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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2024-000427

Susan Brooks Knott Floyd, ... Petitioner

v.

Elizabeth Pope Knott Dross, ... Respondent

RETURN TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTERSTATEMENT OF THE CASE

A. Factual Background

Respondent Susan Brooks Knott Floyd ("Susan") commenced this action on September 20, 2019 against her sister, Elizabeth Pope Knott Dross ("Betsy") in the Court of Common Pleas of Berkeley County, South Carolina. (*See generally* R. pp. 21-32).

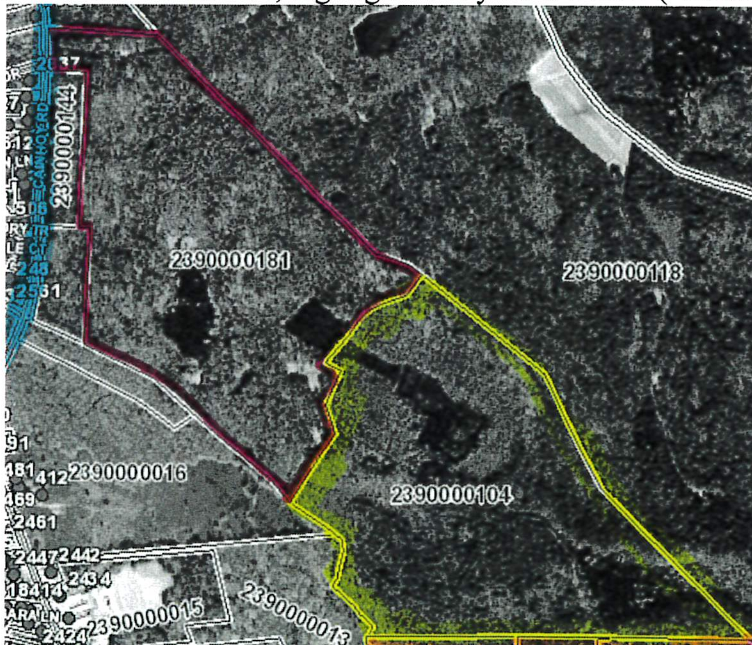
1. The Properties

a. The Unified Tract (Later Subdivided into Betsy's and Susan's Parcels)

Betsy's and Susan's father, Benjamin Franklin Knott ("Father"), owned a 371-acre tract (the "Unified Tract" or "Protected Property") near Huger, Berkeley County, South Carolina. At his death on November 18, 2009, Father subdivided the Unified Tract into two similar parcels:

(a) TMS No. 239-00-00-181, highlighted in purple below ("Betsy's Parcel");

(b) TMS No. 239-00-00-104, highlighted in yellow below ("Susan's Parcel").



(*See* R. p. 192 ¶ 4 & 196). The Unified Tract's only direct road frontage was on Cainhoy Road (shown in blue) on what ultimately became Betsy's Parcel.

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b. Susan's Access Parcel Allowing Her Access to the Unified Tract.

Another parcel relevant to this appeal TMS No. 239-00-00-124 ("the '124 Tract"), which is depicted bounded in pink below ("Access Parcel"):

The Access Parcel fronts Charity Church Road (depicted in green above). One side of the Access Parcel shares a boundary with Susan's Parcel of the Unified Tract (shown in yellow).

Historically, Father and his family accessed the Unified Tract via Charity Church Road through the Access Parcel. (*See* R. p. 193 ¶ 5). On December 9, 1996, Father conveyed the Access Parcel to Susan, providing Susan her own means of entrance to the Unified Tract. (*See id.* R. p. 193 ¶ 6 and 198-201). Father and his family used Susan's Access Parcel to access the Unified Tract. (*See id.*). In late 2004 or early 2005, Susan changed the lock on the gate between Susan's Access Parcel and Charity Church Road, denying Father's and other family members' access to the Unified Tract via Charity Church Road. (*See id.*). Susan continued to use her Access Parcel to gain access to the Unified Tract via Charity Church Road; on the other hand, Betsy and Father accessed the Unified Tract via Cainhoy Road as a result of Susan's action to block their access to the Unified Tract at Charity Church Road. (*See id.*).

