THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NELLA DALEY — APPELLANT

VS. — NO. 2007-CA- 00187

JIMMY HUGHES, ET AL — APPELLEE

APPEAL FROM THE CHANCERY COURT OF ITAWAMBA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, NELLA DALEY

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Jacqueline Mask, Chancellor, 1st Judicial District, Tupelo, MS (trial judge);
2. Nella Daley (appellee);
3. Jimmy Hughes, Dan Pate, Ann Hughes Pate, Steven Izard, and Irma Hughes Izard (appellants);
4. Honorable Rhett Russell, Tupelo, MS (appellee's trial attorney)
5. Honorable Duncan Lee Lott, Booneville, MS (appellant's trial attorney)

This the 11 day of October, 2007.

Duncan Lott

DUNCAN LOTT
ATTORNEY FOR APPELLANT

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B. THE TRIAL COURT ERRED IN ESTABLISHING AN EASEMENT BY NECESSITY ACROSS NEIGHBORING LANDOWNERS PROPERTY WHERE PLAINTIFF'S PROPERTY WAS NOT LANDLOCKED AND THERE WERE ALTERNATE ROUTES AVAILABLE TO THE PLAINTIFFS AND THE ALTERNATIVE ROUTES DID NOT INVOLVE DISPROPORTIONATE EXPENSE AND INCONVENIENCE.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Jimmy Hughes, Dan Pate, Ann Hughes Pate, Steven Izard, and Irma Hughes Izard, brothers and sisters and their husbands, filed their Complaint for easement by necessity in the Chancery Court of Itawamba County, Mississippi, seeking an easement across the property of Nella Daley, a cousin, on the basis the property of the Pates and the Izards were "landlocked" and a right-of-way across Daley's property was needed for access. The trial court determined the appellee's property was not "landlocked" but a bridge would need to be constructed over a ditch

on the appellees' property and the cost would be prohibitive. At the conclusion of testimony, the appellees moved the Court to amend their pleadings to assert the additional claim of prescriptive easement, which was granted. The Chancellor entered her Opinion and Judgment on December 18, 2006, granting the appellees an easement by necessity across a path, on the property of Nella Daley. Daley contends the "landlock" situation was created by the plaintiffs when their father divided the property, and there were alternate routes the appellees could use. Nella Daley perfected her appeal on January 24, 2007.

B. STATEMENT OF FACTS

The parties, by stipulation, introduce exhibits that reflect the easement sought by the plaintiffs and the ditch that separated the plaintiffs' property, and created plaintiffs' claim they need an easement across Daley's property. (R. E. 22) Most facts were not in dispute except the "prohibitive" costs of building a bridge across the ditch that disected the plaintiffs' property.

In 1937 Joseph L. and Ophilia Hughes deeded certain portions of their property to their four sons including sons, V.L. Hughes and W.G. Hughes. V.L. Hughes is the father or father-in-law of the plaintiffs and W.G. Hughes is the father of Daley. Daley was deeded her property by her father, W.G. Hughes in 1997 (R. 13) and then her sister deeded her interest in the land to Daley in 2002. (Exhibit No. 24).

In 2003 Daley marked her landlines, which barricaded the path across her property. (R. 19) This is the path the plaintiffs seek to establish an easement by necessity, so as to get to the Pate and Izard property. Daley testified as to the property lines of the parties, the ditch in question, and the path as depicted in color plat. (R.E. 23) Daley stated the path had not been used for 30 to 35 years and barbed-wire had been strung across the path. (R. 25) Daley testified

she walked the property with her father for the last twenty years and never saw signs the path was being used. (R. 25) Daley confirmed the ditch was seven to eight feet deep. (R. 34)

Irma Izard, one of V.L. Hughes' daughters, stated the ditch was eight to twelve feet deep and fourteen feet wide at certain places. (R. 42) The Izard land was being used for farming and Izard referred to the ditch as a "small stream that flows on her property". (R. 44) Izard admitted she would need one bridge to get to her property from her brother's property. (R. 57) Izard admitted she had not looked into the costs of a flatbed trailer being placed across the ditch as a bridge. (R. 58)

