

COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2007-CA-01537

DOUBLE J. FARMLANDS, INC.

APPELLANT

V.

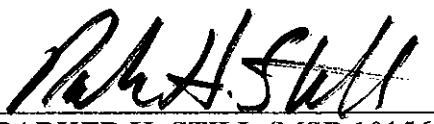
PARADISE BAPTIST CHURCH, ET AL.
AND BETTY DOWNS TYLER

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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 Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusals.

1. Percy Lynchard, Jr., Chancery Court Judge
2. Double J. Farmlands, Inc., Appellant
3. Paradise Baptist Church, Et Al., Appellee
4. Betty Downs Tyler, Appellee
5. Parker H. Still, Attorney for Appellant
6. Rebecca S. Thompson, Attorney for Appellant
7. Mildred LeSure, Attorney for Appellee
8. Leigh Ann Darby, Attorney for Appellee


PARKER H. STILL (MSB 101568)

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that this Court allow oral argument in this matter.

COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2007-CA-01537

DOUBLE J. FARMLANDS, INC.

APPELLANT

V.

PARADISE BAPTIST CHURCH, ET AL.
AND BETTY DOWNS TYLER

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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 Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusals.

1. Percy Lynchard, Jr., Chancery Court Judge
2. Double J. Farmlands, Inc., Appellant
3. Paradise Baptist Church, Et Al., Appellee
4. Betty Downs Tyler, Appellee
5. Parker H. Still, Attorney for Appellant
6. Rebecca S. Thompson, Attorney for Appellant
7. Mildred LeSure, Attorney for Appellee
8. Leigh Ann Darby, Attorney for Appellee

TABLE OF CONTENTS

REQUEST FOR ORAL ARGUMENT.....	i
CERTIFICATE OF INTERESTED PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	vi
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
1. Course of Proceedings and Disposition in Court Below.....	2
2. Statement of Relevant Facts.....	4
SUMMARY OF THE ARGUMENT.....	13
ARGUMENT.....	15
STANDARD OF REVIEW.....	15
I. BECAUSE DEFENDANT TYLER FAILED TO RESPOND TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PRESENTED NO EVIDENCE IN THE PLEADINGS, INTERROGATORIES OR ADMISSIONS TO RAISE A TRIABLE ISSUE OF MATERIAL FACT, DID THE TRIAL COURT ERR IN DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT TYLER?.....	16
II. WHEN THE DISPUTED 6.5 ACRE TRACT HAD BEEN UNDER A CLAIM OF OWNERSHIP BY THE PLAINTIFF, AND THE PLAINTIFF HAD BEEN IN ACTUAL, HOSTILE, OPEN, NOTORIOUS, VISIBLE, CONTINUED AND UNINTERRUPTED, EXCLUSIVE AND PEACEFUL POSSESSION OF SAID 6.5 ACRES IN EXCESS OF FIFTY (50) YEARS, AND DEFENDANT TYLER HAS RECOGNIZED THE EXISTING FENCE AS THE BOUNDARY LINE, DID THE TRIAL COURT ERR IN DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT TYLER AND DEFENDANT PARADISE?.....	17

III.	BECAUSE THE TRIAL COURT DENIED THE PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT SOLELY BASED ON THE AFFIDAVIT OF DEFENDANT TYLER WHICH WAS ATTACHED TO DEFENDANT PARADISE’S RESPONSE TO MOTION FOR SUMMARY JUDGMENT, AND SAID AFFIDAVIT WAS LATER DETERMINED TO BE FRAUDULENT AND SUBMITTED IN BAD FAITH, DID THE TRIAL COURT ERR IN DENYING THE PLAINTIFF’S MOTION TO RECONSIDER ORDER DENYING SUMMARY JUDGMENT?.....	18
IV.	WHERE THE PLAINTIFF PRESENTED UNCONTRADICTED EVIDENCE THAT THE 6.5 ACRE TRACT HAD BEEN UNDER A CLAIM OF OWNERSHIP AND THE PLAINTIFF HAD BEEN IN ACTUAL, HOSTILE, OPEN, NOTORIOUS, VISIBLE, CONTINUED AND UNINTERRUPTED, EXCLUSIVE AND PEACEFUL POSSESSION OF SAID 6.5 ACRES IN EXCESS OF FIFTY (50) YEARS AND DEFENDANT TYLER AGREED THE PLAINTIFF OWNED THE LAND, DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANTS’ MOTION FOR A DIRECTED VERDICT (RULE 41 DISMISSAL)?.....	21
A.	The 6.5 acre tract was under claim of ownership by the Plaintiff.....	22
B.	The Plaintiff’s occupation of the 6.5 acre tract was actual and hostile.....	23
C.	The Plaintiff’s occupation of the 6.5 acre tract was open, notorious and visible.....	25
D.	The Plaintiff’s occupation of the 6.5 acre tract was continuous and uninterrupted for a period of ten (10) years.....	25
E.	The Plaintiff’s occupation of the 6.5 acre tract has been exclusive.....	25
F.	The Plaintiff’s occupation of the 6.5 acre tract has been peaceful.....	25
V.	WAS IT IMPROPER FOR THE TRIAL COURT TO CONCLUDE THAT DEFENDANT TYLER WAS EXPERIENCING MENTAL PROBLEMS AND DETERMINE THAT HER TESTIMONY WAS UNRELIABLE WITHOUT ANY MEDICAL TESTIMONY OR PROOF THEREOF?.....	26

STATEMENT OF THE ISSUES

I. Because Defendant Tyler failed to respond to the Plaintiff's motion for summary judgment and presented no evidence in the pleadings, interrogatories or admissions to raise a triable issue of material fact, did the trial court err in denying the Plaintiff's motion for summary judgment as to Defendant Tyler?

II. When the disputed 6.5 acre tract had been under a claim of ownership by the Plaintiff, and the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted, exclusive and peaceful possession of said 6.5 acres in excess of fifty (50) years, and Defendant Tyler has recognized the existing fence as the boundary line, did the trial court err in denying the Plaintiff's motion for summary judgment as to Defendant Tyler and Defendant Paradise?

III. Because the trial court denied the Plaintiff's motion for summary judgment solely based on the Affidavit of Defendant Tyler which was attached to Defendant Paradise's response to motion for summary judgment, and said Affidavit was later determined to be fraudulent and submitted in bad faith, did the trial court err in denying the Plaintiff's motion to reconsider order denying summary judgment?

