

IN THE SUPREME COURT OF MISSISSIPPI

**WILLIAM MARION THRELKELD, RANDY KIM
WHITTEN AND WIFE, IVA NELL WHITTEN, EDWARD
L. MAYNARD, MARY RUTH WHITTEN, SANDRA KAY
FARLEY, HEYWOOD WASHBURN AND WIFE, SUE T.
WASHBURN, MOLLY T. THOMPSON, AND FULTON
THOMPSON**

APPELLANTS

VS.

CAUSE NO. 2007-CA-00944

**MITCHELL L. SISK AND WIFE, GRACE SISK,
JAMES BRUCE SISK, SR., PHYLLIS SISK GOGGANS**

APPELLEES

**APPEAL FROM THE CHANCERY COURT
OF LEE COUNTY, MISSISSIPPI**

BRIEF OF APPELLEES

**THOMAS M. McELROY, ESQ.
ATTORNEY FOR THE APPELLEES**

**THOMAS M. McELROY, P.A.
301 NORTH BROADWAY
TUPELO, MS 38804
662-842-3723
662-842-3744 fax**

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. William Marian Threlkeld, Appellant
2. Randy Kem Whitten, Appellant
3. Iva Nell Whitten, Appellant
4. Edward L. Maynard, Appellant
5. Mary Ruth Whitten, Appellant
6. Sandra K. Farley, Appellant
7. Mitchell L. Sisk, Appellee
8. Grace Sisk, Appellee
9. James Bruce Sisk, Sr., Appellee
10. Phyllis Sisk Goggans, dismissed Plaintiff
11. Heywood Washburn, Predecessor in Title to Appellees
12. Sue Washburn, Predecessor in Title to Appellees
13. Molly Thompson, Predecessor in Title to Appellees
14. Fulton Thompson, Predecessor in Title to Appellees
15. Phillip R. Williams, Successor in Interest to Heywood Washburn, et al
16. Sonja B. Williams, Successor in Interest to Heywood Washburn, et al
17. James R. Williams, Successor in Interest to Heywood Washburn, et al
18. Shelly J. Williams, Successor in Interest to Heywood Washburn, et al

19. Honorable Kenneth Burns, Special Chancellor
20. B. Sean Akins, Attorney for Appellants
21. Thomas M. McElroy, Attorney for Appellees
22. Jeremy Eskridge, deceased Attorney for Appellants

This the 29th day of January 2008.

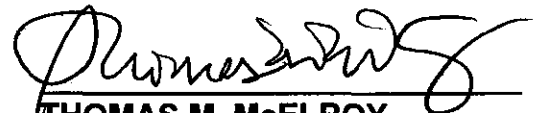

THOMAS M. McELROY
MSB NO. [REDACTED]
ATTORNEY FOR APPELLEES

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
STATEMENT OF ISSUES	vii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
CONCLUSION	17
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

<i>Bank of Miss. v. Hollingsworth</i> , 609 So. 2d 422, 424 (Miss. 1992)	12
<i>Brandenburg v. Brooks</i> , 264 Ark. 939, 576 S.W.2d 196 (1979)	13
<i>Broadhead v. Terpening</i> , 611 So. 2d, 949	13, 14
<i>Carver v. Jones</i> , 28 Ark. App. 288, 773 S.W.2d 842, 845 (Ark. App. 1989)	13
<i>Clark v. [*196] Myrick</i> , 523 So. 2d 79, 81 (Miss. 1988)	12
<i>Dieck v. Landry</i> , 796 So. 2d 1004, 1007 (P7) (Miss. 2001)	12
<i>Fike v. Shelton</i> , 611 So. 2d 949	14
<i>Fisher v. Fisher</i> , 771 So. 2d 364, 367 (P8) (Miss. 2000) (citing <i>Richard v. Richard</i> , 711 So. 2d 884, 888 (P13) (Miss. 1998))	12
<i>Gulf Coast Research Laboratory v. Amaraneni</i> , 877 So. 2d 1250, 1252 (P8) (2004) .	12
<i>Hammett v. Woods</i> , 602 So. 2d 825, 827 (Miss. 1992)	12
<i>Hancock v. Henderson</i> , 236 Md. 98, 202 A.2d 599, 603 (Md. 1964)	13
<i>McNeil v. Hester</i> , 753 So. 2d 1057, 1063 (P21) (Miss. 2000)	12
<i>Medina v. State of Mississippi ex. rel Sumner</i> , 354 So. 2d 779, 784 (Miss. 1978) ...	13
<i>Myers v. Blair</i> , 611 So. 2d 969, 971 (Miss. 1992) (citing <i>Dethlefs v. Beau Maison Dev. Corp.</i> , 511 So. 2d 112 (Miss. 1987)	14
<i>Pecander Associates, Inc. v. Glasgow Trust</i> , 446 A.2d 1097, 1100 (Del. 1982)	13
<i>Pleas v. Thomas</i> , 75 Miss. 495, 500, 22 So. 820, 821 (1897)	13
<i>Rogers v. Marlin</i> , 754 So. 2d 1267, 1272 (Miss Ct. App. 1999)	14
<i>Scruggs v. Shelby</i> , 733 So. 2d 347, 349 (Miss. Ct. App. 1999	14
<i>Sigal v. Mfrs. Light and Heat Co.</i> , 450 Pa. 228, 299 A. 2d 646, 649 (Pa. 1973)	16
<i>Smith v. Virginia Iron, Coal & Coke Co.</i> , 143 Va. 159, 129 S.E. 274, 276 (Va. 1925)	13

