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

NO. 2009-CA-01842

D.L. HARKNESS and MARY P. HARKNESS, INDIVIDUALLY and THE D.L. AND MARY P. HARKNESS FAMILY TRUST

APPELLANTS/ PLAINTIFFS

vs.

BUTTERWORTH HUNTING CLUB, INC., and HAROLD D. HAMMETT, RICHARD D. HAMMETT, and ROBERT F. HAMMETT, INDIVIDUALLY

APPELLEES/ DEFENDANTS

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE CHANCERY COURT OF HOLMES COUNTY, MISSISSIPPI; ACTION NUMBER 07-0171

ORAL ARGUMENT REQUESTED

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SUMMARY OF REPLY

The trial court's ruling, granting appellee Butterworth Hunting Club, Inc. ("BHC") an easement by necessity, is based on a manifestly wrong factual finding. BHC's land did not become landlocked and inaccessible as a result of severance from its grantor's land. Rather, the land from which BHC's land was severed was, itself, landlocked. This erroneous factual finding merits reversal of the trial court's ruling.

Appellees failed to prove that an easement across Appellants' land is necessary . (Appellees are hereafter collectively referred to as "BHC"; Appellants are hereafter collectively referred to as "Harkness.") BHC's arguments regarding necessity and the burden on it to use alternative access are not supported by the record, and the trial court's findings on necessity and burden are manifestly wrong.

Additionally, BHC presented no evidence from which the trial court could ascertain when BHC's land became landlocked. BHC's incomplete and flawed effort to show when its land became landlocked is made for the first time on appeal and should therefore be rejected.

Finally, BHC's other arguments do not support the trial court's grant of an easement by necessity.

ARGUMENT AND AUTHORITIES

I. BHC FAILED TO DEMONSTRATE THAT THEIR LAND BECAME INACCESSIBLE AS A RESULT OF BEING SEVERED FROM A LARGER TRACT OF LAND.

The trial court's finding that BHC's land became landlocked and inaccessible when it was severed from Holmes and Carroll Land Company's land is manifestly wrong.[1] It is this erroneous factual finding that forms the basis for the trial court's grant of an easement by necessity to BHC. BHC witnesses admitted at trial that BHC's land was severed from Holmes and Carroll Land Company's land which was, itself, already landlocked. (Tr. at 76-77, 79-80, 90; R.E. at 37-38, 40-41, 51).[2] Thus, BHC's land was not rendered inaccessible by virtue severance from Holmes and Carroll Land Company's land.

Butterworth Hunting Club, Inc. ("BHC") argues at page 14 of its brief that the Court's holding Sturdivant v. Todd, 956 So.2d 977 (Miss. App. 2007) somehow modifies or overrules the holding in Wilson v. McElyea, 815 So.2d 462, 463 (Miss. App. 2002). However, the portion of Sturdivant that states that "[a]n easement by necessity will be granted when the land is not necessarily landlocked but would be 'highly convenient or essential to the full enjoyment of the land'" in no way modifies or overrules the rule from Wilson that "[a]n easement by necessity

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[1] The trial court held:

> In the case at bar, when the Holmes and Carroll Land Company, Inc. conveyed the property to [BHC], the land was rendered inaccessible, except by passing over the portion of the land that was titled to the Plaintiff or by trespassing on the land of strangers. (R. at 363; R.E. at 8).

[2] The following citation format is used throughout this Reply Brief: Citations to the Record (R. at __); citations to Appellants' Record Excerpts (R.E. at __); citations to trial transcript (Tr. at __); citations to Appellants'/Plaintiffs' trial exhibits (Tr. Ex. __).

may properly arise only when a parcel of property becomes landlocked in the process of being severed from a larger tract." (Emphasis added). The quoted portion of Sturdivant relates to the issue of necessity, whereas the quoted portion of Wilson relates to when an easement by necessity arises.

