THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2016-001291
Op. No. 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, is ..... Respondent.

BRIEF OF RESPONDENT TOWN OF LEXINGTON

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STATEMENT OF THE CASE

This is an appeal involving two consolidated actions in which the Petitioners 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 Respondent 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 Respondent 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 the South Carolina Court of Appeals. The Town of Lexington then filed its appeal.

On March 23, 2016, the Court of Appeals issued an unpublished opinion that reversed and remanded the question as to the scope of the easement. The Court of Appeals also reversed and remanded the grant of summary judgment on the slander of title and tortious interference with contract claims against McGuinn. The Court of Appeals did not find it necessary to rule on the Town of Lexington's contention that it did not have an opportunity to be heard on the scope of easement issue. The

reversal and remand of that issue will allow the Town to be heard when that issue is adjudicated on remand.

The Espinos thereafter filed a Petition for Rehearing which was denied by the Court of Appeals by Order filed May 20, 2016. (App. 13). The Espinos then filed a Petition for Writ of Certiorari that was granted by this Court.

ARGUMENTS

I. The Court of Appeals was correct in reversing summary judgment on the scope of easement issue and remanding for further proceedings to determine the intent of the grantors.

As their first issue on certiorari, the Espinos contend that the Court of Appeals erred in reversing summary judgment on the scope of easement issue because there existed a "potential latent ambiguity" in the language of the easement. The Espinos' argument appears to be two-fold. First, they contend that the Court of Appeals decided an issue that was not raised in the lower court or before the Court of Appeals. Second, they argue that the terms of the easement instrument on its face are not ambiguous and provide only for "maintenance" as they define it. The Town of Lexington submits that the Court of Appeals' analysis of this issue was correct and should be affirmed.

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). (Emphasis added). As the highlighted language states, 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," however, were never submitted to nor considered by Judge Johnson when he ruled on the scope of the easement.

Citing existing precedent, the Court of Appeals correctly explained that when an instrument such as a deed or easement incorporates plans by reference, then those plans must be considered and read in conjunction with the deed or easement. *See*, *Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001); *Fuller-Ahrens Partnership v. South Carolina Dept. of Highways & Public Transportation*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993). However, in the case at bar, the easement was construed without reference to the "as-built plans." The Court of Appeals thus found that a "potential latent ambiguity" exists, thereby warranting further fact-finding and proceedings. (App. 4).

The Espinos contend that the parties did not make that latent ambiguity argument in the court below. In fact, the Espinos insist that "nobody argued the easement was ambiguous." *See*, Petitioner's Brief, p. 6. That is not correct. Both the Town and McGuinn clearly argued that the Espinos' limited construction of the easement could not be determined on its face because quite clearly the instrument expressly refers to the "as-built plans" for a "complete and accurate description" of

the easement. The Town and McGuinn further argued that reference to the "as-built plans" and other evidence show, contrary to the Espinos' position, that the sewer pipe at issue is an inactive spur line whose purpose was to provide for future development of the property located behind the Espinos' property. The Court of Appeals agreed with the Town and McGuinn's position and concluded that the absence of the "as-built plans" created a "potential latent ambiguity," suggesting that it is unclear without reference to the "as-built plans" what the intent of the parties was with respect to the spur line at issue. (App. 4). In short, the Court of Appeals agreed that reference to the "as-built plans," as expressly referenced in the easement instrument itself, must be considered in determining the scope of the easement and the language used in the instrument itself. The Espinos are clearly incorrect in suggesting that the Court of Appeals decided this case on an issue that was not raised in the lower court.[1]

Moreover, the Espinos are equally mistaken in arguing that McGuinn and the Town did not discuss ambiguity in the Court of Appeals. For instance, in its opening brief, the Town addressed the Espinos' proposed construction of the easement and wrote as follows: "The restrictive meaning that the Espinos give to the term 'maintenance,' if true, shows that the easement instrument is, at the very least,

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[1] As the transcript reflects, the Town's counsel argued as follows to Judge Keesley: "And at the very least, as Mr. Moore has argued, there's an issue of ambiguity with the written easement that would give rise to the denial of summary judgment allowing that issue to be tried with a full airing of the facts and ultimate findings of fact and conclusions of the law by the court sitting in equity." (R. 295). McGuinn's counsel also argued the issue of ambiguity. (R. 290-291, 308).

ambiguous." (App. 50).[2] Similarly, on reply, the Town wrote that "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." (App. 105). In its opening brief, the Town also pointed out that "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.'" (App. 50).

