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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

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

Appellate Case No. 2021-000659

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

v.

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

FINAL BRIEF OF APPELLANTS

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s/ Jonathan M. Milling
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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE EASEMENT AT ISSUE WAS APPURTENANT, AND THAT THE CURRENT EASEMENT OWNER CAN UTILIZE THE WATER TO THE EXCLUSION OF THE TITLE OWNER OF THE PROPERTY UNDERNEATH THE IMPOUNDED WATER?

STATEMENT OF THE CASE

This appeal arises from the circuit court's Order Granting Defendants' Motion for Partial Summary Judgment entered on July 26, 2019, to which Plaintiff's timely Motion to Reconsider was denied by Order of May 26, 2021. The basis of this appeal involves the scope of an easement and determination of whether the grant of such right was in gross or appurtenant.

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. (R. p. 31-32). Respondent Answered and included a Counterclaim seeking a determination that the aforementioned easement was appurtenant. (R. p. 45-46). 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). Appellant timely moved for reconsideration of this decision, and on May 26, 2021, Judge Lee entered an Order on Reconsideration denying Appellant's motion. (R. p. 15-22; 231-35). Appeal was timely taken.

STATEMENT OF THE FACTS

The facts, 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"). See Abney Deed 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). No reference is made in the Holston Transfer to any easement granted unto Smith. 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 easement to the pond at issue in this action. (R. p. 202-21).

Standard of Review

The scope of an easement is an equitable matter in which a reviewing court may take its own view of a preponderance of the evidence. *See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 67, 558 S.E.2d 902, 906–07 (Ct. App. 2001)

ARGUMENTS

I. THE LOWER COURT ERRED IN HOLDING THAT RESPONDENT HAS THE RIGHT TO THE EXCLUSIVE USE OF THE POND PARTIALLY COVERING APPELLANTS' PROPERTY.

"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)). "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Snow v. Smith*, 416 S.C. 72, 84, 784 S.E.2d 242, 248 (Ct. App. 2016)(*quoting Binkley v. Rabon Creek Watershed Conservations Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001)). "[T]he intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *Windham*, 381 S.C. 192, 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)). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Winham*, 381 S.C. at 201, 672 S.E.2d at 583 (*quoting Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987)). The grantor's intent must be determined from the four corners of the deed. *Id*.

"The character of an express easement is determined by the nature of the right and the intention of the parties creating it." *See Tupper v. Dorchester County*, 326 S.C. 318, 325-26, 487 S.E.2d 187, 191 (1997)(*citing* 25 Am.Jur. (2d) *Easements and Licenses* § 13 (1966)). There are two types of easements, easements in gross and appurtenant easements. "An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer." *Windham*, 381 S.C. at 201-02, 672 S.E.2d at 583 (*quoting Tupper v. Dorchester County*, 326 S.C.

318, 325-26, 487 S.E.2d 187, 191 (1977)). "In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof." *Id*. "Unless an easement has ***all*** the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross." *Id*. (***emphasis*** added). "Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted." *See Hamilton v. CCM, Inc*., 274 S.C. 152, 263 S.E.2d 378 (1980).

A. THE SUBJECT EASEMENT DOES NOT EVIDENCE A CLEAR INTENT FOR RESPONDENT TO HAVE THE EXCLUSIVE USE.

In the instant situation, the Smith Transfer contains the following language:

> 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. 149-152; 189-191).

As an initial matter, this easement identifies Smith, individually, as the recipient of the easement, without any reference to his heirs or assigns. Id. Without further reflection, then, it would appear that the intent was for the right to be bestowed as a personal privilege. He is the grantee, referenced later in the clause, and again, no reference is made to the easement passing to others. Thus, at least initially, it appears that the intent of the parties was to allow for Respondent's predecessor in interest to enjoy the privilege outlined in the easement and infringe upon the property rights of the grantor, should he elect to do so while the grantor owned those adjacent properties.[1]

[1] Nothing in the easement suggests that Smith had the authority to construct the dam or impound the water in the event Bonnette conveyed her adjacent properties prior to Smith beginning construction of a dam.

This reservation of "right, privilege and easement" can be broken down into two distinct aspects. Initially we have the ability in the future to construct dam and impound water. See id. The language used does not express the continuation of a continuing construction project. "[T]o construct" is not an existing or ongoing situation but rather looks prospectively to something that could or might take place. No timeline is set forth. The only parameter outlined is the authority for future construction to occur "partially" on the conveyed premises and "partially" on lands owned by the grantor.[2] See id.

