IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUPREME COURT DOCKET NO. 2015-CA-00651

MICHAEL POWELL — APPELLANT

VERSUS — DOCKET NO. 2015-CA-00651

CLINTON F. MEYER AND
JEANETTE ENGOLIA — APPELLEES

BRIEF OF APPELLANT

Appeal from the Chancery Court of Pearl River County
State of Mississippi

ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant 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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Michael Powell, Appellant.
2. Clinton F. Meyer, Appellee.
3. Jeanette Engolia, Appellee.
4. Paula Elizabeth Spillman Powell, Appellant's wife.
5. Gerald C. Patch, Attorney for Appellees, Clinton F. Meyer and Jeanette Engolia.
6. Gail D. Nicholson, Attorney for Appellees, Clinton F. Meyer and Jeanette Engolia.
7. G. Gerald Cruthird, Attorney for Appellant, Michael Powell.
8. Honorable M. Ronald Doleac, Chancellor, 10th Judicial District of Mississippi.

Respectfully submitted,

MICHAEL POWELL, Appellant

BY: _____
G. GERALD CRUTHIRD

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STATEMENT OF ISSUES

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2. Whether the Trial Court committed manifest error and applied an erroneous standard of law in determining that all necessary elements of adverse possession by Appellees clear and convincing evidence before the Court.

3. Whether the Trial Court committed was manifestly wrong in failing to find that the Appellants' request for confirmation and quieting of his title in and to the .22 acres tract of real property at issue in this litigation was not supported by the overwhelming weight of the evidence.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN LOWER COURT.

This instant appeal arises from a suit filed by the Appellees, Clinton F. Meyer and Jeanette Engolia against the Appellant, Michael Powell, on January 23, 3013, in the Chancery Court of Pearl River County, Mississippi seeking confirmation and quieting of title in and to a .22 acre tract actually located within and described as part of a twenty-five (25) acre tract owned by the Appellant from 1997 forward, which Appellees, who own a 2.19 acre tract immediately adjacent to and contiguous to Appellants' lands claimed through adverse possession. After process issued by the Chancery Court of Pearl River County, Mississippi was served upon the Appellant, Appellant filed his Answer and Counterclaim on March 4, 2013, and the Plaintiffs filed their Defenses and Answer to Counterclaim on April 4, 2013. The Court conducted a pre-trial conference on June 30, 2014, with the attorneys for the respective parties, and scheduled trial for November 7, 2014, in the Chancery Court Room in the Pearl River County Governmental Complex in Picayune, Mississippi. The lower Court tried the instant case on November 7, 2014; and at the conclusion of trial, the Court allowed counsel for the Appellant and the Appellees to submit Proposed Findings of Fact and Conclusions of Law for its consideration. After the parties delivered their respective Proposed Findings of Fact and Conclusions of Law unto the lower Court on and after December 19, 2014, the Court rendered and filed its Opinion and Final Judgment on January 22, 2015. ***(R.96-114, R.E. 5)***

In its Opinion and Final Judgment ***(R.E.5),*** the Lower Court found and adjudicated that Appellees had established by adverse possession their claim to ownership to the .22 acre parcel of lands described in their original Complaint, and confirmed and quieted their ownership in such lands against the Appellant, Michael Powell; and likewise, the Lower Court denied the Appellant's claim for quieting and confirming is title in and to the .22 acre parcel of real property at issue in this litigation.

On February 2, 2015, Appellant filed his Motion to Alter or Amend Judgment, or in the Alternative, for a New Trial ***(R.115-121 & R.E. 24)*** asserting therein that the Lower Court in its finding and adjudication that the Appellees were awarded ownership of the .22 acre tract of real property owned of record by the Appellant based on adverse possession which was supported by clear and convincing evidence, was manifestly wrong and unsupported by substantial evidence.

On March 5, 2014, the lower Court conducted a hearing in the Pearl River County Chancery Court Building in Poplarville, Mississippi on the Appellant's Motion to Alter or Amend Judgment, or, in the Alternative, for a New Trial, and after lengthy oral argument and submission of authorities, the Court then rendered and filed its Order on Motion to Alter or Amend Judgment, or, in the Alternative, for a New Trial on March 18, 2015, ***(R.142 & R.E. 83)***, denying the Appellant's Motion to Alter or Amend Judgment, or, in the Alternative, for a New Trial, and further, finding that all provisions of the Court's Opinion and Final Judgment dated January 22, 2015, shall remain in full force and effect, subject to appeal.

