

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00243 COA

JOHN WEBB LAMPLEY, JR. AND LEIGH W. LAMPLEY

APPELLANTS

v.

**PATRICIA PEPPER GRAMELSPACHER, BETH PEPPER, CHRISTOPHER LEFAY AND
HUGH MCLAURIN PEPPER III**

APPELLEES

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

TRIAL JUDGE: HON. E. G. CORTRIGHT

COURT FROM WHICH APPEALED: CHANCERY COURT OF YAZOO COUNTY

ATTORNEY FOR APPELLANTS:

CHARLES W. WRIGHT, JR.

ATTORNEY FOR APPELLEES:

DEREK E. PARKER

NATURE OF THE CASE: REAL PROPERTY

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF APPELLEES RECOGNIZING
IMPLIED EASEMENT ARISING FROM PREEXISTING USE

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

FRAISER, C.J., FOR THE COURT:

This dispute arose between family members over a strip of road in Yazoo County, Mississippi, crossing the Lampleys' property and allowing for entrance onto Gramelspacher's property. The following findings of fact made by the chancellor are undisputed by the parties. John Webb Lampley, Jr., and his wife, Leigh W. Lampley, sought to enjoin Patricia Pepper Gramelspacher and her family from using a road running through the Lampleys' land and connecting Gramelspacher's property with Highway 16 (a public road). The lands now owned by the Lampleys and Gramelspacher came from a common source, i.e., H.M. Pepper and wife, S.R. (Rossa) Pepper, who acquired the same in December of 1905. H.M. Pepper subsequently died and left as his heirs at law, his widow, Rossa Pepper, and his children, Ross Handley Pepper, Mrs. Elizabeth Pepper Dixon and Hugh McLaurin Pepper. On the death of H.M. Pepper, Rossa Pepper became the owner of a 5/8th interest in all the lands herein involved, and each of his children became the owner of a 1/8th interest therein.

In 1937, Rossa Pepper and her three children partitioned the property into three separate tracts. Each child and their spouse received a separate tract, with Rossa Pepper retaining a life estate to the whole property. For convenience, the chancellor designated the tracts as Tract One, Tract Two, and Tract Three. In 1905, H.M. and Rossa Pepper resided on the land. They had a house on Tract One, approximately 1800 feet from Highway 16. They gained access to their home from a road leading almost directly north from Highway 16. (See Attachment). It is the status of this road that is in controversy. The evidence does not show exactly how long the road has been in existence, but it is clear that the Peppers were using the road as long ago as 1905. Family members continued living in the house and utilizing the road until 1965-67. From that point until 1994, the house was not inhabited except for occasional weekend and vacation use. The house fell into a state of disrepair.

Through various mesne conveyances, Tract Two and portions of Tract Three now belong to John W. Lampley, Jr., and his wife. Patricia Pepper Gramelspacher, who owns an interest in Tract One with Hugh McLaurin Pepper III, moved from California back to the old Pepper home on Tract One in September 1994. Gramelspacher was accompanied by her daughter and her daughter's husband [hereinafter collectively referred to as "the Peppers"]. The road in dispute leading to the old Pepper home crosses Tracts Two and Three before reaching the land of Tract One. The Peppers began using the aforesaid road for ingress and egress. Lampley, however, asserts that he owns part of that road, and that the Peppers have no right to use it.

The Lampleys filed a civil action for a preliminary injunction on October 20, 1994, against the Peppers, requesting the court to prohibit the Peppers from trespassing on the Lampley property. The Peppers filed their answer and subsequently filed a counter-complaint also requesting the court to issue a preliminary injunction prohibiting the Lampleys from trespassing on their property and requesting declaratory judgment for an easement or right-of-way across the Lampleys' property. Judgment was rendered in favor of the Peppers.

The chancellor held that the Peppers had an implied easement to utilize the roadway, on the premise that it was the primary means of access to the home, and it was necessary for the convenient and comfortable use of the property. The chancellor also held that the Peppers had obtained an easement by adverse possession, noting that in addition, there was no intention by Hugh McLaurin Pepper or his successors to abandon the easement. Finally, the chancellor granted the Peppers an injunction prohibiting the Lampleys from interfering with the Peppers' use of the road in dispute. The Lampleys'

complaint was dismissed with prejudice.

