SUPREME COURT OF MISSISSIPPI

GEORGIA CHARLOT, APPELLANT

VERSUS Case No.: 2009-TS-00719

DENNIS L. HENRY AND
BARBARA HANSON HENRY, APPELLEES

APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

(ORAL ARGUMENT NOT REQUESTED)

Respectfully submitted by:

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COUNSEL FOR APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellees 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 recusal.

1. Dennis L. Henry, Plaintiff/Appellee;

2. Barbara Hanson Henry, Plaintiff/Appellee;

3. Georgia Charlot, Defendant/Appellant;

4. Rick Olando Amos, Esq.
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   Counsel for Defendant/Appellant; and

5. Eric D. Wooten, Esq.
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   Counsel for Plaintiffs/Appellees.

Respectfully submitted, this the 11 day of January, 2010.

DENNIS L. HENRY &
BARBARA HANSON HENRY,
APPELLEES

By: WOOTEN LAW FIRM, PLLC

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TABLE OF AUTHORITY

A. Federal and Mississippi Case Law.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. The lower court reviewed all information presented by the parties and determined that there no genuine issues regarding material facts. In reaching its decision, the lower court relied upon well-settled Mississippi and federal jurisprudence.

Because the issues in this case are not novel and have been authoritatively decided by prior decisions, and because the relevant facts and arguments are adequately presented in the briefs and the record in this cause, oral argument is not needed. Miss. R. App. P. 34.

STATEMENT OF THE ISSUES

A. Whether the Chancellor properly determined that Defendant waived the affirmative defense of adverse possession through her failure to raise defense in Complaint.

B. Whether the Chancellor properly determined that Defendant failed to justify her delay in raising affirmative defense of adverse possession; and was thus justified in denying Defendant's Motion for Leave to Supplement Pleadings.

C. Whether the Chancellor properly determined that there were no genuine issues of material fact and that Plaintiffs were entitled to summary judgment as a matter of law.

STATEMENT OF THE CASE

With the exception of the relief the defendant, Georgia Charlot [hereafter the "Defendant"], requested from this Honorable Court, to which the plaintiffs, Dennis L. Henry and Barbara Hanson Henry [hereafter jointly referred to as the "Plaintiffs"], respectfully object, Plaintiffs concur with the Nature of the Case submitted by Defendant in her Appellant's Brief. Plaintiffs also generally concur with the chronology submitted by Defendant in both the Course of the Proceedings and the Disposition of the Lower Court; however, Defendant omitted certain pertinent information which clearly justifies the lower court's granting of summary judgment in this Cause. Plaintiffs therefore submit the following combined statement of material facts and chronology of the lower court proceedings:

1. On or about July 30, 1986, Plaintiffs purchased the home of Mrs. Henry's great-aunt, Mathilde Courtney Hanson [Plaintiffs' property hereafter referred to as the "Hanson Family Property"]. As indicated in the deraignment of title set forth in the Complaint, the Hanson Family Property was created through the combination of three separately purchased parcels, with the parcel lying adjacent to eastern boundary of the Defendant's property [hereafter the "Charlot Family Property"] being acquired by Mrs. Henry's great-uncle, J. Edward Hanson, in 1934. *See.* Record Excerpts submitted by Defendant pursuant to Miss. R. App. P. _____, pgs. 10-12 (hereafter cited as "(RE. ___)"). Due to an oversight in 1962, record title to the western 10 feet of the Hanson Family Property was not held by Mr. and Mrs. Hanson with rights of survivorship; which lead Plaintiffs to require the conservator of Mrs. Hanson's intervivos estate to confirm the title to the entire Hanson Family Property before they purchased it. (*See generally*, RE. 21-22).

On or about July 29, 1986, a judgment confirming title to the Hanson Family Property in the name of Mrs. Hanson was entered.[1]

2. In addition to confirming the title, Plaintiffs also caused the Hanson Family Property to be surveyed by James R. Clarke, R.L.S. on or about July 24, 1986 [hereafter the "1986 Survey"]. (RE. 79-80) The 1986 Survey was attached to and authenticated by the Affidavit of James R. Clarke, R.L.S., dated November 6, 2008 (RE. 75-82). In Paragraph 3 of his Affidavit, Mr. Clark averred that he personally surveyed the Hanson Family Property on or about July 24, 1986; and that he "did not find any encroachments on or affecting the surveyed property", *i.e.*, the Hanson Family Property. (RE. 75). Mr. Clarke further stated that the eastern boundary of the property was marked by an old wire fence. Id. The 1986 Survey unquestionably established on July 24, 1986 that there were no encroachments upon the Hanson Family Property and that an old wire fence "ran along and marked the property's eastern boundary on the date of the survey." Id.

3. After acquiring the Hanson Family Property in 1986, Plaintiffs had exclusive possession of their property until November 2006 when Defendant caused FEMA to clear the southern 2/3rds of their property's eastern boundary, including its fence line. (*See.* Judgment, RE. 173 at ¶5). Shortly thereafter, a FEMA trailer was placed a upon the Charlot Family Property (Id.), and sometime after to January 29, 2008, Defendant caused a new wooden fence to be constructed over and on the Hanson Family Property, enclosing and preventing Plaintiffs from having access to a large portion of property (Judgment, RE. 173-174 at ¶5)[property at issue in this cause hereafter referred to as the "Disputed Property"].

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[1] Legal title to the Hanson Family Property was confirmed in the name of Mathilde Courtney Hanson through a judgment, dated July 29, 1986, entered by the lower court in Cause No. 88,582. **(RE.26-28).**

4. This encroachment resulted in Plaintiffs' counsel sending a certified letter to Defendant, dated February 15, 2008, providing Defendant with notice that her stairs and fence were wrongfully encroaching upon the Hanson Family Property and demanding that she immediately remove the same from their property. (RE. 30-35) This letter was mailed to Defendant's home address, *i.e.*, 516 East Second Street, by was returned to sender unclaimed. (RE. 34) Plaintiffs were therefore forced to take legal action to confirm their title to the Disputed Property and to remove Defendant's fence from their property.

