THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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

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

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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
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McGuinn Construction Management, Inc., Appellant,

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

Of whom Town of Lexington is the Appellant.

Appellate Case No. 2014-001519

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge
William P. Keesley, Circuit Court Judge

Unpublished Opinion No. 2016-UP-138
Heard February 1, 2016 – Filed March 23, 2016

REVERSED AND REMANDED

Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Appellant Town of Lexington; and S. Jahue Moore and John Calvin Bradley, Jr., both of Moore Taylor Law Firm, P.A., of West Columbia, for Appellant McGuinn Construction Management, Inc.

John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Andrew A. Aun, of Aun & McKay, PA, of Irmo, for Respondents.

PER CURIAM: In this consolidated action, McGuinn Construction Management, Inc. (McGuinn) appeals the circuit court's grant of summary judgment in favor Saul and Mara Espino (the Espinos) as to the scope of a sewer easement on their property. Additionally, McGuinn appeals the grant of summary judgment to the Espinos as to McGuinn's claims against them for slander of title and tortious interference with contract. The Town of Lexington (the Town) also appeals the circuit court's ruling as to the scope of the easement. In particular, it appeals the circuit court's refusal to vacate the summary judgment order because the Town did not participate in the summary judgment hearing. We reverse and remand.

1. Regarding the scope of the sewer easement on the Espinos property, we find the circuit erred in granting summary judgment. Summary judgment is a drastic remedy that should be cautiously invoked. *Bloom v. Ravoira*, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Tupper v. Dorchester Cty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Id.* "In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *K & A Acquisition Grp, LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009). "The intention of the grantor must be found within the four corners of the deed. When intention is not expressed accurately in the deed evidence *aliunde* may be admitted to supply or explain it. The instrument is not thereby varied or contradicted but is explained or corrected." *Id.* (quoting *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987)).

When a deed incorporates plans by reference, they should be read in conjunction with the deed itself. *See Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 177, 180, 427 S.E.2d 920, 922 (Ct. App. 1993) (stating when a deed incorporates highway plans by reference, those plans and the notations thereon must be read with the deed). "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. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). "Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 242, 672 S.E.2d 799, 803 (Ct. App. 2009) (citations omitted).

> Ambiguities . . . are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the will, deed, or other instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the will, deed, or other instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.

Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969).

> A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

The deed at issue demonstrates Coventry Associates, Inc. conveyed to the Town an easement for the maintenance of sewer lines located on property of the grantor

known as Coventry Lake Subdivision. The deed also specifically referenced "as-built" plans for further description of the easement. According to undisputed testimony and plats presented at the summary judgment hearing, the as-built plans show the sewer pipe at issue was an inactive spur line "to nowhere." The pipe was positioned to extend to land owned by Coventry Associates at the time of the conveyance and adjoining the Espinos' property. We conclude further inquiry into the facts surrounding the grant of the easement was necessary to determine the grantor's intent. Language in the deed, when applied to the object it describes, reveals a potential latent ambiguity rendering the grant of summary judgment as to the scope of the easement inappropriate in this case. Therefore we reverse and remand as to this issue.

2. With respect to the grant of summary judgment in favor of the Espinos on McGuinn's claims for slander of title and tortious interference with contract, we also reverse and remand. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Jones v. Lott*, 387 S.C. 339, 347, 692 S.E.2d 900, 904 (2010). However, "an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court." *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 206, 743 S.E.2d 850, 854 (Ct. App. 2013). When a case is at the summary judgment stage it is inappropriate for the appellate court to decide an issue when the facts and arguments are not fully developed. *See id.* (declining to affirm the grant of summary judgment on basis of additional sustaining ground when facts and arguments as to that issue had not been fully developed in the lower court).

The circuit court premised its rulings as to McGuinn's slander of title claim and tortious interference with contract claim on its conclusion regarding the scope of the sewer easement. Because we reverse and remand the scope of the easement issue, we also reverse and remand the grant of summary judgment on the slander of title and tortious interference with contract claims as any other sustaining grounds for these rulings were not fully developed in the circuit court.

3. With respect to the Town's contention the circuit court erred in refusing to vacate the summary judgment order because the Town did not have an opportunity to be heard regarding the scope of the sewer easement, we decline to address the issue. Because the cases involving McGuinn and the Town have been consolidated, and we remand the question of the scope of the easement, the Town will have an opportunity to be heard. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an

appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).

REVERSED and REMANDED.

HUFF, A.C.J., and KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
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PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Respondents Saul Espino and Mara Espino file this Petition for Rehearing with respect to this Court's decision in *McGuinn Construction Mgmt. v. Espino*, 2016-UP-138 (S.C. Ct. App. filed March 23, 2016). Respondents suggest the Court overlooked or misapprehended the following points in reversing the decision of the trial court.

I. The Court concluded that further inquiry into the facts surrounding the grant of the easement was necessary to determine the grantor's intent because the Court found the language "reveals a *potential latent ambiguity* rendering the grant of summary judgment as to the scope of the easement inappropriate." (Emphasis added). In so ruling, the Court overlooked or misapprehended the following points:

A. Neither appellant argued below that the easement created a "potential latent ambiguity." *See* Complaint, R. 40-42 (no mention of latent ambiguity); Answer of Town, R. 67-70, 107-114 (no mention of latent ambiguity); McGuinn Motion for Summary Judgment, R. 115-116 (asserting no issue of material fact); McGuinn Motion for Reconsideration, pp. 154-155 (no mention of latent ambiguity; actual assertion that express grant in easement was unambiguous). McGuinn's counsel argued that the easement unambiguously and "obviously" gave it the right to do what it did. (R. p. 249, ll. 13-23; p. 250, ll. 4-6; p. 251, ll. 6-18; p. 255, l. 24 - p. 256, l. 24; p. 257, ll. 17-22; p. 286, l. 18- p. 287, l. 22; p. 288, l. 17 - p. 289, l. 15; p. 307, ll. 1-17). In fact, counsel argued that "we believe that as

a matter of law" McGuinn had the right to tap into the lines through the easement. (R. p. 307, ll. 19-20; see also R. 308, ll. 10-12). At the hearing on the Rule 59 motion, 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, ll. 5-7; l. 21 - p. 291, l. 8; see also p. 308, ll. 12-14). *E.g.*, *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993) (a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) (Rule 59 motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier). The Town's counsel argued this as well for the first time at the hearing on the Rule 59 motion. (R. p. 295, ll. 3-9). *C.A.H.*; *Hickman*. The Town then argued, however, that the grant of an easement in the manner McGuinn sought was "clearly" shown. (R. p. 310, l. 24 - p. 311, l. 4).

B. The trial court (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, the court (Judge Keesley) made no such ruling.

C. Appellant McGuinn did not argue the existence of a "latent ambiguity" in his Brief of Appellant. Instead, McGuinn argued that the easement unambiguously permitted the use he sought, or an "easement by

dedication" existed. (McGuinn App. Br. pp. 7-9). McGuinn largely argued that 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" precluding summary judgment. McGuinn did not even explain how any purported "facts in controversy" were material facts precluding summary judgment for Respondents. (McGuinn App. Br. p. 10-12). It is true that McGuinn used its Reply Brief to assert, for the first time, that there was "ambiguity in the easement." (Reply Br. p. 4). *See McClurg v. Deaton*, 395 S.C. 85, 87 n. 2, 716 S.E.2d 887, 888 n. 2 (2011) (stating an issue may not be raised for the first time in a reply brief). Yet in that same brief McGuinn argues "the intent of the easement" is "obvious" (Reply Br. p. 5), belying any claim of ambiguity.

D. Appellant Town of Lexington also did not argue the existence of a "latent ambiguity." Instead, the Town argued that the meaning was clear once reference to the "as built" plans was had. (Town App. Br. pp. 9-16). In fact, 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. (Town App. Br. p. 17). 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," (Town Reply Br. p. 9), an

argument which comes too late. *McClurg v. Deaton*. Yet the Town *then* argued the meaning was clear, not ambiguous. (Town Reply Br. pp. 9-10). There never was any argument that the language resulted in a "potential latent ambiguity."

E. The Town contended that Judge Johnson could not have ruled without the "as-built" plans, but then contends that those plans were never submitted or offered. (Reply Br. pp. 8-9). Neither appellant 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 (which no party, including the appellants, submitted to him).

F. The grant in the easement is not ambiguous. It is express and limited, and provides for maintenance, a term that has a distinct meaning in the law. Whether viewing it within the four corners of the document or even with reference to "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, it could have said so – it did not. There is no language such as "maintenance and expansion," "maintenance and enlargment," or "maintenance and connection to future lines." The easement contains no such language.

G. Any argument by the Town should be discounted since the Town's motion to dismiss it from the action was granted and it was not a party at the time of the judgment. Furthermore, the trial court's order expressly provided it

was not binding upon those who were not parties to the matter. The Town, therefore, was not an "aggrieved" party for purposes of Rule 201, SCACR.

II. In reversing the trial court's decision to grant summary judgment as to Appellant McGuinn's claims for slander of title and tortious interference with contract, the Court overlooked or misapprehended the following points:

A. McGuinn's argument on this point is conclusory and should have been deemed abandoned. The argument in the principal brief is one paragraph long and cites to no authority. (McGuinn App. Br. p. 12). The argument in the reply brief is also one paragraph long and cites to no authority. (McGuinn Reply Br. Pp. 5-6). *See, e.g., 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).

B. McGuinn's pleading on these two causes of action is conclusory, jumbled and incomplete, and there is no evidence McGuinn could produce to support either of these causes of action. At bottom, neither cause of action is appropriately pled, nor could they be, as Respondent's pointed out in

their Brief. (Resp. Br. pp. 19-22). Reversing summary judgment here is an act of futility, and this Court should affirm even if the Court believes the trial court based its decision on its ruling as to the first issue. *E.g.*, *Moorhead v. First Piedmont Bank and Trust Co.*, 273 S.C. 356, 256 S.E.2d 414 (1979) (a right decision upon a wrong ground will be affirmed); *Watkins Motor Lines, Inc. v. Span-America Medical Systems, Inc.*, 296 S.C. 175, 177, 371 S.E.2d 2, 3 (Ct. App. 1988) ("This court may affirm a trial court's decision on any ground appearing in the record and, hence, may affirm a trial judge's correct result even though he may have erred on some other ground."); *Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987) ("In this state it has long been recognized that a right decision based upon a wrong ground will be affirmed.").

