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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Judge
Civil Action No. 2016-CP-41-00153

Appellate Case No. 2021-000659

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

v.

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

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

Having received and reviewed the Initial Brief of Respondents, and arguments raised therein, Appellants, Carr Farms, Inc. and Titan Farms, LLC (collectively "Appellant"), hereby submits this Reply Brief of Appellant pursuant to Rule 208(a)(3) of the South Carolina Rules of Appellate Procedure, responding to those issues raised by Respondents and not previously addressed by Appellant.[1] Appellant submits this Brief as a supplement to the Initial Brief of Appellant, and hereby specifically adopts and reargues those arguments presented therein. For these reasons presented herein, as well as those previously presented, the circuit court erred in granting summary judgment to Respondent.

I. Respondent misinterprets the notice provided to Appellant.

In arguing that Appellants were on notice of the subject easement, Respondent states that the deed from Bonnette to Smith was in Titan's chain of title and suggests, therefore, that Titan should have been on notice of the subject easement. Such is not the case. While both the Smith Tract and the tract ultimately acquired by Titan both come from the same grantor, Bonnette, these are different chains of title and a title abstract of the Titan tract would not include the Smith deed. Furthermore, as found by the Circuit Court, the deeds from Bonnette to Titan fail to disclose the existence of the subject easement. (R. p. 18). The suggestion that the subject easement is in the Titan chain of title is simply inaccurate.

Respondent goes on to argue that because the plats on record for the subject properties include the existence of a pond that Appellants should have been on notice of the subject easement.

[1] Appellant rests on the arguments presented in his Initial Brief of Appellant as sufficient where no Reply is included herein.

This too misses the point. While the existence of the pond has never been disputed, it is the exclusive use aspect of the subject easement that the public is without notice of. Respondent points to the absence in the record of evidence that anyone other than Respondent utilized the pond before Appellant's acquisition of the property, but there is also an absence in the record that Respondent actually utilized the pond or that Respondent attempted to preclude anyone else from using the pond. An inspection of the respective properties themselves would simply alert one that the pond covers three parcels. The Initial Brief of Appellant has outlined the common law of riparian rights and the right of a property owner to use the water over his or her property. Nothing in a physical inspection of the pond at issue, or the chain of title for the Titan tract, would reflect anything differently.

II. The subject easement fails the necessary elements for an appurtenant easement.

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

Respondent argues that because a spring of water existed and produced water prior to the execution of the deed containing the subject easement that this element is met. Unfortunately, the existence of the spring, and the production of water, is not enough. The easements relate to the impoundment of water and the "exclusive use" of the impounded water. This did not occur until at least 10 years after the deed was executed. The impounded water and "exclusive use" thereof does not "inhere in the land."

b. The easement does not "concern the premises."

Challenging the argument of Appellant, Respondent essentially argues the description is "good enough" to establish that the easement "concern[s] the premises." Surely, Respondent

would not believe that if the impounded water completely covered the neighboring parcel owned by Bonnette that the description was "good enough." This certainly was not the intent of the grantor, but the lack of specificity creates this precise issue. That no claim of trespass was raised by Bonnette is the proverbial "red herring" as Bonnette's easement was in gross and as such she authorized the impounding of water and use thereof. Thereafter, there is no evidence in the record prior to the instant legal proceedings that Smith or anyone in his lineage has attempted to prevent anyone else from using the pond or claimed exclusive use.

c. The easement does not have "one terminus on the land."

While Respondent argues that the requirement that the easement have "one terminus on the land" is met because no evidence is in the record that the water levels ever dropped to a point where the water was wholly on Appellant's property, such argument misses the point. The claimed easement is for the "exclusive use" of the subject pond. As outlined in the Initial Brief, and herein, the common law allows for the use of the water over one's own property. Thus, Respondent's claimed "exclusive use" has no "terminus" on Respondent's property as Respondent would be able to utilize the water over Respondent's property. Rather the claimed "exclusive use" of the water over Appellant's property has no terminus in the land of Respondent. This element also fails.

