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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Roger M. Young, Sr., Circuit Court Judge

Appellate No. 2020-001354

Susan Brooks Knott Floyd .... Respondent,

v.

Elizabeth Pope Knott Dross .... Appellant.

INITIAL BRIEF OF RESPONDENT

G. Trenholm Walker, S.C. Bar No. 5777
Charles P. Summerall, IV, S.C. Bar No. 5433
WALKER GRESSETTE FREEMAN & LINTON, LLC
66 Hasell Street (29401)
P.O. Box 22167
Charleston, SC 29413
T: 843.727.2200
F: 843.727.2238

Attorneys for Respondent Susan Brooks Knott Floyd

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court correctly granted Susan partial summary judgment determining that Susan, as owner of the landlocked half of the 371 acre Conservation Easement Property, has a right of access to her parcel over the roads crossing over Betsy's half of the Conservation Easement Property where the clear and unambiguous provisions of the Conservation Easement entered by their father expressly reserved the right to Susan to use those same roads for all activities permitted under the Conservation Easement.

II. Whether the Circuit Court correctly ruled that extrinsic evidence could not be considered to contradict terms of the Conservation Easement that both parties agreed were clear and unambiguous.

III. Whether the Circuit Court correctly ruled that the reserved right to use the roads over Betsy's Parcel to access Susan's Parcel is consistent with the stated Purpose of the Conservation Easement, is not inequitable, and does not produce an absurd result.

IV. Whether the Circuit Court correctly ruled that Susan's declaratory claim as to her right of access is not precluded by the Conservation Easement Act of 1991.

STATEMENT OF THE CASE

Respondent Susan Brooks Knott Floyd ("Susan") brought this non-jury action against her sister, Appellant Elizabeth Pope Knott Dross ("Betsy"), seeking various relief pertaining to Susan's rights associated with her ownership of half of a 371 acre tract of land previously owned by their father, Benjamin Franklin Knott ("Mr. Knott"). Mr. Knott placed the property under a Conservation Easement in 1998. He devised the property to Susan and Betsy pursuant to the terms of his Will, providing that the property be subdivided upon his death in basically two equal parcels with each daughter receiving half. Betsy has appealed the Circuit Court's grant of partial summary judgment to Susan determining that, pursuant to the unambiguous terms of the Conservation Easement, Susan has the expressly reserved right to use the unpaved roads crossing over Betsy's half of the Conservation Easement Property, which fronts on a public road, to access Susan's landlocked parcel for all activities permitted under the Conservation Easement.

Susan commenced this action by filing a Lis Pendens, Summons and Complaint on September 20, 2019. (*See generally* 9/20/19 Compl.). Susan filed an Amended Complaint on November 22, 2019. (*See generally* 11/22/19 Am. Compl.). Susan asserts claims sounding in:

> Declaratory Judgment (including the expressly reserved right to use roads which is the subject of this appeal);
> Reformation of Deeds of Distribution;
> Easement Implied by Prior Use;
> Easement by Necessity; and
> Injunction
>
> *(See id.).*

Betsy filed her Answer to Amended Complaint and Counterclaim on December 5, 2019. (*See generally* 12/5/19 Ans. to Am. Compl.). In that filing, Betsy denied Susan's claims and asserted a declaratory judgment counterclaim. *(See id.).* On December 20, 2019, Susan filed a Reply to Defendant's Counterclaim (*See generally* 12/20/19 Reply).

On July 15, 2020, Susan filed Plaintiff's Notice and Motion for Partial Summary Judgment (*See generally* 7/15/20 Pl.'s Mot. Partial Summ. J.). Susan's Motion for Partial 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 requested that the Circuit Court grant her partial summary judgment as to the First Cause of Action for Declaratory Judgment in her Amended Complaint, and deny Betsy's Counterclaim to the extent it requests a Declaratory Judgment that Susan has no right to use the roads crossing over Betsy's Parcel. (*See id.*). Susan based her Motion for Partial 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 p. 8, Par. 28).

Concurrent with her Motion for Partial Summary Judgment, Susan filed her Affidavit 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 Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, with her Affidavit attached thereto as an Exhibit. (*See generally* 8/24/20 Def.'s Memo. Opp. Pl.'s Mot. Partial Summ. J.). Betsy did not file a cross-motion for summary judgment. On August 27, 2020, Susan filed her Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, with her Supplemental Affidavit in Support

of her Motion for Partial Summary Judgment attached thereto as an Exhibit. *(See generally* 8/27/20 Pl.'s Reply).

On August 31, 2020, the Honorable Roger M. Young, Sr., Circuit Court Judge, conducted a hearing on Susan's Motion for Partial Summary Judgment. (*See generally* 8/31/20 Transcript). Judge Young emphasized at the hearing that the Motion for Partial Summary Judgment only sought a determination that Susan has an expressly reserved right under the Conservation Easement to use the roads on Betsy's Parcel to access Susan's Parcel. (*See id.* at pp.4-5, and at p.9). 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.

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

On September 11, 2020, the Circuit Court entered its Order Granting Plaintiff's Motion for Partial Summary Judgment ("Partial Summary Judgment Order"). The Order contains an extensive recitation of the undisputed material facts and conclusions of law. (*See generally* 9/11/20 Order Granting Pl.'s Mot. For Partial Summ. J.). In the Partial Summary Judgment Order, Judge Young 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 pp. 8-9).

The Circuit Court's Form 4 Judgment in a Civil Case, filed with the Partial Summary Judgment Order, provided:

> (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 p. 2).

On September 17, 2020, Betsy filed her Defendant's 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, Susan filed her Plaintiff's Memorandum in Opposition to Defendant's Motion to Alter or Amend Order Granting Partial Summary Judgment. (*See generally* Pl.'s 9/29/20 Memo. In Opp. to Def.'s Mot. to Alter or Am. J.).

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. *Stephens & 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* 10/2/20 Order Den. Mot. to Alter or Amend J., at pp. 1-2).

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

For the reasons that follow, this Court should affirm Judge Young's grant of partial summary judgment to Susan in this matter.

STATEMENT OF FACTS

Susan and Betsy are sisters. Susan lives in Charlotte, North Carolina. Betsy lives in Mount Pleasant, South Carolina. They each own a large parcel of adjoining land near Huger in Berkeley County, South Carolina, that was devised to them by their father in his Will. Their respective 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 on November 18, 2009. (*See* Partial Summary Judgment Order at p. 2).

In 1998, eleven years before his death, Mr. Knott granted a Deed of Conservation Easement (the "Conservation Easement") on the unified tract to Wetlands America Trust, Inc. ("Wetlands America" or "Ducks Unlimited"). The unified 371-acre tract is referred to herein as the "Conservation Easement Property" and the "Protected Property". The Conservation Easement was recorded in the Berkeley County Register of Deeds on December 31, 1998 in Book 1521 at Page 0004. (*See id.* at pp. 2-3).

Under the terms of his Will, Mr. Knott devised approximately half of the Conservation Easement Property to Susan and the other half to Betsy. Susan and Betsy, in their capacity as co-Personal Representatives of Mr. Knott's Estate, subsequently executed separate Deeds of Distribution from the Estate to evidence title to their respective parcels that were recorded in the Berkeley County Register of Deeds in January 2011. Betsy received the front half of the Conservation Easement Property, fronting on Cainhoy Road and totaling approximately 182 acres ("Betsy's Parcel", TMS No. 239-00-00-181). Susan received the back half of the Conservation Easement Property, totaling approximately 189 acres ("Susan's Parcel", TMS No. 239-00-00-104). *(See id.).*

Susan's Parcel does not front on any roads and is landlocked. (*See* Susan's Affidavit at p.2, Par. 4). Appendix E to the Baseline Documentation Report ("Report"), prepared by Mr. Knott and Wetlands America in December of 1998 as an integral part of the Conservation Easement, shows the sole entrance gate to the Conservation Easement Property at Cainhoy Road, as well as the unpaved road system that the Knott family used going from that gate across what is now Betsy's Parcel to access what is now Susan's Parcel. (*See* Susan's Affidavit p.3, Par.18, Report Appendix E, and photographs of the entrance gate and road system at Report Appendix I). The Conservation Easement and the accompanying Report do not refer to any other entrance or access to the Conservation Easement Property. (*See generally* Conservation Easement and Report, attached to Susan's Affidavit as Exhibits 1 and 1A).

