SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FRANCIS N. BURGESS, SR. et al — APPELLANTS

V. — NO. 2007-CA-01266

H. ALEX TROTTER — APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE
SECOND JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
FOURTH DIVISION, CHANCELLOR PATRICIA WISE

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT IS REQUESTED

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BURGESS RESPONSE TO APPELLEE TROTTER'S STATEMENT OF THE CASE

Appellee H. Alex Trotter's (Trotter) Statement of the Case properly identifies the two parcels of land at issue in this case as depicted on "Exhibit 3" attached to the COA *En Banc* Opinion remanding this case, Trotter v. Burgess, 840 So.2d 762, (Miss. App. 2003), (also identified as Number 2001-CA-0198-COA). A copy of "Exhibit 3" is annexed herewith for convenience in its review.

In its *En Banc* opinion the COA remanded the case:

> [f]or reconsideration of the 140 yard strip because it has not yet been definitely located" We also reverse and remand for determination of the ownership of Parcel 2 on our exhibit (Exh. 3), which is the land between the old road and the eastern 2.5 acres of the NW1/4 of SW1/4 for reconsideration in light of this opinion. (Emphasis added).

Burgess appealed this case for the second time because the Chancellor located the 140 yard strip (the one acre) in the same location which had been reversed in the COA *En Banc* Opinion of March 18, 2003 "because it has not yet been definitely located" COA Opinion ¶43. The Chancery Court's Opinion deprives the Burgesses of all road access to their 126.3 acres of land except down the driveway from the residence to the road..

The Chancellor also ignored the definitive findings of the COA in her Opinion which was not rendered in consideration of these findings.

> Trotter states, regarding the subject Bolton Brownsville Road:
> "[I]t was conclusively determined that the road was moved (to the west) 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 Trotter's sufferance. Trotter Brief, Page 3, quoting COA Opinion, Trotter v. Burgess, 840 So.2d 762, (Miss. App. 2003).

For the first time in this action, counsel continually refers to the 1941 deed as the "access deed" which is not correct as the plain language of the deed clearly shows it was not written to provide access to the road as Trotter advocates and which the Chancellor accepted. The concept that the intention of the 1941 deed was for road access dominated the erroneous reasoning of the

Chancellor in this matter. It is not in dispute that the Burgesses had a prescriptive easement to the road in front of their residence since their acquisition of the property in 1927.

ARGUMENT

At the bottom of Page 5 of the Trotter Brief, Trotter incorrectly interprets the directions in the COA Opinion in its remand. Paragraphs 1. and Paragraph 2. are stated in reverse order. Under the guidlines in the COA opinion, it is necessary to first determine the location of the one acre conveyed in the 1941 deed to determine what it was intended to accomplish; and from that determination, the language of the deed determines the ownership of Parcel 2, which is the 2.99 acres lying east of the old road bed, not the other way around as Trotter argues and the Chancellor accepted.

MUTUAL MISTAKE ARGUMENT

Another major misconception in the Chancellor's reasoning is that the mutual mistake of the parties to the two deeds at issue, 1927 deed and the 1941 deed, were not mistakes in the deeds as consistently stated, but were mistakes as to the mutual understanding of the locations of the property described in the deed language. No reformation of the deed language is necessary. The remanding COA Opinion states:

> The relief of reformation is not needed in order to use the concept of mistake when interpreting what this different deed was intended to accomplish. ¶31.
> We find that insofar as the 140 yard tract is concerned, the evidence of mistake on the understood location of the Burgess property's western boundary was central to determining what the 1941 deed was intended to do. ¶32

And in ¶31: We also find that the failure to make findings on the mutual mistake concept leaves us unable to conclude that the factual validity of the concept was accepted or rejected before deciding where the property covered by the 1941 deed was located. Emphasis added.

The Court's misunderstanding of the mutual mistake concept in the location of the properties in this case clouds the reasoning underlying the Chancellor's decisions throughout this case. The Court consistently referred to "mistakes in the deeds" rather than the mutual mistake in the locations described in the deeds. This factor is made clear by the following on Page 7 of

the Trotter brief:

Burgess had the burden of proving mutual mistake in the 1911 and 1927 deeds (conveying the E half of the SW1/4 to Burgess) 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 this burden. Burgess provided no direct evidence of mutual mistake in the two deeds. Emphasis added.

