

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00069 COA

MATT BARNES AND WIFE, KATHY M. BARNES, PAUL BARNES AND WIFE, SYLVIA A. BARNES, J. B. BARNES AND WIFE, ELORIA L. BARNES, AND JEFFERY K. BARNES

APPELLANT

v.

WILLIAM E. WOOTEN, BEN P. GANANN, NED RUSHING, THOMAS CRANE, JAMES C. ARTHUR, INDIVIDUALLY AND IN THEIR CAPACITY AS THE LEAKE COUNTY BOARD OF SUPERVISORS AND WEYERHAEUSER COMPANY

APPELLEES

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

TRIAL JUDGE: HON. RAY HILLMAN MONTGOMERY

COURT FROM WHICH APPEALED: LEAKE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

JAMES C. MCINTYRE

ATTORNEYS FOR APPELLEES:

ROBERT N. BROOKS (FOR WOOTEN ET AL.)

VERNON R. COTTON (FOR WEYERHAEUSER)

NATURE OF THE CASE: REAL PROPERTY

TRIAL COURT DISPOSITION: HELD LAKE ROAD AS PUBLIC ROAD AND ISSUED A PERMANENT INJUNCTION AGAINST BARNES ET AL, GRANTING LEAKE COUNTY A

JUDGMENT IN THE AMOUNT OF \$135.00 ACTUAL DAMAGES PLUS \$8,883.00 IN ATTORNEY'S FEES AND WEYERHAEUSER \$55,194.00 IN ACTUAL DAMAGES PLUS \$4,000.00 IN ATTORNEY'S FEES. THE LOWER COURT ALSO DISMISSED WITH PREJUDICE THE BARNES COMPLAINT TO REMOVE CLOUD ON THE TITLE.

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This appeal arises from a Leake County Chancery Court judgment finding a roadway in Leake County known as Lake Road to be a public roadway by prescription. Based on this adjudication, a permanent injunction was entered against Matt Barnes and wife, Kathy M. Barnes, Paul Barnes and wife, Sylvia A. Barnes, J.B. Barnes and wife, Eloria L. Barnes and Jeffery K. Barnes (the Barnes), jointly and severally, ordering them to refrain from interfering in any way with the public use of Lake Road. The Barnes were also found liable to Leake County, jointly and severally, for \$135.00 in actual damages and \$8,883.00 in attorney's fees and liable to Weyerhaeuser Company, jointly and severally, for \$51,194.16 in actual damages and \$4,000.00 in attorney's fees. On appeal, the Barnes assert that the lower court erred, in light of the proof, (a) by adjudicating Lake Road to be a public road, (b) issuing a permanent injunction against them, and (c) awarding a judgment of both damages and attorneys' fees to the Leake County Board of Supervisors [hereafter "the Board"] and Weyerhaeuser Company. The Barnes further assert that the lower court erred in failing to amend its findings or make additional findings of fact.

We conclude that the portion of the judgment of the lower court issuing an injunction against the Barnes and awarding damages to both the Board and Weyerhaeuser was consistent with the proof presented at trial, and we, therefore, affirm. However, we do not find that an award of attorneys' fees was warranted, and we, therefore, reverse and render that portion of the judgment awarding such fees to the Board and Weyerhaeuser.

I.

FACTS

In November 1991, the Barnes collectively acquired title to certain real property in Leake County, Mississippi, through which runs the passageway in question known as Lake Road. According to the testimony of Matt Barnes and Kathy Barnes, the Barnes contacted the Board in an attempt to have the road maintained and repaired by the county. After a period of no response from the Board, the Barnes then placed a cable across the entrance to Lake Road in June 1992. This caused the Board to receive numerous complaints, and the Barnes were requested to attend a Board meeting to discuss the matter. At the meeting, the Barnes were told to remove the cable; however, both Matt Barnes and Kathy Barnes testified that they were told by Mr. Wooten, a member of the Board, that the county had no intention and was not in a financial position to maintain the road for a group of hunters.

