IN THE SUPREME COURT

STATE OF MISSISSIPPI

2008-CA-01579

CHARLES T. SCARBOROUGH — APPELLANT

VS.

MILDRED P. ROLLINS — APPELLEE

APPEALED FROM THE CHANCERY COURT OF
OKTIBBEHA COUNTY, MISSISSIPPI

REPLY BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The undersigned, Charles Bruce Brown, attorney of record for Appellee herein, certifies that the following listed persons have an interest in the outcome of this case. There representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Charles Scarobrough, Appellant
Dolton W. McAlpin, Appellant's Attorneu

Hon. Kenneth M. Burns (Trial Judge)

Charles Bruce Brown
Attorney for Appellee
MSB[redacted]

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STANDARD OF REVIEW

An appellate court employs a limited standard of review on appeals from the chancery court *Reddell v. Reddell,* 696 So.2d 287, 288 (Miss. 1997). The findings of the chancellor will not be disturbed unless he was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. *Goode v. Village of Woodgreen Homeowners Ass'n,* 662 So.2d 1064, 1070 (Miss. 1995). Stated another way, the findings of a chancellor will not be disturbed when supported by substantial, credible evidence. *Branton v. Branton,* 559 So.2d 1038, 1042 (Miss. 1990). As to issues of fact to which the chancellor did not make a specific finding, the appellate court is required to assume that the chancellor resolved ass such factual issues in favor of the appellee. *Bryant v. Cameron, 473 So.2d 174, 179 (Miss. 1985).* The chancellor is the finder of fact and determines the credibility of the witnesses.

The decision to grant or deny a continuance is left to the sound discretion of the chancellor, and will not be reversed unless there is shown a manifest abuse of discretion. *Rives v. Rives,* 416 So.2d 653, 656 (Miss. 1982), *Irby v. Estate of Irby,* ____ So.2d_____(Miss. 2009), NO. 2007-CA-00689-SCT Decided 4/23/2009.

SUMMARY OF APPELLEE'S ARGUMENT

The Chancellor determined that the gravel road was the boundary between the parties properties. Scarborough admitted suggesting to Rollins that they both owned the road. Rollins had the property surveyed prior to her purchase of the property, and hired an independent surveyor after this litigation ensued. They both placed her southern line in the gravel road. Any possible uncertainty as to her ownership of the apartment's yard, all of which lies north of the road was conclusively decided by the doctrine of adverse possession due to the continued existence and maintenance of the yard since 1966. Scarborough demanded money from Rollins or he would take her culverts. He was forewarned by her closing attorney to not take her culverts. Scarborough trespassed upon Rollins' property and took the culverts. He had been indicted for Grand Larceny by the Oktibbeha County Grand Jury for taking the culverts. Only after his arrest did he hire a surveyor, who was a former student and long time friend. Scarborough's surveyor gave the Chancellor three possible locations or choices for Scarborough's boundary line, and had changed his survey at least once since the suit was filed. Scarborough's actions were intentional and malicious in taking the culverts and multiple trespasses, some of which occurred during the pendency of this litigation.

ARGUMENT

I.

APPELLANT'S STATEMENT OF ISSUE:

The actual boundary line between Scarbrough and Rollins is the quarter section line between the Northwest Quarter and Southwest Quarter of Section 10, Township 18 North, Range 14 East, of Oktibbeha County, Mississippi.

APPELLEE'S RESPONSE:

The actual boundary line between Scarborough and Rollins was the main issue before the lower Court, and the Chancellor found that the boundary line was the gravel road.

This case began as a boundary line dispute, but the primary reason Scarborough filed the case was to muddy up the waters in the criminal case, wherein he was indicted for grand larceny for the taking of Rollins' culverts located in the ditch on her side of the road. Scarborough sent Rollins a letter threatening to take her culverts if she did not pay him two hundred dollars per year for the use of the gravel road in question (Exhibit D-15). The attorney who closed the transaction wherein Rollins purchased the apartment complex sent Scarborough a response warning him of possible legal consequences of taking Rollins' culvert (Exhibit D-13). Scarborough ignored this and removed the 40 feet of culvert out from under the gravel placed on top of the culverts during installation. The police investigated and charges of grand larceny were brought, and Scarborough was subsequently indicted by the Oktibbeha County Grand Jury. Only after being charged and arrested did Scarborough hire a surveyor. (Tr. 60, lines 3-11) The culverts were already gone