STATEMENT OF ISSUES

ISSUE ONE:

THE SIKS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT THEY POSSESSED A PRESCRIPTIVE EASEMENT OVER THE GRAVEL DRIVE WHICH IS THE SUBJECT OF THIS APPEAL.

ISSUE TWO:

THE COURT CORRECTLY FOUND THAT THE SIKS POSSESSED AN EASEMENT BY NECESSITY OVER THE WHITTENS' GRAVEL DRIVE.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Mitchell L. Sisk and Wife, Grace Sisk, Frank Sisk, James Bruce Sisk, Sr., Plaintiffs, originally filed their lawsuit against William Marion Threldkeld, Randy Kern Whitten and Wife, Iva Nell Whitten, Edward L. Maynard and Mary Ruth Whitten on February 9, 1998 in the Lee County Chancery Court. After the death of the original Plaintiff, Frank Sisk, who was replaced in the lawsuit by his daughter, Phyllis Sisk Goggans; the death of an attorney of record, Jeremy J. Eskridge; continuances; the recusal of all of the sitting Chancellors of the First Judicial District; this cause was finally heard on March 1-2, 2007 before the Honorable Kenneth M. Burns who heard the testimony of the witnesses, viewed the documents and photographs introduced into evidence, and upon Motion of the Plaintiffs and Defendants viewed the gravel drive and the surrounding property of all of the Parties.

The case was heard on the Fourth Amended Complaint of Mitchell L. Sisk and Wife, Grace Sisk, and James Bruce Sisk, Sr., to establish an easement by prescription and/or an easement by necessity across the gravel drive which is shown between the arrows on Plaintiffs' Exhibit "1." P-1 also identifies James Williams as the owner of Parcel #2.01 and Phillip Williams as the owner of Parcel #2.00. These parcels were purchased by the Williams from Heywood Washburn, et al, after this litigation commenced. Parcel #2.01 and #2.00 were formerly united and were referred to throughout the trial as the "Washburn" property. The gravel drive continued south onto the Washburn property on what is now Parcel 2.01 and turned either to the west for Mitchell Sisk and Grace Sisk to access Parcels 17 and 8 or continued south for James Bruce Sisk to access Parcel 16.

This gravel drive is described below by virtue of the survey of the Lee County

Surveyor, Carl J. Scherff, registered land surveyor number 2467, dated August 3, 2007. The Plaintiffs and the Defendants all agree that this legal description of the gravel drive should replace the description contained in the Order of the Lee County Chancery Court dated May 3, 2007:

COMMENCING AT AN AXLE AT THE NORTHWEST CORNER OF THE SOUTHWEST QUARTER OF SECTION 2, TOWNSHIP 11 SOUTH, RANGE 5 EAST, LEE COUNTY, MISSISSIPPI. THENCE SOUTH 00 DEGREES 44 MINUTES 22 SECONDS EAST 2641.33 FEET TO THE SOUTHWEST CORNER OF THE SOUTHWEST QUARTER OF SECTION 2, TOWNSHIP 11 SOUTH, RANGE 5 EAST, LEE COUNTY, MISSISSIPPI. THENCE EAST 676.50 FEET TO AN IRON PIN; THENCE SOUTH 89 DEGREES 58 MINUTES 34 SECONDS EAST 659.59 FEET TO THE CENTER OF A GRAVEL DRIVE, FOR A POINT OF BEGINNING. THENCE AROUND THE ARC OF A CURVE TO THE NORTHEAST, WITH A RADIUS OF 4871.66 FEET, A TANGENT OF 174.34, AND A CHORD OF NORTH 25 DEGREES 07 MINUTES 11 SECONDS EAST 348.45 FEET; THENCE AROUND THE ARC OF A CURVE TO THE RIGHT, WITH A RADIUS OF 399.54 FEET, A TANGENT OF 36.06 FEET, AND A CHORD OF NORTH 30 DEGREES 43 MINUTES 09 SECONDS EAST 71.84 FEET; THENCE NORTH 38 DEGREES 07 MINUTES 45 SECONDS EAST 158.95 FEET; THENCE AROUND THE ARC OF A CURVE TO THE LEFT, WITH A RADIUS OF 204.04 FEET, A TANGENT OF 33.96 FEET, AND A CHORD OF THE NORTH 25 DEGREES 46 MINUTES 18 SECONDS EAST 67.00 FEET; THENCE AROUND THE ARC OF A CURVE TO THE LEFT, WITH A RADIUS OF 705.62 FEET, A TANGENT OF 87.92 FEET, AND A CHORD OF NORTH 06 DEGREES 18 MINUTES 56 SECONDS EAST 174.48 FEET; THENCE AROUND A CURVE TO THE RIGHT, WITH A RADIUS OF 363.12 FEET, A TANGENT OF 81.29 FEET, AND A CHORD OF NORTH 12 DEGREES 40 MINUTES 19 SECONDS EAST 158.65 FEET; THENCE AROUND THE ARC OF A CURVE TO THE LEFT, WITH A RADIUS OF 307.27 FEET, A TANGENT OF 66.04 FEET, AND A CHORD OF NORTH 15 DEGREES 49 MINUTES 05 SECONDS EAST 129.13 FEET; THENCE NORTH 05 DEGREES 34 MINUTES 29 SECONDS EAST 284.24 FEET TO THE CENTER OF LEE COUNTY ROAD NO. 530, AND THE END OF THIS EASEMENT. LYING AND BEING IN THE NORTHWEST QUARTER OF SECTION 2, TOWNSHIP 11 SOUTH, RANGE 5 EAST, LEE COUNTY, MISSISSIPPI.

Phyllis Sisk Goggans, filed a motion to be dismissed from this lawsuit, which motion was granted by the Lee County Chancery Court. Phyllis Sisk Goggans is the daughter of Frank Sisk, deceased, who along with his brother, Mitchell, purchased farm land from Mrs. Willie Priest in 1965 and from Heywood Washburn, et al, in 1970.

Frank Sisk, Mitchell Sisk and wife, Grace Sisk, and James Bruce Sisk, Jr. were

Thomas dated November 16, 1936, recorded in Book 259, Page 283. This conveyance was for property located in Section 2, Section 10, and Section 11 of Township 11 South, Range 5 East, Lee County, Mississippi. See part of Exhibit "P-8."

The second conveyance was a Warranty Deed from F. G. Thomas to R. M. Priest dated December 27, 1941, recorded in Book 301, Page 283, part of Exhibit "P-8" in which he conveyed forty (40) acres to R. M. Priest. The eastern most boundary of this forty (40) acre tract was the west side of the gravel drive running from Lee County Road 530 to a point on the north line of the Washburn property (Parcel 2.0 and 2.01 combined).

The third conveyance was a Warranty Deed from F. G. Thomas to W. Donald Priest dated December 27, 1941, recorded in Book 301, Page 284 conveying nine (9) acres. Part of Collective Exhibit "P-8." The westernmost boundary of the 9 acre tract was the east line of the gravel drive, which ran from Lee County Road 530 to the north line of the Washburn property.

The conveyances to R. M. Priest and to W. Donald Priest left F. G. Thomas with access down the gravel drive to the Washburn property and to Parcels 8 and 17 (now owned by Mitchell L. Sisk and Wife, Grace Sisk). Parcels 7 and 18, now owned by Phyllis Sisk Goggans, were sold to Frank and Mitchell Sisk by Mrs. Willie Priest in 1965, and were also accessed by the Sisks down the gravel drive.

The land retained by F. G. Thomas was the gravel drive running from County Road 530 to the north line of the Washburn property and is shown on Exhibit "P-1" as beginning at the top arrow pointing to County Road 530 and ending at the bottom arrow which points to the north line of the Washburn property. F. G. Thomas and his successors and/or assigns, including Mitchell Sisk et ux, Grace Sisk, and James Bruce Sisk, Jr., used this

gravel drive to access the Washburn property, and Parcels 7, 8, 16, 17, and 18.

TITLE TO LAND OF MITCHELL SISK AND WIFE, GRACE SISK:

Frank and Mitchell Sisk purchased thirty-six point sixty-nine (36.69) acres located in Section 10 and Section 11 from Mrs. Willie Priest on November 4, 1965. See Exhibit "P-2." Mrs. Willie Priest was the widow of R. M. Priest. The Defendant, Randy Kem Whitten, is the great-grandson of R. M. and Willie Priest. Upon receipt of this conveyance of land, Frank and Mitchell Sisk began using the gravel drive between the two (2) Priests' properties and easement on the Washburn property to gain access to the agricultural lands (Parcels 7 and 18) purchased from Mrs. Willie Priest on November 4, 1965. The Sisks purchased this land to raise soybeans. Record Page 12, Line 28. This is the date the Sisks began their claim of a right to use the gravel drive for access to their land. The record reflects that in 1965 the gravel road was the only access to Parcels 7, 8, 17, and 18. Record Page 264, Line 25 - Page 265, Line 3.