IV. Where the Plaintiff presented uncontradicted evidence that the 6.5 acre tract had been under a claim of ownership and the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted, exclusive and peaceful possession of said 6.5 acres in excess of fifty (50) years and Defendant Tyler agreed the Plaintiff owned the land, did the trial

court err in granting the Defendants' motion for a directed verdict (Rule 41 dismissal)?

V. Was it improper for the trial court to conclude that Defendant Tyler was experiencing mental problems and determine that her testimony was unreliable without any medical testimony or proof thereof?

VI. Was it improper for the trial court to discount the testimony of Plaintiff's witness, Jody Tyler, solely based on his relationship with Defendant Tyler?

STATEMENT OF THE CASE

The Chancery Court of Tate County denied the Plaintiff's motion for summary judgment and subsequent motion to reconsider order denying summary judgment. At trial, the court granted the ore tenus Rule 41 motion to dismiss by Defendant, Paradise Baptist Church, Et Al. (hereinafter "Defendant Paradise") and joined by Defendant, Betty Downs Tyler (hereinafter "Defendant Tyler"). The Plaintiff now appeals the Chancery Court's decision with the Mississippi Court of Appeals, seeking a reversal of the trial court's decision and requesting that the case be rendered.

Course of Proceedings and Disposition in Court Below

The original Complaint in this action to quiet and confirm title by adverse possession was filed on February 2, 2006, naming Paradise as a Defendant. The complaint alleged that the disputed 6.5 acre tract had been under a claim of ownership by the Plaintiff, and the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted, exclusive and peaceful possession of said 6.5 acres in excess of fifty (50) years. On April 25, 2006, Defendant

Paradise filed a Third Party Complaint against Defendant Tyler for breach of Warranty Deed. The Plaintiff filed a motion for summary judgment on March 30, 2007, asserting that summary judgment was proper because there were no genuine issues of material facts that would allow a reasonable fact finder to find for the Defendants. Defendant Paradise filed a response to the Plaintiff's motion attaching an Affidavit attested to by Defendant Tyler. Defendant Tyler failed to respond to the Plaintiff's motion. On June 30, 2007, the Tate County Chancery Court denied the Plaintiff's summary judgment motion. The Chancery Court, in an oral opinion, held that the Affidavit submitted by Defendant Paradise created a genuine issue of material fact. Subsequent to the Chancery Court decision, the Plaintiff took the deposition of Defendant Tyler which unequivocally proved that the Affidavit submitted by Defendant Paradise and acquiesced to through oral argument by Defendant Tyler was fraudulent and submitted in bad faith. In response, on July 27, 2007, Plaintiff filed a motion to reconsider order denying summary judgment based on the newly discovered evidence. Defendant Tyler again failed to respond to the motion. On August 23, 2007, the date of the trial, the Chancery Court arbitrarily denied the motion without oral argument. The Plaintiff proceeded to trial by calling five (5) witnesses and offering uncontradicted evidence that the 6.5 acre tract had been under a claim of ownership, and that the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted, exclusive and peaceful possession in excess of fifty (50) years. Defendant Tyler agreed in all aspects with the Plaintiff. At the conclusion of the Plaintiff's case, Defendant Paradise made a motion for directed verdict which was joined by Defendant Tyler. The court considered the motion as a Rule 41 motion to dismiss and granted the motion holding that the Plaintiff failed to meet the hostile element of adverse possession.

Statement of Relevant Facts

The Plaintiff, Double J Farmlands, Inc. (hereinafter "Double J"), is a foreign corporation consisting of the heirs of Robert Garrott Roseborough. Double J is the fee simple owner of approximately six hundred (600) acres of land encompassing the disputed 6.5 acre tract. (R. at 6). This disputed 6.5 acre tract is located within the larger tract. (R at 6, Exhibit 2).¹ This property has been in the Roseborough family for over seventy (70) years and the Defendant Tyler and her deceased husband, Harvey Tyler, have shared a boundary line on the north east side of the tract for approximately fifty (50) years. (*Id.* at 6).

On January 5, 2005, Harvey Tyler, who tended to all the property, died. (R. at 87). On July 20, 2005, approximately seven (7) months after Harvey Tyler's death, Defendant Betty Downs Tyler conveyed a tract of land purporting to contain the 6.5 disputed acres to Defendant Paradise for \$3,000.00. (R. at 81). Defendant Tyler conveyed the property without the benefit of title work. (C.P. at 54-55) [The deed is stamped "No title work requested or done."]. Defendant Paradise, a local Church, desiring to begin construction on the newly acquired property proceeded with obtaining a survey. The dispute arose when the survey revealed that the property conveyed contained the 6.5 acre tract in possession of the Plaintiff and enclosed by the Plaintiff's fence. (R., Exhibit 1).

On February 2, 2006, the Plaintiff filed a complaint to quiet and confirm title by adverse possession naming Paradise as a Defendant, and alleging that the 6.5 acre tract had been under a claim of ownership by the Plaintiff, and the Plaintiff had been in actual, hostile, open, notorious,

¹ The 6.5 acres is located within the large tract, the south line on Exhibit 2 is for demonstrative purposes only, and is not an existing fence. The fence is located on the boundary line with the Tyler's property.

visible, continued and uninterrupted, exclusive and peaceful possession of said 6.5 acres in excess of fifty (50) years. (C.P. at 10-15). Defendant Paradise proceeded with filing a third party complaint against Defendant Tyler for breach of Warranty Deed. (C.P. at 29-31).

On March 30, 2007, the Plaintiff filed a motion for summary judgment. The motion set forth that the 6.5 acres had been under a claim of ownership, the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted, exclusive and peaceful possession of said 6.5 acres in excess of fifty (50) years, the property was encompassed by a fence and Defendant Tyler, and her deceased husband, had been the adjoining landowner to the property and recognized the fence as the boundary line. (C.P. at 62-77). Plaintiff accompanied the motion with Affidavits from Herbert Whalen, Walter McKellar, and Johnny White all attesting to the forgoing facts. (C.P. at 50-53).

Defendant Tyler failed to file a response to the Plaintiff's motion for summary judgment. Defendant Paradise filed a response, and attached an Affidavit signed by Defendant Tyler. (C.P. at 85-101).

