STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr. – Circuit Court Judge

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SC Court of Appeals

APPELLATE CASE NUMBER 2012-212010

Eugene Gathers, Respondent,

v.

Ned Wright, Hattie Wright Gaston, Annie M. Wright, Edward Wright, Samuel Wright, James Wright, Earline Wright Maxwell, Wilmenia Wright, Henry Wright, Oscar Wright, Leroy Wright Harold Wright, Charles Wright, Samuel Wright, Jr., Ernestine Wright, Henry Wright, Jr., Ernest McKnight,, along with John Doe or Mary Roe, fictitious names to designate minors, infants person of unsound mind, under disability or incompetent. Person in prison, persons in the military service within meaning of Title 50, United States Code, commonly referred to as the Soldiers and Sailors Civil Service Act of 1940, if any, and Richard Roe and Sarah Roe, fictitious names to designate the unknown heirs, devisees, distributees, issue, executors, administrators, successors or assigns of Ned Wright, Hattie Wright Gaston, Annie M. Wright, Edward Wright, Samuel Wright, James Wright, Earline Wright, Wilmenia Wright, Henry Wright, Oscar Wright, Leroy Wright, Harold Wright, Charles Wright, Samuel Wright, Jr., Earnestine Wright, and henry Wright, Jr., also all other unknown person claiming any right, title, estate of lien upon the real estate which is the subject of this action, Defendants,

of whom Ernest McKnight is the Appellant.

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# MEMORANDUM ADDRESSING APPEALABILITY

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## INTRODUCTION

Appellant-Defendant's ("McKnight's") Notice of Appeal challenges a trial court order dated May 2, 2012, and filed May 4, 2012, (the "4th Order"). McKnight received written notice of the entry of this 4th Order on May 10, 2012. Below is a chronological listing of all Trial Court's orders of record in the case below (2010-CP-10-00250):

| # | Description | Date | Filed | Received |
|---|---|---|---|---|
| 1st | Consent Order of Dismissal - Dismissing with prejudice McKnight's Counter-Claim for Adverse Possession | July 26, 2010 | August 2, 2010 | N/A |
| 2nd | Order Granting John Wright's Motion for Summary Judgment and Quieting Title in John Wright (as to All Defendants except McKnight) | April 21, 2011 | April 21, 2011 | N/A |
| 3rd | Order on Anna Porcher's Motion to Intervene (as a creditor only) | March 12, 2012 | March 15, 2012 | N/A |
| 4th | Order Denying Motion to Set Aside Summary Judgment (2nd Order) | May 2, 2012 | May 4, 2012 | May 10, 2012 |

The Notice of Appeal mistakenly describes the order appealed from as one dated March 12, 2012, (instead of being one dated May 2, 2012). McKnight will serve and file and Amended Notice of Appeal to correct the date of the 4th Order if such an amendment is warranted.

McKnight *timely served* his Notice of Appeal from the Trial Court's 4th Order on May 22, 2012, in accordance with Rule 203(b)(1), SCACR, which allows for service "within thirty (30) days (after receipt of written notice of entry of the order or judgment). McKnight then *timely filed* this Notice of Appeal on the same day, May 22, 2012, in accordance with Rule 203(d)(1)(B), SCACR, which allows for filing within ten (10) days (after the notice of appeal is served).

Although this memorandum is focused on the narrow issue of appealability of the Trial Court's 4th Order, a brief overview of McKnight's equitable interests and foreclosure of mortgage claim will give context to the appealability issues involved in this case.

## MCKNIGHT'S EQUITABLE CLAIMS

McKnight seeks to foreclose and protect his equitable interest in the subject property. McKight holds a mortgage dated September 25, 2003, in the principal amount of $6,187.52, which was filed on September 29, 2003, in the Charleston County RMC Office in book M-469, at Page 341. This Mortgage was given to McKnight by three of the named defendants: John Wright, Anna Michelle Porcher, and Harold L. Wright ("Mortgagors").

