

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

SC Court of Appeals

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2020-001354

Susan Brooks Knott Floyd, Respondent

v.

Elizabeth Pope Knott Dross, Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err when he granted Susan summary judgment, where there is at least a scintilla of evidence supporting that the Conservation Easement was ambiguous?

SUGGESTED ANSWER: Yes.

- II Did the trial judge err in finding that the plain language of the Conservation Easement expressly creates an enforceable right for Susan to use roads on Betsy's Parcel?

SUGGESTED ANSWER: Yes.

- III. Did the trial judge err in granting summary judgment where there is at least a scintilla of evidence that Susan's conduct was not equitable?

SUGGESTED ANSWER: Yes.

- IV. Did the trial judge err in granting summary judgment where the trial judge's construction of the Conservation Easement would produce an absurd result?

SUGGESTED ANSWER: Yes.

- V. Did the trial judge err in granting summary judgment where the Conservation Easement Act of 1991 precludes Susan's claims?

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

A. Factual Background

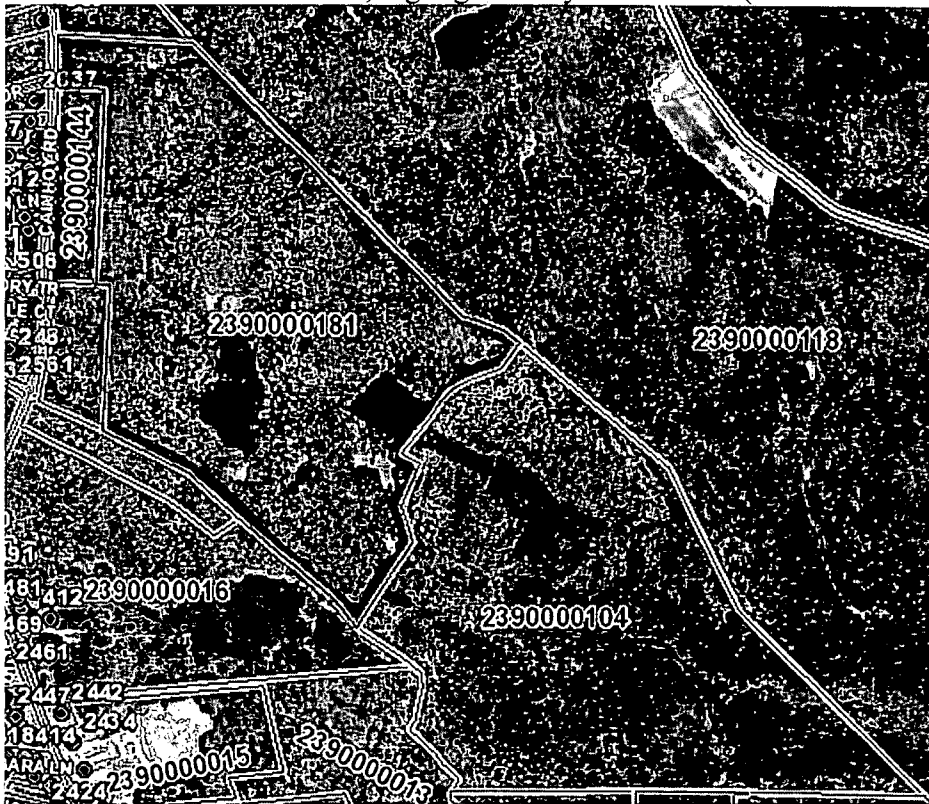
Respondent Susan Brooks Knott Floyd ("Susan") commenced this action on September 20, 2019 against her sister, Elizabeth Pope Knott Dross ("Betsy") in the Court of Common Pleas of Berkeley County, South Carolina. (See generally 9/20/19 Compl.).

1. The Properties Involved in This Lawsuit

a. The Unified Tract (Later Subdivided to Become Betsy's Parcel and Susan's Parcel)

Betsy's and Susan's father, Benjamin Franklin Knott ("Father"), owned an approximately 371-acre tract of land (the "Unified Tract" or sometimes the "Protected Property") near Huger, Berkeley County, South Carolina. At his death, Father subdivided the Unified Tract into two parcels of similar size:

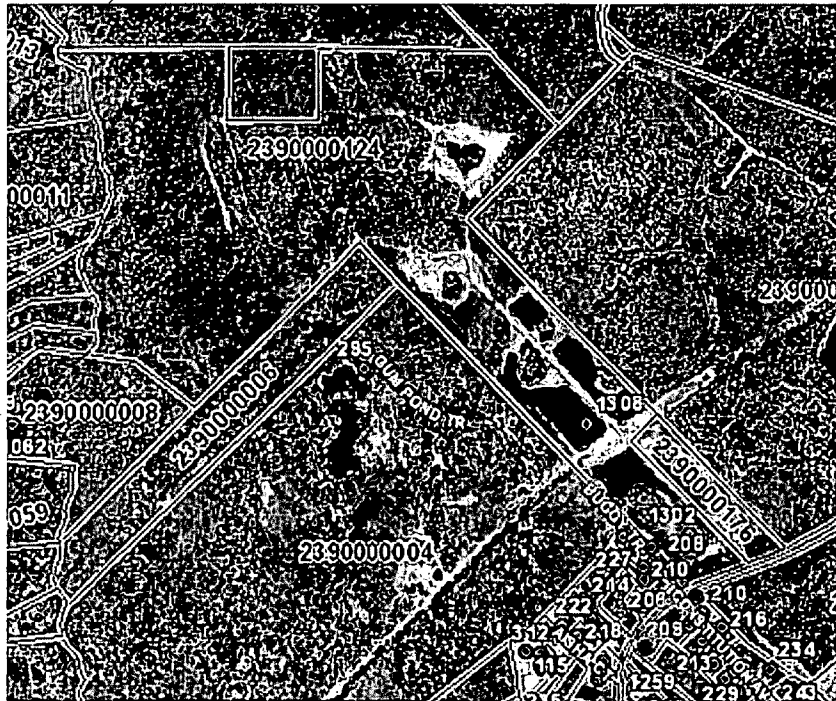
- (a) TMS No. 239-00-00-181, highlighted in purple below ("Betsy's Parcel");
- (b) TMS No. 239-00-00-104, highlighted in yellow below ("Susan's Parcel").



