IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-01266

FRANCES N. BURGESS, SR., ET AL. — APPELLANTS

V.

H. ALEX TROTTER — APPELLEE

APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEE H. ALEX TROTTER

ORAL ARGUMENT NOT REQUESTED

Watts C. Ueltschey, MSB No. [redacted]
Sheldon G. Alston, MSB No. [redacted]
J. Anthony Sherman, MSB No. [redacted]
Brunini, Grantham, Grower and Hewes, PLLC
1400 Trustmark Building
P.O. Drawer 119
Jackson, MS 39205
Tel: 601.948.3101
Fax: 601.960.6902

Attorneys for Appellee, H. Alex Trotter

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-01266

FRANCES N. BURGESS, SR., ET AL. **APPELLANTS**

V.

H. ALEX TROTTER **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. The Honorable Patricia Wise, Trial Court Chancellor P.O. Box 686 Jackson, MS 39205-0686.

2. Frances N. Burgess, Sr., Frances N. Burgess, Jr. and Lula Michelle Burgess, Appellants.

3. H. Alex Trotter, Appellee.

4. Watts C. Ueltschey, Eugene R. Wasson, Sheldon G. Alston, J. Anthony Sherman, Brunini, Grantham Grower and Hewes, PLLC, P.O. Drawer 119 Jackson, MS 39205, Attorneys for Appellee.

5. Clay L. Pedigo, 2614 Southerland Drive Jackson, MS 39216, Attorney for Appellant.

This the 5th day of March, 2006.

J. Anthony Sherman, Attorney for Appellee

TABLE OF CONTENTS

Certificate of Interested Persons i

Table of Contents ii

Table of Authorities iv

Statement of the Issues 1

Statement of the Case 2

A. The Property 2

Trotter Survey 2

B. Procedural History 4

Summary of the Argument 6

Argument 9

A. The Chancellor considered mutual mistake and was not manifestly erroneous in determining the ownership of the land described as between the old Bolton-Brownsville road and the eastern 2.5 acres of the NW 1/4 of the SW 1/4 in the deed recorded on Book 109, Page 171 in the land records of Hinds County, Mississippi. 9

B. The Chancellor was not manifestly erroneous in locating the one acre access tract in the 1941 deed 13

C. The Chancellor did not commit manifest error in her analysis of the monuments of title in the determination of the location of the one acre access tract of land conveyed to Burgess in 1941. It was not error for her to consider a tract of land as a monument of title. 16

D. Trotter's testimony regarding the fence was not barred by the principle of collateral estoppel. The Chancellor, after giving Appellant's counsel the opportunity to cross-examine at will concerning the existence or non-existence of fences, weighed the evidence and made her findings. 17

E. The Chancellor did not abuse her discretion in her consideration of the existence or non-existence of alleged fences. 18

F. The Chancellor followed the mandates of the Court of Appeals and found in favor of the Appellee. The Court of Appeals did not make any determinative findings that bound the Chancellor on remand. 18

Conclusion 21

Certificate of Service 23

TABLE OF AUTHORITIES

Alewine v. Pitcock, 47 So.2d 147 (Miss. 1950) 13

Beasley v. Beasley, 171 So. 680 (Miss. 1937) 16

Bert Allen Toyota v. Grasz, 909 So. 2d 763 (Miss. Ct. App. 2005) 10

Channel v. Loyacono, 954 So. 2d 415, 425 (Miss. 2007) 18

Griffin v. Campbell, 741 So. 2d 936 (Miss. 1999) 18

Herod v. Robinson, 115 So. 40 (Miss. 1927) 16

McCoy v. McCoy, 611 So. 2d 957 (Miss. 1992) 10

Steinweinder v. Aetna Cas. and Ins., 742 So. 2d 1150 (Miss. 1999) 7, 10

STATEMENT OF ISSUES

While Burgess lists several issues for appeal, the first two issues are the most prominent:

1. The Chancellor considered mutual mistake and was not manifestly erroneous in determining the ownership of the land described as lying between the old Bolton-Brownsville road and the eastern 2.5 acres of the NW 1/4 of the SW 1/4 in the deed recorded on Book 109, Page 171 in the land records of Hinds County, Mississippi.

2. The Chancellor was not manifestly erroneous in locating the one acre access tract conveyed in the 1941 deed.

While these are the primary issues of this appeal, Trotter will address each of the other issues raised by Burgess:

3. The Chancellor did not commit manifest error in her analysis of the monuments of title in the determination of the location of the one acre access tract conveyed to Burgess in 1941. It was not error for her to consider a tract of land as a monument of title.

4. Trotter's testimony regarding the fence was not barred by the principle of collateral estoppel. The Chancellor, after giving Burgess' counsel the opportunity to cross-examine at will concerning the existence or non-existence of fences, weighed the evidence and made her findings.

5. The Chancellor did not abuse her discretion in her consideration of the existence or non-existence of alleged fences.

6. The Chancellor followed the mandates of the Court of Appeals and found in favor of Trotter. The Court of Appeals did not make any determinative findings that bound the Chancellor on remand.

