

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

BRIEF OF APPELLANT

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AMENDED 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 the 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 of Jones & Schneller, PLLC.

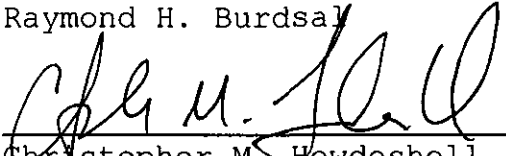
For Appellee:

1. The Marshall County Board of Supervisors, consisting of Willie Flemon, Jr., Eddie Dixon, Keith Taylor, George Zinn, III, and Ronnie Joe Bennett, Appellee;
2. Tacey Clark Clayton, Esq., Attorney of Record for the Marshall County Board of Supervisors;

3. Kent E. Smith, Esq., Attorney for Marshall County Board of Supervisors and member of the law firm of Smith Whaley.

Raymond H. Burdsal

By:



Christopher M. Howdeshell,
Attorney of Record for
Raymond H. Burdsal

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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 of Jones & Schneller, PLLC.

For Appellee:

1. The Marshall County Board of Supervisors, consisting of Willie Flemon, Jr., Eddie Dixon, Keith Taylor, George Zinn, III, and Ronnie Joe Bennett, Appellee;
2. Tacey Clark Clayton, Esq., Attorney of Record for the Marshall County Board of Supervisors;

3. Kent E. Smith, Esq., Attorney for Marshall County Board of Supervisors and member of the law firm of Smith Whaley.

Raymond H. Burdsal

By: _____
Christopher M. Howdeshell,
Attorney of Record for
Raymond H. Burdsal

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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN ADJUDGING THAT APPELLEE, MET ITS BURDEN OF PROOF IN ESTABLISHING THAT THE PUBLIC EXERCISED EXCLUSIVE, HOSTILE, AND CONTINUED AND UNINTERRUPTED USE OF THE SUBJECT ROAD FOR THE REQUISITE TEN YEAR PERIOD.
- II. WHETHER THE TRIAL COURT ERRED IN AWARDING A DECLARATORY JUDGMENT THAT POWELL CHAPEL ROAD FROM HIGHWAY 4 TO THE CEMETERY BEYOND POWELL CHAPEL ROAD, AS IDENTIFIED ON THE MARSHALL COUNTY ROAD MAP, IS A COUNTY ROAD BY PRESCRIPTION.
- III. WHETHER THE TRIAL COURT ERRED IN ADJUDGING THAT APPELLANT'S ACTIONS IN PLACING A GATE ACROSS THE SUBJECT ROAD AND A SIGN ON THE RIGHT OF WAY OF THE SUBJECT ROAD DECLARING IT TO BE PRIVATE PROPERTY WAS IN VIOLATION OF MISSISSIPPI CODE ANNOTATED §65-7-7, AS AMENDED, THEREBY AWARDING APPELLEE A PERMANENT INJUNCTION ENJOINING DEFENDANT FROM OBSTRUCTING THE SUBJECT ROAD, CONSTRUCTING A GATE OR OTHER STRUCTURE WHICH CROSSES POWELL CHAPEL ROAD, AND POSTING ANY SIGN WHICH INDICATES THAT POWELL CHAPEL ROAD IS A PRIVATE DRIVE.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

On February 9, 2004, Marshall County, Mississippi, ("Appellee"), by and through its Board of Supervisors, Appellee herein, filed a Complaint for Permanent Injunctive Relief and Damages against Raymond H. Burdsal, ("Appellant"), asking the Chancery Court to declare Powell Chapel Road a public road, and to enjoin Appellant from obstructing said road. (R.1,13). Service of Process was completed, and Appellant filed an Answer and Counter-Complaint on April 7, 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, and for increasing the width of the road, and for the destruction of gate posts erected by Appellant. (R.2,17). On May 11, 2004, Appellee filed an Answer to Counter-Complaint denying the allegations of Appellant. (R.3,30). By Order of the trial court dated August 23, 2004, Counsel for Appellant was substituted in place of said William F. Schneller, Esq. (R.4,35). This matter was tried in the Chancery Courtroom at Holly Springs on April 18, 2005, and, at said trial, Appellant withdrew its Counter-Complaint against Appellee. (R.5, 57).

On April 19, 2005, the Trial Court made a ruling from the bench, which was memorialized in a Judgment dated May 7, 2005,

finding that Powell Chapel Road was ~~a public road~~, and enjoining Appellant from erecting any ~~obstruction across said road~~.

