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.

PETITION FOR REHEARING

s/ Jonathan M. Milling
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Pursuant to Rule 221 of the South Carolian Appellate Court Rules, Appellants respectfully request that the Court grant rehearing and review of *Carr Farms, Inc. and Titan Farms, LLC v. Susannah Smith Watson, et al.*, Op. No. 2024-UP-086 (S.C. Ct. App. Filed March 20, 2024)(the "Opinion"). While the Opinion addresses some of the arguments raised and presented by Appellants, other arguments raised, which would be dispositive, appear to have been overlooked or misapprehended by the Court. Consideration of these arguments should yield a decision in favor of Appellants, and a reversal of the decision of the circuit court. For the reasons set forth herein, Appellants respectfully seek rehearing.

I. The Opinion overlooks or misapprehends several key arguments which demonstrate that the subject easements fail to meet the necessary requirements for an appurtenant easement.

As presented by Appellants, the easement at issue is comprised of two (2) components, each seeking to encumber the servient estate separately. The language of the easement seeks to (1) encumber the property of the servient estate with water should a dam be erected and water impounded in the future (which was ultimately done), and (2) encumber the servient estate such that the owner of the servient estate's use or access of their property or the water through the "exclusive use" clause. Admittedly, it is possible for the owner of the servient estate to use its property consistent with the impoundment encumbrance, if said easement meets the necessary requirement for an appurtenant easement. The "exclusive use" encumbrance, however, would eliminate the owner of the servient estate from making any use of its property. While the Opinion addresses some of the arguments raised regarding the impoundment easement, it does not address how the "exclusive use" easement satisfies the necessary elements for an appurtenant easement.

A. Neither the impoundment easement, nor the "exclusive use" easement inhere in the land.

As it relates to the impoundment easement, the Opinion determines that "[t]he right to the impoundment of water on the servient estate was inseparable from the land on the servient estate. The land was essential to the dominant estate's use of the servient estate for the creation of the Pond as granted in the Smith Deed." Unfortunately, in making this determination the Opinion may have overlooked the fact that at the time of the Smith Deed there was no impounded water, and thus the right to impound water, as well as the impounded water itself, *was*, in fact, separable from the land. Such would defeat this necessary element.

While it is true that Appellants have cited no cases which have the specific factual situation as present here, the scope of an easement (and whether it is appurtenant or in gross) must be determined based upon the facts of each case. Without each of the essential elements being present, the easement will be characterized as in gross. *See Windham v. Riddle*, 381 S.C. 192, 201-02, 672 S.E.2d 578, 583 (2009). Such is a factual determination, and this Court takes its own view 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). Some evidence of each element must be present, however, and there is an absence of evidence to demonstrate that as a part of a conveyance of land, the water which might be impounded in the future is permanent, inseparable, or essential attribute or quality of the property, to be intrinsic to the property. Without meeting these requirements, it does not inhere in the land.

While in *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, this Court did have an occasion to review an easement for the impoundment of water, the question was not presented whether the subject easement was in gross or appurtenant, and thus there was no discussion of this particular issue. Of note, the *Binkley* easement was not included land

conveyance, but rather a stand-alone easement.[1] Further, the *Binkley* easement included a Sketch Map outlining the location of impounded water, the acres covered, elevation and contour lines. *See Binkley*, 348 S.C. at 68-69, 558 S.E.2d at 907-08.[2] The *Binkley* easement thus evidences an imminent intent to impound the water, and where it would flow. Beyond this, however, and completely different from the instant easement, is the absence of any purported easement that only the easement holder which impounded the water would be permitted to use the water. While the water was impounded, access and use of the water was in no way restricted.

This distinction is important, especially when viewing the essential elements of appurtenant easements, as there is no evidence from which the circuit court or this Court may rely to determine that the second aspect of the subject easement, the "exclusive use" inheres 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 Smith granted unto Abney the right to use the impounded water. In so doing, it is clear that the "exclusive use" easement was not essential, permanent, inseparable. As this argument was not addressed in the Opinion, the Court may have overlooked or misapprehended the argument. Thus, Appellants ask the Court to rehear the foregoing arguments which were not addressed in the Opinion, and therefore may have been overlooked or misapprehended. When considering these arguments, the decision of the circuit court should be reversed.

[1] While easements in a deed are certainly permissible and valid, having a stand-alone easement of this nature certainly evidences the intent of the parties. Further, grantee of the easement, Rabon Creek Watershed Conservation District of Fountain Inn, remained the holder of the easement at the time of the action, and thus the nature of the easement (appurtenant or in gross) was not relevant to the proceeding.

