

SUPREME COURT OF MISSISSIPPI

WAREHOUSING MANAGEMENT LLC, and R. W. CASTENS – APPELLANTS

v.

HAYWOOD PROPERTIES, LP, HAYWOOD TRUCKING, INC., and R. CHARLES
HAYWOOD – APPELLEES

No. 2007-TS-00438

August 31, 2007

On Appeal from the Twentieth Chancery Court District in Rankin County, Mississippi.

REPLY BRIEF OF THE APPELLANTS

Richard Redfern (MSB [REDACTED] Redfern Law Firm, 368 Scarbrough Street, Post Office Box
180158, Richland, Mississippi 39218, Telephone 601-936-6003, Facsimile 601-936-5967,
Attorney for Appellants, Warehousing Management, LLC and R. W. Castens

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STATEMENT OF THE ISSUE

Two neighbors asserted title to a 28 foot parcel of real property separating the northern and southern boundaries of their respective properties. After the southerly neighbor commissioned a survey that determined the disputed property was within the calls of his deed, the northern neighbor filed suit, the court appointed an expert surveyor whose survey agreed with the survey of the southern neighbor. Then the northerly neighbor filed an amended complaint and claimed title to the disputed property through adverse possession. The Chancery Court ruled in favor of this adverse possession claim, and vested title to the disputed property with the northerly neighbor.

Did the Chancellor commit manifest error in finding the northerly neighbor met the burden required for establishing an adverse possession claim?

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal following a ruling in favor of Appellees Haywood Properties, LP, Haywood Trucking, Inc., and R. Charles Haywood (hereinafter “Haywood”) in the Twentieth Chancery Court District in Rankin County, Mississippi. Appellees sought adverse possession of a 28 foot parcel of real property separating Haywood’s property and that of Appellants Warehousing Management, LLC and R. W. Castens (hereinafter “Castens”). The Chancery Court ruled in favor of Appellees on their adverse possession claim. This Court must decide if the Chancery Court’s ruling and its justification were in error.

B. Course of Proceedings and Disposition in the Court Below

Haywood commenced this action against Castens on December 29, 2003. (R. at 10.) Haywood sought, *inter alia*, the establishment of an incorrect boundary line as the true boundary line separating Haywood’s and Castens’ properties. (R. at 129.) After the court appointed expert

agreed with Castens, Haywood subsequently filed an Amended Complaint claiming ownership of the 28 foot parcel of real property by adverse possession on December 3, 2004. (R. at 45-46.)

Castens answered Haywood's complaint on August 17, 2004, (R. at 22.), denying Haywood's claims and counter-claiming seeking certain specified relief. (R. at 129.) Castens answered Haywood's amended complaint on December 3, 2004. (R. at 54.) The Chancery Court found that Haywood had acquired title to the disputed property through adverse possession on February 13, 2007, (R. at 137.), and denied Castens' Motion For Reconsideration, For New Trial, To Amend And Alter Judgment, And For Other Relief on March 6, 2007. (R. at 154.) Castens filed a Notice Of Appeal on March 15, 2007, (R. at 155.), and this Court granted appeal on June 11, 2007. Castens asks this Court to reverse the Chancery Court's finding of adverse possession in favor of Haywood.

C. Statement of the Facts

Haywood owns two acres of real property in the City of Pearl, Rankin County, Mississippi. (R. at 127.) Haywood's property abuts Bierdeman Road on its west side and is situated north and adjacent to a parcel of real property owned by Castens. (R. at 127.) Castens' and Haywood's properties possess a common property line running east and west, forming the north line of Castens' property and the south line of Haywood's. (R. at 127.) The east \ west boundary line of the parties had never been marked, surveyed, fenced, or the like, prior to the dispute between the litigants which arose in 2000. It had never been in question and both land owners and their successors in title used each others property by permission. Hrg. Transcrip.18:10, 29; 21:25; 34:28 (January 9, 2007).

Haywood acquired his property via Warranty Deed from Dale Yeager and John F. Mills, recorded in Deed Book 267 at Page 240 of the Rankin County Land Records, and dated January 22, 1971 (hereinafter "Haywood property"). (R. at 128.) Haywood later conveyed this property

to Haywood Properties, LP, recorded in Deed Book 820 at Page 614 of the Land Records of Rankin County, Mississippi, on December 3, 1997. (R. at 128.) Haywood believed he purchased the property now in dispute when he originally purchased his two acres in 1971. (R. at 130.)