On June 30, 2007, Chancery Court Judge Percy Lynchard heard oral arguments on the Plaintiff's motion for summary judgment and denied the motion solely based on the Affidavit submitted by Defendant Paradise and attested to by Defendant Tyler. Subsequent to the Chancery Court decision, the Plaintiff took the deposition of Defendant Tyler wherein she was questioned regarding the Affidavit.

The Affidavit attested to by Defendant Tyler and submitted by Defendant Paradise contains the following statement in paragraph 3, "My husband and I at all times were in actual, hostile, open, notorious, visible, continuous, uninterrupted, exclusive and peaceful possession of the disputed 6.5 acre tract as well as the remainder of the 50 acre tract." (R., Exhibit 8). When

questioned regarding the Plaintiff's fence, Defendant Tyler confirmed that neither she nor her husband had been on the disputed property:

Q. Did y'all ever cross the fence?

A. I had no reason to go over there because I knew I would be trespassing.

(C.P. at 125-137, R. at 81). Defendant Tyler again confirmed this testimony later in the deposition:

Q. Have you ever just – did you ever cross the fence and just walk on this property?

A. No.

(C.P. at 125-137, R. at 80.).

Paragraph 4 of the Affidavit contains the following statement, "My husband, Harvey Tyler, deceased, maintained and leased the property and at other times farmed the land. It has always been my understanding that the subject property belonged to my husband." (R., Exhibit 8). When questioned regarding this statement, Ms. Tyler responded as follows:

Q. I'm going to draw your attention to paragraph 4, Ms. Tyler. You stated that you have maintained and leased this property and at other times farmed the land.

A. I have never maintained or leased the property. I have never farmed the land.

(C.P. 125-137, R. at 81.).

Q. Did your husband ever maintain and farm the land?

A. Never. Never.

(*Id.* at 125-137, R. at 81).

Paragraph 5 of the Affidavit contains the following statement, "Sometimes I accompanied him to check on the property which included the 6.5 acres." (R., Exhibit 8). When questioned regarding this statement Defendant Tyler responded as follows:

Q. It says, Sometimes I accompanied him, and that means your husband, to check on the property which included the 6.5 acres.

A. We never got over there to check anything.

(C.P. at 125-137).

When further questioned regarding the Affidavit, Ms. Tyler responded as follows:

Q. Do you understand that when you signed that document you are swearing on oath it was true and it's been submitted to the Court?

A. That's my signature, but this is not exactly what I signed.

Q. So is it your contention as we sit here today, Ms. Tyler, that you signed the back of this document, but this is a new page that's been submitted on the front?

A. Well, it's not true that we maintained and leased the property and at other times farmed the land. This is totally untrue.

Q. Ms. Tyler, did you— was this document prepared and you just came in and signed it? Is that how it was?

A. I read a paper that I signed, but this is not exactly what I signed.

(*Id.* at 125-137).

In response to the testimony elicited through Defendant Tyler's deposition, the Plaintiff filed a motion to reconsider the order denying summary judgment pursuant to Mississippi Rule of Civil Procedure 60. Defendant Tyler again failed to respond to the motion. On August 23, 2007, the date of the trial, Judge Lynchard denied the motion without oral argument. (R. at 2-3).

At trial the first witness called by the Plaintiff was Johnny White. Mr. White is a stockholder and Vice President of Double J. (R. at 5). Mr. White testified that during the seventy (70) year time period in which the property² has been in the Roseborough family and now subsequently titled in the Plaintiff's name, a fence has served as the boundary line between

² Property meaning the entire 600 acre tract which includes the disputed 6.5 acres.

Defendant Tyler's property and the Plaintiff's property. (R. at 9, 17, 54-55). The fence line between the Plaintiff and Defendant Tyler is well established and recognized as the boundary line by the ASCS office. (R. at 11-12, Exhibit 3).

Testimony provided by Mr. White further established that no claim of ownership had ever been made by Defendant Tyler or her deceased husband despite being adjoining property owners for fifty (50) years. (R. at 16-17). Mr. White went on to testify that the fence had been maintained in the same location and that he paid taxes on approximately 600 acres within the fence line. (R. at 17, 20).

Mr. White's testimony was followed at trial by Herbert Whalen. Mr. Whalen has leased the property, including the 6.5 acre tract, for the last twenty (20) years for the purpose of raising cattle. (R. at 58). His cattle go right up to Defendant Tyler's fence. (R. at 59). Mr. Whalen testified that he had never missed a year running cattle on the property and the existing fence has been the boundary line between the Plaintiff and Defendant Tyler for fifty (50) years. (R. at 58-59). He further testified that the fence had never been down and is a good fence capable of keeping his cows in the pasture. (R. at 60).

Walter McKellar lives approximately two (2) miles from the Plaintiff's property and passes by it several times daily. (R. at 68). Mr. McKellar testified that he has been living in the area forty-two (42) years and the fence has been the boundary between the Plaintiff's property and Defendant Tyler's property during that entire time period. (*Id.* at 68). Mr. McKellar further testified that the fence has never been down and the property has always been in control of the Plaintiff and their predecessors. (R. at 70, 77).

Following Mr. McKellar, the Plaintiff called Defendant Tyler as a witness. Defendant Tyler identified the Affidavit she signed which was the basis for denying the Plaintiff's motion

for summary judgment. (R. at 80, Exhibit 8). When questioned regarding the Affidavit,

Defendant Tyler responded as follows:

Q. Isn't it true that you never crossed the Double J fence or walked on the 6.5 acres that is disputed?

A. Yes, that's true.

(R. at 80).

Q. Please Read Paragraph 4.

A. "My husband, Harvey Tyler, deceased, maintained and leased the property and at other times farmed the land. It has always been my understanding that the subject property belonged to me and my husband." This is not true. He did not lease the property. He did not farm that.

(*Id.* at 80).

Q. You felt that if you went on this property, you would be trespassing; is that correct?

A. Yes

(R. at 81).

Q. You never made a claim of ownership?

A. Not a public claim.

(*Id.* at 81).

Q. Who do you feel like the owner is of this property, Ms. Tyler?

A. I know that Ms. Joyce White³ inherited it from her father.

Q. You agree that the Whites own this property?

³ Joyce White is the mother of Johnny White and a member of the Roseborough family and a shareholder of Double J. Farmlands, Inc.

A. I agree Ms. Joyce White owns it.

(R. at 83).

Upon being questioned by her own counsel, Defendant Tyler responded as follows:

Q. Is it your property and somebody told you can't go on it?

A. You cannot go on property that somebody else declares they own.

(R. at 85).