With the exception of McKnight's claim for adverse possession, the Trial Court's 2nd Order purportedly preserved all of McKnight's allegations and claims in this matter. However, by vesting the Plaintiff with fee simple title to the subject property, the court summarily stripped McKnight of certain rights and interests in the property, as is further explained below. As this 2nd Order was a final judgment as to the issue of ownership of the property, it is an appealable order under Rule 72, SCRCP and Rule 201, SCACR.

The referenced mortgage has all the usual elements of a South Carolina mortgage instrument. The mortgagors granted a security interest to McKnight for the better securing the payment of the $6,187.52, a Habendum Clause and General Warranties of Mortgagors (Title, Possession Further Assurances, etc.). Accordingly, when the mortgagors conveyed a mortgage to McKnight in September of 2003, they asserted the following:

a) LEGAL TITLE / OWNERSHIP - They owned the property (as of the date of the mortgage, September 29, 2003) and had the legal right to convey a mortgage interest therein to McKnight.

b) CLEAR TITLE - Their title to the property was free of any liens and encumbrances, except those that may be specifically noted in the mortgage.

c) SUPERIOR TITLE - Their title was superior to any other title that may exist on the property.

d) FURTHER ASSURANCES - They would provide further assurances to get any required legal documents that may be needed to make the grantee's mortgage interest good.

e) GENERAL WARRANTIES - They and will defend the grantee's title against all legal claims that may be made against it, including compensating the grantee for any loss should the title prove faulty.

The mortgage further states that the Mortgagors "do grant, bargain, sell and release unto the said Earnest McKnight ...[the subject property]... TOGETHER with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in anywise incident and appertaining." The only such right with respect to the property not conveyed by the mortgage to McKnight was possession and use of the property as indicated by the provision stating that "...the mortgagor is to hold and enjoy the same premises until default of payment shall be made."

## 4th ORDER CONSTITUTED DENIAL OF MOTION FOR RELIEF FROM 2nd ORDER UNDER RULE 60(b)

Although McKnight's Motion to Set Aside the Summary Judgment Order (2nd Order) refers to Rule 59(e), it is better styled and treated as one under SCRCP, Rule 60(b), and disposed of as provided therein, and not under SCRCP, Rule 59. The "mistake" provision of Rule 60(b)(1), SCRCP, afforded McKnight one (1) year from written notice of entry of the order to file and serve the motion (or until April 21, 2012, at the earliest), and the "equitable to allow

prospective application" provision of Rule 60(b)(4) afforded McKnight three years from such notice (or until April 21, 2014) and, accordingly, it was timely filed on September 27, 2011, under both of these subsections. McKnight also has a continuing right to file an amended or even a new motion under Rule 60(b)(4), and would immediately do so, with leave of this Court of Appeals, if doing so would better clarify the issues on appeal in this case going forward on remand or otherwise.

**Findings of Fact in 2nd Order**

The 2nd Order made the following findings of fact and conclusions of law:

a) Wright paid taxes and *maintained possession* of the property for a period of over twenty years;

b) Wright's possession was *open, notorious, hostile and continuous for this period*;

c) Wright's actions *constitute an ouster* of all other heirs and possible claimants.

d) As a result of Wright's acts, title to the subject property has vested in Wright.

**Rule 60(b) Mistakes in 2nd Order**

The 2nd Order includes mistakes of the trial court which were reiterated and compounded by the new findings of fact and conclusions of law issued in the 4th Order. Specifically, the trial court erred in in finding that there was an ouster by Wright as against the Mortgagors when neither the pleadings nor the court's orders set out the required elements of such an ouster. See *Fender v. Smashum*, 581 S.E.2d 853,(S.C. App (2003). Elements presented by Plaintiff's counsel and the court lacked the required showing of "actual" and "exclusive" possession as against Wright's fellow co-tenants for the requisite twenty (20) year period for implied ouster by possession. In addition, one of the three (3) mortgagors granting the mortgage interest to McKnight was none other than Wright himself! The mere existence of this mortgage, in which

all three mortgagors assert, inter alia, legal ownership, obviously negates any valid claim of ouster by Wright as to the other co-mortgagors. Thus, the Order was mistaken as a matter of law.

