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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joseph M. Strickland, Master-in-Equity

Appellate Case No.: 2017-001795
Civil Action No.: 2014-CP-40-01805

Country Properties, LLC,……...Respondent,

v.

Nancy Dunn Martin,……..Appellant.

INITIAL REPLY BRIEF

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REPLY ARGUMENT

Appellant, Nancy Dunn Martin ("Appellant" or "Martin") offers the following rebuttal argument in response to the Respondent's Brief.[1] Appellant incorporates her prior statements of the issues presented on appeal, the case, the standards of review, and the facts into this brief by reference, as well as her prior arguments, so as to avoid unnecessary recapitulation. In this reply brief, Appellant demonstrates that the Respondent's Brief fails to confront or resolve the numerous errors in the Lower Court's reasoning that were pointed out in the Appellant's Brief.

I. Respondent's brief fails to address numerous flaws in the factual findings of the Lower Court, but rather repeats the same erroneous contentions.

In its brief, Respondent recites the same faulty factual contentions that were in the Lower Court's order. Appellant explained a number of these issues in her brief, but a few should be highlighted here. For instance, Respondent states in its brief that there are "two" parcels of land through which it seeks to traverse when, in fact, there are five. (Resp. Br. at pp. [4–6].) This error is critical because Respondent failed to provide even a shred of evidence of an easement in the chain of title for the majority of the five parcels. In support of the flawed contention that there are only two chains of title, Respondent offer lists of the exhibits in the case for "Defendant's Chain" and the "Lewis Chain." (Resp. Br. at pp. [12–13].) However, even viewed most favorably those chains leave out two of Appellant's tracts of land and, moreover, only one of the chains has any mention of an easement at all. [*See* Pl. Ex. 29 (containing purported easement language only applying to Partition Tract D).] Moreover, Respondent's lists have noticeable gaps where the

[1] For the record, Appellant notes that Respondent County Properties, LLC has during the briefing of this appeal sold the property which is the purported dominant estate in this case to Raglins Creek Farms, LLC. (*See* Book 4669, Page 295, recorded February 3, 2022 with the Kershaw County Register of Deeds.) Appellant understands that a motion to substitute parties is pending, but will continue to refer to the "Respondent" or "Country Properties" for the sake of consistency through the briefing.

chain was established not by the actual documents but by the testimony of Respondent's abstractor. (*See* Resp. Br. at pp. [12–13] (repeatedly referring to "Williams").] This is particularly noteworthy because the abstractor stated that she pulled the title records "from now back to the beginning of time" but found no recorded easements in the Defendant's chain of title. [Trial Tr. p. 20, l. 24–p. 21, l. 3; P. 77, ll. 10–16.]

As it did in the case below, Respondent spends a good portion of its time demonstrating in its brief that the road in question in this case exists. The existence of a road is by no means evidence of an easement over that road, yet Respondent argues the road's existence repetitively. (*See, e.g.*, Resp. Br. at pp. [7, 9, and 14].) Appellant does not contest the existence of the road—she contests Respondent's right to use her road without her permission. Respondent appears to believe that existence of the road somehow demonstrates that the road is public or has an easement over it. In doing so, Respondent ignores extensive evidence that the road was used frequently and maintained carefully by Appellant and her predecessors in title. This includes the purchase of a motor grader that kept the road in such pristine condition that Appellant's father could drive his Mercedes on the road. [*See* Trial Tr. p. 373, l. 13–p. 374, l. 9.] The existence of the road does not *ipso facto* create a right for Respondent to use the road. *See Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169–70 (2015) (citation omitted) (requiring that use that is adverse or under claim of right to establish prescriptive easement).

Indeed, Respondent's own expert made it abundantly clear when he testified that although he could see a road on old aerial photos, he could not and was not making a determination as to any prescriptive easement. [Trial Tr. p. 304, ll. 9–22 (including Mr. Mills' statement that, "If it's not a recorded easement, it's not our determination.").] Respondent's expert also testified that there is "[n]o recorded easement" across "what's known as Edward Frank Martin Jr.'s land and Laura Jane Lewis Allen's land." [Trial Tr. p. 301, ll. 10–15.] In point of fact, although Mr. Mills

was Respondent's only testifying expert, Respondent has not cited to his testimony anywhere in its entire brief. (*Compare* Resp. Br. *with* [Trial Tr. pp. 265–316].)

