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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Patrick C. Fant, III, Circuit Court Judge

Case No. 2023-CP-23-04246
Appellate Case No. 2024-000999

Anderson Laurens Road AA, LLC and Anderson Laurens Road ZZ, LLC, Appellants,

v.

Annacey Park Homeowners Association, Inc. and the City of Greenville, Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT IN REPLY

In its Initial Brief, Respondent Annacey Park Homeowners Association, Inc. (the "HOA") makes several assertions that call for reply: (1) the HOA makes factual assertions that are outside the Record on Appeal; (2) the HOA incorrectly states that the appealed Orders include a legal finding that Kellett Drive is a public street; (3) the HOA incorrectly asserts that Appellants have admitted or acknowledged Kellett Drive is a public road (by virtue of their Complaint); and (4) the HOA incorrectly asserts that the City's disavowal of any title interest in Kellett Drive is a negative expressions of *affinity*, as opposed to *ownership*.

In its Initial Brief, Respondent the City of Greenville (the "City") likewise makes assertions that require reply: (1) the City's Initial Brief adopts a position contrary to the plain language of the City's Answer as well as testimony presented by the City's Engineer at trial; and (2) the City attempts to create uncertainty about Appellants' quiet title claims by suggesting third-party interests in Kellett Drive which do not exist.

I. The HOA Makes Factual Assertions that are Outside the Record on Appeal.

In its Initial Brief, the HOA identifies several recorded title instruments, none of which were introduced into evidence at trial. In fact, none of these recordings ((i) Deed Book 2679, Page 3870; (ii) Deed Book 2397, Page 3947; and (iii) Deed Book 2679, Page 3870 (collectively, the "Deeds")) were even mentioned at trial. SCACR Rule 210(h) provides that "[e]xcept as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal. The case of Solley v. Navy Fed. Credit Union, Inc. 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012) amplifies Rule 210.

> The record must show that the issue was raised in the trial court. Zaman v. S.C. State Bd. of Med. Exam'rs, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991); Reid v. Kelly, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980). A motion or an objection made during an off-the-record conference that is not made a part of the record does not

> preserve the question for review. York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct.App.2005) ("Whe[n] an objection and the ground therefore is not stated in the record, there is no basis for appellate review."); Hundley v. Rite Aid of S.C, Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct.App.2000) (finding arguments must be conducted on the record to be preserved for appellate review).

The HOA's mention of the Deeds goes to the very heart of this appeal. In the face of the City's Answer and trial testimony denying any interest in Kellett Drive, it became incumbent on the HOA to prove the existence of a right of way, public or private. The HOA made no effort to do so. Had the HOA attempted such proof, Appellants would have presented rebuttal testimony and documents. The HOA cannot now make evidentiary presentations and title arguments it failed to make at trial. E.g., SC State Highway Dept. v. Meredith, 241 S.C. 306, 128 S.E.2d 179 (1962) ("…counsel is prohibited from embodying in briefs any fact which does not appear in the record…."). Appellants respectfully request that this Honorable Court strike all references to the Deeds in the HOA's Brief.

II. The HOA Incorrectly States that the Appealed Orders Include a Legal Finding that Kellett Drive is a Public Street.

Not knowing whether Kellett Drive was or was not in the City's public road inventory, Appellants took the conservative path and filed the underlying action as a statutory abandonment proceeding. Appellants' Complaint and reversionary interests plat predate the City's Answer, wherein the City denied any interest in Kellett Drive. After the City's Answer, Appellants consistently accepted the City's position and argued the case as a quiet title action. Appellants abandonment arguments at trial were made on the assumption that the HOA or the City might attempt to prove a public interest, but neither the HOA nor the City did so. Nevertheless, the HOA declares in its Brief of Respondent that "there is ample evidence to support the Circuit Court's ruling that Kellett Drive is a public Right of Way." Appellants beg to differ on both accounts. First of all, public interests do not magically invest in roads. They arise through condemnation,

dedication or prescription, and no evidence was submitted to prove any of these methods.[1] Definitively and to the contrary, the City's representative testified that Kellett Drive is not in the public inventory. More importantly, there simply is no ruling from the lower court that Kellett Drive is public. The lower court's Form 4 Order is all of three sentences long and merely denies statutory abandonment. The only other Order issued by the lower court in this matter is a denial of Appellant's Rule 52 and Rule 59 Motions (the "Motion Ruling"). The lower court's Motion Ruling includes a nominally more extensive discussion of factual issues and trial arguments, but it is disingenuous to suggest there is a ruling that Kellett Drive is a public right of way. Neither Respondent made any effort to prove condemnation, prescription or dedication. As such, it would have been error for the lower court to make such a ruling without evidentiary support.

