2010-TS-01154

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2010-TS-01154

DONALD GREENWOOD AND CAROL GREENWOOD — APPELLANTS

v.

GERALD ALLEN YOUNG, SR. AND MELODY ANN YOUNG — APPELLEES

GREENWOOD APPELLANTS' PRINCIPAL BRIEF
(ORAL ARGUMENT NOT REQUESTED)

APPEAL FROM THE CHANCERY COURT FOR THE
SIXTH JUDICIAL DISTRICT OF WINSTON COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record to the Appellants certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order for the Justices of the Supreme Court and/or the Judges of the Court of Appeals to evaluate possible disqualification or recusal.

1. The Appellants, Donald Greenwood and Carol Greenwood.
2. The Appellees, Gerald Allen Young, Sr. and Melody Ann Young.
3. Donald Greenwood's trial counsel, Honorable Christopher M. Posey of The Edward A. Williamson Law Firm.
4. Carol Greenwood's trial counsel, Honorable James Mayo of the Fair & Mayo Law Firm.
5. The Appellees trial and appellate counsel, Honorable Terry Jordan of the Jordan & White Law Firm.
6. Honorable J. Max Kilpatrick, Chancery Judge of the Sixth Judicial District.
7. Barbara G. Jones, Sue G. Livingston and Tessie G. Higginbotham

Respectfully submitted, this the 13th day of January, 2011.

DONALD AND CAROL GREENWOOD

BY: CHRISTOPHER M. POSEY
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER AUTHORITIES:

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STATEMENT OF THE ISSUES

This adverse possession case involves the following issues on appeal:

1. Whether the Trial Court erred in overruling Defendants/Appellants *Motion in Limine* and standing objection seeking to exclude any evidence or testimony of adverse possession allegedly occurring prior to the date the Trial Court voided the *Warranty Deed* from Don Greenwood to the Plaintiffs/Appellees, as any acts of possession would not have been adverse to Don Greenwood, the Grantor of the *Warranty Deed*, during that period?

2. Whether the Trial Court erred in holding that the Plaintiffs/Appellees proved by clear and convincing evidence that, by their specific actions, they maintained the exclusive, complete, actual, notorious, hostile, adverse, continuous, undisputed and peaceful possession, ownership and control of the disputed property, for 10 years, entitling them to title of the disputed property through the theory of adverse possession, pursuant to Miss. Code Ann. § 15-1-13(1)?

STATEMENT OF THE CASE

A. Course of Proceedings

Although the trial of this matter involved a single issue – the Plaintiffs, Melody and Gerald Young's, claim of ownership to two acres of disputed property under the theory of adverse possession – this case has a somewhat lengthy and complex litigation history, which will be briefly set forth herein.

This action was originally initiated on October 10, 2006, in Cause No. 2006-268, in the Chancery Court of Winston County, Mississippi, on a *Complaint to Set Aside Warranty Deed* filed by Barbara G. Jones, Sue G. Livingston and Tessie G. Higginbotham against the Plaintiffs herein, Gerald Allen Young, Sr. and Melody Ann Young. The *Warranty Deed* in question being a July 12, 1996 *Warranty Deed* from Defendant, Donald Greenwood (hereinafter referred to as "Don Greenwood" or "Defendant"), to the Plaintiffs, Gerald Allen Young, Sr. and Melody Ann Young (hereinafter referred to as "The Plaintiffs", "Mr. Young", "Mrs. Young" or "The Youngs"), concerning the two acres of disputed property. Essentially, Barbara G. Jones, Sue G. Livingston and Tessie G. Higginbotham alleged that when the land was originally deeded to their brother, Don Greenwood, in 1984, they retained a right of first refusal should any portion of the property ever be offered for sale; however, it was not until 2006 that they discovered the fact that Don Greenwood had deeded a two acre portion of the property to the Youngs in 1996. Additionally, they alleged that the 1996 *Warranty Deed* should be declared void, as it was a part of the homestead property of Don Greenwood and his wife, Carol, and Carol Greenwood did not sign the *Warranty Deed.*

Thereafter, Defendant, Carol Greenwood, was allowed to intervene in Cause No. 2006-268. Several amended pleadings were filed, including Defendant, Don Greenwood, being brought into the lawsuit by a cross-claim filed by the Youngs. Ultimately, on December 5, 2007 an *Agreed Judgment Voiding Warranty Deed and Other Relief* was filed in Cause No. 2006-268. In that Agreed Judgment, the original *Warranty Deed* from Don Greenwood to the Youngs, dated July 12, 1996 and recorded in Book 234, Page 156, was voided for lack of spousal signature on the homestead property of the Grantor, pursuant to Miss. Code Ann. § 89-1-29. Further, all other issues by the parties in that Cause were dismissed without prejudice. (R. p. 58).

On November 27, 2007, prior to the final dismissal without prejudice of Cause No. 2006-268, the Youngs filed a *Complaint to Quite and Confirm Title to Real Estate* against Don and Carol Greenwood, as Cause No. 2007-302, pertaining to the same two acres of property that was the subject of the earlier Cause. Several amended pleadings were allowed by the Court in Cause No. 2007-302, including the adding of Barbara G. Jones, Sue G. Livingston and Tessie G. Higginbotham as necessary parties, who filed a joint, pro se *Answer and Defenses* wherein they alleged the service of the Summons and Complaint was not made upon them within 120 days after the filing of the Complaint and moved for dismissal, pursuant to Rule 4(h) of the MS Rules of Civil Procedure. The Court, after conducting a hearing on the same, sustained that Motion and, on February 12, 2009, entered an *Order of Dismissal* and Cause No. 2007-302 was dismissed without prejudice.

The Plaintiffs, Melody and Gerald Young, then filed a *Second Amended Complaint to Quite and Confirm Title to Real Estate by Adverse Possession* in the Instant Case, Cause No. 2009-40, with Defendants, Don Greenwood, Carol Greenwood,

Barbara G. Jones, Sue G. Livingston and Tessie G. Higginbotham all being timely served. Therefore, although the *Second Amended Complaint to Quite and Confirm Title to Real Estate* by adverse possession was filed as a separate case in Cause No. 2009-40, it is a continuation of the litigation of this matter from the two previous cases, Cause No. 2006-268 and Cause No. 2007-302, both of which were dismissed without prejudice.