There was no mistake in the deeds as recognized by the COA. The mutual mistake was in the locations of the properties conveyed by the two deeds which is why reformation of deed language is not necessary but proof of mistake in locations and their respective boundary lines is necessary. The mutual mistaken understanding in the location of the Burgess property is proven beyond a reasonable doubt by the language in the 1941 deed by Stella Trotter, the same Grantor in the 1911 Deed conveying five acres off the east side of her West half of the SW1/4.

Trotter's witness, Si Bondurant, accepted as a title real estate expert, contributed to the Court's erroneous understanding of the mutual mistake concept, which had been accurately set out for the Court by the Burgess real estate expert K.F. Boackle. Bondurant affirmed the Burgess position throughout the two trials of this case that the subject deeds of 1911, 1927, and 1941 accurately and described the property conveyed therein without mistake or error in the property descriptions. Regarding the five acre conveyance joining the western boundary of the Burgess NE 1/4 of SW1/4, Section 20, Bondurant responded on direct beginning on Transcript Page 277 at line 5:

A. ....[t]he 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 continuous tract and it is a clear and precise unambiguous legal description that can be clearly located and identified.

Q. So in you opinion the 1927 deed did not carry title into the Burgesses for Parcel 2.

A. No, absolutely not. 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 and clearly provides for. (Emphsis added)

Q. Now, based upon the facts as you understand them and testimony that you have heard, is there any way for title to get into the Burgesses in the - - - by virtue of the 1927 deed with respect to Parcel 2 other than by the reformation of the 1927 deed?

A. No, not by virtue of the deed unless the deed is reformed to provide for a different description.

Continuing on Page 278, at Line 3:

Q. Therefore, the only way that Parcel 2 could be held to be in the Burgesses is by virtue of the reformation of the 1927 deed and for that matter probably predecessor deeds as well.

A. I would think they would all have to be reformed. (Emphasis added) And, yes, that's the only way that title could be into the Burgesses since possession is no longer an issue.

This testimony is clearly in contradiction of the controlling authority of this case regarding the concept of mistake and reformation in the determination of the actual results of the 1927 deed and the 1941 deeds:

> The relief of reformation is not needed in order to use the concept of mistake when interpreting what this different deed was intended to accomplish. COA Opinion ¶31.
>
> We find that insofar as the 140 yard tract is concerned, the evidence of mistake on the understood location of the Burgess property's western boundary was central to determining what the 1941 deed was intended to do. ¶32.

There has never been a dispute by Burgess of the record title to Parcel 2, the western boundary line of which was established by Stella Trotter in her 1911 deed, and subsequently to the Burgesses in her 1927 deed. The question has always been, did Stella Trotter know the location of this boundary line in 1911 and thereafter? That answer is obviously not, as established by the language in her 1941 deed which as been set out in detail in the Burgess Brief and again in the following section. That line was first established by the Surveys of 1997 and there has never been, to this day, any evidence of a fence on this line! Burgess has never challenged record title to Parcel 2. The Court of Appeals recognized this fact when it remanded the case for determination of the understood location of the tract.

LOCATION OF THE ONE ACRE IN THE 1941 DEED

In the 1941 deed, Stella Trotter states:

> 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 W2 of SW1/4 of Section 20, Township 7 North, in Range 2 West, containing 1 acre, more of less.

This one acre of land located by the Chancellor is depicted as a rectangular one acre lying east of the two roads. (Survey interred by Bondurant, Exhibit 41) It is not "a narrow strip of land" and it is not "lying between the old and new Bolton- Brownsville Highway." These terms are not ambiguous. The one acre lying between the two roads does "join the land now owned by said A.L. Burgess" **if** Stella Trotter mistakenly believed the Burgess land lay along side the old road. (As depicted in the 1997 Survey, Exhibit 3, and the current aerial tax map of the Hinds County Tax Assessor's office, (Exhibit 30, Burgess property; Exhibit 31, Trotter property). It is proof beyond a reasonable doubt that this one acre could not lay between the two roads **and** join the land of Burgess if Stella Trotter knew this land, known as parcel 2 on the Survey Exhibit, lay 95.39 feet east of the old road. To lay between the two roads and join the Burgess property is impossible. The language in the deed is proof beyond a reasonable doubt that Stella Trotter believed the Burgess property bordered the old road. To assume otherwise, is not reasonable. The COA Opinion recognized this fact in its finding in ¶30

> In fact, we 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, 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. And continuing in ¶32: We find that insofar as the 140 yard tract is concerned, the evidence of mistake on the understood location of the Burgess property western boundary was central to determining what the 1941 deed was intended to do. (Emphasis added)

The Chancellor did not determine the location of the one acre tract in consideration of the

COA findings as directed, but rather placed it in the same location which went up on appeal initially without any new or additional evidence, resulting in this second appeal of this issue.

