

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

County of Florence and Thomas J. Hewitt,

Plaintiffs,

vs.

Carol Eagerton,

Defendant.

FILED IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-21-3192

2017 NOV -7 PM 3:42

DORIS POOL

RECEIVED

AMENDED ORDER

DEC 08 2017

SC Court of Appeals

This action was filed on December 12, 2013, by Plaintiffs, seeking injunctive relief against Defendant and a declaration that Hewitt Cemetery Road is a public road under the theory of prescriptive easement and/or public dedication. This matter came before the Court for a non-jury trial on January 11, 2017. After carefully considering all of the testimony and exhibits introduced along with the arguments and submissions of counsel, and after reviewing the relevant law, the Court makes the following findings of fact and conclusions of law.

I. BACKGROUND AND PROCEDURAL HISTORY

This action was initiated by Plaintiffs after Defendant erected locked gates across Hewitt Cemetery Road along her property lines in order to block public access and use of the road at various times between 2011 and 2013. Plaintiffs are seeking a permanent injunction and restraining order prohibiting Defendant's interference with the road. Defendant claims the road is private and she has a right to prohibit public use, while Plaintiffs contend it is a public, county-maintained road. The issue in this case is whether Florence County and the public acquired a prescriptive easement and/or an easement by dedication to the road in question.

Defendant is the owner of three adjacent tracts of land in Florence County, South Carolina: a 20.9 acre tract ("Tract A"), a 40.7 acre tract ("Tract B"), and a 12.51 acre tract ("Tract C"). Hewitt Cemetery Road forms the eastern boundary to Tracts A and C, and the western boundary to Tract B. It runs perpendicular to Cato Road to the North and Branch Road to the

RECEIVED A TRUE COPY
Doris Pool Ottana
CLERK OF COURT C.P. & C
FLORENCE COUNTY, S.C.

South. The northern portion of Hewitt Cemetery Road from Defendant's property to Cato Road is state maintained and is not in dispute. The rest of the road runs south to Branch Road.

Defendant acquired the three individual properties at different times. On December 11, 1981, Defendant and her husband purchased Tract A from Willie Mae Painter. Pls. Ex. 16. The map depicting the parcel shows the road in question as "Center of Road Property Line," the center of which formed the eastern boundary to the property. On October 21, 1988, Defendant and her husband purchased 40.7 acres ("Tract B") adjacent to and east of Tract A, from Willie Mae Painter, and bounded on the west by "Dirt Road - The Property Line." Pls. Ex. 15. On April 4, 2000, Defendant and her husband purchased 12.5 acres from Roberta Griffin ("Tract C"), which is adjacent to Tract A from the south and Tract B from the west. The plat depicting the parcel shows the eastern boundary of the property as "(County Maintained) Hewitt Cemetery Road (Dirt)."¹ Pls. Ex. 17.

Throughout its lifetime, Hewitt Cemetery Road has been called by various names, and has been designated differently on plats recorded in the Office of the Clerk of Court:²

- "Old Ave" (plat dated April 30, 1954, prepared by Ervin Engineering Co.)
- "Old Avenue" (plat dated January 31, 1968, prepared by Ervin Engineering Co.)
- "Hewitt Cemetery Rd." (plat dated October 15, 1976, prepared by Ferrell Prosser, Registered Surveyor)
- "Dirt Road" (plat dated October 17, 1988, prepared by Ervin Engineering Co.)
- "Hewitt Cemetery Road" (plat dated February 26, 1992, prepared by Lind Hicks & Associates)
- "County Maintained Road" (plat dated July 1, 1993, prepared by Ervin Engineering Co.)
- "Hewitt Cemetery Road . . . (County Maintained)" (plat dated November 16, 1998, prepared by Nesbitt Surveying Co.)
- "Hewitt Cemetery Road . . . (County Maintained)" (plat dated August 10, 1999, prepared by Nesbitt Surveying Co.)

¹ On April 4, 2002, Defendant acquired her husband's interest in all three tracts.