Mr. Knott owned a home on the other side of Cainhoy Road from the Conservation Easement Property. (*See* Am. Compl. at p.3, Pars. 9 and 10, admitted in Betsy's Ans. to Am. Compl. at p.2, Pars. 9 and 10). Both before and after Mr. Knott died, the entrance gate on Cainhoy Road and the unpaved roads depicted in the Report were used to access the Conservation Easement

Property by Mr. Knott, Betsy and her family, Susan and her family, and Wetlands America (through its affiliate, Ducks Unlimited) when inspecting the two parcels or in exercising its other rights under the Conservation Easement. (*See* Susan's Affidavit in Support of Motion for Partial Summary Judgment at p.4, Par.20).

The Conservation Easement Property is in a natural state and has no houses on it. It contains uplands and wetlands and provides habitat for ducks and other wildlife. (*See* Partial Summary Judgment Order at p.3). Section 1.1 of the Conservation Easement states its "Purpose" as follows: "It is the purpose of this Easement to assure that the Protected Property will be retained in perpetuity predominantly in its natural, scenic, and open condition, as evidenced by the Report, for conservation purposes 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. ('Purpose')." (*See id.* at pp. 3-4 and see Conservation Easement at p.4)

The Conservation Easement specifies the activities permitted on the Conservation Easement Property. These permitted activities include, without limitation, hunting, fishing, agriculture, and timber harvesting. Section 4 of the Conservation Easement sets forth the "Reserved Rights" of the Grantor (then Mr. Knott), many of which provide for the maintenance and use of the Conservation Property by the Grantor. (*See id.* at p.4).

After his death on November 18, 2009, Mr. Knott's Will was probated in the Charleston County Probate Court in Estate File No. 2009-ES-10-01843. In his Will, Mr. Knott named Susan and Betsy as co-Personal Representatives. (*See id.*, and the Will attached to Susan's Affidavit as Exhibit 2).

Regarding the Conservation Easement Property, and consistent with Mr. Knott's reserved right in Section 4.1 of the Conservation Easement, the Will directed that the 371 acre tract be subdivided between Susan and Betsy as shown on the "Subdivision Survey" attached to the Will. (*See* Will and Subdivision Survey attached to Susan's Affidavit as Exhibits 2 and 3). To evidence their respective ownership of the subdivided parcels, in January 2011 Susan and Betsy, in their capacity as co-Personal Representatives, executed and recorded two Deeds of Distribution:

> (a) The Deed of Distribution evidencing Betsy's Parcel was recorded in the Berkeley County Register of Deeds on January 20, 2011 in Volume 8790 at Page 126.
> (b) The Deed of Distribution evidencing Susan's Parcel was recorded in the Berkeley County Register of Deeds on January 20, 2011 in Volume 8790 at Page 130.

(*See* Partial Summary Judgment Order at p.4, and the Deeds attached to Susan's Affidavit as Exhibits 4 and 5).

The property descriptions in the Deeds of Distribution reference a Plat recorded in the Berkeley County Register of Deeds on December 30, 2010 in Plat Cabinet O at Page 161P. Neither the recorded Plat nor the Subdivision Survey attached to the Will shows the unpaved roads within the Conservation Easement Property. (*See id.*, and the recorded Plat attached to Susan's Affidavit as Exhibit 6).

The Deeds of Distribution do not expressly reference the Conservation Easement, but the Deeds contain the following provision applicable to both Susan's Parcel and Betsy's Parcel: "TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises/Property belonging, or in anywise incident or appertaining." (*See id.* at p. 5, and *see* the Deeds).

The introductory recital to the Conservation Easement provides that the term "Grantor" refers collectively to Mr. Knott, together with his heirs, personal representatives, successors, and

assigns. Susan is an heir, personal representative, and successor in title to Mr. Knott. Betsy is also an heir, personal representative, and successor in title to Mr. Knott. (*See id.* at p. 5). Thus both Susan and Betsy are included in the defined term "Grantor".

Section 5.5, entitled "Subsequent Conveyances", provides that: "The Grantor shall 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.*, and *see* Conservation Easement at p. 18)

Section 4 of the Conservation Easement, entitled "RESERVED RIGHTS", sets forth certain "Reserved Rights" which the Grantor reserved for himself and his heirs, successors and assigns. In Section 4.3, entitled "Roads", Mr. Knott expressly reserved for himself and his heirs, successors and assigns: *"The right to use roads for all activities permitted under this Easement."* (Emphasis added). (*See id.*, and *see* Conservation Easement at pp. 7-9).

Section 5.8, entitled "Perpetuity", provides that: "The burdens of this Easement will run with the Protected Property and will be enforceable against the Grantor and all future owners in perpetuity during the period of such ownership." (*See id.*, and *see* Conservation Easement at p. 19). Susan and Betsy each own half of the Protected Property and are bound by the provisions of the Conservation Easement.

The "roads" referenced in Section 4.3, which Mr. Knott's "heirs, successors and assigns" have an express "right to use", are delineated on the Report. (*See id.* at pp. 5-6, and *see* particularly Appendix "E" to the Report attached as Exhibit 1-A to Susan's Affidavit filed in support of the Motion). As stated in the Conservation Easement, the Report provides an accurate representation of the Protected Property and shall be used to monitor Grantor's "future uses of the Protected

Property and practices thereon." (*See id.* at p.6, and *see* Conservation Easement at pages 2-3 and 16).

As stated in the "Physical Environment" section of the Report: "A section of County Road #98 flanks the property on the west for a distance of 0.70 miles. Improved dirt roads on the property total approximately 2.8 miles. Short sections of embankments on the managed wetlands are a part of the road system." (*See id.* at p. 6, and Report at p.4).[1] The Report also refers to the entrance gate to the Conservation Easement Property, located on Cainhoy Road. As Judge Young found and concluded, the specific locations of both the entrance gate and the roads within the Conservation Easement Property are shown on Appendix E to the Report. Photographs of the entrance gate and the road system are included in Appendix I to the Report. (*See* Partial Summary Judgment Order at p. 6, and Report Appendices E and I).

Pursuant to Section 4.3 of the Conservation Easement, Mr. Knott's heirs, successors and assigns have reserved the "right to maintain and replace existing roads at the same location" as shown on the Report. Section 3.3 prohibits the building of any new roads on the Conservation Easement Property, with very limited exceptions. One exception is the reserved right in Section 4.3 to construct new roads to the defined "New Structures"; however, Mr. Knott's heirs, successors and assigns are required to "use existing roads whenever possible for access to the New Structures."

(*See id.* at p.6, and Conservation Easement at pp. 5 and 8-9).

Since Mr. Knott's death, Betsy has maintained a locked gate at the sole entrance to the Conservation Easement Property, which is on Betsy's Parcel where the existing interior road enters Cainhoy Road. At times in the past, Betsy provided Susan with a key to the entrance gate.

[1] The Report pages are not numbered. Report page numbering as cited in Susan's Brief starts with the cover page, titled "EASEMENT DOCUMENTATION REPORT", as p. 1.

However, Betsy subsequently changed the lock to the gate and has not provided Susan with the key, depriving Susan of unrestricted access to Susan's Parcel for activities expressly permitted under the Conservation Easement. When Susan contacted Betsy about access to Susan's Parcel, Betsy asserted that Susan does not have the right to access Susan's Parcel by using the gate or the roads on Betsy's Parcel shown on the Report. (*See* Susan's Affidavit at p. 4, Par. 21; *see also* Partial Summary Judgment Order at pp. 6-7).