The Court of Appeals stated in its ¶ 43. "We reverse and remand for reconsideration of the 140 yard strip because it has not yet been definitely located. We also reverse and remand the determination of the ownership of the eastern 2.5 acres of the NW1/4 of SW1/4, for reconsideration in light of this opinion. (Emphasis added)

The Chancellor's reasoning to again locate the one acre tract to be a rectangular tract, which is not a narrow strip of land, lying predominately east of the Bolton-Brownsville road, and not lying between the two roads, is manifest error, or at the very least, an abuse of discretion.

In Trotter's Brief in the last paragraph of Page 11, the misunderstanding of the mistake concept and deed language as remanded by the COA is highlighted by the following. As previously argued, this misunderstanding was central to the flawed reasoning by the Court.

> From the Trotter Brief, Page 11;
> Additionally, Burgess argues that the mutual mistake is not a mistake as to the deed but a mistake as to the location of certain property described in the deed. Therefore, Burgess would have this Court believe that no reformation of the deed is necessary if a mutual mistake had been proven. (This is exactly what the COA held in its remanding Opinion) 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.* (Emphasis added) Second, the idea that a mistake as to location does not require reformation of the deed is simply another way of arguing adverse possession. ..... Therefore, Burgess must have the deed reformed to take title to Parcel 2.
> Trotter Brief, Page 11.

These statements are contrary to the COA Opinion in its ¶31. "The relief of reformation is not needed in order to use the concept of mistake when interpreting what this different deed was intended to accomplish." Trotter is thus continuing to argue erroneously, in support of the Chancellor's Judgment and Order, that reformation of the deeds in question are necessary to find for Burgess. Further highlighting the misunderstanding of the concept of mistake by the Chancellor is found in the Chancellor's Order quoted in the last line on Page 10 in the Trotter Brief:

> [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.

This comment again highlights the Court's reasoning that a mutual mistake must be

found in the deeds and shows the failure to recognize the distinction between the location of property correctly described in the deed, and the mistaken location of the property described. This point of mistakes in deed locations is referred to over and over again as dispositive in the COA Opinion. The Trotter Brief calls this distinction "semantics" which is quite a comment considering the plain language in the COA Opinion. Under the mistaken belief that mutual mistakes refer to deed descriptions as consistently argued by Trotter, the Chancellor was convinced that she was making her decisions honorably in consideration of the COA opinion as directed.

Trotter's real estate expert, Si Bondurant , argued the Trotter point of view as recited in the first few lines of Page 12 of Trotter's Brief. Bondurant 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." Transcript Page 277. This was opposite the opinion of the COA as discussed supra.

OWNERSHIP OF PARCEL 2

Burgess' real estate expert K.F. Boackle testified it was evident from the deed language the purpose of the 1941 deed was to get the Burgess property over to the new road all the way down to the length of the SW/4 as noted by the COA and shown on the Exhibit 3 Survey of the north half of the quarter. It was the parties understanding at the time of the 1941 deed that the Burgess property went (west) over to the old road and the purpose of the 1941 deed was to bring the Burgess property over to the new road (Tr. Page110, lines 20-27; Page 111, lines 1-6) thus providing road frontage on the old road for the Burgess 126.3 acres. (Surveys Exh. 3 and 5)

This testimony was in accord with the testimony of a Trotter Title expert noted by the Court of Appeals in its ¶ 25:

[t]he abstractor had "[e]xamined the records on this property back to 1838. It was his opinion that the eastern 2.5 acres were conveyed (in the 1911 and 1927 deeds) in order to give Burgess family the property between the old road and the east line of the NW 1/4 of SW1/4. Thus when the Burgess family got the eastern 2.5 acres in NW 1/4 of SW 1/4 and also a similar tract to the south, it was his opinion that they were thought to be getting the land between their existing property the road."
COA Opinion, ¶ 25