Furthermore, with no ouster, the Mortgagors retained a legal interests in the property, including a right of partition and right of first refusal under Section 15-61-25. A fact which in turn gives rise to the mistaken ruling in the 4th Order.

**Findings of Fact in 4th Order**

The trial court made the following findings and conclusions in his 4th Order:

1. That McKnight contends he has standing to assert claims under Section 15-61-25 ("Right of First Refusal of Joint Tenants or Tenants in Common").
2. That McKnight seeks reimbursement for taxes he purportedly paid.
3. That McKnight asserts a claim under a mortgage.
4. That McKnight's claims were expressly preserved in this Court's prior order (this is the "law of the case" referenced above).
5. That joint tenants or tenants in common are provided certain rights under Section 15-61-25.
6. That McKnight is neither a joint tenant nor a tenant in common.
7. That, as a creditor, he has no statutory right of first refusal under Section 15-61-25 which provides no basis for setting aside of this Court's prior order.
8. That McKnight's motion is untimely and improper.

**Rule 60(b) Mistakes in 4th Order**

The trial court made a mistake in finding that McKnight has no right of first refusal under section 15-61-25 without a full hearing on the matter. The Mortgagors retained their legal rights

in the property as noted above. and McKnight was conveyed an equitable interest in those rights (save possession and use prior to default. as noted above) by virtue of the mortgage. Thus. at least arguably. McKnigh was conveyed and/or assigned any rights of first refusal the Mortgagors may had under Section 15-61-25.

For these reasons. both the 2nd and 4th Orders were mistaken as a matter of law and together were appealable final judgments as to the disposition of the ownership rights in the subject property to the detriment of McKnight. despite the Trial Court's preservation of his rights as a mortgagee as detailed above.

## CONCLUSION

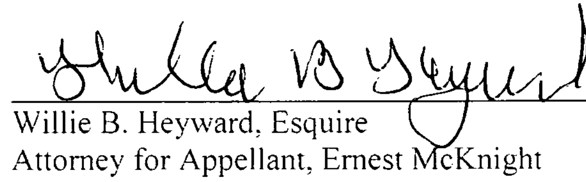
The 4th Order of The Honorable J.C. Nicholson dated May 2, 2012, and filed May 4, 2012, is appealable as a denial of McKnight's motion for relief from his 2nd Order (re-characterized as a motion under Rule 60(b)) improperly quieting title in Wright based upon a mistaken theory of "ouster" when the essential elements of "ouster" (importantly, ouster by "actual" and "exclusive" possession) do not appear in the Order or in the pleadings, the Order is both a mistake and inequitable vis-a-vis McKnight's ability to continue in this matter with his equitable and legal claims preserved.

Quiet Title actions that result in several owners implicate a partition action by default when a mortgage interest and foreclosure is involved as to some, but not all, of the owners. Whether or not S.C. Code 15-61-25 becomes an issue in this case depends upon a judicial finding as to whether or not Appellant's rights as a mortgagee are tantamount to an assignment of the statutory right of first refusal therein from the three Mortgagors to the Appellant has not yet been properly addressed.

McKnight hereby moves before this Court for leave to file an amended Motion to Set Aside the

Summary Judgment (4th Order) to be styled as one under Rule 60(b), and this matter be remanded to the Trial Court for an Order of Reference to the Charleston County Master-in-Equity to take testimony and fully adjudicate the rights of the parties in this matter.

Respectfully Submitted,



Willie B. Heyward, Esquire
Attorney for Appellant, Ernest McKnight

June 21, 2012

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON ) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2010-CP-10-250

Eugene Gathers

PLAINTIFF,

VS.

