IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2011-CA-00560

RIVERVIEW DEVELOPMENT COMPANY, LLC — **APPELLANT**

VS.

GOLDING DEVELOPMENT COMPANY, LLC — **APPELLEE**

APPEAL FROM THE CHANCERY COURT OF WARREN COUNTY, MISSISSIPPI CAUSE NO. 2008-392 GN

BRIEF OF APPELLEE GOLDING DEVELOPMENT COMPANY, LLC

(Oral Argument Not Requested)

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CERTIFICATE OF INTERESTED PARTIES

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

1. Lewis Miller, Jr., owner of Riverview Development Company, LLC
2. Riverview Development Company, LLC, appellant
3. William M. Bost, Jr., counsel for Riverview Development Company, LLC
4. Jerome C. Hafter, R. Gregg Mayer, Phelps Dunbar, counsel for Riverview Development Company, LLC
5. Gene D. Berry, Frank Dantone, Henderson Dantone, P.A., Blake Teller, Teller Hassell & Hopson, counsel for Golding Development Company, LLC
6. Steve Golding, owner of Golding Development Company, LLC
7. Golding Development Company, LLC, appellee
8. The Honorable Jane Weathersby

So certified this the 11 day of April, 2012.

Gene Berry

Gene D. Berry

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STATEMENT REGARDING ORAL ARGUMENT

The issues raised by the Appellant, Riverview Development Company, LLC, are governed by clearly established legal principles and oral argument is not necessary.

STATEMENT OF THE ISSUES

I. The Chancery Court properly found that the City of Vicksburg did not "reacquire" by adverse possession Parcels "A" and "B" it conveyed by deed in 1926.

II. The Chancery Court properly found that Golding Development owns Parcels "A" and "B".

III. The Chancery Court properly allowed evidence of the statutorily-mandated appraisals related to the sale of land by a municipality.

IV. There were no errors that warrant reversal and remand for a new trial.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the Chancery Court of Warren County, MS, Cause No. 2008-392 GN. Appellant, Riverview Development Company, LLC ("Riverview"), filed a Complaint for Declaratory Judgment, to Quiet and Confirm Title and Cancel and Remove Claim or Cloud. (C.P. 8).[1] This Chancery suit was a reaction by Riverview to a Warren County Circuit suit filed in 2008 by Golding Development Company, LLC ("Golding") against Lewis Miller, Jr., and Riverview for trespass and damages to Golding's land.

After almost two years of litigation, Riverview amended its Compliant to assert a novel theory of adverse possession. Under its unprecedented theory, the City of Vicksburg conveyed away ten (10) acres (Parcels "A" and "B") in 1926, but somehow re-acquired the land by adverse possession even though the City **never** claimed to own the land. There was no adverse possession. Under this flawed theory, the City conveyed the ten (10) acres to Riverview along with other land in a 2004 Quitclaim Deed. Riverview made this novel argument even though the City's 2004 Quitclaim Deed to Riverview does **not** describe the ten (10) acres (Parcels "A" and "B"). The Quitclaim Deed conveyed a different ten (10) acres of land the City actually owned. The Honorable Trial Judge correctly dismissed the suit and rightly found that Golding owned the land.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On December 30, 2008, Riverview filed the Chancery Court case against Golding. (C.P. at 8). The Complaint included an incorrect deraignment of title whereby Riverview purported to own

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[1] The citations in this brief are as follows: Clerk's Papers "C.P. Vol. __ at __"; Transcript "T. Vol. __ at __"; Trial Exhibits "Ex-__"; Riverview Record Excerpts "Riverview R.E. __"; Golding Record Excerpts "Golding R.E. __".

legal title to the ten (10) acres (Parcels "A" and "B"). (C.P. Vol. I at 10-13). Golding filed an Answer and Counterclaim which included a valid deraignment of its title to Parcels "A" and "B". (C.P. Vol. I at 93). Golding also asserted that the suit was barred by a final judgment in a prior lawsuit *National City Bank, NA v. Miller Materials, Inc.*, Cause No. 2:03-0526. *Id.*

On August 10, 2010, after the case had been pending for almost two years, Riverview sought leave to amend its Complaint to claim title to the ten (10) acres by adverse possession. (C.P. Vol. IV at 525). Over Golding's objection, the Trial Court allowed the amendment. (C.P. Vol. V at 616). The Amended Complaint was filed along with a list of exhibits A-P thereto. (C.P. Vol. V at 619-633). Golding answered and asserted a Counterclaim (C.P. at 634) to which Riverview failed to respond.

The case proceeded to trial on January 26, 2011. Riverview called several witnesses including John Palmerton, a surveyor, Wendall Moore, James Hoben, James Price, Don Miller, Jr., Lawrence Leyens and Lewis Miller, Jr.. Riverview did **not** call James Sherrard, an attorney and Riverview's designated expert witness. After two days of testimony, Riverview rested and Golding made a motion under Rule 41(b), MRCP, which the Trial Court granted. (T. Vol. IV at 493). The Trial Court entered its Findings on January 28, 2011. (C.P. Vol. V at 727). A separate Final Judgment was entered. (C.P. Vol. V at 37). Riverview filed a Post-Trial Motion on February 14, 2011. (C.P. Vol. V at 741). The Trial Court denied the Post-Trial Motion by Order on March 7, 2011. (C.P. Vol. VI at 800). Riverview appealed.[2]

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[2] Riverview is totally confused on Rule 41(b), MRCP. Riverview cites *Camacho v. Chandeleur Homes, Inc.*, 862 So.2d 540, 542 (Miss. App. 2003) arguing that a Rule 41(b), MRCP, dismissal should be granted "reluctantly." That case concerned a pre-trial dismissal as a sanction for failure to prosecute the case. *Id.* at 541. Riverview fails to distinguish the elementary difference between a dismissal for failure to prosecute and a dismissal at the close of plaintiff's case for lack of proof. This Court has never applied a "reluctant" standard to a dismissal at the close of plaintiff's case. Further, the substantiated evidence/manifest error standard applies. *Stewart v. Merchants Nat'l Bank*, 700 So.2d 255, 259 (Miss. 1997)

III. STATEMENT OF THE FACTS

I. FACTUAL BACKGROUND

a) THE 1926 DEED FROM THE CITY OF VICKSBURG CONVEYED PARCELS "A" AND "B" TO GOLDING'S PREDECESSOR-IN-TITLE.

In 1922, the City of Vicksburg leased acreage adjacent to the Mississippi River to the Inland and Coastwise Waterways Service ("Inland"), a federal agency. (Ex. P-6). The lease was for fifty years and used a detailed metes and bounds description covering approximately 27 acres. (Ex. P-6). The rent was $1,000 per year. The approximate perimeter of the City lease property is depicted by the area outlined in blue on Riverview's aerial photograph Exhibit P-1. (Riverview R.E. 15).

In 1926, the City conveyed about forty (40) acres in this area to the Yazoo and Mississippi Valley Railroad ("YMVRR"). (Deed, Ex. P-7,Book 166, Page 136). The approximate perimeter of the land conveyed by the City to YMVRR is depicted by the area outlined in gold (or yellow) on the aerial photograph, Riverview Ex. P-1. (Riverview R.E. 15). This acreage is also defined in a 1993 Survey by Joe Strickland, Professional Land Surveyor. (Ex. P-23). (*See also*, Ex. P-29). This conveyance **included** about ten (10) acres of the land subject to the lease to Inland. The 1926 deed referred to the ten (10) acres as Parcels "A" and "B". (See page 2 of Deed Ex. P-7; Book 166 at 139). Parcels "A" and "B" are depicted in the cross-hashed area on Riverview Ex. P-1. (Riverview R.E. 15). Parcels "A" and "B" are also identified on Golding R.E. 1, a copy of the 1993 Strickland Survey. (C.P. Vol. III at 308).

(the judge should consider "the evidence fairly" and "dismiss the case if it would find for the defendant."). The dismissal is a finding of fact. *Ainsworth v. Callon Pet. Co.*, 521 So.2d 1272, 1274 (Miss. 1987); *Milligan v. Milligan*, 956 So.2d 1066, 1071 (Miss. App. 2007) ("Involuntary dismissals are rightly granted during a non-jury trial" under Rule 41(b) "at the close of plaintiff's case-in-chief for failure to show a right to relief.").

In the 1926 Deed, the City "excepted" Parcels "A" and "B" from the "warranty" of the Deed because those parcels were subject to the 1922 lease by the City to the Inland. (Ex. P-7, second full paragraph on page 2 of the Deed, Book 166 at page 137).

Riverview admits that Parcels "A" and "B" were conveyed by the City to YMVRR in 1926. (Riverview Brief at 12). There is a clear chain of title from YMVRR to Golding.[3]

b) LEASES BY THE CITY OF VICKSBURG AFER THE 1926 DEED

Riverview claims that after the 1926 Deed "the City continued to receive lease payments for the subject property from the Waterways Service." (Riverview Brief at 6 with no cite to record). Further, without any proof, Riverview claims that "[a]t that time, the Waterways Service and not YMVRR, occupied Parcels "A" and "B". (Riverview Brief at 6). Riverview continues to speculate that "the Waterways Service and its assignees continued to pay the City rent under the lease until 1951...". (Riverview Brief at 6). The 1926 Deed to YMVRR recognized that the conveyance of Parcels "A" and "B" was subject to the fifty-year lease. (Ex. P-7). Inland would have paid $1,000 per year for approximately 27 acres. Parcels "A" and "B", ten (10) acres, were only a part of the lease acreage.

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[3] In its brief, Riverview attempts to disguise its inconsistent allegations. Riverview states on appeal "Here, decades after the City of Vicksburg in 1926 conveyed by warranty deed the subject property (a conveyance which has never been denied),..." (Riverview Brief at 9). Riverview forgot its original Complaint where it represented, "but since the City of Vicksburg **never conveyed** the remaining part of the property claimed by Defendant..." (C.P. Vol. I at 14). Riverview flat out alleged "since the City reserved and retained the 'overlap' property from its deed to A&VRR [sic]..." (C.P. Vol. I at 14).