After several months with no action or contact from the Board concerning improvements, the Barnes

again blocked the entranceway into the road, putting up a locked gate in August 1992. On March 17, 1993, the Board entered an order officially recognizing Lake Road as a county public road, and the Barnes were notified through their attorney to remove the locked gate or face legal action. The letter also indicated that the county would have the Sheriff come and remove the obstruction if Barnes did not take it down by a certain date. The county then proceeded, through an order of the Board on its minutes, to direct the physical removal of the obstruction and began maintenance on Lake Road in June 1993.

This case originated in October 1993 with a petition filed by the Barnes to remove a cloud on title to Lake Road or Old Sallis Road against the Leake County Board of Supervisors individually and in their capacity as the Board. The Barnes contended that the order entered by the Board on March 17, 1993, adjudicating the road to be a public road by prescription and the actions taken by the Board thereafter constituted a cloud on their title. The Board filed an answer and counterclaim for damages against the Barnes for the expense of removing a gate which had been erected by the Barnes. In a related action, Weyerhaeuser filed a separate complaint against the Barnes for injunctive relief, alleging that the Barnes had denied its agents access through Lake Road to certain property which contained timber purchased by the company. Both causes were consolidated for trial.

II.

Whether the Judgment was Supported by the Proof

The Barnes argue that the chancellor erred in holding that Lake Road is a public road by prescription because the county failed to meet its burden of proof. In support of their argument, the Barnes claim that the road is in deplorable condition, impassable, and connected to no other roadway. The Barnes also contend that the road is not used by the public school system for transit nor used by mail carriers for delivery, and that it is not a "dedicated road" on past Board minutes. This Court reviews the chancellor's findings of fact under the manifest error standard. *Myers v. Blair*, 611 So. 2d 969, 971 (Miss. 1992). The chancellor is in the best position to arrive at correct factual findings and conclusions from his firsthand knowledge of seeing the witnesses and determining their credibility. *Id.* However, with regard to questions of law, this Court will review the record de novo. *Id.*

In order to establish that Lake Road is a public road by prescription, the county bears the burden of proving that its use is "(1) open, notorious and visible; (2) hostile; (3) under claim of ownership; (4) exclusive; (5) peaceful; and (6) continuous and uninterrupted for ten years." *Myers*, 611 So. 2d at 971 (citing *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112, 117 (Miss. 1987)). Because Lake Road is not a "dedicated public road" under the statutes, the county must prove that it was "habitually used by the public in general for a period of ten years; and such use must be accompanied by evidence, other than mere travel thereon, of a claim by the public of the right so to do." *Id.* (citing *Brooks v. Sanders*, 243 Miss. 46, 137 So. 2d 174, 175 (1962)).

In his final judgment, the chancellor noted that both the testimony and evidence from the initial hearing on the temporary injunction and the testimony from the trial on the permanent injunction were taken under advisement in reaching his decision, as well as findings of fact and conclusions of law submitted by both parties. His opinion set out the necessary elements for a prescriptive right and

discussed the testimony and exhibits which supported his finding that the road was one generally used by the public for a period longer than ten years. The chancellor then determined that because the Board had met its burden of proving public use, the burden had shifted to the Barnes, who failed to prove that use of the road was permissive and not adverse or hostile. Accordingly, the road was held to be a public road by prescription, and an injunction was entered against the Barnes from interfering in any way with the public use and enjoyment of Lake Road. The Barnes were also ordered to pay damages and attorneys' fees to the Board and Weyerhaeuser. In support of his final judgment, the chancellor noted the testimony of several witnesses, including that of Elizabeth Tate, who testified that her family had used the road for over fifty years from the time when she was a little girl traveling to church to the present, when she visited the property four or five times a year until the Barnes put up the locked gate. Tate also testified that she remembered mail carriers traveling the road to bring her grandfather mail, as well as county employees working the road as late as 1984 or 1985.

