Clemson* for the following proposition: "[T]he owner of the easement [the defendant here] cannot materially increase the burden of the servient estate or impose thereon a new and additional burden." (Op. at 2). This quote is taken from a paragraph that that stated in full as follows (all emphasis added – quote by this Court in underlining):

> The rights of any person having an easement in the land of another are *measured and defined by the purpose and character of the easement*. A principle which underlies the use of all easements is that the owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden. Though the rights of the *easement owner are paramount, to the extent of the easement*, to those of the landowner, the rights of the easement owner and of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both the easement and the servient tenement. The *owner of an easement is said to have all rights incident or necessary to its proper enjoyment, but nothing more.* And, *if he exceeds his rights* either *in the manner* or *in the extent of its use*, he becomes a trespasser to the extent of the unauthorized use.

Id. at 918-919. Here, applying the Supreme Court's explication of the law in its entirety, rather than an isolated portion of it, demonstrates that the defendant in the present case has exceeded the right granted in the easement.

The right to use an easement is "measured and defined by the purpose and character of the easement," *i.e.*, "the extent of the easement." 197 S.E.2d at 918-919. Here, the manifest purpose, character, and extent of the easement is for the ingress and egress of two-way commercial traffic to, from, and between two commercial tracts that are the site of various businesses. The clear and only purpose of the easement was to allow invitees to travel over the easement to gain access to the commercial tracts and, after having thusly accessed the commercial tract, to then transact business on the commercial tract itself. Nothing in the language of the easement, the circumstances that existed at the time of the creation of the easement, or the evidentiary record indicates any intent to grant or create any right to use the easement for "wrong-way" commercial traffic, to use it as a physical site for transacting business in the easement itself, or to use the easement for any purpose other than the free flow of two-way commercial traffic to, from, and between the two commercial tracts. By allowing the defendant to do so here, this Court has violated the *Clemson* principle that it quoted in its opinion. The defendant's "drive-thru" use of the easement places "new and additional burdens on the easement," *i.e.*, wrong-way traffic and "stop and go" business transactions in the easement itself, both of which unreasonably interfere with and destroy the plaintiff's mutual right to use the easement for its intended and manifest purpose of providing for the free flow of two-way commercial traffic to, from, and between the commercial tracts.

The rights created by an easement "are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both the easement and the servient tenement." *Clemson*, 197 S.E.2d at 919. This principle of easement law is particularly important here, because it is undisputed that the parties have mutual rights to use the easement for its stated purpose. Thus, the plaintiff and defendant have identical rights to use the easement. As shown earlier, the plain and ordinary meaning and purpose of the easement was

to provide for the ingress and egress of two-way commercial traffic to, from, and between the commercial tracts. The defendant's conversion of the easement to "wrong-way" commercial traffic and to a stop-wait-go business transaction location interferes with and completely destroys the plaintiff's right to use the easement for its stated purpose.

The servient estate's right to use an easement includes "all rights incident or necessary to its *proper* enjoyment, *but nothing more*," and the servient estate cannot "exceed[] [its] rights *either in the manner or in the extent* of its use." *Clemson*, 197 S.E.2d at 919 (emphasis added). Here, the easement grants the defendant the right to use the easement for two-way commercial traffic to, from, and between the commercial tracts, "and nothing more." By converting the easement to wrong-way commercial traffic and to a stop-and-go location for transacting business in the easement itself, the defendant has exceeded its right in both "the manner [and] in the extent of its use." Nothing in the language of the easement, the circumstances that existed at the time of the creation of the easement, or the evidentiary record indicates any intent to grant the defendant the right to use the easement in this manner or to this extent. Thus, the defendant's use is "an unauthorized [and] excessive use" that entitles the plaintiff to the equitable relief of an injunction.

In *Clemson*, the Supreme Court also rejected the defendant's claim for an easement by implication or right of way by necessity. The defendant argued that it needed to enlarge the drainage ditches so that it could exercise its property rights over its own property to convert the use of its property to a residential development. The Supreme Court rejected this argument, because the defendant's need to enlarge the existing drainage ditches was a self-inflicted wound that arose solely because the defendant wanted to change the use of its property:

> The need to drain the property of the [defendants] for use as a residential housing development represents a *change in circumstances brought about by [the defendants] themselves* and cannot be the basis for creating a way of necessity. . . . "A way by necessity can be implied *only when the necessity existed at the time of*

> *the grant*. In other words, the necessity is to be determined from the conditions existing at the time of the conveyance." . . . "As a consequence of the rule stated this *necessity must not be created by the party claiming the right of way*."

197 S.E.2d at 920 (emphasis added) (citations omitted). Here, it is undisputed that, at the time of the creation of the easement, there was no need for a drive-thru lane in the easement or any use beyond the ingress and egress of two-way commercial traffic to, from, and between the commercial tracts. There is no evidence that any original party to the creation of the easement had any such intent or contemplated any future need for any use that was different from the standard and ordinary use of an easement for two-way commercial traffic.