Betsy further contends that Susan has no right to use the gate or the interior roads under the terms of the Conservation Easement because she allegedly "created" her own access problem. Betsy asserts Susan formerly owned a large parcel on the opposite side of Susan's Parcel that fronted on Charity Church Road and that Susan sold that property and abandoned an easement that would have provided her access from Charity Church Road to the ten acres she reserved immediately adjacent to Susan's Parcel. (*See* Partial Summary Judgment Order at p.7). As addressed in detail in the "Argument" section below, Betsy's contentions relating to this separate property that was never part of the Conservation Easement Property and was not mentioned anywhere in the Conservation Easement or Report, were not only correctly excluded by Judge Young and irrelevant to the interpretation of the unambiguous terms of the Conservation Easement, but they are also misstated and misleading.

Susan has averred in her Affidavits that Betsy's refusal to recognize Susan's expressly reserved right to access Susan's Parcel by using the roads crossing over Betsy's Parcel has adverse consequences for both Susan and her half of the Conservation Easement Property. As an example, Betsy has rejected Susan's requests for access so that Susan can take steps to preserve and protect the "Whiskey Still Dam" from erosion problems in order to maintain a large freshwater reserve, which is one of the important "conservation values" on Susan's Parcel identified in the Baseline

Report. (*See* Susan's Supplemental Affidavit at p.2, Par. 5, and *see* the Report at p.8). Such protective measures are expressly reserved rights under Section 4.9 of the Conservation Easement. (*See* Conservation Easement at pp. 10-11).

In August 2020, Betsy took the extreme step of denying even Susan's basic request to use the roads on Betsy's Parcel simply to accompany Wetlands America's affiliate, Ducks Unlimited, on its annual inspection of Susan's Parcel, as provided under the terms of the Conservation Easement. (*See* Susan's Supplemental Affidavit at p.2, Par. 5, and *see* Conservation Easement Sections 2.1 and 2.2). Betsy's actions are defeating Susan's ability to exercise the reserved rights set forth in the Conservation Easement, and to protect the conservation values and accomplish the stated Purpose of the Conservation Easement, as to her half of the Protected Property. (*See id.*).

In 2018, in an effort to gain immediate access to Susan's Parcel to address problems such as the Whiskey Still Dam erosion, and also to avoid having to litigate with her sister, Susan sent an email to Betsy to explore purchasing an access easement from Betsy. Betsy rejected that proposal, leaving Susan with no choice but to file this action to obtain relief from the court. (*See* Susan's Supplemental Affidavit at p.2, Par.8).

These averments by Susan show some of her reasons for needing access but do not come into play in the interpretation of the unambiguous terms of the Conservation Easement, the controlling issue on appeal.

STANDARD OF REVIEW

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

> "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-22, 708

S.E.2d 766, 769 (2011). Rule 56(c), SCRCP, provides a circuit court shall grant summary judgment "if 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 ... the moving party is entitled to a judgment as a matter of law." "On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party." *George*, 345 S.C. at 452, 548 S.E.2d at 874. When a circuit court grants summary judgment on a question of law, this Court will review the ruling de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008).

Wright v. PRG Real Estate Management, Inc., 426 S.C. 202, 211-212, 826 S.E.2d 285, 290 (2019).

In this case, it is undisputed that the Conservation Easement encumbers both Susan's Parcel and Betsy's Parcel. Both Susan and Betsy argued to Judge Young that the Conservation Easement is unambiguous. (*See generally* Susan's Motion, and *see* Betsy's Memorandum in Opposition at p.17 and pp.8-9). Judge Young agreed that it is unambiguous. "Because the construction of a clear and unambiguous contract is a matter of law for the court, we review the trial court's findings of law de novo." *Lee v. University of South Carolina*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014).

ARGUMENT

I. The Circuit Court Correctly Granted Susan Partial Summary Judgment Determining That, Pursuant to the Unambiguous Terms of the Governing Conservation Easement, Susan, as Owner of the Landlocked Half of the 371 Acre Conservation Easement Property, has the Expressly Reserved Right to Use the Unpaved Roads Crossing Over Betsy's Half of the Conservation Easement Property, Which Fronts on a Public Road, to Access Susan's Parcel for all Activities Permitted under the Conservation Easement.

Judge Young properly applied well-established rules of construction in analyzing the terms of the Conservation Easement, including the Grantor's expressly reserved right to use roads as stated clearly and plainly in Section 4.3: "The right to use roads for all activities permitted under this Easement." (*See* Conservation Easement at p.9).

"An easement is a right to use the land of another for a specific purpose." *Snow v. Smith*, 416 S.C. 72, 84, 784 S.E.2d 242, 248 (Ct.App. 2016). "An easement may be established by express

grant or by express reservation in a deed or other instrument." 12 *S.C. Jurisprudence Easements* Section 6, *citing Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E. 2d 803 (1965).

"A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E. 2d 902, 909 (Ct.App. 2001) (other citation omitted). "When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself, and using extrinsic evidence to contradict the plain language of the deed is improper." *Snow v. Smith*, 784 S.E. 2d at 248. "The determination of the grantor's intent when reviewing a clear and unambiguous deed is [also] a question of law for the court." *Id.*, quoting *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E. 2d 357, 363 (Ct.App. 2012).

"[T]his court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Id., quoting Plott v. Justin Enters.*, 374 S.C. 504, 513-14, 649 S.E. 2d 92, 96 (Ct.App. 2007). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed." *Proctor*, 730 S.E. 2d at 363 (other citation omitted).

The Grantor's reserved right to use the roads on the Conservation Easement Property is clearly and unambiguously expressed in the Conservation Easement and the accompanying Baseline Documentation Report. "[I]n the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). "Construing contemporaneous instruments together means simply that if there are any

provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated." *Id.*

The Conservation Easement uses plain language and is capable of only one interpretation: Mr. Knott's heirs, successors, and assigns have the expressly reserved right to use the existing roads delineated in the Report "for all activities permitted under this Easement." (*See* Conservation Easement Section 4.3 at page 9). There is no other reference in the Conservation Easement or the Report to a separate entrance gate or separate road access to and through the Conservation Easement Property.

Section 4.1 of the Conservation Easement specifically envisioned that the Conservation Easement Property could be subdivided into two parcels, which Mr. Knott accomplished in his Will by dividing the Property equally between Susan and Betsy. (Exhibit 1 to Susan's Affidavit in Support of Motion for Partial Summary Judgment, p. 8). Nothing in the language of the Conservation Easement limits Susan's right to use the portion of the road system on Betsy's Parcel to access Susan's Parcel after the Conservation Easement Property was divided between them. To the contrary, Section 4.3 expressly reserves unto Susan, as the heir, successor and assign of Mr. Knott, the "right to use roads for all activities permitted under this Easement." (Exhibit 1 to Susan's Affidavit in Support of Motion for Partial Summary Judgment, pp. 8-9). By denying Susan the right to use the portion of the road system on Betsy's Parcel to access Susan's Parcel, Betsy is denying Susan the benefits of "all activities permitted under the Conservation Easement."

Susan's Motion for Partial Summary Judgment was based on the clearly expressed reservation of the right to use roads contained in Section 4.3 of the Conservation Easement. "[S]ummary judgment is proper and a trial unnecessary whe[n] the intention of the parties as to

the legal effect of the [deed] may be gathered from the four corners of the instrument itself." *The Edgewater on Broad Creek Owners Association, Inc. v Ephesian Ventures,* LLC, 430 S.C. 400, 407, 845 S.E.2d 211, 214 (Ct. App. 2020) (other citations omitted).

Judge Young agreed with the parties' respective assertions that the terms of the Conservation Easement are clear and unambiguous. (*See* Partial Summary Judgment Order at p.8). The construction of a clear and unambiguous contract or deed is for the Court. *Snow v. Smith*, 416 S.C. at 85, 784 S.E.2d at 248. Parol evidence is inadmissible to vary its terms. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 128, 713 S.E.2d 799, 805 (Ct. App.2011), *affirmed in part, vacated in part on other grounds*, 429 S.C. 634 (2014). Further, the instrument should be construed as a whole to give meaning to all its terms. *Proctor v. Steedley*, 730 S.E.2d at 363.