Burgess now has two expert opinions before the Court that when Burgess acquired the property in 1927 they believed their property lay adjoining the old road as depicted on the Exhibit 3 Survey and the Tax Assessor's current aerial maps, Exhibits 30 & 31. In consideration of this fact, the language of Stella Trotter in the 1941 Deed is clear that she believed the Burgess property lay along the old road and her deed of one acre between the roads brought the Burgess property over to the new road for the length of one acre. Not simply for access, since Burgess had access from and after their 1927 purchase under their belief of the western boundary line of their property was the north-south fence along east side of the old road bed. This belief of their western boundary is proven by the language of Stella Trotter in the 1941 deed as discussed supra, the testimony of the real estate agent who listed the Burgess property for sale and the surveys prepared for Burgess in his efforts to sell his property. The testimony of real estate agent Joan Vickers Garret (Transcript, Pages 8 to 11, line 24) explained the surveys were ordered because Burgess desired to sell the Burgess property, less the homestead area enclosed by the fence, all as shown in the Survey of September, 1997. (Survey Exhibit 5 in the Excerpts to this Reply Brief) Allen Davis made an offer on the property and the Exhibit 5 Survey was prepared for him as depicted on the Survey. The offer was then withdrawn due to the small amount of road frontage south of the homestead fence. (Testimony of Vickers Garrett, Page 26, lines 8-26). The extensive testimony of real estate broker Garrett (Reply Brief Rec. Excerpts, Page 8 to 46) further corroborates the mistaken belief of the Burgesses that the western boundary line of their

property was the fence along the old road for the entire length of their NE 1/4 of the SW 1/4, not the record title line found by the 1997 surveys. This testimony covers the fence lines and the removal of fences from the witnesses personal knowledge. Should this Chancery Court Judgment and Order stand, there would be no frontage at all to the Bolton- Brownsville road from the Burgess 126.3 acres except eastward over the Burgess driveway to the residence.

THE MONUMENTS OF TITLE ARGUMENT

To enclose the one acre between the roads the Court resorted to the cannons of construction set out in *Dunn v. Stratton, 133 So. 140, 142 (Miss. 1931)* using monuments of title. In this case, the northern boundary was agreed by the parties at trial to be the northern east-west section line of the Burgess property. The Court had two unambiguous monuments, being the two roads to use in an analysis of location of the one acre between the roads, leaving only one other monument to enclose the one acre and establish a southern boundary of the one acre, pursuant to the deed language. In the analysis of the matter by the Burgess expert, K.F. Boackle, he testified the logical southern boundary was the cross fence between the roads making the one acre more or less to be 1.33 acres and depicted on the survey, Exhibit 3.

In the Chancellor's extensive analysis of the monuments of title to locate the one acre in the 1941 deed, she used the two roads and Burgess property's western boundary line of the NE1/4 of SW1/4 as depicted in the November 1997 Survey, Exhibit 3, as the necessary third monument of title. Nowhere in the record of two trials can be found evidence that grantor Stella Trotter knew where the western boundary line of the Burgess property was actually located until indicated by her language in the 1941 deed. (As lying along the old road) However the Chancellor stated, concerning the intent of the 1941 deed:

On the face of these two deeds (1927 and 1941 deeds) and without any evidence to the contrary, the Court is persuaded that Stella 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 the Burgess property out to the old road and continuing on the new road so that Burgess would have access to the public road.
Chancellor's Opinion, Page 14

This analysis is manifestly wrong considering the Stella Trotters language in the 1941 deed of one acre lying between the two roads. This analysis assumes without any evidence that Stella Trotter knew, in 1941, the record location of the Burgess property's western boundary. This is contrary to the evidence from all the Burgess witnesses and the results of litigation on the same issue in the SE1/4 of the SW1/4 in Division 3 of this Chancery Court as fully covered in the Burgess Brief under the collateral estoppel argument . The Court had this Judgment against Trotter on the western boundary of the Burgess property and did not address it in any manner in her analysis of the same issue.

As argued by Burgess, a tract of land cannot be a "monument of title" as the legal definition of the term reveals. (Black's 8th Ed. 2004, Page 1029) (Bugess Brief, Page 20) Trotter's Brief argues that the use of the Burgess property was a proper "monument of title." (Trotter Brief, Pages 16 &17) Expert testimony of K.F. Boackle clarified this term for the Court as being an improper monument in his testimony (Transcript, Page 116, lines25-29; Page 117, lines1-19) as follows:

Question to Boackle: Now you heard Mr. Ueltschey state that there was in analyzing that (1941) deed, three monuments. He stated there were two roads; that's two monuments, and then he stated that the property of A.L. Burgess was another monument. Would that be correct?