On December 1, 2009, this case proceeded to trial in the Winston County Courthouse. Importantly, Plaintiff, Gerald Allen Young, Sr., did not appear at the trial and pursuant to his attorney it was because he "does not desire – he has never been present." (Tr. p. 11). Therefore, it can be reasonably inferred that Mr. Young possessed no documents, knowledge or other factual testimony to support the Plaintiffs' collective claim for ownership of the disputed property through the theory of adverse possession. Furthermore, on the morning of trial, the parties present announced that an agreement had been reached as to the Pro Se Defendants, Barbara G. Jones, Sue G. Livingston and Tessie G. Higginbotham, such that they would be granted the right of first refusal by the prevailing party as set forth in the original 1984 deed they executed to Don Greenwood. The Court approved that settlement agreement, and the Pro Se Litigants were dismissed with prejudice, based on their agreed settlement, and the case proceeded to trial against only Defendants Don and Carol Greenwood.

At the beginning of trial, the parties stipulated to eight exhibits; however, Exhibits No. 4 and 7, were stipulated to by the Defendants subject to the Court's ruling on their joint *Motion in Limine.* (Tr. pp. 20-27). Thereafter, the Court heard oral arguments on the Defendants' *Motion in Limine,* which sought to exclude any evidence or testimony from the Plaintiffs, regarding any possessory acts to prove their adverse possession for all times prior to December 5, 2007, the date on which the 1996

Warranty Deed was declared null and void by the Court. (Tr. p. 27). Essentially, the Defendants argue that, as long as the Grantees occupy property by virtue of a covenant in a Deed, its possession is not adverse to the Grantor of that Deed. The Plaintiffs were the Grantees of the 1996 *Warranty Deed*, and Don Greenwood was the Grantor of the 1996 *Warranty Deed*. Ultimately, the Court overruled the Defendants' *Motion in Limine*; however, that is one of the issues being raised on appeal and argued hereafter in Section II. of the Argument.

The Court heard the testimony of six witnesses over a period of two days. At the conclusion of the trial and on the Motion of the Plaintiffs, the Court inspected the subject property, along with Melody Ann Young, Don Greenwood and their respective attorneys. Further, by separate orders, the Court enjoined Don Greenwood from selling, encumbering, adding co-owners or in any way altering the current legal state of the two acres in question until a final decision could be rendered by the Court. In addition, the Court requested Findings of Fact and Conclusions of Law, which were timely filed by the respective parties. Then, on June 4, 2010, the Trial Court entered a *Final Judgment* and *Opinion* finding, by clear and convincing evidence, that the Plaintiffs are the owners by adverse possession of the two acres of disputed property. Defendants, Don and Carol Greenwood, appeal from the Trial Court's *Final Judgment* and *Opinion*, as well as its ruling on their *Motions in Limine*.

B. Facts

Disputed Property

This adverse possession case concerns family land and the actions and inactions of various members of that family. For a complete deraignment of title on the disputed property, please refer to the Court's Record at pages 45-57. Without going into complete

detail regarding each transaction in the deraignment of title, Mr. Everett L. Greenwood and his wife, Josephine Earline P. Greenwood, owned approximately thirty-one (31) acres of land in Winston County, Mississippi. (R. p. 49). Mr. and Mrs. Greenwood had five children: Donald Greenwood (Defendant herein), Charles W. "Dan" Greenwood, Barbara G. Jones (Pro Se Defendant at trial), Sue G. Livingston (Pro Se Defendant at trial) and Tessie G. Higginbotham (Pro Se Defendant and Defense witness at trial). Plaintiff, Melody Ann Young, is the daughter of Charles W. "Dan" Greenwood, who passed away in August 2006.

Mr. Everett L. Greenwood passed away in 1973, and the thirty-one acre tract of land transferred to his wife, Ms. Josephine Earline P. Greenwood. (R. p. 50 and Tr. p. 204). Then, Ms. Josephine Earline P. Greenwood passed away in 1983. (Tr. p. 204). On July 16, 1984, the Defendant, Donald Greenwood, purchased the nearly thirty-one acre tract from his siblings, who reserved unto themselves and their heirs the first right of refusal to purchase the land, should it be offered for sale. (R. p. 51).

This property later became part of the homestead property of Don Greenwood and his wife, Carol.

At some point in July 1996, a survey was conducted to carve out a two acre tract from the larger thirty-one acre tract, and on July 12, 1996, Don Greenwood signed a *Warranty Deed* conveying the two acre property to the Plaintiffs, Gerald Allen Young, Sr. and Melody Ann Young. (R. p. 55). This two acre tract of property is the subject of this adverse possession litigation. This two acre tract of disputed property is described in the July 12, 1996 *Warranty Deed*, as follows:

> Commence at the Northeast corner of the Southeast Quarter of the Southeast Quarter of Section 35, Township 13 North, Range 12 East and run South 600.0 feet; thence West 560 feet, more or less, to the west right of way boundary of Union Ridge paved public road for the point of

> beginning of the herein described parcel; Run thence West 248.8 feet; thence South 275.0 feet; thence East 387.4 feet to the West right of way boundary of Union Ridge road; thence, following said right of way boundary through a curve to the right, to the point of beginning which lies North 26 degrees 45 minutes West 308 feet from the preceding point, being a part of the Southeast Quarter of the Southeast Quarter of Section 35, Township 13 North, Range 12 East, two acres, more or less.

The land contains in the aggregate, two (2) acres more or less, and is situated in the SE Quarter of the SE Quarter of Section 35, Township 13N, Range 12E, Winston County, Mississippi, (hereinafter referred to as the "disputed property").

Every witness at trial testified that the two acre tract of disputed property once contained the "old house," which was the home of Don Greenwood's mother and father, such that it, at one point, contained a residential structure, yard, landscape, frontage to the county access paved road, and the like. (Tr. pp. 114, 277-278). In fact, Don Greenwood testified that, even after his mother's death in 1983, the house and premises on the disputed property were kept maintained, and were actually rented to various tenants over the years, prior to the execution of the *Warranty Deed* in 1996. (Tr. pp. 277-278).

Voiding of July 12, 1996 *Warranty Deed*

As referenced above, the two acre tract of disputed property was part of a larger tract of approximately thirty-one acres, which was the homestead property of Don Greenwood and his wife, Carol Greenwood, at the time of the signing of said *Warranty Deed*, on July 12, 1996, but the *Warranty Deed* was not signed by Carol Greenwood. (R. p. 55 and Tr. pp. 276-277). The July 12, 1996 *Warranty Deed*, which purports to transfer title of the disputed property from Don Greenwood to the Plaintiffs, was rendered null and void by Order of the Trial Court, dated December 5, 2007, for lack of

spousal signature on homestead property of the Grantor, pursuant to Miss. Code Ann. § 89-1-29 (1972). (R. p. 58).