The Appellant, believing that the lower Court's decisions were manifestly wrong and against the overwhelming weight of the evidence, and further, the lower Court's

determination that Appellees' claim for ownership to the .22 acres tract of real property at issue on the basis of adverse possession was established by clear and convincing evidence, constitutes manifest error by the Court in erroneously applying the standard of law that it utilized in determining that Appellees had established adverse possession to the tract of land at issue in this litigation, and further, the lower Court's denial of Appellant's claim for confirmation and quieting of title to the .22 acre tract of lands in question as his own was manifestly wrong and against the overwhelming weight of the evidence, the Appellant has thereafter perfected his appeal unto this Honorable Court for review of both the lower Court's Opinion and Final Judgment rendered and entered in this case on January 22, 2105 ***(R.E. 5)*** in favor of the Appellees, and further the lower Court's denial of Plaintiff's Motion to Alter or Amend Judgment, or, in the Alternative, for a New Trial, by Order rendered and entered on March 18, 2015. ***(R.E. 24)***

II. STATEMENT OF FACTS

The lower Court in its Opinion and Final Judgment (R.E. 2) decided that Appellees were entitled to ownership of a .22 acre parcel of real property described specifically in a survey obtained by Appellees in preparation for the trial of these proceedings from Gary Burt, dated November 5, 2013, (R. (Exhibit 5) TR. 4), which such acreage was included in a twenty-five (25) acre tract owned by Appellant (R. (Exhibit 9) TR. 4), primarily on the basis of two (2) factual circumstances being, 1) Appellee's construction of a pavilion encroaching on, over and onto such .22 acre tract of lands, and further, the purported existence of an old wire fence or remnants thereof separating the remainder of Appellant's lands from the Appellees' lands.

Both Appellees and Appellant shared a common source of title for their respective properties, being Chester and Daisy Smith; and Appellant had acquired his twenty-five (25) acre tract together with a former partner, Jerry Moody, in 1997 (R. (Exhibit 7) TR. 4) and later acquired full and complete title to such twenty-five (25) acres based on subsequent conveyances with Moody as shown in Exhibits 8 and 9 (R. (Exhibits 8 and 9) TR. 4); and the Appellees acquired their 2.19 acre parcel on July 21, 2000, as evidenced by Warranty Deed (R,(Exhibit 3) TR. 4). Appellant's parcel was located adjacent and contiguous to the Appellees' parcel of lands on the North/Northwest boundary.

Appellees offered Bob Smith as a witness at trial who testified that he was a first cousin of Chester Smith, and had worked on the properties in question from 1941 to 1944. He testified that there was a fence separating his grandfather, Henry Smith's

residence, located upon Appellees' 2.19 acre tract from the other lands owned by his grandfather. Bob Smith testified that he returned regularly to the Henry Smith residence over the years and recalls viewing an old wire fence along the northern boundary of the 2.19 acre tract. He testified that during a family reunion held at the Henry Smith home in the summer of 2012, he viewed a new fence along the old fence line which had replaced the old fence destroyed by a tree which had fallen onto it.

The Appellee, Clinton F. Meyer, testified that he obtained a survey from David Hattaway, dated July 20, 2000, which was attached unto his Warranty Deed in which he and the Appellee, Jeanette Engolia, acquired title unto the 2.19 acres tract; and he admitted that the survey which was attached unto said Warranty Deed (R. (Exhibit 3)) did not show a fence located along the northern common boundary line with the lands owned by the Appellant. Appellee, Clinton F. Meyer, testified that the fence lines wrapping around the Henry Smith home purchased by the Appellee, Jeanette Engolia and him were crushed and severely damaged by trees. Clinton F. Meyer testified that he commenced the construction of an open air pavilion along the north line of his 2.19 acres tract and attempted to stay off the Appellant's property. Meyer testified that Appellant only claimed that Meyer had encroached onto Appellant's lands after a June 20, 2012 survey was completed for Appellant. (TR. 41).

Clinton F. Meyer testified that he was under the impression that the prior owner who had sold Appellees their 2.19 acre tract still owned the strip of lands on and along the Henry Smith Road on the northwest corner of such property, and that he intended to buy such lands in order to increase Appellee's road frontage onto Henry Smith Road (TR. 44-45).

The Appellee, Clinton F. Meyer, testified that he initially offered to buy all of Powell's lands when Powell had completed his dredging operations on his twenty-five (25) acres tract, but that Powell told him such lands were not for sale. (TR. 52).

Upon cross examination, Clinton Meyer admitted that he did not know where his northern boundary line was located; and he asked the Appellant if he had any problem with him (Meyer) maintaining the grounds near the parties' respective line on Henry Smith Road (TR. 55). Appellee, Clinton Meyer, further testified that he remembered talking to Michael Powell on two occasions about buying the strip of land out near Henry Smith Road (TR. 56). Clinton Meyer testified that he built the open air pavilion in stages over the years; and it was intended to be a part of the Appellees' bed and breakfast and catering business they intended to operate out of the Henry Smith House property (TR. 57).

