IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-CA-00335

RAYMOND H. BURDSAL **APPELLANT**

VERSUS

MARSHALL COUNTY, MISSISSIPPI **APPELLEE**

ON APPEAL FROM THE MARSHALL COUNTY CHANCERY COURT

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

For Appellant:

1. Raymond H. Burdsal, Appellant;

2. Christopher M. Howdeshell, Esq., Attorney for Appellant, and member of the law firm of Pittman, Howdeshell & Hinton, PLLC;

3. William F. Schneller, Esq., former attorney for Appellant and partner of the law firm Jones & Schneller, PLLC.

For Appellee:

1. Marshall County Board of Supervisors, consisting of Willie Flemon, Jr., Eddie Dixon, Keith Taylor, George Zinn, III and Ronnie Joe Bennett, Appellee;

2. Kent E. Smith, Esq., Attorney of Record for the Marshall County Board of Supervisors; and

3. Tacey Clark Clayton, Esq., former Attorney of Record for the Marshall County Board of Supervisors

Marshall County Board of Supervisors

By: _____

Kent E. Smith,
Mississippi Bar Number [redacted]
Attorney of Record for Marshall County

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STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On February 9, 2004, Marshall County, Mississippi, by and through its Board of Supervisors, Appellee herein, filed a Complaint for Permanent Injunctive Relief and Damages against Raymond H. Burdsal, Appellant herein, asking the Chancery Court to declare Powell Chapel Road to be a public road; and to enjoin Appellant from obstructing said road. (R. 13)[1]. Service of Process was completed, and Appellant filed an Answer and Counter-Complaint on April 6, 2004, by and through his previous counsel, William F. Schneller, Esq. The Answer denied the allegations that Powell Chapel Road was a public road, and affirmatively asserted that the road was a private road owned by Appellant herein. Further, the Counter-Complaint asked for damages from Appellee for trespass, for increasing the width of the road, and for the destruction of gateposts erected by Appellant. (R. 17).

On May 11, 2004, Appellee filed an Answer to Counter-Complaint denying the allegations of Appellant (R. 30). By Order of the trial court dated August 23, 2004, Counsel for Appellant was substituted in place of said William F. Schneller, Esq. (R. 35). This matter was tried in the Chancery Court in Holly Springs on April 18, 2005 and, at said trial, Appellant withdrew his Counter-Complaint against Appellee. (R. 57).

The trial court, after both sides rested, made a ruling from the bench on April 19, 2005, which was memorialized in a Judgment dated May 7, 2005, and found that Powell Chapel Road was a public road, and further enjoined Appellant from erecting any obstruction across said road. (R. 57). Aggrieved from the Judgment of the trial court, Appellant, by and through counsel of record, filed a Notice of Appeal on May 31, 2005. On September 5, 2006 the trial court's

[1] Throughout the Appellee's brief, the following abbreviations used when making a citation to the record:
R – Reference to the court record
Tr. –Reference to November 5, 2007, trial transcripts
RE – Reference to the Record Excerpt

judgment was reversed and remanded by the Court of Appeals (case number 2005-CA-01085-COA). The Court of Appeals opinion stated that the trial court was correct in its judgment as to finding that the Appellee had proven the elements of open, notorious and visible; under the claim of ownership; and peaceful. However, the Court of Appeals opined that the trial court erred in finding that the elements of hostility, exclusivity and continuous and uninterrupted use for at least ten years, had been proven by the Appellee. ***Burdsal v. Marshall County, Mississippi***, 937 So. 2d 45, 50 (Miss.Ct.App. 2006).

On November 5, 2007 the second trial of this matter was conducted regarding the issues remanded by the Court of Appeals. After both sides had rested, the trial court issued a ruling from the bench, which was memorialized in a Judgment dated November 20, 2007. (R. 124). The trial court found Powell Chapel Road to be a public road. After entry of the Judgment, the Appellant filed a Motion for Reconsideration on November 30, 2007 and was subsequently denied said motion by Order of the court on January 24, 2008, said Order being filed on February 15, 2008. (R. 137). Aggrieved from this Judgment and Order, the Appellant filed a Notice of Appeal on February 15, 2008. (R. 140).

