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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

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 REPLY BRIEF OF APPELLANT

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I. SUSAN HAS NOT SHOWN THAT THE CONSERVATION EASEMENT UNAMBIGUOUSLY CREATED AN AFFIRMATIVE EASEMENT ON THE ROADS ON BETSY'S PARCEL.

As Betsy argues in her opening Brief of Appellant, *any* ambiguity in the Conservation Easement concerning the creation of an easement over Betsy's Parcel would require reversal of the grant of Susan's Motion for Partial Summary Judgment. Susan's Respondent's Brief does not persuasively establish that — beyond a scintilla of evidence — the Conservation Easement unambiguously created an easement for Susan's benefit over Betsy's Parcel. As a result, the Court should reverse the entry of summary judgment against Betsy in this matter.

The language of the Conservation Easement does not support Susan's argument that it unequivocally creates an easement in her favor. First, neither Susan nor Betsy was a signatory to the Conservation Easement. Moreover, at the time of the Conservation Easement, the property had not been subdivided into Susan's and Betsy's Parcels. Most importantly, *nothing* in the Conservation easement expresses *any intention* to create new rights vis-à-vis Susan and Betsy or to limit Betsy's not-yet-existing property rights in her Parcel. The *only* thing that the Conservation Easement reserved was *already existing rights to Father and his heirs, successors and assigns.* At the time of the Conservation Easement, Susan did not hold an easement over Betsy's Parcel, insofar as Betsy's Parcel did not even yet exist. Susan has yet to cite any legal authority to explain how a "reservation" of rights to Father would unambiguously create a new easement years later for the benefit of Susan. Irrespective of the trial court's (or Susan's) beliefs about what Father might have wanted in the future, the issue in this appeal is whether the Conservation Easement unequivocally created an easement over Betsy's Parcel. Betsy respectfully submits that Susan cannot reference anything in the Conservation Easement that would support her contention. While Father undoubtedly retained the right to use roads on any part of the property, there is nothing in the Conservation Easement that would support Susan's current contentions. Susan's Respondent's

Brief does not set forth legitimate grounds for this Court to affirm Judge Young's grant of summary judgment.

II. SUSAN'S ARGUMENT THAT HER FATHER MUST HAVE INTENDED FOR HER TO HAVE AN EASEMENT OVER BETSY'S PARCEL IS WITHOUT MERIT.

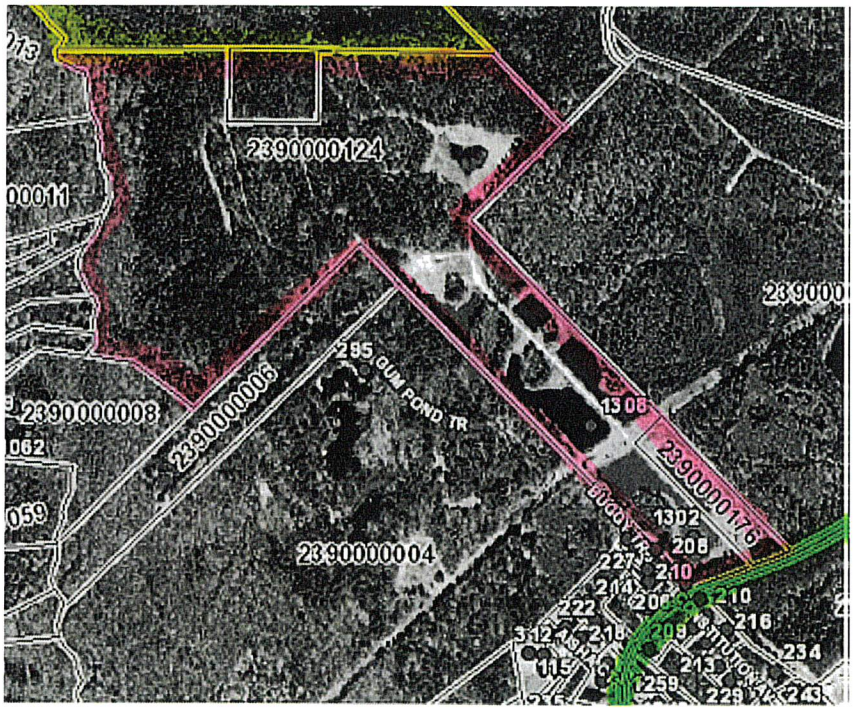
Susan further argues that — even if not plain and unambiguous under the Conservation Easement — her father intended for her to have an easement over her sister Betsy's property:

> 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.