STATEMENT OF THE CASE

A. The Property

Two pieces of property have been disputed throughout this case. Both lie in the NW/4 of the SW/4 of Section 20 Township 7 North Range 2 West in Hinds County, Mississippi. Descriptions of these two controversial parcels of land are important prior to any discussion of the issues.

The property at issue is best depicted by the exhibit attached to the 2003 Court of Appeals opinion. *See* "Exhibit 3" attached to the 2003 Court of Appeals opinion in this matter. The exhibit is a plat that shows in detail the NW/4 of the SW/4 and NE/4 of the SW/4 of Section 20. The dispute between Francis Burgess ("Appellant" or "Burgess") and Alex Trotter ("Appellee" or "Trotter") concerns the NW/4 of the SW/4. The eastern 2.5 acres off the East side of the NW/4 of the SW/4 is clearly depicted and is labeled Parcel 1. Both parties agree that Burgess owns Parcel 1.

Parcel 2 is the land lying in between the western boundary of Parcel 1 and what has been referred to as the old Bolton-Brownsville Road ("Old Road")[1]. The ownership of Parcel 2 is one of the two major issues the Chancellor was to determine on remand. At trial, Burgess argued unsuccessfully that he owns Parcel 2 by virtue of mutual mistake in the 1911 and 1927 deeds as to an understanding of where certain property was located. According to Burgess, because of that mutual mistake, the 5 acres off the East side of the W/2 of the SW/4 (the North one-half of which is Parcel 1 and the South one-half of which is not part of this cause) that were deeded to his predecessors in the 1927 Deed were intended to include Parcel 2. As such, Burgess argues that the western boundary of his property is not the West line of Parcel 1 but is instead the Old Road.

[1]There is a question of whether this is actually the Old Bolton-Brownsville Road, but for purposes of description, this old road bed will be described herein as the Old Road.

However, Trotter argued, and the Chancellor agreed, that the 1911/1927 deeds are clear and unambiguous, that no mutual mistake occurred in the 1911/1927 deeds , that said deeds conveyed Parcel 1 to Burgess and that Parcel 2 remained vested in Trotter's ancestor (his grandmother).

The remaining disputed land in the NW/4 of the SW/4 is the location of a one acre parcel conveyed by Trotter's grandmother to Burgess' father in 1941 (1941 deed). The second issue before the Chancellor on remand was to determine the location of that one acre (also called the "140 strip" at times but referred to in this brief as the "one acre access tract"). The Court of Appeals believed (in error) that the location of the Bolton-Brownsville Road was moved from the Old Road to the New Road in 1939, resulting in the 1941 deed. Operating under this error, it followed that a natural reading of the 1927 deed was to carry the Burgess west line to the Old Road (suggesting mutual mistake which had not been plead by Burgess, but which supported a construction that the 1941 deed extended the entire Burgess boundary west to the New Road). In undisputed evidence at the second trial, it was conclusively determined that the road was moved prior to 1923, perhaps earlier. Therefore, Burgess never had access to either the Old Road or the New Road from the time that he acquired the property in 1927 until the 1941 deed. Burgess' access was always "only by the Trotters' sufferance." *Trotter*, 840 So. 2d at 765. For Burgess to prevail on the ownership of Parcel 2, the 1927 deed had to be reformed (by proof beyond a reasonable doubt) from describing the East 2.5 acres of the NW/4 of the SW/4 to describe <u>all</u> land lying East of the Old Road in the NW/4 of the SW/4.

Burgess argues that because the 1927 deed took his property to the Old Road the one acre access tract in the 1941 deed is completely between the Old and New Roads, resulting in Burgess having both increased acreage and increased frontage on the New Road. To prevail on this second issue (Burgess' construction of the 1941 deed), Burgess must first prevail on reformation of the

1927 deed by proof beyond a reasonable doubt. On the other hand, Trotter argued that Burgess never acquired access to either the Old Road or the New Road (both of which were in existence prior to 1923, perhaps earlier) by the 1927 deed. Therefore, the 1941 deed should be construed as running westerly from the western boundary of Parcel 1 (Burgess), across Parcel 2 and to the New Road to give Burgess access to the New Road with the 1941 tract containing one acre. *See* Plat of Trotter's Proposed 1941 Conveyance, attached to the Pretrial Stipulation and Order. (R.E. 1) The Chancellor agreed with Trotter and found that the one acre tract conveyed by the 1941 deed ran from the west line of Parcel 1, over Parcels 2 and 3 to connect the Burgess property to the New Road. To have held otherwise would have left the Burgess property landlocked.

B. Procedural History

Following Burgess' first attempt to claim the property at issue by adverse possession (a cause of action that failed), this case was commenced by a complaint by Alex Trotter to quiet and confirm title to the NW/4 of SW/4 of Section 20, Township 7, Range 2 West, Second Judicial District, Hinds County, Mississippi, and to remove clouds from title. Burgess, an adjoining landowner, was named as Defendant. Burgess counterclaimed to quiet title, asserting title both by deed and (again) by adverse possession.

On March 29, 2000, a lengthy trial commenced. After two adjournments, the trial was finally concluded on November 21, 2000. The Court heard testimony from expert witnesses with respect to title to the land and heard a multitude of testimony as to possession of the NW/4 of SW/4. Over the course of the trial, Trotter conceded that Burgess rightly owned 2.5 acres off the East side of NW/4 of SW/4. Further, Trotter did not challenge that the 1941 deed to Burgess constituted access to his property, but the location of the one acre tract was disputed.