² It is unclear when the County officially began calling the road "Hewitt Cemetery Road," but several witnesses testified at trial that the latest date was in the late 1990's, when E-911 was implemented in Florence County.

Additionally, records from the Florence County Department of Public Works from the 1980's refer to the road as "Hayward Hewitt Road" and "Hewitt Road."³

At trial, Plaintiffs called multiple witnesses to testify regarding the historical county maintenance of Hewitt Cemetery Road, along with its longstanding public usage. Mr. Carlisle Gregg, Director of Florence County Public Works, testified that Florence County has been maintaining Hewitt Cemetery Road since he began working there in 1972 and had been maintaining Hewitt Cemetery Road prior to that time. Although earlier records had been partially destroyed due to flooding, the records the County was able to produce indicate that from 1981 forward, the County has been regularly maintaining the road in question. Hundreds of individual, handwritten work forms, spanning from October of 1981 through July of 1998, indicate that the road in question was being plowed or otherwise maintained.⁴ Pls' Ex. 19. Two sets of spreadsheets provided by the County, generated every month from July 1999 to December 2001 and January 2002 to June 2013, log the total number of plows performed on a geographical area of roads, including "Hewitt Cem. Rd." Pls' Exs. 20 and 21. These records show that the road in question was generally plowed at least one per month by the County. There was also testimony that when a perpendicular road, Branch Road, was maintained, the County would also complete work on the road in question as part of its scheduled maintenance of the area. According to Mr. Gregg, the County installed a pipe along Hewitt Cemetery Road on July 6, 1993, and patches potholes along the road on a regular basis. Importantly, Mr. Gregg also testified that the County of Florence expended over \$23,000.00 rockering Hewitt Cemetery Road in 2004.

³ At trial, Reggie Sanders, a former employee of the Florence County Tax Assessor's Office and current employee of Florence County GIS Mapping, identified seven (7) aerial photographs of the area in question taken from 1965 through 2015. All of these aerial photographs showed, in clear outline, Hewitt Cemetery Road. The footprint of the road has remained consistent throughout the years.

⁴ Mr. Gregg recalled assigning names and numbers to various unidentified roads in order to inventory them from 1989-1990; before that, road names were memorized by employees and shared with each other to form a sort of historical institutional memory.

Mr. Gregg further testified that only a portion of two roads in Florence County have been deeded to the County of Florence. The other approximately 1,200 roads are designated public roads without a written deed or easement. Mr. Gregg explained that the County has in place a procedure for County roads to be closed, and Defendant made an application to close Hewitt Cemetery Road prior to this lawsuit; however, because her application was opposed by members of the public, the request was denied.⁵

Mr. Jerry Allen, Area Supervisor for Florence County Public Works, testified that he operated a road plow for the County in the early 1980s. One of the areas he regularly plowed was Hewitt Cemetery Road, a dirt road at that time, approximately two times per month. He recalled seeing school buses and other vehicles on the road when they would plow it. Mr. Allen also recalled installing a pipe in the County portion of Hewitt Cemetery Road at the request of Defendant's ex-husband and predecessor in title to a portion of the property now owned by Defendant.

Several individuals who live in the area of Hewitt Cemetery Road—Thomas Hewitt, David Hewitt, Joseph Jones, Robbie Meggs, Mike Wood, Bryan Huggins, Joseph "Bubba" Jones, Dorothy Jones, and Jerry Allen—testified as to the public's regular use of Hewitt Cemetery Road. Thomas Hewitt is an octogenarian, Robbie Meggs, Joseph Jones, and Dorothy Jones are septuagenarians, and David Hewitt is a sexagenarian. All of the witnesses named above testified that they, their families, and other members of the public have used Hewitt Cemetery Road as far back as they can remember, from their early childhood. All of the above witnesses also testified they had witnessed the County of Florence maintaining Hewitt Cemetery Road for all of their lives, and Robbie Meggs stated specifically he does not recall there ever being a gap in county

