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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EUGENE C. FRAZIER, et al — APPELLANTS

VS. — NO. 2008-CA-00555

SIMON FRAZIER, et al — APPELLEES

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APPEAL FROM THE CHANCERY COURT OF
THE SECOND JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
G2007-29 O/3

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***BRIEF OF APPELLANTS***

***(ORAL ARGUMENT NOT REQUESTED)***

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ATTORNEYS FOR APPELLANTS

**BRIEF OF APPELLANTS**

**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 this Court may evaluate possible disqualification or refusal:

1. THE PARTIES LISTED IN THE TITLE OF THE CASE;
2. E. Michael Marks, Trial and Appellate attorney for Appellants;
3. Julie Ann Epps, counsel for Appellants on appeal;
4. Honorable Denise Owens, Chancery Court Judge;

This, the 25th day of August, 2008.

E. Michael Marks
COUNSEL FOR APPELLANTS

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## STATEMENT OF ISSUES

**I. THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN NOT AWARDING TITLE TO THE PROPERTY TO THE PLAINTIFFS BY VIRTUE OF THEIR ADVERSE POSSESSION.**

## STATEMENT OF THE CASE

**(i) Course of the Proceedings and Disposition in the Court Below:**

Plaintiffs-Appellants, Eugene C. Frazier, et al filed suit in the Chancery Court of the Second Judicial District of Hinds County, Mississippi, asking that the Chancellor to declare that they had title to certain real property by virtue of having adversely possessed it for a period greater of ten years. Alternatively, Appellants asked the Chancellor to partition the land and return to Appellants certain sums they had spent paying taxes and making improvements and in managing the property as well as costs for prosecuting their rights.

None of the Defendants-Appellees answered the complaint or appeared in Court at trial to contest the complaint. R.II/4. The case was tried before the Honorable Denise Owen. By Judgment filed March 6, 2008, Judge Owen found that none of the Defendants appeared in person or by counsel. She further found that the Plaintiffs had failed to show by clear and convincing evidence all the elements of adverse possession and denied their claim for adverse possession. She, however, found that they were entitled to recover a judgment for taxes paid and other expenses in maintaining the property in the amount of $1,620.00, plus legal interest and that the Plaintiffs could sue for partition. RE 4-5.

Plaintiffs timely appealed the judgment to this Court. RE 6-7.

**(ii) Statement of Facts:**

By Warranty Deed dated November 8, 1955 (Book 158, page 388) Henry Frazier and his wife Mozella Frazer, Arthur Frazer and his wife Bernice Frazer received the property which is the subject of this litigation. R.I/5-6. The heirs of Henry and Mozella brought this suit against the heirs of Arthur and Bernice to vest title in them by virtue of their adverse possession. R.I/1-4.

Henry and Arthur were brothers. Arthur died in 1998 or 1999; Bernice died in 1989 or 1990. Henry and Mozella were both dead at the time of this lawsuit, Mozella having predeceased Henry. R.II/12-13.

In 1955, Henry fenced all of the property at his expense. Since that time, Henry or his heirs had maintained the fence and made repairs on it. R.II/10. In 1995, Henry cut timber from the property and sold it. R.II/8-9. Two of Henry's heirs built houses on the property. Another of Henry's heirs lived there with his son until his house burned. Henry and Mozella had a house on the property as well. R.II/13.

Neither Arthur nor any of his heirs lived on the property; nor is there any testimony that they used the property for any purpose for more than at least ten years prior to filing of this suit. R.II/13. Arthur and Mozella and their children owned property about a mile and a half down the road from the subject property, and that is where they lived. R.II/14.

Around 1988, by agreement Henry and Mozella and Arthur and Bernice agreed to a roughly equal division of the property. Apparently no deed was recorded for Arthur and Bernice's half. R.II/15. However, after 1988 neither Arthur, Bernice nor their children or heirs helped with any upkeep of any of their part of the property or helped with the

fencing or maintenance of the fence. (R.II/18). There is no evidence that the Arthur, Bernice or their heirs used the property. Furthermore, they had not paid taxes on their portion of the land since at least 1988.[1]

Rather, Henry and his heirs had paid all the taxes. *See, ftnte 1 supra* and Exhibit 1. Henry and his heirs had grazed their own cattle on the land after 1988. They had also inspected the land yearly after 1988. R.II/7. Since 1988, Henry and his heirs had had several meetings with some of the heirs of Arthur and Bernice to get them to assist in taking care of the land and paying the taxes, but the heirs of Arthur and Bernice had refused to do so. R.II/8.

## SUMMARY OF THE ARGUMENT

The Chancellor committed reversible error in not granting the subject property to the Plaintiffs by virtue of their adverse possession. Alternatively the Chancellor erred in not partitioning the property.

## ARGUMENT

### I. THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN NOT AWARDING TITLE TO THE PROPERTY TO THE PLAINTIFFS BY VIRTUE OF THEIR ADVERSE POSSESSION.

