IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2009-CA-01793

RICHARD DEAN — PLAINTIFF / APPELLANT

VERSUS

KATIE C. SLADE, L. GUY JACKSON
JAN DEAN, and FLORA S. NICHOLS RAGAN — DEFENDANTS / APPELLEES

ON APPEAL FROM THE
CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI
CIVIL ACTION NO.: 2006-1049 JB

BRIEF OF DEFENDANTS / APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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VERSUS	
KATIE C. SLADE, L. GUY JACKSON JAN DEAN, and FLORA S. NICHOLS RAGAN	DEFENDANTS / APPELLEES

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.

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a case involving an alleged adverse possession of approximately eighty (80) acres of land in Jackson County, Mississippi. There are four titleholders to the property and they are all defendants in this suit: Katie Slade, L. Guy Jackson, Jan Dean, and Flora Ragan. Defendants Slade and Dean each have an undivided one-third (1/3) share, while Jackson and Ragan each have an undivided one-sixth (1/6) share. All of the titleholders' interests in the property stem from the ownership of Louise B. Cox, who owned the entire plot and divided it among her three children. The plaintiff, Richard Dean, claims adverse possession over the interests of all titleholders. Plaintiff alleges his ownership stems from a parol gift from his grandmother, who had only a one-third (1/3) interest in the property, and whose interest is currently held by Plaintiff's mother, Defendant Jan Dean.

Plaintiff alleges the parol gift from his grandmother was for the entirety of the subject property, even though her interest did not encompass such. He further claims to have adversely possessed the property against the true titleholders. It is clear that even if the parol gift from Plaintiff's grandmother acted to bypass his mother, it would only be for an undivided one-third (1/3) share. Therefore, at most, he is co-tenants with Defendants Slade, Jackson, and Ragan.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This case was filed May 25, 2006 in the Chancery Court of Jackson County, Mississippi. Trial on the merits commenced March 5, 2009. The Chancellor denied Plaintiff's claims of adverse possession through order entered March 17, 2009. Plaintiff requested a JNOV and new trial that was denied by order dated October 5, 2009. Notice of appeal was filed October 29, 2009.

III. STATEMENT OF THE FACTS

Plaintiff included no statement of facts in his brief. Therefore, the facts contained herein should be considered undisputed by the Court.

At one point in time the entire property at issue in this matter was titled to Louise B. Cox. It is more particularly described as follows:

> The SE 1/4 of the NW 1/4; and the NE 1/4 of SW 1/4 of Section 26, Township 6 South, Range 7 West, Jackson County, Mississippi, containing 80 acres, more or less

(Record "R" at 41). By Special Warranty Deed dated August 9, 1960, recorded in Book 200, Page 529, Louise Cox conveyed this property to her three children: Fannie Louise Voitier, Audury Nichols, and Garland L. Cox. Each garnered an undivided one-third (1/3) share as tenants in common. (R. at 42; Trial Exhibit 2).

Upon the death of Fannie Louise Voitier, Defendant Jan Dean was determined to be her sole heir. Voitier's undivided one-third (1/3) interest in the property therefore passed to Defendant Jan Dean. (R. at 43; Trial Exhibit 4).

Upon the death of Audury Nichols, Defendant L. Guy Jackson and Nichols' husband, William David Nichols were named heirs-at-law. (R. at 43; Trial Exhibit 5). Each received an undivided one-sixth (1/6) interest in the subject property. William D. Nichols later passed away and Defendant Flora Ragan was established as his heir-at-law, thus passing to her Nichols' one-sixth (1/6) share of the property. (R. at 43; Trial Exhibit 6).

In 1992 Garland L. Cox, through his attorney-in-fact, conveyed his undivided one-third (1/3) share to Defendant Katie Slade by Special Warranty Deed. (R. at 42; Trial Exhibit 3). Therefore, the property is currently divided as follows: Jan Dean has a one-third (1/3) interest, L. Guy Jackson

has a one-sixth (1/6) interest, Flora Ragan has a one-sixth (1/6) interest, and Katie Slade has the remaining one-third (1/3) interest. (R. at 43-44).

Fannie Louise Voitier was the last of Louise B. Cox's three children to pass away, living until 2000. (R. at 44; Transcript "T" at 26). Plaintiff alleges that in approximately 1993 Voitier passed to him through a parol gift title to the entire property based on Voitier's incorrect assumption that she possessed the property in joint tenancy with rights of survivorship with her deceased siblings after the death of Louise Cox. (T. at 12).

