**IN THE SUPREME COURT OF MISSISSIPPI**
**COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**GEORGIA CHARLOT** — **APPELLANT**

**VERSUS**

**CAUSE NO.: A-2401-2008-00643-2**
**2009-TS-00719**

**DENNIS L. HENRY AND**
**BARBARA HANSON HENRY** — **APPELLEES**

**ON APPEAL FROM THE CHANCERY COURT OF**
**HARRISON COUNTY, MISSISSIPPI**
**FIRST JUDICIAL DISTRICT**

# BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

Respectfully submitted,
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## CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. ERIC D. WOOTEN, ESQUIRE
   VAUGHN, BOWDEN & WOOTEN, PA
   1617 25th Avenue
   Gulfport, MS 39501

2. Dennis L. Henry, Plaintiff/Appellee

3. Barbara Hanson Henry, Plaintiff/Appellee

4. Gerogia Charlot, Defendant/Appellant

5. RICK OLANDO AMOS, Attorney of Record for Defendant/Appellant

Respectfully submitted by:
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# BRIEF OF THE APPELLANT

COMES NOW Appellant by and through her attorney of record, Rick Olando Amos of Amos & Associates, P. A., and files Appellant's Brief pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure, asking this Honorable Court to reverse the Judgment granting Summary Judgment in favor of Plaintiffs/Appellees, Dennis L. Henry and Barbara Hanson Henry, reverse the Judgment denying Defendant's Motion to Supplement Pleadings with a Counter-Claim of Adverse Possession and remand this case for a trial on the merits, with Defendant having a right to assert a claim of the disputed property through adverse possession in the above referenced cause.

## I.

## STATEMENT OF THE ISSUES

**1. The Trial Court erred in denying Defendant's Motion for Leave to Amend her Answer to assert "adverse possession" as a defense in this cause.**

**2. The Trial Court erred in granting Plaintiffs' Motion for Summary Judgment by determining that Defendant waived her right to assert "adverse possession" as a defense when she did not assert adverse possession as a defense within her initial Answer to Plaintiffs' complaint.**

3. **The Trial Court erred in granting Plaintiffs' Motion for Summary Judgment when genuine issues of material fact existed.**

# II.

# STATEMENT OF THE CASE

## A. NATURE OF CASE

This is a Confirmation of Title and/or boundary dispute case, with issues of whether or not Defendant waived her right to assert the defense of adverse possession when she did not raise the defense concurrently with her initial Answer to Plaintiffs' complaint; and, whether Defendant's Motion to amend her answer to assert such defense should have been granted by the Trial Judge. This is an appeal from a Judgment granting Plaintiffs' Motion for Summary Judgment and denying Defendant's Motion for Leave to Amend Pleadings with a Counter-claim in Cause Number C-2401-08-00643-2 of the First Judicial District of Harrison County, Mississippi, the Honorable Margaret Alfonso, presiding. We urge that the Chancery Court's granting Summary Judgment in favor of Plaintiffs, Dennis L. Henry and Barbara Hanson Henry, be reversed. We further urge that the Chancery Court's denial of Defendant's, Georgia Charlot's, Motion to Supplement Pleadings with a Counter-claim should also be reversed. Finally, we urge that this matter be remanded for trial on the merits of this case, with the Defendant having an opportunity to assert adverse possession as a defense or counter-claim in this action.

## B. COURSE OF THE PROCEEDINGS

1. On or around March 13, 2008, with Plaintiffs, Dennis Henry and Barbara Hanson Henry,

filing a Complaint to Confirm and Quiet Title To Real Property against Defendant, Georgia Charlot, in the Chancery Court of Harrison County (First Judicial District). (RE pp. 8-35, CP 1-28)

2. Defendant's Answer was filed in this cause on or about May 22, 2008, per an Agreed Order Granting an Extension. (RE pp. 36-45, CP 29-38)

3. On or around September 22, 2008, the parties agreed to a trial date in this cause for January 7, 2009. However, the court continued the trial until she made a ruling on Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Leave to Amend Pleadings. (RE p 50, CP 43)

4. Plaintiffs submitted Combined Discovery Requests to Defendant on or about September 25, 2008. (RE pp. 51-52, CP 44-45)

5. Defendant submitted Answers to Plaintiffs' Requests for Admission on or about November 6, 2008. (RE pp 53-54, CP 46-47)

6. On or about November 7, 2008, Defendant forwarded Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiffs. Plaintiffs did not answer or respond to this discovery. (RE pp 55-56, CP 48-49)

7. Subsequently, Defendant's attorney requested Plaintiffs' consent to Defendant amending her Answer with the counter-claim of Adverse Possession. However, Plaintiffs' attorney, Eric Wooten, said he would not consent to the amendment. (RE pp 198-200, CP 189-191)

8. Subsequently, on or about November 13, 2008, Plaintiffs' attorney filed Plaintiffs' Motion for Summary Judgment. (RE pp. 57-96, CP50-89)

9. On or about November 19, 2008, Defendant filed a Motion for Leave to Supplement Pleadings with a Counter-Claim to Quiet and Confirm Title through Adverse Possession. (RE pp 99-107, CP 92-99)

10. On or around December 3, 2008, Plaintiffs filed a Response to Defendant's Motion for

Leave to Supplement Pleadings With a Counter-Claim arguing that Defendant had waived her right to assert adverse possession. (RE pp 110-118, CP 102-110)

11. On or around December 8, 2008 Plaintiffs filed a Combined Motion to Compel Discovery and Motion in Limine. (RE pp 121-124, CP 113-116)

12. On or about December 11, 2008, Defendant filed a Motion for Continuance, Motion for More Definite Statement and Motion to Dismiss. These Motions were set to be heard at the December 17, 2008 hearing on Plaintiffs' Motion for Summary Judgment. However, these motions were not heard due to an objection by Plaintiffs' attorney of not having proper notice as required by M.R.C.P. 6. (RE pp. 125-137, CP 117-129)

13. On or around December 15, 2008, Defendant filed a Response and Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment. (RE pp. 140-150, CP 132-143)

14. Defendant filed an Affidavit of Defendant Georgia Charlot on or about December 16, 2008. (RE pp. 151-153, CP 144-146)

15. On or around December 16, 2008, Plaintiffs filed a Combined Response to Defendant's Motion for Definite Statement, Motion for Continuance and Motion to Dismiss. (RE pp160-169, CP 153-161)

16. On or around December 16, 2008, Defendant served Answers and Responses to Plaintiffs Interrogatories and Requests for Production. (RE pp. 154-155, CP 147-148)

17. A hearing was held on Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Leave to Amend Answer on or about December 17, 2008. (RE pp. 249-312 and 241-363)

18. On or about February 9, 2009, Judge Margaret Alfonso issued a Judgment in this cause denying Defendant's Motion to Amend her Answer and granting Plaintiffs' Motion for Summary Judgment. (RE pp. 172-185, CP 164-176)

19. On or around February 19, 2009, Defendant filed a Motion for a New Trial. A hearing on said Motion was held before the Honorable Margaret Alfonso on or around March 17, 2009. (RE pp. 188-204, 313-340; CP 179-195)

20. On or about March 10, 2009, Plaintiffs filed a Response to Defendant's Combined Motion for New Trial, To Reconsider or Amend Judgment and Motion to Stay Judgment Pending Disposition of Motions. (RE pp 206-214, CP 197-205).