The 1926 deed to YMVRR called for a $5,000 payment in the future when Inland released Parcels "A" and "B" from the lease. Riverview originally took the position that Parcels "A" and "B" were not conveyed in 1926. Riverview then realized that it was wrong because this provision did not effect the transfer of title to Parcels "A" and "B". The conveyance was **not** conditioned on a later payment and there was no reverter clause in the deed. As Riverview has now repeatedly admitted, Parcels "A" and "B" were conveyed in 1926 to YMVRR. (Riverview Brief at 12). Riverview still argues that there was no proof the $5,000 was paid so that the railroad could "acquire clear title." (Riverview Brief at 6). This statement is squarely inconsistent with Riverview's admission that title was transferred. Riverview cites no authority on this point. The $5,000 payment provision is simply irrelevant.

In 1951, Inland terminated the fifty-year lease. The City then entered into a lease with Anderson-Tully Company for 20 years at $1,000 per year for the same acreage. (Ex. P-24). The parties used the same metes and bounds legal description that was used in the 1922 lease by the City to Inland. (Ex. P-24 at p. 1-2). There is absolutely no proof that either Anderson Tully or the City was aware that the detailed metes and bounds description in the lease included Parcels "A" and "B" owned by the YMVRR. Riverview put on no proof that the City knowingly leased to Anderson-Tully the ten (10) acres it had sold in 1926 to YMVRR. Riverview put on no proof that the YMVRR (and its successors-in-interest) received **actual notice** that the City cancelled the Inland fifty-year lease and entered into a new lease with Anderson-Tully which covered Parcels "A" and "B".

The undisputed fact is that the City used the same legal description that it had for the acreage and did not go to the trouble of creating a new metes and bounds legal description for the seventeen (17) approximate acres it still owned.

The City continued to enter into long-term leases which used the 1922 metes and bounds lease description. There were renewals to Anderson-Tully in 1969 and 1993. (Ex. P-8 and P-13). Each time the lease was for $1,000 per year for the acreage. Again, there was no proof that the City was aware the lengthy metes and bounds description included Parcels "A" and "B" and no proof that the railroad or its successors-in-interest were notified that the City claimed to own Parcels "A and "B".

In 1975, the Illinois Central Gulf Railroad ("ICGRR"), successor-in-interest to the YMVRR, conveyed the land to Anderson-Tully. (Ex. P-10, Book 536, page 113). The Deed to Anderson Tully attached a survey by E. C. Burkhardt, Registered Surveyor, that was filed of record with the deed. The Survey specifically shows Parcels "A" and "B" as being conveyed by ICGRR to Anderson-Tully. (Ex. P-10). Anderson-Tully acquired fee title to the real property including Parcels "A" and

"B". The 1975 Survey plainly shows the real property going all the way past the top bank of the Mississippi River on the southwestern border of the land. Anderson Tully owned the land (including Parcels "A" and "B") until it conveyed to American Gaming Company by Deed dated March 28, 1994. (C.P. Vol I at 45). Anderson Tully also assigned to American Gaming its interest in the 1969 lease from the City. American Gaming hoped to develop a river-front casino and wanted not only fee-title to the Anderson-Tully land, which included Parcels "A" and "B", but also the additional river-front acreage under the City lease to Anderson-Tully.

Riverview argues that Anderson-Tully and then American Gaming continued to pay the $1,000 per year rent under the City lease. (Riverview Brief at 7). Riverview fails to point out that the lease land included the additional 17 acres beyond the ten (10) acres included in Parcels "A" and "B". Again, there is no proof that the City ever realized that the metes and bounds lease description included Parcels "A" and "B". Anderson-Tully got legal title to Parcels "A" and "B" in its Deed in 1975. (Ex. P-10).

American Gaming defaulted on a deed of trust to National City Bank, N.A. (hereinafter "National City") and National City foreclosed on the former YMVRR/Anderson-Tully land. This led to the Substituted Trustee's Deed to National City (Book 1066, page 418) and the later purchase of the land by Golding from a successor-in-interest of National City.

c) GOLDING HAS A CLEAR CHAIN OF TITLE TO PARCELS "A" AND "B"

On November 26, 2007, Golding purchased the approximate 40 acres formerly owned by the YMVRR, Anderson-Tully and American Gaming adjacent to the Mississippi River for the purpose of developing an office complex on the Mississippi River for its barge company. Golding has clear chain of title to the land including the ten (10) acres at issue (Parcels "A" and "B").

1. Vicksburg Wharf and Land Company conveyed to the City of Vicksburg by Deed dated November 4, 1921, Book 149, Page 292 (Ex. P-5);

2. City of Vicksburg conveyed to The Yazoo Mississippi Valley Railroad ("YMVRR") by Deed dated June 28, 1926, Book 166, Page 136 (Ex. P-7);

3. YMVRR conveyed to Illinois Central Railroad ("ICRR") by Deed dated July 1, 1946, Book 256 Page 209 (Ex. P-17).[4]

4. The ICRR later became the Illinois Central Gulf Railroad ("ICGRR") by way of merger and executed a conveyance of all its real property to ICGRR, Book 493, Page 45;[5]

5. The ICGRR conveyed to Anderson-Tully by Deed dated June 23, 1975, Book 536, Page 113 (Ex. P-10);

6. Anderson-Tully conveyed to American Gaming Company by Deed dated March 28, 1994, Book 1006, Page 298 (Ex. G to Riverview Complaint, C.P. Vol. I at 45);

7. National City Bank of Minneapolis, N.A., obtained title through a Substituted Trustee's Deed dated January 24, 1996, Book 1066, Page 418 (Ex. J to Riverview Amended Complaint, C.P. Vol. V at 633; Ex. C to Riverview's Post-Trial Motion, C.P. Vol. VI at 758);

8. Marshall and Ilsley Trust Co., N.A., successor by merger to National City Bank of Minneapolis, N.A., conveyed to Mississippi Folly LLC, by Deed dated July 18, 2005, Book 1384, Page 396 (Ex. J to Riverview Complaint, C.P. Vol. I at 73);

9. Mississippi Folly, LLC , conveyed to Golding Development by Deed dated November 26, 2007, Book 1470, Page 353 (Ex. K to Riverview Complaint, C.P. Vol. I at 81).

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[4] Riverview now admits that the land was conveyed by YMVRR to ICRR. (Riverview Brief at 6). In the Trial Court, Riverview argued that the land was not conveyed because the Deed did not specifically describe Parcels "A" and "B". (Amended Complaint, C.P. Vol. IV at 623). The Deed, however, included a clause which conveyed "any and all franchises and all property of every kind and character, real, personal, or mixed, tangible or intangible, wheresoever located, now owned by Grantor....." (Ex. P-17, Deed Book 256 at page 229). The Deed also stated "This deed conveys to Grantee all properties of Grantor located in the State of Mississippi...." (*Id.*). A conveyance of all property of grantor in a certain state is sufficient to pass grantor's title to real estate with particular description. *Moffett v. International Paper Co.*, 139 So.2d 655, 656 (Miss. 1962). The YMVRR was also merged into the Illinois Central Railroad. *Madison County Board of Ed. v. Illinois Central R.R. Co.*, 728 F.Supp. 423, 423 (S.D. Miss. 1989). This is another example of the pattern of inconsistency by Riverview.

[5] The ICRR was merged with GM&O Railroad and became the IGCRR. *Dossett v. New Orleans Great Northern RR Co.*, 295 So.2d 771, 771 (Miss. 1974); *Missouri Pacific RR Co. v. United States*, 346 F.Supp. 1193, 1201 (E.D. Mo. 1972) aff'd 409 U.S. 1094 (1973).

d) FINAL JUDGMENT IN THE NATIONAL CITY BANK LAWSUIT

In February, 2003, National City sued to enjoin Miller Materials, Inc., from using a road that crossed over the land owned by National City (which is the YMVRR/Anderson-Tully/American Gaming land now owned by Golding). (Warren Chancery Cause No. 2003-052GN). (C.P. Vol. III at 387). Lewis Miller, Jr., owner of Riverview and Miller Materials, Inc., was directly involved in the lawsuit and sat at counsel table in the trial of that case. (T. Vol. III at 389). In paragraph one of that Complaint, National City alleged that it held fee simple title to the land involved. (See Complaint, C.P. Vol. III at 387). In its Answer and Counterclaim, Miller responded to paragraph one of the Complaint that "[w]ith the exception of the easement hereinafter described, Defendant [Miller] **admits that Plaintiffs** [National City,] **are the record owners of the property** described in Exhibit "A" attached to the Complaint." (See Answer, C.P. Vol. III at 415). Exhibit "A" to the National City Complaint was the Substituted Trustee's Deed to National City, Book 1066, Page 418. (C.P. Vol. III at 408).

In its Suggested Findings of Fact and Conclusions of Law, Miller stated "Plaintiff [National City] is the "**record title owner**" of certain property described more particularly in Exhibit 2, Substituted Trustee's Deed, by which it acquired this property by foreclosure." (Proposed Findings by Miller, C.P. Vol. III at 419-20). (emphasis added). The Court entered a final judgment finding that Miller did not have a prescriptive easement and enjoining Miller from crossing the National City land. (Opinion and Final Judgment, C.P. Vol. III at 428).

The *National City* Court specifically found that Miller contacted the representative of Golding's predecessor-in-title, and offered $300,000 for the land. (Judgment, C.P. Vol. III at 432, 433 and C.P. Vol. IV at 455). The representative refused. (C.P. Vol. IV at 455). The Court found that Miller's offer to purchase the property was an "acknowledgment of a superior title." (Judgment,

C.P. Vol. IV at 455). (citing *Eddy v. Clayton*, 44 So.2d 395, 397 (Miss. 1950)) ("Moreover, the request of appellant to purchase the land, which was later repeated, is a pointed answer to any contention of an adverse claim, since it was an acknowledgment of a superior title"...). Riverview and its owner Miller are, therefore, precluded under *res judicata* and collateral estoppel from now asserting that Golding's predecessor (National City) did not have title to the land at issue in that case (which land included Parcels "A" and "B").

e) LEWIS MILLER, JR.'S (RIVERVIEW) PURCHASE OF LAND FROM THE CITY OF VICKSBURG IN 2004

During 2004, Lewis Miller, Jr. negotiated with the City of Vicksburg to purchase approximately 10 acres of land near the Mississippi River. (See Ex. D-1). By letter dated June 11, 2004, Nancy Thomas, City Attorney for Vicksburg, wrote William M. Bost, Jr., attorney for Lewis Miller, regarding the purchase. That letter stated:

> I am enclosing the three (3) appraisals received on the property that Louis Miller would like to buy from the City of Vicksburg. As we discussed, **the appraisals are based on the survey submitted to the City in 1993 which were done by Gee & Strickland. That survey indicates that the City owns approximately 10.2 acres above the top bank** and approximately 5.8 acres below top bank. The appraisers did not give any value to the acreage under the river. The average value of the three appraisals is $59,000.00.