Respondent contends in its statement of facts that it produced witnesses at trial who "testified that Shady Grove Road had received public maintenance from Highway U.S. 601 to the Respondent's property line during the 1950s and 1960s." (Resp. Br. at p. [7].) As detailed in Appellant's Brief, this is a mischaracterization of the testimony presented at trial for several reasons. In the first transcript excerpt cited by Respondent, Mr. Higgins stated on direct that he had seen a county scraper on Appellant's road as a child. [Trial Tr. p. 174, l. 23–p. 175, l. 14.] However, on cross Mr. Higgins acknowledged that he had no reason to know that heavy equipment he saw on the road belonged to the county. [Trial Tr. p. 182, l. 11 ("I don't know. All I know it was a motor grader.").] Not only did other testimony provide a reason for there to be private heavy equipment on Appellant's road, Mr. Higgins himself provided evidence that Appellant's road was private when he stated that his uncle put up a gate. [Trial Tr. p. 178, ll. 4–17; p. 183, l. 25–p. 186, l 17.] Clearly, Mr. Higgin's uncle was in a better position than a child to know what parts of the road were and were not public.

Respondent also cites to the testimony of Mr. Kirkland, who was also a child during the time period about which he testified. [Trial Tr., p. 188, ll. 8–9.] As noted, Respondent asserts that Mr. Kirkland's testimony is evidence that "Shady Grove Road had received public maintenance from Highway U.S. 60 to the Respondent's property line in the 1950s and 1960s." However, Mr. Kirkland testified that when he was nine years old he started driving his great-uncle's pickup truck down a "swamp road" that he could not identify by name. [Trial Tr. p. 188, ll. 24–25.] Rather than testify that county maintenance went "to the Respondent's property line," Mr. Kirkland said he saw motor graders go all the way across a bridge and "all the way to the river" as far as he could "recollect." [Trial Tr. p. 189, l. 24–p. 190, l. 10.]

Similarly, Mr. LaFaye, a forester who used the contested road briefly in the 1960s, at first testified that the county maintained Appellant's road, but he later clarified that he "assumed it was a community road." [Trial Tr. p. 226, ll. 9–10.] None of these witnesses actually presented any testimony that gave real evidence of county maintenance. Not a single one said, "I talked to the machine operator and he was a county employee;" or "I saw the county logo on the machines;" or "I saw a county pickup truck out there." These witnesses either saw equipment maintaining the road that they assumed belonged to the county or they assumed without knowledge that the county maintained the road. There is not a single shred of direct evidence in the cited testimony that Richland County employees took Richland County equipment out to Appellant's portion of the road and maintained that road on behalf of Richland County. Moreover, the County's right of way agent specifically testified at trial that Appellant's road is not a county road. [Trial Tr. p. 409, l. 14–p. 410, l. 12.] Thus, not only is Respondent's contention faulty, all the evidence adduced at trial points to the road being private and maintained by private equipment.

II. Respondent attempts to improperly shift the burden of proof for its public road theory.

In the fact section of its brief, Respondent says that there is no evidence "that any individual, entity, or governmental authority has petitioned any court or initiated any action to close or abandon any portion of Shady Grove Road . . . ." (Resp Br. at p. [8].) No one has tried to close the road because the road was never public to begin with. By suggesting that Appellant or her predecessors should have petitioned to close the road, Respondent is trying to reverse the burden of proof and make Appellant demonstrate the road is closed. However, the burden of proof is on Respondent to show that the road was dedicated to the public in the first instance.

