

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. : 2013-0533

HERMAN SCOTT, INDIVIDUALLY, ET. AL

Appellants

VERSUS

ANDERSON-TULLY COMPANY

Appellee

BRIEF OF APPELLANT, HERMAN SCOTT

**Appeal from the Chancery Court of Jefferson County,
the Honorable George Ward**

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 disqualifications 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/ Attorney 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 11th day of December, 2013.

s/Pat. A. Catchings

PAT. A. CATCHINGS

Attorney of Record for Appellant

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Stancil v. Farrar, No. 2009-COA 0962, May 2011

Sturvidant v. Todd, 956 So. 2d 977, 982, 987, 992, (Miss. App. 2007)

Thornhill v. Caroline Hunt Trust Estate, 594 So. 2d 1150, 1152 (Miss. 1992)

STATE STATUTES

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STATEMENT OF ISSUES

Whether the chancery court erred in holding that Anderson-Tully proved by clear and convincing evidence that their action entitled them to title of the disputed property under the theory of adverse possession.

STATEMENT OF THE CASE

I. Nature of 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 awarding that appellees the ownership of the tract of 20 acres of land in dispute.

II. Course of the Proceeding

The matter was heard on April 16 and 17, 2012, and Final Judgment was signed on February 22, 2013. Appellants are properly preserving and pursuing their 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.

Conjunctively, the appellants properly preserved and pursued their claim with the Jefferson County Chancery Court by filing 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 admitted the new evidence.

III. Statement of Facts

Appellants have submitted the fact 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 Scotts that they own the disputed acreage and timber rights on this land.

In Chancery Court where ownership of said 20 acres of land is at issue, it is important to have a deraignment of title; neither party presented such deraignment of title during the trial.

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

Both Appellant and Appelles presented argument on April 17 and 18, 2012, and the trial judge held the ownership belong to Anderson-Tully by the theory of adverse possession.

Appellant made Motion for New Trial based on MRCP Rules 60(b)(6), Newly Discovered evidence, based on the authentic of a map.

A hearing was held May 23, 2013, wherein a new trial was denied, but the newly discovered evidence of abstract of Title dated July 14, 1934, consisting of 32 pages was admitted into record.

The disputed 20 acres is now on appeal to the Mississippi Supreme Court.

STANDARD OF REVIEW

Our appellate review is limited by familiar rules. The chancellor's decision will only be reversed when the decision was manifestly wrong, clearly erroneous, or when the chancellor applies an incorrect legal standard. Generally, a finding that proof was sufficient to sustain an adverse-possession claim is finding of fact and requires the application of the substantial evidence/manifest error rule.

SUMMARY OF ARGUMENT

Anderson-Tully's position is they are entitled to the disputed 20 acres of land through adverse possession.

The Scotts contend that:

1. That Anderson-Tully did not meet all elements and requirements under adverse possession, entitling them to the land in dispute.
2. That Anderson-Tully deed did not mention or give a description of the disputed land in section 28.
3. That the trial court erred in finding that the acts of Anderson-Tully were objectively clear and convincing to award the Appellee the disputed land.

ARGUMENT

Whether the chancery court erred in holding that Anderson-Tully proved by clear and convincing evidence that their action entitled them to title of the disputed property under the theory of adverse possession.

RULES

The Scotts argue that the chancery court erred in finding that the disputed 20 acres ownership was Anderson-Tully by adverse possession, because the Appelle did not meet the elements under the Mississippi Code.

Mississippi Code Annotated, Section 15-1-13(1) (Revised 2003), 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. 1992)

ANALYSIS

The burden of proof on adverse possession it is the duty of the possessor of the title through, evidentiary standards of Clear and convincing evidence that each element is met, which has been defined as follow: that weight of proof which produced in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case. ***Thornhill v. Caroline Hunt Trust Estate, 594 So. 2d 1150, 1152 (Miss. 1992)***

The question is whether Anderson-Tully Company acts relied upon by them would be adverse possessor are sufficient enough to place the record title holder on notice that the land was under an adverse claim of ownership.

The Chancellor in his Final Judgment, dated February 27, 2013, stated in his opinion, “in any event, from the evidence, it is clear to the Court that the land records or the

descriptions of the disputed property contained therein, do not accurately describe the disputed tract to any certainty so as to read the various descriptions and known which party is the record title owner of the property.

However, the Court finds that the evidence overwhelmingly supports that the defendant, Anderson-Tully, had acquired the disputed tract by adverse possession. Anderson acquired the Hollywood tract in 1969. Based on the survey of Mr. Burkhart, they understood they owned the disputed tract. They openly and notorious took possession of the property in 1969 by painting blue boundary lines which separated the Hollywood tract from the Scott tract.”

Adverse possession depends heavily on the facts of the case. The facts must support the elements of each claim. Then the adverse possessor has the burden of proving that all elements apply.