when Scarborough's surveyor began his work. (Tr. 79, lines 21-24). The surveyor, Herbert King, was long time friend and former student of Scarborough. (Tr. 59, lines 13-23). Scarborough's surveyor could not give a single description of Scarborough's north line, but gave the Court three possible scenarios or choices (Tr. 85, lines 10-19 and Tr. 100, lines 21-27). Further, the surveyor himself came up with a different description in the survey he testified to, from the prior one was relied upon in the description contained in his complaint to confirm title, and neither of these matched any of the descriptions contained in Scarborough's chain of title. (Tr. 60, line 6 through Tr. 61, line 19). On the other hand, Rollins' chain of title utilizes the same calls in every deed (Tr. 91, lines 2-5). When asked by the Court, "On a piece of plat paper, they would all look alike?", Scarborough's surveyor answered, "Right". (Tr. 101, lines 5-13) Further, the surveyor that prepared the survey attached to the deed where Rollins' purchased the property, and the independent surveyor who was hired after the lawsuit was filed found the exact same location for the Rollins tract.

The most compelling argument that Scarborough's actions are predicated upon his attempt to avoid criminal prosecution is why on earth would he go through all of this to obtain a very small portion of the yard of the apartment complex. Scarborough's survey would put an encroachment into the yard on the east end of his north line, and leave a gap or no man's land to the west. (Tr. 31, lines 12 - 18). Also, anyone looking at Scarborough's survey would have to note that all of the property lines north of the gravel road (Rollins property, the property the Blacks retained, and the Lutheran Church property) all run parallel to each other, whereas the north line drawn by Scarborough's surveyor is at an angle to and at odds with the other east west property lines. (See Copy of Survey attached to the end of Appellant's Brief)

The deeds in Scarborough's chain of titles all have language to the effect of go to a point on the old abandoned road and go down the road until it meets old highway 25, a.k.a. the Starkville Louisville Road, or Louisville Road. **Neither party is paying taxes on the gravel road that the Chancellor found to be the boundary.** This is shown by the Oktibbeha County Tax Map (Exhibit D-2), and Scarborough's witness, the Starkville City Engineer, Bill Webb (Tr. 10, lines 4-28). Also, Scarborough's Surveyor, admitted that county tax map shows the gravel road in question to be a public road. (Tr. 69, line 20 through Tr. 70, line 1). In fact one of the deeds in Scarborough's own chain of title refers to the gravel road in question as being "old road, formerly the same Starkville Louisville Road" (Exhibits D1, which is the same deed as P2-F, and Tr. 9, lines 13-27) The City Engineer admitted that if the gravel road in question was an old county road, then the city took it as such when the City annexed the area. (Tr. 8, lines 14 - 25) Also, Scarborough seems to hang his whole argument on one 5/8" rebar rod found by his surveyor in the yard of the apartments, out of all the other various monuments found, but he ignores the 5/8" rebar rod located on his fence line that runs down the south side of the road. (See the survey appended to appellant's brief). This rebar rod is due south of the one found on the north side of the road and together they arguably mark both sides of the old original gravel road. Although Scarborough's surveyor did state that "Roads can move" (Tr. 56 line 27), the Chancellor was able to find it and determine that it is boundary between the parties property. The parties agreed that Mike Brent would be an acceptable surveyor for the Chancellor to utilize to establish the location of the road.

The argument of appellant from page 17 through 21 attempts to explain and justify the lengths that Scarborough's friend and surveyor went to try to find a property line that would

absolve him of the taking of Rollins' culvert. Then appellant attempts to belittle the surveys of Goodman Engineering and Mike Brent. It should be noted that Goodman Engineering was official surveyor for Oktibbeha County and covered two generations of surveyors in that capacity (Tr. 108, lines 14- 28). Goodman Engineering surveyed most of the property in the county. (Tr. 109, lines 23-25) The appellee hired a second independent surveyor to go out and locate her property lines or corners. (Tr. 141, lines 6-7)

II.

APPELLANT'S STATEMENT OF ISSUE 2:

Rollins did not prove her claim of adverse possession of the land located between her South boundary line and the North boundary of the gravel road by clear and convincing evidence.

