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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

Op. No. 2024-UP-086
Appellate Case No. 2024-000836

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

v.

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

REPLY BRIEF OF PETITIONERS

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Having received and reviewed the Brief of Respondents, and arguments raised therein, Petitioners, Carr Farms, Inc. and Titan Farms, LLC (collectively "Petitioners"), hereby submit this Reply Brief of Petitioners pursuant to Rule 242(i) of the South Carolina Rules of Appellate Procedure, responding to those issues raised by Respondents and not previously addressed by Petitioner.[1] Petitioner submits this Brief as a supplement to the Brief of Petitioners, and hereby specifically adopts and reargues those arguments presented therein. For these reasons presented herein, as well as those previously presented, the decision of the Court of Appeals should be reversed.

I. Respondent overstates the impact of the granting clause in the deed to Respondent.

Respondent urges this Court to conclude that because the granting clause in the deed from Mattie Lee Bonnette ("Bonnette") to F. Broadus Smith ("Smith") includes the necessary language making the real property conveyance a fee simple absolute conveyance that the easement should be seen as appurtenant. Without the "heirs and assigns" language, the conveyance of real property would only be for a life estate. *See eg. Atl. Coast Lumber Corp. v. Langston Lumber Co.*, 128 S.C. 7, 9, 122 S.E. 395, 396 (1924). The "grantee," however, remains the party acquiring the real property and the language of inheritance defines the type estate conveyed (fee simple absolute) and what happens to that real property following the grantee's death. Without the necessary language, the real property would revert to the grantor.

[1] Petitioners rest on the arguments presented in the Brief of Petitioner as sufficient where no Reply is included herein.

In the instant subject deed, Smith is the grantee. App153. He paid the consideration for the real property conveyance (App153) and the spine of the title reveals that he is the grantee. App156. Respondent agrees with this proposition and cites to Black's Law Dictionary to reaffirm the proposition. See Brief of Respondents, at 10 (citing Blacks Law Dictionary, p.840 (12th Ed. 2024)("A 'grantee' is '[o]ne to whom property is conveyed.'"). The granting clause does not change this fact but merely defines the type of conveyance. Relevant to the instant proceeding, Smith, *individually*, was also named as the recipient of an easement to impound water and he, as the grantee, would have the exclusive use and control of the impounded water. There is no language in the easement which expands the easement beyond Smith, though clearly Bonnette could have included language of inheritance had she so desired. Instead, she limited the easement to Smith. While it is in the same instrument, it is a separate conveyance of a separate right; one she limited to just her neighbor who bought the property, the grantee – Smith.

As the easement granted a prospective opportunity to impound water, it begs a hypothetical question – if Smith did not impound the water, would a subsequent purchaser have an easement to impound water and use it exclusively? The answer unequivocally must be "no" as only Smith, by name, was given the opportunity to construct the dam and impound the water. This reveals the individual nature of the right intended. Of course, Smith did construct the dam and impound the water and Bonnette would later sell the real property encumbered by the impounded water to Jean B. Holston ("Holston") without reference to an exclusive use easement. App206-App207. This property was subsequently conveyed to Petitioner Titan Farms, LLC ("Titan"), with none of the conveyances in that chain of title including any reference to Smith (or Smith and heirs or

assigns) having an exclusive use easement. There is only a singular reference in the conveyance from Carey Frick ("Frick") to Titan that the conveyance was subject to the following exception:

> All easements, reservations, rights of way, restrictions, encroachments, plats, zoning regulations and covenants of record which may affect the above-described property and those that an inspection of the property would disclosure.
>
> App166.

While this generic reference is made to easements, as noted above, the Smith easement does not appear in the chain of title for Titan. Similarly, the Smith easement is not reflected on any of the plats recorded for the property, including the plat submitted by Frick (App170), or the plat submitted by Respondent. App216. At most, a review of the property and the relevant plats would reveal an encroachment of water, but nothing suggests that an exclusive use easement would prevent Titan from making use of the water over the property owned. As noted in the Brief of Petitioners, there was no fencing to exclude anyone from using the pond. There was no signage warning of trespass around the pond. Nothing from inspection would suggest Petitioners should be on inquiry notice that Titan was unable to use the water that partially covered its property.