21. On or about April 3, 2009, Judge Alfonso issued an Order denying Defendant's Motion for a New Trial. (RE pp. 215-218, CP 206-209)

22. Thereafter, an Appeal was perfected.

## C. DISPOSITION IN THE LOWER COURT

The hearing on Plaintiffs' Motion for Summary Judgment was held before the Honorable Margaret Alfonso on December 17, 2008, with Honorable Eric D. Wooten, appearing for Plaintiffs; and Honorable Rick O. Amos appearing for Defendant. (RE pp. 249-312, 341-363) On or around December 15, 2008, Defendant filed a Response and Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment. (RE pp 140-150, CP 132-143) At the hearing arguments were made by Attorneys Wooten and Amos. Affidavits and evidence were presented to the Court. The Court took the matter under advisement and stated that she would issue a ruling as soon as possible. On or about February 9, 2009, Judge Alfonso issued a Judgment denying Defendant's Motion for Leave to Amend her Answer and granting Plaintiffs' Motion for Summary Judgment. Judge Alfonso further ordered 1) That the title of Plaintiffs to the property described herein is hereby confirmed and quieted against any adverse claims of Defendant, and Plaintiffs are hereby declared to be the owners of the subject property; and, 2) That Defendant shall remove the encroachments

described herein from Plaintiffs' property. (RE pp. 172-185, CP 164-176)

On or around February 19, 2009, Defendant filed a Motion for a New Trial. (RE pp 188-204, CP 179-195) A hearing on said Motion was held on March 17, 2009. (RE pp 313-340) Judge Alfonso executed an Order denying Defendant's Motion for New Trial on or around April 3, 2009. (RE pp 215- 218, CP 206-209)

This Appeal was then perfected to this Honorable Court.

## D. STATEMENT OF RELEVANT FACTS

1. Appellant and Appellees own adjoining land located in Pass Christian, Mississippi.

2. The Appellees acquired legal title to their property on July 26, 1986, via Warranty Deed. The property is situated in the First Judicial District of Harrison County, Mississippi, in said State is involved to wit (RE pp 8-35 and 172-173, CP 1-28, 164-165):

> Commencing at the intersection of the East line of Seal Avenue and the South line of East 2nd St.; thence Easterly along the South line of East 2nd St. A distance of 244.0 ft., more or less, to the POINT OF BEGINNING; thence N 64 degrees 42'42"E along the South line of East 2nd St. A distance of 87.67 ft. to a point; thence S 20 degrees 25'40"E a distance of 457.24 ft. to a point; thence S 69 degrees 10'45"W a distance of 37.21 ft. to a point; thence N 20 degrees 38'49"W a distance of 251.47 ft. to a point; thence S 70 degrees 20'41"W a distance of 50.06 ft. to a point; thence N 20 degrees 10'33"W a distance of 197.92 ft. to the point of beginning. And being all the land conveyed to J. Edward Hanson under deed from C. L. Chapotel, et al dated May 17, 1920; deed from S.J. Saucier, et ux, dated May 21, 1927, and deed from Charles A. Martin, Jr., et al, dated October 30, 1934, as appear of record; together with all improvements thereon and all rights thereunto pertaining and being the same property confirmed in the name of Mathilda Courtenay Hanson in Cause #88,582 of the Chancery Court of Harrison County, Mississippi. Said property being situated in the City of Pass Christian, First Judicial District of Harrison County, Mississippi, and bearing Tax Parcel No. 1510E001-027.000.

3. Appellees' alleged that their property at issue in this cause was known by the street address of 512 East Second Street, Pass Christian, Mississippi 39571. However, at hearing on

Plaintiffs' Motion for Summary Judgment, Defendant brought to the court's attention that the property which is adjacent to Defendant's property is known by the address of 514 East Second Street, Pass Christian, Mississippi 39571, not 512 East Second Street. This matter was never corrected by Plaintiffs. (RE pp.8 and 57, 295-296; CP 1 and 50)

4. Appellees' acquired their property through their ancestors, with title being confirmed in the Henrys' predecessor in interest, Mathilde Courtenay Hanson, by Judgment of this Court dated July 29, 1986. The legal description consists of a combination of three properties that were purchased by predecessors in interest. At some point the descriptions were combined and restated into its current form. (RE pp 10-12, 59-61; CP 3-5 and 50-54)

5. The Appellant acquired legal title to her property on September 26, 2001, via Tax Deed. The property is situated in the First Judicial District of Harrison County, Mississippi, in said State is involved to wit (RE pp 102-103; CP 94-95) :

> PARCEL: Lot 25 X 455 ft, more or less, M/L S by Bohn E by Menendez N by 2nd St. W by Martin, Lot 19 Blk. 121 according to the official map or plat thereof on file and of record in the office of the Chancery Clerk of Harrison County, Mississippi.

6. However, Appellant contends that she has owned equitable title to this land because her ancestors lived on this property since on or around January 28, 1886. (RE pp 102-107; CP 94-99) She further contends that she and her ancestors have held actual possession of the disputed property in an open, exclusive, hostile, adverse manner for over 100 years, albeit said disputed property may not have been within the calls of her deed. (RE151-153, 276-281; CP 144-146).

7. Appellant's property is known by the street address of 516 East Second Street, Pass Christian, Mississippi 39571 (RE pp. 2, 102; CP 9, 94)

8. An old wire fence separated the western boundary of the Charlot property and the eastern

boundary of the Henry property. At some point after Hurricane Katrina, the old wire fence was removed, but several of the old original wood posts remained in tack. Appellant argues that she immediately installed a new wood fence along the existing original "posts". Appellees contend that the new fence encroached upon their property. (RE pp 151-153, 281-286 & 341; CP 144-146)

9. Appellees asserted that the parties enjoyed quiet, peaceful ownership of their property until around November of 2006. At that time, Charlot placed a FEMA mobile home with steps on what she believed to be her property. The Plaintiffs hired a surveyor in January of 2008 to survey their property. The survey showed that the steps of Charlot's mobile home encroached onto the Henrys' property. (RE pp. 12; CP 5) However, Defendant contended that she and her predecessors in titled were in possession of the disputed property for over 100 years. (RE 151-153, 276-281; CP 144-146)

10. Consequently, this action commenced on or around March 13, 2008, with Plaintiffs, Dennis Henry and Barbara Hanson Henry, filing a Complaint to Confirm and Quiet Title To Real Property against Defendant, Georgia Charlot, in the Chancery Court of Harrison County (First Judicial District). The Complaint consisted, in part, of the following averments and prayer for relief: (RE pp 8-35, CP 1-28 )

a. Paragraph I of the complaint describes Plaintiffs' property as 512 East Second Street, Pass Christian, MS and designates such as the "subject property".
c. Paragraph X avers that Defendant does not own the subject property
d. Paragraph XII avers that Defendant has encroached on the subject property by placing a FEMA trailer on or near the eastern boundary of the subject property; and entered the subject property to clear trees; and, constructed a fence upon three sides of the subject property.
e. Paragraph XIII avers that Defendant's actions constitute intentional trespass.
f. The Wherefore paragraph requests:
    1. Confirmation of ownership of subject property against Defendant
    2. Compensatory damages for Defendant's refusal to remove the fence
    3. A Decree confirming that they are the owners of the subject property

11. Defendant's Answer was filed pursuant to an agreed extension on or about May 22, 2008. Her Answer included a denial of Plaintiffs' owning the disputed property. (RE pp 36-45; CP 29-38)

12. Plaintiffs submitted Combined Discovery Requests to Defendant toward the end of September 2008. (RE pp. 51-52; CP 44-45) Defendant submitted Answers to Plaintiffs' Requests for Admission on or about November 6, 2008. (RE pp 53-54; CP 46-47)

13. On or about November 7, 2008, Defendant forwarded Defendant's First Set of Interrogatories and Requests for Production of Documents to Plaintiffs. (RE pp 55-56; CP 48-49) Subsequently, Defendant's attorney requested Plaintiffs' consent to Defendant amending her Answer with the counter-claim of Adverse Possession. However, Plaintiffs' attorney, Eric Wooten, said he would not consent to the amendment. (RE pp 198-200; CP 189-191)

14. Subsequently, on or about November 13, 2008, Plaintiffs' attorney filed Plaintiffs' Motion for Summary Judgment. (RE 57-96, CP 50-89) Defendant contends that Plaintiffs' attorney was aware that Defendant was going to file a Motion to Amend her Answer with a counter-claim of Adverse Possession. This is evident by the cover letter to Plaintiffs' Motion for Summary Judgment, which was sent to Defendant's attorney by Eric Wooten. The cover letter states *"I recall that you intended to file a motion to amend your client's answer. If you still intend to file the motion, please set it for that day as well."* (RE pp 198-200; CP 189-191)

15. Plaintiffs' Motion for Summary Judgment made the following allegations: (RE pp 57-96; CP 50-89)

a. Paragraph I gives a legal description of Plaintiffs' property and generally describes it as 512 East Second Street; Pass Christian, MS.
b. Paragraph III makes the following averments:
    1. Charlot encroached on Plaintiffs' property sometime between October 1, 2006 and December 15, 2006.
    2. The initial encroachment occurred when Charlot placed a mobile home so

close [the western boundary of her property,] that the stairs to her trailer extended over the Charlot Property's western boundary onto the Henry Property.