(Ex. D-1). (emphasis added).

The letter plainly recites that the "**appraisals are based on the survey submitted to the City in 1993 which were done by Gee & Strickland.**" (Ex. D-1). (emphasis added). The appraisals have a copy of a Survey map attached. (Golding R.E. 2). (The survey is page 8 of the appraisal by W. Thornton, Part of Ex. D-1). The Survey map plainly shows the 10 acres (**shaded area**) that the City owned with the interlined **"City owns 10 acres above top bank.**" *Id.* That Survey map also shows the "**National City Bank**" acreage including Parcels "A" and"B" in the

unshaded area (white area) of the map. *Id.* The June 11, 2004 correspondence enclosed a proposed Quitclaim Deed to be executed by the City with a legal description of the property. After being approved by Riverview, the Quitclaim Deed was later signed by the City on June 21, 2004. (Book 1346, Page 190, Ex. P-11).

The Quitclaim Deed from the City to Riverview specifically described the land conveyed as bounded "**on the east by the property conveyed to National City Bank, N.A. as Trustee filed in Book 1066 at Page 418 of the Warren County, Mississippi land records....**" (Ex. P-11). (emphasis added). Therefore, the border of Riverview's land received from the City is the land described in the Substituted Trustee's Deed to National City. (Book 1066, Page 418). The Substituted Trustee's Deed to National City, as did subsequent deeds down to Golding, included a legal description of Parcels "A" and "B". *See*, Ex. P-1, Riverview R.E. 15, which documents the area outlined in gold was conveyed to Golding.

Lewis Miller, Jr., testified that when he purchased the land from the City "I had an idea of what the general areas were, **but they couldn't tell me exactly what they owned.**" (T. Vol. III at 360). (emphasis added). Riverview did not have a title search or survey performed prior to purchase from the City. (T. Vol. III at 361).

Lawrence Leyens, the Mayor for the City during 2001-2009, testified that he had discussions with Lewis Miller about acquiring City property. Leyens testified that the City cancelled the lease then held by National City for non-payment of rent. Leyens asked the City Attorney, Nancy Thomas, "to put together a deed for Lewis Miller...." (T. Vol III at 327). Nancy Thomas reported to Leyens "that it was a mess down there and that instead of spending $25,000 surveying the land, let's just do a quitclaim deed and it was basically any property the City owned between those four major land parts which were the railroad tracks, Southland Oil, Lee Street and the river." (T. Vol II at 327).

Leyens testified that a letter, dated May 26, 2009, by the City Attorney, Nancy Thomas, "indicates clearly exactly how my understanding of what we did." (T. Vol III at328).

The May 26, 2009 letter written by the City Attorney stated:

> The City understood that the property, previously subject to the lease, was between the railroad tracks and the Mississippi River, north of Lee Street and south of Southland Oil Company, **less and except whatever land the National City Bank of Minneapolis owned.** The City was not sure what it owned and did not want to expend funds to have a title search and survey done.

(C.P. Ex. P-28). (emphasis added).

Leyens testified that he did not know how much land the City owned in the area. (T. Vol. III at 330). Leyens was not involved in the drafting of the Quitclaim Deed from the City to Riverview. (*Id.* at 332). Leyens admitted that he had no personal knowledge of the boundaries of the City property. (*Id.* at 332). He never ordered a survey on behalf of the City. (*Id.*). Leyens simply "**did not know what the City owned at the time this transaction took place with Mr. Miller.**" (*Id.* at 348). (emphasis added).

Even when counsel for Riverview tried to get Mr. Leyens to say that the City owned the lease property, Leyens testified "**I can't tell you specifically what property we owned.... I'm not a surveyor, have never walked a line down there, will not be able to testify specifically what land.**" (T. Vol. III at 350). (emphasis added).

Don Miller, a cousin of Lewis Miller and employee of Riverside Construction, one of Lewis Miller's companies, testified at trial. Don Miller was an alderman for the City for four years starting in 1993. (T. Vol. II at 284).[6]

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[6] Don Miller testified that he was the point person for the Alderman as far as casino development in Vicksburg during his tenure. He testified that the City had a written agreement with Harrah's Casino, the first casino in Vicksburg, that restricted casino development on City land. (T. Vol. II at 286). Miller testified that a proper casino had to touch the Mississippi River or tributary thereof. (*Id.* at 287). Miller testified that American Gaming put forth an effort to open Gold Coast Casino on the Anderson Tully property at the foot

After he left the City and later went to work for Lewis Miller, Don Miller handled correspondence with the City regarding the land purchase in 2004. (T. Vol II at 297). Don Miller saw the appraisals on the land Riverview was purchasing from the City. (T. Vol II at 302). Miller also read the June 11, 2004 letter from Nancy Thomas, the City Attorney, to William M. Bost, Jr., attorney for Riverview, that enclosed the three appraisals and Strickland map. (*Id.* at 303).

Don Miller admitted on cross-examination that in 2004 he did not try to figure out what the City owned. ("that's what lawyers and surveyors do – not me"). (*Id.* T. Vol II at 306). Don Miller simply told his cousin Lewis Miller that he thought it was worth $60,000 for whatever the City owned. (*Id.* at 306). Don Miller confessed on cross **"nobody really knew exactly what the City owned."** (T. Vol. II at 308). (emphasis added). Don Miller repeated under oath **"The City did not know how many acres of land they owned."** (T. Vol. II at 309). (emphasis added). Don Miller further confessed **"[t]hey did not know what was there - nor did we."** (T. Vol III at 309). (emphasis added).

f) SURVEYS BY JOE STRICKLAND, PROFESSIONAL LAND SURVEYOR

In 1993 and 1994, Joe Strickland, a licensed professional land surveyor, surveyed the Anderson-Tully property being purchased by American Gaming Company. These surveys covered the land later purchased by Golding in 2007 and specifically included Parcels "A" and "B". (See Exhibits P-23 and P-29). Riverview put these surveys in evidence. (T. Vol. II at 203 and Vol. III at 375).

This Strickland Survey plat was used by the City of Vicksburg in 2004 in the purchase by Riverview from the City. (Ex. D-1). (Golding R.E. 2).

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of Lee Street or what was sometimes referred to as the "Old Mill J Property." (T. Vol. II at 287).

In 2006 Lewis Miller, Jr. hired Strickland to survey the land Riverview purchased from the City. (T. Vol. III at 368). That survey confirmed that Riverview (Miller) did **not** acquire Parcels "A" and "B" in the 2004 Quitclaim Deed from the City. (See 2006 Strickland Survey, Ex. D-5). The 2006 Survey was admitted into evidence **with no objection** by Riverview. (T. Vol. III at 419). The 2006 Strickland Survey depicted the dividing line between the land purchased by Riverview (Miller) from the City and the National City land purchased by Golding in 2007. (Ex. D-5). The boundary is the same as the 1993 survey plat and the same boundary referred in the plat used by the City in 2004 sale to Riverview (Miller). (Golding R.E. 1). The boundary is the same as the 1975 E.C. Burkhardt Survey. (Attached to P-10).

Miller also admitted that he later contacted another surveyor, Kimble Slaton, and that Slaton verbally confirmed to Miller the lines found by Strickland. (T. Vol. III at 418). Miller steadfastly ignored all the surveys.

g) RIVERVIEW TRESPASSED AND DAMAGED GOLDING'S PROPERTY

Despite having clear knowledge of what Riverview owned, in early 2008, Riverview came onto Golding's property (which Golding bought and paid for on November 26, 2007) and damaged Golding's land. Miller testified after he found out Golding purchased the National City property he was "**very unhappy with Mr. Golding.**" (T. Vol. III at 421). (emphasis added). Miller did nothing from 2004 until early 2008 when he found out that Golding purchased the land. Miller then started immediately clearing land and digging out trenches with heavy equipment on Golding's land. (T. Vol. III at 420-421). Riverview trespassed with trucks and heavy equipment and deepened a very large trench and did other significant damage. On March 5, 2008, Golding filed suit in Warren County Circuit Court against Riverview and Miller for trespass and damages.

SUMMARY OF ARGUMENT

Riverview's Appeal Brief distorts important facts and completely ignores established Mississippi real property law. The Honorable Trial Judge correctly dismissed Riverview's claims and denied Riverview's post-trial motion. Moreover, none of the alleged errors complained of by Riverview justify reversal. Rule 61, MRCP.

Riverview wrongfully claims approximately ten (10) acres of Golding's land. In 1926, the 10 acres were conveyed by the City of Vicksburg ("City") as a part of a larger tract to the railroad, one of Golding's predecessors-in-title. The ten (10) acres was referred to as Parcels "A" (5.78 acres) and "B" (5.03 acres) when conveyed by the City of Vicksburg in 1926. In November 2007, Golding purchased approximately 40 acres of land which purchase included Parcels "A" and "B". Golding has clear legal title to the real property.

In June, 2004, Riverview paid the City $60,000 for **a completely different** 10 acres of land. This land is adjacent to Parcels "A" and "B" but did **not** include Parcels "A" and "B". By statute, the City was required to get three appraisals before it sold any land. A 1993 Survey by Joe Strickland attached to the appraisals, graphically shows that the City was selling 10 acres **adjacent to** Parcels "A" and "B". (Golding R.E. 2). The legal description in the City's Quitclaim Deed to Riverview **does not** include Parcels "A" and "B". In fact, the legal description in the 2004 Quitclaim Deed incorporates the legal description of the Golding (National City) property as its border. Riverview **does not** have a deed to Parcels "A" and "B". Riverview paid for ten (10) acres but wants to get title to twenty (20) acres by this ill-conceived lawsuit

In January, 2006, Mr. Miller, owner of Riverview, hired Joe Strickland, a professional land surveyor, to survey the land he purchased from the City. Mr. Strickland's 2006 survey confirmed that Riverview **did not** acquire Parcels "A" and "B". (Ex. D-5). Miller did nothing with the land

until he found out that Golding purchased the National City land. Miller then went onto Golding's land with equipment and damaged the property. This was despite having an actual survey showing Golding owned the land.

