

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**EVANNA PLANTATION, INC.,
DAVID KLAUS, Trustee of the David Klaus Trust,
AND SABILL FARMS PARTNERSHIP**

APPELLANTS

VS.

NO. 2007-CA-02087

ERNEST G. THOMAS AND CAMILLE S. THOMAS

APPELLEES

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

BRIEF OF APPELLEES

Submitted by:

**M. JAMES CHANEY, JR. (MSB [REDACTED])
TELLER, CHANEY, HASSELL & HOPSON, LLP
1201 Cherry Street - Nogales Building
P.O. Box 789
Vicksburg, Mississippi 39181
Ph: (601) 636-6565
Fax: (601) 631-0114**

Attorney for Appellees

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**EVANNA PLANTATION, INC.,
DAVID KLAUS, Trustee of the David Klaus Trust,
AND SABILL FARMS PARTNERSHIP**

APPELLANTS

VS.

NO. 2007-CA-02087

ERNEST G. THOMAS AND CAMILLE S. THOMAS

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellees, Ernest G. Thomas and Camille S. Thomas, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the court may evaluate possible disqualifications or recusal. The persons are:

1. David Klaus - Appellant
P.O. Box 326
Cary, MS 39058
2. Evanna Plantation, Inc. - Appellant
P.O. Box 326
Cary, MS 39058
3. Sabill Farms, a Partnership - Appellant
P.O. Box 326
Cary, MS 39058

4. Nathan P. Adams, Jr.
Mansour & Adams
143 North Edison
Greenville, MS 38701
5. Ernest Thomas - Appellee
Camille S. Thomas - Appellee
3336 Indiana Avenue
Vicksburg, MS 39180
6. M. James Chaney, Jr.
Teller, Chaney, Hassell & Hopson, LLP
1201 Cherry Street
Vicksburg, MS 39183-2919
7. Honorable Vickie R. Barnes
Chancery Court Judge
P.O. Box 351
Vicksburg, MS 39181-0351

This the 4 day of June, 2008.



M. JAMES CHANEY, JR.

TABLE OF CONTENTS

| | |
|---|-----|
| CERTIFICATE OF INTERESTED PERSONS | i |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| I. PREFATORY STATEMENT | 1 |
| II. SUMMARY OF ARGUMENT | 2 |
| III. ARGUMENT- FACTS | 3 |
| A. <i>Location of the Property</i> | 3 |
| B. <i>The Klaus Demand</i> | 7 |
| C. <i>The Prior Permissive Use</i> | 8 |
| D. <i>History of Thomas' Purchases</i> | 11 |
| E. <i>History of Klaus' Purchases</i> | 15 |
| F. <i>Delta Dirt Dilemma - Why Should Thomas be denied full use and enjoyment of his land so that Klaus' tenant can plant a few more acres?</i> | 21 |
| IV. ARGUMENT-LEGAL ANALYSIS | 25 |
| A. <i>Klaus has no express easement</i> | 25 |
| B. <i>Klaus cannot prove the necessary elements to establish an implied easement by necessity</i> | 28 |
| C. <i>Klaus cannot establish the prerequisites for a prescriptive easement</i> | 32 |
| V. CONCLUSION | 35 |
| CERTIFICATE OF SERVICE | 37 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|------------|
| <u>Biddix v. McConnell</u> , 911 So.2d 468, 475 (Miss. 2005) | 33 |
| <u>Binder v. Weinberg</u> , 48 So. 1013, 94 Miss. 817 (1909) | 26 |
| <u>Bonelli v. Blakemore</u> , 5 So. 228, 66 Miss. 136 (1888) | 26 |
| <u>Burns v. Haynes</u> , 913 So.2d 424, 429, 432 (Miss. App. 2005) | 29, 32, 35 |
| <u>Crawford v. Butler</u> , 924 So.2d 569, 574 ¶ 15 (Miss. App. 2005) | 28 |
| <u>Delancey v. Mallette</u> , 912 So.2d 483, 488 (Miss. App. 2005) | 29 |
| <u>Gulf & Mobile & Ohio R. Co. v. Tallahatchie Drainage Dist.</u> , 67 So.2d 528, 533, 218 Miss. 583 (1953) | 26 |
| <u>Leaf River Forest Products v. Rowell</u> , 819 So.2d 1281, 1284 (Miss. App. 2002) | 29, 30 |
| <u>McDonald v. Board of Mississippi Levee Commission</u> , 646 F.Supp. 449, 464 (ND Miss 1986) | 26 |
| <u>Sharp v. White</u> , 749 So.2d 41, 42 (Miss. 1999) | 34 |
| <u>Sturdivant, et al. v. Todd, et al.</u> , 956 So. 2d 977 (Miss. App. 2007) (February 6, 2007) | 32 |
| <u>Swan v. Hill</u> , 855 So.2d 459, 463 ¶ 17 (Miss. App. 2003) | 28 |
| <u>Taylor v. Hays</u> , 551 So.2d 906, 908 (Miss. 1989) | 28 |
| <u>West v. Brewer</u> , 579 So.2d 1261, 1262 (Miss. 1991) | 33 |
| <u>Wills v. Reid</u> , 86 Miss. 446, 453, 38 So. 793, 795 (1905) | 30 |

I. PREFATORY STATEMENT

The evidence establishes and the parties agree that the Plaintiffs' property is titled in the name of Evanna Plantation, Inc. or the David Klaus Trust. Since David Klaus is the trustee of the trust and the trust owns all of the stock of Evanna Plantation, Inc., the Plaintiffs are sometimes jointly referred to herein as "Klaus". Likewise, the evidence establishes and the parties agree that part of the Defendants' property is titled in Ernest G. Thomas and part in his wife, Camille S. Thomas, for whom he manages the property. Therefore, the Defendants are often referred to herein as "Thomas".