On February 5, 2001 (filed February 6), the Court issued its opinion and order finding that Burgess had been previously deemed not to have adversely possessed the land by the Court in prior litigation; that after considering the evidence the Court found (on the Burgess' compulsory counterclaim to quiet and confirm title by deed and adverse possession) that neither Burgess nor his family adversely possessed any of the disputed property; and on conflicting testimony the Court was persuaded that the strip of land conveyed to Burgess' predecessors in 1941 ran from the Burgess' home west to the new Bolton-Brownsville Road.

Both Trotter and Burgess moved the Court to clarify its opinion as to the description of the one acre access tract. Trotter suggested a survey or a more definite legal description describing the strip as running from one point to another point while Burgess wished to clarify the location of the strip merely by reference to its deed of acquisition (Book 109, Page 171). On June 11, 2001, the Court entered a judgment that Trotter owned all of the NW/4 of SW/4 of Section 20, less 2.5 acres on the East side thereof, and less a strip of land beginning at the South edge of the Burgess driveway and running east over to the Burgess property and conveyed by the Warranty Deed at Book 109, Page 171. The "strip of land beginning at the South edge" is the disputed one acre access tract the Chancellor entertained on remand. Burgess appealed from the first trial. The Court of Appeals affirmed the denial of Burgess' adverse possession claim, and the case went back to the Chancery Court for further determinations.

The Mississippi Court of Appeals instructed the Chancellor to make two determinations:

1. Determine ownership of Parcel 2, being the land between the Old Road and the eastern 2.5 acres of the NW/4 of the SW/4 (Parcel 1) after taking into consideration the possibility of mutual mistake between the parties to the 1911/1927 deeds;

2. Determine the location of the one acre access tract in the 1941 deed after making a determination of the ownership of Parcel 2.

The Chancellor followed the instructions of the Court of Appeals and after hearing all of the evidence at the second trial of this matter, determined that no mutual mistake existed in the formation of the 1911/1927 deeds, that Trotter is the owner of Parcel 2 and that the one acre conveyed by the 1941 deed is located as Trotter argued it should be located. Burgess has appealed from the Chancellor's Judgment and Opinion.

Summary of the Argument

The Mississippi Court of Appeals remanded this case to the Hinds County Chancellor, instructing her to make two determinations:

1. Determine ownership of Parcel 2, being the land between the Old Road and the eastern 2.5 acres of the NW/4 of the SW/4 (Parcel 1) after taking into consideration the possibility of mutual mistake between the parties to the 1911/1927 deeds[2];

2. Determine the location of the one acre access tract in the 1941 deed after making a determination of the ownership of Parcel 2.

The Chancellor re-tried the case in order to hear all of the evidence on the issues highlighted by the Court of Appeals. The Chancellor insisted that both parties put on full proof and did not rely solely on the previous transcript. Both parties obliged, and other than some stipulations and deposition testimony, a full and complete trial was conducted. After the trial, the Chancellor made the following finding:

> Burgess owns only the East 2.5 acres of the NW/4 of the SW/4 and the strip of land described in the 1941 deed. There was no ambiguity or mutual mistake in the 1911

[2]The conveyances at issue in both the 1911 and 1927 deeds are identical.

> Deed by which Stella V. Trotter conveyed the Burgess property. There was no ambiguity or mutual mistake in the 1927 Deed by which A.L. Burgess acquired the Burgess property. Thus, Burgess does not own to the old Bolton Brownsville Road (Parcel 2). Because Burgess does not own to the old Bolton Brownsville Road, the only description of the one-acre strip in the 1941 Deed that can be reconciled with the three monuments used in that description is for the strip to run east to west from the Burgess land to the new Bolton Brownsville Road. The strip should run north to south for a distance sufficient to give Burgess one acre, thus giving Burgess the one acre for which his predecessor bargained and giving him access to the public road.

(R.E. 2; R. 158-59.)

The above-cited excerpt from the Chancellor's opinion makes clear that she considered the potential for mutual mistake in the 1911/1927 deeds. She determined that Burgess failed on his claim of mutual mistake for lack of proof beyond a reasonable doubt and therefore, determined that Trotter owns Parcel 2. She also made a determination about the location of the one acre tract of land conveyed in the 1941 deed, finding that the one acre runs east to west from Parcel 1 to the New Road in order to give Burgess access to the New Road.

Burgess had the burden of proving a mutual mistake in the 1911 and 1927 deeds beyond a reasonable doubt. *Steinweinder v. Aetna Cas. and Ins.*, 742 So. 2d 1150, 1555 (Miss. 1999). The Chancellor was well-supported in finding that Burgess did not carry that burden. Burgess provided no direct evidence of mutual mistake in the two deeds. Rather Burgess' expert speculated that mutual mistake existed between parties (two generations past) and used as his only basis the deed language. Furthermore, Burgess conceded in the Pretrial Agreed Order and Stipulation that no mutual mistake existed in the 1927 deed or any of the predecessor deeds. By contrast, Trotter provided sound expert testimony from Si Bondurant, a real property and title expert, Alex Trotter and Sarah Trotter (via trial transcript) that supported the Chancellor's decision. Of note, Sarah Trotter was the only party alive when the deed was executed whose testimony was considered.

