IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CA-01103-SCT

MISSISSIPPI SAND SOLUTIONS, LLC

v.

BESSIE B. OTIS, SHERRY FISHER, CONNIE FISHER WALKER, DENNIS ROY HOLMES, ROBBIE JEAN HOLMES WARE, MAGGIE FISHER, GREGORY COOPER, JANICE FISHER TURNER, LARRY D. FISHER, JOHNNY L. WRIGHT, BRIDGETT G. WINTERS, JAMES FISHER, JR., RAY W. FISHER, SR., MICHAEL C. FISHER, SR., JIMMY L. WRIGHT, CORNELIUS FISHER, SR., DERRICK FISHER, DIANNE FISHER WILLIAMS, SHARON FISHER HILL, SHELIA FISHER KEYS AND LEDORIA FISHER BALDWIN, C.J. FISHER, JR., HORACE DARRYL FISHER, FRANK FISHER, JOYCE FISHER, SHIRLEY FISHER GRAY AND MINNETTE FISHER CHAMBERS

DATE OF JUDGMENT:	06/17/2019
TRIAL JUDGE:	HON. JANACE H. GOREE
TRIAL COURT ATTORNEYS:	KENNETH B. RECTOR KEVIN EARL GAY JOHN M. MOONEY, JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY SPECIAL COURT OF EMINENT DOMAIN
ATTORNEY FOR APPELLANT:	KENNETH B. RECTOR
ATTORNEYS FOR APPELLEES:	KEVIN EARL GAY JOHN M. MOONEY, JR.
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
DISPOSITION:	AFFIRMED - 12/17/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., COLEMAN AND CHAMBERLIN, JJ.

RANDOLPH, CHIEF JUSTICE, FOR THE COURT:

¶1. Mississippi Sand Solutions (Solutions) appeals a judgment by the Warren County Special Court of Eminent Domain denying its petition to establish a private right-of-way across lands owned by the defendants (the Fishers). Because we find that the special court did not err by applying collateral estoppel to claims relating to access to Solutions' property, we affirm its judgment.

FACTS & PROCEDURAL HISTORY

¶2. This Court has previously documented the history of disputes over this property, first in ***Mississippi Sand Solutions, LLC v. Otis***, 248 So. 3d 813, 815–19 (2018) (***Otis I***), and then again in ***Mississippi Sand Solutions, LLC v. Otis***, 289 So. 3d 708, 709–12 (2019) (***Otis II***). The facts detailed in ***Otis I*** and ***Otis II*** are pertinent here. Solutions now seeks to utilize Mississippi Code Section 65-7-201 to condemn a private right-of-way.

¶3. Solutions' suit to condemn a private right-of-way drew numerous dispositive motions from the Fishers asserting collateral estoppel. Initially, the motions were denied. Before trial, the trial judge recused. This Court appointed a special judge to hear the case. The Fishers again filed dispostive motions asserting collateral estoppel. Again, their motions were denied. The trial commenced, and the first phase occurred without a jury in accord with Mississippi Code Section 65-7-201.

¶4. During phase one, the special judge reconsidered applying the doctrine of collateral estoppel and ruled that Solutions was precluded from offering evidence that alternative

access to its property was unavailable. Solutions was allowed to proffer the evidence out of the presence of the judge for the record. Following Solutions' case-in-chief, the Fishers moved for a directed verdict.[1] The trial court granted their motion, finding that Solutions had failed in several respects to make a prima facie case under Mississippi Code Section 65-7-201. Solutions appeals.

