THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Lower Court Case No. 2013-CP-23-3989
S.C. App. Appellate Case No. 2015-000107
S.C. App. Op. No. 2017-UP-002

Woodruff Road SC, LLC, ... Petitioner,

v.

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

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 23, 2017.

QUESTIONS PRESENTED

1. Whether the construction and operation of a drive-thru lane is a permissible use of an easement that created a right of way of ingress and egress for two-way commercial traffic for travel to, from, and between two commercial tracts.

2. Whether the trial court erred in ruling that a drive-thru lane is a permissible use of the easement for two-way commercial traffic to, from, and between two commercial tracts.

3. Whether the Court of Appeals erred in affirming the trial court's ruling that a drive-thru lane is a permissible use of the easement for two-way commercial traffic to, from, and between two commercial tracts.

STATEMENT OF THE CASE

Introduction: This is a declaratory judgment action to determine the parties' respective rights under a written commercial easement creating a mutual right of way for the ingress and egress of two-way commercial traffic to, from, and between two commercial tracts operated as shopping centers. The easement is located on land owned by the Petitioner (Plaintiff) and was granted by Plaintiff's predecessor in interest to the Respondent's (Defendant's) predecessor in interest.

Over Plaintiff's objection, Defendant built a drive-thru lane in one-half of the 25-feet wide easement, intentionally causing commercial traffic to become stop-and-go traffic and also intentionally causing commercial traffic to travel on the wrong side of the two-way commercial traffic easement. This destroyed any reasonable use of the easement for its intended purpose of two-way commercial traffic. The trial court nevertheless held that the drive-thru lane was a permissible use of the easement, and the Court of Appeals affirmed.

The Court of Appeals ignored the plain and ordinary meaning of the terms used in the unambiguous written easement. Nothing in the language of the easement even hints at a drive-thru lane being a permissible use, and there is no evidence that the parties who created the easement had any intent that the easement could be used for a drive-thru lane. As a result, the Court of Appeals has allowed a "private taking" of Plaintiff's property by Defendant.

Standard of Review: Determining the existence of an easement is a question of fact in an action at law. *Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism*, 659 S.E.2d 151, 153 (S.C. 2008). Here, it is undisputed that the easement exists – it was created by a written and recorded easement agreement. (R. 0221-0232). The size and location of the easement is also undisputed, as they are established by the written easement agreement. (R. 0222, ¶ 3). It is also undisputed that Defendant built a drive-thru lane in the easement.

The only dispute is whether the construction of a drive-thru lane in the easement is a permitted use under the easement agreement, which granted both parties a permanent and mutual right of way for the ingress and egress of two-way commercial traffic. Resolution of this dispute depends upon the meaning of the language used in the easement agreement. *Martin v. Bay*, 732 S.E.2d 667, 672 (S.C. App. 2012); *Binkley v. Rabon Creek Watershed Conservation Dist.*, 558 S.E.2d 902, 906-907 (S.C. App. 2001).

Here, the easement agreement is unambiguous – neither party contends otherwise, and there is no evidence on the intent of the parties that created the easement except the easement agreement. Determining the parties' intent under an unambiguous easement agreement is a question of law for the court, which an appellate court reviews *de novo*. *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012). The parties' intent as to the scope of the easement is to be determined by the plain, ordinary, and popular meaning of the terms used by the parties at the time

the easement was created. *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*, 558 S.E.2d at 906.

Facts: The relevant facts are undisputed. Plaintiff owns Tract B in a shopping center. Defendant owns Tract A in the same shopping center. In 1986, the former owners of Tracts A and B entered and recorded a written easement agreement ("the Easement Agreement") that created the easement at issue here and expressly described it as follows:

> [Tract A – Defendant] shall have a *right of way* at all times, *in common with* [Tract B – Plaintiff] for motor vehicles to *travel onto and over* the asphalt parking area of Tract B [Plaintiff] as shown on the [attached plat] *for the purpose of ingress and egress to Tract A* [Defendant] 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 [Plaintiff] and, as illustrated on [the attached plat] shall be *25 feet along the rear property line of Tract A* [Defendant] and shall be *45 feet along the western most property line of Tract A* [Defendant].

(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). This exhibit shows that two-way commercial traffic would ingress to and egress from the shopping center from Woodruff Road by using the 45-foot section of the easement – the connected 25-foot section of the easement provided further ingress and egress from the 45-foot section of the easement to, from, and between Tract A and Tract B. (See R. 0232;

see also Pl. Exh. 10 (DVD) filed separately).[1] Defendant built the drive-thru lane in the 25-foot section of the easement on the wrong side of the 25-foot easement.

