THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
In the Circuit Court

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SC Court of Appeals

Doyet A. Early, III Circuit Judge

Case No. 2010-CP-15-0247
Appellate Case No. 2016-000477

Ted A. Nettles and Janell B. Nettles, ... Appellants,

v.

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

FINAL BRIEF OF RESPONDENTS SYLVESTER GUESS DREW, JR. AND DEBRA DREW

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STATEMENT OF THE ISSUE ON APPEAL

1. Did the lower court err in determining that the Road in question was a private road, and that the Road was not dedicated to the public?[1]

[1] The lower court also found that the Appellants do not have any easement rights to the Road. Appellants have not challenged this ruling. Therefore, Appellants' have abandoned this issue, it is the law of the case, and this Court should affirm the lower court's ruling. *See Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) (noting that failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). To the extent the issue is properly before the court, Respondents' cite *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015). As the lower court stated, "the *Bundy* case ... is factually and legally on point with this case." (Final Order, p. 14, ¶ 1, R. p. 14, lines 3-4). Pursuant to *Bundy*, the lower court's decision should be affirmed.

STATEMENT OF THE CASE

This appeal concerns whether a dirt road running through the Respondents' property and adjacent to Appellants' property ("Road") is a private road owned by the Respondents' or a public county road accessible for use by the Appellants. Appellants Ted A. Nettles and Janell B. Nettles ("Appellants" or "Nettles") filed the Summons and Complaint in this action on February 25, 2010. (R. at 32). The Nettles sought a declaratory judgment from the Court that they could use the Road to access their property. (R. at 34).

On March 19, 2010, Appellants filed a Motion for a Temporary Restraining Order to access their property by use of the Road, which was heard on April 21, 2010. (R. at 4, lines 11-12). Employees of the Colleton County Public Works Department provided testimony that the County does not claim or maintain the Road. (R. at 4, lines 12-13). On the basis of this testimony, Appellant's motion was denied. (R. at 4, lines 13-14).

The case proceeded to trial before Doyet A. Early, II, on June 29th and June 30th, 2015. (R. at 1.). By order filed on September 21, 2015, Judge Early found that (1) The Road is a private road owned by the Respondents; (2) the Road was never dedicated to the public; and that (3) the Nettles did not have any easement rights to the Road. (R. at 17-18). The Nettles filed a motion to alter or amend the order and a motion to reconsider on November 4, 2015. (R. at 515). By form 4 order filed on November 23, 2015, the Nettles' motions were denied. (R. at 19). Appellants filed their notice of intent to appeal on March 7, 2016.

STANDARD OF REVIEW

"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 (2001). Although this Court may find facts in accordance with its own view of the preponderance of the evidence, "this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "Moreover the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings. *Id.* at 387-88, 544 S.E.2d at 623.

FACTS

In 2009, the Nettles contracted to purchase a 21.07 acre parcel of heirs' property in Colleton County. (R. p. 2, line 1). Prior to the purchase, no one had lived on the property for over fifty (50) years and the Nettles required the seller to file a quiet title action. (R. p. 2, lines 3-4, 18-19). The Nettles' property is a landlocked parcel and is adjacent to the subject Road owned by the Respondents Sylvester Guess Drew, Jr. and Debra Drew ("Respondents" or "Drews"). (R. p. 2, lines 6-9).

The Road runs through the interior of the Drews' property, and it has been gated for over twenty-eight (28) years. (R. p. 2, lines 1-12). Respondent Colleton County ("County") maintains a road known as Camp Lane, which extends from a nearby highway, Hope Plantation Lane, to the Drews' gate, where the county-maintained road ends. (R. p. 2, lines 10-12). The Road continues on the other side of the gate and ends on the Drews' property. (R. p. 2, lines 10-12).