Danny Holley, a supervisor from Itawamba County, testified his family farmed the Pate/Izard property since 1973. (R.69) He used the path in question to bring his equipment from the roadway to the Pate/Izard property. (R. 69) Holley noted the ditch varies in size as it runs the course of the Pate/Izard property. (R. 70) Holley was offered as an expert on bridges by the plaintiffs. During Voir dire, of his qualifications, he testified he deals with bridges for highways and roadways as a supervisor and had no experience in field roads and building bridges over ditches on private property. (R. 72) Daley objected to Holley testifying as an expert on bridges, but the Court allowed him to testify, stating the Court would place the appropriate weight on his testimony. (R. 73) Holley then testified the costs to construct a bridge over the ditch in question would very likely be $10,000.000. (R. 73) Holley admitted there were some places on the ditch that were not as deep or as wide as others (R. 75) and he admitted he had never determined a suitable place to put a bridge across the ditch. (R. 77) Holley acknowledged there are places a bridge could be put up cheaper than others over the ditch in question. (R. 77)

Ann Pate, daughter of V. L. Hughes, testified her land was used for farming (R. 81) and she had used the path in question to get to her land. (R. 84)

Charles Fears, the defendant's surveyor, introduced four alternate routes across the plaintiffs' property that would allow access to the Pate/Izard fields. (R. 88) (Exhibit "35). Fears testified a bridge could be built over the creek in question. (R. 89) Fears noted the path in question had caved into the creek due to rain and he compared the path size to one that would be passable by a four-wheeler. (R. 92)

Ora Hughes, the 92-year old mother of Daley, lived on the disputed property since 1935 (R. 103) and she testified no one had used the path after she and W.G. Hughes built their home. (R. 104) Hughes testified the path in question was used to get to their field and had not been used by V. L. Hughes or his family. (R. 105) Ora Hughes testified she remembered an old bridge that crossed the ditch from one of the Hughes' property to the other Hughes' field. (R. 113)

Defendant, Nella Daley, introduced a picture taken in 1942 of her as a child showing the path in question and a fence that crossed the path. (Exhibit No. 38) Daley testified the path had not been used by her father's brothers (R. 118) and barbed-wire had been placed across the path and connected to a beach tree. (R. 119) Daley introduced photographs of the wire in the trees. (Exhibit No. 29) Early 80's photos depicted the path area grown up with no trespass signs. Daley testified this was how the path had been for 30 or 40 years. (R. 124) Daley testified there had been a bridge across the ditch which connected the Hughes and Pate property (R. 124) and no one had used the path on her property except her family.

Irma Izard was called in rebuttal and stated her father had put up the no trespass signs on Daley's property because of Indian arrowhead hunters, and she acknowledged there was a bridge from the Hughes to Hughes property in the past. (R. 134) Izard testified the bridge in question existed in 1937 when the land was divided by her grandfather, and Red Roberts Road was later moved. (R. 138)

SUMMARY OF ARGUMENT

The chancellor erroneously granted Hughes, Pate, and Izard an easement by necessity across Daley's property. In doing so, the Court found the plaintiffs created their own "land-locked" situation, but Daley must correct this dilemma by allowing Hughes, Pate, and Izard to use her property. The Court found the plaintiffs could access the property in question by crossing their own land, but in doing so they would have to have to cross a ditch on their property and build a bridge at a cost of $10,000.00.

The chancellor improperly considered the opinion testimony of Holley, a county supervisor and farmer of the land in question, that the cost of a bridge over the ditch that runs through the plaintiffs' property would be $10,000.00. Holley never viewed the property to see where a bridge could cross the ditch, nor did he attempt to calculate a cost. He gave a general opinion based on his work as a supervisor with bridges over county roads and highways. The opinion of Holley does not meet the requirements of MRE 702. Holley had no experience in building these type bridges nor did he have any data or facts to support his $10,000.00 opinion.

The chancellor found the "land-locked" situation occurred when the land in question was divided by Joseph Leonard, and Ophilia Hughes to their children not when V.L. Hughes divided his share among his three children, who are the plaintiffs. The chancellor even acknowledged

the land in question is not land-locked. The plaintiffs have access over their own property to the land in question. However the chancellor found a bridge must be built over a ditch to access this area and would be "cost prohibitive". In each case relied upon by the chancellor, the landowner seeking an easement had no access to their own land except by an easement over an adjoining landowner. Even in cases where there was a need for a bridge it was not over the landowner's own property, but a means of access to the landowner's property.

Hughes, Pate, and Izard did not introduce proof of the value of their property or income they derived from farming their land. Without this proof, the plaintiff's claim must fail even assuming the costs of a bridge would be $10.000.00. It is incumbent on the plaintiffs to prove disproportionate cost by comparing that cost to the value of the property in question.