**CERTIFICATE OF MAILING**

NED WRIGHT, HATTIE WRIGHT GASTON, ANNIE M. WRIGHT, EDWARD WRIGHT, SAMUEL WRIGHT, JAMES WRIGHT, WARLINE WRIGHT MAXWELL, WILMENIA WRIGHT, HENRY WRIGHT, OSCAR WRIGHT, LEROY WRIGHT, HAROLD WRIGHT, CHARLES WRIGHT, SAMUEL WRIGHT, JR. ERNESTINE WRIGHT, HENRY WRIGHT, JR., ERNEST MCKNIGHT, along with JOHN DOE OR MARY ROE, FICTITIOUS NAMES TO DESIGNATE MINORS, INFANTS, PERSON OF UNSOUND MIND, UNDER DISABILITY OR INCOMPETENT, PERSONS IN PRINSON, PERSONS IN THE MILITARTY SERVICE WITHIN MEANING OF TITLE 20, UNITED STATES CODE, COMMONLY REFERRED TO AS THE SOLDIERS AND SAILORS CIVIL SERVICE ACT OF 1940, IF ANY, AND RICHARD ROE AND SARAH ROE, FICTITIOUS NAME TO DESIGNATE THE UNKNOWN HEIRS, DEVISEES, DISTRIBUTEES, ISSUE, EXECUTORS, ADMINISTRATORS, SUCCESSORS OR ASSIGNS OF NED WRIGHT, HATTIE WRIGHT GASTON, ANNIE M. WRIGHT, EDWARD WRIGHT, SAMUEL WRIGHT, JAMES WRIGHT, EARLINE WRIGHT, WILMENIA WRIGHT, HENRY WRIGHT, OSCAR WRIGHT, LEROY WRIGHT, HAROLD WRIGHT, CHARLES WRIGHT, SAMUEL WRIGHT, JR., ERNESTINE WRIGHT, AND HENRY WRIGHT, JR., ALSO ALL

| | |
|---|---|
| OTHER UNKNOWN PERSONS | ) |
| CLAIMING ANY RIGHT TITLE, ESTATE | ) |
| OR LIEN UPON THE REAL ESTATE | ) |
| WHICH IS THE SUBJECT OF THIS | ) |
| ACTION, | ) |
| | ) |
| DEFENDANTS | ) |

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SC Court of Appeals

I certify that I have served the **MEMORANDUM ADDRESSING APPEALABILITY** of the Order by Judge Nicholson on all counsel of record by depositing copies of the same in the United States Mail postage prepaid, on June 21, 2012 addressed as follows:

Jonathan S. Altman, Esq.
Derfner, Altman & Wilborn, LLC
PO Box 600
Charleston, SC 29402

Consuela Reese, Legal Assistant
Heirs Property Law Center, LLC

# SECTION 15-61-25.

Right of first refusal of joint tenant or tenant in common to purchase property prior to partition; procedure.

(A) For the purposes of this section, "joint tenants and tenants in common" include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the nonpetitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.

(B) In the circumstances described in subsection (A) of this section, and in the event the parties cannot reach agreement as to the price, the value of the interest or interests to be sold shall be determined by one or more competent real estate appraisers, as the court shall approve, appointed for that purpose by the court. The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty days after their appointment. The costs of the appraisers appointed pursuant to this section shall be taxed as a part of the cost of court to those seeking to purchase the interests of the joint tenants or tenants in common petitioning to sell their interest in the property described in the petition for partition.

(C) In the event that the petitioning joint tenants or tenants in common object to the value of the interests as determined by the appointed appraisers, those joint tenants or tenants in common shall have ten days from the date of filing of the report to file written notice of objection to the report and request a hearing before the court on the value. An evidentiary hearing limited to the proposed valuation of the interests of the petitioning joint tenants or tenants in common shall be conducted, and an order as to the valuation of the interests of the petitioning joint tenants or tenants in common shall be issued.

(D) After the valuation of the interest in property is completed as provided in subsection (B) or (C) of this section, the nonpetitioning joint tenants or tenants in common seeking to purchase the interests of those filing the petition shall have forty-five days to pay into the court the price set as the value of those interests to be purchased. Upon the payment and approval of it by the court, the court shall execute and deliver or cause to be executed and delivered the proper instruments transferring title to the purchasers.

(E) In the event that the nonpetitioning joint tenants or tenants in common fail to pay the purchase price as provided in subsection (D) of this section, the court shall proceed according to its traditional practices in partition sales.