At the time of the Easement Agreement, there was no drive-thru lane or drive-thru service associated with Tract A or Tract B. There is no evidence that the parties to the Easement Agreement intended any "drive-thru lane" use of the easement or anticipated any such use in the future. There is no evidence that they intended any use that would require traffic to stop in the easement. There is no evidence that they intended any use of the easement to transact business with persons while they were stopped and standing in the easement. There is no evidence that they intended any use that would require traffic to drive on the wrong side of the ingress and egress easement.

Plaintiff acquired Tract B in 2010, and its rights were specifically made subject to the terms of the recorded Easement Agreement. (R. 0237 and R. 0241, ¶ 6). Defendant acquired Tract A on June 14, 2013, and its rights were also specifically made subject to the terms of the recorded Easement Agreement. (R. 0233-0234). Four days later, on June 18, 2013, Defendant entered a lease agreement with Starbuck's ("the Starbuck's Lease"). (R. 0249-0259).

The Starbuck's Lease specifically referenced the recorded Easement Agreement and made Starbuck's the "beneficiary of easement rights" granted by the Easement Agreement. (R. 0253, ¶ 1.1). The Starbuck's Lease required Defendant to provide Starbuck's with a building that had a "fully entitled drive-through" and with "the right to operate a drive-through facility." (*Id.*). It also required Defendant to build the drive-thru lane along the rear property line of Tract A, *i.e.*, within one-half of the 25-foot section of the ingress and egress easement. (R. 0256-0258; 0259). The deadline for delivering the leased building with an operational drive-thru and drive-thru lane was

[1] For the convenience of the Court, a copy of the DVD presented at trial is being filed separately, and is available as a "zipfile" that can be emailed to the Court if desired.

November 1, 2013. (R. 0254, ¶ 2.2). Prior to Defendant voluntarily undertaking the duty to Starbuck's to create a drive-thru lane, there was no need for a drive-thru lane anywhere on Defendant's property.

By design, and in fact, the drive-thru lane causes cars to stop in the easement for the purpose of transacting business with Starbuck's while sitting in the easement. (R. 0256-0258; 0259; Pl. Exh. 10 (DVD, filed separately)). It also causes cars to stop and sit in the easement while awaiting their turn to transact business in the easement. (*Id.*). Finally, it also causes traffic to drive on the wrong side of the ingress and egress easement. (*Id.*). Plaintiff objected to Defendant's announced intention to build a drive-thru lane in the easement. Defendant persisted.

Procedural History: Plaintiff filed the instant action and sought a temporary injunction against the construction of the drive-thru lane before the November 2013 delivery deadline in the Starbuck's Lease. (See R. 0031-0037; 0012-0030). The trial court heard and denied the motion for temporary injunction in September 2013. (R. 0007-0009). The trial court specifically held that the question of whether the drive-thru lane violated the Easement Agreement would be decided at a trial on the merits and, if Plaintiff prevailed, the trial court could provide the appropriate relief, including injunctive relief. (R. 0008-0009).

After a bench trial on the merits, the trial court held that the drive-thru lane was a permitted use under the Easement Agreement. (R. 0001-0006). Plaintiff appealed, and the Court of Appeals affirmed the trial court. (Appx. at 001-002). Plaintiff petitioned for rehearing. (*Id.* at 003-024). Defendant did not file a return. The Court of Appeals denied rehearing. (*Id.* at 025).

ARGUMENT

The Court of Appeals summarily affirmed the trial court without any discussion of the issues. It is therefore necessary to first understand how the trial court erred before discussing how the Court of Appeals erred in affirming the trial court.

I. The trial court erred in ruling that Defendant's construction of a drive-thru lane business operation in one-half of the 25-foot section of the easement was a permitted use under the Easement Agreement.

Express easements are strictly enforced according to the plain, ordinary, and popular meaning of the terms used to create and limit the easement. Here, the Easement Agreement expressly created a mutual and permanent right of way for the ingress and egress of two-way commercial traffic. Defendant's construction of a drive-thru lane within the easement precludes any use of the easement for this purpose. Moreover, the drive-thru requires traffic to stop in the easement and transact business with one of Defendant's tenants while stopped in the easement. Such use is not permitted by the plain terms of the Easement Agreement, which limits the use of the easement to two-way traffic passing over the easement for the purpose of access to the two commercial tracts, not for the purpose of transacting business while stopped in the easement. By constructing the drive-thru in the easement, Defendant has converted the easement to its exclusive use and essentially taken ownership of and title to the land in violation of Plaintiff's ownership rights and its right to use the easement for the ingress and egress of two-way commercial traffic.

