

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 David Charles Martin and Mary Ellen)
 Martin,)
 Plaintiffs,)
 v.)
 James T. Jordan, Wanda B. Jordan,)
 Charles Douglas Johnson, Debra Jordan)
 Johnson, Erma C. Johnson, and Horry)
 County,)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO. 2020-CP-26-05844

**ORDER GRANTING
 JUDGMENT IN FAVOR OF
 CHARLES DOUGLAS JOHNSON,
 DEBRA JORDAN JOHNSON, AND
 ERMA C. JOHNSON**



This matter was tried by the Court on September 26, 2022. Present at the trial were David Charles Martin and Mary Ellen Martin (“Martin”), and their counsel, Louis Lang, Esq. Charles Douglas Johnson, Debra Jordan Johnson, and Erma C. Johnson were present and represented by Nate Fata, Esq. Horry County was present and represented by Leslie Cotter, Esq.

INTRODUCTION

This declaratory judgment, quiet title action concerns a 50’ private driveway/roadway utility easement area (the “Property”) under deeds, easements, and plat recorded in 2012. The Property serves the home of Erma C. Johnson and the property of Debra Jordan Johnson and Charles Douglas Johnson off of Johnson Shortcut Road in Conway, South Carolina. Erma C. Johnson’s deceased husband and father of Charles Douglas Johnson farmed the land abutting the Property for decades. For many years, the farmland was accessed from Johnson Shortcut

Road by a twelve-foot wide dirt/gravel drive (“No Name Road” or “Dennis Road”). The twelve-foot wide dirt/gravel drive dead ends and does not connect to other roads or streets.

In 2012, Debra Jordan Johnson and Charles Douglas Johnson (“Johnson”) purchased approximately 5 acres (.32 acres plus 4.83 acres) from James T. Jordan and Wanda B. Jordan (“Jordan”) which included the Property. Prior to the Johnson purchase, Jordan granted Erma C. Johnson an access and utility easement over the Property. A six foot width of No Name Road lies outside the Property and is on the Squires property. Squires is not a party to this action.

In 2019 David Charles Martin and Mary Ellen Martin (“Martin”) purchased Lot 6 on Johnson Shortcut Road. Martin filed this suit claiming fee simple ownership to .32 acres shown on a recorded plat. Horry County claims a prescriptive easement or implied dedication over and in connection with No Name Road and its alleged maintenance of No Name Road. In their counterclaim and at trial, Johnson and Erma C. Johnson asserted (1) that Debra Jordan Johnson and Charles Douglas Johnson own fee simple title to the .32 acres and the 4.83 acres, (2) that the Property is subject to a shared private drive and utility easement under a 2012 deed, plat, and easement of record, all of which predate the Martin’s purchase of Lot 6 in 2019, and (3) that Horry County has no prescriptive easement rights, or real property rights, through implied dedication or otherwise, in any portion of the Property or No Name Road.

FACTS

The history of the Property and the Martin lot is set forth below.

By Deed filed January 27, 2011 in Deed Book 3501, Page 2806, Horry County Register of Deeds¹, James T. Jordan and Wanda B. Jordan acquired the following property from Frances S. Rutland:

¹ All Deed Book references are to documents recorded in the Horry County Register of Deeds office.

ALL AND SINGULAR, all that certain piece, parcel, or lot of land, together with any and all improvements situate thereon, situate, and being in Dogbluff Township, Horry County, South Carolina, being shown and designated as Tract 2, containing 51.75 Acres, more or less, 2254198.1 sq. ft., as shown on that certain plat prepared by K & R Land Surveyors, Inc., for Rutland Frances S., dated January 11, 2011, which plat is recorded in the Office of the ROD for Horry County, in Plat Book 250 at Page 252, reference to which is craved as forming a part and parcel hereof.

James T. Jordan and Wanda B. Jordan recorded a plat in Plat Book 255, Page 227 in September 2012 reflecting the Property as the 50' Shared Private Drive and Utility Easement and the .32 Acres in the 50' Private Easement Area. Horry County approved the Plat for recording as indicated by its signature.

