

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. : 2013-0533

HERMAN SCOTT, INDIVIDUALLY, ET. AL

Appellants

VERSUS

ANDERSON-TULLY COMPANY

Appellees

REPLY BRIEF OF APPELLANTS

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made pursuant to Miss. Rules of Appellant Procedure 28 (a)(1) in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal:

1. Herman Scott/Appellant
2. Leroy Hughes/Appellant
3. Judge George Ward
4. Michael E. Keyton/Attorney for Appellant
5. Pat. A. Catchings/Sttorney for Appellant
6. Landman Teller, Jr./Attorney for Appellee
7. Teller, Hassell & Hopson, LLP/Attorneys for Appellee
8. Individual members of Lynnwood Hunting Club, unknown/Appellee
9. Anderson-Tully Company/Appellee

Certified, this the 15th day of April, 2014.

/s/Pat. A. Catchings

PAT. A. Catchings

Attorney of Record for Appellant

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STATEMENT OF THE CASE

This action arises from a boundary line dispute consisting of twenty (20) acres, more or less. The Appellants alleges that the wrongful cutting and removal of timber on the disputed tract of land has caused them substantial damages. This case is being appealed to the Mississippi Supreme Court to determine whether the trial court erred in applying the doctrine of adverse possession in determining that appellees the ownership of the tract of 20 acres of land in dispute.

The matter was heard on April 16 and 17, 2012, and Final Judgment having been signed on February 22, 2013 is properly preserving and pursuing his claim by filing an appeal. The trial judge rendered the opinion that the defendant had been in possession of the disputed land since 1969, and any question of ownership of the disputed 20 acres of land would be cured under the doctrine of adverse possession. Therefore, the trial judge held that the defendant Anderson-Tully was the owner through adverse possession of said 20 acres of land.

The appellant filed a claim with the Jefferson County Chancery Court for a Release from Judgment, MRCP Rules 60 (b) (6) and in alternative a new trial. At the May 23, 2013 hearing the Chancellor denied plaintiff request for new trial based on Rule 60 (b)(6), but the newly discovered evidence was admitted into record.

Appellant has submitted the facts their family acquired ownership of 584 acres of land dating back to the year 1925. The Scott family had ownership including the disputed 20 acres, which included leasing of the 20 acres to Lynnwood Hunting Club.

When Herman Scott as administrator of the Scott's Estate, did not renew the hunting club lease in 2007, a dispute arose. Anderson-Tully in 2008 through their Attorney, Mr. Teller, informed the Scott that they own the disputed acreage and timber rights on this land.

Anderson-Tully maintained that they acquired possession through Quit Claim deed of the disputed 20 acres from Atwood in 1969. Since, they have cut timber and marked the land with blue paint.

Both Appellant and Appelles presented argument on April 17 and 18, 2012, and the trial judge rendered his decision in March 2013, ruling the ownership of the disputed 20 acre tract, belong to Anderson-Tully by the theory of adverse possession.

The disputed 20 acres is now on appeal before this honorable court to determine whether the theory of adverse possession was properly applied by using the testimony of witnesses alone to the exclusion of other evidence.

ARGUMENT

- I. The Chancery Court erred in determining that appellee Anderson-Tully has proven by clear and convincing evidence consisting of credible testimony of witness and specific acts were sufficient enough to entitled them to ownership under the theory of adverse possession.

The rule under *Mississippi Code Annotated, Section 15-1-13(1) (Revised 2003)*, governing adverse claims provides the following: “Ten (10) years actual adverse possession by any person claiming to be the owner for that time of any land, uninterrupted 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.”

There are six required elements in determining whether property as being adversely possessed. Thus the party claiming adverse possession must prove by clear and convincing evidence that his possession was (1) under claim of right or ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful, without the consent of the owners. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1002).

The elements of adverse possession are provided in the statute to protect both parties in an adverse possession claim, here Appellee claim adverse possession after failing to prove they owned the disputed 20 acres by description within their deed. The appellants have shown ownership of the disputed tract, since 1925, if appellants elected to file adverse possession using the same elements, then their years of ownership and claim of adverse possession would have been obtained before 1969.

Case law have provided that the above requirements be present in order to establish a adverse possession claim. Since, the trial court has found adverse possession we are limited too, these requirement and will briefly review the elements, for this honorable court.

1. Claim of ownership

Under the claim of ownership the question is whether the possessory acts relied upon by the would be adverse possessor are sufficient to fly his flag over the land and to put the record title holder on notice that the lands are held under an adverse claim of ownership. *Hill v. Johnson, 27 So. 3d 426 (Miss. Ct. App. 2009)*

The Appellees cites “the chancellor must look to the quality and not the quantity of the acts indicative of possession.” This cite amounts to the actions of ATCO of quality of harvesting timber every 10 years, instead of annually or periodically. The maintenance of the land is interpreted to mean more than 10 years intervals, prior to harvesting the timber. There is no testimony that ATCO did any furtherance of the disputed land other than use it in the ordinary manner in which ATCO used it as a timber company. Since ATCO is an old timber company, they should have carefully checked their deed and the land records to assure the accuracy of their property in 1969.

The factor of ownership by ATCO has not been met in their deed, maintenance as to put the Appellant or any other true owner that they intend to possess and own this property as a requirement of claim of ownership.

2. Actual or Hostile

The actual or hostile occupation of land necessary to constitute adverse possession

required a corporeal occupation, accompanied by a manifest intent to hold and continue to hold the property against the claim of all other persons, and adverse to the rights of the true owners. *Hill*, 27 So. 3rd 431-432.

Under *Pulliam v. Bowen* the Mississippi Supreme Court has repeatedly stated that to show actual or hostile possession, the adverse possessor “must unfurl his flag on the land, and keep it flying, so that the (actual) owner may see.” *Blankinship v. Payton*, 605 So. 2d 817, 820 (Miss 1992).