II. STATEMENT OF FACTS.

Appellant, Raymond H. Burdsal (hereinafter "Burdsal") owns approximately 22 acres in Marshall County adjacent to a now paved road called Powell Chapel Road. (RE 1) Powell Chapel Road is also adjacent to Powell Chapel Church, a predominantly black church, that is and has been holding religious services there since at least the 1960's with members regularly traveling Powell Chapel Road for services, revivals, and funerals. There are also at least three cemeteries located adjacent to Powell Chapel Road. The public has been using Powell Chapel Road to get to those cemeteries for decades. (RE 2, 3, 4).

Pursuant to the Legislature's instructions, in June 2000, the County voted to hold a public hearing on a new Marshall County Map and registry. That hearing was held in June 2000, at which time the new County map and road registry were adopted. Powell Chapel Road was listed as a county road for the first .8 miles after it came off Highway 4. (R.13). Burdsal did not make any objections to the inclusion of Powell Chapel Road into the County map and road registry. (RE 5).

Leo Bogart testified at the second trial of this matter and indicated that in the 1960's, he personally requested that Supervisor Totten repair damage to Powell Chapel Road. (Tr 8). This repair work was completed and subsequent repairs and maintenance were done by Supervisor Brisco, Supervisor McClatchy and Supervisor Flemon. Mr. Bogart went on to testify that after making requests to the Supervisors regarding Powell Chapel Road, the necessary work was performed. (Tr. 8, 9, 10, 11). Mr. Bursdal himself stated in his deposition that his grandmother's brother was a supervisor and regularly put gravel on the road and repaired it in the 1930's. (RE 6). He also testified that no one in his family had put any gravel on the road personally. (RE 6).

Also of note, the deed by which Mr. Burdsal acquired the property from his Mother, Grace Colston, contained a legal description referring to Powell Chapel Road as **"a public gravel road."** (R. 108). That conveyance was on October 3, 1980. Id. Mr. Burdsal conveyed the property to his own closely held corporation, American Mortgage Corporation, on September 8, 1989 and he even referred to Powell Chapel Road as **"a gravel road."** (RE 7, 8, 9). Mr. Burdsal testified in his deposition that neither he nor his family graveled Powell Chapel Road and witnesses testified that Marshall County graveled the road and maintained it at least from the 1960's forward. (RE 6, Tr. 11, 24).

Mr. Bursal admitted in his deposition that the road was regularly traveled by the members of Powell Chapel Church since the 1960's and that the County had never asked permission for

the public to use or the County to maintain that property. (RE 10, 11). Testimony elicited from Ricky Lesure was that he personally witnessed a road grader working Powell Chapel Road, in the 1980's. (Tr. 24, 25). Also of note, is the testimony of Mr. Burdsal during his deposition, he was asked if he remembered how long the Powell Chapel Church sign had been posted to which he responded, "No I don't. As a matter of fact, the church people asked my grandfather permission to put a sign up there, probably, I don't know." (Tr 67). The testimony of Leo Bogart stated that all signs for Powel Chapel Church were done by the church itself. (Tr. 14, 15).

The testimony of all Appellee witnesses indicated that permission was never sought nor given to use Powell Chapel Road. No one recalls their parents or ancestors requesting permission or being given permission. (Tr. 13, 14, 23, 34). Mr. Burdsal testified that he did not hear his grandfather give permission to any member of Powell Chapel Church, but that he recalled a conversation that occurred when he was ten years old between his grandfather and J.M. "Flick" Ash, wherein his grandfather told Mr. Ash that he had given the church members permission. (Tr.62, 63). However, Mr. Ash, who is still alive, was not called as a witness to verify that the conversation had taken place. As such, the word of Mr. Burdsal is the only evidence that any permission was granted and that evidence is contradicted by the testimony of four Appellee witnesses.

