

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-CA-00438

July 19, 2007

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

BRIEF OF THE APPELLANTS

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ORAL ARGUMENT NOT REQUESTED

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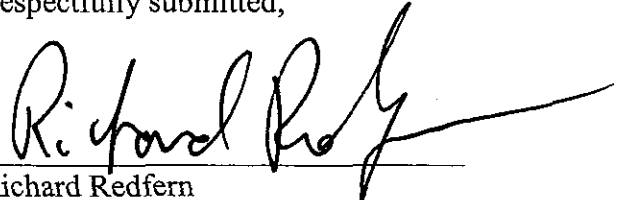
July 19, 2007

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Warehousing Management, LLC, Appellant;
2. R. W. Castens, Appellant;
3. Richard Redfern, Attorney for the Appellants;
4. Haywood Properties, LP, Appellee;
5. Haywood Trucking, Inc., Appellee;
6. R. Charles Haywood, Appellee;
7. David L. Morrow, Jr., Attorney for the Appellees;
8. Judge John S. Grant, III, Chancellor in the Twentieth Chancery Court District in Rankin County, Mississippi.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard Redfern", written over a horizontal line.

Richard Redfern
Attorney of record for the Appellants

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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 Castons, 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 Dccember 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. Transcrip. 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

This Court should reverse the Chancery Court’s ruling that Haywood acquired title to the disputed property through adverse possession, as such ruling was clearly erroneous.

For one to acquire title to property through adverse possession, they must show that their 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 adverse possession claim by clear and convincing evidence. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992).

Haywood failed to satisfy the burden of his adverse possession claim in the instant case and show that he occupied the disputed property in an open, notorious and visible manner; that his occupation was hostile; that such occupation took place under a claim of ownership; that his occupation took place to the exclusion of all others; and that such occupation occurred for a period in excess of ten years. Haywood did not provide notice of his adverse occupation of the disputed property to Castens’ predecessors in title and the subject property’s record owners. Haywood also occupied the disputed property with the permission of and jointly with those predecessors in title.

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

Mississippi law defines adverse possession as

[t]en (10) years' actual possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land full and complete title . . .

Miss. Code Ann. § 15-1-13(1) (1972 as amended).

The Mississippi Supreme Court has established a six-element test for adverse possession.

“Our law requires that a party claiming title by adverse possession must prove that his possession of the lands in issue has been and is (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*, 469 So. 2d at 90.

As the Johnson Court stated, “[t]he question in the end 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*, 469 So. 2d at 91.

The Johnson Court also stated that

possession with permission of the record title holder is never sufficient to establish adverse possession and ripen into title in the adverse possessor no matter how long continued. Permissive possession of land does not confer title in the person in permissive possession until a positive assertion of right hostile to the record title holder has been made known to him.

Johnson, 469 So. 2d at 91.

Haywood, as the would be adverse possessor, carries the burden of proving each element of his adverse possession claim by clear and convincing evidence. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992). Contrary to the Chancellor’s findings in the court below, Haywood did not carry this burden. As such, this Court should reverse the Chancery Court and vest title to the disputed property in its record title holder, Castens.

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

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)). Mississippi courts have repeatedly denied adverse possession claims where the would be adverse possessor failed to provide adequate notice of their claim to the property’s true owner.

In *Rawls v. Parker*, 602 So. 2d 1164 (Miss. 1992), the Mississippi Supreme Court reversed the Chancellor’s finding of adverse possession, concluding that the possessory acts of the would be adverse possessor were insufficient to put the appellant on notice of the appellee’s adverse possession of the disputed property. These possessory acts included the cultivation of a garden and the storage of personal property (a washing machine, tractor and tractor parts) on the disputed property. *Rawls*, 602 So. 2d at 1168.

In *Walker v. Murphee*, 722 So. 2d 1277 (Miss. App. 1998), the Mississippi Court of Appeals affirmed a Chancellor’s finding against adverse possession, concluding that the would be adverse possessor’s acts of storing junk cars, occasionally parking two eighteen wheelers, and mowing and cultivating a garden on the disputed property were insufficient to put the record title holder on notice that his property was being adversely possessed. The Court stated that “the alleged acts of adverse possession and the qualities or the characteristics of those acts” must be such “to put a title holder on notice that a claim, adverse to his own, is being made against his property. Thus, although an act may demonstrate possession, it may also fail to provide

sufficient notice to alert a title holder to an adverse claim upon his land.” *Walker*, 722 So. 2d at 1281.