Castens acquired his property via Warranty Deed from Kenneth H. Bush and Jay Michael Bush, recorded in Deed Book 835 at Page 343 of the Land Records of Rankin County, Mississippi, and dated May 15, 1998 (hereinafter “Castens property”). (R. at 128.) Formerly, the Bushes had acquired this property via Warranty Deed in August, 1986, from Erbie D. Moore and Gertie P. Moore. (R. at 128.) Gertie Blackmon (formerly Gertie P. Moore) and Erbie D. Moore acquired the property in 1970. (R. at 128.)

In 2000, Castens became concerned there may be problems with the north and south boundary lines of his property. (R. at 128.) Castens had a survey performed by Charles Craft, a registered land surveyor, in October of 2003. (R. at 128.) Craft’s survey showed the true north boundary line of Castens’ property to be 28 feet north of the line Haywood claimed to be the true boundary line. (R. at 128.) Craft’s survey showed Castens’ and Haywood’s common boundary line was in fact 28 feet north of a utility pole which Haywood claimed to represent the common boundary line between the parties’ properties. (R. at 128.) Castens did not believe the utility pole to be the common boundary line and took down a north south fence to the point he believed to be the north line of his property, approximately 28 feet north of the utility pole. (R. at 129.)

At trial, and with the parties’ agreement, the Chancery Court appointed a registered land surveyor, T. E. McDonald, as an expert. (R. at 127 and R. at 129.) Subsequently, the parties stipulated to the true location of their common property line, (R. at 127.), which Mr. McDonald determined was the line indicated in Castens’ 2003 survey. (R. at 129.) Haywood then amended his complaint to allege adverse possession. The disputed issue at trial was whether Haywood

had acquired by adverse possession a parcel of real property 28 feet in width and running the length of Castens' and Haywood's adjoining properties (hereinafter "disputed property"). (R. at 127-28.) This disputed property is situated north of Castens' and south of Haywood's stipulated common property line. (R. at 127-28.)

The Chancellor found that both Haywood and Castens "have made some use of the disputed property, which consists of a vacant area between buildings erected on each respective lot." (R. at 130.) The Chancellor also found that "[t]rucks have used the disputed area to turn and back into" loading docks facing the disputed property. (R. at 130.) Testimony at trial also revealed the hostile nature of the controversy concerning the disputed property. This hostility included Haywood's wife blocking Castens' use of a gate allowing ingress to and egress from the disputed property, and Haywood's assertion that Castens' had damaged certain property of Haywood's located on the disputed property and property north of the disputed property. Hrg. Transcript. 54:5 (January 9, 2007.) This action began in the year 2000.

The Chancellor also found additional uses by Haywood of the disputed property. These uses included, *inter alia*, filling the disputed property with sand and gravel, parking trailers there and authorizing the placement of utility poles on the disputed property. (R. at 131.) The Chancellor found Haywood also paid certain taxes on the disputed property and granted an easement over the disputed property to the City of Pearl in 1984. (R. at 131.) Haywood testified he paid taxes according to the two acres of property described in his deed, Hrg. Transcript. 90:11 (Jan. 9, 2007), and that the easement allowed the installation of a sewer line on Bierdeman Road for his benefit and that of others with property there. Hrg. Transcript. 82:1 (Jan. 9, 2007). The Chancellor also found that Haywood granted others permission to use the disputed property, (R. at 131.), and "constructed a fence along and basically parallel to Bierdeman Road near the

western property line of both Haywood and Moore during Moore's occupancy of the Castens property." (R. at 134.)

Other witnesses testified at trial concerning the disputed property. The Chancellor found that Gertie Blackmon testified that Haywood owned his property when she owned the Castens property, that Haywood claimed ownership of the disputed property at that time and that Haywood allowed Mrs. Blackmon and her now deceased husband of the time, Erbie Moore, to use the disputed property. (R. at 132.) However, the trial transcript shows that Mrs. Blackmon testified that she, too, allowed Haywood to enter and use her property, Hrg. Transcript. 21:27-22:2 (Jan. 9, 2007), and that Haywood never informed Mrs. Blackmon that he was attempting to take title to any of her property. Hrg. Transcript. 22:12-17 (Jan. 9, 2007). Haywood's testimony corroborated this testimony from Mrs. Blackmon. Hrg. Transcript. 82:12 (Jan. 9, 2007). Haywood also testified that he understood Mrs. Blackmon had testified to her use of the disputed property. Hrg. Transcript. 82:11 (Jan. 9, 2007).

