

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBBIE R. EUBANKS BURNSED

APPELLANT

VERSUS

CAUSE NUMBER: 2009-CA-00051

BILL A. MERRITT

APPELLEES

MARY JACQUILYN MERRITT

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) of the Mississippi Supreme Court Rules, 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 this Court may evaluate possible disqualification or recusal.

1. Robbie A. Eubanks Burnsed, Appellant.
2. Bill A. Merritt, Appellee.
3. Mary Jacquelyn Merritt, Appellee's wife.
4. Darryl A. Hurt, Jr., Attorney for the Appellant
5. Darryl A. Hurt, Sr., Member of the Firm of the Attorney for the Appellant at the time of the filing of the cause of action.
6. Gerald A. Dickerson, Attorney for Appellee
7. Martin Sibe, Member of the Firm of the Attorney for the Appellee at the time of the filing of the cause of action.
8. Honorable Dale Harkey, Circuit Court Judge



Darryl A. Hurt, Jr.,
Attorney for Appellant

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STATEMENT OF ISSUES

1.

THE COURT ABUSED ITS DISCRETION IN OVERRULING THE MOTION FOR CONTINUANCE OF THE APPELLANT, ROBBIE R. EUBANKS BURNSED, AND ENTERING A JUDGMENT IN THIS CAUSE GRANTING THE APPELLEES A JUDGMENT FOR PRIVATE WAY AND EASEMENT.

2.

THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING A JUDGMENT FOR PRIVATE WAY AND EASEMENT TRAVERSING THE LAND OF THE APPELLANT, ROBBIE R. EUBANKS BURNSED, WITHOUT CONDUCTING AN EVIDENTIARY HEARING REGARDING THE NECESSITY AND LOCATION OF THE EASEMENT WHEN SAME WAS NOT SUPPORTED BY LAW OR EVIDENCE.

and easement in the same location as previously litigated.

After the filing of the pleadings of the parties, and several trial settings, the case was ultimately set for trial on December 4, 2008. Mrs. Burnsed contracted pneumonia and filed her Motion for Continuance accompanied by her physician's affidavit. The Motion for Continuance was overruled and a judgment for private way and easement was granted in favor of the Merritts by the trial judge.

Mrs. Burnsed would show that the Court conducted no evidentiary hearing to establish the location or necessity of the private way and easement sought by the Merritts. Further, the record is silent as to whether the Merritts were entitled to the private way and easement at all. Instead, the judgment was entered as presented by the Merritts.

As a result, Mrs. Burnsed seeks a reversal of the judgment of the Circuit Court of George County, Mississippi. Mrs. Burnsed further contends that the overruling of her Motion of Continuance and entry of judgment for private way and easement constitutes an abuse of discretion by the trial judge and calls for reversal.

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SUMMARY OF ARGUMENT

The Appellant, Robbie R. Eubanks Burnsed, contends that the decision of the trial judge in denying her Motion for Continuance constituted an abuse of discretion. Mrs. Burnsed argues that her Motion for Continuance was properly made, timely filed, and was properly supported by a physician's affidavit. The affidavit attached her Motion for Continuance was from her treating physician, Robert Burns, M.D. and reflected that Mrs. Burnsed was suffering from pneumonia.

Mrs. Burnsed further contends that it is noteworthy that no counter-affidavits were filed, nor was it alleged that she was not ill at the hearing on the Motion for Continuance on December 4, 2008. Mrs. Burnsed postulates that it was impossible for her to attend the trial while suffering from pneumonia and being confined to her home.

Mrs. Burnsed further contends that her Motion for Continuance revealed that her attorney was required to be in trial in the Chancery Court of Greene County, Mississippi, on the same date, December 4, 2008. Mrs. Burnsed's Motion for Continuance reflected that her attorney's prior trial setting was established on September 5, 2008, far in advance of the Notice of Setting in the instant case for December 4, 2008.

The Trial Court simply overruled the Appellant's Motion for Continuance and entered the judgment for private way and easement.

Mrs. Burnsed argues that this dispute between the parties has a life span of nearly ten years, originally commencing with the denial of a private way for the Merritts by Order of the George County Board of Supervisors on August 7, 2000. The dispute arose as a result of a seventy-five foot strip of real property existing between the land of the Mrs. Burnsed and the Merritts. The cause of action was litigated in the Chancery Court of George County, Mississippi, resulting in a Judgment from the Chancellor, which equally divided the seventy-five foot strip in question. The decision was appealed to the Court of Appeals of the State of Mississippi, and the decision of the Chancellor was reversed and remanded. The case was then dismissed by the Chancellor, and the Merritts filed the instant cause in the Circuit Court of George County, Mississippi. Mrs. Burnsed would show that all of these matters were contained in her Motion to Transfer the cause of action to the Chancery Court of George County, Mississippi filed in this cause.

