THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas



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

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2016-UP-138 (S.C. Ct. App. filed March 23, 2016)
Appellate Case No. 2016-001291

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

v.

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

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

v.

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

of whom Town of Lexington is, ..... Respondent.

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# BRIEF OF PETITIONERS

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II. Did the Court of Appeals err in reversing the grant of summary judgment to Petitioners on Respondent McGuinn's claims for slander of title and tortious interference with contract?

III. Did the Court of Appeals err in refusing to dismiss the appeal by the Town of Lexington?

## STATEMENT OF THE CASE

This case is about the scope of an easement on Saul and Mara Espino's property. It has a convoluted procedural history because there were two lawsuits over the same subject matter and because three circuit judges heard various aspects of the summary judgment requests.

McGuinn Construction Management filed an action against the Espinos in August 2005. (R.p.40). McGuinn's complaint sought declaratory relief and damages for slander of title and interference with its prospective contractual rights. (R.p.42).

The Espinos answered, counterclaimed, and brought a third-party case against the Town of Lexington. (R.p.55). The Town moved to dismiss and Judge James Johnson granted the motion on October 31, 2007. (R.pp.35-38). Judge Johnson denied the Espinos' motion for reconsideration on December 20, 2007. (R.p.39). After this point the Town was not a party to the case.

The parties attempted to mediate but were not successful. The Espinos moved for summary judgment and McGuinn made a cross-motion for summary judgment. (R.pp.150-151, 152, 153). Judge Johnson granted the Espinos' motion for summary judgment and granted McGuinn's motion to dismiss the Espinos' fifth counterclaim, ruling:

(1) The Espinos were entitled to summary judgment and no one, including McGuinn, had the right to enter the Espinos' property to connect the sewer and drainage lines of Coventry Lake Subdivision;

(2) The Espinos were entitled to summary judgment against McGuinn on the slander of title cause of action;

(3) The Espinos were entitled to summary judgment against McGuinn on the cause of action for tortious interference; and

(4) McGuinn was entitled to dismissal of the fifth counterclaim which alleged an implied covenant of good faith and fair dealing.

(R.pp.25-26).

McGuinn moved for reconsideration of Judge Johnson's order, see (R.p.154), and Judge Johnson thereafter died from a sudden illness.

In October of 2008, the Espinos filed their own lawsuit against Gates Common, S. Wade McGuinn, and the Town of Lexington. (R.pp.71) (amended complaint). On June 25, 2009, the cases were designated complex and assigned to Judge McMahon. (R.p.5)

Judge McMahon heard arguments on the motion for reconsideration but recused himself before entering an order. The matters were then sent to Judge Keesley as chief administrative judge.

Although the only active motion pending in either case was McGuinn's Rule 59 motion from the lawsuit it initiated, the parties indicated a desire to consolidate that case with the second case. The Town filed a motion to consolidate the cases and the Espinos filed a document with the court that included: (a) a transcript of the summary judgment hearing before Judge Johnson; (b) a copy of Judge Johnson's order; (c) a transcript of the hearing before Judge McMahon, regarding the Rule 59 motion; and (d) a proposed order submitted to Judge McMahon on January 19, 2010. (R.p.156). Judge Keesley consolidated the two cases. (R.pp.27-30).

In October of 2013 Judge Keesley held a hearing on McGuinn's Rule 59 motion. (R.p.278). The Espinos opposed this motion. (R.pp.176-196).

Judge Keesley ultimately denied McGuinn's Rule 59 motion, ruling:

(1) No *de novo* hearing was needed on the summary judgment motions;

(2) He was familiar with the record and determined that the proceedings could be completed without prejudice to the parties;

(3) The only hearing necessary was to decide the pending motion to reconsider the July 10, 2008 order by Judge Johnson;

(4) The Town was not a party when the matter came before Judge Johnson;

(5) There was no basis for altering or amending Judge Johnson's rulings; and

(6) The parties to the lawsuit at the time that the matter was presented to Judge Johnson were bound by his ruling;

Judge Keesley did not determine whether Judge Johnson's order was binding upon those who were not parties when Judge Johnson made his ruling. (R.pp.1-2). Judge Keesley denied the Rule 59 motion and ordered the parties to schedule a status conference "so that a plan of action can be implemented." (R.p.14).