OWNERSHIP

The element of ownership under adverse possession should be sufficient enough to put the world on notice that the possessor intended to possess the land as owner. Anderson-Tully acquired their tract of land February 12, 1969, which is known as the Pruitt or Hollywood Place and is referred as tract one. There was no description in metes and bound and no plat attached to the deed.

The deed contained the language, “The entire “Pruitt” or Hollywood place, as now constituted and being all of the original place except the portion thereof lying in the

sixteenth or school section, is intended to be and is hereby conveyed, regardless of whether the above description be accurate and correct or not.” (Exhibit “ 17”) (Deed book 5-K, page 255 Jefferson and Claiborne County, Mississippi.

The defendant Anderson-Tully argues that the language was intended to convey all of the Hollywood tract, whether properly described or not, to cure that defect and it was the parties’ intent to convey the descriptive tract in 1969.

At the times of purchase of the Hollywood tract Mr. E. C. Burkhart, surveyor and forester for Anderson Tully surveyed the land; he also testified at trial that the intent at the time of sell was to include the disputed 20 acres, although such description is not included. Mr. Burkhart also stated that no one knew how many acres the Hollywood tract contained, he conducted a survey and concluded the disputed 20 acres was included (book 2, page 154).

Other Courts have held that if a deed does not contain the description of the property on the face of the deed and within the four (4) corners then the document is defective and their title fails. *Jordan v. Peters, 986 So. 2d 1018, 1022 (Miss. App. 2008)*

The Appellants argue that the title fails because the deed of 1969 does not have a description of the 20 acres, nor does it make mention of Section 28 in it’s deed description, therefore, Anderson-Tully does not have ownership rights to the disputed 20 acres, because of the defect in title.

ACTUAL AND HOSTILE

Actual or hostile use of the land is necessary to constitute adverse possession require a real use, along with a manifest intention to hold and continue to hold the

property against the claim of all other person.

The use of the 20 acres is uncultivated land and suitable for timber, hunting and livestock and described as rough by Mr. Richard Logan, surveyor for the Scott Estate, during testimony given during trial.

It has been held that simply cutting timber or occasionally pasturing the land is not enough to constitute open and hostile possession. ***Blankenship v. Payton, 608 So. 2d 817, 819-820 (Miss 1992)***

The Appellee Anderson-Tully has not made such actual and hostile claim, they have done nothing to actually improve the land, or cared for it on a regular basis. Testimony by Mr. Burkhart and Mr. Brown, employee for Anderson-Tully was they cut the trees in 1990, 1999 and in 2010 and painted the trees with blue paint in 1969, again in 1986 and in 1998, which was not at regular intervals.

The Scotts had no other notice of Anderson claim, than when the appellee's lawyer contacted the Scott family and informed them that they in fact own the property in question. At no point prior to this letter, or the filing of the Scott's complaint, did the Appellants have notice that Anderson-Tully claimed the 20 acres by deed or adverse possession.

Anderson-Tully was never viewed by members of the Scott family or others in the community as being possessors of this land as testimony of the April 17, 18th, 2012 witnesses have stated. Testimony given by the Scotts did show that they knew of some

cutting on the property and repeatedly asked them not to cut the timber because it belongs to their family. It was not evidence at trial that any of the Scott's knew that Anderson-Tully was purporting to own and possess the property as Anderson-Tully.

The Acts of marking, managing and harvesting by Anderson-Tully Company on the disputed land between 1969 and 2010 are insufficient to place the Scotts on notice of their hostile intentions.

OPEN, NOTORIOUS AND VISIBLE

The element of adverse possession is open, notorious, and visible, use of the property. This means that the adverse possessor is openly using another property in a way not hidden or not discoverable. The elements of open, notorious and visible, while in possession of land is not sufficient to satisfy requirement. An adverse-possession claim will not begin unless the landowner has actual or constructive knowledge that there is an adverse claim against his property. An adverse possessor must give some notice or some sign that he is there and keep notice or evidence he is there and throughout the duration of the ten-year period in order to claim, or he intend to claim and defend his property claim.

'The requirement to be open, notorious and visible must be the same as running a flag up a pole to let the entire world know that the adverse possessor is there and he intends to remain. *Sturvidant v. Todd*, 956 So. 2d 977, 982 (Miss. App. 2007)

Testimony of the blue paint was given by several employees of Anderson-Tully of the existence of the blue paint; Mr. Burkhardt, surveyor first painted a line on the trees on the disputed line in 1969; Donald Brown, regional manager for Anderson-Tully saw the

trees painted blue line three times (3) in 1969, 1986 and 1998; Sam Price, employee of Anderson-Tully saw the trees painted line in 1971; and Tom Miller, registered forester for the Scott saw blue paint line on the trees in 2010, and the paint appear to be 14 years old and a fresh painting. The fact that the paint was on the trees does not mean that the marking by the paint line was correct and this was a true and correct boundary line.