Riverview now admits that the City conveyed Parcels "A" and "B" in 1926 but claims the City re-acquired title to Parcels "A" and "B" by adverse possession. The unprecedented adverse possession claim fails because the **City never claimed to own Parcels "A" and "B"**. Riverview did not meet the burden of proof required to show that a grantor adversely possessed land it conveyed away. The City never gave actual notice of a claim of adverse possession to its grantee and never exercised any affirmative conduct required for adverse possession.

Riverview's claim is also barred by res judicata and collateral estoppel. Lewis Miller, Jr., and Miller Materials, Inc., another entity owned and controlled by Miller, lost a Warren County Chancery Court suit (No. 2003-052GN) which sought an easement across the subject property. In that case, Miller admitted that National City, Golding's predecessor-in-title, owned the land. In fact, the Chancery Court found that Mr. Miller was barred from claiming a prescriptive easement across the real property because Miller had made an offer of $300,000 to purchase the property from National City. (Opinion and Final Judgment at p. 6 and 29; C.P. Vol. III at 432, 433; Vol. IV at 429). The Chancery Court found that under clear Mississippi law Miller's offer to purchase was an express acknowledgment of a "**superior title**" and barred his claim to a prescriptive easement across the land. (Opinion and Final Judgment at p. 29). (C.P. Vol. IV at 429). In the instant case, the Honorable Trial Judge properly found that Riverview is barred from re-litigating ownership of the same land.

ARGUMENT

I. THE TRIAL COURT PROPERLY APPLIED ESTABLISHED MISSISSIPPI LAW ON ADVERSE POSSESSION.

In its Amended Complaint, filed approximately 20 months after it filed the original Complaint, Riverview contended that the City of Vicksburg (not Riverview) had somehow adversely possessed Parcels "A" and "B". (C.P. Vol. V at 619). There are a host of reasons why this claim is baseless. First, there simply was no adverse possession under Mississippi law. The City never claimed to have owned or adversely possessed the land. Second, Riverview has no deed from the City which covers Parcels "A" and "B". The legal description in the 2004 Quitclaim Deed to Riverview clearly does not include Parcels "A" and "B". (Ex. P-11).[7]

A. The City of Vicksburg did not adversely possess Parcels A and B

It is now undisputed that the City of Vicksburg conveyed Parcels "A" and "B" to the YMVRR in 1926. (Riverview Brief at 12). The City of Vicksburg **never** claimed to own or have adversely possessed Parcels "A" and "B". The City did not claim to own **"National City Bank of Minneapolis"** land. (*See*, Ex. P-28, May 26, 2009, letter signed by Nancy Thomas, City Attorney). Riverview has no right to even make a claim of adverse possession. The Mississippi adverse possession statute provides:

> Ten (10) years' actual adverse possession by any person **claiming to be the owner** for that time of any land, uninterruptedly continued for ten (10) 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...

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[7] Riverview completely ignores this fatal error in its case. Riverview did not raise this issue on appeal. Riverview does not argue this in its brief and does not cite any authority on this point. The Honorable Trial Judge should be affirmed. Rule 28(a)(3) & (6), MRAP. *Theobald v. Nossser*, 784 So.2d 142, (Miss. 2001).

§15-1-13, Miss. Code Ann. (emphasis added).

The first of six elements of adverse possession is "(1) under a claim of ownership..." *Blackburn v. Wong*, 904 So.2d 134, 136 (Miss. 2004); *Knight v. Covington County*, 27 So.3d 1163, 1167 (Miss. App. 2010) (no proof that party occupied land "under a claim of ownership".).

The City did **not** claim to own Parcels A" and "B" after 1926 and never did any act that would constitute adverse possession. Adverse possession under Mississippi law requires affirmative conduct. The best that can be said is that the City was **not** sure what it owned. (Ex. P-28, "**The City was not sure what it owned**.....", Nancy Thomas, City Attorney). (emphasis added).

The only thing claimed by Riverview is that the City of Vicksburg accepted lease rentals of $1,000 per year on a lease of approximately 27 acres of land. Only ten (10) of the acres were Parcels "A" and "B". There is no proof that the City of Vicksburg knowingly leased Parcels "A" and "B" after the City conveyed land in 1926 to the railroad. The acceptance of lease rentals under a lease the metes and bounds legal description of which overlaps on adjoining land is **passive** conduct. *Bacot v. Duby*, 724 So.2d 410, 419 (Miss. 1998) ("accepting of payments from oil companies for surface damage did not constitute 'unequivocal notice' of an adverse claim to the property.")

When the City leased land to Anderson-Tully in 1951 and 1969, it simply re-used the complex metes and bounds description from the City 1922 lease to Inland. There was no proof that the City occupied Parcels "A" and "B". There was no proof that the City claimed Parcels "A" and "B" to be exempt from taxation as City owned land. There was no proof that Riverview paid a penny of taxes on Parcels "A" and "B" since 2004.

Importantly, the Mississippi Courts have repeatedly held that the proof required by a grantor to establish adverse possession is "**far greater than the average adverse possession case.**" *Skelton*

v. Lewis, 453 So.2d 703, 706 (Miss. 1984). (emphasis added). Here, the City was a grantor of Parcels "A" and "B" when it conveyed to the YMVRR in 1926. In *Skelton*, this Court stated:

> We, however, go further and state that in any case where the grantor claims by adverse possession all or part of the property conveyed, the proof of **actual notice** of that possession by the grantor to the grantee should be stronger than in the normal adverse possession case and should be **clear beyond a reasonable doubt**. The evidence should reveal that the grantee has been **ousted** from the property he received under the conveyance.

453 So.2d at 707. (emphasis added).

Even if the City continued to include Parcels "A" and "B" in lease descriptions, such in no way proves adverse possession by a grantor. Under Mississippi law, "continued possession of land by the grantor after execution of a deed is presumed, in the absence of substantial evidence to the contrary, to be in subordination to the title to the grantee." *Johnson v. Black*, 469 So.2d 88, 91 (Miss. 1985) (denying adverse possession claim by grantor). Here, the property was conveyed in 1926 subject to a fifty-year lease. (Ex. P-7 at page 2). Occupation of the land would be expected.

In *Skelton v. Lewis*, 453 So.2d 703, this Court stated:

> Thus the occupation of land by a grantor, after conveyance made, is presumed to be under, and in subordination to, the legal title held by his grantee, **for he is ordinarily estopped by his deed from claiming that his holding is adverse**. However, this presumption is rebuttable....

453 So.2d at 706. (emphasis added).

As to a "grantor" claiming to have adversely possessed land which he conveyed, this Court stated:

> he has the burden of proving **beyond a reasonable doubt** that the grantee had notice that the grantor was saying in effect, "**Yes, I conveyed it to you, but I did not mean it. I am keeping a part." No doubt should exist.**

Id. at 707. (emphasis added).

There is no evidence that the City gave "**actual notice**" to the railroad, Anderson-Tully or anyone that it claimed to own Parcels "A" and "B".

The City was not an "actual occupant or possessor" of the land as required by statute. In an effort to get around this obvious flaw in their theory, Riverview claims that one may adversely possess through the act of one's tenant. Riverview cites *Norris v. Cox*, 860 So.2d 319 (Miss. App. 2003). That case held that the children of claimants were not agents and could not adversely possess the property at issue. (*Id.* at 323). *Norris* did not involve a grantor claiming adverse possession.

The *Norris* case defines "agent" as "a business representative who handles contractual arrangements between the principal and third parties." *Id.* at 322. Anderson Tully was not authorized to act on behalf of the City and there was no proof of such at trial. To the contrary, ICGRR conveyed legal title to Parcels "A" and "B" to Anderson-Tully in 1975 and Anderson-Tully conveyed that land to American Gaming.

Riverview cites *Allred v. Allred*, 182 P.3d 337 (Utah 2008) where parents conveyed land to a trust for the benefit of their sons, one of whom was trustee. The parents continued to collect the rent on a lease, made alterations and repairs, **paid all taxes on the property** and **over a nine year** period **repeatedly demanded the land be deeded back.** *Id.* at 339. Here, the City did nothing to claim the land because it did not believe it owned Parcels "A" and "B".[8]

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[8] The other cases cited by Riverview are likewise not on point. In *Lendenmeyer v. Genst*, 13 So. 252 (Miss. 1893), Payne, had a chain of title to the land. *Id.* at 253. The court noted that Payne and his predecessor-in-title also leased the land for twenty-years. *Cox v. Richardson*, 191 So. 99 Miss. 1939) involved occupation under a tax title. In *Caillovet v. Martin*, 50 So.2d 351 (Miss. 1951), this court rejected a claim of adverse possession. These cases do not involve a grantor asserting adverse possession and simply do not help Riverview.

Furthermore, it is fundamental law that "the mere possession of land is not sufficient to satisfy the requirement that the adverse possessor's use be open, notorious and visible." *Dean v. Slade*, 63 So.2d 1230, 1236 (Miss. App. 2010); Vol. 10 Thompson on Real Property, §87.04 p. 101-102 (2d Ed.) ("There must be a state of mine in the possessor claiming title to the property as an adverse possessor. Mere naked possession or occupancy of realty must be deemed as being an occupancy for the benefit of the true owner. Possession should be based on a claim of ownership or title to render it adverse.").

In *Hastings v. California Co.*, 129 So.2d 379 (Miss. 1961), this Court stated:

> No continuance of occupation, no matter how long protracted, will avail **unless accompanied by claim of title**; and **every presumption of law is that the occupant hold in subordination and not adversely, to the true owner**. Not only does the law presume that he who has entered without title has done so in recognition of, and subordination to, the title of the owner, but, having affixed this prima facie presumption to his entry, it will not allow him to convert it into an adverse one except by acts which plainly demonstrate its hostile character.