STANDARD OF REVIEW

¶5. The decisions of a special court of eminent domain are subject to the same review we apply to decisions of other courts. ***Wiggins v. City of Clinton***, 298 So. 3d 962, 964 (Miss. 2020) (citing ***Morley v. Jackson Redevelopment Auth.***, 874 So. 2d 973, 975 (Miss. 2004)). Our standard of review is abuse of discretion. ***Id.*** (citing ***Morley***, 874 So. 2d at 975). If the decision of the court rests on factual findings not supported by evidence or incorrect statements of the law, it will not be affirmed, ***id.*** (citing ***Morley***, 874 So. 2d at 975), and "[w]e review questions of law de novo . . . ." ***Morley***, 874 So. 2d at 975 (citing ***In re Williamson***, 838 So. 2d 226, 233 (Miss. 2002)).

ANALYSIS

I. The Private Road Condemnation Statute

¶6. Solutions based this action on Mississippi Code Section 65-7-201, seeking to

[1] We note that "[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Miss. R. Civ. P. 41(b). Here, the Fishers made a motion under our Rule of Civil Procedure 50 for a directed verdict. Because Solutions provides no argument related to this error, we decline to address it. *See* ***McNeese v. McNeese***, 119 So. 3d 264, 269 (Miss. 2013) (quoting ***O.W.O Invs., Inc. v. Stone Inv. Co., Inc.***, 32 So. 3d 439, 446 (Miss. 2010); ***Touchstone v. Touchstone***, 682 So. 2d 374, 380 (Miss. 1996)).

condemn a private road over the property of another. This statute provides for the private exercise of the power of eminent domain. Section 65-7-201, provides in relevant part,

> 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 . . . . The court sitting without a jury shall determine the reasonableness of the application.

Miss. Code Ann. § 65-7-201 (Rev. 2012) (emphasis added). For a party to successfully invoke this statute, it must do two things: (1) establish that this course of action is necessary for it to *access* its land and (2) convince the special court of eminent domain that the proposed plan is reasonable. *Id*.

¶7. First we note that any exercise of eminent domain by the state for public benefit is to be rigorously considered to ensure it strictly accords with the statute that establishes such power. ***Gale v. City of Jackson***, 238 Miss. 826, 120 So. 2d 550, 551–52 (1960) (citing ***Wise v. Yazoo City***, 96 Miss. 507, 51 So. 453 (1910); ***Ferguson v. Bd. of Supervisors***, 149 Miss. 623, 115 So. 779 (1928); ***Nicholson v. Bd. of Miss. Levee Comm'rs***, 203 Miss. 71, 33 So. 2d 604 (1948); ***Whitworth v. Miss. State Highway Comm'n***, 203 Miss. 94, 33 So. 2d 612 (1948); ***Berry v. S. Pine Elec. Power Ass'n***, 222 Miss. 260, 76 So. 2d 212 (1954)). The statutorily created right of a private citizen to invoke the powers of eminent domain to redistribute private property for personal gain is even more scrutinized. ***Whitefort v. Homochitto Lumber Co.***, 130 Miss. 14, 93 So. 437, 439 (1922). "[T]he right to control and use of one's property is a sacred right not to be lightly invaded or disturbed." ***Hooks v. George Cnty.***, 748 So. 2d 678, 681 (Miss. 1999) (citing ***Whitefort***, 93 So. at 439). Courts

shall therefore find a private right to invoke eminent domain only in narrow and limited circumstances. ***Whitefort***, 93 So. at 439.

¶8. Step one requires a petitioner seeking to condemn property to establish that it *does not* have access to its property. Miss. Code Ann. § 65-7-201. *See generally* ***Quinn v. Holly***, 244 Miss. 808, 146 So. 2d 357, 359 (1962) (in which it was shown that a bayou divided petitioner's property in half and that to reach the opposite half, a road had to be constructed across privately owned property); ***Roberts v. Prassenos***, 219 Miss. 486, 69 So. 2d 215, 217–18 (1954) (denying a petition for a private road when the record established that the plaintiffs already had access to their property); ***Whitefort***, 93 So. at 439 (in which a logging company demonstrated that to access its property it needed to build a logging road across either of two privately owned properties). Significantly, this requirement does not mean that the proposed road and route are the only possible route, *see* ***Quinn***, 146 So. 2d at 359, but the petitioner must demonstrate that a right-of-way is a real, actual necessity, not a "mere convenience." ***Rotenberry v. Renfro***, 214 So. 2d 275, 278 (Miss. 1968) (citing ***Whitefort***, 93 So. at 437; ***Roberts***, 69 So. 2d 215); *see also* Miss. Code Ann. § 65-7-201.