References to pages in the record will be preceded by a "R-". References to the transcribed testimony at trial will be preceded by "Tr.".

Numerous copies of a property ownership map were introduced into evidence at the trial on which different portions of the map had been highlighted in different colors to illustrate different areas of the map that were being addressed at that time. See for instance Plaintiff's Exhibit 2 (R-750) and Defendant's Exhibit 1 (R-961) and Exhibits 58-66 (R-951-959). Because the different areas that were lightly highlighted in color did not reproduce well in the record, that map will be included as a page in this brief with the colored boundaries and roads highlighted again in color so as to aid the Court in understanding where the respective parties

properties are located in relationship to each other, to the existing public roads, and to Coon Bayou. See pages 6, 12, 14, 16, 18, 20 hereinafter.

II. SUMMARY OF ARGUMENT

In their Third Amended Complaint, Plaintiffs seek to establish an express easement, a prescriptive easement, and an easement by necessity or implied easement over property owned by Defendants. However, the Plaintiffs already have access across their property from two public roads: Sabil Road to the west and Oil Well Road to the north. As will be shown in the argument that follows, Plaintiffs have no document which grants them an express easement. Neither is there any implied easement by necessity. The three acquisitions of property by Plaintiffs east of the bayou were never the result of a severance of land from a larger tract that left Plaintiff with no access. Rather, each purchase always included property on both sides of the bayou. Plaintiffs had easy access through field roads across their property from the two public roads to Coon Bayou until 2000 when their own agricultural tenant voluntarily plowed over the field roads so as to farm more land. Also, it will cost no more for Plaintiffs to install and maintain a culvert over Coon Bayou on their own property than it does to install and maintain one on Defendants' property.

Plaintiffs even had permission at one time to use the field road from Sabil

Road across Coon Bayou if they would have shared the maintenance costs with Thomas' predecessor in interest, William Moore. However, after the culvert washed out in 1995, no one would use the crossing until it was replaced 3 years later. Klaus declined to pay his portion of the cost (\$1,500.00) and gave up that access - - a decision Klaus now regrets. Initially, Thomas gave Klaus permission to cross his property from Oil Well Road after the Coon Bayou crossing washed out in 1995, but Klaus' tenants disrupted Thomas' Dove hunts, left huge ruts with their farm equipment, and blocked his road. Thomas rescinded that permission. Plaintiffs have no prescriptive easement since all their use of any easement across Defendants' property was admittedly with permission.

III. ARGUMENT - FACTS

A. Location of the Property

Evanna Plantation owns 2,204 acres in Sharkey County, Mississippi (Plaintiffs' Exhibit 35, Deposition of David Klaus, p. 6, R-833). The David Klaus Trust owns 544 acres in its own name and also owns 100% of the stock of Evanna Plantation (Exhibit 35, Klaus Depo., p. 10, R-837).

The Klaus property at issue here is that portion located in Section 22, Township 11 North, Range 7 West, Sharkey County, Mississippi, as well as the north half of the north half of Section 27, Township 11 North, Range 7 West,

Sharkey County, Mississippi. (Plaintiffs' Exhibit 2, R-750; Defendants' Exhibit 51, R-944, See map p. 6).

This Klaus property lies in the corner of the intersection of two public roads: Sabil Road which runs north and south and adjoins the Klaus property to the west for about 1.25 miles, and Oil Well Road which runs east and west and is a public road that intersects Sabil Road and is adjacent to the Klaus property to the north for about one mile. The Thomas property abuts the Klaus property to the east in Sections 23 and 26 and to the south in Section 27. (Plaintiffs' Exhibit 2, R-750; Defendants' Exhibit 51, R-944, See map p. 6).

Coon Bayou is a small stream that wiggles southerly along the section line between Sections 23 and 22 (Klaus owning in Section 22 and Thomas in Section 23) until about midway down the section line when it then veers southwesterly, first through the Klaus property in Sections 22 and 27 and then onto the Thomas property in Section 27. (Plaintiffs' Exhibit 2, R-750; Defendants' Exhibit 51, R-944, See map p. 6). Maps and photos entered into evidence by agreement of the parties depict the respective ownerships of Klaus and Thomas as well as the location of Coon Bayou. See, e.g., Plaintiffs' Exhibit 2, R-750, and Defendants' Exhibit 1, R-961; Defendants' Exhibit 51, R-944; Defendants' Exhibits 58-66, R-951-959; See map p. 6.

A reproduction of the map that was entered into evidence by agreement of the parties is attached hereto with the Klaus property highlighted in yellow, the two public roads that border the Klaus property to the west and north are highlighted in pink, Coon Bayou highlighted in blue, and the approximately location of the two easements across Thomas' property that Klaus seeks to establish being highlighted in green.

DISTRICT

DAVID
KLAUS
Trustee

MURRELL

Oil Well Rd

Klaus/Evanna property

/// Klaus 100 acres E of Bayou

Coon Bayou

Private roads on
Thomas Property

Public roads

Thomas property

DAVID
KLAUS
Trustee

22

DAVID
KLAUS
Trustee

Ernest Thomas

23

REBECCA
LAMB
et al

SABIL Rd

KLAUS

EVANNA 27
PLANTATION

FAMILY
IES LP

27

JANE M.
RANEY
Camille Thomas

FRANCIS
McINTYRE

JULIA
McINTYRE

SUSAN R.
McINTYRE et al

ERNEST THOMAS

26

B. The Klaus Demand

The specific problem is Plaintiffs' desire for easy, no cost access to approximately 100 acres of their property which is located east of Coon Bayou in Sections 22 and 27. (Defendants' Exhibit 51, R-944).

