IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00312 COA

GLENN R. MCBRIDE AND MARGARET M. MCBRIDE

APPELLANTS

v.

MARK GIVENS AND JAMIE GIVENS

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HARRIS SULLIVAN

COURT FROM WHICH APPEALED: LAWRENCE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

ROBERT S. REEVES

ATTORNEY FOR APPELLEES:

MALCOLM T. ROGERS

NATURE OF THE CASE: PROPERTY-ADVERSE POSSESSION

TRIAL COURT DISPOSITION: JUDGMENT FOR DEFENDANT, USE BY PLAINTIFF HELD TO BE PERMISSIVE

BEFORE BRIDGES, P.J., DIAZ, McMILLIN, AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

This case involves a property dispute in which Glenn and Margaret McBride filed suit in the Chancery Court of Lawrence County against Mark Givens and Jamie Givens to confirm and quiet title to a thirty-foot wide strip of land, part of which was being used as a driveway by the McBrides. The McBrides' claim ownership of the driveway portion of the land by adverse possession or, at least, a right to use the land because of an easement by prescription. The chancellor held that although the McBrides used and possessed the land adversely, such use was converted to permissive in July 1983, before the statutory ten-year period had passed. The McBrides now appeal to this Court, arguing that the chancellor erred in finding that the character of the use of the land changed from adverse to permissive.

Finding no error on the part of the chancellor, we affirm.

I.

FACTS

In October 1980, the McBrides bought a house and three acres of land from Michael White. Lying adjacent to, but not included in, this three-acre tract, is a thirty-foot wide, one-acre strip of land that, at the time, belonged to Michael White's brother, Donald. The McBrides' driveway ran from their house to the public road in a curved fashion and encroached upon this neighboring strip of land.

Just prior to the closing of the sale between the McBrides and Michael White, a question arose as to whether or not the portion of the driveway that crossed over onto the one-acre strip was to be included in the sale. Glenn McBride testified that before the sale went through, he spoke with the real estate agent and the closing attorney, and was advised that the driveway, all the way to the public road, was to be a part of the sale. Margaret McBride also testified that she believed that they owned the entire driveway.

In July 1983, Mark Givens purchased sixty-one acres of land from Donald White. Although Mark Givens' name is the only name on the deed, he and his brother, Jamie, planned to use the land as partners in a cattle and timber operation. The day after the conveyance, both Mark and Jamie went to look at the land and discuss future plans for the one-acre strip of land. While they were on the property, Glenn McBride came out and asked the two men what they were doing. The Givenses explained that they had recently purchased the land to the north, plus the one-acre strip. Both Mark and Jamie Givens testified that McBride simply said "okay" and asked if they were planning to fence off the land because he did not want to lose the use of the driveway. Jamie Givens told McBride that they had other access to their land through Dot Givens' land, but if they ever lost permission to use that access, then they would clear the one-acre strip, put up a fence, and use it to transport cows to and from the sixty-acre plot.

The McBrides continued to use the driveway until December 1991, at which time the Givenses informed them that their other access had been lost, and they were about to start clearing the one-acre strip as previously discussed. In April 1992, the Givenses erected a fence on the property line between the McBride land and the one-acre strip. Because the McBrides' driveway crossed over the property line, entrance to the McBrides' property via the driveway was effectively cut off.

The McBrides filed suit in chancery court attempting to prove that they owned the driveway portion

of the one-acre strip because they had adversely possessed it for more than ten years. Alternatively, they claim to have a prescriptive easement. The chancellor held that, while the McBrides' initial possession of the land in question was hostile and adverse, from and after July 1983, their use and possession of the land became permissive.

II.

ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENT

"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) (citing *Dethlefs v. Beau Madison Dev. Corp.*, 511 So. 2d 112, 117 (Miss. 1987)). Therefore, we will address these claims together. One claiming an easement by prescription or the adverse possession of land must prove that the use or possession of the land was (1) open, notorious, and visible; (2) hostile; (3) under claim of ownership; (4) exclusive; (5) peaceful; and (6) continuous and uninterrupted for a period of ten years. *Myers v. Blair*, 611 So. 2d 969, 971 (Miss. 1992) (easement by prescription); *Blankinship v. Payton*, 605 So. 2d 817, 819 (Miss. 1992) (adverse possession).