3. In February 2008, Charlot expanded her encroachment when she caused a fence to be constructed upon a portion of the Henry Property, which extends westward from the mobile home and southward diagonally to a point near the Henry Property's southwest corner.

c. Paragraph V states that Defendant has not submitted any deraignment of title, deed or other document filed of record that could justify her claiming title to the subject property, or justify her encroachment upon the subject property.

b. Paragraph IX attempts to establish boundaries of the subject property pursuant to a survey, dated October 18, 2008.

16. On or about November 19, 2008, Defendant filed a Motion for Leave to Amend Answer with Counter-Claim. (RE pp 99-107; CP 92-99)

17. On December 11, 2008, Defendant filed a Motion for More Definite Statement and a Motion for Continuance. On December 12, 2008, Defendant filed a Motion to Dismiss. Defendant noticed these three motions to be heard at the hearing on December 17, 2008. Plaintiffs objected due to these Motions being heard on December 17, 2008 due to Plaintiffs' not being given at least five days notice as required by M.R.C.P.6. Therefore, these Motions were not heard at said hearing. (RE pp 125-137; CP 117-129)

18. Defendant filed a Response and Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment. (RE pp 140-150; CP 132-143)

19. A hearing was held on Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Leave to Amend Answer on or about December 17, 2008. (RE pp 249-312 and 341-363) At hearing, there was much discussion regarding the location of the original old wood fence. Defendant contended that the original old wire fence existed in the same location where she replaced it with a new wood fence. She argued that she placed the new wood fence along the line where the old stacks still exist, indicating the location of the original old wire fence. Plaintiffs argued that the

original wood fence was east of the new wood fence installed by Defendant. (RE pp.281-286 and p. 341).

20. Defendant submitted an Affidavit prior to hearing on Plaintiffs' Motion for Summary Judgment indicating her contention of how she was the owner of the disputed property, even if such property was not within the call of her deed. She further asserted how she and her ancestors, who were predecessors in title, used the disputed property as their own for over 100 years. (RE pp. 151-153; CP 144-146)

21. On or about February 9, 2009, Judge Margaret Alfonso issued a Judgment in this cause denying Defendant's Motion to Amend her Answer and granting Plaintiffs' Motion for Summary Judgment. (RE pp 172-185; CP 164-176)

22. On or around February 19, 2009, Defendant filed a Motion for a New Trial. (RE pp. 188-204; CP 179-195) A hearing on said Motion was held before the Honorable Margaret Alfonso on or around March 17, 2009. At said hearing an Affidavit was presented from THOMAS W. STENUM, a licensed Professional Land Surveyor in the State of Mississippi, who surveyed property at 516 East Second Street, Pass Christian, Mississippi. He determined that her property, pursuant to deeds, contains 11, 699.49 square feet or 0.269 acre more or less. However, during his survey he noted that there was a wood privacy fence placed on the west boundary of the Charlot property. This privacy fence, which appears to be a new fence, follows the property line pursuant to deeds running from north to south to a point where the property is cornered by two wood fences. The southern fence corner is approximately 1.1 feet west of the property line and extends approximately 16(½) feet west of the property line. The wood fence then corners and runs southwesterly along the remaining length of the property in dispute. He noted further that the wood privacy fence to the west of the property extending southward after the fence corner is placed along old fence posts and remaining old fence posts. I noted and examined one (1) old fence posts and one (1) remaining old fence posts

and it appears that the new privacy wood fence is placed along said old wood posts. Finally, he noted that in examining the old wood post and the remaining wood post, I am of the opinion that these posts were on this property prior to the new wood privacy fence being placed along the lines of said posts.

In examining the west boundary of the Charlot property line pursuant to deeds (this is the property line that is east of the new wood privacy fence), I did not see any evidence of old wood posts, remaining old wood posts, or iron rods which could have been indicators of the true property line. However, the east boundary of the Charlot property consists of numerous old fence posts, a wire fence and trees which have wrapped around some of the old fence posts. These markers indicate the east boundary, running north to south, of the Charlot property. (RE pp 313-340)

23. On or about April 3, 2009, Judge Alfonso issued an Order denying Defendant's Motion for a New Trial. (RE pp 215-218; CP 206-209)

24. An Appeal was perfected

## III.

## SUMMARY OF THE ARGUMENT

### ISSUE I.

**The Trial Court erred in denying Defendant's Motion for Leave to Amend her Answer to assert "adverse possession" as a defense in this cause.**

According to Rule 15(a) of the Mississippi Rules of Civil Procedure and caselaw, amendments should be "freely granted" unless the non-movant party shows that he/she will suffer "actual undue prejudice" if the amendment is granted. In the case at hand, Plaintiffs knew or should have known that Defendant contended that she owned the disputed property because in her answer she denied that Plaintiffs owned the disputed property. (RE pp 36-45, CP 29-38)

Furthermore, she was in possession of the disputed property; (RE pp 13-14, 145; CP 6-7, 138) and, Defendant's attorney had actually requested the consent of Plaintiffs' attorney for Defendant amending her answer to assert adverse possession. (RE pp.198-200; CP 189-191) This request was made prior to Plaintiffs' attorney filing their Motion for Summary Judgment. Finally, discovery, which was incomplete in this case, commenced one (1) month prior to the filing of Plaintiff's Motion for Summary Judgment. (RE pp 51-52; CP 44-45) Therefore, Plaintiffs would not have suffered actual prejudice if Defendant was allowed to amend her Answer to argue adverse possession because Plaintiffs were well aware that that was Defendant's only course of claiming the disputed property.

Therefore, we contend that the Trial Court erred in denying Defendant's Motion for Leave to Amend Pleading by filing a counter-claim to assert ownership of the disputed property via adverse possession.

## ISSUE II.

**The Trial Court erred in granting Plaintiffs' Motion for Summary Judgment by determining that Defendant waived her right to assert "adverse possession" as a defense when she did not assert adverse possession as a defense within her initial Answer to Plaintiffs' complaint.**

Here, Defendant was in possession of the disputed property. In her initial Answer, she denied that Plaintiffs were owners of the disputed property. (RE pp 13-14, 36-45; CP 6-7 and 29-38) These facts alone raise the issue of adverse possession, even if the issue is not specifically raised in pleadings. Furthermore, Defendant claimed that she and her predecessors in title, her ancestors, occupied the disputed property as their own property for more than 100 years. (RE pp 102-107, 151-153; CP 94-99 and 144-146) Moreover, Plaintiffs were aware that Defendant was

going to seek approval to amend her answer to assert a claim to the disputed property through adverse possession prior to Plaintiffs filing their motion for summary judgment.

Therefore, we contend that the Trial Court erred in granting Plaintiff's Motion for Summary Judgment on the basis that Defendant waived her right to assert adverse possession as a defense when she did not include such concurrent with her initial answer to Plaintiffs' complaint.