For many years Garland Cox assumed responsibility for payment of the taxes on behalf of all co-tenants in the property. (T. at 47-48). Upon deeding his interest to Defendant Slade in 1992, the taxes were transferred to the name of Fannie Louise Voitier, et al., c/o Katie and Danny Slade and were paid by Defendant Slade. (R. at 44; T. at 95-96). Originally the payment of taxes were to be rotated among the co-tenants without the need for yearly reimbursement. (T. at 97-98). In 1996 Plaintiff had the tax address changed to his own, though they were still in the name of Fannie Louise Voitier. (R. at 44; T. at 97; Trial Exhibit 10). Defendant Slade offered to pay the taxes one year when she believed Plaintiff was having trouble making the payments. (T. at 98-99). In 1997 Plaintiff contacted Defendant Jackson requesting he make the tax payments on the land. (R. at 45, T. at 67). The taxes were paid in Voitier's name until 2002 when Plaintiff stopped paying the taxes in an attempt to gain title to the property, without being discovered, through a tax sale. (R. at 44; T. at 26-27, 99; Trial Exhibit 10). He also did not pay the 2003 taxes. (T. at 27, 99). In 2005 Defendant Slade became aware of this scheme and redeemed the taxes in the amount of $606.57. (R. at 44; T. at 99). Also in 2005 Defendant Slade changed the address with the tax collector back to her own. (T. at 100).

Plaintiff knew throughout the period of alleged adverse possession he was not the sole owner of the property. (T. at 35). Defendant Jackson showed him a copy of the will of Louise Cox as proof of how title passed. (R. at 45, T. at 67). Plaintiff also engaged in multiple conversations with Defendants Jackson and Slade about buying the others' interests. (T. at 72, 92). Defendant Slade told Plaintiff several times that Plaintiff was not the sole owner of the property. (R. at 45, 101, 103).

Plaintiff never cleared the brush on this property or put up a permanent structure. (R. at 48; T. at 84). He has repaired some fence, but the fence itself pre-dates his claims of adverse possession and is only on three sides of the property. (T. at 12, 31). There have been no improvements to the land and no noticeable use during his possession. (T. at 84, 89).

SUMMARY OF THE ARGUMENT

Defendants believe that Plaintiff has wholly failed to establish adverse possession. First of all, he claims ownership based solely on a parol gift from his grandmother of her share. That share was as a tenant in common with a one-third (1/3) interest in the property. Therefore, even if such a gift occurred, Plaintiff is at most a tenant in common of the property with Defendants Slade, Jackson, and Ragan.

Because of the parties' status as alleged tenants in common, Plaintiff has a much higher burden to prove adverse possession than a normal adverse possession case. He first must prove ouster of the co-tenants, which he has not done. He must prove by clear and convincing evidence notice to Defendants that he was taking actions hostile to their co-tenancy. Plaintiff relies on paying taxes, repairing a fence, and allowing people to operate ATV's on the land as sufficient. However, the law is clear that paying taxes by the party in possession is in fact consistent with co-tenancy, not hostile. The acts of repairing a fence and allowing others to use the land is in no way inconsistent with co-tenancy. As tenants in common, all parties in ownership have the right to use the land as their own. To constitute ouster and adverse possession, Plaintiff must show that his actions were so hostile as to deprive Defendants of their use of the land. This was not done. No structures were built, the land was not cleared for cultivation or the trees removed for timber. Nothing perceptible to the senses of someone driving by the property would alert them to adverse possession, regardless of the standard being applied. Plaintiff simply did not take sufficient action.

Plaintiff's tax payment argument wholly fails due to his purposefully allowing them to lapse in 2002 and 2003. One who truly believes he owns property does not allow the taxes to go unpaid so he himself can redeem the property at a tax sale and avoid the probate procedure required by law.

The very purpose of adverse possession is to grant title to one who believes the property to be his or her own and has openly used it according to that belief of ownership. Plaintiff knew he was not the rightful owner and attempted to scheme his way into ownership. Further proof that Plaintiff knew he was not the rightful owner are the multiple attempts to acquire the interests of Defendants Jackson and Slade. One does not seek to buy interests of land they believe to be their own.

This Court gives great deference to the decisions of a Chancellor sitting as the finder of fact. Plaintiff has put forth nothing in his brief that proves the Chancellor was manifestly wrong or applied an incorrect legal standard. Plaintiff was required to prove each element of adverse possession by clear and convincing evidence, a high threshold indeed. The Chancellor heard the testimony and was in the best position to judge the credibility of the witnesses in all areas of disputed testimony. This Court has nothing before it that demonstrates error by the Chancellor and that Plaintiff proved each element by clear and convincing evidence.

ARGUMENT

I. Standard of Review

The Chancellor's findings of fact may only be disturbed if she abused her discretion, was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *Williams v. King,* 860 So.2d 847, 849 (Miss.Ct.App. 2003) (citing *Denson v. George*, 642 So.2d 909, 913 (Miss. 1994)). "It is not the job of this Court to redetermine questions of fact resolved by the chancellor." *Id.* (citing *Johnson v. Black,* 469 So.2d 88, 90 (Miss. 1985)). "If the record contains substantial, credible evidence to support the findings of fact made in chancery court, this Court will not reverse the chancellor's decision." *Id.*

The elements of adverse possession are well established. The claimant must prove the possession of the property was: (1) under claim of ownership; (2) actual and hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful. *Buford v. Logue,* 832 So.2d 594, 600 (Miss.Ct.App. 2002) (*citations omitted*). "To succeed on a claim of adverse possession, the claimant has the burden to prove **each element by clear and convincing evidence**." *Id* at 600 (Miss.Ct.App. 2002) (citations omitted) (emphasis added).

