IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EVANNA PLANTATION, INC., DAVID KLAUS. TRUSTEE OF THE DAVID KLAUS TRUST, AND SABILL FARMS, A PARTNERSHIP — APPELLANTS

VS. — NO. 2007-CA-02087

ERNEST THOMAS and CAMILLE S. THOMAS — APPELLEES

APPEAL FROM THE CHANCERY COURT
OF
SHARKEY COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS

Submitted by:

Nathan P. Adams, Jr. (MB [redacted]
MANSOUR & ADAMS
143 North Edison Street
P. O. Box 1406
Greenville, MS 38702-1406
662/378-2244

Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EVANNA PLANTATION, INC., DAVID KLAUS, TRUSTEE OF THE DAVID KLAUS TRUST, AND SABILL FARMS, A PARTNERSHIP — APPELLANTS

VS. — NO. 2007-CA-02087

ERNEST THOMAS and CAMILLE S. THOMAS — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellants, Evanna Plantation, Inc., David Klaus, Trustee of the David Klaus Trust and Sabill Farms, a Partnership, 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

Attorney for Appellants

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

Attorney for Appellees

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

This 2nd day of May, 2008.

Nathan P. Adams

NATHAN P. ADAMS, JR.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EVANNA PLANTATION, INC., DAVID KLAUS, TRUSTEE OF THE DAVID KLAUS TRUST, AND SABILL FARMS, A PARTNERSHIP — APPELLANTS

VS. — NO. 2007-CA-02087

ERNEST THOMAS and CAMILLE S. THOMAS — APPELLEES

STATEMENT OF THE ISSUES

---

1. The Court erred when it found that no express easement existed.

2. The Court erred when it found that the Plaintiffs had failed to meet their burden to establish an easement by necessity.

3. The Court erred when it found that Plaintiffs' theory of an easement fails, because the use of the land was permissive as evidenced by William Klaus' and Moore's gentlemen's agreement, as well as their respective depositions, which reveal that the Moore family initially gave the Klaus family permission before Thomas purchased the property.

4. The Court erred in holding that Appellants failed to establish a prescriptive easement either from Oil Well Road on the north or Coon Bayou Road on the south.

5. The Court erred when it found that Plaintiffs' request for damages should be denied.

STATEMENT OF THE CASE

Appellants, Evanna Plantation, Inc., David Klaus, Trustee of the David Klaus Trust, and Sabill Farms, a Partnership, filed a Complaint for Injunction on September 15, 2004 seeking to perfect and to establish easements enabling Appellants to reach 100 acres of land on the east side of Coon Bayou. Appellees have blocked access to the 100 acres of land from Oil Well Road on the north and Coon Bayou Road on the south so that the 100 acres of land has now been rendered inaccessible to Appellants. There is no direct access to a public road from the 100 acres of land except over Thomas land. As a direct cause and result, Appellants have been unable to rent the 100 acres of land located east of Coon Bayou and have suffered lost rental of $21,000.00 for which judgment is sought. Ernest Thomas, answered. On February 27, 2006 an Agreed Judgment was entered allowing amendment to the Complaint to add the additional Defendant and Appellee, Camille S. Thomas, wife of Ernest Thomas. After trial of the matter the Court entered its Memorandum Opinion and Final Judgment of Dismissal on October 23, 2007 from which this appeal is taken. (Vol. 5, T.R. 857-683, R.E. 5)

STATEMENT OF FACTS

Evanna Plantation, Inc. claims a prescriptive easement from Oil Well Road, a public road, south across the property of Ernest G. Thomas to the Klaus 100 acre tract and further claims an easement of necessity, an implied easement, and an

prescriptive easement from Sabill Road, a public road, east across the property of Camille Thomas to the 100 acre tract. The David Klaus Trust claims an express easement, an easement of necessity, an implied easement, and a prescriptive easement from Oil Well Road south over and across the property of Ernest G. Thomas to the 100 acre tract and further claims a prescriptive easement from Sabill Road east across the property of Camille Thomas to the 100 acre tract.

Ownership of property.

(a) The Camille Thomas property lies immediately south of Evanna Plantation, Inc. (see Defendants' Exhibits 62 and 63) (Vol. 7, T.R. 955, 956) and the Ernest Thomas lies east of the Klaus Trust property located in Sections 22 and 27. See Defendants' Exhibit 51 (Vol. 7, T.R. 944) which shows Defendants' property in Sections 23 and 26. Thus, the Thomases own an "L" shaped tract of land which border the land of Appellants on the south and east with Coon Bayou running in a northeasterly direction and cutting off the 100 acres. The Appellants' triangular shape of 100 acres is located partially in both Section 22 and 27 is thus cut off. See Exhibit 51 (Vol. 7, T.R. 944).

(b) The David Klaus Trust owns the East Half of Section 22, Township 11 North, Range 7 West, Sharkey County, Mississippi. This property lies directly west of the Ernest Thomas property in Sections 23 and 26, Township 11 North, Range 7 West. The Klaus property was acquired in two different conveyances,

hereafter described. The Northeast Quarter of Section 22 is shown on Defendant's Exhibit 58. The Southeast Quarter of Section 22 is shown on Defendant's Exhibit 59. Evanna Plantation, Inc. owns the North Half, North Half, Section 27, Township 11 North, Range 7 West. This property was acquired from two difference sources: North Half, Northwest Quarter of Section 27 as shown on Defendants' Exhibit 60; North Half, Northeast Quarter of Section 27 as shown on Defendants' Exhibit 61. Coon Bayou bisects in a northeasterly manner, North Half, Northeast Quarter of Section 27 and East Half of Section 22, Township 11 North, Range 7 West.

(c) Sabill Farms Partnership Sabill Farms Partnership owns no real property; however, Sabill Farms Partnership, is the lessee from both Evanna Plantation and David Klaus Trust of all lands described in the Complaint and as such lessee has a right to possession, injunctive relief and damages as a result of the blocking of the access to the 100 acres of land by Ernest G. Thomas and Camille S. Thomas. Klaus deposition pages 21, 22, 23 and 24. (Vol. 6, T.R. 848-851)

Source of title

A. Section 22-11-7, Property of Klaus Trust On September 1, 1954, in Book 105 at Page 296 (Exhibit 5) (Vol. 4, T.R. 498-500), Lee Pickert and Amber Pickert, sole heirs at law of Frank Pickert, deceased, conveyed by Warranty Deed

to Billy Partee, predecessor of Klaus, the Northeast Quarter of Section 22, Township 11 North, Range 7 West, Sharkey County, Mississippi. In addition, the conveyance was to convey all "rights, easements, improvements and appurtenances thereon situate and thereunto belonging, except as herein reserved." On October 4, 1954, in Book 105 at Page 296 (Exhibit 6) (Vol. 4, T.R. 501-503), Billy Partee conveyed and warranted unto William J. Klaus the Northeast Quarter of Section 22, Township 11 North, Range 7 West. Nine-tenths (.9) of an acre included in the Northeast Quarter of Section 22 lies to the east of Coon Bayou (toward Thomas). Two-tenths (.2) of an acre title to which is vested in Ernest G. Thomas lies to the west of Coon Bayou (toward Klaus). (See deposition Klaus testimony page 37-39, Plaintiffs' Exhibit 35) (Vol. 6, TR 864-866); deposition of Ernest G. Thomas page 29-31, Plaintiffs' Exhibit 1) (Vol. 5, T.R. 728-730) The conveyance from Billy Partee of necessity conveyed to William J. Klaus the right to to travel on Oil Well Road east and south from the road to reach the said .9 of an acre located to the east of Coon Bayou. The Northeast Quarter is bisected by Coon Bayou.

On November 5, 1956, recorded November 12, 1956 in Book 112 at Page 111 (Exhibit 7) (Vol. 4, T.R. 504), Delta Gulf Drilling Company conveyed by Special Warranty Deed the Southeast Quarter of Section 22, Township 11, Range 7 West to William J. Klaus. (Plaintiffs' Exhibit 6) (Vol. 6, T.R. 758) The conveyance further provided it was to convey "rights, easements, improvements

and appurtenances thereon situate and thereunto belonging except as herein reserved." The Southeast Quarter of Section 22 is bisected by Coon Bayou in a Northeasterly direction so that property conveyed to Klaus by Delta Gulf Drilling Company lies on both sides of Coon Bayou, that is, east of Coon Bayou and west of Coon Bayou. (See map, Exhibit 3) (Vol. 4, T.R. 496).

