

**IN THE COURT OF APPEALS 05/21/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00170 COA**

**MEL-GRAVE, INC.**

**APPELLANT**

**v.**

**W.D. SUMRALL, JR. AND BETTY MCCURLEY SUMRALL**

**APPELLEES**

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

TRIAL JUDGE: HON. HYDE RUST JENKINS, II

COURT FROM WHICH APPEALED: CHANCERY COURT OF WILKINSON COUNTY

ATTORNEY FOR APPELLANT:

THOMAS L. ROSENBLATT

ATTORNEY FOR APPELLEES:

RON SENKO

NATURE OF THE CASE: CIVIL - ACTION BROUGHT TO SETTLE LAND DISPUTE OVER  
OWNERSHIP OF AN EASEMENT

TRIAL COURT DISPOSITION: PRESCRIPTIVE EASEMENT AWARDED TO APPELLEE

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

BARBER, J., FOR THE COURT:

Mel-Grave, Inc. (Mel-Grave) appeals from a judgment of the Wilkinson County Chancery Court awarding W.D. and Betty Sumrall a prescriptive easement in a pasture road running across the

northern boundary of its property. Finding no error in the proceedings below, we affirm.

## I. FACTS

This case involves the right to use a mile long dirt road running along the northern edge of a parcel of property belonging to Mel-Grave (the Mel-Grave property). The road connects Highway 61 on the west side of this parcel to another parcel of property that borders the Mel-Grave property on the east side. This second parcel of property belongs to the Sumralls ("the Sumrall property"). Both parcels are located in Wilkinson County.

The evidence at trial showed no record of an easement appurtenant to the Sumrall property in any of the Wilkinson County title records. The evidence also showed that, beginning at least as early as the 1940's, the predecessors in interest of the owners of the Sumrall property used the dirt road as a means of ingress and egress to and from the Sumrall property and that such use was continuous, notorious, and uninterrupted from that time until November of 1993.

In November of 1993, Mel-Grave locked the gate leading from Highway 61 to the road. In so doing, Mel-Grave effectively blocked the Sumralls from entering and exiting their property. As a result, the Sumralls commenced this action in the Wilkinson County Chancery Court seeking vindication of their right to use the road. The chancellor granted summary judgment in favor of Mel-Grave on the Sumralls' claim that they possessed an easement by necessity. Nonetheless, he also concluded that the Sumralls had succeeded in proving that they and their predecessors in interest had acquired a prescriptive right to use the road. From this judgment, Mel-Grave appeals.

## II. DISCUSSION

The standard and burden of proof to establish a prescriptive easement is the same as a claim for adverse possession of land. *Rutland v. Stewart*, 630 So. 2d 996, 999 (Miss. 1994). The elements that must be proved in such a claim are that use of the property is: (1) open, notorious, and visible; (2) hostile; (3) under a claim of ownership; (4) exclusive; (5) peaceful; and (6) continuous and uninterrupted for ten years. *Myers v. Blair*, 611 So. 2d 969, 971 (Miss. 1992). In the present case, Mel-Grave asserts that the chancellor's finding that Sumrall was entitled to an easement by prescription was erroneous because Sumrall presented no evidence that his or his predecessors use of the road was anything but hostile. We find no merit to this assertion.

Where "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." *McCain v. Turnage*, 117 So. 2d 454, 455 (Miss. 1960); *see also Joachim v. Villa Santini, Inc.*, 353 So. 2d 767, 768 (Miss. 1977) (affirming and applying the same rule). In the present case, L.B. Stockett, Jr., a sixty-seven-year-old resident of the community in which the subject parcels of property were located, testified that during the 1940's he could remember Tweed McNeely, the owner of the Sumrall property from the 1920's through 1971, using the pasture road as a means of ingress and egress to and from the Sumrall property. Stockett, however, could not testify with any degree of certainty as to whether McNeely's use of the road during that time was permissive or hostile. Further, Glen Ray Whetstone, Jr., the nephew of the man who owned the Mel-Grave property during the 1950's and a person who worked on that property from 1954 to 1957, admitted that he had no personal knowledge as to what the

understanding was between McNeely and his uncle concerning the permissive or hostile nature of the use of the roadway. The testimony of these two witnesses supports the chancellor's finding that no one knew with any degree of certainty whether McNeely's use of the road during the time that he owned the Sumrall property was hostile or permissive. In such a situation, we think that the presumption of hostility from *McCain*, unrebutted by any evidence to the contrary, operates to establish hostility.

Finally, we also note that J.D. Withers, Jr., the man who purchased the Sumrall property from McNeely in 1971 and subsequently sold it to Sumrall, as well as Sumrall himself, used the pasture road during their respective periods of ownership of the Sumrall property. The evidence also shows that they used the road while believing that their use of the road was appurtenant to their ownership of the property. Clearly, this supports the chancellor's finding that Withers and Sumrall did not understand their use of the pasture road was subject to the will and pleasure of the owners of the Mel-Grave property, but instead used the road under a claim of right.

In view of the preceding considerations, we affirm the chancellor's ruling that Sumralls are owners of a prescriptive easement in the pasture road that runs across the Mel-Grave property.

**THE JUDGMENT OF THE CHANCERY COURT OF WILKINSON COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.**

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