SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRUCE NIEBANCK and Wife,
CLAUDIA NIEBANCK — APPELLANTS

VS. — CAUSE NO.: 2009-CA-00530

ROBERT D. BLOCK, MYFIS C. WIMS, and
Wife, ANGELA D. WIMS — APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellees certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge of this Court may evaluate possible disqualification or recusal.

1. Robert D. Block, Appellee;
2. Myfis C. Wims, Appellee;
3. Angela D. Wins, Appellee;
4. Bruce Niebanck, Appellant
5. Claudia Niebanck, Appellant
6. Lawrence L. Little & Associates, PA, Counsel for Appellees;
7. Lawrence L. Little, Counsel for Appellees;
8. Tara B. Scruggs, Counsel for Appellees;
9. James W. Amos, Counsel for Appellants;
10. Vickie B. Cobb, DeSoto Chancery Court Judge

TARA B. SCRUGGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

In order to establish a claim of adverse possession, the claimant must prove by clear and convincing evidence each of the following six elements: 1) under claim of ownership; 2) actual or hostile; 3) open and notorious; 4) continuous and uninterrupted for a period of ten years; 5) exclusive; and 6) peaceful. If any one element cannot be proved, the claim of adverse possession fails. The Appellants (hereinafter "the Niebancks") were unable to prove by clear and convincing evidence that they had openly and notoriously maintained actual or hostile possession of the disputed property.

The property in contention is located along the common boundary between the Niebancks' 25 acre parcel and a 32 acre tract now owned by the Appellees (hereinafter "Block and Wims"). Prior to Block and Wims' purchase in 2005, the entire 32 acre parcel was owned by William Austin. Mr. Austin was also a predecessor in title to the Niebancks. At one time, Mr. Austin owned the entire 57 acres which is now owned by the Niebancks, Block and Wims. From 1991 until 2005, William Austin was the Niebancks neighbor and owner of the disputed property. The Niebancks, claim of adverse possession would have ripened during Mr. Austin's ownership of the disputed property.

The actions which the Niebancks allege they engaged in consisted of occasional visits from various community organizations, the pasturing of horses and bushogging. Because of the location of this property and the sporadic nature of these activities, these actions were not sufficient to put Mr. Austin or Block and Wims on notice that the Niebancks were claim ownership of that property.

Additionally, at some point after the Neibancks purchased their property, Mrs. Niebanck approached Mr. Austin and asked for permission to ride their horses on his property. Mr. Austin gave the Niebancks permission to be on his land for their recreational activity. This permission was not withdrawn during the time that Mr. Austin owned the disputed property. Since permissive use can never ripen into adverse possession, the Niebancks are unable to prove that their use of the land was hostile and therefore cannot satisfy the requirements for a claim of adverse possession.

Finally, the Neibancks assert that they should have been granted a new trial or an amendment of judgement based upon their post-trial production of a prior survey of the Niebanck property. This survey contains Mr. Neibancks' signature and was in the possession of the Neibancks but was not presented as evidence at trial. As the surveyor was not called to testify at trial and Block and Wims were never allowed the opportunity to challenge the authenticity or validity of the survey, the survey itself is inadmissible hearsay and should be excluded from any consideration regarding this matter.

Therefore, because the Niebancks were unable to prove all six elements of adverse possession, the Courts denial of their claim should be upheld. Likewise, as the sole ground for the Neibancks Motion for New Trial or Amendment of Judgment is inadmissible hearsay, the Court's denial of the Motion should also be upheld.

ARGUMENT

In order to establish a claim of adverse possession, the Niebancks must have proved by clear and convincing evidence each of the following six elements: 1) under claim of ownership; 2) actual or hostile; 3) open and notorious; 4) continuous and uninterrupted for a period of ten years; 5) exclusive; and 6) peaceful. *Double J Farmlands, Inc. v. Paradise Baptist Church*, 999 So.2d 826, 829 (Miss. 2008); Miss. Code Ann § 15-1-13. If the Appellants (hereinafter "the Niebancks") failed to prove any one element, the claim of adverse possession fails. The Niebancks were unable at trial to prove by clear and convincing evidence that they had openly and notoriously maintained actual or hostile possession of the disputed property.

When reviewing the decisions of a Chancellor, the Appellate Court has a limited standard of review. *Warehousing Mgmt., LLC v. Haywood Props., LP*, 978 So.2d 684, 687 (Miss. Ct. App. 2008)(citing *Nichols v. Funderburk*, 883 So.2d 554, 556 (Miss. 2004)). A Chancellor's decision will not be reversed unless it was manifestly wrong, clearly erroneous or the chancellor applied an incorrect legal standard. *Id.* If there is substantial evidence to support the Chancellor's findings, the ruling must be affirmed. *Id.* In this case there is more than substantial evidence to support the findings made by the Chancellor and therefore her denial of the Niebanck's claim of adverse possession should be upheld.