(See 8/24/20 Def.'s Memo. Pl.'s Opp. Mot. Partial Summ. J. Ex. 1 ¶ 4 & Ex. 1-A). The Unified Tract's only direct road frontage is on Cainhoj Road (shown in blue) on what would ultimately become Betsy's Parcel.

b. Susan's Access Parcel Allowing Her Access to the Unified Tract.

Although not directly the subject of this lawsuit, there is another parcel of property that is relevant to this appeal. This property is TMS No. 239-00-00-124, and is depicted bounded in pink below ("Access Parcel"):



The Access Parcel fronts Charity Church Road (depicted in green above). The opposite side of the Access Parcel shares a boundary with the Unified Tract (particularly Susan's Parcel), which is shown in yellow above.

Historically, Father and his family (including Susan and Betsy) accessed the Unified Tract, via Charity Church Road through the Access Parcel. (See 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1 ¶ 5). On or about December 9, 1996, Father conveyed the Access Parcel to Susan, which would provide Susan her own entrance to the Unified Tract. (See *id.* Ex. 1 ¶ 6 and Ex. 1-B). Father and his family continued to use Susan's Access Parcel to access the Unified Tract. (See *id.*). In late 2004 or early 2005, Susan caused the lock on the gate between Susan's

Access Parcel and Charity Church Road to be changed, denying Father and the rest of the family access to the Unified Tract via Charity Church Road. (*See id.*). Susan continued to use her Access Parcel to gain access to the Unified Tract via Charity Church Road. (*See id.*). However, Betsy and her father began accessing the Unified Tract exclusively via Cainhoy Road. (*See id.*).

On September 26, 2007, Susan and her husband sold the Access Parcel (except for a 10.48-acre developable tract that borders Susan's Parcel to the south (TMS No. 239-00-00-117 or the "Floyd Property")) to WH Land Company, LLC for \$4,000,000. (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-C). Susan and her husband retained ownership of the Floyd Property.¹ Susan also retained an unrecorded "easement for access, ingress, and egress" over Susan's Access Parcel. (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-D). On February 25, 2008, to further memorialize that unrecorded easement, those parties executed an Easement Agreement, which provided Susan "a non-exclusive, perpetual access easement" over an "unpaved access road which provides vehicular access from the Floyd Property to Charity Church Road." (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-E). That easement ("Susan's Access Easement") granted Susan access to the Unified Tract (specifically to Susan's Parcel) via Charity Church Road through the Access Parcel and through the Floyd Property.

On April 1, 2015 — years after she was deeded Susan's Parcel — Susan executed a Termination, Cancellation, Renunciation and Abandonment of Easement, in which she and her husband agree to "terminate, cancel, renounce, abandon, transfer, grant and convey to WH Land Company, LLC all their right, title and interest in, to and under" Susan's Access Easement. (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-F). After Susan and her husband sold the Access Parcel and terminated Susan's Access Easement, Susan's Parcel and the Floyd Property became "landlocked."

2. The Conservation Easement on the Unified Tract.

¹ The Floyd Property is depicted as the un-highlighted square box (above the number 2390000124) in the preceding image.

The Unified Tract was the subject of a 1998 Deed of Conservation Easement ("Conservation Easement") between Father and Wetlands America Trust, Inc. ("Ducks Unlimited"). (*See generally* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1).² The Conservation Easement's express purpose was "to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition . . . and to prevent any use of the Protected Property which will significantly impair or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem." (*See id.* ¶ 1.1). To assist in achieving this end, Father granted Ducks Unlimited the right to visual access to the Unified Tract and to have a limited right of entry to inspect the Unified Tract for compliance with the Conservation Easement. (*See id.* ¶¶ 2.1 & 2.2).

To further the purpose of the Conservation Easement, Father agreed that certain "uses and practices *as modified by the reserved rights set forth in Section 4*, though not an exhaustive recital of the inconsistent uses and practices, are hereby deemed to be inconsistent with the Purpose of this Easement and shall be prohibited, *subject to the rights reserved in Section 4*." (*See id.* ¶ 3 (emphasis added)). Father agreed not to engage in numerous activities on his property, including farming, constructing structures, building new roads (or widening existing ones), leasing, mining, possessing exotic plants or animals, agriculture, and commercial hunting or fishing. (*See id.* ¶¶ 3.1-3.16). In other words, the Conservation Easement greatly limited and restricted Father's right to use his Unified Tract.

Nevertheless, Father retained certain "Reserved Rights" in the Unified Tract "for himself, his heirs, successors and assigns." (*See id.* ¶ 4). For example, Father reserved "[t]he right to subdivide the Protected Property into two parcels, provided that no parcel contains less than 100 acres." (*See id.* ¶ 4.1). Of relevance to this lawsuit, Father also retained the following rights with regard to roads on the Unified Tract:

² The Conservation Easement is to be construed under the law of South Carolina. (*See id.* ¶ 5.19).

The right to maintain and replace existing roads at the same location with roads of like size and composition. The right to construct new roads to the New Structures using permeable materials (e.g. sand, gravel, crushed stone). Grantor shall use existing roads whenever possible for access to the New Structures.^[3] The right to widen existing roads for utility rights-of-way. The right to use roads for all activities permitted under this Easement. Maintenance of roads shall be limited to normal practices for non-paved roads, such as the removal of dead vegetation, scraping and crowning, necessary pruning or removal of hazardous trees and plants, application of permeable materials necessary to correct erosion, placement of culverts, water control structures, and bridges, and maintenance of roadside ditches.

(See *id.* ¶ 4.3). In addition to the foregoing, Father also retained and reserved the following rights to himself with regard to the Unified Tract:

- The right to hunt and fish with family and friends (¶ 4.4);
- The right to construct and maintain one dock (¶ 4.5);
- The right to have one area of the Unified Tract for use as a landfill (¶ 4.6);
- The right to have one borrow pit to provide fill material for road repair (¶ 4.7);
- The right to construct septic systems and drill wells (¶ 4.8);
- The right to develop, manage and maintain wetlands (¶ 4.9);
- The right to develop, maintain and cultivate agricultural fields and wildlife food plots (¶ 4.10);
- The right to maintain vegetation (¶ 4.11);
- The right to engage in certain timber activities (¶ 4.12);
- The right to cut or maintain certain protected oaks under specific circumstances (¶ 4.13);
- The right to engage in agriculture in a manner consistent with the Conservation Easement (¶ 4.14);
- The right to use agrichemicals (¶ 4.15);
- The right to introduce exotic plants and animals consistent with laws (¶ 4.16);
- The right to store fuels (¶ 4.17);
- Mineral rights (¶ 4.18);
- The right to maintain utilities for any structures (¶ 4.19);
- The right to install certain signs (¶ 4.20);
- The right to grant easements on the Unified Tract, "if such rights are (i) used exclusively by an adjacent property owner and not in connection with an industrial activity or a

