IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JANICE HERRINGTON WARD, WILLIAM LLOYD WARD, JR., RITA COLLINS AND LINDA STENNETT — APPELLANTS

VERSUS — NO. 2009-CA-02025

TRIMAC INVESTMENTS, LLC — APPELLEE

APPEAL FROM THE COUNTY COURT (EQUITY DIVISION) OF
FORREST COUNTY, MISSISSIPPI
CIVIL ACTION NO. 00004-894-E

THE HONORABLE MICHAEL W. McPHAIL, PRESIDING

REPLY BRIEF OF APPELLANTS, JANICE HERRINGTON WARD AND WILLIAM LLOYD WARD, JR.

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Due to the complexities of this case the Wards believe that oral argument would be beneficial to the Court. This case contains an issue of first impression as to how an implied easement by necessity affects the relief offered in Miss. Code Ann §65-7-201. Additionally, oral argument would benefit the Court in understanding the geographical location of the existing implied easement by necessity, and all adjoining landowners to which access could have been sought.

LEGAL ARGUMENT

A. The Wards did not waive their implied easement argument.

Trimac argues in its Appellee's brief that William and Janice Ward (hereinafter the Wards) waived the right to claim that Trimac has an implied easement across Lynda Jarrell's property. (Trimac Brief 11) This alleged waiver is based on the fact that the Wards dismissed their Third Party Complaint against Lynda Jarrell. (CP 86) This position is not well founded because Trimac carries the burden of proving the proposed private road is reasonably necessary. *Gibbes v. Hinds County Bd. of Sup'rs*, 952 So.2d 1011, 1015 (Miss. Ct. App. 2007).

Trimac's position that because the Wards did not pursue a Third Party Complaint against Lynda Jarrell, Trimac's burden of proof was somehow reduced is nonsensical. The law is very clear in that before Trimac may acquire a private roadway over the lands of another, Trimac must allege and show that it has been unable to obtain a reasonable right-of-way from all of the surrounding property owners. *Rotenberry v. Renfro,* 214 So.2d 275, 278 (Miss. 1968). The law has never been that the Wards carry any burden of proof. The Ward's decision not to pursue a Third Party Complaint against Lynda Jarrell in no way reduces Trimac's required burden of proof. Further, the proper procedure to enforce an implied easement is in Chancery Court and not County Court. Trimac owned an easement and all it had to do was file a suit in Chancery Court to confirm the location of the easement.

In *Whitefort,* the Court held that "one seeking to establish a private way of ingress and egress must bring his case within the statute by showing necessity and not mere convenience, and that he has been unable to acquire such right by contract, and that there is no other practical way that it may be acquired by contract or grant, and that he has no way over his own lands, in order that the board of supervisors may acquire jurisdiction." *Hooks v. George County*, 748 So.2d 678, 682 (Miss. 1999); citing *Whitefort v. Homochitto Lumber Co.,* 93 So. 437, 439

(1922). There is no law that requires the owner of the servient estate in a private right of way case to prove that the owner of dominant estate is not entitled to a private right of way. If this Court were to take Trimac's argument to completion, the Wards would have to carry the burden of proof which is as stated earlier nonsensical and without merit.

B. An implied easement does exist over the Lynda Jarrell property, and Trimac has to prove that the private right of way over the Ward's property is reasonable and necessary.

Trimac incorrectly asserts that although it has legal access to a public road by way of implied easement it can still pursue a private right of way pursuant to Miss. Code Ann. §65-7-201. A prerequisite for filing an action under Miss. Code Ann. §65-7-201 is that a party does not have access to a public road, meaning the property is landlocked. It follows that if a party has legal access to a public road by way of implied easement, then its property is not landlocked.

The burden of proof is on Trimac to prove its property is landlocked, and the reasonable and necessary route is by taking the Wards' property. Taking the Wards' property against their will and over their objection is serious. Property ownership is a sacred right and before a Court is allowed to eminent domain a private right of way over the Wards' property it should be convinced the Trimac property has no legal access to a public road. The evidence is undisputed. Trimac has access over the Jarrell property to a public road. The fact that the route is longer and inconvenient is not relevant.