Finally, the remaining factors to be proven have been met. The County has maintained Powell Chapel Road for well over ten (10) years, the taking of Powell Chapel Road was in fact hostile, as no permission was sought or given, and the evidence of ownership is found in the maintenance of the road itself which began in the 1960's. Mr. Burdsal admitted that he did not gravel or maintain the road but had to be aware the work was being done. (RE 6, Tr. 11, 24).

III. SUMMARY OF THE ARGUMENT

The Court was correct in holding that Powell Chapel Road is a public road by virtue of prescription. The County met its burden of proof on the remaining three elements of prescription by showing through the testimony of several individuals that the road has been maintained by the County for well over ten years, regularly used by the public and permission was not sought nor given for the use.

Further, the Court had deeds from Appellant's family with language dating back to 1980 indicating that Powell Chapel Road was a "public gravel road". (R 108). Last, the evidence included an Order from the Board of Supervisors of Marshall County dated June 25, 2000 adopting a County Map and Registry which included Powell Chapel Road as a county road for .8 miles from Highway 4. (RE 12, 13, 14, 15).

The Chancellor conducted a view of the road and surrounding property during the first trial and personally observed the road conditions for himself. He said that the road appeared to be well-traveled and maintained and had been maintained for a lot longer than the required ten years. (RE 16, 17). The decision he made in adjudicating Powell Chapel Road as a County road was not manifestly wrong or clearly erroneous, but was based on the Chancellor's careful review of all the evidence.

ARGUMENT

I. STANDARD OF REVIEW

The Court's scope of review is succinctly set forth and explained in ***Myers v. Blair***, 611 So. 2d 969, 971 (Miss. 1992).

> Our scope of review of a chancellor's findings of fact is that "the findings of fact as there determined shall not be reversed unless clearly shown to be erroneous. It has therefore been the uniform rule that the [c]hancellor's findings on the facts is reviewable on appeal on when manifestly wrong" Griffith, *Mississippi Chancery Practice*, § 674 (2nd ed. 1950). **The rationale for this rule is based upon the firsthand knowledge the chancellor acquired from seeing the witnesses and**

hearing their sworn testimony. It is argued that the chancellor is thus better qualified to arrive at correct factual findings and conclusions than an appellate court reviewing only a dry record of the proceedings.

(emphasis added.)

II. THE TRIAL COURT DID NOT ERR IN IT'S DETERMINATION THAT POWELL CHAPEL ROAD IS A PUBLIC ROAD THROUGH THE USE OF PRESCRIPTION

A. The Requirement of Hostility

While it is true that permissive use cannot rise to the level of hostile use, the Court in ***Rawls v. Blakeney*** stated,

> "Requiring a litigant who is attempting to establish adverse possession or a prescriptive easement to prove that there was no permission for use would be unreasonable; the law typically frowns upon requiring a party to prove a negative." ***Rawls v. Blakeney***, 831 So. 2d 1205, 1209 (Miss. App. 2002).

Testimony offered by the Appellee witnesses establishes that they personally never received permission from the Burdsal family to use Powell Chapel Road. They also stated that they did not have any recollection of their parents receiving permission to use Powell Chapel Road. The Appellant stated, "[M]y grandfather gave Powell Chapel Church the permission, because many of the people who attended the church at that time period most of them are deceased now from what I remember." (Tr. 62). The Appellant's claim of permissive use requires the Court to believe that the Appellant accurately remembers a conversation he allegedly overheard when he was ten years old, between his grandfather and a prominent member of Marshall County, J.M. "Flick" Ash. (Tr. 63)