A. The Easement Agreement expressly limits the scope and use of the easement to two-way traffic for ingress and egress.

The language of an express easement determines the purpose, extent, and scope of the easement. *Martin,* 732 S.E.2d at 672; *Lighthouse*, 586 S.E.2d at 148; *Binkley*, 558 S.E.2d at 906-907. That language is applied according to the terms used by the parties as understood in their "plain, ordinary, and popular sense." *Id.*

An easement is a "right of use over the property of another." BLACK'S LAW DICTIONARY 457 (5th Ed. 1979), *cited and applied in Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism*, 659 S.E.2d 151, 154 (S.C. 2008). This right of use is "for a *specific purpose*." *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012) (emphasis added). Here, the Easement Agreement sets forth the specific purpose of the easement as being a "right of way" (R. 0221, ¶ 1), which is "a right belonging to a party *to pass over* another's land." BLACK'S, *supra* at 1191 (emphasis added). The Easement Agreement expressly describes and limits this "right of way" as being for the "ingress and egress" of motor vehicles. Ingress means the "act, or right of, entering," and egress means the "act of going out." *Id.* at 463, 703. In short, the specific purpose of the easement is for two-way commercial traffic to enter, pass over, and exit the easement.

The plain, ordinary, and popular meaning of a right to "pass over" the land of another does not include the act of stopping in the easement to transact business while stopped in the easement. It also does not include the act of stopping in the easement and waiting in line to later stop in the easement and transact business while stopped in the easement. Thus, the easement cannot be used for a "drive-thru" lane and, therefore, the trial court erred in finding that the "drive-thru" was a permitted use under the Easement Agreement.

Moreover, the plain, ordinary, and popular meaning of ingress and egress of motor vehicle traffic is two-way traffic in the easement. Here, the drive-thru and its signage directs traffic onto the wrong side of the easement, making it impossible to use the easement for the ingress and egress of motor vehicle traffic, *i.e.*, two-way traffic. Thus, the easement cannot be used for the "drive-thru" lane and, therefore, the trial court erred in finding that the "drive-thru" was a permitted use under the Easement Agreement.

B. The express terms of an easement agreement are strictly enforced.

The terms of an express easement, including any limitations imposed thereon, 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 (Tract B here). *Plott v. Justin Enters.*, 649 S.E.2d 92 (S.C. App. 2007); *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist.*, 586 S.E.2d 146 (S.C. App. 2003); *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Property Regime*, 410 S.E.2d 580 (S.C. App. 1991).

In *Plott*, the deeds in a development granted the lot owners a "perpetual, non-exclusive appendant and appurtenant easement for ingress and egress upon, over and across" a roadway. 649 S.E.2d at 94. The defendants planted shrubs and built a wire fence along part of the roadway's boundary, blocking access across the roadway at several points. *Id.* at 94, 97. The Court of Appeals affirmed the trial court's ruling that the fence and shrubbery had to be removed, even though the plaintiffs could cross the roadway at other points. *Id.* at 97.

In *Lighthouse*, a condominium developer ("the Developer") conveyed existing water and sewer systems to the public service district ("the District"). The Developer also granted the District an ingress and egress easement over the condominium property to access and maintain the water and sewer systems, which included a water tower. 586 S.E.2d at 146-147. The District leased space on the water tower to a telecommunications company for the placement of antennae and related equipment, and it also leased the company the right to use the easement to access the water tower for installing and maintaining the telecommunications equipment. *Id.* at 147. The Court of Appeals affirmed the trial court's ruling that the easement was limited to its stated purpose of ingress and egress for accessing and maintaining the water and sewer system. *Id.* at 148. The easement therefore could not be used to access the water tower for the purpose of installing and

maintaining telecommunications equipment, even though the ingress and egress used was identical to that used to maintain the water and sewer systems, and even though no evidence showed that such use caused any problems or imposed any additional burdens on the servient estate. *Id.*

In *Xanadu*, the grantor granted a "perpetual non-exclusive easement of ingress and egress located on a portion of [its] property" to several grantees. 410 S.E.2d at 581. The instrument specifically set forth the size and location of the easement. *Id.* One grantee planned to construct parking spaces on a portion of the easement. Another grantee objected and brought suit for interference with its ingress and egress rights under the easement. The trial court agreed that the parking spaces would narrow the ingress and egress passage way but found the parking spaces were nevertheless not unlawful, because the ability to ingress and egress remained intact. *Id.* The Court of Appeals reversed and ordered the removal of the parking spaces: (1) the easement was "specific in its terms as to the easement's width, length, and location"; and (2) therefore, "the easement cannot be constricted to *any degree* by the placement" of the parking spaces." *Id.*

Here, the plain language of the easement establishes that the sole purpose of the easement is to provide direct, two-way traffic access to, from and between the commercial tracts. Defendant's construction of a drive-thru lane renders two-way traffic impossible, and it has converted the easement into a business transaction location that requires stop and go traffic in an easement intended for direct, non-stop traffic. Thus, the trial court erred in finding that the drive-thru was a permitted use under the Easement Agreement.

