STATE OF SOUTH CAROLINA COUNTY OF SALUDA	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
CARR FARMS, INC. and TITAN FARMS, LLC, Plaintiff(s), -vs- SUSANNAH SMITH WATSON, CARSON M. WATSON, and JANE WATSON, Defendant(s).	Docket No. 2016-CP-41-00153 **ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came before the Court on July 30, 2018 pursuant to cross-Motions for Partial Summary Judgment filed by both the Plaintiffs and Defendants. The Plaintiffs were represented by Jonathan M. Milling, Esq. and the Defendants were represented by Daniel L. Draisen, Esq. of Krause, Moorhead and Draisen, P.A. Defendants' Motion is hereby GRANTED, and Plaintiffs' Motion is DENIED.

PROCEDURAL BACKGROUND

The Plaintiffs filed their Complaint on July 20, 2016 alleging, among other things, that Plaintiffs are entitled to: (1) a permanent injunction prohibiting Defendants from making false and slanderous statements about Plaintiffs; (2) a declaration that Plaintiffs are entitled to use the water from a pond that is partially located on their respective properties and partially on Defendant Susannah Smith Watson's ("Watson") property without limitation, and (3) damages for alleged defamation.

The Defendants filed their initial Answer on August 16, 2016 denying the allegations of the Plaintiffs' Complaint. Defendants then filed several Amended Answers and Counterclaims, including a Third Amended Answer and Counterclaims on October 10, 2017 asserting, among other things, that Defendants are entitled to: (1) a declaration that Defendant Watson is entitled to exclusive use and control of the water from the pond partially located on Plaintiff Titan Farms, LLC's ("Titan") property; (2) damages for trespass and for conversion of the water; (3) a declaration that so long as any portion of the Carr Farms, Inc.'s ("Carr") property is flooded,

Plaintiff Carr may only use so much of the water as floods the Carr property and any use by Carr of the water from the pond must be reasonable in light of Defendants' otherwise exclusive right to impound and to use the water from the pond; and (4) that Plaintiffs' use of their property for a peach growing operation has caused the introduction of chemicals and pesticides into the soil and groundwater resulting in environmental damages and personal injuries to Defendant Watson.

On January 3, 2018, Defendants filed their Motion for Partial Summary Judgment as to their First and Fourth causes of action as stated in their Second Amended Answer and Counterclaim relating to Titan and Carr use of water. Defendants allege there are no genuine issues of material fact as to those claims and they are entitled to judgment as a matter of law. Thereafter, on February 2, 2018 Plaintiffs filed their response to Defendants' Motion and a Cross-Motion for Partial Summary Judgment as to the First, Third and Fourth Causes of Action as stated in Defendants' Second Answer and Counterclaims.

FACTUAL BACKGROUND

The following facts are not in dispute, with all parties outlining the same factual recitation. Those facts are as follows:

On or about October 1, 1960, for valuable consideration, Mattie Lee Bonnette ("Bonnette") granted, bargained, sold and released unto F. Broadus Smith ("Smith"), his heirs and assigns:

> All that piece, parcel or tract of land, together with all improvements thereon, containing five (5) acres, more or less, located in Ridge Spring School District, Saluda County, South Carolina, and generally described as follows: Bounded on the North by South Carolina State Highway No. 23; Bounded on the East by other lands of Mattie Lee Bonnette; Bounded on the South by other lands of Mattie Lee Bonnette; and Bounded on the West by lands now or formerly owned by Charles Abney.
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> . . .
>
> Also granted herein is the right, privilege and easement for F. Broadus Smith to construct a dam partially located on the premises herein conveyed and other lands owned by the grantor herein to impound water on lands owned by the grantor and grantee herein and that grantee is to have exclusive use and control of the same.
>
> Together with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

> To Have and To Hold all and singular the premises before mentioned unto the said F. Broadus Smith, his Heirs and Assigns forever.

Jt. Exh. 3. The October 1, 1960 conveyance from Bonnette to Smith was properly recorded in the office for the Clerk of Court for Saluda County, South Carolina on or about October 3, 1960 in Deed Book 50 at page 291 ("Smith Transfer"), and has been assigned tax map number 150-00-00-017 by Saluda County, South Carolina ("Smith Property").