129 So.2d at 385. (Emphasis added).

B. Miss. Code Ann. § 89-1-39 likewise bars "adverse possession" in this case

Section 89-1-39, Miss. Code Ann. provides:

> A conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and **shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed**. (emphasis added).

Riverview admits that the City conveyed property which included Parcels "A" and "B" in 1926. (Riverview Brief at 12). Parcels "A" and "B" were subject to a fifty-year lease when conveyed in 1926. The City is estopped to claim that a purported leasing of land which existed at the time of conveyance allowed it to reacquire title it had clearly conveyed to the railroad.

The statute is plain and unambiguous. It should be applied as written. Riverview cites *Turner v. Miller*, 276 So.2d 690 (Miss. 1973). In *Turner*, this Court held that Miller was estopped to claim a ½ interest in property he had earlier conveyed to another person by special warranty deed. *Id.* at 693. This Court held that the special warranty deed was effectively a quitclaim deed and applied the statute. (*Id.* at 692). The Trial Judge correctly applied the statute in this case as one of is reasons to reject Riverview's adverse novel possession claim.

II. THE TRIAL COURT PROPERLY CONCLUDED GOLDING WAS THE OWNER OF PARCELS "A" AND "B".

Riverview pretends as if the Honorable Trial Court was prohibited from finding that Golding was the legal owner of Parcels "A" and "B" because the Substituted Trustee's Deed to National City, (Book 1066, Page 418), Golding's predecessor-in-title, was not put "in evidence" by Golding during Riverview's case-in-chief. The Trial Court is entitled to consider admissions in pleadings and recorded deeds attached to pleadings in making its findings under Rule 41, MRCP.

There is a chain of title of Parcels "A" and "B" from the City in 1926 down to Golding. Riverview offers absolutely no contrary proof.

Riverview's original and Amended Complaints refer to the legal description in the 2004 Quitclaim Deed from the City to Riverview. (C.P. at Vol. 1, p. 8; Vol. V, p. 626). That legal description **incorporates** as its boundary the "property conveyed to National City Bank of Minneapolis, National Association, as Trustee, filed in **Book 1066, Page 418,** of the Warren County land records. ..." (*Id.*) The Deed from the Substituted Trustee to National City was cited in Riverview's original Complaint and Amended Complaint. (C.P. Vol. I, p. 12, and Vol. V at p. 627). In the original Complaint and Amended Complaint, Riverview continued with the deraignment from

National City's successor-by-merger, Marshall & Isly Trust, N.A. to Mississippi Folly, LLC down to Golding. (C.P. Vol. 1, p. 12-13; Vol. V at 627).

The very deed Riverview complains about was listed as Exhibit "J" to Riverview's Amended Complaint. (C.P. Vol. V at 633). *See*, Rule 10(c), MRCP; ("[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). *Heartsouth, PLLC v. Boyd*, 865 So.2d 1095 (Miss. 2003) (Chancery Judge properly reviewed agreement attached to pleadings). The other deeds in Golding's chain of title were listed as Exhibits to the Amended Complaint. (C.P. Vol. V at 632-33).

In *Re Extension of the Boundaries of the City of Pearl*, 365 So.2d 952, 955 (Miss. 1978), this Court stated:

> The pleadings, summons, all motions and all orders theretofore made in the case are parts of the record, prove themselves and it is not necessary to formally introduce them at the hearing. It is not necessary to introduce in evidence a part of the record in the instant case, because the court takes judicial notice of all judicial parts of the record and it is therefore already in evidence....

Id. at 955 (*quoting*, Griffith's Mississippi Chancery Practice, §572 (2d ed. 1950).

The Honorable Trial Court properly found that Golding was the owner of Parcels "A" and "B".

> Defendant acquired legal title to the property in question and other property adjoining the property in question in 2007 by title deraigned from the sale by the City to the railroad. In his chain of title is the National City Bank of Minneapolis, National Association as Trustee, said Substituted Trustee's deed being recorded in Deed Book 1066 at page 418 of the Land Records of Warren County, MS.

(Order, C.P. Vol. V at 729).

The Trial Court simply recited what is reflected by the official land records of Warren County, MS, and in pleadings and exhibits filed by Riverview.

The Honorable Trial Court also correctly found that the 2004 conveyance by the City to Riverview did **not** include parcels "A" and "B".

> The City, in exchange for $59,000.00 plus one half of the appraisal costs, sold to Plaintiff, 'All property owned by the Mayor and Board of Aldermen of the City of Vicksburg, which is located in Section 29 and 31, Township 16 North and Range 3 East....' The description continues by stating specific calls referencing other landmarks and land owners and that the property is **bounded "on the east by the property conveyed to National City Bank of Minneapolis, National Association as Trustee, filed in Book 1066 at page 418** of the Warren County, Mississippi Land Records...."
>
> That this deed was corrected twice more without changing the description of the property sold.
>
> That pursuant to *Carrere v. Johnson*, 115 So. 196, 197 (Miss. 1928), the particular description controls and therefore, the City did not convey the property in question to Plaintiff. Plaintiff bought property without a title search or survey and acted at his peril.

(Order, C.P. Vol. V at 728-29) (emphasis added).[9]

In its Post-Trial Motion, Riverview submitted a copy of the Substituted Trustee's Deed (Book 1066, Page 418) when it asked the Court to determine the boundary of the land it received from the City in the 2004 Quitclaim Deed. (C.P. Vol. VI at 758). Riverview sought relief from the Court based on the very deed of which it now complains. (C.P. Vol. VI at 744). Riverview stated in its Post-Trial Motion "while copies of these deeds were not introduced as trial exhibits, these deeds were cited in the deraignments of title set forth in pleadings, were discussed at trial, and are cited on pertinent points in the court's order findings." (C.P. Vol. VI at 744). Riverview can not complain that the Honorable Trial Court improperly considered the deed in its Findings.

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[9] In *Carrere*, this Court held "[w]e think the well-established rule that, where a general description is followed by a particular description, the particular description controls, and the general description will be rejected, applied." 115 So. at 197. *See also*, *Hines v. Krauss*, 72 So. 2d 737, 742 (Miss. 1954) ("It may constitute a sufficient description of the land conveyed to state that it is bounded by or adjoining lands belonging to named persons. Such is the rule in Mississippi.").

The Trial Court can consider recorded deeds in its own court file. *Peden v. The City of Gautier, MS*, 870 So. 1185, 1187 (Miss. 2004); *see also, Gulf City Fishers, Inc. v. Bobby Kitchens, Inc.*, 518 So.2d 661, 663 (Miss. 1988) ("It would be asinine to allow Gulf Coast Fishers to challenge the accuracy of documents which Gulf Coast Fishers itself submitted to the trial judge."); *Johnson v. Ford Motor Co.*, 354 F.Supp. 645, 646 (N.D. Miss. 1973) ("The court will take judicial notice of its own records.").[10]

The Trial Court's determination that Golding was the owners of Parcels "A" and "B" is absolutely correct. As the Trial Court correctly noted, the 1993 Survey by Joe Strickland was "introduced without objection as a full exhibit for the court's consideration." (Ex. P. 23) (Mar. 7, 2011 Order, Riverview R.E. 2). That survey set forth the boundary of Tracts "A" and "B". The Strickland Survey was used as a part of the appraisals obtained by the City in the 2004 sale of land to Riverview. (Golding R.E. 2). That survey plat showed that the City was selling approximately 10 acres adjacent to but wholly separate from Parcels "A" and "B". (Golding R.E. 1). The Trial Court specifically found that Riverview as provided with the appraisals. (Order at paragraph 14; Riverview R.E. 2). The 2006 Survey was entered in as evidence at trial with no objection and shows the same boundary. (Ex. D-5).

The overwhelming proof confirms the Honorable Trial Court's findings.

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[10] The cases cited by Riverview are not on point. In *Chamblee v. Chamblee*, 637 So.2d 850, 866 (Miss. 1994), the court found that it was error to restrict visitation when there was "virtually no evidence" that the visitation would be harmful. In *Hudson v. Vandever*, 810 So.2d 617, 621 (Miss. App. 2002), the court reversed a finding by the trial court of a default under a real estate contract. The court found that the terms of the repayment obligations under the contract were not proven with any measure of certainty and, therefore, the finding of a default was not established by complete evidence. *Id.* at 623. In *Burgess v. Trotter*, 840 So.2d 762 (Miss. App. 2003), the court affirmed the trial court's finding that there had been no adverse possession. *Id.* at 770. The court remanded the case regarding the location of "a narrow strip of land, approximately 140 yards long"referred to in the deed. *Id.*

III. THE TRIAL COURT PROPERLY ALLOWED EVIDENCE OF STATUTORILY-REQUIRED APPRAISAL DOCUMENTS.

The Honorable Trial Court properly admitted the appraisals obtained by the City of Vicksburg in connection with the 2004 sale to Riverview. The appraisals identify the property to be appraised and were statutorily mandated in the sale of land by a municipality if competitive bids were not obtained. §21-17-1, Miss. Code Ann.

The appraisals were required by state law and were properly admitted under Rule 803(8),MRE, as a public record or report. *Rebelwood Apartments, LP v. English*, 48 So.3d 483, 490 (Miss. 2010).

Moreover, the appraisals were properly admitted to show that Riverview and Mr. Miller were on notice of what land was being sold by the City and that Parcels "A" and "B" were **not** a part of the land appraised. *Noah v. General Motors Corp.*, 882 So.2d 235, 239 (Miss. App. 2004) (Reports were **not** hearsay under Rule 801(c), MRE, when offered to show notice).

Also, there was no harm in allowing the appraisals because the same information was shown by other evidence. Rule 61, MRCP. The 1993 Survey (introduced by Riverview) and 2006 Strickland Surveys showed the exact same boundaries as the plat attached as a part of the appraisal. (Ex. P-23 and D-5). The Nancy Thomas letter, Ex. P-28, said "less and except whatever the National City Bank of Minneapolis owned." *DeMeyers v. DeMeyers*, 742 So.2d 1157, 1160 (Miss. 1999) ("In particular, where a party has introduced evidence on an issue, that party may not complain about the admission of evidence on the same proposition by an opposing party.").