On July 7, 2014, McGuinn served and filed a notice of appeal from Judge Keesley's order. (R.pp.316-317). On July 15, 2014, the Town filed and served a notice of appeal. (R.pp.318-319).

The parties briefed the matter and appeared for oral arguments on February 1, 2016. The Town's lawyer argued on behalf of *both* the Town and McGuinn.

On March 23, 2016, the Court of Appeals filed a memorandum opinion pursuant to Rule 220, SCACR, reversing the circuit court orders. *McGuinn Construction Mgmt. v Espino*, 2016-UP-138 (S.C. Ct. App. filed March 23, 2016); see also (App.pp.1-5). The Court of Appeals held:

(1) the circuit court erred in granting the Espinos summary judgment regarding the scope of the easement there was a "potential latent ambiguity" requiring further inquiry into the facts;

(2) the circuit court erred in dismissing McGuinn's claims for slander of title and tortious interference with contract because the circuit court's ruling was based on its conclusion with regard to the easement's scope. The court reversed that ruling without addressing any additional sustaining grounds; and

(3) the court did not need to reach the Town's argument that summary judgment should be vacated because the Town did not have an opportunity to be heard regarding the scope of the easement.

(App.pp.2-5).

The Court of Appeals denied the Espinos' petition for rehearing. (App.p.13).

## STATEMENT OF FACTS

In April 1988, Coventry Associates, Inc., conveyed water and sewer lines on its property in Lexington, South Carolina to the Town of Lexington. The deed referenced "the record drawing of the 'as-built' water system of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc., dated November 9, 1987...." (R.p.132). Coventry Associates also conveyed the following rights to the Town:

> All easements and rights of way necessary for the maintenance of the aforesaid water and sewer lines, said easements being 15' and 30' in width, reference being made to the "as-built" plans referenced above for a more complete and accurate description of said easements.
>
> ALSO:
>
> All drainage easements located on property of Grantor known as Coventry Lakes Subdivision, and being more particularly shown on the record drawing of "as-built drainage" plan of Coventry Lake Subdivision prepared by Palmetto Engineering & Surveying Co., Inc., dated November 9, 1987....

(R.p.132). The deed was executed by M. Stewart Mungo for Coventry Associates.

The Espinos purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company in 1992. (R.p.140, p. 7, line 7 - p.8, line 14).

McGuinn was the developer of the Gates Common Subdivision that backed up to the Espinos' property. For years the Gates Common property was unimproved.

McGuinn ultimately applied for and received re-zoning to build a patio home subdivision at the site. Storm drainage, water and sewerage infrastructure had to be installed, and McGuinn designed this infrastructure to connect to the existing infrastructure of the Coventry Lakes Subdivision where the Espinos owned their property. It is undisputed that McGuinn intended to install the infrastructure on the Espinos property under the easement that grants the Town, its successors and assigns the right to "maintenance of the aforesaid water and sewer lines...." (R.p.132).

McGuinn approached the Espinos for permission to enter their property to connect to the sewer line and install other infrastructure such as storm drainage. The Espinos denied the request. McGuinn chose not to locate the storm drainage on the Espinos' property, but without the Espinos' permission and with notice that litigation was pending as to whether the easement authorized McGuinn's activities, McGuinn instructed his subcontractor to proceed with connecting to the sewer on the Espinos' property.

The subcontractor proceeded to dig in the Espinos' back yard, destroying the yard. Once McGuinn installed its sewer and storm drainage, McGuinn proceeded to develop its property at a rapid pace without regard to the elevation increases of construction. This increased the post-construction water flow, which has continued to degrade the soil conditions at the Espinos' home. The conditions are deplorable.

The lawsuits followed as set forth in the Statement of the Case. The trial court held as a matter of law that the easement did not permit McGuinn, or anyone else, to expand the use of the easement apart from the Town's right to maintain the lines within the easement. The court dismissed McGuinn's other claims for slander of title and for tortious interference of contract. The court also held that the ruling would bind only those parties before the court—the Town had successfully gotten itself dismissed from the case. The Court of Appeals reversed those rulings.