Applying these fundamental rules of construction to the Conservation Easement, the Circuit Court correctly concluded that the clear and unambiguous terms of Section 4.3 of the Conservation Easement allow Susan, as heir and successor in title to Mr. Knott, the Grantor, to exercise the Grantor's reserved right to access her parcel by use of the roads specifically depicted in the Report. Accordingly, the Circuit Court granted Susan's Motion for Partial Summary Judgment to allow Susan 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 was expressly reserved by Mr. Knott when he conveyed the Conservation Easement, not just for his benefit, but also for the benefit of his heirs, successors, and assigns. Under Section 5.8, the provisions of the Conservation Easement run with the land in perpetuity and are enforceable against Betsy as a "future owner". (Exhibit 1 to Susan's Affidavit in Support of Motion for Partial Summary Judgment, p. 19).

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. As Judge Young concluded, 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 protect and maintain it, including preserving the conservation values, without access.

At the hearing on Susan's Motion for Partial Summary Judgment, Judge Young recognized that the Conservation Easement runs with the land in perpetuity, and he wisely considered the critical, long-term importance of the access "mechanism" in the context of Mr. Knott's reserved right to divide the Conservation Easement Property into 2 parcels:

> So 500 years from now, Ben, the father, knew that this was going to last forever and he knew that his daughters weren't going to be the property owners, and he knew that maybe somewhere down the road it's inconceivable--or it is conceivable that somebody other than one of Betsy's heirs or one of Susan's heirs would own this piece of property.
>
> There's--there has to be some mechanism to make this work. He's the one that devised them two separate pieces of property, and he had to think that it wouldn't be Susan and it wouldn't be Betsy.
>
> And while he might have thought at the time, you know what, these are my girls, they will always get along, they'll make it work out, that's not realistic to think that that would be the situation 10 years, 50 years, or 500 years from now.
>
> So I have to think about this beyond just what these two ladies want, but what this easement's purpose is going to be or was. Or still is, for that matter. And future property owners are going to be somebody other than these two people and it's got to make it work.

So it's not inconceivable that 50 years from now or 500 years from now that Susan's heirs were not going to own the piece of property and that Susan's piece of property was going to end up landlocked at some point in time.

So with that in mind, dad Ben had to have anticipated that this was going to happen, and that somebody was going to need to get to Susan's piece of property and Betsy's future owners were going to have to let them get to Susan's piece of property.

(*See* 8/31/20 Transcript at p. 42, line 23, through p. 44, line 8).

Betsy asserts that the plain language of the Conservation Easement does not give Susan a right of access to Susan's Parcel across Betsy's Parcel because the Conservation Easement requires that the use of the Conservation Property must be in compliance with all applicable laws, and Susan's use of the road without Betsy's permission would constitute a trespass under the law. The Circuit Court disagreed. As Judge Young correctly concluded, given the expressly reserved right in Section 4.3, Susan's use of the roads on Betsy's Parcel to access Susan's Parcel for activities permitted under the Conservation Easement would be authorized by the terms of the Conservation Easement and would not constitute a trespass or otherwise violate South Carolina law. (Partial Summary Judgment Order at pp. 9-10). This limited use would not be contrary to the intent and "Purpose" of the Conservation Easement since it expressly provides for it.

Betsy also argues that Section 4.21 of the Conservation Easement is the only way that Susan can gain permission to cross Betsy's Parcel. In that section, the Grantor reserved the right to, among other things, grant easements or rights of passage across or upon the Protected Property to "an adjacent property owner", subject to certain conditions. As Judge Young concluded, Betsy's argument ignores the plain meaning of the Conservation Easement. Susan's Parcel is part of the 371 acre Protected Property, not "adjacent" to it. Section 4.21 refers to granting easements or rights of passage to "an adjacent property owner", whereas Susan owns half of the Protected Property and comes under the definition of "Grantor". (Partial Summary Judgment Order at p.10).

Because the clear and unambiguous terms of the Conservation Easement reserve a right of access to the Grantor over the existing roads, the lower court did not commit error in granting partial summary judgment on Susan's first cause of action, and the Court should affirm Judge Young's Partial Summary Judgment Order.

II. **The Circuit Court Correctly Ruled that Extrinsic Evidence Could Not be Considered to Contradict the Unambiguous Terms of the Conservation Easement.**

Even though Betsy contends the Conservation Easement is unambiguous (*See* Betsy's Memorandum in Opposition to Susan's Motion for Partial Summary Judgment at p.17 and pages 8-9), she raises alternative arguments in the event the Court were to determine that the language of the Conservation Easement is ambiguous, based on what she alleges is extrinsic evidence of Mr. Knott's intent. However, because Section 4.3 and the Conservation Easement clearly and unambiguously express Susan's reserved right to use the roads, the lower court correctly held Betsy's extrinsic evidence cannot be considered. Betsy's disputed assertions cannot be used to change, vary, or explain the unambiguous terms of the Conservation Easement. "When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself, and using extrinsic evidence to contradict the plain language of the deed is improper." *Snow v. Smith*, 784 S.E.2d at 248. "The determination of the grantor's intent when reviewing a clear and unambiguous deed is [also] a question of law for the court." *Id.*

In an effort to confuse the issues and circumvent the plain meaning of Section 4.3 of the Conservation Easement, Betsy makes numerous assertions that are incorrect and factually disputed by Susan, as well as legally irrelevant and outside the limited scope of Susan's Motion for Partial Summary Judgment. In opposing Susan's Motion, Betsy submitted an Affidavit containing her extraneous assertions. Susan disputed Betsy's assertions in Susan's Supplemental Affidavit in Support of her Motion for Partial Summary Judgment. Regardless, these contested facts are not

material because, as Judge Young held, the operative wording of the Conservation Easement is clear and unambiguous.

Rule 56(e) requires that a party opposing a motion for summary judgment must present competent evidence, which would be admissible at trial, which shows that a genuine issue of *material* fact exists. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993); *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 450 S.E.2d 624 (Ct. App. 1994), *affirmed*, 459 S.E.2d 850 (1995). Betsy's Affidavit failed to meet the Rule 56(e) requirements because none of the disputed statements contained in the Affidavit can be used to change, vary, or explain the unambiguous terms of the Conservation Easement. The Circuit Court properly granted Susan's Motion for Partial Summary Judgment pursuant to Rule 56.

Even if the Circuit Court had considered extraneous evidence of Mr. Knott's alleged intent, which Judge Young correctly declined to do because the Conservation Easement is clear and unambiguous as to the Grantor's reserved right to use the roads under Section 4.3 (*See* Order at pp. 11-12), Betsy's Affidavit still failed to present competent evidence which would be admissible at trial. Betsy's Affidavit contained disputed assertions of events that allegedly took place long before, and long after, Mr. Knott executed the Conservation Easement in December of 1998. If the Circuit Court had concluded that the Conservation Easement is ambiguous and allowed extrinsic evidence, the only relevant evidence would pertain to Mr. Knott's intent at the time the Conservation Agreement was entered into.

In *DD Dannar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 27, 846 S.E.2d 883, 892 (Ct. App. 2020), this Court cited extensive precedent emphasizing that what is relevant is the parties' intent at the time the agreement was entered into:

> *See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977) ("The purpose of all rules of contract construction is to determine the parties'

intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, *at the time the contract was entered into.* The court should put itself, as best it can, in the same position occupied by the parties *when they made the contract.* In doing so, the court is able to avail itself of *the same light [that] the parties possessed when the agreement was entered into* so that it may judge the meaning of the words and the correct application of the language." (emphases added) (citation omitted)); *U.S. Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009) ("To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes *at the time the contract was entered.*" (emphasis added)); *Ellie*, 358 S.C. at 94, 594 S.E.2d at 493 ("In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes *at the time the contract was entered.*" (emphasis added)).