For the reasons stated, the Court should grant this Petition, withdraw its prior opinion, and issue a new opinion affirming the trial court's decision.

Respectfully Submitted,

April 6, 2016

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The South Carolina Court of Appeals

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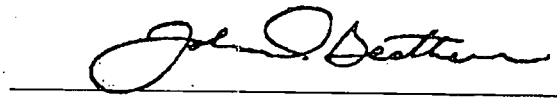
Appellate Case No. 2014-001519

ORDER

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

Thomas Ellsuff A.C.J.

J.



J.

Columbia, South Carolina

FILED

May 20, 2016

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The Honorable William P. Keesley

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FINAL BRIEF

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STATEMENT OF THE CASE

This matter has an unusual and somewhat tortured procedural history. This appeal actually involves two separate cases which were consolidated in the Lower Court and which remain consolidated for purposes of this Appeal. (R. pp. 1, 27). For simplification of argument, Appellant McGuinn Construction Management Inc.'s Brief will only address factual and legal issues raised in the case that it commenced against the Respondents Saul and Mara Espino on or about August 8, 2005. (R. p. 40).

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

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

Appellant McGuinn filed a Motion for Summary Judgment and Motion to Dismiss Respondent Espinos' Counterclaim for Breach of Implied Covenant of Good Faith and Fair Dealing on October 2, 2007 (R. p. 115). Countermotions for Summary Judgment were

filed by the Respondent Espinos. (R. p. 150). A hearing was held before Judge James W. Johnson, Jr., Presiding Judge of the Eleventh Judicial Circuit on these outstanding motions on April 14, 2008. (R. p. 238). Judge Johnson signed and filed an Order on June 16, 2008, denying Appellant McGuinn's Motion for Summary Judgment and granting Respondent Espinos' Cross Motion for Summary Judgment as to Appellant's Declaratory Judgment, Slander of Title, and Interference with Contractual Relations causes of action. (R. p. 15). Judge Johnson's Order also granted Appellant McGuinn's Motion to Dismiss the Fifth Counterclaim of the Espinos for Breach of Implied Covenant of Good Faith and Fair Dealing. (R. p. 15).

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

Appellant's motion was eventually heard by the Honorable William P. Keesley, Rule 63 SCRAP Successor Judge, on October 7, 2013. (R. p. 278). On or about June 9, 2014, Judge Keesley issued his Order denying the Appellant McGuinn's Rule 59 Motion for Reconsideration (R. p. 1). This appeal followed. (R. p. 316).

STATEMENT OF THE FACTS

This case concerns the right of Appellant to access and utilize a sewer easement owned by the Town of Lexington across property owned by the Respondents. There is no question as to the existence of valid easements owned by the Town of Lexington running across the Respondents' property. There is no question that there are sewage/drainage

pipes owned by the Town of Lexington running through and under these easements. The issue before the Court in this case and on this appeal is whether or not the Appellant may tap into and/or utilize this easement and these pipes in the development of property located adjacent to and behind property owned by the Respondents. The Lower Court, relying in part on its construction of the word "maintain" in the deed to the Town of Lexington, found and ruled as a matter of law that Appellant had no authority under the easement in question to enter Respondents' property and/or to connect to drainage and/or sewage lines in Coventry Lake Subdivision. (R. p. 15). Appellant contends that Lower Courts' Orders overlook and ignore questions of fact relating to this issue, and the Order of Judge Johnson, later affirmed by Order of Judge Keesley, is erroneous and should be reversed by this Court with the matter remanded to the lower court for further proceedings.

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

The property description on the deed by which Respondents took title references and incorporates a plat prepared for Saul J. Espino and Mary Y. Espino by Belter & Associates dated April 27, 1992. This plat, which is found at Deed Book 210-G, page 149, clearly shows a 15' sanitary sewer easement running into the Respondents' property, along the side of the Espinos' property and out of Respondents' property into property then identified as "Heritage Hills Subdivision. (R. pp. 197, 213). In addition, the plat also showed the existence of a storm drainage easement running across and through Respondents' property. (R. p. 213).

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

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

Appellant McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. Appellant is the successor in interest to Coventry Associates, Inc., in a deed filed April 11, 1988. (R. p. 197). Gates Common subdivision backs up to the Coventry Lakes subdivision and the Respondent Espinos' property in Lexington. Appellant McGuinn applied to have the property rezoned for purposes of developing a subdivision and was granted the zoning for which he had applied. (R. p. 197). Storm drainage, water, and sewer infrastructure needed to be installed for the Appellant's project. This was to be accomplished by connecting the new underground infrastructure to the spur line running under the existing easement on Respondent Espinos' property. The installation would require connecting the new

infrastructure with the existing infrastructure located under the Respondents' property. The Town of Lexington approved the use of this drainage easement by the Appellant McGuinn. (R. p. 197). Appellant obtained a building permit from the Town of Lexington. (R. p. 201). All necessary permits were obtained to begin Construction. (R. p. 200).

In 2005, Appellant McGuinn was in the process of completing this work. Appellant obtained a building permit from the Appellant Town of Lexington and had all building plans approved by the Town. (R. p. 197). With the Town's permission and after obtaining all necessary approvals, Appellant McGuinn began to use the sanitary system easement to connect Appellant's housing development to the Town's sewer system. (R. p. 197.) Respondents Espino refused to allow Appellant McGuinn to perform this task, asserting, in part, that the easement in question is limited to the maintenance of the sewer system. This dispute led to the action which is presently before this Court on appeal.

STANDARD OF REVIEW

A Trial Court may grant a party's Motion for Summary Judgment, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Rule 56(c) SCRCP). An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment. *Epstein v. Coastal Timber, Co.*, 393 S.C. 276, 711 S.E.2d 912 (2011). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences that can be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). Even when there is no dispute as to the evidentiary facts, summary judgment should be denied when there is a dispute as to the

conclusions or inferences that can be drawn therefrom. *Wilson v. Style Crest Prods., Inc.*, 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham v. Blue Cross Blue Shield of South Carolina*, 349 S.C.356, 563 S.E.2d 331 (2002).

ARGUMENT

I. THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGEMENT AS TO APPELLANT'S DECLARATORY JUDGMENT CAUSE OF ACTION.

Applying the standard(s) set forth above, it is clear that Judge Johnson erred in finding and ruling that there were no genuine issues as to any material, triable questions of fact present in this case and ruling that the Respondents were entitled to Judgment as a matter of law. Judge Keesley continued and affirmed these errors of law in his Order in affirming the granting of summary judgment on behalf of the Respondents. The Lower Courts' rulings overlooked and ignored the facts of this case and applicable South Carolina case law and should be reversed by this Court and this matter should be remanded to the Lower Court for further proceedings.

A. Judge Johnson's Order Overlooks Issues of Material Fact.

Summary judgment is appropriate only where there are no genuine issues of material fact and it is clear that the moving party is entitled to judgment as a matter of law. (Rule 56(c) SCRAP). In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the

light most favorable to the nonmoving party. *Koestler v. Carolina Rental Ctr.*, 313 S.C. 490, 443 S.E.2d 392 (1994); *Hancock v. Mid-South Management Co., Inc.* 381 S.C. 326, 673 S.E.2d 801 (2009). Further, the non-moving party is only required to present a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.* 381 S.C. 326, 673 S.E.2d 801 (2009); *Rosen v. University of South Carolina,* 398 S.C. 703, 731 S.E.2d 298 (Ct. App. 2011).

Judge Johnson found and ruled as a matter of law that Appellant had no authority under the easement to enter Respondents' property and/or connect to the drainage and/or sewer line in Coventry Lakes Subdivision. In doing so, Judge Johnson very narrowly construed the language contained in the deed, deeding the easements and line to the Town of Lexington. A review of the record on this case demonstrates that there was ample evidence presented before Judge Johnson which should have precluded summary judgment as to the nature of the easement, the scope of the easement and whether or not Appellant had the right to utilize it. The Appellant introduced a Plat dated April 27, 1992. (R. p. 213). This plat, specifically prepared for the Respondents, clearly shows the existence of a drainage and sewage lines across the Respondents' property. These easements do not connect to anything on Respondents' property. They go in and out of the Respondents' property. In fact one of these easements shows water being discharged beyond Respondents' property into property now owned by Appellant. (R. p. 213). It is clear from reviewing this Plat that the easements across Respondents' property were intended as "spur" lines to serve areas not yet developed at the time Respondents bought their property. This is exactly the type of use that Appellant is seeking in this case, that the language of the Plat either creates an easement by dedication or strongly supports Appellant's interpretation of the plat and deed. (R. p. 40). To rule otherwise would clearly contravene

public policy, and the apparent purpose of the easement, to serve the future development of properties adjacent to Respondents' property which were not yet developed. To the contrary, the easement as construed and interpreted by Judge Johnson would serve no purpose whatsoever. Clearly the plat and the deed create questions of fact as to the intent and scope of the easement.

Further, the Appellant presented the affidavit of Wade McGuinn, the principal of McGuinn Construction Management, Inc. (and Gates Common, LLC). (R. p. 197). Mr. McGuinn's affidavit is consistent with the drawings on the 1992 plat of Respondents' property and the deed to Lexington County and provides that permissive use of existing lines and easements, such as he is seeking in this case, are the "standard and common manner of expanding a sewage system." (R. p. 198). The Appellant's affidavit also provides that, "the use of and work planned to occur in the easement is within the scope of the easement, as the operation and maintenance of a sewer system. This was confirmed in a legal opinion obtained by my company, and attached as Exhibit "C." (R. p. 198). Appellant's affidavit also contained, in addition to the legal opinion, documents showing that all necessary permissions and approval were obtained by it prior to the commencement of this work, including from the owner of the easement (and the underground pipes), the Town of Lexington (R. pp. 201 – 205).

