IN THE COURT OF APPEALS 4/23/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00582 COA

JOHN PAUL CRECHALE

APPELLANT

v.

ROBERT JOHN CRECHALE

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DENISE SWEET-OWENS

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

DENNIS HORN AND SHIRLEY PAYNE

ATTORNEY FOR APPELLEE:

FRANK W. TRAPP

NATURE OF THE CASE: EASEMENT

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF DEFENDANT

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

SUMMARY

Robert Crechale ("Bob") filed a complaint and a motion for a temporary restraining order to prohibit

his father, John Crechale ("John") from digging up a drainage pipe system located on the Crechale's Restaurant property, owned by half-brothers Bob and Kenneth ("Kenny") Crechale. Bob filed an amended complaint seeking an injunction and declaratory relief to establish that (1) John did not have an easement across the property, except to install underground utilities; (2) John had no right to construct an improved road across the property or otherwise alter the topography; and (3) John had no right to alter the existing storm water drainage system. John counterclaimed seeking to (1) enter the Crechale's Restaurant property to replace the drainage system with one of equal capacity; (2) develop an improved road across the property; and (3) restrain Bob from obstructing the improved road.

Prior to trial, the parties agreed to an order stating that John would not attempt to alter the drainage system. After a full hearing, the chancellor found that John did not possess a roadway easement and permanently enjoined John from entering the property to alter the existing drainage system, to construct a road, or to alter the topographical condition of the property. In her opinion on April 23, 1993, the chancellor also found that John had a "conditional easement of access," a right of ingress and egress over the Restaurant property to get to his tract of land to the south until Gibraltar Street was developed, which would then give John access to his property . She also found that John could enter the Restaurant property in order to install underground utilities to his property. Both parties submitted proposed judgments to the court. Counsel for Bob provided notice by letter to counsel for John of his intention to appear before the chancellor on June 22, 1993, a regular *ex parte* hearing date. Counsel for John responded by letter that he did not need to speak with the chancellor any further regarding the proposed judgments. Counsel for Bob appeared before the chancellor, and his proposed judgment was modified and entered by the court on July 26, 1993.

John subsequently filed a motion to alter or amend judgment. After an evidentiary hearing on the matter, the chancellor denied John's motion and corrected what she termed a "clerical error" in her initial order. Both John and Bob appealed the chancellor's ruling to this Court.

FACTS

Clifford Waterhouse, Lelia Waterhouse and William Bufkin owned what is now known as the "Crechale's Restaurant property," as well as a land to the west of the property. On July 12, 1946, these parties entered into a "Roadway Agreement" establishing a mutual driveway easement between the two adjacent lots. The "Roadway Agreement" easement was binding upon the successors in title to the owners of both parcels of land. The "Roadway Agreement" described the easement as "commencing on U.S. Highway 80 and extending back southwesterly approximately three hundred forty-two feet to the south boundary of said lot."

John ultimately obtained the Crechale's Restaurant property subject to the roadway easement and opened Crechale's Restaurant. John also owned land immediately to the south of the Restaurant property. John gained access to this southern property by proceeding through the existing mutual driveway and then across the Crechale's Restaurant parking lot and over an undeveloped field.

John subsequently sold the restaurant and conveyed the restaurant property by special warranty deed to his two sons, Bob and Kenny, while retaining his property to the south and to the west of the restaurant property. The special warranty deed was made subject to the "Roadway Agreement" as follows:

> Terms and conditions contained in that Roadway Agreement between Clifford Waterhouse and wife, Lelia Waterhouse and William Bufkin and Ruth Evelyn Bufkin, as filed in the aforesaid Chancery Clerk's office in Book 450, at Page 355.
>
> The foregoing tract is also subject to all the rights, easements and appurtenances hereunto belonging, or anywise incident or appearing.
>
> It is further understood and agreed the grantors reserve the right of ingress and egress across the subject property for himself, his heirs, successors, administrators and assigns. Said right of ingress and egress can only be halted with the written consent of the grantor, his heirs, successors, administrators and assigns.

Bob and Kenny further agreed by written "Memorandum of Understanding" with John "to execute whatever instruments are necessary to facilitate the development of the acreage located to the south of the 'restaurant property.' These instruments may include but shall not be limited to right-of-way agreements and utility easements."