Accordingly, the Chancellor was not manifestly erroneous in finding that Burgess did not carry his burden and in finding that Parcel 2 was owned by Trotter.

After determining that Parcel 2 was owned by Trotter, the Chancellor analyzed the location of the one acre access tract conveyed from Stella and R.W. Trotter to Burgess' predecessors in the 1941 deed. The conveyance at issue reads as follows:

> A narrow strip of land approximately 140 yards, long, lying between the old and new Bolton-Brownsville Highway, and joining the land now owned by said A.L. Burgess, and being in the W/2 of SW/4 of Section 20, Township 7 North, in Range 2 West, containing 1 acre, more or less.

Both parties agreed that the 1941 deed was ambiguous. Therefore, the Chancellor utilized the canons of construction in interpreting an ambiguous deed. Relying on testimony from Trotter's title/real property expert, Si Bondurant[3], and utilizing the three monuments in the deed, the Chancellor found that the intent of the deed was to bring the Burgess property over to the New Road. The Chancellor was well supported in her determination that the land in the 1941 deed was "to run east to west from the Burgess land to the new Bolton Brownsville Road. The strip should run north to south for a distance sufficient to give Burgess one acre, thus giving Burgess the one acre for which his predecessor bargained and giving him access to the public road." (R.E. 2; R. 158-59.)

While Burgess' brief is difficult to interpret, he appears to raise other issues. Trotter will also rebut these tangential arguments below.

---

[3] Contrary to Burgess' brief, Si Bondurant is not an attorney with Brunini, Grantham, Grower and Hewes. He has his own firm, Blair and Bondurant.

Argument

A. The Chancellor considered mutual mistake and was not manifestly erroneous in determining the ownership of the land described as between the old Bolton-Brownsville road and the eastern 2.5 acres of the NW 1/4 of the SW 1/4 in the deed recorded on Book 109, Page 171 in the land records of Hinds County, Mississippi.

The Chancellor was charged by the Court of Appeals with determining the ownership of Parcel 2, the land between the Old Road and the eastern 2.5 acres of the NW/4 of the SW/4 (Parcel 1). The ownership of Parcel 2 hinged on the interpretation of the 1911/1927 deeds in which the respective grantors conveyed by warranty deed to the respective grantees the E/2 of the SW/4 and **5 acres off the East side of the W/2 of the SW/4**. The "5 acres off the East side of the W/2 of the SW/4" is the conveyance that is in dispute because the grantee in the 1927 deed was the Burgess family. Trotter maintains, and the Chancellor agreed, that the northern half of the 5 acres off the East side is the eastern 2.5 acres of the NW/4 of the SW/4. The southern half of the 5 acres is the eastern 2.5 acres of the SW/4 of the SW/4, a piece of land that was not in issue in the trial and is not in issue in this appeal.

Burgess argued (without proof) that the parties to the 1911/1927 deeds thought the eastern boundary of the quarter-quarter section (NW/4 of SW/4) was located farther west than it is in reality. Burgess argued that because of this mistaken notion the parties believed that the 1911/1927 deeds conveyed Parcel 2 to the grantees in an effort to bring the grantees' property to the Old Road. Burgess argued (without proof) because of this alleged mutual mistake about the location of the section line that the intent of the parties should be honored. Therefore, Burgess argues that Burgess should be deemed the owner of Parcel 2 because the intent was to bring the parcel of land that Burgess now owns all the way to the Old Road. Most interesting is that Burgess, who is without the option of adverse possession (because he has lost the adverse possession argument with regard to

the land at issue twice already), asks to be named the owner of Parcel 2 without reformation of the predecessor deeds. Even if Burgess were able to carry his burden with regard to mutual mistake, vesting title to Parcel 2 in him without reformation of the deed is a legal impossibility.

"Proof must establish mutual mistake beyond a reasonable doubt." *Steinweinder v. Aetna Cas. and Ins.*, 742 So. 2d 1150, 1555 (Miss. 1999). "The Mississippi Supreme Court has stated that proof must establish mutual mistake beyond a reasonable doubt." *Bert Allen Toyota v. Grasz*, 909 So. 2d 763, 769 (Miss. Ct. App. 2005). "[A]n abundance of case law exists indicating the proper burden of proof in mutual mistake cases involving reformation of a deed is beyond a reasonable doubt." *McCoy v. McCoy*, 611 So. 2d 957, fn. 7 (Miss. 1992). "It is certainly true that a description in a deed may not accurately reflect what parties wish to convey. If that is so, then parol evidence may be offered to show that due to mutual mistake an erroneous description was used in the deed. If the evidence of mistake is found convincing beyond a reasonable doubt, the instrument may be reformed." *McCoy v. McCoy*, 611 So. 2d 957, 961 (Miss. 1992).