David Klaus testified that since he moved to Sharkey County from California in 1972 to help his uncle, Bill Klaus, his family has had permission to access this 100 acres from two different routes: From the south, Klaus states he had permission to use a field road located on Thomas property that runs east from Sabil Road (public) and then crosses Coon Bayou via a large culvert. This entire road, sometimes referred to as Coon Bayou Road, is south of the Klaus property on property Thomas now owns and runs easterly from Sabil Road just south of the south property line of Klaus in Section 27, Township 11 North, Range 7 West. After crossing the bayou, it is then only a short distance north to the south line of the Klaus 100 acres located east of Coon Bayou. From reviewing the maps, it appears this route would entail traveling about three-fourths of a mile on Thomas' property in Section 27, Township 11 North, Range 7 West. (Plaintiffs' Exhibit 2, R-750; Defendants' Exhibit 51, R-944, See map p. 6). The second route, and the better route according to Klaus, travels east along Oil Well Road (public) which runs along the north line of Sections 22 and 23, Township 11 North, Range 7 West

until Oil Well Road crosses Coon Bayou; it then travels south across the Thomas property in Section 23 for approximately one-half mile and then southwesterly until reaching the north portion of the Klaus 100 acres located east of Coon Bayou in Section 22. Both of these proposed routes are depicted generally on the maps introduced as Plaintiffs' Exhibit 2, R-750; or Defendants' Exhibits 51, R-944 and Exhibits 58-66, R-951-959. These proposed routes are also depicted on the map which is reproduced on page 6 of this brief.

C. The Prior Permissive Use

Klaus testified that his family had permission to use both of those routes from the prior property owners continuously from sometime prior to 1972 until permission was withdrawn by Thomas in 2002. (Tr. 54, line 28-29; Tr. 59, line 11-14; Tr. 60, line 19-24; Tr. 86, line 20-23).

William Moore, a Sharkey County farmer and land owner who is friends with both parties, testified via sworn affidavit by agreement of the parties. (Plaintiffs' Exhibit 28, R. 808-809). Different members of Moore's family had at one time owned the property now owned by Thomas. Moore stated that the bayou crossing on the private dirt road running east from Sabil Road, on what is now Thomas property, was originally installed prior to 1972 and that Moore's father and Klaus' uncle, Bill Klaus, had an agreement that Klaus could use the road in

exchange for Klaus sharing in the maintenance cost on a 50/50 basis. Moore further stated that maintenance was a problem and that the crossing over Coon Bayou would periodically wash out during high water. Other problems were caused by tractors and field equipment forcing dirt to slough off the sides of the crossing. (Plaintiffs' Exhibits 28, R-808-809). Both Klaus and Thomas generally agree that maintenance of a stream crossing is a constant irritation as described by Moore. (Klaus Tr. 73, line 8-9; Thomas Tr. 154, line 9-12; see also Crawford Affidavit, Exhibit 29, R-811-813).

Moore further testified that in 1995 the crossing washed completely out and that no one could use the crossing for about three years. According to Moore, during this time, Klaus accessed his 100 acres east of Coon Bayou from Oil Well Road across the property that had then been purchased by Thomas. (Moore Affidavit, Exhibit 28, R-808-809). Thomas, in fact, confirmed that he gave Klaus permission to cross the northern portion of the property that he had purchased in 1993 and 1995 which is located in Section 23, Township 11 North, Range 7 West and that adjoins Oil Well Road after the Coon Bayou crossing had washed out in 1995. (Tr. 143, line 28-29; Tr. 144, line 1-8).

In 1998, Moore repaired the Coon Bayou crossing by putting in a large culvert made from an old fuel tank. Moore asked Klaus to share in the expense

pursuant to their longstanding agreement. Klaus declined and said that the cost wasn't worth it and that he would just use the access from Oil Well Road across the Thomas property. (Moore Affidavit, Exhibit 28, R-808-809). Klaus admits that he now wishes he had continued the agreement and paid his share which was about \$1,500.00. (Plaintiffs' Exhibit 35, Klaus Depo., p. 68, R-895; Tr. 63, line 24-28). Photos of the culvert to cross Coon Bayou installed by Moore in 1998 and now owned and maintained by Thomas since 2002 were introduced as Defendants' Exhibits 52, 54, and 55, R-945-948).

Bill Crawford, the equipment supervisor for Ballard Plantation and Bill Moore, also testified by agreement of the parties via sworn affidavit. Crawford is in charge of the dirt moving and ditching equipment for the Moore entities. He has worked for Moore since 1965. Crawford has repaired the Coon Bayou crossing for Ernest Thomas twice since Thomas acquired the property in 2002, and Crawford also did the work for Thomas on the road running south from Oil Well Road and replaced the culvert there that had been damaged by Klaus' tenants. (Plaintiffs' Exhibit 29; R. 811-813).

Crawford testified that when he first came to work for Moore in 1965, there were several ramps that crossed Coon Bayou which would allow access to the property located east of Coon Bayou during low water. (Plaintiffs' Exhibit 29,

paragraph 5; R. 812). Klaus acknowledged, both at his deposition (Plaintiffs' Exhibit 35, p. 102-103; R. 929, 930) and at trial, that he did not dispute Crawford's testimony. (Tr. 178, lines 9-17).