¶9. Once the lack of access has been established, the petitioner must show that it has attempted to obtain access through its own private efforts before petitioning the special court to redistribute private property. ***Hooks***, 748 So. 2d at 681 (citing ***Rotenberry***, 214 So. 2d at 278); ***Whitefort***, 93 So. at 439. Petitioners must make good-faith efforts to purchase rights-of-way from their neighbors before coming to the court system. ***Rotenberry***, 214 So. 2d at 278.

¶10. Only after establishing a lack of access and that their neighbors will not negotiate can a petitioner stand before a court and claim necessity. Then, if necessity has been established, the petitioner must still satisfy the special court that the proposed right-of-way is reasonable. Miss. Code Ann. § 65-7-201.

II. The special court of eminent domain properly applied the doctrine of collateral estoppel to the issue of access.

¶11. The trial court held that the factual findings of ***Otis I*** collaterally estopped Solutions from relitigating the issue of alternative access to its property. The trial court held that the issue of alternative access to Solutions' property had already been legally determined. Solutions argues the issue of access was not actually litigated or essential to the final judgment in ***Otis I***.

¶12. Collateral estoppel exists to prevent "parties from relitigating issues authoritatively decided on their merits in prior litigation to which they were parties or in privity." ***Marcum v. Miss. Valley Gas Co.***, 672 So. 2d 730, 733 (Miss. 1996) (internal quotation mark omitted) (quoting ***State ex rel. Moore v. Molpus***, 578 So. 2d 624, 640 (Miss. 1991)). The doctrine requires one to prove that the specific disputed issue was "actually litigated, determined by, and essential to the judgment in the former action, even though a different cause of action is the subject of the subsequent action." ***Dunaway v. W. H. Hopper & Assocs., Inc.***, 422 So. 2d 749, 751 (Miss. 1982) (citing ***Lee v. Wiley Buntin Adjuster, Inc.***, 204 So. 2d 479 (Miss. 1967); ***Lyle Cashion Co. v. McKendrick***, 227 Miss. 894, 87 So. 2d 289 (1956)).

¶13. Thus, we look to see if the specific issue was addressed and ruled upon in the prior case. ***Baker & McKenzie, LLP v. Evans***, 123 So. 3d 387, 403 (Miss. 2013). Courts will

determine if the specific issue was actually raised in the previous case and if the prior court actually made a finding on the issue. ***Channel v. Loyacono***, 954 So. 2d 415, 425 (Miss. 2007).

¶14. Before the chancery court in ***Otis I***, the Fishers brought a complaint for declaratory judgment against Solutions. They sought to establish (1) that an easement recorded against their property was invalid and (2) that there was no entitlement to an easement by necessity because alternative access was available. Solutions filed a counterclaim asserting a claim for an easement by prescription and by expressed grant.[2] The Fishers' complaint asserted, "[p]laintiffs would further show that the Defendants are not entitled to an easement by necessity as there is other access to the Defendants property." In its order rendering judgment for the plaintiffs, the chancery court specifically held, "[d]efendants also fail to establish an easement by necessity because there are other ways to *access* the pit." (Emphasis added.)

¶15. In ***Otis I***, this Court addressed the lengths that the plaintiffs undertook to establish that Solutions could not establish a claim for an easement by necessity because it had alternative *access* to its property. 248 So. 3d at 821–22. This Court recognized that Solutions "hotly" contested evidence regarding *access* on appeal. ***Id.*** at 822. The Court declined to address Solutions' arguments on appeal because Solutions failed to make contemporaneous objections at trial or in its posttrial motion to reconsider the judgment regarding *access*. ***Id.*** Solutions now argues that since it did not oppose *access* at trial, *access* was not relevant to its theory in that case. Solutions' suggestion that the issue of *access* was not litigated because

[2] Solutions eventually dismissed its claim asserting an easement by expressed grant.

