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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Sr., Circuit Court Judge

Appellate No. 2020-001354

Susan Brooks Knott Floyd..... Petitioner/Respondent,

v.

Elizabeth Pope Knott Dross..... Appellant.

PETITION FOR A WRIT OF CERTIORARI

G. Trenholm Walker (S.C. Bar No. 5777)
Charles P. Summerall, IV (S.C. Bar No 5433)
Walker, Gressette & Linton, LLC
Post Office Box 22167
Charleston, SC 29413
T: (843) 727-2200
F: (843) 727-2238
Walker@wglfirm.com
Summerall@wglfirm.com

Attorneys for Petitioner/Respondent
Susan Brooks Knott Floyd

March 18, 2024

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CERTIFICATE OF COUNSEL

Counsel for Petitioner/Respondent Susan Brooks Knott Floyd ("Petitioner" or "Susan") certifies that Petitioner filed a Petition for Rehearing on February 1, 2024, and that the Court of Appeals denied the Petition by Order filed on February 15, 2024.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err and fail to follow precedent governing the construction of the unambiguous Conservation Easement by denying Susan's expressly reserved right of road access to her 189-acre half of the Conservation Easement Property contrary to the unambiguous wording of the Conservation Easement, thereby thwarting this clearly expressed right as well as the right for one subdivision of the Conservation Easement Property into two parcels, and also impairing the important purposes of the Conservation Easement?

2. Did the Court of Appeals err and fail to follow precedent by going outside the four corners of the Conservation Easement and considering disputed extrinsic evidence regarding a separate parcel of land that was not referenced in the Conservation Easement and has nothing to do with it?

OVERVIEW

This case involves the terms of a Conservation Easement (the "Conservation Easement") granted in 1998 by the parties' father, Benjamin Franklin Knott ("Mr. Knott"), to Wetlands America Trust, Inc., ("Wetlands America") on 371 acres in Berkeley County (the "Property") that abut SC Highway S-8-98, known as Cainhoy Road. The dispute on appeal involves whether the terms of the Conservation Easement allow Susan to use the existing roads on the Property to access her half of the Property that is landlocked. Susan's sister, the Appellant, Elizabeth Pope Knott Dross ("Appellant" or "Betsy"), asserts the Conservation Easement does not grant Susan the right to use the existing roads over Betsy's half of the Property to access Susan's half of the Property.

The lower court granted Susan's motion for partial summary judgment, holding that the unambiguous terms of the Conservation Easement expressly reserve to Susan the right to use the

unpaved roads crossing over Betsy's half to access Susan's half of the Property for all activities permitted under the Conservation Easement.

In its Opinion Number 6044 filed on January 17, 2024 (the "Opinion"), the Court of Appeals reversed the lower court's ruling and determined that the reserved right to use the existing roads on the Property did not allow Susan to use the roads over Betsy's half to access Susan's half of the Property. As stated in more detail below, the Opinion transgresses settled precedent of this Court governing the construction of unambiguous contracts in failing to give effect to the clear terms of the Conservation Easement and in considering extrinsic evidence to support its ruling. Susan respectfully requests that this Court grant certiorari and review the decision of the Court of Appeals that ignores this fundamental rule of contract construction and causes an untenable result – namely, an owner with no access to her parcel.

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI IN THIS CASE

The parties, the lower court, and the Court of Appeals all agree the terms of the Conservation Easement are clear and unambiguous, yet the two courts came to diametrically opposite rulings. The difference is that the Court of Appeals turned to inapplicable provisions of the Conservation Easement and further considered extrinsic evidence in reaching its decision.

South Carolina jurisprudence is uniform that an unambiguous contract must be construed in accordance with its clear terms, and extrinsic evidence cannot be considered. The Court of Appeals' Opinion is contrary to this Court's precedent; the Court of Appeals misconstrued the unambiguous Conservation Easement, and improperly considered disputed extrinsic evidence.

By denying Susan's expressly reserved right of road access, the Court of Appeals' Opinion thwarts not only Susan's rights to use and enjoy her property for the purposes allowed under the Conservation Easement but also the important public purpose of the Conservation Easement as to

Susan's 189-acre half of the Property. The Conservation Easement and its accompanying Baseline Documentation Report (the "Report"), referenced at length in the Conservation Easement, prescribe both the intended road access and the conservation values to be protected on the 371-acre Property. As stated in the Conservation Easement and accompanying Report, the Property serves important public conservation purposes, including providing habitat for flora and fauna.

A conservation easement is an important, frequently utilized legal instrument for protecting properties throughout South Carolina, benefiting the public and the State. As in this case, conservation easements often include a reserved right to subdivide the protected property, enabling families to retain legacy properties for future generations. There are no South Carolina appellate court decisions addressing a reserved right of road access in the context of a conservation easement that allows subdivision of the protected property. This case thus presents a novel question of law for this Court that construes an important right common to those conservation easements.

Because the decision of the Court of Appeals conflicts with prior decisions of this Court, presents a novel question of law, and involves important public policies underlying conservation easements, Susan petitions this Court for a Writ of Certiorari and a ruling reversing the Court of Appeals and affirming the trial court's determination that the Conservation Easement expressly reserves to Susan the right to use the existing roads on Betsy's half to access her half of the Conservation Easement Property for all activities permitted under the Conservation Easement.