In the instant case, the Chancellor’s Opinion Of The Court only briefly discusses Haywood’s claimed open, notorious and visible possession of the disputed property. While there is evidence that Haywood used the disputed property in the past, Mrs. Blackmon and Mr. Bush testified that they, too, used the disputed property during their ownership of the Castens property. In fact, Mrs. Blackmon and Mr. Bush 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. 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 in *Scrivener*, *Rawls* and *Walker*, the would be adverse possessor in this case, Haywood, never provided sufficient notice to Mrs. Blackmon and Mr. Bush that he was attempting to adversely acquire their property. Haywood does not appear to have provided any notice of this nature at all. As such, Haywood’s claimed adverse possession of the disputed 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 only briefly and inadequately discussed Haywood’s open, notorious and visible occupation of the disputed property required for a successful adverse possession claim.

Haywood carried the burden of proving by clear and convincing evidence every element of his adverse possession claim. The Chancellor’s conclusion that Haywood carried his burden of proving the open, notorious and visible occupation of the disputed property was clearly erroneous for want of evidence to support such a conclusion. Thus, this Court should reverse the

Chancellor's finding of adverse possession and vest title to the disputed property in Castens as Mr. Bush's and Mrs. Blackmon's successor in title.

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

"Hostility of possession may be shown by evidence of the claimant's acts of ownership over the disputed property or by evidence of such improvements on other property as would indicate his intention to claim the property in dispute; and the fact that claimant took possession under a deed is also admissible to show the hostile character of his occupancy." *Rawls v. Parker*, 602 So. 2d 1164, 1169 (Miss. 1992) (quoting 2A C.J.S. Adverse Possession § 283 (1972)).

"The law is also 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).

In *Moran*, like here, the would be adverse possessor was not occupying the disputed property under color of title. *Id.* Instead, the appellant and would be adverse possessor occupied the disputed property by virtue of permission from the appellant's father, who had received permission to use the land from the appellee's predecessor in title. *Id.* In dicta, the Moran Court stated that the appellant's claim of adverse possession would have been aided by "some event or series of events that would have put Saucier or her predecessors in title on clear notice that Moran was asserting a right of possession that was superior to that of the record title holders. There is, however, no such assertion . . ." *Id.* at 699.

In the instant case, Haywood once again provided no notice to Castens' predecessors in title, Mrs. Blackmon and Mr. Bush, that he was attempting to adversely acquire any of their property. On the contrary, the testimony of Mrs. Blackmon and Mr. Bush indicates both

provided permission for Haywood to use portions of their property, and that Haywood provided Mrs. Blackmon and Mr. Bush with permission to use portions of his property. Both stated Haywood never gave “any reason to believe that he was trying to take” anything from them. Hrg. Transcrip. 22:15; 37:16(January 9, 2007). While the Chancellor found that Haywood intended to claim title to the disputed property and that this intention satisfied the hostility element of his adverse possession claim, the testimony of Mrs. Blackmon and Mr. Bush refute such a finding. If anything, these testimonies show that both Haywood and Mrs. Blackmon and Mr. Bush exchanged permission for both adjoining landowners to use portions of their respective properties. These exchanges of permission included permission for Haywood and Castens’ predecessors in title to use the disputed property as well.

Furthermore, the surveys (Craft and the court’s expert McDonald) stipulated to by the parties at trial, shows the disputed property lies within Castens’ property line. Thus, Castens should be considered 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 considered 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 Mrs. Blackmon and Mr. Bush provided Haywood defeats Haywood’s satisfaction of the hostility element necessary for his successful adverse possession claim.

The Chancellor also found that Haywood’s hostile possession of the disputed property was evidenced by his construction of a fence along his western boundary line that continued onto the Castens property during Mrs. Blackmon’s ownership, said fence including a gate restricting

access to the disputed property. Mrs. Blackmon's testimony clearly shows, however, that this fence continued onto her property only through the permission her now deceased husband provided for Haywood to construct said fence on that property. The fence was for the benefit of both land owners as it keep trespassers off both properties and was constructed by agreement. Hrg. Transcript. 24:27; 40:1; 51:9 (January 9, 2007.)

