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

APPELLANT'S REPLY BRIEF

James W. Amos MSB[redacted]
Attorney for Appellants
2430 Caffey St.
Hernando, MS 38632
Phone: 662-429-7873

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APPELLANTS' REPLY BRIEF

I.
ARGUMENT

A. THE CHANCELLOR ERRED IN FINDING THAT THE NIEBANCKS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THEY HAD OPENLY AND NOTORIOUSLY POSSESSED THE DISPUTED PROPERTY OR THAT THEY HAD ACTUAL OR HOSTILE POSSESSION OF THE DISPUTED PROPERTY.

At page 2 of Appellees' Brief they said,

> "Additionally, at some point after the Niebancks 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 This permission was not withdrawn during the time that Mr.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 Niebanks are unable to prove that their use of the land was hostile and therefore cannot satisfy the requirements for a claim of adverse possession."

No reference to the record was given by Appelleees for this evidence.

The Niebancks would show that at page 129 of the transcript, Mrs. Niebanck, on redirect

examination, was asked,

> "Now when you testified that you asked Mr. Austin if you could traverse his property to use your horses is that the kind of wording you used? To traverse? You wanted to ride horses back there, right?"

She was further asked,

> "Explain to the Court exactly what land of Mr. Austin's you were asking to use."

She answered,

> "I thought I had explained to Mr. Little. Maybe it's the way I explained it. I I asked Mr. Austin, who I would see on occasion, by the way Bill, do I have permission? Could we use the property? Whatever. I don't even remember how I expanded on it."

On pages 130-131 of the Transcript she explained which property of Mr. Austin's she was referring to. She said,

> "(By Mr. Amos): You were not asking for permission to use the disputed property, were you?
> A I didn't know it was disputed.
> Q Right.
> A I just asked him for permission could we use his property?
> Q Ok.
> A I use his property.
> Q And his property was on the northern side --
> A Yes.
> Q Of what you believe your property was?
> A Yes."

Mr. & Mrs. Niebanck did not ask for permission to use any of the property they believed they owned. They only asked for permission to use Mr. Austin's property on the northern side of the fence. They believed they already owned the disputed area of land.

The Niebancks believe they have proven the elements of adverse possession by clear and convincing evidence. They further believe that this case is controlled by the law

as set forth in the case of Warehousing MGMT v. Haywood Properties, LP, 978 So.2d 684 (Miss. 2008). In that case Haywood had acquired two (2) acres of land in Pearl, Mississippi, which was adjacent to the property of Warehousing Management, LLC which was owned by Casten. There was a shared property line between Casten's property and Haywood's property. Haywood owned the two (2) acres to the south of Casten's. The line was the southern border of Haywood's property and the northern border of Casten's property. The dispute came about in 2003 when Casten hired a land surveyor to survey the property to determine the boundary line. According to the survey Casten's line was actually 28 feet north of the line Casten and Haywood had treated as the boundary. There was a utility pole that Casten had treated as the southwest corner of his property. The survey showed the pole was actually 28 feet into Casten's property. Haywood filed suit seeking to establish the boundary line at the utility pole. The Court appointed a surveyor to determine the boundary line. The Court's surveyor's findings were the same as Casten's surveyor. Haywood then filed an amended complaint seeking the Court to declare him to be the owner of the disputed parcel by adverse possession. After acquiring his property in 1971, Haywood had made a number of improvements: filling the disputed area with sand and gravel and maintaining it by grading; among other things he kept the area cleared and parked vehicles there. The Court concluded Haywood to be the owner of the disputed parcel and ordered the property line should run east to west along the south side of the utility pole. Caston asserted one issue: whether the Chancellor erred in finding that Haywood proved his claim of adverse possession by clear and convincing evidence.

In the instant case, Appellants believe they have satisfactorily proven each and every element of adverse possession. The Niebancks further believe that even though, as in the

Warehousing Management case, supra, where the disputed property and actual fenced boundary line were not actually the property as contained in the description in their deeds, they do in fact actually own the disputed property.

