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May 24 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Judge
Civil Action No. 2016-CP-41-00153

Opinion No. 2024-UP-086 (S.C. Ct. App. Filed March 20, 2024)

Carr Farms, Inc. and Titan Farms, LLC, ... Appellants,

v.

Susannah Smith Watson, Carson M. Watson,
and Jane Watson.....Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the South Carolina Court of Appeals on April 25, 2024.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN ITS ANALYSIS OF THE NECESSARY ELEMENTS FOR AN APPURTENANT EASEMENT AND THEREBY DEPRIVE APPELLANT OF FUNDAMENTAL PROPERTY RIGHTS?

II. DID THE COURT OF APPEALS ERR IN HOLDING APPELLANT WAS ON CONSTRUCTIVE NOTICE OF THE EXISTENCE OF A PURPORTED EXCLUSIVE USE EASEMENT OUTSIDE THE CHAIN OF TITLE FOR THE SUBJECT PROPERTY BECAUSE A POND EXISTED ON THE SUBJECT PROPERTY?

III. DID THE COURT OF APPEALS ERR IN FINDING RESPONDENT COULD PREVENT APPELLANT FROM MAKING USE OF THEIR PROPERTY?

STATEMENT OF THE CASE

The underlying civil action was commenced on July 20, 2016, in Saluda County Court of Common Pleas, Case No. 2016-CP-41-00153. Relevant to the instant appeal, the Second Cause of Action listed in the Complaint seeks a declaration from the Court that a 1960 easement was one in gross, and as such Petitioner Titan is able to utilize impounded water (a pond) above Petitioner's property. (R. p. 31-32). Respondent Answered and included a Counterclaim seeking a determination that the aforementioned easement was appurtenant, that Petitioner Titan is unable to utilize the impounded water, and that Responded is entitled to exclusive use of the water. (R. p. 45-46). Of note, the subject easement is not in the chain of title for Petitioner Titan's property. (R. p. 18). The parties each moved for partial summary judgment on the issue of whether the subject

easement was in gross or appurtenant and a hearing conducted on July 30, 2018 before the Honorable Alex Kinlaw, Junior. (R. p. 103-230). Both cross motions were denied. (R. p. 1).

Thereafter, the matter came before the Honorable Alison R. Lee evaluating the same issue on the easement. Judge Lee concluded the easement was appurtenant, and issued an Order Granting Partial Summary Judgment. (R. p. 2-14). Petitioners timely moved for reconsideration of this decision, and on May 26, 2021, Judge Lee entered an Order on Reconsideration denying Petitioners' motion. (R. p. 15-22; 231-35). Appeal was timely taken.

The facts relevant to this appeal, which largely are not in dispute, are as follows:

On or about October 1, 1960, for valuable consideration, Mattie Lee Bonnette ("Bonnette") granted, bargained, sold and released unto F. Broadus Smith ("Smith") in fee simple

> All that piece, parcel or tract of land, together with all improvements thereon, containing five (5) acres, more or less, located in Ridge Spring School District, Saluda County, South Carolina, and generally described as follows: Bounded on the North by South Carolina State Highway No. 23; Bounded on the East by other lands of Mattie Lee Bonnette; Bounded on the South by other lands of Mattie Lee Bonnette; and Bounded on the West by lands now or formerly owned by Charles Abney.
>
> On the above tract of land is now located the home of Mattie Lee Bonnette and her husband, Roy Bonnette.
>
> The tract was originally conveyed to Mattie Lee Bonnette by three separate deeds. The first deed, dated April 2, 1929, and recorded in Deed Book 26 at page 481 in the office of the Clerk of Court for Saluda County, South Carolina, conveyed one-half (1/2) acre from Mrs. Hassie P. Cogburn, et al. to Mattie Lee Bonnette; the second deed, recorded in Deed Book 28, page 29 in the office of the Clerk of Court for Saluda County, South Carolina, and dated January 15, 1932, conveyed three and 96/100 (3.96) acres to Mattie Lee Bonnette from the Joint Stock Land Bank of Columbia; the third deed recorded in Deed Book 34 at page 310 in the office of the Clerk of Court for Saluda County, South Carolina and dated December 26, 1938, conveyed one-half (1/2) acre from the heirs of Hassie P. Cogburn to Mattie Lee Bonnette.
>
> Also granted herein is the right, privilege and easement for F. Broadus Smith to construct a dam partially located on the premises herein conveyed and other lands owned by the grantor herein to impound water on lands owned by the grantor and grantee herein and that grantee is to [sic] have exclusive use and control of the same.

(R. p. 149-52; 189-91) ("Smith Deed").

The October 1, 1960 conveyance from Bonnette to Smith was recorded in the office for the Clerk of Court for Saluda County, South Carolina on or about October 3, 1960 in Deed Book 50 at page 291 ("Smith Transfer"), and has been assigned tax map number 150-00-00-017 by Saluda County, South Carolina ("Smith Property").