(*See* Resp.'s Br., at 21). For the reasons that follow, however, the evidence is undisputed and shows that there are at least questions of fact as to Father's intentions and desire with regard to the ultimate division of the Conservation Easement Property.

As set forth in Betsy's opening Brief, the undisputed evidence shows that the easement over Betsy's Parcel has not always been necessary to access Susan's Parcel. To the contrary, at all times relevant to this case, Susan has had a means of ingress and egress to and from Susan's Parcel that did not necessitate Susan trespassing on Betsy's property.

On or about December 9, 1996 — approximately two years *before* the Conservation Easement — Father conveyed a parcel of property (TMS No. 239-00-00-124) to Susan. That parcel (the "Access Parcel") is depicted bounded in pink below:



Susan's Access Parcel fronts Charity Church Road (in green above). Susan's Access Parcel shares a boundary with the Unified Tract (the portion of the Unified Tract that would ultimately become Susan's Parcel), which is in yellow above. As this demonstrates, before Father ever entered into the Conservation Easement, he granted Susan property adjoining the Unified Tract that would allow her to access the Unified Tract via Charity Church Road (without using Cainhoy Road). Betsy presented evidence that Father (as well as Susan and Betsy) historically accessed the Unified Tract through the Access Parcel. (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1 ¶ 5).[1]

Thus, at the time Father entered into the Conservation Easement in 1998, there were *two* means of accessing the then-Unified Tract: (a) via Cainhoy Road directly; and (b) through Susan's Access Parcel via Charity Church Road. As Susan notes, that time in 1998 is the relevant point in time for determining Father's intentions. (*See* Resp.'s Brief, at 21 ("[W]hat is relevant is the parties'

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1 After the conveyance, Father and his family used Susan's Access Parcel to access the Unified Tract. (*See id.*). In 2004 or 2005, Susan changed the lock on the gate between Susan's Access Parcel and Charity Church Road, which prevented Father from accessing the Unified Tract via Charity Church Road. (*See id.*). Susan continued to use the Access Parcel to get onto the Unified Tract via Charity Church Road. (*See id.*). Betsy and Father accessed the Unified Tract via Cainhoy Road. (*See id.*).

intent at the time the agreement was entered into.")). Thus, at the time he entered into the Conservation Easement, Father *knew that Susan had an alternative route to access the Unified Tract* (into what would ultimately become Susan's Parcel). In other words, at that time, if the Unified Tract were divided as it currently is, both daughters would have been able to access their respective parcels *without any additional easements*.

Father subdivided the Unified Tract and bequeathed two separate tracts of it to Betsy and Susan in his February 12, 2004 Will. (*See* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 2 art. III). Again, at the time of the Will, Susan still owned the Access Parcel. At that time, she would have been able to access Susan's Parcel via the Access Parcel without the need for an easement over Betsy's Parcel. Once again, Father's Will is silent about granting any easement to Susan over Betsy's Parcel. If Father believed that he needed to grant Susan an easement over Betsy's Parcel at that time, it would have been reasonable to expressly state or reiterate that in his Will. He did not (because he never intended to grant Susan an easement over Betsy's Parcel). But Father did include language in his Will expressly granting Susan an easement over a different tract of land Betsy would own. (*See* Will). This shows not only that Father had the opportunity in his Will to grant to Susan an easement across any parcels that Betsy owned, but that he used that opportunity to grant an easement where he intended one to exist. The fact that Father provided an easement to Susan over a different piece of property but did not provide an easement to Susan over Betsy's Conservation Easement Parcel shows that Father had no absolutely no intention for Susan to have an easement over Betsy's Parcel.