C. Defendant has wrongly converted the entire 25-foot section of the easement to its exclusive use, thereby essentially taking title to Plaintiff's land and denying Plaintiff its expressly granted right to use the easement for ingress and egress.

An easement is the right to use the land of another for a specific purpose. *Proctor*, 730 S.E.2d at 363; *Lighthouse*, 586 S.E.2d at 148. The grantee of an easement, however, cannot use

the easement in a manner that deprives others of their right to use the easement for the same specific purpose. *Plott, supra; Xanadu, supra.* Moreover, the grantee of an easement does not receive any title to the land of the grantor. *Proctor*, 730 S.E.2d at 363; *Lighthouse*, 586 S.E.2d at 148. The grantor remains the owner of the land and is free to use the land in any manner whatsoever, provided that such use does not interfere with the grantee's right to use the easement for its stated purpose. *Hill v. Carolina Power & Light, Co.*, 28 S.E.2d 545, 549 (S.C. 1943).

Here, Defendant's construction of the drive-thru lane in the easement is a private taking of ownership and title to Plaintiff's land, because Defendant has converted the land to its exclusive use for the exclusive benefit of one of its tenants. Thus, Defendant has exceeded the plainly stated scope of the easement granted and wrongly taken sole ownership rights over and use of Plaintiff's land.

The Easement Agreement expressly stated that the right of way for the ingress and egress of vehicular traffic was a right held in common by both Tract A and Tract B. (R. 0221, ¶ 1, stating: "[Tract A] shall have a *right of way* at all times, *in common with* [Tract B]" (emphasis added)). Defendant's construction of the drive-thru lane has converted that portion of the easement to Defendant's exclusive use in clear violation of Plaintiff's expressly reserved and mutual right to use the easement for ingress and egress, and it has completely destroyed any use of the easement for the ingress and egress of two-way commercial traffic. Thus, Defendant has exceeded the plainly stated scope and purpose of the easement as set forth in the Easement Agreement.

D. The trial court erred in failing to enforce the Easement Agreement according to its express terms.

The trial court focused on there being no interference with the business operations of the tenants of Tract B (Plaintiff), no permanent or physical obstructions in the easement, no

overburdening of the easement, and nothing that was "too far" removed the easement from its intended use:

> [T]he current tenants of Tract A [Defendant] *have not overburdened the easement through their operations* [*i.e.*, the drive-thru lane], because there *does not appear to be any obstructions to business operations* of the tenants of Tract B [Plaintiff]. Prior cases that have found an easement's scope to be exceeded *all involve physical barriers or permanent structures*. In this case, the owners and tenants of Tract A [Defendant] have merely improved the property by leveling and paving it. There is *no physical obstruction*, such as a gate, which prevents the owners or tenants of Tract B [Plaintiff] from accessing that portion of the property in question. Furthermore, the fact that vehicles may sit idling for a period of time up to ten minutes does *not constitute such a permanent obstruction that overburdens the easement*, or *too far removes the easement from its intended use*.

(R. 0005) (all emphasis added). As demonstrated below, the trial court rested its ruling on an erroneous and myopic view of the law.

1. Enforcing the easement is not dependent upon an obstruction to or interference with the business operations of the owner (Plaintiff) or its tenants.

The trial court found that the drive-thru was a permitted use, because it did not obstruct or interfere with the business operations of Plaintiff or its tenants. Obstruction or interference, however, is not the question. Rather, the question is whether the drive-thru is a permitted use under the plain, ordinary, and popular meaning of the terms used in the express Easement Agreement. It is not and, therefore, the drive-thru lane is not a permissible use, even if it does not cause any harm to Plaintiff. In any event, the drive-thru interferes with the permanent right expressly granted and reserved to Plaintiff to use the easement for two-way commercial traffic. Thus, the drive-thru is not a permitted use.