## ARGUMENTS

### I. The Court of Appeals erred in reversing the grant of summary judgment to the Espinos as there is no "potential latent ambiguity" in the easement's language and no such argument was properly made.

The Court of Appeals found the circuit court erred in granting summary judgment to the Espinos because the deed demonstrated Coventry Associates gave the Town an easement for the "maintenance" of sewer lines yet "the as built plans show the sewer pipe at issue was an inactive spur line 'to nowhere'"—making it odd to grant of an easement for maintenance. The Court of Appeals concluded further inquiry into the facts surrounding the grant of the easement was necessary to determine the grantor's intent. The Court found the easement's language "when applied to the object it describes" revealed a "potential latent ambiguity."

This was incorrect. The Court of Appeals should have affirmed summary judgment because "maintenance" has a plain meaning and because nobody argued the easement was ambiguous.

#### A. The easement is limited to "maintenance" of the sewer line.

An easement is a right to use the land of another for a specific purpose. *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (2012); *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944).

This right of way may arise by grant, from necessity, by prescription, or by implication from prior use. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006); *Steele*, 204 S.C. at 132, 28 S.E.2d at 647–48.

"A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App.2001). As this Court has instructed:

> A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App.1997) (citing 17A Am. Jur.2d *Contracts* § 338, at 345 (1991)). It is a question of law for the court whether the language of a contract is ambiguous. *Id.* Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.* The determination of the parties' intent is then a question of fact. *Id.* On the other hand, the construction of a clear and unambiguous deed is a question of law for the court. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

*S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (construing an unambiguous restrictive covenant).

The rights of one claiming an easement by express grant are limited within the scope of the privilege. *Marlow v. Marlow*, 284 S.C. 155, 325 S.E.2d 703 (1984). The extent of the servitude is determined by the terms of the grant. *Id.* (citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950)); *Gordon v. Hoy*, 178 S.E.2d 495 (Va. 1971).

This easement reads:

> All easements and rights of way *necessary for the maintenance of the aforesaid water and sewer lines*, said easements being 15' and 30' in width, reference being made to the "as-built" plans referenced above for a more complete and accurate description of said easements.

(R.p.132) (emphasis added).

This is a limited grant, restricted by its terms. Whether McGuinn or the Town could *ever* prevail depends on the construction of the phrase "necessary for the maintenance of the aforesaid water and sewer lines." *Id.* (underline added). Under the applicable law, they cannot prevail.

Black's Law Dictionary defines "maintain" as "To care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep." Black's Law Dictionary 1039 (9th ed 2009). Black's defines "maintenance" as "The care and work put into property to keep it operating and productive; general repair and upkeep." *Id.* These definitions do not contemplate improvement, expansion, or any other kind of addition to the thing or property, but expressly limit themselves to keeping the existing condition of the property "as is."

Courts throughout the country use the ordinary and regular meaning of the terms "maintain" and "maintenance." As the New Jersey Superior Court explained:

> To "maintain" something, such as a roadway, means to "to keep in an appropriate condition, operation, or force; keep unimpaired." Random House Dictionary (2010 ed.). Moreover, the act of maintenance is commonly defined as "[t]he care and work put into property to keep it operating and productive; general repair and upkeep." Black's Law Dictionary 965 (7th ed.1999).

*Township of White v. Castle Ridge Dev. Corp.*, 16 A.3d 399 (N.J. Super. 2011). Other courts agree. *Stanford v. State Dep't of Highways and Pub. Transp.*, 635 S.W.2d 581 (Tx. Ct. App. 1982) (noting to "maintain" has been defined as "to hold or keep in any particular state of efficiency or validity; to support, sustain or uphold; to keep up; not to suffer to fail or decline," and concluding that "maintenance" of an overpass "is that which is required to preserve the overpass as it was originally designed and constructed"); *El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 243 F.2d 927 (5th Cir. 1957) (noting "maintain" means "to hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up," and finding contract required the United States to

