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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-in-Equity

C.A. No.: 2018-CP-23-05191
Appellate Case No. 2020-001188

Richard Joseph Rogozinski, Respondent,

v.

County of Greenville and City of Simpsonville,

OF WHOM

City of Simpsonville is Appellant,
and

County of Greenville is Additional Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER-IN-EQUITY ERR IN FINDING THAT MAPLE COURT WAS DEDICATED AND ACCEPTED AS A PUBLIC ROAD BY GREENVILLE COUNTY?

STATEMENT OF THE CASE

Respondent Richard J. Rogozinski (“Appellant” or “Rogozinski”) commenced this action by the filing of a Complaint on October 9, 2018 seeking a determination that a road known as Maple Court was dedicated and accepted as a public road. Based on the refusal of both the County of Greenville (the “County”) and the City of Simpsonville (“Simpsonville”) to acknowledge that Maple Court was a public road, Rogozinski named both Appellants as parties to the action. In the Complaint and Amended Complaint filed by Rogozinski on January 9, 2019, Rogozinski sought a determination that Maple Court was a public road and an Order requiring the County or Simpsonville to make repairs to it. The Appellants filed motions to dismiss on December 14, 2018. (Motions, R. ____), arguing that Rogozinski lacked standing, among other things. The Court denied the motions to dismiss on January 14, 2019. (10/10/19 Order, R. ____). Rogozinski filed an Amended Complaint on January 9, 2019.

The case was referred to Charles B. Simmons, Jr., Master-in-Equity for Greenville County, by order dated December 10, 2019. (12/10/19 Order, R. at ____). The case was tried without a jury on June 2, 2020. Judge Simmons issued an order on July 7, 2020 declaring that Maple Court was a public road for which Simpsonville was responsible to maintain and repair based on its annexation of the road, but declining to order Simpsonville to make immediate repairs. (7/7/20 Order, R. at ____). The same Order found that Simpsonville was responsible for maintaining and repairing Maple Court because Simpsonville had annexed the road subsequent to the acceptance of the road by the County. On July 15, 2020 and July 17, 2020, the Appellants filed motions to reconsider, alter or amend pursuant to Rules 52 and 59, SCRPC. The Master denied the motions on August 14, 2020. (8/14/20 Order, R.

at ____). Simpsonville served a notice of appeal on August 27, 2020, and the County served a notice of appeal on September 11, 2020. The central argument of Appellants both at trial and on appeal is that the public never accepted the road known as Maple Court, and thus dedication of the road was never perfected. Respondent has no preference as to whether the County or Simpsonville is responsible for the road pursuant to S.C. Code Ann. § 5-27-120 or any statute related to maintenance of roads in this state.

STANDARD OF REVIEW

The determination of whether a road has been dedicated to public use is one in equity. *Mack v. Edens*, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1984). In *Fesmire v. Digh*, 683 S.E.2d 803, 385 S.C. 296 (Ct. App. 2009), this Court summarized the standards of review applicable to actions at law versus actions in equity as follows:

In an action at law, the trial court's factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial court's findings. *Townes*, 266 S.C. at 86, 221 S.E.2d at 775. In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence. *See Wilder Corp. v. Wilke*, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct.App.1996) (citing *Townes*, 266 S.C. at 86, 221 S.E.2d at 775) (holding that because the master-in-equity heard the action, which was equitable in nature, without appeal to the circuit court, the appellate court could find the facts on appeal in accordance with its own view of the preponderance of the evidence). **However, this broad scope of review does not require this Court to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses.** *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 111 (Ct.App. 2004). (emphasis added)

ARGUMENT

I. APPELLANT PROVED THAT MAPLE COURT WAS DEDICATED AND ACCEPTED AS A PUBLIC ROAD

“Perfecting a dedication of property to public use involves two steps. First, an owner must express an intention to dedicate his property to public use in a positive and unmistakable manner. Second, there must be a public acceptance of the property offered for dedication.” *Boyd v. Hyatt*, 294 S.C. 360, 364, 364 S.E.2d 478, 480 (Ct.App. 1988) (quoting *Helsel v. City of Myrtle Beach*, 307 S.C. 24, 26-27, 413 S.E.2d 821, 824 (1992)). At trial, Respondent provided clear and convincing evidence that Maple Court was both dedicated to the public and accepted by the public.