5. On or about March 13, 2008, the Plaintiffs filed their Complaint to Confirm and Quiet Title to Real Property against the Defendant, seeking confirmation of their title to the Disputed Property. (RE. 8-35) In Paragraph VII of their Complaint, Plaintiffs alleged that they acquired fee simple title to the Disputed Property through the deraignment of title set forth in said paragraph. (RE. 9-12) In Paragraph VIII of the Complaint, Plaintiffs further alleged that they acquired their property in exchange for good and valuable consideration; that they acted in good faith when purchasing their property; that a title search was performed prior to purchase; and that they had no notice of any adverse claims to their property, nor should they have known of any adverse claims to their property. (RE. 12)

6. On May 22, 2008, Defendant filed her Answer, which provided notice of certain affirmative defenses and generally denied that Plaintiffs were entitled to any of the relief sought therein. (RE. 41-45) In Paragraph X of her Answer, Defendant admitted to the allegations set forth in said Paragraphs VII and VIII of Plaintiffs' Complaint. (RE. 42)

7. On September 22, 2008 counsel for the parties mutually agreed to a trial setting of January 17, 2009. (RE. 46) Plaintiffs propounded written discovery upon Defendant on September 25, 2008. (RE. 48-49)

8. On November 13, 2008, Plaintiffs simultaneously filed their Motion for Summary Judgment (RE. 57-84), with their memorandum in support of said motion. (RE. 85-96) The hearing of Plaintiffs' Motion for Summary Judgment was set for December 17, 2008. (RE. 97-98)

9. On November 21, 2008, Defendant simultaneously filed her Motion for Leave to Supplement Pleadings with a Counter-Claim (RE. 100-101), with Defendant's Supplemental Pleadings: Counterclaim to Quite and Confirm Title (RE. 102-107) [hereafter jointly referred to as the "Motion for Leave to Supplement"]. Defendant also set her motion for hearing on December 17, 2008. (RE. 108-109) The allegations submitted through the proposed counterclaim were not sworn to by Defendant; instead the proposed pleading was simply executed by Defendant's counsel. (RE. 105) Moreover, the proposed pleading did not allege that Defendant acquired a portion of Plaintiffs' property through adverse possession; it actually attempts to defend Defendant's title to the Charlot Family Property against the adverse possession claims of Plaintiffs. (*See*. RE. 102-104)

10. In Paragraph XXI of the proposed counterclaim, Defendant even admits that the Charlot Family Property is "immediately adjacent and contiguous on the east direction to the real property owned by Plaintiff/Counter-Defendants as legally described in Paragraph XXII below", *i.e.*, the Hanson Family Property [emphasis added]. (RE. 103) Meaning, Defendant alleged through the proposed counterclaim that the eastern boundary of the Hanson Family Property and the western boundary of the Charlot Family Property are as described in the legal description to Plaintiffs' property. More surprising, the counterclaim specifically requests that the lower court confirm Defendant's title to a Lot 25' x 455', bounded on the south by Bohn, east by Menendez,

north by 2nd Street and west by Martin, *i.e.*, Plaintiffs predecessor in title to their property. (RE. 105)

11. On December 3, 2008, Plaintiffs filed their objection to Defendant's Motion for Leave to Supplement Pleadings (RE. 110-118), and due to Defendant's failure to respond to Plaintiffs' written discovery, Plaintiffs also filed their Combined Motion to Compel and Motion in Limine on December 8, 2008 (RE. 121-124), which was noticed for hearing on December 17, 2009.

12. On December 11, 2008, Defendant filed a Motion for Continuance (RE. 125-127), a Motion for More Definite Statement (RE. 128-131), and a Notice of Hearing attempting to set these motions for hearing on December 17, 2008. (RE. 132-133) On or about December 12, 2008, Defendant filed a Motion to Dismiss (RE. 134-137), and a Notice of Hearing attempting to also set this motion for hearing on December 17, 2008. (RE. 138-139) On December 15, 2008, Defendant simultaneously filed her Response and Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment. (RE. 140-149), and the Affidavit of Georgia Charlot attached thereto. (RE. 150-154)

13. On December 16, 2008, Plaintiffs filed their Combined Response to Defendant's Motion for More Definite Statement, Motion for Continuance and Motion to Dismiss (RE.160-169), which included an objection to Defendant's three motions being heard on December 17, 2008. (RE.160-161) On December 16, 2008, Plaintiff submitted her responses to the discovery requests propounded upon her on September 25, 2008.

14. Prior to the hearing of Plaintiffs' Motion for Summary Judgment, the lower court heard Plaintiffs' objection to the lower court's hearing of the three motions filed by Defendant on December 11-12, 2008. (RE.252-255) When questioned by the lower court, Defendant's counsel

essentially admitted Plaintiffs were not provided with the requisite notice, thus, the lower court refused to hear said motions. (RE. 254)

15. During the hearing of Plaintiffs' Motion for Summary Judgment, the lower court and counsel for both parties discussed and compared the attestations set forth in the Affidavit of Georgia Charlot with those in the Affidavit of James R. Clarke, R.L.S. (*See generally*. RE. 257-269) The lower court also spent considerable time reviewing the three surveys attached as Exhibits to Mr. Clarke's survey. (*See generally*, RE.260-267) During the hearing, counsel opposite acknowledged to the Court that Defendant's only claim to the Disputed Property was through adverse possession. (RE. 286, 292)

16. During his oral argument opposing Plaintiffs' Motion for Summary Judgment, counsel for Defendant represented to the lower court on multiple occasions that Defendant and her ancestors have had possession and control of the Disputed Property for over 100 years. (See. RE. 277-278, 280, 285 &295) Counsel for Defendant must have misunderstood his client, because these statements were not consistent with his client's affidavit, nor are they supported by any testimony, sworn statements, or documentary evidence presented to the lower court.[2] In fact, as noted by counsel for Plaintiffs during rebuttal, Defendant's affidavit did not contradict or