[2] These are the attributes the *Binkley* Court noted were customarily included in "flowage" easements. None of them are present in the instant easement.

B. Neither the impoundment easement, nor the "exclusive use" easement are essentially necessary to the enjoyment of the dominant estate.

Akin to the foregoing, Appellants ask the Court to rehear the "necessity" essential element in light of the following overlooked or misapprehended arguments previously presented but not addressed in the Opinion. The Opinion concludes that the easement "was essentially necessary to the enjoyment of the dominant estate to enjoy the Pond. . .." Appellants respectfully submits that the proper way to view the "necessity" element is whether the subject easement is "essentially necessary for the enjoyment of the property" as a whole. Evaluating the "necessity" element in this way explains how easements for ingress and egress of landlocked property satisfy this element, as without the easement the owner cannot enjoy (or use) their property. Viewed this manner, the instant easement is not "essentially necessary for the enjoyment" of the property as impounded water didn't exist at the time of the conveyance or for approximately ten (10) years thereafter. Smith had the ability, right and use of his property this entire time without the impounded water. The impounded water was not essentially necessary for the enjoyment of his property.

In addition to the foregoing, and consistent with the "exclusive use" position outlined in discussing the "inhere" requirement, the "exclusive use" of the impounded water (once it was impounded) was not essentially necessary for the enjoyment of the property as Smith granted unto Abney the ability to use the impounded water. If the "exclusive use" of the impounded water was "essentially necessary for the enjoyment of the property," then he would not have allowed Abney, his heirs and assigns, to use the impounded water. As with the foregoing section, Appellants ask the Court to rehear these overlooked or misapprehended arguments, and when considered, yields a different result.

II. The Opinion overlooks or misapprehends Appellant's argument on notice.

The Opinion further outlines that Appellants are bound by the "exclusive use" easement even though the Opinion acknowledges that the subject deed it is absent from Titan's chain of title. In making this determination, the Opinion concludes that because the pond was readily apparent (which Appellants do not challenge), the fact that it spanned three adjacent properties put Titan on inquiry notice about the legal ownership of the pond. In support of this conclusion, reference is made to 66 Am. Jur. 2d *Records and Recording Laws* § 78 (2021). Before this Opinion, however, South Carolina has never adopted this provision and has not otherwise made such a proclamation. Thus, if the Court is now adopting this position, Appellants would urge that a prospective application of this new rule would be appropriate such that it would not govern the instant matter, which would yield a different result in this Court's decision.

The Opinion does reference *S.C. Dep't of Transp. v. Horry County*, 391 S.C. 76, 84, 705 S.E.2d 21, 25 (2011), but in *S.C. Dep't of Transp. v. Horry County*, the subject easement was included in the chain of title of the servient estate, as opposed to the easement being recorded in a different chain of title as we have in the present case. *Id.*, 391 S.C. at 80, 84, 705 S.E.2d at 23, 25. Rehearing and consideration of this misapprehended argument yields a different outcome in this matter.

III. The Opinion overlooks or misapprehends Appellants' argument regarding the practical impact of the decision.

Finally, the Opinion overlooks or misapprehends Appellants' argument that by permitting the "exclusive use" easement to prevail, the Opinion 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 was argued by Appellants, this Court in *Willimon v. Gilstrap*, No. 2014-001233, 2016 WL 245073 (S.C. Ct. App. Jan. 20, 2016) previously found the term "exclusive" cannot be interpreted so as to exclude the owner of the servient property from using it consistent with the purpose of the easement, yet that is the precise situation we have at hand. In making the earlier decision, this Court relied upon the North Carolina case of *Hundley v. Michael*, 105 N.C.App. 432, 413 S.E.2d 296, 298 (N.C. Ct. App. 1992), which stated "to now exclude the servient tenement owner from using the property within the easement would indeed produce an 'unusual' result." *Id.,* 105 N.C. at 435, 413 S.E.2d at 298. Appellants seek rehearing on the foregoing argument so as to avoid the "unusual result" noted in *Hundley*. Upon rehearing and consideration of this overlooked or misapprehended argument, Appellants submit that the only way to avoid such a result is to vacate the circuit court's decision on the "exclusive use" easement.

CONCLUSION

For the reasons set forth herein, Appellants respectfully asks this Court grant its petition for rehearing and review the Opinion to address those matters addressed herein.

Respectfully submitted,

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