Mrs. Burnsed would show that the Merritts commenced a separate cause of action, in the Circuit Court of George County, Mississippi, in an effort to achieve the relief which they were originally denied by the George County Board of Supervisors in 1999.

Mrs. Burnsed would show that the Judgment appealed from in the instant case, was entered without an evidentiary hearing, without trial, and that she was thus not afforded her day in court to establish these facts and present evidence in opposition to the Merritts' claim that they were entitled to a private way and easement traversing her property.

Mrs. Burnsed argues that the private way and easement which has now been granted to the Merritts by the Circuit Court of George County, Mississippi, is without legal authority, is not supported by credible evidence, and now works a severe injustice upon her.

Mrs. Burnsed further shows that the entry of the judgment for private way and easement,

against her in the face of her severe illness and properly filed Motion for Continuance, constitutes an abuse of discretion by the trial judge and demands reversal.

Mrs. Burnsed would show that the transcript in this cause consists of slightly more than three pages, and is void of any evidence or testimony presented to the trial judge constituting the location or necessity of the Merritts' private way and easement. Mrs. Burnsed is now faced with a permanent easement traversing her land which was granted without a trial, clearly amounting to an abuse of discretion and obvious need for reversal.

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ARGUMENT

The Appellant, Robbie R. Eubanks Burnsed, argues that the trial court's decision in overruling her Motion for Continuance and entry of a Private Way and Easement foists upon her a perpetual easement traversing her land and the decision of the lower court should be reversed. Specifically, Mrs. Burnsed contends that the decision of the trial judge amounts to an abuse of discretion, is wholly without legal authority, and has completely deprived her of her right to trial and her day in court.

Mrs. Burnsed would show that the Circuit Court of George County, Mississippi, entered its Judgment granting private way and easement on July 31, 2007. (RE 4) The Judgment purportedly was in response to Mr. Merritt's Motion for Judgment on the pleadings. The Judgment not only granted to the Plaintiffs an easement, but also assessed damages in the sum of \$960.00. (RE 4) Mrs. Burnsed argues that it is noteworthy that the Court conducted no evidentiary hearing prior to the entry of the judgment on July 31, 2007.

Mrs. Burnsed shows that she filed her Motion to Set Aside the Judgment of July 31, 2007, on August 30, 2007. (RE 5) Mrs. Burnsed argued that the parties have been involved in long-standing litigation in the Chancery Court of George County, Mississippi, and that she originally filed her Motion to Transfer the Mr. Merritts' cause of action to the Chancery Court of George County, Mississippi. (RE 2)

Mrs. Burnsed's attorney, and the attorney for the Merritts entered an agreed order on September 20, 2007 setting the case for trial for October 23, 2007. (RE 6) The case was later set for trial April 3, 2008.

Mrs. Burnsed shows that the case was in fact set for trial on April 3, 2008. However, Mrs. Burnsed was forced to file a Motion for Continuance due to a significant health problem being experienced by her husband, John Burnsed. (RE 8) As a result, the cause was reset for trial to October 20, 2008. Mrs. Burnsed was forced to file a Motion for Continuance of that cause due to her requirement to attend continuing education as a result of her employment as a registered nurse at Singing River Hospital in Pascagoula, Mississippi. (RE 10)

Mrs. Burnsed would show that the case was subsequently set for trial on December 4, 2008. On December 2, 2008, Mrs. Burnsed properly filed her Motion for Continuance alleging that she was suffering from pneumonia. (RE 11) Mrs. Burnsed's Motion for Continuance was accompanied by an affidavit from her physician, Robert Burns, M.D., establishing her significant medical condition. (RE 11) Mrs. Burnsed's Motion for Continuance also alleged that her attorney was required to appear in the Chancery Court of Greene County, Mississippi, on December 4, 2008, in Marcus G. Freeman versus Pamela F. Newell Daughdrill Hinton and Husband Timothy Hinton, cause number 2008-141NH, which had been scheduled for trial on September 5, 2008.