Furthermore, Section 5.22 of the Conservation Easement includes the following merger and integration provision confirming that the intent of Mr. Knott and Wetlands America on matters relating to the Conservation Easement is fully encapsulated in the Easement itself:

> "5.22 Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with Section 5.11."
>
> (*See* Conservation Easement at p. 24)

As stated in *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 127-128, 713 S.E.2d 799, 805 (Ct. App. 2011), *affirmed in part, vacated in part on other grounds*, 429 S.C. 634 (2014):

> "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument... The parol evidence rule is particularly applicable where the written instrument contains a merger or integration clause...
>
> A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement...
>
> The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing. Furthermore, when the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to the agreement, even when the writing is silent as to the particular terms sought to be established."
> (internal citations omitted)

In addition to excluding from consideration Betsy's disputed allegations of events occurring prior to the December 1998 Conservation Easement, the Circuit Court also properly excluded Betsy's disputed allegations of events occurring long after the Conservation Easement was executed and recorded. Not only do Betsy's assertions involve separate properties that have never been part of the Conservation Easement Property and are not subject to the Conservation Easement, but the law is clear that evidence of later events is not relevant to a party's intent at the time the subject agreement is executed. *See DD Dannar, LLC v SC LAUNCH!, Inc., cited supra* (excluding from consideration meeting minutes which took place years after the subject agreement was executed).

An explanation of the inaccurate and misleading nature of the statements contained in Betsy's court filings, including her Initial Brief, requires a review of chronological events contained in the case record. By Deed dated November 19, 1996, and recorded in the Berkeley County Register of Deeds on December 9, 1996 in Book 976 at Page 125, Mr. Knott conveyed to Susan approximately 246 acres of land. (*See* Exhibit B to Betsy's Affidavit filed with her Memorandum in Opposition to Susan's Motion for Partial Summary Judgment). On the same day, November 19, 1996, Mr. Knott deeded other, very valuable property to Betsy. (*See* Susan's Supplemental Affidavit at p.2, par. 9). The Deed to Betsy was recorded on the same date, December 9, 1996, in Book 976 at Page 128. (*See* last page of Exhibit B to Betsy's Affidavit filed with her Memorandum in Opposition to Susan's Motion for Partial Summary Judgment).[2] It is undisputed in this case that Mr. Knott had loving relationships with Susan and Betsy, and he treated

[2] The property description that is part of this Deed is missing from Betsy's Exhibit, but it is undisputed that in this Deed Mr. Knott conveyed to Betsy a large and very valuable parcel of land. (*See* 8/31/20 Transcript at p. 45, lines 7-12).

them in a generous and even-handed manner. (*See* Am. Compl. at p.4, par. 14, admitted in Betsy's Answer to Am. Compl. at p.3, par.14). The simultaneous 1996 Deeds are examples of Mr. Knott's generous and even-handed treatment of his daughters, as is Mr. Knott's later division of the 371 acre Conservation Easement Property equally between Susan and Betsy.

The 246 acre tract which Mr. Knott gave to Susan in 1996 was adjacent to the 371 acre tract which Mr. Knott retained, and which more than two years later Mr. Knott protected under the Conservation Easement. The 246 acre tract fronted on Charity Church Road, a public road. When Mr. Knott gave Susan the 246 acre tract, he did not reserve any form of right or easement to go across that property to access his 371 acre retained tract, which had its own entrance on Cainhoy Road. In December of 1998, when Mr. Knott and Wetlands America entered into the Conservation Easement and the accompanying Report to protect the 371 acre tract, they did not make any reference at all to the separate, 246 acre tract which Mr. Knott had given to Susan two years earlier. Nowhere in the Conservation Easement or the Report does it say that an unassociated piece of property affects any reserved rights contained in the Conservation Easement. To the contrary, the 246 acre tract is a separate and distinct property that was never part of the protected Conservation Easement Property, and it has nothing to do with the Conservation Easement.

Mr. Knott placed no conditions or restrictions on the 246 acre tract when he gave it to Susan, and Susan was free to sell or otherwise dispose of the property. In 2007, Susan and her husband (Susan had conveyed an interest in the property to her husband) sold the 246 acre tract to WH Land Company, LLC, except for a 10.48 acre parcel which the Floyds retained, for a stated consideration of $4,000,000.00. (*See* Exhibits C and D to Betsy's Affidavit). The tract that was sold to WH Land Company, LLC, is referred to herein as the "WH Land Property", and the 10.48

acre parcel which the Floyds retained is referred to herein as the "Floyd Property". The 10.48 acre Floyd Property was adjacent to the 371 acre tract owned by Mr. Knott.

In connection with the Floyds' sale of the WH Land Property, WH Land Company granted the Floyds an easement (the "WH Land Easement") that provided the Floyds the right to cross over the WH Land Property only to access the 10.48 acre Floyd Property. (*See* Exhibits C, D, and E to Betsy's Affidavit). Under the WH Land Easement, the 10.48 acre Floyd Property was the dominant estate, and the WH Land Property was the servient estate. Consistent with this limited grant of easement, the plat of its location attached to the WH Land Easement shows it terminating at the boundary of the 10.48 acre Floyd Property. (*See* Exhibit E to Betsy's Affidavit).

After the division of the Conservation Easement Property between Susan and Betsy pursuant to Mr. Knott's Will, the Floyds terminated the WH Land Easement. Betsy incorrectly asserts that, by terminating the WH Land Easement, Susan voluntarily landlocked Susan's half of the Conservation Easement Property. Betsy's assertion is based on the false premise that the WH Land Easement granted the Floyds the right to cross over the WH Land Property for the purpose of accessing what later became Susan's half of the Conservation Easement Property. In her court filings, including her Initial Brief, Betsy wrongly asserts that the WH Land Easement granted Susan the right to cross over the WH Land Property to access Susan's Parcel. *See* Appellant's Initial Brief at page 4 ["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."], and at page 23 ["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."].

The WH Land Easement did not make any reference to the 371 acre tract that is encumbered by the Conservation Easement. It not only did not. It could not. Mr. Knott was the owner of the Conservation Easement Property in 2007 and 2008 at the time of the WH Land Easement, and Susan had no legal interest in the Conservation Easement Property. The WH Land Easement did not "grant" or "allow" Susan access to a parcel she did not own. Accordingly, Betsy's assertions are wrong, and her usage of the defined terms "Susan's Access Parcel" and "Susan's Access Easement" is misleading and should be rejected.

This Court should disregard all of Betsy's misstatements about the WH Land Property and the WH Land Easement, including Betsy's assertion that the WH Land Easement provided access to Susan's Parcel when it categorically did not. This Court should affirm Judge Young's proper exclusion of Betsy's extraneous and irrelevant assertions.

Some of the extraneous allegations in Betsy's Affidavit and in her Initial Brief could possibly be relevant to the alternative claims in the Amended Complaint pertaining to an implied easement by prior use and easement by necessity, but those issues were not before the Circuit Court in connection with Susan's limited Motion for Partial Summary Judgment, and are not before this Court on this appeal.[3] Under clear precedent, Betsy's allegations should not be considered in this appeal from the Partial Summary Judgment Order, which is limited to the clearly expressed reservation of the right to use roads contained in Section 4.3 of the Conservation Easement. "[S]ummary judgment is proper and a trial unnecessary whe[n] the intention of the

[3] *See* 8/31/20 Transcript at 23:11, where Judge Young stated "...before the Court is not easement by necessity today." *See also* Betsy's Initial Brief at p. 14, fn. 5: "Although not an issue in this appeal, Betsy contends that Susan would not be entitled to an implied easement."

parties as to the legal effect of the [deed] may be gathered from the four corners of the instrument itself." *The Edgewater on Broad Creek Owners Association, Inc.*, 845 S.E.2d at 214.

The fact that Susan at one time owned separate property with access to Charity Church Road is irrelevant to her expressly reserved right to use the roads on the Conservation Easement Property, which roads are specifically delineated in the Baseline Report. As Judge Young stated to Betsy's counsel at the hearing on Susan's Motion for Partial Summary Judgment:

> How is that relevant if she [Susan] has an express right to use those roads? It's irrelevant that she [Susan] has--had other access to the property if an express easement was reserved and she inherited it.