Subsequently, J. H. Washburn, Jr. and wife, Sue Washburn, and Fulton Thompson and wife, Molly Thompson conveyed Parcel 17 and Parcel 8, which consisted of farm land in the Chiwapa Creek Bottom, to Frank R. Sisk and Mitchell Sisk, dated May 30, 1970, recorded Book 872, Page 480. Heywood Washburn testified that the property in Parcel 17 and Parcel 8 was used for growing crops. Record Page 251, Line 12. He further testified that the only known access to Parcel 17 and Parcel 8 was across the gravel drive and the Washburn property to the Chiwapa Creek Bottom. Record Page 251, Line 8 - 26. At the time of the sale, Heywood Washburn was not aware of any other means of ingress or egress to the property, Record Page 253, Line 6, and believed that the gravel drive was a public road. Record Page 259, Line 3 - 7.

From the time of the purchase of the property from Mrs. Willie Priest in 1965 and the purchase of property in 1970 from Washburn and Thompson, the Sisks, and David and Phyllis Goggans drove their farm equipment down the gravel drive in the spring to prepare to plant and plant crops; in the summer to periodically check and spray their crops; and in the fall to harvest their their crops. This farming schedule necessitated the use of tractors, combines, disks, spray rigs and trucks all of which are described in Exhibit "P-12." Testimony of Mitchell Sisk: Record Page 26, Line 5 - Page 29, Line 9; Testimony of Paul Sisk, Record Page 108, Line 2 - Record Page 109, Line 20; Record Page 115, Line 5 - 19; Testimony of David Goggans, Record Page 274, Line 26 - Record Page 276, Line 3.

TITLE TO LAND OF JAMES BRUCE SISK, SR.:

Title to Parcel 16 is held by James Bruce Sisk, Sr. This property was purchased from John A. Raspberry, Guardian for Mrs. Maudie Bell Long, Cause No. 15158 by Allen Sisk and Wife, Mary Sisk by Warranty Deed dated October 31, 1959, recorded in Book 535, Page 265 of the land records of Lee County, Mississippi. Subsequently Allen Sisk, et ux., conveyed Parcel 16 to his son, James Bruce Sisk, Sr., by Warranty Deed dated January 11, 1981, recorded in Book 1061, Page 633. The title of James Bruce Sisk, Sr. does not derive from a common source with any of the Defendants or with the Plaintiffs, Mitchell Sisk and Wife, Grace Sisk. See Plaintiffs' Exhibit "P-5."

The Defendant Kem Whitten testified to the use of the gravel drive by Allen Sisk. Record Page 165, Line 7. James Bruce Sisk, Sr. testified to the use of the gravel road prior to 1965 and up to 1995 without interference from anyone including Kem Whitten's great-uncle, Doyle Priest, and Donald Priest, his grandfather. Not until 1995 did Kem Whitten begin harassing Bruce Sisk, Sr. and Paul Sisk for driving farm equipment down

the gravel road. The Sisks continued to use the gravel drive after Kem Whitten attempted to stop their use in 1995 and then filed their original Complaint on February 9, 1998.

The record is filled with testimony that the gravel drive was used by Heywood Washburn, Doyle Priest, Donald Priest, James Bruce Sisk, Sr., Mitchell Sisk, Paul Sisk (son of Mitchell Sisk), Frank Sisk, deceased, the predecessor in title to Phyllis Sisk Goggans, and David Goggans without incident or objection by the Priests well into the 1980's. Record Page 211, Line 13-25. From August 1983 until January 1985, Randy Kem Whitten and Wife, Iva Nell Whitten renovated the house located on Parcel 48.3H. in which they now live on the gravel road. From August 1983, when the full-time renovation of the house began, until 1995, the Sisks used the gravel drive without objection from anyone. Only after Randy Kem Whitten and Wife, Iva Nell Whitten resided in the home for a period of ten (10) years did an objection occur to the Sisks' use of the property. See Record Page 209, Line 21 - 28.

EQUIPMENT USED ON GRAVEL DRIVE:

The credible testimony in this case by Mitchell Sisk, Bruce Sisk, and David Goggans,¹ established that Mitchell Sisk and Grace used the following described equipment, with the following widths on the gravel drive to access the agricultural property in the Chiwapa Creek Bottom from 1965 until the Defendant, Kem Whitten began harassing and attempting to intimidate the Plaintiffs from using the gravel drive to access Parcel 7, 8, 16, and 17.

