IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD DEAN — PLAINTIFF/APPELLANT

VS. — CAUSE NO. 2009-TS-01793

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

# BRIEF OF THE APPELLANT

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Richard Dean certifies the following list of persons have an interest in the outcome of this case. These representations are made in order that the Judges of the Mississippi Supreme Court may evaluate possible disqualifications or recusal:

1. Appellant, Richard Dean;

2. Appellee, Katie C. Slade;

3. Appellee, L. Guy Jackson;

4. Appellee, Jean Dean;

5. Appellee, Flora S. Nichols Ragan;

6. Pepper A. Pearson, Page, Mannino, Peresich, & McDermott, PLLC, 2408 14th Street, Gulfport, MS 39501-2019; Attorney for Appellant Richard Dean;

7. John M. Kinard, Wilkinson, Williams, Kinard, Smith & Edwards, 734 Delmas Avenue, Pascagoula, MS 39567; Attorney for Appellee Katie C. Slade;

8. John M. Kinard, Wilkinson, Williams, Kinard, Smith & Edwards, 734 Delmas Avenue, Pascagoula, MS 39567; Attorney for Appellee L. Guy Jackson;

9. John M. Kinard, Wilkinson, Williams, Kinard, Smith & Edwards, 734 Delmas Avenue, Pascagoula, MS 39567; Attorney for Appellee Flora S. Nichols Ragan;

10. Chancery Court Judge Jaye A. Bradley, P.O. Box 998, Pascagoula, MS 39568-0998; trial court judge.

THIS, the 22nd day of April, 2010.

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## STATEMENT OF THE CASE

The Plaintiff/Appellant Richard Dean initiated this action for adverse possession in the Chancery Court of Jackson County, Mississippi, on May 25, 2006. The property at issue is approximately eighty (80) unimproved acres in Vancleave, Mississippi. As has been stated throughout the pleadings in this matter, the subject property was previously titled to siblings, Fannie Louise Voitier, Audury M. Nichols, and Garland L. Cox. (See Trans. at 28) The Defendant Katie C. Slade claims an interest in the subject property by the deed of from Eloise Cox, attorney-in-fact for Garland L. Cox. *Id.* The Defendant L. Guy Jackson claims an ownership interest through his mother Audury M. Nichols. *Id.* The Defendant Flora S. Nichols Ragan claims an ownership interest through William David Nichols, widower and heir of Audury M. Nichols. *Id.* Richard Dean, as asserted in his Complaint from the lower court, believed that the warranty deed vesting title in Fannie Louise Voitier, Audury M. Nichols, and Garland L. Cox vested as joint tenants with rights of survivorship, and not as tentants in common. Therefore, Richard Dean believed that his grandmother Fannie Louise Voitier, as last surviving of the three siblings, was the sole title holder to the subject property. Further, Richard Dean believed he received title to the land through the parol gift of his grandmother Fannie Louise Voitier.

From approximately 1993 until the time of filing of the Complaint for adverse possession, Richard Dean has erected fences, posted signs, paid property taxes, informed adjacent owners of his ownership interest in the property, and asserted his ownership interest to the property to the Defendants/Appellees in this matter. During the course of this litigation, the Defendants/Appellees failed to conduct any discovery other than the deposition of the Plaintiff. The Defendants/Appellees did not propound Interrogatories, Requests for Production, or Requests for Admission as allowed

by the Mississippi Rules of Civil Procedure. Therefore, the evidence applicable in this matter is almost exclusively drawn from the exhibits and testimony presented at trial.

Throughout the trial of this matter, Richard Dean testified to his belief that he owned the subject property, and to his actions supporting said belief. Further, as testimony presented at trial shows, the Defendants/Appellees were cognizant of Mr. Dean's claim of ownership and the actions he took in accordance with that belief. Additionally, Defendant Jan Dean, who declined to participate in the trial of this matter, submitted a letter subsequent to trial expressing her belief that the subject property was titled to the Plaintiff through the parol gift of his grandmother and his adverse possession. (Rec. at 104-105).

Prior to trial on this matter, on March 5, 2009, the certain Defendants/Appellees submitted their trial brief to the Chancellor. Said trial brief was not submitted to Plaintiff until after the conclusion of the trial. Upon discovery of the submission of the Defendants' Trial Brief, counsel for the Plaintiff/Appellant Richard Dean filed of record the Trial Brief with the Chancery Court Clerk. On March 17th, 2009, the Chancellor entered her order in the trial of this matter. (Rec. at 27-40). Despite the evidence presented to the contrary, the Chancellor of the lower court ruled that Richard Dean had failed to prove his ownership interest by adverse possession. Further, the Findings of Fact and Conclusions of Law entered by the Chancellor contain numerous factual discrepancies and provisions that are contrary to the evidence presented at trial. Based upon these factual discrepancies and misstatements of the evidence presented at trial, the Order of the Chancellor should be overturned.

Subsequently, the Plaintiff/Appellant filed his Motion for New Trial or JNOV on April 3, 2009. (Rec. at 53-94). Per order of the Court, Plaintiff/Appellant filed his Brief in Support of his Motion for New Trial or JNOV in lieu of oral argument on July 10, 2009. (Rec. at 109-186). As a

part of his Brief, the Plaintiff/Appellant discussed the misinterpretation of both law and fact that were a part of the Chancellor's Final Order and Findings of Fact and Conclusions of Law. Many of these misinterpretations were drawn directly from the Trial Brief of the Defendants/Appellees, and in direct contradiction of the testimony and evidence presented at trial. Despite the plea of the Plaintiff/Appellant, the Chancellor denied the Motion for New Trial or JNOV by Order filed on October 5, 2009. (Rec. at 242). The Chancellor ignored both the applicable evidence and law in this matter by ruling that Richard Dean's contact with the Defendants/Appellees negated his exclusive possession of the property, and her decision should be overturned.