In sum, the record does reflect that the Respondents argued in the courts below that there exists a potential ambiguity given the construction of "maintenance" urged by the Espinos and consideration of the "as-built plans" which were intended by the grantor to provide a "complete and accurate description" of the easement. Therefore, contrary to the Espinos' assertions, the Court of Appeals did not rule on an issue that was not raised by the litigants.

Moreover, as the second part of this argument, the Espinos repeat their position that the terms of the easement instrument on its face are not ambiguous and provide only for "maintenance." The Court of Appeals was correct in rejecting that argument. As the Town has previously argued, the obvious purpose and intent of the easement was to grant the Town the right to operate the sewer system and to

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[2] In their brief, the Espinos claim that that Town did not argue that the easement was "at the very least ambiguous" until the Reply Brief. *See*, Petitioners' Brief, p. 14. The Espinos are clearly incorrect. That very argument and the phrase "at the very least ambiguous" appears in the Town's opening brief to the Court of Appeals at page 16. (App. 50).

have its sewer pipes in the ground traversing the Espinos' and other residents' properties. A construction that restricts the rights to "maintenance," as construed by the Espinos, would not even allow the Town to *operate* the sewer system, which results in an absurd construction. 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 construction would prevent the use of the easement for its obvious intended purpose of transporting sewage. Thus, the Espinos' position does not and cannot reflect the intention of the parties creating the easement.

The Espinos focus on a single word in the easement instrument itself – "maintenance." They 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 recognize, however, that "maintenance" may mean more than "regular upkeep or repair"; it is also inclusive of the "operation" of the sewer lines. This was, in fact, conceded by the Espinos' counsel when he stated that the easement "allows the Town to maintain, maintain the operation, the water, sewer and drainage for Coventry Lakes Subdivision." (Tr. 255). Moreover, on appeal, the Espinos 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."

Additionally, the Espinos' position on appeal is not even consistent with Judge Johnson's ultimate ruling given that he determined 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). This demonstrates that Judge Johnson did not limit the easement to "maintenance," and in fact broadened its purpose beyond simply the "maintenance" or "upkeep" 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, Judge Johnson 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 was not a proper ruling at the summary judgment stage. That ruling clearly was based on disputed facts and disputed inferences to be drawn from the facts. The Espinos' counsel conceded this very point when he stated:

"we feel like there are many, many issues of fact with reference to this case when it relates to Mr. McGuinn's position in this case." (Tr. 254).[3]

By way of further explanation, 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 deny summary judgment; 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 simply no evidence that this particular spur 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. Indeed, the Court of Appeals recognized that undisputed evidence "show[s] 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'

[3] Similarly, the Espinos' counsel agreed that "there are issues of fact with reference to this declaratory judgment as to their position." (Tr. 258).

property." (App. 4). In effect, there is at least a scintilla of evidence 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. As the Court of Appeals correctly determined, that scintilla of evidence should have precluded summary judgment in the Espinos' favor.

In sum, the evidence in the record constitutes 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. That is the relief that the Court of Appeals correctly granted. That decision should be affirmed.[4]

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

As their third issue on certiorari, the Espinos re-assert their position that the appeal filed by the Town of Lexington should be dismissed because the Town is not an "aggrieved party" and, therefore, lacks standing to appeal. The Town respectfully disagrees.

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[4] The second issue raised by the Espinos challenges the reversal of summary judgment on McGuinn's claims for slander of title and tortious interference with contract. That issue does not impact or involve the Town of Lexington.