D. History of Thomas Purchases

A review of the history and sequence of Thomas' purchases is necessary to understand the appropriate legal analysis.

Thomas purchased his first tract (52.85 acres) of property in Section 23, Township 11 North, Range 7 West that is adjacent to Oil Well Road in 1993 from John Hennessey (Deed, Plaintiffs' Exhibit 31, R-816; Map, Defendants' Exhibit 65, R-953) and another larger tract in 1995 from Mississippi Farm Group Ltd. (Deed, Plaintiffs' Exhibit 32, R-818; Map, Defendants' Exhibit 66, R-959). Thomas' 1993 acquisition from John Hennessey and his 1995 acquisition from Mississippi Farm Group Limited are generally highlighted on the map on the following page in red.

DISTRICT

DAVID
KLAUS
Trustee

MURRELL

OIL WELL Rd.

Klaus/Evanna Property

///Klaus 100 Acres E of Bayou

Coon Bayou

---Private roads on
Thomas property

Public roads

Thomas property

DAVID
KLAUS
Trustee

22

DAVID
KLAUS
Trustee

Ernest
Thomas

~~REBECCA
LAMB~~

et al

23

Rest of §23
and all of §26

Ms Farm Group
to

Thomas 7/20/95

ERNEST THOMAS

&h 32

26

**SABIL
Rd.**

KLAUS

EVANNA 27
PLANTATION

27

JANE M.
RANEY CT
Camille Thomas

FRANCIS
McINTYRE

JULIA
McINTYRE

FAMILY
IES LP

SUSAN R.
McINTYRE et al



12

In 2002 and 2003, Thomas purchased the two tracts that are located in Section 27 that adjoins Sabil Road (public) from Jane Raney (Deeds, Plaintiffs' Exhibits 19 and 20, R-793-796; Maps, Defendants' Exhibits 63 and 64, R-956, 957). These two acquisition from Jane Raney are shown on the map on the following page again outlined in red.

DISTRICT

DAVID
KLAUS
Trustee

MURRELL

OIL WELL Rd

Klaus/Evanna Property

///Klaus 100 Acres E of Bayou

Coon Bayou

--- Private roads on
Thomas property

Public roads

Thomas property

DAVID
KLAUS
Trustee

22

DAVID
KLAUS
Trustee

**Ernst
Thomas**

23

~~REBECCA
LAMB~~
etal

N
↑

**SABIL
Rd**

KLAUS

EVANNA 27
PLANTATION

COON
BAYOU

ERNEST THOMAS

FAMILY
IES LP

W. O P Bayou
JANE M.
RANEY CT
Camille Thomas

$\frac{1}{2}$ N $\frac{1}{2}$ E
of BAYOU
 $\frac{1}{2}$ N $\frac{1}{2}$ E
of Bayou

26

RANEY to Thomas
8/02/02
Exh 21

RANEY to
Thomas
1/31/03
Exh 22

SUSAN R.
MCINTYRE et al

FRANCIS
MCINTYRE

JULIA
MCINTYRE

14

E. History of Klaus' Purchases

First of all, the Klaus family obtained the 100 acre tract east of Coon Bayou not in one deed, but via three separate deeds from three different landowners. The first acquisition by the Klaus family was the northeast quarter of Section 22, Township 11 North, Range 7 West from Partee in 1954. (Plaintiffs' Exhibit 5; R. 755). Only a minuscule portion of that property is east of Coon Bayou and the entire tract fronts the public road, Oil Well Road, to the north (Defendants' Exhibit 58; R. 951; Tr. 65, 66). The map that follows illustrates the location of this acquisition from Partee, outlined in red.

DISTRICT

DAVID
KLAUS
Trustee

MURRELL

Oil Well Rd

Klaus/Evanna property

/// Klaus 100 acres E of Bayou

Coon Bayou

Private roads on
Thomas Property

Public roads

Thomas property

DAVID
KLAUS
Trustee

22

NE 1/4 822
Partee to Klaus
10/4/54
Exh 5
DAVID
KLAUS
Trustee

Ernest Thomas

23

REBECCA
LAMB
et al

16

N
↑

SABIL
Rd.

KLAUS

EVANNA 27
PLANTATION

FAMILY
IES LP

27

JANE M.
RANEY CT
Camille Thomas

FRANCIS
McINTYRE

JULIA
McINTYRE

SUSAN R.
McINTYRE et al

ERNEST THOMAS

26

Klaus then acquired the property immediately below that tract, being the southeast quarter of Section 22 in 1956 from Delta Gulf Drilling Company. (Plaintiffs' Exhibit 6; R. 758). Again, rather than severing the property east of Coon Bayou, the deed combined and included acreage on both sides of Coon Bayou. (Defendants' Exhibit 59; R. 952). With this acquisition, there was still access to Oil Well Road to the north and access to Sabil Road to the west since, according to Klaus, the Klaus family already owned the west half of Section 22, Township 11 North, Range 7 West. (Tr. 67). The map with this acquisition outlined in red appears on the next page.

DISTRICT

DAVID
KLAUS
Trustee

MURRELL

OIL WELL Rd

Klaus/Evanna property

/// Klaus 100 acres E of Bayou

Coon Bayou

Private roads on
Thomas Property

Public roads

Thomas property

DAVID
KLAUS
Trustee

22

DAVID
KLAUS
Trustee

Ernest Thomas
~~REBECCA LAMB~~
etal

23

SE 1/4
S 22
Delta Drilling
to
Klaus
11/5/56

18

SABIL
Rd.