On redirect, Defendant Tyler again made it clear that she did not own the disputed 6.5 acre tract and had never made a claim of ownership. When questioned, she responded as follows:

Q. Just so there's no confusion later on in the testimony, the fence, the disputed 6.5 acres....I just don't want there to be any confusion later on that you were not clear about the property I'm talking about. Are you clear with me about that?

A. I know that property.

Q. And this property, you felt that if you went on this property, you would be arrested for trespassing?

A. That's the law.

Q. And you felt that would happen to you if you went on the property?

A. There used to be signs that said "no trespassing."

Q. Have you ever farmed the property?

A. Of course not.

Q. You never leased the property?

A. No.

Q. By the court- Do you understand, ma'am, that he's referring to the 6.5 acre tract?

A. Yes Sir. But I never farmed it. I never took a penny from the Whites or Mr. Whalen or anybody for that 6.5. I never went on it.

(R. at 93-94).

The final witness called by the Plaintiff at trial was Jody Tyler. Jody Tyler is the son of Defendant Tyler and owns property that adjoins the Plaintiff.⁴ Jody Tyler testified that the fence between the Plaintiff's land and Defendant Tyler's land has been there his entire life.⁵ (R. at 96-97).

Jody Tyler further testified that Defendant Tyler had also made a claim that she owned a portion of his land. (R. at 98). As with the previous witnesses, Jody Tyler relayed to the court that his family had always recognized the fence as the boundary line and had never made a claim of ownership to any property on the Plaintiff's side of the fence. (R. at 98). He also acknowledged that Herbert Whalen ran cows right up to the fence. (*Id.* at 98).

At the conclusion of Jody Tyler's testimony the court questioned him regarding Defendant Tyler's mental condition.⁶ (R. at 106-107). After the questioning by the court, the Plaintiff proceeded with making a motion for directed verdict based on the evidence presented and the fact that Defendant Tyler admitted the Plaintiff owned the land. (R. at 107). The court denied the motion. (*Id.* at 107).

Following the Plaintiff's motion, Defendant Paradise made a motion for directed verdict

⁴ Jody Tyler owns a strip of land that shares a common boundary with the Plaintiff. The fence at issue serves as their boundary. His property is directly to the west of Defendant Tyler and they share a common boundary on the east.

⁵ Jody Tyler is 42 years old.

⁶ Jody Tyler has not had any contact with his mother in the past four (4) years. (R. at 100).

which was joined by Defendant Tyler.⁷ The trial court in granting the Rule 41 motion to dismiss refused to consider the testimony of Defendant Tyler setting forth that she was an elderly lady who appears to be experiencing mental problems.⁸ (R. at 113). The trial court also discounted the testimony of Jody Tyler on the basis that his relationship with his mother had impaired his judgment.⁹ (R at 114). The trial court setting out the elements of adverse possession concluded that the Plaintiff failed to meet the element of hostile intent. (R. at 115-116).

In Summary, the Plaintiff offered undisputed proof that the fence between their property and defendant Tyler's property had been in existence well beyond the requisite ten (10) year period as required to obtain property by adverse possession. The testimony unequivocally showed that the Plaintiff claimed ownership to the property. The claim of ownership was actual and hostile, as evidenced by the fence and no trespassing signs. The occupation of the property was open, notorious, visible and exclusive. By the Defendant's own admission, first in the deposition and then at trial, she feared being arrested for trespassing by entering the disputed 6.5 acre tract, clearly showing a hostile claim of ownership by the Plaintiff. The Plaintiff met the elements of adverse possession and is lawfully entitled to unencumbered title to the said 6.5 acres.

⁷ The court treated the Defendants' directed verdict motion as a Rule 41 motion to dismiss. (R. at 109).

⁸ No expert testimony was given regarding Defendant Tyler's mental condition.

⁹ Mr. Tyler testified that he loves his mother and is not trying to hurt her. (R. at 102).

SUMMARY OF THE ARGUMENT

The trial court's ruling and this appeal are essentially about two issues: the denial of the Plaintiff's motion for summary judgment, and the granting of the Defendants' Rule 41 motion to dismiss. The trial court in denying the Plaintiff's motion for summary judgment and subsequent motion to reconsider, held that the Affidavit attested to by Defendant Tyler and submitted by Defendant Paradise created a genuine issue of material fact. However, this Brief will explain that the Affidavit submitted by Defendant Paradise was fraudulent, submitted in bad faith and failed to create a genuine issue of material fact. The three independent bases on which this Court can hold that the Plaintiff was entitled to summary judgment include: (1) Actual evidence, being the Affidavits submitted by the Plaintiff conclusively and unequivocally establishing that the Plaintiff made a claim of ownership and has been in actual, hostile, open, notorious, visible, continued and uninterrupted well in excess of ten (10) years, exclusive and peaceful possession of the 6.5 acre tract, (2) The Affidavit of Defendant Tyler as falsely submitted by Defendant Paradise was fraudulent and submitted in bad faith thereby creating no genuine issue of material fact, (3) Defendant Tyler did not respond to the Plaintiff's motion for summary judgment and subsequent motion to reconsider order denying summary judgment.

The trial court's denial of summary judgment was improper because the Defendants failed to offer specific, probative evidence demonstrating that triable issues of material facts exist. Defendant Tyler failed to respond to the motion and Defendant Paradise submitted a fraudulent Affidavit. While at the time of the initial summary judgment hearing, the specific facts regarding the fraudulent Affidavit were unknown, the trial court was advised by the Plaintiff that the Affidavit was false. Since Defendant Tyler failed to respond and Defendant Paradise offered nothing but unsubstantiated assertions, there was no evidence sufficient to

establish that material facts existed. The only viable evidence submitted at the hearing was the three (3) Affidavits submitted by the Plaintiff, all of which were uncontradicted.

Even though the trial court found that the Affidavit submitted by Defendant Paradise and attested to by Defendant Tyler created a genuine issue of material fact, the trial court erred in failing to consider the Plaintiff's motion to reconsider the order denying summary judgment based on the fraudulent Affidavit. The trial court's only reason for denying Plaintiff's summary judgment was the Affidavit. When the Affidavit was proven false, there was no other evidence for the court to consider and no genuine issue of material fact. Without the Affidavit or any other evidence, summary judgment was proper. Therefore, the Court of Appeals should reverse the decision of the chancery court and render the case.