When the Appellee, Clinton Meyer, was questioned about the photographs admitted into evidence as Exhibits 6 and 13, by the parties (R. (Exhibits 6 and 13) TR. 4.). The Appellee was not able to point out any evidence of the old fence line Appellees' claimed to exist between the parties' respective properties (TR. 60-61), and further, Clinton Meyer was not able to point out any usage of the disputed area over the .22 acre tract reflected on Exhibits 6 and 13 (TR. 62).

Paula Elizabeth Spillman Powell, testified that she is the wife of the Appellant, having married him on November 12, 2005. She testified that she has a degree in Architectural Engineering Technology from the University of Southern Mississippi, and owns an ice company in Picayune. She testified that when she first began dating the Appellant, she entered upon his lands located off of Henry Smith Road in 2004, and

assisted him in his dredging operations for gravel, sand and dirt. Paula Powell testified that she had been out upon the lands owned by the Appellant several times a week for the past 9–10 years (TR. 73-75).

Paula Powell testified that she was familiar with the .22 acre tract at issue in this litigation, and identified it on a Pearl River County Tax Assessor's aerial map admitted into evidence as Exhibit 15 (R. (TR. 5.). She testified that she had observed the lands in dispute regularly since she drove right by it on her way further west to the Appellant's dredging operations (TR. 77-78). Paula testified that the undergrowth area making up most of the disputed .22 acre tract has remained the same over the years, and that she has never seen a fence located in that area until a new wire mesh fence was suddenly erected on Appellant's property in the early summer of 2012 (TR. 80-81).

Paula further testified that the most of the area located in the .22 acre tract depicted in Exhibit 5 is still occupied by under-brush. She further testified that both Exhibit 6 and Exhibit 13 clearly reflect that the fence located in the area in dispute is a new fence (TR. 82). Paula further testified that all fence posts along the new fence line are metal posts and not wooden posts. (TR. 84). She further testified that there is a brick column located over onto the Appellant's lands on the road frontage for Henry Smith Road, which is attached to the wrought iron fence of Appellees, and that the fence line which runs west from such column is the new fence apparently erected by the Appellees. (TR. 86-88).

Upon repeated cross-examination by Appellees' counsel in the lower Court proceedings, Paula Powell steadfastly denied that there had been a fence located in

the disputed .22 acre tract of land at issue in this litigation. She stated that the only fence located in the disputed area is the new fence constructed in 2012. She also testified that the pavilion had not been located exactly in the same area as any former improvements were located. (TR 92-96).

The Appellant, Michael Vernon Powell, testified that he is sixty-seven (67) years of age, and that he has lived in Pearl River County, Mississippi for over sixty (60) years. He testified that his occupation is an excavator of fill, and is involved in the mining of gravel and sand. (TR. 103). Powell testified that he had first visited the lands owned by the parties in 1972 with his then father-in-law, Byrness Puyper. He testified that his father-in-law recalled the history of the Henry Smith House; and that after such visit he commenced buying several types of fill, including gravel and dirt from Chester Smith, which was located upon such property. He further testified that he was very familiar with the lands owned by the parties, and the he had bought a lot of material from that location (TR. 106-108). Appellant testified that his partner, Jerry Moody, and he purchased the twenty-five (25) acres tract he now owned from Chester Smith's son, Dale Smith, in 1997. Powell testified that approximately three (3) years later, the Appellee, Clinton Meyer, approached him with a request to allow him to cut down a live oak tree which was located inside the .22 acre tract that is in controversy in this litigation, and further described in Exhibit 5 admitted into evidence in the lower Court trial. Powell testified that Meyers asked him then if he would sell him a part of the .22 acre tract at issue located out near the common corner of the parties' respective properties on Henry Smith Road; and that Powell had told him the property was not for sale. (TR. 111-112).

Michael Powell testified that in 2004, Meyer asked him about buying the same property again, and Appellant again told him the property was not for sale. (TR. 113). Powell testified that at that time Clinton Meyer told him that the brick column located upon Powell's property and inside the .22 acre tract at issue might be located upon Powell's property, but that he shouldn't worry because Meyer intended to buy it. (TR. 114).

Appellant testified that Appellees commenced building the open air pavilion in 2006, and that it did encroach upon his property. He testified that he didn't object because he wanted to maintain a good relationship with his neighbor. He further testified that the encroachment by the pavilion by a few feet was the only activity in the disputed area by anyone. The Appellant further testified that there had been no activity in the .22 acre disputed area from 1972 until 2012, when he commenced clearing lands for a second road he intended to construct back into the rear of his twenty-five (25) acres tract. He again reiterated that there was no fence located in the .22 acre tract at issue in this litigation. (TR. 118-119).