The Appellant also stated, in reference to his grandfather, "[H]e gave permission, but I can't tell you to who or when, like I said, I was ten years old." (Tr. 65). The testimony offered by the Appellant amounts to hearsay and lacks credibility due his doubt as to whom the permission was granted and the fact that J.M. "Flick" Ash is still alive and in Marshall County, Mississippi. The Appellant could have easily had Mr. Ash testify as to the content of the conversation had

between himself and the Appellant's grandfather. However, Mr. Ash was not called as a witness on the Appellant's behalf. Another issue with this testimony is that Mr. Burdsal testified he was born in 1950 and was ten years old when the conversation between Mr. Ash and his grandfather took place. (Tr. 63). He then went on to testify that his grandfather died in 1958 or 1959. (Tr. 67). If Mr. Burdsal was ten years old when this conversation occurred it would follow that the conversation occurred in 1960, approximately one to two years after his grandfather's death.

The argument of the Appellant is also flawed in that during the first trial he testified "they began using the road permissibly from our grandfather and the ...I would say in the mid-30's when their road washed out." (RE 18). When the court pointed out to Mr. Burdsal that he was not yet born during the 1930's he stated, "I would say I cannot attest to the '30's, it's just what I have what I have been told, but I can attest to the '50's that I did see church members walk by on foot and horseback and mule, going...attending church." (RE 18). This testimony simply establishes that he witnessed the use of the road by church members as far back as the 1950's. At no point during the first trial did Mr. Burdsal make a mention of the conversation had between his grandfather and Mr. Ash.

The Chancellor in this matter was able to hear the testimony of the Appellant and the Appellee's witnesses. With the inconsistencies in Mr. Burdsal's testimony the Chancellor was correct in relying on the Appellee witness testimony. Which he deemed was sufficient to establish a lack of permission. The Court in ***Myers v. Blair***, stated as follows,

> "It has therefore been the uniform rule that the [c]hancellor's findings on the facts is reviewable on appeal only when manifestly wrong. The rationale for this rule is based upon the firsthand knowledge the chancellor acquired from seeing the witnesses and hearing their sworn testimony. It is argued that the chancellor is thus better qualified to arrive at correct factual findings and conclusions than an appellate court reviewing only a dry record of the proceedings" ***Myers v. Blair***, 611 So. 2d 969 (Miss.1992).

The Chancellor was able to weigh the credibility of the witness testimony against that of the Appellant and found that the element of hostility was in fact met.

The argument made by the Appellant that the church members failed to maintain the road in question further advances Appellee's claim of adverse possession by prescription. The County maintained the road, not the church members and the County is claiming adverse possession by prescription. Also, the Appellant makes the argument that the failure of the church members to inform the Appellant that they considered the road a public road indicates doubt as to the nature of the road. The failure to inform Mr. Burdsal of the belief Powell Chapel Road is a public road evidences the church members' belief that the County's ownership was open and notorious, a fact commonly known by the public.

The Appellant incorrectly stated that the Court, in its prior opinion regarding hostility, stated,

> "Burdsals testimony as to granting permission is collaborated by the fact that his grandfather, since the 1950's, paid to put up a sign on his property identifying Church times and services." ***Burdsal v. Marshall County, Mississippi***, 937 So. 2d 45, 50 (Miss.Ct.App. 2006).

This statement was made by the Court in its prior opinion referring to the requirement, under the claim of ownership. However, the Appellee would aver that the testimony offered by Leo Bogart is proof that the Appellant was mistaken in his belief that since the 1950's his grandfather paid to put a sign on his property with church times and services. Mr. Bogart testified that he did not recall Mr. Burdsal or his father or his grandfather building a sign for Powell Chapel Church. When he was asked why he was sure this had not happened he responded, "Because all signs was always done by the members of the church." (Tr. 14, 15).

The Appellant in this matter argues that no testimony was presented to rebut the fact that permission was given and implies that the testimony offered establishing a lack of knowledge

regarding this matter was insufficient to rebut the Appellant's claims. The Appellant at no point offered any evidence he, himself witnessed the permission being granted. He did offer testimony that one to two years *after his grandfather's death,* he witnessed a conversation between his grandfather and Mr. Ash. His testimony, at best, only displays a belief that permission was granted. This is similar to the claims of the church members who believe permission had not been given, as they viewed the road public. Consistent with the Courts ruling in ***Rawls,*** as cited herein, the church members are not required to prove a negative. Therefore, the testimony that permission was not granted is sufficient to meet that requirement of hostile use.