A. I don't believe that. I disagree with that. Monuments cannot be peoples' properties. Monuments can either be natural or artificial. Monuments are roads and streams and fences. They can't be somebody's property.

Q. So, in analyzing this deed, the Court will have to come up —there's two monuments. The Court would have to come up with a third and a fourth; correct?

A. That's correct ---- well, it's not necessarily monuments. Monuments mark section

corners and monuments form boundaries, but the Court is going to have to determine if that north-south ---- I mean that mid-section line is the north boundary of this property and that fence the south boundary of this property. And in my opinion, it is because we have the western side and eastern side, those are definites. And the only place one acre will fit and stll matche the definite description contained in the 1941 deed is as described as Parcel 3 on the (Survey Exh.3).

Q. Thank you. Do you have any other opinions that you want to express?

A. Well, I think it is clear that this iron pin was the corner of the previously conveyed property, at least that was the intention of the parties, and then when the 1941 deed came on, that made sense that it joined the property of A.L. Burgess.

Q. Thank you. Do you have anything further at all?

A. No.

Trotter argues, with the support of Bondurant, that the Chancellor was well-supported in her utilization of the Burgess property as a monument of title in her analysis of the 1941 deed, and her statement on Page 15 of the Brief, that Stella Trotter knew where this boundary line was. This argument is disingenuous under the fact that nowhere in this case is there any evidence that Stella Trotter knew in 1911 that the Burgess western property line, after her five acre conveyance, was 95.39 feet east of the old road.

The Chancellor's decisions on these matters was manifest error, and if accepted by this appellant court results in the loss of all Burgess frontage to the Bolton Brownsville Road for his 126.3 acres except the driveway from the road to the Burgess residence. This would be a disingenuous result considering the whole of the testimony in this case, the Tax Assessor maps, and the September, 1997 Survey of the Burgess property before the fences were torn down.

The Chancellor's analysis of the monuments of title to establish the location of the one acre went forward with the erroneous premise that the one acre was to give Burgess access to the road. Burgess never needed to purchase access to the road. He had access since 1927 which is evident in the September, 1997 Survey showing the fence parameters of the Burgess property

before the fences are shown destroyed on the November 1997 Survey. Ex. 3.

Trotter's expert witness Si Bondurant is quoted in his Brief on Page 14 as saying "testimony has indicated that the purpose of the (1941) deed was to give access from the Burgess homestead to new Bolton-Brownsville road" Transcript Page 283. No such testimony ever came from any Burgess witness or any documents in the case. Trotter then stated "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. (Transcript P.134) To clarify the clear meaning of this quote it is necessary to read the Boackle continuing testimony.

Line 24: Answer: But in my opinion, the clear purpose, beyond a doubt in my mind, is to get the Burgess property over to the road, and by this narrow strip of land lying between the roads, you give the Burgess the same frontage they had prior to the delivery of the 1941 deed. If you put in any other place, you're changing what they had prior to that deed. (Emphasis added)

The point previously made concerning the assumption by the Chancellor throughout her analysis that the 1941 deed was meant only to give access to the new road in front of the Burgess homestead, was erroneous. As Boackle stated the purpose of the 1941 deed was to bring all the Burgess property over to the new road, to give the same frontage the property had prior to the moving of the road to the west.

THE COLLATERAL ESTOPPEL ARGUMENT AS IT RELATES TO THE WESTERN FENCE BOUNDARY OF THE BURGESS PROPERTY

Trotter's brief on Page 17, maintains that Trotter's testimony concerning the fence boundary lines as depicted on the Surveys, (Exhibits 3 & 5) was not barred by the principle of collateral estoppel and 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." (Emphasis in the Brief) "Therefore, this issue is moot."

This statement cannot be true and is certainly not moot, as the Chancellor did rely on

something that resulted in her statement that Stella Trotter knew the Burgess property line was the western boundary of her five acre conveyance in 1911 and not along the old road bed as Boackle testified and all other Burgess witnesses testified. She could not have had this reliance without giving credibility and accepting the Trotter allegation that he did not tear down the subject fence along the old road bed as he was severely sanctioned for so doing in the south half of the Burgess SW1/4. (See Composite Exhibit 38, the Orders and Opinions of Judge Denise Owens of 3/6/01) This fence line's existence was dispositive in the Burgess argument of mistaken possession of the land east of the old road under the 1927 deed and recognized by Stella Trotter's language in the 1941 deed as previously covered in these briefs This credibility issue as to the fence boundary existence was not before the Court in the first trial in the case when counsel did not make an offer of proof on this issue, which is now Exhibit 38 in this retrial. This issue went directly to the credibility of Alex Trotter's testimony throughout this trial and, as the Trotter brief states, "Chancellor's Opinion is devoid of any evidence that she relied on or gave credibility to Trotter's testimony concerning a fence boundary line." Emphasis in the Brief