Burgess presented no testimony from the parties involved in the creation of the 1911 or 1927 deeds nor any other direct evidence as to any alleged mutual mistake between the parties to those deeds. Burgess simply had his expert speculate that the parties to the deeds intended for the conveyance of the 5 acres off the east side of the SW/4 to bring what is currently Burgess' land to the Old Road. Since the conveyance was clear, unambiguous and did not bring the Burgess' property to the Old Road, Burgess argued that the parties to the deeds made a mutual mistake as to the location of the East-West quarter-quarter section line. Not only is this speculation insufficient to carry Burgess' burden, but it was wholly contradictory to admissions already made by Burgess. Prior to trial, Burgess stipulated to the fact that no mutual mistake existed in the 1927 deed or any of the predecessor deeds. (R.E. 2; R. 103.) The order plainly states that "**[i]t is now assumed by**

the parties in this action that [Hardy and Burgess] were not mistaken as to the land being conveyed by the 1927 Deed. There is no evidence in the land records suggesting a mutual mistake in the deeds, prior to the 1941 Deed." *Id.* (emphasis added).

An absence of mutual mistake was fortified by the testimony of Trotter's expert Si Bondurant. Bondurant testified that, in his opinion, "there is no evidence of mutual mistake. Certainly not evidence beyond a reasonable doubt that there was a mutual mistake between the parties to the 1927 deed." T. 281. In considering who owned Parcel 2, Bondurant stated that "the property has been consistently described as the east half of the southwest quarter and the east five acres of the west half of the southwest quarter which is an 85-acre contiguous tract and it is a clear and precise and unambiguous legal description that can be clearly located and identified." T. 277. Bondurant stated that the 1927 deed did not carry title to Parcel 2 into Burgess because it "conveyed only the east five acres of the west half of the southwest quarter which regards to the property that's in dispute is the east two and a half acres of the northwest quarter of the southwest quarter. That's what the deed plainly provides for." T. 277.

Additionally, Burgess argues that the mutual mistake is not a mutual mistake as to the deed but a mistake as to the location of certain property described by the deed. Therefore, Burgess would have this Court believe that no reformation of the deed is necessary if a mutual mistake had been proven. First, for purposes of record title, the alleged distinction between a mistake in the deed and a mistake in the location of the property is merely semantics. Second, the idea that a mistake as to location does not require reformation of the deed is simply another way of arguing adverse possession. Burgess has already lost his adverse possession argument twice as noted by the Court of Appeals in its 2003 opinion. Therefore, Burgess must have the deed reformed to take title to Parcel 2. This notion was reiterated by Si Bondurant, who stated that the only way, outside of

adverse possession, for title to Parcel 2 to be conveyed to Burgess is by reformation of the deed to "provide for a different description." T. 277. The only way that Burgess can hold title to Parcel 2 at this juncture is to reform the deed under mutual mistake.

Even though Burgess brought forth only speculation about mutual mistake from his expert, K.F. Boackle, Boackle's reasoning about the mutual mistake was flawed as well. Boackle stated that the 1911 deed did not "get the true intentions of the parties on the paper because it didn't bring the Burgess property to the old road." T. 90-91. The supposition that the 2.5 acre tract on the east side of the NW/4 of SW/4 conveyed in both the 1911 and 1927 deeds was to allow the Burgess property to connect to the old road is false for two reasons:

(A) Stella Trotter was the predecessor in title, owning the entire NW/4 of SW/4. The 1911 deed to Burgess' predecessor in title (Hendricks) made no reference to any road and gave a clear and unambiguous conveyance of the East 2.5 acres of NW/4 of SW/4.

(B) Burgess conceded prior to trial that the Old Road was moved to its current location prior to 1923. See R.E. 1; R.103. In 1927, at the time that A. L. Burgess acquired the East 2.5 acres of the NW/4 of SW/4, there was no purpose in connecting to the Old Road. The road had already been moved to the location of the current Bolton-Brownsville Road. Therefore, from the time that A. L. Burgess initially acquired title, Burgess never held title over to the Old or New Road and always had access over the Old Road and over the land between the roads to the new Bolton-Brownsville Road by his driveway at the "sufferance" of Trotter across land owned by Trotter.

Therefore, Burgess' argument as to why the parties to the 1911 or 1927 deed were mistaken is weightless.

Additionally, for the sake of the stability of title, ancient deeds over 75 years old should not be reformed. "It has long been recognized as a part of the land title law of this state that one in exclusive possession of land for more than 31 years, and especially under a claim based on color of title, acquires such a title as may be safely approved by any abstractor or attorney, and in our opinion it would greatly impair the stability of land titles throughout the State if we should not follow this well-settled rule of property." *Alewine v. Pitcock*, 47 So. 2d. 147, 150 (Miss. 1950). Title changes this far removed from the questioned conveyances are handled through adverse possession, a remedy that Burgess is without after losing that argument twice already.

Regardless, no evidence of mutual mistake was provided, and the Chancellor was well-supported in finding that there was no mutual mistake in the formation of the deeds. As Bondurant stated, the 1927 Deed and its predecessor deeds are clear and unambiguous. And Burgess has already stipulated that no mutual mistake existed in the 1911 or 1927 deeds. Burgess certainly did not prove mutual mistake beyond reasonable doubt. The Chancellor considered all the evidence and found that "the Burgesses concede that the 1927 Deed is clear and unambiguous; therefore, the Court cannot find that the parties were operating under mutual mistake...The Court hereby finds that Parcel 2, the old road bed, is confirmed in Trotter." (R.E. 2; R. 153.) Accordingly, the Chancellor weighed the evidence, considered the potential of mutual mistake and determined ownership of Parcel 2.