> Clear and convincing evidence has been defined as:
>
> > that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

Hospital Housekeeping Systems, Inc. v. Townsend, 993 So.2d 418, 426 (Miss.Ct.App. 2008) (citations omitted). "Clear and convincing evidence is such a high standard that even the

overwhelming weight of the evidence does not rise to the same level." *Id.* The clear and convincing standard is obviously a high burden, certainly much greater then a preponderance of the evidence. Defendants must meet this burden as to each and every factor in the adverse possession analysis. If this Court harbors any doubt or hesitancy about whether the burden is met as to any element, the Chancery Court must be upheld.

II. Plaintiff Did Not Possess The Property Under A Claim Of Ownership

A. Plaintiff's interest, if any, was as a co-tenant in common

Plaintiff asserts that he owned this land due to a parol gift from his grandmother, Fannie Louise Voitier. (Appellants' Brief at 9). This gift allegedly occurred in 1993. (T. at 12). However, the undisputed facts of the case are that Ms. Voitier had only a one-third (1/3) interest in the property as a tenant in common until her death in 2000. (R. at 41-45). At that time, her interest passed to defendant Jan Dean. (R. at 41-45). "It is well established that one who purchases or obtains by conveyance the undivided share of a tenant in common becomes a cotenant with the remaining owner or owners." *Anderson v. Boyd,* 229 Miss. 596, 91 So.2d 537, 541 (Miss. 1956) (*citing* 86 C.J.S., Tenancy In Common, § 8b; *Howard v. Wactor,* Miss. 1949, 41 So.2d 259). As Plaintiff points out in his brief, Ms. Slade testified that Plaintiff "said that he had his **grandmother's interest**." (T. at 92, emphasis added). Therefore, even if this were a valid parol gift, Plaintiff was entitled to only a one-third (1/3) share of the property and his claim of ownership under this theory is only to that share. His grandmother could not pass a different share than she possessed. *See Wilder v. Currie,* 231 Miss. 461, 473, 95 So.2d 563, 566 (1957) (citations omitted).

Plaintiff cites to the cases of *Chatman v. Carter,* 209 Miss. 16, 45 So.2d 841 (1950), and *Davis v. Davis,* 68 Miss. 478, 10 So. 70 (1891) for the proposition that "a parol gift accompanied

by possession of the land for ten years confers title by adverse possession." (Appellant's Brief at 10). However, the grantors at issue in both *Chatman* and *Davis,* unlike what Plaintiff asserts of his grandmother, conveyed only that interest that they themselves had. Also, Plaintiff fails to prove that a parol gift of any interest took place. The claimant in *Chatman* produced five deeds of trust and timber deeds evidencing the alleged parol gift, and this Court deemed even that insufficient to show a parol gift followed by adverse possession. 45 So.2d at 843-44. In the case at bar, we have only the hearsay statement of Plaintiff that it was given to him by his grandmother, without any other proof. (T. at 12).

In short, there is not sufficient evidence to demonstrate that a parol gift of any interest was ever made from Ms. Voitier to Plaintiff. However, even if such a gift were made, that interest could only be what she herself possessed, which was a one-third (1/3) share as a tenant in common.

B. Plaintiff paying taxes did not assert ownership

Defendants do not dispute that the payment of taxes is one issue that may be considered in determining whether property has been adversely possessed. However, it is far from dispositive. *Buford,* 832 So.2d at 602 (citing *Geoghegan v. Kraus,* 228 Miss. 231, 240, 87 So.2d 461, 465 (1956)). "Payment of taxes alone will not ripen a defective possession into title." *Buford,* 832 So.2d at 602 (citing *Leavenworth v. Reeves,* 106 Miss. 722, 64 So. 660, 661-62 (1914)). In fact, the two cases specifically cited by Plaintiff to support his argument that the Chancellor erred both found in favor of the party who did **not** pay the taxes. *See Buford,* 832 So.2d 594; *Apperson v. White,* 950 So.2d 1113 (Miss.Ct.App. 2007) (title holder who payed taxes lost possession of property to adverse possessor); *See also Webb v. Drewery,* 4 So.3d 1078 (Miss.Ct.App. 2009). Therefore, the fact that Plaintiff paid taxes on the land for a period of time is not conclusive of ownership and is to be given

no extra weight by this Court.

