IN THE SUPREME COURT

OF

THE STATE OF MISSISSIPPI

NELLA DALEY	**APPELLANT**
VS.	**NO. 2007-TS-00187**
JIMMY HUGHES, ET AL	**APPELLEES**

BRIEF OF THE APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Appellees, Jimmy Hughes, Dan Pate, Ann Pate, Stephen Izard and Erma Izard, does hereby certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Nella Daley, Appellant, Indialantic, Florida;
2. Jimmy Hughes, Appellee, Itawamba County, Mississippi;
3. Dan Pate, Appellee, Itawamba County, Mississippi;
4. Ann Hughes Pate, Appellee, Itawamba County, Mississippi;
5. Stephen Izard, Appellee, Lexington, South Carolina;
6. Erma Hughes Izard, Appellee, Lexington, South Carolina;
7. Duncan Lott, attorney for Appellant, Booneville, Mississippi; and

8. Rhett R. Russell, attorney for Appellees, Tupelo, Mississippi.

RHETT R. RUSSELL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

IN THE SUPREME COURT

OF

THE STATE OF MISSISSIPPI

NELLA DALEY	**APPELLANT**
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RESTATEMENT OF THE ISSUES

Appellees being dissatisfied with the wording of Appellant's statement identifying the issues presented for review would submit a restatement as follows:

1. Whether the lower court improperly considered testimony from a person accepted as an expert in constructing bridges with reference to the estimated cost of constructing a bridge.

2. Whether the lower court erred in recognizing that each Appellee held an easement by necessity along a field road across Appellant's real property to access their property.

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STATEMENT OF THE CASE

Appellees being dissatisfied with the Statement of the Case presented by Appellant submit herewith their Statement of the Case.

Nature of the Case, Course of Proceedings and Disposition by Lower Court

This is an appeal of a December 14, 2006, Judgment of the Chancery Court of Itawamba County, Mississippi, wherein the Chancellor recognized that each Appellee held an easement by necessity across Appellant's real property from a public road to real property of Appellees lying south of a creek. Prior to trial the Chancellor, accompanied by the attorneys for the parties, made

a personal inspection of pertinent features and aspects of the parcels of adjoining real property of the parties.

Statement of Relevant Facts

Appellees, Jimmy Hughes, Ann Hughes Pate and Erma Hughes Izard, are siblings with Dan Pate and Stephen Izard being spouses of two of the siblings. Appellant, Nella Daley, is a first cousin of those of the Appellees who are siblings. (R 58-59; T 40). The father of Ms. Daley is Webster Hughes whose brother, Verlon (V.L.) Hughes, is the father of Mrs. Pate, Mrs. Izard and Mr. Hughes. The parents of Webster and Verlon Hughes are Joseph and Ophelia Hughes; thus, the paternal grandparents of Appellant and those Appellees who are siblings. (T 40).

The parties hereto own parcels of real property abutting each to the other in Itawamba County, Mississippi. All such real property of the parties was under common ownership having at one time been all owned by Joseph and Ophelia Hughes who, during their lifetimes, divided their property among their children with Verlon and Webster Hughes each receiving an equal share by Deeds dated December 29, 1937. (R 59-60, 114; T 41; Exhibits 18 and 23). By Deeds dated 1965 and 1971 Verlon Hughes divided the property he had received from Joseph and Ophelia Hughes among his children, being those Appellees who are siblings.[1] (R 113, 129; T 46; Exhibits 17, 21, 22, 26 and 27). In 2002 Ms. Daley received full title to the property Webster

[1]A fourth sibling received her proportionate share and later transferred her interest to Stephen and Erma Izard.

Hughes had received from Joseph and Ophelia Hughes. (R 64; Exhibit 24). The map marked as Exhibit 1 depicts the subject real properties of the parties with Jimmy Hughes' portion marked "A," Dan and Ann Pate's portion marked "B," Stephen and Erma Izard's portion marked "C" and Ms. Daley's depicted on the bottom left. (See colored map Page 23 of Record Excerpts.)

