

IN THE COURT OF APPEALS 11/14/95
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00008 COA

JOHN F. HARRIS AND MARTHA S. HARRIS

APPELLANTS

v.

ROBERT KING AND FANNIE KING

APPELLEES

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

TRIAL JUDGE: HON. MELVIN MCCLURE

COURT FROM WHICH APPEALED: PANOLA COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANTS:

D. RONALD MUSGROVE

STEVEN GRAY MCCORD

ATTORNEY FOR APPELLEES:

ROBERT H. BROOME

NATURE OF THE CASE: REAL PROPERTY-PRESCRIPTIVE EASEMENT

TRIAL COURT DISPOSITION: PRESCRIPTIVE EASEMENT GRANTED IN FAVOR OF
ROBERT AND FANNIE KING TRAVERSING ACROSS THE LAND OF JOHN F. AND
MARTHA S. HARRIS

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

McMILLIN, J., FOR THE COURT:

This case arises from a dispute over access to a tract of land situated in Panola County. Robert and Fannie King filed a complaint against John F. and Martha Harris to establish an easement in a road which the Kings had used to cross the Harrises' property into their forty-acre tract until prevented from doing so by the Harrises.

At the conclusion of the trial, the chancellor held that the Kings had established an easement by prescription by clear and convincing evidence. Finding substantial evidence in the record to support that decision, we affirm.

I.

FACTS

Robert and Fannie King acquired title to a forty-acre plot in Panola County, Mississippi, from Grace A. King by warranty deed dated October 27, 1986. Grace King, who was Robert's mother, had obtained the property as part of a divorce settlement in June of 1960. Grace King, her former husband Charlie, and certain members of their family lived on the property from 1952 until approximately 1973 or 1974. The testimony at trial established that the road across what is now the Harrises' property was the sole access used by the Kings for ingress and egress to their property throughout this period of approximately 21 years.

Robert and Fannie King, after acquiring title from Mr. King's mother, did not make their primary home on the forty acres. They did, however, go there to hunt and spend time in the old home place. The Kings used the road across the Harrises' property from the time they acquired the land from Robert's mother in 1986 until January of 1994, when the Harrises informed the Kings that they would no longer be able to use the road. The action of the Harrises rendered the Kings' forty acre tract landlocked since the tract did not touch a public road. The Kings therefore filed this suit to establish an easement by prescription over the property owned by the Harrises.

Based on the facts presented at trial, the chancellor determined that the Kings had, in fact, acquired a prescriptive easement over the existing roadway. A final decree was entered December 9, 1994, wherein the chancellor stated that "the private easement by prescription is the same type easement as described in *Lindsey v. Shaw*, 49 So. 2d 580" and that "the owners of the dominant and subservient tenements must each use the easement in such a manner not to interfere with one another's utilization thereof." Aggrieved by the chancellor's ruling, the Harrises have appealed and assign as error: (1) the elements of an easement by prescription were not proven by clear and convincing evidence, and (2) the court improperly held that the permissive use of the easement was not determinative in establishing an easement by prescription.

II.

STANDARD OF REVIEW

The chancellor, as fact-finder, sits to resolve all factual disputes and judge the credibility of the witnesses. *See West v. Brewer*, 579 So. 2d 1261, 1263-64 (Miss. 1991); *Polk v. Polk*, 559 So. 2d 1048, 1049 (Miss. 1990). On appeal, this Court is required to follow the "substantial evidence/manifest error" standard of review. *West*, 579 So. 2d at 1264 (quoting *Stallings v. Bailey*, 558 So. 2d 858, 861 (Miss. 1990)). Therefore, this Court must determine whether the chancellor's ruling is supported by substantial evidence. Further, unless the chancellor abused his discretion, committed manifest error in his decision, or applied an erroneous legal standard, his decision should not be disturbed on appeal. *Bowers Window and Door Co., Inc. v. Dearman*, 549 So. 2d 1309 (Miss. 1989) (citing *Culbreath v. Johnson*, 427 So. 2d 705, 707-08 (Miss. 1983)); *Johnson v. Hinds County*, 524 So. 2d 947, 956 (Miss. 1988).

III.

THE EASEMENT

The Harrises argue that the Kings did not establish by clear and convincing evidence the necessary elements of an easement by prescription. Their main contention is that the Kings failed to show the "most basic element of an easement . . . ten years continuous non-interrupted use because they did not gain title until 1986." The Harrises also argue that the evidence at trial showed that any use of the passageway was permissive and therefore could never ripen into a prescriptive right.