The Chancellor also correctly noted that the tax notices that Plaintiff paid were actually still in the name of Ms. Voitier and were simply mailed to his attention. (R. at 46). This, of course, is logical since she was the last survivor of the three tenants in common who took title to the land from Louise B. Cox. Plaintiff's grandmother did not pass away until 2000, so all taxes paid before that time were technically paid on her behalf, not that of Plaintiff. Plaintiff cannot insert himself into the position of that person in whose name the taxes are being paid simply because he sent the check.

It also is important that Plaintiff stopped paying taxes in 2002 in a sly attempt to gain title out from under Defendants through a tax sale. This action dooms his claim for adverse possession. First of all, it is not the act of someone possessing the property under a claim of ownership. If one truly believes property is theirs, there certainly is no need to allow the taxes to lapse in an attempt to redeem the property at a tax sale. A second problem for Plaintiff as an alleged co-ten is that Mississippi law is clear that a redemption of property at a tax sale is for the benefit of all parties.

> A co-tenant in possession is under a duty to pay the taxes but failing in that has a duty to redeem from the tax sale for the benefit of all of the tenants, in common, and he cannot purchase any interest adverse to them, and a purchase of an outstanding tax title by a tenant in common inures to the benefit of all tenants the cost of the redemption being a common charge against the property held in common.

Wilder, 231 Miss. at 476, 95 So.2d at 568 (citing *Howard v. Wactor,* 41 So.2d at 261). As a tenant in common who allowed the taxes to lapse, Plaintiff had an obligation to redeem for all owners. These are not the actions of someone who believes he owns the property, and can only be one of two things: an attempt to take property out from under the co-tenants, or an attempt to subvert the Chancery Court's vital role in the distribution of one's assets after they have passed. In addition, it is undisputed that Defendant Slade redeemed those taxes for 2002, which itself is an act of

ownership over the land as a co-tenant and interrupts the ten year minimum. (T. at 99).

Perhaps most importantly, the paying of taxes never amounts to an act sufficient to adversely possess land from a co-tenant because it is insufficient to create an ouster. "Evidence of acts by a cotenant not inconsistent with cotenancy, such as using the land and paying taxes on it, do not constitute an ouster of the other cotenants." *Frazier v. Frazier,* 2009 WL 1298413 *2 (Miss.Ct.App.) (citing *Campbell v. Dedeaux*, 386 So.2d 713, 715 (Miss. 1980)). Because Plaintiff, at most, was only a co-tenant of the land, simply paying the taxes is not sufficient to claim adverse possession.

C. Plaintiff knew he was not the titleholder of the land

The record in this case is filled with evidence that Plaintiff knew he was not the sole owner of this property. At trial he testified that upon his grandmother's passing in 2000 he was fully aware that he did not have title. (T. at 35). The testimony also shows that Plaintiff discussed with Defendants Slade and Jackson the possibility of buying the shares of the other. Defendant Jackson testified that he had six or eight conversations with Plaintiff about purchasing Defendant Slade's share. (T. at 71). The first of these conversations took place in 1997 and the last took place in 2005. (T. at 71-73). Plaintiff was unable to refute this assertion, saying he just did not remember if he and Jackson discussed buying Defendant Slade's interest. (T. at 51).

Defendant Slade also had conversations with Plaintiff that clearly made him aware of her ownership. First of all, Plaintiff approached her in 1994 about buying out Defendant Jackson, and she expressed her desire to sell her share. (T. at 92). Plaintiff himself testified that Defendant Slade challenged his ownership of the land in 1995. (T. at 25-26). Defendant Slade also testified that she and Plaintiff had more than eight conversations regarding the ownership of the property. (T. at 101).

Defendant Slade testified definitively that she asserted her interest in the land to Plaintiff and told him repeatedly that she and Defendant Jackson were co-tenants in the land. (T. at 103, 107-8). These conversations occurred repeatedly until at least the late 1990's. (T. at 107-8).

It strains the bounds of logic to argue that someone who believes they are the rightful owner of property would attempt to buy other interests in that same land. It would not happen and Plaintiff's attempts to do so demonstrate his knowledge of the interests of Defendants in the land as co-tenants.

D. The fence on the property did not establish ownership

"The mere presence of a fence, without more, has never been sufficient to sustain a claim of adverse possession." *Double J Farmlands, Inc. v. Paradise Baptist Church,* 999 So.2d 826, 829 (Miss. 2009). Plaintiff asserts in his brief that the fence on the property is proof of his claim of ownership over the land, but he is mistaken. First of all, the fence was present prior to his alleged possession:

> Q. So in 1993 you felt like you had some type of an interest. What did you do based on that?
> A. ...I posted it and posted signs with my name and number up, if any fences needed any type of repair, that type of thing....