³ Under the Conservation Easement, Father reserved the right to construct one single-family home and related structures (collectively the "New Structures") on the Unified Tract. (See *id.* ¶ 4.2).

commercial activity of a type and nature not permitted by this Easement; (ii) required or convenient in connection with the permitted utilities on the Protected Property; or (iii) required or convenient in connection with the uses of the Protected Property permitted by this Easement" (§ 4.21);

- "The right to lease, or grant other less-than-fee interests in all or a portion of the Protected Property for any use permitted to the Grantor under this Easement" (§ 4.22);
- The right to construct boardwalks under certain circumstances (§ 4.23);
- The right to use vehicles and machinery (§ 4.24); and
- "The right to engage in any and all acts or uses not expressly prohibited herein that are not inconsistent with the intent and purpose of this Easement." (§ 4.25).

(*See id.* §§ 4.4-4.25).

Under the Conservation Easement, Father also agreed to "include reference to all terms and conditions of this Easement in any subsequent deed, or legal instrument by which the Grantor divests itself of either the fee simple in all or part of the Protected Property, or its possessory interest in any portion of the Protected Property" (*See id.* § 5.5). The burdens of the Conservation Easement "run with the Protected Property and will be enforceable against [Father] and all future owners in perpetuity during the period of such ownership." (*See id.* § 5.8). Father was required to file and record the Conservation Easement. (*See id.* § 5.20).

3. Father's Death and Subdivision of the Unified Tract.

Father died on November 18, 2009. In Article III of the February 12, 2004 Will of Benjamin F. Knott ("Will"), Father named his daughters as co-executors and granted each one-half of the Unified Tract:

I give to my daughter, Susan, a 189.427 acre (more or less) tract of land designated Unit III-C in that certain Subdivision Survey of Unit 111-C done by William H. Dennis and V dated January 27, 1998, revised 11/13/98 and revised further 3/8/00, a reduced copy of which Subdivision Survey is attached to this Will. I give to my daughter, Elizabeth (Betsy), a 181.60 acre (more or less) tract of land designated Unit III-C-5 in the said attached Subdivision Survey.

(*See 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 2 art. III*). In other words, at his death in 2009, Father divided the United Tract into the Betsy Parcel (which fronts Cainhoy Road) and the Susan Parcel and conveyed those parcels to his daughters. The Will is silent as to the provision of any easement being provided to Susan or any right of Susan

to enter onto Betsy's part of the Unified Tract.⁴ (*See* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 2). On January 11, 2011, by Deeds of Distribution, Betsy and Susan each received title to their respective parcels of the Unified Tract. (*See* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Exs. 4-5).

B. Procedural History

This lawsuit involves Susan's claim that she is entitled to use Betsy's Parcel to access the "landlocked" Susan's Parcel.

Susan filed the initial Summons and Complaint against her sister Betsy on September 20, 2019. (*See generally* 9/20/19 Compl.). On November 22, 2019, Susan filed her Amended Complaint. (*See generally* 11/22/19 Am. Compl.). Plaintiff Susan's Amended Complaint alleges the following background facts:

Susan and Betsy are sisters. As more fully described below, they each own a large parcel of adjoining land near Huger in Berkeley County, South Carolina, which parcels are the subject of this action. Their adjoining parcels share a common boundary line and were previously a unified tract of land, totaling approximately 371 acres (formerly TMS No. 239-00-00-104), with its sole highway frontage on State Road S-8-98, also known as Highway 98 or Cainhoy Road. The unified tract was owned by their father, Benjamin Franklin Knott ("Mr. Knott"), until his death in 2009

(*See id.* ¶ 1). The Amended Complaint asserts claims sounding in:

- (1) Declaratory Judgment;
- (2) Reformation of Deeds of Distribution;
- (3) Easement Implied by Prior Use;
- (4) Easement by Necessity; and
- (5) Injunction.

⁴ Father also willed a 1.99 acre parcel on the other side of Cainhoy Road (which contained Father's former home) to Betsy and Susan. (*See* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 2 art. III). In his Will, Father unequivocally expressed his "understanding and intent that my beneficiaries of the said 1.99 acres, and their descendants, have and shall continue to have free right of ingress, egress and regress to and from said 1.99 acres, over and along the existing roads to said property." (*See id.*).

(See generally 11/22/19 Am. Compl.). In a nutshell, Susan alleges under various legal theories that she is entitled to judicial relief granting her an easement or other right to access of Susan's Parcel *through Betsy's Parcel*. On December 5, 2019, Betsy filed her Answer to Amended Complaint and Counterclaim. (See generally 12/5/19 Ans. to Am. Compl.). In that filing, Betsy denied liability and asserted a declaratory judgment counterclaim. (See *id.*).

On July 15, 2020, Susan filed Plaintiff's Notice of Motion and Motion for Partial Summary Judgment ("Motion for Summary Judgment"). (See generally 7/15/20 Pl.'s Mot. Partial Summ. J.). Susan's Motion for Summary Judgment requested a declaratory judgment that:

(A) Pursuant to the unambiguous terms of the governing Conservation Easement, including the expressly reserved rights in Section 4.3 thereof, Susan, as owner of approximately half of the Conservation Easement Property, has the right to use the unpaved roads crossing over Betsy's Parcel to access Susan's Parcel for all activities permitted under the Conservation Easement; and

(B) Betsy is required to provide Susan at all times with the key or code to the locked entrance gate to the Conservation Easement Property.

(See *id.* at 1). Susan based her Motion for Summary Judgment "on the clearly expressed reservation of the right to use roads contained in Section 4.3 of the Conservation Easement." (See *id.* at 8 ¶ 28). Concurrent with her Motion for Summary Judgment, Susan filed her Affidavit of Susan Brooks Knott Floyd in Support of Plaintiff's Motion for Partial Summary Judgment (with exhibits). (See generally 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl.'s Mot. for Partial Summ. J.). On August 24, 2020 Betsy filed her Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, with her Affidavit of Elizabeth Pope Knott Dross attached thereto as an Exhibit. (See generally 8/24/20 Def.'s Memo. Opp. Pl.'s Mot. Partial Summ. J.). On August 27, 2020, Susan filed her Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment. On that date, Susan also filed her Supplemental Affidavit of Susan Floyd in Support of Motion for Partial Summary Judgment. (See generally 8/27/20 Pl.'s Suppl. Affid. in Supp. of Mot. for Partial Summ. J.).