## SUMMARY OF THE ARGUMENT

The law of this State is well established that for possession to be adverse it must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful." *Apperson v. White,* 950 So. 2d 1113, 1116 (Miss. App. 2007); citing *Walker v. Murphree,* 722 So.2d 1277, 1281 (P16) (Miss. Ct. App. 1998). Further, the ruling of a Chancellor in an adverse possession case must be overruled if it shown that the decision was not supported by substantial evidence, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Id.*, citing *Sanderson v. Sanderson,* 824 So. 2d 623, 625-26 (Miss. 2002). The Chancellor in this matter not only ignored the testimony and evidence at trial, but also applied erroneous legal standards to the evidence and testimony presented.

The decision of the Chancellor states that the erecting of a fence and payment of property taxes was insufficient evidence to support a claim of adverse possession. (Rec. at 180-181). However, this assertion ignores all other evidence presented by Richard Dean during the trial of this matter, including the testimony of Richard Dean and Katie C. Slade. Further, the Chancellor ignores and misinterprets the case law applicable to this matter.

The Chancellor of the lower court relied upon the testimony of Katie C. Slade that she did not see the signs posted by Richard Dean on the property as proof that his possession of the property was not hostile. (Rec. at 33). However, the Chancellor fails to acknowledge the importance of the stipulated testimony of signs being posted, or question the obvious credibility issues that existed with the testimony of Katie C. Slade in this matter. Further, the Chancellor fails to acknowledge that L. Guy Jackson failed to even visit the subject property even though he was on notice of Richard Dean's claim of sole ownership. The Mississippi Legislature enacted the adverse possession statute

to resolve the problem of inattentive landowners such as L. Guy Jackson. See *Buford v. Logue,* 832 So. 2d 594, 601 (Miss. App. 2002). Further, the Chancellor of the lower court relied upon the testimony of Katie C. Slade that she informed Richard Dean that she believed she had an interest in the property for the proposition that his possession was not hostile. (Rec. at 33). However, there are multiple hostile acts by Richard Dean, including repeatedly informing the Defendants/Appellees that he believed he was sole owner of the subject property, payment of taxes, and holding out the property as his own to the public at large. Further, as noted in the Findings of Fact and Conclusions of Law of the Chancellor, the Defendants/Appellees filed a partition suit and informed Richard Dean that they did not believe he had sole title to the property (Rec. at 28, 34). This partition suit was clear evidence of the Defendants'/Appellees' knowledge of Richard Dean's adverse claim.

A claimant of title to real property by adverse possession must show that his possession of the land was open and notorious. *Broadus v. Hickman,* 210 Miss. 885, 50 So. 2d 717 (Miss. 1951). Mississippi case law has established the rule that less notorious and obvious acts are necessary to vest title in what are known as wild lands than lands suitable to occupy as by residency or for husbandry and farming. *Broadus,* 50 So. at 717. Despite admissions from all parties that the subject property was "wild lands", the Chancellor failed to apply the appropriate standard. Further, the Chancellor ignored testimony and evidence regarding Richard Dean granted permission to use the property to third parties, received and refused offers to purchase the property, erected fences, and posted signs. Further, the Chancellor ruled that Katie C. Slade and L. Guy Jackson testified that there had been no substantial changes to the property in their lifetime. (Rec. at 34). However, this ignores the testimony of L. Guy Jackson that he had only visited the property once in his lifetime. (Trans. at 65, 71).

In the Chancellor's Findings of Fact and Conclusions of Law, she concludes that the evidence was insufficient to show that the Plaintiff exercised actual or hostile possession that was open, notorious and visible or continuous for a ten (10) year period. (Rec. at 35). This finding is based upon the Chancellor's conclusion that Richard Dean received tax notices from 1997 to 2005, and that he intentionally failed to pay the taxes in 2002 and 2003 to avoid a costly probate action as to his grandmother's estate. (Rec. at 35). However, a review of the exhibits presented at trial reveal that Richard Dean actually at the very least was receiving tax notices in 1995. (Trial Exhibit 10). Further, Katie C. Slade admits that she did not redeem the taxes until 2005 (Trans. at 99). Subsequent to Ms. Slade's attempt at redemption, Richard Dean paid the taxes for all delinquent years. This presents clear and un-controverted evidence that Richard Dean paid the taxes on and received tax notices for the property without interruption for more than ten (10) years. Further, the Chancellor fails to recognize the testimony of L. Guy Jackson testified that as early as 1992, Richard Dean had told him he owned the property. (Trans. at 66). The Chancellor also ignored the testimony of Katie C. Slade regarding Richard Dean informed her that he believed he owned the property during a discussion about an agent from Vancleave Real Estate approaching her about selling the subject property. (Trans. at 94).

In the Findings of Fact and Conclusions of Law of the Chancellor she states that Richard Dean contacted Katie C. Slade and L. Guy Jackson to discuss his purchase of their share of the property (Rec. at 36-37). However, as the trial testimony reveals, Richard Dean stated to these two Defendants/Appellees that he would not purchase their interest in the subject property because he was the sole title holder to the subject property. Further, the evidence reveals that any discussion regarding payment to the Defendants/Appellees by Richard Dean was to his paying a nuisance settlement value to avoid costly litigation. In addition to the factual misrepresentations, the

Chancellor's reliance and interpretation of *Nosser v. Buford*, 852 So. 2d 57 (Miss. App. 2002), is inaccurate and erroneous. The Chancellor ignored both the applicable evidence and law in this matter by ruling that Richard Dean's contact with the Defendants/Appellees negated his exclusive possession of the property, and her decision should be overturned.

The Chancellor ruled in her Findings of Fact and Conclusions of Law that Richard Dean's peaceful possession of the property was interrupted by the payment of taxes in arrears by Katie T. Slade. (Rec. at 37). However, Richard Dean has been paying taxes at least since 1995, and both L. Guy Jackson and Katie C. Slade were on notice as to Richard Dean,s claim of ownership by 1994 at the very latest. In order for peaceful possession to be interrupted, there must be more than mere words by the parties attempting to reclaim their property. The Mississippi Supreme Court has stated that " There must be either a suit during the time before the expiration of the ten-year period or there must be a physical interruption of the adverse possession, or some unequivocal asserting of the claimant's rights...". *McSwain v. B. M. Stevens Company,* 247 So. 2d 707, 709 (Miss. 1971). The actions of the Defendants/Appellees were entirely insufficient to interrupt the peaceful possession of Richard Dean.

