

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

In the Court of Common Pleas
William P. Keesley, Presiding Judge
James W. Johnson, Jr., Presiding Judge

Case No. 2005-CP-32-2712
Case No. 2008-CP-32-4192
2016-UP-138 (S.C. Ct. App. Filed March 23, 2016)
Appellate Case No. 2016-001291

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S.C. SUPREME COURT

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 MCGUINN CONSTRUCTION
MANAGEMENT, INC.**

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the grant of summary judgment to the petitioners?
2. Did the Court of Appeals err in reversing the lower courts granting Respondents' motions for summary judgment as to slander of title and tortious interference with contract?

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, Respondent McGuinn Construction Management Inc.'s Brief will only address factual and legal issues raised in the case that it commenced against the Appellants Saul and Mara Espino on or about August 8, 2005. (R. p. 40).

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

Petitioners Espino answered and asserted various counterclaims against Respondent McGuinn (R. p. 43). Respondent 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.

Respondent McGuinn filed a Motion for Summary Judgment and Motion to Dismiss Petitioners Espino's 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 Petitioners Espino. (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 Respondent McGuinn's Motion for Summary Judgment and granting Petitioners Espino's Cross Motion for Summary Judgment as to Respondent McGuinn's Declaratory Judgment, Slander of Title, and Interference with Contractual Relations causes of action. (R. p. 15). Judge Johnson's Order also granted Respondent McGuinn's Motion to Dismiss the Fifth Counterclaim of the Petitioners for Breach of Implied Covenant of Good Faith and Fair Dealing. (R. p. 15).

Respondent 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 Respondent'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.

Respondent'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 Respondent McGuinn's Rule 59 Motion for Reconsideration. (R. p. 1). This appeal followed. (R. p. 316).

Oral arguments were heard in the South Carolina Court of Appeals on February 1, 2016. On March 23, 2016, the Court of Appeals filed a memorandum opinion pursuant to Rule 220 of the South Carolina Rules of Appellate Procedure, reversing the Circuit Court's

Order. *McGuinn Construction Mgmt. v. Espino*, 2016-UP-138 (S.C.Ct. App., filed March 23, 2016). The Court of Appeals subsequently denied Petitioners' Petition for Rehearing. (App. P. 13). Petitioners petitioned this Court for Certiorari. The Petition was granted by this Court on September 29, 2017.

STATEMENT OF THE FACTS

This case concerns the right of Respondent McGuinn to access and utilize a sewer easement owned by the Town of Lexington across property owned by the Petitioners. There is no question as to the existence of valid easements owned by the Town of Lexington running across the Petitioners' 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 Respondent 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 Petitioners. 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 Respondent had no authority under the easement in question to enter Petitioners' property and/or to connect to drainage and/or sewage lines in Coventry Lake Subdivision. (R. p. 15). Respondent 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. The Court of Appeals correctly reversed the lower court's order and remanded this to the lower court for further proceedings.

On or about May 8, 1992, Petitioners 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 Petitioners 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 Petitioners' property, along the side of the Espinos' property and out of Petitioners' 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 Petitioners' 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 purchase 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).

Respondent McGuinn Construction Management is the Developer of the neighborhood known as the Gates Common Subdivision. Respondent 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 Petitioners Espino's property in Lexington. Respondent McGuinn applied to have the property rezoned for purposes of developing a subdivision and was granted the zoning for which it had applied. (R. p. 197). Storm drainage, water, and sewer infrastructure needed to be installed for the Respondent's project. This was to be accomplished by connecting the new underground infrastructure to the spur line running under the existing easement on Petitioners Espino's property. The installation would require connecting the new infrastructure with the existing infrastructure located under the Petitioners' property. The Town of Lexington approved the use of this drainage easement by the Respondent McGuinn. (R. p. 197). Respondent 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, Respondent McGuinn was in the process of completing this work. Respondent 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, Respondent McGuinn began to use the sanitary system easement to connect Respondent's housing development to the Town's sewer system. (R. p. 197.) Petitioners Espino refused to allow Respondent 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 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) SCRPC). 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). Summary Judgment is considered a drastic remedy that should be cautiously invoked. *Bloom v. Ravoira*, 334 S.C. 417, 529 S.E.2d, 710 (2000). 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). Summary Judgment should not be granted even when there is no dispute as to evidentiary facts if there is a disagreement as to the conclusions to be drawn from the facts. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). 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 OF APPEALS CORRECTLY REVERSED THE LOWER COURTS GRANTING OF PETITIONERS' SUMMARY JUDGMENT MOTION AS TO RESPONDENT MCGUINN'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 Petitioners 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 Petitioners. The Lower Courts' rulings overlooked and ignored the facts of this case and applicable South Carolina case law. The Court of Appeals correctly recognized this in its Order reversing the Lower Court's Orders. The decision of the Court of Appeals is correct and should be affirmed by this Court.

The Court of Appeals opinion correctly recognized that there were multiple contested issues of fact in this case that precluded a Summary Judgment for Petitioners. (Op. No. 2016-UP-138, filed March 23, 2016). The Court correctly found that further inquiry into the facts surrounding the granting of the easement at issue in this case was necessary to determine the scope of the easement as well as the grantor's intent. The Court of Appeals correctly determined that this was not a case in which summary judgment for the Petitioners was appropriate. The Court correctly concluded that further inquiry into the facts surrounding the granting of the easement was necessary in this case. The Court of Appeals decision is appropriate, and should be affirmed by this Court.

