IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00942 COA

JERRY MILLER **APPELLANT**

v.

RILEY SMITH, RUTH SMITH, PATRICIA SMITH MAYFIELD, SYLVIA SMITH KAHN ZEBROWSKI, JANE SMITH GATES, RILEY SMITH, JR. AND RICHARD A. SMITH **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	08/09/95
TRIAL JUDGE:	HON. DON GRIST
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	SARAH C. JUBB
ATTORNEY FOR APPELLEES:	OMAR D. CRAIG
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	TRIAL COURT FOUND THAT APPELLEES ESTABLISHED THE EXISTENCE OF A PRESCRIPTIVE EASEMENT OVER MILLER'S LAND, AND THAT THEY WERE ENTITLED TO INJUNCTIVE RELIEF
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

On October 28, 1994, Appellees (collectively referred to as "the Smiths") filed a complaint for an injunction against Jerry Miller ("Miller") in the Chancery Court of Lafayette County in an attempt to secure a prescriptive easement over a parcel of land owned by Miller. On August 11, 1995, the chancellor found in favor of the Smiths and granted the easement. Miller now appeals arguing that

the Smiths did not prove the six elements necessary to establish a prescriptive easement. We affirm the chancellor's judgment.

FACTS

Old Allen Road runs generally south from Mississippi State Highway No. 6 in Lafayette County, Mississippi. Bordering the west side of Old Allen Road is a two and nine-tenths (2.9) acre parcel of land that is currently owned by Miller. This parcel was deeded to Miller in 1992 by Dorothy Lott, who owned the parcel since 1968. To the west of and contiguous to Miller's land is a one hundred and forty one (141) acre parcel of land owned by the Smiths. Riley and Ruth Smith own a life estate in the one hundred and forty one (141) acres with the remainder interest being owned by their siblings ("the Smiths"). Audley Brummett ("Brummett") owns a nineteen (19) acre tract of land that is also contiguous to the western border of the Miller land and the northern border of the Smith's land.

The dispute which gave rise to this litigation involves a primitive road ("the Road") which extends generally westward from Old Allen Road, crossing just inside the northerly border of Miller's land and proceeding onto the Smith's land. For all practical purposes, the Road is the only point of ingress and egress to the Smith's land. The record also reveals that Brummett used the Road as his primary means of accessing his land.

A brief history of the Road and its use would prove helpful at this point. Many years ago, the Road was a public road, providing vehicle, pedestrian, and utility access to homes back on the Smith's land and beyond. The Smiths bought the land in 1946. The Road was used publicly by school buses and mail vehicles, both servicing families who lived on the Smith's land. The last family with school aged children moved off the property in the early 1950's. The Smiths maintained a garden on their property. The land was also used for hunting and general enjoyment by the Smiths and the Brummetts during the time of their ownership. The general public continued to use the Road until the county stopped maintaining it in the late 1960's.

It is unclear exactly when Lafayette County began or abandoned maintenance of the Road, but the evidence is clear that the county maintained the Road from 1945 until sometime during the years 1966 through 1968. After the county stopped its maintenance of the Road, Brummett and Riley Smith jointly undertook the periodic maintenance of the Road. The Smiths had tenants on their land up until approximately 1991. The Road was their only means of ingress and egress to their homes.

Dorothy Lott testified that while she owned the land that Miller now owns, there were no restrictions placed on its use. It was not until Dorothy Lott sold her land to Miller in 1992 that all access to the Road was restricted. Miller placed a load of gravel in the middle of the Road, thereby blocking all passage.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE SMITHS FAILED TO PROVE EACH OF THE SIX ELEMENTS NECESSARY TO ESTABLISH A PRESCRIPTIVE EASEMENT OVER AND ACROSS MILLER'S LAND.

On appeal, Miller argues that the Smith's failed to prove each of the six elements of a prescriptive easement, and therefore, should not have been granted injunctive relief in the way of an easement across Miller's land. We disagree. The standard of review we employ in reviewing the findings of fact and conclusions of law of a chancellor has been stated many times. This Court will not disturb a chancellor's findings unless the chancellor was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. *Merchants & Planters Bank of Raymond v. Williamson*, 691 So. 2d 398, 402 (Miss. 1997). The facts in the case *sub judice* are not largely in dispute. The law, however, is in dispute. The above standard of review has no application when there is an error of law. In these cases, our review is de novo. *Myers v. Blair*, 611 So. 2d 969, 971 (Miss. 1992).