Taking the cumulative errors of the Chancellor as to facts and law applicable in this matter, it is clear that her decision was manifestly wrong and clearly erroneous. Therefore, the decision of the Chancellor must be overturned, and Richard Dean must receive absolute title to the property by adverse possession.

## ARGUMENT

The law of this State is well established that for possession to be adverse it must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful." *Apperson v. White,* 950 So. 2d 1113, 1116 (Miss. App. 2007); citing *Walker v. Murphree,* 722 So.2d 1277, 1281 (P16) (Miss. Ct. App. 1998). The appellate court must look to the evidence and determine "whether or not the statement of facts justify the decree." *Buford v. Logue,* 832 So. 2d 594, 600 (Miss. App. 2002). Further, the ruling of a Chancellor in an adverse possession case must be overruled if it shown that the decision was not supported by substantial evidence, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Id.*, citing *Sanderson v. Sanderson,* 824 So. 2d 623, 625-26 (Miss. 2002).

### 1. The Chancellor Erroneously Concluded that Richard Dean Failed to Possess the Property Under a Claim of Ownership

The decision of the Chancellor states that the erecting of a fence and payment of property taxes was insufficient evidence to support a claim of adverse possession. (Rec. at 180-181). However, this assertion ignores all other evidence presented by Richard Dean during the trial of this matter. Specifically, testimony was provided that Richard Dean received title to the subject property by the parol gift of his grandmother, Fannie Louis Voitier. (Trans. at 12). Further, Katie C. Slade testified to Richard Dean's assertion of his ownership from his grandmother's parol gift. Katie C. Slade testified that

> Q. How did he represent himself insofar as the property was concerned? was he calling on behalf of his mother or himself, or do you recall?
> A. You know, I am trying to think. You know, I don't know that I recall him saying per se. I don't think he said I have a deed. But I think that he said that he had his grandmother's interest. I think that's how he put it to me, something like that.

(Trans at 92). Although Defendants/Appellees Katie C. Slade and L. Guy Jackson both testified at trial, neither presented evidence or testimony to contradict the fact that Richard Dean believed he had received title through the parol gift of his grandmother.

The Mississippi Supreme Court has stated that a parol gift accompanied by possession of the land for ten years confers perfect title by adverse possession. *Chatman v. Carter,* 209 Miss. 16, 45 So. 2d 841 (Miss. 1950); *Davis v. Davis,* 68 Miss. 478, 10 So. 70 (Miss. 1891). Further, paying of taxes, while not conclusive, is a factor evidencing possession and claim of ownership. *Buford v. Logue,* 832 So. 2d 594, 602 (Miss. App. 2002). In her Final Order, the Chancellor cites to *Snowden & McSweeny Co. v. Hanley,* 16 So. 2d 24, 25 (Miss. 1943), as authority for the assertion that a fence alone is insufficient to sustain a claim of adverse possession. (Rec. at 32). However, the Court in *Snowden* states that

> Our statute, Section 2287, Code 1930, does not require an inclosure as an essential to adverse possession, and that our reported decisions do not so require is definitely disclosed by *Sproule v. Alabama, etc., R. Co.,* 78 Miss. 88 , 29 So. 163. A hedge-row, was held to be sufficient in *Jones v. Gaddis*, 67 Miss. 761, 7 So. 489. When a fence, or a hedge-row, or the like, is relied upon to delineate the boundaries of the adverse claim the applicable rule is expressed in the latest text on the subject, 1 Am. Jur., p. 870, wherein it is said that "the question in such cases is whether the inclosure, like other acts of possession, is sufficient to fly the flag over the land and put the true owner upon notice...

*Snowden*, 16 So. 2d at 25. As is clearly shown by the quote above, the Court in *Snowden* admits that a fence or hedge-row is sufficient, so long as it is sufficient to put the owner on notice of the adverse claim. The Court in *Snowden* went on to conclude that, if the fence was not of such a character to rely solely on its construction and maintenance to prove adverse possession, then it must be considered with other factors presented. *Id.* at 687. Further, it must be distinguished that the claim for adverse possession in the *Snowden* matter was in the nature of a boundary dispute. *Id.* The Chancellor clearly misinterpreted and misapplied the findings of the Court in *Snowden.*

Additionally, the Mississippi Supreme Court has stated that "If a fence encloses the property for ten years, under a claim of adverse possession, title vests in the claimant and possessor, even though the fence was subsequently removed or fell into disrepair." *Cole v. Burleson,* 375 So. 2d 1046 (Miss. 1979); see also *Burnsed v. Merritt*, 829 So. 2d 716 (Miss. App. 2002). In this matter, Richard Dean not only erected, repaired, and maintained the fence that was the traditional and accepted boundary of the property, but also posted signs notifying the public at large of his ownership. This is evident by the receipts entered into evidence showing the materials purchased by Richard Dean to maintain the fence. (Exhibit 10).

The Chancellor also cites to *Apperson,* 950 So. 2d 1113, 1116 (Miss. App. 2007), for the proposition that "payment of property taxes is not conclusive of ownership. However, she fails to recognize that payment of taxes is considered as a factor in proof of ownership. *Buford v. Logue,* 832 So. 2d 594 (Miss. App. 2002). Further, the cumulative facts of erecting a fence, payment of taxes, and uncontradicted testimony regarding the parol gift to Richard Dean from his grandmother established a claim of ownership.