At trial, several County employees testified about their knowledge of the Road. William Washington, the County Public Works Director and a County employee for 39 years, testified that the County performed no maintenance beyond the Drews' gate, and that the Road was private beyond the Gate. (R. p. 3, lines 12-14). Christopher Varnadoe, the County supervisor for roads and bridges, testified that the County was not responsible for grading the Road inside the gate because it was private. (R. p. 3, lines 15-18). He further testified that the Road was not in the County system of roads and bridges as it was known to be private. (R. p. 3, lines 19-20). Finally, Donna Thomas, who coordinates addresses for the County's emergency services, testified that the Road beyond the gate was a private road. (R. p. 3, lines 21-22).

Walter Gene Whetsell, a surveyor with fifty (50) years' experience and also a member of Colleton County Council, also testified at trial that the Road was private. (R. p. 4, lines 1-3). Mr. Whetsell had conducted many surveys of the entire property was familiar with both the Nettles' property and the Drews' property. (R. p. 4, lines 4-6). Mr. Whetsell testified that the Road was in the middle of lands originally owned by Mr. Drew's grandfather and was constructed by Mr. Drew's grandfather. (R. p. 4, lines 6-7).

In response, Appellants offered the testimony of Herman Miller, who lived on the Nettles' property from 1936 to 1953. (R. p. 4, lines 18-19). Mr. Miller testified that during that limited period, the County "scraped" the Road,[2] the school bus accessed the Road to pick up children, and that he and his family used the Road. (R. p. 4, lines 19-20). Mr. Miller could not testify as to anything after 1953 when he left the Nettles' property. (R. p. 4, lines 18-19).

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[2] The alleged scraping down by the County was more fully explained by Mr. Drew's testimony. On an occasional basis, Mr. Drew would pay the grader from the County $25 to come scrap the Road beyond Camp Lane. (R. at 168, lines 13-25). This occurred on a limited basis, thirty or forty years ago. (*Id.*) Since about 1973, Mr. Drew and his family exclusively scraped the road and the County did not. (*Id.*)

Prior to closing, the lack of access to the property under contract was known to the Nettles and was the subject of much conversation between the Nettles, their legal counsel, the real estate agents, and the title insurance company. (R. p. 5 lines 14-22 – p. 6, lines 1-8). A series of emails demonstrate that the Nettles were advised by counsel that they would need to come to an agreement with the Drews because the Drews owned the private Road. (R. p. 5, lines 9-12). The Nettles' contract to purchase the property contained a contingency clause for access that provided the sale was contingent on receiving approval from the Drews to have unrestrained access to their property. (R. p. 5, lines 3-6).

On October 14, 2009, the Nettles' attorney informed them that an easement would be required to gain access to the property, and that the Nettles would not be purchasing marketable title if there was a question regarding access. (R. p. 6, lines 4-6, 9-13). On November 6, 2009, the Nettles' counsel informed them that the Road was private. Janell Nettles sent multiple emails to her real estate agents and attorneys indicating that she understood that the road was private and that access was an issue. (R. p. 6, lines 14-21).

Despite the above representations from their counsel that the Road was private, the Nettles purchased the property with full knowledge that there was no access. (R. p. 7, lines 18-19). The Nettles found a new attorney to represent them at closing, and obtained a title insurance policy dated December 4, 2009 that specifically stated "[r]ights of access to and from the lands insured hereby are neither insured nor guaranteed, notwithstanding any insuring provision contained elsewhere in the commitment/policy." (R. p. 7, lines 5-6, 11-14).

Both before and after the purchase, the Nettles met with the Drews and requested access via the Road. (R. p. 2, lines 19-20). The Drews repeatedly advised that the Nettles could not use the Road to access their property. (R. p. 2, line 20 – p. 3, lines 1-2). The Drews offered alternate

locations for the Nettles to access their Property, but the Nettles insisted that the Drews pay for road construction on any of those alternate routes. (R. p. 3, lines 3-6). With actual knowledge of both the lack of access to the property and the absence of any recorded dedication or easement for such access, the Nettles elected to purchase the property.