## ISSUE III.

**The Trial Court erred in granting Plaintiffs' Motion for Summary Judgment when genuine issues of material fact existed.**

**We contend that the following genuine issues of material fact still exists. Therefore, Plaintiffs' Motion for Summary Judgment should not have been granted:**

1. Whether Defendant has a claim to the disputed property by adverse possession?

2. Whether or not Plaintiffs accuracy described the disputed property in their complaint and Motion for Summary Judgment. Plaintiffs described the disputed property as 512 East Second Street, Pass Christian, Mississippi. However, the 512 East Second Street property is not adjacent to Defendant's property. The property which is adjacent to Defendant's property is 514 East Second Street; Pass Christian, Mississippi. Furthermore, Plaintiffs made no attempt to amend their complaint to insert the correct description of the disputed property. (RE pp 2, 102; CP 9, 94 )

3. Plaintiffs asserted that the parties enjoyed quiet, peaceful ownership of their property until around November of 2006. At that time, Charlot placed a FEMA mobile home with steps on what she believed to be her property. The Plaintiffs hired a surveyor in January of 2008 to survey their property. The survey showed that the steps of Charlot's mobile home encroached

onto the Henrys' property. (RE pp. 12; CP 5) However, Defendant contended that she and her predecessors in titled were in possession of the disputed property for over 100 years. (RE 151-153; CP 144-146). Therefore, the issue of how long had Defendant been in possession of the disputed property exists.

4. At hearing, there was much discussion regarding the location of the original old wood fence. Defendant contended that the original old wire fence existed in the same location where she replaced it with a new wood fence. She argued that she placed the new wood fence along the line where the old stacks still exist, indicating the location of the original old wire fence. Plaintiffs argued that the original wood fence was east of the new wood fence installed by Defendant. (RE pp.281-286 and 341) Therefore, the issue of the location of the original old wire fence was not resolved.

5. Whether Plaintiffs Complaint is a boundary dispute relief case versus a confirmation of title case. Therefore, elements of a boundary case have not been proven. Furthermore, even if the court could grant Plaintiffs' Bill to Confirm Title, the court could only confirm tittle to property in which plaintiffs possess. Plaintiffs were not in possession of the disputed property.

Therefore, we contend that the Trial Court erred in granting Plaintiffs' Motion for Summary Judgment when genuine issues of material fact existed.

## IV.

## THE ARGUMENT

### ISSUE I.

**The Trial Court erred in denying Defendant's Motion for Leave to Amend her Answer to assert "adverse possession" as a defense in this cause.**

Rule 15(a) of the Mississippi Rules of Civil Procedure (M.R.C.P.) sets forth the requirements for amending complaints and provides, in pertinent part, as follows:

> 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 calender, 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.

The Mississippi Supreme Court in **Red Enterprises, Inc. v. Peashooter, Inc.**, 455 So 2d 793 (Miss. 1984), ( citing **Foman v. Davis**, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (Miss. 1962)), held that the mandate of Rule 15(a) that leave to amend "shall be freely given when justice so requires" is to be heeded and if the underlying facts or circumstances relied upon by the plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. The court further held that in the absence of any apparent or declared reason, such as undue prejudice to the opposing party by virtue of allowing the amendment, futility of the amendment, etc., then leave should be "freely given." **Red Enter, Inc.**, Id at 795.

In **Red**, the Circuit Court of Rankin County directed a verdict in favor of Peashooter, Inc. And against Red Enterprises, Inc. In the sum of $15,000 on a promissory note, and $5,000.00 attorney's fee. Red Enterprises, Inc. appealed . The sole question on appeal was whether or not the lower court erred in refusing to allow appellant the right to amend its answer to assert the affirmative defense of accord and satisfaction. At trial appellant attempted to proved accord and satisfaction. Appellee objected on the ground that accord and satisfaction is an affirmative defense, was not affirmatively pled, and that appellee was not prepared to meet the defense. Appellant sought to amend its pleadings under **M.R.C. P. Rule 15(b)**. The Mississippi Supreme Court held that prejudice would not have resulted if the amendment was granted The Court further stated that the appellant denied that it owed the amount of the note to appellee. The

logical conclusion left was that payment had been made. Simple interrogatories would have shown why appellant contended he did not owe the amount of the note. The Court was of the opinion that, under the facts of this case, the lower court should have granted the amendment setting up accord and satisfaction and the failure to do so constituted reversible error.

## UNDUE PREJUDICE:

In our case, Plaintiffs filed their Complaint against Defendant on or about March 13, 2008. (RE pp. 8-35; CP 1-28) Defendant filed her Answer on or about May 22, 2008, pursuant to an extension. (RE pp 36-45; CP 29-38) Discovery did not commence in the case until September 25, 2008 when Plaintiffs propounded discovery on Defendant. (RE pp 51-52; CP 44-45) Subsequently, Defendant's attorney and requested Plaintiffs consent to Defendant amending her Answer with the counter-claim of Adverse Possession. However, Plaintiffs' attorney, Eric Wooten, said he would not consent to the amendment. Plaintiffs' attorney was aware that Defendant's attorney was going to file a motion to amend her pleadings. (RE pp 198-200; CP 189-191) However, prior to the motion being filed, Plaintiffs' attorney filed Plaintiffs' Motion for Summary Judgment. (RE pp57-96; CP 50-89)

Consequently, Plaintiffs' attorney was aware that Defendant was going to file a Motion to Amend her Answer with a counter-claim of Adverse Possession. This is evident by the cover letter to Plaintiffs' Motion for Summary Judgment, which was sent to Defendant's attorney by Eric Wooten. The cover letter states *"I recall that you intended to file a motion to amend your client's answer. If you still intend to file the motion, please set it for that day as well."* (RE pp198-200, 315-316; CP 189-191)

Furthermore, Defendant was in possession of the disputed property and contended as in

her Answer to Plaintiffs' complaint that the Plaintiffs were not owners of said property. (RE pp 53-54, 151-153; CP 46-47, 144-146)

Moreover, Plaintiffs did not present any evidence indicating that they would suffer undue prejudice if Defendant was allowed to amend her Answer to assert adverse possession as a defense or counter-claim. (RE pp 299-312) Therefore, Plaintiffs would not have suffered undue prejudice if Defendant's Motion to Amend was granted and Defendant was allowed to argue adverse possession during the merits of the case.

In **Wilner v. White**, 788 So 2d 822 (Miss. 2001), the Court held that there was no indication that there would be any undue prejudice caused by the allowance of Wilner's amended complaint. The Court found that under the "freely given where justice so requires" standard, Wilner should have been allowed to amend her complaint and to test her claim on the merits since even the few facts given appear to present a proper subject for relief.

In **Wal-Mart super Center v. Long**, 852 So. 2d 568, (Miss. 2003), the court cited **William Iselin & Co.**, 433 So 2d at 911, in giving examples of when motion to amend may be prejudicial include: where it would burden the adverse party with more discovery, preparation, and expense, particularly where the adverse party would have little time to investigate and acquaint itself with the matter. In the **Wal-Mart** case, Wal-Mart had to show that it had suffered "actual prejudice" after Long was allowed to amend her complaint. The Court held that the amended complaint does not cause Wal-Mart to suffer actual prejudice.

Finally, in **Moeller v. Am. Guar. and Liab. Ins. Co.**, 812 So. 2d 953, 962 (Miss. 2002), the court held the following:

> In the present case it is difficult to ascertain the actual prejudice that American Guarantee would have suffered had Fuselier been allowed to amend their complaint to include a

> request for prejudgment interest. Neither special chancellor participating in this case presented any insightful reason as to why the motions to amend were denied. This lack of explanation or showing of actual prejudice to American Guarantee, combined with M.R.C.P. 15(a) and the case law relying upon Rule 15(a)'s language stating that leave to amend "shall be freely given when justice so requires," leaves this Court with little choice but to find an abuse of discretion on the part of both special chancellors. The motion to amend should have been granted.