It is certainly true that a Chancellor sitting as a fact finder has a wide discretion under *Griffin v. Campbell* 741 So.2d 936, 937 (Miss. 1999). But how the judge applies those facts to resolving the legal issues presented by the case is a matter for *de novo* review on appeal. *Trotter v. Burgess*, 840 So.2d 762, at ¶ 17 (Miss. App. 2003) citing *Lee Hawkins Realty Inc. v Moss,* 724 So.2d 1116, 1118 (Miss. Ct. App. 1998). Burgess argues this Appellant Court find the failure of the Chancery Court to assess the credibility of this party in light of Judgments of Division 3 on the same fence at issue here, to be an abuse of discretion. The principle of collateral estoppel under the facts of this case is applicable and dispositive as to the credibility of the testimony of H. Alex Trotter throughout the two trials of this case before this Chancellor.

CONCLUSION

This case, Trotter v. Burgess, 840 So.2d 762, (Miss. App. 2003), was remanded for the reconsideration of the location of two tracts of property as stated in its ¶43:

"We reverse and remand for reconsideration of the 140 yard strip because it has not yet been definitely located. We also reverse and remand the determination of the ownership of the eastern 2.5 acres of the NW1/4 of SW1/4, for reconsideration in light of this opinion. (Emphasis added)

The COA Opinion contained numerous findings and comments on the evidence which the Chancellor was bound to consider. On remand, the directives and mandates issued by an appellate court are binding on the trial court. *G. B. Boots Smith Corp. v. Cobb,* 911 So.2d 421, 423 (Miss. 2005). When an appellate court "has already decided a specific issue in a case on a prior appeal, the trial court has been found to be in error where, on remand, it has refused to follow this Court's opinion and directions." *Dunn v. Dunn,* 695 So.2d 1152, 1155 (Miss. 1997). An appellate court's instructions on remand "in no sense of the word are .....merely advisory." *California Co. v. State Oil & Gas Bd.,* 28 So.2d 120, 121 (Miss. 1946).

In this remanded hearing, the Court was bound to accept "the findings and directions" of Court of Appeals, to not do so is an abuse of discretion. Appellee Trotter's Brief states the Chancellor "heard the evidence and followed the mandates of the Court of Appeals." And "findings" cited by Burgess are not determinative findings that bound the Chancellor on remand." Appellee Brief at page 18. To the contrary, the Burgesses have shown in their Brief that the Court below failed in dispositive instances to follow the mandates and findings in her decisions as set forth in the Judgment and Opinion of the Court, all without new evidence, which made the Judgment subject to reversal for an abuse of discretion or manifest error.

The findings, observations and directions of the COA Opinion, (Trotter v. Burgess, 840 So.2d 762, (Miss. App. 2003), which the Chancellor is bound to consider in "light of this

opinion" are reviewed here:

¶ 21 The language of the 1941 deed suggest the entire property is between the old and new locations 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 bordered the old road. And,

¶ 22 [t]he natural reading of the actual language is to define a tract that lay totally between the two roads and was contiguous to land then owned by Burgess

It has been shown that the Chancellor ignored the plain language in the 1941 deed, relying instead on some unsupported belief that Stella Trotter knew in 1911 and 1941 where the western title boundary of the Burgess property lay. The Chancellor did not consider the "natural reading of the deed language," if she had done so she could not have arrived at the conclusion she espoused, placing the "narrow strip of land" of one acre in a rectangular tract predominantly outside the two roads . This conclusion deprived the Burgesses of all road frontage to their 126.3 acres with the exception of one acre in front of the residence with access down the driveway from the home to the road.