In determining the scope of an easement, the Court looks to the intent of the parties and the intent of the parties who created it. See, *Lighthouse v. South Island Public Service District,* 355 S.C. 529, 30 S.E.2d 146 (1993). Appellant submits that the evidence presented before Judge Johnson clearly creates a question of fact, or, at the very least, a scintilla of evidence which precludes the granting of summary judgment in Respondents' favor as to this issue. None of evidence submitted to the Court by Respondents, or relied

upon by the Lower Court, refutes this evidence. At the very least, this evidence creates legitimate, triable, and material issues of fact and constitutes more than a "scintilla" of evidence needed to defeat Respondents' summary judgment and the Order denying reconsideration are clearly erroneous and should be reversed by the Court.

Judge Johnson relied primarily on excerpts of testimony from Gene Edwards, former Town Engineer, and Rosemarie Nuzzo, an engineer from the Town of Lexington, who approved Appellant's plans to tie into the existing easement/sewer lines, and representatives of the field engineers hired by Appellant. (R. p. 15). None of this testimony, which, as construed and interpreted by the Court, conflicts with the Affidavit of Wade McGuinn, submitted to the Court or goes to anyone's intention as to the scope of the Easement granted to the Town. This testimony, as presented to the Court and relied on by the Court in its Order, does not support the restrictive interpretation of the easements granted to the Town of Lexington. At best, it merely creates questions of fact as to these issues. It is not sufficient to grant Respondents a judgment as a matter of law as to Appellant's causes of action for declaratory judgment.

B. The Court and Respondents' Counsel Recognized the Existence of Questions of Fact.

As set forth above, questions of fact precluding summary judgment were presented to Judge Johnson which were ultimately ignored by Judge Johnson in his Order, grants the Respondents summary judgment to Appellant's declaratory judgment cause of action. However, both counsel for Respondents and Judge Johnson specifically recognized the existence of questions of fact at the hearing and in the Order granting Respondents' cross-motion for summary judgment.

Judge Johnson's Order dated June 16, 2008, recognizes a number of facts "in

controversy." (R. p. 15). (Appellant submits that the fact Judge Johnson found there to be facts "in controversy," clearly supports Appellant's argument that summary judgment was inappropriate in this case). Appellant submits that much of the Lower Court's Order is taken up by identifying facts and issues and then attempting to resolve them. (R. p. 15).

Judge Johnson cited several instances/examples of conflicting evidence in his recitation of facts. (R. p. 15). Judge Johnson's Order cites numerous issues, many of which he considered "significant." (R. pp. 19 - 20). Instead of recognizing that these issues were issues in dispute that needed to be resolved by a trier of fact, Judge Johnson either attempted to rule on them as a matter of law or ignore them altogether. In so doing, Judge Johnson misconstrued and misapplied South Carolina Law pertaining to summary judgment. Both his Order granting Respondents' motion and Judge Keesley's Order affirming it are erroneous and should be reversed by this Court and the case remanded for further proceedings in the Lower Court.

Finally, it should be noted that this matter came before Judge Johnson pursuant to cross motions for summary judgment. In his argument before Judge Johnson, counsel for Respondents, strenuously argued that summary judgment to the Appellant was not proper, because there were, "many, many issues of fact" pertaining to whether or not Appellant had the right to use the existing easement over Respondents' property. (R. pp. 254; 258).

C. Judge Johnson Misconstrued the Nature of the Proceedings Before Him.

Judge Johnson erred in treating the motion before him as a bench trial of the case and not as a summary judgment motion. Based upon this error of law, Judge Johnson applied the incorrect standard and ignored evidence in the record. His Order and Judge Keesley's Order denying Appellant's motion for reconsideration are an abuse of discretion,

clearly erroneous and should be reversed by this Court.

As set forth above, this matter came before Judge Johnson pursuant to the parties' Rule (56) SCRCP cross motions for summary judgment and pursuant to various motions to dismiss. (R. pp. 115; 150; 152; 153). At no time did the parties agree or stipulate that this matter was before the Court on any other grounds or for any other reason. At no time did the parties inform the Court that this matter was ripe for any adjudication beyond the scope of the summary judgment motions filed with the Court. Both parties submitted memoranda. Appellant submitted an affidavit of Wade McGuinn. (R. p. 153). Some of the discovery already taken was submitted to the Court, but not all. At no time did the parties inform the Court that discovery had been completed.

At oral argument ample evidence was presented before Judge Johnson. Judge Johnson's Order dated June 16, 2008 set forth a number of facts "in controversy." (R. p. 17). (As set forth above, Appellant submits that the fact Judge Johnson found there to be facts "in controversy," clearly supports his argument that summary judgment was inappropriate in this case.)

In fact, Judge Johnson cited several instances/examples of conflicting evidence in the body of his Order. (R. p. 15). Judge Johnson's Order cites numerous issues, many of which he considered "significant." (R. pp. 19 - 20). Instead of recognizing that these issues were issues in dispute that needed to be resolved by a trier of fact, Judge Johnson either attempted to resolve them, rule on them as a matter of law, or ignore them altogether. There are numerous instances in the Order where the Court appears to make findings as to the weight to be given to deposition excerpts presented by one of the parties. (R. pp. 17 - 19). In addition, Judge Johnson's Order contains findings of fact as to evidence not introduced into the record, but "anticipated" by him. ("The Defendants anticipate

testimony of the town attorney that at no time was he asked to opine as to the legal authority granted to the Town on the easement in question and what authority, if any, the developer would have derived therefrom." (R. p. 17). This went well beyond the purview of posture in which this matter was before the Court, a summary judgment motion. Judge Johnson's Order and the findings and rulings contained therein clearly exceeded the motions which brought this matter before the Lower Court. The Lower Court Orders are clearly erroneous and should be reversed by the Court.

II. THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AS TO SLANDER OF TITLE AND TORTIOUS INTERFERENCE WITH CONTRACT.

The Lower Court erred in granting the Respondents' motions for summary judgment as to Appellant's causes of action for slander of title and tortious interference with contract. Although Judge Johnson set forth the elements for each cause of action, he based his rulings as to these causes of action solely on the reasoning that, "as the Court has determined that the Plaintiff (Appellant) did not have the authority to occupy the Espinos' (Respondents') property or to connect to either sewer or drainage lines in Coventry Lakes Subdivision." (R. pp. 23 – 24). As set forth and argued above, the Court clearly committed error(s) of law in its determination as a matter of law that Appellant did not have any rights to enter Respondents' property or to connect to either sewer or drainage. This determination was clearly erroneous and the Court's Orders should be reversed by the Court. Similarly, this erroneous finding, which constitutes a clear abuse of discretion on the part of the Lower Court, cannot be and should not be used as the basis for granting Respondents' Summary Judgment Motions as to either the sland of title or interference with contract causes of action. The Order of Judge Johnson and the Order of Judge Keesley affirming it are clearly erroneous and should be reversed by this Court.

CONCLUSION

Viewing the evidence presented in the light most favorable to Appellant, the non-moving party, the plat and deed clearly indicate the easements at issue in this case were intended to service the Appellant's property and were intended for an expansion of the Town's sewer system. Thus, there is a genuine issue of material fact as to the nature and scope of the easements and whether or not the Appellant has the right to tie into/use/improve them, and it was an abuse of discretion and an error of law for the court to find otherwise.

Respectfully submitted,

By: _____

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April 7, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Case No. 2005-CP-32-2712

McGuinn Construction Management, Inc., ... Appellant,

v.

Saul Espino and Mara Espino, ... Respondents.

Case No. 2008-CP-32-419

Saul Espino and Mara Espino, ... Respondents,

v.

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

Of whom, Town of Lexington, is ..... Appellant.

BRIEF OF APPELLANT TOWN OF LEXINGTON

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in allowing the summary judgment ruling on the scope of the easement at issue to stand and in failing to remand for a trial in equity on the issue which would allow the Town of Lexington, as an interested party, the opportunity to be heard?

II. Did the Circuit Court err in granting summary judgment to the Espinos and in determining that the easement was limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision, where issues of fact in dispute should have precluded summary judgment?

STATEMENT OF THE CASE

This is an appeal involving two consolidated actions in which the Respondents Saul Espino and Mara Espino are parties. This appeal is from an Order filed June 16, 2008, when the late Circuit Court Judge James W. Johnson, Jr. granted summary judgment on a declaratory judgment cause of action to the Espinos regarding the scope of an express easement granted to the Appellant Town of Lexington by Coventry Associates, Inc. (a predecessor in interest to the Espinos). This appeal is also from a subsequent Order filed June 9, 2014, and issued by Circuit Court Judge William P. Keesley which adjudicates a motion for reconsideration filed by the Appellant McGuinn Construction Management, Inc. ("McGuinn"). Shortly after McGuinn filed its motion for reconsideration, Judge Johnson died. In accordance with Rule 63, SCRCP, Judge Keesley heard and adjudicated the motion for reconsideration as the successor judge.

By way of brief factual background, in 1992, Saul Espino and Mara Espino purchased their residence at 108 Coventry Court within the Town of Lexington. The residence is in the Coventry Lake Subdivision. In approximately 2005, McGuinn began the development of Gates Commons which is a townhouse development adjacent to Coventry Lake Subdivision and located directly behind the Espinos' property. In order to provide sewer for the Gates Commons development, McGuinn sought to tie into the Town of Lexington's system using an easement across

the Espinos' property. The easement at issue, which was granted in April 1988 to the Town, provides as follows:

> 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. 233). The easement specifically makes reference to the "as-built plans" for "a more complete and accurate description of said easements." (R. 233). The Espinos have objected to the use of the easement across their property to tie in the sewer line from the Gates Commons development, and as a result, two lawsuits have been filed.

The initial suit bearing Civil Action Number 2005-CP-32-2712 (hereafter the "2005 action") was filed on August 11, 2005, by McGuinn against the Espinos. (R. 40-43). Almost two years later, on May 23, 2007, the Espinos amended their answer to include a third-party complaint against the Town of Lexington. (R. 55-66). The Espinos impleaded the Town of Lexington under Rule 14, SCRCP, to seek recovery for damages sustained to their own property based on causes of action for gross negligence, inverse condemnation, and trespass against the Town. The Town moved to dismiss the third-party complaint, and by Order filed October 31, 2007, Judge Johnson granted that motion finding that the third-party complaint was not proper under Rule 14, SCRCP. (R. 35-38).

