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THE STATE OF SOUTH CAROLINA
In the Supreme Court

May 28 2024

S.C. SUPREME COURT

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

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2024-000427

Susan Brooks Knott Floyd..... Petitioner,

v.

Elizabeth Pope Knott Dross..... Respondent.

**REPLY OF SUSAN BROOKS KNOTT FLOYD
TO RETURN OF ELIZABETH POPE KNOTT DROSS
TO PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

Introduction.....3

Argument5

1. This appeal presents issues coming within the listed considerations for review by this Court because it involves a novel legal issue and a decision of the Court of Appeals that is contrary to settled precedent of this Court5

2. Susan’s positions and Judge Roger Young’s Order implement the unambiguous terms of the Conservation Easement and abide by this Court’s precedent; Betsy’s positions and the Court of Appeals’ decision are contrary to the four corners of the Easement and improperly rely on disputed extrinsic evidence, in violation of this Court’s precedent7

A. The Court of Appeals’ interpretation of the Conservation Easement conflicts with its plain and unambiguous terms, exhibits a misunderstanding of the fundamental nature of a conservation easement, and goes beyond the single issue ruled on by Judge Young and presented by this appeal.....7

B. The Court of Appeals’ decision was influenced by prejudicial extrinsic evidence that should not have been considered under settled precedent of this Court.....9

C. Betsy’s add-on arguments in her Reply that were not ruled upon by the Court of Appeals do not bear on the proper construction of the reserved right in the Easement to use the roads and were correctly decided by Judge Young.....12

Conclusion 15

Introduction

Petitioner Susan Brooks Knott Floyd (“Petitioner” or “Susan”) submits this Reply in response to the Return of the Respondent, Elizabeth Pope Knott Dross (“Respondent” or “Betsy”), to Susan’s Petition for Writ of Certiorari seeking this Court’s review of the decision of the Court of Appeals in Floyd v. Dross, 442 S.C. 79, 897 S.E. 2d 191 (Ct. App. 2024) (the “Opinion”).

It is undisputed that:

1. The only access from a public road to the unpaved road system within the 371-acre Protected Property, that is specifically described in the 1998 Conservation Easement and accompanying Baseline Report is via the sole entrance gate on Cainhoy Road on Betsy’s Parcel. **R.p. 6 ¶19, p. 127, p. 129, and pp. 133-135.**
2. Susan’s and Betsy’s father, Mr. Knott, as the original Grantor, expressly reserved the rights to the Grantor “to use roads for all activities permitted under this Easement” (Section 4.3) and to subdivide the Protected Property into two parcels of no less than 100 acres (Section 4.1). **R.pp. 91-92.**
3. As Mr. Knott’s heirs, personal representatives, assigns, and successors in title to their subdivided Parcels, Susan and Betsy come within the defined term “Grantor.” **R.p. 84 and p. 90.**
4. The Grantor’s “Reserved Rights” in Section 4 have priority, as set forth in Section 4’s opening clause: “Notwithstanding any provision to the contrary contained in this Easement....” **R.p. 90.**
5. The Conservation Easement is unambiguous; extrinsic evidence is irrelevant and cannot be considered in construing the Easement. **See Susan’s Petition and Betsy’s Return; Order of Judge Young, R.pp. 1-7.**

6. If Susan is denied the express right reserved to her as Grantor in the Conservation Easement to use the roads described in the Easement to access her 189-acre interior half of the Protected Property “for all activities permitted under this Easement,” Susan has no access to her half of the Protected Property, and it will be impossible for Susan to fulfill the stated conservation “Purpose” of the Easement as to her Parcel. **R.p. 87.**

Since the language of the Conservation Easement is unambiguous, under this Court’s precedent the Easement must be enforced as written. Pursuant to the plain meaning of Section 4.3, Susan and Betsy both may exercise the Grantor’s expressly reserved right “to use roads for all activities permitted under this Easement.” **R.p. 92.** There can be no alternate interpretation.