Relevant Period of Time for Plaintiffs' Adverse Possession Claim

The Plaintiffs' claim to ownership of the disputed property, under the theory of adverse possession, is allegedly based on their "use" of the property from July 12, 1996, the date in which the Plaintiffs were the Grantees of the voided *Warranty Deed*, through August 30, 2006, the date that the Pro Se Defendants first notified Plaintiffs that there may have been a problem with the *Warranty Deed* and transfer of property under that Deed. (Tr. p. 31 and Trial Exhibit 2). The time period between July 12, 1996 and August 30, 2006 represents a period of time in excess of ten years, (hereinafter this will be referred to generally as "the relevant time period").

Plaintiffs

The Plaintiffs in this action are Gerald Allen Young, Sr. and Melody Ann Young. Importantly, Mr. Young was not present at the trial of this matter, at any time, and offered no testimony of any kind; therefore, it can be reasonably inferred that Mr. Young possesses no documents, knowledge or other factual testimony to support the Plaintiffs' collective claim for ownership of the disputed property through the theory of adverse possession. (Tr. p. 14). Mrs. Young testified that she currently lives in Carriere, Mississippi, which is in Pearl River County, in the Southwest portion of the State, and prior to that, she maintained her primary residence in New Orleans, Louisiana. (Tr. p. 110). Importantly, at no point during the relevant time period did Mrs. Young actually maintain her primary residence on the disputed property or even in Winston County, Mississippi. (Tr. p. 113). Mrs. Young testified that during the time period of July 1996 through June 1997, she was working with the train company, Amtrak, and would ride

the train as an attendant wherever it might go, such as Miami, Chicago and other destinations outside the State of Mississippi. (Tr. p. 111). Since June 1997, Ms. Young testified that she has been an employee with the New Orleans Police Department, working approximately 80 hours per week in this capacity. (Tr. p. 113).

Plaintiffs' Use of the Property During the Relevant Time Period

The collective testimony of all witnesses at the trial of this matter clearly support the fact that Plaintiffs rarely, if ever at all, themselves personally, actually used the disputed property in any manner whatsoever. In fact, Don Greenwood, Carol Greenwood and Tessie Higginbotham, all residents of Winston County, Mississippi, each testified that they had never, not one single time, seen either of the Plaintiffs using the disputed property, in any manner whatsoever, during the relevant time period. (Tr. pp. 212, 285, 329, 335). In fact, in looking at the totality of Mrs. Young's testimony during cross-examination, she could not recall a single incidence where she herself actually stepped foot on the disputed property from July 12, 1996 through August 30, 2006 – the relevant time period. (Tr. pp. 114-119).

In preparation of coming under a "claim of ownership" of the disputed property, pursuant to the July 12, 1996 *Warranty Deed*, a survey was apparently done on the property, since the legal description of the disputed two-acre property was found in the 1996 *Warranty Deed*, such that any survey would have had to have been done prior to the date of the Deed, to carve out the property description of the disputed property from that of the larger tract of Don Greenwood's homestead property. (Tr. p. 98). Although the Trial Court found that all four corners of the subject property were marked with florescent tape and "clearly visible from the adjacent public road," the undisputed testimony from all the witnesses are that at least two corners of the disputed property

would not have been visible from the adjacent road. (R. pp. 307-308 and Tr. pp. 99, 139-140, 165, 231). At the time of trial and the Trial Court's inspection of the property, it is clear to all that the property lines are not clearly recognizable. In fact, the Plaintiff testified at trial that the property line was no longer visible and its location was largely unknown to her. (Tr. p. 105).

Furthermore, based on the testimony of Mr. Clarence Kelly, Emergency Management and Fire Coordinator for Winston County, Mississippi, the "old house" on the disputed property was burned and responded to by the Noxapater Voluntary Fire Department on July 8, 1996, four days before the Plaintiffs came in under any "claim of ownership" to the disputed property, pursuant to the *Warranty Deed*. (Tr. pp. 250-252). Of course, neither of the Plaintiffs were present for the burning of the "old house." (Tr. p. 97).

During the relevant time period, testimony regarding any "use" of the disputed property by the Plaintiffs or even at their direction is limited, non-specific, sporadic, non-continuous, non-exclusive and to some extent contradicted by the testimony of others. It is undisputed that the disputed property was bush hogged a "few" times during the relevant time period. Plaintiffs' witness, Ray Greenwood, Melody Young's brother testified that he bush hogged the property two or three times over this ten plus year period of time, and his father, Dan Greenwood, may have bush hogged the property one or two times during this same time period. (Tr. p. 139). But, Don Greenwood, who owns all of the surrounding property and maintains his primary residence adjacent to the disputed property, testified that he never saw Dan Greenwood bush hog the property; only recalled Ray Greenwood bush hogging the property on one single occasion during the entire, relevant time period; and, that he himself bush hogged the

property multiple times. (Tr. pp. 69-70, 282-283, 290).[1] Furthermore, Carol Greenwood, who also resided adjacent to the disputed property for portions of the relevant time period, testified that the disputed property was only bush hogged by Don Greenwood, and that she never saw Dan or Ray Greenwood bush hogging the property. (Tr. p. 165).

Additionally, it is undisputed that a third-party bulldozed the debris from the burned "old house"; however, the Plaintiffs could not provide a definitive date and time for this action or any other relevant information regarding the same. (Tr. pp. 104, 283). Also, there is some contradictory testimony in the record about a third-party bulldozing the disputed property on a second occasion; however, the Plaintiffs offered no proof of whether or not this actually happened or when it might have happened. Moreover, the only testimony put forth by the Plaintiffs in this regard is that such work was performed to "clear a pad" for a mobile home; however, Don Greenwood testified that the only area cleared off was the location of Carol Greenwood's mobile home[2], which is located west of the disputed property on Don's separate property – not on the disputed property. (Tr. pp. 284, 291).

Ultimately, the only thing that Mrs. Young could definitively say that she did herself or had done, during the relevant time period, in regards to the disputed property was (1) pay the property taxes for at least 8 of the 10 years, and (2) obtain a 911 address designation for the property in December 1999. (Tr. pp. 96-97). In fact, Tessie

[1] Although the Trial Court's Opinion asserts that Don Greenwood never bush hogged the disputed property after 1996, the testimony of Don Greenwood, corroborated by that of Carol Greenwood, clearly shows that Don Greenwood bush hogged the disputed property, and in fact, was the last person to bush hog the disputed property in 2006. (R. pp. 312-313 and Tr. pp. 165, 290).

[2] From August 2008 through to the date of the trial of this matter, Carol Greenwood resided in a mobile home located on the homestead property of her and Don Greenwood. The mobile home is located approximately 100-200 feet west of the disputed two acre property. (Tr. p. 166).