On October 10, 2008, the Espinos filed a second lawsuit against the Town of Lexington. That action, which bears Civil Action Number 2008-CP-32-419

(hereafter the "2008 action"), includes causes of action for negligence, gross negligence, regulatory taking, slander of title, trespass, and conversion against the Town. (R. 71-86).

Prior to the filing of the 2008 action, the Espinos and McGuinn had filed cross motions for summary judgment in the 2005 action. The Town was not a party to that action at that point. Those motions were heard by Judge Johnson, and on June 16, 2008, he issued an order granting partial summary judgment to the Espinos. (R. 15-26). Specifically, he ruled in the Espinos' favor on the declaratory judgment cause of action and determined as a matter of law that "the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision." (R. 15). McGuinn subsequently filed a motion for reconsideration, but sadly Judge Johnson died shortly thereafter and never ruled on that motion.

Subsequently, based upon the motion of the Town, in March 2012, the two actions were consolidated. In his Order of Consolidation, Judge Keesley explained that "[t]he consolidation will enable the Town of Lexington to address Judge Johnson's Order and participate in the currently pending Motion for Reconsideration and, if necessary, any appellate review that may result from that ruling." (R. 30).

McGuinn's motion for reconsideration was ultimately heard by Judge Keesley on October 7, 2003. Following that hearing, Judge Keesley issued an

order finding "no basis for altering or amending Judge Johnson's rulings." (R. 13). Judge Keesley left unanswered the question as to whether the Town will be bound by Judge Johnson's decision on the scope of the easement. He wrote: "The court agrees that the parties to the lawsuit at the time that 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. 13-14).

McGuinn subsequently filed an appeal to this Court. The Town of Lexington then filed its appeal.

ARGUMENTS

I. The Circuit Court erred in allowing the summary judgment ruling on the scope of the easement at issue to stand and in failing to remand for a trial in equity on the issue which would allow the Town of Lexington, as an interested party, the opportunity to be heard.

As an initial issue, the Appellant Town of Lexington contends that Judge William Keesley erred in ruling on McGuinn Construction's motion for reconsideration on the merits. The Town asserts that Judge Keesley should have vacated the prior declaratory ruling regarding the scope of the easement and allowed the Town an opportunity to be heard on the issue, including the opportunity to present evidence regarding the intention of the parties as to the scope of the easement.

The Town holds the easement, and therefore, it is clearly an interested party as to any judicial determination regarding the scope of that easement. The Town, however, was not a party to the 2005 action at the time that Judge James Johnson issued his declaratory ruling defining the scope of the easement. The Town therefore argued to Judge Keesley at the reconsideration stage that, as a non-party to the 2005 action, the Town cannot be bound by the declaratory ruling issued by Judge Johnson. In the interests of judicial economy and because the Town is an interested party on the scope of easement issue, the correct decision would have been to vacate the declaratory ruling by Judge Johnson and allow for a full adjudication of the issue

with all interested parties joined and having the opportunity to be heard. That would allow for all interested and affected parties to be bound by the ultimate decision. However, Judge Keesley declined to take that approach and instead affirmed Judge Johnson's ruling. He did leave undecided, however, whether the Town will be bound by Judge Johnson's ruling.[1]

The Espinos cannot dispute that the Town is impacted by a judicial determination as to the scope of the easement. In fact, in the 2008 action brought by the Espinos against the Town, the Espinos attached the June 16, 2008 Order of Judge Johnson as an exhibit to the complaint and incorporated the rulings by reference. (R. 73). The Espinos have therefore taken the position that the declaratory ruling by Judge Johnson as to the scope of the easement is a critical issue in the 2008 action and appear to further maintain that the Town is bound by that ruling. However, the Town cannot be bound by a ruling in the 2005 action when the Town was not a party to that action and had no opportunity to be heard when Judge Johnson issued his decision.

The decision of the South Carolina Supreme Court in *Spanish Wells Property Owners Association v. Board of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988), is instructive. In *Spanish Wells*, a planning

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[1] Judge Keesley writes: "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. 14).

commission had approved a preliminary development permit, and that decision was subsequently appealed to the Circuit Court and ultimately to the Supreme Court. The Circuit Court had dismissed the appeal because the development permittee had not been joined as a party to the appeal. In affirming the Circuit Court, the Supreme Court adopted the majority rule nationally and ruled that a development permittee is a necessary party to an appeal from a planning commission to the Circuit Court. The Supreme Court explained that "[d]esignating the permittee a necessary party insures the most vitally interested party's participation in the appellate process." 367 S.E.2d at 161. "Additionally, the majority rule insures that where a circuit court reverses a permit approval, the permittee will be bound because it is a party to the appeal." *Id.*

The same rationale applies in the present case. While neither McGuinn Construction nor the Espinos sought dismissal under Rule 12(b)(7) for the failure to name a necessary party, *Spanish Wells* is nonetheless instructive in demonstrating that the Town of Lexington, the possessor of the property right, i.e. the easement, is an interested party (and likely a necessary party) for any adjudication regarding that easement. As the Supreme Court explained in *Spanish Wells*, it is important to have the "most vitally interested party's" participation in the adjudicatory process, and the absence of that party in the process will result in that interested party not being bound by the ultimate decision. That is precisely what has occurred here. The Town is an interested party. The Town did not participate in the adjudicatory process before Judge Johnson. As a result, the Town is not bound by Judge Johnson's ruling. This

further highlights the error committed by Judge Keesley. Judge Johnson's ruling should have been vacated, and Judge Keesley should have allowed the scope of easement issue to be determined in a proceeding with the Town joined as an interested or necessary party, and thus, all parties would have an opportunity to be heard and be bound by the ultimate decision. This Court is, therefore, requested to vacate the declaratory ruling by Judge Johnson as to scope of the easement and remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue. Alternatively, the Town requests that the Court remand with direction that the declaratory judgment entered by Judge Johnson in the 2005 action shall have no preclusive effect on the Town in the 2008 action, leaving the scope of easement issue to be litigated *de novo* in that action.

II. The Circuit Court erred in granting summary judgment to the Espinos and determining that the easement was limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision, where issues of fact in dispute should have precluded summary judgment.

The Appellant Town of Lexington further contends that Judge James Johnson, as ultimately affirmed by Judge William Keesley in his Order denying reconsideration, erred in granting summary judgment on the scope of easement issue. The errors committed are both procedural and substantive.

In early 2009, the South Carolina Supreme Court issued its decision in *Hancock v. Mid-South Carolina Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009), which clarified that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." 673 S.E.2d at 803. When he granted summary judgment to the Espinos on the scope of easement issue in his Order filed June 16, 2008, Judge Johnson did not have the benefit of the *Hancock* decision. In his Order, Judge Johnson included a detailed explanation of the "summary judgment standard," but that recitation of the standard does not reflect whether he was applying the "mere scintilla" rule. (R. 20-21). Further, it cannot just be assumed that Judge Johnson applied the "mere scintilla" standard because, as the Supreme Court explains in *Hancock*, the appellate authority prior to 2009 had been unclear and inconsistent. *See*, *Hancock*, 673 S.E.2d at 802 ("We recognize that the court of appeals has been somewhat inconsistent on whether a mere scintilla of evidence will overcome a motion for summary judgment"). In fact, the Supreme Court specifically cited a decision of the Court of Appeals from 2007 that rejected the "mere scintilla" standard. 673 S.E.2d at 802, n.1.

In addition, Judge Johnson's discussion and ruling on the declaratory judgment cause of action is extremely brief. The section in his Order that sets out his decision on the scope of easement issue includes no discussion of the evidence

presented by the parties and certainly gives no indication that Judge Johnson correctly applied the "mere scintilla" standard. Earlier in the Order, there is a section entitled "Facts in Controversy," which by that very description indicates an awareness by Judge Johnson that the facts are not undisputed but are indeed "in controversy." (R. 17). That characterization in itself weighs against the granting of summary judgment under a "mere scintilla" standard.[2]

More importantly, Judge Johnson failed to recognize that the record does include at least a "mere scintilla" of evidence that should have resulted in the denial of the Espinos' motion for summary judgment on the scope of easement issue. The evidence in the record reflects that in April 1988, an express easement was granted to the Town of Lexington by Coventry Associates, Inc. (a predecessor in interest to the Espinos). The easement was described as follows:

> 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. 233).

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[2] Judge Johnson did not simply rely on the evidence presented, but he considered even what the Espinos' counsel described as "anticipated" testimony. Judge Johnson wrote: "The Defendants anticipate testimony of the Town Attorney that at no time was he asked to opine as to the legal authority granted to the Town on the easement in question, and what authority, if any, the developer would have derived therefrom." (R. 17).

The easement specifically makes reference to the "as-built plans" for "a more complete and accurate description of said easements." (R. 233). The "as-built plans," which are needed for a "complete and accurate description" of the easement, however, were apparently never submitted to nor considered by Judge Johnson when he ruled on the scope of the easement. It is well settled that "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Simmons v. Berkeley Electric Cooperative, Inc.*, 404 S.C. 172, 744 S.E.2d 580, 584 (Ct. App. 2013). In the hearing before Judge Keesley, the Espinos' counsel confirmed that the "as-built plans" were never presented to Judge Johnson, but he then proceeds to make the curious statement that "the as-built plans have nothing to do with the language relating to the easements." (R. 313-314). He is clearly mistaken. The as-built plans are a significant and integral part of the description of the easement. To reiterate, the written language cites to the as-built plans "for a more complete and accurate description of said easements." (R. 233). Those as-built plans were contemplated by the parties to the easement as being critical to any understanding of the scope of the easement. Yet, those as-built plans are not in the record. The Town submits that summary judgment is not appropriate where further inquiry into the facts is needed. That is especially true where the court was called upon to determine the scope of an easement that makes specific reference to as-built plans to provide "for a more complete and accurate description of said

easements," and yet, the moving party – the Espinos – who have the initial burden of production failed to produce the as-built plans for the court's consideration.[3]