1973 ½ ton Chevrolet Pickup

1

David Goggans married Phyllis Sisk Goggans, successor in interest to Frank R. Sisk, in 1972 and worked on the Sisk operation and on his own property purchased in the early 1980's from Doyle Priest. Record 260 Line 25, Exhibit P-11.

1976 ½ ton Chevrolet Pickup
1983 ½ ton Chevrolet Pickup
1966 Chevrolet C-60 bean truck
1977 GMC 6000 bean truck
1976 Chevrolet C-60 bean truck
1985 Ford F-250 truck with spray rig folded to 12'
8' wide trailer
John Deere 8630 tractor 12' wide
John Deere 4630 tractor 12' 6" wide
International 1466 tractor 12' 6"
International 1486 tractor 12' 6"
930 Case tractor
John Deere 7700 Combine 11' 6" wide
John Deere 1010 Field Cultivator 16' wide folded
White Model 272 Disk 18' wide folded
Case Disk 15' folded
30' Great Plain Drill 15' 6" wide folded
John Deere 7100 planter 21' wide
20' foot chisel plow

See Exhibit "P-12."

David and Phyllis Sisk Goggans drove the following described equipment across the gravel drive to access the property owned by Frank Sisk, which was subsequently inherited by Phyllis Sisk Goggans:

1980 ford 700 2-ton Bean truck - 8 1/2'
1981 GMC C50 2-ton bean truck - 8 1/2'
Trailer to carry seed to field - 8'
Spray truck for chemicals - 12 feet wide
Cotton Wagon - 8'
Farmall 1-row Cotton Picker- 10' wide
International 416, 2 Row Cotton Picker
Water wagon for fish ponds - 8'-9'
John Deere 4840 9' wide
John Deere 4240 9' wide
1466 dual wheel International 12' 6" wide
1486 International
8'-9' 930 Case
9' John Deere Combine 7700
20 and 25 feet headers
6600 John Deere Combine with 20' head
International 496 disk 15' wide folded
Case Disk 23 feet Fold up to 15 feet

Case I H Disk 496 23 feet fold up to 15 feet
20 foot Chisel Plow
Grate Plows
Grain Drill 30 feet fold up to 15 feet
John Deere 7100 planter 21' wide

See Exhibit "P-12."

In addition, Bruce Sisk and his father Allen Sisk used a tractor to pull a twelve (12") foot disc down the gravel drive and across the Washburn property to access Parcel 16, which was originally owned by Allen Sisk. In addition Bruce Sisk used his pickup to go down the gravel road to feed cows and check on his property.

THE WIDTH OF THE EASEMENT

Also at issue in this case is the width of the easement on each side of the centerline of the gravel drive. The original deeds to Donald Priest and to R. M. Priest do not define the width of the road. From 1965 until 1995, a period of more than thirty (30) years, the Sisks used this gravel drive without contest by any party including the grandfather, great-uncle, and great-grandmother of Randy Kem Whitten to drive their farm equipment to and from their farmland. Heywood Washburn, et al, and the Priests entered into a joint venture to raise catfish in the ponds and lakes located on the Washburn property until the early 1980s and used the gravel drive to access the lakes on the Washburn property. In fact, after Donald Priest went out of the commercial fish raising business on the Washburn property in Section 11, another individual continued raising catfish for a number of years on the Washburn property and used the gravel drive to access the catfish lakes on the Washburn property. See Record Page 161, Line 24.

In 1983, David Goggans and Phyllis Sisk Goggans acquired title to Parcel 48.01 and Parcel 48.04, which is now owned by Edward L. Maynard, (the Defendant in this cause

who did not appear at trial), from Donald Priest. See Exhibit "P-11." The property was grown up and no roads existed across Parcel 48.01 in order to access Parcel 48.04 or Parcels 7, 8, 17 and 18 owned by the Sisks. David Goggans testified that he was concerned about access to Parcel 48.04 at which time he was advised by Donald Priest that an easement was not necessary for David Goggans to access Parcel 48.04 because it was a county road. See Record Page 271, Line 7 - 15. After cleaning up the property, David Goggans and Phyllis Sisk made the property available to Frank and Mitchell Sisk, in order to gain access to their property in the Chiwapa Creek Bottom, (Parcels 7, 8, 17, and 18). It included what is now Parcel 48.04 and the total property purchased by David Goggans extended all the way to the gravel drive, which is the basis of this lawsuit.

All of the Sisks have used the gravel drive in question in order to access their Chiwapa Creek Bottom land for a period extending from 1965 in the case of Mitchell and Grace Sisk and in the case of James Bruce Sisk prior to 1965 when his father, Alan Sisk used the gravel drive to access Parcel 16.

