RENDERED: OCTOBER 2, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000393-MR

JOHN DIETRICH AND
SUSAN DIETRICH — APPELLANTS

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 08-CI-00552

FREDERIC PARK — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, KRAMER AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellants, John and Susan Dietrich, appeal from an order of the Calloway Circuit Court granting summary judgment in favor of Appellee, Frederic Park, and ordering the Dietrichs to remove a portion of their house encroaching on an alleged roadway. For the reasons set forth herein, we reverse and remand to the trial court for further proceedings.

The Dietrichs and Park are owners of real property located in the Irvin Cobb Resort Subdivision, Unit I, located on Kentucky Lake in Murray, Kentucky. The original plat of the subdivision was recorded on November 8, 1978, and depicts approximately fifteen lots that are accessed by a road designated as Irvin Cobb Resort Road. A revised plat subsequently filed in December 1978 shows only eleven lots in the subdivision, as well as an unnamed road modified in location and route from the road depicted on the original plat. On the most recent survey of the property contained in the record, the road is identified as North Shore Circle.

Park purchased subdivision lots #8 and #9 (as depicted on the revised plat) by virtue of a deed dated August 3, 2001. The Dietrichs obtained their initial interest in the real property by virtue of a land contract dated June 17, 2004, from Irvin Cobb Resort, Inc., by and through its President, Cliff Robertson.[1] As represented on the plats, the portion of the road in dispute herein abuts Park's property on the north easterly side. The Dietrichs' property lies generally on the opposite side of the platted road just to the north east of Park's lots. The record clearly establishes, however, that the subdivision was not developed as platted and the disputed section of the road was never constructed. In fact, the Dietrichs claim it was nothing more than a one-way dirt path that was not used for ingress or egress to the lots.

[1] The Dietrichs' property sits essentially within the center of a circular roadway but is not a numbered lot according to either plat.

During construction of their house in 2008, the Dietrichs received a letter from Park's attorney informing them that their house encroached on what was shown on the original plat as Irvin Cobb Resort Road, which Park claimed was either a county or public road (according to a survey Park had conducted).[2] Park demanded that the Dietrichs immediately remove their home and construction debris from the roadway.

The Dietrichs thereafter met with Calloway County officials who confirmed that the roadway was depicted on the plat but never constructed, and thus was not a county road. The Dietrichs were apparently told the property was owned by Charles and Donna Scott.[3] The Scotts subsequently offered to sell the Dietrichs the disputed piece of property. About the same time, Park also contacted the Scotts and expressed his concern that if the Dietrichs purchased the property in question they would continue to build their house and block access to the roadway. As such, in an effort to appease all parties, the Scotts and the Dietrichs included the following restrictions in the deed:

1. Road must remain open with a 12' right of way.
2. Owners will maintain as a gravel road.
3. Road will be named Dietrich Drive.
4. There will be a 5' easement along existing property on the Scotts' side beginning at Resort Road and continuing for 70'.

[2] Park further complained that the Dietrichs had placed construction debris in the roadway blocking his access. The debris was thereafter removed.

[3] Although it is not entirely clear from the record, it appears as though the Scotts were the original owners/developers of the Irvin Cobb Resort subdivision. The development subsequently changed owners several times but the Scotts retained property adjacent to both Park's and the Dietrichs' properties.

After purchasing the property in September 2008, the Dietrichs constructed a 14-foot wide gravel road for the use of other lot owners. It is uncontested that until the Dietrichs laid the gravel road in 2008, the disputed roadway was not developed in accordance with the subdivision plat.

On November 7, 2008, Park filed a petition for declaratory and injunctive relief in the Calloway Circuit Court against the Dietrichs, Irvin Cobb Resort, Inc., Cliff and Patricia Robertson (owners of the Irvin Cobb Resort, Inc. stock at the time of its dissolution), and Calloway County. Therein, Park claimed that the Dietrichs' house encroached on a county road, infringing on his rights and the rights of others to use such, and that he had suffered an irreparable injury and diminution in property value. Park sought a declaratory judgment that the road was a county road or, in the alternative, a private road for the use of all lot owners, as well as an injunction ordering the Dietrichs to remove their house from the roadway.

The Dietrichs thereafter filed an answer claiming that there was no public roadway and, even if the plat indicated an intent to establish such, it had been abandoned because a period in excess of fifteen years had passed without such ever having been developed or used. The Dietrichs also filed a counterclaim claiming ownership of the disputed property by deed or adverse possession.