The importance of the "as-built plans" to a complete understanding of an easement is reflected in the case of *Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). In *Binkley*, the Court of Appeals addressed the scope of a water flowage easement. The Court found that the language in the written easement instrument was clear and unambiguous but nonetheless questioned whether "that language extend[s] the easement to the top of the dam as Rabon Creek claims." 558 S.E.2d at 907. The easement instrument made express reference to a "Sketch Map" which "by reference [is] incorporated in and made a part of this instrument." *Id.* The Court of Appeals then relied on that "Sketch Map" in determining the scope or extent of the easement. Citing information depicted in the "Sketch Map," the Court concluded that "under the unambiguous language of the flowage easement, Rabon Creek has the right to flood

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[3] Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact Here, the Espinos were moving for summary judgment and requested declaratory relief from the court including a determination of the scope of the easement. The Espinos therefore had the burden under Rule 56(c) to present the court with the easement so that the court could make the determination sought. The Espinos presented the Court with the written easement instrument but failed to produce the as-built plans which are specifically referenced in that written instrument and provide "a more complete and accurate description of said easements." (R. 233). The Espinos thus failed to meet their initial burden under Rule 56(c), and as a result, summary judgment was erroneously granted. *See*, *Baughman v American Tel and Tel Co*, 306 S.C. 101, 410 S.E.2d 537 (1991).

land surrounding the lake up to the 724.5 foot contour line, i.e., the top of the dam." *Id.*

Thus, in *Binkley*, the scope or extent of the flowage easement could not be determined on the written language of the easement alone; the Court needed to consider the information depicted on the "Sketch Map" to fully determine the scope of the easement. It was critical to review the "Sketch Map" because the parties had made specific reference to it in the written instrument, and without that information, the Court could not have determined the extent of the easement. The same is true in the present case. A complete and proper adjudication as to the scope or extent of the easement cannot be made on the written instrument alone, not when the easement instrument makes specific reference to the as-built plans as providing "a more complete and accurate description of said easements." (R. 233). Summary judgment should therefore be reversed and vacated to allow for the court to consider the as-built plans and the information contained therein.

It is well settled that "[t]he general rule is that the character of an express easement is determined by the nature of the right and intention of the parties creating it." *Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Public Service District*, 355 S.C. 529, 586 S.E.2d 146, 148 (Ct. App. 2003). "To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the clear and unambiguous language in grants of easements must be construed according to

terms which parties have used, taken, and understood in their plain, ordinary, and popular sense." *Id.* In addition, courts are required to "effectuate the parties' intention unless that intention contravenes some well-settled rule of law or public policy." *Id.* "The intent of the parties ... must be determined by a fair interpretation of the grant or reserve creating the easement." *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803, 806 (1965). "If the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court." *Smith v. Commissioners of Public Works of City of Charleston*, 312 S.C. 460, 441 S.E.2d 331, 335 (Ct. App. 1994).

Judge Johnson, however, did not cite to nor follow these rules of construction. He did not consider nor address the intentions of the parties when the easement instrument was executed in 1988. He did not consider the impact of the as-built plans which by reference are a critical part of the grant creating the easement. Moreover, he made no express determination as to whether the easement instrument was clear and unambiguous, particularly in light of the as-built plans, or whether the parties' intent needed to be determined based upon extrinsic evidence. In fact, the analysis in which Judge Johnson did engage cannot be reasonably gleaned from his Order.

The Espinos seem to focus on the meaning of the term "maintenance" within the easement instrument. They argue that expanding the sewage flow through the

pipe across their property is not the "maintenance" of the line. The restrictive meaning that the Espinos give to the term "maintenance," if true, shows that the easement instrument is, at the very least, ambiguous. The obvious purpose and intent of the easement was to grant the Town the right to operate the sewer system and to have its sewer pipes in the ground traversing the Espinos' and other residents' properties. A construction that restricts the rights to "maintenance" alone, using the plain and ordinary meaning of that term, would not allow the Town to *operate* the sewer system. Judge Johnson obviously recognized some ambiguity existed because he ruled that "the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision." (R. 15). Judge Johnson did not limit the easement to "maintenance," and thus he broadened its purpose beyond the "maintenance" of the water and sewer lines as stated in the written instrument. Yet, without then considering the "as-built plans" specifically referenced in the easement instrument, or the plats that were in the record or any other extrinsic evidence as may be available, he then limited the scope of the easement and did not allow for the use of the easement to carry sewage generated beyond the boundaries of Coventry Lake Subdivision. There is no basis for that limitation on the scope of the easement. It is an interpretation that is subject to reasonable debate and a difference of opinion, and for that reason, Judge Johnson's ruling that the easement does not allow the sewer line crossing the Espinos' property to carry sewage generated beyond the boundaries of Coventry Lake Subdivision

should not be a ruling made on a summary judgment motion. That ruling clearly is based on disputed facts and disputed inferences to be drawn from the facts.

The evidence in the record reflects, as argued by McGuinn's counsel at the summary judgment hearing, that the sewer line across the Espinos' property is a spur line. (R. 248-249). It serves no function for the removal of sewage from the Espinos' home or from any other residence in the Coventry Lake Subdivision. Until Gates Commons was developed, that spur line served no purpose. It did not hold or transport any sewage. Frankly, Judge Johnson did not need the as-built plans to reach that conclusion; the plats in evidence depict the position of the easement on the Espinos property and show that the easement runs from the rear of the Espinos property, which is the outer boundary of the Coventry Lake Subdivision to the street in front of the Espinos' home. (R. 212-213). There is no evidence that this particular sewer line served any purpose, with the exception of future expansion of the system to provide service for the parcel of undeveloped property located behind the Espinos' property. That information makes it obvious that the spur line across the Espinos' property was installed and the easement granted to allow for future expansion and a tie-in to the existing system when the adjoining property was developed, which subsequently occurred with the construction of Gates Commons. If that information does not make the intent of the easement obvious with respect to the spur line across the Espinos' property, at the very least, it constitutes a "mere scintilla" of evidence that should have precluded summary judgment in the Espinos' favor.

A fair consideration of the grant of easement, particularly when the written instrument is considered together with the as-built plans or at least the plats showing the location of the easement on the Espinos' property, warrants a conclusion that the scope of that easement included a tie-in to the existing system after the adjoining property behind the Espinos' home was developed. At a minimum, the evidence in the record – as well as the as-built plans which should have been considered by the lower court – constitute a "mere scintilla" of evidence that precludes summary judgment thereby requiring a remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Town of Lexington respectfully requests that this Court reverse the Order of late Circuit Court Judge James W. Johnson, Jr., filed June 16, 2008, and the Order of Circuit Court Judge William P. Keesley, filed June 9, 2014, and remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue. Alternatively, the Appellant Town of Lexington requests that the Court remand with direction that the declaratory judgment entered by Judge Johnson in Civil Action Number 2005-CP-32-2712 shall have no preclusive effect on the Town in Civil Action Number 2008-CP-32-419, leaving the scope of easement issue to be litigated *de novo* in that action.

Respectfully submitted,

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April 20, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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

Case No. 2005-CP-32-2712
Case No. 2008-CP-32-4192

McGuinn Construction Management, Inc., ... Appellant,
v.
Saul Espino and Mara Espino, ... Respondents.

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

Of whom
Town of Lexington, ... Appellant.

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II. Have either appellant presented a genuine issue of material fact that would preclude summary judgment in this case where the express language of the easement is limited to "maintenance" of the existing sewer line?

III. Is McGuinn's argument about the grant of the Espinos' motion for summary judgment as to McGuinn's claims for slander of title and tortious interference with contract properly before this Court?

IV. On the merits, should this Court affirm the dismissal of McGuinn's claims for slander of title and tortious interference with contract?

COUNTER-STATEMENT OF THE CASE

The procedural history of this case is long and complex. The following derives from Judge Keesley's order denying the motion for reconsideration.

McGuinn Construction Mgmt, Inc. (McGuinn) filed an action against the Espinos in August 2005. (Case No. 05-CP-32-2712). The Complaint sought declaratory relief and claimed damages for slander of title and interference with "perspective contractual rights." (R. p. 42).

The Espinos answered and counterclaimed. They also brought a third-party case against the Town of Lexington. The Town moved to dismiss and Judge James Johnson granted the motion by final order filed October 31, 2007. The Espinos sought reconsideration but Judge Johnson denied the motion on December 20, 2007. Accordingly, the Town was not a party to the action at that time.

The parties attempted to mediate the case but were not successful. The Espinos moved for summary judgment on April 3, 2008. On April 14, 2008, Judge Johnson entered an order dismissing the Expinos' Fifth Counterclaim. The parties attempted a second mediation but it also failed. On May 21, 2008, McGuinn moved for summary judgment on the Espinos' Second, Third, Fourth, Sixth and Ninth Counterclaims.

On June 13, 2008, Judge Knox McMahon designated the case as complex and assigned it to Judge Johnson. On June 16, 2008, Judge Johnson entered an order granting the Espinos' motion for summary judgment and granting McGuinn's motion to dismiss the Fifth Counterclaim (even though the prior order had already dismissed that counterclaim). Judge Johnson ruled:

(1) the Espinos were entitled to summary judgment and that 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.

On June 26, 2008, McGuinn moved once again for summary judgment as to the Fifth Counterclaim.

On July 10, 2008, McGuinn filed a motion for reconsideration and to alter or amend Judge Johnson's order of June 16.

On July 13, 2008, Judge Johnson died from a sudden illness.

On October 10, 2008, the Espinos filed a lawsuit against Gates Common, LLC, S. Wade McGuinn, individually, and the Town. (Case No. 08-CP-32-04192).

On June 10, 2009, Judge McMahon filed an order in the second case denying motions for summary judgment filed by Wade McGuinn and Gates Common, granting the Town's motion to strike the claim for punitive damages, granting the Town's motion to make more definite and certain, and granting the Town's motion to strike the claim for attorney fees.

On June 25, 2009, the cases were designated as complex and assigned to Judge

McMahon, pursuant to Rule 63, SCRCP (Disability of a Judge) and an administrative order issued by Chief Justice Toal regarding Chief Judges for Administrative Purposes.

On November 25, 2009, Judge McMahon filed an order incorporating the conclusions of fact and law from Judge Johnson's order. Judge Keesley determined this order found no *de novo* hearing was required, Judge McMahon was certifying familiarity with the record, and a hearing would be held only upon the pending motion for reconsideration.