(T. at 12). Clearly the fence was already in place when the supposed adverse possession began so it could not be proof of any act of ownership. Plaintiff is not making a claim that his adverse possession began prior to 1993. Therefore, the only way a fence could constitute notice is if it were erected after that date. If Plaintiff was rebuilding or repairing a fence already present and placed there by Defendants' predecessors in title it cannot be notice of an adverse claim, and if not built by Plaintiff cannot be an act of ownership.

Second, the fence as it currently exists only encloses three sides of the property, so it is not

clear to anyone viewing the land exactly what is supposedly being adversely possessed. (T. at 31). The Chancellor correctly noted that a fence alone is not sufficient to sustain a claim of ownership. (R. at 46). In this case, since there is no evidence the fence was surrounding the entire property for a ten year period, it certainly was not "'sufficient to fly the flag over the land and put the true owner upon notice that his land is held under an adverse claim of ownership.'" *Snowden & McSweeny Co. v. Hanley,* 195 Miss. 682, 687, 16 So.2d 24, 25 (1943) (quoting 1 Am.Jur. p. 870).

Finally, because Defendants were co-tenants of the land, there is nothing inconsistent with their co-tenancy to place a fence on the land. Co-tenants with equal access and shared use of the property also equally share in the benefit of improvements. A fence on three sides of the property is not sufficient to constitute an ouster and make co-tenants aware that another party is making an adverse claim to the property.

E. Conclusion

Plaintiff has failed to establish that he was acting under a claim of ownership for the required ten years. His claim to ownership stems from the alleged gift from his grandmother, whose interest was only one-third (1/3) in co-tenancy. Plaintiff, as an alleged co-tenant, did not act sufficiently to effect an ouster of Defendants. Paying taxes is not sufficient, but even if it were, he stopped paying in 2002 and interrupted the ten year requirement. A fence enclosing three sides of the property was also not sufficient. There is nothing in the record that the property was enclosed for the required ten years if built by Plaintiff, and cannot be an act of ownership by Plaintiff if erected by Defendants' predecessors in title. Also, a fence is not inconsistent with Defendants claims of ownership in co-tenancy. Finally, Plaintiff clearly never believed himself to be the true owner. Both Defendants Jackson and Slade testified to conversation about buying others' shares of the land and to notifying

Plaintiff he was not the sole owner. Plaintiff's claim for adverse possession fails because he has not proved by clear and convincing evidence he acted under a proper claim of right or ownership over the land.

III. Plaintiff's Use / Occupation Of The Land Was Not Actual Or Hostile

"To prove actual possession, the adverse possessor must show that he exercised control over the disputed property, 'evidenced by things visible to the eye or perceptible to the senses.'" *Webb,* 4 So.3d at 1083 (Miss.Ct.App. 2009) (quoting *Wicker v. Harvey,* 937 So.2d 983, 993-94 (Miss.Ct.App. 2006)). "To be hostile, in an adverse-possession sense, is to take some action adverse to the interest of the true owner." *Double J Farmlands,* 999 So.2d at 829. "The element of hostility is not subject to a single universal definition. It may manifest differently from one claim of adverse possession to the next." *Id.* at 830.

A. Plaintiff's possession was not easily perceptible

Plaintiff maintains that he placed signs on the property and a fence around it as proof of hostility. He is incorrect. Defendant Slade testified that she did not see any signs.

> Q. What did you observe insofar as posted signs on the property?
> A. I never noticed any posted signs.
> Q. You did not?
> A. No, I did not.
> Q. Did you ever see any that had been knocked down for whatever reason, they were lying in a pathway or where ever?
> A. I am trying to think. No, I don't think so, no.

(T. at 89). Plaintiff makes issue in his brief of the Chancellor relying on Defendant Slade's testimony over the stipulated testimony regarding posted signs. This Court gives great deference to a Chancellor sitting as trier of fact in regards to witness credibility:

> The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was

> there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. **These are indispensable**.

Madden v. Rhodes, 626 So.2d 608, 625 (Miss. 1993) (quoting *Culbreath v. Johnson,* 427 So.2d 705, 708 (Miss. 1983)) (emphasis added). This same level of deference is required here. The Chancellor believed the testimony of Defendant Slade upon observation of her testimony and that should not be disturbed.

The issue of the fence has been discussed, *supra,* and Defendants incorporate the previous facts and argument. A fence that existed prior to Plaintiff's alleged possession and that was installed and maintained by Defendants' predecessors in title is not an act of hostility.

There is also no testimony in the record of structures being built, land being cleared, or any activity that would be perceptible by a basic inspection of the land. Simply put, Plaintiff took no actions that were openly hostile to the ownership of Defendants. Even if one of the Defendants had noticed posted signs against trespassing, that is not a hostile act against a co-tenant. All co-tenants have an interest in keeping others off the land, as well as the right to post such signs. That in no way makes their interest greater than the other tenants in common.

