

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Doyet A. Early, II, Circuit Court Judge
Case No. 2010-CP-15-00247

Ted A. Nettles and Janell B. Nettles,

Appellants,

v.

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

Respondents.

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SC Court of Appeals

INITIAL BRIEF OF RESPONDENT COLLETON COUNTY

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TABLE OF CONTENTS

Table of Authorities.....ii

Statement of the Issue on Appeal.....1

Statement of the Case.....1

Argument.....2

 I. THE CIRCUIT COURT PROPERLY HELD THAT THE ROAD IS A PRIVATE ROAD.....

 II. THE CIRCUIT COURT PROPERLY HELD THAT THE APPELLANTS FAILED TO PROVE THAT THE PRIVATE ROAD WAS DEDICATED TO THE PUBLIC AND THAT THE PUBLIC ACCEPTED THE DEDICATION...

Conclusion.....6

TABLE OF AUTHORITIES

Cases

Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 S.E.2d 289 (2009)..... 4

Cleland v. Westvaco, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993).....5, 6

Fanning v. Stroman, 113 S.C. 495, 101 S.E. 861 (1920).....3

Helsel v. N. Myrtle Beach, 307 S.C. 24, 413 S.E. 2d 821 (1992).....7

Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992)..... 4, 5

Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993).....4

K & A Acquisition Grp., LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252 (2009)....4

Kirby v. Southern Railway, 41 S.E. 765, 768 (1902).....2, 3

State v. Hardell, 11 S.C. 360, 368-69 (1879).....2

Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (1989)..... 4

Townes Assoc. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).....4

Vick v. S.C. Dep't of Transp., 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001).....4

Court Rules

Rule 220(c).....7

STATEMENT OF THE ISSUE ON APPEAL

- I. Did the Circuit Court properly hold that the road in question was a private road?
- II. Did the Circuit Court properly hold that the Appellants failed to prove that the private road was dedicated to the public?

STATEMENT OF THE CASE

This action arises out of a dispute over access to a road. The Appellants, Ted A. Nettles, Jr. and Janell B. Nettles (the "Nettles"), appeal the decision of the Colleton County Circuit Court holding that the Nettles failed to prove, by a preponderance of the evidence, that the dirt road running adjacent to their property is a public road owned by Colleton County, to which they have access.

The Nettles are the owners of a property (the "Property") located off of Camp Road¹ (the "Road") in Colleton County. The co-Respondents, Sylvester Guess Drew, Jr. and Debra Drew (the "Drews"), own properties adjacent to the Nettles' Property. Prior to the Nettles' purchase of the Property, no one had lived on the Property for over fifty (50) years. The Nettles, at trial of this matter on June 29 and June 30, 2015, raised allegations that the Drews blocked the Nettles' access to their Property by erecting a locked gate on the Road, and that this gate on the Road caused the Nettles' Property to be landlocked. At trial, the Nettles sought a determination by the court that the Road was a public road/ public easement, an easement by necessity, an easement implied by prior use, or a prescriptive easement. By Order signed by Judge Doyet A. Early, II on September 18, 2015, Judge Early held that: (1) the Road is a private road; (2) the Road was never dedicated to the public, nor accepted by the public; and (3) the Nettles did not have any easement

¹ The Appellants' Brief refers to the disputed portion of Camp Road as "West Camp Avenue." (Appellant Br. 1, n. 1). Regardless of its name, Respondent agrees that it is undisputed that the portion of Camp Road that is east of the intersection with Polite Road is not at issue in this case. The only portion of Camp Road at issue on appeal is that portion of Camp Road west of the intersection with Polite Road.

rights to the Road. (See J. Early Order, Sept. 18, 2015). As to whether the Road was a public road, Judge Early held that:

[The Nettles] failed to prove that the Road is a public highway or a neighborhood road. The Road is not a 'principal road leading to a market, town, or some place of general resort,' nor is it 'commonly traveled by all types of people.'

(See J. Early Order, 9), and further held that:

The [Nettles] failed to show that either the Drews or their predecessors in title made an express or implied dedication of the Road. The Drews erected a gate across the Road to keep the public out, which is utterly inconsistent with an intention that the Road be dedicated to the public... The [Nettles] are similarly unable to demonstrate that any purported dedicate of the Road was accepted by the Public... the County explicitly denies ownership over the Road or any corresponding responsibility to maintain it.

(See J. Early Order, 10-11).

From this decision, on November 4, 2015, the Nettles filed a motion to alter or amend Judge Early's order and motion to reconsider. (R. p.). On November 23, 2015, the court denied these motions. (R. p.). The Nettles then filed their Notice of Appeal on March 7, 2016. (R. p.). Although the Drews filed a motion to dismiss the Nettles' appeal on April 20, 2016 arguing an untimely appeal, this motion was ultimately denied and the Nettles were allowed to proceed with the filing of their Initial Brief. They did so on September 16, 2016.