In Warehousing Management, supra, the Court stated,

> "An occupant of land who mistakenly believes the land lies within the boundaries established in his own deed, when the land actually belongs to another, may acquire title to that land by adverse possession. In Alexander v. Hyland , 214 Miss. 348, 357-58, 58 So.2d. 826, 829-30 (1952) (citing Evans v. Harrison, 130 Miss. 157, 163-64, 93 So. 737, 738 (1922).

On pages 5 and 6 of Appellees' brief they discuss use of horses, visitors and other activities which the Niebancks claim, in part, entitle them to ownership of the disputed property by adverse possession. At page 85 and 86, Mr. Niebanck said that the horses had the complete run of the property including the disputed area.

In regard to visitors, Mr. Niebanck stated that ever since the early nineties they had worked with Catholic missions for them to bring out underprivileged children and handicapped children to the property. They would bring fifty a week during the summer time in buses and they would be given a nature tour. They would feed the children and allow them to ride horses. They had all types of animals like a petting zoo.

On page 6 of Appellees' brief they try to reinforce that the Niebancks had obtained permission from Mr. Austin to ride their horses on his property which included the disputed area. The Niebancks had previously discussed this earlier in this brief.

On page 10 of Appellees' brief they state,

> "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 its 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."

Mr. Austin and his family may have built the fence that lies between the northern border of the Niebanck property and the southern border of the property of Mr. Block and Mr. & Mrs. Wims. This Court should remember that Mr. Austin and his wife, Lynda Austin, sold the 25 acres of property to Mr. & Mrs. Douglas on July 6th, 1979. Whatever Mr. Austin and his family's intentions were regarding the said fence, it became a northern boundary line of the 25 acres of land conveyed to Mr. & Mrs. Douglas which subsequently became the property of Mr. Niebanck by deed dated July 11th, 1991, some twelve years later.

The proof in this case is that Mr. Niebanck acquired title to the property in July, 1991 (Exh. 4) and he and his wife maintained and used it exclusively to the exclusion of any other persons for more than the statutory time period.

The Chancellor erred in denying the Niebancks' claim of adverse possession.

B. THE CHANCELLOR ERRED IN DENYING THE NIEBANCKS' MOTION FOR A NEW TRIAL OR AMENDED JUDGMENT.

When Appellants filed for a new trial or amendment of judgment pursuant to Rule 59, Mississippi Rules Of Civil Procedure, or in the alternative, for relief from the Order Dismissing Complaint, the Chancellor should have used that opportunity to review the record in this case and modify its Order by finding the Niebancks had proven each and every element of adverse possession by clear and convincing evidence and by granting them title to the disputed property by adverse possession.

There is ample evidence that the property Mr. Niebanck purchased in 1991 was fenced all

of the way around. There is evidence that Mr. Niebanck and his wife believed that they owned all of the property within the fence lines, including the property on the northern side of the subject property which is disputed. The Chancellor should have entered an amended order vesting ownership of the disputed area of property in Mr. & Mrs. Niebanck by adverse possession. She was wrong in failing to do so.

II.
CONCLUSION

Mr. & Mrs. Niebanck have proven each and every one of the elements of adverse possession by clear and convincing evidence. The Chancellor's decision was manifestly wrong and clearly erroneous. The decision of the Chancellor should be reversed by this court and a decision should be rendered granting ownership of the disputed 1.1 acres of land to them by adverse possession.

Respectfully submitted,

JAMES W. AMOS MSB[redacted]
ATTORNEY FOR APPELLANTS
2430 CAFFEY ST.
HERNANDO, MS 38632
PHONE: (662)-429-7873

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CERTIFICATE OF SERVICE

I, James W. Amos, Attorney for Appellants, Bruce Niebanck and wife, Claudia Niebanck, do hereby certify that I have mailed by U. S. Mail, postage prepaid, a true and correct copy of the Appellants' Reply Brief to the following:

(1) Honorable Vicki B. Cobb
Chancellor
Third Judicial District
P.O. Box 1104
Batesville, MS 38606

(2) Lawrence L. Little, Esq.
Attorney for Appellees
829 North Lamar Blvd., Suite 6
Oxford, MS 38655

Dated this 13th day of January, 2010.

JAMES W. AMOS