Higginbotham, Carol Greenwood and Don Greenwood, all testified that they had never, not one single time, seen either of the Plaintiffs using the disputed property in any manner whatsoever, during the relevant time period. (Tr. pp. 212, 231, 285, 329, 335).

Importantly, Mrs. Young testified that at no point during the relevant time period, did she ever cultivate the soil, cut timber, sell timber, lease mineral rights, lease hunting rights, hunt, plant a garden, build a house, build a fence, build a pond or make any other improvements whatsoever to the disputed property. (Tr. pp. 114-115). Certainly, Mrs. Young could not detail or itemize specific acts of usage for each month, for each year, for the relevant time period, and there is virtually nothing on the property that would allow others to know of her occupation, if any. (Tr. p. 115). Furthermore, Mrs. Young acknowledged that she made no efforts whatsoever to forcibly keep people off the property, until she placed "Posted – No Trespassing" signs after litigation was commenced in 2006, which would be outside the relevant time period. (Tr. p. 120).

Moreover, during her testimony, Ms. Young seemed to be confused as to the exact parameters and four corners of the disputed property, and, in fact, the **Trial Court even questioned the Plaintiff as to, "How can you adversely possess land if you don't know where property lines are?"** (Tr. pp. 105, 129).

Don Greenwood's Use of the Disputed Property

Don Greenwood testified that he continued to use the disputed property, as his own, during the relevant time period of July 12, 1996 through August 30, 2006. (Tr. pp. 85, 285-290). In fact, Plaintiffs' witness Ray Greenwood also acknowledged that Don Greenwood would use the disputed property, as needed and desired, during this time period. (Tr. pp. 148-149 and R. p. 313). Don Greenwood testified that he bush hogged the disputed property multiple times, and in fact, he was the last person to bush hog the

property in 2006, prior to the litigation. (Tr. p. 290). Additionally, Don Greenwood testified that he hunted on the property on multiple occasions, during the relevant time period. (Tr. pp. 288-289).

Also, at some point during the relevant time period, Don Greenwood, began selling dirt out of a pit on his adjoining property, just west of the disputed property. (Tr. pp. 145, 285). In order to access the dirt pit, heavy equipment would travel across the disputed property and onto Don's adjoining property, with Don's permission. (Tr. pp. 285-287). In fact, Don testified that the single biggest improvement done to the disputed property, during the relevant time period, was the improvement of the road running across the property, which was done under his instruction. (Tr. p. 291). Primarily, Don had to purchase a wider culvert and widen the road, so that heavy equipment could more easily access his dirt pit. (Tr. pp. 286-287, 297). Don testified that during the course of this excavation of dirt, he would travel onto and across the disputed property multiple times per week, over the course of many years. (Tr. pp. 285-289). Although the Trial Court's *Opinion* makes reference to the fact that Don did not sell dirt off of the disputed property and attempts to hold that fact against him, Don testified that he was selling a particular type of sand off of his adjacent property, which is not located on the disputed property. (Tr. p. 324).

Based on the testimony elicited at trial, it is clear that Don Greenwood not only jointly used the disputed property, but that he used the disputed property more than any other person, including the Plaintiffs, improved the property more than any other person, and was never prevented from using or improving the disputed property, until after litigation was commenced in 2006.

SUMMARY OF THE ARGUMENT

This adverse possession case involves an appeal from the Trial Court's (1) overruling the Defendant's *Motion in Limine* regarding the introduction of testimony and evidence sought to be excluded under specific questions of law and (2) finding that the Plaintiffs' proof was sufficient to sustain a claim of adverse possession. Essentially, the Plaintiffs allege that they continuously used and occupied two acres of disputed property, located in Winston County, from the time they were the Grantees of a July 12, 1996 *Warranty Deed* from Don Greenwood until August 30, 2006, when litigation over the two acre property was commenced. Importantly, on December 5, 2007, the Trial Court entered an Order voiding the *Warranty Deed* for lack of spousal signature on the homestead property of the Grantor.

The Defendants each filed a *Motion in Limine* and made a standing objection during the trial seeking to exclude any evidence or testimony from the Plaintiffs regarding any possessory acts to prove their adverse possession claim for the time period of July 12, 1996 through December 5, 2007. In support of this argument, the Defendants asserted that Mississippi Case law holds that, so long as the Grantee occupies property by virtue of a covenant in Deed, its possession is not adverse to the Grantor. *Washington v. Crowson*, 222 So. 2d 137, 139 (Miss. 1969). Simply put, a claim of adverse possession cannot begin unless the landowner has actual or constructive knowledge that there is an adverse claim against his property, and Don Greenwood was never on notice that the Plaintiffs were claiming the land in some method hostile and adverse to the covenant in the Deed; therefore, adverse possession can not be established for any time, prior to the voiding of the *Warranty Deed*, which would serve to defeat the Plaintiffs' claim. Furthermore, based on the Plaintiffs' illusory position as

the record title holder as the Grantees under the *Warranty Deed*, none of their actions would have given Don Greenwood notice that they were attempting to "adversely" possess the disputed property.

The Trial Court erred in overruling this Motion, allowing such evidence and testimony to come in, and basing that ruling on the 1903 case of *Avera v. Williams*, which is inapplicable and distinguishable from the instant case. *Avera* holds that a deed for homestead, in which a Grantor's wife did not join, though void, is available as color of title to sustain a claim by adverse possession **as against third persons**. *Avera v. Williams*, 81 Miss. 714, 33 So. 501 (Miss. 1903) (Emphasis added) (referring also to "third persons" as "strangers"). But, since Don Greenwood was the Grantor of the voided *Warranty Deed*, he is not a "third person" or "stranger" to that transaction, and following the ruling in *Washington* and other cases, the Plaintiffs use, as Grantees under the *Warranty Deed*, would not be adverse to the Grantor of said Deed, Don Greenwood.

Alternatively, even if this Court is inclined to affirm the Trial Court's overruling of the Defendants' *Motion in Limine*, the Plaintiffs still failed to meet their burden of proof, by clear and convincing evidence, that they are entitled to title of the disputed property through the theory of adverse possession, pursuant to Miss. Code Ann. § 15-1-13(1) and this Court's case law. Simply put, any use of the disputed property by the Plaintiffs was limited, sporadic, unoccupied, non-hostile, non-continuous, and non-exclusive. In fact, every trial witness except Mrs. Young and her brother, Ray Greenwood, testified that they never, not one single time, saw the Plaintiffs on the disputed property doing anything whatsoever, during the relevant time period, and even Ray Greenwood could not point to specific dates and acts performed by Mrs. Young.