Both parties subsequently filed motions for summary judgment. Following a hearing, the trial court entered an order on February 20, 2014, granting

summary judgment in favor of Park, finding that the road in question was dedicated to the public by virtue of the recorded plat. As such, the trial court concluded that the Dietrichs' house constituted an encroachment and required such to be removed from the platted roadway. The trial court specifically stated,

> The Court, after reviewing the pleadings, finds that the road as originally platted and which is the subject of this motion was appropriately dedicated to the public. While this road does not appear to be a county road, the Court does not believe that its categorization as a county road has any affect as to whether defendants would have the right to encroach upon what was platted.
>
> While defendants claim, and the record does suggest that there are no definite dimensions on the original plat, the Court finds that the original plat does have sufficient information, particularly measurements and scale design, for anyone to be on notice as to what the plat does in fact show. While it would certainly be better if every line were clearly delineated with appropriate survey measurements, the Court believes that all parties were able to show what was actually depicted. Because of that, the Court is of the opinion that the defendants had adequate notice of the road. Additionally, the pleadings suggest, and the Court finds, that defendants had actual notice of the encroachment during the time in which they were constructing such encroachment by virtue of the written notice provided by plaintiff's attorney.

The Dietrichs thereafter appealed to this Court as a matter of right.[4]

Our standard of review governing an appeal of a summary judgment is well settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was

[4] We would point out that the Dietrichs' reply brief exceeds the 5-page limitation. Given that Park did not move to strike the brief, we will not do so. However, the Dietrichs and counsel should be aware that in the future, failure to file briefs in conformity with the Rules may result in having such struck *sua sponte* by the court.

entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. In *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), our Supreme Court held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because factual findings are not at issue, there is no requirement that the appellate court defer to the trial court. *Goldsmith v. Allied Building Components*, 833 S.W.2d 378, 381 (Ky. 1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest,* 807 S.W.2d at 480.

The Dietrichs argue herein that summary judgment was improper because there remain many material issues of disputed fact. The Dietrichs contend that the trial court's conclusion that "[i]f platted and dedicated to the public, it's a road," is erroneous because (1) there was never any intention to dedicate the property in question and (2) there has been no public use to complete the

dedication. Furthermore, the Dietrichs argue that even if the road was dedicated by virtue of the plat, it was abandoned because it was never developed and/or utilized.

Dedication by plat is a common method of reserving property for public use. In *Cassell v. Reeves*, 265 S.W.2d 801, 802 (Ky. 1964), Kentucky's then-highest Court held:

> It is a settled principle that when a map or plat of a subdivided tract of land is exhibited or recorded and conveyances are made of the lots by reference thereto, the plat becomes a part of the deeds, and the plan shown thereon is regarded as a unity. And, nothing else appearing, it is held that all the streets, alleys, parks or other open spaces delineated on such map or plat have been dedicated to the use of the purchasers of the lots and those claiming under them as well as of the public. They become appurtenances to the lots. It is presumed that all such places add value to all the lots embraced in the general plan and that the purchasers invest their money upon the faith of this assurance that such open spaces, particularly access ways, are not to be the private property of the seller. . . .

The Court went on to state that "[i]t is not necessary that dedication to public use should be in writing or in any particular form. It is enough that the intention at the time to dedicate appears and the subsequent public use completes the act of dedication." *Id.* at 802-3. It is this language that the Dietrichs seize upon in arguing that there has been no public use to complete the dedication of the disputed property herein. However, we believe that the Dietrichs have misconstrued the context of the above language

In *Cassell*, a landowner subdivided lake-front property and sold lots with reference to a recorded plat. The plat showed several streets serving the area,

as well as two unnumbered lots along the lake front. The two lots were eventually sold and when the purchaser of one of the lots wanted to build a house on the property, the adjoining property owners contested such, arguing that the original developer had represented on the plat that the lot was to be reserved for public access to the lake.

In concluding that the lot was dedicated to the use of all lot owners in the subdivision, the *Cassell* court recognized that although dedication by plat is a widely accepted method of proving an intention for the reserved property to be dedicated for public use, merely leaving a blank on the plat without a designation of its purpose does not in and of itself indicate a clear intention to dedicate the space to public use. However, the Court observed that other circumstances and conditions could demonstrate such an intention, and concluded that leaving an unmarked space on the plat between a street and the lake, coupled with proof of actual public use of that space, was sufficient evidence to prove the intent of the developer to dedicate the property for public use. *Id.* at 803.