On August 31, 2020, the Honorable Roger M. Young, Sr. heard Susan's Motion for

Summary Judgment. (*See generally* 8/31/20 Transcr.). Judge Young began the hearing by clarifying that the Motion for Summary Judgment *only* sought a determination that the Conservation Easement created an *explicit right* for Plaintiff Susan to use the road on Betsy's Parcel to access Susan's Parcel. (*See id.* at 4:7-6:10). As Judge Young stated:

Let's focus on whether or not she has an express right to use it, because we're not arguing --before the Court is not easement by necessity today. You didn't ask for that.

This is a partial summary judgment, not a full summary judgment, and it's only on the issue of whether or not there is an express reserve right to use those roads. That would be helpful.

(*See* 8/31/20 Transcript, at 23:10-17).

On September 11, 2020, the Court entered its Order Granting Plaintiffs' Motion for Partial Summary Judgment ("Summary Judgment Order"). (*See generally* 9/11/20 Order Granting Pl.'s Mot. for Partial Summ. J.). In relevant part, Judge Young's Summary Judgment Order stated:

Applying these fundamental rules of construction to the Conservation Easement, the Court concludes that the clear and unambiguous terms of Section 4.3 of the Conservation Easement allow Susan, as successor in title to Mr. Knott, the Grantor, to exercise the Grantor's reserved right to access her parcel by use of the roads described in the Report. Accordingly, the Court hereby grants the Motion to allow the Plaintiff and her heirs, successors, and assigns "[t]he right to use the roads for all activities permitted under [the] Easement", as is expressly set forth in Section 4.3. This right, which runs with the land in perpetuity under Section 5.8, was expressly reserved by Mr. Knott when he conveyed the Conservation Easement.

Since Mr. Knott also expressly reserved the right to subdivide the Conservation Easement Property into two parcels under Section 4.1, 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, subject to any limitations contained in 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 reasonable interpretation and application of this reserved right is that it was to allow access over the other half of the Conservation Easement Property to gain access to the interior half once it was subdivided. Additionally, it would be impossible for the owner of the interior half of the Conservation Property to exercise the reserved rights to care for and maintain it, including preserving the conservation values, without access.

(See *id.* at 8-9). The Court's Form 4 Judgment in a Civil Case granted Susan the following declaratory and/or injunctive relief:

(A) Pursuant to the unambiguous terms of the governing Conservation Easement, including the expressly reserved rights in Section 4.3 thereof, the owner of TMS No. 239-00-00-104 has the right to use the unpaved roads crossing over TMS No. 239-00-00-181 to access TMS No. 239-00-00-104 for all activities permitted under the Conservation Easement; and

(B) Betsy is required to provide Susan at all times with the key or code to the locked entrance gate to the Conservation Easement Property.

(See 9/11/20 Form 4 Judgment in a Civil Case, at 2).

On September 17, 2020, Betsy filed her Motion to Alter or Amend Judgment pursuant to South Carolina Rule of Civil Procedure 59(e). (See *generally* Def.'s 9/17/20 Mot. to Alter or Am. J.). On September 29, 2020, Plaintiff Susan filed her Memorandum in Opposition to Defendant's Motion to Alter or Amend Order Granting Partial Summary Judgment. On October 2, 2020, Judge Young entered his Order Denying Motion to Alter or Amend Judgment, stating in relevant part:

Plaintiff limited her motion for Partial Summary Judgment to very narrow declaratory relief, seeking an affirmative declaration of Floyd's right to use the roads crossing over Dross' Parcel to access Floyd's Parcel for all activities permitted under the Conservation Easement. The terms of Section 4.3 of the Conservation Easement are clear and unambiguous, granting Floyd, as the successor in title, heir and personal representative of her father, Ben Knott, the Grantor of the Conservation Easement, the "right to use the roads for all activities permitted under [the] Easement" that runs with the land in perpetuity under Section 5.8 of the Conservation Easement. Moreover, parties may not use Rule 59(e) motions to address new issues. *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014), *citing Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). Therefore, the Court hereby DENIES Defendant's Motion to Reconsider.

(See 10/2/2020 Order Den. Mot. to Alter or Amend J., at 1-2).

On October 9, 2020, Defendant Betsy filed her timely Notice of Appeal to this Court. (See 10/9/20 Notice of Appeal).

For the reasons that follow, the Court should reverse Judge Young's grant of partial summary judgment to Susan in this matter and should deny Susan's Motion for Partial Summary Judgment.

ARGUMENT

I. STANDARD OF REVIEW

The standards governing this Court's review of an order granting summary judgment are well-settled:

This court reviews the grant of a summary judgment motion *under the same standard applied by the trial court* pursuant to Rule 56(c), SCRPC. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n. 2, 677 S.E.2d 612, 614 n. 2 (Ct. App. 2009). Rule 56(c), SCRPC, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

See Paine Gayle Props., LLC v. CSX Transp., Inc., 400 S.C. 568, 576, 735 S.E.2d 528, 532-33 (Ct. App. 2012) (emphasis added) (affirming grant of summary judgment).

Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. *See Jackson*, 383 S.C. at 14 n.2, 677 S.E.2d at 614 (citing S.C.R. Civ. P. 56(c)). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009) (quoting *Rife v. Hitachi Constr. Mach. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)). "On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist." *Murphy v. Tyndall*, 681 S.E.2d 28, 30 (Ct. App. 2009). For the reasons that follow, this Court should reverse the trial court's grant of partial summary judgment.

II. THE TRIAL JUDGE ERRED IN GRANTING SUSAN PARTIAL SUMMARY JUDGMENT.

The trial judge granted Susan partial summary judgment because he concluded that the Conservation Easement — between Father and Ducks Unlimited prior to subdivision of the Unified Parcel — created an unambiguous express right for Susan to use roads on Betsy's Parcel. For the reasons that follow, the trial judge erred, and this Court should reverse the grant of partial summary judgment.

A. Susan Could Only Obtain Summary Judgment If the Conservation Easement Unequivocally and Unambiguously Granted Her Rights to Use the Roads on Betsy's Parcel.