By Easement recorded on October 2, 2012, in Deed Book 3611, Page 190, James T. Jordan and Wanda B. Jordan conveyed to Erma C. Johnson a 50 foot wide easement (50' Shared Private Drive and Utility Easement) shown in Plat Book 255 at Page 227:

An unencumbered, unobstructed, non-exclusive easement and or right of way, in, over and across the 50' Shared Private Drive and Utility Easement as shown on plat prepared by K & R Land Surveyors, Inc., for Charles D. and Dennis R. Johnson, dated August 14, 2012, which plat is recorded in the Office of the ROD for Horry County, in Plat Book 255 at Page 227, for the purpose of ingress, egress and the installation, maintenance and repair of utilities.

This being a portion of the property conveyed to James T. Jordan and Wanda B. Jordan by Deed of Frances S. Rutland, recorded January 27, 2011, in the Office of the ROD for Horry County, in Deed Book 3501 at Page 2806.

By Deed filed October 2, 2012, in Deed Book 3611, Page 197, James T. Jordan and Wanda B. Jordan conveyed to Charles Douglas Johnson and Debra Jordan Johnson the following:

ALL AND SINGULAR, all that certain piece, parcel, or lot of land, together with any and all improvements situate thereon, situate, and being in Dogbluff Township, Horry County, South Carolina, and being more particularly shown and designated as Tract 5, containing 4.83 Acres, more or less,, as shown on plat prepared by K & R Land Surveyors, Inc., for Charles D. and Dennis R.

Johnson, dated August 14, 2012, which plat is recorded in the Office of the ROD for Horry County, in Plat Book 255 at Page 227, reference to which is craved as forming a part and parcel hereof.

There is also conveyed herewith the .32 acre shown and designated as “0.32 acres Easm. Area” upon the above referenced plat. (Emphasis added).

The within property is conveyed subject to the use of others in and to an unencumbered, unobstructed, non-exclusive easement and or right of way, in, over and across that portion of the 50’ Shared Private Drive and Utility Easement which lies within the bounds and right of way of the herein conveyed parcel and as is shown on the above referenced plat for the purpose of ingress, egress and the installation, maintenance and repair of utilities.

This being a portion of the property conveyed to James T. Jordan and Wanda B. Jordan by Deed of Frances S. Rutland, recorded January 27, 2011, in the Office of the ROD for Horry County, in Deed Book 3501 at Page 2806.

By General Warranty Deed filed July 17, 2017, in Deed Book 4026, Page 1326, James T.

Jordan and Wanda B. Jordan conveyed to Jeffrey C. Fulmer Construction Co. Inc. the following property:

ALL AND SINGULAR, all those certain pieces, parcels or lots of land, together with any and all improvements situate thereon, lying and being situate in Dogwood Township, Horry County, South Carolina, and being further shown and designated as Lots 3, 4, and 6 on that certain Plat entitled “Plat of Jordan Development Phase 1”, prepared by K & R Land Surveyors, Inc., dated February 20, 2017, and recorded June 27, 2017 in the Office of the Register of Deeds for Horry County, South Carolina in Plat Book 275 Page 335, reference to which is craved as forming a part and parcel of these presents.

This conveyance is subject to all obligations, easements, limitations, covenants, restrictions and other matters of record and governmental ordinances and regulations affecting the property.

By General Warranty Deed filed March 29, 2019 in Deed Book 4195, Page 1404, Jeffrey

C. Fulmer Construction Co., Inc. conveyed the following property to David Charles Martin and Mary Ellen Martin:

ALL AND SINGULAR, all that certain piece, parcel or lot of land, together with any and all improvements situate thereon, lying and being situate in

Dogwood Township, Horry County, South Carolina, and being further shown and designated as Lot 6 on that certain Plat entitled "Plat of Jordan Development Phase 1", surveyed for James T. Jordan and prepared by K & R Land Surveyors, Inc., dated February 2, 2017, revised April 20, 2017 and recorded June 27, 2017 in the Office of the Register of Deeds for Horry County, South Carolina in Plat Book 275 at Page 335, reference to which is craved as forming a part and parcel of these presents.