(R.5, 57). Appellant perfected a timely appeal, and the trial court's judgment was reversed and remanded by opinion dated September 5, 2006, identified as Court of Appeals Case Number 2005-CA-01085-COA. The mandate of the Court of Appeals issued on September 26, 2006. (R.6, 84). The opinion of the Court of Appeals found that the trial court made no reversible error in finding that Appellee had proved the elements of open, notorious and visible; under a claim of ownership; and peaceful. However, the Court of Appeals found that Appellee had not proven its case as to the elements of hostility, exclusivity, and continuous and uninterrupted use for at least ten years. Burdsal v. Marshall County, 2005-CA-01085-COA (Miss. App. 2006). ¶ 24.

A second trial of this matter was conducted on the remaining three issues beginning on the 5th day of November, 2007. After both sides had rested, the Trial Court made a ruling from the bench, which was memorialized in a judgment executed on November 20, 2007. (R.7, 126). On November 30, 2007, Appellant herein filed a Motion for Reconsideration which was denied by Order signed on the 24th day of January, 2008, and filed on February 15, 2008. (R.8, 137). It is from this Judgment and Order which Appellant is aggrieved. Appellant, through counsel of record, filed a Notice of Appeal on February 15, 2008. (R.9, 140).

II. STATEMENT OF THE FACTS.

Many of the facts in this matter were established in the first trial of this matter and the aforementioned opinion of this Court. Factual references to this Court's prior opinion are noted herein.

Appellee brought an action against Burdsal in the trial court seeking to have Powell Chapel Road declared a public road and to enjoin Burdsal from obstructing it. (R.1, 13). Powell Chapel Road ("the road") is a gravel road which has been in existence since the early 1900's. The road commences at the southern right of way line of U.S. Highway 4 and Marshall County. The road originally ran through property owned by Burdsal's grandparents. In 1950, Appellant's grandparents conveyed 70 acres to Burdsal's mother, who later conveyed it to her children. Burdsal now owns approximately 22 acres adjacent to the road. Mount Hope Cemetery, a private cemetery of the Colston Family (Burdsal's mother's family) is located near the southeastern end of the road on the property of Ronald Mitchell. Powell Chapel Church is located on the road as well.

Burdsal, ¶ 3.

According to the testimony elicited at the first and second trial of this matter, the Church members have traveled this road to access their Church, and have on occasion spoken to various members of the Board of Supervisors concerning placing gravel on muddy spots in the road. (R.1, Tr. 8-10). Ricky Lesure, a witness

for the Appellee, stated that he had only seen a road grader on the road once in the 1980's. (R.11, Tr.24-25). Lucy Boga, another witness for Appellee, testified that she had never seen anyone put gravel on the road. (R.12, Tr.42).

Testimony also revealed that the Church members access their Church by this road by walking, or riding, for the purpose of Church meetings or maintenance of the Church property. (R.13,7, Tr.7,29,40). Appellant testified that the use of the road by the Church members began by permission, which was given by his grandfather after another road to the Church washed out. (R.14, Tr.62) See also, Burdsal, ¶ 16, 21. Appellant also testified that the members of the Church who were present at this time are now deceased. (R.14, Tr.62). Appellant and Mitch Tomlinson testified that they had never heard of the road being called Powell Chapel Road until this proceeding was initiated. (R.15, Tr.59,76). Mr. Tomlinson confirmed that the road was originally a "pig trail", that gravel was thrown in some mudholes in the road, but did not know whether Appellee had done this or not. (R.16, Tr.75). Mr. Tomlinson also testified that the road in question does not connect with another public road, but rather with the property of a Donnie Mitchell, and that the only persons who used the road were the Church members and Appellant. (R.17, Tr.71). Based on his observations for many years preceding, Mr. Tomlinson testified that he considered the road a private road. (R.18, Tr.73).

In 1997, the Board installed a "E-911" sign at the entrance to the road, which was subsequently taken down by a Mr. McLatchey, a former Supervisor for Appellee. On June 12, 2000, the Board voted to hold a public hearing, scheduled for June 26, 2000, to discuss the adoption of the new road registry and map pursuant to Mississippi Code Annotated §65-7-1 (Revised 1998). The Board posted notice of the hearing in the *South Reporter* on June 25, 2000. The road registry and county road map, which included Powell Chapel Road, were then adopted by Order of the Board on June 26, 2000. Burdsal, ¶4.

In January, 2004, Burdsal erected a gate and sign across the entrance of the road at the right-of-way line of U. S. Highway 4. On January 16, 2004, Larry Hall, the Marshall County Road Administrator, requested that Burdsal remove the gate. Burdsal complied, but left the gate posts. The Board subsequently removed the posts. Burdsal, ¶5.