On December 22, 2009, the Espinos moved to reconsider a prior ruling denying their motion to dismiss the motion for reconsideration for failure to comply with Rule 59(g), SCRCP. On December 22, 2009, Judge McMahon held a hearing on McGuinn's motion for reconsideration of Judge Johnson's order.

On January 11, 2010, Judge McMahon denied the Espinos' motion. Judge McMahon noted several status conferences were held prior to the December 22, 2009, hearing and the spirit of Rule 59(g) had been met. Judge Keesley agreed.

Although Judge McMahon heard arguments on the motion for reconsideration, before he entered a written order, Judge McMahon recused himself on February 11, 2011. The matter was then sent to Judge Keesley as Chief Judge for Administrative Purposes.

On September 6, 2011, an order was entered designating Judge Keesley as the successor judge pursuant to Rule 63 and the Chief Justice's administrative order.

Although the only matter pending at the time was McGuinn's Rule 59 motion, the parties indicated a desire to consolidate that case (Case No. 05-CP-32-2712) with the other case (Case No. 08-CP-32-04192). On September 8, 2011, the Town filed a motion

to consolidate.

On September 28, 2011, 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.

On March 27, 2012, Judge Keesley filed an order consolidating the two cases. On April 5, 2012, the Espinos moved to reconsider the consolidation order. On August 20, 2012, the court denied the motion.

On September 24, 2013, the Espinos once again sought dismissal of the Rule 59 motion and, once again, Judge Keesley denied the motion. On October 7, 2013, Judge Keesley held a hearing on the Rule 59 motion.

On June 9, 2014, Judge Keesley entered an order denying the Rule 59 motion. Judge Keesley ruled:

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

(2) Judge Keesley certified familiarity 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) Judge Keesley outlined the various arguments made by all parties before

him (R. pp. 9-13);

(6) There is no basis for altering or amending Judge Johnson's rulings.

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

(8) Judge Keesley did not determine whether Judge Johnson's order was binding upon those who were not parties when Judge Johnson made his ruling.

Judge Keesley therefore 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 its notice of appeal from Judge Keesley's order.

On July 15, 2014, the Town filed and served its notice of appeal from both Judge Keesley's order and from Judge Johnson's order.

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...." 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, Inc.

In 1992, Mr. and Mrs. Espino purchased property located at 108 Coventry Court in Lexington, South Carolina from the Mungo Company. (R. p. 140 p. 7, l. 7 - p. 8, l. 14). McGuinn was the developer of Gates Common Subdivision that backed up to the Espinos' property.

For years the Gates Common property was unimproved. McGuinn ultimately applied for and received rezoning 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 their 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 lawsuits followed as set forth in the Statement of the Case above.

ARGUMENTS

McGuinn asserts two things: (1) that the court should not have granted summary judgment regarding the scope of the easement because of the existence of material facts (McGuinn App. Br. pp. 8-15); and (2) that the circuit court should not have granted the Espinos' motion for summary judgment as to McGuinn's claims for slander of title and tortious interference with contract. (McGuinn App. Br. p. 15).

The Town contends the circuit court should have overturned its prior grant of summary judgment as to the scope of the easement and permitted the Town to be heard. (Town App. Br. pp. 6-18).

This Court should not be persuaded by the arguments of either appellant but, rather, should affirm the circuit court's rulings. The Court should also conclude that the Town lacks appropriate standing to appeal because it is not an aggrieved party with respect to the orders being appealed.

SCOPE OF REVIEW

At the hearing, McGuinn's lawyer described the proceeding as involving "competing motions for summary judgment in this matter." (Supp. R. p. 2, ll. 7-17) Under the posture of cross-motions for summary judgment, the parties agreed that the case was before the court for its decision as a matter of law. *See, e.g., Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011) (where cross motions for summary judgment are filed, the parties concede the issue before the appellate court should be decided as a matter of law); *Alltel Communications v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n. 2,

731 S.E.2d 869, 872 n. 2 (2012) ("[T]he parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary.")(citing *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir.1981) ("[C]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties.")).

Even so, this case truly involves construction of the language of the grant in an easement. Although both appellants bottom their appeals on the claims that there are factual disputes, they overlook one important aspect of this rule: that the facts in dispute must be *material* facts. *See, e.g., Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) (when plain, palpable and undisputed facts exist on which reasonable minds cannot differ, summary judgment should be granted). Because the grant of the easement here is so specific and limited, there are simply no facts that either appellant may produce that will make a difference in the final outcome.

Lastly, the appeal involves a determination of the scope of the easement. That determination is a mater of equity. *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006).

I. THE TOWN'S APPEAL SHOULD BE DISMISSED

The Town has separately appealed, contending the trial court should not have granted the Espinos' motion for summary judgment. The Court should dismiss the Town's appeal.

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 is no challenge to this ruling. 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 be heard on appeal. *See* 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).

This Court should therefore dismiss the separate appeal the Town filed in this case.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR THE ESPINOS

Both the Town and McGuinn argue that because there are issues of fact, summary judgment was not appropriate. The Court should affirm Judge Johnson's initial order and Judge Keesley's order denying reconsideration.

The Easement in this Case 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 by prior use. *Rhett*; *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." *Rhett*; *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App.2001). *See, e.g.*, *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003) (if a contract's language is clear and unambiguous, the language alone determines the contract's force and effect; a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense)(citing *C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988). As the Supreme 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).

South Carolina Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (applying these rules in construction of 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*, 211 Va. 539, 178 S.E.2d 495 (1971).

Here, the easement expressly provided:

> 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 regardless of the facts depends on the construction of the phrase "necessary for the maintenance of the aforesaid water and sewer lines." Under the law, they cannot prevail.

The words "maintain" and "maintenance" are not defined in the document. Black's Law Dictionary provides the following definition for "maintain": "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.* Neither of these definitions contemplate improvement, expansion, or any other kind of addition to the thing or property. Instead, the definitions expressly limit themselves to maintaining the existing condition of the property.

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 Development Corp., 16 A.3d 399 (N.J. Super. 2011). Other courts are in agreement. *See, e.g., Stanford v. State Dept. of Highways and Public Transp.*, 635 S.W.2d 581 (Tx. Ct. App. 1982) (noting that 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 the term "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, LLC v. Loring Realty Advisors. VII, LLC*, 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.").

As 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 Services L.L.C.*, 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 Authority 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 less, but certainly no more.

The rights of one claiming an easement by express grant are limited within the scope of the privilege. *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950). The extent of the servitude is determined by the terms of the grant. *Id.* See also *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (2001) (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, LLC v. Point Development, LLC*, 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), cited in *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (2012). Although to the extent of the easement the rights of the easement owner are paramount to those of the landowner, the easement owner's rights are *not* absolute but are limited, so the owners of the easement and the servient tenement may have reasonable enjoyment. *Clemson Univ.*; *Rhett*. The owner of an easement has all rights incident or

necessary to its proper enjoyment, but nothing more. *Clemson Univ.*; *Rhett.*

An easement burdens the rights of the owner of real property and thus 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. *See, e.g., Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980) (restrictions as to the 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 here 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.

The Court should affirm the trial court's ruling that the Town's rights under the unambiguous language of the easement are limited to "maintenance," and as such McGuinn does not have the right to trespass onto the Espino's property, damage the land, change the landscape, or otherwise expand the scope of the existing easement.

III. MCGUINN'S ARGUMENT REGARDING THE GRANT OF SUMMARY JUDGMENT FOR THE ESPINOS ON MCGUINN'S CLAIMS FOR SLANDER OF TITLE AND TORTIOUS INTERFERENCE WITH CONTRACT

McGuinn argues the circuit court erred in granting the Espinos' motion for summary judgment as to McGuinn's causes of action for slander of title or tortious interference with contract. (McGuinn App. Br. P. 15). This Court should affirm.

First, the Court should deem this argument abandoned. It is conclusory, and is contained in one paragraph with no citation to authority. As this Court and the Supreme Court have stated repeatedly, a conclusory argument may be deemed to be abandoned.

See, e.g., 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, this argument depends upon McGuinn's argument that there are "material" issues of fact regarding the scope of the easement held by the Town. However, as discussed above, the easement the Town holds is expressly limited in scope to "maintenance" of the existing line. McGuinn has 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 can McGuinn do so. In fact, McGuinn admits 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, and neither have presented any evidence that they negotiated for those expanded rights with the Espinos. Instead, McGuinn simply took steps it did without regard to the existing rights of the Espinos as property owners.

Last, there is no issue of material fact regarding whether McGuinn could ever establish either cause of action. To maintain an action for slander of title in South Carolina, McGuinn must establish: (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a

result of diminished value of the property in the eyes of third parties. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). The tort may only be maintained by one who possesses an estate or interest in the affected property. *Id.* It is grounded in the tort of injurious falsehood. *Id.*

In the complaint it filed in 2005, McGuinn asserted that 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 in jumbled fashion 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 improper 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 punitve.

(R. pp. 41-42, ¶¶ 13-16). 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 simple, conclusory statements alleging slander of title in name only.

Further, there is no evidence (nor could there be) that McGuinn owns any portion or interest in the Espinos' property. Even so, 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.

The same is true regarding McGuinn's claims for tortious interference with contract. In its brief, McGuinn draws no distinction between whether it was claiming interference with existing contracts or prospective contracts. The complaint limited itself to "perspective" contracts, but the brief makes no distinction. Regardless, either claim fails 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 School 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 has not pled nor proffered a scintilla of evidence that the Espinos knew of the existence of a contract McGuinn had with a third party and intentionally procured that third party's breach of its contract with McGuinn. This tort claim would fail 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. *Eldeco, Inc. v. Charleston County School Dist.*, citing *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). McGuinn has not pled nor proffered 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 this Court does not deem these arguments abandoned because of the conclusory manner in which the claims were pled and the arguments are presented in the brief, the Court should affirm 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 this Court should affirm that ruling.

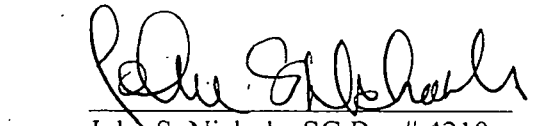
CONCLUSION

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 limits itself to "maintenance" of the existing line. It is plain, and it is unambiguous.