STATEMENT OF THE CASE

Susan brought this non-jury action against her sister, Betsy, seeking various relief pertaining to Susan's rights associated with her ownership of half of the Property previously owned by Mr. Knott that he placed under the Conservation Easement in 1998. Susan and Betsy became owners of halves of the Property in 2011 through deeds of distribution pursuant to the terms of his Will. **Amended Complaint, ¶¶ 17-19, R. pp. 39-40.** Betsy received the front half of the

Property, abutting Cainhoy Road and totaling approximately 182 acres ("Betsy's Parcel"). Susan received the back half of the Property, totaling approximately 189 acres ("Susan's Parcel"). **R. p. 3.**

Susan commenced this action by filing a Lis Pendens, Summons and Complaint on September 20, 2019. (*See generally* 9/20/19 Compl.). **R. pp. 22-32**. Susan filed an Amended Complaint on November 22, 2019. (*See generally* 11/22/19 Am. Compl.). **R. pp. 35-48**.

Betsy filed her Answer to Amended Complaint and Counterclaim on December 5, 2019. (*See generally* 12/5/19 Ans. to Am. Compl.). **R. pp. 49-59**. In that filing, Betsy denied Susan's claims and asserted a declaratory judgment counterclaim. (*See id.*). **R. pp. 49-59.** On December 20, 2019, Susan filed a Reply to Defendant's Counterclaim (*See generally* 12/20/19 Reply). **R. pp. 60-65.**

On July 15, 2020, Susan filed Plaintiff's Notice and Motion for Partial Summary Judgment on her first cause of action for declaratory judgment (*See generally* 7/15/20 Pl.'s Mot. Partial Summ. J.). **R. pp. 66-74**. Susan's Motion for Partial Summary Judgment requested a declaratory judgment that:

> (A) Pursuant to the unambiguous terms of the governing Conservation Easement, including the expressly reserved rights in Section 4.3 thereof, Susan, as owner of approximately half of the Conservation Easement Property, has the right to use the unpaved roads crossing over Betsy's Parcel to access Susan's Parcel for all activities permitted under the Conservation Easement; and
> (B) Betsy is required to provide Susan at all times with the key or code to the locked entrance gate to the Conservation Easement Property.

(*See id.*). **R. p. 66 ¶1, Lines 6-12.**

On August 31, 2020, the Honorable Roger M. Young, Sr., Circuit Court Judge, conducted a hearing on Susan's Motion for Partial Summary Judgment. (*See generally* 8/31/20 Transcript). **R. pp. 299-350**. On September 11, 2020, Judge Young entered an Order Granting Plaintiff's

Motion for Partial Summary Judgment ("Partial Summary Judgment Order"). The Order contains an extensive recitation of the undisputed material facts and conclusions of law. **R. pp. 1-17**. In the Partial Summary Judgment Order, Judge Young stated:

> Applying these fundamental rules of construction to the Conservation Easement, the Court concludes that the clear and unambiguous terms of Section 4.3 of the Conservation Easement allow Susan, as successor in title to Mr. Knott, the Grantor, to exercise the Grantor's reserved right to access her parcel by use of the roads described in the Report. Accordingly, the Court hereby grants the Motion to allow the Plaintiff and her heirs, successors, and assigns "[t]he right to use the roads for all activities permitted under [the] Easement", as is expressly set forth in Section 4.3. This right, which runs with the land in perpetuity under Section 5.8, was expressly reserved by Mr. Knott when he conveyed the Conservation Easement.
>
> Since Mr. Knott also expressly reserved the right to subdivide the Conservation Easement Property into two parcels under Section 4.1, the Conservation Easement clearly envisioned that the Conservation Easement Property would have more than one owner, and that each owner would have the right to use the existing roads for any purposes allowed under the Conservation Easement, subject to any limitations contained in the Conservation Easement. Further, there would be no need for the owner of property to reserve a right to use the roads on the owner's property. The reasonable interpretation and application of this reserved right is that it was to allow access over the other half of the Conservation Easement Property to gain access to the interior half once it was subdivided. Additionally, it would be impossible for the owner of the interior half of the Conservation Property to exercise the reserved rights to care for and maintain it, including preserving the conservation values, without access.

R. pp. 8-9.

On October 2, 2020, Judge Young entered his Order Denying Betsy's Motion to Alter or Amend Judgment. **R. pp. 18-20.** On October 9, 2020, Betsy filed a timely Notice of Appeal. **R. pp. 276-298**. On January 17, 2024, the Court of Appeals filed its Opinion reversing the Circuit Court. Susan filed a Petition for Rehearing, which the Court of Appeals denied by Order filed on February 15, 2024 ("Order Denying Rehearing"). Susan now seeks this Court's review of the Court of Appeals' decision.

STATEMENT OF THE FACTS

The primary issue ruled upon by Judge Young and the Court of Appeals is the meaning of one sentence in Section 4.3 of the Conservation Easement. Section 4.3, entitled "Roads," is part of Section 4 of the Conservation Easement covering the "RESERVED RIGHTS" of the "Grantor." It states the "Grantor" reserves the right "to use roads for all activities permitted under this Easement." **R. p. 92.** Judge Young ruled this provision allowed Susan, as a "Grantor" under the terms of the Conservation Easement, to use the existing road over Betsy's Parcel to access Susan's Parcel. The Court of Appeals reversed, holding this provision did not grant Susan this right.