H.K. O'Cain testified that the road had been used by the public for the fifty plus years in which he had owned land. Isaac Anderson, a former county employee, testified that he and other county workers maintained the road at least twice a year from 1963 until 1991 when he retired. He also testified that he and his family had used the road as early as the 1950's to visit a cemetery situated on the property belonging to the O'Cains. Bennie Truesdale, former supervisor from 1972 until 1980, testified that the road was maintained by the county both prior to and during his term as a supervisor, and that he personally used the road to access his property until the Barnes put the gate across the road. Dean Myers, former supervisor from 1980 until 1987, testified that the road was maintained during his term in office, and during that time, he was often called on by Doug Thornton of MP&L to perform maintenance on the road so that MP&L could service its lines. Thornton testified that he used the road to check and maintain MP&L power lines running along Lake Road and into Madison County. Herbert McDonald testified that he and other families had used the road since the 1950s to travel to various churches in Madison County.

In addition Tommy Adcock, the mapper for Leake County Tax Appraisal, testified to verify that the Barnes were not assessed taxes on the roadway, and that the road was indicated by solid lines on the map as a public roadway, as opposed to broken lines which represented private roadways. Further, Jerry Hardin of the State Auditor's office testified that following an investigation conducted by his office into whether the Board was working on a private road with public funds, he was of the opinion that Lake Road was, indeed, a public road and recommended that the investigation be closed.

The chancellor's opinion clearly set out the law in regard to prescriptive easements, as well as the facts which supported his finding that Lake Road had been used by the public for over ten years in a prescriptive manner. Based on our limited standard of review as to his findings of fact, we cannot say that those findings constituted manifest error, and we, therefore, affirm.

III.

Failure to Make Additional Findings

The Barnes next contend that the chancellor erred in refusing to amend his findings and make additional findings of fact in regard to the final judgment. After the court rendered its final judgment,

the Barnes filed a motion to amend pursuant to Rule 52(b) of the Mississippi Rules of Civil Procedure, requesting the lower court to adopt as part of its judgment thirty-seven specific additional findings of fact. Seven of these findings requested the court to state all facts to support a finding that Weyerhaeuser had been damaged by each individual plaintiff. The other thirty dealt with a variety of very specific findings relative to the Board minutes and use of the road, as well as the course of dealings between the Barnes and Weyerhaeuser.

The Barnes argue to this Court that had the trial court amended its finding and made the additional findings, there would have been no proof that any of the Barnes, particularly all members of the Barnes family except Matt Barnes, were responsible for damages or attorneys' fees to the Board and Weyerhaeuser.

While the Barnes are correct in their assertion that Rule 52(b) entitles parties to request the court to make additional findings of facts, their reliance on the rule and certain case law is misplaced under the facts of this case. The Barnes cite as authority the case of *Lowery v. Lowery*, 657 So. 2d 817 (Miss. 1995). In *Lowery*, Mrs. Lowery requested the court to provide specific findings of facts and conclusions of law under Rule 52 of the Mississippi Rules of Civil Procedure, which provides:

[I]n all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specifically and state separately its conclusions of law therein and judgment shall be entered accordingly.

Lowery, 657 So. 2d at 819 (citing M. R. C. P.. 52(b)). However, the trial judge refused to supply even general findings of fact or conclusions of law despite a party's request to do so. *Id.* at 819. The supreme court stated that such a refusal to provide even general findings was clearly reversible error under the mandatory directive of the word "shall" in Rule 52. *Id.*

Under Rule 52, the court "may," and "generally should," in its discretion, provide findings of fact and conclusions of law absent a party's request. *Id.* (citing *Tricon Metals & Servs., Inc. v. Topp*, 516 So. 2d 236, 239 (Miss. 1987)). Further, when a party does make a request for specific findings of fact and conclusions of law under Rule 52, the supreme court, in *Century 21 Deep South Properties v. Corson*, held that where a court makes general findings of fact and conclusions of law, it has technically complied with the mandate of Rule 52. *Century 21 Deep S. Properties v. Corson*, 612 So. 2d 359, 367 (Miss. 1992).