**2. The Chancellor Erroneously Concluded that Richard Dean's Possession of the Subject Property Was Not Hostile, and that the Defendants/Appellees Were Not Aware of Said Possession**

In order to gain a possessory interest in real property by adverse possession, the party asserting said interest must prove that his possession of the subject property was hostile. *Apperson,* 950 So. 2d 1113, 1116 (Miss. App. 2007). As stated by the Mississippi Supreme Court, the Mississippi Legislature enacted the adverse possession statute to resolve the problem of inattentive landowners who ignore their property over long periods of time. *Buford,* 832 So. 2d 594, 601 (Miss. App. 2002); citing *Clanton v. Hathorn,* 600 So. 2d 963, 966 (Miss. 1992). Further, *Double J. Farmlands, Inc. v. Paradise Baptist Church,* as cited by the Chancellor, states that an adverse

possessor must prove that his occupation of the subject property was hostile, and that the record owners were aware of his occupation and took no action to prevent the adverse possession. *Double J. Farmlands, Inc.*, 999 So. 2d 826 (Miss. 2008). However, the Mississippi Supreme court has recognized that notice as to hostile possession may be from actual knowledge or its equivalent thereto. *Johnstone v. Johnson,* 248 So. 2d 444, 448 (Miss. 1971). The ultimate question to be considered is whether the possessory acts relied upon are sufficient to place the record title holder on notice of the adverse possession claim. *Webb v. Drewrey,* 4 So. 3d 1078, 1082 (Miss. App. 2009). Further, Mississippi case law recognizes that a party may maintain such control over a parcel of land as to amount to actual possession. *Buford*, 832 So. 2d at 603. The Mississippi Court of Appeals has stated that the claimant giving permission to allow another to use the land is a factor weighing in favor of adverse possession as proof of actual or constructive possession. *Id.*

The Chancellor of the lower court relied upon the testimony of Katie C. Slade that she did not see the signs posted by Richard Dean on the property as proof that his possession of the property was not hostile. (Rec. at 33). However, the Chancellor notes in her Findings of Fact and Conclusions of Law that there was stipulated testimony from several eye witnesses who saw these signs on the property. (Rec. at 32). As a part of her testimony, Katie C. Slade alleged that she visited the property at least once a year.[1] (Trans. at 87). When questioned about the condition of the subject property, Katie C. Slade admits that she had seen barbed wire fencing on the property. (Trans. at 89). Considering the stipulated testimony of witnesses not a party to this litigation, and Katie C. Slade's

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[1] Although not an essential fact to this argument, the Plaintiff/Appellant wishes to recognize the fact that he lived in Fort Worth, Texas, during the majority of the time he was possessing the property. As the Trial testimony shows, the Defendants/Appellants visited the property considerably less than the Plaintiff/Appellant, despite them both living no more than an hour from the property.

admission of seeing barbed wire fencing, the lower Court should have questioned the credibility of her testimony regarding the posting of signs.

Further, the Chancellor of the lower court relied upon the testimony of Katie C. Slade that she informed Richard Dean that she believed she had an interest in the property for the proposition that his possession was not hostile. (Rec. at 33). Katie C. Slade testified that as of 1992, the tax notices were mailed to her for payment. (Trans. 96). Richard Dean, without Katie C. Slade's, or any other party's permission, transferred mailing of the tax notices to himself. (Trans. 97). Katie C. Slade admits that she only had the tax notices sent to her for payment for the taxes owed in the years 1992 through 1994, and that Richard Dean changed the tax notices over to him. (Trans. 96). The last notice she could possibly have received would have been in early 1995 for 1994 taxes. *Id.* Her admission as to the tax records is reiterated during cross-examination when she testifies that

Q. Now, you do admit their Rick had the taxes switched over to his address?

A. Yes.

Q. And then he paid it for some period of time?

A. Yes, he paid it for some period of time, yes.

Q. And when is the last time you paid the taxes; do you remember?

A. NOW, 2000 -- let's see, now, 2000 -- let's see, it would be for 2005 and 2006.

Q. Okay. And that was after the litigation started?

A. Yes. I guess it was.

Q. Okay. prior to that when was it?

A. Prior to the litigation?

Q. Yes, ma'am.

A. I believe 1994, '95, something like that.

(Trans. at 106). Also, as shown by the tax receipt for Fiscal Year 1995 (i.e. tax year 1994), the Jackson County Tax Assessor hand wrote the change in delivery of tax notices from Katie C. Slade to Richard Dean. Richard Dean changed the forwarding of tax notices from Katie C. Slade to himself based upon his belief that we was the sole owner of the subject property, and responsible party for payment of taxes. These were hostile actions by Richard Dean known by Katie C. Slade, and ignored by the Chancellor in her Findings of Fact and Conclusions of Law.

In the testimony presented at trial, Katie C. Slade further testifies to recollection that the parties would begin a rotation of payment of taxes. (Rec. at 34). While the Chancellor never states what she bases this upon, she does state that "Katie acknowledges that Rick paid the taxes on the property for a few years but testified such was pursuant to an agreement *between the two parties*. Rick denies that any such agreement took existed between them." (*Emp. Add.*) (Rec at 34). The only testimony regarding this alleged agreement was from Katie C. Slade regarding some vague "rotational" agreement in which Dean, Slade and Jackson would "rotate" paying the taxes. (Trans at 97). However, Katie C. Slade never attempted to transfer the tax notices back to her, pay the taxes from her own money, or offer any money to Richard Dean for taxes from 1995 through 2005. Further, Katie C. Slade admits that she did not attempt to pay any the taxes, until redemption of the 2002 taxes in 2005, while failing to redeem 2003 and 2004 taxes still due. (Trans. at 106). Further, L. Guy Jackson's testimony reveals that he had not paid any taxes on the property since 1993, and had no first hand knowledge of who or how they were paid. (Trans. at 67-68). The assertions of Richard Dean that he was the sole owner of the property put Katie C. Slade on notice that he was

paying the taxes from his own money, not as an alleged continuation of the agreement of the original title holders, and brings the credibility of Ms. Slade's testimony as to the agreement into question. As stated above, the transfer of notices and payment of taxes were hostile acts, and not permissive as the Chancellor ruled.

Additionally, Richard Dean's posting of signs and maintenance of fences would not have put L. Guy Jackson on notice of Richard Dean's hostile possession on the property due to the fact that Mr. Jackson admits that he had not visited the property since 1992, and this was his only visit to the property (Trans. at 65). However, the fact that he has admitted that Richard Dean asserted he was the sole owner of the property should have put L. Guy Jackson on notice of Richard Dean's hostile possession of the property. During cross-examination, L. Guy Jackson testified as follows:

Q. Is it pretty much your position that you felt like you had an ownership interest and you weren't going to be bothered with coming down here and looking after it or anything like that?