KLAUS

EVANNA **27**
PLANTATION

FAMILY
IES LP

27

JANE M.
RANEY CT
Camille Thomas

FRANCIS
McINTYRE

JULIA
McINTYRE

ERNEST THOMAS

26

The southernmost portion of the 100 acres located east of Coon Bayou was acquired by the Klaus family from W.W. Moore in 1976. (Plaintiffs' Exhibit 8; R. 763). This is the north half of the northeast quarter of Section 27. (Defendants' Exhibit 61; R. 954). Again, this purchase included property on both sides of Coon Bayou. It is adjacent to the property already owned by Klaus to the north that had been acquired from Delta Gulf Drilling Company in 1956 (Defendants' Exhibit 59; R. 952). Furthermore, Klaus acknowledged that this tract was adjacent to the property Klaus had already acquired in 1963 from Harris (Plaintiffs' Exhibit 13; R. 771) to the west which is adjacent to Sabil Road (Defendants' Exhibit 60; R. 953; Tr. 67). The following map illustrates Klaus purchases in Section 27.

DISTRICT

DAVID
KLAUS
Trustee

MURRELL

OIL WELL Rd

Klaus/Evanna Property

///Klaus 100 Acres E of Bayou

Coon Bayou

Private roads on
Thomas property

Public roads

Thomas property

DAVID
KLAUS
Trustee

22

DAVID
KLAUS
Trustee

**Ernest
Thomas**

23

~~REBECCA
LAMB~~
etal

20

N
↑

**SABIL
Rd.**

KLAUS

NE 1/4 820
EVANNA
PLANTATION

27

NE 1/4 820

ERNEST THOMAS

Harris to
Klaus
12/19/63
Exh 13

FAMILY
IES LP

27

JANE M.
FRANEY CT
Camille Thomas

WW Moore
to
Evanna
Pit.

8/2/76
Exh 8

26

SUSAN R.
MCINTYRE and

MCINTYRE and

FRANCIS
MCINTYRE

JULIA
MCINTYRE

F. Delta Dirt Dilemma - Why should Thomas be denied full use and enjoyment of his land so that Klaus' tenant can plant a few more acres?

All witnesses agree that the land owned by both parties is typical, flat, low, south delta farm land. The soil type is primarily buckshot gumbo, a heavy clay soil, that when wet is soft, slippery and sticky. When dry, that type of soil is very hard and brittle. (Klaus Tr. 68, lines 19-29; Tr. 69, lines 1-12; Tr. 70, lines 10-13; Willis Tr. 106, lines 22-29; Thomas Tr. 153, lines 25-29; Tr. 159, lines 7-14). All the property in this area is subject to periodic flooding. (Tr. 111, 113).

Thomas testified that he initially rented out the property he purchased in Section 23 for farming until about 1999 when he then enrolled the property in the Wetlands Reserve Program and executed a perpetual conservation easement in favor of the federal government. As part of that program, his property was then taken out of cultivation and trees were planted. Therefore, as the farm use of the property decreased, the hunting and recreational use of the property increased. (Tr. 144, lines 12-15; Tr. 154, lines 21-23; Tr. 157, lines 12-25).

Thomas testified that he tried to work with Klaus and his tenants, but he had problems with the tenants who interrupted his dove hunts when they drove through his property from Oil Well Road right in the middle of dove hunts. Besides a safety issue, there was food being served at one dove hunt that was ruined by all the dust from the vehicles. (Tr. 155, lines 7-29).

In addition, when the Klaus farm tenants fail to harvest their soybeans before the fall rains, the harvesting activities cause deep ruts on the Thomas property that can not be reasonably repaired until the following spring or summer. (Plaintiffs' Exhibit 23, 24, R-802-804). Photos of the type ruts about which Thomas complained are shown in Defendants' Exhibits 48, 49 and 50, R-941-943. In addition, on at least one occasion, Thomas testified that his road was completely blocked by vehicles of strangers who said they had permission to hunt the Klaus property located east of the bayou. (Tr. 156, lines 1-7).

Thomas said that he has a small ATV 4-wheeler with flotation tires that he uses to traverse his property when it is wet and in the fall and winter for duck and deer hunting so as not to leave ruts. However, when the tractor ruts are present, even with the ATV, Thomas has gotten stuck in ruts and even flipped over on one occasion. (Tr. 158, lines 10-29; Exhibit 24, R-803). Also, Thomas testified that he has a culvert across his field road that is about 50 feet south of Oil Well Road, and that when Klaus' tenants would make ruts on their first pass, they would then on their second trip through the property try to avoid the first set of ruts by going even wider, and that, in the course of doing this, they completely destroyed a small culvert that Thomas maintained on his farm road heading south from Oil Well Road. (Tr. 145, lines 15-29; Tr. 146, lines 1-9; Tr. 152, lines 15-23).

Klaus testified that farm equipment utilized now is much larger and heavier than back in the '70s. Klaus contends, however, that by planting earlier maturing soybeans, the problems with the ruts made during the late harvest would be reduced. As to the disruption of Thomas' dove hunts, Klaus suggests that Thomas could schedule his hunts with Klaus months in advance and Klaus would then ask his tenants to avoid traveling in that area during the hunts. (Klaus depo, R-901-903; Tr. 89, lines 13-27).

Thomas understandably bristles at the notion that he would have to ask a stranger for permission or to schedule a hunt on his own property. Furthermore, Thomas notes that the hunts are often not scheduled, but are relatively spontaneous depending on which of his friends or guests can go, the weather, and the number of doves or ducks in the area. (Thomas depo, p. 19-20; R-995).