The Nettles commenced this action on February 25, 2010 seeking access to their property by way of the Road. (R. at 32). Specifically, Appellants' alleged that the Road is a public or county road, a public neighborhood road, or if not, that they are entitled to an easement for access by necessity, prescription, or prior use. (R. at 2, lines 15-17). On April 22, 2010, the court filed an order denying the Nettles' motion for a temporary restraining order to prevent the Drews from denying the Nettles access to the Road. (R. at 4, lines 13-14). The case was tried before Doyet A. Early, II, on June 29th and June 30th, 2015. (R. at 1). By order filed on September 21, 2015, Judge Early found that (1) The Road is a private road owned by the Respondents; (2) the Road was never dedicated to the public; and that (3) the Nettles did not have any easement rights to the Road. Appellants filed this present Appeal. (R. at 17-18).

ARGUMENT

I. The Road is a Private Road.

The lower court found, as an initial matter, that the Road is a private way. Appellants apparently concede this point, but argue that the once private way was dedicated to the public. Since Appellants' brief is unclear as to whether they dispute this finding, Respondents will briefly address the issue.

Roads in South Carolina are classified as public highways, neighborhood roads, and private ways. *Kirby v. Southern Railway*, 41 S.E. 765, 768 (S.C. 1902). Public highways and neighborhood roads are able to be used by members of the general public. 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. Harden,* 11 S.C. 360, 368-69 (S.C. 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,* 101 S.E. 861, 862 (S.C. 1920) (finding that a road which ends on the edge of a swamp several hundred yards from a landing is not public); *see also State v. Washington* 61 S.E. 896, 897 (S.C. 1908) (holding that a church or mill constitutes a public place).

In certain situations, a road can become a neighborhood road by prescription. The test utilized to determine the existence of a neighborhood road by prescription is "general use by all persons, for public purposes, for an uninterrupted period of twenty years or more." *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 trial court found, based on the overwhelming evidence presented by the Respondents' at trial, that the road was private. First, the road is not a public highway because it is not a "principal road leading to a market, town, or some place of general resort." *See State v. Harden,* 11 S.C. 360, 368-69 (S.C. 1879). The evidence is undisputed that the Road dead-ends in the middle of the Drews' property. Appellants offered no evidence to suggest otherwise. Nor is the Road "commonly traveled by all kinds of people." *Id.* The evidence is undisputed that the road is gated and the gate remains locked, except for when Mr. Drew enters and exits his property. Other people (with limited exceptions of family, friends, and specific license holders) do not use and are not permitted to use the Road.

Second, the Road cannot constitute a neighborhood road because both termini are not on a public highway or other public policy. *See id; Fanning v. Stroman,* 101 S.E. 861, 862 (S.C. 1920) (finding that a road which ends on the edge of a swamp several hundred yards from a landing is not public). Thus, the Road is a private way.

II. The Road Was Never Dedicated to the Public

Appellants argue on appeal that the trial court erred in finding that the road was not dedicated to the public. The lower court found that "Plaintiffs offered no evidence whatsoever that the Road has been dedicated nor accepted by the County." (Final Order, p. 9, R. p. 9, lines 15-16).

To prove a dedication of a road to the public, the party claiming dedication must 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,* 433 S.E.2d 875, 883 (S.C. Ct. App. 1992). "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 433, S.E.2d at 317.

In order to show that an owner intended a piece of land to be dedicated, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. *Horry County v. Laychur*, 434 S.E. 2d 259, 261 (S.C. 1993). In certain situations, the intent to dedicate may be implied from allowing lengthy public use of the land. *Cleland v. Westvaco Corp.,* 431 S.E. 2d 264, 266 (S.C. Ct. App. 1993); *see also Cnty. Of Darlington v. Perkins,* 239 S.E. 2d 69, 71 (S.C. 1977) (finding that dedication was implied when the public used the dirt road continuously for fifty years without interference by the landowners). Absent an express grant, one who asserts a dedication must demonstrate clear and unequivocal conduct by the

landowner indicating their intention to create a right in the public to use the property. *Derby Heights, Inc. v. Gantt Water & Sewer District*, 116 S.E.2d 13, 16 (S.C. 1960).

