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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough,
Circuit Court Judge

Appellate Case No. 2025-001719

Henry Bailem, IV, Joseph Bailem, Sheila Bailem, Diane Jefferson, Michael Jefferson, Sr., Rashica Coakley, and Ann Bailem Simmons,

Appellants,

v.

County of Charleston, Town of Mount Pleasant, DRB Group South Carolina, LLC f/k/a Dan Ryan Builders South Carolina, LLC, Marie P. Howard, Lewis B. Howard, Jr., Lanelle P. Johnson, William Bailem, Sr., X Syvier Lynn Johnson, Sonia Maria Simmons, Kenneth Davis, Juanita Nelson, Titus Howard, Myeisha Howard, James Howard, And John Doe and Jane Doe, fictitious names used herein to designate the unknown heirs at law, distributes, and/or devisees of all persons who are minors or members of the Armed Forces of the United States of America, as contemplated By the Soldiers' and Sailors' Relief Act, 1940,as Amended, and all persons entitled to claim under and through any of them

Defendants,

of which County of Charleston, Town of Mount Pleasant, DRB Group South Carolina, LLC f/k/a Dan Ryan Builders South Carolina, LLC are the

Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Appellants submit this Reply Brief to address the new arguments and characterizations raised in the Initial Briefs of Respondents County of Charleston ("County"), Town of Mount Pleasant ("Town"), and DRB Group South Carolina, LLC ("DRB"). As set forth below, none of the Respondents' arguments overcome the genuine issues of material fact that preclude summary judgment.

Respondents collectively advance a narrative that the 1986 plat is a straightforward, unambiguous dedication by willing landowners, followed by decades of public reliance. But that narrative requires this Court to do precisely what summary judgment prohibits: resolve disputed factual questions in Respondents' favor. The core factual disputes (1) whether the signatures on the 1986 plat were authentic, (2) whether the surveyor had authority from the landowners to file a plat dedicating the road to the public, and (3) whether any purported dedication was undermined by the County's own contemporaneous and subsequent conduct remain unresolved. See *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.")

Rather than confront these disputes, Respondents raise ancillary arguments that, upon examination, either support Appellants' position or are irrelevant to the dispositive issues. Respondents attack Appellants' alternative theories as "contradictory," invoke the apparent authority and acquiescence doctrines, and argue that equitable tolling cannot apply to a private developer. None of these arguments resolve the factual disputes at the heart of this case.

ARGUMENT

1. The Simmons testimony illustrates, rather than resolves, a factual dispute.

All Respondents place heavy reliance on the deposition testimony of Ann Bailem Simmons, claiming it establishes that the Heirs of John Ballam knowingly signed the 1986 plat. The County states that Simmons "was present and witnessed the Heirs of John Ballam sign" the plat. (County Br. at 21.) The Town characterizes her as confirming she "was present when the signatures . . . were affixed." (Town Br. at 4.)

A fair reading of the testimony reveals equivocation, not confirmation. When asked about the plat signing, Simmons testified: "I'll say it like this: When they signed, I don't know. I know that this plat was signed." (R. pp. 0355-0356). This statement does not establish who signed, which plat was signed (the original four-lot version or the later five-lot version), or whether the signers understood that the plat purported to dedicate the family's private road to public use. At best, it confirms that a plat exists with signatures, which is not in dispute. What is in dispute is the authenticity and authorization of those signatures, as well as the circumstances under which they were obtained.

It is also clear from the transcript and the questions and answers surrounding this particular passage that the Respondents seize on as an "admission" that Ms. Simmons was not clear about what she was being asked or about the distinction between the Exhibit 4 plat and any other plat showing the parcels on the ground. (R. pp. 0355-0356)

That all Respondents must stretch this ambiguous testimony into definitive proof of a knowing execution of this particular plat underscores the evidentiary gap in their case. If the circumstances surrounding the plat's execution were clear and uncontroverted, Respondents would not need equivocal deposition testimony such as this to meet their burden.

2. Appellant's alternative theories are not contradictory but rather illustrate the many factual and legal issues precluding summary judgment.

The Town and DRB argue that Appellants' case is fatally undermined because Appellants advance two theories: (1) that the signatures on the 1986 plat are not authentic, and (2) that the signatures may have been transferred from an earlier plat without the landowners' knowledge or consent. The Town goes so far as to characterize this as an attempt to "conjure a dispute of fact" (Town Br. at 26–27).

