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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Judge
Trial Court Case No. 2016-CP-41-00153

Appellate Case No. 2024-000836

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

v.

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

BRIEF OF PETITIONERS

s/ Jonathan M. Milling

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QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN ITS ANALYSIS OF THE NECESSARY ELEMENTS FOR AN APPURTENANT EASEMENT AND THEREBY DEPRIVE PETITIONER OF FUNDAMENTAL PROPERTY RIGHTS?
- II. DID THE COURT OF APPEALS ERR IN HOLDING PETITIONER 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 PETITIONER 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. App35-App36. 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. App49-App50. Of note, it is not disputed that the subject easement is not in the chain of title for Petitioner Titan's property. App22. 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. App107-App234. Both cross motions were denied. App5.

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. App6-App18. Petitioners timely moved for reconsideration of this decision, and on May 26, 2021, Judge Lee entered an Order on Reconsideration denying Petitioners' motion. App19-App26; App235-App244. 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.

App153-App156 ("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”). App157. 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. App197-App205. 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. App157. Respondent acknowledges this right of Carr. App53, ¶ 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”). App206-App209. 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. App164-App169. A portion of the Holston Property, of which Titan is the title owner, remains flooded today. App163; App179. 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. App206-App225.

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)(“Opinion”) App297-App302. Petitioner sought rehearing which was denied on April 25, 2024. App303-App316. This Court granted the petition for a writ of certiorari on December 10, 2024. For the reasons set forth herein, the Opinion of the Court of Appeals should be vacated and this matter remanded.

ARGUMENT

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

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)). “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).

The easement at issue in the present matter can be broken down into two distinct privileges – (1) the ability in the future to construct dam and impound water and (2) the “exclusive use and control of the same [impounded water].” While the dam has been constructed and the water

impounded, it is the “exclusive use” aspect of the easement that presents the instant challenge. Of note, while the devise language in the deed provides for the conveyance to “F. Broadus Smith, his heirs and assigns,” the plain language in the paragraph of the deed discussing the easement and granting the easement only awards this authority unto F. Broadus Smith. App153. While the paragraph thereafter references the grantee having the “exclusive use and control,” only F. Broadus Smith is granted the easement in this paragraph and not his heirs or assigns. App153. The absence from the language of the easement of “heirs and assigns” reflects an intent within the deed itself to distinguishing the language used for the easement from the overall conveyance of the property. This is evidence of the intent of the parties that both the Circuit Court and Court of Appeals ignored. Beyond this, however, is the absence of the subject easement from the chain of title for the estate of the grantor. The courts below acknowledge that Petitioner “did not have *actual* notice of the easement.” App22 (*emphasis* in original). Rather, the Court of Appeals concludes that because the subject pond is readily apparent from visual inspection of the property and the record that Petitioner should have been on inquiry notice because the pond spans three separate properties. App301. Suggestion is made that Petitioner had a responsibility to attempt to discern the legal ownership of the pond as a result of the foregoing. App301. Ownership is different from an easement, as title is not transferred. *See Windham*, 381 S.C. at 201, 672 S.E.2d at 582. Thus an attempt to discern ownership would have confirmed that Petitioner owned the subject property. Nothing in the record for Petitioner Titan’s chain of title, which confirms ownership, shows any restrictions on the use of the impounded water. This Court has never extended inquiry or constructive notice to require search of adjacent property chains of title to impute notice and this Court shouldn’t extend such a requirement in the instant case. 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 Petitioner’s use of the impounded water.

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 this Court. *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 “exclusive use” easement fails to meet these necessary elements, and therefore is a mere personal privilege or easement in gross.

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.” App298. As noted, 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. In evaluating whether the easement “inhere’s in the land,” 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.” App298. It wasn’t until ten (10) years later that Broadus Smith elected to start constructing the dam to impound the water and thereby form the pond. This lapse of time demonstrates that the initial right in the easement – to construct the dam and impound water - was, in fact, separable from the land. That a spring sourcing the impounded water existed

at that time, as no doubt will be outlined by Respondent, is of no impact. Exclusive access and use of the spring is not the scope of the easement. The impounded water does not “inhere in 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 the “exclusive use” easement doesn’t “inhere in the land.” The “exclusive use” is not “permanent, inseparable, or essential.” It did not exist at the time of the conveyance. Thereafter, the “exclusive use” wasn’t “permanent, inseparable, or essential” as the original owner constructing the dam, F. Broadus 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. 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. To allow the easement in the present matter to eliminate the property rights of the servient estate owner to use their property is contrary to the laws of this State.

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 proclaims 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.” App299. This position ignores the fact that a pond was not “essentially necessary to the enjoyment of the property” for ten (10) years after the conveyance as it wasn’t constructed during

this time period. App299. Certainly, the impoundment of water was considered at the time of the conveyance 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 subject easement is one in gross.

B. THE OPINION FAILS TO RECOGNIZE THAT NOTHING IN PETITIONER’S CHAIN OF TITLE, OR A PHYSICAL INSPECTION 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.” App22 (*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; App163, App170. This conclusion is echoed in the Opinion. App300. While the existence of the pond is not in dispute, this fact in no way suggests that the existence of a pond would place Petitioner on notice that any party claimed “exclusive use” of said pond. Respondent may suggest that there is no evidence in the record that anyone other than Respondent used the pond, but there is likewise no evidence in the record that anyone was precluded from using the pond (or that Respondent actually used the pond). If there were fencing,

“No Trespass” signs, or some other indicia of exclusion present on the premises then, perhaps, Petitioner might be on constructive or inquiry notice, but these facts are present. Despite this, the Opinion concludes that Petitioner was on constructive or inquiry notice and was obligated to inquire into the chain of title for the adjacent parcels upon which the pond expands. App300 - App301. This conclusion goes too far and South Carolina has never required review of property records of adjacent parcels.

In real estate transactions, a constructive notice issue arises when a buyer “becomes aware or should have become aware of certain facts, which if investigated, would reveal the claim of another.” *Spence v. Spence*, 368 S.C. 106, 121, 628 S.E.2d 869, 876-77 (2006). Constructive notice requires a purchaser to inquire into the ownership rights pertaining to the property, including both public and privately recorded documents. *Id.* This inquiry, however, only extends to what an investigation done by a “reasonably cautious and prudent purchaser” would reveal. *Id.* Purchasers are “bound to the exercise of due diligence” in their inquiry but are not responsible for “matters which lies beyond the range of that inquiry and which the diligence might not disclose.” *Id.* (quoting *Black v. Childs*, 14 S.C. 312, 321-22 (1880)).

While the Opinion is correct that the existence of the pond is clear from inspection, and that it spans over three parcels, nothing from this inspection suggests that one of the three property owners has “exclusive use” of the impounded water. This is especially true when inspection of the chain of title for the Titan parcel lacks any reference to an “exclusive use” easement. Beyond this, a physical inspection of the property would not reveal any indicia of one property owner excluding others from making use of the impounded water. To the contrary, the Carr property had access to the impounded water so there were no efforts undertaken to preclude their or their predecessor’s use of it. A “reasonably cautious and prudent purchaser” would not be on notice

under these circumstances that there was an “exclusive use” easement that prevents their making use of the impounded water. 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.”).

Beyond the foregoing, the Opinion opines that Petitioner should have researched the chain of title for the common grantor in this case. App300. 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 denied by this Court as contrary to the longstanding law of South Carolina.

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 Petitioner Titan 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, 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, Petitioner should be allowed to utilize the pond. The Courts below erred in concluding that the easement prevented Titan cannot use the water over the property it owns. The Opinion should, therefore, be reversed.

Respectfully submitted,

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