The testimony elicited at trial clearly shows that at no point during the relevant time period did the Plaintiffs ever cultivate the soil, cut timber, sell timber, lease mineral rights, lease hunting rights, hunt, plant a garden, build a house, occupy a residence, build a fence, build any type of physical structure, post the property, prevent others from using the property, build a pond, store items of personal property, operate a business, graze cattle, maintain boundaries or make any other improvements to the disputed property whatsoever. Certainly, Plaintiffs could not detail and itemize specific acts of usage for each month, for each year, for the relevant time period, and there is virtually nothing on the property to visually allow others to know of their occupation or non-occupation. Furthermore, the testimony elicited at trial clearly shows that Don Greenwood continued to use the disputed property, during the relevant time period, and in fact, used the property more regularly than any other person, including the Plaintiffs. Moreover, during her trial testimony, Mrs. Young seemed confused as to the location of the exact parameters of the disputed property. How can someone adversely possess property, if they do not know the location of the property boundary lines?

Clearly, the Plaintiffs wholly failed to meet their burden of proof, by clear and convincing evidence, that each and every element of adverse possession was met, and the Trial Court erred in holding that adverse possession had been established.

ARGUMENT

I. STANDARD OF REVIEW

This case involves an appeal from the Trial Court's (1) overruling the Defendant's *Motion in Limine* regarding the introduction of testimony and evidence sought to be excluded under specific questions of law and (2) finding that the Plaintiffs' proof was sufficient to sustain a claim of adverse possession. Of course, this Court adheres to a

limited standard of review of the decisions of a Chancellor. *Nichols v. Funderburk*, 883 So. 2d 554, 556 (Miss. 2004). The Court will reverse only when the Chancellor's determinations were manifestly wrong, clearly erroneous, or when the Chancellor applied an incorrect legal standard. *Id.* A finding that the proof was sufficient to sustain a claim of adverse possession is a fact-finding that requires the Court's application of the substantial evidence/manifest error test. *Walker v. Murphree*, 722 So. 2d 1277, 1280 (Miss. Ct. App. 1998). However, the Court will review questions of law under a *de novo* standard. *Carroll v. Carroll*, 976 So. 2d 880, 885 (Miss. Ct. App. 2007) (citing *Isom v. Jernigan*, 840 So. 2d 104, 106 (Miss. 2003)).

II. WHETHER THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS/APPELLANTS *MOTION IN LIMINE* AND STANDING OBJECTION SEEKING TO EXCLUDE ANY EVIDENCE OR TESTIMONY OF ADVERSE POSSESSION ALLEGEDLY OCCURRING PRIOR TO THE DATE THE TRIAL COURT VOIDED THE *WARRANTY DEED* FROM DON GREENWOOD TO THE PLAINTIFFS/APPELLEES, AS ANY ACTS OF POSSESSION WOULD NOT HAVE BEEN ADVERSE TO DON GREENWOOD, THE GRANTOR OF THE *WARRANTY DEED*, DURING THAT PERIOD?

On July 12, 1996, Defendant, Donald Greenwood, signed a *Warranty Deed* conveying the disputed two acre property to the Plaintiffs, and this *Warranty Deed* was properly filed with the land records of the Winston County Chancery Court in Deed Book 234 at Page 156. (R. p. 55). The filing of this *Warranty Deed* in the land records of Winston County operates to put the general public on notice that the Plaintiffs are the record title holders of the subject property, beginning on that date, July 12, 1996. On December 5, 2007, the Trial Court entered an *Agreed Judgment Voiding Warranty Deed and Other Relief*, which declared the July 12, 1996 *Warranty Deed* void for lack of spousal signature on the homestead property of the Grantor, pursuant to Miss. Code Ann. § 89-1-29. (R. p. 58). Defendants, Don and Carol Greenwood, each filed a pre-trial *Motion in Limine* seeking to exclude any evidence or testimony from the Plaintiffs

regarding any possessory acts to prove their adverse possession claim for the time period of July 12, 1996 through December 5, 2007, which would be the entire relevant time period. (R. pp. 42-44, 60). Also, during the trial of this matter, both Defendants made a standing objection to the introduction of all such evidence or testimony being presented by the Plaintiffs. (Tr. pp. 20-27, 60-61).

Any Use of the Disputed Property by Plaintiffs would not be "Adverse" to Don Greenwood, the Grantor of the *Warranty Deed*

Ultimately, the Trial Court overruled the Defendants' *Motion in Limine* by finding that the 1903 Mississippi Supreme Court case of *Avera v. Williams* controlled on the issue. (Tr. pp. 36-37). The *Avera* case, however, is inapplicable and easily distinguishable from the issue presented by the Defendants in the subject case. Specifically, the *Avera* case holds that a deed for a homestead, in which a Grantor's wife did not join, though void, is available as color of title to sustain a claim by adverse possession **as against third persons**. *Avera v. Williams*, 81 Miss. 714, 33 So. 501 (Miss. 1903) (Emphasis added) (referring also to "third persons" as "strangers"). In the instant case, the Plaintiffs assert a claim of adverse possession against Don Greenwood, who was the Grantor of the July 12, 1996 voided *Warranty Deed* and not a "third person" or "stranger" to that transaction, making the *Avera* case inapplicable and easily distinguishable from the subject case. Conversely, this Court has held that so long as the Grantee occupies property by virtue of covenant in Deed, its possession is not adverse to the Grantor. *Washington v. Crowson*, 222 So. 2d 137, 139 (Miss. 1969). Simply put, the possession of the property in this event would not be adverse to the Grantor. *Id.* As this Court has stated, "until the Grantee in the Deed brought to the attention of the land owner notice that the Grantee claimed the land in some method hostile and adverse to

the covenant to the Deed, adverse possession could not be established." *Id* at 139-140. (citing *Smith v. Cunningham*, 79 Miss. 425, 30 So. 652 (1901); *Barron v. Federal Land Bank*, 182 Miss. 50, 180 So. 74 (1938); *Morgan v. Collins School House*, 160 Miss. 321, 133 So. 675 (1931); and, *Day v. Cochran*, 24 Miss. 261 (1852)).

A claim of adverse possession cannot begin unless the landowner has actual or constructive knowledge that there is an adverse claim against his property. *Scrivener v. Johnson*, 861 So. 2d 1057, 1059 (Miss. Ct. App. 2003). In the subject case, based on the Plaintiffs "illusory position" as the record title holder of the disputed property, as the Grantee under the *Warranty Deed*, none of their actions would have given Don Greenwood notice that they were attempting to adversely possess the disputed property. In 2010, the Mississippi Court of Appeals applied this same rationale to a similar situation in the case of *Dean v. Slade*, 2009-CA-01793-COA (November 9, 2010).