BHC admits that its land was landlocked when it purchased it, and the record is clear on this point. (Tr. at 76-77, 79-80, 90; R.E. at 37-38, 40-41, 51). Thus, BHC's land did not become inaccessible as a result of being severed from a larger tract of land, which, as the Court in Wilson held, is the "only" way an easement by necessity "may properly arise." 815 So.2d at 463.

II. BHC FAILED TO PROVE NECESSITY.

On pages 15-17 of its brief, BHC seeks to rewrite the record by arguing that alternative access would require it to build a bridge and that "[t]he cost would be outrageous." However, there is no evidence in the record that proves BHC would have to construct a bridge to use alternative access or of the cost of making alternative access available. With respect to the issue of the cost of using alternative access, the Court in Burns v. Haynes, 913 So.2d 424, 430-31 (Miss. App. 2005) held:

> In determining what is reasonably necessary, the court looks to "whether an alternative would involve disproportionate expense and inconvenience." "Such a situation would arise when the expense of making the means of access available would exceed the entire value of the property to which access was sought."

(Citations omitted).

The party claiming an easement by necessity in Evanna Plantation, Inc. v. Thomas, 999 So.2d 442 (Miss. App. 2009) was denied an easement because it failed to present proof of the value of the land to which access was sought or of the cost of accessing the land through available alternative access. Id. at 446-47. In this case, though it was its burden to do so, BHC

presented no evidence at trial of the value of its land or the cost of using available alternative access to BHC's land via Sixteenth Section land. BHC cannot now, and for the first time on appeal, allege that a bridge would be necessary to use alternative access and characterize the cost as "outrageous" as substitutes for the evidence it failed to present at trial.[3]

III. BHC FAILED TO PROVE WHEN ITS LAND BECAME LANDLOCKED.

On appeal and for the first time since this case was filed, BHC attempts to prove when the parcel from which its land was severed became landlocked. In a confusing list of conveyances, BHC attempts to show on pages 21-22 of its brief that St. Regis' land -- which, at one time, encompassed BHC's land and Harkness's land -- was landlocked. However, this argument fails for at least four reasons.

First, the sequence of conveyances at pages 21-22 of BHC's brief merely traces ownership of BHC's and Harkness's respective parcels back in time to common ownership by St. Regis. The conveyances listed by BHC do not prove St. Regis' land was landlocked and if so, when it became landlocked. Instead, BHC's argument assumes that St. Regis' land was landlocked. However, assumptions are not proof. To prove St. Regis' land was landlocked, BHC would have to present land deeds to all the land surrounding St. Regis' land. There are no such documents or evidence in the record. St. Regis could have owned surrounding land that had

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[3] The trial court held that BHC would have to build a bridge or "deep culvert" to use alternative access. (R. at 363; R.E. at 8). However, the words "bridge" and "culvert" were not uttered at trial by any witness. The trial court reached this finding based on the bare, unsupported testimony of one witness. BHC could have put an engineer and a contractor on the witness stand to establish the means and cost of alternative access. BHC could further have established the value of its land through the testimony of an appraiser. Then, and only then, could the trial court have weighed the cost of making alternative access available against the value of BHC's land and ruled upon the reasonableness of using alternative, as Evanna Plantation requires.

public road frontage, however, from the record before the trial court and this Court, that determination cannot be made.

Second, BHC's arguments regarding when St. Regis' land became landlocked do not relate to an easement across the Road[4] on Harkness's land being used by BHC, but rather to a hypothetical easement across the Northern portion of Harkness's land. The hypothetical easement BHC claims it has was not before the trial court and suffers from the same fatal flaw discussed in the first point above.

Third, proof of when its land became landlocked is an absolute requirement to obtain a judicially ordered easement by necessity. In Leaf River Forest Prods. v. Rowell, 819 So. 2d 1281, 1284 (Miss. App. 2002) , the Court held:

> Finally, the claimant must demonstrate that the implicit right of way arose at the time of the initial severance from the common owner. See Wills v. Reid, 86 Miss. 446, 453, 38 So. 793, 795 (1905) (stating that an easement by necessity will not exist unless it is demonstrated that the necessity arose the exact moment of the conveyance or severance from the common tract).