On September 26, 2007, Susan and her husband sold part of the Access Parcel for $4,000,000 to WH Land Company, LLC; importantly, Susan retained a 10.48-acre developable tract that borders Susan's Parcel ("Floyd Property")). (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-C).[2] She also retained Susan's Access Easement via "a non-exclusive, perpetual access easement" over an "unpaved access road which provides vehicular access from

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[2] The Floyd Property is the un-highlighted square box (above the number 2390000124) in the preceding image.

the Floyd Property to Charity Church Road." (*See* 8/24/20 Def.'s Mem. Opp. Pl.'s Mot. for Partial Summ. J. Ex. 1-D & 1-E). Susan's Access Easement allowed her access to the Unified Tract (particularly to what would ultimately be Susan's Parcel) via Charity Church Road through the Access Parcel and Floyd Property. In other words, at that time Susan did not need an easement over Betsy's Property to access Susan's Parcel of the Unified Tract.

Father passed away in November of 2009. Following his death, Betsy's Parcel and Susan's Parcel (collectively comprising the Unified Tract) were conveyed to Father's daughters. At that time — as had been the case at all times during Father's life — Susan did not need an easement over Betsy's Parcel to access Susan's Parcel. She had an easement to reach the Floyd Property from Charity Church Road. The Floyd Property adjoined Susan's Parcel of the Unified Tract. Therefore, at that time (more than a decade ago), Susan still did not need to access her parcel through her sister's property.

On April 1, 2015 — several years after receiving Susan's Parcel — Susan executed a Termination, Cancellation, Renunciation and Abandonment of Easement, which ended 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," with no access from any road. This occurred *after* Father's death and nearly 20 years after the Conservation Easement. Until Susan volunteered at that time to render both Susan's Parcel and the Floyd Property "landlocked," she always had access under conditions that existed at the time of her Father's death.

Ironically, Susan is the one who seeks to interpret her Father's intentions through the lenses of intervening events. As set forth above, at all relevant times during her Father's life (including the execution of the Conservation Easement and the Will), he knew that she had access to her part of the Unified Tract without resort to an easement over her sister's property. Years after her father's death, Susan chose to landlock her own property and, by her own actions, threaten the purposes of the Conservation Easement. If the purpose of the Court's analysis is to determine Father's intent, it is clear that, at the relevant times, he would have known that he did not need to grant Susan

access through Betsy's Property. Nevertheless, *Susan* chose to change the status quo and to create the dispute that brings the parties to the Court.

Under these circumstances, there is plainly at least an issue of fact as to Father's intentions. Therefore, the trial court erred in granting Susan's Motion for Summary Judgment.

III. SUSAN HAS NOT REFUTED THAT THERE IS AT LEAST A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER HER INEQUITABLE CONDUCT PRECLUDES THE RELIEF GRANTED IN THIS CASE.

Betsy has argued compellingly that the trial judge should not have granted summary judgment to Susan, because of her inequitable conduct. In her Respondent's Brief, Susan has not effectively raised any arguments to defeat Betsy's assertion of inequitable conduct that would require the denial of summary judgment in this matter.

Susan first argues that "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* Resp. Br., at 31). She further posits that equitable defenses do not apply here because "[t]his case involves the existence of Susan's right to use the roads over Betsy's Parcel to access Susan's Parcel." (*See id.* at 32).