A. **The Chancellor did not err in finding that the Niebancks failed to prove by clear and convincing evidence that they had openly and notoriously possessed the disputed property.**

"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." *Ellison v. Meek*, 820 So.2d 730, 735 (Miss. Ct App. 2002)(citing *People's Realty & Dev. Corp. v. Sullivan*, 336 So.2d 1304, 1306 (Miss. 1976)). "An adverse possessor must unfurl his flag on the land, and keep it flying, so that the (actual) owner may see . . . that an enemy has invaded his domains, and planted the standard of conquest." *Warehousing,* 978 So.2d at 687 (citing *Wicker v. Harvey*, 937 So.2d 983, 994 (Miss. Ct. App. 2006)). In considering a claim of adverse possession, the chancellor must "look to the quality and not the quantity of the acts indicative of possession" and determine if they were sufficient to fly the flag of adverse ownership over the property and put the true owner on notice. *Apperson v. White*, 950 So.2d 1113, 1117 (Miss. Ct. App. 2007)(citing *Walker v. Murphree*, 722 So.2d 1277, 1281 (Miss. Ct. App. 1998)). "Sporatic use of another's property does not constitute open and notorious possession." *Ellison*, 820 So.2d at 736 (citing *Cook v. Mason*, 134 So. 139 (Miss. 1931)).

At trial, the Chancellor heard testimony from Mr. and Mrs. Niebanck regarding their alleged activities on the disputed property. These activities consisted of their horses having access to the disputed area, groups of children and other organizations visiting their farm in the summer, bushogging and riding horses and four wheelers. (Test. Bruce Niebanck Tr. at 85-87; Test. Claudia Niebanck Tr. at 118-119). None of these activities are substantial or continuous enough to establish a claim of adverse possession.

1. Horses

The Niebancks own six horses that are sometimes restricted to certain areas of the property and are sometimes permitted to roam the entire twenty-five acre tract. (Test. Bruce Niebanck Tr. at 85, 94-95). When they are not being kept in another field or area, there is nothing that would prevent the horses from entering the disputed area. (Test. Bruce Niebanck Tr. at 95). All this testimony shows is that occasionally, the Niebanck's horses might have walked across or grazed on the disputed property. Use of the disputed land for occasional pasturing is "insufficient to constitute open and hostile possession." *Ellison*, 820 So.2d at 735 (citing *Roy v. Kayser*, 501 So.2d 1110, 1112 (Miss. 1987)).

2. Visitors

The Niebancks testified that numerous groups, mostly children, would visit their property in the summers to see the animals, go on nature walks and visit the lake. (Test. Bruce Niebanck Tr. at 86; Test. Claudia Niebanck Tr. at 118). When asked if any of these activities took place on the disputed property, Mrs. Niebanck responded that the activities occurred throughout the property. (Test. Claudia Niebanck Tr. at 119). This began in the early 90's and ended in either 1998 or 1999. (Test. Bruce Niebanck Tr. at 86; Test. Claudia Niebanck Tr. at 122-123, 128). Again, all this evidence shows is that occasionally, during some summers, visitors of the Niebancks might have entered the disputed property. Additionally, since the Niebancks did not purchase the property until 1991, these activities could not have taken place for any more than eight (8) years. This is two years short of the ten (10) year requirement for adverse possession.

3. Other Activities

Bushhogging, riding horses and riding four wheelers are at best, intermittent activities and likely were not confined to the 1.1 acre disputed area. Additionally, the Niebancks had obtained permission from Mr. Austin to ride their horses on his property which included the disputed property. (Test. Claudia Niebanck Tr. at 126, 129; Test of William H. Austin, Jr. Tr. at 145-146).

In her ruling the Chancellor stated

> The property is quite deep. This property in question is not easily accessible by road. It's not view-able by a road and in order for the Niebancks to fly their flag of ownership that would put Mr. Bill Austin on notice that they were claiming an adverse claim over the property, I think they would have had to do more than what they did. I don't think there were actually any actions that would have flown a flag of ownership over this property that would have given Mr. Bill Austin, who was the record owner of the property during the time that they were adversely claiming, notice that they were actually claiming this property by adverse possession.