This conveyance is subject to all obligations, easements, limitations, covenants, restrictions and other matters of record and governmental ordinances and regulations affecting the property.

No mobile homes shall be permitted on the subject property.

The Plat recorded in Plat Book 275, Page 335 on June 27, 2017, depicts and references the "Existing 50' Shared Private Drive Utility Easement (PB 255/227)." Horry County Planning and Zoning signed this Plat.

TRIAL

At trial, Martin Exhibits 1-5, 1-A, and 5-A were entered into evidence. Johnson and Erma C. Johnson Exhibits were entered into evidence. Horry County Exhibits 1-8 were also entered into evidence.

Martin called James Jordan as its witness. Jordan testified that although he wanted to retain title to the .32 acres shown in Plat Book 255 at Page 227, his lawyer Richard Booth, Esq. prepared the Deed to Johnson and included the .32 acres in the conveyance to Johnson. Jordan further testified that in his Answer and Counterclaim filed by his then counsel, Lisa Davis, Esq., he asserted the .32 acres was conveyed in fee simple to Charles Douglas Johnson and Debra Jordan Johnson. Jordan testified that he paid the real property taxes on the .32 acres.

Horry County's 30(b)(6) deposition testimony excerpts were read into the record by counsel. Horry County's deposition excerpt testimony was that No Name Road was never dedicated or accepted by Horry County at any time, No Name Road is a dead end drive and is

not used by the public to travel to other roads or streets, and that Horry County records contain no specificity on where maintenance was actually performed in any given year on No Name Road.

Charles Douglas Johnson testified that in 2012 he and his wife, Debra Jordan Johnson, acquired fee simple title in the 4.83 acres and the .32 acres from Jordan, subject to the 50' private drive and utility easement. Charles Douglas Johnson testified he never intended to dedicate any portion of the Property to Horry County and that he maintained the dirt/gravel drive area (No Name Road), as did his father, for decades. He further testified he signed the 2012 Plat indicating that he would maintain the private property and that Horry County was not responsible for its maintenance. Charles Johnson testified he does site work for a living and that he would mow or bush hog the side of No Name Road over the years and he would use his box grader to grade No Name Road from time to time. Charles Johnson testified Horry County dumped some gravel on No Name Road by mistake on one occasion.

Erma Johnson, Charles Johnson's mother, testified she lived near the Property or next to the Property most of her life and that since at least 1970 her husband had farmed the land next to the Property. Erma Johnson did not recall any maintenance by Horry County other than on one occasion 19 years earlier. Erma Johnson and Charles Johnson each testified that if any work on No Name Road was performed by Horry County, such as bush hogging or grading, they would have noticed the same.

Horry County called its director of Public Works, Randall Plummer, to testify. Plummer testified as to the maintenance records for No Name Road. Plummer testified that one-tenth of a mile, or 528 feet, of No Name Road, was maintained by Horry County since at least 2000.

Although the maintenance records indicate Horry County might have provided some gravel or performed some sporadic bush hogging or motor grading of No Name Road since 2000, the extent of any such maintenance or the specific areas of No Name Road actually maintained is not indicated in the records. Horry County also acknowledged that there were years in which no maintenance was performed on No Name Road and that part of No Name Road, six (6) feet in width, lies outside the Property and on the Squire's land. From Horry County's records, Horry County did no maintenance on No Name Road in years 2011, 2014, 2016, 2018, or 2019.

Plummer testified that Horry County maintained the 12-foot wide No Name Road and that 12 feet (two mower decks in width) on either side of No Name Road would have been maintained by Horry County. However, the Horry County employees who testified could not specifically recall the extent of their maintenance on any particular portion of No Name Road in any particular year. Some Horry County employees testified they had no specific recollection of what they did on No Name Road or what was actually bush hogged. At least one Horry County employee testified he would only bush hog one mower deck in width (six feet) on the side of No Name Road so as not to interfere or destroy the crops, such as cotton, that were planted close to No Name Road. In addition, an Horry County employee testified that bush hogging a side of No Name Road might take 15 minutes.