In analyzing our case to the examples of undue prejudice as stated in the Wal-Mart case, Plaintiffs would not have been burdened with more discovery because discovery had commenced only one (1) month prior to Plaintiffs' Motion for Summary Judgment being filed. Plaintiffs were well aware of Defendant's contention that she was the owner of the disputed property because she was in possession of the disputed property. They knew that Defendant desired to assert adverse possession as a defense. This is evident by the cover letter to Plaintiffs' Motion for Summary Judgment, which was sent to Defendant's attorney by Eric Wooten. The cover letter states *"I recall that you intended to file a motion to amend your client's answer. If you still intend to file the motion, please set it for that day as well."* (RE pp 198-200, 315-316; CP 189-191)

Consequently, Plaintiffs could not argue that the allowance of the instant amendment would have resulted in unanticipated discovery. They were further aware as the court alluded that adverse possession was Defendant's only avenue to claim said property, since the property was not within the call of her deed. Consequently, Plaintiffs could not have argued that they did not anticipate preparing to counter Defendant's claim to the disputed property by adverse possession, or that there would have been an added or unanticipated expense to them preparing for such counter attack. .

Finally, Plaintiffs did not make an argument as to how they would be prejudiced if our amendment was granted. (RE pp 299-312) Therefore, Plaintiffs were not able to show that they

would have suffered "actual prejudice" as a result of Defendant amending her Answer to assert adverse possession as a defense or counter-claim.

## UNDUE DELAY

In **Webb v. Braswell**, 930 So 2d 387, (Miss. 2006), the Webbs pointed out that this Court has found, in part through the comment of the rule, that amended pleadings have been liberally permitted throughout Mississippi's legal history. See **Moeller v. Am. Guar. and Liab. Ins. Co.**, 812 So. 2d 953, 962 (Miss. 2002); **Beverly v. Powers**, 666 So. 2d 806, 809 (Miss. 1995); **Rector v. Miss. State Highway Comm'n**, 623 So. 2d 975, 978 (Miss. 1993).

In **Webb** , the Webbs filed a motion to amend their complaint four years after initiating suit, and only a few months before trial, and also noted that the Webbs' attorney admitted he was aware of the nature and extent of their claims in 2000, four years before filing the motion. Therefore, the trial court found that the Webbs had more than an adequate amount of time to analyze their case and amend their pleadings much earlier than when they filed the motion and that failure to do so timely was the result of a lack of diligence. Finally, the trial judge found that granting the motion would result in undue delay to the litigation, undue prejudice to the defendants, and "would encourage delay, laches, and negligence." The Mississippi Supreme court agreed with the trial court and made the following comment:

"Amending the complaint at this stage, well after the discovery deadlines, would without doubt cause undue prejudice to the defendants in the form of delay and cost."

In the case at hand, Plaintiffs' filed their Complaint against Defendant on or about March 13, 2008. (RE pp 8-35; CP 1-28) Defendant filed her Answer on or about May 22, 2008, pursuant to an agreed extension. (RE pp 36-45; CP 29-38) Discovery did not commence in the

case until around September 25, 2008, when Plaintiffs propounded discovery on Defendant. (RE pp 51-52; CP 44-45) Defendant propounded discovery on Plaintiffs on or around November 7, 2008. (RE pp 55-56; CP 48-49) Discovery should have been allowed to determine exactly what portion of Plaintiffs' property was Defendant encroaching. Was Defendant's fence encroaching 1 feet or 25 feet onto Plaintiffs' property. What are the true measurements of the alleged encroachment. Furthermore, Plaintiffs contended that the Subject Property was at 512 East Second Street, Pass Christian, Mississippi. However, that property with that address is not adjacent to Defendant's property. The property, with the address of 514 East Second Street, Pass Christian, Mississippi is actually adjacent to Defendant's property. (RE pp 295-296- 310-311) Therefore, discovery should have been the tool to resolve some of those questions.

Unlike the Webb case where the Webbs' motion to amend occurred four years, Defendant's motion to amend her pleadings in our case occurred one (1) month after discovery commenced in this action, albeit six months after her initial answer was filed. Furthermore, Plaintiffs' knew or should have known of Defendant's possession of the disputed property when they became owners in 1986, yet their complaint to clear title did not occur until over 20 years later. Finally, we contend that Plaintiffs' attorney knew, prior to filing the Motion for Summary Judgment that Defendant was going to argue adverse possession in this case. Therefore, Plaintiffs were not prejudiced by such argument.

## THE COURT'S RATIONALE

This Court entered a Judgment on February 9, 2009, denying Defendant's Motion for Leave to Supplement Pleadings with a Counter-Claim. The court cited **Natural Mother v. Paternal Aunt**, 583 So 2d 614, 617 (Miss. 1991) which determined that "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.

Moreover, the court cited **Edwards v. Jackson National Life Insurance Company**, 860 So 2d 845 (Miss. Ct. App. 2003) (quoting **McCarty v. Kellum**, 667 So 2d 1277, 1284-85 (Miss. 1995)) by stating " 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 in such circumstances that the right of the adverse party will necessarily be prejudicially affected.

Accordingly, amendment is not allowed where it encourages delay, laches and negligence. **Natural Mother**, 583 So 2d at 617 (citing Griffith, Mississippi Chancery Practice Section 392 (2d ed. 1950)).

The court further cited the following reasons as a basis for the denial of Defendant's Motion for Leave to Amend:

*1. Defendant did not attempt to amend her Answer by adding a brand-new counterclaim until a week after Plaintiffs filed their Motion for Summary Judgment.*

*2. There is no reason of record which justifies the six month delay between the Defendant's Answer and her Motion for Leave to amend.*

*3. Allowing the counterclaim at this point would result in undue delay and would prejudice the opposing party.*

*4. Charlot has failed to exercise due diligence by waiting until after trial was set and Plaintiffs have filed a Motion for Summary Judgment to bring a counterclaim that she could have brought at any time after being served with the Complaint.*

*5. The court further denied Defendant's Motion for the following reasons:*

*a) due to the untimeliness of Defendant's Motion,*

*b) the lack of diligence in asserting the claim and*

*c) all the reasons stated above.*

However, Defendant made the following arguments in her Motion for New Trial, Reconsideration or Amend Judgment, which was also denied by the court: (RE pp 188-204; CP 179-195)

**1. DEFENDANT DID IN FACT ATTEMPTED TO AMEND HER ANSWER BY ADDING A BRAND-NEW COUNTERCLAIM PRIOR TO PLAINTIFFS FILING OF THEIR MOTION FOR SUMMARY JUDGMENT.**

**2. THERE IS REASON OF RECORD WHICH JUSTIFIES THE SIX MONTH DELAY BETWEEN THE DEFENDANT'S ANSWER AND HER MOTION FOR LEAVE TO AMEND .**

For the foregoing reasons, we contend neither undue delay nor undue prejudice existed to justify the court's denial of defendant's motion to amend her pleading. Accordingly, we contend that the trial court erred in denying Defendant's Motion to Amend her Answer.

## ISSUE II.

**The Trial Court erred in granting Plaintiffs' Motion for Summary Judgment on the basis that Defendant waived her right to assert "adverse possession" as a defense when she did not include such defense concurrently with her initial Answer to Plaintiffs' complaint.**

In **Pittman v. Simmons**, 408 So 2d 1384, (Miss. 1982), Simmons filed suit in Chancery Court against Pittman seeking to remove clouds upon their property title and for injunctive relief. In their Answer, the Pittmans denied that Simmons owned the disputed property. However, they did not assert the defense of Adverse Possession concurrently with their Answer, nor did they seek by cross-bill to cancel Simmons' claim to the property and confirm and quiet title in themselves. The lower court held that the Pittmans did not make a claim to the disputed property by virtue of Adverse Possession. The lower Court's decree recited that the Pittmans elected not to show acquisition of title and ownership of the disputed property by adverse possession, but only claimed the property of which they were record owners. The court further held, as a matter of law, that adverse possession must be pled and proven, otherwise such affirmative defense is waived, and that title cannot vest in a party under claim by adverse possession unless a bill of complaint or cross-bill has been filed by that party. The Court further reasoned that Defendants,

in offering proof as to ownership, relied solely upon the allegation that same had been conveyed to them under the aforementioned Warranty Deed and that they had bought and paid for the subject property.