(Op. of Ct. Tr. at 182-183). The Chancellor did not make this ruling based upon testimony alone. During the trial she visited the site and was able ascertain for herself the nature and location of the disputed property. This, in addition to the testimony provided by the Niebancks themselves, provided ample evidence to support denial of the adverse possession claim. Therefore, the denial of the Niebanck's claim of adverse possession must be affirmed.

B. **The Chancellor did not err in finding that the Niebancks failed to prove by clear and convincing evidence that they had actual or hostile possession of the disputed property.**

To be meet the requirement of hostility, the adverse possessor must "take some action adverse to the interest of the true owner." *Double J Farmlands, Inc. v. Paradise Baptist Church*, 999 So.2d 826, 829 (Miss. 2008)(en banc). "The adverse possessor must present some proof that its occupation of the record owner's property was hostile, and that the record owner-aware of the adverse possessor's hostile occupation-took no action to prevent adverse possession." *Id.* However, "permissive use by the possessor of the property in question defeats the claim of adverse possession. *Id.* (citing *Gadd v. Stone*, 459 So.2d 773, 774 (Miss. 1984)).

The issues of both permissive use and the existence of a fence as they pertain to adverse possession were recently addressed in the case of *Cleveland v. Killen*. Just as in the instant case, this case involved two brothers who owned adjoining properties divided by a straight property line. *Cleveland v. Killen*, 966 So.2d 848, 850 (Miss. Ct. App. 2007). One brother built a fence completely on his own property and to the north of the property line for the purpose of enclosing a cow. *Id.* "By all accounts this fence was crooked and, although the fence was somewhat parallel to the boundary line, it was not intended to represent the boundary line, it was not intended to represent the boundary between the properties." *Id.* The other brother then asked if he could "tie on" his own additional fence to the cow fence. *Id.* It was undisputed that permission was requested and granted. *Id.* What resulted was that the second fence separated 2.6 acres of the first brothers land from the remainder of his property. *Id.* The second brother used that 2.6 acres for gardening and animals for more than twenty (20) years. *Id.* The *Cleveland* Court stated "[a]s a general rule, permissive possession of lands, even if long

continued, does not confer title in the person in permissive possession until a positive assertion of a right hostile to the owner has been made known to him." *Id.* at 851 (citing *Hewlett v. Henderson*, 431 So.2d 449, 451 (Miss. 1983). Under these facts, the Court found that there was sufficient evidence to support the Chancellor's ruling that the second brother's use was permissive and therefore his claim of adverse possession was denied.

1. Permissive Use

Mrs. Niebanck asked William Austin for permission to ride their horses on Mr. Austin's property and that permission was granted. (Test. Claudia Niebanck Tr. at 126, 129; Test of William H. Austin, Jr. Tr. at 145-146). Mrs. Niebanck admitted that when she asked, she did not specify an exact location. (Test. Claudia Niebanck Tr. at 126). Regardless of what Mrs. Niebanck might have thought or believed, it was Mr. Austin's understanding that he was granting permission for the Niebancks to be present on any property he owned north of the Niebancks 25 acre tract. (Test. William H. Austin Jr. Tr. at 159). Therefore, even if Mr. Austin had seen the Niebancks and their horses on the disputed 1.1 acre, he would have no reason to believe that they were asserting hostile ownership of the property. He would have assumed that they were present pursuant to his permission and he would have no reason to assert his continued ownership to them.

2. The Fence

The mere presence of a fence, without more, has never been sufficient to sustain a claim of adverse possession. *Double J. Farmlands*, 999 So.2d at 829. "When a fence. . . is relied upon to delineate the boundary of an adverse claim, the applicable rule is whether the enclosure like other acts of possession is sufficient to fly the flag over the land and put the true owners on notice that his land is held by an adverse claim of ownership. *Id.* In the instant case, the presence of the fence in no way enhances the Niebanck's claim of adverse possession.

In 1958, William Austin's parents owned a 600 acre tract of land that included the property that is the subject of the instant case. (Test. William H. Austin, Jr. Tr. at 137). The property was primarily used to raise cattle, raise food for the cattle and as a dairy operation. (Test. William H. Austin, Jr. Tr. at 141). In 1975 or '76, Mr. Austin's parents conveyed to him 57 acres so he and his wife could build a house. (Test. William H. Austin, Jr. Tr. at 137-138). The house he and his wife built is the house now occupied by the Niebancks. (Test. William H. Austin, Jr. Tr. at 142). The fence in question was put up to keep cows out of the Austin's back yard. (Test. William H. Austin, Jr. Tr. at 144, 149). It was never considered a boundary fence. (Test. William H. Austin, Jr. Tr. at 144, 149). In 1979, the Austins had the house and twenty-five (25) acres surveyed out of their entire fifty-seven (57) acres and sold it to Mr. and Mrs. Douglas. (Test. William H. Austin, Jr. Tr. at 138-139, 148, 156-157; Tr. Ex. 3). The legal description used for the Douglas sale is the same as that conveyed to the Niebancks and makes no mention of a fence anywhere in the description. (Tr. Ex. 3; Tr. Ex. 4). Likewise, the deeds to Block