If this Court follows the plaintiffs' logic; if it cost the plaintiffs **any** money to use their land, but it would be cheaper to use an adjoining neighbor's property, they get to use the neighbor's land merely because of economics. The plaintiffs seek a way of necessity because of a mere matter of convenience or saving expense. The control and use of one's property is a sacred right, not to be lightly invaded or disturbed. Nella Daley deserves no less and the plaintiffs deserve no relief when they can use their own land, but chose not to spend money to access their property.

ARGUMENT

A. THE CHANCELLOR IMPROPERLY CONSIDERED INADMISSIBLE TESTIMONY AS TO THE COSTS OF A BRIDGE BEING $10,000.00.

The proof is uncontradicted that Hughes, Izard, and Pate seek an easement across Daley's

property because they do not want to build a bridge across a ditch on their own land to get to the Izard/Pate property. The plaintiffs, Hughes, Izard, and Pate, attempted, over objection, to introduce hearsay testimony as to the costs of building a bridge over the ditch in question, being $10,000.00. The plaintiffs ultimately called Danny Holley, a supervisor, and farmer to testify the costs of a bridge over the ditch that runs by or through the Holley/Izard/Pate/Daley property, would be $10,000.00.

Holley's experience with bridges is in his capacity as a supervisor and bridges over county roads and highways. Holley had no experience in building bridges over a ditch on private property, and in fact had not gone out to the property to examine the ditch for a location or costs of the bridge. Mississippi Rule of Evidence 702 requires one submitted as an expert to base his opinion on sufficient facts or data, and the testimony be the product of reliable principles and methods, and the witness apply the principles and methods to the facts of the case. *Ludlow Corp. vs. Arkwright - Boston Mfrs*, 317 So.2d 47, 50 (Miss. 1975) stated: "The expert must have acquired special knowledge of the subject matter in question by study of recognized authority or by practical experience . . . ." See also *Boggs vs. Eaton*, 379 So.3d 520, 524 (Miss. 1998) for experience in the field in which the expert is offering an opinion.

Holley admitted he never viewed the ditch to determine where a bridge could cross nor did he attempt to figure the costs of such a bridge. His experience with bridges involved his work as a supervisor on highways and county roads. Holley had no experience determining the costs of building a bridge across private property, and admitted he did not do a site evaluation to arrive at a costs or location for the bridge.

The Chancellor relied on this testimony in deciding an easement by necessity was required because the costs of a bridge was "prohibitive". (R. E. 20) The Chancellor based her decision on unsupported testimony, and was error.

The case law requires proof of disproportionate expense when an alternate route is available to the landowner. *Swan vs. Hill*, 855 So.2d 459, 463 (Miss. Ct. App. 2003)

> In determining what is reasonably necessary, the court looks to whether an alternative would involve disproportionate expense and inconvenience. Such a situation would arise when the expense of making the means of access available would exceed the entire value of the property to which access was sought.

The plaintiffs failed to introduce any proof as to the value of the property in question or the money they derive from leasing their property to be farmed. The Court in *Swan vs. Hill,* 855 So.2d 459, 464 (Miss Ct. App. 2003) noted Hill provided no estimate of costs of remodeling or the worth of his business. Due to Hill's failure to establish a disproportionate expense in using the alternate routes available to him, the Court determined he was not entitled to an easement by necessity. The proof presented by Hughes, Pate, and Izard was inadequate to establish a disproportionate expense in using the alternate routes across their own property to the land in question.

Charles Fears, Daley's surveyor, established four different routes across the plaintiffs' property that would allow access to the Pate and Izard land. The plaintiffs' only objection to these routes were they required building a bridge across the ditch that ran through the Hughes/Pate/Izard /Daley property. The burden is on Hughes, Pate, and Izard to establish the disproportionate expense involved in building a bridge over the ditch in question and their proof is inadequate, in light of Holley's opinion being inadmissible and the plaintiffs' failure to prove

the value of their property, or a comparison to the income their property may derive from farming.

Daley requests this Court exclude the testimony of Holley as to the cost of a bridge, and find the plaintiffs failed to establish a disproportionate expense in using the alternate routes.

B. THE TRIAL COURT ERRED IN ESTABLISHING AN EASEMENT BY NECESSITY ACROSS NEIGHBORING LANDOWNERS PROPERTY WHERE PLAINTIFF'S PROPERTY WAS NOT LANDLOCKED AND THERE WERE ALTERNATE ROUTES AVAILABLE TO THE PLAINTIFFS AND THE ALTERNATIVE ROUTES DID NOT INVOLVE DISPROPORTIONATE EXPENSE AND INCONVENIENCE.