On February 9, 2004, the Board filed an action in the trial Court seeking to have the road declared public. Burdsal, ¶6. The entire road was graveled by Appellee in 2005, during the pendency of this matter. (R.19, Tr.70). Appellant testified that Donnie Mitchell built another road to the Church from Highway 4 before the second trial. (R.20, Tr.55, Ex. No.1).

Notably, in its ruling from the bench on November 15, 2007,

the Trial Court stated as follows:

What troubles me is that why Mr. Burdsal waited so late to make an open claim of it being a private road. (R.21, Tr. 82-83).

III. SUMMARY OF THE ARGUMENT.

A. Powell Chapel Road Is Not a Public Road.

The testimony elicited at the second trial of this matter revealed no additional significant facts that were not presented at the first trial. The evidence revealed that Appellee provided intermittent, and sporadic maintenance on the road, and that the Church members merely traveled the road to access their Church. Under the prior rulings of this Court, and established law, this does not present a factual basis to adjudge that the use of the road was by the general public, hostile, exclusive, or continuous and uninterrupted for a period of ten years. Further, it was established in the prior hearing that the use of the road began by permission, which would preclude prescriptive rights, and no substantive evidence was offered to the contrary. Appellee's case was based upon the assumption of the Church members that the road was a public road, not upon substantive factual evidence. Simply, the evidence was insufficient to prove that the road at issue is a public road.

ARGUMENT

I. STANDARD OF REVIEW.

A Chancellor's findings of fact will not be disturbed unless they are manifestly wrong or clearly erroneous or where it is determined that the Chancellor applied an erroneous legal standard. In Re Estate of Lloyd, 868 So. 2d 363, 367 (Miss. 2004).

II. THE TRIAL COURT'S FINDINGS OF FACT WERE MANIFESTLY WRONG OR CLEARLY ERRONEOUS WHEN IT DETERMINED THAT POWELL CHAPEL ROAD IS A PUBLIC ROAD; FURTHER, THE COURT APPLIED AN ERRONEOUS LEGAL STANDARD.

A. The Law of the Case Controls.

The law of the case established on the first appeal will normally control on later trials and appeals of the same case involving the same issues and facts. The trial court has the power to refuse to apply the law of the case if it is found to have been erroneously established on the first appeal, but the trial court should not undertake to do so except in rare and exceptional cases where the first decision was probably and obviously wrong and results in grave injustice. See, Holcomb v. McClure, 64 So.2d 689, 691 (Miss. 1953). See also, Leatherwood v. State, 539 So.2d 1378 ("it is axiomatic that a decision on a question of law decided on a former appeal becomes the law of the case, whether the case be civil or criminal, and will be heard on subsequent trials and appeals of the same case involving the same issues and facts"). See also, 5 Am.Jur. 2d §744, Appeal and

Error(1962)).

B. The Requirement of Hostility.

Hostility means an assertion of title superior to the potential competing claims of anyone else; it can be rebutted by showing that the actual record title owner gave permission to begin the possession. Lynn v. Soterra, Inc., B.P., 802 So.2d 162, 166 (Miss. App. 2001) (citing Thornhill v. Caroline Hunt Trust Estate, 594 So.2d 1150, 1153 (Miss. 1992)). An adverse occupancy must be hostile from the inception of the period claimed. Eddy v. Clayton, 44 So.2d 395, 397 (Miss. 1950). Further, the prior opinion of this Court stated that 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. Burdsal, at ¶ 15.

Use that commences with the permission of the record title holder is never sufficient to established adverse possession, and ripen into title in the adverse possessor, no matter how long continued, until a positive assertion of right hostile to the record title holder has been made known to him. Johnson v. Black, 469 So.2d 88, 91 (Miss. 1985) (citing Hewlett v. Henderson, 431 So.2d 449, 451 (Miss. 1983). Burdsal, ¶ 15. (Citing Moran v. Sims, 873 So.2d 1067, 1069 (Miss. App. 2004)). The testimony revealed at the second trial of this matter indicates that the Church members merely used the road to travel back and forth to

their Church. No work was performed on the road by the Church members, nor was any other act hostile to Mr. Burdsal's interest brought out in the testimony. Further, the Church did not inform Burdsal that it considered the road to be a public road in the meeting that took place between them in 2003 or 2004, which indicates doubt as to the nature of the road. Thus, without even considering whether permission was granted to the Church members to use the road, the claim of hostility cannot be met with the testimony presented.