3. Open, Notorious and Visible

The mere possession of land is not enough to satisfy the requirement that the adverse possessor’s use be considered open, notorious, and visible. An adverse possession claim will not begin unless the landowner has actual or constructive knowledge that there is an adverse claim against his property. This requirement is also there to give the landowner notice that a person other than them is occupying their land, thus giving them a chance to regain possession of their land. *Webb v. Drewrey*, 4 So. 3d 1078, 1083 (Miss. Ct. App. 2009)

The Appellees only filed to Quiet Title after the commencement of this suit, therefore the Appellees have not given the required notice as set out in *Greenwood v. Young*, 80 So. 3d 140 (Miss. Ct. App.).

Here, the Chancellor decided that the Appellee ATCO had acquired ownership under the claim of adverse possession, based on testimony of witnesses. If ATCO had been more open, notorious and visible then perhaps the Scott’s would have known of their presence on the disputed tract prior to 2003.

4. Continuous and uninterrupted for a period of ten years

The Appellees purchased their land in 1969, except the disputed 20 acres. The appellants agree that Appellee have had 10 years of continuous and uninterrupted under adverse possession because the 20 acres was not acquired in 1969.

5. Exclusive Use

Exclusive within the statute mean that the adverse possessor's use of the property was consist with his exclusive claim to the right to use the property. Exclusive use is at the most basics level the intent of actual and hostile possession. To satisfy the element of exclusivity, the claimant's conduct must afford an unequivocal indication that his is exercising dominion of a sole owner. *Stone v. Lea Brent Family Invest, L. P.*, 998 So. 2d 448, 455. Exclusive use indicates a right to use the land above other members of the general public.

6. Peaceful

The adverse possession must be peaceful. *Jordan v. Fountain*, 986 So. 2d 1018, 1023. The records showed that ATCO purchased land in 1969, however the description of the 20 acres was not shown in the deed. The Apellees did not assert ownership of the disputed 20 acres tract until 2010, when they filed a Petition to Quiet Title. Therefore, as neighbor there has been peaceful extistance, until the Scott heir refused to renew the Linwood Hunting Club lease.

SUMMARY OF ARGUMENT

The Appellants, respectfully maintain that the Chancellor was erroneous in his finding that Appellee ATCO were the owners of the disputed 20 acre tract, based on

adverse possession, due to the purchase of land in 1969 in which the deed did not include a description of the disputed land in the deed. If appellees are allowed to acquire the 20 acre tract by adverse possession dated back to 1969, then clearly the Appellants have prior to 1969 acquired by adverse possession, because their ownership of the 20 acres date back to 1925.

The Appellees, argue the elements of adverse possession were in their favor, however, the testimonies given were not clear and confusing as the chancellor stated in his findings, which amounted to the chancellor belief in the most credible witness. The witnesses presented by the Appellees consisted of employees, a surveyor hired by ATCO and a community person who is also a member of the Linwood Hunting club, which makes it questionable as how creditable are the witnesses for ATCO.

The appellants argue that the specific actions of Appellees ATCO; have not met every element of adverse possession because they cannot meet them based on testimony of the survey and the condition of the 20 acre tract of land. The Scotts regularly traveled the boundary lines and did not observe signs or other notices, that Appellees intended to claim the disputed land through adverse possession. Such actions as hiring help to harvest and maintain the timber every 10 years is not the kind of elements set forth in case law of adverse possession. The Appellees have only presented those elements in which they have conducted as a result of their use of the land which are loggers. ATCO activity on the 20 acres tract of land has been consistent with their conduct on land not in dispute.

Under Adverse Possession each element must be met and the parties having the intent to own the land in consistence with the owner. Appellee ATCO are in the business

to harvest and cutting of timber, the painting of the blue lines, every 8 to 10 years is no proof of ownership. Paint is not on every tree, but here and there, this is not enough to put others on notice that ATCO intend to claim under theory of adverse possession. Appellants also painted lines on trees, the color of orange on the trees of the 20 acre in dispute. Appellants has made it known that the fence which is on the 20 acre was built as a manner of convenience and not a border, as Appellees ATCO alleges..

We the Appellant's maintain that Appellee ATCO did not prove the elements at trial court nor in Appellee's brief. Their deed never contained the description of the land, nor have they acquired it under adverse possession, because Appelles did not meet the requirements for adverse possession.

Therefore, we pray that this honorable court reverse the trial court decision and find ownership for the Appellant or in the alternative remand the case back to the trial court for title and surveying of the 20 acre tract in dispute.

CONCLUSION

The Appellants argue that ATCO did not prove by clear and convincing evidence nor credible testimony that they were entitled to the twenty acres, which amounted to error on behalf of the trial judge. Therefore, the appellants request that this honorable court to decide this case on the merit and not by adverse possession, because appellees have not met these six requirement to establish ownership.

In conclusion, Appellants respectfully requests this Court to reverse the decision of the Chancellor that Appellee, ATCO, owns the twenty acres or remand this case back to Jefferson County Chancery Court, for a New Trial in order to establish by

derangement of title, who owns the disputed land.

Respectfully submitted,

HERMAN SCOTT

BY: /s/ Pat. A. Catchings

PAT. A. CATCHINGS

CERTIFICATE OF SERVICE

I, PAT. A. CATCHINGS, Attorney for Appellants, Herman Scott, et. al, hereby certify that I have this day mailed postage pre-paid a true and correct copy of Appellants Reply-Brief to the following, to-wit:

Judge George Ward
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This the 15th day of April, 2014.

s/s Pat. A. Catchings

PAT. A. CATCHINGS