Clearly the Trial Court applied an incorrect legal standard and wrongly decided this question of law, such that a reversal of that decision is warranted.

It would defy logic and long standing Mississippi case law to allow the Plaintiffs to put forth any evidence or elicit any testimony of adverse possession allegedly occurring prior to December 5, 2007, since the Plaintiffs were "occupying," "using" and "possessing" the disputed property as the Grantees in a *Warranty Deed*; therefore, there is no antagonistic purpose of the Plaintiffs' occupation of the disputed property, during this time period, and any possessory acts performed on the disputed property, during this time period, would not be hostile or adverse to Don Greenwood, the Grantor of the *Warranty Deed*. Therefore, any claim of adverse possession by the Plaintiff should only begin with the date the *Warranty Deed* was declared void, and title should only ripen in the Plaintiffs through adverse possession if all elements of adverse possession are met,

ten years after the date on which the Deed was voided. To hold otherwise would circumvent and negate the Trial Court's Order voiding the *Warranty Deed* and Miss. Code Ann. § 89-1-29.

Any Use of the Disputed Property by Plaintiffs would be Permissive

Furthermore, any possessory acts by the Plaintiffs on the disputed property, during this time period, would not be adverse to Don Greenwood, as he had essentially given the Plaintiffs his permission to occupy and use the land by signing the *Warranty Deed.* To be hostile, in the adverse possession sense, is to take some action adverse to the interest of the true owner. *Double J Farm Lands, Inc. v. Paradise Baptist Church,* 999 So. 2d 826 (Miss. 2008). In other words, hostile use can be easily distinguished from "permissive" use. Mississippi cases hold that possession with permission of the record owner can never ripen into adverse possession until there is a positive assertion of a right hostile to the record owner, which is made known to him. *Johnson v. Black,* 469 So. 2d 88, 91 (Miss. 1985). Any permissive holding, by one claiming title to land by adverse possession should be deducted in computing time to acquire title. *Meyer v. Sea Food Co.,* 136 Miss. 868, 101 So. 702 (1924). Mrs. Young even testified that she felt like she had permission to use the disputed property after the signing of the *Warranty Deed.*

III. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE PLAINTIFFS/APPELLEES PROVED BY CLEAR AND CONVINCING EVIDENCE THAT, BY THEIR SPECIFIC ACTIONS, THEY MAINTAINED THE EXCLUSIVE, COMPLETE, ACTUAL, NOTORIOUS, HOSTILE, ADVERSE, CONTINUOUS, UNDISPUTED AND PEACEFUL POSSESSION, OWNERSHIP AND CONTROL OF THE DISPUTED PROPERTY, FOR 10 YEARS, ENTITLING THEM TO TITLE OF THE DISPUTED PROPERTY THROUGH THE THEORY OF ADVERSE POSSESSION, PURSUANT TO MISS. CODE ANN. § 15-1-13(1)?

Alternatively, even if this Court affirms the Trial Court's overruling of the Defendants' *Motion in Limine* and would allow evidence and testimony regarding the

Plaintiffs' alleged use of the disputed property for the time period before the Trial Court voided the 1996 *Warranty Deed*, the Plaintiffs still failed to meet their burden of proof, by clear and convincing evidence, that, by their specific actions, they maintained the exclusive, complete, actual, notorious, hostile, adverse, continuous, undisputed and peaceful possession, ownership and control of the disputed property, for 10 years, entitling them to title of the disputed property through the theory of adverse possession, pursuant to Miss. Code Ann. § 15-1-13(1).

General Rules

Miss. Code Ann. § 15-1-13(1) is the general adverse possession statute and states as follows: "ten (10) years' actual adverse possession claiming to be the owner for that time of any land uninterruptedly continued for ten (10) years by occupancy, decent, conveyance, or otherwise, in what ever way such occupancy may have commenced or continued, shall vest in every occupant or possessor of such land a full and complete title, . . ." Miss. Code Ann. § 15-1-13(1)(1972). From this statute, a six element test has been extracted as the Mississippi Supreme Court has stated 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 10 years; (5) exclusive; and, (6) peaceful. *Rice v. Prichard*, 611 So. 2d 869 (Miss. 1992).

As contemplated by the statute, each of the six elements must operate together, continuously for an excess of ten years. Importantly, the Plaintiffs claim to adverse possession begins on July 12, 1996, the date they first came under a claim of ownership by being the Grantees of the *Warranty Deed*; therefore, the statute of limitations on an adverse possession claim was not put into motion until that date, and any actions prior to that date, including the survey and burning of the "old house" would not be

considered acts of possession as they were performed prior to the statute of limitations on the adverse possession claim being put in operation.

Clear and Convincing Evidence Standard

The burden of proof is on the adverse possessor, in this case the Plaintiffs, to show by clear and convincing evidence that each element of adverse possession is met. *Double J Farm Lands, Inc. v. Paradise Baptist Church*, 999 So. 2d 826 (Miss. 2008). This includes clear proofs of acts and conduct fit to put a person of ordinary prudence, and particularly the true owner, on notice that the estate in question is actually, visibly and exclusively held by a claimant in antagonistic purpose.

Clear and convincing evidence has been defined as follows:

> 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.

Moran v. Fairley, 919 So. 2d 969, 975 (Miss. Ct. App. 2005) (quoting *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 960 (5th Cir. 1995)). Without a doubt there is a significant difference between a fact finder's evaluation of a petitioner's evidence under a clear and convincing evidence standard vis-à-vis a preponderance of the evidence standard. As a matter of common sense, clear and convincing evidence is a standard or persuasion higher than the ordinary preponderance standard. *Levi v. Mississippi State Bar*, 436 So. 2d 781, 783 (Miss. 1983). In fact, "clear and convincing evidence is such a high standard [of proof] that even the overwhelming weight of the evidence does not rise to the same level." *Moran* at 975 (citing *In re C.B.*, 574 So. 2d 1369. 1375 (Miss. 1990)).

Essentially, the question is not whether the fact finder thinks the Plaintiffs have proven their case for adverse possession, but whether the evidence of adverse

possession was so clear that no hypothetical, reasonable fact finder hearing the proof could conclude otherwise. *Haygood v. First Nat. Bank of New Albany*, 517 So. 2d 553 (Miss. 1987).