"maintain" existing bridges but not to construct new bridges under its agreement with the city of El Paso); *Wall v. Windmann*, 142 So.2d 537 (La. Ct. App. 1962) ("to 'maintain' means to preserve or keep in an existing state or condition and embraces acts of repair and other acts to prevent a decline, lapse, or cessation from that state or condition. In a wide variety of situations the word 'maintain' has been taken to be synonymous with 'repair.' This is the usual meaning, the dictionary meaning, and the meaning which must control in the absence of a clear expression of a contrary intention.") (citations omitted); *Polo/West Hartford v. Loring Realty Advisors*, 2009 WL 1299099 (Conn. Sup. Ct. 2009) (noting Webster's Third New International Dictionary (3d ed.1961) defines "maintain" as "To keep in a state of repair, efficiency, or validity: preserve from failure or decline" and the word "maintenance" means "the labor of keeping something (as building or equipment) in a state of repair or efficiency; care; upkeep." The Random House Compact Unabridged Dictionary (2d Ed.1996) defines "maintain" as "To keep in existence continuance; preserve; retain." The word "maintenance" means "care or upkeep, as of machinery or property.").

The Connecticut Supreme Court explained:

> "Maintenance" in relation to property has been defined as "the upkeep or preservation of the condition of property"; Black's Law Dictionary; and "making repairs and otherwise keeping premises . . . in good condition"; Ballantine's Law Dictionary. It connotes a state of physical repair, upkeep, and preservation. *Frye v. Angst*, 28 Wis.2d 575, 582, 137 N.W.2d 430 (1965); 54 C.J.S. *Maintenance*, p. 905. It does not, in common parlance, encompass the expenditure of funds for the administrative or managerial purposes of a corporation. If the covenant here in question had been intended to authorize expenditures other than those related to the physical upkeep and repair of the roads, it could easily have so stated.

*Saphir v. Neustadt*, 413 A.2d 843, 851 (Conn. 1979). Accord *Holguin v. Fulco Oil Servs.*, 245 P.3d 42 (N.M. 2010) (Black's Law Dictionary 973 (8th ed. 2004) defines maintenance as "[t]he care and work put into property to keep it operating and productive; general repair and upkeep." Merriam-

Webster's Collegiate Dictionary 702 (10th ed. 1996) defines maintenance as "the act of maintaining" and further defines maintain as "to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline."); *Maine Turnpike Auth. v. Brennan*, 342 A.2d 719 (Me. 1975) (finding "maintenance" to include annual upkeep and, to a degree, repairs necessary to sustain the operation of the turnpike, and noting on other occasions, the court construed "maintenance" to mean a keeping in a state of efficiency or a refusal to suffer decline); *Coleman v. Portage Cty. Engineer*, 975 N.E.2d 952, 959-960 (Ohio 2012) (holding under Ohio's Tort Claims Act, a "complaint is properly characterized as a maintenance, operation, or upkeep issue when 'remedying the sewer problem would involve little discretion but, instead, would be a matter of routine maintenance, inspection, repair, removal of obstructions, or general repair of deterioration.").

The easement in this case is limited to one thing: *maintenance* of the *existing* line. Had the parties intended the easement to be for anything other than regular upkeep or repair of the "aforesaid water and sewer lines," they could have said so. They could have said "maintenance of the aforesaid water and sewer lines, as well as improvement of those lines or expansion to permit additional lines." They could have said "maintenance as well as future additions or expansions." They did not say any of these things. Instead, the only thing the grantor agreed to allow was "maintenance," and only of the "aforesaid" lines (*i.e.*, the existing lines). In the eyes of the law this means taking those steps to prevent decline of the existing lines, to provide upkeep on the existing lines, and to perform repairs on the existing lines. No more. No less.

As noted above, the rights of one claiming an easement by express grant are limited within the scope of the privilege and the extent of the servitude is determined by the terms of the grant. *Binkley*, 348 S.C. at 67, 558 S.E.2d at 906-907 (the language of an easement determines its extent;

clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in the plain, ordinary, and popular sense); *Ten Woodruff Oaks v. Point Dev.,* 385 S.C. 174, 683 S.E.2d 510 (Ct. App. 2009) (same).