Our law requires two things to prove a public road dedication. First, the landowner must show in an unmistakable manner that they intend to dedicate the property to public use. *Town of*

Kingstree v. Chapman, 405 S.C. 282, 302, 747 S.E.2d 494, 504 (Ct. App. 2013) (quoting *Mack v. Edens*, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995)). Second, the public must impliedly or explicitly accept the dedication with a reasonable time. *Id.* Critically, "the burden of proof to establish dedication is upon the party claiming it." *Id.*, at 302, 747 S.E.2d at 504 (quoting *Anderson v. Town of Hemingway*, 269 S.C. 351, 354, 237 S.E.2d 489, 490 (1977)) (internal punctuation omitted).

Here, Respondent has the proof of showing that Appellant's potion of the road was made public. Appellant does not have the burden to show that it was closed. This is particularly important here because a public dedication is matter of equity. *Id.*, at 301, 747 S.E.2d at 504 (quoting *Mack*, at 239, 464 S.E.2d at 126). This means that this Court has the power "on appeal to find facts in accordance with [its] own view of the preponderance of the evidence." *Id.*, at 302, 747 S.E.2d at 504 (quoting *Mack*, at 239, 464 S.E.2d at 126). This Court can and should find that the County itself was correct when it said Appellant's road belongs to her and not Richland County and that childhood memories of heavy equipment and swamp superhighways are insufficient to show an unmistakable public dedication.

III. Respondent failed to prove the location of the road over which the purported easements by grant would run.

Respondent is relying on purported easement language from roughly one hundred years ago to argue that it has an easement by grant. Respondent is arguing that Appellant's current road is the only one available for the purported easement language to match. Respondent glosses over the fact that none of the purported easement language actually gives any identifying language that matches Appellant's road. Moreover, the land and the roads in the area have morphed over the years—the old homeplace on Appellant's land has been abandoned. [*See* Trial Tr. p. 185, l. 22–p. 186, l. 3 (Mr. Higgins stating his aunt refused to move to the old Martin house)]. The residence

reflected on the partition plat from the 1880s as being on Austin Black's land is no longer there. [*Compare* Pl. Ex. 18, p. 13 (naming a residence) *with* Def. Ex. 1 (showing no visible house or clearing in aerial imagery of that location).] Respondent has failed to prove the identity of the road and that is made abundantly clear from the purported easement language for the 1918 deed relating to Partition Tract D (the only deed anywhere in Appellant's chains of title that contains any easement description).

In order to effectuate an easement by grant, the recorded document must contain a description that "acts as a guide to the location of the easement on the land such that the easement" is capable of being identified to a certainty. *See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn,* 348 S.C. 58, 72, 558 S.E.2d 902, 909 (Ct. App. 2001) (multiple citations in footnote and internal punctuation omitted). Rather than pointing to evidence identifying the purported easement by grant with any level of certainty, Respondent **fails to even quote** the 1918 deed's purported easement language anywhere in its brief. Momentarily setting aside all the other issues with Respondent's easement by grant theory, it is important to examine the actual language in the deed. The deed language states: "a permanent right of way of Twenty (20) feet from a certain road passing by the lands of C.M. Martin and this said road runs through this said plat and this said right of way to be in force from said road running through this said plantation back to said lands of J.H. Miller and Ella T. Miller . . . ." [Pl. Ex. 29.] This is noteworthy language for a few reasons. First, it says "by" the lands of C.M. Martin, not "through." As noted in Appellant's Brief, the land of C.M. Martin at this point in time was Partition Tract C, which Cordero M. Martin had purchased from Mary Black Nance in 1892, according to Respondent's title abstractor. [*See* Pl. Ex. 20, p. 2, ¶ 8.]

Importantly, both Cordero's purchase in 1892 and Ossie's purchase in 1918 were identified by the partition plat land allocations from the 1880s. That is, Cordero bought Tract C and his wife

Ossie later bought Tract D. It is therefore logical to believe that the easement in the 1918 deed was referring to a road running at the bottom of Cordero's and Ossie's property boundaries—that is to say "by" their property.[2] This is also supported by the reference to "this said plantation." The plantation in question was "River Place Plantation," which was originally inherited by Mary Peay Black and her brother Austin Black. This ownership is reflected in the partition plat from the 1880s. [*See* Pl. Ex. 18, p. 13.] No roads were reflected on the partition plat, but a residence, falling right below Partition Tract D, is reflected on the plat. Certainly, is seems likely that the residence would have been accessible by a road and, most likely, that road would have run "by" the lower part of Cordero's property, which would have been on the same plane as the residence.