IV. NO OTHER ALLEGED ERROR WARRANTS REVERSAL AND REMAND FOR NEW TRIAL.

A. Riverview's expert, John Palmerton, was properly precluded from testifying as to certain opinions not disclosed before trial

Riverview asserts that the trial court "improperly excluded expert testimony that would have established the boundary lines of the subject property in conformity with Riverview's claim of ownership." (Riverview Brief at 21). Riverview grossly exaggerates the very limited testimony that the trial court correctly excluded by John Palmerton. The excluded opinions were limited and **not** disclosed prior to trial.

To preserve this issue for appeal, Riverview was required to make a proffer of the witnesses proposed testimony. MRE 103(a)(2); *Pittman v. Dykes Timber Co.*, 18 So.3d 923, 929 (Miss. App. 2009). Riverview's proffer reveals the limited nature of the opinions that were excluded.

Riverview never mentions its very limited proffer because it wants this Court to think that Palmerton had strong opinions that would have really helped Riverview' case. That is not true. Riverview's proffer on Palmerton consists of approximately four pages. (T. Vol. II at 222-226). Palmerton never gave testimony that would establish the boundary lines in conformity with Riverview's claim. The proffer by Palmerton only concerned aerial photographs taken in 1956, 1961, 1962, and 1974, and that lumber appeared to be stacked on the area of what he believed was the leased area. (T. Vol. II at222-26).

Golding submitted interrogatories to Riverview which included a Rule 26(b)(4), MRCP, expert interrogatory. (Interrogatory No. 5, see, C.P. at Vo. IV, p. 596). Riverview's original response mentioned John Palmerton, but gave no opinions. Mr. Palmerton was deposed on June 15, 2010. Later by supplemental response dated September 27, 2010, Riverview mentioned that Palmerton "has been deposed." No opinions were listed. (C.P. Vol. IV at 596).

In his deposition on June 15, 2010, Mr. Palmerton answered **"yes sir" when asked to admit that "you as a professional land surveyor cannot make a determination as to the actual location of the dividing line between the City of Vicksburg's successor and/or assigns, Riverview Development and the Yazoo Mississippi Valley Railroad's successors and assigns."** (T. Vol. II at 161). No supplemental expert interrogatory was provided by Riverview to change or alter that sworn testimony. There was no proffer that Palmerton's opinion had changed.[11]

Palmerton simply did not support Riverview's claim. Palmerton aerial, Ex. P-1, outlines the perimeter of Parcels "A" and "B" and puts the line in the same approximate location as Joe Strickland. (Riverview R.E. 15). Riverview's counsel admitted this at trial when he said "**Mr. Palmerton's ability to locate that line is the same as Mr. Slaton's or Mr. Strickland or anybody else's and they all came up with the same version of where the line ought to be."** (Review Counsel, T. Vol. II at 165). (emphasis added).

The trial court allowed Palmerton to give any testimony that had been disclosed prior to trial. The trial court correctly applied Mississippi law that if the expert testimony was not disclosed or given in his deposition, then it could not be allowed. (T. Vol. II at 174, 183, 196, 210, 213).

Riverview mentions "two CDs full of hundreds (sic) documents and 19 various exhibits at his deposition." (Riverview Brief at 22). Yet, Riverview never identifies where Palmerton disclosed the excluded opinions or gave an opinion as a professional land surveyor that the actual boundary was anywhere other than the trial court found. Riverview did not make Palmerton's deposition a part

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[11] Riverview flat our misrepresents Palmerton's testimony in its appeal brief. Riverview says "at no point did Palmerton concede he was unable to establish metes and bounds of property, draw boundary lines or other work of a licensed surveyor." (Brief at 22). That statement is false. Palmerton admitted "that you as a professional land surveyor cannot make a determination as to the actual location of the dividing line between the City of Vicksburg's successor and/or assigns, Riverview Development and the Yazoo Mississippi Valley Railroad successors and assigns." (T. Vol. II at 161).

of the record. Appellant has "the duty of insuring that the record contains sufficient evidence to support his assignments of error on appeal." *Tennessee Properties, Inc. v. Gillentine*, 66 So.3d 695, 698 (Miss. App. 2011). The deposition contained nothing that would help Riverview.

Riverview distorts the law on pre-trial disclosure. Riverview provided **no** disclosure regarding the excluded opinions. Riverview argues that since Palmerton had been deposed he could say absolutely anything at trial unless Golding had filed a motion to compel. Golding had absolutely no reason to file a motion to compel as to Palmerton. Palmerton offered no opinion that supported Riverview. (T. Vol. II at 161).

Golding had no notice of the undisclosed opinions. In *Coltharp v. Carnesale*, 733 So.2d 780 (Miss. 1999), this Court reversed and granted a new trial where an expert was allowed to testify regarding opinions not timely disclosed. This Court specifically rejected the argument that the appellant should have filed a "motion to compel" in order to be able to strike the expert's testimony. *Id.* at 786. The Court noted that where the experts prior disclosure provide no notice of the opinion at issue, no motion to compel was necessary. *Id.* See also, *Palmer v. Volkswagen of Am., Inc.*, 904 So.2d 1077, 1090 (Miss. 2005) (expert properly excluded where opinions were not provided; no motion to compel was necessary).

By filing expert interrogatories, Golding "acquired a procedural right" to the disclosure of expert witness information from Riverview "sufficiently in advance of trial to afford [Defendant] a reasonable opportunity to prepare and cross-examine the evidence to be offered." *Coltharp v. Carnesale*, 733 So.2d 780, 786 (Miss. 1999). **By waiting until trial** to disclose this information, Riverview violated Golding's procedural rights. *Harris v. General Host Corp.*, 503 So.2d 795, 797 (Miss. 1986) ("Procedural rights created under this rule must be taken seriously.").

This Court has been quite clear about the necessity of a party providing full expert disclosure. *T. K. Stanley, Inc. v. Cason*, 614 So.2d 942 (Miss. 1993); *Blanton v. Board of Supervisors of Copiah County, MS*, 720 So.2d 190, 196 (Miss. 1998). *Square D Co. v. Edwards*, 419 So.2d 1327, 1329 (Miss. 1982), (pretrial discovery of expert opinions was necessary to prevent "trial by ambush and surprise"; "[d]iscovery of expert opinion must not be allowed to degenerate into a game of evasion."); *Nichols v. Tubb*, 609 So.2d 377, 384 (Miss. 1992) ("This means that the *substance* of *every* fact and *every* opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial.").[12]

B. The Trial Court properly found a "scrivener's error" in lease agreement between the City and Anderson-Tully

Riverview complains about the Trial Court's finding that the City continued to include "the property previously sold, Parcels "A" and "B", with other property being leased by scrivener's error." (Opinion at ¶ 5 and 6). (Riverview R.E. 2).

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[12] Riverview cites *Warren v. Sandoz Pharmaceuticals Corp.*, 783 So.2d 735 (Miss. App. 2000) in support of its argument that it is somehow is excused from the consequences of its failure to disclose because Golding did not file a motion to compel on Palmerton. In *Warren*, the defendant filed an expert designation reserving the right to call "any expert witness listed by any co-defendant." *Id.* at 742. The expert at issue "had been designated as an expert witness by a co-defendant..." *Id.* The expert witness had been properly and timely disclosed under Rule 26(b)(4) by another party. That is not what happened here. Riverview waited until trial and **for the first time disclosed** the new opinions from Palmerton. In *Warren*, there was no prejudice or unfair surprise by late disclosure because the testimony had been designated by a co-defendant. In this case, there was prejudice and unfair surprise.

The other cases cited by Riverview are not controlling. *Ford Motor Co. v. Tennin*, 960 So.2d 379 (Miss. 2007) involved a huge attorney fees sanction for late production of documents and is simply not on point. In *Caracci v. International Paper Co.*, 699 So.2d 546 (Miss. 1997), the trial court struck the plaintiff's expert because a supplemental disclosure of expert testimony was not filed as a part of a sworn discovery response. This Court reversed. This Court stated "[k]nowing that an interrogatory response is not under oath and waiting until trial to bring this violation to the Court's attention is 'trial by surprise'." *Id.* at 555. In *Caracci*, the defendant had the expert disclosure but only complained that it was not in the form of a sworn interrogatory. *Id.* at 547. No Mississippi appellant decision authorizes what Riverview has done in this case.

The Honorable Trial Court heard all the evidence, reviewed the pleadings, exhibits and surveys. This factual finding was based on very substantial evidence. First, the City used a detailed metes and bounds description in the 1922 lease to Inland. (Ex. P-6, p. 2). This lease description covered approximately 27 acres. When the City entered into the 1951 lease with Anderson-Tully, it used the same legal description, even though it had sold and conveyed a part of the acreage to the YMVRR. There was no proof that the City did this knowingly or intentionally.

It was proven by very substantial proof that the City was **not** sure what it owned in this area. (See correspondence from N. Thomas, City Attorney, Ex. P-28; testimony of L. Leyens, T. Vol. III at 330, 338). The Trial Court's conclusion that Parcels "A" and "B" were included by mistake is based on substantial evidence. *Lang v. Lutz*, 868 So.2d 363, 367 (Miss. 2003) (chancellor, as trier of fact, evaluates the sufficiency of the proof). The City was not sure what it owned and merely used the same description by mistake, not being cognizant that Parcels "A" and "B" were included in the lease description. *In Re the Matter of the Boundaries of the City of Laurel*, 922 So.2d 791, 795 (Miss. 2006). (Chancellor is entitled to draw reasonable inferences from the evidence as trier of fact).

There was not a shred of evidence that use of the same metes and bounds legal description was anything more than an oversight by the City. If the City sold the ten acres to the railroad and then **knowingly** included the same ten acres in the lease to Anderson-Tully, such would be tantamount to fraud. Fraud is never presumed but must be proven. *Boling v. A-1 Detective & Patrol Serv.*, 659 So.2d 586, 590 (Miss. 1995).

Anderson-Tully, the leasee under the 1951 and subsequent leases, certainly believed that Anderson-Tully owned fee title to Parcels "A" and "B". In the 1975 deed from Illinois Central Gulf, successor to YMVRR, Parcels "A" and "B" were clearly conveyed to Anderson-Tully. (See Survey

attached to Ex. 10, Book 536, Page 113). In March 1994, when Anderson-Tully conveyed to American Gaming, Parcels "A" and "B" were included. (C.P. Vol I at 45). Joe Strickland performed surveys in connection with that transaction which plainly show Parcels "A" and "B" as part of the Anderson-Tully land. (Ex. P-23).