The conveyance by Delta Gulf to Klaus of necessity conveyed the right to reach the property on the east side of Coon Bayou and also on the west side of Coon Bayou by right of access from Oil Well Road south to the Delta Gulf conveyance to Klaus.

The properties in Section 22 by mesne conveyances are now owned by The David Klaus Trust by virtue of an executor and trustee's deed executed by David Klaus, Ben Lamensdorf and J. Stein in their various capacities as either executors and/or trustees dated March 26, 2001, recorded April 5, 2001 in Deed Book 254 at Page 141 (Plaintiffs' Exhibit 7) (Vol. 6, T.R. 759-762). The deed conveys the East Half (Northeast Quarter and Southeast Quarter) of Section 22, Township 11, Range 7 West, Sharkey County to the David Klaus Trust. The property is bisected by Coon Bayou (Exhibit 3) (Vol. 4, T.R. 496).

B. Section 27-11-7, Property of Evanna Plantation, Inc. On August 2, 1976, recorded August 30, 1976 in Book 175 at Page 235 (Plaintiffs' Exhibit 8) (Vol. 6, T.R. 764-764), William W. Moore, predecessor in title to Camille Thomas,

conveyed to Evanna Plantation, Inc. the North Half of the Northeast Quarter of Section 27, Township 11 North, Range 7 West, Sharkey County, Mississippi. Defendants' Exhibit 6. The land is bisected in a northeasterly direction by Coon Bayou. William Moore and Mrs. Jane Moore Raney before and after the conveyance to Evanna Plantation, Inc. were the owners of all of Section 27 with the exception of North Half, North Half Section 27 by Deed from Julian H. Moore and wife, Virginia W. Moore dated June 10, 1976 and recorded in Book 175, Page 146 (Plaintiffs' Exhibit 15) (Vol. 6, T.R. 774-776) of the land records of Sharkey County, Mississippi.

C. Leasehold Interest and Title Interest Evanna Plantation, Inc. leased the North Half of the North Half of Section 27, Township 11, Range 7 West on November 24, 2003 to Sabill Farms. The David Klaus Trust leased to Sabill Farms on November 24, 2003, 544 acres of land which includes the East Half of Section 22, Township 11, Range 7 West (Northeast Quarter, Southeast Quarter). Sabill Farms leased to Jessie Willis, Jr., 940 acres of land which includes North Half, North Half, Section 27, Township 11, Range 7 West and also all of Section 22, Township 11, Range 7 West except the 100 acres of land east of Coon Bayou which was not leased because of the Ernest Thomas letter dated February 4, 2003 (Exhibit D-2, Vol. 1, T.R. 143). The title holders' lands are thus Evanna Plantation, Inc. (North Half, North Half of Section 27-11-7) and David Klaus Trust

(East Half Section 22, Township 11, Range 7) with tenants and/or lessors being Sabill Farms, a partnership, and Jessie Willis with respect to the North Half, North Half of Section 27, Township 11, Range 7 West. See deposition of David Klaus, Plaintiffs' Exhibit 35, pages 10 through 13 inclusive (Vol. 6, T.R. 837-840).

Examination of the abstract records and the documents filed in Section 27, Township 11, Range 7, Sharkey County, Mississippi, reveals the following information:

A. On September 22, 1954, recorded September 27, 1954, G. H. King and G. H. King, Jr. conveyed by Warranty Deed recorded in Book 105 at Page 159 (Plaintiffs' Exhibit 9) (Vol. 6, T.R. 765) all of Section 27 less and except the North Half of the Northwest Quarter of Section 27. The conveyance was made to W. W. Moore and J. H. Moore, a partnership operating as J. H. Moore & Son. This conveyance includes the Evanna Plantation property in the Northeast Quarter.

On October 31, 1968, recorded December 20, 1968, Julian H. Moore and Virginia W. Moore, husband and wife, conveyed to William W. Moore by Special Warranty Deed recorded in Book 152 at Page 614 (Plaintiffs' Exhibit 10) (Vol. 6, T.R. 766), the North Half of the Northeast Quarter of Section 27. This is now the Evanna property in the Northeast Quarter. William W. Moore and wife, Frances R. Moore, conveyed to Julian H. Moore by Special Warranty Deed dated October 31, 1968, recorded December 20, 1968 in Book 152 at Page 617 (Plaintiffs'

Exhibit 11) (Vol. 6, T.R. 767) the South Half of the Northeast Quarter and all of the South Half of 27. The instrument recites that it conveys grantor's undivided one-half interest to Julian H. Moore.

William W. Moore on August 2, 1976, recorded August 30, 1976, conveyed the North Half Northeast Quarter, 80 acres, to Evanna Plantation, Inc., of record in Book 175 at Page 235 (Plaintiffs' Exhibit 8) (Vol. 6, T.R. 763-764).

On September 22, 1954, G. H. King and G. H. King, Jr. conveyed the North Half Northwest Quarter of Section 27 to Paul W. Harris and Katherine B. Harris, husband and wife, of record in Book 105 at Page 164 (Plaintiffs' Exhibit 12) (Vol. 6, T.R. 769-770).

Paul W. Harris and Katherine B. Harris, his wife, conveyed to William J. Klaus on December 19, 1963, recorded December 20, 1963 in Book 132 at Page 530 (Plaintiffs' Exhibit 13) (Vol. 6, T.R. 771-772), the North Half Northwest Quarter.

William J. Klaus on March 26, 1970, recorded March 26, 1970, conveyed to Evanna Plantation, Inc., North Half Northwest Quarter, recorded in Book 162 at Page 368 (Plaintiffs' Exhibit 14) (Vol. 6, T.R. 773).

This places the North Half of the North Half (North Half Northeast Quarter and North Half Northwest Quarter) in Evanna Plantation, Inc. by the Deed from William W. Moore dated August 2, 1976 in Book 175 at Page 235 (Plaintiffs'

Exhibit 8) (Vol. 6, T.R. 763-764) and the Deed from William J. Klaus dated March 26, 1970 in Book 162 at Page 368 (Plaintiffs' Exhibit 14) (Vol. 6, T.R. 773). Evanna Plantation, Inc. has therefore owned the whole of the North Half of the North Half from August 2, 1976 to date.

B. On June 10, 1976, Julian H. Moore and wife, Virginia W. Moore, conveyed to William Moore and Mrs. Jane Moore Raney by Warranty Deed of record in Book 175 at Page 146 (Plaintiffs' Exhibit 15) (Vol. 6, T.R. 774-776), recorded June 21, 1976, all of Section 27 except the North Half of the North Half of 27. The exception is the identical property that Evanna Plantation now owns. Note that the conveyance from Julian H. and Virginia Moore to William Moore and Mrs. Jane Moore Raney dated June 10, 1976 recorded June 21, 1976 in Book 175 at Page 146 (Plaintiffs' Exhibit 15) (Vol. 6, T.R. 774-776) predates the William W. Moore conveyance to Evanna Plantation. Therefore, at the time of the conveyance from William W. Moore to Evanna Plantation he already owned a one-half interest in all of Section 27 except the North Half of the North Half of Section 27 (the Evanna property).

C. On October 9, 1987, recorded October 9, 1987, Jane Moore Raney conveyed to W. W. Moore by Right of Way Deed of record in Book 200 at Page 85 (Plaintiffs' Exhibit 16) (Vol. 6, T.R. 777) a 30 foot right of way, attempting to service the property in Sections 23 and 26, Township 11, Range 7, Sharkey

County, Mississippi. The Sections 23 and 26 property is now the Ernest Thomas property located to the east of Coon Bayou and to the east of the Evanna Plantation property located on the east side of Coon Bayou. At the time this conveyance of right of way was made to W. W. Moore, he already owned an undivided one-half interest in all of Section 27 except the North Half Northeast Quarter of 27 (see conveyance from Julian H. Moore, et ux. to William Moore and Jane Moore Raney dated June 10, 1976, or record in Book 175 at Page 146 above, Plaintiffs' Exhibit 15). Moore was already the owner of a one-half interest in parts of Section 27.