Here, as in *Clemson*, the "change in circumstances" giving rise to the defendant's need and desire for a drive-thru lane on the wrong-side of the two-way commercial traffic easement was created by the defendant when it redeveloped its property. The defendant further created its "need and desire" by voluntarily contracting with one of its new tenants (Starbucks) to build a drive-thru lane in the easement for the sole benefit of Starbucks. This self-inflicted wound, however, does not justify a strained reading of the easement's plain language as permitting a drive-thru lane on the wrong side of the two-way commercial traffic easement. It also is not a basis for creating a new rule of law on interpreting easements that requires parties to draft an easement to exclude all non-standard and uncontemplated uses of an easement to ensure that the easement is limited to the clear and plain purpose stated in the easement. Respectfully, that is what this Court erroneously has done in this case, and it has thereby turned the law on its head.

B. *Ballington v. Paxton*

This Court quoted its opinion in *Ballington*, *supra*, which itself quoted the Supreme Court's opinion in *Watson*, *supra*, for the proposition that the easement here allowed the defendant's erection and operation of its drive-thru lane in the easement itself, because the granting of a right

of way does not mean the way is always open and without obstruction absent express language to the contrary in the easement. (Op. at 2). Respectfully, this was error for two basic reasons. First, *Watson* and *Ballington* are examples of the courts applying rules developed for the specific question of whether the grantor of easement (plaintiff here) has the right to erect a gate across a private right of way, typically in a rural setting and typically involving dirt roads and farmland. It is in this context that the statement quoted by this Court arose, *i.e.*, that a right of way need not be always open and without obstruction. With the exception of this Court's opinion in this case, research reveals no case extending this rule beyond the "gate" cases. Second, a full consideration and proper application of the circumstances and pronouncements of law in *Ballington* require a ruling that the defendant's erection and operation of a drive-thru lane in the easement for the purpose of actually conducting business in the easement itself is not permitted by the easement.

1. The rule in *Watson* and *Ballington* does not apply here, because this case is not a "gate" case, and because the allowance of an obstruction is antithetical to the plain and ordinary meaning and purpose of the easement here, which is to allow for the ingress and egress of two-way commercial traffic to, from, and between the commercial tracts so that the travelers can gain access to the commercial tracts from the adjacent highway and, upon arriving thereon, conduct business on the commercial tract itself.

The 1906 decision in *Watson* is the self-proclaimed seminal decision on the right of a grantor (subservient estate) to erect a gate across a road way over which the grantee (dominant estate) has a right of way for ingress and egress. The *Watson* decision is also the original source of the language quoted in this Court's opinion here, to-wit: that a right of way is not always open or without obstruction. *Id.*[1] With the exception of this Court's opinion here, every case located by research that has cited and relied on the rule announced in *Watson* has involved the fact pattern of the grantor erecting a fence or gate across the right of way in a rural setting. See *Owens v. Cantrell*,

[1] The actual quote used by this Court is from the trial court's opinion in *Watson*. The Supreme Court approved and adopted the trial court's reasoning.

65 S.E.2d 773 (S.C. 1951); *Ballington v. Paxton*, 488 S.E.2d 882 (S.C. App. 1997); *Thomas v. Mitchell*, 336 S.E.2d 154 (S.C. App. 1985); *Brown v. Gaskins*, 324 S.E.2d 639 (S.C. App. 1984). The same is true of this Court's opinion in *Ballington*, which this Court cited for the *Watson* rule on a right of way not always being open or unobstructed. Every case citing *Ballington* for this proposition also involved a gate or fence across a right of way in a rural setting. See *Proctor v. Steedley*, 730 S.E.2d 357 (S.C. App. 2012) and *Judy v. Kennedy*, 728 S.E.2d 484 (S.C. App. 2012).[2]

In short, with the exception of this Court's opinion in the present case, no court has cited or applied the *Watson* rule in a case that did not involve the specific and common fact pattern of erecting a gate or fence across a right of way in a rural setting. This fact pattern bears no resemblance to the undisputed facts of this case, which involves two-way commercial traffic in an urban, commercial setting. Moreover, as shown below, consideration and application of the full legal analysis in *Ballington* demonstrates that the *Watson* rule does not apply here.