When Joseph and Ophelia Hughes divided their land among their children such was accomplished in such a way that the parcel deeded to Webster Hughes lay between the only public road in the vicinity, Red Roberts Road, and the southern portion of that parcel deeded to Verlon Hughes (hereinafter referred to as the "southern portion of the Verlon Hughes parcel"). (Exhibit 1). The southern portion of the Verlon Hughes parcel is bounded on the north by a creek[2] (hereinafter referred to as "the creek") always containing water which flows in an eastwardly direction to a much larger stream. The width of the creek varies between ten (10) and twenty (20) feet, and its depth varies between five (5) and ten (10) feet with the depth and width increasing with the flow of water. (R 118; T 42). There exists no means for a motor vehicle or farm equipment to cross this creek from the northern portion to the southern portion of the Verlon Hughes parcel due to its size and the non-existence of either a ford or a bridge.[3]

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[2] This creek is sometimes referred to in the record as a "ditch."

[3] Appellant's ninety-two- (92) year-old mother stated that before she moved from Mississippi she did remember a bridge across this creek; however, the old bridge was not located anywhere near the southern portion of the Verlon Hughes property but was located on the west side of the property belonging to Webster Hughes as a part of the Red Roberts Road and was abandoned when a new bridge was constructed upstream in conjunction with a sharp curve being eliminated from the public road. The remains of the old bridge were viewed by the Chancellor during her inspection of the premises as set forth in her Judgment. (R 193, 195).

relaxation.[6] Mr. and Mrs. Pate were utilizing the road to fulfill a Federal Soil Erosion Program on their portion of land south of the creek until such time as Ms. Daley's barricades prohibited further access. (R 130, 131). Neither Verlon Hughes nor Appellees had any problem whatsoever with accessing their property south of the creek until August, 2003, when Ms. Daley placed numerous warning signs on posts imbedded in the middle of the road and barricaded the full extent of the road by means of numerous railroad ties, wooden stakes, fence posts, chains, cables, barbed wire and sections of rebar steel rods extending as spikes from the road.[7] (R 83-93, 96-98, 103, 105; T 47, 65, 85; Exhibits 7, 8, 9, 12, 14 and 15). She also barricaded the boundary line across the field into which the road enters with multiple fence posts and chains. (Exhibits 10 and 11). The Holley family ceased their leasing of Appellees' property south of the creek in that their only access had been barricaded by Ms. Daley resulting in Appellees no longer receiving rental income. (T 44, 65, 70, 80). Their property became grown up and fallow. (T 44; Exhibit 10 and 11).

Appellees explored the cost of constructing a bridge, but its cost was prohibitive. (T 57, 66, 73). With the road barricaded Appellees had no practical way to access their property (T 50-

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[6] Appellant stated under oath that the road had not been utilized for thirty (30) to thirty-five (35) years contrary to the sworn testimony of all other witnesses, photographs of the road along with farm equipment having transversed the same, and the Chancellor's viewing the road. (T 40; Exhibit 1, 2, 6, 7 and 34)

[7] She stated at trial that she was merely marking her property but did admit during her prior deposition that she did not desire anyone to drive down the road.

57) so they resorted to the initiation of litigation requesting the court to acknowledge that Verlon Hughes benefitted by an easement by necessity for the benefit of his land south of the creek when his parents transferred such to him in 1937 and that crossing over his brother's property was the only reasonably necessary alternative to access his property so that he might have full use and enjoyment thereof with such easement passing with the land to Appellees.

Proceedings And Disposition By The Lower Court

Appellees sought relief from the Chancery Court of Itawamba County, Mississippi. The Chancellor, along with the attorneys for the parties, proceeded to Red Roberts Road and walked over Appellant's land along the road and along the south side on the creek while viewing and inspecting the road, the creek and other features of the land of the parties. (R 193). The southern portion of the Verlon Hughes parcel was grown up and had become fallow. (T 44; Exhibits 10 and 11). Testimony and other evidence was presented reporting the aforestated relevant facts.