The Town's appeal should be dismissed because it 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. Next, McGuinn's argument regarding the dismissal of its other claims is conclusory and should be deemed abandoned. Furthermore, because the easement upon which McGuinn claims its rights does not support those rights, the dismissal of those other claims was proper.

Accordingly, the Court should affirm the orders in their entirety.

Respectfully Submitted,



June 3, 2015

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Presiding Judge

Appellate Case No. 2014-001519

McGuinn Construction Management, Inc.,.....Appellant,

v.

Saul Espino and Mara Espino,.....Respondents,

and

Saul Espino and Mara Espino,.....Respondents,

v.

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

Of whom Town of Lexington is.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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CASES

STANDARD OF REVIEW

The Respondent argues that in this case the parties "agreed" that this matter was solely to be decided by the Court "as a question of law" because the case came before the Court pursuant to cross motions for summary judgment. This position appears to assert the position that anytime both parties to an action file cross motions for summary judgment they stipulate that the case is one that may be decided at that time, as a matter of law, without any further discovery. This assertion is incorrect and should not be adopted by the Court.

Both of the cases cited by the Respondents are distinguishable from the case before the Court. *Alltel Communications, Inc. v. South Carolina Department of Revenue,* 399 S.C. 313, 731 S.E.2d 869 (2012), involved a case of statutory construction in which the parties to the action filed over "63 joint stipulations" as to the facts, making the sole issue before the Court one of statutory interpretation, and making "...a remand to the ALC (lower court) for further factual development futile." The Court held that the joint filing of summary judgment in that case, "...authorize(d) the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties."

Wiegand v. United States Automobile Association, 391 S.C. 159, 705 S.E.2d 432 (2011), involved a question of whether or not the defendant insurer had made a "meaningful offer" of insurance to plaintiff under a policy of insurance. In *Wiegard,* there is no indication that either party argued that there was any evidence to be developed other than what was already in the record. Citing the fact that interpretation of the

contract was a question of law, the Supreme Court construed the policy prior to remanding the case.

Both of these cases are distinguishable from this case. In this case there are numerous facts to be developed. The Appellants have not stipulated that in the event their motion for summary judgment was denied, the case could or should be decided as a matter of law by the Court without any further evidentiary development.

In addition, the Respondent asserts in the "Standard of Review" that the facts in dispute in this case are not "material facts" "because the grant of the easement is so specific and limited, there are simply no facts that either appellant may produce that will make a difference in the final outcome." (Brief of Respondent). As set forth in its brief (as well as below) the undersigned submits that the facts in dispute are certainly material facts, precluding summary judgment in this case.

ARGUMENT

I. THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGEMENT AS TO APPELLANT'S DECLARATORY JUDGMENT CAUSE OF ACTION.

In *Hancock v. Mid-South Carolina Management Company, Inc.,* 381 S.C. 326, 673 S.E.2d 801 (2009), the South Carolina Court held that in cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a "mere scintilla" of evidence in order to withstand a motion for summary judgment. Judge Johnson did not have the benefit of this decision and therefore does not refer to it in his decision granting summary judgment to Respondents. (R. p. 15). This authority is also ignored in Respondents' brief. As set forth in the Appellant's brief, Judge Johnson's Order cited numerous "Facts in Controversy," any of which should have

precluded a grant of summary judgment utilizing the correct "scintilla of evidence" standard. In addition, Judge Johnson's Order fails to take into consideration the "as built" plans which were specifically referred to in the grant of the easement from the Town of Lexington to Coventry Associates, Inc. (R. p. 15). Consideration of the "as built" plans was necessary to the development of the facts of this case and summary judgment was not warranted. See, *Simmons v. Berkley Electric Cooperative,* 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013).

Further, as ably argued in the Brief of the Appellant Town of Lexington, Judge Johnson's Order fails to take the intention of the parties into consideration. *Lighthouse Tennis Club Village Horizontal Property Regime, LXVI v. South Island Public Service District,* 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003). Thus granting of summary judgment was inappropriate and improper in this case.

Further, the Trial Court overlooked substantial evidence in the record when he granted summary judgment to the Respondents. As set forth more fully in the Appellant's Brief, the Trial Judge's Order specifically noted and cited substantial evidentiary conflicts in this case. Yet, Judge Johnson and later Judge Keesley ignored this conflicting evidence and erroneously granted summary judgment to the Respondents.

Summary judgment was also inappropriate in this case as further investigation into the facts by the Court is necessary. Specifically, the Trial Court failed to take into consideration the "as built" plans which are specifically mentioned in the easement deed from Coventry Associates, Inc. (a predecessor in interest to the Espinos) to the Town of Lexington. (R. p. 15). Despite the fact that the easement specifically referred to the "as built plans," for a "more complete and accurate description of said easements," the Trial

Court's Order failed to address and/or consider these plans (there is no evidence that these plans were ever presented to Judge Johnson).

Respondents spend much of their brief focusing on the meaning of "maintenance" in the easement document. They argue that expanding the sewer flow through the pipe across the property is not "maintenance" of the line. The very restrictive meaning that they give to the term "maintenance," if true, shows the ambiguity in the easement. The obvious purpose and intent of the easement was to grant the Town of Lexington the right to operate the sewer system and to have its sewer pipes in the ground traversing Respondents' (and others) property. The strict construction of the term "maintenance" as set forth by the Respondents' brief would not allow the Town to even operate the sewer system. Judge Johnson recognized some ambiguity when he ruled that, "the easement in question is limited in scope to the maintenance, repair, and improvement of the sewer, water, and drainage systems in the Coventry Lake Subdivision." (R. p. 15). Judge Johnson did not limit the easement to "maintenance" and thus he broadened its purpose beyond the "maintenance" of the water and sewer lines as stated in the written instrument. Yet, without considering the "as built plans" specifically referenced in the easement instrument, the plats which were in the record, or any other extrinsic evidence, he then limited the scope of the easement and did not allow for the use of the easement to carry sewage beyond the boundaries of Coventry Lake Subdivision. There is no basis for that limitation as to the scope of the easement. It is an interpretation that is open to debate and for that reason Judge Johnson's ruling construing the easement in such a fashion that it does not allow the sewer line crossing Respondent's property to carry sewage generated beyond the boundaries of Coventry Lake Subdivision should not be a

ruling made on a summary judgment motion. This ruling is clearly based on disputed facts and disputed inferences to be drawn from those facts.

The evidence in the record is that the sewer line across Respondent's property is a spur line for the removal of sewage from the Coventry Lakes subdivision. Until Gates Common subdivision was built, the spur line served no purpose. It did not hold or transport any sewage. The only evidence in the record is that this line was intended to serve the expansion of the sewer system to serve the property located behind Respondents' property. The evidence in this case makes it obvious that the spur line across the Respondents' property was installed and the easement granted to allow for future expansion and a tie in to the existing system when the property adjoining Respondents' was developed, which eventually happened when Gates Common was developed. If that information does not make the intent of the easement obvious with respect to the spur line across the Respondents' property, at the very least it constitutes a "mere scintilla" of disputed evidence that should have precluded summary judgment in the Respondents' favor.

II. THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AS TO SLANDER OF TITLE AND TORTIOUS INTERFERENCE WITH CONTRACT.

The Respondents' argument that Appellant abandoned its argument regarding the Trial Court's error in granting summary judgment as to the slander of title and tortuous interference with contract is based on an incorrect reading of the language contained in Appellant's brief and lacks merit. As argued by the Appellant in his brief, Judge Johnson based his decision to grant summary judgment as to the claims solely on the grounds that, "...the Court has determined that the Plaintiff [Appellant] did not have the authority to

occupy the Espinos' [Respondents'] property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision." (R. p. 15). As argued by the Appellant throughout its brief, this finding is clearly erroneous and should not and cannot be used as the sole basis to grant summary judgment as to the Appellant's slander of title and tortuous interference with contract causes of action. There was no need for the Appellant to reassert each and every argument presented earlier in its brief that the sole grounds the trial court relied on in granting summary judgment as to these causes of action was fatally flawed. Therefore the Appellant did not abandon these arguments in its brief. Once this Court reverses Judge Johnson's determination that Appellant did not have the authority to occupy the Espinos' (Respondents') property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision, there is nothing to support the grounds for summary judgment as to these causes of action and they should be remanded for further development and consideration by the lower court.

CONCLUSION

Viewing the evidence presented in the light most favorable to Appellant, the non-moving party, the plat and deed clearly indicate the easements at issue in this case were intended to service the Appellant's property and were intended for an expansion of the Town's sewer system. Thus, there is a genuine issue of material fact as to the nature and scope of the easements and whether or not the Appellant has the right to tie into/use/improve them, and it was an abuse of discretion and an error of law for the court to find otherwise.

Respectfully submitted,

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April 7, 2015

West Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge
James W. Johnson, Jr., Circuit Court Judge

Case No. 2005-CP-32-2712

McGuinn Construction Management, Inc., ... Appellant,

v.

Saul Espino and Mara Espino, ... Respondents.

Case No. 2008-CP-32-419

Saul Espino and Mara Espino, ... Respondents,

v.

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

Of whom, Town of Lexington, is ..... Appellant.

REPLY BRIEF OF APPELLANT TOWN OF LEXINGTON

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ARGUMENTS

I. The Town of Lexington qualifies as an aggrieved party with respect to the two orders on appeal.

As an initial argument, the Respondents Saul Espino and Mara Espino take the position that the appeal filed by the Appellant Town of Lexington should be dismissed because the Town is not an "aggrieved party" and therefore lacks standing to appeal. The Town respectfully disagrees.