Despite the fact that the part of the driveway that crossed over the McBrides' property line was never included in their deed, they both testified that they believed, although mistakenly so, that it was to be included in the sale. The chancellor found that in 1980, when the McBrides purchased the home and three-acre plot, their use and possession of the land in question was hostile, adverse, and under a claim of ownership.

The chancellor went on to find that the character of the McBrides' use and possession of the land changed from adverse to permissive in July 1983. Since the chancellor did not make specific findings in the record, we must assume that the chancellor resolved such issues in favor of the appellees. *Weeks v. Thomas*, 662 So. 2d 581, 584 (Miss. 1995). The event that sparked the change from adverse to permissive was the conversation between Glenn McBride, Jamie Givens, and Mark Givens, the day after Mark Givens bought the property, which was recounted in our recitation of the facts.

Recognition, by an adverse possessor, of the validity of the title of the true owner during the running of the statutory ten-year period is sufficient to destroy any claim of adverse possession prior to that time. *Delancey v. Davis*, 229 Miss. 475, 481, 91 So. 2d 286, 288 (1956). Proof of such recognition of superior title need not be in the form of an express statement by the adverse possessor, but may be proved by his acts or conduct, which are a recognition of a superior right in another, or which tend, considered together with other evidence, to establish that fact. *See Mathieu v. Crosby Lumber & Mfg. Co.*, 210 Miss 484, 486, 49 So. 2d 894 (1951).

Our recitation of the facts concerning the events of the 1983 meeting between Glenn McBride and the Givenses is based primarily upon the testimony of Givens. Admittedly, McBride's version of the events was materially different. In such instances, the chancellor, sitting as the trier of fact, is the sole judge of the credibility of the witnesses and the proper weight to be given to their testimony. *Denson v. George*, 642 So. 2d 909, 914 (Miss. 1994); *Bland v. Bland*, 629 So. 2d 582, 588 (Miss. 1993). It is evident that the chancellor, in reaching the conclusion that he did, chose to place greater reliance upon the testimony of Givens, and we cannot say that the chancellor committed manifest error or an

abuse of discretion in reaching that conclusion. Accepting the version of the events as related by Givens as true, neither can we conclude that the chancellor committed an error of law in determining that the actions and words of McBride constituted an acknowledgment of the superior title of Givens, and the fact that his continued use of the driveway was permissive only. There is, therefore, no basis for this Court to disturb the judgment of the chancellor on this issue.

III.

THE ASSAULT

McBride brought a separate claim in this action against Givens for a physical assault alleged to have occurred on the contested property, but which was not otherwise related to the dispute over the property. The chancellor denied any recovery, apparently concluding that the evidence was not sufficient to establish tort liability on the part of Givens. On appeal, McBride contends the chancellor erred "in finding the evidence surrounding the assault upon Glen R. McBride by Jamie Givens to be in conflict." We treat this to be an allegation that the chancellor's decision was against the weight of the evidence, since there can be no doubt that there was sharp conflict in the evidence concerning the events surrounding the assault. Again, the chancellor sat as the trier of fact, and we would be at liberty to disturb the judgment only upon a finding that the denial of liability was against the weight of the evidence. *Travis v. Hartford Accident & Indem. Co.*, 630 So. 2d 337, 338 (Miss. 1993). On the sharply conflicting evidence concerning the facts of the altercation, we are unable to conclude that the chancellor's judgment was so contrary to the weight of the evidence as to constitute a manifest injustice, and we can find no basis to set it aside.

Based upon our review of the record, we cannot say that this was a manifest error or an abuse of discretion in any aspect of the chancellor's decision. Therefore, we affirm.

THE JUDGMENT OF THE CHANCERY COURT OF LAWRENCE COUNTY IS AFFIRMED. THE COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

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