Under Claim of Ownership

A mere claim of title to land, unaccompanied by actual adverse possession, will not bar the true owner. *Leavenworth v. Reeves,* 106 Miss. 722, 64 So. 660 (1914). The question is whether the acts by the adverse possessor are sufficient to "fly his flag" over the land and to put the record title holder on notice that the land is being held **under an adverse claim of ownership**. *Johnson v. Black*, 469 So. 2d 88, 90-91 (Miss. 1985) (Emphasis added).

At the trial of this matter, the Plaintiffs brought this Court's case of *Avera v. Williams* to the Trial Court's attention. Plaintiffs assert that this case should "carry the day" in regards to the voided July 12, 1996 *Warranty Deed* operating to give the Plaintiffs "color of title" to sustain a claim by adverse possession; however, as set forth in more detail in Section II. above, the *Avera* case states that a deed to a homestead, in which a grantor's wife did not join, though void, is available as color of title to sustain a claim by adverse possession as against third persons. *Avera v. Williams*, 81 Miss. 714, 33 So. 501 (1903) (Emphasis added) (referring also to "third persons" as "strangers"). Of course, the Defendants in this case, Don and Carol Greenwood, were no strangers at all, and in fact, Don Greenwood was the Grantor under the voided *Warranty Deed.* A grantor is not a "third person" to the deed transaction. Instead, Mississippi case law recognizes the proposition that, **so long as the grantee occupies property by virtue of covenant in deed, its possession is not adverse to the grantor**. *Washington v. Crowson*, 222 So. 2d 137 (Miss. 1969) (Emphasis added). Simply put,

the possession of the property in that event, which is identical to the subject case, would not be adverse to the Grantor, Don Greenwood.

Furthermore, the Plaintiffs rely on their payment of property taxes, for at least 8 out of the 10 years, to further show that this element has been met; however, Courts have consistently and repeatedly held that, "the payment of taxes is but one factor as to possession and whether an adverse possessor has paid property taxes on the land in controversy is not conclusive of the claim of ownership." *Buford v. Logue*, 832 So. 2d 594, 602 (Miss. Ct. App. 2002) (Citing a plethora of cases including *Leavenworth v. Reeves*, 106 Miss. 722, 64 So. 660, 661-662 (1914) and *Houston v. U.S. Gypsum Co.*, 652 F.2d 467, 474 (5th Cir. 1981)).

Actual or Hostile

The actual or hostile occupation of land necessary to constitute adverse possession requires a corporeal occupation, accompanied by a manifest intention to hold and continue to hold the property against the claim of all other persons, and adverse to the rights of the true owner. *Magee v. Magee*, 37 Miss. 138, 153 (1859). "Actual" possession, for purposes of adverse possession, is effective control over a finite area of land, evidenced by things visible to the eye or perceptible to the senses. *Weyerhousing Management, LLC v. Haywood Properties, LP*, 978 So. 2d 684 (Miss. 2008). It includes control over land and intent to exclude others except with occupancy's consent. *Norris v. Cox*, 860 So. 2d 319 (Miss. 2003). To be "hostile", in the adverse possession sense, is to take some action adverse to the interest of the true owner. *Double J Farmlands, Inc. v. Paradise Baptist Church*, 999 So. 2d 826 (Miss. 2008). In other words, hostile use can be easily distinguished from "permissive use." Mississippi cases hold that possession with permission of the record owner can never

ripen into adverse possession until there is a positive assertion of a right hostile to the record owner, which is made known to him. *Johnson v. Black*, 469 So. 2d 88, 91 (Miss. 1985). Therefore, any permissive holding by one claiming title to land by adverse possession should be deducted in computing time to acquire title. *Meyer v. Sea Food Co.*, 136 Miss. 868, 101 So. 702 (1924).

Furthermore, so long as the grantee occupies the property by virtue of covenant in a deed, its possession is not adverse to the grantor. *Washington v. Crowson*, 222 So. 2d 137 (Miss. 1969). Simply put, the possession of the property in this event would not be adverse to the grantor. Until the grantee in the deed brought to the attention of the land owner notice that the grantee claimed the land in some method hostile and adverse to the covenant of the deed, adverse possession could not be established. *Id.* (Citing numerous cases including *Smith v. Cunningham*, 79 Miss. 425, 30 So. 652 (1901); *Barron v. Federal Land Bank*, 182 Miss. 50, 180 So. 74 (1938); *Morgan v. Collins School House*, 160 Miss. 321, 133 So. 675 (1931); and, *Day v. Cochran*, 24 Miss. 261 (1852)).

Although the Trial Court denied the Defendants' *Motion in Limine* seeking to limit and exclude any evidence or testimony of adverse possession alleged to have occurred prior to December 5, 2007, the date of the Trial Court's voiding the *Warranty Deed*, the grounds raised in support of that Motion and argued in Section II. above are relevant to the analysis under this element. In the present case, Don Greenwood signed a *Warranty Deed* attempting to convey the subject property to the Plaintiffs on July 12, 1996. (R. p. 55). This Deed was properly filed in the land records of Winston County in Deed Book 234 at Page 156. This Deed, showing the Plaintiffs to be record owners of the subject property, remained in the land records of Winston County until the December 5,

2007 Order of this Court voiding the *Warranty Deed* for lack of spousal signature on the homestead property of the grantor, pursuant to Mississippi Code Annotated § 89-1-29 of 1972. (R. p. 58). It defies logic that the Plaintiffs can now assert a claim to this property adverse to that of the true owners, if they themselves were on record as the "owners", during this time period. Any claim of adverse possession by the Plaintiffs could not have possibly been made until after this Court's December 5, 2007 Order voiding the *Warranty Deed.* To reach any other conclusion would circumvent and negate said Order and Miss. Code Ann. § 89-1-29.