Even if the Honorable Trial Court's finding of a scrivener's error was incorrect (which was clearly not), this does not help Riverview. There is still a failure of proof on adverse possession and Riverview still has no deed that describes Parcels "A" and "B". Rule 61, MRCP.

C. The Trial court properly denied Riverview's post-trial motion

For the first time in its Post-Trial Motion, Riverview claimed uncertainty as to the "boundary line" of Parcels "A" and "B". Throughout the entire two year history of the lawsuit, there was no question raised as to the perimeters of Parcels "A" and "B". The dispute was about who owned Parcels "A" and "B". If Golding owned Parcels "A" and "B" then the boundary line between Golding and Riverview would be the western perimeter of those parcels. If Riverview owned those parcels, then the boundary between Riverview and Golding was the eastern perimeter.

In Riverview's original Complaint and Amended Complaint, the aerial photograph exhibit prepared by John Palmerton has a gold (yellow) line around the perimeter of the real property described in Golding's (and its predecessors-in-title) deed. (See Riverview's R.E. 15, Ex. P-1; T. Vol. II at 196).

Counsel for Riverview made the following statement as to the perimeters of Parcels "A" and "B" at trial.

> The dispute is about the factual basis of Mr. Miller's claim as to the cross-hatch part. **There is no dispute between the surveyors about where the blue line lies and the yellow line lies.** That's all been pretty well established through the depositions. These lines are where they are. The effect of the facts that we're going to present to the Court is what Your Honor will decide. Mr. Palmerton's ability to locate that line

is the same as Mr. Slaton's or Mr. Strickland's or anybody else's and **they all came up with the same version of where the line out to be**.

T. Vol. II at 165. (emphasis added).

That was Riverview's position until the Trial Court's adverse ruling.

The Honorable Trial Court specifically found that "the City obtained three appraisals and attached to the appraisals was a **survey** done previously which should showed what the City actually owned, a parcel of approximately ten (10) acres which did not include Parcels "A" and "B", the property in question." (Order at ¶ 14, R. E. Tab 2). The Trial Court specifically found that Riverview was provided with the appraisals which included the Survey. *Id.* Riverview offered **no proof** to contradict the Strickland Survey or the lines depicted on Exhibit P-1 prepared by Riverview's own expert.

The Trial Court was clearly correct in finding the boundary based on the Strickland Survey. In *Nosser v. Buford*, 852 So.2d 57, 63 (Miss. App. 2003), the Court affirmed the Chancellor's finding which was based on a survey by Joe Strickland, the same surveyor who prepared the 1993/1994 Survey and the 2006 Survey in this case. The Court noted that "the Nossers had made no attempt to obtain their own surveyor..." Id. at 63. The instant case is ever stronger. Riverview hired a surveyor, John Palmerton, but that surveyor refused to support Riverview's outrageous claims. Surveys are in the record which establish the boundary -- 1975 E. C. Burkhardt Survey, P-10, the Strickland 1993/1994 Survey, Ex. P-23, P-29, and the Strickland 2006 Survey, D-1.

Riverview makes reference to an "incline track" and that the boundary must be determined in relation to the location of the "incline track" as it existed in 1926." (Riverview Brief at 26). Riverview offered no proof that the location of the" incline track" in 1926 conflicted with another call in the deed. Riverview had the burden of proof as to the location of any alleged monument

which it claims conflicts with the boundary. *Sellars v. Union Producing Co.*, 7 So.2d 821, 822 (Miss. 1942) (Plaintiff failed to prove location of monument with "reasonable certainty.") Riverview offered no surveyor to support the location of an "incline track" in 1926, over eighty (80) years ago. Riverview offered no testimony from a surveyor as to how this 1926 "incline track" conflicts with the other calls in the legal description. Riverview offered no proof that a purported call to a monument in a deed conflicts with any other call for distance.

Riverview points to photographs allegedly showing remnants of the track. **No expert testified that the Strickland Survey conflicted in any way with the call to the "incline track".** There was no proof that the object Riverview refers to in the photograph was an "incline track" and no proof that such was the "incline track" mentioned in deeds over 80 years ago. Riverview asks this Court to find what its surveyor or other expert was unwilling to say under oath.

D. The Trial court properly excluded a former city official from testifying as to whether the City owned the property, and properly excluded newspaper articles

Riverview complains that the Honorable Trial Court precluded Don Miller from testifying that he thought the City owned the disputed property. (Riverview Brief at 30).

Riverview's counsel handed Mr. Don Miller a copy of the 1969 Anderson-Tully lease. (Ex. P-8). Don Miller was asked whether or not the City owed the property that was subject to the lease. (T. Vol. II at 289-90). The Trial Court sustained an objection to that question. *Id.* Miller was not an expert and his opinion was improper under Rule 701, MRE. The objection was sustained.

First, Miller later testified "**nobody really knew exactly what the City owned.**" (T. Vol. II at 308). (emphasis added).

Miller had no factual or legal basis to testify who owned the property subject to the lease. Miller was not sure of the acreage he thought the City owned. (T. Vol II at 300). At one time,

Miller thought the City owned about 11 acres. (*Id.* at 299). That is consistent with the Strickland Survey and appraisals which showed 10 acres. If what Riverview says is true, the City owned 20 plus acres and **Riverview only paid for 10 acres**! Miller is not an attorney or surveyor. Miller is not aware of any title opinion that the City owned the land is dispute. (T. Vol II at 292). Mr. Miller could not point to a survey or title opinion that says the City owned Parcels "A" and "B". (*Id.* at 292). Miller was aware of no survey other than the Strickland Survey. (*Id.* at 293).

Importantly, Don Miller testified that he was aware that Riverview ordered a survey of the property after the purchase from the City in 2004. (T. Vol. II at 293). In fact, Don Miller gave the surveyor, Joe Strickland, the quitclaim deed and asked for the survey. (T. Vol. II at 294). Mr. Miller was the person who signed the agreement to have the survey done. *Id.* Miller was the one who got Strickland "started" on the 2006 survey. (T. Vol II at 311). The Strickland Survey ordered by Riverview in 2006 showed that Riverview did **not** acquire Parcels "A" and "B" from the City. (Survey, Ex. 5).[13]

Riverview complains that it should have been allowed to introduce newspaper articles from the year 1951. Riverview claims that the articles "demonstrate that the City was openly and publically asserting control over Parcels "A" and "B" at the time it leased the area to Anderson-Tully...." First, the articles do not show that at all. The articles generally refer to an agreement between "Patton-Tully Transportation" and the City regarding "Vicksburg's river terminal." (Riverview R.E. 16). There is no proof that anyone with the railroad read the articles. The articles

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[13] Riverview's proffer on this point shows the Trial Court was correct. The proffer was that he thought the City-owned land "joined Anderson-Tully on the west and connected the Mississippi River." T. Vol. II at 290-91). This testimony is meaningless. Just a glance at Ex. P-1, the Palmerton aerial, reveals that the City conveyed land outside the Golding property (gold lines) that touches the Mississippi River. Miller did not testify as to the area of river frontage he thought the City owned or where the boundary was between Anderson-Tully land and the City. The entire proffer is of no help. Rule 61, MRCP.

do not say what real property is subject to the lease - and clearly no one reading the article would know that the City was leasing Parcels "A" and "B" (10 acres out of the 27 approximate acres) to another party. The City clearly owned other acreage on the river. The articles do not prove anything in this case about Parcels "A" and "B". They are not relevant. Rule 402, MRE. The Honorable Trial Court was clearly within its discretion in excluding the newspaper articles. *Webb v. Braswell*, 930 So.2d 387, 396 (Miss. 2006) (abuse of discretion standard on exclusion of evidence). Furthermore, the newspaper articles had no probative value and, the error, if any, related thereto, would be harmless. Rule 61, MRCP.

E. The Trial Court properly applied "beyond a reasonable doubt" legal burden where a grantor claims adverse possession of land it conveyed away

Riverview ignores long established Mississippi law when it argues that the Honorable Trial Court erred in applying a reasonable doubt standard to its "adverse possession-by-the-City theory."

Riverview points out that adverse possession normally must be proven by clear and convincing evidence. This Court, however, has long held that a higher burden applies when a grantor purports to have adversely possessed land it has sold and conveyed away. *Skelton v. Lewis*, 453 So.2d 703 (Miss. 1984).[14]

Riverview attempts to distinguish *Skelton* by arguing that the reasonable doubt standard only applies where the grantor attempts to "retain" a part of property conveyed. *Skelton*, 453 So.2d at 706. This Court's ruling is not so restrictive. This Court plainly stated, "We, however, go further and state that **in any case where the grantor claims by adverse possession all or part of the**

[14] Riverview pretends that it met a "clear and convincing evidence" standard. Clearly, Riverview did not meet that burden. *Dean v. Slade*, 63 So.2d 1230, 1235 (Miss. App. 2010) ("Clear and convincing is such a high standard of proof that even the overwhelming weight of the evidence does not rise to the same level.").

property conveyed...." 453 So.2d at 706. Riverview cites no legal authority that supports such a restrictive interpretation of *Skelton*.

In *Cotton v. Cuba Timber Co., Inc.*, 825 So.2d 669 (Miss. 2002) the Mississippi Court of Appeals affirmed a "finding that the Cottons failed to prove adverse possession by clear proof and beyond a reasonable doubt." *Id.* at 671, 674. In *Cotton*, there was a partition deed in 1934 to which Daniel Cotten was a grantor. *Id.* at 674. The plaintiffs contended that Daniel Cotten began adversely possession the land by farming a part of the land. Cotton entered the lands **after** his deed was signed. *Id.* at 669. *See also, Hearn v. Shelton*, 762 So.2d 792, 794-795 (Miss. App. 2000) (reasonable doubt burden applied where grantor claimed adverse possession through payment of taxes on tract after execution of quitclaim deed).