B. The Chancellor was not manifestly erroneous in locating the one acre access tract in the 1941 deed.

The Court of Appeals felt that the ownership of Parcel 2 would affect the interpretation of the 1941 Deed. Therefore, the Court of Appeals instructed the Chancellor, after considering the

effect of mutual mistake on the ownership of Parcel 2, to make a determination as to the location of the one acre access tract described in the 1941 Deed as follows:

> A narrow strip of land approximately 140 yards, long, lying between the old and new Bolton-Brownsville Highway, and joining the land now owned by said A.L. Burgess, and being in the W/2 of SW/4 of Section 20, Township 7 North, in Range 2 West, containing 1 acre, more or less.

Both parties conceded that the deed was ambiguous. (R.E. 2; R. 154.)

The Chancellor heard testimony from Trotter's expert, Si Bondurant, on the interpretation of the 1941 deed. Bondurant noted that the "testimony has indicated that the purpose of the deed was to give access from the Burgess' homestead to the new Bolton-Brownsville Road." T. 283. Burgess' expert, K.F. Boackle even stated that a common sense interpretation of the deed is that the deed was intended to give the Burgess predecessors access to the New Road. T. 134. Bondurant's location of the property was based off his opinion that the 1911/1927 deeds did not bring the Burgess land to the Old Road. T. 276-277. Accordingly, he interpreted the one acre access tract conveyed in the 1941 deed as follows: "You would start at the northwest corner of the Burgess property and you would use the north line of the quarter-quarter section line as the north boundary. You would go to the new Bolton Brownsville Road which would be your western boundary and then you would come south to such a point as was necessary to provide for one acre and then you would run back to the west line of the east two and a half acres of the northwest quarter of the southwest quarter and then run back to the point of beginning." T. 284. "That way you give credence to the monuments that are described which is the new Bolton-Brownsville Road, the old road and also adjoining the Burgess' property which was the east two and a half acres of the quarter-quarter section." *Id.* Burgess can make no argument for his interpretation of the 1941 deed under the Chancellor's interpretation of the 1911/1927 deeds.

After hearing the evidence, the Chancellor carefully analyzed the canons of construction in her analysis of this deed. She stated that "[t]he canons set forth in *Dunn* are appropriate for application to the vague description in the 1941 deed because that description contains certain monuments, such as the 'old and new Bolton-Brownsville Highway' and 'the land now owned by said A.L. Burgess' which are 'more certain and dependable than the reference to '140 yards long' which has no starting point, end point, or direction" (R.E. 2; R. 155.) The Chancellor continued:

> The only way for a parcel of land to both join the land of A.L. Burgess and be between the two roads is to read the description as being this land (between the roads) and that land (between the old road and the land of A.L. Burgess). This is also the only description which would serve the purpose of the 1941 deed, which was to give Burgess record title access to the road which access he did not have previously. Construing the deed in any other manner, will result in Burgess not have [sic] access to the new Bolton-Brownsville Road.
>
> Adopting the orientation of the 40 [sic] yard strip along the Burgess driveway from the new road to the Burgess house would also be consistent with the overriding canon, which is to determine the objective intent of the parties to the 1941 Deed. It is the duty of this Court to construe "not the description of the land that the parties intended to write into the deed, but what land the parties intended to embrace in the description they used." [citation omitted]
>
> Stella V. Trotter was the common source of title of both Burgess and Trotter. She was the grantor in the 1911 deed which severed the Burgess property from the rest of her land. She was also the grantor in the 1941 deed. On the face of those two deeds and without any evidence to the contrary, the Court is persuaded that Stella V. Trotter knew that her land lay between Burgess' land and the old road. Therefore, when she described the land by reference to the two roads and Burgess' existing land, the only logical conclusion is that she intended to convey to Burgess a portion of her land running from Burgess' boundary out to the old road and then continuing on to the new road so that Burgess would have access to the public road. This construction is consistent with the testimony of both Stella Trotter and Francis Burgess at the first trial of this matter.

(R.E. 2; R. 156-57.) Clearly, the Chancellor, after careful consideration of the effect of the 1911/1927 deeds and any potential mutual mistake, made a determination as to the location of the

one acre access tract based on sound testimony provided by Trotter's expert. Accordingly, the Chancellor was not manifestly erroneous in her locating of the one acre access tract.

C. The Chancellor did not commit manifest error in using the Burgess land as a monument of title or in her analysis of the monuments of title.