2. Enforcing the easement is not dependent upon there being any physical barriers or permanent structures.

The trial court found that the drive-thru was a permitted use, because Defendant did not erect any physical barriers or permanent structures in the easement. Here, again, this is not the

question, and the drive-thru is not a permitted use under the plain, ordinary, and popular meaning of the terms used in the Easement Agreement.

The trial court also found that "all" cases finding that the scope of easement had been exceeded involved physical barriers or permanent structures. This analysis is wrong for two reasons. First, the cases involving barriers and structures did not limit their holdings to barriers and structures. Rather, the focus was on the use by easement holder and how it interfered with the rights of others. The fact of interference was the key, not the manner of interference.

Second, it is untrue that "all" cases involved barriers and structures. In *Lighthouse, supra* (the water tower case), there were no physical barriers or permanent structures. In fact, the easement was being used in precisely the manner prescribed by the easement agreement. Nevertheless, the Court of Appeals rightly held that the challenged use exceeded the scope of the express easement agreement. As shown above, the same is true here and, therefore, the trial court erred in finding that the drive-thru was a permitted use.

3. Enforcing the easement is not dependent upon an overburdening of the easement or a use that is too far removed from the purpose of the easement.

The trial court found that the drive-thru was a permitted use, because it did not overburden the easement and was not "too far" removed from the purpose of the Easement Agreement. This is wrong for two reasons. First, the drive-thru completely destroys the plainly stated purpose of the easement, *i.e.*, a right of way for the ingress and egress of two-way commercial traffic. The drive-thru forces drivers onto the wrong side of the ingress and egress easement. It therefore completely destroys any egress use of the easement.

Second, the trial court again addressed the wrong question. The issue is whether the drive-thru is permitted under the plain, ordinary, and popular meaning of the terms used in the Easement Agreement. It is not and, therefore, it matters not whether the challenged use overburdens the

easement or is "too far" removed from the purpose of the easement. The Court of Appeals' opinion in *Lighthouse* is again instructive and controlling. Using the easement in *Lighthouse* to access the water tower for telecommunication purposes did not overburden the easement and was not "too far" removed from the purpose of accessing the water tower. Nevertheless, the Court of Appeals rightly held that the easement could not be used for telecommunication purposes under the plain language of the agreement that granted the easement for water and sewer purposes.

4. The trial court erred in focusing on the existing uses of the easement as opposed to Plaintiff's right to use the easement.

The trial court's order reflects an erroneous focus on the existing use of the 25-foot section of the easement, *i.e.*, the fact that Plaintiff was not using the easement for ingress and egress when Defendant built the drive-thru, as opposed to the Plaintiff's permanent right to use the easement for the ingress and egress of two-way commercial traffic. This misplaced focus resulted in the findings that the drive-thru did not obstruct or interfere with the business operations of Plaintiff or its tenants, did not overburden the easement, and was not "too far" removed from the purpose the easement. This misplaced focus led to the trial court's following, internally inconsistent ruling:

> In equity, this Court notes that there may be times where (sic) the operation of the drive-through extends beyond the parameters of the 25 ft. portion of the easement and into the 45 ft. portion. In order to avoid the possibility of future overburdening, this Court orders that the owners or tenants of Tract A [Plaintiff] may not use this easement to impede the flow of traffic on the 45 ft. portion of the easement.

(R. 0006). Accordingly, "[t]he Defendant may not increase the use of its easement to such an extent that traffic is impeded on the 45 ft. portion." (*Id.*). In other words, the stopping and standing of traffic in the 25-foot section of the easement is not allowed to overflow into 45-foot section and interfere with traffic flow therein.

The 25-foot section and 45-foot section of the easement are parts of a single easement created with the same language, in the same agreement, at the same time, and between the same parties. There is no basis in the Easement Agreement for treating the two sections of the single easement differently. Thus, if Defendant has the right to cause standing traffic in the 25-foot section, it has the right to do so in the 45-foot section. If Defendant does not have the right to cause standing traffic in the 45-foot section of the easement, it cannot cause standing traffic in the 25-foot section.

The answer to this quandary is in the Easement Agreement, which must be enforced according to plain, ordinary, and popular meaning of its terms. As shown earlier, the Easement Agreement creates a permanent and mutual right of way for the ingress and egress of two-way commercial traffic. This is the express purpose of both sections of the single easement. It does not permit any use of the easement that, by design, causes traffic to stop in the easement in order to transact business with a tenant of Tract A or Tract B. It does not permit any use of the easement that interferes with (and here destroys) the stated purpose of ingress and egress of motor vehicles, *i.e.*, two-way traffic. Thus, the trial court erred in finding that the drive-thru was a permitted use.