Nowhere does the Conservation Easement state that the Grantor’s right to use the roads on the 371-acre Protected Property terminates when the Property is subdivided into two parcels. The only limitation on the Grantor’s road use is that the use must be for “activities permitted under this Easement.” **R.p. 92.**

Despite the foregoing points, Betsy’s Return, like the Court of Appeals’ Opinion, is replete with references to disputed extrinsic evidence which is contrary to the Easement’s plain language and should not be considered. See, e.g., **Return, pp. 1-3** (Referring extensively to disputed facts in Betsy’s Affidavit outside the four corners of the Conservation Easement). Similarly, the Court of Appeals’ decision makes multiple references to a parcel of land once owned by Susan that adjoins her half of the Protected Property. referring to it as the “Access Parcel,” despite that property never being mentioned in the Conservation Easement, nor having any bearing on the Conservation Easement’s terms, nor ever being described by that label except by Betsy’s attorneys in an effort to color the record. The Court of Appeals’ decision, and Betsy’s arguments in her Return, are contrary to this Court’s settled precedent and thwart the stated

Purpose of the Conservation Easement by barring Susan from access to her half of the Protected Property.

As explained below and in Susan's Petition, the issues presented in Susan's request for review meet the criteria for granting a writ of certiorari and pose a precedent-setting question for conservation easements not only throughout the State of South Carolina but also in those other states allowing conservation easements.

Argument

- 1. This appeal presents issues coming within the listed considerations for review by this Court because it involves a novel legal issue and a decision of the Court of Appeals that is contrary to settled precedent of this Court.**

Even though Rule 242(b), SCACR, states that the five listed considerations are "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general," Susan submits that this case easily satisfies considerations (1) and (3):

(1) Where there are novel questions of law....

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court....

Rule 242(b)(1) and (3), SCACR.

The primary issue before this Court is not just novel to South Carolina but is a case of first impression in the United States:

Where a grantor reserves the right in a conservation easement to subdivide the protected property and the grantor later subdivides it, what rights reserved to the grantor in the conservation easement may be exercised by the subsequent owners who both qualify as grantors under the easement's terms?

Neither the appellate courts of South Carolina nor those of any other state have determined this question. Neither the Petitioner nor Respondent cites any such precedent; neither does the Court of Appeals in the Opinion. Yet, it is an important question that will arise with

increasing frequency, particularly in South Carolina, as new landowners sort through the allocation and exercise of those reserved rights with other subsequent owners whose land is encumbered by the same conservation easement.

South Carolina is one of the foremost states in the use of private conservation easements to protect property from development. According to data collected by The Nature Conservancy, the leading private land trust organization in the United States, South Carolina property owners have granted 2,187 private conservation easements protecting over 1,050,000 acres of land, as of February 2024.¹ The South Carolina Legislature has recognized the important public policies furthered by conservation easements, as shown by the South Carolina conservation incentives statute (S.C. Code Section 12-6-3515), the South Carolina Conservation Easement Act (S.C. Code Sections 27-8-10 et seq.), and the statutes establishing the South Carolina Conservation Bank (S.C. Code Sections 48-59-10 et seq.) that helps fund conservation easements. The federal tax laws also recognize the immense public benefit from conservation easements by allowing a favorable tax deduction for a conservation easement if it constitutes a qualified conservation contribution. 26 U.S.C.A. § 170 (E)., 26 C.F.R. § 1.170A-14, Treas. Reg. § 1.170A-14.

The precise issue presented in this appeal is certain to arise again. Conservation easements used to protect large acreage properties often include a right of subdivision into a limited number of parcels. The question of reserved rights is immediately manifest upon the subdivision of the protected property. Although not the issue on appeal, this case presents a good example – the reserved rights in the Conservation Easement allow *one* house to be built on the Protected Property but does not allocate this right to either parcel upon subdivision. **R.p. 91, Respondent’s Return, p. 4, fn. 3.** The question of which subsequent owner may exercise which

¹ <https://tnc.maps.arcgis.com/apps/dashboards/e2214b443c65483091cb744b13fed253>.

reserved rights will arise more and more frequently as properties under conservation easement are subdivided and conveyed to new owners different from the original grantors.

This Court's review of this novel question of law is also particularly important because the Court of Appeals' opinion goes against the plain, clear, and unambiguous terms of the Conservation Easement and refers to inadmissible parol evidence in reaching its conclusion that leaves Susan without any access at all to her half of the Protected Property and prevents her from carrying out the conservation Purposes on her protected land.

2. Susan's positions and Judge Roger Young's Order implement the unambiguous terms of the Conservation Easement and abide by this Court's precedent; Betsy's positions and the Court of Appeals' decision are contrary to the four corners of the Easement and improperly rely on disputed extrinsic evidence, in violation of this Court's precedent.