A. Intention to dedicate property to public use.

“Where land is divided into lots according to a plat, showing streets, and lots are sold and conveyed with reference to said plat, the owner thereby dedicates the streets to the use of the lot owners, their successors in title, and the public.” *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (S.C. 1991) citing *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 118, 145 S.E.2d 922, 925 (1965). At trial, Rogozinski offered into evidence a plat recorded on December 5, 1974 in Plat Book 4-X at Page in the Office of the Register of Deeds for Greenville County 17. (Pl. Ex. 1, R. at ___) (the “Plat”). The Plat shows the road known as Maple Court as a street providing access to the land divided into lots on the Plat. *Id.* All subsequent deeds to the subdivided lots make reference to the Plat. (Pl. Ex. 3, R. at ____). Therefore, in accordance with *Helsel v. City of North Myrtle Beach*, the prior owner of the lots dedicated Maple Court to the lot owners, their successors in title, and the public.

In addition, Rogozinski entered into evidence a document entitled, “Statement of Ownership and Consent to Dedicate Streets and Roads to Greenville County for Public Use” (hereinafter the “Statement of Dedication”), reflecting that the owner of the land had subdivided his land and dedicated Maple Court to public use. (Pl. Ex. 2, R. at ____). The attorney for the County at that time, E. P. Riley signed and approved the Statement of Dedication as to its form,

and the owner recorded the same in Dedication Book 1 at Page 193 on December 5, 1974. *Id.* As noted in the Order entered August 14, 2020, Judge Simmons observed that the Statement of Dedication provided that, “Maple Properties is granting and dedicating to those who may purchase said property or any part of it, to the general public and to Greenville County the use and control of the streets and roads shown on said plat of property for public use.” (emphasis added) (8/14/2020 Order, R. at ____). Accordingly, there does not appear to be any genuine dispute regarding whether the prior owner of the land dedicated Maple Court to the public for its use. Instead, the appeal turns on the issue of whether the public accepted Maple Court.

B. Acceptance by the Public.

Considering the non-assessment of taxes, the continued use of Maple Court by the public, the Plat, and the Statement of Dedication, the Master properly concluded that the public accepted Maple Court. “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. **Also, acceptance and dedication may be demonstrated by a governmental authority not assessing taxes on the land.**” *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (S.C. App. 1995), citing *Cleland v. Westvaco Corp.*, 314 S.C. 508 (Ct. App. 1993). At trial, Rogozinski proved that the County did not assess property taxes against the land where Maple Court exists. Rogozinski also demonstrated that the public had enjoyed continued use of Maple Court since he became familiar with the property in the year 1990. This satisfied the requirements set forth in *Mack v. Edens*; however, Judge Simmons bolstered his conclusion with additional findings related to the Plat and the Statement of Dedication.

(i) Non-Assessment of Taxes.

The County does not assess taxes against the land on which Maple Court is located. At trial, Debbie Adkins, the manager and assessor for Greenville County Real Property Services, reviewed the records of the County showing Maple Court and the surrounding land and testified that the County did not levy taxes against the land where Maple Court is located and that Maple Court did not have a tax map number assigned to it. (Transcript, p. 63, lines 1-25, p-64, lines 1-4., R. ____). Rogozinski entered into evidence an aerial view of Maple Court and the surrounding land taken from the public records of the Greenville County Tax Assessor. (Pl. Ex. 6, R. at ____). The land surrounding Maple Court on the exhibit marked as Plaintiff's Exhibit 6 constitutes the same lots of land described in the deeds in Plaintiff's Exhibit 3 and the land identified in Defendant's Exhibits 29 and 30. Together, these documents reflect that Maple Court is not assessed for taxes or assigned a tax map number. *Id.* Moreover, Rogozinski testified that he and his predecessors in title to the property surrounding Maple Court have never paid any sort of taxes for the land where Maple Court exists. (Transcript, p. 10, lines 2-10, R. at ____). Appellants have offered no argument or evidence to suggest that Maple Court was assessed any taxes. Thus, there is no dispute regarding whether the road known as Maple Court is assessed any taxes.