On the 14th day of December, 2006, the Court handed down and entered its Opinion and Judgment which included findings of facts and conclusions of law. (R 183-197). The Chancellor noted that all four (4) essential elements of an easement by necessity were present. The Chancellor noted that Joseph and Ophelia Hughes had common ownership of the dominant and servient tenements (R 188-190) and that the parties received their parcels from this common source, (R 190-191) that Joseph and Ophelia Hughes severed their property in such a manner

that they necessitated an easement across a small portion of that land deeded to Webster Hughes to access that portion of land deeded to Verlon Hughes lying south of the creek (R 191-194) and that there exists a continuing necessity for such easement. (R 194-195). The trial court noted that the cost of building a bridge so as to access property south of the creek would be very expensive, exceeding Ten Thousand Dollars ($10,000). (R 196). The lower court found Appellees to hold an easement by necessity along the field road across Ms. Daley's property to access their property south of the creek with maintenance to be provided by Appellees.

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SUMMARY OF THE ARGUMENT

The findings of the Chancellor should not be disturbed in that she was not manifestly wrong, was not clearly in error and did not apply erroneous legal standards. The Chancellor's ruling was supported by substantial credible evidence. She correctly noted that all four (4) essential elements of an easement by necessity were present:

1. Joseph and Ophelia Hughes had common ownership of the dominant and servient tenements;

2. That the parties to this litigation received their parcels from this common source;

3. That Joseph and Ophelia Hughes severed their property in such a manner that it necessitated an easement across a small portion of land deeded to one of their children to

reasonably access that portion of land deeded to a second of their children; and

4. That there still exists a continuing necessity for such easement.

An easement by necessity arose by implied grant and ran with the land when it was deeded in 1937 by Joseph and Ophelia Hughes and ran with the land to now benefit the Appellees. The easement is essential for their full enjoyment and utilization of their land. Access by crossing a small portion of Ms. Daley's land is the only reasonably necessary alternative available to Appellees to reach their land.

The lower court's decision is sound and should be affirmed.

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ARGUMENT

The lower court correctly adjudicated that until 1937 all parcels of real property in question were commonly owned by Mr. and Mrs. Joseph L. Hughes who then severed such in a way that the portion south of the creek deeded to Verlon Hughes and now held by Appellees was rendered inaccessible to motor vehicles and farm equipment except by passing over the portion deeded to Webster Hughes and now held by Appellant. An easement by necessity arose at such time by implied grant and ran with the land when it was deeded by Verlon Hughes to Appellees. The easement is essential to their full enjoyment and utilization of their land.

I.

WHETHER THE LOWER COURT IMPROPERLY CONSIDERED TESTIMONY FROM A PERSON ACCEPTED AS AN EXPERT IN CONSTRUCTING BRIDGES WITH REFERENCE TO THE ESTIMATED COST OF CONSTRUCTING A BRIDGE.

The crux of Appellant's argument as to this issue is based upon repeated misstatements that Verlon Hughes created the "land-locked situation" south of the creek when he deeded to his portion of the property he received in 1937 from his parents. This is not correct. The record uncontradictorily depicts that the land Verlon Hughes received south of the creek was deeded to him the same day that his parents deeded to his brother, Webster Hughes, the remainder of their property lying south of the creek which abuts the public road. (Exhibits 18 and 23). Their parents were the common owners of all of this land south of the creek and caused such to be divided up so as to leave Verlon's portion landlocked with no reasonable access to the public road except by passing over the portion deeded to his brother. Verlon Hughes never at any time owned the land that had belonged to his parents lying south of the creek between the land deeded to him and the public road. An easement by necessity was created in favor of Verlon Hughes in 1937 and ran with his land south of the creek and it now benefits Appellees. Broadhead v. Terpening, 116 So.2d 949 (Miss. 1992). The parents of Verlon Hughes and Webster Hughes created the "land-locked situation" south of the creek in 1937 when they divided up their property.