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006). "While the determination of the existence of an easement is a question of fact in a law action, the question of the extent of an easement is an action in equity." *See Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 231, 662 S.E.2d 452, 455 (Ct. App. 2008). The issues in this appeal involve not only the existence of an easement, but also the extent of such an easement, should one exist. Under such circumstances, there are sufficient equitable issues to warrant the application of equitable principles:

> CPW first argues that the case before us sounds in equity because its main purpose is to determine the extent of the grant of an easement and, thus, we may take our view of the preponderance of the evidence. On the other hand, the Smiths argue this case involves the determination of the existence of an easement which is a question of fact in a law case. While we agree with the Smiths that the pleadings

> and evidence in this case present the primary issue of whether or not the agreement creates an easement in favor of the Smiths, they also present the question of the extent or scope of the easement. "[T]he determination of the existence of an easement is a question of fact in a law action" and subject to an any evidence standard of review when tried by a judge without a jury. *Jowers v. Hornsby*, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987). However, the determination of the extent of a grant of an easement is an action in equity. *Moore v. Reynolds*, 285 S.C. 574, 577, 330 S.E.2d 542, 544 (Ct. App. 1985). Thus, we may take our view of the evidence on the latter issue. *Townes Assoc., Ltd. v. City Council of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *see also Floyd v. Floyd*, 306 S.C. 376, 412 S.E.2d 397 (1991) (for treatment of cases containing both legal and equitable issues).

See Smith v. Commissioners of Pub. Works of City of Charleston, 312 S.C. 460, 464-65, 441 S.E.2d 331, 334-35 (Ct. App. 1994).

In matters involving equitable relief, courts "rely on the equity maxim 'He who seeks equity must do equity.'" *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). As set forth above, Susan operated for years without needing an easement over her sister's property. She did not access her part of the Unified Tract through Betsy's Parcel. Moreover, she did not assert a declaratory judgment seeking a judicial determination that an easement existed. To the contrary, she did not raise the instant issues until she, by her own actions, created the dispute now before the Court. Instead of being content to continue operating under the circumstances that existed at all times relevant during her father's life, she voluntarily chose to dispose of her existing access rights. Susan herself created the problem she now seeks the Court's intervention to solve. It would be highly inequitable to allow Susan to obtain a perpetual easement over Betsy's Parcel that was only necessary because of her own choices.

Susan further argues that, even if the Court could consider her inequitable conduct, it does not impact the result here because "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." (*See* Resp.'s Br., at 33). This misses the mark. As set forth above, Susan's voluntary conduct created the issue here by depriving her of a long-existing route of access to her Parcel of the Unified Tract. This is not some wholly unrelated transaction

having no bearing on the instant dispute. To the contrary, Susan elected to change certain key facts that her father would have known at the time he entered into the Conservation Easement.

Susan next argues that the Court should excuse her inequitable conduct because there "are very serious and clearly inequitable consequences if Susan has no access to her half of the Conservation Easement Property." (*See* Resp.'s Br., at 33-34). As set forth above, any lack of access to Susan's Parcel is the sole result of *Susan's own conduct.* There is nothing unfair about requiring Susan to live with the consequences of her actions.

Susan additionally contends that her Father "wanted to treat Susan and Betsy equally" and that he did not intend to leave "Susan without any right of access under the Conservation Easement, essentially rendering Susan's Parcel valueless." (*See* Resp.'s Br., at 34). Betsy does not dispute that Father wanted to be fair to his daughters. This is precisely why he granted Susan the part of the Unified Tract that bordered the Access Parcel. Prior to Susan's intervention, her father had accomplished exactly what he set out to do. Both of his daughters had equal parts of the Unified Tract with their own separate means of access. Neither daughter was burdened with an easement requiring her to accept intrusion by the other. It is Susan, not Betsy, who seeks to create an inequity, with her being able to access and use Betsy's Parcel (but not the other way around).

Therefore, this Court should reverse the Judge Young's entry of summary judgment in favor of Susan.

IV. SUSAN HAS NOT REFUTED THAT HER CONSTRUCTION OF THE GOVERNING DOCUMENTS LEADS TO AN ABSURD RESULT.

In her Brief of Appellant, Betsy asserts that Susan's construction of the Conservation Easement leads to an absurd result because (under that approach) Susan and her heirs, successors, and assigns would have the right to do *all* of the things on Betsy's Parcel that Father reserved in Section 4 of the Conservation Easement. Susan does not dispute that her construction of the Conservation Easement could lead to an absurd result, but rather responds that the Court should ignore this because she is not (in this particular instance) asking for absurd relief under the Conservation Easement:

> 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.