Solutions failed to contest it is not well taken.[3] The plaintiffs raised *access* in order to prevail in ***Otis I***, litigated it, and it was specifically ruled on in that proceeding by the trial court.

¶16. Solutions next argues that "it seems impossible to conclude that a factual finding related only to an uncontested claim is 'essential' to an adjudication of a different ***contested*** claims [sic]." Solutions further argues that the chancery court's determination of alternative access was not essential to its judgment because a party must "show that dominant and servient estates were previously held in common ownership" in addition to lack of alternative access in order to obtain an easement by necessity.

¶17. An issue was essential to a prior judgment if it was "necessarily decided enroute to the judgment of the prior action." ***Southern v. Glenn***, 568 So. 2d 281, 284 n.2 (Miss. 1990) (citing ***Newman v. Newman***, 558 So. 2d 821 (Miss. 1990); ***Riley v. Moreland***, 537 So. 2d 1348, 1354 (Miss. 1989); ***Paschall v. Smiley (In re Estate of Smiley)***, 530 So. 2d 18, 25 (Miss. 1988); ***Welborn v. Lowe***, 504 So. 2d 205, 207 (Miss. 1987); ***Miss. Emp. Sec. Comm'n v. Philadelphia Mun. Separate Sch. Dist.***, 437 So. 2d 388, 396 (Miss. 1983)). The determination that the prior court actually made must be examined when considering whether a finding on an issue was essential to the prior judgment. ***Stutts v. Stutts (In re Estate of Stutts)***, 529 So. 2d 177, 179–80 (Miss. 1988).

¶18. Solutions' first argument regarding whether the ***Otis I*** chancellor's finding was

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[3] These arguments are repetitions of arguments presented to this Court in Solutions' motion for rehearing in ***Otis I***. Solutions identified in that motion that this Court's ruling could lead to preclusive effects in the special court and requested this Court amend its opinion to remove any discussion of alternative access. The motion for rehearing and Solutions' arguments were denied by this Court.

essential to the judgment in ***Otis I*** seeks to obfuscate the nature of ***Otis I*** and the separate and independent burdens required by the adverse party to establish its claims. The chancery court's judgment on the issue of an easement by necessity reads, "[d]efendants also fail to establish an easement by necessity because there are other ways to *access* the pit. In addition, and importantly, Defendants failed to prove the pit and the Fisher Heir property were once joined as a common property. ***Burnham v. Kwentus***, 174 So. 3d 286 (Miss. Ct. App. 2015)."

¶19. As found by this Court in ***Otis I***, the burden on this issue was on the Fishers, not Solutions, because the Fishers had sought the declaratory judgment. As such,

> [t]he chancellor's finding that [Solutions] had offered no proof at trial as to the second element improperly shifted the burden of proof from the [Fishers] to [Solutions]. The [Fishers] bore the burden at trial on this issue, as they requested that the issue of an easement by necessity be adjudicated. The [Fishers], though, ultimately met their burden by entering evidence that showed that the first element of an easement by necessity was not met.

Otis I, 248 So. 3d at 821 n.11. The Fishers had a burden to disprove the existence of an easement by necessity. They could have chosen to provide evidence regarding the title history of the property or access to the property. They chose to present evidence on the issue of alternative access, and no evidence was adduced regarding the title history of the property. This was the only ground upon which the chancellor's judgment could be upheld was regarding alternative access. ***Id.*** As such, the issue of access was necessary and essential to the prior judgment.

¶20. We cannot say the trial court's decision to apply the doctrine of collateral estoppel to bar Solutions from relitigating the issue of alternative access to its property was error.