An easement by necessity arises by implied grant when a part of a commonly owned tract of land is severed in such a way that either portion of the property has been rendered inaccessible except by passing over the other portion or by trespassing on the lands of another. *Huggins vs. Wright*, 774 So.2nd 408 (Miss. S.Ct. 2000). Application of the principle requires that whenever a person conveys property he conveys whatever is necessary for the beneficial use of that property, and retains whatever is necessary for the beneficial use of the land he still possesses. See *Huggins*, supra, p. 410. The question in this case is who is the common source? The plaintiffs argue that Joseph Leonard Hughes and wife, Oplia Hughes are the original source of the interest of Webster Hughes, the father of Nella Daley, and V. L. Hughes, the father of the plaintiffs. The defendant contends the land-lock situation did not take place with the transfer from Joseph Leonard and Oplia Hughes to their children, Webster and V. L. Hughes, but rather

the land-lock situation came in the inter family division from V. L. Hughes to his children, the plaintiffs.

The plaintiffs' father created the land-lock situation not the division of the property that occurred years before when Joseph Leonard Hughes and Oplia Hughes divided the property up between their four children. The plaintiffs, now because of the division made by V. L. Hughes creating the land-lock situation, want Daley, a non-participant, to bear the brunt of the plaintiffs' property division. The Court of Appeals noted in the case of *Rogers vs. Marlin*, 754 So.2nd 1267, 1271 (Miss. Ct. App. 1999):

> In order for there to be a way of necessity, the land must have come from a common owner somewhere back in it's chain of title. When the common owner begins to divide up his land, he is not allowed to leave other parts of it landlocked with no way out to the public road.

Daley argues if Pate, Izard, or Hughes' property is land-locked they could obtain access through a fellow plaintiff, Hughes, Pate or Izard.

The Court of Appeals noted in the case of *Cox vs. Trustmark National Bank*, 733 So.2nd 353, 356 (Ct. App. 1999) "that a easement by necessity is only over land that once comprised the larger tract, and not over any adjacent lands that might be a convenient way to a public road." In the *Cox* case, the court again noted the land-lock situation being created by a common source i.e. the parties original grantor. As we know, the plaintiff's original grantor was V. L. Hughes and Daley's original grantor was W.G. Hughes.

Finally, the Supreme Court in the case of *Wills vs. Reid*, 38 So.793 (Miss. 1905) states:

> A purchaser of land does not acquire a way by necessity where the land purchased is not surrounded by other land of the grantor, and while the way claimed by him would be of great convenience and advantage, there are public highways by which he has ready and convenient ingress and egress to and from the land purchased by him.

The Court went on to say the principle does not control when there exists over the lands of the grantee (in his case the plaintiffs) or otherwise an open and convenient way of access to the granted estate. Such additional way of ingress and egress, while perhaps a convenience which might enhance the value of the land, cannot be in any proper legal sense classed as a way of necessity. The court went on to note that *at the date of conveyance* by Watson to Reid the land granted was not "surrounded by other lands of the grantor". In the case at bar, on the dates of conveyance from V. L. Hughes to his children, Ann Pate, Irma Izard, and Jim Hughes, their shares were not surrounded by the property of Nella Daley. Nella Daley's property only borders the east side of the Pate property and the south side of the Hughes property and at no point touches any of the property of the Izards.

Next, the Chancellor misapplies the principle of disproportionate expense in granting an easement by necessity. See *Fourth Davis Land Company vs. Parker*, 462 So.2nd 516 (Miss. 1985) and *Leaf River Forrest Products, Inc. vs. Rowell*, 819 So.2d 1281 (Miss. Ct App. 2002). These cases involve easement for utilities not a way of necessity. The Chancellor used these cases to support her decision to allow a way of necessity.