LAW

A. **Dedication Requirements.**

Real property interests are normally conveyed by deed or will. *Shia v. Pendergrass*, 222 S.C. 342, 348, 72 S.E.2d 699, 701 (1952). In situations where title is claimed by dedication

rather than an actual conveyance, the actions of the parties “must be so unequivocal and positive as to leave little doubt that it was the intention of the owner to dedicate the same to the public use.” *Id.* To perfect a claim of dedication, a party must show two elements: (1) the owner’s clear and unmistakable intention to dedicate the property to public use, and (2) acceptance of that property by the public. *Tupper v. Dorchester County*, 326 S.C. 318, 326 487 S.E.2d 187, 191-92 (1997).

South Carolina law recognizes two types of implied dedication- “one where the question of implied dedication arises from the sale of land with reference to maps or plats; the other when the dedication arises . . . from an abandonment to or acquiescence in public use.” *Vick v. S.C. DOT*, 347 S.C. 470, 477, 556 S.E.2d 693 (S.C. App. 2007), citing *Shia*, 222 S.C. at 347, 72 S.E.2d at 701. Only the owner of a fee simple interest can make a dedication. *Town of Kingstree v. Chapman*, 405 S.C. 282, 747 S.E.2d 494, 504 (Ct.App. 2013), citing *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 316, 433 S.E.2d 875 (Ct.App. 1992).

B. Prescriptive Easement Requirements.

To establish a prescriptive easement, there must be continued and uninterrupted use or enjoyment of the right for a period of twenty years, identity of the thing enjoyed must be proven, and use must be adverse or under claim of right. *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479 (2005), citing *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993).

It “is well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse.” *Simmons v. Berkeley Electric Cooperative Inc.*, 419 S.C. 223, 797 S.E.2d 387, 392, citing *Bundy*, 412 S.C. at 310, 772 S.E.2d at 173; *see 2 Am. Jur. Proof of Facts* 3d 197 § 6, at 218 (1988) (“Any use of

property which is not hostile or adverse to the interests or title of the property owner cannot ripen into a prescriptive right.”)

Furthermore, in order to establish a private right of way by prescription over the lands of another, the use and enjoyment thereof by the claimant must be shown to be adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it is claimed. And such use and enjoyment must continue for a period of at least twenty years. *Babb v. Harrison*, 220 S.C. 20, 66 S.E.2d 457 (1951).

C. Clear and Convincing Burden of Proof For Dedication and Prescriptive Easement.

The burden of proof for a party asserting public dedication is strict, cogent, convincing, and unequivocal evidence. The *Shia* Court, quoting the South Carolina Supreme Court in *Seaboard Air Line R. Co. v. Fairfax*, 80 S.C. 414, 61 S.E. 950, 956, stated:

Dedications being an exceptional and a peculiar mode of passing title to interest in land, the proof must usually be strict, cogent, and convincing, and the acts proved must *349 not be consistent with any construction other than that of a dedication.

Shia v. Pendergrass, 222 S.C. 342, 348-349, 72 S.E.2d 699 (1952).

The *Shia* Court further quoted *Town of Estill v. Clarke*, 179 S.C. 359, 184 S.E. 89, 90:

Now, in order to establish title by dedication in cases where there had been no express gift of the land involved, it is incumbent on the party asserting that a dedication exists to show that the conduct of the owner, relied on to establish it, clearly, convincingly, and unequivocally indicates, expressly or by plain indication, a purpose or intention to create a right in the public to use the land adversely to him and as of right.

Shia, at 349.

