NO. COA05-200

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

DEPARTMENT OF TRANSPORTATION,
Plaintiff-Appellee,

v. Lincoln County
No. 01 CvS 530

PANTHY SHIPP ANDERSON, WILBUR HUNTER, ANNIS ROBINSON, DAPHNE McCULLOUGH, ROLAND H. HUNTER, GEORGIA ROGERS, and DOROTHY GRAHAM and husband, JOE GRAHAM,
Defendants-Appellants.

Appeal by defendants from order entered 9 November 2004 by Judge Charles C. Lamm, Jr. in Superior Court, Lincoln County. Heard in the Court of Appeals 1 November 2005.

*Attorney General Roy Cooper, by Assistant Attorney General J. Bruce McKinney, for plaintiff-appellee.*

*Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Warren A. Hutton, for defendants-appellants.*

McGEE, Judge.

The Department of Transportation (DOT) commenced a condemnation action in Lincoln County for the construction of N.C. Highway 16 (new highway). The new highway began north of N.C. Highway 73 and terminated at the intersection with State Road 1380 (S.R. 1380). The condemned property at issue is a 120-acre tract (defendants' property) located several hundred feet west and south

of S.R. 1380. The condemned property is owned by Panthy Shipp Anderson and other heirs of William Shipp (collectively defendants). Defendants' property is bounded by Catawba Springs Hunting Club, Inc. (hunting club) and by property owned by the estate of S. D. Howard (Howard heirs).

Prior to the commencement of the condemnation action, the hunting club and the Howard heirs exchanged deeds of easement granting the parties a sixty-foot right-of-way along or near an existing farm road, thereby providing the hunting club and the Howard heirs with access to S.R. 1380. A survey completed in December 2002 revealed that the easements encroached onto defendants' property by .0262 acres. The encroachment occurred where the easement crossed the hunting club property near its boundary line with the southwest corner of defendants' property.

As required by N.C. Gen. Stat. § 136-106, DOT filed a plat of defendants' property affected by the condemnation action. Thereafter, a pretrial hearing was conducted to settle the question of whether defendants had legal access to S.R. 1380. Defendants argued that the cross deeds of easement between the hunting club and the Howard heirs created a public right-of-way. Defendants also argued that because the easements creating the alleged public right-of-way crossed defendants' property, the easements provided defendants with legal access to S.R. 1380. Defendants further argued that, upon elimination of the easements by DOT's construction of the new highway, defendants' legal right of access to S.R. 1380 would be lost. Defendants moved to have the trial

court amend the plat introduced by DOT to reflect the alleged public right-of-way to S.R. 1380. In support of the motion, defendants introduced the testimony of Todd Wulfhorst (Mr. Wulfhorst), the attorney who drafted the deeds of easement for the hunting club and the Howard heirs. Mr. Wulfhorst, also an attorney of record for defendants in the present action, testified he intended the deeds of easement to create a public right-of-way to S.R. 1380 from the hunting club property and the Howard heirs property.

The trial court filed an order dated 9 November 2004 concluding there was insufficient evidence to show that the cross deeds of easement between the hunting club and the Howard heirs established a dedicated public right-of-way. The trial court denied defendants' motion to amend the plat. Defendants appeal.

Parties to a condemnation proceeding must resolve all issues, other than damages, at a hearing pursuant to N.C. Gen. Stat. § 136-108. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999). N.C.G.S. § 136-108 provides:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

The trial court's order entered pursuant to the N.C.G.S. § 136-108 hearing was clearly interlocutory, since it did not completely resolve the entire controversy between all the parties.

*See Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). It is well established that, in general, a party may not seek immediate appeal of an interlocutory order. *Rowe*, 351 N.C. at 174, 521 S.E.2d at 709. However, interlocutory orders may be immediately appealed when: (1) the trial court certifies that there is no just reason to delay the appeal, or (2) the interlocutory order affects a substantial right that may be prejudiced upon delay of an appeal. *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881. Orders from a condemnation hearing affecting title and area of land taken must be immediately appealed pursuant to N.C. Gen. Stat. § 1-277, which permits interlocutory appeals of determinations affecting substantial rights. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709 (citing *Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967)). Our Supreme Court recently specified that "[t]he possible existence of an easement . . . is a question affecting title; therefore, [a] trial court's order [based upon that question] is subject to immediate review." *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005). In the present case, the question before the trial court was whether defendants had access to an easement that would have in turn provided legal access to a public road. We find this was a question affecting title and the order was therefore subject to immediate appeal and review.

Defendant's sole assignment of error is that the trial court erred in concluding there was insufficient evidence to show the creation of a dedicated public right-of-way. "It is well settled

in this jurisdiction that when [a] trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

A dedication of property to the public consists of two steps: (1) an offer of dedication, and (2) an acceptance of this offer of dedication by a proper public authority. *Town of Highlands v. Edwards*, 144 N.C. App. 363, 367, 548 S.E.2d 764, 766, *disc. review denied*, 354 N.C. 74, 553 S.E.2d 212-13 (2001). An offer of dedication can be either express, as by language in a deed, or implied, arising from "conduct of the owner manifesting an intent to set aside land for the public[.]" *Bumgarner v. Reneau*, 105 N.C. App. 362, 365, 413 S.E.2d 565, 568, *modified and aff'd*, 332 N.C. 624, 422 S.E.2d 686 (1992). Once the offer of dedication is made, it must be accepted in "some recognized legal manner" by a proper public authority. *Id.* at 366, 413 S.E.2d at 568 (internal quotation omitted); *see Cavin v. Ostwalt*, 76 N.C. App. 309, 311, 332 S.E.2d 509, 511 (1985); *see also Blowing Rock v. Gregorie*, 243 N.C. 364, 368, 90 S.E.2d 898, 901 (1956) (stating that "it is well understood that a dedication is never complete until acceptance."). Acceptance of an offer of dedication "includes both express and implied acceptance." *Bumgarner*, 105 N.C. at 366, 413 S.E.2d at 569.

At the pretrial hearing, defendants offered evidence that the

hunting club and the Howard heirs intended to create a public right-of-way. Mr. Wulfhorst testified that, in drafting the deeds of easement, he was attempting to make the roadway a public dedication on behalf of the hunting club and the Howard heirs. Mr. Wulfhorst agreed that he drafted the deeds of easement in order to memorialize what Mr. Wulfhorst understood to be the desires of the hunting club and the Howard heirs. Mr. Wulfhorst stated he "tried to make it as public as [he] could make it."

Despite this evidence of an intent to offer a public right-of-way, defendants presented no evidence that the offer of dedication was ever accepted by the proper public authority. Therefore, defendants have not carried their burden of proving both offer and acceptance. *See Edwards*, 144 N.C. App. at 367, 548 S.E.2d at 766. The trial court's conclusion that defendants failed to present sufficient evidence of a public right-of-way is supported by the evidence and is consistent with applicable law.

Affirmed.

Judges WYNN and GEER concur.

Report per Rule 30(e).