A. Yes.

Q. So, if Rick was taking any active position on the property, then you wouldn't have been aware of it?

A. True.

Q. Okay. Did Rick ever tell you that he felt like you had no ownership interest and that he owned it?

A. He implied it all of the time.

Q. After he implied it, did you write him a letter or anything telling him, Rick you are wrong. I am an owner?

A. Did I? Yes, I told him.

Q. Did you ever write him?

A. No.

(Trans. at 67). Richard Dean's hostile possession of the property cannot be negated merely because L. Guy Jackson failed to monitor the property that he alleges to own an interest. As stated by the Court in *Buford,* the adverse possession statute was enacted to resolve the problem of inattentive landowners. *Buford*, 832 So. 2d at 603. L. Guy Jackson was given notice of Richard Dean's possession, and he took no action to prevent Richard Dean's possession, or to even visit the property to investigate Richard Dean's assertions of ownership. Richard Dean's possession was hostile and put L. Guy Jackson on notice, despite L. Guy Jackson's failure to act upon said notice.

Further, as noted in the Findings of Fact and Conclusions of Law of the Chancellor, the Defendants/Appellees filed a partition suit and informed Richard Dean that they did not believe he had sole title to the property (Rec. at 28, 34). The filing of said partition suit is a clear indication that the Defendants/Appellees were aware of Richard Dean's hostile possession of the property. Additionally, as shown by the correspondence and the hold harmless agreements submitted into evidence at trial, Richard Dean granted permission to certain people to use the subject property. (Trial Exhibit 8). Following the ruling in *Buford*, this is another factor supporting Richard Dean's claim for adverse possession. The Chancellor erred in ruling Richard Dean's possession was not hostile as has been shown by the testimony, evidence, and law cited above.

### 3. The Chancellor Erroneously Concluded that Richard Dean's Possession of the Property Was Not Open Notorious and Visible

A claimant of title to real property by adverse possession must show that his possession of the land was open and notorious. *Broadus v. Hickman,* 210 Miss. 885, 50 So. 2d 717 (Miss. 1951). Further, Mississippi case law has established that possession that is adverse "and actually, known to the true owner is equivalent to a possession which is open and notorious and adverse." *Sturdivant v. Todd,* 956 So. 2d 977, 993 (Miss. App. 2007); citing *McCaughn v. Young*, 85 Miss. 277, 294, 37

So. 839, 842 (Miss. 1901). Mississippi case law has established the rule that less notorious and obvious acts are necessary to vest title in what are known as wild lands than lands suitable to occupy as by residency or for husbandry and farming. *Broadus,* 50 So. at 717.

As has been cited above, the Defendant L. Guy Jackson testified that Richard Dean informed him of his belief that he was the sole owner of the subject property. (Trans. at 67). Defendant Katie C. Slade also admits that Richard Dean informed her of his belief that he was the sole owner of the subject property. (Trans. at 107). Under *Sturdivant v. Todd,* 956 So. 2d 977, 993 (Miss. App. 2007), Richard Dean informing the Defendants of his belief of sole ownership was open and notorious and adverse.

In this matter, uncontradicted evidence was presented that the subject property was "wild lands" as defined by the courts of this state. For example, Richard Dean had continuously maintained the property's tax status as commercial agricultural. (Trial Exhibit 9). This tax designation is for property that has not been developed or improved. Further, the Defendants/Appellees admitted in their Trial Brief that the subject property was "wild lands", and should be treated with the appropriate lower standard for adverse possession. (Rec. at 66).

As shown by the Findings of Fact and Conclusions of Law of the lower court, the Chancellor ignored the status of the subject property as "wild lands", and, therefore, ignored the lower standard applicable to real property of this type. The Findings of Fact and Conclusions of Law of the Chancellor stated that

> The subject property in this case is unimproved and undeveloped land. Upon the Court's viewing of the property it was noted that the underbrush and forest on is very think *(sic)* except for a two lane path which traverses across the front of the property.

(Rec. at 34). The Chancellor's Findings of Fact and Conclusions of Law states Richard Dean testified that no timber had been harvested, fire lanes had not been cut, new fences had not been

erected, and structures had not been built. (Rec. at 34). However, the Chancellor's ruling as to the testimony of Richard Dean appears to be a misstatement of fact by her as was iterated in the Defendants/Appellees Trial Brief. (See Rec. at 213). It clearly ignores the receipts submitted at trial as evidence of Richard Dean's erecting, repairing, and mentioning fences. (Trial Exhibit 10). Further, it ignores the un-controverted testimony of Richard Dean that he did erect, repair, and maintain fences. It is not disputed that the subject property is wooded and undeveloped. However, it is well settled that

> [N]either actual occupation, cultivation, or residence are necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim.

*Broadus,* 50 So. at 720; see also *McCaughn v. Young,* 85 Miss. 277, 37 So. 839 (Miss. 1909). As shown by the testimony of Richard Dean, the Plaintiff/Appellant granted permission to adjacent land owners to use the property. (Trans. at 15-18). Further, Richard Dean testified that he had taken action to prevent encroachment and spoliation of the timber on the subject property by adjacent landowners. (Trans. at 19-23). Additionally, Richard Dean received and refused offers of to purchase the property as shown by the letters submitted as exhibits at trial. (Trial Exhibit 7). These acts, as testified to by Richard Dean evidence public acts of ownership as required for adverse possession of "wild lands". The fact that the Chancellor points to the lack of timber harvest, fire lanes, new fences, and new structures being built evidences her use of an improper legal standard, and not the proper legal standard for adverse possession claims of "wild lands".