"Summary judgment is [] improper where the motion presents a question as to the construction of a written contract, and the language employed in the contract is ambiguous so that intention of the parties as to the legal effect of the contract may not be gathered from the four corners of the instrument." *Bishop v. Benson*, 297 S.C. 14, 17, 374 S.E.2d 517, 518–19 (Ct. App. 1988). "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *South Carolina Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). Stated otherwise, "[a]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962); *accord Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997) ("An ambiguous contract is one capable of being understood in more ways than just one or one unclear in meaning because it expresses its purpose in an indefinite manner.").

If this Court finds *any* ambiguity in the Conservation Easement, it *must* reverse the trial judge and deny Susan's Motion for Partial Summary Judgment. As discussed in detail below, Betsy can advance a reasonable argument that, if anything, the Conservation Easement should be construed *not* to grant Susan any rights with regard to Betsy's Parcel. There is no language in the Conservation Easement expressly granting Susan an easement or other right in Betsy's Parcel. Irrespective of whether the Court agrees with Betsy's construction of the Conservation Easement,

the mere fact that Betsy presents a good faith construction to compete with Judge Young's construction precludes the entry of summary judgment. For this reason alone, the Court should reverse the trial court's Order granting Susan's Motion for Partial Summary Judgment.

B. The Plain Language of the Conservation Easement Does Not Expressly Create an Enforceable Right for Susan to Use Roads on Betsy's Parcel.

The trial court's grant of partial summary judgment to Susan is premised upon a finding of an "express"⁵ easement or right to use Betsy's Parcel.⁶ Judge Young's Summary Judgment Order relies heavily on Section 4.3 of the Conservation Easement, which granted Father (and his "heirs, successors and assigns") with, *inter alia*, "[t]he right to use roads for all activities permitted under this Easement." (*See generally* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1 ¶ 4.3). Applying this language, Judge Young concluded that "the clear and unambiguous terms of Section 4.3 of the Conservation Easement allow Susan, as successor in title to Mr. Knott, the Grantor, to exercise the Grantor's reserved right to access her parcel by use of the roads." (*See* 9/11/20 Order Granting Mot. Partial Summ. J., at 8). Betsy respectfully submits that the Conservation Easement unequivocally does not create an easement or other right for Susan to use roads on Betsy's Parcel.

"[A] conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements and must be recorded in the same manner as other easements." S.C. Code § 27-8-30(A). "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

⁵ Although not an issue in this appeal, Betsy contends that Susan would not be entitled to an implied easement. "The purpose of an implied easement is to give effect to the intentions of the parties to a transaction, and because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements are not favored." *See Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91-92, 659 S.E.2d 151, 154 (2008). The facts will not support the recognition of an implied easement.

⁶ As set forth above, Judge Young limited Susan's Motion for Partial Summary Judgment to the question of whether the Conservation Easement created an express easement or other right to use Betsy's Parcel. (*See* 8/31/20 Transcript, at 23:10-17).

578, 582 (2009) (quoting *Douglas v. Med. Investors, Inc.*, 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971)). The courts determine the type and scope of an easement by ascertaining the parties' intention as gathered from the language of the instrument; the easement should be construed so as to carry out that intention. See *Smith v. Commissioners of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994).

The general rule is the nature of the right and intention of the parties determines the character of an express easement. *Id.* "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 67, 558 S.E.2d 902, 907 (Ct. App. 2001) (quoting *South Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981)). When the language of 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. See *Snow v. Smith*, 416 S.C. 72, 85, 784 S.E.2d 242, 248 (Ct. App. 2016). If the easement language is ambiguous, the Court may consult extrinsic evidence to determine the grantor's intent. See *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 at n.8 (Ct. App. 2012). The determination of the extent of a grant of an easement is a question in equity. *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006), *Tupper v. Dorchester Cty.*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997).

The plain and unambiguous language of the Conservation Easement makes clear that it does *not* expressly create an easement (or any other right) permitting Susan to access Susan's Parcel via the roads on Betsy's Parcel. The Conservation Easement is devoid of *any* language creating any easements over part of the Unified Tract. It does not express any intention to provide road access in the event Father subdivided the Unified Tract. Neither Susan nor Betsy signed the Conservation Easement. In fact, the Conservation Easement did not even mention them. Judge Young erred in finding that the Conservation Easement somehow conveyed an easement to Susan. The trial judge plainly erred in granting Susan's Motion for Partial Summary Judgment.

Susan's Amended Complaint alleges that Father treated Susan and Betsy "in a generous and even-handed manner." (*See* Am. Compl. at ¶14). This notion of equality amongst Susan and Betsy is evidenced in Father's Will, in which he essentially split his property equally between Susan and Betsy. As to the Unified Tract, Susan received one-half and Betsy received the other (with both being of roughly equal size). Under Susan's construction of the relevant documents, she not only received a parcel roughly the same size as Betsy's Parcel, but also a right to use Betsy's Parcel at any time to access her property. Susan would have received significantly more than Betsy under Father's Will, as she would have received not only her one-half (Susan's Parcel), *but also* a valuable interest in Betsy's half.

1. **The Trial Court's Reliance on Section 4.3 of the Conservation Easement is Misplaced.**

The trial judge based his ruling on Section 4.3 of the Conservation Easement, in which Father "reserve[d]" to himself the right to use roads on the Unified Tract:

The right to maintain and replace existing roads at the same location with roads of like size and composition. The right to construct new roads to the New Structures using permeable materials (e.g. sand, gravel, crushed stone). . . . The right to widen existing roads for utility rights-of-way. The right to use roads for all activities permitted under this Easement.

(*See* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1 ¶ 4.3). Judge Young concluded that — because the reserved rights benefitted Father **and** his "heirs, successors and assigns" — Susan has the reserved right to use roads on the *entire* Unified Tract, including Betsy's Parcel:

Since Mr. Knott also expressly reserved the right to subdivide the Conservation Easement Property into two parcels under Section 4.1, 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, subject to any limitations contained in 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 reasonable interpretation and application of this reserved right is that it was to allow access over the other half of the Conservation Easement Property to gain access to the interior half once it was subdivided. Additionally, it would be impossible for the owner of the interior half of the Conservation Property to exercise the reserved

rights to care for and maintain it, including preserving the conservation values, without access.

(See 9/11/20 Order, at 9). For the reasons that follow, Judge Young's interpretation is inconsistent with the Conservation Easement's plain language, which does not affirmatively convey any property rights to Father or his successors.