5. The trial court has invaded the sanctity of the public record.

The Easement Agreement is a recorded document. Citing *Ward v. Evans*, 693 S.E.2d 7, 11 (S.C. App. 2010), the trial court correctly noted that recorded easements "are valid [as] to subsequent purchasers without notice." (R. 0003). Indeed, "[t]he purpose of the recording statute is to *protect* a subsequent buyer *without notice*." *Ward*, 693 S.E.2d at 11 (emphasis added).

Here, the trial court has rewritten the Easement Agreement to permit the drive-thru lane despite the plain, ordinary, and popular meaning of the terms used to create, define, and limit the scope of the easement. In so doing, the trial court has destroyed the protection afforded by the

recording statute to any subsequent purchaser without notice of the drive-thru use of the easement. The trial court mistakenly believed that this alteration of the public record was cured by the ability of a subsequent tenant or would-be purchaser to observe the drive-thru use of the easement upon an inspection of the property. (R. 0217-0218). The very purpose of the recording statute, however, is to protect a subsequent purchaser "*without notice.*"

The sanctity of the public record is essential to the marketability of property. It defined what Plaintiff purchased in 2010 – it defines what Plaintiff now owns –it defines what Plaintiff can sell in the future – it defines the scope of any title insurance. Plaintiff bought property having an equal and permanent right to use the easement for the ingress and egress of two-way commercial traffic. Plaintiff cannot not now sell property with that permanent right, because the trial court (and the Court of Appeals) has allowed Defendant to convert the easement to its exclusive use and has therefore legitimized Defendant's "private taking" of Plaintiff's property just as surely as if Defendant had purchased the easement land. As a result, Plaintiff no longer owns what it purchased and cannot sell what it purchased despite what appears in the public record.

II. The Court of Appeals erred in affirming the trial court.

The Court of Appeals summarily affirmed the trial court in a three-sentence order that referenced three cases. (Appx. at 001-002). As demonstrated below, the Court of Appeals' ruling was factually and legally incorrect.

A. The Court of Appeals' rulings are factually and legally incorrect.

In the first sentence of its opinion, the Court of Appeals interpreted the meaning of the Easement Agreement as follows: "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." (Appx. at 2) (emphasis added). This ruling is factually and legally incorrect.

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. The Court of Appeals did not identify any supporting language in the easement, because there is no supporting language. Nothing in the facts and circumstances surrounding the creation of the easement supports the Court of Appeals' interpretation of the easement. There is no evidence that the parties creating the easement had any intent to allow the construction and operation of a drive-thru lane in the easement.

In the second sentence of it ruling, the Court of Appeals found: "Because the *record demonstrates* invitees to [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 [Plaintiff]." (Appx. at 2) (all emphasis added). This ruling is factually and legally incorrect.

The undisputed evidence demonstrates that Defendant's invitees do not simply "pause" to place their 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, 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 traffic. As a result, the drive-thru imposes new burdens on Plaintiff's right to use the

easement that are not expressed in the easement and are not supported by any evidence that the parties creating the easement intended any such burden.

Even if it assumed that the drive-thru does not burden Plaintiff's rights under the easement, Defendant's use of the easement is nevertheless limited to the purpose expressly stated in the easement, and nothing more. 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.

In the third and final sentence of its ruling, the Court of Appeals found: "Additionally, the *record reflects* Tract B [Plaintiff] invitees are *currently able to enter and exit* the easement *in a reasonable manner*, and therefore, [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 the free flow of two-way commercial traffic. 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 commercial traffic onto the wrong side of a two-way commercial traffic easement. Permitting Defendant to do so completely destroys Plaintiff's absolute 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 the Court of Appeals' acceptance of that invitation.

B. The cases cited by the Court of Appeals do not support its ruling and, when considered in their proper context, these cases and the legal pronouncements therein demonstrate that Defendant's construction and operation of a drive-thru lane in the easement is not a permitted use of the easement.

The Court of Appeals cited three opinions in support of its ruling. (See Appx. at p. 2, citing *Clemson Univ. v. First Provident Corp.*, 197 S.E.2d 914 (S.C. 1973); *Watson v. Hoke*, 53 S.E. 537 (S.C. 1906); and *Ballington v. Paxton*, 488 S.E.2d 882 (S.C. App. 1997). Respectfully, the Court of Appeals 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.