B. Having the tax notices delivered to him is not actual or hostile occupation

As discussed *supra,* even if taxes did constitute sufficiently hostile action, they were not paid by Plaintiff for an uninterrupted ten years. As soon as he stopped paying in 2002 that acted as an interruption of the required ten years. Further, Defendant Slade testified to the agreed upon nature of Plaintiff paying the taxes going back many years. In fact, it is evident from conversations between Plaintiff and Slade that the taxes would be rotated among the various co-tenants without the need for yearly reimbursement. (T. at 97-98). In addition, Defendant Slade actually offered to pay the

taxes one year when she felt Plaintiff was having trouble and was assured they would be taken care of. (T. at 98-99). Defendant Jackson was asked by Plaintiff to pay the taxes in 1997, but later notified him they had already been paid. (T. at 67-68). Clearly the paying of the taxes was initially and continued as a cooperative effort between the parties. There was no act of hostility regarding taxes sufficient to maintain a claim of adverse possession.

C. Conclusion

Plaintiff undertook no acts sufficiently hostile to meet the standards for adverse possession. The signs allegedly posted were not always visible, if present at all. The payment of taxes was with the knowledge of Defendant Slade and by agreement of the parties. Again, even if the payment of taxes was sufficient it was not done for an uninterrupted ten years. Finally, because this property was owned as tenants in common, Plaintiff took no actions sufficiently hostile to Defendants' co-tenancy of the property. Simply posting signs and repairing a fence that existed prior to the adverse possession is not in any way hostile to Defendants.

IV. Plaintiff's Possession Was Not Open, Notorious, And Visible

"Possession is defined as 'effective control over a definite area of land, evidenced by things visible to the eye or perceptible to the senses....'" *Blankinship v. Payton,* 605 So.2d 817, 819-20 (Miss. 1992). The Chancellor must analyze the qualities and characteristics of the acts that allegedly put a titleholder on notice. *Walker v. Murphree,* 722 So.2d 1277, 1281 (1998). "Thus, although an act may demonstrate possession, it may also fail to provide sufficient notice to alert a title holder to an adverse claim upon his land." *Id.* In this case Plaintiff did not take any actions perceptible to the senses that would constitute open and visible possession sufficient to put Defendants on notice.

A. Plaintiff mistakenly relies on a "wild lands" argument

Plaintiff correctly cites to this Court's previous rulings that the analysis is different for so called "wild lands" than for a residence. (Appellant's Brief at 18). However, his analysis is misguided. First of all, "wild lands" do not include those "lands suitable to occupancy by residing thereon and putting them to husbandry and farming." *Broadus v. Hickman,* 210 Miss. 885, 892, 50 So.2d 717, 719 (1951) (citing *McCaughn v. Young,* 85 Miss. 277, 37 So. 839, 842 (1909)). Plaintiff testified unequivocally that he intended to build a house and reside on this land, so its status cannot be that of "wild land." (T. at 32).

B. The Chancellor's ruling was supported by the evidence

The Chancellor viewed this property herself to aid in the determination of the matter. (R. at 48). This viewing of the land should be given great deference by this Court. The Chancellor noted the presence of thick underbrush throughout the property, noting that actions taken by a possessor must be significant enough for the true owner to see. (R. at 48). This Court stated in *Broadus* that "any person of ordinary observation, going upon and inspecting the land as a prospective purchaser, would have noticed signs of ownership being exercised thereover." 210 Miss. at 893, 50 So.2d at 720. Therefore, just because a land is deemed "wild" does not mean a possessor can take no noticeable steps to establish ownership. Also, Plaintiff cannot argue that the presence of a fence would alert Defendants to his possession because that was there prior to his possession and installed by the predecessors in title of the Defendants. (T. at 12, 31, 66).

In the case of *Sturdivant v. Todd* the chancellor also viewed the property. 956 So.2d 977, 991 (Miss. 2007). He "recognized the rule that adverse possession of wild or unimproved lands can be established by evidence of acts that would be wholly insufficient in the case of improved or

developed lands." *Id.* The *Sturdivant* chancellor noted that the property had been cleared out under the trees, *Id,* in contrast to what Chancellor Bradley found on the property at issue here. (R. at 48). The chancellor in *Sturdivant* also found from his own view of the land the "'the possession of the property...was blatantly clear that it was open, notorious, and visible.'" 956 So.2d at 991. This was actually supported by aerial photos showing a landscaped treeline. *Id.*

Chancellor Bradley should be shown great deference in her own observations of the land and review of the testimony. She correctly noted that Defendant Slade testified to there being no significant changes to the property. (R. at 87). She stated that until the lingering aftermath of Hurricane Katrina in 2005 and 2006 caused her to move to Hattiesburg, she would go the property at least once per year. (R. at 87). The land always gave the same general appearance and there was nothing to indicate ownership adverse to her own. (R. at 87).