Haywood once again carries the burden of proving by clear and convincing evidence every element of his adverse possession claim. The Chancellor's finding that Haywood satisfied the hostility element of his claim 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.

The Chancellor fails to adequately explain Haywood's actions that rise to the level of clear and convincing evidence of his occupation of the disputed property under a claim of ownership. The question for this Court is once again "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).

As evidence of Haywood's claim of ownership, the Chancellor cites Haywood's actions of, *inter alia*, pouring sand and gravel, parking vehicles there, granting permission for others to use the disputed property and the erection of a fence and gate on a portion of the property. As discussed previously, however, Haywood, Castens and Castens' predecessors in title all used the disputed property and effectively granted each other permission to use the property. Mrs. Blackmon also testified that her now deceased husband provided Haywood permission to erect

the aforementioned fence through a portion of his property. Any easement granted or taxes paid was only on the two acres described in the Deed to the Haywood property. At no time did Haywood ever have a separate Deed containing the 28 feet in question.

Furthermore, Castens' survey, the court's expert's survey, and the parties' stipulation at trial, show the disputed property to be within the calls of Castens' deed, and that he was its record owner. "Record title coupled with actual possession of a part of the land constitutes constructive possession of the whole, except that part of the land in conflicting actual possession of another." *Eady v. Eady*, 362 So. 2d 830, 832 (Miss. 1978).

The evidence simply does not support the conclusion that Haywood satisfied the element that he occupy the disputed property under a claim of ownership. Instead, the evidence supports the conclusion that actual and construction possession of the disputed property lies with Castens, and the Chancellor's finding to the contrary was clearly erroneous. This Court should find the same, reverse the Chancellor's ruling and vest title to the disputed property in Castens.

D. Haywood Did Not Exclusively Occupy The Disputed Property.

"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)).

In *Rawls*, the Court reversed the Chancellor's finding of adverse possession in part because the appellee and would be adverse possessor failed to successfully exclude the appellant from the disputed property. 602 So. 2d 1164, 1169 (Miss. 1992). The appellee relied on a conversation with the appellant regarding the presence of an old fence marking the boundary line between the two neighbors. *Id.* at 1168-69. While the Court acknowledged that the fence may

have indicated exclusive use, the appellant's objections to the fence were so strong that the appellee removed it. *Id.* at 1169. Upon the erection of a second fence, the appellant took legal action against the appellee. *Id.* The Court found the appellant's objections and legal action denied the appellee's exclusive use of the disputed property, thus defeating the appellee's adverse possession claim. *Id.*

In *Blankinship v. Payton*, the Mississippi Supreme Court reversed a Chancellor's finding of adverse possession, calling the possession of the disputed property by the parties "inexplicably intermittent, or alternated with use by the true owner, which is not adverse possession." 605 So. 2d 817, 820 (Miss. 1992) (citing Richard R. Powell and Patrick J. Rohan, *Powell on Real Property*, § 91-27 (Supp. 1999)). In *Blankinship*, both parties owned the disputed property by virtue of their respective deeds, but neither occupied the property continuously and to the exclusion of the other. *Blankinship*, 605 So. 2d at 819. The appellant claimed use of the land through the cultivation of different crops, maintaining a garden and grazing livestock on the property. *Id.* The appellee claimed use through her children playing there, grazing a shetland pony and planting trees on the property. *Id.* The Court stated that the parties constructively possessed the land described in their deeds, and said "constructive possession is that which follows the title." *Blankinship*, 605 So. 2d at 820. As neither party met the requirements to adversely possess the disputed property, the Court reversed the Chancellor and awarded the property to the appellants based on a survey they had commissioned and which showed the disputed property was within their property line. *Id.*

In *Eady v. Eady*, 362 So. 2d 830 (Miss. 1978), the Mississippi Supreme Court found that the appellant and record title holder of the disputed property had used the property intermittently along with the would be adverse possessor. The Court found this use sufficient to defeat the

exclusive use element of the appellee's adverse possession claim, stating that "[i]f it be conceded that appellees were occupying the land adversely to the appellant, the possession would have to be described as scrambling, for appellant was active upon it also." *Eady*, 362 So. 2d at 832.