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

In *Clemson*, the issue before this Court was whether the defendant had the right to enter upon the plaintiffs' land to enlarge existing drainage ditches so as to provide sufficient drainage for the defendant's planned residential development of its land. 197 S.E.2d at 916. The defendant had an existing easement right to use the existing ditches to drain water from its land, *i.e.*, to use the drainage ditches as they existed at the time of the creation of the easement. *Id.* at 918. The defendant, however, intended to "materially increase and enlarge the [existing] drainage ditches by making them wider and deeper." *Id.* at 917.[2]

This Court found that the trial court properly enjoined the defendant because it sought to impose "an additional servitude upon the lands of the [plaintiffs]." 197 S.E.2d at 918-919. It is from this discussion that the Court of Appeals 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." (Appx. at 2). This quote is taken

[2] For a more detailed discussion of the facts, issues, and law in *Clemson*, see the plaintiff's Petition for Rehearing, Appx. at 012-016, which is incorporated herein by reference.

from a paragraph that stated several other principles of easement law, and application of those principles to this case demonstrate that Defendant has exceeded the right granted in the easement.[3]

Here, as in *Clemson*, Defendant's rights to use the easement "are 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. The manifest purpose, character, and extent of the easement at issue here was for the ingress and egress of two-way commercial traffic to, from, and between two commercial tracts that were the sites of various businesses, *i.e.*, 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, nothing in the circumstances that existed at the time of the creation of the easement, and nothing in the evidentiary record indicates any intent by the grantor of the easement (servient estate) to grant the grantee (dominant estate) any right to use the easement for "wrong-way" commercial traffic or to use it as a drive-thru lane, *i.e.*, a physical site for the grantee to transact business in the easement itself and thereby interfere with the intended free flow of two-way commercial traffic. Thus, as in *Clemson*, Defendant's "drive-thru" use of the easement places "new and additional burdens on the easement" that exceed the easement right held by Defendant.

Here, as in *Clemson*, the rights of Plaintiff and Defendant "are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable

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[3] The paragraph in *Clemson* stated in full: "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.". 197 S.E.2d at 918-919 (all emphasis added – underlining denotes portion of paragraph quoted by the Court of Appeals in the present case).

enjoyment of both the easement and the servient tenement." 197 S.E.2d at 919. Here, it is undisputed that the parties have mutual and identical rights to use the easement for its stated purpose. Defendant's conversion of the easement to "wrong-way" commercial traffic and to a "stop and go" business transaction location interferes with and completely destroys Plaintiff's right to use the easement for the free flow of two-way commercial traffic.

Here, as in *Clemson*, Defendant's right to use the easement includes "all rights incident or necessary to its proper enjoyment, *but nothing more*," and it cannot "exceed[] [its] rights *either in the manner or in the extent* of its use." 197 S.E.2d at 919 (emphasis added). The easement grants Defendant the right to use the easement for two-way commercial traffic to, from, and between the commercial tract, "and nothing more." Thus, Defendant's drive-thru lane use is "an unauthorized [and] excessive use" for conducting business in the easement and waiting in the easement for the completion of the business transaction, all while driving on the wrong-side of the two-way commercial traffic easement.

In *Clemson*, this Court also applied the well-established principle that the scope and permissible use of an easement is determined at the time of the creation of the easement, and a subsequent change in the needs or desires of the grantee does not and cannot enlarge the easement. 197 S.E.2d at 920. Here, at the time of the creation of the easement, there was no need for a drive-thru lane 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 Easement Agreement 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.

In *Clemson*, this Court also held that the defendant's voluntary decision to develop its property did not justify an enlargement of its easement rights. 197 S.E.2d at 920. Here,

Defendant's need for a drive-thru lane on the wrong-side of the two-way commercial traffic easement was created by Defendant when it redeveloped its tract and entered the contract with Starbuck's. This self-inflicted wound, however, does not justify a strained reading of the easement's plain language to expand its scope beyond the plainly stated purpose in the easement itself. It also is not a basis for creating a new rule of law that requires parties to draft an easement to specifically exclude all non-standard and uncontemplated uses of an easement to ensure that the easement is limited to the clear and plainly stated purpose of the easement. That is what the Court of Appeals has done in this case.