Mrs. Blackmon also testified there was nothing in the deed conveying the Castens' property to Mr. Bush, Castens' predecessor in title, referencing the aforementioned utility pole as the boundary between the Castens and Haywood properties. Hrg. Transcript. 23:7 (Jan. 9, 2007). Mrs. Blackmon testified that the only way to determine the definitive line was through a survey. Hrg. Transcript. 23:11 (Jan. 9, 2007). Furthermore, Mrs. Blackmon testified that the fence Haywood constructed near the western property line of his and Mr. Moore's property was done through the permission of Mr. Moore. Hrg. Transcript. 24:29 (Jan. 9, 2007). Finally, Mrs. Blackmon testified that the only use Haywood made of the disputed property during the time she owned it was the driving of trucks there, the same use as Mrs. Blackmon. Hrg. Transcript. 27:4 (Jan. 9, 2007).

The Chancellor found that Kenneth Bush, Castens' predecessor in title, testified that he believed the property north of the aforementioned utility pole was owned by Haywood, that the utility pole marked the boundary line between his and Haywood's property and that Haywood was the exclusive owner of the disputed property. (R. at 132.) The trial transcript shows, however, that Mr. Bush testified there was nothing in the warranty deed conveying the Castens' property to Castens referencing this utility pole as marking the boundary between the Castens and Haywood properties. Hrg. Transcript. 37:4 (Jan. 9, 2007). Mr. Bush also testified that Haywood did nothing to put Mr. Bush on notice that he was trying to acquire any of Mr. Bush's property. Hrg. Transcript. 37:19 (Jan. 9, 2007). Haywood's testimony corroborated this portion of Mr. Bush's testimony. Hrg. Transcript. 84:15 (Jan. 9, 2007). Haywood also testified that he understood Mr. Bush had testified to Mr. Bush's use of the disputed property. Hrg. Transcript. 85:11 (Jan. 9, 2007).

One of Castens' employees, Herbert McIlroy, testified that he had viewed trucks not owned by Haywood using the disputed property in the past, but the Chancellor found that McIlroy could not say this use was without Haywood's permission. (R. at 133.) Haywood also testified that Castens used the disputed property up until the hostilities regarding said property developed between Haywood and Castens. Hrg. Transcript. 85:14-19 (Jan. 9, 2007).

After the conclusion of the trial, the Chancellor adjudicated Haywood "the sole owner of the disputed property by virtue of his adverse possession thereof," finding that Haywood had provided clear and convincing proof "as to the required elements of adverse possession." (R. at 135.)

SUMMARY OF THE ARGUMENT

Haywood's brief claims that, *inter alia*, his actions with respect to the disputed property demonstrated Haywood's open and visible claim of ownership; that Castens' predecessors in title, Mrs. Blackmon and Mr. Bush, received permission from Haywood to use the disputed property and acquiesced in the erroneous and recently asserted boundary line separating the Castens and Haywood properties; and that Haywood intended to possess the disputed property to the exclusion of all others. Haywood argues this to be clear and convincing evidence of his adverse possession of the disputed property.

Haywood's brief fails to account, however, for the fact that Castens' predecessors in title were never put on notice that Haywood was attempting to adversely acquire the disputed property; that those same predecessors in title exchanged permission with Haywood to use that property; and that Castens and Castens' predecessors in title used the disputed property jointly with Haywood. These facts prevent Haywood's satisfaction of the requirements for a successful adverse possession claim.

Haywood carried the burden of proving every element of his adverse possession claim by clear and convincing evidence. The Chancellor's conclusion that Haywood carried this burden was clearly erroneous for want of evidence to support such a conclusion. This Court should reverse the Chancellor's finding and vest title to the disputed property in Castens.

ARGUMENT

Standard of Review

With regard to questions of fact, this Court's standard of review requires application of the substantial evidence/manifest error test. *Johnson v. Black*, 469 So. 2d 88, 90 (Miss. 1985). "Regarding what findings of fact could be considered clearly or manifestly erroneous, the Supreme Court states: One expression is that 'a finding of fact' is 'clearly erroneous' when: although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been made. Moreover, to the point of credibility, a trial judge has no authority arbitrarily to reject the testimony of a witness otherwise plausible on its face, particularly where that testimony is substantially corroborated." *Heidel v. State*, 587 So. 2d 835, 839 (Miss. 1991).