On October 1, 1960, D.C. Abney ("Abney"), together with his wife, Irene O. Abney, owned property on the western border of the Smith Property by virtue of a conveyance for valuable consideration recorded in the office for the Clerk of Court for Saluda County, South Carolina, on October 15, 1959, and recorded in Deed Book 49 at page 308 ("Abney Property"). The Abney Deed is recorded at Book 49, Page 308. The Abney Property was more particularly described as

> All that certain tract of land containing 164 acres, more or less, known as the "John Cogburn Homeplace", in Ridge Spring School District, Saluda County, SC, lying on both sides of the Columbia-Augusta Highway or State Highway #23, 1 ½ miles East of Ridge Spring on waters of Cloud Creek and bounded on the North by lands of Mrs. Annie E. Boatwright; East by lands of Mrs. Annie Boatwright, J.H. Hipp, and A.L. Bonnett; South by lands of H.G. Cogburn and Estate lands of M.H. Cogburn, deceased. Said tract is more particularly described according to a plat prepared by U.S. Nicholson, Surveyor, on the 5th day of July, 1933, as amended, which is recorded in Plat Book 4, page 6, Office of the Clerk of Court for Saluda County, SC.

On or about September 21, 1970, Smith and Abney entered into an Agreement regarding the prospective impounding of water onto Smith's and Abney's properties (the "Agreement"). (R. p. 153; 192). As outlined in the Agreement, Smith was in the process of constructing a pond on the Smith Property in September 1970. Smith sought to flood approximately one acre of the Abney Property. In exchange for Abney's grant of authority to flood approximately one acre of the Abney Property, Smith, his heirs, assigns, executors and administrators granted to Abney, his heirs, assigns, executors and administrators without limitation "the right to use said water from said pond of F. Broadus Smith as long as any portion of the lands of D.C. Abney is flooded by said pond."

On or about May 25, 2010, the Abney Property was deeded to Carr Farms, Inc. ("Carr"), with said Deed being recorded in the office of the Clerk of Court for Saluda County, South Carolina, at Book 913 at page 276. (R. p. 167-75; 193-201). Carr is the current owner of the Abney Property. As a portion of the Abney Property remains flooded today, Carr has the authority and consent to use "said water from said pond" pursuant to the terms of the Agreement. (R. p. 153; 156-58; 166; 176; 192; 212-15; 244). Respondent acknowledges this right of Carr. (R. p. 49, ¶ 56; 69, ¶ 56; 92, ¶ 56).

On October 1, 1960, the date of the Smith Transfer, Bonnette also owned property on the southern and eastern borders of the Smith Property. On or about March 22, 1976, Bonnette conveyed to Jean B. Holston ("Holston") property adjacent to the Smith Property ("Holston Property"), with said Deed being recorded in the office of the Clerk of Court for Saluda County, South Carolina, at Book 76 at page 148 ("Holston Transfer"). (R. p. 202-05). While the subject pond existed at the time of the Holston Transfer, no reference is made in the Holston Transfer to an exclusive use easement. See id. Titan Farms, LLC, ("Titan") is the current owner of the Holston Property by way of conveyance recorded in Saluda County at Deed Book 966 at page 104. (R. p. 160-65; 206-11). A portion of the Holston Property, of which Titan is the title owner, remains flooded today. (R. p. 156-58; 166; 176; 212-15; 244). None of the conveyances from the Holston Transfer to the conveyance to Titan reveal any reservation of an exclusive use easement to the pond at issue in this action. (R. p. 202-21).

The Court of Appeals affirmed the judgment of the Circuit Court in this matter and concluded that the subject easement met the necessary elements for an appurtenant easement and that Respondent could use the water to the exclusion of Petitioner Titan Farms, the owner of the land underneath the water. *Carr Farms, Inc. and Titan Farms, LLC v. Watson*, Op. No. 2024-UP-

086 (S.C. Ct. App. Filed March 20, 2024). Petitioner sought rehearing which was denied on April 25, 2024. Petitioner now seeks a writ of certiorari to review that decision.

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE EASEMENT DOES NOT GRANT RESPONDENT THE RIGHT TO THE EXCLUSIVE USE OF THE POND PARTIALLY COVERING PETITIONER'S PROPERTY.

Rule 242(b) of the South Carolina Appellate Court Rules, as well as the jurisprudence of this Court, provide that it may grant a writ of certiorari where special and important reasons exist, such as the implication of substantial constitutional issues, where the lower court decision is in conflict with prior decision of this Court, or novel questions of law. Here, the use of one's property, as protected by Article I, Sections 3 and 10, is of fundamental importance and justifies the issuance of the requested writ. Furthermore, precluding a property owner from accessing or using the property he owns, or waters above his property, is contrary to the laws of this State and because the precise issues involved have not been addressed, such is a novel question of law.