Appellant testified that Clinton Meyer inquired a third time about him buying the property out near Henry Smith Road, but located in the .22 acre tract at issue in this litigation for purposes of using the same for parking for his customers. Powell said that until he learned that Meyer intended to sue him on the basis of adverse possession in 2012, he had not had a problem with Appellees utilizing the area along the Henry Smith Road for parking for their customers. (TR. 120-121). Powell testified that he objected to the claims of adverse possession by the Appellees because he had

purchased the .22 acre tract in his original purchase of his lands, had thereafter paid ad valorem taxes on it, and had even constructed a pit required by the Department of Environmental Quality out on the edge of the disputed area. He noted in his testimony that the Plaintiffs were seeking to take most of his road frontage on Henry Smith Road. (TR 123-126).

Appellant further testified that when Jerry Moody and he acquired the twenty-five (25) acres tract initially, they had gone upon the property and cleared out a good bit of the under-brush so that the surveyor who performed the survey in 1997 was able to get to such property and the property line. He testified that there was not any fence nor was there a remnant of a fence located between the properties of Appellees and Appellant, and specifically in the .22 acre tract in dispute in the instant litigation. (TR. 129).

SUMMARY OF THE ARGUMENT

The Appellant, Michael Powell, asserts three (3) propositions for consideration by this Honorable Court in these appellate proceedings.

First, Appellant asserts that the trial court erred in its findings and decision to uphold the Appellees' claim of ownership of a .22 acre tract of land described in Appellees' original Complaint on the basis of adverse possession, as such holding is against the overwhelming weight of the evidence adduced at trial.

Second, Appellant asserts that the trial court erred in determining that all elements necessary to uphold a claim of ownership through adverse possession were proffered by the Appellee and supported by clear and convincing evidence.

Third, Appellant asserts that the trial court erred in failing to find that the Appellant's request for confirming and quieting his title to the disputed tract of land was supported by the overwhelming weight of the evidence, and in failing to confirm and quiet title to the disputed property in the Appellant.

Mississippi's adverse possession statute as well as the plethora of case law interpreting it, sets forth the elements that must be met by one claiming ownership of land through adverse possession: (1) the possession or occupancy of the property must be under claim of ownership; (2) it must be actual or hostile; (3) it must be open, notorious, and visible; (4) it must be continuous and uninterrupted for a period of ten (10) years or more; (5) it must be exclusive; and (6) it must be peaceful. The burden of proof for establishing such a claim is on the party claiming adverse possession and each element must be proven by clear and convincing evidence. *West v. Brewer,* 579 So.2d 1261 (Miss. 1991).

In the case at bar, the parties (and neighbors), Appellant, Michael Powell, and Appellees, Clinton F. Meyer and Jeannette Engolia, are engaged in a dispute over a .22 acre parcel of land running between their larger tracts. The Appellant claims ownership over this small tract of land based upon the vesting deed of his larger twenty-five acre tract of land, which includes the description of the .22 acre tract, and therefore, requested the lower Court to confirm and quiet his title to such tract. Conversely, the Appellees claim ownership of the same .22 acre tract by virtue of adverse possession, claiming that they have met each of the elements required to prevail, and arguing that title should be confirmed and quieted in them. Following a trial in this action, the lower Court ruled in favor of the Appellees, upholding their claim of ownership through adverse possession.

Appellant asserts that this holding was in error and that the Appellees failed to meet their burden of proof to demonstrate each of the elements of adverse possession by clear and convincing evidence. Specifically, Appellant asserts that Appellees use of the land was permissive and limited, and did not amount to the open, notorious, hostile possession under claim of ownership required to claim title under adverse possession. Appellant will show that the evidence adduced at trial demonstrated that the Appellee did not operate under a claim of ownership, but rather, admitted that he was uncertain as to the specific area of property that he believed he owned and that he requested and obtained permission from the Appellant for the activities that he conducted on the disputed property, making his use permissive rather than hostile. Further, Appellant asserts that any actions by Appellees on the land were sporadic (and permissive) and not continuous. Finally, Appellant asserts that, as the lower Court acknowledged, he

had no knowledge of any claim by the Appellee of adverse possession, as any actions undertaken by the Appellee to support such claim were not undertaken in an open, notorious, and visible manner until the summer of 2012. Thus, Appellant asserts that Appellees' claim to ownership of the disputed property through adverse possession is erroneous and further asserts that title in and to the disputed .22 acre tract should be confirmed and quieted in him.

ARGUMENT

APPELLANT'S PROPOSITION NO. 1: WHETHER THE TRIAL COURT IN ITS FINDINGS AND DECISION UPHOLDING THE APPELLEES' CLAIM TO OWNERSHIP BY ADVERSE POSSESSION OF A .22 ACRE TRACT OF LANDS DESCRIBED IN APPELLEES' ORIGINAL COMPLAINT ON THE BASIS OF ADVERSE POSSESSION WAS MANIFESTLY WRONG AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE BEFORE THE COURT.

APPELLANT'S PROPOSITION NO. 2: WHETHER THE TRIAL AN ERRONEOUS STANDARD OF LAW IN DETERMINING THAT ALL NECESSARY ELEMENTS OF ADVERSE POSSESSION BY APPELLEES WERE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE BEFORE THE COURT.