On September 26, 2007, Susan and her husband sold the Access Parcel (except for a 10.48-acre developable tract that borders Susan's Parcel to the south outlined in white in the '124 Tract above (the "Floyd Property")) to WH Land Company, LLC for $4,000,000. (*See* R. pp.

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203-14). Susan and her husband retained ownership of the Floyd Property.[1] Susan also retained an unrecorded "easement for access, ingress, and egress" over the part of Susan's Access Parcel that she had sold. (*See* R. pp. 216-23). On February 25, 2008, an executed Easement Agreement confirmed the grant of "a non-exclusive, perpetual access easement" over an "unpaved access road which provides vehicular access from the Floyd Property to Charity Church Road." (*See* R. pp. 225-35). That easement ("Susan's Access Easement") granted Susan access to the Unified Tract (specifically to Susan's Parcel) via Charity Church Road through the Access Parcel and via the Floyd Property.

On April 1, 2015 — several years later (and well after the Unified Tract had been subdivided between the parties) — Susan executed a Termination, Cancellation, Renunciation and Abandonment of Easement, in which she and her husband agreed to "terminate, cancel, renounce, abandon, transfer, grant and convey to WH Land Company, LLC all their right, title and interest in, to and under" Susan's Access Easement. (*See* R. pp. 237-42).

2. <u>The Conservation Easement on the Unified Tract.</u>

The Unified Tract was the subject of a 1998 Deed of Conservation Easement ("Conservation Easement") between Father and Wetlands America Trust, Inc. ("Ducks Unlimited"). (*See generally* R. pp. 81-148).[2] The Conservation Easement was intended "to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition" and to prevent any use that might "impair or interfere with the conservation values of the Protected Property." (*See* R. p. 87 § 1.1). Father granted Ducks Unlimited the right to visual access to the Unified Tract and a limited right of entry to inspect for compliance with the Conservation Easement. (*See* R. p. 87 §§ 2.1 & 2.2).

Father also agreed that certain "uses and practices *as modified by the reserved rights set forth in Section 4*, though not an exhaustive recital of the inconsistent uses and practices, are

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[1] The Floyd Property is depicted as the un-highlighted square box (above the number 2390000124) in the preceding image.

[2] The Conservation Easement is governed by South Carolina law. (*See* R. p. 106 § 5.19).

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hereby deemed to be inconsistent with the Purpose of this Easement and shall be prohibited, *subject to the rights reserved in Section 4*." (*See* R. p. 88 § 3 (emphasis added)). Father agreed, *inter alia*, not to engage in numerous activities, including farming, constructing structures, building new roads (or widening existing ones), leasing, mining, possessing exotic plants or animals, agriculture, and commercial hunting or fishing. (*See* R. pp. 88-90 §§ 3.1-3.16). The Conservation Easement greatly limited and restricted Father's right to use his Unified Tract.

Nevertheless, Father retained "Reserved Rights" in the Unified Tract "for himself, his heirs, successors and assigns." (*See* R. p. 91 § 4). For example, Father reserved "[t]he right to subdivide the Protected Property into two parcels, provided that no parcel contains less than 100 acres." (*See* R. p. 91 § 4.1). He also retained rights with respect to roads on the Unified Tract:

> The right to maintain and replace existing roads at the same location with roads of like size and composition. The right to construct new roads to the New Structures using permeable materials (e.g. sand, gravel, crushed stone). Grantor shall use existing roads whenever possible for access to the New Structures.[[3]] The right to widen existing roads for utility rights-of-way. The right to use roads for all activities permitted under this Easement. Maintenance of roads shall be limited to normal practices for non-paved roads, such as the removal of dead vegetation, scraping and crowning, necessary pruning or removal of hazardous trees and plants, application of permeable materials necessary to correct erosion, placement of culverts, water control structures, and bridges, and maintenance of roadside ditches.

(*See* R. p. 91-92 § 4.3). Father also retained and reserved other rights with regard to the Unified Tract, including the rights to hunt and fish with family and friends, construct and maintain a dock, and use part of the Unified Tract as a landfill. (*See* R. pp. 92-99 §§ 4.4-4.25).