The Conservation Easement does not affirmatively *create* any property rights as to Father (or his successors). Ducks Unlimited did not convey any property rights to Father. Rather, the Conservation Easement primarily serves as a *limitation* on Father's (and his successors') use of the Unified Tract. It is designed to prevent anyone from ever using the Unified Tract in such a way as to jeopardize its natural state. Far from being an affirmative grant of rights to Father, Section 4 is merely a recitation of *reserved* rights (*i.e.*, rights Father retained for himself). Father could not reserve to himself any rights that he did not already have in the Unified Tract. The Conservation Easement did not grant Father anything; it merely reserved certain preexisting rights to him. The reservation of rights in the Conservation Easement was exclusively between Father and Ducks Unlimited — Father agreed to limit his property rights to protect the condition of the Unified Tract. It contained no provisions governing how reserved rights should be construed between owners of subdivided parts of the Unified Tract. As a result, Section 4.3 could not have created an express easement (or other right) for Susan to use Betsy's Parcel.

Additionally, the trial judge's analysis omits critical language from Section 4 of the Conservation Easement:

Notwithstanding any provision to the contrary in this Easement, the Grantor *reserves* for himself, his heirs, successors and assigns the “Reserved Rights” as set forth in this Section 4. *The exercise of all Reserved Rights will be in full accordance with all applicable local, state and federal laws and regulations, as well as in accordance with the intent and Purpose of this Easement.*

(emphasis added). The Conservation Easement is unambiguous that the "reserved rights" (including the right to use roads on the Unified Tract) can only exist and be exercised so long doing so: (a) does not violate the law and (b) is in accordance with the Conservation Easement's purpose.

After subdivision of the Unified Tract and distribution to Father's daughters, Susan's use of roads on Betsy's Parcel, without Betsy's permission, would constitute a trespass in violation of South Carolina law. This can constitute a statutory criminal offense:

Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

See S.C. Code § 16-11-620. Additionally, the tort of trespass provides a property owner a legal remedy for interference with her right to the "exclusive, peaceable possession" of property. See *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 139, 747 S.E.2d 468, 473 (2013); *Ravan v. Greenville Cnty.*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993).

Susan does not dispute that Betsy is the sole fee owner of Betsy's Parcel. She alone has the right to exclusive and peaceable possession of that property. If Susan enters Betsy's Parcel without permission and uses its roads, she would interfere with Betsy's exclusive right to peaceable possession. Nothing in the Conservation Easement expressly granted her such a right. In the absence of an express right to do so, Susan's use of Betsy's Parcel to access her own property would be a violation of the law.

Therefore, the trial judge erred in granting Susan's Motion for Partial Summary Judgment.

2. The Trial Court's Construction of the Conservation Easement Is Inconsistent With Its Stated Purpose.

The trial judge also erred because his conclusion that the plain language of the Conservation Easement created a right for Susan to use roads on Betsy's Parcel is contrary to the purpose of the Conservation Easement: "to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition . . . and to prevent any use of the Protected Property which will significantly impair or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem." (See

generally 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1 ¶ 1.1).

Betsy contends that the purpose of the Conservation Easement is served when only she and her guests are permitted to use Betsy's Parcel. In order to maintain the natural, scenic and open condition of the Unified Tract in perpetuity, the Conservation Easement seeks to minimize use of that property. Minimizing traffic and use would further this goal, consistent with the purpose of the Conservation Easement. That would limit the threat of human impairment and interference with the wildlife, natural resources, and ecosystem of the Unified Tract. Judge Young's (and Susan's) construction of the Conservation Easement would expose Betsy's Parcel to an undeterminable amount of *additional* traffic and activity.⁷ This would create a potentially endless stream of people who could have rights to use the roads on Betsy's Parcel, which is directly adverse to the Conservation Easement's explicit purpose.

3. **Father's Reservation of the Right to Subdivide the Unified Tract Does Not Support Judge Young's Ruling.**

Judge Young based his application of Section 4.3 of the Conservation Easement, in part, on Section 4.1, which permitted Father to subdivide the Unified Tract. Judge Young reasoned that this provision expressed an intention that, if someone later owned a "landlocked" subdivided part of the Unified Tract, that person would have a right to use *all* of the roads on the Unified Tract to access that subdivided part of the Unified Tract. In other words, Judge Young's holding is based on the idea that the parties expressly contemplated a landlocked owner of a subdivided lot. Judge Young expressed that, if Susan could not use Betsy's Parcel, she would be unable to maintain Susan's Parcel as the Conservation Easement requires.⁸

⁷ As discussed in further detail herein, Susan could ultimately take the position that she is not only entitled to use the roads on Betsy's parcel, but also to do things such as hunt, fish, harvest timber, build a home, build docks, dump trash, and lease to others. Such rights, if they exist, would extend to Susan's heirs and to any person in the chain of title of Susan's Parcel.

⁸ To the extent Judge Young's Order finds that the Conservation Easement requires owners of the Unified Tract to "maintain" all or part of the property, which is not an issue in this case, Betsy challenges such a ruling as the language of the Conservation Easement imposes no such maintenance burden.

Section 4.1 of the Conservation Easement reserves to Father a limited right to subdivide the Unified Parcel: "[t]he right to subdivide the Protected Property into two parcels, provided that no parcel contains less than 100 acres." (*See generally* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1 ¶ 4.1). This provision does not address the right to access any subdivided parcels. It does not expressly state that there will be a right to access any "landlocked" subdivided parcel. This provision does not expressly create any rights flowing to Susan.

It is worth noting that the Conservation Easement did give Father a tool to grant Susan an easement over Betsy's Parcel, if he wished to do so. Section 4.21 of the Conservation Easement reserved the right to grant easements on the Unified Tract, "if such rights are (i) used exclusively by an adjacent property owner and not in connection with an industrial activity or a commercial activity of a type and nature not permitted by this Easement; (ii) required or convenient in connection with the permitted utilities on the Protected Property; or (iii) required or convenient in connection with the uses of the Protected Property permitted by this Easement." (*See generally* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1 ¶ 4.21). However, Father chose not to exercise that right to grant Susan an easement over Betsy's Parcel. If he wanted to do so, the Conservation Easement allowed him to do so.