In the fall of 2006, the Defendant, Sandra K. Farley erected a fence along the western boundary of the gravel drive. This fence with obstructions placed on the east side of the gravel drive by Kem Whitten, prevents the Plaintiffs from driving their farm equipment down the gravel drive to their crop land. Record Page 95, Line 14, to Record 98, Line 8; Record Page 338, Line 16 - 24. The Plaintiffs have brought equipment as wide as 21 feet wide down the gravel drive, across the Washburn property and into the Chiwapa Creek Bottom prior to the erection of the fence by Sandra Farley.

Various deeds by either Donald or Doyle Priest have conveyed title to the middle of the gravel drive. However, by the time of these conveyances, the property had been in

use for more than ten (10) years by the Sisks to access their property. Defendant, Kem Whitten testified that he had no objections to pick-up traffic along the property, but objected to heavier equipment that would tear up the road.

SUMMARY OF THE ARGUMENT

The ruling of the Lee County Chancery Court finding that Frank and Mitchell Sisk acquired an easement by necessity across the gravel drive as the result of the purchase from Mrs. Willie Priest and from Heywood Washburn should be affirmed upon review by this Court. The common source from which both the Mrs. Willie Priest property and the Heywood Washburn property derived was the Bank of Holly Springs to F. G. Thomas conveyance. Both the Priest property (Parcel 18 and 7) and the Washburn property (Parcel 17 and 8) would have been landlocked except for the easement of necessity acquired by the Sisks when the Priest and Washburn properties were purchased. The only other source for access to their property was across the property of David and Phyllis Goggans who had granted a license revocable at will allowing the Sisks to cross their property.

The ruling of the Chancellor finding that the Mitchell and Grace Sisk and James Bruce Sisk had acquired an easement by prescription across the gravel drive as the result of their open, notorious, visible, hostile, under claim of ownership, exclusive, peaceful, continuous and uninterrupted use of the gravel drive for a period of thirty years before the Defendant Kem Whitten objected to the use of the gravel drive should be affirmed upon review by this Court.

LAW AND ARGUMENT

STANDARD OF REVIEW

The factual findings of a chancellor will not be disturbed on appeal unless the findings are manifestly wrong, clearly erroneous, an erroneous legal standard was applied or there has been an abuse of discretion. *Gulf Coast Research Laboratory v. Amaraneni*, 877 So. 2d 1250, 1252 (P8) (2004). This Court will not reverse a chancellor's findings of fact if they are supported by substantial credible evidence. *Hammett v. Woods*, 602 So. 2d 825, 827 (Miss. 1992). This Court must look at the entire record and accept the evidence which supports or reasonably tends to support the findings of the chancellor, together with all reasonable inferences which may be drawn therefrom and which favor the chancellor's findings of fact. *Clark v. [**196] Myrick*, 523 So. 2d 79, 81 (Miss. 1988). However, this Court reviews questions of law *de novo*. *Dieck v. Landry*, 796 So. 2d 1004, 1007 (P7) (Miss. 2001).

This Court has a limited standard of review in examining and considering the decisions of a chancellor. *McNeil v. Hester*, 753 So. 2d 1057, 1063 (P21) (Miss. 2000). "The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Fisher v. Fisher*, 771 So. 2d 364, 367 (P8) (Miss. 2000) (citing *Richard v. Richard*, 711 So. 2d 884, 888 (P13) (Miss. 1998)). A chancellor's findings will not be disturbed upon review by this Court unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *Bank of Miss. v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992). [****12**] "The standard of review employed by this Court for review of a chancellor's decision is abuse of discretion." *McNeil*, 753 So. 2d at 1063 (P21).

EASEMENT OF NECESSITY

It is well-established that 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 [**14] been rendered inaccessible except by passing over the other portion or by trespassing on the lands of another. *E.g.*, *Taylor v. Hays*, 551 So. 2d 906, 908 (Miss. 1989); *Medina v. State of Mississippi ex. rel Sumner*, 354 So. 2d 779, 784 (Miss. 1978); and *Pleas v. Thomas*, 75 Miss. 495, 500, 22 So. 820, 821 (1897). Such easements or rights-of-way by necessity last as long as the necessity exists and terminates when other access to the landlocked parcel becomes available. *E.g.*, *Taylor*, 551 So. 2d at 908; and *Thornton v. McLeary*, 161 Miss. 697, 702-703, 137 So. 785, 786-787 (1931).

In *Broadhead v. Terpening*, 611 So. 2d, 949, the Court held as follows:

"Thus, the issue arises whether an easement or right-of-way by necessity runs with the land, thereby creating a vested right of access for successive holders of the dominant tenement and binding successive holders of the servient tenement to honor that right. This Court has never had occasion in the past to rule on this question. Today, we hold that easements of way by necessity are appurtenant to the dominant tenement and run with the land."