Klaus and Thomas both agree that the topography of the Klaus land and the Thomas land is similar and that Coon Bayou has a similar width and depth whether it is on the Klaus property or the Thomas property. (Klaus depo, p. 32, R-859, lines 14-25; p. 33, R- 860, lines 1-6; p. 35, R-862, lines 2-5; Tr. 161, lines 9-26). A photo of Coon Bayou taken June 11, 2005, from Thomas' culvert looking onto Klaus' bean field was entered as Defendants' Exhibit 53. (R-946). Defendants exhibits 42 and 43 are photos of Klaus property from Oil Well Road. (R-935, 936)

Defendants' Exhibit 45 (R-938) is a photo of Thomas property from Oil Well Road. Except for Klaus' land being cultivated and Thomas land being grass and trees, there is no difference.

The cost of an access road or installing a crossing across Coon Bayou on the Klaus property would be no more difficult or expensive than the cost to install and maintain an access road or crossing on the Thomas property. (Tr. 161, lines 23-26). At one point, Thomas even offered to help Klaus with the cost of the culvert for a crossing on Klaus' own property which Klaus refused. (Tr. 155).

In the Mississippi Delta, a "turn row" or "field road" is simply a lane in a field that is not plowed and gives the farmer access in and around his crops. (Tr. 73, lines 14-22). Klaus admits that prior to 2000, there were "turn rows" or "field roads" on the Klaus property wherein a pickup truck or even a car could travel from the Sabil Road (public road) east to Coon Bayou or from Oil Well Road (public road) south to at least the edge of Coon Bayou on Klaus property if it were dry. (Tr. 70, lines 26-29; Tr. 71, lines 1-29; Tr. 72, lines 1-29; Tr. 74, lines 9-13). Klaus admits that these turn rows or field roads have now been disked away and planted by his current farm tenant, Jessie Willis, in 2000. (Tr. 74, lines 14-18; Tr. 77, lines 5-25). Klaus further admits that this gives him and his tenant a few extra acres of crops and that he prefers all the access roads and crossings to be on

someone else's property for that reason and so that he does not have the headache of installing or maintaining the roads or crossings. (Tr. 74, lines 19-24; Tr. 75, lines 12-17; Tr. 78, lines 1-21).

Thomas introduced into evidence old USCS aerial photos taken in 1966, 1973, and 1979 which indicate field roads or turn rows within the Klaus property from Sabil Road to Coon Bayou. According to Thomas, the 1966 aerial photo indicates a crossing over the bayou on the Klaus property. (Tr. 151; Defendants' Exhibits 67, 68, 69). These low water crossings over Coon Bayou shown in the old aerial photos also confirm the uncontradicted testimony of Bill Crawford, the long time equipment supervisor for Ballard Plantation and Bill Moore, about the low water crossings and ramps that used to cross Coon Bayou when he first came to work for Moore in 1965. (Plaintiff's Exhibit 29, paragraph 5; R-812).

IV. ARGUMENT - LEGAL ANALYSIS

A. Klaus has no express easement.

Klaus has no evidence of any express easement. He can point to no instrument which grants him any easement across any property owned by Thomas. The vague references in several deeds, which state after the granting provision, that the conveyance "is together with and subject to any easements" simply refers to any easements that may already exist and certainly does not create or grant any

new easement. Use of words such as “appurtenances” in a deed is insufficient to show an intention to create an easement where none existed before. Binder v. Weinberg, 48 So. 1013, 94 Miss. 817 (1909); Bonelli v. Blakemore, 5 So. 228, 66 Miss. 136 (1888). The Courts have long held that an easement, just like a deed or any other written instrument, in order to be enforceable, must contain all the formal requisites of a grant of land and should be certain and definite in its terms. McDonald v. Board of Mississippi Levee Commission, 646 F.Supp. 449, 464 (ND Miss 1986); Gulf & Mobile & Ohio R. Co. v. Tallahatchie Drainage Dist., 67 So.2d 528, 533, 218 Miss. 583 (1953). Neither the length of the easement, the width of the easement, the type of the easement, and the location of the easement appears in the Third Amended Complaint, or any instrument, or in Appellants’ brief. Quite simply, there is no easement in favor of Klaus across any property owned by the Defendants.

To the contrary, the evidence shows that the only express easements contained in any of the instruments were easements in favor of Thomas! As to the field road running south from Oil Well Road, in the deed to Hennessey – the predecessor in title to Thomas -- the Grantor, Mississippi Farm Group Limited Partnership, reserved a ten foot wide easement over the existing field road “for the purpose of ingress and egress to adjacent lands in Sections 23 and 26, Township 11

North, Range 7 West, Sharkey County, Mississippi, presently remaining in ownership of Mississippi Farm Group Limited Partnership . . .” (Defendants’ Exhibit 56; R. 949). When Thomas later purchased the remaining property in Section 23 and 26 from Mississippi Farm Group in 1995, Mississippi Farm Group conveyed to Thomas that easement it had reserved and further covenanted and warranted that “it has granted no third party any right of ingress and egress over and across said roadway . . . and that same continues to be a private road for use only by the grantor herein and its successors in title, namely, the grantee herein and by successor in title to said John A. Hennessey, namely, the grantee herein, Ernest G. Thomas” (Plaintiffs’ Exhibit 32; R. 818).