APPELLANT'S PROPOSITION NO. 3: WHETHER THE TRIAL COURT COMMITTED MANIFEST ERROR IN FAILING TO FIND THAT THE APPELLANT'S REQUEST FOR CONFIRMATION AND QUIETING OF HIS TITLE IN AND TO THE .22 ACRE TRACT OF REAL PROPERTY AT ISSUE IN THIS LITIGATION WAS NOT SUPPORTED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Mississippi's adverse possession statute, codified at Sec. 15-1-13 of the Mississippi Code of 1974, as amended, states that, in order for an individual to successfully claim ownership of a parcel of land through adverse possession, the following elements must be met: (1) the possession or occupancy of the property must be under claim of ownership; (2) it must be actual or hostile; (3) it must be open, notorious, and visible; (4) it must be continuous and uninterrupted for a period of ten (10) years or more; (5) it must be exclusive; and (6) it must be peaceful. The burden of proof for establishing such a claim is on the party claiming adverse possession and each element must be proven by clear and convincing evidence. *West v. Brewer,* 579

So.2d 1261 (Miss. 1991). In the case at bar, the Appellant, Michael Powell, hereinafter, Powell, contends that the Chancellor erred in finding that the Appellees, Clinton F. Meyer and Jeanette Engolia, hereinafter Myers and Engolia, had acquired title to a .22 acre land at issue in this case through adverse possession because said Appellees failed to prove the above-listed elements by clear and convincing evidence, and that such finding was contrary to the evidence provided and the applicable law.

I. Appellees' use of the land under dispute was not hostile possession under claim of ownership, under the controlling laws of the State.

In order to succeed in a claim of ownership through adverse possession the party claiming adverse possession must show that his/her use and possession of the subject property was hostile. In order to properly be termed hostile possession, the Courts have noted that the party seeking to adversely possess must "unfurl [his/her] flag over the land, and keep it flying, so that the [owner] may see…that an enemy has invaded [his] domains, and planted the standard of conquest." See *Roebuck v. Massey,* 741 So.2d 375 (Miss.App. 1999).

This is a high standard, and the Courts have been clear that, in order to succeed in meeting such a standard, one claiming ownership through adverse possession must "present some proof that its occupation of the record owner's property was hostile, and that the record owner- *aware* (emphasis added) of the adverse possessor's hostile occupation-took no action to prevent adverse possession." *Double J Farmlands, Inc. vs. Paradise Baptist Church, et al.* 999 So.2d 826 (Miss. 2008). Thus, in order for the adverse possessor to succeed, the law

requires *both* knowledge and passivity on the part of the record landowner of the adverse possessor's hostile actions.

In the case at bar, in finding that the Appellees, Meyers and Engolia, had established a claim to the disputed parcel through adverse possession, the Chancellor relied heavily on two primary factors: the presence of a misplaced fence line running between the parties' properties which delineated the .22 acre encroachment of the Appellees' over the Appellant's land, and the slight encroachment of a pavilion built by the Appellees onto the Appellant's land. In his Opinion and Final Judgment, the Chancellor notes that the Appellees' "fence or remnant fence line has been in place since the early 1940's...and includes the .22 acre disputed area. How better to assert notice of a claim of ownership than to fence the property to the exclusion of the rest of the world?" (R.E. 2-29). The Court, in its Opinion and Final Judgment, went on to hold that, the "Plaintiffs (Appellees) clearly established their claim of ownership to the disputed area since the early 1940's when same was under fence. The Defendant (Appellant) and his predecessors in title were, therefore, put on notice by the Plaintiffs and their predecessors in title of their occupancy, use and possession of the .22 acres, that was adverse to Defendant's record title deed descriptions, *notwithstanding Defendant did not know about the disputed area until about June of 2012."* (emphasis added.) Although the parties' testimony disputed whether or not actual remnants of a 1940's era fence really existed on the disputed land, assuming as the Court did, that the Appellees were correct and that remnants of such a fence did exist-the Courts have made clear that the "mere presence of a fence, without more, has never been sufficient to sustain a claim of adverse possession." *Double J Farmlands, Inc. vs.*

Paradise Baptist Church, et al. 999 So.2d 826 (Miss. 2008). Further, the Courts have explained that, "when a fence…is relied upon to delineate the boundary of an adverse claim, the applicable rule is whether the enclosure like other acts of possession is sufficient to fly the flag over the land and put the true owners on *notice* that his land is held by an adverse claim of ownership." *Id.* Additionally, the presence of a fence is *only evidence* (emphasis added) to be considered when considering the issue of the location of a property boundary line…it does not establish that the fence is the accepted boundary between properties." *Ellison v. Meek,* 820 So.2d 730 (Miss.App. 2002).