The Petitioners argue in their brief that the Court of Appeals decided an issue that

was not first raised in the lower court or in the Court of Appeals. Secondly, they argue that the terms of the easement instrument were not ambiguous and only provide for “maintenance” and nothing else. However, the Court of Appeals correctly decided these issues.

The evidence in the record reflects that in April of 1988, an express easement was granted to the Town of Lexington by Coventry Associates, Inc., (a predecessor in interest to Petitioners). The easement was described as follows:

All easements and rights of way necessary for the maintenance of 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. 233) (Emphasis added)

As the highlighted language provides, the easement specifically makes reference to the “as –built plans” for a more complete and accurate description of the easement. (R. 233). The “as built” plans were never submitted to Court. The Court of Appeals correctly held that when an instrument such as a deed or easement incorporates plans by reference (such as the easement before the Court), 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). In this case, the easement was construed by the Lower Court without reference to the “as built plans.” The Court of Appeals found that an ambiguity exists, thereby warranting further fact-finding and proceedings in the Lower Court.

The Petitioners Espino’s contention that the parties did not raise this issue in the

Lower Court lacks merit. Respondents raised the issue that the “as built plans” and other evidence show that the sewer line at issue in this case is an inactive spur line, whose purpose was to provide for future development behind the Petitioners’ property. Both Respondents clearly argued that the Lower Court erred in failing to recognize that the scope of easement cannot be determined from its face because quite clearly the instrument expressly refers to the “as built” plans for a “complete and accurate description of the easement.” The Respondents both argued that reference to the as built plans (as well as other evidence presented to the Court) show that the sewer pipe at issue is an inactive spur line whose purpose was to provide for future development of the property located behind Petitioners’ property. The Court agreed with this argument and concluded that the absence of the “as built plans” created an ambiguity, suggesting that it is unclear without reference to these plans what the intent of the parties was with respect to the spur line at issue. The Petitioners Espino are clearly incorrect in suggesting that the Court of Appeals decided this case on an issue that was not raised in the Lower Court.

The Petitioners Espino repeat their position that the terms of the easement provide only for “maintenance.” The Court of Appeals correctly rejected this argument and this argument should be rejected by this Court as well. To do anything to the contrary would have brought about an absurd result in this case, as recognized by the Court of Appeals. As set forth above, the evidence presented in this case clearly demonstrated that the sewer line across Petitioners Espino’s property is a spur line. (R. pp. 248-249). It serves no function for the removal of sewage from Petitioners Espino’s home or from any other residence in the Coventry Lakes Subdivision. Until Gates Common was developed, the spur line served absolutely no purpose. It did not hold or transport any sewage. There is no evidence that

this particular spur line served any purpose other than to provide for the expansion of the system to provide service to the undeveloped property located behind that of the Petitioners Espino. The Respondents presented ample evidence that the purpose of the line was to provide for future expansion into the development later named Gates Common. Clearly summary judgment as to this issue was inappropriate, as recognized correctly by the Court of Appeals.

II. THE RESPONDENT MCGUINN DID NOT ABANDON HIS ARGUMENTS REGARDING TORTIOUS INTERFERENCE AND SLANDER OF TITLE.

The Petitioners Espino once again argue that Respondent McGuinn abandoned his argument regarding the Trial Court's error in granting summary judgment as to the slander of title and tortious interference with contract. This argument is identical to their arguments previously raised with this Court and is based on an incorrect reading of the language contained in Respondent McGuinn's brief and lacks merit.

As argued by the Respondent McGuinn 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 [Respondent] did not have the authority to occupy the Espinos' [Petitioners'] property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision." (R. p. 15). As argued by the Respondent McGuinn throughout his briefs filed with the Court of Appeals, this finding is clearly erroneous and should not and cannot be used as the sole basis to grant summary judgment as to the Respondent McGuinn's slander of title and tortious interference with contract causes of action. There was no need for the Respondent McGuinn to reassert each and every argument presented earlier in his 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

Respondent McGuinn did not abandon these arguments in his brief and the argument of the Petitioners to the contrary lacks merit.

Once this Court reversed Judge Johnson's determination that Respondent McGuinn did not have the authority to occupy the Espinos' (Petitioners') property or to connect to either the sewer or drainage lines in the Coventry Lakes subdivision, there was 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

Based on the foregoing discussion, the Respondent McGuinn Construction Company respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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January 9, 2018

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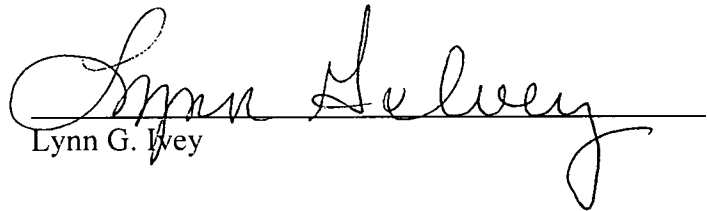
I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, P.A., certify that I have on this day effected service of the Respondent's Brief upon counsel of record, by placing

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