2. *Ballington v. Paxton* and *Watson v. Hoke*

The Court of Appeals quoted its opinion in *Ballington*, which itself quoted this Court's opinion in *Watson*, for the ruling that the easement here allowed Defendant's erection of its drive-thru lane in the easement, 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. (Appx. at 2). 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 has the right to erect a gate across a private right of way, typically in a rural setting and typically involving dirt roads or farmland. In is in this context that the statement quoted by the Court of Appeals arose, *i.e.*, that a right of way need not be always open and without obstruction. With the exception of the Court of Appeals' opinion in this case, research reveals no case extending this rule beyond the "gate" cases.[4]

[4] *Watson* is the original source of the language quoted by the Court of Appeals, to-wit: that a right of way is not always open or without obstruction. With the exception of the Court of Appeals' 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*, 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 the Court of Appeals' opinion in *Ballington* – every case citing *Ballington* for this proposition also involved a gate 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). Two other cases have cited *Ballington* as stating the requirements and elements for finding an easement appurtenant, which was a separate issue

Second, in *Watson* and *Ballington*, both courts held that the grantor's erection of a gate across a rural dirt road was nothing more than a mere inconvenience to the grantee's use of the easement over the dirt road, and it was justified by the grantor's need to protect and reasonably enjoy its property.[5] Here, Defendant's erection of the drive-thru lane is far more than a mere inconvenience – it completely destroys Plaintiff's right to use the easement for its express purpose of providing for two-way commercial traffic from an urban highway onto the commercial tracts, between the commercial tracts, and back on to the urban highway. Creating a stop-wait-go traffic pattern with a drive-thru business operation in the middle of the easement is not a mere inconvenience – it is an unreasonable and impermissible interference with the express purpose of moving two-way commercial traffic from and back to the highway, and to, from, and between the commercial tracts. And directing this stop-wait-go traffic onto the wrong side of a two-way commercial traffic easement completely destroys any reasonable, rational, or safe use of the easement for two-way commercial traffic.

C. To the extent that the Court of Appeals' 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, no one had made any use of the 25-foot easement section at issue here. The Court of Appeals 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 ...." (Appx. at 2) (emphasis added). The record reflects two things. First, 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

in *Ballington* and had nothing to do with the 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).

[5] For a more detailed discussion of the facts, issues, and law in *Watson* and *Ballington*, see the plaintiff's Petition for Rehearing, Appx. at 016-020, which is incorporated herein by reference.

easement. Second, 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.

The only right granted to Defendant by the easement is the right to use the easement, including the 25-foot section, for two-way commercial traffic to and from the adjacent highway, and then 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 erect a drive-thru business operation in the easement, 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 existing interference. The easement grants Defendant a right to use the land, but Plaintiff still owns the land and the attending bundle of rights. As a matter of law, that bundle includes the absolute right to insist that Defendant's use of Plaintiff's land strictly comply with and be limited to the right granted by the easement and no other use. This is true regardless of whether Defendant's current use has not caused Plaintiff to suffer any actual damages at this time, and regardless of whether Defendant's current use does not currently interfere with Plaintiff's ability to use the easement. The fact that Plaintiff does not currently use or need to use the easement does not enlarge Defendant's right to use Plaintiff's land – Defendant's right is 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 Plaintiff's land would 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 then to, from, and between the commercial tracts. Nothing in the public record even hints at Defendant having the right to construct and operate a drive-thru business operation in the easement itself. If 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 Plaintiff according to the public record. When Plaintiff explains that the Court of Appeals 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 traffic pattern 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 Defendant with Plaintiff's mutual right to use the easement has destroyed any meaningful or safe ability to use the easement for its stated purpose.

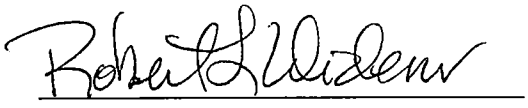
D. The Court of Appeals erred in not ruling on all issues and arguments presented on appeal.

Relying on *Futch v. McAllister Towing of Georgetown, Inc.*, 518 S.E.2d 591 (S.C. 1999), the Court of Appeals held that it need not rule on all remaining issues, because its ruling was outcome dispositive. (Appx. at 2, n.1). 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 Plaintiff's property (a new burden) and interfered with the flexibility afforded thereby for future reconfigurations of Plaintiff's commercial tract (another new burden that also lowers the value and utility of 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.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Plaintiff's Petition for Rehearing, Final Brief of Appellant, and Final Reply Brief of Appellant, it is respectfully submitted that this Court should issue a writ of certiorari to the Court of Appeals, reverse the Court of Appeals, and remand for the entry of judgment in favor of Plaintiff.

Respectfully Submitted,



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May 8, 2017
Columbia, SC

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2017-UP-002
Heard November 17, 2016 - Filed January 4, 2017
Appellate Case No. 2015-000107

Woodruff Road SC, LLC, ...Appellant,

v.

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

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served a copy of the Appellant's Petition for a Writ of Certiorari to the Court of Appeals and Appendix this 8th day of May, 2017, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel for the Respondent at the following address:

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