Alternatively, if the Court determines that the Defendants remained the "true owners" of the disputed property during the time period between July 12, 1996 and December 5, 2007, the Plaintiffs still fail to meet this element because they never actually occupied effective control over the property, as could be evidenced by things visible to the eye or perceptible to the senses. Specifically, Don Greenwood, Carol Greenwood and Tessie Higginbotham each testified at trial that they had never, not one single time, seen either of the Plaintiffs using the disputed property, in any manner whatsoever, during the relevant time period. (Tr. pp. 212, 285, 329, 335). Furthermore, Ms. Young testified that at no point, during the relevant period, did she ever cultivate the soil, cut timber, sell timber, lease mineral rights, lease hunting rights, hunt, plant a garden, build a house, build a fence, build a pond or make any other improvements whatsoever to the disputed property. (Tr. pp. 114-115). Furthermore, there is no evidence or testimony in the record that the Plaintiffs ever built a physical structure of any kind, fertilized trees, maintained the boundaries, posted the property, grazed cattle, operated a business, stored various items of personal property or any other types of improvements either. There is virtually nothing on the property that would visually

allow others to know of the Plaintiffs occupation, if any. And, as set forth above, any use of the property by the Plaintiffs would not have been adverse to Don Greenwood, the Grantor in the *Warranty Deed.*

Open, Notorious and Visible

The purpose of the "open, notorious and visible" element of an adverse possession claim is to place the true owners and the general public on notice of the adverse possessor's hostile occupation through clear and visible indicators of their occupation of the property. *See for example, Apperson v. White,* 950 So. 2d 1113 (Miss. Ct. App. 2007). But in the subject case, Plaintiffs wholly failed to conduct any possessory acts which would have been easily discoverable by the Defendants or the general public to "visually" notify the world of their occupation. As previously referenced herein, there were no fences, no crops, no cultivation of the soil, no structures, no improvements, no pond, no hunting, no timber cutting or any other clear and visible indicators showing the Plaintiffs occupation of the property. (Tr. pp. 114-115). In fact, the testimony shows that the Plaintiffs never maintained a residence on the disputed property, lived several hundreds of miles away during the entire, relevant time period and only came to Winston County sporadically, but there existed nothing visible to notify the world of their hostile occupation. (Tr. pp. 110-120).

Continuous and Uninterrupted Use for Over Ten Years

The Defendants acknowledge that the time period between the date of the voided *Warranty Deed,* July 12, 1996, until August 30, 2006, the date in which Barbara G. Jones, Sue G. Livingston and Tessie G. Higginbotham first put the Plaintiffs on notice that their might be a defect in the *Warranty Deed* and the transfer of land, constitutes a period of time in excess of ten years; however, the testimony elicited at the trial of this

matter certainly shows that the Plaintiffs did not "continuously use" the property during this entire time period. Under Mississippi law, regarding title to land and adverse possession, the adverse possessor must ordinarily exercise usual acts of ownership such as, making useful improvements, continually residing on the land, cutting timber, cultivating the soil, or otherwise using the land in a way a reasonable land owner would use his property. *Houston v. U.S. Gypsom Co.*, 652 F.2d 467 (5th Cir. 1981). Furthermore, Mississippi law clearly sets forth that sporadic use of another property does not constitute open and notorious possession for purposes of an adverse possession claim. *Ellison v. Meek*, 820 So. 2d 730 (Miss. 2002).

In the subject case, Ms. Young testified that she never maintained a residence on the disputed property, lived several hundreds of miles away during the entire, relevant time period and only came to Winston County sporadically. (Tr. pp. 110-113). Certainly, the facts elicited at the trial of this matter clearly illustrate that the Plaintiffs have wholly failed to show that they exercised the usual acts of ownership with the disputed property, for each month, for each year, of the relevant time period. In fact, from 1997-2006, the only things certain and uncontradicted, regarding the Plaintiffs use of the property, is that they paid the property taxes for the majority of those years and obtained an E-911 address on the property in 1999; however, that is hardly an exhibition of the usual acts of ownership and hostile occupation of property.

Exclusive Use

"Exclusive possession", as an element of adverse possession, is an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimants conduct must afford an unequivocal indication that he is exercising

dominion of a sole owner. *Weyerhousing Management v. Haywood Properties, LP*, 978 So. 2d 684 (Miss. 2008).

In the present case, the Plaintiffs made no effort to attempt to build any type of boundary fence or other barriers to keep other people off the subject property, particularly Don Greenwood, who owns all surrounding and adjoining property. (Tr. p. 115). In fact, Don Greenwood continued to use the subject property as his own, during the time period of 1996 – 2006, by creating a 150 foot long road across the disputed property and into the Greenwood property, along with a new culvert and widening of the gravel road so that Winston County and Joe McGee Construction Company could drive dump trucks, bulldozers and other pieces of heavy equipment across the disputed property to get dirt out of a pit located on Mr. Greenwood's adjoining property, located west of the disputed property. (Tr. pp. 145, 285-289, 291, 297). Mr. Greenwood traveled on and across the disputed land continuously, at least once a week, during this time. (Tr. pp. 285-289). Additionally, Don Greenwood testified that he hunted on the disputed property and bush hogged the disputed property on multiple occasions, during the relevant time period. (Tr. pp. 288-290).

Moreover, the Plaintiff never made any attempts to prevent Don Greenwood from using the property until after litigation was commenced, when the Plaintiffs, or their agents, placed "Posted – No Trespassing" signs on said road. (Tr. p. 120).

The Mississippi Supreme Court has stated that "[i]t is well settled that joint use of property is insufficient to establish adverse possession." *Gadd v. Stone*, 459 So. 2d 773, 774 (Miss. 1984) (Finding that the evidence was insufficient to support finding of hostile and exclusive possession for a period of ten years as required for adverse possession, where adverse possessors and record title holders both used road for access to their

lands and adverse possessor did not direct title holders to stop using the road until less than ten years before suit).

Family Relationships

As discussed in the Statement of the Case: Facts Section above, this adverse possession case involves a dispute between family members over the ownership of land that had been in the family for decades. The Mississippi Supreme Court has established that, when a close family relationship is involved, proof of adverse possession is not ordinarily as easily established as when the parties are strangers. *Cleveland v. Killen,* 966 So. 2d 848 (Miss. 2007).

Certainly, the Plaintiffs have wholly failed to meet their burden of proof, by clear and convincing evidence, that each and every element of adverse possession of this two acre tract of family property has been met.

CONCLUSION

It defies logic and long standing Mississippi Case law to allow a Grantee to "occupy" land as a result of a *Warranty Deed* which is later declared void, to then assert a claim of adverse possession over said land against the Grantor of the *Warranty Deed,* since there is no antagonistic purpose of such "occupation" during the period of time between the signing of the Deed and the voiding of the Deed. Simply put, any acts of possession or use of the property, during that time period, would not be adverse or hostile to the Grantor. But, even if this Court disagrees with that position, the Plaintiffs herein have wholly failed to meet their burden of proof, by clear and convincing evidence, as any use they might offer would be limited, sporadic, unoccupied, non-hostile, non-continuous and non-exclusive. Accordingly, the Defendants respectfully

request that this Honorable Court enter an Opinion reversing the Trial Court's ruling under both Issues I and II on the basis asserted herein.

Respectfully Submitted, this the 13th day of January, 2011.

DON AND CAROL GREENWOOD

BY: _____

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the *Greenwood Appellants' Principal Brief* has been forwarded via regular United States Mail, postage pre-paid, to the following addresses:

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