¶ 29 Contains an important observation:

¶ 29 The Chancellor's findings did not address the matter of potential mutual mistake at the time of the old deeds about the **location** of the east line of the quarter-quarter section. Neither is their discussion of what is fairly credible evidence that their were long-time fences. Instead, by relying on the survey platting of the deed descriptions..... Emphasis added

As the Trotter brief clearly shows, the Chancellor did not address the mistake of the parties as to the location of the east line of the quarter-quarter section, the Burgess' western boundary. The Chancellor completely adopted the misunderstanding of the mistake concept as espoused by Trotter that reformation of the deed, the deed language, was required to correct the mistaken understanding of the location of the boundary lines. On Page 11 of the Trotter Brief, this distinction is dismissed as "merely semantics" in stating: "[t]he alleged distinction between a mistake in the deed and a mistake in the location of the property is merely semantics." This

misunderstanding was a controlling factor in the evaluation of the evidence by the Chancellor.

The dispositive evidence of the fence along the old road bed removed by Trotter was never discussed or evidently never considered, even in light of the Division 3 Court finding Trotter subject to exemplary damages for removing the southern section of this fence. (Composite Exhibit 38, Order and Opinion of Judge Owens of March 15, 2000) Trotter continually mis-lead the Court in his statements that this fence did not exist. (Transcript, Page 237, lines 18-29; Page 238, lines 1-20) The Chancellor's failure to note and evaluate the significance of evidence of long time fences anywhere in her Opinion was an abuse of discretion.

¶ 30 contains a specific finding:

> We find that a quite credible interpretation of all the evidence, especially the conveyance in 1927 if a total of 5 acres, half in the forty acre tract involved in this suit and other half to the south, was that the Burgess family was to receive the land between their eastern property and old road.

The Court was to determine the ownership of Parcel 2, being "the land between their eastern property and old road." This finding was of record in *Trotter* and it is the Burgess position that it was not therefore proper for the Chancellor to ignore it and find differently without the introduction of additional evidence which was not available to the reviewing appellate court, of which their was none. To the contrary, witness Boackle gave evidence in support of this finding. The Court's refusal to accept the finding was an abuse of discretion, without additional, dispositive evidence. The Court erroneously relied on the mistaken need that reformation of the 1927 deed was required as argued by Trotter witness Si Bondurant. As argued extensively, the COA specifically stated that reformation was not required in the analysis of mutual mistake in locations of the properties conveyed.

Another specific finding is found in ¶ 32:

¶ 32 We find that insofar as the 140 yard strip is concerned, the evidence of mistake on the understood location of the Burgess property's western boundary was central to determining what the 1941 deed was intended to do. We reverse as to this tract (ownership of Parcel 2) so that the credibility and weight of the evidence about mistake can be determined.

In response to this observation regarding the credibility and weight of evidence about mistake in "determining what the 1941 deed was intended to do", the Trotter Brief states in Paragraph 2 of its Conclusion on Page 21 ".....[b]ecause the 1911/1927 deeds were not reformed, Burgess proposed interpretation of the 1941 deed was nonsensical."

The Chancery Court failed to consider the lack of credibility of Trotter's testimony that the western boundary line fence along the old road never existed. Evidence was abundant in the testimony and the surveys, that this fence defined the long time boundary of the Burgess's understood location of their property. The false testimony of Alex Trotter on this issue was of record in this Chancery Court.

No evidence was in the record that a fence ever existed on the west boundary line of the five acre conveyance. To the contrary, all the Burgess witnesses testified the fence marking the understood western boundary of the Burgess property was the fence along the old road bed. Without the existence of this fence, all the testimony of Burgess and the Burgess' witnesses about cattle being on the property, would have been fabricated. With the evidence from testimony and the Alderman Engineering Surveys concerning the fences, it is evident that the 1941 deed was not for access to the road. The Chancery Court ignored the evidence of fences in its decision.

The Chancellor had the benefit of the COA findings and review of the evidence and was under the obligation to make her rulings "in light of this opinion." Further in

¶ 44, "The judgment of the Chancery Court .....is remanded for further proceedings

consistent with this opinion." Emphasis added.

Accordingly, the Burgesses respectfully request this Court reverse the findings of the Chancellor and, a) render a decision for Burgess to end this case as requested in the Burgess Brief, or b) remand to again try the case with specific instructions to the Court below.

This _____ day of March, 2008.

Respectfully submitted,

FRANCIS N. BURGESS, SR. ET AL.

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CERTIFICATE OF SERVICE

I, the undersigned Attorney at Law, hereby certify that I have this day caused to be delivered a true and correct copy of the above and foregoing Burgess Reply Brief by the United States Postal Service to the following;

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SO CERTIFIED, this the 17th day of March, 2008.

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