[2] The Affidavit of Georgia Charlot does not identify the location of the old wire fence running along the common boundary of the two properties, nor does it claim that said fence deviates from boundary line described in 1986 survey. (RE. 151-153) Moreover, Paragraph 12 of said Affidavit doesn't claim that Defendant has had open, hostile, exclusive and continuous control over the Subject Property; instead, Mrs. Charlot claimed she had such control over "the property at 516 East Second Street", *i.e.*, the Charlot Family Property. (RE. 153) Counsel for Defendant's representations to the lower court are not only inaccurate, they are not supported by any sworn testimony or document admitted into evidence. Frankly, the statements of counsel opposite defy logic. If the Charlot family had in fact, as claimed by counsel opposite, maintained a fence running diagonally across the southern 250' of the Hanson Family Property for the last 100 years, which is denied, one would think that Dan Warburg would have noticed it when he acquired the Hanson Family Property prior to 1908; that Emma Martin would have noticed it when she acquired said property on January 18, 1908; that Charles A. Martin, Sr. and Benjamin J. Martin would have noticed it when they inherited said property; that J. Edward Hanson would have noticed it when he purchased said property on October 30, 1934; that James R. Clarke, R.L.S. would have noticed it when surveyed said property on July 24, 1986 and certified that there were no encroachments upon said property; and that Plaintiffs would not have closed their purchase of said property if they had known of the fence.

call into question any of the attestations of material facts made by Mr. Clarke in his affidavit, nor did it dispute the accuracy of the three "Clarke" surveys. (RE. 53-55) Surprisingly, counsel for Defendant continues to infer what he wishes Defendant had attested to in her affidavit; instead of acknowledging what was actually stated. See. Appellant's Brief at 11 (¶20)(hereafter referred to as "App. Brief at ___ (¶___)").

17. On February 9, 2010, the lower court entered its Judgment denying Defendant's Motion to Supplement, and granting Plaintiffs' Motion for Summary Judgment. (RE. 172-185).

18. In denying Defendant's Motion to Supplement, the lower court determined that the potential claim of adverse possession was "ripe at the time the original Answer was served" (RE. 177 at ¶15); thus, it held Defendant was actually requesting authority to amend her Answer under M.R.C.P. 15(a). (Judgment, RE. 176 at (¶14) The lower court further determined that due to Defendant's failure to plead that her omitting the affirmative defense of adverse possession from her Answer was due to oversight, inadvertence or excusable neglect, the decision of whether to grant Defendant's motion hinged upon whether justice required granting her leave to amend her pleading. (Judgment, RE. 177 at ¶16) The lower court ultimately held that there was no reason of record justifying Defendant's delay in filing her motion to amend; that Defendant "failed to exercise due diligence by waiting"; and that the granting of Defendant's motion would unduly delay the proceedings and prejudice Plaintiffs. (Judgment, RE. 179 at ¶21) The lower court accordingly denied Defendant's Motion to Supplement and would not allow Defendant to amend her complaint to pursue a counterclaim of adverse possession. Id.

19. In granting Plaintiffs' Motion for Summary Judgment, the lower court considered several significant factors; namely: Defendant admitted that Plaintiffs acquired the Hanson Family Property in good faith, paid valuable consideration, with no actual or constructive knowledge of

any adverse claims to such property (Judgment, RE. 180 at ¶27); that Defendant admitted Plaintiffs' deraignment of title was true and correct Id.; that the Affidavit of James R. Clarke, R.L.S., with the three surveys attached thereto, were undisputed, and that they established and confirmed the boundaries lines of the respective properties and that Defendant's stairs and fence were encroaching upon the Hanson Family Property (Judgment, RE. 180-180 at ¶29); that Defendant was not claiming to be the record owner of the Disputed Property (Judgment, RE. 183 at ¶32); that at the hearing, counsel for Defendant admitted his client's only claim to the Disputed Property was through adverse possession Id.; that as an affirmative defense, adverse possession was waived when not raised by Defendant in her Answer Id.; that the "only material issue in the case *sub judice* was the boundary line separating the Henrys' property from the Charlot Property" Id.; that no opposing affidavits were filed by Defendant (Id. at ¶34); that although Defendant did submit her own affidavit, none of the statements therein contradicted the attestations made by Mr. Clarke in his affidavit Id.; and that even though Defendant disputed the location and existence of the old wire fence, the fence's location was irrelevant, unless its location raised a genuine issue over the accuracy or validity of the property description. (Judgment, RE. 174 at ¶35)

20. Another significant fact that the lower court failed to mention was that despite having approximately nine months, Defendant has not produced any admissible or credible evidence, e.g., pictures, 3rd party affidavits, in support of her counsel's claim that the Charlot family has been in open, hostile and exclusive control of the disputed property for over 100 years.

21. The lower court accordingly found that there were no genuine issues of material fact and that Plaintiffs had proven they were entitled to summary judgment as a matter of law and granted Plaintiffs' motion. (Judgment, RE. 184 at ¶39)

22. On or about February 19, 2009, Defendant filed her Combined Motion for New Trial, to Reconsider or Amend Judgment (RE. 188-204) Attached to the combined motion were the Affidavit of Rick Olando Amos, dated February 19, 2009 and the Affidavit of Thomas W. Stennum, dated February 19, 2009, with his survey, dated December 30, 2008, attached thereto. (RE. 201-204)

23. On March 10, 2009, Plaintiffs filed their combined response to Defendant's motions (RE. 206-214), which included their objection to Defendant's untimely submittal of the Stennum Affidavit and request that it be stricken from the record. (RE. 211-212)

24. On April 3, 2009, the lower court denied Defendant's motions. (RE. 215-221). In its Order, the lower court reiterated its justification for granting summary judgment. Noticeably absent from the lower court's Order were references to the Stennum Affidavit; thus Plaintiffs assume that the lower court determined that the affidavit was not timely submitted and did not consider it when rendering her decision.

25. On May 1, 2009, Defendant appealed the lower court's denial of Defendant's Motion for New Trial. (RE. 215-216). Defendant subsequently amended her Notice of Appeal on June 16, 2009 to include the appeal of the lower court's February 9, 2009 Judgment. (RE. 242-243).