D. On January 8, 1988, recorded January 12, 1988, William W. Moore in Book 200 at Page 228 (Plaintiffs' Exhibit 17) (Vol. 6, T.R. 778-779) conveyed a .4723636 interest of his undivided one-half interest to Jane Moore Raney, individually and as Trustee, for the South Half North Half of Section 27 and the South Half of Section 27, Township 11, Range 7, Sharkey County. It would appear that William W. Moore then owned a fractional interest of 0.5276364 of his one-half or approximately .2638182 or one-fourth in the property. The remaining three-fourths were owned by Jane Moore Raney, individually and as Trustee. The conveyance would appear to re-vest in Jane Moore Raney any interest in the questionable right of way except for a one-fourth interest in the right of way in William W. Moore.

Additional facts will be developed in the argument.

SUMMARY OF THE ARGUMENT

Appellants seek to perfect and establish easements enabling them to reach 100 acres of their land located on the East side of Coon Bayou. Appellees have blocked access by Appellants to the 100 acres of land both from Oil Well Road on the North and Coon Bayou Road on the south so the 100 acres of land is inaccessible to Appellants. There is no direct access to a public road from the 100 acres of land except either over Thomas land or over the Coon Bayou stream.

The Thomas property "L's" the Klaus property so that Klaus is enclosed by the "L" both on the Klaus' South and East sides. Oil Well Road runs along the North side of the Klaus property. There is a field road running from Sabill Road, East called Coon Bayou Road to the 100 acres of land. Coon Bayou runs diagonally in a northeasterly direction across the Klaus land. As a result of the Coon Bayou stream, 100 acres of Klaus land is cut off from the principal Klaus land. Appellees have blocked access from Oil Well Road on the North and the Coon Bayou field road running East and West. As a result, Klaus cannot reach the 100 acres of land. (Defendants' Exhibits 62 and 63, Vol. 7, T.R. 955, 956, Exhibit 51, Vol. 7, T.R. 944).

Evanna Plantation, Inc. claims a prescriptive easement from Oil Well Road south across the property of Ernest G. Thomas and further claims an easement of necessity, an implied easement, and an prescriptive easement from Sabill Road east

across the property of Camille Thomas. The David Klaus Trust claims an express easement, an easement of necessity, an implied easement, and a prescriptive easement from Oil Well Road south over and across the property of Ernest G. Thomas and further claims a prescriptive easement from Sabill Road east across the property of Camille Thomas.

ARGUMENT

STANDARD OF REVIEW

The Mississippi Supreme Court in *Cole v. National Life Inc. Co.*, 549 So.2d 1301, 1303 (Miss. 1989) announced the following standard of review for a Chancellor's Decree:

> I. What is the Standard of Review for a Chancellor's Decree?
>
> When presented with what is essentially a question of law, the familiar manifest error/substantial evidence rules have no application to our appellate review of such questions. The principle of "manifest error" applies only to a factual situation. If the chancellor is manifestly wrong in basing his decision upon the facts, then this Court will reverse; otherwise, we will affirm. This rule does not apply on questions of law. *Boggs v. Eaton*, 379 So.2d 520, 522 (Miss. 1980); *Mississippi State Highway Commission v. Dixie Contractors, Inc.* 375 So.2d 1202, 1206 (Miss. 1979); *S & A Realty Co. v. Hilburn*, 249 So.2d 379, 382 (Miss. 1971); *see also, Pullman-Standard, a Division of Pullman, Inc. v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66, 79 (1982).
>
> With regard to a pure question of law this Court shall conduct a *de novo* review.

PROPOSITION I

THE COURT ERRED WHEN IT FOUND THAT NO EXPRESS EASEMENT EXISTED.

The Court found on page 18, Vol. 5, T.R. 674, R.E. 22 as follows:

> The Plaintiffs assert that an express easement exists from Oil Well Road with regard to the Northeast quarter of Section 22, Township 11 North, Range 7 West, because when Partee conveyed this land to William Klaus, he conveyed to Klaus the right to reach the property east of Coon Bayou by right of access from Oil Well Road south and Delta Gulf conveyed the right to reach the property by right of access from Oil Well Road south to the Klaus tract.

In Dieck v. Landry, et al, 796 So.2d 1004, 1009 (Miss. 2001) the Court states:

> > In *Browder v. Graham*, 204 Miss. 773, 38 So.2d 188 (1948), *Browder* purchased a dominant tenement and it was ruled that 'the conveyance to him of the dominant tenement carried with it the appurtenant easement.' The acquisition of an easement by adverse user for the statutory time is no less efficacious than a deed (properly drawn and delivered) in investing such user with full rights to use, enjoy, own and convey such an easement.

As previously demonstrated on pages 3 and 4 of this Brief under the heading Source of Title, on September 1, 1954 (Exhibit 4, Vol. 4, T.R. 498-500) Lee Pickett and Amber Pickett conveyed by Warranty Deed to Billy Partee, predecessor of the Klaus interest, the Northeast Quarter of Section 22, Township 11 North, Range 7 West, Sharkey County, Mississippi. Billy Partee in turn conveyed property to William J. Klaus which included nine-tenths (9/10) of an acre in the Northeast Quarter of 22 which lies to the East side of Coon Bayou. The

deed conveyed "rights, easements, improvements and appurtenances thereon situate and thereunto belonging." Two-tenths (2/10) of an acre are vested in Ernest G. Thomas to the West of Coon Bayou. The conveyance from Billy Partee under the case law granted to William J. Klaus the right to reach the .9 tenths of an acre located to the East of Coon Bayou from Oil Well Road.

PROPOSITION II

THE COURT ERRED WHEN IT FOUND THAT THE PLAINTIFFS HAD FAILED TO MEET THEIR BURDEN TO ESTABLISH AN EASEMENT BY A NECESSITY.

The Court found on page 23 (Vol. 5, T.R. 670, R.E. 23) of its ruling that:

> The Court finds that the Plaintiffs have failed to meet their burden to establish an easement by necessity, because accessing their property through the Defendants' property is not the only reasonably necessary alternative. The Plaintiffs' property is adjoined by both Sabill Road and Oil Well Road. This alternative would not involve any disproportionate expense and inconvenience, because Sabill Road and Oil Well Road are public roads. Although Mr. Klaus testified that additional expense would arise if he were required to build his own crossing over Coon Bayou, there is no evidence that such expense would exceed the entire value of the property to which access is sought.

The Court also found on page 19 (Vol. 5, T.R. 675, R.E. 23) of its ruling as follows:

> The Plaintiffs argue that without an easement by necessity or an implied easement, they are unable to reach their land east of Coon Bayou. The Plaintiffs argue that they are entitled to an easement by necessity, because the land had common identity prior to the division of the property, i.e. Camille Thomas' land borders Evanna Plantation's land on the south, which is bisected by Coon Bayou,

Moore was the original owner of both Evanna Plantation's land and co-owner of Mrs. Thomas' land, and Moore was predecessor in title of both lands. (Emphasis added.)

In Fike v. Shelton, 860 So.2d 1227, 1230-1231, 1232 (Miss. Ct. App. 2003) the Court states:

> There are two types of implication easements: easements essential to the enjoyment of the land and easements by necessity. *Bonelli v. Blakemore*, 66 Miss. 136, 143, 5 So. 228, 230-231 (1888). Necessity easements arise from "the implication that someone who owned a large tract of land would not intend to create inaccessible smaller parcels." *Cox v. Trustmark Bank*, 733 So.2d 353, 356 (¶11) (Miss. Ct. App. 1999).
>
> A claimant seeking an easement by necessity has the burden of proof and must establish that he is entitled to a right of way across another's land. *Broadhead v. Terpening*, 611 So.2d 949, 954 (Miss. 1992). An easement by necessity arises by operation of law when part of a commonly-owned tract of land is severed in a way that renders either portion of the property inaccessible except by passing over the other portion or by trespassing on the lands of another. *Id. See also Rogers v. Marlin*, 754 So.2d 1267, 1272 (¶11) (Miss. Ct. App. 1999). The party asserting the right to an easement must demonstrate strict necessity and is required to prove there is no other means of access. *Id.* An easement by necessity has a "right of access that is appurtenant to the dominant parcel and travels with the land, so long as the necessity exists. By acquiring the dominant estate, one has already paid for and procured the legal right of access to and from that parcel." *Id.* The easement or right-of-way will last as long as the necessity exists and will terminate after other access to the landlocked parcel becomes available. *Pitts v. Foster*, 743 So.2d 1066, 1068-69 (¶8) (Miss. Ct. App. 1999). (Emphasis added.)