APPELLEE'S RESPONSE:

The Court found that the gravel road was the boundary between the properties based on the substantial and credible evidence before the Court, and further that Rollins and her predecessors in title owned the property up to the north side of the gravel road by adverse possession.

The evidence clearly showed that all but two of the apartment buildings were already constructed when the Blacks purchased the property in 1966. (Tr. 238, lines 22-27). The date of the deed was August 1, 1966. (Exhibit D4-F). This predates Scarborough's purchase of his property by eleven years, which he stated he purchased the property in 1977 (Tr. 165, lines 11-14). The property remained in the Black family through two probates and executor's deeds until Rollins purchased the property (Exhibits D4-F, D4-E, D4-D, D4-C, D4-B, and the Rollins Deed D4-A). **Every deed in Rollins' chain of title has the same description or calls, and the**

location of the south boundary was clearly established by two independent, non-biased licensed surveyors. John Black testified that "Goodman" survey that was attached to the Rollins deed matched what he had considered the property line since the apartments were purchased. (Tr. 242, lines 16-27, Exhibit D4-A). Although John Black was only 11 years old when his father and grandfather purchased the property (Tr. 238, lines 12-14), in 1981 he became a half owner in the property. (Tr. 240, lines 2-9, Exhibit D4-E) John Black would gain another one fourth of the other half through inheritance (Tr. 241, line 11 through Tr. 242, line 11). John Black testified that they maintained the yard of the apartments up to the north edge of the gravel road (Tr. 243, lines 11-16, and Exhibit D-8). That he had personally mowed the yard, (Tr. 248 lines 22 through Tr. 249 line 2), and put many a gallon of Round-up in the ditch. (Tr. 243, line 27 through Tr. 244 line 3). In addition the pipe that carried natural gas was ran right down the center of the ditch on the north side of the road, (Tr. 244, lines 9-13), and that the water and sewer lines for the apartments were located in the area between the buildings and the gravel road. (Tr. 244 lines 14-26).

John Black was unequivocal in his testimony that no one ever challenged their claim to and use of the property north of the gravel road. Specifically he testified that:

(1). He and his family claimed the property up to the north edge of the gravel road under a title or claim of ownership. (Tr. 253, line 28 through Tr. 254, line 5)

(2) That he considered the ownership to be an actual ownership and would have defended it if necessary. (Tr. 254, lines 15-22)

(3) That their ownership was open and obvious, notorious and visible.(Tr. 254, lines 23 through Tr. 255, line 7)

(4) Continuous and uninterrupted since he was 11 years old (1966). (Tr. 255, lines 8-12).

(5) That the land was held solely by his family and exclusively. (Tr. 255, lines 13-16)

(6) That their ownership was peaceful. (Tr. 255, lines 17-21)

The testimony of John Black was corroborated by his friend since childhood, Officer Andy Fultz, who actually helped him mow the yard up to the north edge of the road when they were children. (Tr. 263, line 10 through Tr. 266, line 14).

The testimony was also corroborated by the testimony of Arthur Louis Goodman, III, who stated the yard of the apartments was maintained in basically the same way or condition for approximately 35 years. (Tr. 110, line 8 through Tr. 111, line 22).

Mildred "Millie" Rollins, (formerly Millie Kemp) testified that she bought the apartment complex and land in January of 2004, from the Blacks. (Tr. 294, lines 16-21). She testified that she inspected the property and grounds on several occasions prior to purchase. (Tr. 295, lines 1-6). Rollins described the lawn and yard as being very established, and the apartments as being 40 years old. (Tr. 296, lines 1-16). She testified that her and her employees continued to maintain the yard. (Tr. 17-20). Millie testified that she was furnished a copy of the survey and went to the property to view the survey stakes or markers. (Tr. 296, line23 through Tr.297, line 5) Millie described the markers and their location for the court. (Tr. 297, line 6 through Tr. 299, line 19). The apartment complex consists of 48 units. (Tr. 303, lines 14-15). Millie testified that she had no issues as to the boundary of the property until Scarborough sent her a letter demanding money, with the threat of taking her culverts. (Tr. 320, line 1 through Tr. 322, line 14). Clearly any

uncertainty or question as to the ownership of the yard of the apartments up to the north side of the gravel road is conclusively settled by adverse possession.