A. *Standard of Review:*

On appeal, the Supreme Court must consider the entire record before it and accept all those facts and reasonable inferences which support the Chancellor's ruling. *Madden v. Rhodes,* 626 So.2d 608, 616 (Miss. 1993). The Chancellor's findings will not be

[1] Major Eugene Frazier, the man who actually paid the taxes on behalf of the heirs of Henry, confirmed that the heirs of Henry had paid all the taxes on all the land in question since at least 1988. R.II/7. J.D. Frazier, Eugene's brother, at first testified that he thought the heirs of Arthur might have paid some taxes in one year (2005, 2004 or earlier). He

disturbed, be they on evidentiary facts or ultimate facts, unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or unless he applied the wrong legal standard. *Id.* 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. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 754 (Miss.1987)).

Where, as here, there are no specific findings of fact provided by the chancellor, this Court must look to the evidence and see what state of facts will justify the decree. *Boatright v. Horton,* 233 Miss. 444, 102 So.2d 373, 374 (1958). This Court, however, "may not credit unspoken findings not fairly inferrable from the trial court's action." *Riddle v. State,* 580 So.2d 1195, 1200 (Miss.1991); *Century 21 Deep South Properties, Ltd. v. Corson,* 612 So.2d 359, 367 (Miss.1992). *Accord, United States v. Castaneda,* 162 F.3d 832, 835 (5th Cir. 1998) [where the trial court fails to make written findings of facts, the appellate court will review the claim de novo to ascertain if the facts support the holding].

Where the trial court's ruling is based on an error of law, this Court reviews the lower court's decision *de novo. Meeks v. State.* (Miss. 2001) 781 So.2d 109 (Miss. 2001)

B. *The Merits:*

Because the Chancellor made no fact findings; nor did she discuss the applicable law in the judgment, this Court is hampered in determining what the Chancellor viewed as deficiencies in the proof of Plaintiffs' adverse possession claim. The law establishing the elements of adverse possession, however, is clear. One who asserts a claim of adverse

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later, however, testified that the heirs of Henry had paid "all the taxes on both pieces of

possession must establish six elements by clear and convincing evidence. The claimant must prove that his possession or occupancy of the property was: (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) peaceful [citing *Stallings v. Bailey,* 558 So.2d 858, 860 (Miss. 1990) (citing numerous cases)]; *West v. Brewer*, 579 So.2d 1261, 1262 (Miss. 1991).

Miss.Code Ann. § 15-1-13 provides:

> 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.

In general, the underlying question in a case involving a claim of adverse possession is whether the possessory acts relied upon by the would-be adverse possessor are sufficient to put the record title holder on notice that the lands are held under an adverse claim of ownership. *Peagler v. Measells,* 743 So.2d 389 (Miss. App. 1999). Put another way, 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." *People's Realty & Dev. Corp. v. Sullivan,* 336 So.2d 1304, 1305 (Miss.1976); *Jackson v. Peoples Bank,* 869 So.2d 422, 424 (Miss.App. 2004).

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property since 1988." R.II/18-19.

In the instant case in order to establish the elements of adverse possession, the Plaintiffs introduced testimony establishing that they, and not Defendants, had paid the taxes on the property for substantially longer than ten years. R.II/7, 18-19. As this Court has said: "Payment of taxes . . . is very important and strong evidence of a claim of title . . . ." (quoting *Holtzman v. Douglas,* 168 U.S. 278, 284, 18 S.Ct. 65, 42 L.Ed. 466 (1897))." *Wicker v. Harvey,* 937 So.2d 983, 995 (Miss.App. 2006);

Testimony from the Plaintiffs showed that the Defendants had been repeatedly asked to contribute to the payment of the taxes but had failed to do so. The Defendants, therefore, had actual notice that Plaintiffs were paying the taxes—strong evidence of a claim by Plaintiffs to title. *Id. Broadus v. Hickman,* 50 So.2d 717, 772 (Miss. 1951) [paying taxes, among other visible acts of ownership, provided sufficient notice of adverse possession to record title holder]. The evidence of a claim of title is particularly strong here where the Defendants actually refused to pay the taxes or contribute to the maintenance of the property.

In addition, the testimony showed that the Plaintiffs had fenced the property at their own expense as early as 1955 and had continued to maintain and repair that fence at their expense since that time. In the case of *Roy v. Kayser,* 501 So.2d 1110 (Miss. 1987), the Mississippi Supreme Court reversed the Chancellor's ruling that a landowner had failed to acquire title by adverse possession based on the landowner having placed a fence on the land in question. As the Court noted in a subsequent case when describing the holding in that case: "In *Roy,* **we relied almost exclusively on the continuous, undisturbed existence of a fence for at least fifty-five years [in holding adverse possession had been shown**]. En route to rendering a judgment in favor of the appellant's

adverse possession claim, the Court found fencing of property to be a particularly powerful indicator of adverse possession [emphasis added]." *Stallings v. Bailey*, 558 So.2d 858, 860 (Miss. 1990).

