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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Doyet E. Early, III, Circuit Court Judge
Trial Court Case No. 2010-CP-15-00247

Appellate Case No.: 2016-000477

Ted A. Nettles and Janell B. Nettles,

Appellants,

v.

Sylvester Guess Drew, Jr., Debra Drew,
and Colleton County,

Respondents.

INITIAL BRIEF OF APPELLANTS

Dean A. Hayes, Esq.
P.O. Box 11006
Columbia, SC 29211
(803) 765-2968
Attorney for Appellants

A. Parker Barnes, Jr., Esq.
P.O. Drawer 1729
Beaufort, SC 29901-1729
(843) 522-2600
Attorney for Respondents Sylvester Guess
Drew, Jr. and Debra Drew

Ernest Mitchell Griffith, Esq.
Griffith Sadler & Sharp, PA
P.O. Drawer 570
Beaufort, SC 29901
(843) 521-4242
Attorney for Respondent
Colleton County

David M. Swanson, Esq.
Pierce Talmadge MacLennan, Esq.
Haynsworth Sinkler Boyd, PA
134 Meeting St., 3rd Floor
Charleston, SC 29401
(843) 720-4411
Attorneys for Respondents Sylvester Guess
Drew, Jr. and Debra Drew

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STATEMENT OF THE ISSUE ON APPEAL

Did the lower court err by holding that the road in question was not a public county road?

STATEMENT OF THE CASE

This is an action in which the appellants, Ted A. Nettles, Jr. And Janell B. Nettles ("the Nettles"), who are husband and wife, are seeking access by road to property they own ("Property") in Colleton County. The Nettles bought their Property on November 30, 2009. This action was commenced by the Nettles filing their summons and complaint on February 25, 2010. The respondents, Sylvester Guess Drew, Jr. and Debra Drew ("the Drews"), who are also husband and wife, were named as defendants in the summons and complaint because they claim to own the road, now known as West Camp Avenue¹, by which the Nettles seek to access their Property. The respondent, Colleton County, was named as a defendant in the summons and complaint because the Nettles believe West Camp Avenue is a public road or neighborhood road. The South Carolina Department of Transportation was originally named as a defendant in this case, but it was dismissed as a party by a stipulation of dismissal filed on July 26, 2012.

In their original complaint, the Nettles alleged a declaratory judgment action seeking access to their property. The Drews responded to the summons and complaint by filing an

¹ In various deeds and plats in evidence in this case, the road at issue is referred to as "Camp Avenue," "Camp Lane," "Camp Road" or other similar titles. During the trial, no party challenged the identity of the road in question. For the purposes of this appeal, Appellants will refer to the disputed portion of the road as "West Camp Avenue," regardless of how it was described by any witness or evidence at trial. All of the parties agree that the portion of Camp Avenue that is east of the intersection with Polite Road is a county road maintained by Colleton County, and this undisputed portion of Camp Avenue will be referred to as "East Camp Avenue." . The portion of Camp Avenue west of the intersection with Polite Road is the portion of road in dispute in this case.

answer on March 24, 2010. Colleton County filed an answer to the summons and complaint on March 30, 2010. On April 22, 2010, the court filed an order that denied the Nettles motion for a temporary restraining order to prevent the Drews from denying the Nettles access to the Property via the road at issue in this case. Also on April 22, 2010, the Drews filed an amended answer and counterclaim that set forth a counterclaim. The Nettles filed a reply to the counterclaim on May 26, 2010.

On June 24, 2011, the Nettles filed an amended summons and complaint. The Drews responded to the amended summons and complaint by filing an answer and counterclaim on July 20, 2011. By a Form 4 order filed on September 6, 2011, the case was transferred to the non-jury roster, and a formal order transferring the case to the non-jury roster was filed on September 16, 2011. On March 6, 2012, the Drews filed a motion for sanctions. The Drews filed a second amended answer and counterclaim on March 16, 2012. On April 16, 2012, the Nettles filed a reply to the second amended answer and counterclaim.

The Drews filed a motion for summary judgment on December 3, 2012. The Drews' motion for summary judgment was denied by a Form 4 order filed on February 13, 2013. The Drews third counterclaim was dismissed by a stipulation of dismissal filed on March 2, 2015.

The case was tried on the merits by non-jury trial before Doyet A. Early, II, circuit court judge, on June 29th and June 30th, 2015. By an order filed on September 21, 2015, Judge Early held that the Nettles had failed to prove the road in question was a public road or that the Nettles were entitled to an easement through the theory of express grant, prescription, necessity, prior use, or any other theory. The order also found that the Drews owned title to the road in question.

The Nettles filed a motion to alter or amend the order and a motion to reconsider on November 4, 2015, but by a Form 4 order filed on November 23, 2015, the Nettles' motions were denied.