Upon F. Broadus Smith's ("Smith") death, his property was left to his wife, Eliza S. Smith, for and during her natural life, and upon her death to his children Francis B. Smith, Jr., Jane S. McGuigan and Susie S. Watson. See Deed of Distribution dated November 27, 1993, Jt. Exh. 8. On or about December 3, 2014, for valuable consideration, John F. Byrd, Jr., Special Referee, granted, bargained, sold and released unto Susannah Smith Watson (a/k/a Susie S. Watson) the property formerly owned by Smith. Jt. Exh. 18. Susanna Smith Watson ("Watson") is the daughter and heir of Smith and is the current owner of the property formerly owned by Smith. The property is more particularly described and shown on the plat prepared for Heirs of Broadus Smith dated December 3, 2013. Jt. Exh. 17. Watson is the sole owner of the property.

No water was impounded, nor dam constructed, at the time of the Smith Transfer in 1960. There is no evidence of when the dam was actually constructed; however, in 1970 it appears that Smith began construction. On or about September 21, 1970, Smith and D.C. Abney ("Abney"), the owner of the property to the West of Smith, entered into an Agreement in which it is acknowledged that Smith was constructing a pond on his property that "will back over and upon the lands of D.C. Abney." In the Agreement, Abney granted Smith the right to flood approximately one acre of Abney's property ("Abney Property"). In exchange for Abney allowing the flooding of one acre of his property, Smith granted to Abney "the right to use said water from said pond of F. Broadus Smith as long as any portion of the lands of D.C. Abney is flooded by said pond." Jt. Exh. 4. Additionally, the rights granted to both parties based upon mutual promises were binding on the heirs, assigns, executors and administrators of both Smith and Abney. Id. A plat dated January 6, 1971, reflects the existence of the pond and dam at that time, and further shows the parameters of the pond extending upon lands owned by Abney and Bonnette as allowed in Bonnette's transfer of property to Smith. Jt. Exh. 5.

On or about May 25, 2010, the Abney Property was conveyed to Carr, with said Deed

being recorded in the office of the Clerk of Court for Saluda County, South Carolina, at Book 913 at page 276. Jt. Exh. 15. A portion of the Abney Property owned by Carr remains flooded today. Carr, as the current owner of the Abney Property and assignee of Abney, has the authority and consent to use "said water from said pond" pursuant to the terms of the Agreement. Defendants' acknowledge Carr has a right to use water from the subject pond. The issue in this matter is how much water Carr may use.

After the dam was constructed, on or about March 22, 1976, Bonnette conveyed to Jean B. Holston ("Holston") property on the south and east of the Smith Property by Deed recorded in the office of the Clerk of Court for Saluda County, South Carolina, at Book 76, page 148 ("Holston Transfer"). Jt. Exh. 6. The Deed conveyed 117 acres to Holston and does not reference the existence of any easement granted to Smith. Subsequently, through a series of deeds, Titan became the current owner of the Bonnette property conveyed to Holston, along with other land, by Deed dated January 24, 2012 and recorded in Saluda County at Deed Book 966, page 104. Jt. Exh. 16. A portion of the Bonnette Property, of which Titan is now the title owner, remains flooded today. Upon review of the chain of title between the Holston Transfer and the conveyance of the same property to Titan (attached to Plaintiffs' motion), no reservation of an easement to the pond at issue, or the exclusive use thereof, is mentioned or revealed in any of the deeds.[1]

The parties come before the Court seeking a declaration as to the rights of Titan, the owner of the Bonnette property, to use the pond. Additionally, Defendants seek a declaration regarding the parameters or use of water by Carr.

SUMMARY JUDGMENT STANDARD

South Carolina Rules of Civil Procedure Rule 56 provides that summary judgment:

> shall be rendered ... if the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment

[1] The documents do not reflect a complete chain of title. However, the parties agree that Titan is the current owner. Based upon the records presented, this Court cannot state definitively that there is no reservation of an easement related to the pond in any deed in the chain of title.

in his favor as to all or any part thereof. Rule 56(b), SCRCP. Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. See Southern Glass & Plastics Co., Inc. v. Kemper, 399 S.C. 483, 490, 732 S.E.2d 205, 208-209 (Ct. App. 2012) (citing Fleming v. Rose, 567 S.E.2d 857, 860 (2002)). "In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party." Id., 732 S.E.2d at 209 (citing Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003)). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Id. (quoting Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004)). In the instant matter, it does not appear that the parties disagree on the actual facts at issue here, but rather have differing views on the interpretation of such facts and the application of South Carolina law to those facts.

LEGAL ANALYSIS

1. DEFENDANTS' FIRST CAUSE OF ACTION

The First Cause of Action in the Defendants' Counterclaim seeks a declaration that Watson has the exclusive right to impound and to use the water above her property located on the former Bonnette property, now owned by Titan. She also seeks a declaration that Titan has no right to use the water on that portion of its property because it is bound by the easement granted to Smith, his successors, heirs and assigns.