The present case is clearly distinguishable from *Lowery* and other cases in which the trial judge failed to make findings of fact or conclusions of law. In his final ruling, the chancellor made specific findings and recited the details of evidence presented at two hearings in support of his conclusion that Lake Road was a public road by prescription according to the applicable law.

In addition, the chancellor clearly set out the reasoning in support of his damage awards, noting the purchase price of timber and the units lost for damages suffered by Weyerhaeuser as a result of the obstruction placed across Lake Road by the Barnes. This is more than a sufficient answer to the issue raised by the Barnes, but never specifically argued, that an award of damages was improper.

Accordingly, the chancellor far exceeded the requirements of Rule 52, and we, therefore, affirm the chancellor's order refusing to amend or alter his findings.

IV.

Attorneys' Fees

The Barnes also take issue with the lower court award of attorneys' fees to both Leake County and Weyerhaeuser. We note that the issue is not the amount of fees awarded but the fact that such costs were assessed to the Barnes.

In *Denson v. George*, the supreme court stated:

Regarding attorneys' fees, this Court has held that in the absence of contractual provisions or statutory authority, attorneys' fees may not be awarded as damages in a case unless punitive damages are also proper.

Denson v. George, 642 So. 2d 909, 916 (Miss. 1994) (citations omitted).

There is clearly no contractual provision providing for attorneys' fees in this case. While both the Board and Weyerhaeuser requested punitive damages, the chancellor, made no finding on the record that such damages were warranted. In his opinion, the only basis given by the chancellor for his award of attorneys' fees to the Board was that the Board was entitled to attorneys' fees for "defending this case." His award of attorneys' fees to Weyerhaeuser was for "having to bring this action." Finally, there is no statutory authority for awarding attorneys' fees when an injunction is sought but never issued. The statute and procedural rule contemplate attorneys' fees only when a party must seek the dissolution of a wrongfully sued-out injunction. Miss. Code Ann. § 11-13-37 (1972); M.R.C.P. 65(c).

In this case, the Barnes sought an injunction only incidental to their primary claim of relief, which was to confirm their title to Lake Road as being a private roadway. Neither the Board nor Weyerhaeuser were ever restrained or enjoined from any act. Ultimately, the chancellor granted an injunction against the Barnes, but there is no authority in Mississippi for granting attorneys' fees to a litigant successful in obtaining an injunction. *See Jones v. Ackerman*, 403 So. 2d 1282, 1284 (Miss. 1981).

Because there is no basis in the record to support the award of attorneys' fees, the portion of the judgment awarding \$8,883.00 in attorney's fees to the Board and \$4,000.00 in attorney's fees to Weyerhaeuser is reversed and rendered.

THE JUDGMENT OF THE LEAKE COUNTY CHANCERY COURT FINDING LAKE ROAD AS A PUBLIC ROAD, ASSESSING DAMAGES IN THE AMOUNT OF \$135.00 TO

LEAKE COUNTY AND \$55,194.00 TO WEYERHAEUSER, AND PERMANENTLY ENJOINING MATT BARNES, KATHY M. BARNES, PAUL BARNES, SYLVIA A. BARNES, J.B. BARNES, ELORIA L. BARNES AND JEFFERY K. BARNES FROM OBSTRUCTING THE SAID ROADWAY IS AFFIRMED AND THAT PORTION OF THE JUDGMENT AWARDING ATTORNEYS' FEES IN THE AMOUNT OF \$8,883.00 TO LEAKE COUNTY AND \$4,000.00 TO WEYERHAEUSER IS REVERSED AND RENDERED. COSTS OF THIS APPEAL ARE TO BE ASSESSED ONE-THIRD TO THE APPELLANTS, ONE-THIRD TO THE LEAKE COUNTY BOARD OF SUPERVISORS AND ONE-THIRD TO WEYERHAEUSER COMPANY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.