Trimac in its Appellee's brief argued that an implied easement by necessity does not exist automatically. However, that position is not consistent with the laws of the State of Mississippi. It is well-established that an easement by necessity arises by implied grant when a part of a commonly-owned tract of land is severed in such a way that either portion of the property has been rendered inaccessible except by passing over the other portion or by trespassing on the lands of another. *Broadhead v. Terpening*, 611 So.2d 949, 953 (Miss. 1992); citing *Taylor v.*

Hays, 551 So.2d 906, 908 (Miss. 1989); *Medina v. State of Mississippi ex rel. Sumner,* 354 So.2d 779, 784 (Miss. 1978); and *Pleas v. Thomas,* 22 So. 820, 821 (Miss. 1897). As stated above, an easement by way of necessity is a right of access that is appurtenant to the dominant parcel and travels with the land, so long as the necessity exists. By acquiring the dominant estate, one has already paid for and procured the legal right of access to and from that parcel. *Broadhead v. Terpening*, 611 So.2d 949, 955 (Miss. 1992).

It is undisputed that the Trimac and Lynda Jarrell property are adjoining parcels, and that there is unity of title with their two parcels. (T. 71) (T. 98-100) (Ex. 5, 6a, 6b, and 7) It is undisputed that Lynda Jarrell has access to the L. J. Farm Road. (T. 70) The law cited above is very clear in that Trimac has the legal right to cross Linda Jarrell's property because of the unity of title that existed in James M. Hill a.k.a J. M. Hill. (T. 98-100) (Ex. 5, 6a, 6b, and 7) The importance of this right is that it further shows that the Plaintiff did not prove at the time of trial it was reasonably necessary to take the Wards' property rights away from them.

Trimac argued in its Appellee's Brief that expert witness "Sharp admitted on cross-examination that an implied easement could not exist without a lawsuit being filed and a judgment being obtained." (Appellee's Brief 11-12) To further support its position that there is no implied easement, Trimac cited *Leaf River Forest* and *Burns,* by stating "In order to be entitled to a right of way across another's land by implied easement, the claimant must first satisfy the burden of proof by showing reasonable necessity." Citing *Leaf River Forest v. Rowell*, 819 So.2d 1281, 1284 (Miss. Ct. App. 2002); *Burns v. Haynes*, 913 So.2d 424, 430 (Miss. Ct. App. 2005).

However, *Leaf River Forest* also says that "Easements by necessity arise from 'the implication that someone who owned a large tract would not intend to create inaccessible smaller parcels'." *Leaf River Forest,* 819 So.2d at 1284; citing *Cox v. Trustmark Natl. Bank,* 733 So.2d

353, 356 (Miss. Ct. App.1999). As the Mississippi Supreme Court observed over a century ago, the easement is necessary for the protection of a buyer's right to use, occupy and enjoy his otherwise useless, landlocked property. *Id.* at 1284; citing *Pleas v. Thomas,* 22 So. 820, 821 (1897). Similarly, this Court has defended the implication by noting that both "[c]ommon law and public policy proscribe restraints on alienation." *id.* at 356; citing *Pitts v. Foster,* 743 So.2d 1066, 1070 (Miss. Ct. App. 1999).

Trimac also cited to *Burns v. Haynes,* to support its argument that an implied easement by necessity does not exist. (Appellee's Brief pg. 12) However the Court in *Burns* when discussing alternative routes stated, "If none exist then the easement will be considered necessary." *Burns,* 913 So.2d at 430; citing *Fourth Davis Island Land Company v. Parker,* 469 So.2d 516, 520 (Miss.1985). It is undisputed that the Trimac property is landlocked except for the implied easement by necessity across the Lynda Jarrell property. Therefore, Trimac's argument that there is no implied easement by necessity is nothing more than a play on words. The Wards agree that Trimac would have to file a lawsuit to establish the location of the easement; however the Wards would argue the remaining elements for implied easement by necessity across Lynda Jarrell's property are clearly present.

Trimac cites to *Vinoski v. Plummer,* to supports its argument that its implied right to cross the Lynda Jarrell property has no bearing on the relief it is seeking from the Wards. That argument is without merit in that as Trimac stated in its Appellee's brief the facts in *Vinoski* are the complete opposite of the facts in the case at hand. The Court in *Vinoski* stated that the Plummers did not have to seek a private right of way across adjoining landowners before it could seek its right to enforce its implied easement by necessity across the Vinoski property. *Vinoski v. Plummer,* 893 So.2d 239 (Miss. Ct. App. 2002).