The remainder of the property owned by Bonnette, relative to this action, was ultimately deeded to Titan Farms, LLC by deed from Carey Frick a/k/a Carey Edward Frick ("Frick") on January 24, 2012. Jt. Exh. 16. The property was transferred by Frick to Titan and is more particularly shown on the boundary survey prepared for Carey E. Frick, revised November 4, 2002 as recorded in the public records for Saluda County. Jt. Exh. 12.

Watson asserts that Titan, as successor in interest to title to the Bonnette property, is subject to the conveyance made by Bonnette to Smith, his heirs and assigns, in the 1960 deed. Titan denies this claim. The dispute between the parties centers on whether the easement recited in the deed is an appurtenant easement or an easement in gross. "An easement is a right which one person has to use the land of another for a specific purpose and gives no title to the land on which the servitude is imposed." Douglas v. Med. Investors, Inc., 256 S.C. 440, 182 S.E.2d 720

(1971) (citations omitted). "An easement is therefore not an estate in lands in the usual sense." Id. The South Carolina Supreme Court distinguished between the types of easements, stating:

> The character of an express easement is determined by the nature of the right and the intention of the parties creating it. 25 Am. Jur. (2d) Easements and Licenses §13 (1966). An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965). In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. Id.; Smith v. Commissioners, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994); Carolina Land Company, Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Sandy Island Corp. v. Ragsdale, supra; 12 S.C. Juris. Easements §3. It also passes with the dominant estate upon conveyance. Carolina Land Co., Inc. v. Bland, supra. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. Juris. Easements §3(c). Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980).

Tupper v. Dorchester County, 326 S.C. 318, 325-326, 487 S.E.2d 187, 191 (1997).

An easement may be created by reservation in a deed. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965). In construing a deed, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977). "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." Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-2 (1987).

Further, in determining the grantor's intent regarding an easement, the intention must be found within the four corners of the deed. Williams v. Tamsberg, 425 S.C. 249, 259, 821 S.E.2d 494, 500 (Ct. App. 2018)(Citations omitted); Gardner v. Mozingo, 293 S.C. at 25, 358 S.E.2d at 392. That is, each deed or granting document must stand on its own in determining the intention of the grantor. Whether the easement is appurtenant or in gross depends on the intent of the parties at the time the deed is executed. Proctor v. Steedley, 398 S.C. 561, 569, 730 S.E.2d 357, 362 (Ct. App. 2012).

Accordingly, to determine Bonnette's intent regarding the granting of the appurtenant

easement to Smith, the other documents referenced by the Plaintiffs cannot be considered. The clear language of the Bonnette deed grants to F. Broadus Smith, his heirs and assigns, the exclusive right to impound and to use the water impounded on the Bonnette property. However, the language of the deed does not control if all the elements of an easement appurtenant are not met. Proctor, 398 S.C. at 572, 730 S.E.2d at 363.

Plaintiffs cite to the case Windham v. Riddle, 381 S.C. 192, 672 S.E.2d 578 (2009) in support of the proposition that to be an easement appurtenant the easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. Without all of these necessary elements, an easement will be characterized as one in gross. Proctor, supra.

Inhere in the Land

Titan asserts that the grant is a personal privilege to Smith and that it does not "inhere" or "exist as a permanent, inseparable, or essential attribute or quality of a thing". On the contrary, the dam, the pond, and the water are permanent and inseparable from the land. Plaintiffs argue that at the time the easement was granted there was no impounded water to which Smith could have used exclusively. The construction of a dam and creation of a pond to impound water was not of a temporary nature as it has endured since 1970 when it was constructed. The cost, even in 1960, to construct a dam and to create the pond was no small undertaking. The existence of the dam and pond at the time of the deed is not determinative of whether the grant was temporary or permanent. It is clear from the language of the deed that Bonnette intended for Smith to create the dam, impound the water on both their properties, use it exclusively, and control its use. Although no water was impounded at the time the easement was granted, the spring that produced water existed, and water was accessible and available to and on the property. It is apparent that Bonnette and Smith recognized and intended a dam to be constructed on the property for water to be impounded.