Father knew how to grant an easement. He willed a 1.99 acre parcel, which contained Father's former home, to Betsy and Susan. (*See* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 2 art. III). In his Will, Father unequivocally expressed his "understanding and intent that my beneficiaries of the said 1.99 acres, and their descendants, have and shall continue to have free right of ingress, egress and regress to and from said 1.99 acres, over and along the existing roads to said property." (*See id.*). However, Father's granting of the Unified Tract to his daughters did not include any language about "free right of ingress [and] egress" over Betsy's Parcel. Had he wished to grant such a right, Father knew how to do so. However, both the Conservation Easement and Father's Will are silent as to any easement over Betsy's Parcel accruing to the benefit of Susan.

For the foregoing reasons, this Court should reverse the trial judge's grant of partial summary judgment to Susan.

4. **Judge Young Incorrectly Stated That There Would Be No Need for a Property Owner to Reserve the Right to Use Roads on His Own Property.**

Judge Young supported his construction of the Conservation Easement, citing the fact that Father would not need to reserve to himself the right to use roads on his own property, the Unified Tract:

[T]here would be no need for the owner of property to reserve a right to use the roads on the owner's property. The reasonable interpretation and application of this reserved right is that it was to allow access over the other half of the Conservation Easement Property to gain access to the interior half once it was subdivided.

(See 9/11/20 Order Granting Mot. Part. Summ. J., at 9). For the reasons that follow, this was an erroneous basis for Judge Young to rely upon in granting partial summary judgment.

In reality, the Conservation Easement *did* require that Father reserve for himself the right to use roads on his own property. The Conservation Easement was intended to prevent Father (and later owners) from using the Unified Tract in ways that might jeopardize the natural condition of the property. Father agreed to a lengthy laundry list of things that he could *not* do on his property. For example, the Conservation Easement expressly restricted Father from building new roads or widening existing ones. (See generally 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1 ¶ 3.3).

In Section 4, Father spelled out certain rights that he *reserved* to himself, rather than restricting. Father already had and could freely exercise all of these rights prior to the Conservation Easement. One of the existing rights that Father retained for himself was the right to use roads. In addition, Father reserved to himself the right (under certain circumstances) to build structures, hunt, fish, farm and otherwise make specific uses of the Unified Tract. Section 4.3 merely represents Father making clear that, notwithstanding any other provisions in the Conservation Easement limiting his rights in his own property, he retained the right to use roads. Father

reserving to himself the right to use roads on the Unified Parcel was not unusual. Had he not done so, the Conservation Easement might have restricted him from using those roads.

C. **There Is at Least a Scintilla of Evidence That the Relief Requested in Susan's Motion for Partial Summary Judgment Would Be Inequitable.**

Betsy further submits that partial summary judgment was improper because it would be inequitable to grant Susan the requested relief under the circumstances. Under the law, when considering the propriety of equitable relief such as a declaratory judgment, a court may consider the equity of the Plaintiff's conduct:

When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give. *See Foreman v. Foreman*, 280 S.C. 461, 464-65, 313 S.E.2d 312, 314 (Ct. App. 1984). However, if a party has unclean hands, the party is precluded from recovering in equity. A party will have unclean hands where the party behaves "unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000).

See Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E.2d 750, 755-56 (Ct. App. 2005). In matters of equitable relief, courts "rely on the equity maxim 'He who seeks equity must do equity.'" *See Ingram*, 340 S.C. at 107, 531 S.E.2d at 291. There is, at the very least, a scintilla of evidence that the relief granted to Susan is inequitable in light of her actions. Specifically, she had access to Susan's Parcel, but sold it for great personal gain. Having made a healthy profit on the sale of the Access Parcel, she now seeks to implement the Court's equitable jurisdiction to rescue her from a situation of her own making.

It is undisputed that at the time of the Conservation Easement and the drafting of her Father's Will, Susan was a fee owner of the Access Parcel. As a result, she had direct access to Susan's Parcel through the Access Parcel via Charity Church Road. Although she had an absolute right of access, she voluntarily elected to sell that property in 2007 for \$4 Million. Susan admits

that, when she owned the Access Parcel, she had vehicular access to Susan's Parcel. (*See* 8/24/20 Def.'s Memo. Pl.'s Opp. Mot. Partial Summ. J. Ex. 2 # 2).⁹

Even after selling part of the Access Parcel, Susan retained Susan's Access Easement, which allowed her ingress and egress to and from Susan's Parcel and the Floyd Property. (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-E). In 2015, with full knowledge of the impact it would have, Susan agreed to terminate and reconvey Susan's Access Easement to WH Land Company, LLC. (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-F). This occurred years after the Unified Tract had been subdivided and Susan's Parcel had been conveyed to her. She had long accessed Susan's Parcel via Susan's Access Easement. She voluntarily chose in 2015 to end that right, knowing full well that Susan's Parcel (and the Floyd Property) would be landlocked.

It would be grossly inequitable to permit Susan to now use roads on Betsy's Parcel without permission, as she has placed herself into this predicament. Notably, she voluntarily sold most of the Access Parcel for \$4 million, making a hefty profit. Years later, she renounced Susan's Access Easement, which allowed her to access to the Unified Tract. In this lawsuit, Susan seeks to further benefit herself, this time to her sister's detriment. However, she only needs this relief because she disposed of the Access Parcel for her own personal gain. The trial judge should not have granted Susan equitable relief to remedy a problem that was entirely of her own making — and which she handsomely profited from creating.

In light of the foregoing, the trial judge erred in granting partial summary judgment in this matter.

D. The Trial Judge's Construction of the Conservation Easement Would Produce an Absurd Result.

⁹ Susan qualified her admission by stating that access through the Access Parcel was sometimes unavailable because of weather, erosion, and hazardous road condition. (*See id.*). However, this is no different from the access road through Betsy's Parcel (the access Susan sued for). In fact, part of the road within Betsy's Parcel is built on a water embankment and subject to being impassable because of flooding. (*See* 8/24/20 Def.'s Memo. Pl.'s Opp. Mot. Partial Summ. J. Ex. 1 ¶ 11). But for the devotion of significant time, effort, and money by Betsy and her husband, that road would have completely washed away. (*See id.*).

The trial judge also erred in granting Susan partial summary judgment because his construction of the Conservation Easement would, if taken to its logical conclusion, lead to an absurd result.

"Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair and just, the latter construction will prevail." *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248 n.5, 612 S.E.2d 462, 465 n.5 (Ct. App. 2005). Respectfully, the trial judge's interpretation of the Conservation Easement would lead to an absurd result, that Father and Ducks Unlimited plainly did not anticipate.