and Wims make no reference to a fence in the legal descriptions. (Exhibit 5; Exhibit 6; Exhibit 7) However, it is now the Niebanck's argument that the fence that Mr. Austin built is now evidence of their adverse ownership. It is undisputed that Mr. Austin or his family built the fence in question. Test. William H. Austin, Jr. Tr. at 144, 149). Knowing that it was not the boundary of the property, he would have no reason to think that it's existence was a claim of ownership by the Niebancks. This coupled with his permission for the Niebancks to use his property, completely destroys their claim of adverse possession.

C. **The Chancellor did not err is denying the Niebanck's Motion for New Trial or Amendment of Judgment.**

After completion of the trial, the Niebancks filed a Motion for New Trial or Amendment of Judgment. (Ct. R. page 55). The basis for this Motion was a copy of a survey which was attached as additional evidence. The Niebancks claimed that the survey was clear and convincing evidence that the property had been enclosed by a fence and therefore the Chancellor's ruling should be amended or in the alternative, they should be granted a new trial. After a hearing on this Motion and the Trial Court's review of the survey, the Niebancks Motion was denied. (Ct. R. page 64). The Niebancks appeal this ruling and in doing so have attached a copy of that survey for the Appellate Court to review. However, this survey was not properly introduced into evidence at trial and therefore is not properly before this Court at this time.

"A survey is a document that asserts facts, such as the location of boundaries or other real property features, and that document reflects the work and expertise of the surveyor. If the survey is being admitted into evidence to show the truth of the matter asserted in it, then it is

hearsay evidence." *White v. Usry*, 800 So.2d 125, 130 (Miss. Ct. App. 2001) (citing Miss. R. Evid. 801(c)). "In order to have a survey properly admitted into evidence, the surveyor needs to be called to explain and be subject to cross-examination." *Id.* at 131 (citing *Mississippi State Highway Comm'n v. Vivrette*, 529 So.2d 896, 901-02 (Miss. 1988). Hearsay may be admitted under certain circumstances if the declarant is unavailable to testify. Miss. R. Evid. 804. However, "Failure to call a witness to testify . . . does not equate to "unavailability" *Id.* at 131.

Not only was the survey in question not presented at trial, but no mention was made at trial of the survey or the surveyor who prepared it. A cursory review of the survey alongside aerial maps of the property reveals numerous apparent discrepancies. (Tr. Ex. 1; Tr. Ex. 2) It also appears that this survey has been in the Niebanck's possession since 1991. Since the survey was never presented at trial, Mr. Block, Mr. Wims and Mr. Austin were never given the opportunity to question or refute the facts alleged in this survey. They likewise did not have an opportunity to cross-examine the surveyor that prepared it regarding his methods or the survey's validity. Therefore, the survey presented is the very definition of inadmissible hearsay and the Chancellor was correct in denying the Niebancks' attempt to have it considered.

CONCLUSION

All claims of adverse possession must be decided on the facts of each individual case. The Chancellor is the sole, objective individual that hears and sees the evidence as to those facts. "The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of the witnesses and the weight of their testimony." *Ellison v. Meek*, 820 So.2d 730, 734 (Miss. Ct. App 2002)(citing *Fisher v. Fisher*, 771 So.2d 364, 367 (Miss. 2000)). In this case, the Chancellor heard testimony from all of the individuals who had owned and occupied the property

adjoining the disputed tract in the last eighteen years. She also viewed the disputed property in person. After evaluating what she had both heard and seen, the Chancellor found that the Niebancks had not proven by clear and convincing evidence that they had actually, openly, exclusively, peacefully, under a claim of ownership adversely possessed the disputed property for a period of ten years. She found that the Niebancks use of the disputed property was not open and visible but was with the permission of the true owner, William Austin. There is sufficient evidence in the record to support these findings. Therefore, for the foregoing reasons, the ruling of the Chancellor in this matter should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence L. Little, Jr., Attorney at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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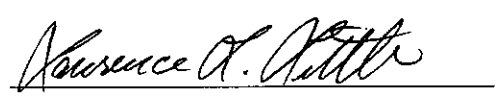
This, the 25th day of November, 2009.



LAWRENCE L. LITTLE