Additionally, Defendant Tyler in failing to respond to the Plaintiff's motion for summary judgment and subsequent motion to reconsider order denying summary judgment further evidences that there was no probative evidence to counter the Plaintiff's motion.

Even if the trial court found a genuine issue of material fact to defeat Plaintiff's motion for summary judgment, the trial court still erred in granting the Defendants' Rule 41 motion to dismiss. The Defendants' motion was granted because the trial court found that the Plaintiff failed to establish the element of actual or hostile occupation of the land. On the contrary, Plaintiff indeed established the actual or hostile element as well as open, notorious, visible, continuous, uninterrupted for ten (10) years, exclusive and peaceful possession of the 6.5 acre tract, and the Defendants' motion should have been denied.

In specifically addressing the trial court's finding that the Plaintiff failed to establish the actual or hostile occupation of land, the Plaintiff offered proof at trial that neither the Defendants nor any person was granted permission to use to use the 6.5 acre tract. The fence demonstrates

the Plaintiff's desire to exclude all others from the property and the property was used for cattle farming with no trespassing signs placed about the property. These acts of the Plaintiff demonstrate a manifest intent by the Plaintiff to hold the property against the claims of all others and the trial court erred in finding the Plaintiff failed to establish a hostile occupation of the property. Therefore, the Mississippi Court of Appeals should reverse the decision of the Chancery Court.

ARGUMENT

STANDARD OF REVIEW

A de novo standard of review is utilized by the Mississippi Court of Appeals for appeals from summary judgment orders. *Daily v. Methodist Medical Center*, 790 So.2d 903, 906 (Miss. Ct. App. 2001) (citing *Cossitt v. Alfa Ins. Corp.*, 726 So.2d 132, 136 (Miss. 1998)). Rule 56(c) of the Mississippi Rules of Civil Procedure states that summary judgment "shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with Affidavits, if any show that there is no genuine issue as to material fact the moving party is entitled to a judgment as a matter of law." MISS. R. CIV. P. 56(c). "When a motion for summary judgment is made and supported as provided in Rule 56 an adverse party may not rest upon the mere allegations or denials of his pleadings, his response must set forth specific facts showing that there is a genuine issue for trial." *Stuckey v. The Provident Bank*, 912 So.2d 859, 864 (Miss. 2005). To successfully oppose a motion for summary judgment, a non-moving party is required to offer specific, probative evidence demonstrating that triable issues of material facts exist. *Id.* at 865. A non-moving party must show more than a mere scintilla of colorable evidence, *i.e.*, they must produce evidence upon which a [trier of fact] could find for them. Unsubstantiated assertions are not enough. *Van v. Grand Casinos of Mississippi, Inc.*, 767 So.2d

1014 (Miss. 2000). While this case should have been adjudicated with an order granting the Plaintiff's motion for summary judgment, the trial court granted the Defendants' Rule 41 motion to dismiss. A substantial evidence/manifest error standard is utilized by the Mississippi Court of Appeals for appeals from a motion to dismiss. *Gulfport-Biloxi Regional Airport Authority v. Montclair Travel Agency Inc.*, 937 So.2d 1000, 1005 (Miss. Ct. App. 2006).

I. Because Defendant Tyler failed to respond to the Plaintiff's motion for summary judgment and presented no evidence in the pleadings, interrogatories or admissions to raise a triable issue of material fact, did the trial court err in denying the Plaintiff's motion for summary judgment as to Defendant Tyler?

The trial court erred in failing to grant the Plaintiff's motion for summary judgment as to Defendant Tyler. Specific, uncontradicted evidence was offered that the 6.5 acre tract had been under a claim of ownership by the Plaintiff, and the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted for ten (10) years, exclusive and peaceful possession.¹⁰ Specifically, the Plaintiff offered (3) Affidavits all of which were uncontradicted. Plaintiff concedes that failing to file an answer to the motion is not grounds in itself for summary judgment.¹¹ However, "an adverse party may not rest upon the mere allegations or denials of his pleadings, his response must set forth specific facts showing that there is a genuine issue for trial."¹²

¹⁰ *Apperson v. White*, 950 So.2d 1113, 1116 (Miss. Ct. App. 2007) (citing *Rice v. Pritchard*, 611 So.2d 869, 871 (Miss. 1992). ("For possession to be adverse it must be (1) under a claim of ownership; (2) actual or hostile; (3) open, notorious and visible; (4) continued and uninterrupted for a period of ten (10) years; (5) exclusive; and (6) peaceful").

¹¹ *See, Cole v. Methodist Medical Center* 820 So.2d 739, 742-743 (Miss. Ct. App. 2002).

¹² *Stuckey v. The Provident Bank*, 912 So.2d 859, 864 (Miss. 2005).

As indicated from the clerk's papers, when the motion for summary judgment was presented before the trial court, the only evidence for the court to consider as to Defendant Tyler was her answer to the third party complaint. (C.P. at 2-4). While Defendant Tyler signed the Affidavit, it was submitted as an Exhibit to the response filed by Defendant Paradise. (C.P. at 100-101). Defendant Tyler filed no response and the court wrongfully ruled that the Affidavit as submitted by Defendant Paradise created a genuine issue of material fact as to the pending motion against Defendant Tyler. Since the Plaintiff offered specific uncontradicted evidence that the 6.5 acre tract had been under a claim of ownership by the Plaintiff, and the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted for ten (10) years, exclusive and peaceful possession, and Defendant Tyler offered nothing to prove otherwise, summary judgment was proper as to Defendant Tyler.

II. When the disputed 6.5 acre tract had been under a claim of ownership by the Plaintiff, and the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted, exclusive and peaceful possession of said 6.5 acres in excess of fifty (50) years, and Defendant Tyler has recognized the existing fence as the boundary line, did the trial court err in denying the Plaintiff's motion for summary judgment as to Defendant Tyler and Defendant Paradise?