As to the other field road running east from Sabil Road, in 1987, Jane Moore Raney had conveyed a 30 foot wide easement to W.W. Moore that ran east from the County road (Sabil Road) just south of the south line of the north half of the north half of Section 27. This is what is commonly referred to as Coon Bayou Road and is the private field road on property Thomas now owns in Section 27 just south of Klaus’ property. This easement grant states that it is “for the benefit of the west half of Section 23 and all of Section 26, Township 11 North, Range 7 West, Sharkey County, Mississippi.” (Plaintiffs’ Exhibit 16; R.-777). As shown on the map on page 6 and 12 of this Brief, the west half of Section 23 and all of

Section 26 is property now owned by Thomas by virtue of his purchase of Mississippi Farm Group in 1995. (See Exhibit 32, R.-818).

Therefore, not only are the two field roads located on and across property Thomas owns, but the record title to both the easement running east from Sabil Road, called Coon Bayou Road, and the easement running south from Oil Well Road is vested only in Thomas who now owns the properties in Sections 23 and 26 by virtue of the deed from Mississippi Farm Group Limited Partnership. (Plaintiffs' Exhibit 32; R.-818).

B. Klaus cannot prove the necessary elements to establish an implied easement by necessity.

Although Klaus has tried to make a claim for implied easement and an easement by necessity, the Court has held that these are different names for the same type of easement and that these terms are interchangeable. Swan v. Hill, 855 So.2d 459, 463 ¶ 17 (Miss. App. 2003); Crawford v. Butler, 924 So.2d 569, 574 ¶ 15 (Miss. App. 2005). In any event, there are two legal prerequisites before this doctrine may be employed. First, the claimant must show that the easement by necessity arises "when 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 the lands of another". Id. See also Taylor v. Hays, 551 So.2d 906, 908 (Miss. 1989). Second, the claimant must

demonstrate that the tract in issue is without any other means of access. Leaf River Forest Products v. Rowell, 819 So.2d 1281, 1284 (Miss. App. 2002); Burns v. Haynes, 913 So.2d 424, 429, 432 (Miss. App. 2005).

To determine whether a lack of access has been caused by a severance of property that was once commonly owned, one need only review the Plaintiffs' three acquisitions that comprise the 100 acre tract located east of Coon Bayou. As shown in the history of the Klaus acquisitions, the Klaus family obtained the 100 acre tract east of Coon Bayou not in one deed, but via three deeds. (See pages 15 through 20). All three acquisitions by Klaus included property that was on both sides of Coon Bayou. See maps p 16, 18 and 20.

Therefore, Plaintiffs have failed to meet the first requirement to establish an implied easement or easement by necessity, because there is no severance from a commonly owned tract that caused the property to be landlocked. Instead, all of the Klaus acquisitions combined and included property on both sides of Coon Bayou from three different grantors. In Delancey v. Mallette, 912 So.2d 483, 488 (Miss. App. 2005), the Court held that as an initial first step the plaintiff must show his tract is blocked in its access to a public road by a parcel of land with which it was once joined. Plaintiff has failed to meet this burden. In Leaf River Forest Products v. Rowell, 819 So.2d 1281, 1284 (Miss. App. 2002), the court further

explained that the sought after easement “may only traverse land that once comprised the larger tract, and not over just any adjacent lands that might be convenient to a public road”. Furthermore, the Leaf River Forest Products court cited Wills v. Reid, 86 Miss. 446, 453, 38 So. 793, 795 (1905) for the proposition that an easement by necessity will not exist unless it is shown by the claimant that the necessity arose “the exact moment of the conveyance or severance from the common tract”. 819 So.2d at 1284, 1285.

In addition to the fact that all three acquisitions by Klaus entities included property on both sides of Coon Bayou and that nothing was severed by reason thereof, the Plaintiffs have not shown that Billy Partee, Delta Gulf Drilling Company, or William W. Moore at the time of their conveyance to the Klaus family, also owned property across which Klaus now wants to claim an easement. As previously shown, Thomas acquired his properties from three different grantors: Hennessey, Mississippi Farm Group Limited Partnership, and Jane Raney.

Even if Klaus could satisfy the requirement that his property became landlocked as the result of severance of the property from a commonly owned tract, Klaus still can not meet his burden of proving real necessity. All of the maps, aerial photos, and testimony demonstrate that Klaus’ property is contiguous

and adjacent to two public roads - Sabil Road to the west and Oil Well Road to the north. The most direct route to Klaus' easternmost property is across Klaus' own property. Defendants' Exhibits 41, 42, and 43 R.-934, 935, 936) are photos of access to Klaus' property from Oil Well Road which Klaus acknowledges indicate no impairment. Defendants' Exhibit 45 R.-938) is a photo from Oil Well Road onto Thomas' property. Other than the Klaus land being a cultivated field and Thomas land being grass, there is no difference. Plaintiffs can not plow over their own field roads in order to squeeze out a few more acres of crops and then claim no access.

Furthermore, there has been no showing that a crossing over Coon Bayou itself would be more expensive to install and maintain on the Klaus property as opposed to the crossing on Thomas property. In fact, the testimony reflects that the cost would be no different. (Tr. 161.) Likewise, Klaus presented no evidence that the cost for Klaus to install a culvert on his own property is disproportionate to the value of his 100 acres.