SUMMARY OF ARGUMENT

A. Chancellor Properly Determined Defendant Waived Affirmative Defense of Adverse Possession.

It has been Mississippi law for over 60 years that adverse possession is an affirmative defense. *See. White v. Turner*, 197 Miss. 265, 19 So.2d 825, 826 (Miss. 1944). As such, it must be properly pleaded and proven by the party relying on it; otherwise it is waived. *See. Stewart v.*

Graber, 754 So.2d 1281, 1284 (¶16)(Miss. App. 1999); see also, Griffith, Mississippi Chancery Practice, Sec. 360 (2d Ed. 1950). The lower court properly determined that Defendant's general denials did not sufficiently plead the affirmative defense of adverse possession; and said defense was thus waived pursuant to Miss. R. Civ. P. 8(c).

B. Chancellor Properly Denied Defendant's Motion for Leave to Supplement Pleadings After Determining Delay Due to Defendant's Failure to Exercise Due Diligence.

Pursuant to Miss. R. Civ. P. 15(a), a "party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served." "Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires." Id.

This Court has previously reasoned that motions for leave to amend should be granted, if justice so requires, "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.". *See. Meredith v. Meredith*, 987 So.2d 477, 484 (¶14)(Miss. App. 2008)(citations omitted). ...However, this Court has also cautioned that "an application to amend should be prompt and not the result of an inexcusable want of diligence." *William Iselin & Co., Inc. v. Delta Auction*, 433 So.2d 911, 913 (1983); and has consistently held that decisions concerning amendments to pleadings lie within the discretion of the lower court, which shall not be reversed absent an abuse of discretion. *See. Moeller v. Am. Guar. & Liab. Ins. Co.*, 812 So.2d 953, 961 (¶26)(Miss. 2002)(citations omitted).

For some unexplained reason, Defendant chose not to raise adverse possession as a defense until the hearing of Plaintiffs' Motion for Summary Judgment, nine months after she was served with the Complaint. (*See.* Judgment, RE. 182 at ¶32) Despite what Defendant has claimed her Motion for Leave to Supplement did not allege that Defendant acquired title to the Disputed Property by adverse possession, nor did it request title to the Disputed Property be confirmed in her name. (RE. 105) Instead, it sought confirmation of Defendant's interest in the Charlot Family Property, and was not relevant to issues before the lower court in the case *sub judice.* Plaintiffs accordingly objected to said motion and requested the lower court deny the relief requested therein. (*See.* Judgment, RE. 111-113)

Further, Defendant submitted no explanation for her delay in moving to amend, nor did she submit any sworn statements, documents or other evidence suggesting that her alleged claim to the Disputed Property was plausible. Accordingly, the lower court held that Defendant failed to exercise due diligence and that "allowing the counterclaim at that point would result in undue delay and would prejudice the opposing party."[3] Therefore, in the sound discretion of the lower court, Defendant's Motion for Leave to Supplement was denied.[4]

C. Chancellor Properly Found that No Genuine Issues of Material Fact Existed and that Plaintiffs Entitled to Summary Judgment as Matter of Law.

As a general rule, summary Judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

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[3] *See.* Judgment, RE. 179 at ¶21. Defendant erroneously claimed on page 19 of Appellant's Brief that Plaintiffs did not make an argument as to how they would be prejudiced if leave to amend was granted. This is simply untrue. Through both pleadings and oral argument, Plaintiffs sufficiently justified the prejudice they would suffer if Defendant's Motion was granted. *See.* RE. 208-209 and RE. 321-323.

[4] Even if Defendant's motion for leave to amend had been granted, the proposed counterclaim was not sworn to by Defendant and it does not contain any allegations which would have prevented summary judgment from being granted.

judgment as a matter of law." Miss. R. Civ. P. 56(c). When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the party resisting the motion. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 458 (1962). After a properly supported motion for summary judgment is made, the non-moving party may not simply rest on the allegations of the pleadings. Rule 56 requires a party opposing a motion for summary judgment to be diligent in presenting his opposition to the trial court. *Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss. 1984).

In the case *sub judice*, Plaintiffs' submittal of the Affidavit of James R. Clarke, R.L.S., with attached surveys (Judgment, RE. 180 at ¶28), together with Defendant's admissions regarding the deraignment of title (*Id.* at ¶27) and Plaintiffs' status as bona fide purchasers convinced the lower court that Plaintiffs were entitled to summary judgment as a matter of law. Moreover, Defendant's failure to plead adverse possession in her Answer (Judgment, RE. 182 at ¶32); her admission regarding deraignment of title (Judgment, RE. 180 at ¶27); her admission that Plaintiffs acquired title to their property in fee simple without knowledge of any adverse claims; her admission that Defendant's only claim to the Disputed Property was through the waived claim of adverse possession (Judgment, RE. 182 at ¶32); her failure to submit any sworn pleading or affidavit claiming title to the Disputed Property, by adverse possession or otherwise (Id.); her failure to submit any evidence suggesting that she or her ancestors had exclusive control over the Disputed Property (Id. at ¶33); and her failure to submit anything to refute the Affidavit of James R. Clarke, R.L.S., and its attached surveys (Judgment, RE. 173-174 at ¶34), overwhelmingly established that there were no genuine issues of material fact. The lower court was clearly justified in granting Plaintiff's Motion for Summary Judgment.

STANDARD OF REVIEW

A. Factual Findings of the Lower Court.

If factual findings of the lower court are supported by credible evidence, such findings will not be reversed, unless they are an abuse of discretion, manifestly wrong or clearly erroneous. *See. Double J. Farmlands v. Paradise Baptist*, 999 So.2d 826, 829 (¶13)(Miss. 2008); *see also, Estate of Burgess ex rel Burgess v. Trotter*, 6 So.3d 1109, 1114 (¶19)(Miss. App. 2008).