2. This Court's decision in *Ballington*.

In *Ballington*, the issue was access to a private pond in the country for swimming and boating purposes. An easement was granted over a private dirt road leading to the private pond so that the grantees could access and use the pond. Problems developed with trespassers and vandalism, so the grantor erected a fence and gate to address the problems, giving keys to the grantees. The problems continued, so the grantor expanded the fence and gate system. The grantees sued, claiming an absolute right to unfettered use of the private dirt road and unfettered

[2] Two other cases have cited *Ballington* as stating the requirements and elements for finding an easement appurtenant, which was a separate issue in *Ballington* and had nothing to do with this Court's application of the *Watson* rule in *Ballington*. See *Windham v. Riddle*, 672 S.E.2d 578, 584 (S.C. 2009) and *Rhetto v. Gray*, 736 S.E.2d 873, 881 (S.C. App. 2012).

access to the private pond. The trial court ruled in favor of the grantor, and the grantees appealed. 448 S.E.2d at 884-885.[3]

Relying on *Watson* and the "obstruction" language quoted by this Court in this case, this Court affirmed the trial court in *Ballington*. This Court reasoned that, under the particular circumstances of the case, the fence and gate system was "no more than a minimal impediment to the use of the easement" for accessing and using the pond. 448 S.E.2d at 886. The fence and gate system was a reasonable response to the need to protect the property and the pond from trespassers and vandalism, and it did not interfere in any meaningful way with the grantees' right to access and use the pond. *Id.* In short, this Court concluded that having to stop at the end of a private dirt road in the country, get out of the car and unlock a gate, and then drive through the gate to the pond did not unreasonably interfere with the grantees' right to use the pond. The fence/gate system prevented trespassing and vandalism to the very pond that grantees had the right to use.

Here, the attending circumstances and the purpose of the easement are completely different from those in *Ballington* and therefore require a different result than *Ballington*:

1. Here, the manifest purpose of the easement is to provide a means for the travelling public to turn off of the adjacent, four-lane highway, drive to one or both of the commercial tracts, conduct business transactions on the tract itself, and then depart the tract and return to the adjacent highway.

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[3] The facts and result in *Watson* were of the same ilk. The plaintiff held a private right of way over a dirt road that passed through the defendant's farm land. The defendant erected a gate across the road, and the plaintiff sued for its removal. The Court held that the gate was permissible under the following analysis:

1. Whether the owner of the servient estate may erect a gate across the right of way "depends upon the circumstances." 53 S.E. at 537-538. He may do so if the gate is "necessary for the enjoyment of his property [the servient estate]," is not "an unreasonable burden on the right of way," and "does not materially affect [the dominant estate's] enjoyment of his right of way." *Id.* at 538.

2. The gate was permissible, because it was necessary for the farm use of the servient estate, and requiring the alternative of fencing the farm land along both sides of the road rather than erecting a gate on the road would be "a most unreasonable burden." *Id.* at 538.

In short, the Court held that the gate was permissible under the particular circumstances of the case, because it was a minimal inconvenience for the dominant estate and essential for the enjoyment and farm land use of the servient estate.

2. To accomplish this purpose, the easement expressly created a mutual right of way for the free flow of two-way commercial traffic to, from, and between the commercial tracts.

3. Intentionally creating a stop-wait-go traffic pattern in the easement is far more than a mere "minimal impediment" to the free flow of commercial traffic to, from, and between the commercial tracts in an urban setting with high volume traffic. It is utterly different from and far more burdensome than creating the need to stop at the end of a private dirt road in the country for accessing a private pond.

4. Converting the two-way commercial traffic right of way into a "wrong-way" traffic pattern completely destroys any reasonable, rational, or safe use of the easement for its express purpose of channeling high volume two-way commercial traffic from an urban highway to, from, and between two commercial tracts.

In *Ballington*, the low volume "stop and go" traffic pattern created by the fence and gate at the end of a private dirt road in the country was a mere inconvenience that was justified by the need to protect the property and pond from damages inflicted by vandalizing trespassers, the prevention of which directly benefited and enhanced the grantees' own use of the pond. Here, the purpose of the easement is to move commercial traffic from an urban highway and onto the commercial tracts. Creating a stop-wait-go traffic pattern with a drive-thru business operation in the middle of the easement itself is not a mere inconvenience – it is an unreasonable interference with the express purpose of moving commercial traffic from the highway and on to the commercial tracts. And directing this stop-wait-go traffic onto the wrong side of a two-way commercial traffic easement destroys any reasonable, rational, or safe use of the easement for two-way commercial traffic.

IV. This Court should rule on all issues and arguments presented on appeal.

Relying on *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591 (S.C. 1999), this Court held that it need not rule on all remaining issues, because this Court's ruling was outcome dispositive. (Op. at 2, n.1). Respectfully, this was error, because there are other issues and arguments that impact the outcome. For example, allowing the destruction of any reasonable,

rational, or safe use of the easement for two-way commercial traffic has lowered the value of the plaintiff's property (a new burden) and interfered with the flexibility afforded thereby for future reconfigurations of the plaintiff's commercial tract (another new burden that also lowers the value and utility of the plaintiff's property). Moreover, doing so invades the sanctity of the public record and interferes with the protection thereby afforded to subsequent purchasers without notice.