In Swan v. Hill, 855 So.2d 459, 463-464 (Miss. Ct. App. 2003) the Court states:

> Mississippi case law establishes that an easement by necessity may be created by proving only reasonable necessity rather than absolute physical necessity. *Fourth Davis Island Land Company v. Parker*, 469 So.2d 516, 520 (Miss. 1985). Therefore, the court will grant an easement where the land is not necessarily landlocked but would be "highly convenient or essential to the full enjoyment of the land." *Id.* (Emphasis added.)
>
> The concern of the court is only whether alternative routes exist. *Id.* at 521. If none exist then the easement will be considered necessary. *Id.* Where other alternatives exist, the court will grant an easement over the neighboring landowner's property if it is the only reasonably necessary alternative available. *Id.* (Emphasis added.)
>
> The trial judge agreed with Hill's assertion that he had obtained an implied easement due to the historical use of the land. It is clear from the record that Hill's property can be accessed from Clay and Hope Streets. Therefore, this Court must determine if accessing Hill's property through Swan's property is the only reasonably necessary alternative. We conclude that it is not. (Emphasis added.)
>
> In determining what is reasonably necessary, the court looks to "whether an alternative would involve disproportionate expense and inconvenience." *Id.* "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." *Mississippi Power Company v. Fairchild*, 791 So.2d 262, 266 (¶11) (Miss. Ct. App. 2001) (quoting *Marshall v. Martin*, 107 Conn. 32, 139 A. 348, 350 (1927)). If the land would be useless and valueless without the easement then the

landowner is entitled to an easement. *Id.* (Emphasis added.)

An easement is reasonably necessary if the landowner's only alternative route is by building a bridge. *Alpaugh v. Moore*, 568 So.2d 291, 295 (Miss. 1990); *Rotenberry v. Renfro*, 214 So.2d 275, 278 (Miss. 1968); *Mississippi Power Company*, 791 So.2d at 267 (¶16). However, the court does not award easements when an alternate route exits but it is longer and more inconvenient. *Wills v. Reid*, 86 Miss. 446, 452, 38 So. 793, 795 (1905); *Ganier v. Mansour*, 766 So.2d 3, 8 (Miss. Ct. App. 2000); *Screws v. Watson*, 755 So.2d 1289, 1294 (¶8) (Miss. Ct. App. 2000). (Emphasis added.)

In Burns v. Haynes, 913 So.2d 424, 430-431 (Miss. Ct. App. 2005) the Court states:

The burden of proof is on the claimant seeking an easement by necessity; the party must establish that he is implicitly entitled to the right of way across another's land. *Leaf River Forest Products v. Rowell*, 819 So.2d 1281, 1284 (P11) (Miss. Ct. App. 2002). An easement by necessity may be created by proving only reasonable necessity rather than absolute physical necessity. *Fourth Davis Island Land Company v. Parker*, 469 So.2d 516, 520 (Miss. 1985). A court will grant an easement where the land is not necessarily landlocked but would be "highly convenient or essential to the full enjoyment of the land." *Id.* Our concern is only whether alternative routes exist. *Id.* at 521. If none exist then the easement will be considered necessary. *Id.* Where other alternatives exist. we will grant an easement over the neighboring landowner's property if it is the only reasonable necessary alternative available. *Id.*

The chancellor found that Burns' property can be accessed from County Road 753. However, Burns argues that the only reasonably necessary alternative to

> access his property is by traversing through Haynes' property. We conclude that there was substantial evidence to support the chancellor's finding. (Emphasis added.)
>
> In determining what is reasonably necessary, the court looks to "whether an alternative would involve disproportionate expense and inconvenience." *Id.* "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." *Mississippi Power Company v. Fairchild*, 791 So.2d 262, 266 (P11) (Miss. Ct. App. 2001) (quoting *Marshall v. Martin*, 107 Conn. 32, 139 A. 348, 350 (1927). If the land would be useless and valueless without the easement then the landowner is entitled to an easement. *Id* (Emphasis added.)

On August 2, 1976, recorded August 30, 1976 in Book 175 (Plaintiffs' Exhibit 8) (Vol. 6, T.R. 763-764) at Page 235, William W. Moore, predecessor in title to Camille Thomas, conveyed to Evanna Plantation, Inc. North Half of Northeast Quarter of Section 27, Township 11 North, Range 7 West, Sharkey County, Mississippi, containing 80 acres, more or less, together with easements, improvements and appurtenances thereon situate and thereunto belonging.

The land of Camille Thomas borders the Evanna property on the south. The William Moore property conveyed to Evanna is bisected by Coon Bayou. The conveyance to Evanna Plantation conveyed property both on the east side and the west side of Coon Bayou. (See Plaintiffs' Exhibit 1) (Vol. 4, T.R. 481) and Defendants' Exhibit 51.) (Vol. 7, T.R. 944) William W. Moore constituted the

owner of the Evanna tract and co-owner of the now Camille Thomas tract. The Evanna west tract that is blocked in its access to the Evanna property east of Coon Bayou was once adjacent to and thus joined with the Thomas tract over which access is necessary. *Swan v. Hill*, 855 So.2d 459, 467 (Miss. App. 2003), *Fike v. Shelton, supra.*

The conveyance from William W. Moore to Evanna Plantation, Inc. necessarily conveyed both an implied easement and an easement by necessity running from Sabill Road across Coon Bayou in that without either an easement by necessity, an implied easement or prescriptive easement it would be impossible for the Plaintiff to reach the land located to the east of Coon Bayou. In *Fike v. Shelton*, 806 So.2d 1227 (Miss. Ct. App. 2003) the Shelton court holds in discussing the necessity of a petition to the board of supervisors that:

> Notwithstanding the board's policy, an easement by necessity was created when the property was partitioned in 1932; therefore, Shelton was under no obligation to petition the board of supervisors of seek a writ of mandamus.

In this case the right of easement of necessity or implied easement was vested in Evanna Plantation upon the conveyance form William W. Moore on August 2, 1976. The right of necessity was further vested in the Klaus Trust by conveyances from Delta Gulf Drilling on November 5, 1956 and Partee on October 4, 1954.

The predecessors in title of both Evanna and Thomas had identity prior to the division of property in Section 27, Township 11, Range 7. 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. An easement by necessity requires no written conveyance because it is a vested right for successive holders of the dominant tenement and remains binding on successive holders of the servient tenement. *Fike v. Shelton, supra.* Here, the 100 acre tract of land is not accessible to either Evanna or The Klaus Trust or their tenants because Defendants have blocked access from both Oil Well Road to the north and Sabill Road to the west and Coon Bayou blocks access on the west side of the 100 acres.

A way of necessity generally arises where a part of a tract of land is conveyed and either the part conveyed or the part retained is entirely surrounded by the other part or by the land of strangers so that it is impossible to reach a public highway from the tract in question without crossing either the other part of the land or the land of strangers. In such an instance, the grantor is deemed to have impliedly granted, or reserved, as the case may be, a way of necessity in favor of one tract, and across the other, to the highway. 25 Am.Jur. 2d, Easements and Licenses, §36

In *Sturdivant, et al. v. Todd*, 2005-CA-01937-COA, 2007 WL 333423 (Miss. App. Feb. 6, 2007):

> ¶ 54. The essence of Sturdivant's argument is not that he lacks any access to his land, but that the access he has is less convenient than that over the adversely possessed land. Our cases establish that an easement by necessity may be created by proving only reasonable necessity rather than absolute physical necessity. *Fourth Davis Island Land Company v. Parker*, 469 So.2d 516, 520 (Miss. 1985). An easement by necessity will be granted when the land is not necessarily landlocked but would be "highly convenient or essential to the full enjoyment of the land." *Id.* Our concern is limited to whether the alternative route would involve disproportionate expense and inconvenience." See also *Dieck v. Landry*, 796 So.2d 1004 (Miss. 2001).