"'[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.'" *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d *Easements and Licenses* § 72 at 478). Because an easement burdens the rights of the owner of real property it must be narrowly construed and not construed in a way that unilaterally expands the rights contained therein without further agreement from the owner of the servient estate. *Hamilton v. CCM*, 274 S.C. 152, 263 S.E.2d 378 (1980) (restrictions as to use of real estate should be strictly construed and all doubts resolved in favor of free use of the property). What McGuinn and the Town advocate is a unilateral expansion of the narrow rights contained within the scope of the easement the Town possesses. The law does not support their view, nor should it.

This Court should review the easement in this case, apply the controlling law, reverse the holding of the Court of Appeals, and remand for entry of judgment according to the circuit court's rulings.

### B. The Court of Appeals based its ruling on a point no one properly raised.

Neither Respondent argued below that the easement created a "potential latent ambiguity." This argument was not in McGuinn's complaint, (R.pp.40-42), the Town's answer, (R.pp.67-70, 107-114), McGuinn's motion for summary judgment, (R.pp.115-116) (asserting no issue of material fact), or McGuinn's motion for reconsideration. (R.pp.154-155) (no mention of latent ambiguity;

actual assertion that express grant in easement was unambiguous). In fact, McGuinn's counsel argued the easement unambiguously and "obviously" gave McGuinn the right to do what it did. (R.p.249, lines 13-23; p.250, lines 4-6; p.251, lines 6-18; p.255, line 24 - p.256, line 24; p.257, lines 17-22; p.286, line 18 - p.287, line 22; p.288, line 17 - p.289, line 15; p.307, lines 1-17). Counsel argued "we believe that as a matter of law" McGuinn had the right to tap into the lines through the easement. (R.p.307, lines 19-20); see also (R.p.308, lines 10-12).

At the Rule 59 hearing, McGuinn's lawyer argued for the first time that "at the very worst from our standpoint it gives rise to an ambiguity in regard to what does it mean to have a sewer line easement." (R.p.290, lines 5-7; line 21 - p.291, line 8); see also (R.p.308, lines 12-14). However, an issue may not be raised for the first time by Rule 59 motion. E.g., *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). The Town's counsel argued this as well for the first time at the hearing on the Rule 59 motion. (R.p.295, lines 3-9). The Town then argued, however, that the grant of an easement in the manner McGuinn sought was "clearly" shown. (R.p.310, line 24 - p.311, line 4).

The Court of Appeals used its own view that the easement contained a "latent ambiguity" as a basis to reverse the circuit court's decision. Although an appellate court may *affirm* for any reason appearing in the record under Rule 220(c), SCACR, the appellate court may not *reverse* for reasons the appellate court feels are apparent. Compare *Dreher v. SC Dept. of Health and Envir. Ctrl.*, 412 S.C. 244, 772 S.E.2d 505 (2015) (party who prevailed below may raise any reason appearing in the record that supports affirmance) with *Koon v. Fares*, 379 S.C. 150, 666 S.E.2d 230 (2008) (issue not raised by appellant to lower court and not ruled upon by lower court is not preserved for appellate review). Instead, parties are required to raise the issues before the trial court and obtain a ruling

therefrom. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review); see also *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (but for very few exceptional circumstances, appellate court will not *sua sponte* raise issues).

Not only was this argument not raised below, it was not ruled on below. As noted above, the original trial judge (Judge Johnson) did not rule on the issue of whether the easement created an ambiguity, even a "potential latent ambiguity." Likewise, in ruling on the motion for reconsideration, Judge Keesley made no such ruling.

This issue was also not argued to the Court of Appeals. McGuinn did not argue a "potential latent ambiguity" in its Brief of Appellant. Instead, McGuinn argued that the easement *unambiguously* permitted the use or that an "easement by dedication" existed. (App.pp.24-26). McGuinn largely argued the record supported judgment in its favor, but since the denial of summary judgment is not appealable, the best McGuinn could hope for was the existence of a genuine issue of material fact. Importantly, McGuinn did not argue a "potential latent ambiguity" precluded summary judgment. McGuinn did not even explain how any purported "facts in controversy" were material facts precluding summary judgment for Petitioners. (App.pp.27-29).