The testimony to which Appellant now asserts that should have been inadmissible is that of Danny Holley who after being accepted as an expert in the area of bridge construction voiced

his opinion that it would cost approximately Ten Thousand Dollars ($10,000) to construct a bridge across the creek so as to allow Appellees to reasonably access their property from the north as an alternative to passing over the land of Ms. Daley.

For approximately nineteen (19) years Danny Holley has been serving as a County Supervisor of Itawamba County, Mississippi, and is presently serving as President of the Board of Supervisors. (T 67-68). He is very familiar with the land of the Appellees having farmed the same with his brother from 1973 until Ms. Daley's 2003 barricade and having prior thereto accompanied his father who farmed the property. (T 68-69, 169-170). Almost daily as a County Supervisor his duties dealt with the construction, bidding, repair and maintenance of bridges. (T 70). He stated that construction of a bridge across the creek would require the driving of pilings into the ground to anchor the bridge or else the bridge would float downstream in certain heavy rains. (T 72). Further, he stated that the driving of pilings would result in a "substantial cost," and when he was asked, "Would it be in the neighborhood or would it exceed Ten Thousand Dollars ($10,000)?" Appellant's counsel voiced no objection, and Mr. Holley responded, "Very likely." (T 73). When a party deems testimony inadmissible he or she shall interpose an objection or else there is a waiver of any objection which might have been made, and such objection would not thereafter be noticed or considered. White v. State, 532 So.2d 1207 (Miss. 1988) and Moore v. Moore, 558 So.2d 834 (Miss. 1990). Such testimony of Mr. Holley was admitted without objection and became a proper part of the evidence before the lower court.

Hattiesburg v. Miller, 11 So.2d 457 (Miss. 1943) and Mississippi DHS v. Moore, 632 So.2d 929 (Miss. 1994).

The Mississippi Supreme Court stated in Mississippi Transportation Commission v. McLemore, 863 So.2d 31, 34 (¶ 4) (Miss. 2003):

> "The analysis for admission for expert testimony is enumerated in the Mississippi Rules of Evidence, Rule 702, as amended on May 29, 2003 ... under Rule 702 expert testimony should be admitted only if it withstands a two-pronged inquiry. ... First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. ... Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue."

It is well-settled Mississippi law that the decision as to whether or not to admit expert testimony is within the sound discretion of the trial judge. Puckett v. State, 737 So.2d 322, 342 (¶ 57) (Miss. 1999); Giannaris v. Giannaris, 962 So.2d 574, 581 (¶ 21) (Miss. App. 2006); Etheridge v. Harold Case and Co., Inc., 960 So.2d 474, 481 (¶ 16) (Miss. App. 2006) (quoting Stanton v. Delta Regional Med. Ctr., 802 So.2d 142, 144 (¶ 4) (Miss. App. 2001); and Mississippi Transportation Commission v. McLemore, *Supra.* An appellate court will not disturb the decision of a trial court as to the admission of expert testimony absent abuse of discretion. Giannaris v. Giannaris, *Id.*; Etheridge v. Harold Case and Co., Inc., *Id.*; Stanton v. Delta Regional Med. Ctr., *Id.*; Mississippi Transportation Commission v. McLemore, *Id.* Judicial notice can be taken that construction of a bridge over a stream is time-consuming and costly. The admission of Mr. Holley's expert testimony was within the sound discretion of the

Chancellor with no abuse of discretion. Mr. Holley was qualified by virtue of knowledge and experience and his testimony was relevant, assisted the trier of fact and reliable.

Access by crossing a small portion of Ms. Daley's land is the only reasonably necessary alternative available to Appellees to reach their land south of the creek. The Mississippi Court of Appeals stated in Burns v. Haynes, 2004-CP-00009-COA (¶ 26) (Miss. App. 2005) as follows :

> "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 reasonably necessary alternative available. *Id.*

II.

WHETHER THE LOWER COURT ERRED IN RECOGNIZING THAT EACH APPELLEE HELD AN EASEMENT BY NECESSITY ALONG A FIELD ROAD ACROSS APPELLANT'S REAL PROPERTY TO ACCESS THEIR PROPERTY.