There is no evidence that Anderson-Tully did anything more than paint blue lines on the timber to show their boundary lines, this is not sufficient notice of the kind to support a finding in adverse possession claims. The notice should be enough that an owner of title or any would be possessor enough notice to say they intend to possess the land as their own.

The matter of boundary lines was of issue in determining whether the property as open, notorious and visible, according to Mr. Burkhart his testimony was the fence that was erected in 1954 was a boundary line, while the Scott and Mr. Logan maintain it was a fence of convenience. The fence was erected in 1954 by Richard Scott to keep livestock in and repaired in 1955. Mr. Scott testified that he moved the fence west a little in order not to make new post holes. Testimony was given by Mr. Logan that at the time of his survey the old fence was on the plat starting from Mr. B. C. Miller dated back to 1944, where the old fence was shown on the plat.

There exists controversy as to fence line as to whether it was a line of convenience to fence-in livestock or for boundary purpose.

The Chancery Court in its Final Opinion, wrote "It is perplexing to the Court that the Scott timber deed, which description the plaintiffs rely on to validate of their title,

does not mention the section line which divides section 28 from 30. While the Miller plat does not note that “the 20 1/10 acres outside of the fence is included in the total acreage” of the survey, it is not clear from the reading and the description in the timber deed whether the acreage outside of the fence was included in the conveyance.”

Mr. Wilbur Nation testifying for Anderson-Tully, testified that the fence erected by Richard Scott was a boundary line, and that the fence ran east of the disputed line, the Scott cut timber up to the line and the community considered it was their property line. The testimony given by Mr. Nation is substantial evidence, because he is not a surveyor, the fence was not built until 1954, making the fence as one of convenience.

CONTINUOUS AND UNINTERRUPTED

In the Opinion of February 22, 2013, the chancellor found that Anderson-Tully had met a ten year period of continuous and uninterrupted possession of the land under adverse possession, because they have a deed from Atwood, dated February 12, 1969, which gave them more than ten years of ownership of the disputed 20 acres. Based on the records the adverse possession claim did not surface, until the Scott’s presented their suit to Quiet Title in 2010.

EXCLUSIVE

Exclusive rights mean that the possessor right is over all other rights. The records show that the Scott and Anderson Tully leased land to the Lynwood Hunting Club, including the disputed land out to the hunting club for numerous years. According to Mr. Wilbur Nation, a neighbor and a member of the Lynwood Hunting Club, Anderson-Tully leased the land to the club from 1972. Mr. Nation, also stated, the Scotts leased

land to the hunting club since 1995 to 2007, which consisted of about 60 acres of the Scott's land, which did not consist of a survey, East of School House Road. This demonstrates Appelles knew that the other lease (Scott lease) of the same property because there was not a plat of the leased property. This would defeat Anderson-Tully exclusive use, dominion and control over the land claim. Whereas, the Appellee (Anderson-Tully) did not show where they had overtly demonstrated dominion and control of the said land. Anderson-Tully claims exclusive control lies in the fact they were able to remove the timber three (3) times since 1969, in 1990, 1999 and 2010, from this property.

The record shows the use of the property by members of the Scott family was frequent, they were on the land, maintained and used the land including placing a fence on the land to enclose animals.

The use by Anderson-Tully was not exclusive because they knew that Lynnwood Hunting Club leased land from the Scott's, which was the disputed 20 acres. Anderson-Tully dominion and control was not exclusive because they allowed the Scott to lease the disputed 20 acres to Lynnwood.

PEACEFUL

The element of adverse possession is peacefulness, or the enjoyment of the property. *Sturvidant v. Todd, 956 So. 2d 987 (Miss. App. 2007)* It is not clear whether Anderson-Tully had peaceful possession of the property, because the Scotts did not have notice that Anderson-Tully was using the 20 acres disputed tract under adverse possession.

The record show no evidence where any of the Scotts or their heirs consented to

give, sell or lease any of the 20 acres of land for timber to Anderson-Tully or Atwood, which mean Anderson-Tully was removing the timber without the consent of the owners.

CONCLUSION

In conclusion, the Appellants ask this honorable court to find that the lower court Chancellor erred in finding Anderson-Tully as the owners of the disputed 20 acres under the elements of adverse possession, thus overturning the lower court ruling and finding for the Appellants the Scotts, so granting them the equitable relief they are entitled too.

In alternative remand the case back to the lower court to resolve the deed discrepancies, and the description of the disputed property through derangement of titles, etc., and any other relief this Honorable may deem appropriate and necessary.

CERTIFICATE OF SERVICES

This is to certify that I, Patricia A. Catchings, Attorney for Appellants, have this date filed thru electronic mail, a true and correct Brief of Appellant, Herman Scott, et. al., to the Mississippi Supreme Court.

This the __11th__ day of December, 2013.

s/ PAT. A. CATCHINGS

PATRICIA A. CATCHINGS