With regard to questions of law, the scope of review is *de novo*. *Planter's Bank & Trust Co. v. Sklar*, 555 So. 2d 1024, 1028 (Miss. 1990).

I. WHETHER THE CHANCELLOR ERRED IN FINDING THAT HAYWOOD MET THE BURDEN REQUIRED FOR ESTABLISHING HIS ADVERSE POSSESSION CLAIM?

For one to acquire title to property through adverse possession, they must show that his or her possession of the subject property was "(1) open, notorious and visible; (2) hostile; (3) under a claim of ownership; (4) exclusive; (5) peaceful; and (6) continuous and uninterrupted for a period in excess of ten years." *Johnson v. Black*, 469 So. 2d 88, 90 (Miss. 1985). The would be adverse possessor carries the burden of proving each element of his or her adverse possession claim by clear and convincing evidence. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992).

A. Haywood Did Not Occupy The Disputed Property In A Manner That Was Open, Notorious And Visible.

Haywood's brief asks this Court to find sufficient evidence in the record to support the Chancellor's finding that Haywood's possession of the disputed property was open, notorious and visible. Much like the Chancellor's brief discussion of this requirement for a successful adverse possession claim, Haywood's discussion is at best cursory, and in reality is wholly inadequate.

Haywood asserts there were no claims that his use of the disputed property was concealed, and there were many "clear, visible indicators of Haywood's occupation of the property." Appellee's Br. 9 (Aug. 17, 2007). However, the Mississippi Court of Appeals has stated that "a 'land owner must have notice, actual or imputable, of an adverse claim to his property in order for it to ripen against him, and the mere possession of land is not sufficient to satisfy the requirement of open and notorious.'" *Scrivener v. Johnson*, 861 So. 2d 1057, 1059 (Miss. App. 2003) (quoting *People's Realty & Dev. Corp. v. Sullivan*, 336 So. 2d 1304, 1305 (Miss. 1976)).

Here, while there is evidence that Haywood previously used the disputed property, Mrs. Blackmon and Mr. Bush testified that they, too, used the disputed property during their ownership of the Castens property. Hrg. Transcrip. 27:4, 85:11 (Jan. 9, 2007). Mrs. Blackmon and Mr. Bush both testified that Haywood never provided them with notice that he was attempting to acquire title to any of their property, the disputed property or any other portion. Hrg. Transcrip. 22:12-17, 37:19 (Jan. 9, 2007). While Haywood may have engaged in acts of possession of the disputed property, his acts of possession were insufficient to put Mrs. Blackmon and, subsequently, Mr. Bush on notice that Haywood was attempting to adversely acquire their property.

As Haywood never provided notice to Mrs. Blackmon and Mr. Bush that he was attempting to adversely acquire the disputed property, Haywood's claimed adverse possession of

that property could never have ripened against either Mrs. Blackmon or Mr. Bush. *Scrivener*, 861 So. 2d at 1059. The Chancellor never found to the contrary, and thus Haywood never carried the burden of proving his open, notorious and visible occupation of the disputed property as required for his successful adverse possession claim. The Chancellor's finding to the contrary was clearly erroneous for want of evidence to support such a conclusion.

B. Haywood Did Not Occupy The Disputed Property In A Hostile Manner.

Haywood contends that neither Mrs. Blackmon nor Mr. Bush testified to granting Haywood permission to use the disputed property. This is simply not the case, as both Mrs. Blackmon and Mr. Bush testified to an exchange of permission with Haywood for all of the adjoining landowners to use the disputed property. Hrg. Transcrip. 24:11-13, 39:13-14 (Jan. 9, 2007).

Haywood also claims that his possession of the disputed property was hostile because Haywood believed the disputed property to be within the calls of his own deed, regardless of the fact that Haywood's belief was mistaken. This argument is also without merit, for Haywood's mistaken belief that the disputed property was within his deed does not negate the fact that Haywood and Castens' predecessors in title exchanged permission to use the disputed property.