Also, the testimony of the Appellee witnesses established that the County had completed maintenance on the road since the 1960's. Mr. Leo Bogart stated, in the 1960's he spoke with Supervisor Totten regarding the maintenance of the road. He went on to testify as follows:

> THE COURT: What happened when you talked to the different supervisors, they just kept putting a little more gravel at a time on it or what"
> THE WITNESSS: Yes, sir, they would put maybe a load of gravel on it, and mostly start at the worse part of the road. And that was what I tried to explain where they pulled a smaller culvert out and put the larger in....put a larger culvert in there.
> THE COURT: So when you would complain about a bad spot in the road the supervisors would fix it?
> THE WITNESS: Yes, sir. (Tr. 14)

After the Court questioned Mr. Bogart counsel for the Appellant questioned him as follows:

> Q: And that the...the...the gravel that you are testifying that the county put on the road was... was done at specific places in the road? Is that your testimony? Is that...am I understanding that correctly?
> A: Like I said, they fixed the worse part first, which was down in the lower part where the culvert is, which we have two culverts in there now. And once they got that fixed then occasionally they would go in and distribute more gravel on the road. (Tr. 18)

Mr. Bogart's testimony clearly establishes that the County continually repaired and maintained the road in question and for a period beginning in 1960 through the present.

Mr. Lesure testified that he personally witnessed the County grading Powell Chapel Road, between 1980 and 1985. (Tr. 24). The Appellant would like to infer that, by this testimony, the grading of Powell Chapel Road was one time occurrence. However, the Chancellor who viewed the road in question also made statements during the first trial that the road beds were well established and "that is indicative of it being used over a long period of time and bladed and graded, and therefore, it gets down lower than the land around it." (RE 16, 17).

The Appellant has admitted throughout this matter that neither he nor his family conducted any work on the road. Therefore, it is likely that all the work completed and was completed by the County as witnessed on different occasions by Mr. Bogart and Mr. Lessure. It would follow that upon returning to his families land throughout the years that Mr. Burdsal would notice that work had been conducted on the road this, paired with his knowledge that he nor his family completed such work, would put him on notice that another was making a claim to the road.

The Appellant argues that the act of putting gravel on the road is not hostile as it was never made known to the Appellant. This is a flawed argument as it would require the Appellee to put the Appellant on actual notice that they were making this adverse claim. Notice as required by adverse possession is that of constructive notice. The County conveyed notice in the graveling and maintenance of the road. The Appellant and his witness Mr. Tomlinson testified that they did not know who put the gravel on the road. However, Mr. Burdsal and Mr. Tomlinson knew the gravel was present, and therefore, Mr. Burdsal knew someone was "trespassing" on his land in order to place this gravel, assuming *arguendo*, Mr. Burdsal truly believed this was a private drive and not a public road. His failure to investigate the matter would show that possibly at the time he believed the road to be public as well.

The testimony offered at trial indicated that the church members used the road anywhere from two to four nights a week, also the public used the road to access the cemeteries and hunt and fish.(Tr. 15, 16, 29, 33, 34, 40,). This testimony shows that the road was not merely used for the church members to access their church but also for the public at large to attend burials and visit loved ones as well as to access the pond and land in which to hunt and fish.

The lack of permission paired with the County's maintenance of the road meets the standard of an assertion of title superior to the potential competing claims of anyone else. ***Lynn v. Soterra, Inc. B.P.***, 802 So. 2d 162, 166 (Miss.App.2001). The Court did not commit reversible error in finding that the element of hostility was met. On the contrary, the Court, weighing all the evidence it had before, ruled correctly that hostility was met by the testimony of the Appellee's witnesses that permission was never granted nor sought, by the personal viewing of the road which the Court believed evidenced years of grading and blade work, by the testimony of Mr. Bogart and Mr. Lessure that they had witnessed the County maintain and repair the road and by the testimony that the church members use the road to access their church at least four nights a week and the public uses the road to hunt and just drive.