In support of her ruling, the Chancellor pointed to the testimony of Katie C. Slade and L. Guy Jackson that no substantial changes were observed on the property during their lifetime. (Rec. at 34). However, the Chancellor's ruling as to the testimony of L. Guy Jackson appears to be a misstatement

of fact by her as was iterated in the Defendants/Appellees Trial Brief. (See Rec. at 213). L. Guy Jackson specifically testified that prior to visiting the property with Richard Dean in 1992, he had never seen the subject property. (Trans. at 71). L. Guy Jackson also testified that he did not visit the property again after the 1992 visit. (Trans. at 65). Clearly from the above stated testimony L. Guy Jackson could not have observed whether or not there were any changes to the subject property, because he had only seen it once in his lifetime.

**4. The Chancellor Erroneously Concluded that Richard Dean Had Not Exercised Hostile Possession that Was Open Notorious, and Visible Continuously for the Requisite Ten (10) Years**

The requirements for adverse possession, as provided for in Miss. Code Ann. §15-1-13, states in part that:

> (1) ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance, or otherwise, *in whatever way such occupancy may have commenced or continued*, shall vest in every actual occupant or possessor of such land a full and complete title...

Miss. Code Ann. §15-1-13; (*emphasis added*). In the Chancellor's Findings of Fact and Conclusions of Law, she concludes that the evidence was insufficient to show that the Plaintiff exercised actual or hostile possession that was open, notorious and visible or continuous for a ten (10) year period. (Rec. at 35). This finding is based upon the Chancellor's conclusion that Richard Dean received tax notices from 1997 to 2005, and that he intentionally failed to pay the taxes in 2002 and 2003 to avoid a costly probate action.[2] (Rec. at 35).

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[2] The Plaintiff/Appellant admits that he was attempting to avoid the expense of the prohibitive cost of an intestate probate action in Florida, where his grandmother passed. However, he adamantly denies that the Defendants/Appellees had any interest in the property.

However, a review of the exhibits presented at trial reveal that Richard Dean actually at the very least was receiving tax notices in 1995. (Trial Exhibit 10). However, Richard Dean testifies that he began receiving tax notices in 1994. (Trans. at 12). Further, Katie C. Slade admits that she did not redeem the taxes until 2005 (Trans. at 99). Additionally, Katie C. Slade's redemption of taxes in 2005 was only for 2002 taxation period. Subsequent to Ms. Slade's attempt at redemption, Richard Dean paid the taxes for all delinquent years. This presents clear and un-controverted evidence that Richard Dean paid the taxes on and received tax notices for the property without interruption for more than ten (10) years. The decision of the Chancellor similarly ignores the fact, as testified to by Richard Dean, that he regularly visited the property since 1993 to erect and maintain fences, post signs, and hold out to the public at large that he was the sole and exclusive owner of the property.

Further, the Chancellor fails to recognize the testimony of L. Guy Jackson testified that as early as 1992, Richard Dean had told him he owned the property. L. Guy Jackson testified that he and Richard Dean walked the subject property in 1992, and after the viewing of the property, both parties returned to L. Guy Jackson's house. (Trans. at 66). L. Guy Jackson went on to testify that Richard Dean told him during this visit in 1992 that Richard Dean said "he owned it all". (Trans. at 68). This clearly establishes that Defendant/Appellee L. Guy Jackson was on notice of Richard Dean's adverse possession claim at least as early as 1992. No attempt was made by L. Guy Jackson to interrupt this claim until filing of the partition suit on December 9, 2005, which is well beyond the requisite ten (10) years.

The Chancellor also ignored the testimony of Katie C. Slade regarding the first time that Richard Dean informed her that he believed he owned the property. Katie C. Slade admits that she contacted Richard Dean regarding an agent from Vancleave Real Estate approaching her about

selling the subject property in 1995. (Trans. at 94). As shown by her testimony, the real estate agent contacted Katie C. Slade because she was listed as the person to receive the tax notices. (Trans. at 94). Katie C. Slade admits that Richard Dean transferred the tax notices to himself in 1994 or 1995 (Trans. at 106). For the alleged conversation to have taken place between Richard Dean and Katie C. Slade regarding the offer of the Vancleave Real Estate agent, it would have had to occur when Katie was still listed on the tax notices. Therefore, the conversation regarding the offer of the Vancleave Real Estate agent would have to have taken place prior to 1995. At least as early as 1994, Katie C. Slade was on notice of Richard Dean's claim as sole owner of the property. Katie C. Slade did not attempt to redeem the property taxes or file the partition suit until 2005, allowing the (10) year period necessary for adverse possession.

**5. The Chancellor Erroneously Concluded that Richard Dean's Contact with Certain Defendants/Appellees Negated His Exclusive Possession of the Property**

In the Findings of Fact and Conclusions of Law of the Chancellor she states that Richard Dean contacted Katie C. Slade and L. Guy Jackson to discuss his purchase of their share of the property (Rec. at 36-37). However, as the trial testimony reveals, Richard Dean stated to these two Defendants/Appellees that he would not purchase their interest in the subject property because he was the sole title holder to the subject property.

During direct examination of the Defendant/Appellee L. Guy Jackson, it was explained that Richard Dean had informed L. Guy Jackson of his belief that he had sole ownership. It was testified to at trial:

Q. Did Rick ever tell you that he felt like you had no ownership interest and that he owned it?

A. He implied it all of the time.

Q. After he implied it, did you write him a letter or anything telling him, Rick you are wrong. I am an owner?

A. Did I? Yes, I told him.

Q. Did you ever write him?

A. No.

Q. Did you ever do anything to perfect your interest in it?

A. I showed him the last will and testament at my house.

Q. Anything else?

A. Not that I recall.

(Trans. at 67). As shown by his testimony, L. Guy Jackson's only refutation of Richard Dean's ownership interest was to show him the will of Louise B. Cox. His action of showing an ancestor's will was not proof overcoming Mr. Dean's claim to the property. L. Guy Jackson goes on to further testify as to a conversation between himself and Mr. Dean in approximately 1993 or 1994 regarding ownership of the subject property. L. Guy Jackson testified that Richard Dean, during the aforementioned conversation, "kept saying he owned it all. And I didn't pay any attention to him" (Trans. at 68). It is clear from L. Guy Jackson's testimony that he knew Richard Dean's belief was that he was the sole owner of the subject property.