The Lampleys appeal presenting the following issues:

I. WHETHER THE CHANCERY COURT ERRED IN FINDING THAT THE PEPPERS HAD ACQUIRED AN EASEMENT BY PRESCRIPTION.

II. WHETHER THE CHANCERY COURT ERRED IN FINDING THAT THE PEPPERS HAD ACQUIRED AN IMPLIED EASEMENT AND/OR AN EASEMENT BY NECESSITY TANTAMOUNT TO AN EASEMENT OF CONVENIENCE.

III. WHETHER THE CHANCERY COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF THE RELATIVE EXPENSE OF PLACING GRAVEL ON THE ROAD LOCATED ON THE LAMPLEYS' PROPERTY AS OPPOSED TO THE ROAD LOCATED ON THE PEPPERS' PROPERTY.

IV. WHETHER THE CHANCERY COURT ERRED IN FINDING THAT THE PEPPERS HAD NOT ABANDONED ANY ALLEGED EASEMENT.

V. WHETHER THE CHANCERY COURT ERRED IN FINDING THE PEPPERS NOT LIABLE FOR TRESPASS UPON THE LAMPLEYS' LAND.

Finding no error in the chancellor's ruling, we affirm.

DISCUSSION

On appeal, the Lampleys argue that the chancellor was in error in granting an implied easement, and instead should have followed the mandates established in the case of *Broadhead v. Terpening*, 611 So. 2d 949, 953 (Miss. 1992), which sets out the test for an easement of necessity. It is the Lampleys' argument that the chancellor erred because another road existed on the Peppers' land for ingress and egress. However, the chancellor ruled that *Broadhead* is not controlling because the parties are not dealing with a piece of landlocked property. In his opinion, the chancellor explains his rationale:

Irrespective of whether Mrs. Gramelspacher and her siblings are in possession of an easement gained through adverse use by their ancestors, I am convinced that there now exists for their benefit an implied easement over the road. This implied easement arises from preexisting uses of the road made during the time (pre-1937) when there was unity of title as to Tracts one, two and three. The law which applies in this regard is stated in 94 ALR 3rd 505 - Unity of Title for Easement by Implication:

(W)here during unity of title an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude is in use at the time of the severance and is necessary for the reasonable enjoyment of the severed part, a grant or reservation of the right to continue such use arises by implication of the law. It is clear that with respect to easements by implication, specifically, as distinguished from ways of necessity, the necessary unitary ownership must have existed at a time when the use alleged to form the basis of the implied easement was already in existence. Accordingly, the cases at least imply that the necessary unity of title must have existed at the time the severance of title alleged to have transformed the "quasi-easement" into an implied true easement takes place.

The chancellor based his decision on the case of *Hutcheson v. Sumrall*, 220 Miss. 834, 840, 72 So. 2d 225, 227 (1954) which states that "an implied easement must be continuous, apparent, permanent and necessary." In *Hutcheson*, the Mississippi Supreme Court adopted the language of *Romanchuk v. Plotkin*, 9 N.W. 2d 421, 424 (Minn. 1943), and explained the requirements of an implied easement:

The doctrine of implied grant of easement is based upon the principle that where, during unity of title, the owner imposes an apparently permanent and obvious servitude on one tenement in favor of another, which at the time of severance of title, is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial, then, upon a severance of ownership, a grant of the dominant tenement includes by implication the right to continue such use.

Hutcheson, 72 So. 2d at 228. There is no dispute among the parties that the three Tracts all derive from a common source and that the road in dispute was relied upon when unity of the three Tracts existed.

While there was no evidence of exactly how long the road in dispute has been in existence, the evidence clearly shows that the Peppers' ancestors were using the road as far back as 1907. The elements of unity, permanence, apparentness, and necessity were satisfied. The chancellor explained his ruling thus:

The road here in question was well defined in 1937 when the property was parti[tioned] among the three siblings. Its use was reasonably necessary for the fair enjoyment of each Tract allotted. The road provided a direct and straight-line access from each of the three Tracts to Highway 16. Its use by the owners of the dominant estates following the partition continued uninterruptedly and without objection for thirty years, Borrowing from the descriptive language of *McAllum, et al v. Spinks*, 129 Miss. 237, 'it would cut the throat of reason and knock the brains out of common sense' to conclude that Rossa Pepper and her children did not intend in their partition to grant to each child the

continued use and enjoyment of this road leading from Highway 16 to the old home now owned by the children of Hugh McLaurin Pepper.