Rule 201(b), SCACR, provides that "[o]nly a party aggrieved by an order, judgment, or sentence may appeal." *See*, Rule 201(b), SCACR. The Court of Appeals 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.* The Court of Appeals 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 Judge 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).[5] The Town was aggrieved by Judge Keesley's rejection of the relief sought by the Town. As its first issue on appeal, the Town asserted 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?" (App. 35). That issue was properly asserted, and the Town has standing to pursue relief on appeal with respect to that issue. The Court of Appeals simply did not find it necessary to reach that issue because it reversed the summary judgment on the scope of easement issue.

The second order on appeal includes the declaratory judgment awarded by Judge Johnson thereby establishing the scope of an express easement granted to the Town of Lexington by Coventry Associates, Inc. The Town submits 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

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[5] The Espinos did not appeal from that Order of Consolidation.

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 lower court 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 wrote: "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 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 therein 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 on which the Town is the grantee. If the Town is not permitted to join McGuinn 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 Court of Appeals allowed the Town to be heard on appeal. That was a correct ruling under the circumstances of these cases and one that should be affirmed.

III. The Court should also consider the issue not reached by the Court of Appeals, namely whether the Circuit Court erred in failing to remand for a trial in equity on the scope of easement issue which would allow the Town of Lexington, as an interested party, the opportunity to be heard.

As indicated, the Court of Appeals did not find it necessary to address the Town's position that it has been denied the opportunity to be heard on the scope of easement issue. If the Court is inclined to reverse the Court of Appeals' decision on the merits of the summary judgment order, the Town respectfully asks for this additional issue to be adjudicated by this Court or that the issue be remanded to the Court of Appeals for a decision.

Plain and simple, the Town should not be bound by Judge Johnson's decision on the scope of easement issue -- that would be a denial of basic due process. The Town, which is the grantee of that easement and thus a necessary party to any judicial determination of its scope, must be permitted to present the evidence required to correctly interpret the scope of the easement and the intentions of the grantor, which would necessarily include a proper consideration of the "as-built plans" that the easement instrument itself references for "a more complete and accurate description of said easements." (R. 233).

In the Court of Appeals, the Town argued, in the alternative, that Judge Keesley erred in failing to vacate the prior declaratory ruling regarding the scope of the easement issue and 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. The Court of Appeals found it unnecessary to reach that issue. Citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999), the Court of Appeals wrote as follows:

> 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.

(App. 4).

As the record clearly reflects, the Town holds the easement, and therefore, it is most obviously an interested party (and likely a necessary 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.[6] The Town therefore argued to Judge

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[6] The Espinos fault the Town for seeking the dismissal of the third-party complaint in the 2005 action; however, it was quite clear (and has never been appealed by the Espinos) that the third-party complaint was an impleader brought in violation of Rule 14, SCRCP. (R. 35-38). It is well settled that "Rule 14 may be used only when the substantive law permits the defendant to shift some or all of his liability to the impleaded party." *Gathings v. Robertson Brokerage Co., Inc.*, 295 S.C. 112, 367 S.E.2d 423, 426 (Ct. App. 1988). This Court further explained the proper use of Rule 14, SCRCP, as follows: "Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability. The outcome of the principal claim must impact the third-party defendant's liability; however, no right exists to implead a third-party defendant who is directly liable to the plaintiff." *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 445 S.E.2d 446, 447 (1994).

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.

As indicated above, the Espinos cannot dispute that the Town is impacted by a judicial determination as to the scope of the easement. 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 therein by reference. (R. 73). In so doing, the Espinos took 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 this 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 particularly instructive. In *Spanish Wells*, a planning commission had approved a preliminary development permit, and that decision was subsequently appealed to the Circuit Court and ultimately to this 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, this 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. This 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 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 this 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. That process would likewise mitigate against the potential for inconsistent rulings.

In sum, in the event this Court reverses the Court of Appeals' decision on the merits of the summary judgment order, the Town requests for the reasons stated herein that this Court 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.

CONCLUSION

Based on the foregoing discussion, the Respondent Town of Lexington respectfully requests that this Court affirm the decision of the South Carolina Court of Appeals which reversed the summary judgment on the scope of easement issue and remanded for a trial in equity in both consolidated actions to determine the scope of the easement at issue. Alternatively, the 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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January 9, 2018

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent Town of Lexington, does hereby certify that service of the **Brief of Respondent Town of Lexington** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of January 2018:

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