As set forth above, Judge Young derived Susan's right to use Betsy's Parcel from Section 4.3 of the Conservation Easement. Specifically, he held that, the right to use roads on the entire Unified Tract accrued to Father **and** to his successors, heirs or assigns, including Susan. He further stated that "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, subject to any limitations contained in the Conservation Easement." (See 9/11/20 Order, at 9).

The trial judge concluded that the Conservation Easement gives Susan, as her Father's heir and successor, the right to use the roads on the entire Unified Tract, including Betsy's Parcel. However, the right to use roads is only one of the rights reserved to Father. The ultimate result of this holding would be that Susan (and all of her heirs, successors, and assigns) have the right to do *all* of the things on Betsy's Parcel that Father reserved to himself in Section 4. This would include the right to do the following on Betsy's Parcel:

- hunt and fish on (Section 4.4)
- construct and use docks (Section 4.5)

- manage and drain the wetlands (Section 4.9)¹⁰
- cut and burn trees and other vegetation (Section 4.11)
- conduct timber activities for profit (Section 4.12)
- engage in farming and equestrian activities for profit (Section 4.14)
- apply agricultural chemicals (Section 4.15)
- introduce exotic plants and animals (Section 4.16)
- store above-ground gas and other fuel (Section 4.17)
- explore for an extract minerals, gas, and oil (Section 4.18)
- grant utility easements (Section 4.19)
- erect signage (Section 4.20)
- lease Betsy's Parcel (Section 4.22)
- construct and use boardwalks and wildlife blinds (Section 4.23) and
- store vehicles, equipment, and machinery (Section 4.24)

These rights would apply regardless of who owned Betsy's Parcel. Susan's interpretation of the Conservation Easement would effectively make Betsy's Parcel (and Susan's Parcel) unmarketable.

E. The Conservation Easement Act of 1991 Precludes Susan's Claims.

The trial judge also erred in granting Susan partial summary judgment because she is statutorily prohibited from asserting her claim to enforce a right allegedly created under the Conservation Easement. The Conservation Easement Act of 1991 limits the people who may bring an action affecting a conservation easement to the following:

An action affecting a conservation easement may be brought by: (1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having a third-party right of enforcement; or (4) a person otherwise authorized by law.

¹⁰ Susan has already made evident her intent to exercise control over the water resources on Betsy's Parcel, as her Amended Complaint asserts that there is a controversy regarding how those water resources are managed. Betsy does not believe there is a controversy in that regard.

See S.C. Code § 27-8-40. Although not in the context of this particular statute, the Supreme Court has held that "the usual and customary meaning of the word 'affected'" is "to produce an effect on; to influence in some way" and/or "[t]o act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things." See *Presidential Soc'y of Charleston v. South Carolina Dep't of Health & Env'tl. Ctrl.*, 430 S.C. 200, 212, 845 S.E.2d 481, 487 (2020).

There is at least a scintilla of evidence that this action affects the Conservation Easement, at least in part because Susan is asking this Court to interpret the Conservation Easement to declare that she has certain rights thereunder. This would impact the use and condition of the Unified Tract. The outcome of this case would impact the definition of the rights to use the Unified Tract under the Conservation Easement. Therefore, the Conservation Easement Act of 1991 would govern Susan's claims.

Susan has not presented a scintilla of evidence that she is one of the four categories of entities that can bring suit under the Conservation Easement Act. She does not own any interest in Betsy's Parcel, which is the property she seeks to burden via the Conservation Easement. She is not the holder of the Conservation Easement.¹¹ She is not a person with a third-party right of enforcement of the Conservation Easement.¹² Susan is not a person otherwise authorized by law to bring an action affecting the Conservation Easement with regard to Betsy's Parcel.

Betsy respectfully submits that the four categories set forth above are the only persons permitted to bring an action affecting a conservation easement. Had the General Assembly intended to authorize any other persons — such as those situated like Susan — it would have expressly done so. "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of

¹¹ S.C. Code § 27-8-20(2) defines a "holder" of a conservation easement as a government body or charitable, not-for-profit or educational corporation, association, or trust. Ducks Unlimited is the holder of this Conservation Easement.

¹² S.C. Code § 27-8-20(4) defines "third-party right of enforcement" as "a right provided by the grantor of the conservation easement to enforce selected terms of the conservation easement." The Conservation Easement does not provide Susan with a third-party right to enforce it. Susan has presented no evidence that Father, as the grantor, otherwise provided her with a third-party right of enforcement.

another, or of the alternative." *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) (quoting *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000)); accord *Berkeley Cty. Sch. Dist. v. South Carolina Dep't of Revenue*, 383 S.C. 334, 348, 679 S.E.2d 913, 920 (2009) ("[B]y expressly excluding only general bond indebtedness from the exemption, the General Assembly by implication included the lease/installment-purchase payments within the definition of 'school operating purposes.'").

Because there is at least a scintilla of evidence that Susan does not fall within the categories of persons that the Conservation Easement Act of 1991 permits to bring a suit, the trial judge erred in granting Susan partial summary judgment.

CONCLUSION

Therefore, for all of the foregoing reasons, this Court should reverse the trial judge's grant of Respondent Susan Brooks Knott Floyd's Motion for Partial Summary Judgment and should deny such motion.

January 4, 2021

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

SC Court of Appeals

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2020-001354

Susan Brooks Knott Floyd, Respondent

v.

Elizabeth Pope Knott Dross, Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant Elizabeth Pope Knott Dross on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2021, addressed to her attorneys of record:

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January 4, 2021

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The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
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ctappfilings@sccourts.org

RE: Susan Brooks Knott Floyd, Respondent vs. Elizabeth Pope Knott Dross, Appellant.
Appellate Case No.: 2020-001354

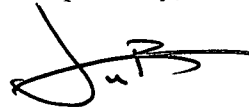
Dear Ms. Kitchings:

Please find enclosed for filing the unbound original *Appellant's Initial Brief and Designation of Matter* in the above-referenced matter. Pursuant to the Supreme Court's Amended Order "re: Operation of the Appellate Courts During the Coronavirus Emergency," I have not included any additional copies.

By copy of this correspondence, I am serving copies of the Brief and Designation of Matter on all counsel of record.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,



Jeffrey M. Bogdan

JMB/jas
enclosures

c: Charles P. Summerall, IV, Esq.
G. Trenholm Walker, Esq.

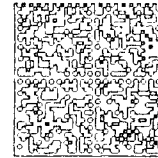
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