B. The Requirement of Exclusivity

The definition of exclusivity as set out by this Court in its prior opinion is as follows:

> "The question in the end is whether the possessory acts relied upon by the would be adverse possessor are sufficient to fly his flag over the lands and to put the record title holder on notice that the lands are held under an adverse claim of ownership." ***Lynn v. Soterra, Inc.*** 802 So. 2d 162, 168 (Miss.Ct.App.2001). citing ***Keener Properties, L.L.C. v. Wilson***, 912 So. 2d 954, 956 (Miss.2005).

This Court in its first opinion indicated that the alleged permissive use was not sufficient to put Mr. Burdsal on notice that the road was being held under an adverse claim. Specifically, the Court stated that, "Burdsal's testimony that he gave the church members permission to use the road, suggests that church members' use of the road was not a right but a privilege." ***Burdsal v.***

Marshall County, Mississippi, 937 So. 2d 45, 50 (Miss.Ct.App. 2006). As argued above, the Appellant has failed in showing that any permission was granted. He cannot with certainty state that his grandfather erected a sign for the church, a claim that is in direct conflict with Mr. Leo Bogart's testimony. Also, he cannot remember who his grandfather gave permission, a claim that is in direct conflict with the testimony of all Appellee witnesses. Accordingly, permission to use the road has not been demonstrated in the testimony of Mr. Burdsal or that of the witnesses. As such, it must be presumed that permission was not granted.

The Appellant cites ***Myers v. Blair***, 611 So. 2d 69, 971 (Miss.1992) which states that the use of the road must be more than mere travel in order to put the record owner on notice that an adverse claim is being made. The witnesses testified that the road was used by church members to attend Powell Chapel Church, members of the community to attend funerals and burials as well as members of the community for hunting and fishing. This testimony indicates public use of the road in question, not mere travel thereon. Also, Mrs. Marie Colston Smith testified in the first trial, on behalf of Mr. Burdsal, that she saw people who she assumed to be hunters using Powell Chapel Road as well as evidence on the road of people "doing activities that you wouldn't appreciate." (RE 19, 20). She also testified that she thought a hunting club was located on the other end of the road. (RE 20).When further questioned about the use of the road Mrs. Smith testified that she did not know how many people she saw travel the road were church members. (RE 21). This would further the argument of the Appellee that the road was used by more than just members of the church. The Appellant's own witness testified that the use of the road was not just by church members but that there was evidence of the general public using the road as well as church members and hunters. Powell Chapel Road is used by the public at large and that should not constitute mere use.

The Appellant goes on to argue that lack of board minutes indicates the weakness of the Appellee's claim the road in question was a public one. However, Mississippi Code Annotated §65-7-1 states as follows:

> "(1) The board of supervisors of each county shall have full jurisdiction over all matters relating to the public roads of the county, including the establishment, laying out, opening, abandonment, altering, changing, working and maintaining of such roads, except as otherwise provided by Section 170 of the Mississippi Constitution of 1890.
> (2) All roads now laid out and opened or hereafter laid out and opened according to law shall be deemed public roads and highways and shall be opened and worked at least sixteen (16) feet wide, wherever practicable, and in any case not less than twelve (12) feet, and any greater width that may be necessary. Ditches and borrow pits shall be kept open or connected so as to drain off the water from the road bed, as far as practicable.
> (3) From and after July 1, 2000, no road shall be included as a part of the county road system until and unless the board of supervisors, by appropriate action spread on its minutes, has established or accepted such road and caused the road to be included in the official record of the county road system as provided in Section 65-7-4."