Concern the Premises

Plaintiffs next assert that the easement is "nondescript" as to which premises would be encumbered at the time of conveyance. However, the granting language states "... to construct a dam partially located on the premises herein conveyed [to Smith] and other lands owned by the grantor [Bonnette]." This description is sufficient to indicate that the Bonnette understood and intended that the dam would be constructed on "other lands" owned by her as well as land

granted to Smith. The parties also understood that the dam would be in the general area of the proposed location of the pond. There could not be a more precise description of the boundaries of the pond at the time of the conveyance because the boundaries had to be determined after the dam was constructed and the lands flooded. Bonnette was still living in 1970 and 1971 at the time the dam was constructed and the water impounded. If there was any concern about the pond and its boundaries, Bonnette could have raised them during the construction. The pond was present at the time she conveyed the property to Holston in 1976 and the parameters of the pond are evident in the recorded plats.

Terminus in the Land

Absence of a terminus on the dominant estate is fatal to a claim of an appurtenant easement. Williams v. Tamsberg, 425 S.C. at 261, 821 S.E.2d at 500. The terminus must be on the land of the party claiming the appurtenant easement. Windham v. Riddle, 370 S.C. at 420, 635 S.E.2d at 560. Plaintiffs argue that because there is not a start and end point or a point of ingress and egress (as in a right of way easement) there is no terminus. Terminus is defined as a "boundary; a limit, either of space or time." Black's Law Dictionary p.1319 (5th Ed. 1979). As reflected in the recorded plat, the boundaries of the impounded water clearly exist on Watson's property. There was no evidence presented that the water levels have ever dropped to a point where the pond is wholly on lands owned by Titan. There is a terminus on the land of the party claiming the appurtenant easement.

Necessary to Enjoyment

Plaintiffs also assert that because no pond existed at the time of the transfer it is not "essentially necessary to the enjoyment thereof." It can be ascertained from the express language in the recorded documents that, at the time Smith bargained with Bonnette to purchase the property, both parties knew that construction of a pond on the property would be essential to Smith's intended use of the property and his enjoyment thereof. Smith negotiated with Bonnette not only for the purchase of the acreage, but also for the grant of an easement to construct a pond and to impound water on his land and "other lands" owned by Bonnette. Considering the language of the deed in full, it is apparent that Smith was purchasing not only a portion of Bonnette's property but also the grant of the easement for the impounding of water on both properties and for the exclusive use of the water. It is also clear that Bonnette was aware that she was bargaining with Smith for him to purchase some of her land, as well as giving him the right

to impound water on her property. She also granted him exclusive use and control of the use of the water in the pond and on her property. Both the purchase of the land and the right to create a dam on Bonnette's property in the same deed establish that the pond was essential to Smith's use and the consummation of the transaction to which Bonnette assented. If use of the pond was not essential, Bonnette would not have allowed Smith to build a dam flooding the property or exclusively control its use. The use of the water impounded on the Bonnette property was and is, by the express terms of the grant, exclusive to Smith, his heirs and assigns.

Other issues raised

Plaintiffs also assert that because Bonnette did not specifically mention the easement in subsequent transfers of her property, there was no intention that the easement in the Smith transfer be one appurtenant to the land. At the time of the Holston transfer, March 22, 1976, Smith had completed the construction of the dam that had been impounding water for several years. The construction of the dam and location of the pond would have been open and obvious to Holston at the time of purchase and in the recorded deed of Bonnette and Smith. There is no evidence that Holston took water from the pond, exercised any rights over any portion of the pond on the property, or had any agreement to use any water from the pond on the property. This is in contrast to the agreement between Smith and Abney discussed later herein, in which Smith specifically granted Abney the right to use the pond. Holston could have negotiated with Smith for use of the pond if desired.

After the construction of the dam, there is no evidence that Bonnette ever complained of any trespass or misuse of her property prior to transferring it to Holston in 1976. Bonnette had already granted exclusive right to control the pond to Smith, his heirs and assigns. The dam has now existed for a period of more than forty (40) years, and no owner or successor in title to Bonnette's property has ever asserted any action for trespass against Smith, his heirs or assigns for the location of the dam or its impounded water. Even viewing the facts as asserted by the Plaintiffs as true, Smith would have adversely possessed that portion of the property (now owned by Titan) openly, notoriously, and hostile for a period far in excess of ten (10) years and would have obtained title to same by adverse possession in the absence of any agreement.