The Conservation Easement also required that Father "include reference to all terms and conditions of this Easement in any subsequent deed, or legal instrument by which the Grantor divests itself of either the fee simple in all or part of the Protected Property, or its possessory interest in any portion of the Protected Property . . . ." (*See* R. p. 101 § 5.5). The burdens of the Conservation Easement "run with the Protected Property and will be enforceable against [Father]

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[3] Under the Conservation Easement, Father reserved the right to construct one single-family home and related structures (collectively the "New Structures") on the Unified Tract. (*See* R. p. 91 § 4.2).

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and all future owners in perpetuity during the period of such ownership." (*See* R. p. 102 § 5.8).

3. **Father's Death and Subdivision of the Unified Tract.**

Father died on November 18, 2009. In Article III of the February 12, 2004 Will of Benjamin F. Knott ("Will"), Father divided the United Tract into Betsy's Parcel (which fronts Cainhoy Road) and Susan's Parcel and conveyed those parcels to his daughters. (*See* R. pp. 150-51 art. III). The Will does not grant Susan an easement (or any right to enter) on Betsy's Parcel. (*See* R. pp. 150-58).

B. **Procedural History**

This lawsuit involves Susan's claim that she is entitled to use Betsy's Parcel to access Susan's Parcel. Susan filed her Amended Complaint on November 22, 2019. (*See* R. pp. 21-48). The Amended Complaint asserts claims sounding in: (1) Declaratory Judgment; (2) Reformation of Deeds of Distribution; (3) Easement Implied by Prior Use; (4) Easement by Necessity; and (5) Injunction. (*See generally* R. pp. 35-48). Susan alleges under various legal theories that she is entitled to judicial relief granting her an easement or other right to the access of Susan's Parcel *through Betsy's Parcel.* On December 5, 2019, Betsy filed her Answer to Amended Complaint and Counterclaim. (*See generally* R. pp. 49-59).

On July 15, 2020, Susan filed Plaintiff's Notice of Motion and Motion for Partial Summary Judgment ("Motion for Summary Judgment"). (*See generally* R. pp. 66-74). Susan's Motion for Summary Judgment requested a declaratory judgment that, *inter alia*, "[p]ursuant to the unambiguous terms of the governing Conservation Easement, including the expressly reserved rights in Section 4.3 thereof, Susan . . . has the right to use the unpaved roads crossing over Betsy's Parcel to access Susan's Parcel." (*See* R. p. 66). On August 24, 2020 Betsy filed her Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, attaching the Affidavit or Elizabeth Pope Knott Dross. (*See generally* R. pp. 172-248).

On August 31, 2020, the Honorable Roger M. Young, Sr. heard Susan's Motion for Summary Judgment. (*See generally* R. pp. 299-350). Judge Young clarified that the Motion for Summary Judgment *only* sought a determination that the Conservation Easement created an

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explicit right for Plaintiff Susan to use the road on Betsy's Parcel to access Susan's Parcel. (*See* R. p. 302:7-304:10). On September 11, 2020, Judge Young entered an Order Granting Plaintiffs' Motion for Partial Summary Judgment ("Summary Judgment Order"). (*See generally* R. pp. 1-17). In relevant part, Judge Young's Summary Judgment Order 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.

(*See* R. pp. 8-9).

On October 9, 2020, Defendant Betsy filed her Notice of Appeal to the Court of Appeals. (*See* R. pp. 276-98). On January 17, 2024, the Court of Appeals filed Opinion No. 6044 ("Opinion"), which (without dissent) reversed Judge Young's grant of summary judgment and remanded the case for further proceedings. On February 1, 2024, Susan filed a Petition for Rehearing with the Court of Appeals, which was denied on February 15, 2024. On March 18, 2024, Susan filed the instant Petition for Writ of *Certiorari*. For the reasons that follow, the Court should deny that Petition.