This section of the Mississippi Code Annotated does not require a board order in order to conduct the maintenance of county roads. It simply requires that after July 1, 2000, no road can fall under the section unless included in the county road system. The Appellee did adopt a registry in 2000 and that registry included Powell Chapel Road, contrary to the Appellants statement that the road registry was adopted in 2005. This registry establishes that the road in question was considered by the Appellee to be a public road subject to the County's maintenance and regulation. (RE 22, 23).The lack of minutes authorizing the maintenance of the road is not indicative of a lack of exclusivity. The Appellee is not required to enter a board order for routine maintenance of county roads. Such a requirment would be overly burdensome and impractical.

It has been established and argued herein that the Appellant was aware of the graveling and maintenance of Powell Chapel Road. Also, the Appellant has admitted that neither he nor anyone in his family completed this maintenance. Also of note is the testimony of Mr. Leo Bogart that the maintenance of Powell Chapel Road began with the worst sections of the road

and was maintained at the request of the public. (Tr. 17). The testimony of the Appellant and Mr. Bogart indicates that the Appellee did complete enough work to be "sufficient to fly his flag over the lands and to put the record title holder on notice that the lands are held under an adverse claim of ownership." ***Lynn v. Soterra, Inc.*** 802 So. 2d 162, 168 (Miss.Ct.App.2001). citing ***Keener Properties, L.L.C. v. Wilson,*** 912 So. 2d 954, 956 (Miss.2005).

The Appellant points out that the use of Powell Chapel Road was joint use. The Court in ***Moran v. Sims***, 873 So. 2d 1067 (Miss.Ct.App. 2004) stated, "Exclusive use does not mean that no one used the driveway. Exclusivity here means that the use was consistent with an exclusive claim to the right to use." In order for a road to be a public road the public at large would be entitled to use. The Appellant uses many of the roads maintained and established as county roads. His use of Powell Chapel Road does not trump the Appellee's claim of exclusivity. The Appellant also argues that the testimony reveals that until 2005 the road was merely a "pig trail". However, the testimony of the Appellant's witness, Ms. Marie Colston Smith, in the first trial was that Powell Chapel Road led to the church and turned into a "pig trail". This would indicate that Ms. Smith's view of Powell Chapel Road was not simply a dirt road but a road like any other that led to a "pig trail". (RE 19).

The evidence presented at trial in the form of testimony and exhibits establishes the requirement of exclusivity. The Appellee began maintaining Powell Chapel Road in the 1960's or earlier and this maintenance was evidenced in the form of gravel being placed on the road as well as the established road bed noted by the Chancellor in the first trial of this matter.

C. The Requirement of Continuous and Uninterrupted Use for at Least 10 years

This Court in its prior opinion stated, "The road has continued to be used in the same fashion for more than fifty years." However, this Honorable Court opined that without the improperly admitted testimony of Board Members and county employees the ten-year

requirement was not met. ***Burdsal v. Marshall County, Mississippi***, 937 So. 2d 45, 50 (Miss.Ct.App. 2006). The Appellee has established continuous and uninterrupted use for at least ten years through the testimony of Leo Bogart. Mr. Bogart stated that in the 1960's he personally spoke with Supervisor Totten regarding the maintenance of Powell Chapel Road. He further testified that he continued to speak with different supervisors over the years up to and including the current supervisor for the district, Mr. Willie Flemon. (Tr. 9, 10). While Mr. Bogart could not give a specific date upon which he requested help from the supervisors, he established that this maintenance began over forty years ago and has continued to present.

Mr. Ricky Lesure testified that he personally observed the county grading Powell Chapel Road in the 1980's. While the Appellant would like to argue that this point is minor due to the fact that it occurred only one time, the Chancellor noted himself that the road bed was such that it was "indicative of it being used over a long period of time and bladed and graded, and therefore, it gets down lower than the land around it." (RE 16, 17).

The testimony of Mr. Bogart and Mr. Lesure paired with the Chancellor's personal observations establishes that the maintenance of the road was not sporadic and intermittent as the Appellant argues but was continuous for over at least forty years.