⁵ This Court finds it noteworthy that Defendant chose to avail herself of county road closure process. Defendant further testified that she sent a letter on November 14, 2011 (Def. Ex. 12) to the then County Administrator, Thomas Robinson, requesting that the County close Hewitt Cemetery Road. She sent a subsequent letter to Mr. Robinson (Def. Ex. 13) again asking the County to close Hewitt Cemetery Road. If Defendant actually believed she was the true owner of the road, it would have been unnecessary for her to go through the petition process and air her grievances with County officials.

maintenance. Defense witnesses Maria Cooper, David Garrison, and Donna Anderson also testified to observing public use of Hewitt Cemetery Road.

II. DISCUSSION

A. Dedication

"The determination of whether a roadway has been dedicated to the public is an action in equity." *Mack v. Edens*, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995). "Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Second, there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication." *Id.* The burden of proving dedication is upon the party claiming it. *Anderson v. Town of Hemingway*, 269 S.C. 351, 354, 237 S.E.2d 489, 490 (1977).

"No particular formality is necessary to effect a common law dedication." *Boyd v. Hyatt*, 294 S.C. 360, 364, 364 S.E.2d 478, 480 (Ct. App. 1988). "An intention to dedicate may be implied from the circumstances." *Id.*

South Carolina law recognizes two types of implied dedication: "one where the question of implied dedication arises from the sale of land with reference to maps or plats; the other when the dedication arises . . . from an abandonment to or acquiescence in public use." *Shia v. Pendergrass*, 222 S.C. 342, 347, 72 S.E.2d 699, 701 (1952). "A dedication need not be made by deed or other writing, but may be effectually made by acts or declarations. 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 874, 883 (Ct. App. 1992).

However,

dedication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent, and convincing. The acts proved must not be consistent with any construction other than that of a dedication, and dedication may not be implied from the permissive, sporadic, and recreational use of property. The

record must contain evidence the owner of the property clearly, convincingly, or unequivocally intended to dedicate the property for public use.

Mack, 320 S.C. at 239, 464 S.E.2d at 126.

"As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property." *Id.* "The use, repair, and working of the streets by public authorities is a mode of acceptance." *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 326, 487 S.E.2d 187, 192 (1997); *see also Darlington Cnty. v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977) (finding County maintenance of a road to include ditching, cleaning, plowing, and installing a drainage system was proof of acceptance of a public dedication). "It is the duty of the fact finder to determine whether or not the public dedication has been accepted." *Id.* at 327, 487 S.E.2d at 192.

i. **Acceptance of the Public Dedication**

Here, the record indicates a historical use of the road by the public, as well as historical maintenance of the road by the County. Jerry Allen, a forty-year employee of Florence County Public Works, testified that Hewitt Cemetery Road was a dirt road in the early 1980s. In his role as Area Supervisor, Mr. Allen's job is to perform maintenance on County roads. He testified that when he and his team would plow Hewitt Cemetery Road, he would see school buses and other cars using the road. He himself used the road to ride dirt bikes when he was younger, and even drove school buses down the road when he was a bus driver. Thomas Hewitt, a lifelong resident of the area, testified that his family has always used Hewitt Cemetery Road ever since he was a child, and he uses it at least once a month to this day. He also stated that his fifty-two-year-old son has worked for the County's road maintenance division for twenty years, and would personally plow that road before it was rocked. David Hewitt, a life-long resident of the area for nearly seventy years, recounted that the County would scrape Hewitt Cemetery Road when he