The Wards completely agree with the Courts ruling in *Vinoski.* The Court's ruling in *Vinoski* supports the Ward's position that Trimac has the right to cross the Lynda Jarrell property. Therefore, Trimac did not meet its burden of proof to show that it was reasonable or necessary to cross the Ward's property. Trimac cited to case law from Wyoming, Iowa, and Kansas to supports its position that it should be entitled to a private right of way across the Wards' property. This law is not relevant or controlling on the interpretation of a Mississippi statute.

C. Trimac did not meet its burden of proof to show disproportionate expense.

Trimac alleges in its brief that "Expert Testimony of the dollar cost of each route is not required." (Appellee's Brief pg. 13) The burden of proof was upon Trimac to prove that the proposed private road is reasonably necessary. *Gibbes v. Hinds County Bd. Of Sup'rs*, 952 So.2d 1011, 1015 (Miss Ct. App. 2007). That burden of proof includes the requirement to prove that an alternative route involved disproportionate expense and inconvenience. The Mississippi Supreme Court has defined disproportionate expense and inconvenience as, "when the expense of making the means of access available would exceed the entire value of property to which access was sought." *Burnes*, 913 So.2d at 430 citing *Mississippi Power Company v. Fairchild*, 791 So.2d 262, 266 (Miss. Ct. App. 2001). The trial Court found and Trimac testified that the value of the timber on Trimac's property was $160,000.00. (CP 87) (R.E. 8) (T. 27, 46) This value did not include the value of the land, which if the Court were to impute a minimal value of two thousand dollars per acre, the total value of the land and timber would equal three hundred and twenty thousand dollars ($320,000). A review of the record shows that Trimac presented absolutely no proof of the expense to build or extend a road across Lynda Jarrell's property.

Trimac's argument that expert testimony of the dollar cost of each route is not required is contradicted by the case law cited above. The law in *Mississippi Power* mandates that Trimac had the burden of showing that the expense of using the implied easement by necessity across Lynda Jarrell's property would exceed the entire value of its property. As discussed above the trial record is completely devoid of any proof of the cost of crossing the Lynda Jarrell property to which Trimac has the implied right to use.

Trimac is relying on Lynda Jarrell's statement that "no one has figured a financially feasible way to cross it", as proof that the use of her property to access the Trimac property would involve disproportionate expense. (Tr. 66) Trimac has fallen woefully short of meeting its burden of proof. The only proof presented was from Lynda Jarrell who is not an expert and has no way of knowing what it would cost for Trimac to cross her property. Additionally it cannot be forgotten that Lynda Jarrell testified that she did not care whose property Trimac crossed as long as it was not hers. (T. 74) Trimac also cites to the trial judge's ruling wherein he stated the following:

> **"The other routes would require a road be built when here, the Defendants' road already exist on the proposed access. In itself, this indicates a sufficient showing of a less disproportionate expense and inconvenience in contrast to the other alternative routes."**

With all due respect given, the trial judge's definition of disproportionate expense is not consistent with the laws of Mississippi, and the road across the Jarrell property already exists. Disproportionate expense is defined by this Court as when the expense of making the means of access available would exceed the entire value of property to which access was sought. There was no evidence presented that would allow the trial court to determine if the route crossing Lynda Jarrell's property would involve disproportionate expense. Therefore, Trimac did not meet its burden of proof.

In paragraph c. of the Appellee's Brief Trimac argued that the three cases of *Vinoski, Fike, and Alpaugh* support its position that it is entitled to private right of way over the Wards' property. In *Vinsoki* and *Fike* the dominant estate owner was giving an implied easement by necessity over the servient estate. The substantial difference between those two cases and the case at hand is that the trial court in those two cases gave the dominant estate owners the relief that the Wards are contending that Trimac should be required to seek from Lynda Jarrell. In *Alpaugh* the dominant estate was surrounded by water on three sides with the servient estate being the only adjoining parcel not cut-off by water. The facts of *Vinoski* and *Fike* are the exact opposite of the facts in the case at hand, and the facts of *Alpaugh* show that *Alpaugh* has no bearing on this case. None of the three cases referenced *supra* in this paragraph support the Plaintiff's position that it should be given a private right of way over the Defendant. *See Vinoski v. Plummer,* 893 So.2d 239 (Miss. Ct. App. 2002); *Fike v. Shelton,* 860 So.2d 1227 (Miss. Ct. App. 2003); and *Alpaugh v. Moore,* 568 So.2d 291 (Miss. 1990).