At trial Defendants claimed (Defendants' Exhibits 67, 68, 69, 70 and 71 U.S. Geological survey aerial photographs) that a way existed across lands of the Plaintiffs to reach Coon Bayou by traveling from Sabill Road along an old farm ditch running in a general east-west direction and intersecting the west boundary of Coon Bayou. Defendants further claimed that aerial photos dated 1966 and 1973 show a crossing of Coon Bayou from the east-west ditch. However, the photographs are not clear, are made from an undetermined altitude, are 41 years old and are susceptible of more than one interpretation. Aerial photographs are notoriously difficult to read, especially as to small detail, and usually require expert testimony. The testimony of David Klaus at trial was unequivocal and emphatic that he came to Mississippi in 1972 and that from the time of his arrival until date of trial, no crossing of Coon Bayou was in place at the place where the

old east-west ditch intersects Coon Bayou. His testimony further showed different interpretations of the aerial photograph as showing the direction of the Coon Bayou water, high ground level and other material. David Klaus is obviously in the best position to know what is and was on the ground from 1972 to date and his version must be accepted when opposed by photographs 41 years old which are not clear and are susceptible of more than one interpretation.

The trial judge found that Appellants' property is adjoined by both Sabill Road and Oil Well Road. It is correct that the bulk of the Klaus property is adjoined on the north by Oil Well Road and on the west by Sabill Road. It is further correct that Sabill Road and Oil Well Road are public roads. However, with respect to the trial judge, she is incorrect that the triangular shaped 100 acres of land is adjoined by either Sabill Road or Oil Well Road. The tract stands alone and does not touch either Sabill Road or Oil Well Road.

Here the 100 acre tract of land is cut off from the Oil Well Road and is further cut off from Coon Bayou Road. It is cut off on the north by the actions of Thomas in blocking access from the Oil Well Road. The 100 acres is cut off from public roads on the west by Coon Bayou. It is cut off on the east by the lands of Thomas. It is cut off from the south by the lands of Thomas. The end result is that Plaintiffs cannot reach the 100 acres of land from a public road.

The result of these findings is that the trial judge is factually incorrect with respect to the premise of the court's finding. The standard of review for factual error is applicable to this situation. The principle of manifest error applies only to factual situations. The Appellants' submit the Chancellor is manifestly wrong in basing her decision upon the above facts and the Court should reverse.

The Court further finds that the Plaintiffs argue that "the land had common identity prior to the division of the property, i.e. Camille Thomas' land borders Evanna Plantation's land on the south which is bisected by Coon Bayou, Moore was the original owner of Evanna Plantation's land co-owner of Mrs. Thomas' land and Moore was the predecessor in title of both lands." (See page 19, Vol. 5, T.R. 675, R.E. 23).

The Court further finds that Mr. Klaus did not testify that "additional expense would arise if he were required to build his own crossing over Coon Bayou, there is no evidence that such expense would exceed the entire value of the property to which access is sought." (Vol. 6, T.R. 679, R.E. 27) However, the Appellants submit this finding is bottomed on the Court's finding that Sabill Road and Oil Well Road adjoin the 100 acres of property. The finding is further contrary to the principal that "an easement is reasonably necessary if the landowner's only other alternative route is by building a bridge." *Swan v. Hill, supra.*

PROPOSITION III

THE COURT ERRED WHEN IT FOUND THAT PLAINTIFFS' THEORY OF AN EASEMENT FAILS, BECAUSE THE USE OF THE LAND WAS PERMISSIVE AS EVIDENCED BY WILLIAM KLAUS' AND MOORE'S GENTLEMEN'S AGREEMENT, AS WELL AS THEIR RESPECTIVE DEPOSITIONS, WHICH REVEAL THAT THE MOORE FAMILY INITIALLY GAVE THE KLAUS FAMILY PERMISSION BEFORE THOMAS PURCHASED THE PROPERTY.

The Judge found on page 24 (Vol. 5, T.R. 680) of her opinion as follows:

> The Defendants assert that the Plaintiffs' use of both roadways was permissive, non-exclusive, and not continuous and uninterrupted, as evidenced by the three years when the crossing was washed out.

The Judge found on page 26 (Vol. 5, T.R. 682) as follows:

> The Court finds that the Plaintiffs theory of an easement fails, because the use of the land was permissive as evidenced by William Klaus' and Moore's "gentlemen's agreement", as well as their respective depositions, which reveal that the Moore family initially gave the Klaus family permission before Thomas purchased the property.

A. Easement by Prescription and Prescriptive Easement. Mississippi easement law is clearly to the effect that an easement may be acquired by express grant, implied grant or prescription. *McDonald v. Board of Mississippi Levee Commissioners*, 646 F.Supp. 449, affirmed 832 F.2d 901 (ND Miss. 1986) In *Rutland v. Steward*, 630 So.2d 996 (Miss. 1994) an easement claimed as of right and used continuously, openly and for a period of ten years or more is sufficient to establish a right by prescription equivalent to a deed conveying such right.

Further, in *Thornhill v. Caroline Hunt Trust Estate*, 594 So.2d 1150 (Miss. 1992) the Mississippi court holds that the standard and burden of proof to establish a prescriptive easement is the same as a claim of adverse possession of the land.

B. Dirt Road from Oil Well Road. Defendants claim the prescriptive easement over the dirt and partially gravel road from the North that runs south from Oil Well Road to the 100 acres is defective because adverse possession was not exercised and that use of said road by the Plaintiffs was by permission of the Moore family and then Thomas.

The trial testimony of David Klaus illustrates the use of the road from Oil Well Road to access the 100 acres of land. Mr. Klaus testified the use was from the time that he arrived in Mississippi in 1972 forward. (Plaintiffs' Exhibit 35, line 20, Vol. 6, T.R. 865; Vol. 9, T.R. 40 line 10) The use consisted of the farming of the 100 acres of land including planting the land to soybeans, cultivation of the crop, and harvest of the crop at maturity. The farming necessitated the moving of both tractors and farm equipment, including combines, from Oil Well Road south to the 100 acres of land. The usage was open, notorious, visible, actual, peaceful, and under the specific control and claim of right to use by Klaus interest while the usage was occurring. This testimony is corroborated by the deposition testimony of David Klaus, Plaintiffs' Exhibit 35, page 43. (Vol. 6, TR 862, 870) Additionally, the testimony of Archie Sanders, who was a tractor driver for Klaus

interest for many years, shows, without challenge, that he drove tractors and combines from the Klaus farm headquarters over Oil Well Road and then south over the road in question. Mr. Sanders further testified as to the placing of gravel from the old railroad right-of-way on the road from Oil Well Road south, and thus improving the road as did Mr. Klaus. This usage continued until it was stopped by Thomas in 2003. Thus, we have a usage of Oil Well Road south from at least 1972 until 2003.

W. W. Moore Conveyance to Federal Land Bank. On November 18, 1987, W. W. Moore, Mary Frances Moore and William W. Moore, II, The Ballard Company, Inc., Moore Planting Company, Inc. and W. W. M. Company, a partnership, et al. conveyed to the Federal Land Bank of Jackson, of record in Book 200 at Page 96 (Exhibit 19) (Vol. 7, T.R. 1038-1050), a large block of land. Included in the land was the West Half, Section 23, West Half Section 26, Township 11 North, Range 7 West, Sharkey County, Mississippi. The Deed further provided "All of the above land is subject to all outstanding mineral rights and easements existing thereon." This is the property that lies immediately East of the Klaus property and across Coon Bayou to the east. Any oral gentlemen's agreement or permissive use to Klaus would have been abrogated upon this conveyance and any subsequent use by Klaus interests was adverse. In *Tucker v. Long*, 873 So.2d 1064 (Miss. Ct. App. 2004) the court held that a deed executed by

a party claiming title to property by adverse possession to the dominant estate owner interrupted possession so that it destroyed the actual, hostile, open, notorious, visible, continuous and uninterrupted possession necessary to establish adverse possession. In like manner, the conveyance from Moore to Federal Land Bank destroyed any permissive agreement in title and possession from November 18, 1987 forward by the Klaus interest was adverse to Defendants Thomas.