Id. at 1284-85 (emphasis added). The Court further held:

> [I]f we were to afford Rowell an easement by necessity through Leaf River's land, without requiring Rowell to prove when the land actually became landlocked, we would undermine the purposes of the easement and infringe upon the rights of third party landowners.

Id. at 1285.

Finally, the Court stated:

> Rowell presents no evidence that the severance from [the common grantor's tract] caused his property to become landlocked. In effect, Rowell is unable to show that

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[4] BHC accesses its land in Section 8 via a road that begins on Hebron Road (a public road), crosses the Sixteenth Section land it leases, traverses the Southwest corner of Harkness' land in Section 9 and enters BHC's land in Section 8. (Tr. Ex. P-6). It is this road that is in dispute. This road is referred to herein as the "Road."

> the severance of [his predecessor-in-title's tract] of land from [the common grantor's] property caused [the common grantor's] property to become a servient estate. Accordingly, we hold that the trial court erred, as a matter of law, when it established an easement by necessity, including the rights to a utility easement, through Leaf River's land in favor of Rowell.

Id.

Like the party seeking an easement by necessity in Rowell, BHC failed to prove when its land became landlocked.[5] Thus, BHC failed to meet its burden of proof on its claim of an easement by necessity, and the trial court's Opinion and Order granting BHC an easement by necessity across Harkness's land is not supported by the evidence and is therefore clearly erroneous.

Finally, having failed to present evidence on an essential element of its claim for an easement by necessity to the trial court, BHC's efforts to do so for the first time on appeal should be rejected. It is a fundamental rule that Mississippi appellate courts do not consider arguments not raised in the trial court. See, e.g., Wilburn v. Wilburn, 991 So. 2d 1185, 1192 (Miss. 2008) (argument not raised in trial court procedurally barred on appeal) and Zurich Am. Ins. Co. v. Beasley Contr. Co., 779 So. 2d 1132, 1135 (Miss. App. 2000) (same). For this reason, and because the evidence BHC does rely upon to show when its land first became inaccessible does not, in fact, prove that point, BHC has failed to meet its burden of proof on an essential element of its easement claim. The trial court's grant of an easement in absence of essential proof was clearly erroneous.

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[5] BHC argues at page 22 of its brief that Sturdivant, 956 So.2d 977 somehow modifies the holding in Rowell, or allows it to avoid the requirement that it prove when its land became landlocked. However, the portion of Sturdivant quoted by BHC in no way modifies or lessens BHC's burden of proving when its land became landlocked, and, in fact, has nothing whatsoever to do with that requirement.

IV. BHC'S OTHER ARGUMENTS IN SUPPORT OF THE TRIAL COURT'S RULING ARE WITHOUT MERIT.

BHC raises several other arguments that are either not relevant or are without merit:

- Argument: "Therefore, even if the severance by the common owner did not cause the property to become landlocked it also did not cause either the dominant tenement or the servient tenement to trespass across the lands of another." Appellees' Brief at 16.
  - Response: BHC makes this argument in an effort to distinguish Wilson, 815 So.2d at 463 ("An easement by necessity may properly arise only when a parcel of property becomes landlocked in the process of being severed from a larger tract.") Setting aside the inartful use of terms (dominant and servient tenements are, themselves, not capable of trespassing), BHC's argument assumes its conclusion. Stated differently, BHC argues that since it has an easement and a right to use the Road on Harkness's property, it is not a trespasser. However, Harkness contests BHC's claim of an easement -- hence this lawsuit. Moreover, BHC's argument does not distinguish Wilson or make that opinion any less applicable to this action. BHC's land was not rendered inaccessible as a result of being severed from a larger tract; it was severed from an already landlocked tract, and under Wilson, no easement across Harkness's land arose when BHC purchased its land.
- Argument: "When the property was conveyed to BHC by the Holmes and Carroll Land Company, Inc., the rights to cross over that land eventually titled to Harkness was necessary for the beneficial use of the property and therefore went with the land." Appellees' Brief at 17.