In utilizing the canons of construction to interpret the 1941 deed, the Chancellor gave great weight to the three monuments of title in the deed: the Old Road, the New Road, and the Burgess' property. Burgess argues that a tract of land, such as the Burgess' property, is not a proper monument of title. Burgess, however, cites no law for this proposition. Burgess simply recites a definition from Black's Law Dictionary, which defines "monument" as "any natural or artificial object that is fixed permanently in land and referred to in a legal description." While Black's carries no authority, nothing in its definition of "monument" bars a tract of land from being used as a monument of title. Moreover, Burgess' expert, K.F. Boackle, testified that a tract of land can be used to aid in the description of a deed. T. 124. Mississippi law holds that deeds using tracts of land as boundaries are valid. *Beasley v. Beasley*, 171 So. 680 (Miss. 1937); *Herod v. Robinson*, 115 So. 40 (Miss. 1927);

More importantly, the Chancellor was well supported in her analysis of the monuments of title. Si Bondurant, a real property expert with nearly 30 years of experience in certifying titles, stated that the Burgess property should be used in construing the meaning of the deed. Bondurant stated that the one acre access tract "could be located any way in any direction that would give credence to the monuments that are listed therein between the old Bolton Road and the new Bolton Road and also joining the Burgess property as a boundary." T. 282. He went on to describe how he believes the property should be located:

> You would locate the property by describing it as starting--or you could do the reverse of this, but you would start at the northwest corner of the Burgess property and you

> would use the north line of the quarter-quarter section line ast he north boundary. You would go to the new Bolton-Brownsville Road which would be your western boundary and then you would come south to such a point as was necessary to provide for one acre and then you wold run back to the west line of the east two and a half acres of the northwest quarter of the southwest quarter and then run back to the point of beginning. So it would be a boundary That way you would give credence to the monuments that are described which is the new Bolton-Brownsville road, the old road and also adjoining the Burgess' property which was the east two and a half acres of the quarter-quarter section.

T. 284.

Accordingly, the Chancellor was well-supported in her utilization of the Burgess property as a monument of title in her analysis of the 1941 deed.

D. Trotter's testimony regarding the fence was not barred by the principle of collateral estoppel. The Chancellor, after giving Appellant's counsel the opportunity to cross-examine at will concerning the existence or non-existence of fences, weighed the evidence and made her findings.

First, Burgess argues that the Chancellor committed manifest error in giving credibility to the testimony of Alex Trotter with regard to a fence boundary line. The Chancellor's opinion is devoid of any evidence that she relied on or gave credibility to Trotter's testimony concerning a fence boundary line. Therefore, this issue of appeal is moot.

Second, Burgess did not object to any of Trotter's testimony about fences. Instead, Burgess simply tried to impeach the credibility of Trotter by bringing up the previous decision by Chancellor Denise Owen. Burgess' attorney even admits that the fence testimony that he goes to great lengths to elicit is only about "credibility." T. 223 and 227.

Third, Chancellor Owen's previous decision about the fence, however, did not involve the property at issue in this dispute and was an adverse possession case (not mutual mistake). That case did not involve the land which is the subject of this appeal. T. 230-38. For collateral estoppel to apply, an issue must be actually litigated, determined, and essential to the judgment in a former

action. *Channel v. Loyacono*, 954 So. 2d 415, 425 (Miss. 2007). The previous determination about adverse possession of adjoining property had nothing to do with the property at issue. Judge Owen's determination dealt with property south of the property at issue in this case. Therefore, collateral estoppel does not apply.

E. The Chancellor did not abuse her discretion in her consideration of the existence or non-existence of alleged fences. .

Burgess has no evidence to suggest that the Chancellor ignored the existence of fences. The Chancellor has the discretion to weigh the evidence as she sees fit. "A Chancellor sitting as a fact finder has a wide discretion." *Griffin v. Campbell*, 741 So. 2d 936, 937 (Miss. 1999). Burgess provides no cites to the record regarding this testimony nor does he make any argument as to how the testimony of the fences would have impacted the Chancellor's findings.

Obviously, Chancellor Wise, after hearing all the testimony and weighing the evidence about fences, found on the law and the facts the property lines as she ruled. The fact that there was or was not evidence of fences in no way justifies disturbing this ruling. Again, Burgess' argument regarding the fences goes to adverse possession, an issue Burgess has twice lost.

F. The Court re-tried the case, heard the evidence and followed the mandates of the Court of Appeals.

Burgess argues that the Court of Appeals made several findings that bound the Chancellor on remand. The Court of Appeals did no such thing, or else, it would have reversed and rendered. No retrial would have been necessary.

Additionally, the quoted "findings" cited by Burgess are not determinative findings that bound the Chancellor on remand. For example, Burgess cites the following portion of paragraph 21 of the opinion: "The language of the 1941 deed suggest [sic] the entire property is between the old and new location of the roads, and that by lying there, it also borders the Burgess property. The most

natural reading of the deed language itself is consistent with the Burgess view that their family property historically bordered the old." Trotter, 840 So. 2d at 767-68. This phrase as quoted does not exist verbatim in the opinion. This quote is a piecemeal of various quotes in the paragraph. Regardless, Burgess fails to note that the Court concluded paragraph 21 by stating that "[t]his deed answers few concrete questions." *Id.* Clearly, the Court made no "finding" in paragraph 21 that was binding on the Chancellor.