The easement conveyed by Bonnette, as Grantor to Smith, his heirs and assigns as Grantee "to impound water on lands owned by the grantor and grantee herein and that grantee is to have exclusive use and control of the same" is an appurtenant easement that runs with the land

and not an easement in gross as asserted by the Plaintiffs. When legal title to the dominant estate passed to Watson, the exclusive right to use and control the water pursuant to the appurtenant easement on the Bonnette property, now Titan's property, also passed to her. In accordance with the express language contained within the four corners of the deed granting the appurtenant easement, Watson (as heir, assignee, and successor in title of Smith) has the exclusive right to use and to control the water that is impounded on that portion of property formerly owned by Bonnette, now owned by Titan.

Accordingly, Watson is entitled to a declaration from this Court that Plaintiff Titan has no common law or other right to use of the water on that portion of its property within the boundaries of the appurtenant easement as specified in the deed.

2. **AS TO DEFENDANTS' FOURTH CAUSE OF ACTION**

On or about September 21, 1970 Smith and D.C Abney ("Abney") entered into an Agreement regarding the flooding of approximately one acre of the Abney property. Jt. Exh. 4. Pursuant to the Agreement, in exchange for Abney's grant of authority to flood the approximately one (1) acre of the Abney Property, Smith granted to Abney "the right to use said water from said pond of F. Broadus Smith as long as any portion of the lands of D.C Abney is flooded by said pond."

The Abney Agreement contains the express provision:

> The consideration for this Agreement is the mutual promises and rights of both parties hereto and said Agreement is binding upon the heirs, assigns, executors and administrators of both parties hereto.

The property (or a large portion thereof) formerly owned by Abney was acquired by R.W. Dubose & Sons, Inc. who on or about November 1, 2001 changed its name to Carr Farms, Inc. The Abney property was deeded to Carr Farms, Inc. by Quit Claim Deed May 25, 2010, recorded in Book 913 at Page 276. Jt. Exh. 15. The property transferred to Carr is more particularly shown on the boundary survey prepared for Carr Farms, Inc. dated June 18, 2004 as recorded in the public records for Saluda County. Jt. Exh. 14. Carr, as successor in interest to title to the Abney property, is subject to the Agreement made between Abney and Smith.

The easement to flood the Abney property and the right of Abney to use the water from the pond so long as any portion of the (formerly Abney) property is flooded is an appurtenant easement that runs with the land. The Abney property, the land that may be flooded, is the

servient estate and the Smith property is the dominant estate.

While Carr, as the successor in title to Abney, has the right to use water from the pond so long as any portion of the (formerly Abney) property is flooded, the right granted by the easement is unquestionably non-exclusive. Unlike the express language contained in the 1960 Bonnette deed, the words "exclusive" or "sole right" do not appear in the Agreement. Accordingly, there can be no legitimate dispute that the only reasonable conclusion or inference drawn from the Agreement is that Watson, as successor to Smith, and Carr, as successor to Abney, both have the right to use the water from the pond to the extent that the water floods the Abney property (and only so long as any portion of the (former Abney) property is flooded). However, each party's use of the water must be reasonable and not in derogation of the rights of the other party to likewise use that portion of the water that floods the Abney property. See White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 609 S.E.2d 811 (2005)(right to reasonable use of body of water may not interfere with like rights of those above, below or on the opposite shore). Accordingly, Watson is entitled to a declaration that the Agreement with Abney constitutes and an appurtenant easement, that such easement runs with the land, and that the easement now inures to the benefit Defendant Watson as successor in title to F. Broadus Smith.

Watson is further entitled to a declaration that both Watson and Carr have the right to use the water from the pond to the extent that it floods the Abney property and only so long as any portion of the (former Abney) property is flooded. Further, each party's use of the portion of the water that floods the property must be reasonable and not in derogation of the rights of the other party to likewise use water that floods the Abney property. Additionally, if Watson elects at any time to cease flooding any portion of the former Abney property, or if such waters are drawn down to the point where no portion of the Abney property is flooded, Carr would no longer have the right to use water from the pond.

ORDER

Based upon the public records, the pleadings, the law applicable to the easements and the undisputed facts and viewing the evidence in the light most favorable to the Plaintiffs, and Defendants' motion for partial summary judgment, there are no genuine issues as to any material facts with regard to Defendants' first and fourth causes of action.

THEREFORE, IT IS ORDERED that Defendants' Motion for Partial Summary Judgment is GRANTED and Plaintiffs' Cross-Motion for Summary Judgment is DENIED.

SIGNATURE PAGE TO FOLLOW

Saluda Common Pleas

Case Caption: Carr Farms Inc , plaintiff, et al VS Susannah Smith Watson , defendant, et al

Case Number: 2016CP4100153

Type: Order/Summary Judgment

IT IS SO ORDERED!

s/ Alison Renee Lee