In fact, Klaus introduced no evidence whatsoever of the cost to install his own culvert or crossing over Coon Bayou. The only figures presented were the Klaus' share ($\frac{1}{2}$) of the cost to replace the culvert over Coon Bayou in 1998 with an old fuel tank was only \$1,500.00 which Klaus declined to pay. (R.-808, 895;

Tr. 63). In Sturdivant, et al. v. Todd, et al., 956 So. 2d 977 (Miss. App. 2007) (February 6, 2007); and Burns v. Haynes, 913 So.2d 424, 431 (Miss. App. 2005) the Court held that the failure of the Plaintiff to present evidence that it would be prohibitively expensive for another route is fatal to the Plaintiffs' claim. The burden is on the Plaintiff to show that an alternative route would involve disproportionate expense and inconvenience, such as when the cost would exceed the entire value of the property to which access is sought. The evidence here is that the inconvenience of maintaining a crossing would be no different on Klaus' property than it is on the Thomas property. Klaus simply does not want any expense or inconvenience. This is obvious from his refusal to share the cost to repair the Coon Bayou crossing in 1998 when he lost his permission to continue to use it. Klaus wants to access his 100 acres from Thomas' property so that Klaus can plant every square inch of his land and have no maintenance expense or worries. Like the unsuccessful claimant in Burns v. Haynes, 913 So.2d 424 (Miss. App. 2005), Klaus provided no evidence of costs nor did experts testify. Thus Klaus failed to prove he was entitled to an easement by necessity.

C. Klaus cannot establish the prerequisites for a prescriptive easement.

Finally, Plaintiffs contend they are entitled to a prescriptive easement across both tracts: first being along Coon Bayou Road (the private field road) easterly

from Sabil Road which is south of Plaintiffs' property and, secondly, south from Oil Well Road to the north part of their 100 acres.

In order to establish a prescriptive easement, the elements of proof are the same as to establish adverse possession of land. The Plaintiffs must show that their possession was:

1. Open, notorious, and visible
2. Hostile
3. Under claim of ownership
4. Exclusive
5. Peaceful, and
6. Continuous and uninterrupted for at least 10 years

See Biddix v. McConnell, 911 So.2d 468, 475 (Miss. 2005). The person claiming the prescriptive easement has the burden of proving each of the above elements by clear and convincing evidence. Id. at 475. See also West v. Brewer, 579 So.2d 1261, 1262 (Miss. 1991).

Like the claimants in Biddix v. McConnell, Klaus fails to show that he alone cared for the property as if it were his own. 911 So.2d at 475, 476. Another flaw similar to what the Court found in Biddix is that "joint use of property is insufficient to establish adverse possession". 911 So.2d at 476. In addition,

sporadic, noncontinuous use is insufficient to establish a prescriptive easement. 911 So.2d at 477.

Perhaps the most compelling legal problem for Klaus on the question of prescriptive easement, however, is his own testimony that his family had always had *permission* to use both entrances until the permission was withdrawn by Ernest Thomas in 2002. (Tr. 54, 59, 62, 86). Moore's testimony is that Klaus' family had permission to use the crossing over Coon Bayou if they would share the maintenance cost 50/50. The crossing washed out in 1995 and was not repaired until 1998. Klaus refused to pay his portion which was about \$1,500.00. When the crossing washed out, Thomas gave Klaus permission to cross his property from Oil Well Road, but Klaus and his tenants abused that permission and it was withdrawn.

In Sharp v. White, 749 So.2d 41, 42 (Miss. 1999), after discussing the six necessary elements, the Court held: "However, use by express or implied permission or license, no matter how long continued, can not ripen into an easement by prescription since adverse use is lacking". In Sharp, the Supreme Court reversed the Court of Appeals because, like the case *sub judice*, the uncontradicted evidence showed that the use of the road was permissive and remained so until the Sharp informed White that she would no longer be allowed to use it. Thus, the Plaintiffs here, like the claimant in Sharp v. White, has failed to

establish at least three of those six elements. 749 So.2d at 43.

This rule of law was reconfirmed in Burns v. Haynes, 913 So.2d 424, 429 (Miss. App. 2005) when the court again held “permission, once given, will not ripen to adverse possession” and use by express or implied permission or license, no matter how long continued can never ripen into an easement by prescription.

V. CONCLUSION

There is little conflict in the facts of this case. Klaus readily admits that maintaining a crossing over a small bayou in the south delta is a content headache he prefers his neighbors to be solely burdened at no cost to him. This allows him to cultivate every square inch of his property without having any responsibility. At one time Klaus’ family had low water crossings which they abandoned. At one time Klaus’ family had permission to access their 100 acres of property east of the bayou from two different directions, but he forfeited one (from Moore) when he declined to pay his share (\$1,500.00) of the cost to replace the culvert, and he lost the other permission (from Thomas) when he failed to control his tenants. The truth is that Klaus can install and maintain a culvert over the bayou on his own property for no greater cost or burden than that incurred by his neighbors.

Although he has filed a shotgun blast lawsuit claiming three different types of legal easements, the truth is that he can not meet his burden of proof to establish any. The Chancellor heard the case and evidence and found Klaus lacking. We respectfully request that ruling be affirmed.

Respectfully submitted,

BY:


M. JAMES CHANEY, JR.

TELLER, CHANEY, HASSELL & HOPSON,
LLP

Nogales Building - 1201 Cherry Street

Vicksburg, MS 39183

Phone: 601-636-6565

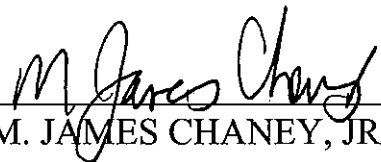
CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF APPELLEES has been filed in the office of the Clerk for the Supreme Court of the State of Mississippi, and a true and correct copy of the same has been provided to counsel listed below by U.S. mail with postage pre-paid.

Nathan P. Adams, Jr.
Mansour & Adams
143 North Edison Street
P.O. Box 1406
Greenville, MS 38702-1406

Honorable Vickie R. Barnes
Chancery Court Judge
P.O. Box 351
Vicksburg, MS 39181-0351

This the 4 day of June, 2008.



M. JAMES CHANEY, JR.

00164069.WPD