"Although never before broached by this court, this point of law is a generally accepted common law principle. The case law of our sister states bears this out. See *Carver v. Jones*, 28 Ark. App. 288, 773 S.W.2d 842, 845 (Ark. App. 1989) [**16] ("Easements by necessity and by implication are appurtenant to the dominant estate and run with land.") (citing *Brandenburg v. Brooks*, 264 Ark. 939, 576 S.W.2d 196 (1979)); *Pecander Associates, Inc. v. Glasgow Trust*, 446 A.2d 1097, 1100 (Del. 1982) (" . . . the right to a way of necessity can lie dormant, be passed from one owner of the dominant estate to successors in interest, and be exercised *in futuro*; *Hancock v. Henderson*, 236 Md. 98, 202 A.2d 599, 603 (Md. 1964) (" . . . an easement [of way by necessity], being appurtenant, passes with each conveyance to subsequent grantees."); *Vanderwerff v. Consumers Gas Co.*, 166 Pa. Super. 358, 71 A.2d 809, 811 (Pa. 1950) ("Easements by implication require no deed or writing to support them and they pass by a conveyance of the estates to which they are appurtenant."); and *Smith v. Virginia Iron, Coal & Coke Co.*, 143 Va. 159, 129 S.E. 274, 276 (Va. 1925) ("The right of way . . . acquired [by necessity] remains vested in the grantee and his successors

in title so long the necessity therefor continues to exist." *Broadhead v. Terpening*, supra.

In *Fike v. Shelton* 611 So. 2d 949 this Court held:

"that access . . . was by oral permission and was in the form of a license which is revocable at will. The limited scope of permission granted to Shelton by Robinson and Berry is not sufficient to extinguish his right to an easement by necessity. It does not rise to the level of unrestricted access."

Here, Appellants' claim that the Sisks acquired access from David and Phyllis Goggans there by extinguishing the easement by necessity is misplaced as this Court held in *Fike v. Shelton*. The access which Goggans granted to Sisk is in the form of a license which is revocable at will. When David Goggans purchased from Donald Priest, his deed made no reference to being subject to an easement for ingress or egress in favor of the Sisks or any other person. See Exhibit "P-11." The Sisk's use of the Goggans property does not serve to extinguish the easement by necessity acquired when Parcels 7, 8, 17 and 18 were purchased from Mrs. Willie Priest and Heywood Washburn et al, as Goggans never granted a permanent unrestricted right of right of access to the Sisks.

EASEMENT BY PRESCRIPTION

In *Rogers v. Marlin*, 754 So. 2d 1267, 1272 (Miss Ct. App. 1999) this Court held that the requisite elements for the establishment of an easement by prescription are: that the use is (1) open, notorious and visible; (2) hostile; (3) under claim of ownership; (4) exclusive; (5) [**11] peaceful; and (6) continuous and uninterrupted for ten years. *Myers v. Blair*, 611 So. 2d 969, 971 (Miss. 1992) (citing *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112 (Miss. 1987)). These elements must be proven by clear and convincing evidence. *Scruggs v. Shelby*, 733 So. 2d 347, 349 (Miss. Ct. App. 1999). The Chancellor addressed each of the elements to establish an easement by prescription and found that

the Plaintiffs had proven by clear and convincing evidence they were entitled to an easement by prescription.

The Plaintiff, James Bruce Sisk, established that the gravel drive had been used by his father Alan Sisk from the time he acquired title in 1959 and the Plaintiffs, Mitchell and Grace Sisk, and his deceased brother Frank Sisk began using the gravel drive in 1965 when Parcels 7 and 18 were purchased from Mrs. Willie Priest. This testimony established the elements of *open, notorious and visible, ... peaceful*. The Defendants, Kem and Iva Nell Whitten only objected in 1995 after having worked on and lived in their house for a period of 12 years. Record Page 209, Lines 21-28. The Chancellor found no controversy concerning the Sisk's use of the gravel drive until the prescriptive period of ten years had long since run.

The Defendants, Kem and Iva Nell Whitten attempted to prove that consent to use the road had been obtained from Donald Priest. However, the Chancellor relying on the ruling in *Moran v. Sims*, 873 So. 2d 1067 (Court of Appeals 2004) found that the Sisks use of the gravel drive was *hostile* to the interests of the Defendants. The Court found in his ruling that "there is no evidence to infer that Defendants or their recent predecessors in title gave the Sisks consent to use the property." *Judgement Page 4, Paragraph 13 (b)*.