F. The Trial Court properly found Riverview was barred by res judicata/collateral estoppel from contesting a Finding of Fact in a prior lawsuit that an offer to purchase the property from National City Bank was an "acknowledgment of superior title

The Honorable Trial Court properly found that Riverview is barred by collateral estoppel and *res judicata* as a result of the *National City* case. The Trial Court properly found that Riverview is in privity with Miller Materials, Inc.[15] Lewis Miller, Jr., owns and controls Miller Materials, Inc. and Riverview and Lewis Miller sat at counsel table during the trial of the *National City* case. (T. Vol. III at 386-388). Lewis Miller testified at that trial. *Id.* at 389.

National City, Golding's predecessor-in-title, sued Miller Materials, Inc., to block it from using a road that crossed over the National City land (now owned by Golding) which land includes

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[15] Riverview comments that there was no proof that the two entities were in "privity" with the exception that Lewis Miller owns both companies. (Riverview Brief at 32). Riverview, however, does not raise this as an issue on appeal and cites no authority to support an argument that the trial court was in error on that point. The Honorable Trial Court's finding of privity must be affirmed. Rule 28(a)(3) & (6), MRAP; *Theobald, supra.*

Parcels "A" and "B". (C.P. Vol. III at 387). In its answer, Miller Materials admitted that National City was the record owner of the property . (C.P. Vol. III at 415). In its Suggested Findings of Fact and Conclusions of Law, Miller Materials again admitted that National City was **the record title owner** of the property. (C.P. Vol. III at 419).

In *National City*, the court found that Miller did not have an easement and found that Lewis Miller contacted the representative of National City and offered $300,000 for the land. (*National City* Opinion and Final Judgment, C.P. Vol. III at 428).

The trial court in *National City* found that Miller's offer to purchase the property was "acknowledgment of a superior title." (C.P. Vol. IV at 455). The trial court in *National City* found that the offer by Miller was an offer to purchase, not an offer to "settle" as Riverview tries to spin. Miller Materials did not appeal or otherwise challenge the fact findings in the *National City* case. That finding of fact in the *National City* case was **not** overturned in any way. Riverview is bound by the factual and legal findings in that prior litigation.[16]

This Court has stated "res judicata is fundamental to the equitable and efficient operation of the judiciary and reflects the refusal of the law to tolerate a multiplicity of litigation." *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So.2d 224, 232 (Miss. 2005). The public policy of res judicata is "designed to avoid the 'expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions.'" *Franklin Collection Services, Inc. v. Stewart*, 863 So.2d 925, 929 (Miss. 2003) (citing *Little v. V & G Welding Supply*, 704 So.2d 1336, 1337 (Miss. 1997)). Four identities must be present

[16] Riverview's attempt to recast its offer to buy the National City land (now owned by Golding) as a "settlement offer" is characteristic of Riverview and Miller's pattern of reformulating legal arguments after an adverse ruling. The factual finding was that an "offer to purchase" was made. (C.P. Vol. III at 428)

before a subsequent action may be dismissed on the basis of res judicata: (1) identity of the subject matter of the original action; (2) identity of underlying facts and circumstances upon which a claim is asserted and relief sought in the two actions; (3) identity of the parties to the two actions, an identity met where a party to the one action was in privity with a party to the other; and (4) identity of the quality or character of a person against whom the claim is made. *Aetna Cas. & Sur. Co. v. Berry*, 669 So.2d 56, 67 (Miss. 1996). If the four identities are present, a party may not raise a claim in a subsequent action. Id. "This is true regardless of whether all grounds for possible recovery were litigated or asserted in the prior action, as long as those grounds were available to a party and should have been asserted." *Id.*

The first and second elements for collateral estoppel are met. The *National City* case included the very land which Riverview claims to own by virtue of a Quitclaim Deed from the City of Vicksburg. The road in dispute in *National City* was located on the very land owned by National City. That land was subsequently conveyed to Golding. Miller admitted in the prior suit that National City owned the property subject only to his alleged claim to use a particular road that crossed the land. (C.P. Vol. III at 419). Miller never claimed to own Parcels "A" and "B" which were a part of the land.

The third and fourth elements for collateral estoppel are met. Riverview is bound by *National City* even though it was not a named party. Lewis Miller is the owner of both Riverview and Miller Materials and actively took part in the *National City* case. "Strict identity of parties is not necessary for either res judicata or collateral estoppel to apply." *Little v. V&G Welding Supply, Inc.*, 704 So.2d 1336, 1338 (Miss. 1997). A nonparty to the prior case can be bound if the nonparty stands in privity with the party in the prior action. *Hogan v. Buckingham*, 730 So.2d 15, 18 (Miss. 1998).

"Privity is a broad concept" which requires the Court to look at the "surrounding circumstances" to determine whether claim preclusion is justified." *Little*, 704 So.2d at 1336.

> Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. The statement that a person is bound ... as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by ... all or some of the rules of *res judicata* by way of merger, bar or collateral estoppel.

Little, 704 So.2d at 1336 (quoting Restatement of Judgments §83 (comment).

"Privity" is not an exact definition but "represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84 (5th Cir. 1977). In *Southwest Airlines*, the Fifth Circuit Court of Appeals set out in detail how a party to a subsequent action that was not technically a party to a previous action is still bound by the doctrines of res judicata and collateral estoppel. The Court held that a non-party who controlled the original suit will be bound by the resulting judgment." 546 F.2d at 95. (citing *Dudley v. Smith*, 504 F.2d 979 (5th Cir. 1974) (President and sole shareholder controls his corporation). The Court also noted that a non-party whose interests were represented adequately by a party in the original suit. Louis Miller, Jr., owns and controls Riverview and Miller Materials, Inc. Miller sat at counsel table in the *National City* trial. (T. Vol. III at 389).

The bar of collateral estoppel prevents the parties from relitigating an issue actually litigated and determined by the prior action and essential to the judgment. *Aetna Cas. & Sur. Co. v. Berry*, *supra*. Riverview is collaterally estopped from disputing ownership of the land encompassed by the National City Deed which property is now owned by Golding. That specific issue was actually litigated in *National City*, determined to be owned by National City, N.A., which determination was

essential to the judgment in the former action preventing Miller from accessing the property. If National City did not own the land, it had no right to block Miller from using it.

Miller, through his other entity, Miller Materials, Inc., had a full and fair opportunity to litigate the issue of whether Golding's predecessor owned the subject property. *Rabo Agrifinance, Inc. v. Terra XXI LTD*, 583 F.3d 348, 353 (5th Cir. 2009) (relationship among entities owned by the same family was "sufficiently close to bind all of them" to prior judgment). Miller could have asserted that the City had adversely possessed Parcels "A" and "B", but Miller did not claim to own Parcels "A" and "B" in the *National City* case. In fact, Miller did the opposite and admitted that National City owned the land. (C.P. Vol. III at 415 and 419).

The cases cited by Riverview on this point do not involve *res judicata,* collateral estoppel or a specific factual finding in a final judgment in a prior lawsuit. In *Lynn v. Sotener, Inc.*, 802 So.2d 162 (Miss. App. 2001), prior to the litigation, the parties to an adverse possession suit discussed a possible agreement to allow use of the road that occupied the strip of land at issue in the lawsuit. *Id.* at 167. On appeal, this Court found "no error in the trial court's decision not to give weight to the failed compromise." *Id.* at 168. This Court stated "[t]hough marginally indicative of a less than adamant claim of right, it does not override the other evidence of decades of assertions of the incidents of ownership. *Id.*

In the instant case, the specific finding in the final judgment was that an offer to purchase the property was made, not a settlement offer to compromise by allowing use of a road. Furthermore, the offer by Miller to purchase the National City land was squarely consistent with the land records which show legal title in National City and the admission in pleadings by Miller Materials that National City was the record owner. The offer to purchase by Miller is consistent with all the surveys.

The case of *Magee v. Garland*, 799 So.2d 154 (Miss. App. 2001) is of no help to Riverview. It does not concern *res judicata*, collateral estoppel or a specific factual finding in a prior final judgment. In that adverse possession case, there was an offer to purchase a parcel **other** than the one in dispute. *Id.* at 156. In the instant case, Miller offered to purchase the National City land which included Parcels "A" and "B".

Conliff v. Hudson, 60 So.3d 203 (Miss. App. 2011) does not concern res judicata, collateral estoppel or a specific adverse finding in a prior final judgment. In *Conlee*, the court held that one party (Hudson) entering into a lease of the disputed property did not bar his later adverse possession claim when the other party (Conlee) non-renewed the lease. *Id.* at 204. Hudson testified that he only entered into the lease to keep the peace. *Id.* The instant case is totally different. Here, there is a specific finding in a prior case that the offer to purchase constituted an acknowledgment of title. There was no appeal of that finding. Riverview is bound by that. Moreover, in *Conliff,* Hudson actually occupied the land at issue for the statutory period before entering into the lease for the purpose of keeping the peace. In the instant case, Riverview has never occupied the subject property.

Lastly, Riverview also asserts that no proof of the chain of title from National City, N.A. down to Golding was placed in evidence. (Riverview Brief at 32). Riverview's original complaint traced the chain-of-title from National City, N.A. down to Golding. (C.P. Vol. I, p 12-13). The listing of all the deeds from National City, N.A. down to Golding are likewise set forth in Riverview's Amended Complaint and list of Exhibits to the Amended Complaint. (C.P. Vol. V at 626, 632-33). The Honorable Trial Judge reviewed the pleadings, exhibits and heard the testimony of Riverview's witnesses, and was clearly correct in dismissing this case.

CONCLUSION

The Honorable Trial Court should be affirmed. Its ruling was based on substantial evidence. The Court applied established Mississippi real property law. Lewis Miller, Jr., had actual knowledge through multiple surveys that Riverview did not own Parcels "A" and "B". Despite this knowledge, he went onto Golding's property and damaged it. Riverview and Miller ask this Court to adopt his unprecedented theory of adverse possession so that he can justify his wrongful conduct. The City of Vicksburg never claimed to own Parcels "A" and "B" after 1926. As a matter of law, the City did not claim to have adversely possessed the land and could not have adversely possessed the land. Riverview has no deed to Parcels "A" and "B". This appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gene D. Berry, attorney for Defendant, Golding Development Company, LLC, do hereby certify that I have this day served via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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This 11 day of April, 2012.

Gene Berry
Gene D. Berry