McGuinn *did* use its reply brief to assert, for the first time, that there was "ambiguity in the easement." (App.p.88). This argument, however, came too late because issues may not be argued for the first time on reply. *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011). Even so, in that same brief McGuinn argued "the intent of the easement" is "obvious," (App.p.89), belying any claim of ambiguity.

The Town did not argue the existence of a "potential latent ambiguity." Instead, the Town argued that the easement's meaning was *clear* given the reference to the "as built" plans. (App.pp.43-50). The Town added "Judge Johnson *did not need* the [']as-built[']plans to reach" the conclusion that the easement was for use of the spur line across Respondent's property to connect to McGuinn's property. (App.p.51) (emphasis added). The Town called this conclusion "obvious." *Id.* Again, it was not until the reply brief that the Town suggested the easement instrument was "at the very least, ambiguous." (App.p.105). Yet, the Town *then* argued the easement's meaning was clear, not ambiguous. (App.pp.105-106). There never was any argument that the language resulted in a "potential latent ambiguity."

The Town contended Judge Johnson could not have ruled without the "as-built" plans, but then noted those plans were never submitted or offered to the circuit court. (App.pp.104-105). Neither Respondent argued below that Judge Johnson should have considered those plans or that Judge Keesley should have granted reconsideration because Judge Johnson did not consider those plans.

Importantly, neither the Town nor McGuinn proffered the "as built" plans for the record before either the circuit court or the Court of Appeals. Precedent explains a party may not complain of an error his own conduct has induced. *Erickson v. Jones St. Publishers*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006); *Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000) (affirming circuit court order where appellant failed to include local ordinances in record and therefore failed to carry burden of presenting appellate court with adequate record). Yet, the Court of Appeals reversed the circuit court's ruling for failing to consider the "as built" plans even though those plans were not before the circuit court, nor were they proffered for the record on appeal.

In truth the easement is not ambiguous. It provides for "maintenance" and maintenance a common term that has a distinct meaning. Whether viewed within the four corners of the document or even with reference to the "as built" plans, the action permitted by the easement is specific, clear, and obvious (as McGuinn and the Town argued below). Had the grantor wished to provide more access beyond "maintenance" the grantor could have said so. There is no language such as "maintenance and expansion," "maintenance and enlargement," or "maintenance and connection to future lines." The term "as-built plans" is undefined, but it infers the easement was subject to the *existing* structures, not later expansions. *Cf.* S.C. Code Ann. Regs. 72-301(4) (1992) (DHEC regulations setting forth standards for stormwater management and sediment reduction provide "'As-Built Plans or Record Documents' means a set of engineering or site drawings that delineate the specific permitted stormwater management facility *as actually constructed.*") (emphasis added). In any event, and as noted above, neither McGuinn nor the Town submitted those "as-built plans" to Judge Johnson, Judge McMahon, Judge Keesley, or the Court of Appeals. Respondents did not argue ambiguity or that they needed the as-built drawings. The Court of Appeals erred in ruling on these grounds.

## II. The Court of Appeals erred in reversing the circuit court's grant of summary judgment in favor of the Espinos on McGuinn's claims for slander of title and tortious interference with contract.

The Court of Appeals ruled that its reversal on the scope of the easement warranted reversal of the circuit court's rulings on McGuinn's slander of title and tortious interference with contract claims. (App.p.4). The court rejected Petitioners' additional reasons to affirm, holding that these claims were not fully developed below. (App.p.4). This Court should reverse the Court of Appeals. McGuinn's claims for slander of title and tortious interference with contract fail as a matter of law.

First, McGuinn's argument on these points should have been deemed abandoned. The argument was conclusory and was contained in one paragraph with no citation to authority. (App.p.29); *Brouwer v. Sisters of Charity Providence Hosp.*, 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014) (conclusory argument not supported by any authority deemed abandoned); *York v. Dodgeland of Columbia*, 406 S.C. 67, 96-97, 749 S.E.2d 139, 154 (Ct. App. 2013) (court deemed issue abandoned where appellants' brief failed to cite any law or authority that supported a particular proposition and, instead, relied upon an attenuated argument and a summary conclusion).