(*See* 8/31/20 Transcript at p. 22, line 25, through p. 23, lines 1-4).

It bears repeating: that separate property, which Susan received from Mr. Knott in 1996, was never part of the protected, 371 acre Conservation Easement Property, and it is not mentioned anywhere in the Conservation Easement or the Baseline Report. Betsy's assertions that Susan knowingly landlocked her half of the Conservation Easement Property are totally wrong. Susan's father conveyed that separate property to her free and clear of any restrictions, just as he conveyed separate and very valuable properties to Betsy. (*See* Susan's Supplemental Affidavit at p.2, par. 9). Susan's father did not retain any right or easement over that separate property to access the Conservation Easement Property. Susan's father and her family could and did continue to use the Cainhoy Road entrance to access the Conservation Easement Property. Susan was free to sell her separate property at any time, which she did with the understanding that she could continue to access the Conservation Easement Property from Cainhoy Road. (*See* Susan's Supplemental Affidavit at p.2, par.9). By its very terms, the WH Land Easement discussed by Betsy did not provide access to Susan's Parcel. The dominant estate was a 10.48 acre parcel that was not part of the Conservation Easement Property. Again, Betsy makes assertions that might be relevant to

alternative arguments of implied easement or easement by necessity, but Judge Young properly excluded Betsy's assertions from consideration in the context of Susan's Motion for Partial Summary Judgment, which is based on her expressly reserved right to use the roads on the Conservation Easement Property. (Partial Summary Judgment Order at pp. 11-12).

Though Betsy largely (and inaccurately) focuses on the WH Land Property and the WH Land Easement, Betsy also references another separate property, as mentioned in Mr. Knott's 2004 Will, that has nothing to do with the Conservation Easement Property. Regarding that separate 1.99 acre property, which contained Mr. Knott's former home and was left jointly to Susan and Betsy, the Will simply states: "It is my 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 road to said property." (*See* Exhibit 2 to Susan's Affidavit at p.2). Betsy's assertion, that Mr. Knott did not include in his Will a similar reference to ingress and egress to and from the Conservation Easement Property, ignores the fact that Mr. Knott had expressly reserved for his heirs and successors the right to use the roads on the Conservation Easement Property in Section 4.3 of the Conservation Easement.

This Court should affirm the Circuit Court's exclusion of all of Betsy's irrelevant assertions relating to extraneous properties and extraneous documents.

III. **The Circuit Court Correctly Ruled that Susan's Expressly Reserved Right to Use the Roads Over Betsy's Parcel to Access Susan's Parcel is Consistent with the Stated Purpose of the Conservation Easement, is Not Inequitable, and Does Not Produce an Absurd Result.**

A. **Susan Must Have Access to Susan's Parcel to Fulfill the Purpose of the Conservation Easement as to Her Half of the Conservation Easement Property.**

When this Court considers the stated "Purpose" of the December 1998 Conservation Easement, two fundamental aspects are clear: (1) Mr. Knott wanted to protect and preserve the

"conservation values of the Protected Property", as documented in the contemporaneous Baseline Report; and (2) Mr. Knott expressly reserved certain rights pertaining to use and enjoyment of the Conservation Easement Property for himself and his heirs, successors and assigns. Mr. Knott unambiguously expressed his intentions in the Conservation Easement in the specific context of his right to subdivide the Conservation Easement Property into two parcels, which he accomplished in his Will when he split the Conservation Easement Property evenly between Susan and Betsy.

Betsy's position, that Susan has no express "right to use roads for all activities permitted under this Easement," would defeat both fundamental aspects of the expressed "Purpose" of the Conservation Easement. Without the right to use the entrance gate on Cainhoy Road and the road system specifically depicted in the Baseline Report to reach her property, Susan cannot access her Parcel. Her inheritance of this land from her father bestows no benefit on her and is effectively a nullity. She pays taxes on it but cannot get to it. She can neither protect the "conservation values" that are the stated Purpose of the Conservation Easement, nor exercise her right to hunt, fish, harvest timber, maintain impoundments for waterfowl, or exercise any of the Grantor's other reserved rights, on her half of the Property. The recitals in the Conservation Easement specifically refer to the Grantor's access to the Protected Property and "the right to preserve and protect the conservation values of the Protected Property in perpetuity." (*See* Conservation Easement at p. 3). Under Betsy's view, contrary to the Conservation Easement, Susan would have no access at all to her 189 acres.

The frustration of the "Purpose" of the Conservation Easement and of Susan's reserved rights thereunder, resulting from Betsy's position that Susan cannot use the roads across her property to access Susan's Parcel, are described in Susan's Supplemental Affidavit attached as

Exhibit 1 to her Reply to Betsy's Memorandum in Opposition to the Motion for Partial Summary Judgment. Susan has requested permission from Betsy to access Susan's Parcel through the locked gate and the roads on Betsy's Parcel to allow Susan to protect the Conservation Easement values and exercise her reserved rights, including: (1) to preserve and protect the "Whiskey Still Dam" from erosion in order to maintain a large freshwater reserve, which is one of the important "conservation values" on Susan's Parcel identified in the Baseline Report (*See* Report at pp. 8-9); and (2) to harvest some timber on Susan's Parcel. Betsy rejected Susan's requests. As described in Susan's Supplemental Affidavit, Betsy has gone so far as to even refuse to allow Susan to use the roads on Betsy's Parcel simply to accompany the Wetlands America (Ducks Unlimited) representative on its annual inspection of Susan's Parcel. Clearly, Betsy's actions are defeating the Purpose of the Conservation Easement as to Susan's half of the Protected Property.

Betsy argues that Judge Young's Partial Summary Judgment Order could expose Betsy's Parcel to additional "traffic and activity" and "create a potentially endless stream of people who could have rights to use the roads on Betsy's Parcel". (*See* Betsy's Initial Brief at p.19). At the hearing, Judge Young referred to Betsy's "imagined wrongs". (*See* 8/31/20 Transcript at p. 37, line 8). Pursuant to the Partial Summary Judgment Order and the express terms of Section 4.3, Susan's reserved right to use the roads to access Susan's Parcel is limited to "activities permitted under this Easement." If Susan were ever to use the roads over Betsy's Parcel for any activity not permitted under the Conservation Easement, Betsy could seek redress from the court.

This Court should affirm Judge Young's conclusion that Susan's reserved right to use the roads over Betsy's Parcel to access Susan's Parcel is consistent with, indeed necessary to, the Conservation Easement's stated Purpose.

B. <u>The Circuit Court Correctly Determined that Susan's Right of Access to Susan's Parcel is Not Inequitable.</u>

Betsy asserts that it would be inequitable for Susan to have the right to use the roads on Betsy's Parcel. Betsy's assertions are largely based on Susan's sale of a separate property, which as described above was never included in the protected Conservation Easement Property and is not mentioned anywhere in the Conservation Easement or the accompanying Report. Betsy asserts:

> 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.

Betsy's Initial Brief at p. 22.

It is not clear whether Betsy's assertions are an attempt to assert unclean hands or some other equitable defense. In any event, Betsy's assertions are flawed for many reasons. As a threshold matter, the limited issue involved in this appeal, the reserved right to use roads, stems from an action at law, in which equitable defenses such as unclean hands have no application. *See Aaron v. Mahl*, 381 S.C. 585, 674 S.E.2d 482 (2009) (the equitable doctrine of unclean hands has no application to an action at law).