The Sisks claimed ownership of the easement by virtue of their efforts to keep the easement open after Heywood Washburn, et al, cut timber on the property and left tree cutting debris on the roadway on the Washburn portion of the gravel drive. The Sisk's efforts to maintain a passable way to their land was consistent with a *claim of ownership*.

"Exclusive" use does not mean that no one else used the driveway. Exclusivity here means that the use was consistent with an exclusive claim to the right to use. *Moran v.*

Sims, 873 So. 2d 1067 .

The Chancellor correctly held that the Plaintiffs had established their right to an easement by prescription.

WIDTH OF EASEMENT

It is well established that the same rules of construction apply to the construction of easement grants as apply to contracts. *Sigal v. Mfrs. Light and Heat Co.*, 450 Pa. 228, 299 A. 2d 646, 649 (Pa. 1973). Where the width of the easement is unambiguously specified in a grant, the grantee is restricted to that width even if it is insufficient for the purposes for which the easement was granted. *Zettlemoyer v. Transcontinental Gas Pipeline Corp.*, 540 Pa. 337, 657 A.2d 920, 924 (Pa. 1995). But where the grant is silent, there is an ambiguity and the intentions of the parties must be determined. *Id.* When the width of the easement is not specified in the grant, the easement "will be held to be of such width as is suitable and convenient for the ordinary uses of free passage[.]" *Tubb V. Monroe County Electric Power Association*, 912 So. 2d 192, pg 17; 2005 Miss. App. LEXIS 714.

There was no specific proof by either party as to the dimensions of the easement granted. It therefore fell to the trial court to attempt to ascertain the intent of the parties. The trial court, by implication, held that it was the intent of the parties that the easement be sufficiently broad to keep up and repair the lines of MCEPA. *Tubb V. Monroe County Electric Power Association*, *supra*.

In *Taylor v. Hays*, 551 So. 2d at 909, we said, "it is well established that a way [of] necessity should be located so as to be the least onerous to the owner of the servient estate while, at the same time, being a reasonable convenience to the owner of the dominant estate. (citing *Stair v. Miller*, 52 Md. [App. 108], 447 A.2d 109).

The Chancellor considered the purpose for which the Sisks acquired Parcels 7, 8, 17 and 18 from Mrs. Willie Priest and from Heywood Washburn, et al, to determine the width of the road. Since the Priest and Washburn tracts were purchased for agricultural purposes by the Sisks, the Chancellor correctly reasoned that the easement should be wide enough to drive their respective tractors, drills, combines, spray rigs, pickups and bean trucks across the gravel drive to their agricultural land. After considering the length of time and the widths of the equipment used by the Sisks, the Chancellor determined that a sixteen-foot easement would permit the Sisks to cross the easement to their agricultural parcels, while at the same time minimizing the burden on the owners of the servient estates. The decision of the Chancellor is supported by clear and convincing evidence and should be affirmed.

APPELLANT'S CLAIM FOR DAMAGES

In their Counter Claim the Defendants sought compensatory damages from the Plaintiffs. However, at trial, not one of the Defendants presented any proof of damages as the result of the use of the easement by any of the Plaintiffs. As no proof of damages was presented to the Chancery Court by the Defendants, the Chancellor correctly did not award damages to the Defendants.

CONCLUSION

The decision of the Lee County Chancery Court finding that the Plaintiffs, Mitchell Sisk and wife, Grace Sisk, and the Plaintiff, James Bruce Sisk, Sr., had acquired an easement by prescription across the gravel drive is supported by clear and convincing evidence based upon over 30 years of use of the gravel drive for transporting farm equipment to their agricultural land in the Chiwapa Creek bottom and the decision of the

Lee County Chancery Court finding that the Plaintiffs, Mitchell Sisk and wife, Grace Sisk, had acquired an easement by necessity across the gravel drive is supported by clear and convincing evidence based upon over 30 years of use of the gravel drive for transporting farm equipment to their agricultural land in the Chiwapa Creek bottom. In conjunction with the finding of both an easement by prescription and easement by necessity the decision of the Lee County Chancery Court setting the width of the easement at sixteen (16) feet is supported by clear and convincing evidence based upon the widths of the farm equipment driven across the gravel drive to the lands of the Sisks in the Chiwapa Creek bottom over a period of more than thirty (30) years. Therefore, the Chancellor's decision should be affirmed.

CERTIFICATE OF SERVICE

I, Thomas M. McElroy, do hereby certify that I have this day mailed by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing APPELLEES

BRIEF to:

B. Sean Akins, Esquire
108 East Jefferson Street
Ripley, MS 38663

Honorable Kenneth M. Burns
Special Chancellor
Post Office Drawer 110
Okolona, MS 38860-0110

THIS, the 29th day of January, 2008.



THOMAS M. McELROY