In *Stallings v. Bailey, supra,* the Court held that the maintenance of a fence and use of the yard enclosed by the fence were acts sufficient to "fly the flag over the land and put the true owner upon notice that his land [was] held under an adverse claim of ownership [citing *Snowden & McSweeny Co. v. Hanley,* 195 Miss. 682, 687, 16 So.2d 24, 25 (1943)]." *Stallings v. Bailey,* 558 So.2d at 861.

In the instant case, the Plaintiffs showed far more than merely that they had built and maintained a fence for more than ten years. They had built homes and occupied the land, raised cattle on it and had cut timber from the disputed property. They had inspected it and taken care of the land at their own expense. *E.g., Buford v. Logue*, 832 So.2d 594 (Miss. App. 2002) [fencing is a factor showing intent to possess by adverse possession] There is no evidence that the Defendants acted in any way to protect their interest in the land. In fact, they failed to answer the complaint or appear in Court. *See e.g., Linton v. Cross,* 876 So.2d 377 (Miss. App. 2003) [adverse possession shown where claimants bushogged area, fertilized pecan trees and gathered pecans and constructed horse pen on area].

In *Roebuck v. Massey,* 741 So.2d 375, 389 (Miss. App. 1999), the Court held that adverse possession had been demonstrated by the existence of a fence, timber cutting, exclusive use and grazing cattle on the land. Here, the Plaintiffs did all this and more.

Similarly in *Linton v. Cross,* 876 So.2d at 380, adverse use was held to be open, notorious and visible where the landowners lived in close proximity to the land and the

acts of ownership were easily visible. The use was also found to be peaceful because of the lack of objection to the clearly visible use. In the instant case, many of the Defendants lived in close proximity to the property, and the acts of ownership by Plaintiffs were easily visible. Moreover, there is no evidence to support the notion that the Defendants objected to the Plaintiffs' use. In fact, the Defendants did not even appear in Court; nor have they made any attempts to exercise any rights to the land.

In *Robertson v. Dombroski,* 678 So.2d 637 (Miss. 1996), the Court reversed a Chancellor's decision that the Robertsons had failed to demonstrate adverse possession. In that case, the evidence showed they had cleared the land and planted grass, grazed cattle, repaired damage to the property, built and repaired a dam, frequently visited the property and improved it and had paid taxes since 1972 with the exception of the years 1984 and 1991 when Dombroski paid taxes.

The Plaintiffs in the instant case exercised even more dominion over the land. The Plaintiffs here cleared the land and built houses, grazed cattle, cut and sold timber, built and repaired a fence, frequently visited the property and paid the taxes on it for more than ten years prior to the suit. Plaintiffs, therefore, established all six elements of a claim of adverse possession. Consequently, as in *Robertson v. Dombroski, supra,* the Chancellor here erred in finding that title had not vested in the Plaintiffs by adverse possession. As in that case, this Court should reverse and find good title to the lands in question to be vested in the Plaintiffs. *Id.* at 643.

## CONCLUSION

The Plaintiffs introduced evidence sufficient to establish the elements of adverse possession. This Court, therefore, should reverse and find title to be vested in Plaintiffs.

RESPECTFULLY SUBMITTED,
SIMON C. FRAZIER, et al, APPELLANTS

BY: E. Michael Marks
ATTORNEY FOR APPELLANTS

**CERTIFICATE**

I, the undersigned, do hereby certify that I have this date mailed, by first class mail, postage prepaid, four true and correct copies of the above and foregoing Brief to Betty Sephton, Clerk, at Box 117, Jackson, MS 39205 and a true and correct copy to each of the following:

1. Simon Frazier, 1109 Marshall Drive, Marrero, LA 70072;
2. Sholana Frazier, 1109 Marshall Drive, Marrero, LA 70072;
3. Nathan Frazier, 24 ½ Victoria Avenue, Harvey, LA 70058;
4. Emily Frazier, 24 ½ Victoria Avenue, Harvey, LA 70058 and 1109 Marshall Drive; Marrero, LA 70072.
5. Arthur Leon Frazier, 1109 Marshall Drive, Marrero, LA 70072;
6. Marie Frazier, 1109 Marshall Drive, Marrero, LA 70072;
7. Carey Frazier, 1833 Buccola Avenue, Marrero, LA 70072-3355;
8. Aaron Frazier, 1833 Buccola Avenue, Marrero, LA 70072-3355;
9. Mrs. John E. Frazier, 2547 N. Tonti, New Orleans, LA 701177
10. Jerry Frazier, Morrison Road, Utica, MS 39175;
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14. Dorothy F. Newell, 6669 Morrison Road, Utica, MS 39175;

15. Bobbie F. James, 6837 Morrison Road, Utica, MS 39175-9314;

16. Earnest L. Frazier, 6666 Morrison Road, Utica, MS 39175;

17. Louvella F. Brown, 6678 Morrison Road, Utica, MS 39175;

18. Hon. Denise Owens, Chancellor, PO Box 686, Jackson, MS 39205.

This, the 25th day of August, 2008.

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