Further, in his testimony, the Appellee testified specifically that he was unsure as to where his property line was, and, additionally that he asked and obtained permission from the Appellant to maintain the area. (T.R. 55-56). Such an admission clearly belies that the Appellee was asserting a hostile claim of ownership over the disputed property.

In the case at bar, Appellees base their claim of adverse possession primarily in the presence of an old fence row dating back to the 1940's running across the disputed property, claiming that such fence signifies an act of open, hostile and actual possession of the disputed land. However, the evidence at trial clearly established--and the Chancellor in his Opinion and Final Judgment directly acknowledged--that at no time prior to 2012 did Appellant, Michael Powell, even know that such a fence existed on the property, as it could not be seen from his property due to the thick vegetation and undergrowth all around the disputed property. To the contrary, Appellant testified at trial that when Jerry Moody and he decided to buy the

twenty-five acre tract in 1997 from Chester and Daisy Smith's son, Dale, they hired Nicholas Smith, a local surveyor, to come to the property and instructed him where each corner of the twenty-five acres was to be located. They then used a bulldozer and trackhoe which they had brought with them to clean the boundary lines, including the one in dispute in the instant litigation, so that Smith could shoot his lines and measurements. Powell testified at least twice at trial that no fence or fragments existed along the common boundary between the parties' lands, as has been asserted by Appellees. (T.R. 115-116, 128-129).

Appellant further notes that neither the survey attached unto Appellee's deed admitted into evidence (R.E. 82), nor their survey performed by Nicholas Smith at the time of their purchase of the twenty-five acres in 1997 (R.E. 86), depict a fence in any form existing on the southern and common boundary line with the Appellees.

The holding of the lower Court, then, presents a two-fold problem: First, the Appellees did nothing to demonstrate actual hostile possession under a legitimate claim of ownership until 2012 (when they assembled a makeshift fence along the purported path of the older fence line, the few remaining remnants of which had been knocked down when the Appellant, Powell, bush hogged the property to clear it). The Appellees merely purchased property with an old fence already on it. In deeming the presence of this fence placed by the Appellees' predecessors in title to be demonstrative of hostile possession, the Chancellor is presuming to know the motivations of those predecessors in title in placing the fence on the property. However, as all parties acknowledge, the land owned by both parties in this action (including the disputed property) derived from a common tract that was owned by a

single family. In the case of *Ellison v. Meek*, the Court of Appeals upheld a Chancellor's finding that adverse possession had not been established where the claimants relied primarily on the presence of an "old barbed wire fence" running across the disputed property to assert their claim of hostile possession, because, as the Court noted, they had not "shown such evidence to establish that the fence ever enclosed the property, when the fence was erected...or that the party erecting the fence was making a claim of ownership" adverse to another. *Ellison v. Meek,* 820 So.2d 730 (Miss.App. 2002). In the case at bar, as in Ellis, to presume that the fence was erected in order to assert ownership against another, is purely speculative, and cannot withstand the test of clear and convincing evidence.

Secondly, the Chancellor himself found that Appellant Powell did not know of the presence of the fence on his land until approximately 2012. The Chancellor further acknowledged that the Appellant could not have known of the fence, as it was not visible from his side of the property due to the overgrowth. These circumstances clearly contradicts the Court's own holding that hostile possession requires that the "acts relied upon by the would-be possessor are sufficient to place the record title holder on notice that the lands are under an adverse claim of ownership." (R.17, quoting *Johnson v. Black,* 469 So. 2d 88 (Miss. 1985). Thus, if the Appellant, as acknowledged by the Court, had no notice of the encroachment, hostile possession under a claim of ownership cannot be proven.

The other factor upon which the Court relied heavily in determining that the Appellees acquired title through adverse possession is that the Appellees, over the course of several years, erected a pavilion on the border of the parties' properties, and

all parties acknowledge that approximately five to six feet of this pavilion encroach upon Appellant Powell's land. While this might, under different circumstances constitute a hostile action evidencing an intent to claim ownership adversely, as the record clearly reflects, the Appellees were aware that the pavilion encroached upon the Appellant's property, and on more than one occasion, the Appellee, Clinton F. Meyer, approached the Appellant, Powell, and offered to buy the property upon which his structure encroached. This action on the part of the Appellee demonstrated that he was not operating under a legitimate, albeit mistaken claim of ownership, as he clearly recognized that he had no right to encroach upon the Appellant's land. The Appellant Powell, however, refused to sell, and stated that he did not fuss about the building but, instead, allowed the Appellee to keep the pavilion where it was with permission because he wanted to be a "good neighbor." (T.R. 115).

The Courts have been very explicit that "possession with permission of the record title holder is never sufficient to establish adverse possession and ripen into title in the adverse possessor no matter how long continued." *Jeannean Johnson v. John E. Black,* 469 So.2d 88 (Miss. 1985).