Susan's Parcel does not front on any roads and is landlocked. (*See* Susan's Affidavit, **R. p. 76 ¶4, Lines 2-3).** Appendix E to the Report, prepared by Mr. Knott and Wetlands America in December of 1998 as an integral part of the Conservation Easement, shows the specific locations of both the sole entrance gate to the Conservation Easement Property at Cainhoy Road, as well as the unpaved road system that the Knott family used going from that gate across what is now Betsy's Parcel to access what is now Susan's Parcel. (See Susan's Affidavit, **R. p. 77 ¶18**, Report Appendix E, **R. p. 129**, and photographs of the entrance gate and road system at Report Appendix I, **R. pp. 133-135**). The Conservation Easement and the accompanying Report do not refer to any other entrance or road access to the Conservation Easement Property. (*See generally* Conservation Easement and Report, attached to Susan's Affidavit as Exhibits 1 and 1A). **R. pp. 80-148.**

The Property is in a natural state and has no houses on it. It contains uplands and wetlands and provides habitat for ducks and other wildlife. (*See* Partial Summary Judgment Order). **R. p. 3.** Section 1.1 of the Conservation Easement states its "Purpose" as follows:

> It is the purpose of this Easement to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition, as evidenced by the Report, for conservation purposes and to prevent any use of the Protected Property which will significantly impair or interfere with the

> conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem. ('Purpose').

(*See id.* **R. pp. 3-4**, and see Conservation Easement at **R. p. 87**).

The introductory recital to the Conservation Easement provides that the term "Grantor" refers collectively to Mr. Knott "together with his heirs, personal representatives, successors, and assigns." **R. p. 84.** Additionally, the introductory sentence of Section 4, "RESERVED RIGHTS", states that the "the Grantor reserves for himself, his heirs, successors and assigns the 'Reserved Rights' set forth in this Section." **R. p. 90.** Susan is an heir, personal representative, and successor in title to Mr. Knott. Betsy is also an heir, personal representative, and successor in title to Mr. Knott. **R. p. 5 ¶13**. Thus, both Susan and Betsy are included in the defined term "Grantor" and may exercise the rights reserved to the Grantor in Section 4 of the Conservation Easement.

Section 3.4 of Section 3, "RESTRICTIONS AND COVENANTS", specifically provides that "[t]he Protected Property may not be subdivided." **R. pp. 88.** However, the "RESERVED RIGHTS" of Section 4 include Section 4.1, titled "Subdivision", that reserved to the "Grantor" "[t]he right to subdivide the Protected Property into two parcels, provided that no parcel contains less than 100 acres." **R. p. 91.** It is the exercise of this reserved right that allowed Mr. Knott to subdivide the Property into Susan's Parcel and Betsy's Parcel.

Section 5.8, entitled "Perpetuity", provides that: "The burdens of this Easement will run with the Protected Property and will be enforceable against the Grantor and all future owners in perpetuity during the period of such ownership." **R. p. 5 ¶16 and R. p. 102**. Susan and Betsy each own half of the Property and are bound by the provisions of the Conservation Easement.

Mr. Knott, as Grantor, and Wetlands America, as Grantee, agreed in the terms of the Conservation Easement that the Report "provides an accurate representation of the Protected Property and the condition of the same as of the date of this Easement...." **R. pp. 85-86**. The

"roads" referenced in Section 4.3, which Mr. Knott's "heirs, successors and assigns" have an express "right to use," are delineated in the Report. (*See* particularly Appendix "E" to the Report attached as Exhibit 1-A to Susan's Affidavit filed in support of the Motion). **R. pp. 5-6 and R. p. 129**. As stated in the "Physical Environment" section of the Report: "A section of County Road #98 flanks the property on the west for a distance of 0.70 miles. Improved dirt roads on the property total approximately 2.8 miles. Short sections of embankments on the managed wetlands are a part of the road system." **R. p. 6 ¶18 and R. p. 118**. The Report also refers to the aluminum entrance gate to the Conservation Easement Property, located on Cainhoy Road. **R.p. 124**. Photographs of the entrance gate and the road system are included in Appendix I to the Report. (*See* Partial Summary Judgment Order, and Report Appendices E and I). **R. p. 6 ¶19 and R. p. 129 and pp. 133-135**.

Since Mr. Knott's death, Betsy has maintained a locked gate at the sole entrance to the Conservation Easement Property on Cainhoy Road. At times in the past, Betsy provided Susan with a key to the entrance gate. However, Betsy subsequently changed the lock to the gate and has not provided Susan with the key, depriving Susan of unrestricted access to Susan's Parcel for activities expressly permitted under the Conservation Easement. When Susan contacted Betsy about access to Susan's Parcel, Betsy asserted that Susan does not have the right to access Susan's Parcel by using the gate or the roads on Betsy's Parcel shown in the Report. (*See* Susan's Affidavit; *see also* Partial Summary Judgment Order). **R. p. 78 ¶21 and R. pp. 6-7.**

Betsy further contends that Susan has no right to use the gate or the interior roads under the terms of the Conservation Easement because she allegedly "created" her own access problem. Betsy asserts Susan formerly owned a large parcel on the opposite side of Susan's Parcel that fronted on Charity Church Road and that Susan sold that property and abandoned an easement that

would have provided her access from Charity Church Road to the ten acres she reserved immediately adjacent to Susan's Parcel. (*See* Partial Summary Judgment Order). **R. p. 7 ¶22**. As addressed in the "Argument" section below, Betsy's contentions relating to this separate property that was never part of the Conservation Easement Property and was not mentioned anywhere in the Conservation Easement or Report were not only correctly excluded by Judge Young as irrelevant to the interpretation of the unambiguous terms of the Conservation Easement, but they are also misstated and misleading.