Trimac stated the following in its Appellee's Brief: "the use of the term 'disproportionate' throughout case law connotes that the cost of comparison is not one of mathematical precision, but one founded on reasonableness, consistent with the standard of reasonable necessity. Expert testimony of the exact dollar cost of alternative routes is not required, especially where the facts show overwhelmingly that one route is more efficient and convenient. Several published opinions illustrated this point." (Appellee's brief pg. 13-14)

Trimac has conveniently chosen not to use the true definition of disproportionate expense used by the Supreme Court of Mississippi in its brief because it clearly shows that Trimac did not meet its burden of proof. Trimac stated that several published opinions support its argument.

However, Trimac did not cite any of those published opinions. The Supreme Court was clear in its definition of disproportionate expense and inconvenience as being "when the expense of making the means of access available would exceed the entire value of property to which access was sought." *Burnes*, 913 So.2d at 430 citing *Mississippi Power Company v. Fairchild*, 791 So.2d 262, 266 (Miss. Ct. App. 2001). Trimac had to prove that the cost of using the Lynda Jarrell property for access was a disproportionate expense, and Trimac did not meet its burden of proof.

D. Trimac is required to seek alternative routes before trying to obtain a private right of way across the Wards' property.

Once again Trimac has failed to meet its burden of proof. Trimac has to at least attempt other possible remedies before it can be given a private right of way across the Wards. The Supreme Court "... has consistently held that the right to control and use of one's property is a sacred right not to be lightly invaded or disturbed." *Whitefort,* 93 So. at 439 (Miss. 1922). In *Whitefort,* the Court held that "one seeking to establish a private way of ingress and egress must bring his case within the statute by showing necessity and not mere convenience, and that he has been unable to acquire such right by contract, and that there is no other practical way that it may be acquired by contract or grant, and that he has no way over his own lands, in order that the board of supervisors may acquire jurisdiction." *Hooks v. George County*, 748 So.2d 678, 682 (Miss. 1999); citing *Whitefort,* 93 So. at 439. The Court explained in *Rotenberry,* that "before one may acquire a private roadway over the lands of another before the Board of Supervisors 'the landlocked landowner must allege and show that he has been unable to obtain a reasonable right-of-way from all of the surrounding property owners.'" *Rotenberry v. Renfro,* 214 So.2d 275, 278 (Miss. 1968). "There must be a real necessity not just mere convenience at stake before

private property can be taken." *Hooks v. George County*, 748 So.2d 678, 682 (Miss. 1999); citing *Rotenberry,* 214 So.2d at 278; *Roberts v. Prassenos,* 219 Miss. 486, 69 So.2d 215 (1954).

Trimac has failed to meet its burden of proof that is required before it can be given a private right of way across the Wards' property. Trimac has argued that reasonable necessity is not absolute necessity; however, Trimac has not proven that there is any necessity to cross the Wards' property. Trimac has shown no attempts to acquire a right of way across anyone other than the Wards. Trimac does not know if it can acquire a right of way across any other landowners because they have not asked any adjoining landowners.

Trimac mistakenly believes that part of its burden of proof is an affirmative defense that must be pled by the Wards. This argument if true would require every defendant in every case to allege the plaintiff's burden of proof as an affirmative defense. If Trimac's affirmative defense argument was correct every defendant would have to disprove the plaintiff's case rather than the plaintiff having to prove its own case.

CONCLUSION

Trimac did not meet its burden of proof to show that it is entitled to a private right of way across the Wards' property. Trimac did not show that it was landlocked, nor did it show that the use of the implied easement by necessity across the Lynda Jarrell property was cost prohibitive. It did not prove that the cost of using the Lynda Jarrell road would exceed the value of its own property. Trimac put on no proof of the cost of using the Lynda Jarrell road. The Wards would respectfully request this Court to reverse and render the trial court's decision because Trimac woefully failed to meet its burden of proof.

Respectfully Submitted,

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CERTIFICATE

I, Terry L. Caves, Attorney for Janice Herrington Ward and William Loyd Ward, Jr., do hereby certify that I have this date mailed a true and correct copy of the above and foregoing Brief of Appellant to:

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This the 17th day of August, 2010.

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TERRY L. CAVES