Once a claimant has established that a landowner made a dedication of a road to the public, the claimant must also show that the public accepted the dedication. *Hoogenboom*, 433 S.E.2d at 883. Acceptance by a public authority can be expressed or implied, and must be made within a reasonable time. *Helsel v. City of N. Myrtle Beach*, 413 S.E.2d 821, 823 (S.C. 1992). Acceptance of an offer of dedication may be recognized through a public authority's using, repairing, or maintaining the streets. *Id.* (finding that acceptance by the City was implied when the public had used the road continuously, maintained the road, and policed the streets); *see also Boyd v. Hyatt*, 364 S.E.2d 478, (S.C. Ct. App. 1988) ("Public use of road for over thirteen years... is evidence of acceptance by the public of the dedication.").

The record contains no evidence that the Drews (or their predecessors in title) made an express or implied dedication of the Road. In fact, the Drews' actions with respect to the Road suggest just the opposite – that they intended for the public ***not*** to use the Road. The Drews erected a gate to keep the public out over twenty-eight (28) years ago. The gate is locked and is only unlocked when Mr. Drew enters or exits his property. Mr. Drew licensed the right to use the Road to specific persons along with hunting rights, further showing his intent that the Road be used only with his permission.

Appellants' brief mentions various plats and deeds that refer to the existence of the Road. (*See* App. Brief, pp. 5-6). Although these records were entered as exhibits at trial, Appellants did not argue or otherwise reference them at trial.[3] Thus, Appellants cannot argue for the first

[3] For instance, there is no proof in the record as to which deeds reference Camp Lane or Camp Road inside or outside of the Drews' locked gate. Appellants' trial counsel offered no testimony and/or no argument as to what deeds, if any, specifically stated that Camp Lane was a public road. The only county roads referenced in the Deeds referred to Polite Road and/or Camp Road outside of the Drews' gate, both of which are public roads.

time on appeal "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (*quoting Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

Further, mere reference to the Road has no impact on whether the road is public or private. These public records do not indicate anywhere that the Road itself is public. Appellants also argue that because the Drews' deeds to their property state that the parcels are "bounded" by Camp Lane, "the most logical interpretation would be that the property lines for both parcels end at the edge of Camp Avenue. This indicates [that the Road] is a public county road and is not owned by either of the Drews." (App. Brief, p. 6). This argument has no merit for two reasons. First, the deeds reference Camp Avenue generally and not specifically the Road in question. Second, mere reference to Camp Avenue in the deeds do not make the Road in question public. The references are simply that – points of reference delineating the property. Such references cannot be used as evidence of intent to dedicate to the public.

Appellants' brief argues that the Drews' intent to dedicate the Road can be implied through previous public use of the Road. The lone evidence cited in support of this position is the testimony of Herman Miller. In particular, Mr. Miller testified during the time that he lived on the Nettles' property, from 1936 to 1953, the County "scraped" the Road, the school bus accessed the Road to pick up children, and that he and his family used the Road.

Appellants are correct that intent to dedicate may be implied in limited circumstances where there is <u>long</u> public use of the land *to which the owner acquiesces*. *See Hoogenboom v. City of Beaufort*, 315 S.C. 306, 317, 433 S.E.2d 875, 883 (Ct. App. 1992) (emphasis added).

Such limited and sporadic use of the Road over sixty (60) years ago, even if true,[4] is not the type of "long" public use to which dedication can be implied. *See Hoogenboom v. City of Beaufort*, 315 S.C. 306, 317, 433 S.E.2d 875, 883 (Ct. App. 1992). Moreover, Appellants provided no evidence that the Drews acquiesced. As Judge Early found, "[n]o witness testified that the Drews were ever put on notice that any use of the Road inside the gate was adverse."