Respondent urges otherwise, relying upon *Frierson v. Watson*, 371 S.C. 60, 636 S.E.2d 872 (Ct. App. 2006). *Frierson*, however, is completely distinguishable. While the easement in *Frierson* was not recorded, the uncontroverted evidence was that Appellant, who sought to contest the easement, not only had notice of the referenced easement, but also had a copy of the document granting the easement. *See Frierson*, 371 S.C. at 68, 636 S.E.2d at 876. Respondent does not suggest that Petitioners had *actual notice*, as was the case with *Frierson*, but rather that Petitioners *should* have known, or was on *inquiry notice*. Nothing in the instant case, however, suggests that a review of Titan's chain of title would impute Titan with notice of an exclusive use easement, or

place Titan on reasonably inquiry that such an exclusive use easement might exist. *See Frierson*, 371 S.C. at 67-68, 636 S.E.2d at 876 (*citing McDonald v. Welborn*, 220 S.C. 271, 276, 612 S.E.2d 730, 732-33 (Ct. App. 2005)(outlining the law imputes notice to the purchaser of real property of the recitals contained in the written instruments *forming the purchasers chain of title* and to make reasonable inquiry and investigation based upon the recitals and references *therein*)(*emphasis* added)). Nothing in a review of the chain of title for the purchaser (Titan), or an inspection of the real property, would place any party on inquiry notice of the existence of an exclusive use easement or otherwise suggest that Titan as the owner of the real property was unable to use the water thereon.

While both the Opinion, and the Brief of Respondent, suggest that Petitioners should have been on "inquiry notice" because of the existence of the pond encroaching upon three (3) parcels, neither outline how or why such "inquiry notice" would exist. The pond was present, true, but nothing about its existence would suggest any the existence of an exclusive use by a third party, or that Titan, as the owner of the property, could not make use of the water upon the property. This is especially true when Respondents acknowledge that two of the three property owners could use the impounded water. App114, ll.2-5. There simply is nothing to suggest that Titan would have any reason to believe that theirs was the lone parcel of three that was not allowed to use the impounded water. Nothing in their chain of title would suggest this. *See McDonald*, 220 S.C. at 16, 66 S.E.2d at 330. Titan did not have actual notice of the easement.[2] *See Frierson*, 371 S.C. at 68, 636 S.E.2d at 876. Nothing from an inspection of the premises or the pond itself would

[2] Of note, the Abney Agreement in Petitioner Carr Farms, Inc. ("Carr") makes no reference to Smith's easement with Bonnette, or any claims of exclusive use.

place Petitioners on notice of any exclusive use easement or of Titan's inability to use the water over its property.

Simply put, the easement was intended to be one in gross, a personal privilege, and the Court of Appeals erred in concluding otherwise. Furthermore, Petitioners were not on actual or inquiry notice of the existence of the subject "exclusive use" easement and the Court of Appeals erred in holding otherwise.

II. Contrary to the position espoused by Respondent, the subject easement fails the necessary elements for an appurtenant easement.

a. The easement does not "inhere in the land."

Without any support from the record, Respondent argues that the yet to be constructed pond was not "temporary" because Smith contemplated the creation of a pond to water crops or livestock. Brief of Respondent, p.13. While there is no evidence of the purpose of impounding the water in the record, any such intent is irrelevant to the permanency of a pond which did not yet exist. As the water was not impounded at the time the easement was included in the Smith deed, the impounded water was "separable" from the land, was not permanent, and was not essential. As such, it did not "inhere in the land." Any contemplated use of the prospective impoundment of water, or the benefits its construction might convey, is of no impact to this analysis. While the spring that ultimately created the pond existed at the time of the conveyance, this does not change the fact that the pond did not exist, and would not exist for another ten (10) years. The easement for the impoundment of water does not "inhere in the land."

Under certain circumstances, an easement can be created prior to use and enjoyment of the same, but such situations do not contemplate an easement for pleasure such as the creation of a pond. Instead, they exist to protect property from flooding (*see eg. Binkley v. Rabon Creek*

Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001)) or to grant ingress and egress so that a property is not landlocked. *See eg Lighthouse Tennis Club Vill. Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist.*, 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003); *Xanadu Horizontal Property Regime v. Ocean Walk Horizontal Property Regime*, 306 S.C. 170, 410 S.E.2d 580 (Ct. App. 1991). The prospective easements have a clear need, as opposed to potential pleasure. The need for the easement does not change. Such is lacking here.

In addition to the foregoing, the exclusive use component of the easement does not "inhere in the land." It is not permanent or inseparable and Smith confirmed as much when he abandoned his claim of exclusive use by allowing D.C. Abney ("Abney") and his heirs and assigns, to use the impounded water so long as a portion of Abney's property was flooded. Specifically, and contrary to his exclusive use of the impounded water, Smith outlines that he

> is in the process of constructing a pond on his farm and that the *said water* which is impounded in *said pond* will back over and upon lands of D.C. Abney and that the said D.C. Abney does hereby grant unto the said F. Broadus Smith the rights to flood approximately one acre of land belonging to D.C. Abney provided, however, that the said D.C. Abney shall have 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*.
>
> App157 (*emphasis* added)

Abney's use of the "*said water*" from "*said pond*" is unlimited as long as a portion of Abney's property is flooded. App114, ll.2-5. Smith thereby abandoned his "exclusive use" which demonstrates that the "exclusive use" is not permanent or inseparable. Respondents' argument that their "control" of the impounded water is consistent with the Abney grant is unavailing as Smith's agreement with Abney confirms that the exclusive use easement is separable. "Exclusive use" of the pond requires the exclusion of all others. With Smith's agreement with Abney, at no

point in time was the impounded water ever "exclusively used" by Smith. The exclusive use easement does not inhere in the land because it is not permanent as noted above.

b. The easement is not "essentially necessary to the enjoyment of the land."