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ARGUMENT

A. Governing Legal Standards.

The governing Appellate Court Rules set forth numerous guidelines for the granting of *certiorari*:

> A writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will be granted **only where there are special and important reasons**. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.A.C.R., Rule 226(b) (emphasis added).

B. The Court Should Not Grant *Certiorari* to Consider Whether the Court of Appeals Failed to Follow Precedent and Improperly Considered Extrinsic Evidence.

1. Susan Has Not Shown Any of the Grounds Set Forth in Appellate Rule 226.

Susan's Petition for a Writ of *Certiorari* is focused upon her disagreements with the Court of Appeals decision that the Conservation Easement does not expressly grant her an easement on Betsy's Parcel. However, she does not set forth any compelling reasons—such as those set forth in Rule 226—why this Court should grant discretionary review of this appeal.

Susan has not argued or shown that any special and important reasons exist that would warrant discretionary review. She does not argue that there are novel questions of law requiring this Court's clarification. This case does not involve a complex question of statutory interpretation or an unsettled area of the law. There was no dissenting opinion in the Court of Appeals, which would suggest that there is not a controversial legal question necessitating

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Supreme Court review. Furthermore, Susan has not shown that the Court of Appeals' Opinion conflicts with a prior decision of that court or this Court. In addition, this case does not involve constitutional or federal issues. Simply put, Susan has not shown a proper reason for the Court to exercise its discretionary jurisdiction in this matter.

This is, at its heart, an appeal involving settled black-letter principles of law. A review of Susan's Petition for Writ of *Certiorari* shows that most of her legal citations are for general contractual interpretation principles. There is not much of a dispute as to *what* the law is. Susan's real argument is simply that she disagrees with the Court of Appeals' application of that legal authority. Betsy successfully argued to the Court of Appeals that the Conservation Easement—applying basic contract law principles—does not create an express easement over Betsy's Parcel. Susan's main contention in her Petition is that this conclusion is incorrect under general contract law. However, as discussed below, Susan has not shown that the Court of Appeals' decision is actually in error.[4]

For the foregoing reasons (and those set forth below), Betsy submits that this Court should not grant review.

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[4] In addition to the arguments made herein, Betsy adopts—and incorporates by reference as if set forth at length—the alternative arguments she made before the Court of Appeals both in her briefs and at oral argument. Those arguments include: (a) that the granting of equitable relief was foreclosed by principles of equity; (b) that Susan's construction of the Conservation Easement would lead to an absurd result; and (c) that the Conservation Act of 1991 (S.C. Code § 27-8-40) prohibits Susan's claims. In addition to the arguments herein, those arguments provide additional and alternative support for the Court of Appeals' reversal of the grant of summary judgment.

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2. **<u>The Court of Appeals Correctly Concluded That the Plain Language of the Conservation Easement Does Not Create an Express Right for Susan to Use Roads on Betsy's Parcel.</u>**

The trial court premised its grant of partial summary judgment only on a finding of an "express" easement or right to use Betsy's Parcel, relying primarily on Section 4.3[5] of the Conservation Easement.[6] The Court of Appeals accurately summarized Susan's arguments—also relying heavily on Section 4.3—as follows:

> Susan argues: (1) the Conservation Easement envisioned that the Unified Tract would be subdivided because section 4.1 reserves the right to subdivide the Unified Tract into two parcels; (2) "there would be no need for the owner of property to reserve a right to use the roads on the owner's property," as Father did in section 4.3; and (3) therefore, the "reasonable interpretation . . . of this reserved right [section 4.3] 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."

(*See* Opinion, at 10).

The Court of Appeals correctly "agree[d] with Betsy's argument that the language in section 4 did not create a right for Susan to access Susan's Parcel via the roads on Betsy's Parcel." (*See* Opinion, at 7). Specifically, the Court of Appeals held:

> 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. [Citation omitted.]
>
> 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 ***<u>as against Ducks Unlimited</u>***. Therefore, we disagree with Susan's assertion that this easement as against Ducks Unlimited translates into her own easement ***<u>as against Betsy</u>***.

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5 Among other things, this provision granted Father (and his "heirs, successors and assigns") "[t]he right to use roads for all activities permitted under this Easement." (*See* R. pp. 91-92 § 4.3).