The language does not recite the breadth of the grantor's land which was authorized to be used for the construction of the dam, nor does it speak to the amount of land which might be authorized to be covered with the impounded water. It is apparent from the plain language, and specifically the reference to an "easement," that title was not to be conveyed to the land that might be covered by the impounded water, or the land upon which the dam might be constructed. *See Douglas v. Med. Investors, Inc.,* 256 S.C. 440, 182 S.E.2d 720 (1971)("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."). The language used, and the lack of specificity regarding the extent of the burden on Bonnette's property, is akin to neighbors being "neighborly." The grantor has no personal interest in using a pond if the water is impounded and she indicates such in the language. Nothing in the four corners of the document suggests that she intended to prohibit future landowners from utilizing the impounded water that partially covered their property. See id.

As suggested from the foregoing, the second privilege in the subject easement, and perhaps most important to the matter at hand, is the grant of the "exclusive use and control of the same

[2] As will be discussed, the restriction upon construction partially upon lands owned by "grantor" is important to the appurtenant easement elements.

[impounded water]" to grantee. Id. Like with the foregoing analysis, the plain language does not award anyone but the grantee the "exclusive use and control" of the impounded water. Absent from the easement language is any reference to "heirs and assigns." Beyond this, however, is the absence of the subject easement from the chain of title for the estate of the grantor. The circuit court acknowledged that Appellant (the successor in interest to the property of Grantor) "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 the world (and Appellant) on notice of the existence of the pond. Id; (R. p. 156-58; 166; 176; 212-15; 244). The issue, however, isn't whether Appellant had notice of the existence of a pond, but rather whether Appellant would have notice of the purported grant of "exclusive use and control" of said pond. Nothing in the chain of title reveals any such notice. (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 Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977). The "exclusive use" easement was in gross and cannot preclude Appellant's use of the impounded water.

B. THE SUBJECT EASEMENT FAILS TO MEET THE NECESSARY ELEMENTS FOR AN APPURTENANT EASEMENT.

As outlined herein, despite what may be the announced intent of the parties, for an easement to be appurtenant, 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.* Thus, even if the Court disagrees with the foregoing, because the easement fails to

satisfy the necessary elements, it must be deemed in gross. *Id.*

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

As outlined in *Windham*, the initial element for an easement appurtenant is that it must "inhere in the land." *Id*. Black's Law Dictionary (7th Ed. 2000) defines "inhere" as "to exist as a permanent, inseparable, or essential attribute or quality of a thing; to be intrinsic to something." The nature of the claimed instant, exclusive, privilege does not "inhere in the land" as it is not a permanent or inseparable attribute of the conveyance. To the contrary, at the time the easement was granted, there was no impounded water to which Broadus Smith could have used exclusively. The easement was not necessary or inseparable from the land as the grant of privilege was prospective. It wasn't until ten (10) years later that Broadus Smith elected to start constructing the dam to impound the water. Furthermore, if the spring which fills the pond dries up, there will be no pond and yet the parties would still have their land.

Additionally, if the parties had intended for Broadus 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. Further, there is nothing to suggest that the "exclusive use" of the pond "inheres in the land." This aspect of the easement is *not* "permanent, inseparable, or essential attribute or quality of a thing; to be intrinsic to something." In fact, as noted, Smith granted unto Abney and his heirs and assigns the ability to use the impounded water. This clearly demonstrates that Smith's "exclusive use" of the pond was "essential." Based upon the foregoing, the grant is not permanent, or inseparable from the land. The instant easement fails this element.

ii. The easement does not *"concern the premises."*

The second element that an easement must meet to be deemed appurtenant is that it must

"concern the premises." *See Windham*, 381 S.C. at 201-02, 672 S.E.2d at 583. As has been outlined herein, the Smith Transfer references the privilege of Smith to create a dam located partially on the conveyed property, and partially on land owned by Bonnette, and to flood part of the property owned by Bonnette. The privilege also awards Smith the "exclusive use and control" of the dam and water. The description of the property conveyed revealed that at the time of the conveyance, Bonnette owned property on the South of the conveyed property, and property on the East of the conveyed property. Thus, the easement is nondescript as to which premises would be encumbered at the time of conveyance, other than to note other lands of Bonnette could be flooded. Hardly can it be said that the easement "concerns the [Bonnette Property]" without further description in the easement.