In August 2020, Betsy took the extreme step of denying even Susan's basic request to use the roads on Betsy's Parcel simply to accompany Wetlands America's affiliate, Ducks Unlimited, on its annual inspection of Susan's Parcel, as provided under the terms of the Conservation Easement. (*See* Susan's Supplemental Affidavit, and *see* Conservation Easement Sections 2.1 and 2.2). **R. p. 259 ¶5 and R. pp. 87-88**. Betsy's actions are defeating Susan's ability to exercise the reserved rights set forth in the Conservation Easement, and to protect the conservation values and accomplish the stated Purpose of the Conservation Easement, as to her half of the Protected Property. (*See id.*). **R. p. 259 ¶5 and R. p. 87.**

ARGUMENT

I. The Court of Appeals erred and failed to follow precedent governing the construction of the unambiguous Conservation Easement by denying Susan's expressly reserved right of road access to her 189-acre half of the Property, thereby thwarting the clearly expressed right and the important purposes of the Conservation Easement.

As this Court stated in *South Carolina Public Service Authority v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981): "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense." When an instrument is unambiguous, "[t]he intention of the

grantor must be found within the four corners of the deed." *Windham v. Riddle,* 381 S.C. 192, 201, 672 S. E. 2d 578, 583 (2009) (internal citation omitted).

As this Court stated in *Lee v. University of South Carolina*, 407 S.C. 512, 517-518, 757 S.E.2d 394, 397 (2014):

> 'If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.' Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.

757 S.E.2d 397(internal citations omitted).

A. The Court of Appeals Misapplied the Rules of Construction in Denying Susan's Expressly Reserved Right to Use the Unpaved Roads Crossing Over Betsy's Half of the Conservation Easement Property to Access Susan's Parcel for all Activities Permitted under the Conservation Easement.

The Grantor's reserved right to use the roads on the Conservation Easement Property is clearly and unambiguously expressed in Section 4.3 of the Conservation Easement, with those roads being specifically shown in the accompanying Report.

The Conservation Easement uses plain language and is capable of only one interpretation: Mr. Knott's heirs, successors, and assigns have the expressly reserved right to use the existing roads delineated in the Report "for all activities permitted under this Easement." (*See* Conservation Easement Section 4.3). **R. p. 92**. There is no other reference in the Conservation Easement or the Report to an entrance gate or separate road access to the Conservation Easement Property except for the "main aluminum entrance gate" on "County Road #98." **R.p. 124**. Section 4.1 of the Conservation Easement specifically envisioned that the Conservation Easement Property could be subdivided into two parcels, which Mr. Knott accomplished in his Will by dividing the Property equally between Susan and Betsy. (Exhibit 1 to Susan's Affidavit in Support of Motion for Partial

Summary Judgment). **R. p. 91**. Nothing in the language of the Conservation Easement limits Susan's right to use the road over Betsy's Parcel to access Susan's Parcel after the Property was divided between them. To the contrary, Section 4.3 expressly reserves unto Susan, as the heir, successor and assign of Mr. Knott, the "right to use roads for all activities permitted under this Easement." (Exhibit 1 to Susan's Affidavit in Support of Motion for Partial Summary Judgment). **R. pp. 91-92**.

Judge Young agreed with the parties' respective assertions that the terms of the Conservation Easement are clear and unambiguous. (*See* Partial Summary Judgment Order). **R. p. 8**. The Circuit Court correctly concluded that the clear and unambiguous terms of Section 4.3 of the Conservation Easement allow Susan, as heir and successor in title to Mr. Knott, the Grantor, to exercise the Grantor's reserved right to access her parcel by use of the roads specifically depicted in the Report.

In reaching the opposite conclusion in the Opinion, the Court of Appeals held that construing this reserved right to allow Susan to access her land would lead to an absurd result. The Court of Appeals reasoned as follows: "If Susan has the right to use the roads on Betsy's parcel pursuant to section 4.3, it logically follows that she must have all of the other owner's reserved rights set forth in section 4 as to Betsy's Parcel." Opinion at p. 12. The Court then states that to "allow Susan to have all of the reserved rights set forth in section 4 as to Betsy's property would devalue Betsy's ownership interest in her parcel." Opinion at p. 12.