"The law is . . . clear that an occupancy that is permissive in nature at its beginning cannot, no matter the length of its duration, transform itself into the type of hostile occupancy necessary to gain title through adverse possession." *Moran v. Saucier*, 829 So. 2d 695, 698 (Miss. App. 2002).

Haywood provided no notice to Castens' predecessors in title, Mrs. Blackmon and Mr. Bush, that he was attempting to adversely acquire any of their property. To the contrary, the testimony of Mrs. Blackmon and Mr. Bush indicates that both provided permission for Haywood

to use the disputed property, and that Haywood provided Mrs. Blackmon and Mr. Bush with permission to use the same property.

Furthermore, the survey stipulated to by the parties at trial shows the disputed property lies within Castens' property line. Haywood did not place his survey into evidence. He obtained a survey before he put up posts claiming the line was close to the light pole. One cannot adversely possess property when they did not even know where it is. Castens is the record title holder of the disputed property. "Hostility means an assertion of title superior to the potential competing claims of anyone else; it can be rebutted by showing that the actual record title owner gave permission to begin the possession." *Lynn v. Soterra, Inc.*, 802 So. 2d 162, 166 (Miss. App. 2001). If Castens' is the record title holder of the disputed property, Mrs. Blackmon and Mr. Bush, as Castens' predecessors in title, were the property's former record title owners. As such, any exchange of permission to use the disputed property that Mrs. Blackmon and Mr. Bush provided Haywood defeats Haywood's satisfaction of the hostility element necessary for his successful adverse possession claim.

The Chancellor's finding that Haywood satisfied the hostility element of his claim through clear and convincing evidence was clearly erroneous. This Court should find the same, reverse the Chancellor's ruling and vest title to the disputed property in its current record title owner, Castens.

C. Haywood Did Not Occupy The Disputed Property Under A Claim Of Ownership.

Haywood's brief asserts that his occupation of the disputed property under a claim of ownership is evidenced by Mrs. Blackmon and Mr. Bush acknowledging their use of the disputed property with Haywood's permission. Haywood calls these acknowledgements "uncontradicted." Appellee's Br. 7 (August 17, 2007). As discussed previously, Mrs. Blackmon and Mr. Bush's testimony at trial shows this claim to be false.

Haywood also asserts that Mrs. Blackmon and Mr. Bush acquiesced in their common boundary line with Haywood being marked by the utility pole near Bierdeman Road. Both Mrs. Blackmon and Mr. Bush testified, however, that the deed to the Castens property makes no reference to the utility pole marking the common boundary line between the Castens and Haywood properties. Hrg. Transcript. 22:18-23:7, 36:23-37:4 (Jan. 9, 2007). In fact, Mrs. Blackmon testified the only way to determine the definitive boundary line was through a survey. Hrg. Transcript. 23:11 (Jan. 9, 2007). It was only after Haywood obtained a survey and placed posts could anybody know he was attempting to adversely possess the property.

Any acquiescence to a utility pole marking the common boundary line is also immaterial in proving by clear and convincing evidence that Haywood occupied the disputed property under a claim of ownership. As Castens' survey and the parties' stipulation at trial show the disputed property to be within the calls of Castens' deed, Castens is the disputed property's record owner. "Record title coupled with actual possession of a part of the land constitutes constructive possession of the whole . . ." *Eady v. Eady*, 362 So. 2d 830, 832 (Miss. 1978). Haywood filed his adverse possession claim only after he lost the survey contest with the Court's expert. He then filed an Amended Complaint much later.

Additionally, Haywood proffers various possessory acts as evidence of his claim of ownership of the disputed property. These acts are similar to those offered by the Chancellor in the Court below, but both Haywood and the Chancellor fail to adequately explain how these actions are clear and convincing evidence of Haywood's occupation of the disputed property under a claim of ownership. The question for this Court is "whether the possessory acts relied upon by the would be adverse possessor are sufficient to fly his flag over the lands and to put the record title holder upon notice that the lands are held under an adverse claim of ownership." *Johnson v. Black*, 469 So. 2d 88, 91 (Miss. 1985). Haywood states in his reply brief, (Page 7)

that there was an “honest” mistake about where the mutual boundary line was and that even Castens was mistaken. This is not true. The first time Castens heard about the light pole was at trial. Castens bought his property by Warranty Deed with a specific legal description and so did Haywood. The parties stipulated there was no overlap in calls.