was a child, and that he has seen light traffic on the road. Robbie Meggs, a resident of the area for the past forty-five years, testified that he uses Hewitt Cemetery Road as much as twice daily and has been doing so all his life. His grandfather owned land near the Hewitt Cemetery Road, and he remembered driving mules along the road in the 1950s. David Bryan Huggins, another local life-long resident of the area, testified that he remembers seeing the County plow Hewitt Cemetery Road when he was a young child and that he still uses the road to access Hewitt Cemetery. Joseph Jones, another lifelong resident of the area for more than seventy years, testified that he uses Hewitt Cemetery Road "all the time" and that maintenance is performed on the road "pretty often." When Mr. Jones' family visits him, they use Hewitt Cemetery Road, and when Mr. Jones is picked up for dialysis treatments three times a week, his driver uses Hewitt Cemetery Road. Yet another lifelong resident of the area, Dorothy Jones, testified that she uses Hewitt Cemetery Road every day to go to work. She sees many people from her neighborhood use that road, and has seen the County doing maintenance on the road, as recently as the week of trial. Mike Wood, a local resident who owns property adjacent to Hewitt Cemetery Road, accesses his property "all the time" using the road in question. He also observed the County plowing the road before it was rocked.

Even witnesses for the defense supported Hewitt Cemetery Road's public use. Ginger Odom, Maria Cooper, and Donna Anderson, former boarders at Defendant's barn, both testified that they noticed light traffic on the road when they were on Defendant's property. Defendant's neighbor, David Garrison, testified as to the "extreme amount of traffic" on the road, stating "it's almost like a freeway."

Furthermore, there was ample evidence presented indicating that the County of Florence has maintained and repaired Hewitt Cemetery Road for decades. Arthur Gregg, Director of Public Works for Florence County since 1989, testified that the portion of the road in question has been maintained by the County of Florence for as long as he could remember, and at least

since 1972 when he began working for Florence County. He also testified that, during that time and before, Hewitt Cemetery Road was and is maintained as part of the County road system, and that the public has called him concerning routine maintenance of that road, to which the County has responded. Mr. Gregg presented maintenance charts showing periodic maintenance of the road. The County performed monthly ploughing of the road, installed a drainage system on a portion of the road at Defendant's request, rocked the road in 2004, and patches potholes on a regular basis. It cost the County approximately \$23,000 to rock Hewitt Cemetery Road, which was paid for from the public fisc as part of a capital improvement program.

Thus, the Court finds by clear and convincing evidence that there was acceptance of the public dedication of the road in question.

ii. **Dedication Arising from the Sale of Land with Reference to Maps or Plats**

"Generally, where property sold is described with reference to a plat or map upon which streets and ways are shown, an easement therein is implied . . . There is an implied covenant that such ways exist and shall continue to exist." *Billings v. McDaniel*, 217 S.C. 261, 605 S.E.2d 592, 593 (1950). In the case of *Woodside Mills v. United States*, the Court construed the law of South Carolina with respect to the platting of streets, finding it was evidence of a manifestation of intent to dedicate such streets to the governing bodies and the general public. 260 F.2d 935 (4th Cir. 1958).

Here, Plaintiffs introduced multiple plats and aerial photographs showing Hewitt Cemetery Road and its existence at least back into the 1950s, long before Defendant had any ownership interest in the area. Reggie Sanders, a seventeen-year employee of the County's GIS and planning department, testified concerning aerial photographs taken between 1965 and the present day of Hewitt Cemetery Road, which are maintained as part of the records of roads kept by Florence County. The images depict Hewitt Cemetery Road in its present and historical

footprint and show that its location from 1965 to the present has not changed. Pls.' Exs. 1-7. Plats recorded in the Office of the Clerk of Court for Florence County (Pls.' Exs. 8-14) show Hewitt Cemetery Road consistent with its configuration of the aerial photographs. Many plats show it as a "County Road" or "County Maintained."