"The standard and burden of proof to establish a prescriptive easement is the same as a claim of adverse possession of land." *Thornhill v. Caroline Hunt Trust Estate*, 594 So. 2d 1150, 1152 (Miss. 1992). To establish adverse possession of land one must prove the possession of the land was: (1) under a claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for ten years; (5) exclusive; and (6) peaceful. *Thornhill*, 594 So. 2d at 1152-1153. Furthermore, each of these elements must be proven by clear and convincing evidence. *Id.*

We are in agreement with the chancellor's conclusion that the Smiths established five of the six elements of adverse possession. Our review of the record in this case reveals, however, that the chancellor left out the element of exclusive possession from his analysis. In his Conclusions of Law, the chancellor stated the elements of adverse possession and cited the *Thornhill* case as authority for these elements. The chancellor left out the fifth element, exclusive possession, from his statement of the elements and his analysis. We find this to be error. We further find, however, that this error is harmless in light of the law in Mississippi with regard to the element of exclusive possession.

The chancellor stated in his findings of fact that both the Smiths and the Brummetts used the land for hunting and enjoyment. It was also noted that the Smiths and the Brummetts shared in the maintenance of the Road after the county stopped providing this service. Furthermore, there was testimony that the Road was Brummett's exclusive avenue of access to his land. The possibility exists that the Smith's and the Brummett's use of the Road could be considered joint or "scrambling." Such joint use has been held to be insufficient to establish adverse possession. *G.E. Gadd v. Stone*, 459 So. 2d 773, 774 (Miss. 1984). Our supreme court has recently stated the following with regard to exclusive possession:

There must be an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimant's conduct must afford an unequivocal indication that he is exercising dominion of a sole owner.

Rawls v. Parker, 602 So. 2d 1164, 1169 (Miss. 1992) (Quoting 2 C.J.S. Adverse Possession § 54 (1972).

While the facts and law shown above seem to indicate that the Smiths did not prove exclusive possession, a deeper look at the law reveals that their proof with regard to exclusive possession and the findings of the chancellor were sufficient to confer adverse possession. The following has been said about the element of exclusive possession:

The term "exclusive," however, does not mean that the easement must be used by one person only, but simply that the right shall not depend for its enjoyment on a similar right in others; it must be exclusive as against the community or public at large. The use may be exclusive in the required sense even though it is participated in by the owner of the servient tenement, or by the owners of adjoining land. The fact that certain persons have acquired an easement by grant or custom does not prevent other persons from acquiring title to the same easement by prescription.

28 C.J.S. Easements § 15 (1972). We feel that this statement of the law is embraced by the holding in the case of *McCain v. Turnage,* which we further feel controls the case *sub judice. McCain v. Turnage*, 117 So. 2d 454 (Miss. 1960). The facts of *McCain* are almost identical to the facts in the case *sub judice.* The only difference is that the chancellor did not grant the prescriptive easement because of non-exclusive use. On appeal, the supreme court held:

that where, as in the present case, a use of the lands of another for roadway purposes has been open, visible, continuous, and unmolested since some point in time anterior to the memory of aged inhabitants of the community, such use will be presumed to have originated adversely. This is in accord with the prevailing view. Any other rule than the one just stated would be calculated to stir up dissension between neighbors and disturb the repose of communities. . . . It is therefore not necessary for the use of the alley by [claimant] to have been exclusive of all other persons; others, also may have used it as a means of ingress and egress to their property . . . . An individual may acquire an easement by way of adverse user, separate and apart from the public, although at the same time the individual is using the same way other persons or the general public uses the same. (citations omitted)

Accordingly, we find that the use of the road shown by the Smiths was sufficient to confer upon

them a prescriptive easement over the land owned by Miller notwithstanding the fact that some of the use of the road was joint. The judgment of the chancellor is affirmed.

THE JUDGMENT OF THE CHANCERY COURT OF LAFAYETTE COUNTY IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.