HISTORY: 2006 Act No. 302, Section 1, eff May 25, 2006, applicable to all petitions for partition filed after that date.

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**581 S.E.2d 853 (S.C.App. 2003)**

**354 S.C. 504**

**Sherwood N. FENDER, Respondent,**

**v.**

**HEIRS AT LAW OF Roger SMASHUM, John Smashum and Arthur Smashum, if living or such heirs of them as may be living, Carolee H. Goodwine, Mae Olive Henderson, Audrey Polite Sawyer, Diana Cornish, Heirs of John Frasier, if living or such heirs of them as may be living, Bernadette Anderson, Eloise Gadson and all other persons unknown, having or claiming any right, title or estate or interest in or lien upon the real property described in the complaint herein, being designated collectively as John Doe and Sarah Roe, including all minors, persons in the armed forces, insane persons and all other persons under any other disability who might have or claim to have any right, title or interest in or lien upon the real property described in the complaint herein, Defendants,**

**Of whom Henrietta Jones, Sarah Shepard and Lucy Smith, as heirs at law of John Smashum, and Queen Smashum, as grantee of Adam Smashum, heir at law of John Smashum, are Appellants.**

**No. 3639.**

**Court of Appeals of South Carolina**

**May 5, 2003.**

Heard March 11, 2003.

Rehearing Denied June 26, 2003[354 S.C. 505].

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[Copyrighted Material Omitted]

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[354 S.C. 507] Derek C. Gilbert, of Beaufort, for Appellants.

Alysoun Meree Eversole, of Beaufort, for Respondent.

CURETON, J.:

Henrietta Jones, Sarah Shepard and Lucy Smith, as heirs of John Smashum, and Queen Smashum, as grantee of Adam Smashum, heir of John Smashum (collectively "Heirs"), appeal the circuit court's grant of summary judgment to Sherwood N. Fender in this quiet title action. We reverse and remand.

**FACTS**

The parties each claim title to a parcel of unimproved land. Each can trace their titles through a series of intestate and deed conveyances to two "Head of Family Land Certificates" granted by the United States District Tax Commission to Roger Smashum around 1867. Roger Smashum's interest eventually passed through intestacy to his son John Smashum and eventually to two of his grandsons, Arthur Smashum and Thomas Smashum.

Fender claims title through a November 1988 deed derived from a succession of conveyances from Arthur Smashum. In 1966, Arthur Smashum conveyed his interest in the

property to Betty M. Sloan by quit-claim deed. Sloan conveyed the property back to Arthur in 1969 by quit-claim deed. In 1983, Arthur conveyed the property to himself and Charlie Mae Brantley as joint tenants with the right of survivorship. Arthur died in 1984 and in 1988 Charlie Mae conveyed the [354 S.C. 508] property to W. Thomas Parker and Fender by warranty deed. [1]

Henrietta Jones, Sarah Shepard and Lucy Smith, claim a tenancy-in-common with Fender as heirs of Thomas Smashum. Queen Smashum claims a one-eighth tenancy in common interest with Fender through a 1999 quit-claim deed from Adam Smashum, an heir of Thomas Smashum.

In December 1999, Fender initiated the present action seeking to quiet title to the property. He asserted the absence of estate or administrative proceedings related to the estates of Roger Smashum, John Smashum, and Arthur Smashum left a cloud over his title. In his complaint, Fender alleges the interest of a business associate and his was adverse to all others. His complaint states:

That possession of the property which is the subject of this cause of action has been in actual, open, notorious and exclusive possession of [Fender and a business associate] under claim of title and that there has been such continued occupation and possession of the premises for over ten (10) years.

Queen Smashum answered on behalf of herself and the heirs of Thomas Smashum in May 2000, and counterclaimed to quiet title to the property in the name of the Heirs. The Heirs claimed Queen Smashum, Henrietta Jones, Sarah Shepard, and Lucy Smith each owned an undivided one-eighth interest in the property.

In June 2001, Fender made a motion for summary judgment. The circuit court conducted a hearing on Fender's motion the following month. In its order issued in August 2000, the court granted summary judgment to Fender. This appeal follows.