In *Fant v. Standard Oil Co.*, 247 So. 2d 132 (Miss. 1971), the Mississippi Supreme Court upheld the Chancellor's finding against adverse possession, in part, because the appellant and would be adverse possessor's use of the disputed property (a twenty foot parking arca) may have occurred, but such use did not occur to the exclusion of the appellee and record title holder. According to the Court, "the use was joint and not exclusive." *Fant*, 247 So. 2d at 133.

These cases demonstrate that while a would be adverse possessor may have the intent to exclude another from the disputed property, they must actually do so in order to satisfy the exclusion element required for a successful adverse possession claim. Joint use with another, particularly joint use with the disputed property's record title holder, will defeat the satisfaction of this exclusion element. Contrary to the Chancellor's findings in the court below, Haywood never exclusively used the disputed property, but only engaged in joint use of the property with Castens and Castens' predecessors in title.

As discussed previously, Mrs. Blackmon and Mr. Bush both testified that they granted permission to Haywood to use portions of the Castens property when they were its record title holders. Haywood, in turn, provided permission to Mrs. Blackmon and, subsequently, to Mr. Bush to use portions of his property. These exchanges of permission included permission to use the property now in dispute.

As *Rawls*, *Blankinship*, *Eady*, and *Fant* show, joint use of disputed property, even if sporadic or intermittent, prevents satisfaction of the exclusive use element required for adverse possession. Mrs. Blackmon and Mr. Bush used the disputed property before Castens, and

Castens made use of the disputed 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 disputed property joint with Castens and his predecessors in title, and not exclusive as required for Haywood's adverse possession claim to succeed. Furthermore, and analogous to the record title holder in *Rawls*, Castens did not recognize a claimed boundary line asserted by the would be adverse possessor, Haywood. Castens' lack of recognition and objection to this boundary line also prevent Haywood's satisfaction of the exclusive use element required for his successful adverse possession claim.

Finally, as Castens' should be considered the record title holder of the disputed property by virtue of the surveys stipulated to by the parties at trial, he should also be found to have constructive possession of the disputed property. *Blankinship*, 605 So. 2d at 820. Such constructive possession also prevents Haywood's satisfaction of the exclusive use element required for his successful adverse possession claim. The Chancellor's finding to the contrary is clearly erroneous as such conclusion is once again not supported by clear and convincing evidence. As in *Blankinship*, this Court should reverse the Chancellor and vest title to the disputed property in Castens.

E. Haywood Did Not Occupy The Disputed Property For A Period In Excess Of Ten Years.

If, as the Chancellor concluded, that Haywood's actions with respect to the disputed property continued "for a period of approximately 27 consecutive years," (R. at 133.), those actions only occurred simultaneously with the actions of Castens and his predecessors in title. Thus, while Haywood may have occupied the disputed property in excess of ten years, Castens and his predecessors in title did so as well. Haywood's occupation is simply insufficient to satisfy with clear and convincing evidence this element of his adverse possession claim. The

only dispute of the 28 feet property occurred in 2000 when Haywood's wife caused trucks to be parked on the property of Mr. Castons. Hrg. Transcrip. 74:29 (January 9, 2007.) The Chancellor's conclusion to the contrary was manifestly in error, and this Court should find the same.

CONCLUSION

The Chancellor's ruling that Haywood satisfied all of the elements 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, that such occupation took place to the exclusion of all others, and that his occupation occurred for a period in excess of ten years. Haywood did not satisfy his burden with respect to any of these elements, and therefore his adverse possession claim must fail.

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.

ADDENDUM

1. Miss. Code Ann. § 15-1-13 (1972 as amended). Adverse possession; exception

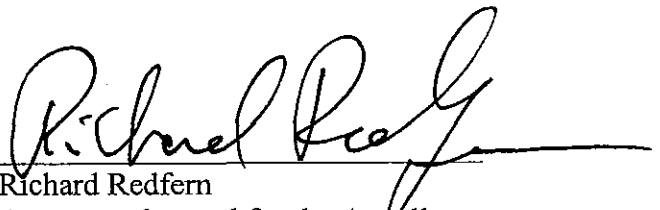
(1) Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.

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 David L. Morrow, Jr.
MORROW LAW FIRM, P.L.L.C.
Post Office Box 148
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This the 19th of July, 2007.


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