¶21. Absent application of the doctrine of collateral estoppel, the result is no different. The evidence and representations[4] made by Solutions establish that at all times Solutions has had access to its property. Therefore, it cannot meet its burden under the statute to prove that its action is "necessary for ingress and egress" to its property. Miss. Code Ann. § 65-7-201. Its own representations establish that it currently has, and has never not had, access for the purposes of ingress and egress to its property.[5]

¶22. At the trial before the special court, Solutions called Roy Cooper, one of its three members, as a witness. Cooper testified that Solutions has always been able to cross to its property and that none of the Fishers have ever barred it or its employees from crossing to its property.[6]

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[4] A heading in Solutions' brief is "**The Membsy Fisher Heirs have consented to the use of C.J. Fisher Drive for access to the MSS property**." In its brief, Solutions noted that "throughout this case, the Fisher Heirs have maintained that they do not object to the use of C.J. Fisher Drive by MSS." Solutions even confirms that the access is still ongoing, stating that the Fishers "admittedly have allowed use of the road to continue even until the present day."

[5] At the time of the trial, the Fishers had obtained an order from a chancery court, affirmed by this Court on emergency petition, assessing $50 against Solutions for every third-party truck that crossed the Fishers property per day. At the time of trial then, Solutions had unbounded personal access for ingress and egress and had been given access for all other purposes under the terms of this order. After the proceedings before the special court of eminent domain concluded, we reversed the order and remanded the case to the chancery court for further proceedings. ***Otis II***, 289 So. 3d at 711.

[6] On cross-examination, the record reveals Cooper's testimony:

> [Counsel for the Fishers]: Okay. So at this point in time the Chancellor said you don't have access to cross the Defendants' property, my clients, but during this time period you still crossed that property, didn't you?
>
> [Cooper]: Yes.

[Counsel for the Fishers]: My clients let you cross that property; did they not?

[Cooper]: Yes.

[Counsel for the Fishers]: Nobody from - - none of my clients objected to your employees crossing their property getting to their houses or even you crossing this way, did they?

[Cooper]: No.

. . . .

[Counsel for the Fishers]: All right. What I'd like to show you was - - this was - - have you seen this order? This is the Mississippi Supreme Court Order that was handed down based upon your Writ to Seek to Stay that important judgment. Did you review that?

[Cooper]: Yes.

[Counsel for the Fishers]: And that was your efforts to stay the enforcement of you being a trespasser. The order states - - you tell me, if I am wrong here, that for these third party trucks that are going to cross the Fisher's property, you've got to pay this Fisher family $50 per truck. Do you recall that?

[Cooper]: Yes.

[Counsel for the Fishers]: And the Court set that amount, correct?

[Cooper]: Yes.

[Counsel for the Fishers]: Okay. And that applied to these third party that were crossing onto their property. Your customers, as you call them.

[Cooper]: That's correct.

[Counsel for the Fishers]: You do not pay - - you never did pay for any of your employees to cross, right?

[Cooper]: That's correct.

[Counsel for the Fishers]: You never paid for any of your contract - - the

Cooper's testimony established that Solutions had actual access for the purposes of ingress and egress to its property.

¶23. When a party has been given voluntary access to its property over the land of another and that party continues to have access for the purposes of ingress and egress, that party cannot assert a claim under Mississippi Code Section 65-7-201 for a private road through the land of their obliging neighbor. Even without applying the doctrine of collateral estoppel, Solutions, by its own arguments and testimony of its own witnesses, demonstrated it could not make a prima facie case under this statute.

CONCLUSION

¶24. We affirm the judgment of the Warren County Special Court of Eminent Domain.

¶25. **AFFIRMED.**

KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.

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people to get your equipment onto your property, correct?

[Cooper]: That's correct.

[Counsel for the Fishers]: You've never had to pay for any of your employees to have ingress and egress across our property?

[Cooper]: That's correct.