It is undisputed there are alternate routes across the plaintiffs' property to access the Pate and Izard land rather than use Daley's path. However, the Chancellor found those routes involved a disproportionate expense (i.e. building a $10,000.00 bridge over a ditch). (R. E. 20) The Chancellor misapplied *Alpaugh, Rotenberry, and Reid.* The Court of Appeals noted in *Ganier vs. Mansour*, 716 So.2d 3, 7-8 (Miss. Ct. App. 2000):

> The common thread in *Alpaugh, Rotenberry, and Reid* is the respective boards determined that petitioners' land was accessible by only one route; therefore, the petitioners in those cases proved their requested easement were reasonably necessary and not for mere convenience. In the case *sub judice*, Mansour must

> have proved reasonable necessity because the Board awarded him an easement. However, unlike the boards in *Alpaugh, Rotenberry, and Reid*, the bill of exceptions indicates there was more than one reasonable route over which an easement could be established, including the historical route South Rainbow utilized before they sold the Mansour and Eifling tracts. The Board chose a route which was less burdensome to the owner of servient land. The crux of Mansour's complaint is that the Pink Line route would require him to absorb substantial financial burdens in making improvements on the Ganier's land, for which he will receive only the limited benefit of ingress and egress which is already reasonably available via The Road. In so arguing it is apparent that he believes that he is entitled to the route which contains an existing road without regard to the burden it would cause Ganier. He is mistaken.

The Court further stated:

> The statute does not contemplate granting one citizen or corporation a right of way through the property of another citizen or corporation as a matter of mere convenience or as a mere matter of saving expense. There must be real necessity before private property can be invaded by a citizen for private purposes if that can be done at all. The right to the control and use of one's property is a sacred right, not to be lightly invaded or disturbed. Citing *Whitefort vs. Homochitto Lumber Company*, 130 Miss. 14, 93 So. 437 (1922)

The Court of Appeals in *Swan vs. Hill*, 855 So.2d 459 (Miss. Ct. App. 2003) set out the guidelines and principles which a landowner seeking an easement across a neighboring landowner's property must establish.

> In proceeding for easement by necessity, the concern of the court is only whether alternative routes exist, and if no alternative routes exist, then easement will be considered necessary; where other alternative routes exist, the court will grant easement over neighboring landowner's property if it is only reasonably necessary alternative route available.
>
> In determining what is a reasonably necessary alternative route, for purpose of claim for easement by necessity, the court looks to where the alternative would involve disproportionate expense and inconvenience; such situation would arise when the expense of making means of access available would exceed the entire value of the property to which access was sought.

The Chancellor equates building a bridge over a ditch to the *Mississippi Power Company* case, supra, that involved building a bridge exceeding $250,000.00 or as in *Rotenberry*, supra, the

petitioner would be required to build a private bridge across the Talahatchie River or the Yocona Drainage Channel. In the case at bar, we do not have a $250,000.00 bridge across a creek or the need to build a bridge across the Talahatchie River. We have a ditch, on private property, that does not require an expensive bridge over a river or creek that would cost $250,000.00 or more. Taking the plaintiffs' testimony on the cost of a bridge (if admissible), we have a cost of $10,000.00. There is no proof presented by the plaintiffs how this cost compares to the value of the plaintiffs' property, since they offered none. The Court in *Swan*, supra at 464, found Hill provided no estimate of the cost of remodeling his carwash or the worth of his business. Due to Hill's failure to establish a disproportionate expense in using the alternate routes available to him, Hill failed to prove that he was entitled to an easement by necessity.

The case relied upon by the Chancellor involved land accessible by only one route and a disproportionate expense exceeding $250,000.00. In the case at bar we have neither. The land in question is accessible by the plaintiffs over their own property, and at a cost that does not approach $250,000.00.

CONCLUSION

This Honorable Court is compelled to reverse and render the chancellor's grant of an easement by necessity. There is no "land-locked" situation as the plaintiffs have access through their own land to the area in question. Assuming the plaintiffs have a "land-locked" situation, the alternate routes are not costs prohibitive. The chancellor used improper evidence to evaluate the costs of a bridge, which if excluded, would provide no basis for the chancellor's finding. This Court can determine: (1) There is no "land-locked" situation, (2) If there is, it was not created from a common source, (3) There is inadequate proof of disproportionate costs to use an

alternate route, and (4) the plaintiffs failed to offer any proof as to the value of their land or income derived from this property. Based on any one of these elements, the chancellor's Opinion and Judgment must be reversed and rendered.

Respectfully submitted,

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By: Duncan Lott
Duncan Lott

CERTIFICATE OF SERVICE

This is to certify that I, Duncan Lott, attorney for Appellant, have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to the following;

Honorable Jacqueline Estes Mask
Chancellor, First Judicial District
P.O. Box 7395
Tupelo, MS 38802

Rhett Russell, Esq.
Attorney at Law
P.O. Box 27
Tupelo, MS 38802

This the 11 day October, 2007.

DUNCAN LOTT