Finally, as to the lower Court's finding that the Appellees' "use, maintenance, building, and storing materials on the [Appellant's] side of the fence," constitutes hostile possession under claim of ownership, a review of the testimony presented at trial clearly shows that the Appellee Meyer never provided definitive dates as to when he began to store materials upon Appellant's lands. Furthermore, the Appellee stated in testimony that he did not know where the Appellant's line was. (T.R. 55). Both Appellant and his wife testified in trial that the Appellees took no actions

upon the disputed land, other than the pavilion extending a few feet over the property line; however, because the pavilion was built in stages, as acknowledged by the parties, the section of pavilion encroaching upon Appellant's property was not in existence ten (10) years ago. This encroachment, further, was permitted by the Appellant in the interest of being neighborly.

Thus, Appellant would assert that the great weight of evidence adduced at trial clearly shows that the Appellees failed to establish that their possession of the disputed property was actual, hostile possession, nor that their actions "put the [Appellant] on notice that the lands are held under an adverse claim of ownership." *Askew v. Reed* 910 So.2d 1241 (Miss.App. 2005).

II. Appellees' use and possession of the land at issue in this case was not open, notorious, and visible.

In order for a claimant to prevail in a claim of ownership through adverse possession, he/she must prove by clear and convincing evidence that his/her use of the land at issue was open, notorious, and visible. In order to be open, notorious and visible, the actions of the would-be adverse possessor must be such that they effectively "fly [their] flag over the land and put the true owner upon notice that his land is held under and adverse claim of ownership." *Davis v. Clement* 468 So.2d 58 (Miss. 1985). The Courts have made it clear that subtle innuendo will not suffice; the claimants' actions must be sufficiently bold to make a "clear claim of ownership" over the land to be adversely possessed, and that "sporadic use of another's property does not constitute open and notorious possession." *Ellison v. Meek,* 820 So.2d 730 (Miss.App. 2002).

Additionally, the Chancellor, in his Opinion and Final Judgment, states that the Appellant Powell failed to show by preponderance of evidence that he did anything to assert his ownership prior to learning of the conflict with the parties' deed descriptions and the existence of a fence in 2012. However, this burden on the Appellant is misplaced. Under our law, the burden is upon the party claiming adverse possession, not the record owner to assert actions signifying ownership of the disputed land. The question, then, must be begged, why would the Appellant take active steps to "assert" ownership over property that he was unaware (as the Chancellor noted) was under attack and threat of adverse possession? As the lower Court noted specifically, the Appellant was unaware of the existence of any fence claimed as a symbol of adverse possession by the Appellees until approximately June, 2012; therefore, he would have had no knowledge of any need on his part to actively "assert" his ownership. In creating the remedy of adverse possession, the Court's goal would seem to be the creation of an efficient system of settling long-ripening land disputes-- not to create an onerous burden upon landowners to stay constantly vigilant policing their land boundaries against subtle encroachers.

In the case at bar, as established by the evidence presented, the Appellees' use of the land was very limited, and any such use was with the express permission of the Appellant. In the case of *Davis v. Clement*, the parties relied primarily on the existence of an old fence that ran through the property at issue and some sporadic use of the property by the parties claiming adverse possession; however, the Court in *Davis* found such actions to be insufficient to establish a claim of adverse possession. Similarly, in the case of *People's Realty and Development Corp. v. Sullivan,* the

Supreme Court found that the placement of a wire fence on the property of another, which could not be easily discovered, together with limited use of the land, and the adverse possessor's attempts to buy the property from the owner were insufficient acts to constitute "adverse, hostile, and exclusive occupancy contemplated by the statue." *People's Realty and Development Corp. v. Sullivan,* 336 So.2d 1304 (Miss. 1976). As the Court noted, "The acquisition of title by adverse possession, as that phrase is used in real property law, contemplates a special kind of possession. It is the intendment of the law that title to real property belonging to another may never be acquired by mere possession, however long continued, which is surreptitious or secret, or which is not such as will give unmistakable notice of the nature of the occupant's claim. Such occupancy must not only be adverse, hostile, and exclusive as to the others, but it must also be peaceful, uninterrupted, and continuous, under claim of ownership. In addition, the occupancy, under claim of ownership, must be actual, open, notorious, and visible." *Id.*

As in *Davis,* in this case, "despite protestations to the contrary, the record reveals that all the [Appellees] really have to base their claim on is an old...fence." *Davis v. Clement,* 468 So.2d 58 (Miss. 1985). Furthermore, the Defendant was unaware of the existence of this fence until 2012, as noted by the Chancellor. The other encroachment onto the Appellant's property by the Appellees, by way of their pavilion, was used with the express permission of the Appellant, as he was trying to "be a good neighbor", as stated at trial. (T.R. 119). Such permissive use cannot constitute actions establishing adverse possession. Thus, the Appellant asserts that

the actions of the Appellees are not sufficient to establish an open, notorious, and visible claim of adverse possession.