Further, Richard Dean testifies to the fact that, although Katie C. Slade and L. Guy Jackson had spoken to him about buying out their alleged interests in the subject property, he only engaged in these conversation in an attempt to settle the matter and avoid costly litigation. Richard Dean testified during his cross-examination as follows:

Q. Is it your contention she [Katie C. Slade] doesn't have any ownership interest in the property?

A. No, I mean, I contend I own the property.

Q. Okay. Were there conversations between you and other defendants, not your mother, in regard to the possible sale or purchase of the property among the parties?

MR. PARLIN: Objection, Your Honor, that's going to be in a situation of the type of a compromise.

THE COURT: What was the question again?

MR. KINARD: The question was: Were there ever any discussions among the plaintiff and the other parties in regard to the purchase or sale of the properties between them?

THE COURT: I will allow it. You can answer that question, Mr. Dean.

THE WITNESS: Ever?

BY MR. KINARD:

Q. Ever.

A. Well, yeah, I know we talked about the – well, not really, – it's hard to explain. It's not really sale of the property, because I thought I owned the property, but you brought up about, would I just basically be willing to buy my piece[3]. And I said if it was cheaper to make them – pay them some extortion to go away than it was to go through all of this mess, I would have let my attorney talk about it.

(Trans. at 50-51). Although not readily apparent from the Transcript excerpt above, the objection of Mr. Parlin was based upon the fact that settlement negotiations had taken place prior to filing of the suit for adverse possession.

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[3] Due to a scriveners's error, the end of this sentence should have stated "buy my *peace*". The full intentions of Richard Dean in his testimony may not be apparent without the clarification that his intention was not to purchase a portion of the property, but to provide a nuisance value settlement to the Defendants. Further, the absence of correct punctuation placing the statement "buy my peace" in quotations, denies the reader the understanding that Mr. Dean was quoting Mr. Kinard's phrasing from settlement negotiations prior to filing of suit, as is evident from Mr. Dean reference that he would have let his attorney talk about it.

Exclusivity, within the meaning of the statute, has been ruled to be the adverse possessor's use of the property consistent with an exclusive claim to the right to use the property. *Apperson,* 950 So. 2d 1113, 1119 (Miss. App. 2002). One example of such a claim would be offers of nuisance settlement to avoid litigation. In *Moran v. Saucier,* the chancellor was presented with a similar set of facts. *Moran,* 829 So. 2d 695 (Miss. App. 2002). In that matter, Saucier presented as proof against Moran two letters which clearly stated that Moran believed he had adversely possessed the property and divested Saucier of title. *Id.* One of the letters, from Moran's attorney, offered $500.00 as a nominal settlement value to avoid litigation. *Id.* at 699. The Mississippi Court of Appeals ruled that the letter from Moran's attorney was a settlement offer, and not an offer to purchase the property negating Moran's claim of adverse possession. *Id.* Richard Dean's testimony that he would be willing to pay certain sums was in reference to him merely paying a nuisance value settlement to avoid litigation, and not an admission of the Defendants'/Appellees' alleged co-tenancy. Therefore, the Chancellor's reliance in this matter on the discussions of purchase of the property improper.

In addition, Katie C. Slade testified at trial that Richard Dean had informed her of his belief in his sole ownership in the subject property. Katie C. Slade testified as follows:

> A. ...[H]e told me that he did not have to fool with me or Guy, that he could do with whatever he wanted with the property. And I told him absolutely not. That, you know– he said, I could build a house in the middle of it. I said, no, you cannot build a house in the middle of that property. I said, you know, this is an undivided legal estate. I mean, we need to go through legal channels to do this. You can't just go build a house, *because you say it's yours.*
>
> Q. So, at that point he told you he thought it was his property?
>
> A. And I told him absolutely no, that I have a third interest, Guy has a third interest. And it turned into an argument. ...

(Trans. at 107); (*emphasis added*). This testimony is in direct contradiction of Katie C. Slade's earlier testimony at trial that she never heard Richard Dean say to her that he owned the entire parcel

solely. (Trans. at 103). What is consistent throughout is that all parties admitted that Richard Dean held the property out as his solely.

In addition to the factual misinterpretations discussed above, the Chancellor's reliance on *Nosser v. Buford*, 852 So. 2d 57 (Miss. App. 2002), is improper. In her Findings of Fact and Conclusions of Law, the Chancellor cites to part of the ruling in *Nosser* that "sporadic cutting of firewood, bush hogging, hunting and granting of permission to place election signs on undeveloped land" were not sufficient to prove adverse possession. (Rec. at 37). However, the Court in *Nosser* held that it was not only quantity, but also the character of the acts of the possessors, which was insufficient due to their admission that the activities took place on an elevated bluff that was clearly out of the sight of the public at large. *Nosser,* 852 So. 2d at 61.

The Mississippi Supreme Court stated in *McSwain v. B. M. Stevens Company* that

> We do not think these verbal statements are sufficient. There must be either a suit during the time before the expiration of the ten-year period or there must be a physical interruption of the adverse possession, or some unequivocal asserting of the claimant's rights, which would enable the person in possession to institute legal proceedings in trespass or otherwise to prevent acts of ownership.

*McSwain,* 247 So. 2d 707 (Miss. 1971) ; citing *Daniels v. Jordan*, 161 Miss. 78, 84-85, 134 So. 903, 904 (Miss. 1931); see also *Bounds v. Davis,* 253 Miss. 849,179 So. 2d 566 (Miss.1965); *Rice v. Pritchard,* 611 So. 2d 869, 873 (Miss. 1992). Further, the Mississippi Supreme Court has stated that

> We think the majority of the courts and the sounder reason hold that there must be something more than a protest to interrupt the running of a claim of right followed by actual users: there must be at least an interruption of the use ... by the opposing person who opposes such claim.

*Rice,* 611 So. 2d at 873; citing *Board of Educ. of Itawamba County Miss. v. Loague*, 405 So.2d 122, 125-26 (Miss. 1981).