B. Denial of Motion for Leave to Supplement Pleadings with a Counter-Claim.

The grant or denial of a motion to amend a complaint pursuant to Miss. R. Civ. P. 15(a) is within the sound discretion of the lower court. *Wal-Mart Super Center and Besam, Inc. v. Eva Long*, 852 So.2d 568, 570 (¶6)(Miss. 2003)(citing *Moeller at* 961). Granting of leave to amend a pleading shall be freely given by the lower court, when justice so requires; unless, the proposed amendment would still render the claim futile, would cause undue prejudice, or was result of inexcusable neglect or delay. See. *Meredith at* 482 (¶14). The standard of review for denial of a motion for leave to amend is whether the lower court abused its abuse of discretion. *Wal-Mart* at 570 (¶6). Unless this Honorable Court is convinced that the lower court abused its discretion, it lacks authority to reverse. *Id.*

C. Granting of Motion for Summary Judgment.

Summary judgment is a decision on the merits and shall be granted, upon proper motion, "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c); *see also, Owen v. Pringle*, 621 So.2d 668, 670 (Miss.1993). When reviewing a lower court's granting of summary

judgment, this Honorable Court shall apply a de novo standard of review. *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608, 610 (¶4)(Miss. 2008)(citations omitted).

ARGUMENT

A. Defendant Waived Adverse Possession.

A matter is an affirmative defense where, if the movant is successful in proving the requisite elements of the defense, the movant shall win regardless of what the opposing party proves. *See. Hertz Commercial Leasing Division v. Morrison*, 567 So.2d 832, 835 (Miss. 1990). Under Mississippi law, if a movant can prove all of the requisite elements of adverse possession, he would win regardless of whether the opposing party could prove he held perfect title to the real property in dispute. *See generally. Crosswhite v. Golmon*, 939 So.2d 831, 834 (¶12) n. 1 (Miss. 2006). Thus, adverse possession is clearly an affirmative defense, and as such, is waived if not properly pled.

Defendant admittedly failed to raise the affirmative defense of adverse possession in her Answer. (Judgment, RE.182 at ¶32) Moreover, Defendant's Answer consisted of nothing more than general denials. (RE. 41-45) It contained no counterclaim of any kind, and was void of any claims regarding possession and control of the Disputed Property. Despite what Defendant's counsel has claimed, Defendant did not formally plead adverse possession as a defense until the date of the hearing of Plaintiffs' Motion for Summary Judgment.[5]

Defendant has repeatedly, and mistakenly, claimed that adverse possession is not an affirmative defense and was not waived. Defendant's counsel has even represented to the lower court that he could find no Mississippi cases holding that adverse possession is waived if not

[5] *See.* Judgment, RE. 182 at ¶32. The counterclaim attached to Defendant's motion for leave to amend did not claim rights to the Disputed Property, it sought confirmation of Defendant's interest in the Charlot Family Property. (RE. 103-105)

raised not raised "initially" (RE.319), *i.e.*, in Defendant's Answer, and that a general denial of Plaintiffs' allegations was sufficient to raise the defense of adverse possession. (*See.* App. Brief at 23-24). In making these representations, Defendant has obviously misinterpreted and/or overlooked the previous decisions of this Court.[6] This Court has repeatedly and consistently held that a claim of adverse possession is an affirmative defense, which is waived if not properly pled by the claimant.[7] As noted by the lower court in its Order denying Defendant's Motion for New Trial, Defendant has misinterpreted the decisions of this Court.[8]

Surprisingly, Defendant has continued to claim that the general denials in her Answer sufficiently pled adverse possession as a defense (*See.* App. Brief at 23-24), and submitted that this Court's decision in *Pittman* v. Simmons, 408 So.2d 1384, 1386 (Miss. 1982) as support thereof. However, Defendant has ignored or overlooked the lower court's findings of fact in *Pittman*, namely: that Mrs. Pittman testified under oath as to possession; that her answer contained averments of Pitmman's continuous possession of the subject property for 25 years; and that her answer requested cancellation of Simmons' claim to the subject property. *Pittman* at 1386. In comparison, Defendant's Answer in the case sub judice was not a sworn pleading, thus it contained no averments; it consisted of general denials of Plaintiffs' allegations, not sworn statements of fact; Defendant's Answer did not request that the lower court cancel Plaintiffs' claim to the Disputed Property; nor did it request the lower court confirm her claim to the Disputed Property. (See RE. 8-35) The facts of the case *sub judice* are clearly distinguishable from the facts in *Pittman*, and Defendant has mistakenly relied upon it in support of her appeal.

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[6] *See generally. Stewart* at 1284 (¶16); *White v. Turner,* at 826; and *Brown v. Akin*, 790 So.2d 893 (¶5)(Miss. App. 2001).

[7] *Id.*

[8] *See.* Judgment, RE. 216 at ¶4.

The plain and simple truth of the matter is that adverse possession is an affirmative defense, and as such, is waived under Miss. R. Civ. P. 8(c) if it is not properly pled or alleged. The lower court's factual findings in the case *sub judice* are well supported and based on credible and considerable evidence; therefore, these findings should not be questioned by this Court, absent abuse of process or manifest error, which is denied. *Burgess* at 1114 (¶19).

B. Lower Court Properly Denied Motion for Leave to Amend Complaint.

After determining Defendant's Motion for Leave to Supplement was in fact a motion for leave to amend,[9] the lower court applied the provisions of Miss. R. Civ. P. 15(a) to the facts of the case *sub judice*. As the lower court correctly noted, "MRCP 15(a) provides that after a certain point in time, a party must either have written consent from the opposing party or seek leave of court to amend a pleading and that the court may grant leave to amend "when justice so requires."" (Judgment, RE. 176 at ¶14) The lower court found further guidance in Miss. R. Civ. P. 13(f), which provides as follows:

> "(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment on such terms as the court deems just. (*Id.* at ¶15)

In applying said Rules of Civil Procedure to the facts of the case *sub judice*, the lower court properly determined that Defendant's Motion for Leave to Supplement did not contain any allegations that Defendant's omission of adverse possession was due to oversight or neglect, and found that "her request turns on whether justice requires that leave to amend be given." (Judgment, RE. 177 at¶16)

[9] The lower court properly reasoned that Defendant's motion was actually a motion to amend, because the claim of adverse possession was ripe on the date Defendant filed her Answer. (Judgment, RE. 177 at ¶15)

In determining whether justice required the granting of leave to amend, the lower court reasoned as follows:

> ""Motions for leave to amend are left to the sound discretion of the trial court." *Church v. Massey,* 697 So. 2d 407, 413 (Miss. 1997). However, this discretion does not go unfettered. "An application to amend should be prompt and not the result of an inexcusable want of diligence," and leave should not be granted where there exists undue delay or a failure to exercise due diligence. *Natural Mother v. Paternal Aunt,* 583 So. 2d 614, 617 (Miss. 1991)(internal citations omitted). In examining the liberality of the standard for granting leave to amend, the Mississippi Supreme Court found that:
>
> > "freedom to grant leave to amend when justice so requires...diminishes as the litigation progresses. Since prejudice to the opposing party is the key factor governing the court's discretion in granting leave to amend a pleading, the court will ordinarily refuse to grant such permission where the motion comes so late and in such circumstances that the right of the adverse party will necessarily be prejudicially affected. *Edwards v. Jackson National Life Insurance Company,* 860 So. 2d 842, 845 (Miss. Ct. App. 2003) *(quoting McCarty v. Kellum,* 667 So. 2d 1277, 1284-85 (Miss. 1995)). Accordingly, amendment is not allowed where it encourages delay, laches and negligence. *Natural Mother,* 583 So. 2d at 617 (citing Griffith, Mississippi Chancery Practice §392 (2d ed. 1950))."" (Judgment, RE. 177-178 at ¶17)

Moreover, when considering a motion to amend under Miss. R. Civ. P. 15(b), this Court held that pleadings shall be freely amended "when the presentation of the merits will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him." *Red Enterprises, Inc. v. Peashooter, Inc.*, 455 So.2d 793, 795 (Miss. 1984)(emphasis added). Stated differently, amendment of the pleadings is justified when the facts submitted to the court appear to present a "proper subject for relief." *See. Estes v. Starnes*, 732 So.2d 251, 252 (Miss. 1999)(citations omitted). Meaning, when Defendant claimed justice required the lower court's granting of leave to amend, it was incumbent upon Defendant to provide the lower court with something suggesting her claim was plausible.

However, Defendant submitted nothing that would indicate justice, or equity in the case *sub judice,* required the lower court to grant Defendant leave to amend. Despite facing a Motion for Summary Judgment and having sufficient time, Defendant did not submit any pictures, sworn statements or other evidence which in any supports a claim of adverse possession. If she had, the lower court may have been more sympathetic to her claim.

Moreover, Defendant failed to submit any reasonable justification or explanation as to why she waited until the hearing of Plaintiffs' Motion for Summary Judgment to raise the claim of adverse possession.[10] The only explanation given thus far was in her Motion for Leave to Supplement, wherein she alleged that Plaintiffs' "complaint is unclear as to whether they contend that they own all or a portion of Defendant's property." (RE. 100) The lower court did not find Defendant's explanation too convincing, labeling it as being "spurious at best." (Judgment, RE. 178 at ¶18)

As noted above, a grant or denial of a motion to amend a complaint pursuant to Miss. R. Civ. P. 15(a) is within the sound discretion of the lower court. *Wal-Mart* at *570* (¶6)(citing *Moeller at* 961). Granting of leave to amend a pleading shall be freely given by the lower court, when justice so requires; unless, the proposed amendment would still render the claim futile, would cause undue prejudice, or was result of inexcusable neglect or delay. See. *Meredith* at 482 (¶14)(citing Moeller at 962).

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[10] *See.* Judgment, RE. 178 at ¶20. The insufficiency of Defendant's justification for her undue delay is epitomized in the "Undue Delay" and "The Court's Rationale" sections of her Argument in the Appellant's Brief, wherein Defendant's argument could be summed up as "at least I didn't wait four years" (See. Appellant's Brief at 21). Even to this day, Defendant does not appreciate, or simply does not care, that her unsubstantiated and frivolous claim to the Disputed Property has deprived the Plaintiffs of their property and their right to sell a portion of said property to an adjacent property owner. It is unreasonable for Defendant to think she can proceed at as slow a pace as she wants, when Plaintiffs are at risk of losing the sale of their property to the only party capable of purchasing it.

The factual findings the lower court relied upon in denying Defendant's Motion for Leave to Amend were substantial, and its denial of said motion was not an abuse of process; actually, it is what equity and justice required. *Wal-Mart* at 570 (¶6). Unless this Honorable Court is convinced that the lower court abused its discretion, it should not reverse the lower court's Judgment or Order. *Id.*

C. Lower Court Properly Granted Motion for Summary Judgment.

Granting of summary judgment is dispositive and is appropriate only where "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Prime Rx, LLC v. McKendree, Inc.*, 917 So. 2d 791, 794 (¶8)(Miss. 2006)(citations omitted). In making this determination, courts review "all admissions, answers to interrogatories, depositions, affidavits, and any other evidence, viewing the evidence in a light most favorable to the non-movant." Id.

1. Plaintiffs Entitled to Summary Judgment as Matter of Law.

Through their Complaint, Plaintiffs requested the lower court to confirm they were the record and rightful owners of the Disputed Property; to confirm Defendant wrongfully encroached upon their property and to order Defendant to reimburse for the monetary damages sustained by Defendant's wrongful encroachments upon their property, *i.e.*, cost of removing fence. (RE. 15) Mississippi law requires a party seeking to confirm or remove a cloud on title to prove that he or she possesses perfect title. *Culbertson v. Dixie Oil Co.*, 467 So.2d 952, 954 (Miss. 1985). If a person is attempting to confirm title against someone who has taken possession of their property, Mississippi law further requires such person to prove their title is superior to the party in possession. *White v. Usry*, 800 So.2d 125, 131 (Miss. 2001). Pursuant to M.C.A. §11-17-35, a party seeking to confirm or remove a cloud on title must submit a

deraignment of their title in compliance with the following:

> "In bills to confirm title to real estate, and to cancel and remove clouds therefrom, the complainant must set forth in plain and concise language the deraignment of his title. If title has passed out of the sovereign more than seventy-five (75) years prior to the filing of the bill, then the deraignment shall be sufficient if it show title out of the sovereign and a deraignment of title for not less than sixty (60) years prior to the filing of the bill. A mere statement therein that complainant is the real owner of the land shall be insufficient, unless good and valid reason be given why he does not deraign his title."