Despite the proper filing of the Motion for Continuance, the trial judge entered his Order on December 4, 2008, overruling Mrs. Burnsed's Motion for Continuance, overruling her Motion to Set Aside Final Judgment, and granted the Merritts' Private Way and Easement traversing Mrs. Burnsed's property. (RE 12)

Mrs. Burnsed is cognizant that the granting of a continuance is vested in the sound discretion of the trial court. Unless manifest injustice appears to result from the denial of a continuance, the Supreme Court should not reverse. Hatcher v Fleemen, 617 So.2d 634 (Miss. 1993) (emphasis added)

However, Mrs. Burnsed argues that a greater injustice could hardly have occurred than the facts the instant case will reveal. Even a cursory review of the clerk's papers and the three (3) page transcript in this cause reflect that no hearing was conducted on any issue in this cause, with the exception of the hearing on the Motion of Continuance on December 4, 2008. The record is completely silent as to the testimony of any witness, introduction of any exhibit or evidence whatsoever in this cause.

Mrs. Burnsed shows that her Motion to Set Aside Judgment and Motion to Transfer amply reflect that this cause has a life of almost ten years. (RE 2, 5) As a result, it can hardly be argued that Mrs. Burnsed was seeking to avoid trial. To the contrary, the Chancery Court action involving the same litigants and same issues resulted in numerous days of trial. The court date of December 4, 2008, was simply the culmination of injustice worked upon Mrs. Burnsed. Clearly, a more draconian result could not have occurred with the granting of a perpetual easement on her property.

Mrs. Burnsed would show that the trial judge clearly abused his discretion in the denial of her Motion for Continuance. Obviously, a hearing would have amply reflected that the Judgment entered on July 31, 2007, was not proper and should have been set aside. The Mississippi Supreme Court in Bay Springs Forrest Products v Wade, 435 So.2d 690 (Miss. 1983) held:

"The grant or denial of a continuance vests within the sound discretion of the Trial Court, and the Appellant Court will not reverse unless convinced that the Trial Court abused its discretion and unless it is satisfied that an injustice has resulted therefrom. (emphasis added)

It is clear that this case was resolved with no testimony of any expert witness, lay witness, or party. Further, there was no introduction of any exhibits in support of the Plaintiffs' complaint. In short, Mrs. Burnsed was denied her day in Court and her opportunity to be heard by the trial judge, all of which

resulted in an extreme injustice to her. A simple review of Mrs. Burnsed's pleadings will reveal that she has expended an extreme amount of effort in protecting her real estate through long-standing litigation in the Chancery Court of George County, Mississippi, and the Appellate process over a period of ten years.

Mrs. Burnsed postulates that it is quiet shocking that after a ten year dispute in three Courts, this case was resolved without the taking of any testimony from any witness. Clearly, if this does not amount to an injustice, one does not exist in the law.

Mrs. Burnsed contends that this case is easily distinguishable from other cases in which a simple Motion for Continuance may be denied. To be sure, this dispute commenced in between the parties in 1999, and should not have been resolved in summary fashion. It is evident that this case involves a substantial question of law and fact regarding the granting of a Private Way and Easement. These facts should be considered in a review of this cause. Particular facts control in whether the trial court abused its discretion in granting or refusing a continuance. Guiseppe v Cozzani, 159 So.2d 278 (Miss. 1964). Obviously, the trial judge failed to consider the quantum of evidence and facts surrounding the dispute between the parties in its limited review and consideration of this matter.

To add insult to injury, the Motion for Continuance of Mrs. Burnsed filed on December 2, 2008, alleged that her attorney experienced a conflict in schedule. (RE 11) Specifically, Mrs. Burnsed's attorney was required to appear in the Chancery Court of Greene County, Mississippi, on December 4, 2008. Absent unusual circumstances, a bona fide trial setting in one court will entitle an attorney to a continuance of another case which may be subsequently called for setting in other courts. Leonard v Leonard, 486 So.2d 1240 (Miss. 1986) These facts were properly reflected in Mrs. Burnsed's Motion for Continuance. (RE 11)

Mrs. Burnsed argues that it is chilling that the trial court entered its Judgment granting a perpetual easement traversing her land without first determining whether Mr. Merritt was entitled to a private way and easement at all. Obviously, the necessity of the easement and location of the easement could only have been determined by an evidentiary hearing. The trial court abused its discretion in granting a Judgment awarding the Merritts, a private way and easement traversing her land when same was not supported by law or evidence.