Following the rulings of the Mississippi Supreme Court, it would require the Defendants/Appellees to do more than merely state to Richard Dean that he did not exclusively own the subject property. Even if the testimony of the Defendants/Appellees is taken as true, it would require affirmative action to interrupt Richard Dean's exclusive possession. The fact that the Defendants/Appellees did not institute any legal action until filing of the partition suit on December 9, 2005, evidences that they did not attempt to interrupt Mr. Dean's exclusive possession until after the requisite ten (10) year period. (Rec. at 28). The Chancellor clearly ignored both the applicable evidence and law in this matter by ruling that Richard Dean's contact with the Defendants/Appellees negated his exclusive possession of the property.

### 6. The Chancellor Erroneously Concluded that Richard Dean's Peaceful Possession of the Property was Interrupted by Defendant/Appellee Katie C. Slade

In order for peaceful possession to be interrupted, there must be more than mere words by the parties attempting to reclaim their property. As cited above " There must be either a suit during the time before the expiration of the ten-year period or there must be a physical interruption of the adverse possession, or some unequivocal asserting of the claimant's rights...". *McSwain,* 247 So. 2d at 709. Further, there must be more than a mere dispute to arise to present an obstacle to peaceful use of the property. *Apperson,* 950 So. 2d 1113, 1119 (Miss. App. 2007).

The Chancellor's ruling in the Findings of Fact and Conclusions of Law, due to the similarity of the langauge used, appears to rely exclusively on the Trial Brief submitted by the Defendants/Appellees. Her reliance on the Trial Brief unfortunately results in her ruling ignoring the evidence and testimony of the case. The Chancellor ruled in her Findings of Fact and Conclusions of Law that Richard Dean's peaceful possession of the property was interrupted by the payment of taxes in arrears by Katie T. Slade. (Rec. at 37). However, as has been previously shown,

Richard Dean has been paying taxes at least since 1995, and both L. Guy Jackson and Katie C. Slade were on notice as to Richard Deans claim of ownership by 1994 at the very latest. Katie T. Slade did not redeem the unpaid taxes until 2005. Katie T. Slade's payment of taxes was outside of the (10) year limitation. Therefore, the Chancellor's finding is against the evidence as presented at trial.

## CONCLUSION

The law of this State is well established that for possession to be adverse it must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful." *Apperson v. White,* 950 So. 2d 1113, 1116 (Miss. App. 2007). The testimony, evidence, and law applicable of this case shows that Richard Dean the Plaintiff/Appellant not only met the burden to prove these elements, but he exceed them.

The ruling of the Chancellor ignored the testimony and evidence at trial supporting Richard Dean's claim of title by the parol gift of his grandmother. The Chancellor also misstated that taxes were not paid by Richard Dean until 1997, when the evidence and testimony clearly reflects payment of taxes from at least 1995 to 2005. Further, the Chancellor ignored that L. Guy Jackson was on notice of Richard Dean's claim of possession from as early as 1992, but no later than 1993. The Chancellor similarly ignores that Katie C. Slade was on notice since as early as 1994, but no later than 1995. The Chancellor's Findings of Facts and Conclusions of Law makes vague mention of Richard Dean's posting of signs, erecting of fences, and holding himself out as the owner to the public at large. However, she fails to recognize these acts as clearly establishing his open, notorious, and visible use of the property.

In addition to the Chancellor's factual misinterpretations and omissions, she misinterpreted case law and applied improper legal standards. The Chancellor cites to *Snowden*, 16 So. 2d 24 (Miss. 1943), for the principle that fences alone are not conclusive of adverse possession. This is not only a misrepresentation of *Snowden,* but it also ignores Mississippi case law saying that erection and maintenance of a fence for ten (10) years is conclusive of adverse possession. Further, the Chancellor failed to use the lower standard applicable to adverse possession cases involving "wild

lands", despite the fact that all parties admitted to the unimproved condition of the property. The Chancellor's reliance on *Nosser v. Buford,* 852 So. 2d 57 (Miss. App. 2002), was erroneous as well. Her reliance on *Nosser* fails to recognize the primary point of that case was that both quantity and character of occupation of property must be considered.

Throughout her Findings of Fact and Conclusions of Law, the Chancellor iterates inaccurate facts and misinterpretations of the evidence presented. Further, the Chancellor repeatedly applies erroneous law, ignores applicable law, or misinterprets the cases she cits. Based on these cumulative errors, the ruling by the Chancellor of the lower court was not supported by substantial evidence, was manifestly wrong, clearly erroneous, and supported by erroneous legal standards. Therefore, her decision should be overturned, and title should be granted to Richard Dean by adverse possession.

THIS, the 22ND day of April, 2010.

Respectfully submitted,

RICHARD DEAN

**BY:** PAGE, MANNINO, PERESICH & MCDERMOTT, PLLC

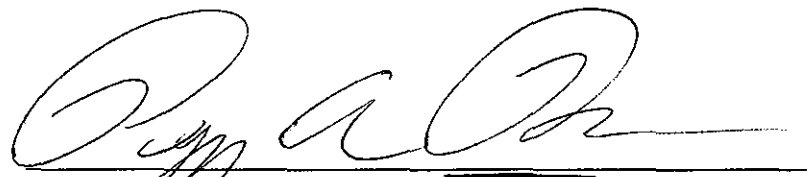
**BY:** _____

PEPPER A. PEARSON, MSB #[redacted]

## CERTIFICATE OF SERVICE

I, PEPPER A PEARSON, of the law firm of PAGE, MANNINO, PERESICH & MCDERMOTT, P.L.L.C., do hereby certify that I have this date mailed, by United States Parcel Service Overnight Delivery, postage prepaid, a true and correct copy of the above and foregoing Brief of the Plaintiff/Appellant and Appellant's Record Excerpt to the Supreme Court Clerk at her usual mailing address of Mississippi Supreme Court, 450 High Street, Jackson, Mississippi 39201-3418, and also via United States Parcel Service Overnight Delivery to John M. Kinard, Esquire, at his usual business address of Wilkinson, Williams, Kinard, Smith & Edwards, 734 Delmas Avenue, Pascagoula, MS 39567.

THIS, the 22nd day of April, 2010.



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