Second, McGuinn's argument depended upon McGuinn's assertion that there were "material" issues of fact regarding the scope of the easement held by the Town. As discussed above, the easement the Town holds is expressly limited in scope to "maintenance" of the existing line. McGuinn presented no evidence to establish the existence of a material fact as to whether McGuinn's entry upon the Espinos' property was for "maintenance," nor could McGuinn do so. In fact, McGuinn admitted repeatedly that its goal was to "tap into" the existing line, which is *not* maintenance, but is an expansion of the existing line. Neither the Town nor McGuinn have the right to unilaterally increase the scope of the grant in the easement, and neither have presented any evidence that they negotiated for those expanded rights with the Espinos. Instead, McGuinn took unilateral action without regard to the existing rights of the Espinos as property owners.

Third, there was no issue of material fact regarding whether McGuinn could ever establish either purported cause of action as a matter of law. For slander of title, McGuinn must establish: (1) the publication; (2) with malice; (3) of a false statement; (4) that is derogatory to plaintiff's title causing special damages; (6) as a result of diminished value of the property in the eyes of third parties. *Pond Place Partners v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). Only one who

possesses an estate or interest in the affected property may maintain the tort grounded in the tort of injurious falsehood. *Id.*

McGuinn's complaint asserted the subject property was owned by the Espinos, (R.p.40, ¶5), and the easement was owned by the Town. (R.p.40, ¶6). McGuinn then pled as a second cause of action:

> 13. The Defendants have unlawfully interfered with the Plaintiff's attempted development of its property.
>
> 14. The conduct of the Defendants has been unreasonable and totally beyond the bounds of proper conduct.
>
> 15. The conduct of the Defendants amounts to a slander of title and to an unlawful interference with the Plaintiff['s] perspective (sic) contractual rights.
>
> 16. As a direct and proximate result of the aforementioned wrongful conduct on the part of the Defendants, the Plaintiff has had a delay in its construction; has had to unnecessarily expend huge sums of money for engineers and other experts; has lost significant amounts of income and profit; has lost a significant business opportunity; has suffered an increase in interest rates; and has been damaged in its business reputation all to its damage both actual and punitive.

(R.pp.41-42, ¶¶13-16). This is the extent of McGuinn's pleading of *both* claims. There is no assertion of a "publication;" "malice," "a false statement," "a statement derogatory to [McGuinn's] title" or a "diminished value of the property in the eyes of third parties." Instead, there are conclusory statements alleging slander of title in name only.

There is also no evidence (nor could there be) McGuinn owns any portion or interest in the Espinos' property. And there are no facts from which a trier of fact could find the Espinos did anything to publish, with malice, a false statement derogatory to McGuinn's title to its own property.

McGuinn's claims for tortious interference with contract is similarly defective. McGuinn did not explain whether it was claiming interference with existing contracts or prospective contracts.

The complaint limited itself to "perspective" contracts, but McGuinn's brief made no distinction. Regardless, either way the claim failed as a matter of law.

To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of its breach; (4) the absence of justification; *and* (5) resulting damages. *Eldeco, Inc. v. Charleston County Sch. Dist.*, 372 S.C. 470, 642 S.E.2d 726 (2007) (citing *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993)). McGuinn did not plead nor proffer any evidence that the Espinos knew of the existence of a contract McGuinn had with a third party and then intentionally procured that third party's breach of its contract with McGuinn. This tort claim fails as a matter of law.

To establish a cause of action for intentional interference with prospective contractual relations, a plaintiff must show: (1) intentional interference with prospective contractual relations; (2) for an improper purpose or by improper methods; *and* (3) resulting in injury. *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). McGuinn did not plead nor did McGuinn proffer a scintilla of evidence that the Espinos interfered with prospective contractual relations, that any such interference was intentional, that the Espinos used improper methods of interfering with those contracts McGuinn planned to enter into, that the Espinos had some improper purpose for interfering in those contracts, or that McGuinn suffered any resulting injury. Failure to plead or proffer evidence of any one element is fatal, but here there is a *complete* failure of pleading or proof.