C. Mississippi Farm Group Limited Partnership, a Mississippi limited partnership, successor in interest to Federal Land Bank, after the Moore conveyance as described in the preceding paragraph, on April 13, 1993 conveyed 52.85 acres in the Northwest Quarter of Section 23, Township 11 North, Range 7 West to John A. Hennessey. Defendants' Exhibit 56 (Vol. 7, T.R. 949-950). This is the property directly to the east of the Klaus Trust property and fronting on Oil Well Road. Mississippi Farm Group reserved a non-exclusive easement for the purpose of ingress and egress to Sections 23 and 26, Township 11 North, Range 7 West lands 10 feet in width to follow the meanderings of the east bank of Coon Bayou. The conveyance is dated April 13, 1993. See Defendants' Exhibit 56 (Vol. 7, T.R. 959-950). On July 20, 1995, Mississippi Farm Group conveyed to Ernest G. Thomas, Defendant herein, West Half of Section 23, West Half of Section 26 and east Half of Section 26 together with an easement running along South Half, North Half of Section 27 for the benefit of Sections 23 and 26. This

would be the easement from Sabill Road east to Sections 23 and 26. The conveyance provides it is a non-exclusive right of use in common. Of particular note is the provision on page 163 which recites: "the Grantor herein further covenanting and warranting that it has granted no third party any right of ingress and egress over and across said roadway therein described 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 the successor in title to the said John A. Hennessey." (Plaintiffs' Exhibit 32) (Vol. 6, T.R. 818-823) The language means that Mississippi Farm Group has granted no permission to anyone for use of the route south from Oil Well Road and that any use of the said route by Plaintiffs of necessity was adverse to interest of title holders of Section 23 from the time of the conveyance to Federal Land Bank by W. W. Moore on November 18, 1987. On February 4, 2003, Ernest Thomas withdrew any permission that he had the right to give to Klaus interest (Plaintiffs' Exhibit 26) (Vol. 6, T.R. 806). Plaintiffs contend their prescriptive easement had long before vested and the alleged Thomas permission was actually of no legal force.

D. Prescriptive Easement over Coon Bayou Road. Defendants claim that Plaintiffs' claim of prescriptive easement to the southern portion of its property located East of Coon Bayou fails because the use of the road that crosses Coon Bayou was interrupted for a period of three years beginning in 1995. It is charged

the crossing was washed out and not available for anyone to use and, in consequence, there has not been uninterrupted adverse use of said road. The claim by implication admits that an adverse use by Plaintiffs was occurring. On pages 42, 43 and 44 the testimony of David Klaus (Plaintiffs' Exhibit 35) (Vol. 6, T.R. 869-871) dealt with the washed out crossing. Although the judge found this to apply to both roads it only applies to the east-west Coon Bayou Road, not the Oil Well Road. Mr. Klaus testified as follows:

Page 42, line 7 (Vol. 3, T.R. 441)

Q. And are you aware that in - - do you agree that in 1995 the crossing washed out due to a flood and high water?

A. I'm not sure of the date, but in that time frame some time in the middle 90's, late 90's, whenever it was, it did wash out.

Q. And that prevented anybody from using the crossing because the crossing wasn't there?

A. As far as the crossing, that's correct. You couldn't use it.

Q. And do you know that somewhere in 1998 Bill Moore rebuilt the crossing over Coon Bayou?

A. Yes, sir, some time in that area.

Q. And did he ask you to participate in the cost of replacing that crossing?

A. I don't believe it was Bill. I believe William asked me if I wanted to share in the expenses.

Q. So it was William that asked you that?

A. I believe it was William.

Page 43, line 1 (Vol. 3, T.R. 442)

Q. Okay. And did you decline to do so?

A. I did.

Q. And did you tell him any reason?

A. We really didn't use it enough. Ever since I had been farming - - I'm going to go back to 1972 when I got here. We always used the north entrance to this land to get to our Coon Bayou thing. I'm not saying we didn't ever use the crossing, but very seldom. Maybe a truck would go over it or maybe a tractor every now and then.

But I don't know if you've ever been on a combine going over Coon Bayou, but that was a dangerous crossing. It would scare some of the guys. A lot of times the tractors didn't prefer to use it. I'm not saying they didn't, but a lot of times they preferred to use the north entrance. Ever so often we did use the crossing, but I didn't think we used it enough to justify the money to go ahead and fix it.

Q. Okay. And then at least while the crossing was out even if you wanted to, you couldn't use it?

A. That's right.

Q. And so then to get to this 100 acres - - and for the record it's kind of highlighted in a pale yellow that's on the east side of Coon Bayou - - that's the property that you're trying to get access to?

Page 44, line 2 (Vol. 3, T.R. 443)

A. That's correct.

Q. All right. So whatever use sporadic though, it may have been prior to 1995 ceased completely when the crossing washed out?

A. What ceased completely after the culvert where the crossing washed out was the crossing of the culvert. The using of this road up to this culvert was always used. We never stopped using it.

Q. So the crossing and the part east of Coon Bayou ceased being used?

A. No. Sir. We would come down this road. Now, we'd use this part, too. We'd come down this way because remember we had crops which we'd look at. You take trucks down there and look at what was going on and who's planting and everything else.

We always would come down this way up to the crossing from the east, and we'd come on this part on the west side of Coon Bayou up to where the crossing was washed out to look at our crops on this part.

Additionally, Mr. Thomas testified in his deposition, Plaintiffs' Exhibit 1, that he was aware of the use of Coon Bayou Road by the Plaintiffs. See pages 39, 40, 41 and 42.

Page 39, line 5 (Vol. 3, T.R. 443)

Q. Did you talk with John Hennessey about Mr. Klaus' use of the road over there from the north road?

A. No. I wasn't aware he was using it.

Q. When you bought the other land in 23 other than Hennessey's land that borders Klaus' land on the east side, did you talk with anyone about the use of the north road?

A. No.

Q. Did you have a survey made, an engineering survey made of that land when you purchased it?

A. No, sir.

Q. Now when you bought the property that's now in Mrs. Thomas' name from Raney, did you talk with anyone about the use of the Coon Bayou Road?

A. I did.

Q. Who did you talk with?

A. William Moore.

Q. Okay. And that was before you bought the property?

A. That's correct.

Page 40, line 1 (Vol. 3, T.R. 444)

Q. And what did Mr. Moore report to you?

A. Well, I was aware that Mr. Klaus was using that road to access his hundred acres. And I was aware that either he had an easement or something, and I wanted to find out what was the situation.

Q. All right. And what did Mr. Moore tell you?

A. Mr. Moore said that they had an agreement with Mr. Klaus where he had permission to use that road. And in consideration for the permission, he would help them maintain the crossing over the bayou on that road.

Q. In consideration you mean the Klaus' would help maintain the Coon Bayou crossing?

A. Share in the maintenance of it.

Q. Did he say how long that had been going on?

A. For years he said.

Q. All right. And you were aware - - Mr. Moore was not the owner of that property at that time, was he?

A. No. Ms. Raney was.

Q. Ms. Raney was the owner of the property?

A. Mr. Moore was the owner of the property just as you cross the bayou.

Page 41, line 1 (Vol. 3, T.R. 444)

Q. And were you aware that Mr. Moore had conveyed his property, the Moore family I guess had conveyed their properties to the Federal Land Bank in 1987 approximately?