- Response: Harkness does not contend that BHC does not need a means of access to its landlocked property. (In fact, it has one that does not require trespassing on Harkness's property). Rather, the issue is whether BHC has an easement by necessity -- the creation and existence of which is prescribed by well-established Mississippi law -- on the Road on Harkness's land.

- Argument: "Harkness's argument was that the BHC did not have a recorded ingress and egress easement." Appellees' Brief at 18.
  - Response: No argument regarding the existence of a recorded ingress and egress easement in favor of BHC was necessary at trial -- one does not exist. If a recorded easement did exist, this lawsuit would not have been filed. Rather, Harkness made this point to the trial court so that there was no doubt regarding the existence vel non of a recorded easement.
- Argument: "He [Harkness] admitted that his own Deed . . . stated that the conveyance was 'Subject to any outstanding mineral rights and easements of record or in use." Appellees' Brief at 19-20.
  - Response: Harkness has never contested the language of his deed to the land on which the Road is situated. However, whether and to what extent BHC has an easement is in dispute.
- Argument: "If Harkness did not own the adjoining land to the North and have access across the new U.S. Army Corps of Engineers damn [sic] on Williams Creek, then Harkness would have had to use the same road that BHC was using." Appellees' Brief at 21.
  - Response: This hypothetical proves nothing. Harkness's land is not landlocked.

- Argument: "BHC could have chosen to enforce it's [sic] rights to cross the Harkness property to the North and access Hebron Road." Appellees' Brief at 21.
    - Response: This argument is addressed in Section IV herein. BHC's argument assumes that Harkness's land, whether to the North or South, was the only access its predecessors-in-title had to a public road. However, there is nothing in the record to demonstrate that this is true. Moreover, BHC has never -- until this appeal -- raised any claim or issue regarding using other portions of Harkness's land to access its land. The plain truth is that BHC bought a landlocked piece of property, and the trial court imposed an easement on Harkness's property without requiring BHC to prove when its land became landlocked, as required by Rowell. See Rowell, 819 So. 2d at 1285 (grant of easement without proof of when land became landlocked "would undermine the purposes of the easement and infringe upon the rights of third party landowners.")

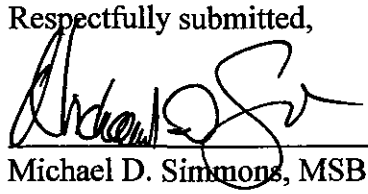
V. THE TRIAL COURT'S GRANT OF AN EASEMENT IS A VOID EXERCISE OF EMINENT DOMAIN POWER.

The trial court's grant of an easement by necessity in favor of BHC was a void exercise of eminent domain power. BHC's arguments to the contrary show a misunderstanding of Harkness's argument in this regard. BHC's argument presumes that it has an easement by necessity. Harkness agrees that if such an easement exists, there was no void exercise of eminent domain power. However, if BHC does not have a right to an easement by necessity, the trial court's grant of one was -- for the reasons set forth in Harkness's principal brief -- a void exercise of eminent domain power.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Harkness's principal brief, Harkness respectfully requests that the Court reverse that portion of the Chancery Court of Holmes County's September 29, 2004 Opinion and Order, which granted an easement by necessity in favor of Appellees. Harkness further respectfully requests that the Court render a judgment providing that Appellees do not have an easement across Harkness's land or right to use the Road on Harkness's land.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Miss. R. App. P. 25 and 31, I hereby certify that I have this day served the above and foregoing Reply Brief by causing a true and correct copy to be placed in the United States Mail, First-Class Postage Pre-Paid, addressed, as follows:

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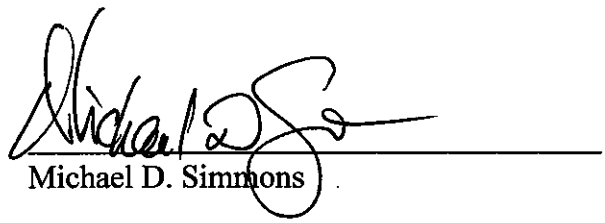
This 2d day of July, 2010.



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