Of course, Respondent will likely argue that these suggestions are on some level conjecture, but that is precisely the point. The deed language in Ossie's chain of title could mean anything, even if it is still viable and even if it covered all of Appellant's land, which it does not. The language in the deed does not make it possible for anyone in this day and time to identify with any level of certainty what road is being reserved. Respondent's identification of Appellant's road is based solely on the fact that Respondent wants to use it, not on a genuine attempt to construe the old deed. Respondent took an existing road and went back one hundred years in time to try and find easement language that could shoehorn in Respondent's desire to use Appellant's road. Respondent failed in its burden of proving that there is an easement location that can be identified to a certainty and for that reason any claim of easement by grant fails as a matter of law.[3]

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[2] This argument momentarily sets aside the key point that Respondent never proved an easement across Cordero's land at all and did not even enter the deed by which he obtained Partition Tract C into evidence.

[3] This is equally true of the language from Respondent's chain of title. Even if language from someone else's chain of title is applicable to Appellant's property, the deed language is even more inscrutable. [*See* Pl. Ex. 17 (listing "convenient rights of way for cart and wagon road over the lands of the parties of the first part and each of them to the Burney lands, the Martin lands, and the English lands for the purposes of ingress and egress and access from the public road to such tract

IV. Appellant's factual contentions are supported by the record and Respondent's argument to the contrary is not preserved.

Respondent argues that Appellant failed to preserve certain factual arguments for review on appeal. (Resp. Br. at pp. [11–12].) Appellant supported her factual contentions in the Appellant's Brief with citations to the record. Moreover, the law does not require preservation of each and every miniscule factual contention, but rather of issues. *See State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (multiple citations omitted) ("The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal.").

Notably, Respondent's argument itself is not preserved. Appellate law requires the presentation of a valid argument to include specifics—otherwise the argument is considered abandoned. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (citations omitted) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). In this instance, Respondent's short, conclusory argument fails to point to a single fact or page number as an example of the contentions with which it takes issue. As such, the Court and Appellant must guess as to which factual contentions are supposedly problematic. Because of this, Appellant cannot provide any specific rebuttal. For this reason, Respondent's conclusory argument should be deemed abandoned.

V. South Carolina has explicitly declined to adopt the "effective interruption" standard for prescriptive easement claims.

In its brief, Respondent makes light of the locked gate located towards the beginning of Appellant's road, calling it "the so-called obstruction." (*See* Resp. Br. at p. [15]; *see also* p. [19].)

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of land")]. In none of the language of that deed is there any description allowing the reader to identify a specific road.

Appellant established that the gate has been up for decades and that the padlocks of those who did not receive direct permission to access the property were routinely removed several times over the years. [*See, e.g.*, Trial Tr. pp. 457–58.] Yet Respondent argues that this did not stop people from using the road and, thus, does not matter. Respondent's argument contravenes South Carolina public policy and good common sense.

This Court recently recognized that "our supreme court considered what constituted an interruption of a prescriptive period and elected not to adopt an 'effective interruption' standard." *Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc.*, 433 S.C. 144, 157, 857 S.E.2d 16, 23 (Ct. App. 2021), reh'g denied (Apr. 26, 2021) (citing *Pittman v. Lowther*, 363 S.C. 47, 50–52, 610 S.E.2d 479, 480–81 (2005)). This is because a landowner is "not required to battle successfully for his rights." *Id.* at 157–58, 857 S.E.2d at 23 (quoting *Pittman*, at 51–52, 610 S.E.2d at 481). Overt acts, such as "erecting physical barriers," are sufficient to interrupt the prescriptive period regardless of whether the purported dominant estate owner thwarts the overt act by cutting the gate chain. *See id.* at 158, 857 S.E.2d at 23–34 (quoting *Pittman*, at 52, 610 S.E.2d at 481). Even verbal threats which "convey to the dominant landowner the impression that the servient landowner does not acquiesce in the use of the land" interrupt the prescriptive period. *Id.*