But, as Judge Young pointed out in his Order and commented at the hearing, the only question presented is whether Section 4.3 clearly and unambiguously gives the right to Susan to use the existing road on Betsy's Parcel to access her Parcel "for all activities permitted under this Easement." **R. pp. 10-11.** ("Betsy argues that, if Susan has the right to use the roads on Betsy's

Parcel, then Susan would also be able to hunt, fish, and exercise all of the other reserved rights in Section 4 on Betsy's Parcel. The Court disagrees with that assertion. As stated in the Motion and by Susan's counsel on the record at the hearing, Susan is not seeking to exercise any reserved right on Betsy's Parcel except using the interior road to gain access to Susan's Parcel.") Susan has not alleged the right to exercise any other reserved right on Betsy's Parcel, such as the reserved right to hunt or fish or build a dock on Betsy's Parcel. See, Sections 4.4 and 4.5 of the Conservation Easement. **R. p. 92.**

It is error for a court to go beyond the scope of the pleadings and grant relief on a theory which was not pleaded. Crocker v. Crocker, 281 S.C. 154, 158, 314 S.E.2d 343, 346 (Ct. App. 1984). That is effectively what the Court of Appeals did in basing its ruling on different reserved rights that were not asserted by Susan in her Amended Complaint.

Further, absent the assertion by Susan of any reserved right other than the right to use the roads to access her Parcel, the Court of Appeals was addressing a hypothetical question. The law is settled that courts should not decide hypothetical issues since they are not ripe for determination: "In general, this court may only consider cases where a justiciable controversy exists. 'A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.' " Mead v. Beaufort Cnty. Assessor, 419 S.C. 125, 141, 796 S.E.2d 165, 174 (Ct. App. 2016)(internal citations omitted). There is no justiciable controversy concerning the exercise of the other reserved rights.

Even if the question of the exercise of the other reserved rights under Section 4 were before the court, which it is not, they would work in favor of Betsy and Susan equally. Both are now "Grantors" under the terms of the Conservation Easement. Betsy would have the same rights as Susan; if it devalued one parcel, it would devalue the other as well. Even though the Court of

Appeals may hold the view this is a nonsensical result, a "court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007). Here, regardless of the wisdom or folly of its terms, the clear and unambiguous wording of Section 4.3 reserves to the Grantor, which includes Susan -- an heir, successor, and assign of Mr. Knott -- the "right to use roads for all activities permitted under this Easement."

At the hearing on Susan's Motion for Partial Summary Judgment, Judge Young, recognizing that the Conservation Easement runs with the land in perpetuity, wisely considered the critical, long-term importance of the road access "mechanism" in the context of Mr. Knott's reserved right to divide the Conservation Easement Property into two parcels:

> So 500 years from now, Ben, the father, knew that this was going to last forever and he knew that his daughters weren't going to be the property owners, and he knew that maybe somewhere down the road it's inconceivable--or it is conceivable that somebody other than one of Betsy's heirs or one of Susan's heirs would own this piece of property.
>
> There's--there has to be some mechanism to make this work. He's the one that devised them two separate pieces of property, and he had to think that it wouldn't be Susan and it wouldn't be Betsy.
>
> And while he might have thought at the time, you know what, these are my girls, they will always get along, they'll make it work out, that's not realistic to think that that would be the situation 10 years, 50 years, or 500 years from now.
>
> So I have to think about this beyond just what these two ladies want, but what this easement's purpose is going to be or was. Or still is, for that matter. And future property owners are going to be somebody other than these two people and it's got to make it work.
>
> So it's not inconceivable that 50 years from now or 500 years from now that Susan's heirs were not going to own the piece of property and that Susan's piece of property was going to end up landlocked at some point in time.
>
> So with that in mind, dad Ben had to have anticipated that this was going to happen, and that somebody was going to need to get to Susan's piece of property and Betsy's future owners were going to have to let them get to Susan's piece of property.

(*See* 8/31/20 Transcript). **R. p. 340, Line 23 - p. 342, Line 8.**

Because the Court of Appeals refused to enforce the clear and unambiguous wording of Section 4.3, thereby leaving Susan no access to her Parcel, Susan requests that this Court review the Court of Appeals' reversal of Judge Young's decision.

B. The Court of Appeals mistakenly held that the Grantor's reserved right "to use roads for all activities permitted under this Easement" was intended only to protect the Grantor as against the Grantee even though there is no wording in the Conservation Easement to support this interpretation. The Grantee's express right to access the Protected Property to monitor compliance did not curtail the Grantor's inherent right to use the roads on the Protected Property for the conservation purposes described in the Conservation Easement.

The second component of the Court of Appeals' reasoning in holding Susan could not exercise the reserved right in Section 4.3 to use the existing roads to access her Parcel was its finding that Mr. Knott and Wetlands America intended the right to use the roads on the Protected Property to be reserved *solely as against the Grantee*, Wetlands America, even though there is no wording in the Conservation Easement supporting this interpretation. The Court of Appeals used the following rationale to explain this conclusion:

> ... The purpose of section 4 as a whole is for the Protected Property's owner to reserve the right to use the property in various ways as against the Conservation Easement's holder, Ducks Unlimited. For example, subsections 4 and 12 reserve the rights to hunting and harvesting timber, respectively. Thus, we view the reserved right to use the roads set forth in subsection 3 as comparable to an easement by reservation in a deed. See Sandy Island Corp., 246 S.C. at 419, 143 S.E.2d at 806 ("A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands.").
>
> Accordingly, the language of section 4.3 grants to Father (and his heirs, successors, and assigns) an easement by reservation over the roads on the Protected Property as against Ducks Unlimited. Therefore, we disagree with Susan's assertion that this easement as against Ducks Unlimited translates into her own easement as against Betsy.

Opinion at p.10.