(*See* Susan's Init. Br. of Resp., at 35).

However, in making this argument, Susan misconstrues Betsy's position. Betsy is not arguing or suggesting that Susan is asking to hunt, fish, construct docks, burn trees or engage in any similar conduct on Betsy's Parcel. To the contrary, Betsy's argument is that Susan's legal interpretation of the Conservation Easement is incorrect because — taken to its logical end — it would lead to an absurd result if Susan did wish to engage in such conduct.

Section 4 of the Conservation Easement enumerates rights that are *reserved* to Father: "the Grantor reserves for himself, his heirs, successors and assigns the 'Reserved Rights' set forth in this Section 4." (*See generally* 7/15/20 Affid. of Susan Brooks Knott Floyd in Supp. of Pl's Mot. for Partial Summ. J. Ex. 1 ¶ 4). The various subsections of Section 4 enumerate those "Reserved Rights." Susan and Judge Young contend that Susan has a right to use Betsy's Parcel under Section 4.3 of the Conservation Easement, which reserves to Father "[t]he right to use roads for all activities permitted under this Easement." (*See id.* ¶ 4.3). In other words, Susan contends that Father's reservation of the right to use roads anywhere on the property inured not only to himself, but also to Susan (even with regard to roads on Betsy's Parcel). Under Susan's construction of Sections 4 and 4.3 of the Conservation Easement, she is entitled participate in this Reserved Right on the *entire* Conservation Easement Property.

Other subsections of Section 4 enumerate additional Reserved Rights, including the right to hunt on the property, construct docks on the property and to harvest timber. (*See generally id.* ¶¶ 4.1-4.25). If Susan's construction of Section 4.3 is accepted, the *only* possible construction of the remaining Reserved Rights would be that, like her Father, Susan would be permitted to exercise those rights on the entire property by, for example, hunting on Betsy's Parcel. Even though Susan is not *now* asking the Court to permit her to hunt on Betsy's Parcel, her construction of Section 4 of the Conservation Easement would necessarily lead to that result. The very foundation of Susan's

argument is that, given the definition of "Grantor" in the Conservation Easement, she is entitled to exercise all of the Reserved Rights to the full extent that her Father could and on any part of the Conservation Easement Property where her Father could do so. The Court should decline to accept Susan's overly broad construction of the Reserved Rights provisions of the Conservation Easement, as it would ultimately and necessarily lead to the absurd result that Susan could exercise *any* Reserved Right anywhere on the property, including within the boundaries of Betsy's Parcel.

Therefore, this Court should reverse the trial judge's grant of summary judgment to Susan.

V. CONTRARY TO SUSAN'S ARGUMENTS, HER CLAIMS ARE BARRED BY THE CONSERVATION EASEMENT ACT OF 1991.

Susan does not dispute that, under the Conservation Easement Act of 1991, only the following may bring an "action affecting" a conservation easement: "(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." *See* S.C. Code § 27-8-40. Rather, she argues that the Conservation Easement Act does not bar her claims because "both Susan and Betsy have requested a determination of each other's rights relating to the Conservation Easement and the Conservation Easement Property." (*See* Resp. Br., at 37).

Respectfully, for purposes of this action, Susan is not an "owner of an interest" in the property that may be impacted by the construction of the Conservation Easement. Betsy's Parcel is the only portion of the Unified Tract that Susan seeks to burden in this case via the Conservation Easement. Susan is not an owner of any interest in Betsy's Parcel and, as a result, is not a proper party Plaintiff under the Conservation Easement Act of 1991.

CONCLUSION

Therefore, the foregoing reasons and those set forth in her Brief of Appellant, Appellant asserts that this Court should reverse the trial court's grant of partial summary judgment and deny such motion.

March 15, 2021

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PROOF OF SERVICE

I certify that I have served the Initial Reply 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 March 15, 2021, addressed to her attorneys of record:

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