It appears that Respondent takes the position that because he asked that the easement be included in the deed, even though the dam was not constructed for ten (10) years, the subject easement and the exclusive use thereof was "essentially necessary to the enjoyment of the land." This position belies the fact that Respondent used and enjoyed the land for ten (10) years before construction of the dam. Prospective easements, as noted previously herein, are generally for ingress and egress, and therefore "essentially necessary to the enjoyment of the land." *See eg Lighthouse Tennis Club Vill. Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist.*, *supra*; *Xanadu Horizontal Property Regime v. Ocean Walk Horizontal Property Regime*, *supra*. They are necessary. Such is not the case here.

Beyond the foregoing, and as outlined in the previous section, even after construction of the dam, the exclusive use was not "essentially necessary to the enjoyment of the land." In fact, because the agreement predates the impoundment of water, at no point in time has Smith *ever* had exclusive use of the impounded water. Merriam-Webster defines "exclude" as "(1)(a) to prevent or restrict the entrance of; ((b) to bar from participation, consideration, or inclusion; (2) to expel or bar especially from a place or position previously occupied." See Merriam-Webster Dictionary at https://merriam-webster.com/dictionary/exclude (as of March 13, 2025). Smith at no point in time ever excluded Abney from making use of impounded water; in fact he specifically allowed Abney to use the impounded water. Exclusive use is not now and has never been essentially necessary for the enjoyment of the land. The lapse of time before construction of the dam and

Abney's use of the pond eliminates the exclusivity and demonstrates that it was not "essentially necessary."

III. Enforcement of the exclusive use easement is contrary to the law of South Carolina.

As outlined in the Brief of Petitioner, Respondent's claimed "exclusive use" of the pond prevents Petitioner from making use of the property owned underneath the water. While the owner of a servient estate cannot make use of their property in contravention of any valid easement, such a proposition does not prevent the owner of the servient estate from making *any* use of their property. This is precisely what Respondent argues should be the instant situation, however. As previously recognized by the Court of Appeals in *Willimon v. Gilstrap*, No. 2014-001233, 2016 WL 245073 (S.C. Ct. App. Jan. 20, 2016), 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. *See Willimon*, at *1 (*citing Hundley v. Michael*, 105 N.C.App. 432, 413 S.E.2d 296, 298 (N.C. Ct. App. 1992)). In *Hundley*, similar to the instant situation, the owner of two parcels of land (lots 2 and 3) and sold lot 2 and granted a "permanent and exclusive easement of ingress and egress over a road fifteen feet in width" across lot 3. *See Hundley*, 105 N.C.App. at 433-34, 413 S.E.2d at 297. Thereafter, lot 3 was sold but contrary to the present situation, reference is made to the existence of the easement of ingress and egress to lot 2. The owners of lot 3 made use of the fifteen-foot portion of the servient estate subject to the easement and thereafter the owners of the dominant estate holding the easement (lot 2) erected a fence along the burdened portion of the property to prevent the owners of the servient estate (lot 3) from making any use of that portion of their property. *See id*.

The North Carolina Court of Appeals in evaluating this situation noted that the original owner of both lots elected not to retain the fee simple title to the fifteen foot parcel encumbered by the easement when she conveyed lot 3, instead conveying the entire parcel subject to the easement. *See id*. 105 N.C.App. at 435, 413 S.E.2d at 298. "[T]o now exclude the servient tenement owner from using the property within the easement would indeed produce an 'unusual' result." *Id*. The Court does note that "[a]bsent explicit language to the contrary, the owner of land subject to an easement has the right to continue to use his land in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the easement." *Id*. (*citing Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d 906 (1944). In *Hundley*, using the language "exclusive easement" and including the reservation of the easement in both the chain of title for the dominant estate and the servient estate did not support the position advanced by the dominant estate that they could exclude the owner of lot 3 from using that portion of their property burdened by the easement.

While *Hundley* is a decision from our sister state, the underlying rationale is entirely consistent with the laws of South Carolina. *See eg. 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)(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.") Respondent's position seeks to divest Petitioners from making any use of their property, and in so doing divest Titan of ownership. As was the case in Hundley, and consistent with South Carolina law, Respondent cannot preclude Petitioners from making use of their property or the water above. The Court of Appeals erred in this regard and their Opinion should be reversed.

CONCLUSION

For the reasons stated herein, as well as those outlined in the Brief of Petitioners, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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