While a deraignment of title is sufficient to prove title to property, absolute compliance with M.C.A. §11-17-35 is no longer mandatory. *Williams v. King*, 860 So.2d 847, 850 (Miss. 2003). The Mississippi Supreme Court ultimately determined that a party seeking to confirm or remove a cloud on title must submit a deraignment of title, or he must prove he acquired title by adverse possession, or prove he acquired title from the defendant, or prove that both parties derive their claim from a common source, and that his is the better title from that source. *Crosswhite at* 834(¶12) n. 1 (Miss. pp. 2006)(quotation citation omitted).

In the case *sub judice*, Plaintiffs submitted a clear and concise deraignment of title in satisfaction of M.C.A. §11-17-35.[11] The lower court found that Defendant admitted said deraignment was true and correct and that Plaintiffs acquired fee simple title to the Hanson Family Property through the successions described in said deraignment.[12] Said deraignment of title fulfilled the statutory requirements of M.C.A. §11-17-35 and proved how Plaintiffs acquired perfect title to the Subject Property.[13]

The lower court further found that Defendant admitted Plaintiffs acquired the Hanson Family Property in 1986 in good faith, for fair value, without actual or constructive notice of any

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[11] *See.* Judgment, RE. 180 at ¶¶26-27.
[12] *See.* Judgment, RE.180 at ¶27.
[13] *See. Crosswhite* at 834-835 (¶12) n. 1.

adverse claims or encroachments upon their property. (RE. 180 at ¶27) These admissions established that Plaintiffs acquired title to said property as bona fide purchasers, free and clear of any non-perfected claims. *See. Deramus v. Pierce*, 904 So.2d 1104, 1107 (¶22)(Miss. App. 2004)(citing *Board of Educ. of Lamar County v. Hudson,* 585 So.2d 683, 687 (Miss.1991).

The lower court further found that Defendant admitted her only claim to the Disputed Property was through adverse possession. (Judgment, RE. 182 at ¶32) Thus, as bona fide purchasers, Plaintiffs acquired the Hanson Family Property on July 30, 1986, free and clear of Defendant's alleged unperfected claim of adverse possession. *See. Deramus* at 1107.

The lower further found that Plaintiffs submitted the Affidavit of James R. Clarke, R.L.S., dated November 19, 2008, with three of his surveys attached thereto as exhibits, and it accepted the attestations and findings set forth therein. (Judgment, RE. 180 at ¶¶28-30) The lower court determined that the 1986 survey established the boundary lines and legal description for the Hanson Family Property as of July 24, 1986; and it confirmed that in 1986, the eastern boundary of Plaintiffs' property was marked by an old wire fence and that there were no noticeable encroachments upon the property as of the date of the survey. (*Id.* at ¶30)

The lower court found that the October 18, 2008 Survey of James R. Clarke confirmed the property described in the various legal descriptions set forth in the vesting deeds matched the physical boundary of the Hanson Family Property.[14] It also established the location of the common boundary between the Hanson Family Property and the Charlot Family Property; and confirmed that Defendants' steps and wooden fence wrongfully encroach upon the Plaintiffs' property.

Based upon the aforesaid factual findings the lower court determined that Plaintiffs had

[14] *See.* Judgment, RE. 181 at ¶30. The legal description in the deed vesting title in Plaintiffs describes the three parcels after their merger in 1934. See. Ex. C. of Affidavit of James R. Clarke, R.L.S. (RE. 82)

proven they had perfect title to the Hanson Family Property, including the Disputed Property; that they acquired title to such property in good faith, for fair value and without knowledge of any adverse claims.

2. No Genuine Issue of Material Facts Exist.

Once a properly supported motion for summary judgment is made, the non-moving party may not simply rest on the allegations of the pleadings. Miss. R. Civ. P. 56 requires a party opposing a motion for summary judgment to be diligent in presenting his opposition to the trial court. *Bourn at* 749. The United States Supreme Court has determined that where the non-movant bears the burden of proving a claim or defense, and the evidence submitted indicates that one essential element of the non-movant's claim or defense does not exist, all other issues are rendered immaterial and summary judgment is proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Moreover, once the movant has shown the facts and circumstances support summary judgment, the non-moving party must rebut with "significant probative" evidence", *Ferguson v. National Broadcasting Co.*, 584 F. 2d 111, 114 (5th Cir. 1978), or, must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.* at 323. However, "only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment," *Phillips Oil Company v. OKC Corporation*, 812 F.2d 265, 272 (5th Cir. 1987), and "the court must first consult the applicable law to ascertain what factual issues are material." *Fields v. City of Houston, Texas*, 922 F.2d at 1183, 1187 (5th Cir. 1991).

In the case *sub judice*, the lower court found that Plaintiffs' averments to title and the surveys attached to the Clarke Affidavit were supported by said Affidavit, wherein Mr. Clarke

explained his findings and observations made when surveying the respective properties. (Judgment, RE. 180-181 at ¶29) The lower court further found that the Clarke affidavit was undisputed and that Defendant did not submit any probative evidence or affidavits to contradict his statements and findings. (Judgment, RE. 182-183 at ¶34) The lower court accordingly held that there were not genuine issues of material fact and granted Plaintiffs' Motion for Summary Judgment. (Judgment, RE. 184 at ¶39)

The lower court noted that Defendant did submit an affidavit "recalling the history of the various fences that bounded her property. (Judgment, RE. 182 at ¶34) However, none of those statements contradict the statements in Clarke's Affidavit", in part, because the location of the fence is only relevant to a claim of adverse possession, which was waived. Judgment at (*Id.* at ¶¶34-35) Notwithstanding the lower court's finding, Defendant's statements regarding the location of the old wire fence would not have affected the granting of summary judgment to Plaintiffs even if adverse possession had not been waived by Defendant; because after admitting that Plaintiffs acquired title to their property as bona fide purchasers, free of unperfected claims, Defendant was required to prove that she adversely possessed Plaintiffs from the Disputed Property after they purchased it.