Even if this description is seen as sufficient to "concern the premises," it cannot be said that the second part of the privilege, the "exclusive use and control" aspect, "concerns the premises." "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 imposed." *Douglas*, 256 S.C. at 445, 182 S.E.2d at 722. The interpretation espoused by Respondent, and adopted by the circuit court, does not grant the privilege to "use the land of another for a specific purpose" but rather excludes the use of the land of another for the use of water. The exclusive use does not "concern the land" but only concerns the water, wherever it might be impounded. This interpretation defies the common law of South Carolina as it defines easements and therefore cannot be appurtenant.

iii. The easement does not have ***"one terminus on the property of the party claiming it."***

Traditionally, one would interpret this clause to reference the starting or ending point of an easement or rite of way for passage to have a "terminus on the property." That is not the case here, as the easement is not one of ingress or egress. It is not a rite of way. Rather, it is the grant of a

privilege to impound water, and also the exclusive use and control water over the lands owned by another.

Whether the easement is appurtenant or in gross depends upon the intent of the parties at the time the deed is executed. *See Proctor v. Steedley*, 398 S.C. 561, 569, 730 S.E.2d 357, 362 (Ct. App. 2012). At the time of the conveyance, there was no impounded water so it would be impossible to determine whether the impounded water would be on the property of the party claiming the easement. While the language does outline the intent to construct the dam partially on the Smith property, and the impounded water to be partially on the Smith property, this does not end the inquiry for this element.

The privilege to exclusively use the water over the Bonnette property, if appurtenant, essentially divests the owner of the servient estate of the ability to use their land, and enjoy water over their property. This effectively renders the easement a conveyance of the property, not an easement. It is clear that this was not the intent in the deed, or the language would have been different. Furthermore, the grant of exclusive use of the impounded water over the Bonnette property does not have a "terminus" in the land; the exclusive use portion of the easement relates *only* to the Bonnette property. If Smith impounded water wholly on his land there is no question that he could exclusively use that water. Because the easement's grant of exclusive use of water over the land of Bonnette, that grant does not relate to the property of Smith and thus has no terminus in the land of Smith. Such is fatal to the claim that the easement is appurtenant. *See Williams v. Tamsberg*, 425 S.C. 249, 261, 821 S.E.2d 494, 500 (Ct. App. 2018).

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

Respondent's claim to exclusive use of the impounded water is not "essentially necessary to the enjoyment of the property." It must, thus, be considered appurtenant. In considering

whether the easement is appurtenant or in gross depends, the intent of the parties must be evaluated at the time the deed is executed. *See Proctor v. Steedley,* 398 S.C. 561, 569, 730 S.E.2d 357, 362 (Ct. App. 2012). In the present situation, there was no pond at the time the deed was executed. There was no dam. While the deed reflects an intention at some point in time to possibly impound water, it did not exist at the time of the execution of the deed. The exclusive use of a future pond is, therefore, not "essentially necessary to the enjoyment of the property."

If we look beyond the existence (or lack thereof) of impounded water at the time the deed was executed to evaluate whether the exclusive use of the pond was necessary to the enjoyment of the property, we need look no further than the easement Smith granted to Abney. In that easement, Smith demonstrates the exclusive use of the pond is not "essentially necessary" as he therein grants Abney the ability to use the impounded water.

The pond may be aesthetically pleasing to Respondent. It may be a luxury for Respondent. A claim of "exclusive use" of the water over property titled in the name of someone else does not change the appeal or enjoyment and thus is not "essentially necessary to the enjoyment" of Defendant's property. This is especially true when considering Smith entered into the Agreement with Abney which gave Abney (and his heirs and assigns) the ability to use the water without eliminating the enjoyment thereof. The Agreement therefore demonstrates Smith's "exclusive use" of the water was not "essentially necessary to the enjoyment thereof."

C. THE GRANT OF EXCLUSIVE USE OF THE WATER IS CONTRARY TO THE ESTABLISHED LAWS OF THIS STATE.

As noted herein, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *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)) (emphasis added). Imputing upon an unsuspecting landowner the inability to use a portion

of his land, 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 Wayburn,* 270 S.C. at 41, 239 S.E.2d at 892. 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. Even if the intent of Smith and Bonnette was to create an appurtenant easement, the purported "exclusive use" is contrary to the laws of South Carolina and therefore cannot stand.

CONCLUSION

Based upon the foregoing, it is clear that in reviewing the necessary elements for an appurtenant easement, the subject easement and the claim of "exclusive use" fails. As a result, Appellant should be allowed to utilize the pond. The circuit court erred in concluding that the easement prevented Titan cannot use the water over the property it owns. The judgment of the circuit court should, therefore, be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 211(b), SCACR I certify that the Final Brief is identical to the briefs previously served under Rule 208 except for those revisions and corrections authorized by Rule 211(b)(1) and (2), SCACR.

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