

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CA07-1234

JERRY RILEY

May 14, 2008

APPELLANT

V.

APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT
[NO. CV-2006-492]

FIRST BAPTIST CHURCH OF
HIGGINSON

HONORABLE BILL MILLS, JUDGE

APPELLEE

AFFIRMED

Jerry Riley appeals from an order of the White County Circuit Court enjoining him from building a private road on “Mills Street,” an unopened road that was designated on a plat filed in 1899, that is situated between two lots owned by the First Baptist Church of Higginson, hereinafter “the Church.” On appeal, Riley argues that the circuit court erred in its findings of facts and conclusions of law when it decided that: A) William Earl Bogan and Catherine Cora Bogan, husband and wife, who were the Church’s predecessors in title, held title to lands over which a private road was authorized by the County Court of White County on November 14, 2005; B) the Bogans’ mortgagee and holder of a deed of trust, Advanta National Bank, held an interest in the land; and C) the holder of a deed of trust was entitled to receive notice for the establishment of a private road pursuant to Arkansas Code

Annotated section 27-66-401 (Repl. 2004). He also argues that the trial court erred when it issued a decree enjoining him from constructing the private road that was authorized by County Court of White County. We affirm.

This is a case in equity involving the issuance of an injunction; therefore, our review is de novo. See generally *Ark. Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001); *Clark v. Casebier*, 92 Ark. App. 472, 215 S.W.3d 684 (2005). However, we review the trial court's decision to award injunctive relief under an abuse of discretion standard, see *United Food & Comm. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 353 Ark. 902, 120 S.W.3d 89 (2003), and we review the court's factual findings leading to the issuance of the injunction under the clearly erroneous standard. See *Southern College of Naturopathy v. State*, 360 Ark. 543, 203 S.W.3d 111 (2005); *City Slickers v. Douglas*, 73 Ark. App. 64, 40 S.W.3d 805 (2001). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, upon viewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. See *Ligon v. Stewart*, 369 Ark. 380, --- S.W.3d ---- (2007).

This case is unusual in that there is no testimony in the record. All we have before us are copies of deeds, including the deed of trust granted by the Bogans to Advanta National Bank; an order of the County Court of White County granting a private road to Riley; the August 7, 2006 minutes of the Higginson Town Council Meeting in which Riley was granted a twenty-foot easement to be added to the thirty-foot-wide private road that he obtained from the White County Court; a copy of the plat for Hedrick's Addition to the Town of Higginson, filed for record on September 22, 1899; and four stipulations. The

stipulations are as follows:

1. The real property which is the subject matter of this lawsuit is described on a plat of Hedrick's Addition to the Town of Higginson, Arkansas, which said plat was filed in the White County Clerk's Office in Plat Cabinet B Sleeve 5.
2. The City of Higginson has never accepted the street designated as "Mill Street" as reflected by the said Plat.
3. The public has never used "Mill Street."
4. The legal description over which defendants claim they have authority to build a private road is described in a county court order filed November 14, 2005. (White County 2005-33).

All of the arguments made to the trial court were apparently contained in the parties' trial briefs.

In granting the permanent injunction against Riley, the trial court found that while it could assume that the Bogans received actual notice of the county court proceeding and the public received published notice because the county court order memorialized the Bogans' attendance and referred to the published notice, there was nothing in the order to "indicate notice to the holder of the Deed of Trust interest." It concluded that "the holder of the Deed of Trust would definitely have an interest recognizable under ACA 27-66-401," and due to the lack of notice, "any successors and assignees are not bound by the Order of the County Court." We note that the Church is a successor-in-interest to the holder of the deed of trust.

Although Riley has listed four points on appeal, the crux of his argument relative to the first three points is that, upon filing of the Hedrick's Addition plat and the subsequent sale of lots in relation to that plat, Mills Street was "irrevocably dedicated" to the town of Higginson, and essentially, that dedication made the town the actual owner of all the

land upon which his private road was granted. He contends that because of the dedication, the stipulations were of no importance in this case; neither acceptance of the street by the town nor lack of public use defeat the dedication. Further, citing the plain wording of Arkansas Code Annotated section 27-66-401¹, Riley contends that the holder of the deed of trust was not entitled to any more notice than the public at large. We disagree.

It is settled law that a dedication is “the donation of land or the creation of an easement for public use.” *City of Cabot v. Brians*, 93 Ark. App. 77, 216 S.W.3d 627 (2005).

However, it is also widely accepted that public rights accrue by some method of public acceptance, which may be expressly given by representatives of the public or by the use of the

¹ Arkansas Code Annotated § 27-66-401 provides:

When the lands, dwelling house, or plantation of any owner is so situated as to render it necessary to have a private road from such lands, dwelling house, or plantation to any public road or navigable watercourse over the lands of any other person and the other person refuses to allow that owner the private road, then it shall be the duty of the county court to appoint viewers to lay off the road, provided the owner:

- (1) Gives notice to such person twenty (20) days before application to the court;
- (2) Petitions the court;
- (3) Shows necessity for the private road;
- (4) Shows that the person refuses to allow the road; and
- (5) Deposits with the clerk of the court sufficient money to pay all costs and expenses accruing on account of the petition, notice, view, and survey of the private road.

property by the public. See *Mebane v. City of Wynne*, 127 Ark. 364, 192 S.W. 221 (1917). Here, we have neither public acceptance in the form of the city formally accepting the street nor public use. Accordingly, the town possessed only the right to an easement, which it had yet to exercise. *Fuel Oil Co. v. Downs*, 205 Ark. 281, 168 S.W.2d 419 (1943) (holding that title acquired by dedication to the public is an easement, with the fee remaining in the adjacent landowner); see also *Arkansas State Highway Comm'n v. Sherry*, 238 Ark. 127, 381 S.W.2d 448 (1964).

We note further that it is settled law that a deed of trust vests the holder with “naked legal title to realty.” See *Harris v. Collins*, 202 Ark. 445, 150 S.W.2d 749 (1941). Therefore, we hold that, contrary to Riley’s assertions, the plain wording of Arkansas Code Annotated section 27-66-401 entitled Advanta National Bank to actual notice as one of the “owners” of the land referred to in the plat as “Mills Street.”

Regarding Riley’s remaining point, he argues that the circuit court erred in granting the Church injunctive relief because the time to appeal from the November 14, 2005 County Court order had “expired” without an appeal to circuit court. We do not reach this argument, however, because Riley failed to get a ruling on it from the trial court, and therefore, it is not preserved for our review. *Morgan v. Chandler*, 367 Ark. 430, 241 S.W.3d 224 (2006).

Affirmed.

HEFFLEY and VAUGHT, JJ., agree.