Burgess also cites to paragraph 22 in the opinion that states "[t]he natural reading of the actual language (in the 1941 deed) is to define a tract that lay totally between the two roads and contiguous to land then owned by Burgess." This is not a "finding" either[4]. In fact, none of these comments regarding the 1941 deed's interpretation are determinative because the Court specifically instructed the Chancellor to decide the meaning of the 1941 deed. The Court of Appeals concluded that the Chancellor should reconsider the "140 yard strip because it has not been definitely located." *Id.*

Burgess states that the quote in paragraph 29 of the opinion stating that there "was fairly credible evidence that there were long time fences"[5] is some sort of binding determination. This quote from the Court is simply an assessment of the evidence presented at the trial below and not a "finding" that bound the Chancellor.

Burgess then quotes at length from paragraph 30 where the Court states:

> [W]e find that a quite credible interpretation of all the evidence especially the conveyance in 1927 of a total of 5 acres, half in the forty acre tract involved in this suit and the other half to the south,

---

[4]This "natural reading" actually describes the Chancellor's interpretation as well.

[5]Burgess misquotes the Court. The Court said, "Neither is there discussion of what is fairly credible evidence that there were long-time fences."

> was that the Burgess family was to receive the land between their eastern property and the old road. No other plausible explanation for the 1927 conveyance of a pinched half mile tract appears in the current record. Perhaps there is one, though.

Id. As the quote itself makes clear, the Court entertains such an interpretation as "quite credible." The Court, however, notes that another explanation might exist and does not render an opinion as to the interpretation[6]. Therefore, the Chancellor was not bound by this mere commentary.

The Chancellor was instructed by the Court of Appeals to:

1. Determine ownership of Parcel 2, the land between the Old Road and the eastern 2.5 acres of the NW/4 of the SW/4 (Parcel 1) after taking into consideration the possibility of mutual mistake between the parties to the 1911/1927 deeds;

2. Determine the location of the one acre access tract in the 1941 deed after making a determination of the ownership of Parcel 2.

The Chancellor precisely followed the instructions of the Court of Appeals and after hearing all of the evidence at the trial of the matter, determined that no mutual mistake existed in the formation of the 1911/1927 deeds, that Trotter is the owner of Parcel 2 and that the one acre access tract should be located where Trotter argued it should be located. Therefore, this issue of appeal is without merit.

---

[6]Additionally, the Court of Appeals was under the impression that the road was not moved to its new location until 1939 (as advised in the Burgess' first appeal). Therefore, the Court of Appeals thought that the purpose of the 1927 deed was to get the Burgess property to the Old (assumed by the Court of Appeals to be in use) Road. However, as the Pretrial Agreed Order and Stipulation illustrate and as testified at trial, Burgess conceded that the Old Road was abandoned by 1923 at the latest. Therefore, Burgess never acquired title to the Old Road and the "plausible explanation" of the 1941 deed was to grant Burgess access to the New Road which Burgess never had access to except "at the sufferance of Trotter."

Conclusion

The Mississippi Court of Appeals instructed the Chancellor to make two determinations:

1. Determine ownership of Parcel 2, the land between the Old Road and the eastern 2.5 acres of the NW/4 of the SW/4 (Parcel 1) after taking into consideration the possibility of mutual mistake between the parties to the 1911/1927 deeds;

2. Determine the location of the one acre access tract in the 1941 deed after making a determination of the ownership of Parcel 2.

The Chancellor then held another trial of the matter. At trial, Burgess failed to produce any direct evidence of mutual mistake outside of his expert's speculation, failing to carry his burden of proving mutual mistake beyond a reasonable doubt. Because Burgess did not prove mutual mistake, the 1911/1927 deeds were not reformed by the Chancellor. Accordingly, the Chancellor found title to Parcel 2 to be in Trotter.

Because no mutual mistake was shown and because the 1911/1927 deeds were not reformed, Burgess' proposed interpretation of the 1941 deed was nonsensical. All parties agreed that the purpose of the 1941 deed was to give the Burgesses access to the New Road. With Parcel 2 belonging to Trotter, the Chancellor found that the one acre access tract ran from east to west across Parcel 2 all the way to the New Road. The tract runs north to south far enough to give the Burgesses one acre of land.

The remaining issues of appeal are desperate attempts by the Appellant to drag this litigation out even further. The issues are all without merit. The Chancellor, quoted above at length, issued a sound opinion and was not manifestly erroneous in any of her findings.

Accordingly, Trotter asks this Court to affirm the findings of the Chancellor.

This the 5th day of March, 2008.

Respectfully submitted,

H. ALEX TROTTER

By: _____
One of His Attorneys

OF COUNSEL:

Watts C. Ueltschey, MSB No. [redacted]
Sheldon G. Alston, MSB No. [redacted]
J. Anthony Sherman, MSB No. [redacted]
Brunini, Grantham, Grower and Hewes, PLLC
1400 Trustmark Building
P.O. Drawer 119
Jackson, MS 39205
Tel: 601.948.3101
Fax: 601.960.6902

Attorneys for Appellee, H. Alex Trotter

CERTIFICATE OF SERVICE

I, J. Anthony Sherman, do hereby certify that I this day caused a true and correct copy of the above to be served, United States mail, first class postage prepaid, on the following:

Clay L. Pedigo
2614 Southerland Drive
Jackson, MS 39216
Tel: 601-366-8273

Hon. Patricia Wise
P.O. Box 686
Jackson, MS 39205-0686.
Tel: 601-968-6549

This the 5th day of March 2008.

J. Anthony Sherman