This Court has consistently recognized an easement as "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)). Despite making it clear that the title to the land does not transfer to the holder of the easement, permitting the Court of Appeal's decision to stand grants the instant easement holder "exclusive use" of a pond which exists, in large part, on Petitioners' property. Thus, Respondent's "exclusive use" denies Petitioner *any* use or access to their property. Such an absurd result is contrary to the rights of property owners in this State.

A. THE SUBJECT EASEMENT FAILS TO MEET THE NECESSARY ELEMENTS FOR AN APPURTENANT EASEMENT AS ESTABLISHED BY THIS COURT.

For an easement to be appurtenant, or exist beyond a mere personal privilege, it must meet all of the elements outlined by our Courts. *See Windham*, 381 S.C. at 201-02, 672 S.E.2d at 583. It must "inhere[] in the land, concern[] the premises, ha[ve] one terminus on the land of the party claiming it, and [be] essentially necessary to the enjoyment thereof." *Id.* The Court of Appeals failed to fully address Petitioner's position and thereby entered its decision in violation of the laws of this State.

i. The easement does not "*inhere in the land.*"

As outlined in *Windham*, an initial element for an easement appurtenant is that it must "inhere in the land." *Id.* The Court of Appeals' Opinion cites to Black's Law Dictionary (7th Ed. 2000), which defines "inhere" as "to exist as a permanent, inseparable, or essential attribute or quality of a thing; to be intrinsic to something." Their analysis, however, misses the mark by failing to address how the instant easement satisfies this requirement, especially the purported "exclusive use." As noted before the Court of Appeals below, the easement at issue includes a prospective grant of authority to impound water and use said impounded water to the exclusion of the property owner. The Opinion merely recites that the "right to the impoundment of water on the servient estate was inseparable from the land on the servient estate." See Opinion at page 2. It wasn't until ten (10) years later that Broadus Smith elected to start constructing the dam to impound the water which demonstrates that the right was, in fact, separable from the land.

Beyond the foregoing, however, the Opinion fails to address how the "exclusive use" of the pond might "inhere in the land." This is because it doesn't "inhere in the land." The "exclusive use" is not "permanent, inseparable, or essential" as it did not exist at the time of the conveyance.

Furthermore, any argument that the "exclusive use" inheres in the land erodes when we recall that the original owner, Smith, granted unto his neighbor, Abney, the right to use the impounded water. In so doing, Smith demonstrated that his "exclusive use" of the water was not essential, permanent, inseparable. Unfortunately the Court of Appeals fails to acknowledge, or even address, this argument. If the original parties had intended for Smith to permanently have exclusive use of the pond, the Smith Transfer would have included additional acreage to accommodate the entirety of the pond. This was not done, however, and the Opinion of the Court of Appeals eliminates the property rights of the servient estate owner. Furthermore, by failing to address how the "exclusive use" easement might "inhere in the land," the Opinion is in conflict with the analysis of *Windham*.

ii. **The easement is not *"essentially necessary to the enjoyment thereof."***

Similar to the defect noted in the foregoing section, Respondent's claim to exclusive use of the impounded water is not "essentially necessary to the enjoyment of the property." The Court of Appeals, however, simply notes the subject easement "was essentially necessary to the enjoyment of the dominant estate because it was necessary to grant the dominant estate the right for the impounded waters to encroach on the servient estate, and therefore necessary for the dominant estate to enjoy the Pond, which was built in accordance with the intentions of the Smith Deed grantor and grantee." Initially, this sentence fails to address how it is "essentially necessary to the enjoyment of the property" to construct a pond which isn't constructed until ten (10) years later. Certainly, the impoundment of water was considered as it was included in the deed, but hardly can "consideration" of something equate to that matter being "essentially necessary to the enjoyment of the property" when no action is taken on that "consideration" for an extended period of time.

Beyond this, however, as with the foregoing section addressing "inhere in the land," the "exclusive use" of the water is not "essentially necessary for the enjoyment of the property" when considering Smith and Abney's Agreement which gave Abney (and his heirs and assigns) the ability to use the water without eliminating Smith's enjoyment. The Agreement therefore demonstrates Smith's "exclusive use" of the water was not "essentially necessary to the enjoyment thereof." The Opinion deprives the owner of the servient estate from making use of his property and fails to follow *Windham* in evaluating the necessary elements for an appurtenant easement.

B. THE OPINION FAILS TO RECOGNIZE THAT NOTHING IN PETITIONER'S CHAIN OF TITLE, OR A PHYSICAL IN SPECTION OF THE PROPERTY WOULD SUGGEST "EXCLUSIVE USE" OF THE POND.