The flaw in this rationale is that Section 4 of the Conservation Easement has nothing to do with the *Grantee's* right of access. The right of access of the Grantee is expressly stated in Section 2.2: "...the Grantee shall have the right to enter the Protected Property for the purposes of inspecting same to determine compliance herewith. The right of entry and access herein described does not extend to the public or any person or entity other than the Grantee, its agents, employees, successors, and/or assigns." (**R. pp. 87-88**). Section 2.2 does not state or imply that the Grantee's access is to the exclusion of the Grantor, nor does it restrict in any way the Grantor's fundamental right to be on the Property and use its existing roads.

It would have been necessary to reserve the right to use the roads in Section 4.3 as against the Grantee *if* the restrictions in Section 3 curtailed the owner's right to use the roads on the Property. They do not. The restriction in Section 3.3 addressing "Roads" does not prohibit the Grantor from *using* the existing roads. It simply prohibits *construction* of new roads: "There shall be no building of any new roads, nor widening of existing roads." **R. p. 88.** By comparison, as already shown, it was necessary to reserve the right to one subdivision of the Property in Section 4.1 because the restriction in Section 3.4 prohibited any subdivision of the Property. **R. p. 88.**

In the context of use of the existing roads, the Court of Appeals was mistaken in saying "[i]t logically follows that, despite Susan's argument to the contrary, the property owner who creates a conservation easement needs to expressly reserve the right to engage in certain activities on the property if he wishes to clearly exclude those activities from the broadly-worded restrictions on the property's use in other provisions of the conservation easement." Opinion at p. 11. This statement exhibits a fundamental misconception of a conservation easement by the Court of Appeals. A conservation easement does not *per se* prohibit all activities and uses, as the Court

pronounced. It is like any other restrictive covenant. The restrictions and obligations are only those that are specifically stated.[1] In this case, Section 3 lists those restrictions. **R. pp. 88-90.**

Given that there was no need for Mr. Knott to reserve the road access right as against Wetlands America, Judge Young correctly applied rules of construction in his Order and identified the reasonable interpretation of the reserved road access right:

> "Since Mr. Knott also expressly reserved the right to subdivide the Conservation Easement Property into two parcels under Section 4.1, the Conservation Easement clearly envisioned that the Conservation Easement Property would have more than one owner, and that each owner would have the right to use the existing roads for any purposes allowed under the Conservation Easement, subject to any limitations contained in the Conservation Easement. Further, there would be no need for the owner of property to reserve a right to use the roads on the owner's property. The reasonable interpretation and application of this reserved right is that it was to allow access over the other half of the Conservation Easement Property to gain access to the interior half once it was subdivided. Additionally, it would be impossible for the owner of the interior half of the Conservation Property to exercise the reserved rights to care for and maintain it, including preserving the conservation values, without access."

(R. p. 9).

Susan respectfully submits that neither the terms of the Conservation Easement nor the law supports the alternative holding of the Court of Appeals that the specific purpose of the Grantor's reserved right "to use roads for all activities permitted under this Easement" was to preserve a right of access in the Grantor only *against* the Grantee when the Conservation Easement does not restrict the Grantor's right to use the existing roads.

C. The Court of Appeals erroneously decided that Section 4.21 allowed the Grantor to create an easement over the Conservation Easement Property for the benefit of Susan if he had intended her to have access over Betsy's half of the Conservation Easement Property to her half.

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[1] "Conservation easements are negative easements that impose specific restrictions on the use of the property. Johnston v. Sonoma Cnty. Agric. Preservation & Open Space Dist., 123 Cal. Rptr. 2d 226, 229 (Cal. App. 1st Dist. 2002), as modified (Aug. 22, 2002). See also, (1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include one or more of the following: (a) retaining or protecting natural, scenic, or open-space aspects of real property;...." S.C Code Ann. § 27-8-20.

The Court of Appeals also construed the Conservation Easement contrary to its clear and unambiguous wording when it concluded that if Mr. Knott had wanted to grant the rear half of the Property (after subdivision) an easement over the front half of the Property, he would have expressly granted that easement under Section 4.21. Opinion at p. 13 ("Expressly addressing the right to grant easements in subsection 21 of section 4 further demonstrates that Father did not intend for subsection 3 to address access to a future subdivided parcel-subsection 21 gave Father and his successors all the authority needed to grant an easement over any part of the Unified Tract for any purpose consistent with the Conservation Easement's purpose.")

Contrary to what the Court of Appeals suggests, the clear and unambiguous wording of Section 4.21 does not address easements involving access by the owner of one parcel of the subdivided Property over the land of the owner of the other parcel of the subdivided Property. Section 4.21 addresses only the reserved right of the Grantor to grant easements to an "*adjacent property owner*" over the Property.[2] Susan's Parcel is not adjacent to the Property; it is part of the Property. (**R.p. 98**). The Court of Appeals' interpretation completely ignores that Section 4.21 applies only to granting an easement to an "adjacent property owner."

Additionally, the ruling of the Court of Appeals suggesting that Mr. Knott could have reserved an easement over the front half of the Property to the rear half of the Property under this provision is contrary to settled law. An owner of property cannot impose an easement over the owner's property in favor of the owner under the doctrine of merger of title. *See, e.g., Windham v.*

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[2] "4.21 Easements and Rights of Passage. The right to grant easements or rights of passage across or upon the Protected Property if such rights are (i) used exclusively ***by an adjacent property owner*** and not in connection with an industrial activity or a commercial activity of a type and nature not permitted by this Easement[;] (ii) required or convenient in connection with the permitted utilities on the Protected Property; or (iii) required or convenient in connection with the uses of the Protected Property permitted by this Easement." **R. p. 98.** (double emphasis added).