A. Yes, sir.

Q. How did you acquire that information?

A. I knew Mr. Moore. He told me he did it.

Q. What was your source of information that the Klaus' were using the Coon Bayou Road?

A. Eyes visible, right. And tearing it up.

Q. You were seeing that use from your property that was on the east side of the bayou?

A. Oh, yes, sir. Oh, yes, sir.

Q. So when you were out there hunting, you could see them using the road over there?

A. They weren't using it, except during farming season that I remember seeing.

Q. But I mean where you picked the knowledge up was when you were hunting over there?

A. Well, no, no. I don't just hunt on my land. Now I go up to it, and I bush hog in there.

Q. Well, when you were out there on your land?

A. Yes, right. It just wasn't' during hunting season necessarily.

Page 42, line 1 (Vol. 3, T.R. 445)

Q. And that source of knowledge would have been all the way back in 1993?

A. It would have been prior to that because when Mr. Moore owned the land, I had permission to hunt it.

Q. To go hunt?

A. Yes, sir.

Q. So you've been a long time hunter?

A. I've been on there a long time.

Q. What kind of hunting did you do up there?
A. Duck and dove.

Q. Duck and dove. Duck in Coon Bayou?

A. Oh, no sir, huh-huh (negative). In the fields.

Q. In the fields?

A. Yes, sir.

Q. Well, when did you first start hunting out there with Mr. Moore?

A. That 52 acres I started hunting that with him when I was maybe 35 years old.

Q. And how old are you now?

A. 64.

Q. Okay. So you were familiar with the situation out there for a long time?

A. Well, I was out there hunting for a long time, yes sir.

The claim of Appellants for a prescriptive easement is based upon the adverse use of said property for a long period of time. The law of adverse possession is quite clear that the ordinary sweep of ten year adverse possession statute operates to invest the adverse occupant on completion of the ten year period with a new and independent title to every estate in the realty and such new title may be used not only defensively by the occupant, but also as an adequate basis to confirm or quiet his title. *Levy v. Campbell*, 28 So.2d 224 (Miss. 1947) See also *Lowi v. David*, 98 So. 684, 134 Miss. 296 (Miss. 1924) which holds, that once acquired, title by adverse possession requires a conveyance or other adverse possession for the statutory period to reacquire the title. The interruption of possession, if in fact it occurred, which Plaintiffs do not concede, would not cause a forfeiture of Plaintiffs' right of prescriptive easement once perfected by use.

Am. Jur. 2d, Volume 25, page 685, Easements, provides as follows:

Nonuse alone does not result in abandonment, and, as a general rule, an easement acquired by grant or reservation cannot be lost by mere nonuse for any length of time, no matter how great. Similarly stated, nonuse will not extinguish an easement crated by express grant, no matter how long the easement has gone unused. An express or implied intention to abandon must also be shown clearly; that is, there must be clear and convincing proof of an intention in the owner of the dominant tenement to abandon the easement. Nonuse itself, if long continued, is some evidence of intent to abandon.

An easement created by prescription may be lost by mere nonuse if the nonuse is for the same period required to establish the prescriptive easement. There is some conflict, however, as to whether it is necessary to show an intent to abandon. Some authorities have stated that it is not necessary to show an intent to abandon in order to prove loss of such an easement. On the other hand, it has been said that once established, an easement by prescription can only be lost by continued nonuse for the prescriptive period accompanied by facts and circumstances clearly indicating an intentional relinquishment.

Use of another route does not affect the interest in an easement, unless there is an intentional abandonment of the former way. Thus, an easement or a right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another equally convenient way, unless there is an intentional abandonment of the former way.

An owners' nonuse, lack of improvement and acquiescence of building on the easement may result in abandonment. Also, an easement may be lost by prescription or adverse possession; and, in such a case, nonuse may be considered as a factor in the accomplishing the extinguishment by adverse possession.

Nonuse will not be established where only a segment of an easement lies unused. An easement of necessity can lie dormant without extinguishment, be passed to successors in interest and used in the future.

Parties may specify a period of nonuse after which an easement will be deemed abandoned.

Appellants' right to prescriptive easement was not revoked by Appellees in that the easement had long since matured in Appellants. Once an easement has matured or vested in a party, title to said easement is only lost by acts amounting to adverse possession for the statutory period of ten years.

PROPOSITION IV

THE COURT ERRED IN HOLDING THAT APPELLANTS FAILED TO ESTABLISH PRESCRIPTIVE EASEMENTS EITHER FROM OIL WELL ROAD ON THE NORTH OR COON BAYOU ROAD ON THE SOUTH.

The Chancery Court correctly stated the rule with respect to establishment of prescriptive easements as follows:

> In Thornhill v. Caroline Hunt Trust Estate, 594 So.2d 1150, 1152-1153 (Miss. 1992) the Court states:
>
> > The standard and burden of proof to establish a prescriptive easement is the same as a claim of adverse possession of land. *Dethlefs v. Beau Maison Development Corp.*, 51 So.2d 112, 117 (Miss. 1987). In order to establish adverse possession or a prescriptive easement here, the Trust must show that the possession was: "(1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful." *West v. Brewer*, 579 So.2d 1261, 1262 (Miss. 1991) (quoting *Stallings v. Bailey*, 558 So.2d 858, 856 (Miss. 1990). These elements must be proven by clear and convincing evidence. *West*, 579 So.2d 1262.

The Court then held as follows:

> The Defendants assert that the Plaintiffs' use of both roadways was permissive, non-exclusive, and not continuous and uninterrupted, as evidenced by the three years when the crossing was washed out.

The crossing that was washed out only affected the Coon Bayou east-west road. It did not affect the Oil Well Road easement. Additionally, the Coon Bayou Road was useable both on the east and west sides of the crossing over Coon Bayou. (Page 44, line 2, Klaus (Vol. 3, T.R. 443) also page 31 of Appellants' Brief. See page 44, line 3-21, Klaus deposition Plaintiffs' Exhibit 35, Vol. 6, T.R. 871.

The Court quotes statements from *Biddix v. McConnell*, 911 So.2d 468, 475-476, 477-478 (Miss. 2005) in part (Vol. 5, T.R. 657, page 25, R.E. 29) as follows:

> Secondly, Biddix and Williams did not solely care for the property in question. Testimony provided by the Noels and McConnells both demonstrate that they provided the upkeep on the 25-foot easement, which is of course, their property.
>
> ***
>
> This Court defined exclusivity as having the intention to "appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right." *Rawls v. Parker*, 602 So.2d 1164, 1169 (Miss. 1992).
>
> However, this assertion by Biddix and Williams is clearly misplaced. This Court has stated that "it is well settled that joint use of property is insufficient to establish adverse possession." *Gadd v. Stone*, 459 So.2d 773, 774 (Miss. 1984) (citing *Fant v. Standard Oil Co.*, 247 So.2d 132 (Miss. 1971).

Biddix v. McConnell is not factually similar to the case at bar. *Biddix, supra.*, involves the construction to be placed upon a protective covenant providing for an easement for the installation of utilities or other uses deemed to be necessary for the service of property. The court held the golf cart path was not necessary for servicing of utilities and further held the owners were limited from demonstrating their exclusive ownership because of the provisions of the covenant. The *Biddix* case is factually distinguishable from the case at bar.

The Appellants respectively assert the Chancery Court's reliance on the "joint use" rule to address the element of "exclusivity" is misplaced. In *Gadd v. Stone, supra*, the issue was title to the land, not prescriptive easements, which of course do not take title to the land. Adverse possession of land is acutely different from adverse possession of a prescriptive easement. In *Browder v. Graham*, 38 So.2d 188 (Miss. 1948), the court stated in part:

> . . . During all of this period of time, Emery Browder, his father, and his predecessor in title Smith had used a right of way over an adjoining and separately owned forty acres, on the SE¼ of NE¼, Sec. 26, T. 5, R. 9W, now owned by Graham, and across the same as an outlet from their lands to the school, the church, and the public road. The use of this roadway had been by car, by truck, by wagon and on foot by those residing on the Browder land as business or pleasure might direct. The road was fairly defined and continued in the same location for far more than the prescriptive period of ten years, except for an occasional slight diversion because of some mud hole or other obstruction.
>
> [3] We are convinced by the evidence that Albert Smith, Emery Browder's father, and Emery Browder, and their families

> continued to use this way, through the years, as a means of ingress and egress to and from their home and this having continued for more than ten years it ripened into an easement by prescription across the lands of Graham. Alcorn v. Sadler, 71 Miss. 634, 14 So. 444, 42 Am.St.Rep. 484; Cummins v. Dumas, 147 Miss. 215, 113 So. 332, and Jenkins v. McQuaid, 153 Miss. 185, 120 So. 814.
>
> [5] The question has been raised as to the extent of use of the way by Browder and his predecessors in title, but the answer of Graham, himself, admits there has been a passageway over his lands. It is not necessary, in order to establish an easement by prescription, that the way has been in constant use, day and night, but it may be established by such use as business or pleasure may require. Alcorn v. Sadler, 71 Miss. 634, 14 So. 444, 42 Am.St.Rep. 484.