(ii) Continued Use by the Public

Rogozinski moved to Greenville County in 1990 to assist his parents with the management of the apartments located along Maple Court. (Transcript, 8, lines 6-19, R. at ____). His parents owned the apartments along Maple Court, and Rogozinski received a fractional share of the property with the apartments in 1990, followed by full ownership of the apartments approximately nine (9) years later. (Transcript, p. 13, lines 8-11, p. R. at ____)(Pl. Ex. 3, R. at ____).

During the approximately thirty (30) years between 1990 and the date of trial in 2020, Rogozinski and his parents never attempted to restrict the use of Maple Court by the public.

(Transcript, p. 9, lines 7-16, R. at ____). No one ever told Rogozinski that Maple Court was a private road, and there was never a sign indicating that Maple Court was a private road. (Transcript, p. 8, lines 20-25, R. at ____). The photographs admitted into evidence reveal that there are no gates or barriers to prevent the public from accessing or using Maple Court. (Def. Ex. 12 and 13, R. at ____). The parking lot on the property of Rogozinski adjoins the road known as Maple Court (Transcript, p. 57, lines 10-12). Although Rogozinski placed signs on his property to discourage persons who were not residents in his apartment complex from dumping trash on his property or trespassing, the signs were located on his own, private property. (Transcript, p. 54, lines 13-15, R. at ____) (Def. Ex. 12, 13, and 19, R. at ____).

Deputies from the Greenville County Sheriff's Office routinely and continuously used Maple Court for the last thirty years. (Transcript, pp. 9, lines 17-22, p. 16, lines 11-23, p. 47, lines 5-15, p. 54, lines 20-25, and p. 55, lines 1-4, R. at ____). The deputies have continuously parked on Maple Court, exited their vehicles on foot, and then used radar guns from Maple Court to clock drivers who are instructed by deputies to turn onto Maple Court where they park and receive citations for traffic offenses. (Transcript, pp. 9, lines 17-22, p. 16, lines 11-23, p. 47, lines 5-15, p. 54, lines 20-25, and p. 55, lines 1-4, R. at ____).

Counsel for Simpsonville tested Rogozinski as to whether only his tenants used the road known as Maple Court: "So when you say the public uses that road, we're talking about your tenants." (Transcript, p. 46, lines 20-21, R. at ____). Rogozinski responded, "No. People go in and out. The police have done their route in there for years." (Transcript, p. 46, lines 22-23, R. at ____). In his response, Rogozinski made it clear that the public at large use Maple Court, not just his tenants.

Appellants also challenged Rogozinski on whether any mailing address existed on Maple Court. (Transcript, p. 43, lines 16-18, R. at ____). However, Rogozinski testified that he has used the address of 33 Maple Court for years and received tax notices mailed to that address. (Transcript, p. 43, lines 16-21, p. 56, lines 1-15, R. at ____). In addition, the deed from Hazel M. Rogozinski to Respondent recorded on December 22, 1999 shows the mailing address of Respondent to be 33 Maple Court, Simpsonville, SC 29681. (Pl. Ex. 3, R. at ____).

Based on this uncontested testimony and evidence that the public had enjoyed the use of Maple Court and the lack of any evidence to the contrary, Judge Simmons found that the public had used Maple Court continuously. (7/7/20 Order, R. at ____ and 8/14/20 Order, R. at ____). Implied acceptance may be found through use by the public or public authorities. *Helsel*, 307 S.C. at 27, 413 S.E.2d at 823. In this case, Rogozinski provided evidence of use of Maple Court by both the public and public authorities.