Also as to the requirement of hostility, this Court stated as follows in its prior opinion:

Burdsal's testimony as to granting permission is corroborated 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, ¶ 16.

Later in the opinion, this Court stated as follows, to-wit:

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 granted by him. Burdsal, ¶ 21.

On cross examination, Appellant testified that he had heard his grandfather telling other members of the community that he had given the Church members to use the road because a prior road to the Church had washed out. No testimony was presented at trial to rebut the fact that the road was being used by permission, other than that the witnesses did not know that the use of the road had begun by permission. Although the Trial Court recognized that the use of the road began by permission, the lack of evidence

rebutting this fact was not addressed by the Trial Court. Appellant explained the witnesses lack of knowledge by testifying that many of the Church members that originally had been granted permission were now deceased. Based on this Court's prior opinion, and subsequent testimony, permissive use of the road was established, but no testimony was elicited that a positive assertion of right hostile to Mr. Burdsal had ever been made by the Church members, nor was testimony presented that the Church members made known their claim that the road was public. Thus, the Court erred in finding that the road had become a public road by prescription.

As to Appellee, or someone else, placing gravel on the muddy spots in the road, this act is neither hostile to Appellant, nor was it made known to him until 2005 when the entire road was graveled. The testimony revealed that only "spot" maintenance was done on the road by the Appellee, which consisted of placing gravel in some muddy spots in the road. The testimony revealed that this spot maintenance allowed the Church members to more easily access their Church. There was no testimony presented that this was a hostile act; in other words, an act of the Appellee establishing a claim to ownership of the road against Appellant, but rather Appellee's officials assisting members of a Church. Further, even assuming, *arguendo*, that placing gravel or spot maintenance on the road was a hostile act by the Appellee, this act was never made known to Appellant, as he testified that he

III. BECAUSE THE TRIAL COURT'S FINDINGS WERE MANIFESTLY WRONG OR CLEARLY ERRONEOUS WHEN IT DETERMINED THAT POWELL CHAPEL ROAD IS A PUBLIC ROAD; THE TRIAL COURT ERRED IN FINDING THAT APPELLANT HAD VIOLATED MISSISSIPPI CODE ANNOTATED §65-7-7, AS AMENDED, AND IN ENJOINING APPELLANT FROM OBSTRUCTING THE ROAD.

Mississippi Code Annotated §65-7-7 (1972) reads, in pertinent part, as follows:

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 same, to be recovered before any justice of the peace of the county, in the name of the county.

Very simply, as argued before, there was insufficient evidence presented by Appellee to meet its burden of proof that Powell Chapel Road is a public road. Since it could not be a public road, it retains its character as a private road. Thus, when Mr. Burdsal erected a gate and sign across the entrance of the road at the right of way line of US Highway 4 in January, 2004, he was lawfully entitled so to do. Because Powell Chapel Road is a private road, the Court erred in adjudicating that Appellant had violated the above-referenced statute, and also erred in awarding Appellee a permanent injunction against Burdsal from obstructing this road.

CONCLUSION

The Trial Court's determination that Powell Chapel Road is a public road is manifestly wrong or clearly erroneous. The evidence showed that Appellee merely provided only spot or intermittent maintenance on the road; that the church members used the road merely to access their church facilities, and that this was by permission. Importantly, Appellee never presented evidence that any of the acts which occurred on the road were hostile, put Appellant on notice that the public claimed the road, or that any claim was continuously and uninterruptedly made for the requisite ten year period. In fact, the substance of the testimony presented by Appellant reveals that the Church members merely assumed that the road was public. Without more, Appellee cannot establish that this road is a public road, and the Court's ruling that this road is a public road is clearly erroneous and contrary to the law of this state.

Further, since the Court's ruling that Powell Chapel Road is a public road is in error, then the Court's ruling that the actions of Appellant in placing a gate across the road, in violation of Mississippi Code Annotated §65-7-7, and issuing an injunction against Appellant, was also in error.

Based on the foregoing, Appellant would respectfully submit there was insufficient admissible evidence to establish Powell

CERTIFICATE OF SERVICE

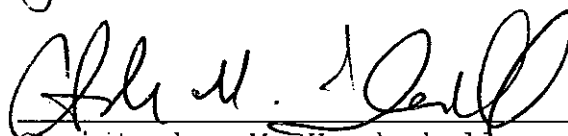
I, Christopher M. Howdeshell, Attorney for Appellant, do hereby certify that I have this date forwarded via United States mail, postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellant** to:

Honorable Glenn Alderson
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This, the 6th day of June, 2008.



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