The Nettles filed their notice of intent to appeal on March 7, 2016. The Drews filed a motion to dismiss the appeal on April 7, 2016 based on their allegation that the notice of intent to appeal was untimely. On April 20, 2016, the Nettles filed a reply to the motion to dismiss. On June 7, 2016, the Court of Appeals issued an order denying the Drews motion to dismiss. On July 28, 2016, the Nettles moved for substitution of counsel, and on August 17, 2016, the Court of Appeals issued an order granting the Nettles motion for substitution of counsel.

ARGUMENT

The lower court erred in holding that the road in question is not a public county road. "The determination of whether a road has been dedicated to public use is one in equity." *Vick v. S.C. Dep't of Transp.* 347 S.C. 470, 477, 556 S.E.2d 693, 697 (Ct. App. 2001). In an equitable action, the appellate court "may find facts in accordance with its own view of the preponderance of the evidence." *Id.*

A party seeking to establish dedication of property must prove two elements. *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 191-92 (1997). The party must first show that the owner of the property in a positive and unmistakable manner intended to dedicate the property to public use. *Id.* The party must also show, within a reasonable time, an express or implied acceptance of the property offered for dedication. *Id.* "Intent to dedicate may also be implied from long public use of the land to which the owner acquiesces." *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 317, 433 S.E.2d 875, 883 (Ct. App. 1992). "No formal acceptance by the public of an offer of dedication is necessary, and acceptance of the offer may be implied by

the public's or public authority's continuously utilizing and maintaining the property in some fashion." *Blarcum v. City of N. Myrtle Beach*, 337 S.C. 446, 451, 523 S.E.2d 486, 489 (Ct. App. 1999).

For demonstrative purposes only, the parties in this action agreed on a map that provided the location of the parcels of land bordering West Camp Avenue. (R. p.) On this map, the 21.70 acre parcel owned by the Nettles is labeled as Parcel A. (R. p.) A nineteen acre parcel owned by the respondent, Sylvester Drew, Jr. is labeled as Parcel B, while an eleven acre parcel owned by the respondent, Debra Drew, is labeled as Parcel C. (R. P.) A gate installed by the Drews blocks Camp Avenue just west of its intersection with Polite Road, and it is the blocked portion of Camp Avenue, known as West Camp Avenue, that is at issue in this action. (R. p.) The parcel owned by the Nettles, and the parcels owned by each of the Drews all are bounded partially by West Camp Avenue. (R. p.)

In the present case, a lot of the evidence as to the existence of West Camp Avenue is found in the deeds and plats offered into the record. Plats and deeds obtained from the Colleton County Register of Deeds Office show that West Camp Avenue has been in existence since at least the middle of the nineteenth century. (R. p.) The trial judge even stated that the road has "been there since before the Civil War." (R. p.) An old hand-drawn plat of the area from around 1880 shows West Camp Avenue as being a "road to settlement." (R. p.) Another old plat from around the same time period does not list West Camp Avenue but shows that it forms the boundary between Deer Creek and the Edisto River for the parcel of property shown in the plat. (R. p.) A plat prepared in 1965 and recorded in book 14, at page 87, clearly shows "Camp Lane"

extended all the way to Deer Creek, which is west of Camp Avenue's intersection with Camp Avenue. (R. p.)

A deed dated July 31, 1882, recorded in book T, at page 502, mentions "Camp Avenue." (R. p.) In a deed dated June 6, 1946, recorded in book 94, at page 124, Camp Avenue is referred to as "Camp Lane Road," a road leading from Jacksonboro Highway (now known as Hope Plantation Avenue) to Deer Creek. (R. p.) By a deed dated May 23, 1949, recorded in book 102, at page 463, A. G. Kiser conveyed to J. L. McMillan, the grandfather of the respondent, Sylvester Drew, Jr., three acres of property, and this deed stated the property conveyed was "bounded . . . on the South by Camp Lane" (R. p.) Also on May 23, 1949, by a deed recorded in book 108, at page 68, J. L. McMillan conveyed to A. G. Kiser one and one-half acres of land, and the deed stated the property being conveyed was "bounded as follows: North by Camp Lane" This deed to A. G. Kiser also stated the following: "The intention of this Title is to trade the above one and one half acres of land, South of Camp Lane to A. G. Kiser, for Three Acres of Land north of Camp Lane, as shown by Title of even date from A. G. Kiser to J. L. McMillan." (R. p.) The three acre parcel and the one and one-half acre parcel were both located west of the intersection between Camp Avenue and Polite Road, so these parcels are bounded by West Camp Avenue. (R. p.)