The two brothers jointly owned and operated the restaurant for several years until serious disagreements arose between the parties resulting in litigation. After much litigation, Crechale's Restaurant was placed in receivership and sold by public auction. Bob bought the property and the business at the auction. Meanwhile, in March of 1991, John filed a complaint against Bob and Kenny to establish his right to a permanent easement across the restaurant property to his land to the south, alleging that the only reasonable access appropriate for developing his property was access through the Crechale's Restaurant property. A settlement was reached by the parties in which John agreed to dismiss with prejudice his claim to a permanent easement in return for the right to place underground utilities on the "Roadway Agreement" land.

On September 13, 1991, one month after the property was sold to Bob, John started driving large eighteen-wheel vehicles, dump trucks and heavy equipment across the restaurant property to his property to the south. Bob protested. On that same day, contractors for John entered the restaurant property to re-work the existing drainage system. On September 16, 1991, counsel for John notified Bob of John's intent to grade the driveway established by the "Roadway Agreement" and extend the driveway to his property to the south.

Bob filed a complaint and a motion for a temporary restraining order to prohibit John from working on the drainage system. On September 23, he filed an amended complaint seeking an injunction and declaratory relief to establish that (1) John had no easement across the property other than the easement to install underground utilities; (2) John had no right to construct an improved road across the property or otherwise alter the topography; and (3) John had no right to work on the existing storm water drainage system. John counterclaimed seeking to enter the property to replace the drainage pipe with one of equal capacity, to develop an improved road across the property extending to his property to the south and to restrain Bob from obstructing the improved road.

Prior to trial, John agreed to forego any work on the drainage system on the Crechale's Restaurant property, and an agreed order to that effect was entered by the court. After a full hearing, the chancellor entered her opinion on April 23, 1993, which held that John did not reserve the roadway easement when he conveyed the tract to his sons nor in the 1992 settlement agreement. The chancellor also permanently enjoined John from entering the property to replace the drainage system and from altering the topography of the property. However, the chancellor did find that John Crechale had a "conditional easement of access," a right of ingress and egress over the restaurant tract to get to his southern tract, which he could "continue to exercise until such time as Gibraltar Street is developed" and that John could enter the restaurant property to install underground utilities for his southern tract.

The court's opinion provided as follows:

> On or about April 10, 1989, [John] transferred for value by Special Warranty Deed the northern tract on which there was a restaurant, Crechale's, to his two (2) sons, [Kenny] and [Bob] Crechale. This deed was subject to a roadway agreement between [John] and other landowners west of his property who are not parties to this suit. The roadway agreement provides for a roadway three hundred and forty-two (342) feet in length and forty feet wide. This agreement this Court finds to be an easement of twenty feet from the western adjoining lands and a reciprocal easement of twenty feet from the Crechale property up to three hundred and forty-two (342) feet. This easement falls wholly within the northern tract.
>
> . . . the parties, [John] included, entered into an agreement which required [Bob] Crechale to secure from the western adjoining landowners an easement to lay underground utility lines on the roadway easement. This utility easement will benefit the southern tract still owned by [John]. The terms of this agreement as dictated into the record never mentioned a roadway easement to extend unto the southern tract.
>
> [Bob] obtained the utility easement from the adjoining landowners and the prior suit was dismissed with prejudice.

This Court finds from the testimony that [John] has a right of ingress and egress until such time as Gibralter Street is developed and [Bob] Crechale has not interfered with [John's] right of ingress and egress to the southern tract. This right must be exercised in [a] way not to injure the servient estate,

i.e. the construction of a road as attempted by [John] injures the servient estate.

. . . But noteworthy to the Court is the fact that [John] has a conditional easement of access. [Bob] has not interfered with this and [John] may continue to exercise this right until such time as Gibraltar Street is developed. . . .

Both parties submitted proposed judgments based on the chancellor's bench opinion. Counsel for Bob provided notice by letter to counsel for John of his intention to appear before the chancellor on June 22, 1993, a regular *ex parte* hearing day, to submit his proposed final judgment. Counsel for John responded by letter that he did not feel a need to speak further with the chancellor about the proposed judgments. Counsel for Bob appeared before the chancellor on June 22, 1993, and Bob's proposed judgment was modified and entered by the court on July 26, 1993. In the final decree, there was no mention of John having a "right of ingress and egress until such time as Gibraltar Street is developed." John filed a motion to alter or amend final judgment based on his contention that the final decree reversed the prior bench opinion ruling of the chancellor in the April 23, 1993, by denying John ingress and egress until Gibraltar Street is developed. Bob claimed that the initial opinion granted John ingress and egress to the restaurant property until access to John's property from Gibraltar Street was developed and that, since access to John's property from Gibraltar Street was already developed, John's right of egress and ingress was canceled. After an evidentiary hearing, the chancellor denied John's motion to alter or amend, holding that the final decree accurately reflected the court's opinion. The chancellor further held that a clerical mistake in the initial opinion would be corrected. The original opinion was modified as follows:

This Court further finds from the testimony the father has a conditional right of ingress and egress until such time as *access to* Gibraltar Street is developed.