See also the common driveway case *Gano v. Strickland*, 52 So.2d 11 (Miss. 1951)

At the conclusion of the Chancellor's opinion, the Court finds on page 26, T.R. 682, R.E. 30, that:

> The Court finds that the Plaintiffs' theory of an easement fails, because the use of the land was permissive as evidenced by William Klaus' and Moore's "gentlemen's agreement", as well as their respective depositions, which reveal that the Moore family initially gave the Klaus family permission before Thomas purchased the property.

Appellants have previously dealt with the "gentlemen's agreement" and "Moore family permission" in Proposition III, page 25 of Appellants' Brief.

Appellants contend the requirements of *Thornhill v. Caroline Hunt Trust Estate, supra.*, have been amply fulfilled for the establishment by the Appellants of prescriptive easements.

(a) Under claim of ownership.

The testimony of Klaus illustrates the use of the road from Oil Well Road to the 100 acres of land. The use began when Mr. Klaus arrived in Mississippi in 1972. (Plaintiffs' Exhibit 35, line 20, Vol. 6, T.R. 865, Vol. 9, T.R. 40, line 10). Appellants found it necessary to move tractors and farm equipment, including combines, from Oil Well Road south to the 100 acres of land. The testimony of Archie Sanders showed that he drove tractors and combines from the Klaus headquarters over Oil Well Road and then south on the easement in question. (Vol. 9, T.R. 124) He further testified as to the placing of gravel from the old railroad right of way on the road from Oil Well Road south. Usage was also made of the Coon Bayou Road, although not as extensively as the Oil Well Road easement.

(b) Actual or hostile.

On November 18, 1987, the Moore family conveyed the land to the Federal Land Bank of Jackson, of record in Book 200 at Page 96 (Exhibit 19, Vol. 7, T.R. 1038, 1050, page 27 of our Brief. The conveyance effectively destroyed any permissive agreement given to Klaus as to possession or use of any easement or right of use from November 18, 1987 forward. Mississippi Farm Group Limited Partnership, successor to Federal Land Bank, after the Moore conveyance, on April 13, 1993 conveyed 52.85 acres to John A. Hennessey (Defendants' Exhibit 56,

Vol. 7, T.R. 949, 950, Appellants' Brief page 28). Mississippi Farm Group also conveyed to Ernest Thomas certain property on July 20, 1995. The conveyances contain language that Mississippi Farm Group granted no permission to anyone for use of the route south from Oil Well Road. See page 28 and 29 of Appellants' Brief.

December 29, 1993 was when the Deed was signed from John Hennessey to Ernest Thomas (Exhibit F, Vol. 3, T. R. 404). According to the deposition of Thomas, the first time he talked to David Klaus was after December 29, 1993. (Plaintiffs' Exhibit 1, page 30, Vol. 5, T.R. 729) The next time Mr. Thomas talked to David Klaus, according to his testimony, was some time in 2001. (Plaintiffs' Exhibit 1, Vol. 5, T.R. 731, page 32, line 7-25, page 33, line 1-7). From the time of the conveyance from the Moores to Federal Land Bank in 1987 to when Mr. Thomas first talked to Klaus in 1993 or early 1994 is approximately six years. Thomas later testified that he talked to Klaus some time in 2001, another seven years, or a total of thirteen years without anything being mentioned about permission to use the land. It was not until February 4, 2003, or fifteen years later, that Klaus was told not to use the entrance off of Oil Well Road or the Coon Bayou field Road. (Exhibit D-2, Vol. 1, T.R. 143).

(c) Actual, notorious and visible.

Mr. Thomas testified, page 40, line 1 Vol. 3, T.R. 444, that he was aware that Klaus was using the road to access the 100 acres of land. Mr. Thomas further testified, page 41, line 1, Vol. 3, T. R. 444, that he saw the Klauses using the road on the east side of the bayou (Coon Bayou Road) while he was hunting. He further testified this knowledge would have been obtained before 1993.

(d) Continuous and uninterrupted for a period of ten years.

Klaus testified the use of the easements had been continuous for a period in excess of ten years. The use made of the easements by the Klaus interest was exclusive to them for the service of their farming interest of the 100 acres of land. The Thomas land, according to his deposition, Plaintiffs' Exhibit 1, Vol. 5, T.R. 706, line 22 is used for WRP and CRP purposes. Row crop farming does not take place and thus there is no use that would be joint with the Klaus interest over the land.

(e) Peaceful.

Appellants used the prescriptive easements continually for a period in excess of ten years in a peaceful manner without protest by anyone until the demand by Thomas in 2001 for the use to be terminated. A review of the material presented at trial amply demonstrates the establishment of prescriptive easements to reach the 100 acres of land.

PROPOSITION V

THE COURT ERRED WHEN IT FOUND THAT PLAINTIFFS' REQUEST FOR DAMAGES SHOULD BE DENIED.

The actions of Appellees have prevented the Appellants from leasing the 100 acres of land. Testimony of David Klaus was that the land was rented for $42.00 per acre times 100 acres or $4,200.00 per year. (Vol. 9, T.R. 53) He has been prevented from leasing the land for a period of five (5) years (i.e. 2003, 2004, 2005, 2006 and 2007) for a total rental of $21,000.00 for which he should be compensated. 22 Am. Jur. 2d §447, page 529; *Adams & Sullivan v. Sengel*, 177 Ky 535, 197 SW 974, 7 ALR 268; *Yazoo & M.V.R.R. Co. v. Consumers Ice & Power Co.*, 67 So. 657, 109 Miss. 43 (Miss. 1915); and *Cook Industries, Inc. v. Carlson*, 334 F.Supp. 809 (D.C. Miss. 1971).

CONCUSION

WHEREFORE, PREMISES CONSIDERED, Appellants, Evanna Plantation, Inc., a Mississippi corporation, David Klaus, Trustee of the David Klaus Trust, and Sabill Farms, a Partnership, bring this appeal and pray that the Supreme Court of the State of Mississippi reverse and remand this cause to the Chancery Court of Sharkey County, Mississippi with instructions to establish easements over and across the Appellees' land so as to enable Appellants to reach the 100 acres of land on the east side of Coon Bayou and that instructions be given to the Chancery Court to issue an injunction prohibiting Appellees from blocking

access of the Appellants to the 100 acres of land from either Oil Well Road on the north or Coon Bayou Road on the south. Appellants further pray that the Supreme Court of the State of Mississippi issue directions to the Chancery Court of Sharkey County, Mississippi to enter a judgment in favor of Appellants for lost rental in the amount of $21,000.00. Appellants respectfully pray for such other and further relief as the Mississippi Supreme Court may deem appropriate and proper.

Respectfully submitted this 2nd day of May, 2008.

Nathan P. Adams

NATHAN P. ADAMS, JR., Attorney for Appellants

OF COUNSEL:

MANSOUR & ADAMS
146 North Edison Street
P. O. Box 1406
Greenville, MS 38702-1406
662/378-2244

CERTIFICATE OF SERVICE

I, Nathan P. Adams, Jr., attorney of record for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

M. James Chaney, Jr.
Teller, Chaney, Hassell & Hopson, LLP
1201 Cherry Street
Vicksburg, MS 39183-2919

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

This 2nd day of May, 2008.

Nathan P. Adams

NATHAN P. ADAMS, JR.