**STANDARD OF REVIEW**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) . When determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn from it, must be viewed in the light most favorable to the nonmoving party. *Faile v. S.C. Dep't of Juvenile Justice,* 350 S.C. 315, 324, 566 S.E.2d 536, 540 (2002).

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If triable issues exist, those issues must be submitted to the jury. *Young v. S.C. Dep't of Corrections,* 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct.App.1999). Even where no dispute as to evidentiary facts exists, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. *Hall v. Fedor,* 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct.App.2002). Moreover, summary judgment is a drastic remedy that should be cautiously invoked to ensure no person is improperly deprived of a trial of disputed factual issues. *Lanham v. Blue Cross & Blue Shield of S.C.,* 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002).

**LAW/ANALYSIS**

The Heirs argue the circuit court erred in finding Fender acquired title to the subject property through adverse possession. We agree.

As an initial matter, the Heirs assert the circuit court erred in failing to find that they are co-tenants in the subject property with Fender. The Heirs cite 86 C.J.S. *Tenancy In Common* § 8 (1997) for the proposition that upon the intestate death of John Smashum and his wife, his two surviving children, Arthur Smashum and Thomas Smashum owned the property as tenants in common. They further argue that any grantees of Arthur necessarily owned a proportional interest in the property as tenants in common with them as heirs of Thomas Smashum. While acknowledging that Arthur and Thomas were cotenants, Fender asserts the cotenancy came to an end when Arthur conveyed the property to a stranger, reacquired title to the property, and thereafter conveyed the property by warranty deed to himself and Charlie Mae Brantley. [2] He further refers to the deposition testimony of Queen [354 S.C. 510] Smashum that prior to the death of Arthur Smashum in 1985, she obtained permission from him for her and her husband Adam to plant a garden on the property.

As stated in the case of *Andrews v. McDade*, 201 S.C. 24, 28-29, 21 S.E.2d 202, 204 (1942):

As to real property, the general rule is that where the state has passed a perfect legal title, the doctrine of abandonment is not applicable thereto, and that the title vested in the grantee cannot be affected or transferred by his act in departing from the land and leaving it unoccupied, or otherwise ceasing to exercise dominion over it....

At common law, while an incorporeal hereditament may be lost by abandonment, the principle is firmly established that perfect legal title to a corporeal hereditament cannot be abandoned, or lost by abandonment, operating alone, and dissociated from other acts or circumstances; and so it is frequently said that so far as land is concerned, there can be an abandonment only in a case where the title is imperfect, or less than absolute. The doctrine of abandonment has, therefore, no application to a fee simple; but inchoate rights and equitable rights in land may be abandoned, and so may mere possessory rights, and rights acquired by user....

Although technically a fee simple title holder may not by nonuse abandon his title, his nonuse and failure to assert his title to the property may constitute an important circumstance in a determination of whether another has held the property adversely to the title holder. As clarified at oral argument, Fender does not claim he ousted the Heirs, but rather claims his predecessors in title ousted the Heirs. Thus, he reasons he is not a cotenant with the Heirs and thus need only prove adverse possession for ten years prior to the date of the commencement of this action. We first examine whether Fender's predecessors in title ousted the Heirs.

"Ouster" is the actual turning out or keeping excluded a party entitled to possession of any real property. *Grant v. Grant,* 288 S.C. 86, 340 S.E.2d 791 (Ct.App.1986).... Actual ouster of a tenant in common by a cotenant in possession occurs when the possession is attended with such circumstances [354 S.C. 511] as to evince a claim of exclusive right and title and a denial of the right

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of the other tenants to participate in the profits. *Woods v. Bivens,* 292 S.C. 76, 354 S.E.2d 909 (1987); *Brevard v. Fortune,* 221 S.C. 117, 69 S.E.2d 355 (1952). The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other

cotenants that the intention to disseize is clear and unmistakable. *Felder* [*v. Fleming*], 278 S.C. [327] at 330, 295 S.E.2d [640] at 642 [(1982)]. Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property. *Id.*, 278 S.C. at 331, 295 S.E.2d at 642.