III. Appellant asserts that the Appellees use of the disputed property was not exclusive, continuous and uninterrupted for a period of ten (10) years.

While the Appellees asserted at trial that they maintained and used the disputed property continuously for ten or more years, the Appellant contends that the evidence presented and the applicable case law disputes this.

In the case of *City of Waynesboro v. McMichael,* the city attempted to claim ownership of a private roadway through adverse possession; however, the Court of Appeals, in upholding the Chancellor's finding of insufficient evidence to support an award of adverse possession, found that during the thirty-five year time period during which the City claimed adverse possession, they only sporadically worked on the property, had made "no improvements to the road, nor erected any signs or repaired the fence," and had thus, failed to meet the "continuous" and "exclusive" elements of adverse possession. *City of Waynesboro v. McMichael,* 856 So.2d 474 (Miss. App. 2003). Similarly, the Appellees in the case at bar have claimed that they have used and maintained the property at issue since purchasing the property, and the Chancellor agreed. However, as the photographic and testimonial evidence demonstrates, the Appellees did not clear and maintain the .22 acres at issue, nor did they maintain or repair the purported fence running along the disputed property and around which they built their case in chief (until the remnants of any fence were taken down by the Appellant during his maintenance of the property, at which point the Appellees attempted to erect a makeshift fence along the line, which was the first open

attempt on their part to assert ownership against the Appellant. Finally, all other use, as with the Appellees' encroaching pavilion were accomplished with the express permission of the owner, Appellant.

Furthermore, Appellee, Clinton Meyer, testified that the pavilion and other improvements to their property were ongoing for several years until Appellees actually commenced operation of their business at the Henry Smith House in 2010-2012. (T.R. 57). Appellant testified the pavilion was not constructed until 2006, (T.R. 114-115); and Appellee's suit for adverse possession was not filed until January, 2013. (R. 2-18).

The most significant contradiction to Appellee's assertion of adverse possession is testimony by both Appellee, Clinton Meyer, and Appellant, Michael Powell of two and possibly three attempts by Meyer to purchase all or part of the .22 acre tract at issue in this litigation. These discussions set forth in the testimony at trial (T.R. 45-46, 52, 53-54, 56, 113, and 120) absolutely vitiate Appellees' claim of adverse possession determined to have existed by the Chancellor in his Opinion and Final Judgment rendered in the lower Court proceedings. Therefore, Appellant asserts that the Court erred in failing to grant his request to confirm and quiet his title to the .22 acre of disputed land at issue in this litigation.

CONCLUSION

The Appellant, Michael Powell, submits unto this Court that the Chancellor in the lower Court proceedings awarded Appellees a .22 acre portion of the twenty-five acres Appellant had bargained for and purchased from the same family-sellers from which Appellees purchased their original 2.19 acre tract on the basis of adverse possession which Appellant asserts is not established by clear and convincing evidence in the record of this case.

Without intending in any manner to be disrespectful of the Chancellor in the lower Court, Appellant asserts the relatively weak record and proof offered by Appellees does not rise to the level of clear and convincing proof to support a finding of adverse possession on behalf of Appellees on any of the six (6) requisites for adverse possession.

The record and transcript for the instant case are modest and not lengthy and Appellant directs the Court's attention to the utter lack of testimonial or documentary proof of the "old" fence or its remnants in the record of this case upon which the findings of adverse possession were based.

Simply stated, Appellant who had over forty years' experience with the lands he purchased from the Smith heirs in contrast to the Appellees who followed him in their purchase of a smaller, 2.19 acre tract from the same seller-family, and therefore, Appellant submits, the two tracts of lands should have been left to stand alone separately by the lower Court.

Appellant urges this Honorable Court to reverse the lower Court's decision and render a decision under which Appellant's title to his twenty-five acre tract of land is quieted and confirmed as against Appellees and all other persons.

Respectfully submitted,

MICHAEL POWELL, APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

I, G. GERALD CRUTHIRD, attorney at law and attorney of record for the Appellant, Michael Powell, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellant unto Gerald C. Patch, of counsel for the Appellees, Clinton F. Meyer and Jeanette Engolia, at his usual mailing address, P.O. Box 460, Picayune, Mississippi 39466; and further unto Gail D. Nicholson, Esquire, of the law firm of Nicholson and Nicholson, attorneys at law as Co-Counsel for the Appellees, Clinton F. Meyer and Jeanette Engolia, at her usual business/mailing address, 1822 23rd Avenue, Gulfport, Mississippi 39531; and further unto the Honorable M. Ronald Doleac, Chancellor, 10th Judicial District, at his usual business/mailing address, P.O. Box 872, Hattiesburg, Mississippi 30403.

THIS, the 2nd day of November, A.D., 2015.

G. GERALD CRUTHIRD