As the court in *Hoogenboom* made clear, "dedication is an exceptional mode of passing an interest in land, and the proof of dedication must be strict, cogent, and convincing," and "[t]he acts proved must not be consistent with any construction other than that of dedication." *Id.* As more fully described above, the acts proven at trial – that the Drews erected and maintained a gate to keep out the public – clearly indicates a construction other than dedication.

Even if intent to dedicate could be implied, which it absolutely cannot, there is not a shred of evidence in the record that the public accepted such dedication. Acceptance (like intent to dedicate) can be express or implied. Appellants do not contend that there was any express acceptance; instead, Appellants argue implied acceptance. The only way to show implied acceptance is "through a public authority's using, repairing, or working the streets." *See Helsel v. City of N. Myrtle Beach*, 413 S.E.2d 821, 823 (S.C. 1992) (finding that acceptance by the City was implied when the public had used the road continuously, maintained the road, and policed the streets); *see also Boyd v. Hyatt*, 364 S.E.2d 478, (S.C. Ct. App. 1988) ("Public use of road for over thirteen years . . . is evidence of acceptance by the public of the dedication.").

Several County representatives testified unequivocally at trial that the County does not claim, maintain, or have any other involvement with the Road. Appellants do not even contend that the public uses the Road. Appellants' lone evidence of implied acceptance is the testimony

[4] Judge Early noted that Mr. Miller's testimony was rebutted by that of Mr. Drew, who testified that private landowners could pay the County a small fee to have their roads scraped.

of Mr. Miller. However, Mr. Miller's testimony, even if true, does not establish implied acceptance. First, Mr. Miller could not testify as to anything happening after 1953. Second, although Mr. Miller testified that the County scraped the road prior to 1953, this testimony was rebutted by Mr. Drew, who testified that at that time private landowners could pay the County a small fee to have their roads scraped.

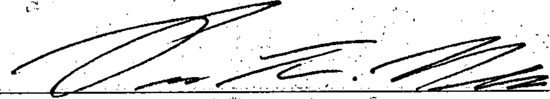
Finally, to the extent Appellants try to argue on reply that the trial court erred in finding no easement by prescription or prior use, Respondents will briefly address the issue. Appellants' provide no testimony whatsoever showing any adverse use of Camp Lane. The Drews maintained a secure gate for 28 years, precluding adverse use for that time. Moreover, Appellants introduced no evidence that they are in privity of estate with predecessors in title who meet all the requirements of a prescriptive easement as required by the *Bundy* decision. *See Bundy v. Shirley*, 412 S.C. 292, 313-14 772 S.E.2d 163, 174-75 (2015). As to an easement implied by prior use, Appellants conceded at trial that they had failed to prove the necessary elements. (Final Order, p. 17, R. p. 17, line 6).

<u>CONCLUSION</u>

Dedication of a road to public use "is an exceptional mode of passing an interest in land." *Hoogenboom,* 315 S.C. at 433, S.E.2d at 317. Accordingly, South Carolina courts require that a plaintiff seeking to demonstrate dedication prove it by "strict, cogent, and convincing" evidence." *Id.* Not only did Appellants fail to meet this exceptional burden of proof at trial, in the words of the lower court, they "offered no evidence whatsoever." (Final Order, p. 9, R. p. 9, line 15).

Dated: March 30, 2017

Respectfully submitted,



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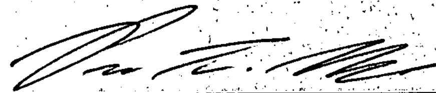
CERTIFICATE OF COUNSEL

I hereby certify that the Respondents Sylvester Guess Drew, Jr. and Debra Drew's Final Brief complies with Rule 211(b).

Respectfully submitted,



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