(iii) The Plat and Statement of Dedication

Though the court could have declared Maple Court a public road based merely on the non-assessment of taxes and continued use by the public in accordance with *Mack v. Edens*, Judge Simmons also considered the recorded Plat and Statement of Dedication as relevant to the acceptance of Maple Court as a public road. The face of the Plat indicates that it is a “Final Plat” and contains a Certificate of Approval for Recording signed by J. Coleman Shouse as Director of Planning for Greenville County Planning Commission. *Id.* Likewise, the Statement of Dedication contains the signature of the County Attorney at the time, E. P. Riley, approving the dedication of Maple Court to the public. *Id.* The County and Simpsonville never refuted these documents. (7/7/20 Order, R. at ____). These two documents provided further indicia that the public had accepted the dedication of Maple Court. (7/7/20 Order, R. at ____).

Although the County called Kesha Gamble, a County Engineer with thirteen (13) years of experience, to testify about the requirements for acceptance of a road by the County, Kesha Gamble admitted that she did not know what the requirements were in 1974. (Transcript, p. 92, lines 11-14, R. at ____). Similarly, Appellants cited S.C. Code §6-29-1170 as requiring public acceptance to be “by action of the governing body customary to these transactions.” Notwithstanding the arguments of Appellants that Judge Simmons should have disregarded the Plat and Statement of Dedication, the Appellants failed to provide any requirements in effect in 1974 for the County to accept a public road. (8/14/2020 Order, R. at ____).

Furthermore, Appellant Simpsonville failed to object to the admission of the Plat and Statement of Dedication into evidence at trial, and it failed to raise any argument related to consideration of the Plat and Statement of Dedication in their Motion to Amend. Therefore, Appellant failed to preserve this issue for appeal. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010) (“It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.” (quoting *Lucas v. Rawl Family Ltd. P’ship*, 359 S.C. 505, 598 S.E.2d 712 (2004))). Failure to raise an issue in a memorandum in opposition of summary judgment, in a Rule 59(e) motion, or at the summary judgment hearing will preclude appeal on that issue from a grant of summary judgment. *Easterling v. Burger King Corp.*, 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016).

“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments,” *Home Med. Sys., Inc. v. South Carolina Dep’t of Rev.*, 382 S.C. 556, 562, 677 582, 586 (2009) (quoting *I’On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). “The requirement also

serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I 'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (citing *Brown v. Singletary*, 226 S.C. 482, 85 S.E.2d 738 (1955)). As a result, Appellant Simpsonville should not be permitted to appeal or argue against the trial judge's consideration of the Plat and Statement of Dedication. The County should not be permitted to appeal this issue, either. Since the trial court determined that Simpsonville, not the County, had annexed Maple Court and was responsible for its repair and maintenance, the County has no interest in challenging the Plat and the Statement of Dedication. Therefore, the arguments of the County regarding the Plat and Statement of Dedication are moot.

In sum, the language in the Plat and Statement of Dedication, together with the signatures of officials of the County on these documents, alone may prove acceptance of Maple Court, but, at the very least, these documents bolster the evidence that the public accepted the dedication of Maple Court.

CONCLUSION

The trial court rightfully determined that Maple Court was a public road. The non-assessment of taxes against Maple Court and the continued use of Maple Court by the public demonstrated conclusively that Maple Court was a public road. The Plat, the Certificate of Approval on the Plat, and the Statement of Dedication signed by the County Attorney further support this conclusion. Judge Simmons gave all these matters proper consideration, as his Order entered on July 7, 2020 indicates. "Considering all of the above-referenced factors, the Plaintiff has provided strict, cogent, and convincing evidence and proof of dedication and acceptance. *See Tupper v. Dorchester Cnty.*, 326 S.C. 318, 326, 487 S.E.2d 187, 187 (1997)." (7/7/2020 Order, R.

at ____). For these reasons, the Orders of the Honorable Charles B. Simmons, Jr. declaring Maple Court to be a public road should be affirmed.

Respectfully submitted,

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