

IN THE COURT OF APPEALS 2/27/96
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00356 COA

ROY EUGENE CLARK AND WIFE, NANCY JEAN CLARK

APPELLANTS

v.

CORRINE M. ROBBINS

APPELLEE

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

TRIAL JUDGE: HON. ANTHONY T. FARESE

COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

WILLIAM T. SLOAN

ATTORNEY FOR APPELLEE:

V. GLENN ALDERSON

NATURE OF THE CASE: ADVERSE POSSESSION

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF

BEFORE THOMAS, P.J., COLEMAN, AND McMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

This case involves a property dispute in which the plaintiff Corinne Robbins filed suit in the

Chancery Court of Lafayette County to confirm and quiet title to a 48.5 foot strip of land, part of which was being used as a driveway by the defendants, Roy and Nancy Clark. The Clarks counterclaimed asserting that they were the record owners or, alternatively, had acquired the property through adverse possession. The chancellor found that the property in question was included in the Robbins' deed and that the Clarks had failed to prove the elements of adverse possession by clear and convincing evidence. The Clarks appeal, challenging the denial of their adverse possession claim.

FACTS

The litigants own adjoining property, with the Clarks owning land southwest of the Robbins' property. The disputed land consists of 48.5 feet of property along this southwest strip. In 1960, the Robbins purchased approximately twenty acres on Highway 30 from James Edward Smith. The Robbins built their home on a portion of the land and also began to sell off portions. The Robbins soon sold a plot to F.F. Barger with a 90.5 foot frontage on Highway 30. Barger constructed his home within six feet of the Robbins' property line. During construction of the Barger residence, a driveway was graded that encroached upon a portion of the Robbins' land. The Robbins gave permission to Barger to place part of his driveway on their land.

The Bargers sold their property to Morris Lee Denton in 1966. This deed included the disputed 48.5 feet of property. The Barger property was transferred three more times until purchased by the Clarks in 1975. The deed to the Clarks, as well as two of the intervening deeds, included the additional 48.5 feet.

Mrs. Robbins testified that she gave permission to use the driveway to each subsequent purchaser of the Barger property. Soon after the Clarks moved in, Mrs. Robbins told Nancy Clark that a portion of the Clark's driveway was on her land. Clark testified that she advised Robbins that she and her husband had a deed and a survey indicating that the land belonged to them.

In 1977, the Clarks moved away and rented the house and property to a succession of tenants for a period of ten years. They moved back into the house in 1987. The testimony at trial is undisputed that the driveway was used continuously and exclusively by the Clarks and their tenants for more than ten years. However, there was no testimony regarding the tenants' use of the remainder of the disputed section from 1977 to 1987.

Precision Engineering surveyed Robbins' property in 1986 and included the disputed section in Robbins' property. Both parties testified that they were not aware of a dispute over the ownership of the property until the Clarks moved back to the property in 1987. In March of 1991, Robbins destroyed a flowerbed that the Clarks had placed in the disputed section.

Upon completion of the testimony, the trial court issued a decree holding that the Clarks did not prove by clear and convincing evidence that they had adversely possessed the property. The chancellor found that the Clarks had not possessed the property for the requisite ten years and that Robbins had given permission to use the driveway. The chancellor did give the Clarks a

private way of necessity to use the driveway during their ownership of the property.

ANALYSIS

This Court must apply the substantial evidence/ manifest error test to questions of fact. *Rawls v. Parker*, 602 So. 2d 1164, 1167 (Miss. 1992). The chancellor's findings of fact will not be reversed unless clearly erroneous. However, this rule does not apply to questions of law. Questions of law are reviewed de novo. *Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992).

Miss. Code Ann. § 15-1-13 (1972) defines adverse possession as:

Ten years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title

The Supreme Court of this State has construed this statute to establish a six-part test which requires that possession be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for ten years; (5) exclusive; and (6) peaceful. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1993); *Thornhill v. Caroline Hunt Trust Estate*, 594 So. 2d 1150, 1152 (Miss. 1992). This six-part test has been extended to apply to prescriptive easements. *Myers v. Blair*, 611 So. 2d 969, 970 (Miss. 1992).

The burden of proof is on the adverse possessor to prove by clear and convincing evidence that each element has been met. *Thornhill*, 594 So. 2d at 1262. The Mississippi Supreme Court has held that the acts of the adverse possessor must be sufficient to "fly his flag" over the land in order to place the record title holder on notice of the adverse claim. *Rice*, 611 So. 2d at 871; *Johnson v. Black*, 469 So. 2d 88, 90-91 (Miss. 1985).

A. Continuous Possession

The chancellor held that the Clarks had not continuously possessed the property for the statutorily required period of ten years because they had rented the property for a ten year period. In Mississippi, a tenant's occupation of the property is sufficient for the owner to adversely possess the property. *Lindenmayer v. Gunst*, 70 Miss. 693, 695, 13 So. 252, 253 (1893); see also *Cox v. Richerson*, 186 Miss. 576, 590, 191 So. 99 (1939) (buyer at a tax sale may occupy the land through possession by a tenant.) Because either the Clarks or their tenants peacefully possessed the land from 1975 until 1987, the Clarks have proven continuous possession for the statutory period.

B. Permissive Use

The chancellor found that Robbins permitted the Clarks to use the disputed section by her statement in 1975 advising Nancy Clark that the driveway was "on her." Possession with

permission of the record title owner "can never ripen into adverse possession until there is a positive assertion of a right hostile to the record owner which is made known to him." *Rice*, 611 So. 2d at 872 (citations omitted). However, the Mississippi Supreme Court has recognized that a simple verbal protest is insufficient to toll the prescriptive period. *McIntyre v. Harvey*, 158 Miss. 16, 128 So. 572, 573 (1930), *overruled on other grounds by Rutland v. Stewart*, 630 So. 2d 996 (Miss. 1994).

In *McIntyre*, which also dealt with a prescriptive easement, the Court held:

there must be something more than a protest to interrupt the running of a claim of right followed by actual users; there must be at least an interruption of the use . . . by the opposing person who opposes such claim. When another is asserting a claim of right and using a passageway under such claim, a party must do something more than merely verbally protest; there must be a physical interruption or a court proceeding . . . which interrupts the exercise of the right claimed and being used by the opposite parties.

McIntyre, 128 So. at 573. *See also Rice*, 611 So. 2d at 873; *Board of Educ. v. Loague*, 405 So. 2d 122, 125-126 (Miss. 1981).

The evidence is clear that although Robbins approached Mrs. Clark and stated that a portion of the driveway was on her land, the Clarks disputed this fact and continued to use the driveway as their own. In fact, Mrs. Clark advised Robbins that the Clarks had a deed and a survey showing that they owned the driveway and the land.

As to the driveway, the chancellor granted the Clarks a private way of necessity that does not run with the land. However, since the Clarks' use of the driveway was without permission, this Court holds that the Clarks should have been more properly awarded a prescriptive easement that runs with the land for use of the driveway. *see Logan v. McGee*, 320 So. 2d 792, 793 (Miss. 1975).

We hold that the chancellor was correct in ruling that the Clarks failed to establish adverse possession of the entire 48.5 foot tract of land because there was no testimony presented regarding the tenants' use of any of the property other than the driveway. We further hold that as a matter of law the Clarks did establish an adverse claim to the driveway by virtue of their open, adverse and hostile possession of the driveway for the statutory period and that this claim ripened into a perpetual easement by prescription.

THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS AFFIRMED IN PART, REVERSED AND RENDERED IN PART. COSTS ARE ASSESSED EQUALLY AGAINST THE APPELLANTS AND APPELLEE.

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