Riddle, 635 S.E.2d 558, 560 (S.C. Ct. App. 2006), *aff'd*, 672 S.E.2d 578 (S.C. 2009) (an easement cannot exist where both the purported servient and dominant estates are owned by the same person).

Susan respectfully requests that this Court review the Court of Appeals' interpretation of Section 4.21 as proof that Mr. Knott did not intend for the future rear parcel of the Property to have the right to use the existing roads on the front parcel to access it. The clear and unambiguous wording states it is a reserved right to grant easements to an "adjacent property owner."

D. The Court of Appeals' reversal of Judge Young's Order leads to an absurd result that thwarts both the Purpose of the Conservation Easement and Mr. Knott's expressed intention to provide for subdivision of the Protected Property for Susan, and her heirs, successors and assigns, to access and use her 189-acre half of the Protected Property and protect its recognized conservation values.

Under the Court of Appeals' holding, Susan is prohibited from exercising the reserved rights that protect and advance the conservation purposes of the Conservation Easement because she cannot access her half of the Property.

The Conservation Easement states its "Purpose" in Section 1.1:

> "It is the purpose of this Easement to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition, as evidenced by the Report, for conservation purposes and to prevent any use of the Protected Property which will significantly impair or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem. ('Purpose')."

R.p. 87.

Judge Young recognized this detrimental consequence from denying Susan the use of the existing roads to access her Parcel in his Order: "...it would be impossible for the owner of the interior half of the Conservation Property to exercise the reserved rights to care for and maintain it, including preserving the conservation values, without access." **R.p. 9**. As just one example of the impossibility of protecting identified conservation values on Susan's half of the Conservation

Easement Property if Susan is denied the expressly reserved road access: Betsy has rejected Susan's request for access so that Susan can take steps to preserve and protect the "Whiskey Still Dam" from erosion problems in order to maintain a large freshwater reserve, which is one of the important "conservation values" on Susan's Parcel specifically identified in the Report. (*See* Susan's Supplemental Affidavit, and *see* the Report). **R. p. 259 ¶5 and R. p 122**. Such protective measures are expressly reserved rights under Section 4.9 of the Conservation Easement, yet Susan is unable to exercise those rights without access.

In the Opinion, the Court of Appeals stated the following rules of construction applicable to contracts in general that apply to the Conservation Easement:

> "Common sense and good faith are the leading touchstones of the construction of a contract[,] and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair[,] and just, the latter construction will prevail." *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (quoting *Georgetown Mfg. & Warehouse Co. v. S.C. Dep't of Agric.*, 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct. App. 1990)).

Opinion at p. 8.

The Court of Appeals cited these rules of contract construction in holding that it would be an absurd construction of Section 4.3 to find Susan had a right to use the existing roads on Betsy's Parcel to access her Parcel because that would mean she could exercise any of the other reserved rights in Section 4 on Betsy's Parcel. Susan addressed the fundamental flaw in this holding in Part A, *supra*. However, these same legal principles of contract construction apply if Section 4.3 is construed to deny access to Susan to her Parcel.

To avoid an interpretation that would thwart rather than further the conservation purposes of the Conservation Easement, Judge Young recognized that the Conservation Easement runs with every portion of the Protected Property in perpetuity, and he wisely considered the critical, long-

term importance of the access "mechanism" in the context of Mr. Knott's reserved right to divide the Conservation Easement Property into two parcels. (*See* 8/31/20 Transcript). **R. p. 340, Line 23 - p. 342, Line 8.**

The Court of Appeals' ruling mistakenly defeats the owner of the interior half of the Protected Property being assured access to it and works against protection of its conservation values. In so doing, the Opinion leads to an absurd result. Susan requests that this Court review the Court of Appeals' determination that she, as Grantor, is not entitled to the Grantor's reserved right in the Conservation Easement to use the existing roads to further the conservation purposes identified in the Conservation Easement and Baseline Report.

II. The Court of Appeals erred and failed to follow precedent by going outside the four corners of the Conservation Easement and considering disputed extrinsic evidence regarding a separate parcel of land that has nothing to do with the Conservation Easement.

As this Court stated in *Rodarte v. University of South Carolina*, 419 S.C. 592, 603, 799 S.E.2d 912, 917-918 (2017):

> "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990) (citing *Iseman v. Hobbs*, 290 S.C. 482, 483, 351 S.E.2d 351, 352 (Ct. App. 1986)). " 'Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties *as found within the agreement*.'" *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014) (emphasis added) (quoting *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011))." 'Interpretation of a contract is governed by the *objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it.' " *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015) (emphasis added) (quoting *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 143–44 (Ct. App. 2009)."

As this Court stated in *Gilliland v. Elmwood Properties*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990), the parol evidence rule is "especially true when the written instrument contains a

merger or integration clause." Section 5.22 of the Conservation Easement includes the following merger and integration provision confirming that the intent of Mr. Knott and Wetlands America on matters relating to the Conservation Easement is fully encapsulated in the Easement itself:

> 5.22 Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with Section 5.11.