It is important to consider that the Plaintiffs' complaint sounds in private way. (RE 1) However, the judgment granted a private way and easement (emphasis added). It is clear that the judgment expands the statutory authority granted by Mississippi Code Annotated 65-7-201 as amended, to-wit:

“When any person shall desire to have a private road laid out through the land of another, when necessary for ingress and egress, he shall apply by petition, stating the facts and reasons, to the special court of eminent domain created under Section 11-27-3 of the county where the land or part of it is located, and the case shall proceed as nearly as possible as provided in Title 11, Chapter 27 for the condemnation of private property for public use. The court sitting without a jury shall determine the reasonableness of the application. The owner of the property shall be a necessary party to the proceedings. If the court finds favor of the petitioner, all damages that the jury determines the landowner should be compensated for shall be assessed against and shall be paid by the person applying for the private road, and he shall pay all the costs and expenses incurred in the proceedings.”

Mrs. Burnsed argues that the applicable statute is silent regarding the granting of an “Private Way and Easement”. Clearly, the lower court awarded the Merritts what the statute does not provide.

The court in this cause entered its Judgment granting a private way and easement on July 31, 2007. (RE 4) The trial court simply awarded Mr. Merritt an easement traversing the land of Mrs. Burnsed without anything other than the cold pleadings. The Mississippi Supreme Court, has long ruled that pleading, themselves, do not constitute evidence. Pleadings were not evidence and attorneys were properly not permitted to read from pleadings to the jury. Scott v K.B. Photo Services, Inc., 260 So.2d.

642 (Miss. 1972) Mrs. Burnsed would show that the taking of testimony is clearly required by Mississippi Law.

In all trials the testimony of witnesses shall be taken orally in open Court, unless otherwise provided by these rules or the Mississippi Rules of Evidence.

When a motion is based on facts not appearing of record, the Court may hear the matter on affidavits presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or on depositions. (M.R.C.P. 43)

An easement may be acquired by express grant, implied grant, or prescription. McDonald v Board of Mississippi Levy Commissioner, 449 F.Supp. 449 (Miss. 1986) The Judgment granting a private way and easement in the case at bar, is silent as to the necessity of a private way. Easements or rights-of-way by necessity exist only as long as the necessity exists. An easement of necessity terminates when another access to landlocked property becomes available. Taylor v Hayes, 551 So.2d 906 (Miss. 1989) An easement by necessity arose by implied grant when part of a commonly owned tract of land was severed in such a way that either portion had been rendered inaccessible except by passing over a portion or by trespassing on lands of another. Broadhead v Tarpening, 611 So. 2d 949 (Miss. 1992) Assuming, arguendo, that Mr. Merritt was entitled to a "way of necessity", it appears that the trial court should have required evidence to establish whether a necessity exists. It is also noteworthy that the record is silent as to whether the Merritts have another means of access, for same was surely not established at a trial or hearing. This requiring may not be overlooked by the trial court. A way of necessity does not arise by implication if a complainant has another mode of access to his property, however inconvenient either by another way over his own land or by right of way over land of another. Lancaster v. City of Columbus, 333 F. Supp. 1012 (Miss. 1972) The standard required in the establishing a private way is clearly the same as imposed on a Chancellor in establishing an easement. The evidence supported the Chancellor's rejection of an established road as a location for an easement by necessity. The Chancellor examined the

dominant and servient easements and found that the location of an established road would unnecessarily interfere with the business of the owner of the servient tenement and established a way that was deemed most suitable for all parties. Broadhead v Terpening, 611 So. 2d 949 (Miss. 1992)

The lack of another means of access is sine qua non to the granting of a private way.

The Mississippi Supreme Court set aside an Order granting a private way where it was evident that the property owner who sought the private way had an alternate means of access to his property. Hooks v George County, 748 So.2d 678 (Miss. 1999) The Judgment in the case at bar does not establish that the private way was due to landlocked property or whether the Merritts had an alternate means of access.

Mississippi Law clearly requires the trial court to establish “reasonable necessity” before granting a private way.