6 Judge Young concluded that "the clear and unambiguous terms of Section 4.3 of the Conservation Easement allow Susan . . . to exercise the Grantor's reserved right to access her parcel by use of the roads." (*See* R. p. 8).

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(*See id.*, at 10). The Court of Appeals rejected Susan's argument that the Conservation Easement's reservation of rights to use roads on the Unified Tract somehow granted her rights over Betsy's Parcel: "[D]espite 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. Therefore, there is no reason to assign another, more limited purpose to section 4.3 (*i.e.*, to access Susan's parcel). (*See id.* at 11).

"[A] conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements and must be recorded in the same manner as other easements." S.C. Code § 27-8-30(A). "'An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed.'" *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (*quoting Douglas v. Med. Investors, Inc.*, 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971)). The courts determine the type and scope of an easement by ascertaining the parties' intention as gathered from the language of the instrument; the easement should be construed so as to carry out that intention. *See Smith v. Commissioners of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994). The general rule is the nature of the right and intention of the parties determines the character of an express easement. *Id.* "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 67, 558 S.E.2d 902, 907 (Ct. App. 2001) (citation omitted). When an easement is unambiguous, the Court must determine the parties' intent from the easement itself and should not resort to extrinsic evidence to contradict that plain language. *See Snow v. Smith*, 416 S.C. 72, 85, 784 S.E.2d 242, 248 (Ct. App. 2016). If an easement is ambiguous, the Court may consult extrinsic evidence to determine the grantor's intent. *See Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 at n.8 (Ct. App. 2012).

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The determination of the extent of a grant of an easement is a question in equity. *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006); *Tupper v. Dorchester Cty.*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997).

The unambiguous language of the Conservation Easement does *not* expressly create an easement (or any other right) permitting Susan to access Susan's Parcel via the roads on Betsy's Parcel. The Conservation Easement is devoid of *any* language creating any easements over part of the Unified Tract. It does not express any intention to provide road access in the event Father subdivided the Unified Tract. Neither Susan nor Betsy signed the Conservation Easement. In fact, the Conservation Easement did not even mention them. Judge Young erred in finding that the Conservation Easement somehow conveyed an easement to Susan. The trial judge plainly erred in granting Susan's Motion for Partial Summary Judgment.

Susan's Amended Complaint alleges that Father treated Susan and Betsy "in a generous and even-handed manner." (*See* R. p. 36 ¶14). This notion of equality amongst Susan and Betsy is evidenced in Father's Will, in which he essentially split his property equally between Susan and Betsy. As to the Unified Tract, Susan received one-half and Betsy received the other (with both being of roughly equal size). Under Susan's construction of the relevant documents, she not only received a parcel roughly the same size as Betsy's Parcel, but also a right to use Betsy's Parcel at any time to access her property. Susan would have received significantly more than Betsy under Father's Will, as she would have received not only her one-half (Susan's Parcel), *but also* a valuable interest in Betsy's half.

a. Susan's Reliance on Section 4.3 of the Conservation Easement is Misplaced.

The Court of Appeals correctly concluded that Section 4.3 of the Conservation Easement does not expressly grant Susan rights to access or use of Betsy's Parcel. Section 4.3 provides that Father (for himself and his successors) reserved and retained:

> The right to maintain and replace existing roads at the same location with roads of like size and composition. The right to construct new roads to the New Structures using permeable materials (e.g. sand, gravel, crushed stone). Grantor shall use

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> existing roads whenever possible for access to the New Structures. The right to widen existing roads for utility rights-of-way. The right to use roads for all activities permitted under this Easement. Maintenance of roads shall be limited to normal practices for non-paved roads, such as the removal of dead vegetation, scraping and crowning, necessary pruning or removal of hazardous trees and plants, application of permeable materials necessary to correct erosion, placement of culverts, water control structures, and bridges, and maintenance of roadside ditches.

(*See* R. p. 91-92 § 4.3). The Court of Appeals correctly concluded that the unambiguous language of Section 4.3 does not create any right in Susan to enter or use Betsy's Parcel.