A deed dated May 5, 1973, recorded in book 171, at page 257, conveying an eleven acre parcel to Sylvester Drew, the father of the respondent, Sylvester Drew, Jr., states that the property is "bounded as follows to wit: On the North by Camp Lane Road separating same from nineteen (19) acre tract this date being conveyed to Sylvester Drew, Jr." (R. p.) The deed conveying this same eleven acre parcel from Sylvester Drew to the respondent, Sylvester Drew, Jr., contains this same language, as does the March 6, 2007, deed in which Sylvester Drew, Jr.

conveys the property to his wife and co-respondent, Debra Drew. (R. p.) This is the same eleven acre parcel shown as Parcel C on the map entered into the record by the parties for demonstrative purposes only. (R. p.) Similarly, the nineteen acre parcel owned by Sylvester Drew, Jr. and shown as Parcel B on the demonstrative map states that his parcel is "bounded on the south by Camp Avenue." (R. p.) Since both of the Drews' deeds state their respective parcels are "bounded" by Camp Avenue, the most logical interpretation would be that the property lines for both parcels end at the edge of Camp Avenue. This indicates West Camp Avenue is a public county road and is not owned by either of the Drews.

Further proof that West Camp Avenue is a public county road is found in the testimony of Herman Miller. Mr. Miller testified that he was the great, great grandson of Amy Simmons, who owned the property now owned by the Nettles. (R. p.) Amy Simmons acquired the property by a deed dated December 18, 1906, recorded in book 29, at page 118. (R. p.) The Nettles purchased the property from the heirs of Amy Simmons following an action to quiet title. (R. p.) Mr. Miller testified that he was born on what is now the Nettles' property in 1936 and that he lived there with his family until he left in 1953 to join the military. (R. p.) He also testified that, during the time he lived there, the county "scraped" West Camp Avenue regularly and that the school bus picked up children at a barn located west of what is now the Nettles' property. (R. p.) Mr. Miller stated that he accessed what is now the Nettles' property by using West Camp Avenue and that it was the only road to the property. (R. P.) There was no gate preventing access to West Camp Avenue when Mr. Miller lived there. (R. p.). It was only 1985 when the Drews installed a cable, and later a gate, that access to West Camp Avenue was restricted. (R. p.)

West Camp Avenue has been shown as a road on many deeds and plats going back to the 1800's. Mr. Miller testified that the whole time he lived on what is now the Nettles' property his family and relatives accessed the property by using West Camp Avenue. (R. p.) There is also evidence that the county regularly maintained West Camp Avenue by scraping it between 1936 and 1953. This is proof West Camp Avenue was impliedly dedicated to the public and that the public utilized the road so that it became a public county road.

The Drews and Colleton County argue that West Camp Avenue has never been recognized as a county road. (R. p.) However, a 2005 edition Colleton County Road Atlas lists West Camp Avenue as a county road. (R. p.) A 2008 edition Colleton County Sheriff's Atlas also lists West Camp Avenue as a county road. (R. P.) A South Carolina Department of Transportation map of Colleton County, dated June 2005, shows West Camp Avenue as an unpaved county road. (R. p.) Going further back in time, a South Carolina Department of Transportation general highway map, dated 1975, reports West Camp Avenue as an unpaved county road. (R. p.) Going even further back in time, West Camp Avenue is listed as a county road on an Army Corp. of Engineers map from 1943, which also mirrors a plat from 1917. (R. p.)

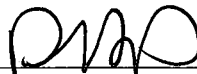
The Drews and Colleton County may argue that, even if West Camp Avenue was, in the past, a county public road, the road has been abandoned and is no longer a county road. However, if a road became public, whether by dedication or through prescriptive or long-established use, the only way to terminate the public right of way is by following the statutory procedures set forth in S.C. Code Section Ann. 57-9-10 et seq. (1976, as amended). *S.C. Dep't of Transp. V. Hinson Family Holdings, LLC*, 361 S.C. 649, 655-56, 606 S.E.2d 781, ___ (2004). If West Camp Avenue is a public road, the Drews, nor anyone else, may acquire it through adverse

possession no matter how long they have exercised control of the road. *Chafee c. City of Aiken*, 57 S.C. 507, ___, 35 S.E.2d 800, 802-03 (1900).

CONCLUSION

For the reasons set forth above, the Court should hold that the trial court erred by not holding the road in question a public county road.

Respectfully submitted,



Dean A. Hayes
P.O. Box 11006
Columbia, SC 29211
(803) 765-2968
Attorney for Appellants

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PROOF OF SERVICE

I certify that I have served Appellants' Initial Brief on the following by depositing a copy of it in the United States mail, postage prepaid, on September 16, 2016, addressed as follows:

A. Parker Barnes, Jr., Esq.
P.O. Drawer 1729
Beaufort, SC 29901
(843) 522-2600
Attorney for Sylvester Guess Drew, Jr.
and Debra Drew

Ernest Mitchell Griffith, Esq.
P.O. Drawer 570
Beaufort, SC 29901
(843) 521-4242
Attorney for Colleton County

David M. Swanson, Esq.
Pierce Talmadge MacLennan, Esq.
Haynsworth Sinkler Boyd, PA
134 Meeting Street, 3rd Floor
Charleston, SC 29401
(843) 720-4411
Attorneys for Respondents Sylvester Guess Drew, Jr.
and Debra Drew

September 16, 2016



Dean A. Hayes, SC Bar # 66066
P.O. Box 11006
Columbia, SC 29211
(803) 765-2968
Attorney for Appellants