(*See* Conservation Easement at p. 24). **R. p. 107.**

Given the Grantor's unambiguous reservation of the right to use roads in Section 4.3 of the Conservation Easement, the identification of the access gate on Cainhoy Road and the internal road system in the Report, and the Conservation Easement's merger and integration provision, pursuant to this Court's precedent, the Court of Appeals should have restricted its analysis of the access issue to the four corners of the Conservation Easement and the accompanying Report. Instead, both in its Opinion and its Order Denying Petition, the Court of Appeals references Susan's previous ownership of a separate parcel of land adjacent to the Conservation Easement Property. Opinion at pp. 3, 15-16. Extrinsic evidence of Susan's ownership and subsequent sale of an adjacent parcel is irrelevant, and was properly not considered by Judge Young.

In its short Order denying Susan's Petition for Rehearing, the Court of Appeals explained its reference to parol evidence with the following justification:

> [W]e take this opportunity to address the following assertion on page 8 of the-petition: "The Court mistakenly found that Susan had access to her half of the Protected Property based on the express easement she reserved from Charity Church Road to a 10-acre parcel, the benefited parcel, that was next to the Protected Property." This court made no such finding. As clearly set forth in the opinion, when Father executed the Conservation Easement in 1998, Susan owned the Access Parcel. She did not sell it or reserve an easement over it until 2007. In 1998, Susan had no need for an easement over the Access Parcel because she owned that property. *See Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485,493 (Ct. App. 2004) ("In ascertaining intent, the court will strive to discover the situation of the

parties, along with their purposes at the time the contract was entered." (emphasis added)).

Order denying Petition for Rehearing dated February 15, 2024.

In this statement the Court of Appeals acknowledges its consideration of extrinsic evidence in construing the clear and unambiguous terms of the Conservation Easement by saying it was entitled to consider the situation of the parties at the time the contract was entered, citing Ellie, Inc. v. Miccichi, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004). However, the Court of Appeals in Ellie made clear that external evidence of intent and matters outside the four corners of the contract may only be considered if the contract is *ambiguous*. 594 S.E.2d at 493 ("However, where an agreement is ambiguous, the court should seek to determine the parties' intent.") Otherwise, according to the Court of Appeals in Ellie, "[t]he court must enforce an unambiguous contract according to its terms, regardless of the contracts wisdom or folly, or the parties' failure to guard their rights carefully." 594 S.E.2d at 493.

Betsy's extrinsic evidence of possibly other access from a nearby parcel, to vary the terms of the clear and unambiguous Conservation Easement, cannot be considered. *Snow v. Smith*, 784 S.E.2d 242, 248 (S.C. Ct. App. 2016)("When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself, and using extrinsic evidence to contradict the plain language of the deed is improper.").

The Court of Appeals' consideration of this improper extrinsic evidence and Betsy's arguments regarding other possible outside access, including the Court of Appeals' adoption of Betsy's misleading terminology in referring to a separate "Access Parcel", was contrary to uniform precedent of this Court that extrinsic evidence cannot be considered in any respect to determine the intent of the parties to a contract where the terms are clear and unambiguous, which "is

especially true when the written instrument contains a merger or integration clause." Gilliland v. Elmwood Properties, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (S.C. 1990).

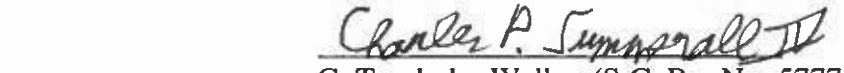
Susan respectfully submits that this Court should review the Court of Appeals' decision that relies, in part, on improper extrinsic evidence that contradicts the unambiguous terms of the Conservation Easement, contrary to this Court's unwavering precedent that parol evidence may not be considered if the terms of a contract are clear and unambiguous.

CONCLUSION

Based on the foregoing, Susan respectfully requests that this Court grant her Petition for Writ of Certiorari and review the decision of the Court of Appeals herein.

March 18, 2024

Respectfully submitted,



G. Trenholm Walker (S.C. Bar No. 5777)
Charles P. Summerall, IV (S.C. Bar No 5433)
Walker, Gressette & Linton, LLC
Post Office Box 22167
Charleston, SC 29413
T: (843) 727-2200
F: (843) 727-2238
Walker@wglfirm.com
Summerall@wglfirm.com

Attorneys for Petitioner/Respondent
Susan Brooks Knott Floyd

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Sr., Circuit Court Judge

Appellate No. 2020-001354

Susan Brooks Knott Floyd..... Petitioner/Respondent,

v.

Elizabeth Pope Knott Dross..... Appellant.

PROOF OF SERVICE

I certify that I have served the **Petitioner/Respondent Susan Brooks Knott Floyd's Petition for Writ of Certiorari** by electronic mail, on March 18, 2024, addressed to the attorneys of record via electronic mail:

Todd Hess, Esq.
5922 Weddington Road, Suite 15-195
Wesley Chapel, NC 28104
toddhess@biziplaw.com

Joshua Steven Whitley, Esq.
Smyth Whitley, LLC
126 Seven Farms Drive
First Citizen Plaza, Suite 260
Charleston, SC 29492
Jwhitley@smythwhitley.com

John William Fletcher, Esq.
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402
jfletcher@barnwell-whaley.com

Attorneys for Appellant Elizabeth Pope Knott Dross

Nancy Jane Dennis
Paralegal