In 2015, the South Carolina Supreme Court held that a party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence. *Bundy v.*

Shirley, 412 S.C. 292, 772 S.E.2d 163, 169 (2015). See, also, *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App.1997) (“The party claiming a prescriptive easement has the burden of proving all elements.”); *Davis v. Monteith*, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986) (stating claimant had the burden of proving adverse possession by clear and convincing evidence); see 12 S.C. Jur. *Easements* § 10 (Supp. 2015) (“A prescriptive easement is analogous to adverse possession.”). The *Bundy* Court reasoned that by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property. *Id.*, citing Daniel J. Smith, *Establishment of Private Prescriptive Easement*, 2 Am. Jur. *Proof of Facts* 3d 125 § 3 (1988 & Supp. 2015) (“This stricter standard of proof may be a result of the general opinion expressed by courts and commentators that prescriptive rights are not favored in the law since they result in corresponding losses or forfeitures of rights of other persons.”)

ANALYSIS

A. **Debra Jordan Johnson and Charles Douglas Johnson Own Fee Simple Title to the .32 Acres.**

Full fee simple title to the .32 acres and the 4.83 acres was conveyed by Jordan to Charles Douglas Johnson and Debra Jordan Johnson, subject to the private 50 foot-wide easement, under Deed recorded in Deed Book 3611, Page 197. The Jordan to Charles Douglas Johnson and Debra Jordan Johnson Deed is unambiguous in that it conveyed the 4.83 acres and the .32 acres, subject to the easement rights of others. The construction of an unambiguous deed is a question of law, not fact. The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself. *Walter v. Sumney Building Systems, Inc.*, 429 S.E.2d 854, 856 (S.C. App. 1994).

If Jordan had not intended to convey fee simple title to the .32 acres, he would not have included in the Deed's property description the following language: "There is also conveyed herewith the .32 acre shown and designated as "0.32 acres Easm. Area" upon the above referenced plat." Nor would Jordan have referred to it (the .32 acres) in the next paragraph as "The within property is conveyed subject to . . . the 50' Shared Private Drive and Utility Easement . . ." The Deed's specific reference to the .32 acres being conveyed, in addition to the 4.83 acres, with reference to a recorded plat showing the .32 acres confirms Jordan's intent to convey the .32 acres in fee simple to Debra Jordan Johnson and Charles Douglas Johnson. Accordingly, the Court finds that Debra Jordan Johnson and Charles Douglas Johnson own full fee simple title to the .32 acres and the 4.83 acres pursuant to the 2012 Deed from Jordan recorded in Deed Book 3611, Page 197.

In 2019, Jeffrey C. Fulmer Construction Co., Inc. conveyed Lot 6 to Martin, subject to easements and matters of record. The 2012 Johnson Deed and the 2012 easement are matters of record and predate the Martin's title. Martin took title to Lot 6 subject to the 2012 Deed from Jordan to Johnson.

I find and conclude that full fee simple title to the .32 acres was conveyed by Jordan to Charles Douglas Johnson and Debra Jordan Johnson in the unambiguous 2012 Johnson Deed. Even considering extrinsic evidence concerning the conveyance, such as the testimony of Jordan and Charles Douglas Johnson, I find and conclude that Jordan conveyed fee simple title to .32 acres to Charles Douglas Johnson and Debra Jordan Johnson.

B. No Dedication Occurred.

No dedication of any kind, including an implied dedication, ever occurred with respect to any portion of No Name Road or the Property. The Property was delineated for the first time in a 2012 plat as a 50' Shared Private Drive and Utility Easement. In 2012, Horry County approved the plat recorded in Plat Book 255 at Page 227, which depicts the 50 foot-wide private easement area for the subdivision of two (2) parcels. A private easement was granted to Erma Johnson under Deed Book 3611, Page 190. In 2017, Horry County Planning and Zoning signed the plat recorded in Plat Book 275, Page 335, acknowledging the "Existing 50' Shared Private Drive and Utility Easement (PB 255/227)."

There has been no unequivocal dedication of No Name Road or the Property, or any portion thereof, to Horry County by any owner of the Property at any time. The argument by Horry County that its sporadic maintenance of some part of the Property on an inconsistent and infrequent basis and to unspecified extent, is insufficient to conclude that the owner of the Property intended to relinquish or dedicate the Property. Horry County testified it never accepted any dedication of No Name Road. In addition, Jordan testified he paid the taxes on the .32 acres. The payment of taxes on property subject to a claim of dedication is evidence contrary to intent to dedicate the property. *Town of Kingstree v. Chapman*, 747 S.E.2d 494, 504 (Ct.App. 2013), citing *Tupper v. Dorchester County*, 326 S.C. 318, 326-7, 487 S.E.2d 187, 192 (1997).