To establish an easement by prescription, the claimant must prove by clear and convincing evidence the elements of adverse possession, which include showing that possession was: (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful. *Thornhill v. Caroline Hunt Trust Estate*, 594 So. 2d 1150, 1152-53 (Miss. 1992) (citations omitted). For purposes of meeting the ten-year statutory period, tacking may be used by successive adverse users in establishing an easement by prescription. *Rutland v. Stewart*, 630 So. 2d 996, 999 (Miss. 1994). Once established, the prescriptive easement has the effect of a deed "in investing such user with full rights to use, enjoy, own and convey such an easement," *i.e.* the easement will run with the land. *Logan v. McGee*, 320 So. 2d 792, 793 (Miss. 1975).

The Mississippi Supreme Court has held that "where . . . the 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." *McCain v. Turnage*, 117 So. 2d 454, 455 (Miss. 1960). The landowner must overcome this presumption by proving that the initial use was permissive. *See Joachim v. Villa Santini, Inc.*, 353 So. 2d 767, 768 (Miss. 1977). If such use is proven to be permissive, thereby rebutting this presumption, it "cannot ripen into an easement by prescription since adverse use is lacking." *Myers v. Blair*, 611 So. 2d 969, 971 (Miss. 1992). The determination of whether a use is prescriptive or permissive is a question of fact for the chancellor sitting as the fact-finder. *Dethlefs v. Beau Maison*

Development Corp., 511 So. 2d 112, 117 (Miss. 1987).

The Kings presented five witnesses to establish the necessary elements for their claim of an easement by prescription. First, John F. Harris, who was called as an adverse witness, admitted that at the present time, there was no way to access the Kings' property other than across his land. When Harris purchased the land from the former owners in 1961, the King family had already been using that road for approximately nine years. Harris did nothing to keep the Kings from gaining entry until some time in 1994, after some thirty-three years had passed.

Charles King and Martha Beavers, brother and sister of Robert King, both testified to living on the property in the early 1950's and using the road as their sole access to Highway 315. In addition, neither remembers their parents being granted express permission to use the road. Martha Beavers also testified that she lived there with her mother until 1971 and that her mother continued to live there until 1973 or 1974.

Finally, Monroe Short, a civil engineer and land surveyor testified, based on survey maps and aerial photographs of the area in 1951, that a "poor motor road" existed which passed from Highway 315 through what is now the Harrises' property to approximately ten buildings along the roadway. He also stated that this road, in the early 1940's, was a road used by the public that continued through to River Road on the other side; however, based on personal knowledge of the area since 1953, he testified that the portion of the road extending past the Kings' home was no longer maintained.

In awarding a prescriptive easement to the Kings, the chancellor found that the access road was a "recognized old settlement road." He further noted that the Kings had used the road to access their property since 1952.

The Harrises argue that the chancellor committed manifest error in awarding a prescriptive easement because the Kings failed to prove that the use of the roadway was hostile. They support that proposition primarily by their own testimony that, once they acquired the land, they tacitly permitted the previously-existing use to continue. However, the issue when a prescriptive easement is involved is the manner of the use at its inception, whether prescriptive or permissive. If the commencement of the use was adverse, the prescriptive period may not be interrupted by a subsequent unilateral grant of permission. The chancellor based his determination upon a finding that, at its inception, the right of use of the roadway by Mr. King's mother and her family was pursuant to rights enjoyed by the general public in what was a recognized public way that had subsequently fallen into disuse by the general public. Such use would not, therefore, depend upon the permission of the owner of the adjoining property (the Harrises' predecessors in title), but would have to be seen to be in direct contravention of any claimed right of the owner to interfere with such use. Such use is sufficiently hostile to commence the running of the prescriptive period. Even assuming the chancellor was erroneous in concluding that the road was previously a public way, the Kings are still entitled to the presumption of *McCain v. Turnage* that the inception of the use of the roadway in the early 1950's was hostile to the then-existing owners. The Harrises have failed to overcome the presumption by producing evidence that the use at its commencement was permissive. The proof was uncontradicted that the roadway had been used by the Kings and their predecessors in title without interference from the Harrises or their predecessors in title for a period in excess of forty years. The chancellor felt that the evidence was clear and convincing that an easement by prescription over the roadway had been

established. We conclude that this ruling did not constitute manifest error, and we affirm.

THE JUDGMENT OF THE PANOLA COUNTY CHANCERY COURT GRANTING A PRESCRIPTIVE EASEMENT IN FAVOR OF THE KINGS IS AFFIRMED. APPELLANTS ARE TAXED WITH ALL COSTS WITH THIS APPEAL.

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