On appeal, Appellants assigned three errors in the trial below, but the question of whether or not the lower court manifestly erred in finding that the appellants made no claim to the disputed property by adverse possession was the question to dispose of all other questions. On appeal, the Mississippi Supreme Court found that although Defendants did not file a cross-bill seeking to cancel the claim asserted by appellees, they did deny all averments of ownership on the part of appellees, and they charged that they have used said property in the same way for the past twenty-five years. The Supreme Court stated, "We think that the averments of the answer were sufficient to raise the defense of adverse possession." **Downing v. Starnes**, 35 So. 2d 536 (Miss. 1948); **Dochterman v. Marshall**, 92 Miss. 747, 46 So. 542 (Miss. 1908).

In the case at bar, this action commenced on or around March 13, 2008, with Plaintiffs, Dennis Henry and Barbara Hanson Henry, filing a Complaint to Confirm and Quiet Title To Real Property against Defendant, Georgia Charlot, in the Chancery Court of Harrison County (First Judicial District). (RE pp 8-35; CP 1-28). Defendant's Answer was filed per an agreed extension on or about May 22, 2008. Within Defendant's Answer, she denied Plaintiffs' right to the Disputed Property. (RE pp 36-45; CP 29-38). Discovery did not commence until toward the end of September, 2008, when Plaintiffs submitted Combined Discovery Requests to Defendant. (RE pp 51-52; CP 44-45). Thereafter, Defendant's attorney requested Plaintiffs' attorney's consent to Defendant amending her Answer to assert a counter-claim of Adverse Possession. However, Plaintiffs' attorney, Eric Wooten, said he would not consent to the amendment. (RE pp 198-200; CP 189-191) Subsequently, on or about November 13, 2008, Plaintiffs' attorney

filed Plaintiffs' Motion for Summary Judgment. Nonetheless, on or about November 19, 2008, Defendant filed a Motion for Leave to Amend Answer with Counter-Claim of Adverse Possession. Prior to hearing on Plaintiffs' Motion for Summary Judgment, Defendant filed an Affidavit asserting ownership to the disputed property and indicating that the property had been owned and used by her ancestors for over 100 years. Moreover, at hearing, Defendant's counsel asserted that Defendant asserted ownership of the disputed property via adverse possession. Nonetheless, Judge Alfonso issued a Judgment denying Defendant's Motion for Leave to Amend Answer and granting Plaintiff's Motion for Summary Judgment on the basis that Defendant had waived her right to assert adverse possession as a defense or counter-claim.

Like the holding in the Pittman case, we contend that although Defendant did not file a cross-bill seeking to cancel the claim asserted by appellees, she did deny all averments of ownership on the part of plaintiffs of the disputed property, (RE pp. 36-45 & 182; CP 29-38 & 173) In addition Defendant was in possession of the disputed property and submitted an Affidavit prior to hearing on Plaintiffs' Motion, whereby she charged that she and her ancestors had used the disputed property in the same way for the past 100 years. Moreover, Plaintiffs were aware of Defendant's desire to assert adverse possession as a claim through Defendant's attorney's contact with Plaintiffs' attorney requesting permission to amend her Answer; and Defendant actually filed a Motion to amend her Answer to assert such counter-claim. Finally, at hearing on the Motion for Summary Judgment, Defendant argued ownership of the disputed property via adverse possession. The court even stated that adverse possession would be Defendant's only avenue of claiming the disputed property. (RE pp. 285-286, 292) Therefore, we contend the defense of adverse possession was sufficiently raised.

Moreover, the Pittman court cited **Alexander v. Hyland**, 214 Miss. 348, 58 So. 2d 826

(1952)(quoting **Metcalfe v. McCutchen**, 60 Miss. 145, and **Jones v. Gaddis**, 67 Miss. 761, 7 So. 489 (Miss. )) by stating the following:

"The Court held that even though a party has claimed the land in controversy as being within the calls of his deed and has relied upon his deed as the foundation of his claim, when in fact the land was not within the calls of his deed, yet, if he has occupied the land for the statutory period under the claim that it was his own and was embraced within the calls of his deed, he is entitled to recover on the ground of adverse possession; that it is the fact of adverse possession under the claim of right for the statutory period that establishes title. In its opinion in the Metcalfe case, the Court said: "We adopt the views of those courts which hold that possession is adverse in which the holder claims, and intends to claim title, without regard to the fact that the possession and claim is held and made under an honest, but mistaken, belief that the land is within the calls of his deed. It is the fact that possession is held, and that title is claimed, which makes it adverse possession, or claim, or both, though they may have resulted from a mistake; but it is their existence and not their cause that the law considers and existing, they constitute adverse possession."

In our case, Defendant occupied the disputed land and claimed to have occupied the land for over 100 years, via her ancestors. Furthermore, she denied that Plaintiffs were the owners of the disputed land. Therefore, like the Metcalfe case, her possession along with her claim for title makes it necessary for the law to consider adverse possession. Within the Court's Judgment, the Court noted that Defendant was in possession of the disputed property. However, the Court asserted that it would not consider such since this was merely an argument of adverse possession, which was deemed waived by Defendant. (RE pp 182; CP 173) Accordingly, we contend that Defendant did not waive her right to assert the defense of adverse possession by the mere fact of not including such defense within her initial Answer as concluded by Judge Margaret Alfonso.

In **Crosswhite v. Golmon**, 939 So 2d 831 (2006), Golmon brought action against adjacent property owners, Crosswhite, seeking removal of fence that allegedly encroached on property. The Chancellor ordered removal of fence. Crosswhite's Motion for a new trial was denied. Crosswhite appealed. Appellants argued that plaintiffs pleading did not give notice of claims of title or boundary lines by deed or otherwise thus defendants were prejudiced in

defending against these claims. The Court found in favor of Golmon because Crosswhite never filed an Answer to Plaintiff's complaint; 2) did not raise the issue at trial and 3) did not raise the issue in the Motion for New Trial. Therefore, Golmon was barred from raising the issue on appeal.

In the case at hand, Plaintiffs in their Motion for Summary Judgment cited **Crosswhite** in their argument that Defendant waived the right to raise the defense of adverse possession as a defense because it was not raised in her initial Answer. However, this is an incorrect reasoning of **Crosswhite**. In **Crosswhite**, the Defendant did not even file an answer to the complaint. However, he raised the defense of adverse possession at trial. The Court noted that evidence presented by the Crosswhites went toward "establishing an ownership right arising out of adverse possession," but "the Defendants did not establish the elements of adverse possession by clear and convincing evidence." See **Crosswhite** , Id at page 833.

In **Crosswhite**, the defense of adverse possession was allowed to be developed at trial even though the Defendants did not even file an answer to plaintiff's complaint. The issues presented on appeal in Crosswhite did not cover the issue of whether the defense of adverse possession is barred if not raised in the initial Answer. In our case, although the defense of adverse possession was not raised in the initial Answer, Defendant denied Plaintiffs' assertion of ownership of the disputed property and filed a Motion to Amend her Answer to make a counter claim of adverse possession.

Furthermore, in **Brown v. Akin**, 790 So 2d 893 (Miss. 2001), the Court held that Akin could not raise adverse possession at trial because he had initially submitted a counter claim arguing adverse possession. However, the Court dismissed this counter claim because Akin failed to join a necessary party to his claim as required by the court. Akin did not attempt to

amend his complaint with the counter claim of adverse possession until after the trial commenced. Therefore, because adverse possession was never plead prior to trial, the issue of such was not before the court.