In response to the Lampleys' argument that the easement is not necessary because of the existence of another road on the Peppers' property, the chancellor relied on *Fourth Davis Island Land Co. v. Parker*, 469 So. 2d 516 (Miss. 1985). *Fourth Davis*, analyzing the earlier case of *Bonelli v. Blakemore*, 66 Miss. 136, 5 So. 228, 230 (1888), stated:

A close reading of *Bonelli* reveals that the Court distinguished between ways of necessity, which require strict necessity for their creation and implied easements of things not strictly necessary, but highly convenient or essential to the full enjoyment of the land. . . .

The strict necessity in *Bonelli* refers to creation of private rights of way that provide the sole access to landlocked property. The *Bonelli* court's recognition that there may be implied grants of things not strictly necessary but highly convenient demonstrates that when the easement is not in the form of a way of necessity, strict necessity is not required. It is thus possible to distinguish between the cases involving ways of necessity, wherein the implied easement provides the only means of access to the land, and cases where the implied easement is highly convenient or essential to the full enjoyment of the land.

Fourth Davis Island Land Co., 469 So. 2d at 520-21 (Miss. 1985) (citations omitted). The chancellor was correct in ruling that the Peppers were not responsible for proving strict necessity. An implied easement from pre-existing use may be maintained for purposes other than a strict way of necessity. The evidence showed that the road in dispute was the most convenient and fair means of access to the Peppers' home from Highway 16.

The Mississippi Supreme Court recently reiterated the controlling standard of review of a chancellor's ruling:

On appeal this Court will not reverse a Chancery Court's findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence supporting those findings. We must consider the entire record before us and accept all those facts and reasonable inferences therefrom which support the chancellor's findings. The findings will not be disturbed unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous, or an erroneous legal standard was applied. And the chancellor, being the only one to hear the testimony of the witnesses and observe their demeanor, is to judge their credibility. He is best able to determine the veracity of their testimony, and this Court will not undermine the chancellor's authority by replacing his judgment with its own.

Madden v. Rhodes, 626 So. 2d 608, 616 (Miss. 1993) (citations omitted). Because substantial evidence undergirds the chancellor's decision that the Peppers are entitled to an implied easement arising from a pre-existing use, we affirm and find it is unnecessary for this court to determine or consider whether the chancellor erred in making an additional finding that the Peppers also acquired

the easement by adverse possession. *See Rawls v. Parker*, 602 So. 2d 1164, 1169 (Miss. 1992) (holding that chancellor impliedly adopted survey indicating record title, rendering adverse possession claim unnecessary).

The Lampleys also complain on appeal that the chancellor erred in sustaining the Peppers' objection to a line of questioning pertaining to an alternative road on the Peppers' property. The Lampleys rely on an old road supposedly in existence on the Peppers' property that is called the old "Granddaddy Bob" road, leading from the Pepper home to Highway 16, to prove that the road in dispute is not necessary. At trial, the Lampleys sought to introduce evidence of the cost to repair or maintain the old "Granddaddy Bob" road as a means of ingress and egress on the Pepper property. The Peppers wanted to repair and maintain the road in dispute, so the Lampleys asserted and offered to prove that the Peppers could just as easily use those funds to maintain the road on their own land, therefore negating any necessity for using the disputed road. However, the chancellor sustained the Peppers' objection to that line of questioning, ruling that the questions regarding the Peppers' funds were irrelevant. The Lampleys contend that they preserved this issue for appeal. The Peppers argue that not only was evidence irrelevant to any issue at trial, but additionally, the required proffer was not made.

At trial, during the adverse cross-examination of Patricia Pepper Gramelspacher, counsel for the Lampleys inquired into the Peppers' source of funds to maintain the road in dispute:

Q. Now, you have funds with which to purchase gravel to put on this road from the fork to the estate property; don't you?

BY MR. PARKER: I don't believe that is relevant, Your Honor.

* * * *

BY THE COURT: Sustained.

BY MR. WRIGHT: (Continuing)

Q. In your Petition you have requested this Court that you be allowed to place gravel; on that road, haven't you?

A. I believe so.

Q. And who is going to purchase this gravel?

A. I would have to.

Q. And you have requested to be able to put culverts on this road from the fork up to the estate property. Who is to purchase these culverts?