Horry County has not met its clear, unequivocal and convincing burden of proof for any dedication. Where maintenance was performed along any part of the Property or No Name Road at any particular time, if any, has not been established by clear, convincing, and unequivocal evidence. Moreover, the Property is much longer and wider than the existing 12-foot dirt/gravel

drive, No Name Road, that served the farmland for years. Horry County's claim relating to No Name Road involves the property rights of other persons who are not parties, including Squires. After careful review of the evidence, I find that Horry County has not met its burden of proving an implied dedication or dedication occurred at any time with respect to any portion of No Name Road or the Property.

B. No Prescriptive Easement Exists.

Horry County cannot and has not met the clear and convincing burden of proof required for each element of a prescriptive easement. The uninterrupted, exclusive, adverse, twenty-year element requirements for prescriptive easements have not been proven. The general public has never used No Name Road or the Property to travel to another street or road. Instead, Horry County approved the 2012 Plat designating the Property as a private easement. Five years later, Horry County Planning and Zoning approved a 2017 plat referencing the Property as a private easement. Horry County recognized the Property, including No Name Road, as being private property and not public property. The element of exclusive use cannot be met when the public did not use No Name Road to get to other streets, the plat approved by Horry County Planning and Zoning clearly states the Property is a private easement with the property owners obligated to maintain the Property, and the testimony at trial was that the Johnsons used No Name Road to access their farmland.

For decades, Johnson maintained No Name Road. Horry County has not exclusively and continuously maintained or used No Name Road. There were five years in the last decade before this lawsuit was filed (2011-2020) when Horry County performed no maintenance: 2011, 2014, 2016, 2018, and 2019. As such, Horry County cannot meet the continuous or without

interruption elements needed for a prescriptive easement. Moreover, Horry County witnesses testified that if they did bush hog the side of No Name Road, it would take 15 minutes to 30 minutes. Spending a half an hour maintaining a farm drive once a year or every several years is not sufficient to constitute adverse, exclusive, or continuous possession required for prescriptive easements.

Horry County has not met its clear and convincing burden of proving it adversely, exclusively, continuously and without interruption used or maintained No Name Road or the Property, or any portion thereof, for the requisite time period. The Johnsons maintained and used No Name Road as a private drive throughout the last 50 years. Horry County and the public did not maintain or use No Name Road exclusively, continuously, and without interruption. Accordingly, Horry County has not proved the elements of adverse, exclusive or continuous use, without interruption, with respect to No Name Road, the Property, or any portion thereof. Horry County's claim as to a prescriptive easement over No Name Road, the Property, or any portion thereof, is denied in its entirety.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

(1) full fee simple title to the .32 acres and 4.83 acres was conveyed by Jordan to Debra Jordan Johnson and Charles Douglas Johnson in 2012 by Deed recorded in Deed Book 3611, Page 197;

(2) Martin's claim as to owning fee simple title to the .32 acres is denied;

(3) the Property is subject to a private easement under the 2012 recorded plat in Plat Book 255 at Page 227 and 2012 easement recorded in Deed Book 3611, Page 190;

(4) no dedication of any portion of No Name Road or the Property ever occurred;

(5) no prescriptive easement in favor of Horry County exists over any part of the Property or No Name Road; and

(6) Horry County's claims as to a prescriptive easement, dedication, or implied dedication as to No Name Road or any portion of the Property are denied in their entirety.

AND IT IS SO ORDERED.

H. Steven DeBerry, IV
Presiding Judge
Fifteenth Judicial Circuit



Horry Common Pleas

Case Caption: David Charles Martin , plaintiff, et al VS James T Jordan , defendant, et al
Case Number: 2020CP2605844
Type: Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771