Rule 201(b), SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." *See*, Rule 201(b), SCACR. This Court has explained that "[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Shaw v. City of Charleston,* 351 S.C. 32, 567 S.E.2d 530, 532 (Ct. App. 2002). "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." *Id.* Moreover, "[a] party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests." *Id.* This Court has further explained that "[t]here is no material distinction in general standing principles juxtaposed to the ability of an 'aggrieved party' to appeal pursuant to Rule 201(b) of the South Carolina Appellate Court Rules." *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237,

242 (Ct. App. 2008). *See also, Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

There are two orders on appeal. The most recent order issued by Circuit Judge William P. Keesley filed June 9, 2014, denied the motion for reconsideration, and in doing so, rejected the Town's position that the prior declaratory ruling regarding the scope of the easement should be vacated and the Town be given the opportunity to be heard on the issue, including the opportunity to present evidence regarding the intention of the parties as to the scope of the easement. Judge Keesley had previously issued an Order of Consolidation which "enable[d] the Town of Lexington to address Judge Johnson's Order and participate in the currently pending Motion for Reconsideration and, if necessary, any appellate review that may result from that ruling." (R. 30). The Town has been clearly aggrieved by Judge Keesley's rejection of the relief sought by the Town. As its first issue on appeal, the Town asserts as follows: "Did the Circuit Court err in allowing the summary judgment ruling on the scope of the easement at issue to stand and in failing to remand for a trial in equity on the issue which would allow the Town of Lexington, as an interested party, the opportunity to be heard?" That issue is properly asserted, and the Town has standing to pursue relief on appeal with respect to that issue.

The second order on appeal includes the declaratory judgment awarded by late Circuit Court Judge James W. Johnson, Jr. thereby establishing the scope of an

express easement granted to the Town of Lexington by Coventry Associates, Inc. (a predecessor in interest to the Espinos). The Town believes that it is an aggrieved party as to that order for two reasons.

First, the Town submits that it is an interested party (and likely a necessary party) for any adjudication regarding the scope of the easement in accordance with the decision of the South Carolina Supreme Court in *Spanish Wells Property Owners Association v. Board of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988). The Town holds that easement and therefore a judicial determination interpreting the easement instrument and establishing the scope of the easement clearly affects the property rights of the Town. Consequently, based on the prevailing case law defining an "aggrieved party," as discussed above, the Town meets that definition.

Second, the Town explained in the court below that it was not a party to the 2005 action at the time that Judge Johnson issued his declaratory ruling defining the scope of the easement. The Town therefore argued to Judge Keesley at the reconsideration stage that, as a non-party to the 2005 action, the Town cannot be bound by the declaratory ruling issued by Judge Johnson. The Town sought a ruling that the declaratory judgment entered in the 2005 action shall have no preclusive effect on the Town in the 2008 action, leaving the scope of easement issue to be litigated *de novo* in that action. Judge Keesley, however, declined to state whether the Town will be bound by Judge Johnson's ruling. Judge Keesley writes:

"However, the court is not determining ... whether the June 16, 2008 order is binding upon those who were not parties when Judge Johnson made his ruling." (R. 14). Without that determination, the potential remains for the Town to be held bound to the decision made by Judge Johnson without any opportunity to be heard on that issue. The Town cannot predict what will be the ultimate result after remand. The Espinos appear to take the position that the Town should be bound by the ruling by Judge Johnson, and in fact, Judge Johnson's order is attached as an as an exhibit to the Espinos' complaint in the 2008 action and the rulings are incorporated by reference. (R. 73).

In short, the Espinos cannot have it both ways. They cannot argue that the Town is not an aggrieved party that cannot participate in this appeal and also argue that the Town is bound by Judge Johnson's declaratory judgment as to the scope of the easement. If the Town is not permitted to join McGuinn Construction in arguing that summary judgment was incorrectly granted, then the Town is entitled to a remand with direction that the declaratory judgment entered by Judge Johnson in the 2005 action shall have no preclusive effect on the Town in the 2008 action, leaving the scope of easement issue to be litigated *de novo* in that action.

The Town further notes that the Espinos have failed to address the merits of its first issue on appeal. The Espinos have not disputed the Town's assertion that it was an interested or even necessary party to the determination regarding the scope of the easement. Moreover, the Espinos take no position in their brief on whether

the proper course of action for Judge Keesley to have taken was to vacate the declaratory ruling by Judge Johnson and allow for a full adjudication of the issue with all interested parties joined and having the opportunity to be heard. As the Town argues, that would allow for all interested and affected parties to be bound by the ultimate decision.

II. The Circuit Court erred in granting summary judgment to the Espinos and determining that the easement was limited in scope to the maintenance, repair, and improvement of the sewer, water and drainage systems in Coventry Lake Subdivision, where issues of fact in dispute should have precluded summary judgment.

As an initial matter, the Espinos' discussion of the standard of review is in error. The Espinos correctly point out that Judge Johnson heard cross motions for summary judgment. Because there were cross motions pending, the Espinos take the position that the parties conceded that there were no material issues of fact in dispute and that the court could make a ruling as a matter of law. The Espinos rely on two cases which are inapposite. Cross motions for summary judgment are often filed to determine an issue of law. The parties have either stipulated to the required facts, the material facts are not in dispute, or the issue is purely a question of law such as the construction of a statute. For instance, in *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), as cited by the Espinos, the Supreme Court found that the parties had stipulated to the facts and

in doing so conceded that "further development of the facts was unnecessary." 731 S.E.2d at 872, n.2. The Supreme Court concluded that "the summary judgment inquiry was purely one of law." *Id.* Further, in that case, the Supreme Court was called upon to decide an issue of statutory construction which is a question of law appropriate for consideration on cross motions for summary judgment.

The present case is different. There were multiple causes of actions of action filed by both sides. Each party moved for summary judgment on numerous grounds. The standard under Rule 56, SCRCP, as well as prevailing authority, hold that the court was required to consider the facts in a light most favorable to the non-moving party. Thus, for the Espinos' motion, the court views the facts in a light most favorable to McGuinn Construction, and for McGuinn Construction's motion, the court views the facts in a light most favorable to the Espinos. The Supreme Court has clearly explained that to be the proper procedure for cross motions for summary judgment:

> The circuit court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *"[I]n considering cross motions, the court should draw all inferences against each movant in turn."* On appeal from an order granting summary judgment, the appellate court

> will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.

RWE Nukem Corp. v. ENSR Corp., 373 S.C. 190, 644 S.E.2d 730, 733 (2007). (Citations omitted) (Emphasis added). The highlighted language shows that cross motions are handled no differently. The same standard of review applies in such circumstances. This Court is in accord. *See, Bostic v. American Home Mortgage Servicing, Inc.*, 375 S.C. 143, 650 S.E.2d 479, 481 (2007), *citing RWE Nukem Corp., supra*. The Supreme Court, in fact, recently reversed summary judgment in a case where cross motions had been filed by the parties on the very basis that a genuine issue of material fact precluded summary judgment on an equitable estoppel claim. *See, Springob v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384, 388 (2014) ("[t]his is sufficient to create an issue of material fact as to whether Appellants suffered a definite, substantial, and detrimental change in reliance on these purported oral representations"). The fact that cross motions were filed did not preclude the Supreme Court from considering the evidence in the light most favorable to the non-moving party.

The same is true in the present case. The mere filing of cross motions does not change the standard of review. This Court should not view the filing of cross motions as a concession that there are no issues of fact in dispute. The Court should assess the facts "against each movant in turn" just as this Court and the Supreme Court have done in the past.

Moreover, it is well settled that "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Simmons v. Berkeley Electric Cooperative, Inc.*, 404 S.C. 172, 744 S.E.2d 580, 584 (Ct. App. 2013). The record on appeal clearly shows that Judge Johnson was not provided sufficient factual information to determine the scope of the easement. The easement instrument specifically makes reference to the "as-built plans" for "a more complete and accurate description of said easements." (R. 233). The "as-built plans," which are needed for a "complete and accurate description" of the easement, however, were never submitted to nor considered by Judge Johnson when he ruled on the scope of the easement. While this very point was made in the Town's opening brief, it was entirely disregarded by the Espinos. They offer no explanation or excuse for the failure to submit the "as-built plans." They do not even attempt to argue that the "as-built plans" were not material. Their silence, it is submitted, reinforces the importance and necessity of consideration of that evidence which *by the very language of the easement instrument* provides for "a more complete and accurate description of said easements." (R. 233). The court should not have attempted to determine as a matter of law the meaning and scope of that easement without consideration of the "as-built plans." That alone warrants reversal and a remand for a trial in equity.

Instead of addressing important evidence such as the "as-built plans," the Espinos focus on a single word in the easement instrument itself – "maintenance."

The Espinos cite cases from other jurisdictions defining the meaning of the word "maintenance." That is their entire argument. They engage simply in a definitional analysis of a single word. They fail to consider the meaning of the word "maintenance" within the context and purpose of the easement instrument as a whole. And, as also discussed, they fail to consider the meaning of the word "maintenance" as further clarified and described by the explicit reference to the "as-built plans."

Moreover, as the Town previously pointed out, the restrictive meaning that the Espinos give to the term "maintenance," if true, shows that the easement instrument is, at the very least, ambiguous. The obvious purpose and intent of the easement was to grant the Town the right to operate the sewer system and to have its sewer pipes in the ground traversing the Espinos' and other residents' properties. A construction that restricts the rights to "maintenance" alone, using the plain and ordinary meaning of that term, would not even allow the Town to *operate* the sewer system. The term "maintenance," from a practical standpoint, cannot be limited to the "regular upkeep or repair" of the lines as the Espinos assert. That limited use would prevent the use of the easement for its obvious intended purpose of transporting sewage. Thus, as the Town has argued, the Espinos' position is untenable, and at the very least, reflects that the easement instrument itself is ambiguous and does not reflect the intention of the parties creating the easement.

Contrary to the Espinos' position, the scope of the easement at issue cannot be determined by simply defining a single word. It cannot be determined without considering the context provided by the instrument as a whole. And, it cannot be determined without consideration of the "as-built plans" which are explicitly referenced as providing for "a more complete and accurate description of said easements." (R. 233).

In sum, the evidence in the record – as well as the as-built plans which should have been considered by the lower court – constitute a "mere scintilla" of evidence that precludes summary judgment thereby requiring a remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Town of Lexington respectfully renews its request that this Court reverse the Order of late Circuit Court Judge James W. Johnson, Jr., filed June 16, 2008, and the Order of Circuit Court Judge William P. Keesley, filed June 9, 2014, and remand for a trial in equity in both consolidated actions to determine the scope of the easement at issue. Alternatively, the Appellant Town of Lexington requests that the Court remand with direction that the declaratory judgment entered by Judge Johnson in Civil Action Number 2005-CP-32-2712 shall have no preclusive effect on the Town in Civil Action Number 2008-CP-32-419, leaving the scope of easement issue to be litigated *de novo* in that action.

Respectfully submitted,

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