C. Conclusion

The evidence is clear that nothing visible to the eye or detectable to the senses was done by Plaintiff that amounted to an open possession of the property in a fashion adverse to Defendants. Even if this land is considered "wild", some action must still be taken to mark the land as one's own. Plaintiff stated that he posted signs, a fact disputed by Defendant Slade, as the testimony cited *infra* demonstrates. The Chancellor was in the best position in hearing the testimony and observing the property herself to determine if Plaintiff had "unfurl[ed] his flag on the land...so that the (actual) owner may see, and if he will, that an enemy has invaded his domains, and planted the standard of conquest." *Blankinship,* 605 So.2d at 820.

V. Plaintiff's Possession Was Not Continuous And Uninterrupted For Ten Years

Plaintiff must prove by clear and convincing evidence that his possession adverse to the co-

tenant Defendants was uninterrupted for ten years. This Court has held "that mere sporadic, noncontinuous use is insufficient." *Buford,* 832 So.2d at 603 (citing *Eastlawn Development Co. v. Wells,* 311 So.2d 334, 337 (Miss. 1975)). Plaintiff relies on his payment of taxes and the fact that he told Defendants Jackson and Slade that he owned the property prior to 1995 as proof of continuous ownership for over ten years. His argument fails.

As stated throughout this brief and admitted by Plaintiff, he in fact did not pay the taxes continually, instead allowing them to go unpaid in 2002 and 2003. This interrupted his continual claim to the land to the extent payment of taxes supports adverse possession.

Plaintiff cites to no case that supports the premise that merely informing someone you own their land is sufficient to start the clock for adverse possession. It is telling that Plaintiff can cite to no specific acts that would have been noticeable and perceptible to Defendants prior to 1995 that would have triggered adverse possession. Instead he relies solely on assertions of ownership that were quickly dispelled.

Plaintiff has wholly failed to demonstrate he openly and exclusively possessed the land for a period of ten years based on the payment of taxes and telling the Defendants he owned it.

VI. Plaintiff's Possession Was Not Exclusive

As the Chancellor noted, exclusive possession is "an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimant's conduct must afford an unequivocal indication that he is exercising dominion of a sole owner." *Rawls v. Parker,* 602 So.2d 1164, 1169 (Miss. 1992) (citations omitted). The record is clear that Plaintiff took no acts sufficient to exercise dominion as a sole owner to the exclusion of Defendants as co-tenants.

A. Plaintiff knew he did not own the property

The primary reason Plaintiff fails this aspect of the analysis is that he knew he was not the sole owner of the property, as proven by his discussions to buy Defendant Slade's and Defendant Jackson's shares. (T. at 71, 72, 74, 94). The Chancellor considered the testimony of Defendants credible in this area and that should not be disturbed.

Plaintiff has made a curious, confusing, and inappropriate argument about these offers to buy the land from Defendants. He makes comments as to the nature of the discussions to buy the property as nothing more than settlement negotiations for the lawsuit, and charges that the court reporter erred in the transcription. (Appellant's Brief at 22-23). First of all, Plaintiff's counsel submitted a Rule 10(b)(5) notice that the record was accurate. This was the time to challenge the transcription, so these assertions are waived.

Plaintiff then uses this challenge to the accuracy of the trial transcript to assert that his offers to settle are proof of his ownership. It is curious that testimony that was objected to by Plaintiff at trial is now sought to be used as proof of exclusive ownership. Also, the timing of the various discussions completely nullifies his argument. Defendants Slade and Jackson testified that at various times from 1995-2005 Plaintiff discussed buying their shares in the land. (T. at 71, 72, 74, 94). Plaintiff now attempts to claim in footnote 3 that his discussions about buying the land outright were just prior to filing suit, presumably in 2005. (Appellant's Brief at 23). The Chancellor correctly recognized that Plaintiff discussed the purchase of Defendant Slade's and Jackson's shares of the land long before contemplating this lawsuit and that those discussions demonstrate he knew his alleged possession of the land was not exclusive.

B. The quality of Plaintiff's acts were not sufficient

Defendants agree with Plaintiff that it is the quality and character of the adverse possessor's acts more than the quantity that merit consideration. That is why Plaintiff has failed to demonstrate exclusive possession.

Plaintiff does not point to a single "quality" act that would demonstrate exclusive possession. The facts are that he put up no permanent structure noticeable to Defendants, Defendant Slade did not see the signs allegedly posted during her visits to the property (T. at 89), and the Chancellor herself noted that the underbrush had not been cleared (R. at 48). Plaintiff makes a misguided argument regarding the sufficiency of statements to interrupt the exclusive possession. However, because Plaintiff had taken no significant actions himself on the property, no action was required. Defendants had nothing more than Plaintiff's own words that he owned the property to think he was making a claim, so simple words refuting his claim are surely sufficient. If Plaintiff had cleared the land for farming or built a house in plain view, then simple words may not be sufficient and legal action may have been required. In this case, words were sufficient to refute Plaintiff's claims.