A. The Court of Appeals' interpretation of the Conservation Easement conflicts with its plain and unambiguous terms, exhibits a misunderstanding of the fundamental nature of a conservation easement, and goes beyond the single issue ruled on by Judge Young and presented by this appeal.

There is no question the Easement reserves to the Grantor the right "to use roads for all activities permitted under this Easement." **R. pp. 91-92.** Yet, the Court of Appeals held that even though Susan was a Grantor as well as heir and successor to her deceased father, she was not entitled to exercise the reserved right of the Grantor to use the roads solely to access her half of the Protected Property. Instead, the Court of Appeals used a strained interpretation to say that the Grantor's reserved right to use the roads applied only as to the Grantee, Wetlands America, even though there is no such limitation in the Easement. Nor was there any reason to reserve a right of access against Wetlands America, since this right was not eliminated or in any way curtailed in the restrictions imposed by Section 3 of the Easement. **R. pp. 88-90.**

The Court of Appeals' rationale rests on an apparent mistaken understanding of conservation easements. The Court of Appeals' premise that the Grantor had to reserve a right to

use the roads or else would not have had that right is incorrect. Floyd v. Dross, 442 S.C. 79, 90, 897 S.E.2d 191, 197 (Ct. App. 2024)(“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”). Contrary to what the Court of Appeals implies, a conservation easement does not automatically eliminate all rights of the grantor, requiring the grantor to specifically reserve a right to preserve it. A conservation easement only restricts those rights enumerated in its restrictions, no more.

“Conservation easements are negative easements that impose specific restrictions on the use of the property.” Wooster v. Department of Fish & Game. 211 Cal.App.4th 1020, 1025, 151 Cal.Rptr.3d 340, 345 (2012). If a particular right was not abridged in the restrictions imposed by the Easement, then the reservation of the right was not necessary to exercise it as to the Grantee, Wetlands America. The restrictions in Section 3 of the Easement do not include a prohibition on the use of the existing roads. **R.pp. 88-90**. The reservation of that right was not necessary to preserve that right as against Wetlands America, as the Court of Appeals ruled, because the right was not eliminated by the restrictions and covenants in Section 3.

As Judge Young pointed out, there was no reason to reserve the right to use the roads unless there was an intent to allow that right to be exercised by both later owners of the Protected Property who both qualified as Grantors. **R.p. 9** (“... 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... 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 specific question is who may exercise the Grantor’s reserved right, not against whom it is exercised nor the reason it was reserved.*

The only reserved right that Judge Young ruled upon and that Susan seeks to exercise is the reserved right of the Grantor “to use roads for all activities permitted under this Easement.” The Court of Appeals went outside the issues on appeal in deciding that it would lead to an absurd result if Susan could exercise the right to use the roads to access her parcel because it would mean she could exercise all other reserved rights on Betsy’s Parcel. 897 S.E. 198. Susan is not seeking to exercise any other reserved right, only the reserved right to cross the existing road to reach her landlocked parcel. The exercise of this right will not materially impair Betsy’s use of her half of the Protected Property. In a different context, at least one court has held a simple right of access over property encumbered by a conservation easement is a “de minimus” use that does not adversely affect conservation values. Redwood Constr. Corp. v Doornbosch, 248 A.D.2d 698, 670 N.Y.S.2d 560 (1998).

B. The Court of Appeals’ decision was influenced by prejudicial extrinsic evidence that should not have been considered under settled precedent of this Court.

The Court of Appeals’ Opinion also goes against settled precedent prohibiting consideration of extrinsic evidence to alter the terms of a clear and unambiguous agreement. Although the Court of Appeals cited this standard more than once, it did not abide by it and clearly considered evidence of Susan’s previous ownership of adjoining property, as is evident by their multiple mentions of it and adoption of the Respondent’s argumentative description of it as the “Access Parcel.”

This Court’s precedent requires that an unambiguous contract be enforced as written.² In this Reply, Susan addresses some examples of how Betsy’s arguments and the Court of Appeals’ decision violate this Court’s precedent.

² Some of this Court’s extensive precedential decisions regarding unambiguous agreements are cited in Susan’s Petition at pp. 9-10 and p. 20.