To the extent that Betsy is attempting to assert equitable estoppel, the South Carolina Supreme Court has clearly held that equitable estoppel cannot be used to alter the terms of an unambiguous, written contract. In *Rodarte v. University of South Carolina*, 419 S.C. 592, 799 S.E.2d 912 (2017), the respondents sought to use equitable estoppel to introduce parol evidence in a case involving an unambiguous contract. The Supreme Court, in reversing the Court of Appeals, stated that:

> Allowing Respondents' equitable estoppel claim to go forward--with the introduction of parol evidence that would entail-- would be tantamount to permitting a party to convert an unambiguous contract into an ambiguous one based on little more than 'the subjective, after-the-fact meaning one party assigns to it.' (citation omitted)... Simply put,

> Respondents cannot use equitable estoppel to let in through the back door what the parol evidence rule prevents from coming in the front door.
>
> Indeed, an unambiguous, written contract is inherently incompatible with the doctrine of equitable estoppel.

419 S.C. at 604, 799 S.E.2d at 918.

Betsy asserts that a court may consider the equity of the plaintiff's conduct "when considering the propriety of equitable relief such as a declaratory judgment", and she further asserts that the "determination of the extent of a grant of an easement is a question in equity." (*See* Betsy's Initial Brief at p.22 and p.15). Betsy is incorrect. This case involves the *existence* of Susan's right to use the roads over Betsy's Parcel to access Susan's Parcel. In Susan's Amended Complaint and her Motion for Partial Summary Judgment, Susan asked the court to declare that she has an expressly reserved right to use the roads crossing over Betsy's Parcel to access Susan's Parcel. In her Answer and Counterclaim (at p. 10) and in her Memorandum in Opposition to the Motion for Partial Summary Judgment (at p. 19), Betsy asserted that Susan has no right at all to use the roads on Betsy's Parcel. In other words, Betsy denies the existence of any right of Susan to use the roads.

The determination of the *existence* of an easement is an action at law. *Inlet Harbor v South Carolina Dept. of Parks, Recreation and Tourism*, 377 S.C. 86, 659 S.E.2d 151 (2008). Furthermore, an action to construe a contract is an action at law. *Miller v. Dillon*, 423 S.C. 197, 206, 851 S.E.2d 462, 467 (Ct. App. 2020). Regarding the nature of an action for declaratory judgment: "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Gordon v. Colonial Ins. Co. of California*, 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000), *cert. denied* (2001). "An issue, essentially one at law, will not be transformed into one in equity simply because declaratory relief is sought." *Id.* The issue on this

appeal involves construction of the Conservation Easement and the existence of Susan's reserved right to use the roads. Accordingly, Betsy may not assert equitable defenses in this action at law.

Even if Betsy could assert equitable defenses, they would not apply to the subject of this appeal. Betsy's assertions relate to Susan's sale of a separate property that was never part of the protected Conservation Easement Property and was never subject to or mentioned in the Conservation Easement. Betsy is attempting to assert inequity based on Susan's sale of the separate property even though her father, Mr. Knott, did not tie that separate property to the protected Conservation Easement Property in any way. The issue on appeal involves the construction of a clear and unambiguous term in the Conservation Easement. The ultimate question before this Court is limited to Susan's expressly reserved right contained in the Conservation Easement to use the roads on the Conservation Easement Property to access Susan's Parcel. Betsy admits in her Initial Brief (at p. 3) that the separate property is "not directly the subject of this lawsuit". Betsy's assertions do not involve Susan allegedly acting "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 n.2, 531 S.E.2d 287, 292 n.2 (2000) (doctrine of unclean hands precludes a plaintiff from recovering in equity if the plaintiff acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant).

Betsy's assertions are also contrary to the Grantor's expressly reserved right to use the roads in Section 4.3 of the Conservation Easement. The Circuit Court concluded that permitting Susan, as the successor in title to half of the Conservation Easement Property, to exercise this reserved right solely to access her Parcel to maintain, protect, and preserve it is equitable, not inequitable. (*See* Partial Summary Judgment Order at p.12). There are very serious and clearly inequitable consequences if Susan has no access to her half of the Conservation Easement

Property. The entire Purpose of the Conservation Easement would be thwarted as to Susan's 189 acre Parcel. Susan would neither be able to maintain and protect the important conservation values on her Parcel that are identified in the Report, including the large freshwater reserve known as the Whiskey Still Pond, nor would she be able to have the use and enjoyment of exercising the Conservation Easement's reserved rights on her Parcel.

In terms of fairness, and as admitted in Betsy's Memorandum in Opposition to Susan's Motion for Partial Summary Judgment: "Ben [Knott] wanted to treat his two daughters equally." (*See* Betsy's Memorandum in Opposition at p.18). In her Initial Brief, Betsy references Mr. Knott's treatment of Susan and Betsy "in a generous and even-handed manner", and she states that this notion of equality between Susan and Betsy is evidenced in Mr. Knott's Will, in which he split his property equally between Susan and Betsy. (*See* Betsy's Initial Brief at p. 16). Betsy then asserts that, if Susan has the right to use the road on Betsy's Parcel to access Susan's Parcel, "Susan would have received significantly more than Betsy under Father's Will". *See id.* Betsy ignores the fact that Susan's right to use the roads is not only expressly reserved in Section 4.3, but is consistent with the Knott family's usage of the roads when Mr. Knott was living. (*See* Susan's Affidavit at p.4, Par. 20). Further, Betsy's admission that Mr. Knott wanted to treat Susan and Betsy equally is totally inconsistent with Betsy's incredible position that Mr. Knott left 189 acres of the Conservation Easement Property to Susan without any right of access under the Conservation Easement, essentially rendering Susan's Parcel valueless. Betsy's position would result in gross inequity to Susan and be totally contrary to Mr. Knott's "even-handed" treatment of his daughters.

Accordingly, to the extent this Court considers equity, the Court should affirm Judge Young's finding and conclusion that Susan's reserved right to access Susan's Parcel is equitable, not inequitable.

C. The Circuit Court Correctly Rejected Betsy's Argument that Susan's Right to Use the Roads to Access Susan's Parcel Would Produce an Absurd Result.

In her Opposition to Susan's Motion for Partial Summary Judgment (at pp. 13-15), and again on appeal, Betsy asserts that Susan could seek to exercise reserved rights such as timbering, mineral exploration, etc., on Betsy's Parcel. As stated in Susan's Supplemental Affidavit in Support of her Motion for Partial Summary Judgment (at p. 2, Par. 6), Susan is asking the Court to affirm only her express right to use the roads to access Susan's Parcel to protect conservation values and exercise reserved rights on Susan's Parcel, not on Betsy's Parcel. Susan is not asking to exercise proprietary rights associated with Betsy's Parcel.

However, Betsy argues that, if Susan has the right to use the roads on Betsy's Parcel, then Susan would also be able to hunt, fish, cut timber, and exercise all of the other reserved rights in Section 4 on Betsy's Parcel. The Circuit Court rejected that assertion. (*See* Partial Summary Judgment Order p. 10). As stated in the Motion for Partial Summary Judgment and by Susan's counsel on the record at the hearing on the Motion, Susan is not seeking to exercise any reserved right on Betsy's Parcel except using the interior road to gain access to Susan's Parcel. (*See* 8/31/20 Transcript at p. 49, lines 18-22). This statement is entirely consistent with the allegations in Susan's first cause of action in her Amended Complaint, her Reply Memorandum, and her Supplemental Affidavit.

As Judge Young stated at the hearing, the only reserved right of the Grantor before the Court is the right to use the roads as stated in Section 4.3. The Circuit Court did not rule on whether Susan may exercise any other reserved rights on Betsy's Parcel, and Judge Young specified that his Order shall not be considered or construed as such. (*See* Partial Summary Judgment Order at p. 10). The Partial Summary Judgment Order and this appeal are limited to the sole issue of Susan's expressly reserved right to use the roads to access Susan's Parcel. The Partial Summary Judgment

Order does not end this action. Any other issues between Susan and Betsy relating to the Conservation Easement Property remain for subsequent court determination.