There was further evidence presented of an express dedication of Hewitt Cemetery Road by plats referred to in deeds which are in Defendant's chain of title. Deeds into Defendant (Pls.' Exs. 15-17) show Hewitt Cemetery Road on plats referred to in the deeds. There is also a deed to Defendant's ex-husband (Pls.' Ex. 18) that references "Hewitt Cemetery Road, County maintained." No plat references a right-of-way to Defendant's property. If Hewitt Cemetery Road is not a public road as Defendant contends, then Defendant would have been buying land-locked property, as there are no easements recorded in Defendant's deeds granting access to her property from either Cato or Branch Roads.⁶

Thus, the Court finds by clear and convincing evidence that the road in question was expressly dedicated to the public.

iii. Use by "the Public at Large"

Defendant argues that the local users of Hewitt Cemetery Road constitute a "special class" of the public because they live in the same community and therefore fail the test for public dedication and acceptance. See 26 C.J.S. *Dedication* § 26 ("In order to acquire a public easement, the use must be by the public at large."). However, an examination of case law makes it clear that this rule does not apply in this case.

In the case *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952), the question of implied dedication to the public was raised regarding a twelve-foot alleyway/driveway on appellant's land in the City of Florence. Shia, the owner of the servient tenement, sought to

⁶ According to the testimony of Arthur Gregg, Public Works Director, of the 1,200 roads (consisting of approximately 500 miles) in Florence County, only *two* have written right-of-way deeds to Florence County. The remaining 1,198 roads are maintained by Florence County without any written deed or right-of-way to the County.

enjoin Pendergrass from utilizing the alleyway to access the rear of his grocery store, which abutted the alleyway. Pendergrass argued that the strip of land in question had been dedicated to the use of the public and to the City of Florence by the former owner, Mrs. C.M. Berry. When Mrs. Berry owned the land, she had permitted various tenants of the buildings on Pendergrass' property to utilize the alleyway for loading and unloading. Because there was evidence that "this twelve foot strip of land was used primarily by the tenants who rented the warehouse on Mrs. Berry's lot" and that "other witnesses testified that the only use made of the driveway was for business purposes by that special class of the public who had occasion to enter the rear of those stores which abutted thereon," the Court found no public dedication: "As already shown, the only thing which has been done by the owner of the property upon which an implied dedication can rest, is that they permitted a certain class of the public to use this strip of land." *Id.* at 349.

The instant case is distinguishable from *Shia*. There, only employees of the adjacent businesses had any reason to utilize the contested alleyway and there was no evidence to the contrary; a regular member of the public would have had no purpose to be in the alleyway. Thus, it is evident that only a limited number of persons were making use of the land. Here, however, Hewitt Cemetery Road is clearly used by the surrounding community at large. At trial, substantial testimony was presented that multiple individuals living in the general vicinity of the road, as well as their friends and family, school buses, and medical transport vehicles, all frequently make use of Hewitt Cemetery Road and have done so over many generations. Defendant's argument on this point fails.

Thus, the Court finds by clear and convincing evidence that there has been use of the road in question by the public at large.

iv. **Payment of Taxes**

Defendant argues the fact that she pays taxes on the portion of Hewitt Cemetery Road traversing her property is proof that Hewitt Cemetery Road is not dedicated as a public road. If,

in fact, Defendant has paid property taxes on the footprint of Hewitt Cemetery Road as it crosses her property, this is not in and of itself significant evidence that the road was not dedicated. In *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952), the South Carolina Supreme Court explained that the fact a property owner paid taxes on a road "of itself is not generally treated as very strong evidence"

Here, the Tax Assessor for Florence County, Jack Newsome, testified that the dirt beneath most road beds in Florence County is taxed to the property owners. Further, Hewitt Cemetery Road was dedicated as a public way long before Defendant acquired her property. All of her deeds reference plats that show either Hewitt Cemetery Road or a road or avenue located on her property before she acquired it. Therefore, the Court does not find Defendant's argument regarding payment of taxes to be compelling enough in light of all the evidence to find that no public dedication has occurred.

B. Prescriptive Easement

An easement is a right to use land of another for a specific purpose. *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944). This right of way may arise by grant, from necessity, by prescription, or by implication by prior use. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006). The requirements necessary to establish a right-of-way by prescription are: (1) the continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under claim of right. *Babb v. Harrison*, 220 S.C. 20, 66 S.E.2d 457, 458 (1951). A claimant seeking a prescriptive easement must be held to a strict standard of proof. *Bundy v. Shirley*, 412 S.C. 292, 306, 772 S.E.2d 163, 170 (2015).