The Conservation Easement does not affirmatively grant property rights to Father (or his successors). Ducks Unlimited did not have any property rights in the Unified Tract to grant Father, who was the sole fee simple owner. Rather, the Conservation Easement is primarily a *limitation* on Father's (and his successors') use of the Unified Tract. It is designed to prevent anyone from using the Unified Tract in such a way as to jeopardize its natural state. Far from an affirmative grant of rights, Section 4 is merely a recitation of *reserved* rights (*i.e.,* already-existing rights that Father kept for himself). As the Court of Appeals correctly noted, "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." (*See* Opinion, at 1). In such an agreement with Ducks Unlimited, Father could only reserve rights that he already had as an owner in the Unified Tract.

The Conservation Easement was between Father and Ducks Unlimited—Father agreed to restrict his (and his successors') rights to use the Unified Tract to protect it. Neither Susan nor Betsy was a signatory to the Conservation Easement. The Conservation Easement does not purport to delineate the rights of Susan and Betsy in the event of a hypothetical subdivision of the property. The Conservation Easement does not contain any provisions governing how reserved rights should be divided between owners of subdivided parts of the Unified Tract. The Conservation Easement does not itself subdivide the Unified Tract. It never even attempts to set

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forth Susan's and Betsy's respective rights. As a result, Section 4.3 could not have created an express easement (or other right) for Susan to use Betsy's Parcel.

The Conservation Easement reserves certain rights to Father (and his successors) vis-à-vis Ducks Unlimited. It does not expressly purport to delineate the rights of Susan and Betsy between themselves. It does not manufacture property rights. It limits the use of property to protect and preserve certain areas. *See* S.C. Code § 27-8-20 ("'Conservation easement' means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations" for certain conservation purposes). Susan has not cited any authority supporting her attempt to use a Conservation Easement to manufacture an easement between two non-parties to that agreement.

The Court of Appeals aptly noted that—contrary to her own accusation that Betsy and the Court of Appeals did so—Susan herself improperly introduces extrinsic evidence to support her argument. Specifically, to reach her conclusion, "Susan must reference outside evidence showing that there was only one way to access the Unified Tract when Father executed the Conservation Easement in 1998 and that a future subdivision of the tract into two parcels would necessarily render one of the parcels landlocked." (*See* Opinion, at 11). Without this evidence, there is nothing to support that Section 4.3—which is silent on the rights between Susan and Betsy—means what Susan otherwise argues that it does. Susan could not even suggest that the Conservation Easement intended to grant her a future right of access through Betsy's Parcel in the event of a hypothetical future subdivision unless the parties contemplated that back in 1998. In the absence of such evidence—and in the absence of any language expressly stating an intention to grant Susan rights over Betsy's future property—there is simply no way for a court to conclude that the 1998 Conservation Easement should be read to create rights between parties years in the future under circumstances not presently known to the contracting parties.

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b. Even if Section 4.3 Allows Susan to Use Roads on Betsy's Parcel, She May Not Do so In a Way That Violates the Law Against Trespass.

In addition to the foregoing, Susan's analysis omits and ignores critical language from Section 4 of the Conservation Easement:

> Notwithstanding any provision to the contrary in this Easement, the Grantor *reserves* for himself, his heirs, successors and assigns the "Reserved Rights" as set forth in this Section 4. *The exercise of all Reserved Rights will be in full accordance with all applicable local, state and federal laws and regulations, as well as in accordance with the intent and Purpose of this Easement.*

(emphasis added). The Conservation Easement unambiguously requires that "reserved rights" (including the right to use roads on the Unified Tract) can only exist and be exercised so long doing so: (a) does not violate the law and (b) is in accordance with the Conservation Easement's purpose. After subdivision of the Unified Tract and conveyance to Father's daughters, Susan's use of roads on Betsy's Parcel, without Betsy's permission, would constitute a trespass in violation of South Carolina law. *See* S.C. Code § 16-11-620. Additionally, the tort of trespass provides a property owner a legal remedy for interference with her right to the "exclusive, peaceable possession" of property. *See Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 139, 747 S.E.2d 468, 473 (2013); *Ravan v. Greenville Cnty.,* 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993). Susan does not dispute that Betsy is the fee simple owner of Betsy's Parcel and has the right to exclusive and peaceable possession of that property. If Susan enters Betsy's Parcel, this would interfere with Betsy's exclusive right to peaceable possession. In the absence of an express right to do so, Susan's use of Betsy's Parcel to access her own property would violate the law.

c. The Court of Appeals Correctly Held that Father's Reservation of the Right to Subdivide Does Not Support Susan's Arguments.