The trial court erred in failing to grant the Plaintiff's motion for summary judgment as to Defendant Tyler and Defendant Paradise because neither Defendant offered any proof to dispute the Plaintiff's claims. As previously stated, Defendant Tyler failed to respond to the motion and Defendant Paradise failed to offer any probative evidence other than the Affidavit attested to by Defendant Tyler. The court's ruling that the Affidavit submitted by Defendant Paradise created a genuine issue of material fact, was against the overwhelming weight of evidence submitted by the Plaintiff. The Tyler Affidavit setting forth that she and her husband were in actual, hostile, open, notorious, visible, continuous, uninterrupted, exclusive and peaceful possession of the 6.5

acres in dispute was fraudulent on its face. (R., Exhibit 8). All evidence presented by the Plaintiff was in direct contradiction of the Affidavit and yet the court gave the Affidavit great weight and denied the Plaintiff's motion for summary judgment. Since the Plaintiff proved the elements of adverse possession and no probative evidence was offered to rebut, summary judgment was proper as to Defendant Tyler and Defendant Paradise.

III. Because the trial court denied the Plaintiff's motion for summary judgment solely based on the Affidavit of Defendant Tyler which was attached to Defendant Paradise's response to motion for summary judgment, and said Affidavit was later determined to be fraudulent and submitted in bad faith, did the trial court err in denying the Plaintiff's motion to reconsider order denying summary judgment?

The trial court erred in denying the Plaintiff's motion to reconsider order denying summary judgment because the Affidavit which the court determined created a genuine issue of material fact was determined to be false. Subsequent to the summary judgment hearing, the Plaintiff took the deposition of Defendant Tyler in order to specifically question her regarding the Affidavit.

The Affidavit attested to by Defendant Tyler and submitted by Defendant Paradise contained the following statement in paragraph 3, "My husband and I at all times were in actual, hostile, open, notorious, visible, continuous, uninterrupted, exclusive and peaceful possession of the disputed 6.5 acre tract as well as the remainder of the 50 acre tract." (R., Exhibit 8). When questioned regarding the Plaintiff's fence, Defendant Tyler confirmed that neither she nor her husband had been on the disputed property:

Q. Did y'all ever cross the fence?

A. I had no reason to go over there because I knew I would be trespassing.

(C.P. at 125-137, R. at 81).

Defendant Tyler again confirmed this testimony later in the deposition:

Q. Have you ever just – did you ever cross the fence and just walk on this property?

A. No.

(C.P. at 125-137, R. at 80).

Paragraph 4 of the Affidavit contains the following statement, “My husband, Harvey Tyler, deceased, maintained and leased the property and at other times farmed the land. It has always been my understanding that the subject property belonged to my husband.” (R., Exhibit 8). When questioned regarding this statement, Ms. Tyler responded as follows:

Q. I’m going to draw your attention to paragraph 4, Ms. Tyler. You stated that you have maintained and leased this property and at other times farmed the land.

A. I have never maintained or leased the property. I have never farmed the land.

(C.P. at 125-137, R. at 81).

Q. Did your husband ever maintain and farm the land?

A. Never. Never.

(*Id.* at 125-137, R. at 81).

Paragraph 5 of the Affidavit contains the following statement, “Sometimes I accompanied him to check on the property which included the 6.5 acres.” (R., Exhibit 8). When questioned regarding this statement Defendant Tyler responded as follows:

Q. It says, Sometimes I accompanied him, and that means your husband, to check on the property which included the 6.5 acres.

A. We never got over there to check anything.

(C.P. at 125-137).

When further questioned regarding the Affidavit, Ms. Tyler responded as follows:

Q. Do you understand that when you signed that document you are swearing on oath

it was true and it's been submitted to the Court?

A. That's my signature, but this is not exactly what I signed.

Q. So is it your contention as we sit here today, Ms. Tyler, that you signed the back of this document, but this is a new page that's been submitted on the front?

A. Well, it's not true that we maintained and leased the property and at other times farmed the land. This is totally untrue.

Q. Ms. Tyler, did you— was this document prepared and you just came in and signed it? Is that how it was?

A. I read a paper that I signed, but this is not exactly what I signed.

(C.P. at 125-137).

The testimony provided by Defendant Tyler unequivocally proved the Plaintiff's contention that the Affidavit was fraudulent. In response, the Plaintiff filed a motion to reconsider order denying summary judgment pursuant to Rule 60.¹³ Since the Affidavit was proven false the Defendants had no evidence to dispute the Plaintiff's motion. This was evidenced by Defendant Tyler again failing to respond to the motion and Defendant Paradise filing a one (1) page response/motion failing to address any of the issues as set forth by the Plaintiff. (C.P. at 146).

With the Affidavit proven false, and that being the court's only rationale for denying the Plaintiff's motion for summary judgment, it appeared evident that the Plaintiff's motion would be granted. However, on August 23, 2007, the date of the trial, the court arbitrarily denied the motion without oral argument. (R. at 2-3). No finding of fact was made regarding Defendant

¹³ See MISS. R. CIV. P. 60(b). (Allowing a motion to reconsider to be filed within six (6) months after an order was entered or taken for fraud, misrepresentation, or newly discovered evidence.).

Tyler's mental state before the Plaintiff's motion was denied.¹⁴

It hardly seems logical that the trial court can deny the Plaintiff's motion for summary judgment solely based on Defendant Tyler's Affidavit and then, when the Affidavit is proven false, fail to grant the motion. The Defendants offered no evidence to oppose the Plaintiff's motion other than the Affidavit and the trial court erred in failing to grant the Plaintiff's motion when their one (1) piece of evidence was proven false. Summary judgment was proper, and sanctions should have been assessed against the Defendants for submitting a fraudulent Affidavit.

IV. Where the Plaintiff presented uncontradicted evidence that the 6.5 acre tract had been under a claim of ownership and the Plaintiff had been in actual, hostile, open, notorious, visible, continued and uninterrupted, exclusive and peaceful possession of said 6.5 acres in excess of fifty (50) years and Defendant Tyler agreed the Plaintiff owned the land, did the trial court err in granting the Defendants' motion for a directed verdict (Rule 41 dismissal)?

The trial court erred in granting the Defendants' motion for directed verdict¹⁵ because the Plaintiff put forth evidence that arguably they might be entitled to a judgment.¹⁶

The law in Mississippi is well settled in determining if adverse possession has occurred. The test in determining if adverse possession has occurred is as follows: "for possession to be adverse it must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6)

¹⁴ The trial court relied on Defendant Tyler's testimony to defeat the Plaintiff's motion for summary judgment, yet disregarded her testimony at trial.

¹⁵ See e.g. *Mississippi Real Estate Commission v. Geico Financial Services, Inc.*, 602 So.2d 1155 (Miss. 1992) (Where a non-jury trial is involved, a motion for directed verdict granted by the court is procedurally a dismissal on the merits under Rule 41(b)).