The Dietrichs are correct that dedication must be proven by evidence of the intent of the dedicator. In cases such as *Cassell*, where the dedicator's intent was not clearly stated on the plat, the intent must be inferred from the context of the plat and evidence of actual public use for the intended purpose. But also as noted in *Cassell*, an intent to dedicate a public way may be inferred where the lots are sold with reference to a platted street, and no other evidence is necessary to prove

the intent to dedicate. As stated in *Shurtleff v. City of Pikeville*, 309 Ky. 420, 217 S.W.2d 976, 977 (1949):

> Where a street is dedicated by plat, . . . the recording of the plat and the sale of lots in the subdivision with reference to the street amount to an immediate dedication of the street to the use of the purchasers of the lots and of the public, although the street is not actually opened . . . .

See also Morrow v. Richardson, 278 Ky. 233, 128 S.W.2d 560, 562 (1939); 23 Am. Jr. 2d *Dedication* §26 (2002). In other words, where the intention to dedicate a public way appears on the face of the plat, no additional evidence is necessary to prove acceptance of the dedication. "[T]he act of subdividing lots on a plat generally constitutes an offer to dedicate the roads appearing on the plat as public, and the sale of a lot as depicted on the plat completes the dedication." *Kircheimer v. Carrier*, 446 S.W.3d 224, 228 (Ky. 2014). Thus, the fact that the roadway herein was never built or used by the public does not preclude a finding that a public road was established.

Notwithstanding our agreement with the trial court that a public road was established when the plat was filed in 1978 and lots sold thereafter, we nevertheless believe that the trial court erred in failing to address the Dietrichs' claim that such had been abandoned. As previously noted, it is undisputed that until the Dietrichs constructed the 14-foot gravel road, no sort of passable right of way existed. In fact, one neighbor characterized it as a muddy "goat path." The record contains numerous affidavits stating that the disputed roadway had never previously been used for public or private purposes. The trial court found that the

Dietrichs should have been aware of the boundaries of the roadway even though the plat did not contain any specific dimensions. Nevertheless, there seems to be no question that at the time they began construction on their house, they were not aware that the muddy one-way path was in fact a public road.

In *Sarver v. Allen County, By and Through Its Fiscal Court*, 582 S.W.2d 40 (Ky. 1979) (superseded by statute, on other grounds, as stated in *Trimble Fiscal Court v. Snyder*, 866 S.W.2d 124 (Ky. App. 1993)), our Supreme Court specifically recognized that a public road that is not a "county road" can be abandoned without formal action.[5] Further, non-use of a public road for over 15 years constitutes an abandonment of the status. *See also* Kentucky Handbook Series, *Kentucky Law of Damages* § 26:4 (2015) ("Where the public has failed to use such a public road for more than 15 years, it ceases to be a public road."); *Blankenship v. Acton*, 159 S.W.3d 330 (Ky. App. 2004).

Clearly, the roadways in the Irvin Cobb Resort Subdivision, particularly the previously undeveloped section at issue herein, are not county roads.[6] The trial court found as much when it dismissed Calloway County as a plaintiff in the underlying action. Furthermore, the roadway in question, while depicted on the 1978 plats, was not developed until 30 years later, when the Dietrichs graveled the 14-foot right of way in 2008. Finally, the record contains

[5] In contrast, KRS 178.116(1) requires formal action to discontinue "[a]ny county road, or road formerly maintained by the county or state."

[6] According to KRS 178.010, "'County roads' are public roads which have been accepted by the fiscal court of the county as a part of the county road system." Thus, while a road may be "public," it is not necessarily a "county road."

numerous affidavits stating that during that interim period, the roadway was never used for ingress or egress to the subdivision lots. We are of the opinion that the Dietrichs produced substantial evidence demonstrating that a material issue of fact exists as to whether the disputed roadway had been abandoned. Accordingly, we must conclude that the trial court erred in granting summary judgment.

For the reasons set forth herein, the order of the Calloway Circuit Court granting summary judgment in favor of Park is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Warren K. Hopkins
Murray, Kentucky

BRIEF FOR APPELLEE:

Gerald Bell
Murray, Kentucky