Ms. Daley relies upon Ganier v. Mansour, 766 So.2d 3 (Miss. App. 2000), however, this opinion involves an appeal pursuant to § 65-7-201 MCA of a decision of a Board of Supervisors by a person desiring to have a private road through someone else's property with the Court pointing out in ¶ 17 of its opinion that, " ... an easement by necessity differs from a request for a

private right-of-way pursuant to § 65-7-201 ... ."

The Mississippi Court of Appeals stated in Sturdivant v. Todd, 2005-CA-01937-COA (¶ 53) (Miss. App. 2007) that, "An easement by necessity is an easement that arises by implication whenever a part of a commonly owned tract of land is severed such that one portion of that property has been rendered inaccessible except by passing over the other portion, or by trespassing on the lands of another." In the case at hand the parents of Verlon and Webster Hughes in 1937 severed their tract of land so that the one portion of the property deeded to Verlon Hughes was rendered inaccessible to motor vehicles and farm equipment except by passing over the other portion deeded to Webster Hughes.

Easement by necessity is appurtenant not only to the dominant tract as a whole, but also to each and every part thereof, and is not extinguished by division of the dominant tract but benefits the owners of the several parts, nor is there any requirement that the dominant estate must touch or join the servient estate. Beloit Foundary Co. v. Ryan, 192 N.E.2d 384, 388 (Ill. 1963) and Right of Owners of Parcels Into Which Dominant Tenement Is or Will Be Divided to Use Right of Way, *10 A.L.R.* 3rd 960, 968.

"Whenever a person conveys property, he conveys whatever is necessary for the beneficial use of that property." Huggins v. Wright, 774 So.2d 408, 411 (Miss. 2000). An easement by way of necessity is pertinent to the dominant and is conveyed whether or not described when the dominant tenement is deeded. Easements by necessity run with the land and

are deeded with each conveyance regardless of description. Dieck v. Landry, 796 So.2d 1004, 1008 (Miss. 2001) and Broadhead v. Terpening, *Supra.*

An appellate court employs a limited standard of review on an appeal from the Chancery Court and will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or applied erroneous legal standard. Riddell v. Riddell, 696 So.2d 287, 288 (Miss. 1997) and Goode v. Village of Woodgreen Homeowners' Association, 662 So.2d 1064, 1070 (Miss. 1996). A chancellor's ruling supported by substantial credible evidence will not be reversed. Brandon v. Brandon, 559 So.2d 1038, 1042 (Miss. 1990).

CONCLUSION

An easement by necessity arose by implication in 1937 when part of the tract of land commonly owned by the parents of Verlon and Webster Hughes was severed by them in such a manner that the one portion of the property south of the creek deeded to Verlon Hughes was rendered inaccessible for reasonable access by motor vehicles and farm equipment except by passing over the other portion deeded to Webster Hughes. Verlon Hughes's property south of the creek was accessed by a road he built with permission across the property of Webster Hughes. Such road was utilized for access purposes by Verlon Hughes and by Appellees and their tenants for decades without any objection whatsoever until full ownership of Webster Hughes's land vested with his daughter, Ms. Daley, at which time she promptly barricaded the road. Without the use of the road Appellees have no reasonable alternative for accessing their land south of the creek with the construction of a bridge being cost-prohibitive. The easement by necessity is highly convenient and is essential to the full enjoyment and use of the land of Appellees south of the creek.

The Judgment of the Chancery Court of Itawamba County, Mississippi, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Rhett R. Russell, one of the attorneys for Appellees, have this day mailed, postage prepaid, by U.S. Postal Service, a true and correct copy of the above and foregoing Brief of the Appellee to Duncan Lott, attorney for Appellant, at his usual mailing address being P.O. Box 382, Booneville, MS 38829, and to Honorable Jacqueline Estes Mask, Trial Court Judge, at her usual mailing address being P.O. Box 7395, Tupelo, MS 38802.

SO CERTIFIED, on this the 14th day of November, 2007.

RHETT R. RUSSELL