Again, the evidence in this case of a continuous, open, notorious, and uninterrupted use of Hewitt Cemetery Road by the public for a period of time exceeding twenty years is

overwhelming, as explained above. Thus, the first and second prongs are satisfied by clear and convincing evidence.

As to the third prong, "[w]hen the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been 'adverse,' such that the owner of the servient tenement will bear the burden of rebutting the presumption." 12 S.C. Jur. *Easements* § 10 (citing *Poole v. Edwards*, 197 S.C. 280, 15 S.E.2d 349 (1941)). Use with the permission of the owner is not adverse. *Id.* (citing *State v. Murphy*, 124 S.C. 274, 117 S.E. 529 (1923)). Here, the evidence preponderates to the effect that the public has used Hewitt Cemetery Road adversely under claim of right for a period in excess of twenty (20) years. Although Defendant did give permission to certain individuals to access her property using Hewitt Cemetery Road (family, friends, and patrons of her stable), she did not give permission to the general public or the County and protested their use of the road, even erecting gates and keeping said gates locked on multiple occasions. Defendant did not meet her burden of rebutting the presumption because she did not present any evidence that she gave the public or the County permission to use or improve the road.

There is clear and convincing evidence that the public has had the uninterrupted use and enjoyment of Hewitt Cemetery Road for a period in excess of twenty years. The footprint of Hewitt Cemetery Road has not changed since at least 1965, as evidenced by the aerial photographs and plats that are in evidence. The fact that the County has maintained Hewitt Cemetery Road establishes the use of Hewitt Cemetery Road under a claim of right. The public, by the testimony of Plaintiff's witnesses, uses Hewitt Cemetery Road adverse to any other claim to Hewitt Cemetery Road.

[Continued on the next page.]

III. CONCLUSION

In this case, the evidence is clear, unequivocal, and convincing that the public, by dedication, and/or by prescription, has acquired the right to use Hewitt Cemetery Road as a part of the County Road system. The continuous and widespread public usage of the road for well over twenty years, along with historical maintenance of the road performed by Florence County, without change or interference from previous owners, clearly establishes the public character of the road, and shows that the public and the County has accepted the dedication. This conclusion is fortified by the extent and duration of the maintenance which the County has performed on the road without assistance from Defendant.

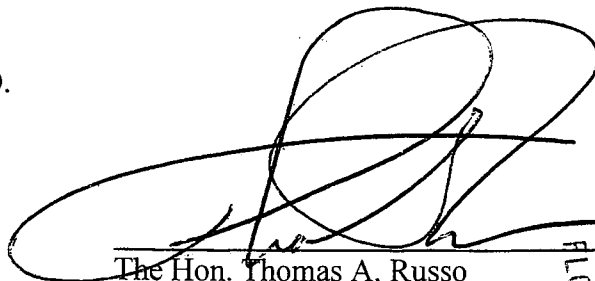
IT IS THEREFORE, ORDERED that Hewitt Cemetery Road is declared to be a public road and a public right-of-way is declared to exist for the use and benefit of the public on Hewitt Cemetery Road by virtue of dedication and prescriptive easement;

IT IS FURTHER ORDERED that Florence County has the right to maintain Hewitt Cemetery Road;

IT IS FURTHER ORDERED that Defendant, Carol Eagerton, is hereby permanently prohibited and restrained from interfering with the public's access and use of Hewitt Cemetery Road;

AND IT IS SO ORDERED.

11/7, 2017
Florence, South Carolina



The Hon. Thomas A. Russo
Presiding Judge, Twelfth Judicial Circuit

2017 NOV -7 PM 3:42
DARIN S. MILLER, CLERK
FLORENCE COUNTY, S.C.

FILED

CERTIFIED: A TRUE COPY
Darin Powell Ottana
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.