It is Betsy's position -- that Susan has no right to use the roads to access Susan's Parcel-- that would lead to an absurd result. Betsy's position requires this Court to ignore, among other provisions of the Conservation Easement:

(a) the inclusion of Susan as the heir, personal representative, and successor in title to Mr. Knott, within the term "Grantor" defined in the first paragraph of the Conservation Easement;
(b) the Grantor's reservation of rights "for himself, and his heirs, successors and assigns", as stated in the first paragraph of Section 4;
(c) the expressly reserved right in Section 4.3 "to use the roads for all activities permitted under this Easement.";
(d) the context of the reserved right to use the roads, e.g., in conjunction with Mr. Knott's reserved right in Section 4.1 to subdivide the Conservation Easement Property into 2 parcels.

More broadly, as addressed above, Betsy's position would lead to the absurd result that Susan has no right or ability to protect the conservation values identified in the Report, or exercise any of the Grantor's reserved rights, on Susan's Parcel. According to Betsy, and as she did in August 2020, she can prevent Susan from using the roads even to accompany Ducks Unlimited on its annual inspection of Susan's Parcel, as provided in the Conservation Easement. Nor would Susan have any ability to access her Parcel to address any concerns identified by Ducks Unlimited on Susan's Parcel. Betsy's position would thus defeat the entire Purpose of the Conservation Easement as to Susan's half of the Conservation Easement Property, totaling 189 acres of the 371 acres that Mr. Knott sought to protect in perpetuity.

To prevent this absurd result, this Court should reject Betsy's extreme position and affirm Judge Young's Partial Summary Judgment Order.

IV. **The Circuit Court Correctly Ruled that Susan's Claims Are Not Precluded by the Conservation Easement Act of 1991.**

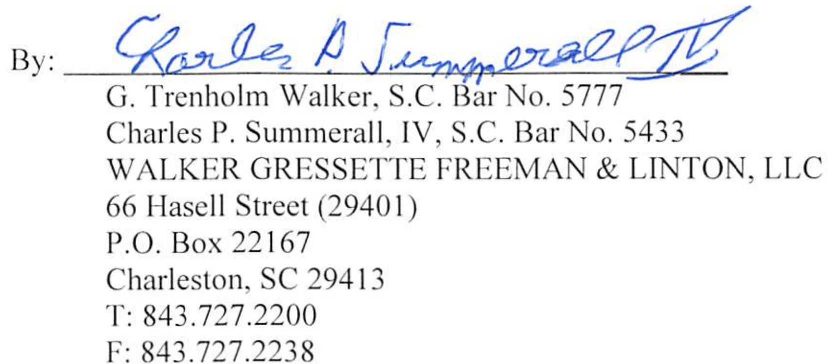
Without citing any caselaw or other authority in support of her position, Betsy argues that, under the Conservation Easement Act of 1991, specifically Section 27-8-40, Susan is not entitled to bring this action affecting the Conservation Easement. Betsy did not assert the Conservation Easement Act as a defense, nor did Betsy challenge Susan's capacity to bring this action, in her Answer to Amended Complaint and Counterclaim. Betsy's assertion of the Act is ironic given Betsy's own Counterclaim for declaratory judgment, which asks the court to declare that Susan "has no easement of any kind over Betsy's Parcel and does not otherwise have any rights regarding Betsy's Parcel." (*See* Answer to Am. Compl. and Counterclaim at 10). Thus both Susan and Betsy have requested a determination of each other's rights relating to the Conservation Easement and the Conservation Easement Property. Under Betsy's strained and unsupported interpretation of the Act, she could not assert her Counterclaim against Susan.

The Circuit Court correctly ruled that Susan owns half of the Conservation Easement Property and comes under the definition of "Grantor" in the Conservation Easement. The Conservation Easement Act plainly states in Section 27-8-40 (A)(1) that "an owner of an interest in the real property burdened by the easement" may maintain an action. Additionally, S.C. Code Ann. § 27-8-40 (A)(4) provides that an action affecting a conservation easement may be brought by "a person otherwise authorized by law." As an affected person who is suffering an injury-in-fact that will be remedied by the Partial Summary Judgment Order if this Court affirms it, Susan also has constitutional standing and qualifies under subsection (A)(4) as well. *See, ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (discussing the grounds for standing and elements needed to establish constitutional standing).

CONCLUSION

The Conservation Easement is clear and unambiguous. Susan's expressly reserved right to use the roads over Betsy's Parcel to access Susan's Parcel is the mechanism whereby the Purpose of the Conservation Easement can be fulfilled as to Susan's landlocked half of the Conservation Easement Property.

For the foregoing reasons, Susan requests that this Court affirm in all respects the Circuit Court's Partial Summary Judgment Order, the accompanying Form 4 Judgment, and the Order Denying Motion to Alter or Amend Judgment.



By: ______________________

G. Trenholm Walker, S.C. Bar No. 5777
Charles P. Summerall, IV, S.C. Bar No. 5433
WALKER GRESSETTE FREEMAN & LINTON, LLC
66 Hasell Street (29401)
P.O. Box 22167
Charleston, SC 29413
T: 843.727.2200
F: 843.727.2238

Attorneys for Respondent Susan Brooks Knott Floyd

March 5, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Roger M. Young, Sr., Circuit Court Judge

Appellate No. 2020-001354

Susan Brooks Knott Floyd .... Respondent

v.

Elizabeth Pope Knott Dross .... Appellant

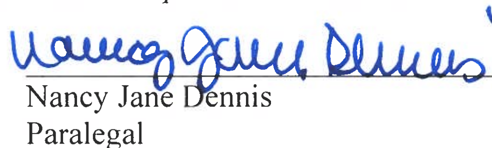
PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent and Respondent's Designation of Matter To Be Included In The Record On Appeal** on the Appellant Elizabeth Pope Knott Dross, via electronic mail, on **March 5, 2021**, addressed to her attorneys of record at the following addresses:

Jeffrey Michael Bogdan, Esq.
John W. Fletcher, Esq.
Barnwell Whaley Patterson & Helms, LLC
Post Office Drawer H
Charleston, SC 29402
jbogdan@barnwell-whaley.com
jfletcher@barnwell-whaley.com

Joshua Steven Whitley, Esq.
Smyth Whitley, LLC
126 Seven Farms Drive
First Citizens Plaza, Suite 260
Charleston, SC 29492
jwhitley@smythwhitley.com

Attorneys for Appellant Elizabeth Pope Knott Dross



Nancy Jane Dennis
Paralegal

From:	Nancy Jane Dennis
To:	jwhitley@smythwhitely.com; Jeffrey Bogdan; John Fletcher
Cc:	Trenholm Walker; Charles P. Summerall, IV
Subject:	Floyd v. Dross
Date:	Friday, March 5, 2021 1:38:10 PM
Attachments:	image073990.png 03-05-21 Initial Brief of Respondent.pdf 03-05-21 Proof of Service.pdf 03-05-21 DOM.pdf

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Attached please find Respondent's Initial Brief and Designation of Matter with Proof of Service.

Nancy Jane
Paralegal

NANCY JANE DENNIS, Paralegal
843.727.2222 direct
NJDennis@WGFLLAW.com

PO Box 22167, Charleston, SC 29413
66 Hasell Street, Charleston, SC 29401

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G. Trenholm Walker
Thomas P. Gressette, Jr.
Ian W. Freeman
John P. Linton, Jr.
Charles P. Summerall, IV
Jennifer S. Ivey

Charles P. Summerall, IV
Direct: 843.727.2205
Email: SUMMERALL@WGFLLAW.COM

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Mar 05 2021
SC Court of Appeals

March 5, 2021

VIA EMAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: Susan Brooks Knott Floyd, Respondent v. Elizabeth Pope Knott Dross, Appellant
Appellate Case No.: 2020-001354
WGFL File: 8185-001

Dear Ms. Kitchings:

Please find attached Respondent's Initial Brief and Designation of Matter in the above-referenced matter with Proof of Service by electronic mail only.

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

Sincerely,

WALKER GRESSETTE FREEMAN & LINTON, LLC

Charles P. Summerall, IV

cc: G. Trenholm Walker, Esq. (email only)
Jeffrey M. Bogdan, Esq. (email only)
John Fletcher, Esq. (email only)
Joshua Steven Whitley, Esq. (email only)