The reason for this is a matter of common sense. An actual or "effective" interruption policy "would require additional actions that 'would encourage wrongful or potential violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes.'" *Id.*, at 158, 857 S.E.2d at 24 (quoting *Pittman*, at 52, 610 S.E.2d at 481). Instead of enforcing a standard that would encourage violence between neighbors, South Carolina public policy encourages peace. *Id.*, at 159, 857 S.E.2d at 24 (quoting *Pittman*, at 52, 610 S.E.2d at 481). In this case, Appellant and her father maintained a gate blocking the road for decades. Cognizant of the fact that people who had permission to use the gate might allow third parties to add additional

locks or that people like Respondent's member, Mr. Podell, might try to cut chains to add unpermitted locks, Appellant and her father posted signs about lock cleanings and routinely went on to remove locks they did not recognize or approve. That included removing Mr. Podell's lock and interrupting his use. [*See* Trial Tr., p. 346, ll. 15–16 (" . . . I was able to use the gate and all of a sudden I wasn't.").] A gate locked with a padlock and chain can never be one hundred percent effective when another person is determined to surmount it. This is particularly so where the power company must maintain a lock for which many people have the master key. [*See* Trial Tr., p. 159, ll. 11–13 (Mr. Guy stating that after his lock was removed he used a key for the Santee Cooper lock).]

Under that set of circumstances, Appellant is left to ask, what else could she do? If a locked gate is not enough to show that the owner is protecting their road, then would an armed guard be enough? A rigged shotgun? Constant security patrols? Bear traps? Tire spikes? The property in question is rural and contains no residence. To protect the property any more than she already has, Appellant would have to risk going to prison or being sued for grievous injuries. South Carolinians are not required to cause injury to others to protect their property rights, and to do so is generally illegal. South Carolinians are not required to post guards to prevent someone from obtaining an easement by prescription, nor should they be. Respondent is making an argument for obstruction of the road that goes against the law and common sense. South Carolina has not adopted an effective interruption standard because that would turn neighbors into feuding criminals. Appellant did what she was required by law to do interrupt the prescriptive period. Mr. Podell even testified as much. Respondent is essentially now implying that Appellant should have committed violence to keep Mr. Podell off her land to protect her property rights. Appellant asks, if a locked gate is not enough, what is?

CONCLUSION

Respondent fails to resolve numerous flaws in the Lower Court's order. Respondent relies on faulty characterizations of weak testimony. Respondent seeks to have this Court invade Appellant's property rights on the bases of multiple flimsy arguments that it has attempted to paste together. Respondent simply cannot prove the necessary elements of any of the theories it has attempted to cobble together. For these reasons, Appellant requests that this Court reverse the order of the Lower Court and maintain Appellant's rights in her property.

Respectfully submitted,

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Country Properties, LLC,.....Respondent,

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Nancy Dunn Martin,.....Appellant.

PROOF OF SERVICE

The undersigned certifies that she has served Appellant's **Initial Reply Brief and a Designation of Matter On Reply** upon counsel for Respondent by attachment to AIS-registered email, pursuant to Order of the Supreme Court in re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (2021-08-25-02), on March 21, 2022, as follows:

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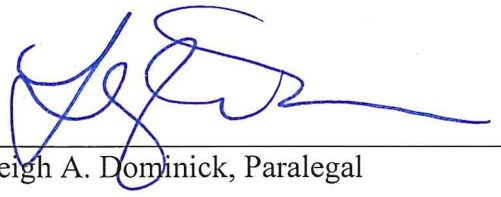

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RE: Country Properties, LLC v. Nancy Dunn Martin
Civil Action No.: 2014-CP-40-1805
BPWM File No.: 8-2376.102

Dear Ms. Kitchings:

Please find attached for filing, **Respondent's Initial Reply Brief and Designation of Matter** in the above-referenced case, as well as a Proof of Service for the same. Please let me know if you have any questions or concerns.

With my kindest regards, I am,

Sincerely,

Chelsea J. Clark

CJC/ld

cc: Brent McDonald (by AIS email only)
John Wells (by AIS email only)