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

It appears that Respondent takes the position that because he asked that the easement be included in the deed, even though the dam was not constructed for ten years, the subject easement and the exclusive use was "essentially necessary to the enjoyment of the land." This position belies the fact that Respondent used and enjoyed the land for ten years before construction of the

dam. The argument further ignores the fact that Smith waived the "exclusive use" and deemed "exclusive use" unnecessary when he abandoned any claim of exclusive use and allowed Abney and his heirs and assigns to use the impounded water. The pond was not "essentially necessary" and the "exclusive use" was not "essentially necessary."

III. This Court need not find all "exclusive use" easements are invalid, just the instant one.

As outlined in the Initial Brief of Appellant, Respondent's claimed "exclusive use" of the pond prevents Appellant from making use of the property owned underneath the water. While the owner of a servient estate cannot make use of their property in contravention of any valid easement, such a proposition does not prevent the owner of the servient estate from making <u>any</u> use of their property. This is precisely what Respondent argues should be the instant situation, however. Relying upon misperception of how the SC Department of Transportation operates (without citation), Respondent argues that an easement to construct a highway across an owner's property results in an analogous situation. Unfortunately, and contrary to this argument, when the SC Department of Transportation constructs a highway, the subject property is acquired by the State and the property owner compensated. See S.C. Constitution, Art. I, § 13; S.C. Code Ann. §§ 28-2-10 *et seq* (The Eminent Domain Procedure Act); *see also SC Dep't of Transp. v. Powell*, 424 S.C. 206, 818 S.E.2d 433 (2018). The State is not allowed to deprive the owner of total use of their property through an easement.

Beyond the foregoing, as previously recognized by this Court in *Willimon v. Gilstrap*, No. 2014-001233, 2016 WL 245073 (S.C. Ct. App. Jan. 20, 2016), the term exclusive cannot be interpreted so as to exclude the owner of the servient property from using it consistent with the

purpose of the easement. *See Willimon*, at *1 (*citing Hundley v. Michael*, 105 N.C.App. 432, 413 S.E.2d 296, 298 (N.C. Ct. App. 1992)). In *Hundley*, similar to the instant situation, the owner of two parcels of land (lots 2 and 3) and sold lot 2 and granted a "permanent and exclusive easement of ingress and regress over a road fifteen feet in width" across lot 3. *See Hundley*, 105 N.C.App. at 433-34, 413 S.E.2d at 297. Thereafter, lot 3 was sold but contrary to the present situation, reference is made to the existence of the easement of ingress and egress to lot 2. The owners of lot 3 made use of the fifteen foot portion of the servient estate subject to the easement and thereafter the owners of the dominant estate holding the easement (lot 2) erected a fence along the burdened portion of the property to prevent the owners of the servient estate (lot 3) from making any use of that portion of their property. *See id*.

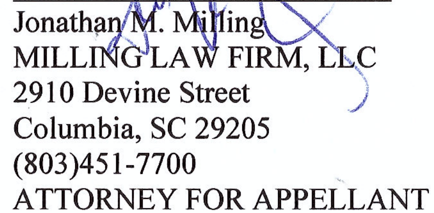
The North Carolina Court of Appeals in evaluating this situation noted that the original owner of both lots elected not to retain the fee simple title to the fifteen foot parcel encumbered by the easement when she conveyed lot 3, instead conveying the entire parcel subject to the easement. *See id*.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

easement. Respondent, likewise, cannot preclude Appellant from making use of their property or the water above.

CONCLUSION

For the reasons stated, the circuit court erred in granting Respondent summary judgment.

Respectfully submitted,



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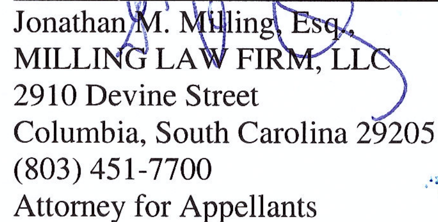
CERTIFICATE OF COUNSEL

Pursuant to Rule 211(b), SCACR I certify that the Final Brief is identical to the briefs previously served under Rule 208 except for those revisions and corrections authorized by Rule 211(b)(1) and (2), SCACR.



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