*Freeman v. Freeman,* 323 S.C. 95, 99-100, 473 S.E.2d 467, 470 (Ct.App.1996). "Ouster is presumed from possession only if it is continued for a period of twenty years. Title by ten years' adverse possession by a cotenant against another may be acquired only after actual ouster of which the latter has notice, or should have in the exercise of a reasonable diligence and vigilance." *Watson v. Little,* 224 S.C. 359, 364, 79 S.E.2d 384, 387 (1953).

We conclude the conveyance from Arthur to Betty Sloan by quit-claim deed in 1966; the reconveyance by Sloan to Arthur in 1969; the conveyance to himself and Charlie Mae Brantley as joint tenants in 1983, and the conveyance by Brantley [3] to Fender and W. Thomas Parker by a purported warranty deed in 1988, together with the fact Queen Smashum obtained Arthur's permission to plant a garden on the property are insufficient by themselves to establish that the Heirs were ousted. "In the absence of authorization or ratification, any attempted conveyance of the common property by one cotenant is not binding upon his cotenants, and operates to pass title to nothing more than the seller's own interest." 20 Am.Jur.2d *Cotenancy and Joint Ownership* § 106 (1995). We recognize that these conveyances are some evidence of ouster and should not be ignored [4] for possession under such deeds [354 S.C. 512] and the assertion of exclusive and unequivocal ownership in time could ripen into title by adverse possession. Nevertheless, Arthur did not enter into possession under such a deed. Moreover, his transfer to Betty Sloan in 1966 and her reconveyance to him in 1969 were by quit-claim deeds which gives rise to the inference Arthur realized he may have had less than a good legal title. [5] In addition, we find that Fender did not present evidence regarding the character of Arthur's possession or that Arthur took actions to exclude the Heirs from the property or asserted exclusive ownership over the land. Likewise, there is no evidence of the character of Charlie Mae's possession of the property.

We conclude, therefore, that a question of fact exists whether Fender established the Heirs were ousted of their interest in the property by Arthur or Charlie Mae. We further conclude that under the posture of the record in this case, Fender and the Heirs are co-tenants in the property. Therefore, Fender must show that his actions toward the property amounted to an ouster of the Heirs before he can establish title by adverse possession.

There are well-established principles applicable to cotenancy, which control the controversy.... A cotenant has the right, in common with his cotenants, to the possession of the property owned in common, so ordinarily the possession by one cotenant is the possession of all. The latter ceases when the exclusive possession of a cotenant becomes adverse to the right of possession by the other cotenant or cotenants; but the hostile character of the possession must be such as to amount to an ouster of the other cotenant or cotenants and must be clearly and unmistakably established by the evidence. While the possessor need not give express notice of the hostility of his possession to the other or others, the nature of it must be brought home, as it has been said, to the other owner or owners.

*Watson,* 224 S.C. at 365, 79 S.E.2d at 387. One claiming title to land by adverse possession has the burden of proving adverse possession by clear and convincing evidence. *Lusk v. Callaham,* 287 S.C. 459, 460, 339 S.E.2d 156, 157 (Ct.App.1986).

[354 S.C. 513] The circuit court makes no reference to ouster in its order, but analyzes Fender's claim of title based solely on an adverse possession analysis. In fact, as we understand Fender's claim, he does not claim title to the property pursuant to ouster of the heirs, but rather based solely on adverse possession. Inasmuch as ouster is a prerequisite to a cotenant claiming title by adverse possession, we will analyze Fender's evidence to determine whether a question of fact exists as to whether Fender met this prerequisite.