Section 4.1 of the Conservation Easement reserves to Father a limited right to subdivide the Unified Parcel: "[t]he right to subdivide the Protected Property into two parcels, provided that no parcel contains less than 100 acres." (*See generally* R. p. 91 § 4.1). Additionally,

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Section 4.21 of the Conservation Easement reserved the right to grant easements on the Unified Tract:

> 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."

(*See generally* R. p. 98 § 4.21). The Court of Appeals properly noted that Section 4.21 (with 4.1) of the Conservation Easement further supported its conclusion:

> [A]ddressing 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

(*See* Opinion, at 13). In other words, Father reserved for himself the right to create what Susan now claims the Conservation Easement created (though there is no express language to that effect).

Father knew how to grant an easement; he willed a 1.99 acre parcel, which contained Father's former home, to Betsy and Susan. (*See* R. pp. 150-51 art. III). In his Will, he unequivocally expressed his "understanding and intent that my beneficiaries of the said 1.99 acres, and their descendants, have and shall continue to have free right of ingress, egress and regress to and from said 1.99 acres, over and along the existing roads to said property." (*See id.*). However, Father's granting of the Unified Tract to his daughters did not include any language about "free right of ingress [and] egress" over Betsy's Parcel. Had he wished to grant such a right, Father knew how to do this and could have done so.

Susan argues that 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" and that the Section only deals with Father's "reserved right . . . to grant easements to an 'adjacent property owner.'" (*See* Petition for Writ of *Certiorari*, at 17). This argument misconstrues Section 4.21.

Section 4.21 contains three subsections (i) through (iii), which are joined by the disjunctive "or." In other words, it sets forth three different situations where the right to grant easements on the property is reserved and retained.

Section 4.21, as a whole, does not limit the granting of easements to "adjacent" property owners and does not prohibit easements to those owning property that formerly comprised part of the Unified Tract. While subsection (i) of Section 4.21 does relate to easements given to "adjacent property owner[s]," it is the only subsection containing that limitation. On the other hand, Subsection 4.21(iii) allows Father (and his successors) to give easements if "required or convenient in connection with the uses of the Protected Property permitted by this Easement." (*See* R. at 98 § 4.21). Subsection 4.21(iii) does not limit Father to granting easements to "adjacent property owners," as subsection (i) does. As a result, Susan's argument concerning Section 4.21 is without merit.

C. <u>The Court Should Not Grant *Certiorari* to Consider Whether the Court of Appeals Failed to Follow Precedent Governing the Construction of the Unambiguous Conservation Easement by Determining That Susan Did Not Expressly Reserve the Right of Road Access Over Betsy's Parcel.</u>

Susan further argues that the Court should grant *certiorari* because "both in its Opinion and its Order Denying Petition, the Court of Appeals references Susan's previous ownership of a separate parcel of land [*i.e.,* the Access Parcel] adjacent to the Conservation Easement Property." (*See* Pet. for Writ. of *Certiorari*, at 21). She concludes that "[e]xtrinsic evidence of Susan's ownership and subsequent sale of an adjacent parcel is irrelevant, and was properly not considered by Judge Young." (*See id.*). For the following reasons, Susan has not shown a proper reason for the Court to grant *certiorari* on that basis.