C. Conclusion

Plaintiff did not exclusively possess this property for ten years. He knew the property was not his and discussed purchasing the share of Defendants. Further, he took no actions that demonstrated exclusivity to the other co-tenants or that were perceptible.

VII. Plaintiff's Possession Was Not Peaceful

The Chancellor correctly held that Defendant Slade redeeming the taxes for 2002 was not consistent with peaceful possession by Plaintiff. Use of land is not peaceful if there is "controversy" or a "dispute" with the owners of the land, or if an "objection" is made to the claimants' (Plaintiff's)

use of the land. *Moran v. Sims,* 873 So.2d 1067, 1070 (Miss.Ct.App. 2004); *Buford,* 832 So.2d at 603. The testimony is clear in this matter that Defendants Slade and Jackson protested the ownership of Plaintiff. Combined with the act of paying the taxes Plaintiff left unpaid, the possession was not peaceful.

VIII. A Heightened Standard Is Required Among Co-Tenants

Acts of possession that would normally constitute adverse possession are not sufficient to prove adverse possession between co-tenants due to their relationship which is "confidential and fiduciary in nature." *Speight v. Wheeler,* 310 So.2d 716, 720 (Miss. 1974). "Each has a duty to sustain, or at least not to assail, the common interest, and to sustain and protect the common title. It is a relationship of trust and confidence between co-owners of property." *Id.* Thus, the co-tenants in the instant case have a duty to each other to protect the common title of the subject property. Moreover, there is a "presumption that one co-tenant's possession is not hostile to the others" and "occupancy by co-tenant who pays taxes is wholly insufficient" to establish adverse possession. *Hurst v. J.M. Griffin & Sons, Inc.,* 209 Miss. 381, 387, 46 So.2d 440, 442 (1950) (citations omitted). In *Hurst* this Court held that a co-tenant's "cultivation of five or six acres" on lands that were "for the most part 'wild'" was consistent with his status as a co-tenant. *Id.*

It is undisputed that Defendants Slade, Jackson, Ragan, and Jan Dean are co-tenants based on the evidence in the record. Plaintiff claims he took his grandmother's share, but that was simply the same share later passed to Jan Dean, Plaintiff's mother. Therefore, even if the parol gift existed of his grandmother's share, Plaintiff is merely a co-tenant of an undivided one-third (1/3) share. Plaintiff's payment of the taxes that were in the name of Ms. Voitier was consistent with the actions of a co-tenant, as stated in *Hurst.*

Before a co-tenant can prove adverse possession, he must prove there has been an ouster of the other tenants in common. *Williams v. Estate of Williams,* 952 So.2d 950, 953 (Miss.Ct.App. 2006) (citing *Jordon v. Warren,* 602 So.2d 809, 814-15 (Miss. 1992)). The rules of ouster are clear:

> An ouster cannot be proved merely by acts which are consistent with an honest intent to acknowledge the rights of the cotenant. It does not necessarily imply an act accompanied by a force. Because of the relationship between tenants in common, possession which in ordinary cases would constitute adverse possession is not sufficient where entry was made as a tenant in common.***In order to establish ouster of cotenants by a tenant in common in possession, the cotenants out of possession mut have notice of his adverse claim either 'from actual knowledge or as is sometimes vaguely expressed, by acts equivalent thereto,' as by conduct so unequivocal that knowledge on the part of the cotenant out of possession must be necessarily presumed. (Citations omitted). The testimony of such knowledge by the other tenants in common must be clear and convincing. (Citations omitted).

Johnstone v. Johnson, 248 So.2d 444, 448 (Miss. 1971).

Because Plaintiff was merely stepping into the position of his grandmother when he gained "possession", his acts were that of a co-tenant and not as an outside, unknown adverse possessor. The heavy burden of ouster has not been met. Plaintiff's actions on the land were wholly consistent with an alleged co-tenant of the land and not sufficient to give notice to Defendants that he intended to vest title solely in himself.

CONCLUSION

A reading of Mississippi case law makes clear that adverse possession occurs when one party believes land to be hs own, treats it as his own, and makes it known to all that it belongs to him. That is not the situation in this matter. If Plaintiff had any claim to the land, it was solely as a tenant in common of the land through the parol gift from Decedent Voitier to the exclusion of his mother, Defendant Jan Dean. Plaintiff has not met the very high burden of ouster of the co-tenants. Even if this Court should hold that this land was not held in co-tenancy as tenants in common, Plaintiff has failed to prove each and every element of adverse possession by clear and convincing evidence. It is indeed a high threshold for a plaintiff, and that threshold has not been crossed.

Respectfully,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has this day caused to be hand delivered or mailed, postage prepaid and firmly affixed thereto, a true and correct copy of the foregoing writing to the following:

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SO CERTIFIED, this the 19th day of May, 2010, in Pascagoula, Jackson County, Mississippi.

Respectfully Submitted,

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