In her Return, Betsy uses color highlighting to reference separate properties, and she continues to use misleading terms like “Access Parcel”-- even though those separate properties and manufactured terms like “Access Parcel” are not mentioned anywhere in the Conservation Easement, and they have nothing to do with the self-contained 371-acre Protected Property described in the Easement. Betsy’s arguments are based on numerous disputed assertions involving extrinsic evidence ³-- even though Betsy admits that the Conservation Easement is unambiguous, making extrinsic evidence irrelevant to construing the plain language of the Easement. **R.p. 188** (“...the Conservation Easement is unambiguous”)

All of Betsy’s and the Court of Appeals’ numerous references to the separate property that Mr. Knott conveyed to Susan in 1996 are irrelevant and violate settled precedent regarding the construction of unambiguous contracts. See, e.g., Snow v. Smith, 416 S.C. 72, 85, 784 S.E.2d 242, 248 (Ct. App. 2016) (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). Both Susan and Betsy cite Snow v. Smith and other established case law, but it is Susan’s, not Betsy’s, positions that are consistent with this Court’s precedent.

The prejudice is manifest when one considers the full record, even though none of these facts should be considered in interpreting the unambiguous terms of the Easement. Susan brings them up only to refute Betsy’s misleading suggestion in her Reply that her rendition of certain background “facts” is undisputed.

³ Betsy’s and Susan’s conflicting assertions of extrinsic facts are contained in their competing affidavits submitted in support of and opposition to Susan’s motion for partial summary judgment. Betsy’s “facts” in her Reply are drawn directly from her disputed assertions. **Reply pp. 1-3; R. pp. 75-79, pp. 192-194, pp. 258-260.**

In her Return Betsy says Mr. Knott accessed the Protected Property from Charity Church Road over land he conveyed to Susan in 1996. If that were true, Mr. Knott would have reserved an easement over that neighboring property to access his separate, 371-acre tract (which became the Protected Property when the Conservation Easement was placed on it in 1998) when he conveyed it to Susan in 1996. He did not. Instead, Mr. Knott gifted the property to Susan without any restrictions, just as he gifted another property to Betsy in 1996 that is also separate from the 371-acre tract which Mr. Knott protected with the Conservation Easement. **R.p. 259.**

Even though it is improper extrinsic evidence which cannot be considered, another of Betsy's disputed assertions is her reference to Susan's 2015 execution of an easement termination document relating to Susan's sale of her separate property (**Return p. 3**), which has nothing to do with the Conservation Easement. It is a matter of public record that Susan terminated that irrelevant easement on that separate property in 2011. That easement termination document was recorded in the Berkeley County Register of Deeds on September 12, 2011, in Volume 9091 at Page 322, and it was previously produced in discovery to Betsy and her counsel (Bates-stamped Knott Floyd 000879-881). Upon request by a separate party that has nothing to do with the Conservation Easement, Susan re-executed the same easement termination document in 2015. In any event, as stated by Susan in her Supplemental Affidavit (**R.p. 259**), she was free to sell her separate property at any time, which she did with the understanding that she could continue to access the Conservation Easement Property from Cainhoy Road-- as specifically described in the Conservation Easement and Baseline Report.

But, none of this extrinsic evidence, much less Betsy's spin on it, can be considered in interpreting the unambiguous Easement. Though Judge Young followed this Court's precedent and correctly disregarded Betsy's attempt to confuse the issues by offering disputed extrinsic

evidence, the Court of Appeals' decision is clearly influenced by Betsy's extrinsic evidence and misleading terminology. As an example, the Court of Appeals' Opinion states: "[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 and Charity Church Road (through the Access Parcel that he had conveyed to Susan in 1996)." (*See* Opinion at p. 15) (emphasis in original).

Finally, with all due respect, the Court of Appeals was incorrect in its assertion that extrinsic evidence was the only way Susan could establish that Cainhoy Road constituted the sole public road adjoining the Protected Property and that a future subdivision of the Protected Property would leave one parcel landlocked. The Easement and attached Baseline Report clearly establish these two facts. The *only access* to the 371-acre Protected Property, which Mr. Knott and Wetlands America specifically described in the Conservation Easement and Baseline Report, is from Cainhoy Road. Appendix E to the Baseline Report, prepared by Mr. Knott and Wetlands America as an integral part of the Conservation Easement, shows the specific locations of both the sole entrance gate to the Protected Property at Cainhoy Road, as well as the unpaved road system that the Knott family used going from that gate across what is now Betsy's Parcel to access what is now Susan's Parcel. (See Susan's Affidavit, **R. p. 77 Par.18**, Report Appendix E, **R. p. 129**, and photographs of the entrance gate and road system at Report Appendix I, **R. pp. 133-135**). That is not extrinsic evidence.