This argument misapprehends both the record and the law. Appellants' theories are not contradictory; they are alternatives. Either the signatures are not those of the landowners, or they are genuine but were affixed to a different document and then transferred without authorization to the recorded plat containing the public dedication language. Both theories lead to the same conclusion: the 1986 plat with its public dedication was not validly executed by the landowners. Alternative pleading is expressly permitted. More importantly, the existence of two plausible explanations for how the plat came to bear those signatures, neither of which supports knowing, voluntary dedication, is itself evidence of a genuine factual dispute. That Respondents can identify no single, uncontroverted account of how the plat was executed confirms that this is a question for the factfinder, not one for summary judgment.

The Town's reliance on *Cothran v. Brown* is inapposite. (Town Br. at 26.) That case established the test for the application of judicial estoppel, an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. Under the *Cothran* opinion, the following test must be satisfied for the equitable doctrine to be applied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be

part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Clearly, that test is not met here.

Cothran addressed the narrow circumstance of a party submitting contradictory affidavits—the same witness swearing to opposite facts—to create a sham issue. Here, different witnesses and different evidence support different theories about how signatures came to appear on the plat. That is not a sham; it is a genuine evidentiary dispute.

3. Pennington's agency does not establish a dedication.

The Town argues that even if Pennington filed the plat in error, he did so as the Bailem family's agent, not the County's or the Town's, and that "[a]ny dispute should therefore lie between the Bailems and Pennington." (Town Br. at 27–28.) Citing *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996), the Town invokes apparent authority to bind the landowners to whatever Pennington filed. (Town Br. at 27.)

This argument conflates two distinct questions. The first is whether the landowners authorized the public dedication—the very factual dispute at the heart of this case. The second is whether, assuming Pennington acted without authorization, third parties may rely on his unauthorized act. The apparent authority doctrine might be relevant to the second question, but it cannot answer the first. The first question—whether the landowners actually authorized the dedication—is the threshold issue that must be resolved before any reliance argument can arise.

The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they, in turn, deal with the agent in reliance on this manifestation. *Eadie,* 322 S.C. at 171, 470 S.E.2d at 401. Whether the landowners placed Pennington in a position to dedicate their private road to public use—as opposed to merely preparing a subdivision

plat—is itself a disputed factual question. The landowners hired Pennington to subdivide property, not to give away their road. The scope of his authority cannot be resolved on summary judgment.

The Town's argument also proves too much. If a surveyor's filing is automatically binding on the landowner regardless of authorization, then no landowner could ever challenge an unauthorized plat—a result incompatible with basic principles of property law and due process.

4. The "butting and bounding" argument supports Appellants' position.

All Respondents argue that because the lot conveyances describe the parcels as "butting and bounding" on John Ballam Road, Appellants never owned the road itself and therefore lack standing to challenge the dedication. (County Br. at 9; Town Br. at 5–6, 29–30; DRB Br. at 8–11.) DRB devotes particular attention to this argument, tracing each chain of title to show the road was "consistently excluded from every conveyance." (DRB Br. at 10.) This argument fails for two reasons.

First, if the road was excluded from the individual lot conveyances, it remained with the original grantors—the Heirs of John Ballam. The question then becomes whether those Heirs validly dedicated the road to public use, which is the very factual dispute at the heart of this case. The "butting and bounding" language does not resolve that question; it merely identifies who held the road, not whether those holders authorized its dedication.

Second, the "butting and bounding" language is equally consistent with a private road or easement serving the subdivided lots. Lots in a subdivision are routinely "but and bound" on private roads without any implication that those roads have been dedicated to the public.

5. **Appellants' statements reflect confusion that Respondents created rather than acquiescence**.

Respondents cite various statements by Appellants—maintenance work orders referring to a "Town Road," Henry Bailem's statement that "it's their road," Marilyn Bailem's testimony about the

Town's maintenance duty, and Diane Jefferson's 2021 work order requesting ditch cleaning on "a Town Road"—as evidence of judicial admissions or acquiescence. (County Br. at 25; Town Br. at 13, 30.) The Town argues that Appellants "cannot now complain that a dedication of which they had full knowledge led to public possession of which they have taken advantage." (Town Br. at 30.)

Viewed in context, these statements demonstrate precisely the opposite of what Respondents claim. They were made by laypersons in the course of requesting services they believed they were entitled to—services the County and Town had intermittently provided. They reflect the very confusion that decades of contradictory government conduct created. The County told Appellants in 1993 that the road was private. Then the County paved it. The County said the road was not part of the County road system. Then the Town accepted maintenance responsibility. Government officials alternately treated the road as public or private.