The Appellant argues that in the first opinion of this Court it was established that "mere use of the road by mere church members or hunters does not in and of itself establish hostility." (***Citing Appellant's brief***). The Appellant has taken out of context the statement made by this Court. What was stated is as follows:

> "The use of the road by church members and hunters does not, in and of itself, establish hostility. Permissive use cannot, by definition be hostile use; lack of objection, however, does not automatically establish consent." ***Moran v. Sims***, 873 So. 2d 1067, 1069 (Miss.Ct.App. 2004).

When this statement is put in context it becomes obvious that this Court was referring to permissive use under the claim of hostility and not referencing the claim of continuous and uninterrupted use for at least ten years. However, as argued herein, permission has not been established and testimony was given establishing that the community used this road for the purposes of hunting, church and attending funerals.

Therefore, the Court did not commit reversible error when finding that the element of continuous and uninterrupted use for at least ten years was established. The testimony elicited established the Appellee maintained the road in question for well over the ten year requirement. Also, it was established that the public at large has used and continues to use Powell Chapel Road.

III. THE TRIAL COURT DID NOT ERR IN FINDING THE APPELLANT HAD VIOLATED MISSISSIPPI CODE ANNOTATED §65-7-7, AS AMENDED

Mississippi Code Annotated §65-7-7 states:

> "If any person shall fell any bush or tree and leave any portion thereof in any stream or on any public highway, road, or ditch draining the roadway or obstruct the same in any manner whatever, and not immediately remove the obstruction, the overseer of the road shall remove the same, and the person so felling the tree or bush, or otherwise obstructing the road or water shall forfeit and pay all expenses of removing the same, to be recovered before any justice of the peace of the county, in the name of the county. It is the duty of the overseer to cause suit to be commenced therefor, and such person shall be liable for all damages occasioned to another by the obstruction. However, no cattle gap placed on a county road, subject to overflow by the Mississippi River and not protected by levees, shall be considered an obstruction in the public road if such cattle gap is installed with the permission of the board of supervisors and the person installing same also provides a gate adjacent to the road for the passage of stock."

The Appellee has presented sufficient evidence that Powell Chapel Road is in fact a public road by prescription, and therefore, the Appellant has violated the above referenced statute in placing a gate and sign across the entrance of a public road. Also, the Court was correct in issuing a permanent injunction against the Appellant from obstructing this public road.

CONCLUSION

The Chancellor in this case went to great lengths to personally view the property, hear all the testimony, review all the records and carefully transcribe an oral opinion setting out the evidence upon which he based his conclusion. That evidence consisted of testimony from the first trial of the Appellant, his family member Marie Smith and citizen Donald Mitchell, Board minutes, County Road Map, County Road Registry, and deeds conveying property to and from Appellant. The testimony of the second trial consisted of the Appellant, Mitchell Tomlinson, Lucy Boga, Yvonne Holland, Ricky Lesure and Leo Bogart. The witnesses for the Appellee established that Powell Chapel Road had been maintained by the Appellee for more than forty years. Also, the Appellee witnesses testified that the use of Powell Chapel Road was by the general public without permission from the Appellant. The Appellant's testimony was inconsistent and failed to show proof of permissive use or lack of knowledge of the Appellee's maintenance of the road in question. After carefully considering all this evidence, the Court concluded that in the second trial of this matter there was "nothing before the Court today that would change the Court's opinion as to the other elements that's already been decided by the Mississippi Court of Appeals." The Court further stated that the County had gained possession of Powell Chapel Road through prescription. The trial court's carefully considered decision should be upheld.

RESPECTFULLY SUBMITTED,

/s/Kent E. Smith
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CERTIFICATE OF SERVICE

I, Kent E. Smith, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Brief of Appellee by U. S. Mail, postage prepaid, to:

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The Honorable Glenn Alderson
18th Chancery District
P.O. Drawer 70
Oxford, MS 38655

This, the 4th day of August, 2008.

/s/ Kent E. Smith
KENT E. SMITH