A. I would if I decided to use culverts.

Q. And you have personal funds available to you to contribute toward the building of this road?

BY MR. PARKER: We object, Your Honor.

BY THE COURT: Yeah, I sustain the objection. I don't see the relevancy of the source of the money to put in culverts.

....

BY MR. WRIGHT: If it please the Court, they have pled an issue of the unreasonable costs and burden upon the defendant and counterplaintiff in constructing a road from Highway 16. The position of Mr. Lampley is that if they have sufficient funds with which to attempt to redo the road from the fork to their property line, then they have funds with which to do the necessary work to prepare a road from Highway 16.

BY MR. PARKER: If I might respond, Your Honor?

BY THE COURT: No, I think I will sustain the objection.

BY MR. PARKER: Well, then, I'll withdraw my objection. If counsel opposite wants to go into the relative cost vis-a-vis repairing and making a new road, I

will be glad to allow the witness to do that.

BY THE COURT: I don't believe it's relevant.

On appeal, the Lampleys contend that the chancellor was in error because *Gulf Park Water Co. v. First Ocean Springs Dev. Co.*, 530 So. 2d 1325, 1331 (Miss. 1988) requires evidence of alternative ways across the Peppers' land. *Gulf Park Water Co.* states that the necessity required of an implied easement "should be judged by whether an alternative would involve disproportionate expense and inconvenience, or whether a substitute can be furnished by reasonable labor or expense." *Gulf Park Water Co.*, 530 So. 2d at 1331. However, the Lampleys failed to put in the record any proffer of evidence of the cost of building a new road compared to the cost of maintaining the road in dispute. It is well established that in order to preserve for appeal the refusal to admit certain evidence, the substance of the excluded evidence must be placed in the record for review by the appellate court. The comment to Rule 103 of the Mississippi Rules of Evidence states "when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded." M.R.E. 103 cmt. (a). There is nothing in the record to indicate to this Court that the repair of the "Granddaddy Bob" road is a feasible alternative of maintaining the road in dispute.

The trial court has broad discretion in deciding the relevancy of evidence. *Terrain Enters. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995). "Further, this Court will not reverse the trial court's decision unless abuse of that discretion is shown. Further, for a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Mockbee*, 654 So. 2d at 1131 (citations omitted). At trial, the Lampleys failed to make an offer of proof on this issue. Furthermore, not only have they failed to prove to this Court that the chancellor abused his discretion, but they also failed to prove that a substantial right has been adversely affected. This issue is without merit.

The Lampleys also argue that the chancellor erred in finding that the Peppers had not abandoned their right to the disputed road. The chancellor found that the Peppers never evidenced any intention to abandon the easement. The Lampleys claim that the chancellor failed to take into consideration the dilapidated state of the old Pepper home and the excessive overgrowth of vegetation, weeds and debris on the road. The chancellor based his decision on the few intermittent visits to the home, the occasional use of the road, and the erection of a gate to keep out trespassers. The chancellor cited 25 Am.Jur. 2d *Easements and Licenses* § 105 (1966), which states, "As a general rule, an easement acquired by grant of reservation cannot be lost by mere nonuse for any length of time, no matter how great. The nonuse must be accompanied by an expressed or implied intention to abandon." *Id.* The chancellor found that the evidence clearly showed that the road was in use by the family from 1937 until 1966 or 1967. After that time, the evidence showed that the road was still used intermittently by Hugh McLaurin Pepper's children and grandchildren. One grandson used the road to gain access to Tract One for gardening and chopping firewood. The chancellor found that there was never any evidence of an intent to abandon the use of the road in dispute.

Finally, the Lampleys contend that the Peppers are liable for trespass upon their property. The Lampleys never introduced a showing of damages at trial arising out of the alleged trespass. Moreover, because the Peppers are entitled to use the roadway crossing the Lampleys' land, we find this issue nonconsequential and without merit. Satisfied that the chancellor's decision recognizing the Peppers' implied easement from pre-existing use was sufficiently fortified by the evidence, we affirm.

THE JUDGMENT OF THE YAZOO COUNTY CHANCERY COURT RECOGNIZING AN IMPLIED EASEMENT ARISING FROM PREEXISTING USE IN THE APPELLEES IS AFFIRMED. COSTS ARE TAXED TO APPELLANTS.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.