V. To the extent that this Court's decision was influenced by the lack of any current use of the easement by the plaintiff, it is irrelevant to the issues before this Court.

Prior to the erection of the drive-thru lane at issue here, no one had ever made any use of the 25-foot easement section at issue here. This Court seemed concerned with this fact at oral argument, and the opinion appears to reflect this concern: "the *record reflects* [the plaintiff's] invitees are *currently* able to enter and exit the easement in a reasonable manner ...." (Op. at 2) (emphasis added). The record reflects two things. First, the plaintiff's invitees currently use the 45-foot section of the easement without interference from the drive-thru lane erected in the 25-foot section of the easement. Second, the plaintiff does not currently use the 25-foot section, does not currently need to use the 25-foot section, and therefore does not currently suffer any damage or interference caused by the drive-thru. This case, however, is not about accrued damages or existing interference. It is about rights, ownership, and title.

This is a declaratory judgment action seeking a declaration of the parties' rights under the express easement agreement. Thus, this case is about rights, not accrued damages or existing interference. The only right granted to the defendant is the right to use the easement, including the 25-foot section, for the free flow of two-way commercial traffic to and from the adjacent highway, and to, from, and between the two commercial tracts. This is the only reasonable interpretation of the plain language and purpose of the easement; it does not include the right to

construct and operate a drive-thru business operation in the easement itself; and it does not include the right to direct commercial traffic onto the wrong side of the roadway created by the easement.

This case is about ownership, not accrued damages or currently existing interference. The easement grants the defendant a right to use the land, but the plaintiff still owns the land and still holds the attending bundle of rights. As a matter of law, that bundle includes the absolute right to insist that the defendant's use of the plaintiff's land strictly comply with and be strictly limited to the right granted by the easement and no other use. This is true regardless of whether the defendant's current use has not caused the plaintiff to suffer any actual damages at this time, and regardless of whether the defendant's current use does not currently interfere with the plaintiff's right or ability to use the easement. The fact that the plaintiff does not currently use or need to use the easement does not enlarge the defendant's right to use the plaintiff's land – the defendant's right to use the plaintiff's land remains strictly limited to the right granted by the easement, and nothing more.

Finally, and perhaps most importantly, the case is about title and the sanctity of the public record under the recording act, not accrued damages or currently existing interference. Any prospective purchaser of the plaintiff's land will inspect the public record established by the recording act and see nothing more than the grant of a standard commercial easement for the ingress and egress of two-way commercial traffic from and back to adjacent highway and also to, from, and between the commercial tracts. Nothing in the public record even hints at the defendant having the right to construct and operate a drive-thru business operation in the easement itself. When that buyer inspects the property, however, it will see a drive-thru business operation that is utterly at odds with the public record and the title held by the plaintiff according to the public record. When the plaintiff explains that this Court has ruled that the easement is nevertheless

available to the buyer for two-way commercial traffic, albeit on the wrong side of the road with a stop-wait-go business operation actually in one of the lanes, the buyer will do one of two things. It will walk away from the purchase or demand a lower price, because the existing and now court-approved interference by the defendant with the mutual right to use the easement for its plainly stated purpose has destroyed any meaningful, safe, or commercially worthwhile ability to use the easement for that purpose. As a result of this Court's opinion, any rational buyer will rightly conclude that the defendant effectively owns and exercises dominion over the land under the drive-thru lane. That land will therefore have no value to any buyer, and it would not make any sense for any buyer to pay anything for that land, even though the plaintiff holds "title" to that land according to the public record.

CONCLUSION

The only right held by the defendant to use the plaintiff's land is the specific and limited right granted by the easement, to-wit: the free flow of commercial traffic from and back to the adjacent public highway, and to, from, and between the parties' respective commercial tracts. As a matter of law, the defendant has no right to use the plaintiff's land in any other manner. As a matter of law, the plaintiff has the absolute right to prevent and enjoin any use beyond the limited right granted by the easement, regardless of whether the defendant's use is currently causing the plaintiff to suffer damages or currently interfering with the plaintiff's mutual right to use the easement for its stated purposes. For these reasons, and for all of the additional reasons set forth herein and in the plaintiff's appellate briefs, which are incorporated herein by reference, it is respectfully submitted that this Court should grant rehearing and issue a substitute opinion that reverses the appealed order and remands for the entry of judgment in favor of the plaintiff.

Respectfully Submitted,

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February 3, 2017
Columbia, SC

The South Carolina Court of Appeals

Woodruff Road SC, LLC, Appellant,

v.

SC Greenville Hwy 146, LLC, Respondent.

Appellate Case No. 2015-000107

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

FILED

March 23, 2017

cc:
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The Honorable Letitia H. Verdin