Beyond the foregoing problems regarding the "exclusive use" easement, said encumbrance is absent from the chain of title for the servient estate. The circuit court acknowledged that Petitioner the subject easement is not in Petitioner Titan's chain of title, and concludes Petitioner Titan "did not have *actual* notice of the easement." (R. p. 18) (*emphasis* in original). Reliance is, thereafter, placed upon whether the existence of the pond would put Petitioner on notice of the existence of the easement. Id; (R. p. 156-58; 166; 176; 212-15; 244). This conclusion is echoed in the Opinion. See, p. 5. While the existence of the pond is not in dispute, this in no way suggests that the existence of a pond would place Petitioner on notice that a party claimed "exclusive use" of said pond. This is especially true when there is a complete absence of any claimed "exclusive use" easement in Petitioner's chain of title. (R. p. 202-21). Imputing upon an unsuspecting landowner the inability to use a portion of his land, or the water upon his land, without anything in the chain of title evidencing such a restriction is contrary to the settled South Carolina law and public policy. *See Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 107, 217 S.E. 2d 16, 20 (1975)(*citing Moyle v. Campbell* 126 S.C. 180, 119 S.E.2d 186 (1923)); *National Bank of*

Newberry v. Livingston, 155 S.C. 264, 152 S.E. 410 (1930))("The law imputes to a purchaser who proposes to acquire title to real estate notice of the recitals in any properly recorded instrument of writing which forms a link in a chain of title to the property proposed to be acquired.").

The Opinion goes on to conclude that because the pond was readily apparent (which Petitioners do not challenge), the fact that it spanned three adjacent properties would put Petitioner Titan on inquiry notice about the legal ownership of the pond, or the possibility that someone had an "exclusive use" that prevented Petitioner Titan from making any use of its property. In support of this conclusion, reference is made to 66 Am. Jur. 2d *Records and Recording Laws* § 78 (2021). South Carolina, however, has never adopted this provision and has not otherwise made such a proclamation. To the contrary, South Carolina has relied heavily on the necessity of filing for lien priority and the corresponding notice provided by filing. *See, e.g. Arrowpoint Federal Credit Union v. Bailey et al.*, 438 S.C. 573, 884 S.E.2d 506 (2023)(declining to adopt replacement mortgage theory which would usurp the South Carolina race-notice statute). The imposition of notice under these circumstances has never been the law of South Carolina and the decision to proceed according to the Opinion works a manifest injustice upon Petitioners in violation of their property rights. Such a novel legal idea should properly be addressed by this Court.

C. THE COURT OF APPEALS SHOULD NOT HAVE DETERMINED RESPONDENT MAY EXCLUSIVELY USE THE POND AS THIS DECISION IS CONTRARY TO THE ESTABLISHED LAWS OF THIS STATE.

This Court has made it clear that easements will not be enforced if they are in violation of South Carolina law or public policy. *See Windham*, 381 S.C. at 201, 672 S.E.2d at 582-83 (*quoting Wayburn v. Smith*, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977)). Restricting one's use of their property, or the water on his land, without anything in the chain of title evidencing such a restriction, is contrary to the settled South Carolina law and public policy. *See Carolina Land Co.*,

Inc., supra. This is especially true when "the fee simple owner of the pond bed [] has the exclusive right to the use of the surface waters above its property and may exclude all others from access to those waters." *White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 135, 609 S.E.2d 811, 820 (S.C. Ct. App. 2005). Allowing Respondent to have exclusive use of the water over the pond bed owned by Titan is, thus, contrary to the laws of this State.

Additionally, the Opinion fails to acknowledge that its decision transforms the nature of the conveyance from an easement whereby the dominant and servient estates must coexist, to a fee simple devise and thereby divests Titan Farms of the ability to make any use of the property underneath the impounded water. As has been held previously by this Court, the owner of the servient estate may use of his property as long as it would not unreasonably interfere with the easement, and vice versa. *See Faulkenberry v. Norfolk Southern Ry. Co.*, 349 S.C. 318, 563 S.E.2d 644, 648 (2002)(*citing Marion County Lumber Co. v. Tilghman Lumber Co.*, 75 S.C. 220, 55 S.E. 337 (1906)). Thus, a "hand in glove" relationship exists between the parties. Use of the impounded water above Petitioner's property would not "unreasonably interfere" with the easement, but preventing use of the water under the guise of "exclusive use" will prevent Petitioner from making *any* use of his property. Such an interpretation deprives Petitioner of its property rights and is contrary to the laws of this State.

CONCLUSION

Based upon the foregoing, Petitioner respectfully as that this Court grant this petition for certiorari to correct the misapplication of its precedent, protect the property rights of this State and address the novel position taken by the Court of Appeals.

Respectfully submitted,

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May 24, 2024