Even if these arguments were not abandoned because of the conclusory manner in which the claims were pled and the arguments were presented in the Brief on appeal, the Court of Appeals should have affirmed the dismissal of these claims on this record. In light of the limited scope of

the existing easement there are no facts McGuinn can produce to establish any right to recover under either a cause of action for slander of title or for tortious interference with contract, existing or prospective. Accordingly, Judge Johnson properly granted summary judgment for the Espinos as to each of these claims and Judge Keesley correctly denied McGuinn's motion for reconsideration.

This Court should reverse the Court of Appeals and affirm the circuit court's grant of summary judgment as to McGuinn's claims for slander of title and tortious interference with contract.

### III. The Court of Appeals erred in refusing to dismiss the Town of Lexington's appeal.

The Town separately appealed, contending the trial court should not have granted the Espinos' motion for summary judgment against McGuinn. The Espinos contended the Court of Appeals should have dismissed the Town's appeal. Because the Court of Appeals reversed the grant of summary judgment for the Espinos against McGuinn the Court of Appeals did not address this issue in its opinion or on rehearing. This Court should take notice of the fact that the Town, who had gotten itself dismissed from the case and was *not* a party at the time Judge Johnson and Judge Keesley ruled, was not an aggrieved party who could bring an appeal of the circuit court's order.

In the order denying rehearing, Judge Keesley stated:

> The court agrees that the parties to the lawsuit at the time the matter was presented to Judge Johnson (2005-CP-32-02712) are bound by his ruling. However, the court is not determining in this order whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling.

(R.pp.1-2, 10, 13-14). There was no challenge to this ruling at all. Furthermore, it is undisputed that by the time Judge Johnson entered the order on June 16, 2008, the Town had been dismissed from the case by order filed October 31, 2007. (R.p.2).

The Town is therefore not an aggrieved party with respect to the order and should not have been heard on appeal. Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) ("The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation."); *Burns v. Gardner*, 328 S.C. 608, 617–18, 493 S.E.2d 356, 361 (Ct. App.1997) (dismissing the portion of an appeal involving an issue raised in which the appellants were not aggrieved parties and thus could not pursue the issue on appeal). See also *Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014) (it is an appellate court's duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court).

The Court of Appeals declined to address this issue despite its duty to do so. This Court should take notice of the issue and dismiss the separate appeal the Town filed in this case. *Ex parte South Carolina Dep't of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010) (this Court dismissed appeal by SC Department of Motor Vehicles because the Department was not a party to the case the Department was trying to appeal).

The Court should remand the matter to the circuit court with instructions consistent with this Court's rulings on appeal.

## CONCLUSION

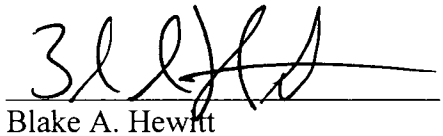
The purpose of summary judgment is to obviate delay where there is no real material issue of fact. *Hammond v. Scott*, 268 S.C. 137, 232 S.E.2d 336 (1977). Here, there is no material issue of fact. The easement says what it says and is limited to "maintenance" of the existing line. It is plain and it is unambiguous.

The Town's appeal should have been dismissed because the Town is not an aggrieved party as to the orders being appealed. Further, there is no genuine issue of material fact regarding the scope of the easement in this matter, which is expressly limited.

McGuinn's argument regarding the dismissal of its other claims was conclusory and should have been deemed abandoned. Furthermore, because the easement upon which McGuinn claims its rights does not support those claimed rights, the dismissal of those other claims was proper.

The Court should reverse the Court of Appeals and reinstate the trial court's judgment.

Respectfully Submitted,



November 20, 2017

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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



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

Appellate Case No. 2016-001291

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McGuinn Construction Management, Inc., ..... Respondent,
v.
Saul Espino and Mara Espino, ..... Petitioners.

And
Saul Espino and Mara Espino, ..... Petitioners,
v.
Gates Commons, LLC, S. Wade McGuinn,
Individually, and Town of Lexington, ..... Defendants,

Of whom
Town of Lexington, ..... Respondent.

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**PROOF OF SERVICE**

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

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November 20, 2017

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