This Court recently held that a party claiming title by adverse possession must prove all six elements by clear and convincing evidence and "that the mere presence of a fence, without more, has never been sufficient to sustain a claim of adverse possession."[15] Thus, Defendant was required to prove that since July 26, 1986, she, personally, took hostile occupation of the Disputed Property with the knowledge of Plaintiffs; that Plaintiffs took no action to prevent such

[15] *See. Double J at* 829 (¶¶13-16). To prove adverse possession, the claimant must show its possession was: (1) open, notorious and visible; (2) hostile; (3) under claim of ownership; (4) exclusive; (5) peaceful; and (6) continuous and interrupted possession for a period of 10 years. *See. Biddix v. McConnell*, 911 So.2d 468, 475 (Miss. 2005)(citations omitted).

adverse possession; and that she held such possession exclusively for ten consecutive years. *Id.* at 830 (¶15-16). Defendant provide no such proof; in fact, the lower court found that Plaintiffs had exclusive possession of their property from the date of their purchase through the date Defendant's steps encroached upon the Disputed Property sometime in 2007. (Judgment, RE. 183-184 at ¶38) The lower court further found that Plaintiffs immediately disputed Defendant's adverse claim to the Disputed Property by filing their Complaint in March 2009. *Id.*

Defendant's adverse possession of the Disputed Property obviously fails the length of time element required to prove adverse possession; therefore, even if she had not waived adverse possession through her inexcusable neglect, which is denied; she would not have been able to prove all of the requisite elements for an adverse possession claim.[16]

Plaintiffs proved to the lower court through substantial and overwhelmingly evidence that they were entitled to summary judgment as a matter of law and that there were no genuine issues of material fact. Defendant on the other hand submitted nothing substantive in support of her claim and the lower court was justified in granting Plaintiffs' Motion for Summary Judgment.

CONCLUSION

In justification of their claim to the Disputed Property, Plaintiffs submitted a deraignment of their title, together with other evidence establishing their ownership of the Subject Property, including the three Clarke surveys and the Clarke Affidavit. The lower court found that Plaintiffs had proven they had perfect title to their property. The lower court further found that the Clarke surveys established the respective boundaries for both the Hanson Family Property and Charlot Family Property and proved that Defendant's fence and steps wrongfully encroached upon the Hanson Family Property. The lower court further found that through her admissions, it

[16] *See. Celotex Corp. at 323 (*all other issues are rendered immaterial and summary judgment is proper, if essential element of non-movant's claim does not exist).

was undisputed that Defendant's only claim to the Disputed Property was through adverse possession; however, the lower court determined Defendant had waived this defense through her failure to raise it in her Answer, coupled with her inexcusable delay in seeking leave to amend her Answer. Finally, the lower court found that Plaintiffs had been in exclusive possession of the Hanson Family Property from the date they acquired it in 1986 until the date Defendant encroached upon their property sometime in 2007. These findings of fact were based upon substantial and credible evidence, and this Honorable Court upholds these findings.

Defendant has claimed, without reasonable justification, that justice required the lower court to grant her leave to amend. However, Defendant submitted nothing to the lower court explaining her delay, nor did she provide the lower court with any probative evidence indicating that her claims were plausible. Although, her counsel has repeatedly stated to the lower court that his client, and her ancestors, had open, hostile and exclusive possession of the Disputed Property for over a 100 years, Defendant has not made such claim by sworn statement or otherwise, nor did Defendant submit any third-party affidavit, photographs, or other documents in support of this claim. Moreover, Defendant's admissions not only acknowledged she did not have legal or record title to the Disputed Property, it eliminated one of the essential elements of an adverse possession claim, *i.e.*, possession for 10 years.

Defendant had no legal or equitable right to trespass upon Plaintiffs' property. Her actions deprived Plaintiffs of their property, and have cost Plaintiffs a considerable amount of expense and heartache in recovering what was wrongfully taken from them. The lower court's denial of Defendant's Motion for Leave to Amend and granting of Plaintiffs' Motion for Summary Judgment was based upon well founded and established Mississippi law. Frankly, justice did not require granting of Defendant's Motion, it required the lower court's granting of

summary judgment. Alternatively, should this Court find that justice actually required the lower court to allow Defendant leave to amend, Plaintiffs respectfully submit that such amendment would have had no affect on the outcome of the case *sub judice*, in that Defendant was and is incapable of proving the six essential elements for an adverse possession claim.

Plaintiffs therefore respectfully request that this Honorable Court affirm the lower court's Judgment denying Defendant's Motion for Leave to Amend and granting of Plaintiffs' Motion for Summary Judgment. Plaintiffs further request that this Honorable Court affirm the lower court's denial of Defendant's Combined Motion for New Trial, to Reconsider or Amend Judgment.

RESPECTFULLY SUBMITTED, this the 15th day of January, 2010.

DENNIS L. HENRY AND
BARBARA HANSON HENRY

BY: ~~WOOTEN LAW FIRM, PLLC~~

BY:

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APPELLEES

CERTIFICATE OF SERVICE

I, ERIC D. WOOTEN, do hereby certify that I have this date hand delivered a true and correct copy of the above and the foregoing pleading to all counsel of record by U.S. Mail, postage prepaid, and/or by telecopy at the following:

Hon. Margaret Alfonso
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This the 15th day of January, 2010.

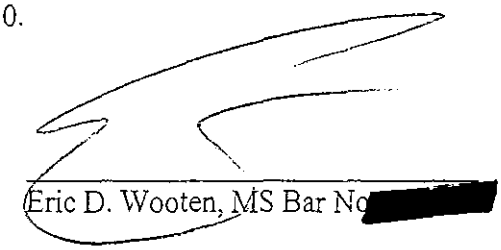
~~Eric D. Wooten~~, MS Bar No [redacted]

CERTIFICATE OF FILING

I, ERIC D. WOOTEN, do hereby certify that pursuant to Miss. R. App. P. 25(a), I have this date sent by UPS Overnight, all costs prepaid, one original and three copies of the Appellees' Brief, along with copy of same on CD in Word format for filing to:

Betty W. Sephton, Court Clerk
Supreme Court of Mississippi
450 High Street
Jackson, Mississippi 39201-1082

This the 15th day of January, 2010.



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