As discussed previously, Haywood, Castens’ and Castens’ predecessors in title all used the disputed property and effectively granted each other permission to use the property. Thus, while Haywood may have engaged in acts of possession with respect to the disputed property, so did Castens and Castens’ predecessors in title. The evidence simply does not support the conclusion that Haywood occupied the disputed property under a claim of ownership. What the evidence does support is the conclusion that actual and constructive possession of the disputed property lies with Castens, and the Chancellor’s finding to the contrary was clearly erroneous.

D. Haywood Did Not Exclusively Occupy The Disputed Property.

Haywood’s purported possession of the disputed property relies on the assertion that Haywood granted Castens and Castens’ predecessors in title, Mrs. Blackmon and Mrs. Bush, permission to use the disputed property. Haywood claims this permission makes him the only party to exclusively occupy the disputed property. Once again, the facts show otherwise.

“There must be an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimant’s conduct must afford an unequivocal indication that he is exercising dominion of a sole owner.” *Rawls v. Parker*, 602 So. 2d 1164, 1169 (Miss. 1992) (quoting 2A C.J.S. Adverse Possession § 54 (1972)).

While a would be adverse possessor may have the intent to exclude another from the disputed property, there must be an actual exclusion in order to satisfy the exclusion requirement for a successful adverse possession claim. Joint use of the disputed property, particularly joint use with the property’s record title holder, prevents a successful exclusion. Haywood never

exclusively used the disputed property, but only engaged in joint use of the property with Castens and Castens' predecessors in title.

Again, Mrs. Blackmon and Mr. Bush both testified that they granted permission to Haywood to use the disputed property when they were the property's record title holders. Haywood, in turn, provided permission to Mrs. Blackmon and, subsequently, to Mr. Bush to use the disputed property. Mrs. Blackmon and Mr. Bush used the disputed property before Castens, and Castens made use of the property prior to the commencement of this action. This use occurred simultaneously with Haywood's use of the disputed property, thus making Haywood's use of the property joint with Castens and Castens' predecessors in title. This joint use of the disputed property, even if sporadic or intermittent, prevents satisfaction of the exclusive use requirement for a successful adverse possession claim.

Finally, as Castens' is the record title holder of the disputed property by virtue of the survey stipulated to by the parties at trial, he also has constructive possession of the disputed property. *Blankinship v. Payton*, 605 So. 2d 817, 820 (Miss. 1992). Such constructive possession also prevents Haywood's satisfaction of the exclusive use requirement for a successful adverse possession claim, and the Chancellor's finding to the contrary is clearly erroneous. As in *Blankinship*, this Court should reverse the Chancellor and vest title to the disputed property in Castens.

CONCLUSION

The Chancellor's ruling that Haywood satisfied the requirements of his adverse possession claim was clearly erroneous. Haywood carried the burden of proving with clear and convincing evidence that he occupied the disputed property in an open, notorious and visible manner, that such occupation was hostile, that his occupation took place under a claim of ownership and that such occupation took place to the exclusion of all others. Haywood failed to satisfy his burden with respect to any of these elements, and his adverse possession claim must therefore fail as well.

For the reasons previously stated, Castens respectfully requests this Court reverse the judgment of the Chancery Court and vest title to the disputed property in Castens.

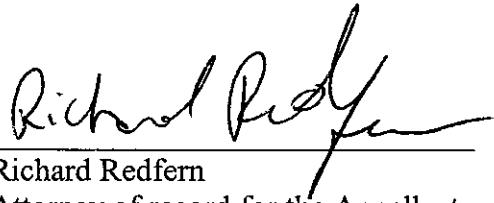
CERTIFICATE OF SERVICE

I, Richard Redfern, attorney for Warehousing Management, LLC and R. W. Castens, do hereby certify that I have this date caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellants, to:

Honorable John S. Grant, III
Chancellor, Rankin County
Post Office Box 1437
Brandon, Mississippi 39043

Honorable David L. Morrow, Jr.
MORROW LAW FIRM, P.L.L.C.
Post Office Box 148
Brandon, Mississippi 39043-0148

This the 31st day of August, 2007.


Richard Redfern
Attorney of record for the Appellants

RICHARD REDFERN
Attorney at Law
Post Office Box 180158
368 Scarbrough Street
Richland, Mississippi 39218
(601) 936-6003
Mississippi State Bar No. [REDACTED]