C. Betsy's add-on arguments in her Reply that were not ruled upon by the Court of Appeals do not bear on the proper construction of the reserved right in the Easement to use the roads and were correctly decided by Judge Young.

Petitioner will briefly address the other arguments of Respondent in her Return that were not ruled upon by the Court of Appeals as alternative grounds for upholding its decision.

In her Return, Betsy asserts that Susan's use of the roads over Betsy's Parcel to access Susan's Parcel would constitute a trespass. **Return p. 14.** Judge Young correctly rejected that assertion: "Given the expressly reserved right in Section 4.3, Susan's use of the roads on Betsy's Parcel to access Susan's Parcel for activities permitted under the Conservation Easement would be authorized by the terms of the Conservation Easement and would not constitute a trespass or otherwise violate South Carolina law. **"R. p. 9.**

In her Return, Betsy asserts that Section 4.21 of the Conservation Easement provides a mechanism for granting easements on the Protected Property. **Return pp. 15-16.** As Judge Young decided (**R.p. 10**), and as further addressed in Susan's Petition, Section 4.21 applies to "an adjacent property owner". It is inapplicable: Susan comes within the Easement's definition of Grantor, and Susan's Parcel is part of the Protected Property. **R.p. 10.**

Betsy further argues that subsection 4.21 (iii) allows for easements if "required or convenient in connection with the uses of the Protected Property permitted by this Easement." That argument ignores that Section 4.3 expressly reserves the right of the Grantor--defined to include Susan--to "use roads for all activities permitted under this Easement." No other access right is "required or convenient."

Betsy asserts that it is unfair to her if Susan has the right to use the roads over Betsy's Parcel to access Susan's Parcel. **Return p. 11.** Betsy's assertion pales in comparison to the complete devaluation of Susan's Parcel if Susan is denied her Grantor's reserved right to use the roads to access her Parcel and fulfill the stated Purpose of the Conservation Easement as to her 189-acre half of the Protected Property. As stated previously, at least one court has held that a simple right of access over property encumbered by a conservation easement is a "de minimus"

use that does not adversely affect conservation values. Redwood Constr. Corp. v Doornbosch, 248 A.D.2d 698, 670 N.Y.S.2d 560 (1998).

Betsy's assertion also ignores the important public policies underlying conservation easements:

“The social utility of devoting property to conservation, historic preservation, and charitable purposes is strong enough to justify severe restraints on alienation that are reasonably necessary or convenient to assure that the property will be used to carry out the intended purposes.”

1 Restatement 3d, Property: Servitudes, §3.4, Comment i, (2000).

Although “severe restraints on alienation” are justified in the context of conservation easements, Susan's right to exercise the Grantor's reserved right to use the roads to access her Parcel does not come close to being a “severe restraint” on Betsy's Parcel. Section 4.3 limits Susan's right to use the roads to “activities permitted under this Easement,” just as the Knott family has historically done. Further, her request for declaratory relief was self-limiting. She only wants to use those roads to gain access to her landlocked parcel. If Susan were ever to damage the roads on Betsy's Parcel, Betsy would have the right to seek reimbursement under common law principles that equitably apportion the cost of repair and maintenance between the owner of the land and the person using the right of access. Hayes v. Tompkins, 287 S.C. 289, 337 S.E.2d 888 (1985).

Betsy has aggressively prevented Susan from using the one entrance road to the Protected Property to reach her half. Betsy changed the locks on the gate on Cainhoy Road on her parcel that the Baseline Report specifically identified as the sole entrance to the 371-acre Protected Property. In the past, Betsy has even refused Susan's request to accompany Ducks Unlimited on its annual inspection of Susan's Parcel. **R.p. 259 ¶¶5 and R. pp. 87-88**. Betsy is thwarting the stated Purpose of the Conservation Easement as to Susan's 189-acre half of the Protected

Property. In considering Betsy's disputed extrinsic evidence and misconstruing the plain language of the Conservation Easement, the Court of Appeals violated this Court's precedent regarding the construction of unambiguous agreements.

By granting Susan's Petition for Writ of Certiorari, this Court can fully review the novel issue presented by this appeal that has important precedential value for the interpretation of conservation easements not just in South Carolina but nationwide.

Conclusion

For the foregoing reasons and those stated in her Petition for Writ of Certiorari, Susan requests that this Court grant review of the decision of the Court of Appeals.

Respectfully submitted,



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