ARGUMENT

I. The circuit court properly held that the Road is a private road.

Roads in South Carolina are classified as public highways, neighborhood roads, and private ways. Kirby v. Southern Railway, 41 S.E. 765, 768 (1902). A public highway is "a principal road leading to market, town, or some place of general resort, and is commonly traveled by all kinds of people." State v. Hardell, 11 S.C. 360, 368-69 (1879). A neighborhood road is a road which runs between public roads or places. Id. at 767. For a road to be classified

as a neighborhood road, both termini must be on a public highway or other public place. Fanning v. Stroman, 113 S.C. 495, 101 S.E. 861 (1920) (finding that a road which ends on the edge of a swamp several hundred yards from a landing is not public). In certain situations, a road can become a neighborhood road by prescription. In order for a Plaintiff to prove that a road is public by prescription, the Plaintiff must show that the road “was used by the public generally by all persons for public purposes, as a matter of right and not of favor, for an uninterrupted period of 20 years or more.” Fanning, 113 S.C. 495, 101 S.E. 861; State v. Sartor, 33 S.C.L. (2 Strob.) 29, 32 (1847). A private way is a road through privately owned property and is not used by the public, though individuals may develop rights to use private ways (i.e., through prescriptive use). See Kirby, 41 S.E. at 767.

The Circuit Judge correctly held that the Plaintiffs failed to prove the Road is a public highway or a neighborhood road. None of the evidence presented at trial showed that the Road was one “leading to a market, town, or some place of general resort,” nor is it “commonly traveled by all kinds of people” so as to make it a public highway. Moreover, the Road cannot be classified as a neighborhood road because it does not terminate in another public road or public place. Instead, the Road ends on property owned by the Drews. This fact was not disputed at trial. For the past twenty-eight (28) years, the Drews have maintained a locked gate across the Road in order to keep the public off of their property. (R. p.). The Road has not been used by the general public or been traveled often by all kinds of people during that time. (R. p.). There has been no County maintenance of the Road past the locked gate. (R. p.). Furthermore, the only evidence provided at trial showing a general use of any kind was Herman Miller’s statements that the county scraped the Road and there was a school bus route on the Road for seventeen (17) years (R. p.). This testimony does not provide the required twenty (20) years of

uninterrupted general public use “by all persons for public purposes, as a matter of right and not of favor” necessary to prove a public road by prescription. As such, the Road is a private way.

II. The circuit court properly held that the Appellants failed to prove that the private Road was dedicated to the public and that the public accepted the dedication.

“The determination of whether a roadway has been dedicated to the public is an action in equity.” K & A Acquisition Grp., LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 256 (2009). “On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence.” Buffington v. T.O.E. Enterprises, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009) (*citing* Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). “While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility.” T.O.E. Enterprises, 383 S.C. at 391, 680 S.E.2d at 290 (*citing* Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)).

The circuit court properly held that the Road is private and this decision should not be disturbed on appeal. The Nettles had the burden of proving that the Road was public, yet they failed to prove, by a preponderance of the evidence, that this was the case. To prove that the Road was dedicated to the public, the Nettles were required to show that “(i) the person who owned the land intended to dedicate it to a public use; and (ii) that the dedication was accepted by the public.” Hoogenboom v. City of Beaufort, 315 S.C. 306, 317, 433 S.E.2d 875, 883 (Ct. App. 1992). “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 public use.” Vick v. S.C. Dep’t of Transp., 347 S.C. 470, 477-78, 556 S.E.2d 693, 697-98 (Ct. App. 2001); See also Horry County v.

Laychur, 315 S.C. 364, 368, 434 S.E.2d 259, 261 (1993) (holding that an owner's intent to dedicate his property to public use must be expressed in a positive and unmistakable manner). The intent to dedicate may be implied, but only in situations where the owner has allowed lengthy public use of his land; the occasional permissive or sporadic use of the property is not sufficient to show implied dedication. See Cleland v. Westvaco, 314 S.C. 508, 511, 431 S.E.2d 264, 266 (Ct. App. 1993). "Dedication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent, and convincing." Hoogenboom, 315 S.C. at 317, 433 S.E.2d at 883.

The Nettles failed to provide evidence at trial proving dedication of the Road. The evidence showed that the Drews never made an express or implied dedication of the Road to public use² and, on the contrary, made it quite clear that the Drews did not wish for others to use the Road. (R. p.) For the past twenty-eight (28) years, the Drews have maintained a locked gate across the Road in order to keep the public off of their property. (R. p.) Mr. Drew testified that he only unlocks the gate to enter or exit his property. (R. p.) In fact, when the Nettles first looked at the Property available for purchase, they had to ask permission of Mr. Drew in order to enter through the locked gate. (R. p.) Furthermore, the undisputed testimony of Colleton County employees was consistent with this being a private Road, which the County did not maintain or travel on. (R. p.) Walter Gene Whetsell, a surveyor with over fifty (50) years of experience, also opined that neither the Drews, nor their predecessors, ever dedicated the Road to public use. (R. p.)