III. The HOA Incorrectly Asserts that Appellants have Admitted or Acknowledged Kellett Drive is a Public Road.

As stated above, Appellants' Complaint and reversionary interests plat predate the City's Answer, wherein the City denied any interest in Kellett Drive. After the City's Answer, Appellants consistently accepted the City's position and argued the case as a quiet title action. Appellants abandonment arguments at trial were made on the assumption that the HOA or the City might attempt to prove a public interest, but neither the HOA nor the City did so. Accordingly, Appellants' Complaint should not be deemed admission. As stated at trial: "…the City denies that

[1] There is patently no evidence or debate as to condemnation. The elements of proof necessary to prove prescription are 1) continued and uninterrupted use and enjoyment for 20 years, 2) identity of the thing enjoyed, and 3) demonstration that such use was adverse, under claim of right, as opposed to permissive. E.g., Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951). There is nothing in the record as would satisfy these prescription standards. Dedication requires proof of a positive and unmistakable intent to dedicate to public use and the public entity's acceptance. E.g., Anderson v. Town of Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977). Respondents' Briefs disregard controlling precedent on dedication. In Anderson v. Town of Hemingway our Supreme Court unambiguously states that "Since we know that individual owners are not apt to transfer it to the community or subject it to public servitude without compensation, the burden of proof to establish dedication is upon the party claiming it." Id. at 354, 237 S.E.2d at 490. Yet, both the City and the HOA assert it is Appellants' burden to prove disprove dedication.

there are any public rights. So, [Appellants went] through the statutory question as to public interests as a – avoidance of doubt…just as a precaution…." *(Hrg. Transcript at 9).*

IV. The City is Legally Estopped from Retracting its Denial of any Public Rights or Interests in Kellett Drive, which the HOA incorrectly asserts is a Negative Expression of Affinity, as Opposed to Ownership.

In its Answer, the City denied *"**that it claims an interest in Kellett Drive*** apart from existing and planned public utility easements." *(Answer of the City of Greenville) (emphasis added).* The City now attempts, in its Brief of Respondent, to walk back this averment, stating that "denial of any claim of interest, or of any interest, in Kellett Drive by the City is not tantamount to a denial of a public interest." Further, "[a]s discussed, *supra*, the City simply does not claim an interest in Kellett Drive; it does not affirmatively deny an interest in Kellett Drive, and it does not affirmatively deny that there may be some public interest in Kellett Drive although the City does not claim such an interest." *(Respondent City of Greenville's Initial Brief, p. 5).* The City's contortions are not made in a vacuum. The Court must view the City's Answer in its fulsome context, as responsive to specific averments in Appellants' Complaint. Appellants' Complaint alleges in Paragraph 5:

> "Respondent, City of Greenville (the "City"), is a municipality organized and existing in the County of Greenville pursuant to the laws of the State of South Carolina. The City is charged with maintaining public roads within the incorporated limits of the City of Greenville, ***and the City is joined to this action so that it can defend prescriptive, public rights in Kellett Drive, the roadway that is the subject of this action***." *(emphasis added).*
>
> The City responded to this Paragraph 5 as follows:
>
> "Respondent City of Greenville ***admits the allegations of paragraph 5***, but denies that it claims any interest in Kellett Drive apart from existing planned public utility easements. Accordingly, Respondent City of Greenville does not object to the closure Kellett Drive, subject, however, to the aforementioned easement rights." *(emphasis added).*

Moreover, the City did not object to, or contest, unambiguous trial declarations that Kellett Drive is not a public road. For example, counsel for Appellants stated to the lower court that "the City does not recognize Kellett Drive as a public way. It is not in their inventory of roads that they maintain or otherwise claim and preserve as a public way." *(Hrg. Transcript at 7-8).* The City was mute in response to this statement. Likewise, the City Engineer testified at trial confirming the absence of public rights:

> Question: "…maybe I can just confirm some of the conclusions that were set forth in, in your email that, that is the City's position that, that Kellett [Drive] is not in the public road inventory presently."
> Answer: "That is correct."
> Question: "You couldn't find anything that, that demonstrated a dedication or acceptance?"
> Answer: "That is correct. We had legal do research, and they could not find any evidence of it ever being deeded to the City or the County at that time."