For context, the Court of Appeals discussed the Charity Church Road access in its Opinion solely in response to Susan's argument that Section 4.1 of the Conservation Easement (allowing Father to subdivide the property) shows such an intention:

> [T]he evidence shows that there was more than one access point for the Unified Tract *when Father executed the 1998 Conservation Easement*, i.e., Cainhoy Road

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> and Charity Church Road (through the Access Parcel that he had conveyed to Susan in 1996). [Citation omitted.] This belies Susan's claim that Father's reserved right to subdivide the Unified Tract (in section 4.1) would inevitably render one of the two resulting parcels (Susan's Parcel) landlocked—in 1998, Susan already owned the adjacent parcel fronting Charity Church Road. [Citation omitted.]
>
> The fact that Susan's Parcel became landlocked through her own conveyances *after* Father executed the Conservation Easement is irrelevant to Father's intent when he executed the Conservation Easement in 1998.

(*See* Opinion, at 15-16 (emphasis in original)). Moreover, in its Order denying Susan's Petition for Rehearing, the Court of Appeals further clarified its reference to access routes to the Unified Parcel ***in 1998***:

> [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)).

(*See* Ct. App. Feb. 15, 2024 Order (emphasis in original)). For the reasons that follow, these references do not require the exercise of this Court's discretionary jurisdiction.

It is clear that references to the Access Parcel did not have any bearing on the Court of Appeals' decision. The first 13 pages of the Court of Appeals' Opinion concludes that the cited provisions of the Conservation Easement unambiguously **did not** grant Susan an easement (or any rights) over Betsy's Parcel. The Court of Appeals then continued that "[e]ven if we were to consider the language of section 4.3 to be ambiguous such that we may consider evidence outside of the Conservation Easement's plain language, we would still conclude that Father did not intend to grant an express easement over Betsy's Parcel to access Susan's Parcel." (*See* Opinion, at 14). The Court of Appeals citation of this evidence is not a separate basis for its

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holding. The Court of Appeals did not need to—and did not—rely on extrinsic evidence to reverse Judge Young's grant of summary judgment.

Rather, it relied on the plain, unambiguous language of the Conservation Easement in reaching its decision. It only mentioned the Access Parcel to confirm that—***if*** the court were to consider extrinsic evidence of Father's intent when he entered into the Conservation Easement in 1998—that evidence does not support Susan's contention that he intended to provide her an easement through Betsy's Parcel to access a hypothetical future landlocked Susan Parcel. As the Court of Appeals aptly stated, ***if*** the court considered such evidence, it would show that ***in 1998*** Father could not have foreseen or intended to address a possible future landlocked portion of the Unified Tract. If Father contemplated anything in 1998, it was that there was ample access to the Unified Tract via Cainhoy and Charity Church Roads, respectively. Thus, the Court of Appeals correctly concluded that, ***if extrinsic evidence may be considered***, that evidence does not support Susan's reading of the Conservation Easement.

Second, the consideration of this extrinsic evidence would not have impacted the Court of Appeals' decision, even if the Conservation Easement was ambiguous.[7] The law is clear that summary judgment is not proper "where the motion presents a question as to the construction of a written contract, and the language employed in the contract is ambiguous so that intention of the parties as to the legal effect of the contract may not be gathered from the four corners of the instrument." *See Bishop v. Benson*, 297 S.C. 14, 17, 374 S.E.2d 517, 518–19 (Ct. App. 1988). If the Court of Appeals found *any* ambiguity in the Conservation Easement, it *was required to* reverse Judge Young's grant of summary judgment. Irrespective of whether the Court of Appeals agreed with Betsy's construction, the mere presence of an ambiguity would have precluded the entry of summary judgment.

[7] "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *South Carolina Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001).

Finally, even if the Court of Appeals should not have discussed the Access Parcel as "extrinsic evidence," Susan does not identify an important question that requires this Court's clarification. Susan simply disagrees with the Court of Appeals' decision. She does not cite to any specific precedent that the Court of Appeals ignored, misquoted, or misapprehended as a matter of law. Rather, Susan merely argues that the Court of Appeals should not have considered extrinsic evidence under the facts of this case.

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CONCLUSION

Therefore, for the foregoing reasons, this Court should deny the instant Petition for Writ of *Certiorari*.

RESPECTFULLY SUBMITTED

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