The Nettles, in their Initial Brief, rely on three pieces of evidence. First, the Nettles cite to a number of deeds and plats obtained from the Colleton County Register of Deeds. These

² Furthermore, the Record reflects that no other party professes to be the owner of the Road or has ever expressed an intention to dedicate the Road to public use. (R. p.)

documents range from the years 1880 to 1973. (R. p.) The 1973 deed records the properties' transfer to Sylvester Drew, Sylvester Drew, Jr.'s father. (R. p.) The Nettles' argument on appeal is that:

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 [the Road] is a public county road and is not owned by either of the Drews.

(Appellant Br. 6). But this logic does not prove the elements required to dedicate a private road. Assuming, *arguendo*, that the Drews are not the owners of the Road, the Nettles fail to prove that *any owner* has ever clearly and unequivocally dedicated the Road to the public. Furthermore, the metes and bounds expressed in a deed are merely points of reference; they do not show an intention by the owner to dedicate the Road to public use.

Secondly, the Nettles provide testimony of Herman Miller, a previous resident of the Nettles' Property. Mr. Miller resided on the Property from 1936 to 1953, and he testified that for those seventeen (17) years, the county scraped the Road and there was a school bus route on the Road. (R. p.) Mr. Miller's knowledge of the Road's use ends in 1953. This testimony merely shows that some owner allowed access to the Road on occasion; it does not prove positively and unequivocally that the Road was dedicated for public use. See Cleland v. Westvaco, 314 S.C. 508, 511, 431 S.E.2d 264, 266 (Ct. App. 1993) (holding that the occasional permissive or sporadic use of the property is not sufficient to show implied dedication). Moreover, the testimony of Colleton County employees proves that the County considers this a private Road. (R. p.).

The Nettles' final argument relies on County Atlases and other similar documents showing the Road as a county road. (R. p.) However, similar to the deeds discussed above, an Atlas description does not prove the elements necessary for dedication of a private road. No

evidence was offered at trial proving that the owner of the Road dedicated the Road to public use; therefore, any Atlas specifying the Road as a county road is irrelevant.

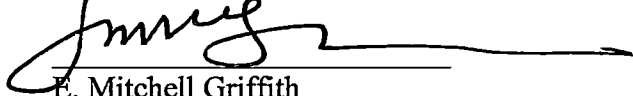
There must also be an express or implied public acceptance of the property offered for dedication, made within a reasonable time. Helsel v. N. Myrtle Beach, 307 S.C. 24, 26-27, 413 S.E. 2d 821, 823 (1992). The law does not require a formal acceptance, but acceptance must at least be implied by the public's continuous use of the property, or the public authority's use, repair work or work on the street. Id.

The Plaintiffs presented no evidence at trial indicating an acceptance of the Road by the public. On the contrary, Walter Whetsell testified that no part of the Road was ever accepted by Colleton County, and all of the County's employees testified that the public wants no responsibility for the Road's maintenance and explicitly denies ownership of the Road. (R. p.):

CONCLUSION

For the reasons stated, the circuit court properly held that the Road is a private road and that the Nettles failed to prove the elements of their case. Accordingly, Respondent Colleton County asks the Court to affirm the circuit court's order holding that the Road is a private road. Pursuant to Rule 220(c), SCACR, Respondent Colleton County asks the Court to affirm on any ground appearing in the Record on Appeal. Additionally, Respondent Colleton County adopts by reference all relevant portions of the Respondents, Sylvester Guess Drew, Jr. and Debra Drew's Initial Brief.

Respectfully submitted,



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November 16, 2016

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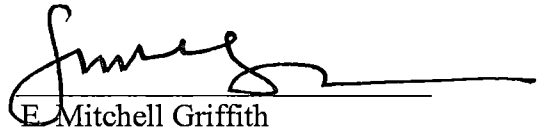
I certify that on November 16, 2016, I served *Initial Brief of Respondent Colleton County* and *Respondent Colleton County's Designation of Matter* on the following by depositing a copy in the United State Mail with postage prepaid and addressed as follows:

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RE: Nettles v. Colleton County et. al.
Civil Action No: 2016-000477
GS&L File No: 1247-001

Dear Ms. Kitchings:

Please find enclosed the original and one copy each of *Initial Brief of Respondent Colleton County*, *Respondent Colleton County's Designation of Matter*, and *Proof of Service* in this case. I would appreciate you filing the originals and returning the clocked copies to me in the enclosed envelope.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,

E. Mitchell Griffith

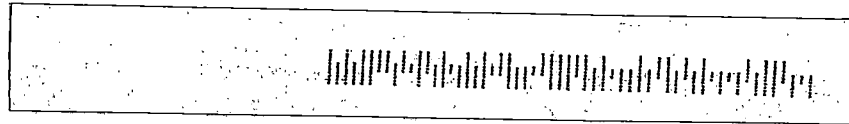
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Enclosures

cc: A. Parker Barnes, Jr.
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