(Hrg. Transcript at 43-44). Counsel for the City declined to question or counter the foregoing testimony. Indeed, the City asked no questions of this witness whatsoever. *(Hrg. Transcript at 46).* Further, the City did not question or counter the City Engineer's declaration of no desire to subsequently accept Kellett Drive into the public roads inventory on account of its poor condition and safety issues. *(Hrg. Transcript at 44).* Yet, in its Respondent Brief, the City now attempts to retract its disavowal of public rights. Such a retraction effort is nothing short of a legal argument the City failed to raise below, but also, it is barred by the doctrine of judicial estoppel.

The South Carolina Supreme Court expressly adopted the doctrine of judicial estoppel in the case of Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. Id. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to ***protect the integrity of the judicial process and the courts*** *(emphasis added).* Id. The Supreme Court explained,

> For the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. Id. at 251–52, 489 S.E.2d at 477. Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 475–76 (Ct. App. 2000).

The City admitted in its Answer that it was joined in this action to defend prescriptive, public rights in Kellett Drive and then denied the existence of any such rights.[2] *(Answer of the City of Greenville).* The City now engages in tortured explanations and seeks to "flip the script." In the name of judicial integrity, the City should be judicially estopped from suggesting it has not denied the existence of public rights in Kellett Drive.

In a similar fashion, the HOA waxes insincere as it confronts the City's denial of any public interest in Kellett Drive. The HOA would have this Court believe that the City uses the word "interest" to mean affinity, as opposed to ownership. The underlying action presented quiet title and road abandonment claims; it begs credulity to suggest that title interests were not the subject of the City's pleadings and testimony.

V. The City's Suggestion of Third-Party Interests in Kellett Drive is Untimely and Improper.

Last, the City attempts to inject ambiguity into this case by inferring for the first time in its Respondent Brief that other public bodies might claim an interest in Kellett Drive. The City cites to BancOhio Nat'l Bank v. Neville and S.C. Department of Transp. V. Hinson Family Holdings, LLC, for the proposition that the South Carolina Department of Transportation ("SCDOT") *might* claim an interest in Kellett Drive. These cases do not require that *all* public bodies be joined in a statutory abandonment action. Rather, only where the State of South Carolina is "the presumed

[2] The possible existence of utility easements not in dispute is excepted.

owner of property" must it be joined. BancOhio Nat'l Bank v. Neville, 310 S.C. 323, 326, 426 S.E.2d 773, 776 (1993). The Court in BancOhio and these Appellants also note various other road closure decisions that effected lawful abandonments without joining SCDOT. E.g., First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 417 S.E.2d 592 (1992); Thompson v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989) (included Horry County as a party at interest); Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); City of Greenville v. Bozeman, 254 S.C. 306, 175 S.E.2d 211 (1970); and City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946). It is well known to the City that roads which are not part of the SCDOT highway system do not fall under SCDOT jurisdiction. Likewise, the City Engineer confirmed that the City's own research concluded the County held no interest in the 250-foot-long, dead-end Kellett Drive which is fully within the City limits. *(Hrg. Transcript at 44).* The City's inference that other public bodies might hold an interest in Kellett Drive is obfuscation of the worst sort. This matter is purely a quiet title action between adjacent landowners in which the only possible guardian of public rights was joined. The City disclaimed any public interest, and the Record on Appeal is void of any basis for now raising third-party claims.

CONCLUSION

For the reasons set forth above, Appellants respectfully request this Court reverse the judgment of the Circuit Court, confirming title to Kellett Drive in accordance with applicable, stipulated, reversionary interests.

Respectfully submitted,

/s/ William B. Swent

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September 19, 2024

PROOF OF SERVICE

This is to certify that I have, this 19th day of September, 2024, served a true and correct copy of **APPELLANTS' REPLY BRIEF** in the above-captioned action by U.S. mail and e-mail to:

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September 19, 2024

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RE: Annacey Park Homeowners Association, Inc. and the City of Greenville v. Anderson Laurens Road AA, LLC and Anderson Laurens Road ZZ, LLC
Appellate Case No. 2024-000999

Dear Ms. Kitchings:

Enclosed for filing is Appellants' Reply Brief along with our proof of service. By copy of this letter, copies of the same are being served upon counsel for Respondents.

Thank you for your assistance in this matter.

Sincerely,

Fox Rothschild LLP

/s/ William B. Swent

William B. Swent

WBS/ela

Enclosures

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