Informal statements made by lay persons navigating this contradictory landscape are not judicial admissions. Nor do they constitute acquiescence in the legal sense. The common law doctrine of acquiescence arises when adjacent landowners mutually recognize and accept a clear line as the boundary between their properties for a long period. 9 Powell on Real Property § 68.05(2) (2000); see also *Croft v. Sanders*, 283 S.C. 507, 509, 323 S.E.2d 791, 792 (Ct. App. 1984) ("A boundary line may be determined by mutual recognition of and acquiescence in a particular line.") "It is well established that if landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time . . . they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one." *Klapman v. Hook*, 206 S.C. 51, 57, 32 S.E.2d 882, 884 (1945).

Here, there was no "mutually recognized" understanding of the road's ownership. The entire premise of this case is that Appellants did not know their rights were being threatened because the County simultaneously told them the road was private. One cannot acquiesce to something one does

not know is happening. Similarly, the County's characterization of Appellants' counsel's hearing statement as a "concession" that Appellants knew of the problem by 2002 misrepresents the record. (County Br. at 13.) The 2002 paving occurred because the County had damaged the road with its own equipment, and County officials told Appellants the paving was remedial. Critically, the County continued to tell Appellants that the road was private after 2002.

The Town's attempt to recharacterize the 1993 letter as merely stating that the road could not yet be accepted without improvements (Town Br. at 6) ignores the letter's plain language. The County stated it would "consider [the road] to be a private road" until improvements were made. That language describes the current status, not a conditional promise of future acceptance. It is also entirely consistent with Appellants' position that the County treated the road as private for years after the alleged 1986 dedication.

6. The real "windfall" is taking private property through surveyor error.

The County argues that reversing summary judgment would give Appellants a "windfall"—a paved road they did not pay taxes on. (County Br. at 17.) This argument inverts the equities of this case.

The real windfall would be allowing Respondents to acquire private property through a surveyor's unauthorized act, without compensating the landowners. It was the County's own conduct—paving a road it simultaneously told Appellants was private, sending a 1993 letter confirming the road was not part of the County road system, and maintaining contradictory positions for decades—that created the situation all parties now face.

The equitable doctrines that Respondents invoke, laches, estoppel, and acquiescence, should not reward parties whose own contradictory conduct caused the delay they seek to exploit. The County cannot create confusion and then invoke equity to benefit from it. *Robinson v. Estate of Harris*, which

both the Town cites (Town Br. at 20–21), is distinguishable because there the petitioners waited thirty-nine years to challenge publicly recorded instruments while taking no action whatsoever. *Robinson v. Estate of Harris*, 389 S.C. 360, 372, 698 S.E.2d 801, 807 (2010). Here, the County's own ongoing representations actively prevented Appellants from understanding the nature and extent of the threat to their property.

The County's footnote raising the alternative three-year fraud statute under S.C. Code Ann. § 15-3-530 fares no better. As discussed in Appellants' Initial Brief, the discovery rule governs accrual, and the County's own contradictory representations prevented discovery within the statutory period.

7. Third-party reliance on a defective plat does not cure the defect.

The County points to the McManus family plat and the Mt. Pleasant Waterworks plat, citing John Ballam Road as a public right-of-way. (County Br. at 16.) This argument proves nothing about the validity of the underlying 1986 dedication. These subsequent plats and instruments necessarily relied on the same 1986 plat whose validity is in dispute. If the 1986 plat was defective—because the signatures were not authentic, the surveyor lacked authorization, or the dedication was never validly made—then third-party reliance on that defective document cannot retroactively cure the defect. The argument is circular: the 1986 plat is valid because others relied on it, and others relied on it because the 1986 plat existed. It is well established that recording provides constructive notice but does not validate an otherwise defective instrument. S.C. Code Ann. Sec. 30-7-10 addresses only the effect of recording on subsequent purchasers, not the validity of the instrument itself.

Respondents do not establish that any third party conducted an independent investigation into whether John Ballam Road had been validly dedicated to public use. A utility provider, adjacent landowner, or developer referencing a road as shown on a recorded plat is doing nothing more than

describing what the plat purports to show. It is not independent evidence that the road was lawfully dedicated.

CONCLUSION

Respondents' briefs, both individually and collectively, do not overcome the genuine issues of material fact identified in Appellants' Initial Brief. The authenticity of the signatures on the 1986 plat, the surveyor's authority to file it, the validity of the purported dedication, and the effect of the County's decades of contradictory conduct all remain disputed. These are quintessential jury questions that cannot be resolved on summary judgment.

The Town's additional arguments that Appellants' alternative theories are somehow contradictory, that Pennington's agency binds the landowners regardless of authorization, and that Appellants' lay statements constitute acquiescence raise factual questions that only underscore the need for trial. Summary judgment is not the appropriate vehicle for resolving these disputes.

Appellants respectfully request that this Court reverse the trial court's grant of summary judgment and remand this matter for trial.

Respectfully submitted,

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