Both John and Bob subsequently appealed the chancellor's ruling to this Court. John's issues are the following:

I. WHETHER THE CHANCELLOR ERRED IN DENYING JOHN THE ROADWAY EASEMENT?

II. WHETHER THE EX PARTE COMMUNICATION RENDERED THE CORRECTED FINAL JUDGMENT VOID?

Bob cross appealed asserting the following as error:

I. WHETHER THE CHANCELLOR ERRED IN REFUSING TO ORDER THE CANCELLATION OF RECORD OF JOHN'S CONDITIONAL RIGHT OF INGRESS AND EGRESS THROUGH THE RESTAURANT PROPERTY SINCE ACCESS TO GIBRALTAR STREET HAS BEEN DEVELOPED?

ANALYSIS

This Court's scope of review of matters appealed from chancery court is very limited. A chancellor's findings of fact will not be overturned where they are based on substantial credible evidence. *Hammett v. Woods*, 602 So. 2d 825, 827 (Miss. 1992); *Mullins v. Ratcliff*, 515 So. 2d 1183, 1189 (Miss. 1987).The chancellor's findings of fact and conclusions will not be disturbed unless the chancellor abused her discretion, was manifestly wrong or clearly erroneous, or applied an erroneous legal standard. *Madden v. Rhodes*, 626 So. 2d 608, 616 (Miss. 1993).

I. DID THE CHANCELLOR ERR IN DENYING JOHN THE ROADWAY EASEMENT?

After careful review of the underlying facts and the record, we hold that the chancellor's finding that John had no right to a roadway easement was proper. Factually, the chancellor found that the original easement only extended 342 feet between the property of the two original adjoining landowners. John requested an easement that extended further down through the Crechale 's Restaurant property so that it would reach his property. The chancellor declined to find that John had such an easement, and, on that basis alone, we would uphold the chancellor's ruling. However, the chancellor also expressly found that John did not retain an easement when he agreed to the 1992 settlement of the prior litigation between the parties. The chancellor held "[w]hen the lawsuit was settled as between the parties, institutional necessity and the parties contemplate finality. *Res judicata* is the principle of law applicable in this instance. *See Walton v. Bourgeois*, 512 So. 2d 698 (Miss. 1987); *Pray v. Hewitt*, 179 So. 2d 842 (Miss. 1965)." The chancellor properly applied the doctrine of *res judicata* to this issue. We hold that this issue is without merit.

II. DID THE EX PARTE COMMUNICATION RENDER THE CORRECTED FINAL JUDGMENT VOID?

John asserts that the chancellor reversed herself in her final judgment entered July 26, 1993, by taking away John's conditional easement granted by the court in her prior bench opinion of April 23, 1993. He asks us to void the final judgment, recuse the chancellor and remand this matter for another hearing based on what he terms "improper" *ex parte* communication by Bob's counsel and the chancellor at the *ex parte* hearing on June 22, 1993.

As we noted earlier in this opinion, the chancellor conducted an evidentiary hearing on the matter. The chancellor corrected her April 23, 1993, bench opinion to say that John had a conditional easement until such time as John had "access" to Gibraltar Street versus until such time as Gibraltar Street was developed, but the chancellor declined to alter or amend her final judgment denying John a conditional easement.

We find nothing in the testimony on the motion to alter or amend to indicate improper *ex parte* communications. We find no reason to recuse the chancellor, particularly when such motion was not made until after she ruled on the motion to alter or amend. As stated many times before, the chancellor is vested with broad discretion; she acted well within her power in her final judgment.

CROSS APPEAL

I. DID THE CHANCELLOR ERR IN REFUSING TO ORDER THE CANCELLATION OF RECORD OF JOHN'S CONDITIONAL RIGHT OF INGRESS AND EGRESS ?

We are cited to no case or statute requiring that the chancellor expressly order the cancellation of record of John's conditional right of ingress and egress. Her final judgment language clearly addresses the issue. We decline to go beyond the chancellor's ruling.

THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED. COSTS ARE ASSESSED AGAINST THE APPELLANT.