In our case, Defendant had filed a Motion to Amend her Answer to assert a claim by adverse possession under Mississippi Rules of Civil Procedure 15(a). (RE pp 99-107; CP 92-99) The rule states that such "leave to amend shall be freely given when justice so requires. Accordingly, Defendant did not waived her right to assert the defense of adverse possession as concluded by plaintiffs.

Finally, in **Moses v. Weaver**, 210 Miss. 228 the defense of Adverse Possession was not raised in a prior suit between the same parties over the same strip of land. Therefore, the defense was waived in a subsequent suit. This case involved the issue of res judicata. The court held that all questions which could have been raised in a former suit between the parties are res judicata. This case is different from our case in that Defendant has requested the Court to raise the defense of adverse possession prior to trial of the case in chief. Also see **Gause v. Spearman**, 61 So 2d 665 (Miss. 1952)

Accordingly, if Ms. Charlot's right to raise the defense of Adverse Possession was not barred, why would the court disallow such a defense even though it was raised after discovery commenced and prior to trial and prior to Plaintiffs' Motion for Summary Judgment. Accordingly, the court's assertions that Defendant's motion was untimely and that there is no reason of record which justifies the six month delay between the Defendant's Answer and her Motion for Leave to amend are unfair and an abuse of discretion.

Moreover, the court's assertion that allowing the counterclaim at this point would result in undue delay and would prejudice the opposing party is unfounded. According to Plaintiffs'

attorney's cover letter, Plaintiffs were aware of Defendant asserting a claim of adverse possession. Therefore, they would not have been prejudiced if the issue was raised at trial.

The Court granted Plaintiffs' Motion for Summary Judgment in its Judgment, dated February 9, 2009. The court cited, in part, the following reasons for its decision: (RE pp 172-185; CP 164-176)

1. At the hearing, counsel for Defendant admitted that Defendant's only claim to the Disputed Property is by adverse possession. However, the Defendant did not raise the defense of adverse possession until the hearing. Failure to assert adverse possession as an affirmative defense waives that defense. The court cited **Stewart v. Graber**, 754 So. 2d 1281, 1284 (Miss. 1999) (citing **White v. Turner**, 19 So. 2d 825, 826 (Miss. 1944)).

2. At the hearing, Charlot argued that the old wire fence shown on the 1986 survey was actually in a different location, but she offered nothing to prove the veracity of those statements.

However, Appellant urges that this matter be remanded for the following reasons:

1. The court is incorrect in its conclusion that the defense of adverse possession was not raised until the hearing. As previously stated, Defendant's attorney attempted to obtain Plaintiffs' attorney's consent to amend her Answer with the counterclaim of adverse possession. In addition, Defendant filed her Motion to Amend approximately one month prior to the hearing and nearly two months prior to the scheduled trial.

Furthermore, the court cited **Stewart v. Graber**, 754 So. 2d 1281, 1284 (Miss. 1999) in its assertion that Ms. Charlot waived her right to assert adverse possession. In that case, the defense of adverse possession was not raised in Defendant's Answer. However, the defense of adverse possession was raised and explored at trial. The lower court ruled in favor of Plaintiffs but did not consider adverse possession in its ruling. On appeal, the court held that "the failure

of the Stewarts to amend their pleadings to make them conform to the evidence relative to adverse possession is not fatal." The Appellate Court concluded that adverse possession should have been considered and ruled upon in the lower court's judgment. Therefore, the case was remanded to the trial court for an examination of the evidence related to adverse possession. On remand, the chancellor sought additional findings of fact with regard to adverse possession. In his order, dated February 10, 2000, he found that the Stewarts failed to prove their defense of adverse possession by clear and convincing evidence. See **Stewart v. Graber** 760 So 2d 868.(Miss. 2000). Accordingly, in the case at bar, Ms. Charlot did not waive her right to assert the defense of adverse possession.

2. Charlot hereby submitted an Affidavit from Surveyor Thomas W. Stenum, which indicates the existence of an "old fence post" and "remaining old fence post" along the boundary of the disputed property. (See RE 201-204; CP 192-195)

3. Charlot's Motion to amend her Answer to assert the defense of adverse possession should have been granted, which would have resulted in Plaintiffs' Motion for Summary Judgment being denied.

Due to the foregoing, we contend that the trial court erred in granting Plaintiffs' Motion for Summary Judgment on the basis that Defendant had waived her right to assert adverse possession when she did not raise this defense concurrently with her initial Answer.

## ISSUE III.

**The Trial Court erred in granting Defendants' Motion for Summary Judgment when genuine issues of material fact existed.**

### A. SUMMARY JUDGMENTS

When reviewing a lower court's decision to grant or deny a summary judgment motion, it

is proper to employ a de novo standard of review. **Hudson v. Courtesy Motors, 794 So. 2d 999, 1002 (Miss. 2001) (citing Russell v. Orr, 700 So 2d 619, 622 (Miss. 1997).**

The central focus of summary judgment is whether a genuine issue exists about any material fact in a particular case. A fact is material if its determination in favor of one party or the other can affect the outcome of the case. A genuine issue of material fact exists if a reasonable jury could find for the party opposing the summary judgment motion based on the evidence in the record. **Brown v. Credit Center, Inc., 444 So.2d 358 (Miss. 1983).** The single and most important issue for appeal would be that this Court should not have granted summary judgment with the existence of genuine issues of material facts remaining in dispute. **House v. Secretary of Health and Human Resources, 688 F.2d 7 (2nd Cir. 1982).** Also in **Brown**, the court explained that while considering the motion for summary judgment, "the trial court must view all the evidence in the light most favorable to the non-movant." **Brown, Id, at p. 363.** Moreover, in **Brown,** the motion for summary judgment should be granted if the moving party is entitled to judgment as a matter of law, otherwise it should be denied. **Brown, Id.**

Rule 56(c) of the Mississippi Rules of Civil Procedure provides for summary judgment when there are no issues of material fact such that the movant is entitled to judgment as a matter of law. When making this ruling this Court had a duty to consider the affidavits, and all other evidentiary matters such as depositions, admissions, interrogatories, etc. submitted on Plaintiffs Rule 56 motion.

Summary judgment is about the presence of a trialworthy issue. As a result, the procedure raises special concerns in chancery court where the fact finder is the judge, not a jury. This consideration led the State Supreme Court to "deferentially suggest" that chancellors use "great care and caution in granting [summary judgment] when a hearing on the merits can in all

likelihood be heard as expeditiously as the time consumed in applying for, resisting and ruling upon a motion for summary judgment. **McMullan v. Geosouthern Energy Corp.**, 556 So 2d 1033, 1036 (Miss. 1990); see also **McDonald v. Holmes**, 595 So 2d 434, 438 (Miss. 1992); **Martin v. Simmons,** 571 So 2d 254, 258 (Miss. 1990); **Marsalis v. Lehmann**, 566 So 2d 217,221 (Miss. 1990) (Hawkins, C.J., specially concurring); **Ratliff v Ratliff**, 500 So 2d 981, (Miss. 1986).

**2. BURDEN OF PROOF ELEMENT**

Under Rule 56(c), the movant carries the burden of demonstrating that no genuine issue of material fact exists. **Short v. Columbus Rubber and Gasket Co., Inc, 535 So.2d 61 (Miss. 1988) and Seymour v. Brunswick Corp., 655 So.2d 892 (Miss. 1995).** The moving party has the burden of proving that no triable genuine issue of fact exists, and the non-moving party is given benefit of reasonable doubt. **Tucker v. Hinds, 558 So 2d 869,872 (Miss. 1990).** However, the plaintiff must show that the party charged is the party actually responsible for the wrong, with reasonable certainty or definiteness. **Berry v. Bunt, 172 So. 2d. 398, 401 (Miss. 1965).**

Here, Defendant asserts that the moving Plaintiffs have not carried this burden. Although this burden is one of production and persuasion and not of proof, Plaintiffs still have not carried their burden. This Court cannot look at the evidence which has been presented and determine that the Plaintiffs have carried their burden of demonstrating that no genuine issue of material facts exists. Accordingly, Plaintiffs' Motion for Summary Judgment should have been denied.