¹⁶ See e.g. *Aronson v. The Univ. of Mississippi*, 828 So.2d 752 (Miss. 2002) (Where there arguably is evidence that a party might be entitled to judgment, the court errs in dismissing the case); *Ladner v. Stone County*, 938 So.2d 270, 273 (Miss. Ct. App. 2006).

peaceful.” *Apperson v. White*, 950 So.2d 1113, 1116 (Miss. Ct. App. 2007) (citing *Rice v. Pritchard*, 611 So.2d 869, 871 (Miss. 1992)).

A. The 6.5 acre tract was under a claim of ownership by the Plaintiff.

In order to prove the 6.5 acres was under a claim of ownership by the Plaintiff, their “possessory acts must be sufficient to fly their flag over the property” and put the Defendants on notice that the land was being held under an adverse claim of ownership. *Apperson v. White*, 950 So.2d 1113, 1117 (Miss. Ct. App. 2007). The *Apperson* case, is factually similar to the case at hand, in that the adverse possessor’s predecessor in interest had constructed a barbed-wire fence over sixty years earlier and it had been maintained as the property line ever since. *Id.* at 1117. In the *Apperson* case, the court found the fence to be the “most substantial evidence of a possessory act performed by the White [adverse possessor] sufficient to fly their flag over the property.” *Id.* at 1117. The point was reiterated, that the court “has long recognized that the existence of an old fence, including disputed land in with the land of the claimant, was strong evidence of the elements required to prove adverse possession. *Id.* at 1117. (citing *Roebuck v. Massey*, 741 So.2d 375, 389 (Miss.Ct. App. 1999)).

At trial, Johnny White testified that: (1) the property¹⁷ had been in the Roseborough family and now subsequently titled in the Plaintiff’s name for approximately seventy (70) years; (R. at 7, 9).; (2) during this time period a fence has served as the boundary line between Defendant Tylers’s property and the Plaintiff’s property; (R. at 9, 17, 54-55).; (3) the boundary line between the Plaintiff and Defendant Tyler is well established and recognized as the boundary line by the ASCS office; (R. at 11-12, Exhibit 3).; (4) No claim of ownership had ever been made

¹⁷ Property meaning the entire 600 acre tract which includes the disputed 6.5 acres.

by Defendant Tyler or her deceased husband despite being the adjoining property owners for fifty (50) years; (R. at 16-17).; (5) the fence has been in the same location; (R. at 17).; and (6) Mr. White paid taxes on the property. (R. at 20).

Herbert Whalen's testimony further demonstrated that the Plaintiff's possessory acts were sufficient to "fly their flag over the property" specifically that he leased the property, including the 6.5 acres, for the last twenty (20) years. (R. at 58). His cows went right up to the existing fence and the fence had been the boundary line for fifty (50) years.¹⁸ (R. at 58-59).

The most compelling evidence presented at the hearing was Defendant Tyler's own testimony. Defendant Tyler specifically stated (1) she never crossed the fence; (R. at 80); (2) if she went on the property she would be trespassing; (R. at 81); (3) she never made a public claim of ownership¹⁹; (R. at 81).; (4) the Plaintiff owns the property; (R. at 83); and (5) there were "no trespassing" signs on the property; (R. at 94).

This testimony coupled with that of Walter McKellar and Jody Tyler unequivocally demonstrates and proves that the Plaintiff's possessory acts were sufficient to "fly their flag over the property."

B. The Plaintiff's occupation of the 6.5 acre tract was actual and hostile.

"The actual or hostile occupation of land necessary to constitute adverse possession requires a corporeal occupation, accompanied by a manifest intention to hold and continue to hold the property against the claims of all other persons, and adverse to the rights of the true

¹⁸ See e.g. *Kayser v. Dixon*, 309 So.2d 526, 528-529 (Miss. 1975.) ("It is well settled that actual or constructive occupation, cultivation, or residence is sufficient to constitute adverse possession.").

¹⁹ See e.g. *Simmons v. Cleveland*, 749 So.2d 192, 197 (Miss. Ct. App. 1999). ("Adjoining landowners who occupy their respective premises up to a certain line, if continued for a sufficient length of time, are precluded from claiming that the boundary thus recognized and acquiesced in is not the true one.").

owner.” *Apperson v. White*, 950 So.2d 1113, 1118 (Miss. Ct. App. 2007) (citing *Magee v. Magee*, 37 Miss. 138, 153 (1859)).

The trial court erred in examining the element of actual or hostile occupation in two (2) ways. First, the court seemed to take issue with the Plaintiff’s mistaken belief that the property was within the calls of his deed. (R. at 111, 115). However, it is well settled that “possession is hostile and adverse when the adverse possessor intends to claim title notwithstanding that the claim is made under a mistaken belief that the land is within the calls of the possessor’s deed.” *Wicker v. Harvey*, 937 So.2d 983, 994 (Miss.Ct.App. 2006) (citing *Alexander v. Hyland*, 58 So.2d 826, 829 (Miss. 1952)). Second, the trial court found no evidence was presented that the Plaintiff evicted the surveyors in 2005 when the survey was conducted on the 6.5 acres. (R. at 112). Based on this finding, the court determined the Plaintiff did not meet the element of hostile occupation. This conclusion is against the overwhelming weight of evidence and would seem to require an adverse possessor be on constant watch for anyone entering the property which is clearly not the law.²⁰

The Plaintiff’s possessory acts of running cattle on the property, posting no trespassing signs, and maintaining the fence are demonstrative to show the Plaintiff’s intent hold the property against the claims of all others and hostile/actual occupation.²¹

²⁰ See e.g. *Askew v. Reed*, 910 S.2d 1241, 1245 (Miss.Ct.App. 2005) (“In an adverse possession claim, the fact finder must analyze both the alleged acts of adverse possession and the qualities or the characteristics of those acts which enable them to put a title holder on notice that claim, adverse to his own, is being made against his property.”).

²¹ See e.g. *Roebuck v. Massey*, 741 So.2d 375 (Miss.Ct.App. 1999) (“Testimony by neighbors that they had believed for many years the fence represented the boundary between the landowner and adjoining landowners’ properties, and that adjoining landowners family had cut timber and raised cattle on the disputed portion of the property was sufficient to support finding that adjoining landowners acquired title to landowners property on their side of the fence by adverse possession.”).