The circuit court found the ten-year statutory period began with the November 14, 1988 deed to Fender and Parker, and ended in November 1998. In finding adverse possession, the court relied on: 1) the receipt by Fender of a warranty deed dated November 14, 1988; 2) the paying of property taxes for the statutory period of ten years; 3) the assertion of title by the giving and receiving of fractional interests through successive conveyances by warranty deeds during the statutory period; and 4) the erection of no trespassing signs on the property during the statutory period. The trial court also presumed Adam and Queen Smashum's previous use of the property was merely permissive. based on Queen's statement that Arthur gave her "the privilege" to plant a garden on the property before his 1984 death. While Fender's affidavit states he and his co-owner "exercised ownership rights ... by tending and maintaining the property," the affidavit does not indicate how, nor does the circuit court place any significance to this statement.

We find the actions cited by the circuit court do not as a matter of law establish ouster and consequently do not show Fender obtained title to the property by adverse possession. Fender's proof is not clear and unequivocal that he exercised "hostile, open, actual, notorious and exclusive" possession of the tract throughout the ten-year period. The fact that Fender placed "No Trespassing" signs on the property, without more, cannot be shown to be adverse to the rights of the other co-tenants. Especially in the light of the deposition testimony of Queen Smashum that she visited the property in recent years and did not see the "No Trespassing" signs allegedly posted by Fender. *See Felder v. Fleming,* 278 S.C. 327, 330, 295 S.E.2d 640, 642 (1982) and *Horne v. Cox,* 237 S.C. 41, 44-45, 115 S.E.2d 513, 515 (1960) (Possession of one [354 S.C. 514] tenant in common is the possession of all and, for one tenant to establish title against a cotenant by adverse possession, he must overcome the strong presumption that he holds possession in recognition of the cotenancy.) In addition, the fact that Fender paid the taxes does not constitute ouster. *See Watson,* 224 S.C. at 368, 79 S.E.2d at 387 (payment of taxes by a cotenant ordinarily entitles him only to a proportionate contribution from the other cotenants). The circuit court erred in finding that Fender established title by adverse possession to the subject property.

For the forgoing reasons, the circuit court's summary judgment order is reversed and the case remanded to the circuit court for proceedings consistent with this decision.

**REVERSED AND REMANDED.** [6]

STILWELL and HOWARD, JJ., concur.

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Notes:

[1] In February 1990, Parker and Fender conveyed their interests to Fender, Parker-Matthews Investors, Inc., and Mary Hudson Feltner. Feltner conveyed her interest to Fender in 1993.

[2] Fender cites 20 Am.Jur.2d *Cotenancy and Joint Ownership,* Section 31 for the proposition that "a tenancy in common will come to an end upon forfeiture or abandonment of the common property, upon its conveyance, voluntary or otherwise, to a stranger, or upon the definite ouster by the cotenant of his fellows."

[3] Arthur died in 1985.

[4] These conveyances arguably constitute color of title under our adverse possession statutes. *Woods v. Bivens,* 292 S.C. 76, 78-79, 354 S.E.2d 909, 911 (1987).

[5] According to Fender, he had actual notice of these deeds.

[6] Because we reverse on this issue, we do not address Smashum's other issues on appeal.

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June 21, 2012

South Carolina Court of Appeals
1015 Sumter St.
P. O. Box 11629
Columbia, S.C. 29211

RECEIVED
JUN 25 2012
SC Court of Appeals

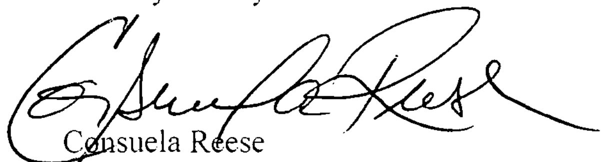
Re: **Eugene Gathers vs. Ned Wright et al.**
**Case No.: 2010-CP-10-250**
Appellate Case No. 2012-212101

Dear Sir/Madam:

Enclosed please find original and one copy of the Memorandum Addressing Appealability of the Order by Judge Nicholson. Please file same and return the clocked copy to me in the self-addressed, stamped envelope provided herein.

By copy of this letter, I am also serving the Respondent's attorney, with a copy of the Memorandum at the address as shown below.

Thank you for your consideration in this matter.



Consuela Reese
Legal Assistant to
Willie B. Heyward
Attorney for Appealant, Ernest McKnight

Encl: as stated

cc: Jonathan S. Altman, Esquire
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