We contend the following issues of material fact exists and therefore, a trial on the merits of this case should occur:

1. Defendant did not waive her right to assert the defense of adverse possession. Consequently, issues relating to the assertion of adverse possession still exists.

2. There is a question as to the actual description of the disputed property. Plaintiffs described the disputed property as 512 East Second Street, Pass Christian, Mississippi. However, the 512 East Second Street property is not adjacent to Defendant's property. The property which is adjacent to Defendant's property is 514 East Second Street; Pass Christian, Mississippi. Furthermore, Plaintiffs made no attempt to amend their complaint to insert the correct description of the disputed property. (RE 295-296, 310-311)

3. Plaintiffs asserted that the parties enjoyed quiet, peaceful ownership of their property until around November of 2006. At that time, Charlot placed a FEMA mobile home with steps on what she believed to be her property. The Plaintiffs hired a surveyor in January of 2008 to survey their property. The survey showed that the steps of Charlot's mobile home encroached onto the Henrys' property. (RE pp. 12; CP 5) However, Defendant contended that she and her predecessors in titled were in possession of the disputed property for over 100 years. (RE 151-153; CP 144-146). Therefore, the issue of how long had Defendant been in possession of the disputed property exists.

4. At hearing, there was much discussion regarding the location of the original old wood fence. Defendant contended that the original old wire fence existed in the same location where she replaced it with a new wood fence. She argued that she placed the new wood fence along the line where the old stacks still exist, indicating the location of the original old wire fence. Plaintiffs argued that the original wood fence was east of the new wood fence installed by Defendant. (RE pp.281-285 and p. 341) Therefore, the issue of the location of the original old wire fence was not resolved.

5. Whether Plaintiffs Complaint is a boundary dispute relief case versus a confirmation of title case. Therefore, elements of a boundary case have not been proven. Furthermore, even if the court could grant Plaintiffs' Bill to Confirm Title, the court could only confirm tittle to property in which plaintiffs possess. Plaintiffs were not in possession of the disputed property. (RE pp. 295-296)

Consequently, issues surrounding the property in dispute are left unresolved. Accordingly, there are genuine issues of material fact remaining in this case. Therefore, we contend that the trial court erred in granting Plaintiffs' Motion for Summary Judgment.

## V.

## THE CONCLUSION

We contend that Judge Margaret Alfonso abused her discretion when she denied Defendant's Motion for Leave to Amend her Pleadings to assert adverse possession as a counter-claim. It is well settled under Rule 15(a) of the Mississippi Rules of Civil Procedure and caselaw that amendments should be "freely granted" unless the non-movant party shows that he/she will suffer "actual undue prejudice" if the amendment is granted. In our case, Plaintiffs knew that Defendant contended that she owned the disputed property because in her answer she denied that Plaintiffs owned the disputed property. Furthermore, she was in possession of the disputed property and her attorney had actually requested the consent of Plaintiffs' attorney for Defendant amending her answer to assert adverse possession. This request was made prior to Plaintiffs' attorney filing their Motion for Summary Judgment. Finally, discovery, which was incomplete in this case, commenced one (1) month prior to the filing of Plaintiff's Motion for Summary Judgment. Therefore, Plaintiffs would not have suffered actual prejudice if Defendant was

allowed to amend her Answer to argue adverse possession because Plaintiffs were well aware that that was Defendant's only course of claiming the disputed property.

Therefore, we contend that the Trial Court erred in denying Defendant's Motion for Leave to Amend Pleading by filing a counter-claim to assert ownership of the disputed property via adverse possession.

Further, Defendant was in possession of the disputed property. In her initial Answer, she denied that Plaintiffs were owners of the disputed property. These facts alone raise the issue of adverse possession, even if the issue is not specifically raised in pleadings. Moreover, Defendant claimed that she and her predecessors in title, her ancestors, occupied the disputed property as their own property for more than 100 years. Moreover, Plaintiffs were aware that Defendant was going to seek approval to amend her answer to assert a claim to the disputed property through adverse possession prior to Plaintiffs filing their motion for summary judgment.

Therefore, we contend that the Trial Court erred in granting Plaintiff's Motion for Summary Judgment on the basis that Defendant waived her right to assert adverse possession as a defense when she did not include such concurrent with her initial answer to Plaintiffs' complaint.

Finally, we contend that the following genuine issues of material fact still exists. Therefore, Plaintiffs' Motion for Summary Judgment should not have been granted:

1. Whether Defendant has a claim to the disputed property by adverse possession?

2. Whether or not Plaintiffs accuracy described the disputed property in their complaint and Motion for Summary Judgment. Plaintiffs described the disputed property as 512 East Second Street, Pass Christian, Mississippi. However, the 512 East Second Street property is not adjacent to Defendant's property. The property which is adjacent to Defendant's property is 514

East Second Street; Pass Christian, Mississippi. Furthermore, Plaintiffs made no attempt to amend their complaint to insert the correct description of the disputed property.

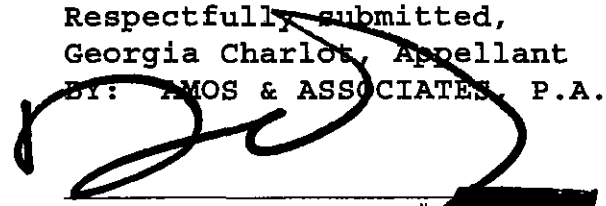
3. Plaintiffs asserted that the parties enjoyed quiet, peaceful ownership of their property until around November of 2006. At that time, Charlot placed a FEMA mobile home with steps on what she believed to be her property. The Plaintiffs hired a surveyor in January of 2008 to survey their property. The survey showed that the steps of Charlot's mobile home encroached onto the Henrys' property. (RE pp. 12; CP 5) However, Defendant contended that she and her predecessors in titled were in possession of the disputed property for over 100 years. (RE 151-153; CP 144-146). Therefore, the issue of how long had Defendant been in possession of the disputed property exists.

4. At hearing, there was much discussion regarding the location of the original old wood fence. Defendant contended that the original old wire fence existed in the same location where she replaced it with a new wood fence. She argued that she placed the new wood fence along the line where the old stacks still exist, indicating the location of the original old wire fence. Plaintiffs argued that the original wood fence was east of the new wood fence installed by Defendant. (RE pp.281-285 and p. 341) Therefore, the issue of the location of the original old wire fence was not resolved.

5. Whether Plaintiffs Complaint is a boundary dispute relief case versus a confirmation of title case. Therefore, elements of a boundary case have not been proven. Furthermore, even if the court could grant Plaintiffs' Bill to Confirm Title, the court could only confirm tittle to property in which plaintiffs possess. Plaintiffs were not in possession of the disputed property.

Therefore, we contend that the Trial Court erred in granting Plaintiffs' Motion for Summary Judgment when genuine issues of material fact exist. .

Respectfully submitted,
Georgia Charlot, Appellant
BY: AMOS & ASSOCIATES, P.A.



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## CERTIFICATE OF SERVICE

I, Rick O. Amos of Amos & Associates, P. A., Counsel for Plaintiff/Appellant, do hereby certify that I have on this day hand delivered a true and correct copy of the above and foregoing Appellant's Brief to Attorney for Plaintiffs/Appellees Dennis L. Henry and Barbara Hanson Henry and Judge Margaret Alfonso at the following respective post office addresses:

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**THE HONORABLE MARGARET ALFONSO**
**CHANCERY COURT JUDGE**
**HARRISON COUNTY-FIRST JUDICIAL DISTRICT**
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**GULFPORT, MS 39501**

This the 13th day of November, 2009.

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