C. The Plaintiff's occupation of the 6.5 acre tract was open, notorious and visible.

The Plaintiff has a fence around the disputed property and runs cattle on said property to the exclusion of all others. There has never been an attempt to hide their use of the disputed tract and the fence serves as a clear and visible indicator of their occupation. The fence and property are visible from a public road and Defendant Tyler's residence.²²

D. The Plaintiff's occupation of the 6.5 acre tract was continuous and uninterrupted for a period of ten(10) years.

Uncontroverted testimony demonstrated that the Plaintiff performed the above mentioned acts from the 1930's until at least 2005, when the survey was performed. The trial court likewise found a continuous and uninterrupted occupation for a period of ten (10) years. (R. at 115).

E. The Plaintiff's occupation of the 6.5 acre tract has been exclusive.

Exclusive possession is defined as the "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 the he is exercising dominion of a sole owner." *Wicker v. Harvey* 937 So.2d 983, 995 (Miss. Ct. App. 2006) (quoting *Rawls v. Parker*, 602 So.2d 1164, 1169 (Miss. 1992)). The Plaintiff's intention to exercise dominion as the sole owner is without question. The property in dispute is enclosed by a fence, is used to raise cattle, and most importantly for over fifty (50) years there has never been a claim of ownership made by anyone. (R. at 16-17, 58-59).

F. The Plaintiff's occupation of the 6.5 acre tract has been peaceful.

The evidence is undisputed that the Plaintiff and their predecessors have peacefully

²² See e.g. *Linton v. Cross*, 876 So.2d 377, 379 (Miss.Ct.App. 2003) ("Claimants' use of disputed land was open, notorious and visible, so as to support adverse possession claim, where landowners lived approximately 200 yards from the disputed area, area was not heavily wooded and was clearly visible from landowners' house, and thus landowners should easily have been able to see claimants' acts of ownership or the results of them.").

possessed the property for a period exceeding ten (10) years. No party ever contested the Plaintiff's ownership until the survey was performed, and no claim of ownership had ever been made by Defendant Tyler or her deceased husband despite being the adjoining property owners for fifty (50) years. (R. at 16-17).

The Plaintiff's evidence presented at trial was sufficient that a reasonable finder of fact could find that the Plaintiff met the requirements to obtain title by adverse possession. The trial court erred in granting the Defendants' motion for directed verdict (Rule 41 motion to dismiss) in view of the evidence presented.

V. Was it improper for the trial court to conclude that Defendant Tyler was experiencing mental problems and determine that her testimony was unreliable without any medical testimony or proof thereof?

The trial court erred in concluding that Defendant Tyler was experiencing mental problems and her testimony was unreliable without any medical proof. Defendant Tyler's testimony at her deposition was precisely what she testified to at trial. No medical proof was offered to indicate Defendant Tyler was experiencing mental problems. To the contrary, Ms. Tyler testified that the only mental problems she suffered were associated with the death of her children. (R. at 89).

The trial court erred in finding that Defendant Tyler was experiencing mental problems without any proof, and her testimony should not have been determined unreliable.

VI. Was it improper for the trial court to discount the testimony of Plaintiff's witness, Jody Tyler, solely based on his relationship with Defendant Tyler?

The trial court erred in discounting the testimony of Jody Tyler solely based on his relationship with Defendant Tyler. Defendant Tyler testified that he loved his mother and was not trying to hurt her. (R. at 102). There was no specific testimony that Jody Tyler was

attempting to undermine Defendant Tyler. The finding by the court that his relationship with Defendant Tyler had impaired his judgment is against the evidence presented, and the court erred in discounting his testimony.

CONCLUSION

Since the Plaintiff's initial motion for summary judgment, the Defendants have offered no proof to contest the claim for adverse possession. This is evident by Defendant Tyler failing to respond to the motion and subsequent motion to reconsider, and by Defendant Paradise submitting a fraudulent Affidavit. Because the Plaintiff produced sufficient, uncontroverted evidence of adverse possession, summary judgment was proper, the ruling of the trial court should be reversed, with the case being rendered.

The evidence putforth at the hearing, at the very minimum, indicates that the Plaintiff arguably might be entitled to judgment. The witnesses called by the Plaintiff provided testimony proving all elements of adverse possession, and Defendant Tyler agreed that the Plaintiff owned the land. While the court found Defendant Tyler to be suffering from mental problems, without any medical opinion, her testimony remained unchanged throughout her deposition, questioning by the Plaintiff and questioning by the court. As reiterated time and time again, the Defendants are simply without any defense to the Plaintiff's claim of adverse opinion. Upon review of relevant case law, one can easily determine that this is one of the more clear cut cases of adverse possession and the trial court erred in the application of the law. Because the Plaintiff presented evidence that they might arguably be entitled to a judgment, the Rule 41 dismissal by the trial court was improper and the ruling should be reversed.

Respectfully submitted, this the 4th day of January, 2008.

DOUBLE J. FARMLANDS, INC.

A handwritten signature in black ink, appearing to read 'P.H. Still', written over a horizontal line.

Parker H. Still ([REDACTED])

Parker H. Still
Smith, Phillips, Mitchell, Scott & Nowak, LLP
P. O. Drawer 1586
Batesville, MS 38606
(662) 563-4613
Attorney for the Appellant

Rebecca S. Thompson
Smith, Phillips, Mitchell, Scott & Nowak, LLP
P. O. Box 346
Hernando, MS 38632
(662) 429-5041
Attorney for the Appellant

CERTIFICATE OF SERVICE

I, Parker H. Still, one of the attorneys for the Appellant, do hereby certify that I have this day mailed, posted prepaid by United States mail, a true and correct copy of the above and foregoing Brief of Appellant to:

Mildred J. LeSure, Esq.
Attorney at Law
P.O. Box 541
Senatobia, MS 38668
Attorney for the Appellee

Leigh Ann Darby, Esq.
Moore & Darby, PLLC
216 S. Ward Street
Senatobia, MS 38668
Attorney for the Appellee

This the 4th day of January, 2008.



PARKER H. STILL

AMENDED CERTIFICATE OF SERVICE

I, Parker H. Still, one of the attorneys for the Appellant, do hereby certify that I have this day mailed, posted prepaid by United States mail, a true and correct copy of the above and foregoing Brief of Appellant and Record Excerpts to:

Percy L. Lynchard, Jr.
P. O. Box 340
Hernando, MS 38632
Trial Court Judge

This the 7th day of January, 2008.



PARKER H. STILL