

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 CHANCERY COURT OF
MARSHALL COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF THE ARGUMENT.

The issue before this Court is whether the Chancellor erred in finding that Powell Chapel Road is a public road by virtue of use by the general public which was hostile, exclusive, and uninterrupted for a period of Ten Years. Appellee devotes a majority of its brief to discuss Appellants case-in-chief. The reason, Appellant would respectfully submit, for this discussion is because the evidence submitted by Appellee, who had the burden of proof, could not justify the trial court's ruling.

The record reveals that intermittant or "spot" maintenance was performed on the road and that this maintenance was done only at the request of the Church members; and that the Church members and others traveled the road. There is no testimony of continuous and uninterrupted, regular maintenance; no testimony of use by the general public or a claim by the general public to use the road; nor testimony of a hostile act which was made known to Appellant before 2005.

You cannot make a highway out of a pig trail; but that is exactly what Appellee is asserting should occur and why the Chancellor was manifestly wrong or erroneous in granting relief sought by Appellee.

II. THE REQUIREMENT OF HOSTILITY.

Appellee argues that permissive use of the road was not established because Appellee's statements about the permissive use of the road by the Church members was hearsay and lacks credibility. Further, Appellee states that one party to the conversation about permissiveness, Mr. "Flick" Ash is still alive and was not called as a witness before the Court.

As mentioned in the Brief of Appellant, this Court recognized the fact that the use of the road began by permission in its prior opinion. Once this fact is established, prescriptive ownership can not be claimed until a positive assertion of right hostile to the record title owner has been made known to him. Johnson v. Black, 469 So.2d 88, 91 (Miss.1985). Thus, Appellant is not attempting to argue that Appellee must prove that there was "no permission" as Appellee seems to state in its brief, but rather that once permissive use is established, Appellee must prove a positive assertion of title by the public in order for the prescriptive period to commence. There is no evidence in the record of such a hostile act until 2005, when the entire road was graveled by Appellee.

As to whether Mr. Ash is still alive, no references to the record were provided in Appellant's Brief. Thus, this was not part of the record, and such statements should be disregarded.

Ditto v. Hinds County, Mississippi, 665 So.2d 878, 880 (Miss. 1995).

Appellee further states that Appellant herein has argued to this Court that the act of putting gravel on the road is not a hostile act, as it was never made known to Appellant. This is an incorrect statement of Appellants argument. Appellant herein is arguing that, in spite of the evidence regarding permission, 1) the act of putting gravel on the road was not an act that was "hostile"; in other words, an act that was an assertion of title to the road by the Appellee. In addition, and as a separate argument, Appellant herein submits that any such act by Appellee was insufficient to put Appellant on notice that the Appellee was claiming the road as public property. As to hostility, the testimony revealed the purpose of placing the gravel on the road was for the benefit of the Church members. The maintenance was not part of a regular maintenance plan, but was done only when the Church members complained. As to notice, the testimony revealed that only "spot" or intermittent maintenance occurred. Thus, the purpose of the maintenance was not to assert ownership, but rather to appease the members of the Church, and the irregularity of the maintenance supports this purpose.

III. THE REQUIREMENT OF EXCLUSIVITY.

Appellee herein argues that the testimony revealed more than mere travel on the road. The record is clear that the

Church members did nothing more than travel the road, and the Appellee did nothing more than intermittent maintenance.

Further, Appellee's Brief does not address the requirement of the claim by the public of the right to use the road. There is no testimony that the public needs the road to facilitate traffic flow, to access commercial establishments, to access another public road, to access other public property or any other valid purpose. Absent more, Appellee's claim does not meet the requirement of exclusivity.

Appellee further argues that Mississippi Code Annotated § 65-7-1 (2000) does not require a board order in order to conduct the maintenance of a county road. Mississippi Code Annotated § 60-7-4.1 reads as follows.

The Legislature of the State of Mississippi finds and determines as a matter of public policy and legislative intent that the preceding and public hearing required for initial adoption of the official map and county road system register required under § 65-7-4, Mississippi Code of 1972, are not intended to layout, open, designate or otherwise establish new public roads, but to document and record existing roads which are, **at the time of the initial adoption of said map and register, adjudicated by the board, consistent with fact, to be public roads by dedication, under the methods provided by statute, or by prescription and required by public convenience and necessity. (Emphasis Added).**

There are no minutes, evidence, or a finding of fact by Appellee as to why the road in question is a public road by prescription or that public convenience and necessity requires the road to be designated a public road. Further, Appellee

a public road is manifestly wrong or erroneous. The intermittent placement of gravel on the road was not a hostile act; other than intermittent maintenance, Appellee herein could only prove mere travel on the road; not a claim by the public of the right to use the road. Further, Appellee did not prove that there was regular maintenance performed on the road. The road is just a farm road which does not connect to another public road or public property, and which the public does not need.

Based on the foregoing, Appellant would respectfully submit there was insufficient admissible evidence to establish Powell Chapel Road as a public road, and the trial court's decision should be reversed and rendered.

RESPECTFULLY SUBMITTED, this the 19th day of September, 2008.

RAYMOND H. BURDSAL

By: Christopher M. Howdeshell
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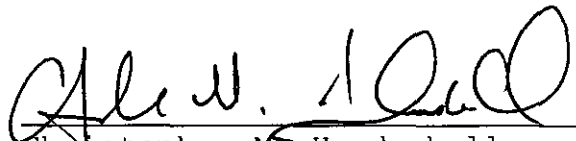
CERTIFICATE OF SERVICE

I, Christopher M. Howdeshell, Attorney for Appellant, do hereby certify that I have forwarded via United States mail, postage prepaid, a true and correct copy of the above and foregoing **Reply Brief of Appellant** to:

Honorable Glenn Alderson
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This, the 19th day of September, 2008.



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