“Landowners who sought a private way across neighboring land met the required burden of proof that a private way was “reasonable necessary” for ingress and egress to their property where their property was bounded on three sides by water and on the fourth side by neighboring land. The landowners would not be required to explore the option of building a bridge to their land due to the unreasonableness inherent in such an undertaking; the landowners’ burden of proof concerning necessity was met by showing that they had no other access to their property.” Alpaugh v Moore, 588 So. 2d 921 (Miss. 1990)

Mississippi Law clearly requires the issue of reasonableness to be adjudicated prior to the granting of a private way. In interrupting Mississippi Code Annotated Section 65-7-201, as amended, The Mississippi Supreme Court held that “It is enough that the road be reasonably and absolutely necessary in order that the Petitioner afforded a means of ingress and egress over the lands of another.” Reid v Horne, 209 So. 2d 780 (Miss. 1968) The Petitioner for the establishment of a private way must allege and show that he has been unable to obtain a reasonable right of way from all of the surrounding property owners and must show a real necessity for such a right of way, as distinguished from a means of mere convenience. Rotenberry v Renfro, 214 So. 2d 276 (Miss. 1968)

Clearly, if trial court had allowed Mrs. Burnsed her opportunity for hearing, it could have been explained through the testimony of witnesses and introduction of evidence that the Merritts were not entitled to a Judgment for private way and easement. Sadly, Mrs. Burnsed was not afforded her opportunity for trial.

The trial court's entry of Judgment for private way and easement amounted to an abuse of discretion and cries for reversal. That the trial court abused its discretion in granting a Judgment awarding the Merritts a private way and easement traversing land of the Appellee, when same was not supported by law or evidence.

Mrs. Burnsed would show that the transcript on December 4, 2008, consists of a total of just over 3 pages. (RE 13) Mrs. Burnsed hastens to add that the transcript does not amount to trial testimony, but only argument of counsel. No hearing of any kind was conducted regarding the necessity of the Merritts' private way, or whether their property was landlocked in any fashion. Further, no trial was conducted on the issue of damages. The trial Court did not have the benefit of testimony of witnesses, introduction of evidence, testimony of expert witnesses, or a trial of any kind prior to his entry of a Judgment for private way and easement.

Mrs. Burnsed would show that it is noteworthy that the Merritts' Judgment appealed from does not purport to be a default judgment, nor summary judgment. Instead, the Merritts were simply allowed to file their pleadings, file a motion on for judgment on the pleadings, and were thus granted a perpetual easement traversing the land of Mrs. Burnsed.

Mrs. Burnsed postulates that a clear reading of the limited record in this case will amply reveal that the trial judge abused his discretion, failed to follow applicable Mississippi Law, and the judgment of the court should be reversed.

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CONCLUSION

Robbie R. Eubanks Burnsed contends that the trial judge below committed manifest error and abused his discretion in overruling her properly filed Motion for Continuance and entering a Judgment granting the Merritts, a Judgment for Private Way and Easement traversing her property.

A review of the clerk's papers and three page transcript clearly reflects that this decision was made without the benefit of a trial. Instead, the pleadings of the Merritts, were simply accepted as true, and Judgment was granted.

To be sure, Mrs. Burnsed was deprived of her right to trial and her day in court. Mrs. Burnsed properly filed her Motion for Continuance and affidavit from her physician which reflected that she was suffering from pneumonia on December 4, 2008. Her Motion for Continuance further reflected that her attorney was required to appear in trial in another county on December 4, 2008. Nonetheless, the judge arbitrarily overruled her Motion for Continuance and entered a judgment for private way and easement in favor of Mr. Merritt.

It is elemental that Mr. Merritt would carry the burden of proof in establishing the necessity and location of his private way. However, the trial judge neglected to grant your Mrs. Burnsed the opportunity for trial which would have forced the Merritts to prove that they were in fact entitled to a

private way and easement. Evidence and testimony would have been solicited to establish this issue.

Mrs. Burnsed was denied her opportunity for trial by the overruling of her properly filed Motion for Continuance, and a perpetual easement now encumbers Mrs. Burnsed's property.

The Judge is obviously manifestly in error, and the Judgment of the Circuit Court of George County, Mississippi, should be reversed and remanded in order to accomplish justice.

RESPECTFULLY SUBMITTED

ROBBIE R. EUBANKS BURNSSED,
APPELLANT

BY:


DARRYL A. HURT, JR.

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CERTIFICATE OF SERVICE

I, DARRYL A. HURT, JR., counsel for the Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief for Appellant to the Honorable Gerald A. Dickerson, attorney for Appellees, at his address of 346 Cox-Courthouse Square, Lucedale, Mississippi 39452, and the trial Judge, Honorable Dale Harkey, at P.O. Box 998, Pascagoula, Mississippi 39568-0998.

Dated this the 12 day of June, A.D., 2009


DARRYL A. HURT, JR.

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