Scarborough's unsupported claims to have mowed or done anything north of the gravel line were clearly refuted by the testimony of John Black, Officer Andy Fultz, Millie Rollins and the pictures of the property itself. It is incredible that he would claim that he mowed north of the road, while allowing his land to the south to lie idle and grow up in brush and trees, as shown by the pictures placed into evidence.

Possession is defined as effective control over a definite area of land, evidenced by things visible to eye or perceptible to senses and includes control over land and intent to exclude others except with occupant's consent, *Blankinship v. Payton,* 605 So.2d 817 (Miss. 1992). The peculiar facts of each individual case determine whether or not there has been sufficient acts to acquire title by adverse possession, *Broadus v. Hickman,* 50 So.2d 717, 210 Miss. 885 (Miss 1951). One in exclusive possession of land for more that thirty-one years, and especially under a claim based on color of title, acquires marketable title thereto by adverse possession, *Alewine v. Pitcock,* 47 So.2d 147, 209 Miss 362 (Miss 1950). The adverse possession of successive occupants in privity with each other may be combined to reach the statutory period, a concept generally known as tacking, *Buford v. Longe,* 832 So.2d 594 (Miss. Ct. App. 2002). Where one enters into possession of land claiming title by deed, his possession by law will be deemed coextensive with boundaries stated by deed, *Brown v. Jarratt,* 87 So.2d 874, 228 Miss 338 (Miss 1956) and *Cranford v. Hilbun,* 147 So.2d 309, 245 Miss. 269 (Miss. 1962). Where title to disputed area had been acquired by adverse possession at time of survey, it was immaterial as to where surveyor may have located true section line, *Kersh v. Lyons,* 15 So.2d 768, 195 Miss 598

(Miss. 1943). Therefore, Rollins' predecessor in title, the Blacks had clearly established their ownership over the yard of the apartments ten years after their purchase in 1966, which would be one year prior to Scarborough's purchase of the tract to the south.

III.

APPELLANT'S STATEMENT OF ISSUE 3:

The gravel road is not a boundary line.

APPELLEE'S RESPONSE: A road, gravel or paved can clearly be a boundary between properties.

It is incredible that appellant would suggest that a road cannot be a boundary between properties. The roads and streets of this state divide homes in subdivisions; commercial property down the main streets of our towns and cities, and innumerable tracts of land and farms in the country. The deeds in Scarborough's chain of title refer to the gravel road in question as an "old abandoned road". Common sense tells us that for a road to have been abandoned, it had to have been a road in the first instance, which was admitted by the city engineer, Bill Webb, who was Scarborough's witness. (Tr. 12, lines 10-18).

Scarborough's own chain of title contains a deed that refers to the gravel road as the "old Louisville-Starkville road (Tr. 9, lines 5-27 and Exhibit D1, which is a copy of the same deed as P2-F in Scarborough's chain of title). The county tax maps show the road as public, and neither party is paying any property taxes on the land under that road. (Tr. 10, lines 4-28 and Tr. 72, lines 2-9). The city engineer admitted that this road could very well belong to the city. (Tr. 12, line 27 through Tr. 13 line 1). In fact the road is listed as a public road on the 1974 Michael Baker Official Map of Starkville. (Tr. 125, lines 10-14 and Exhibit D-9). Appellant's attempts to

refute this clear and convincing evidence is disingenuous and specious.

IV.

APPELANT'S STATEMENT OF ISSUE 4:

The lower court should have continued the trial of this cause as to the issues involving the culverts due to Scarborough's indictment for grand larceny and the pendency of a criminal case against him.

APPELLEE'S RESPONSE:

The lower Court granted the appellant a continuance, and the granting of a further continuance lies within the sound discretion of the court. Further, this assignment of error was waived in that the appellant did not request any further continuance.

The plaintiff announced ready at the trial. (Tr. 2, line 3-4). The prior request for a continuance of the case had already been granted by the court from the first trial date of February 26, 2008 until March 17, 2008. The appellant was the one who filed this action on July 28, 2006, after the charges of grand larceny were pending, so to claim that the indictment was a surprise is not convincing. The appellant did not request any further continuance, so this assignment of error is not properly before the court. The motion for continuance is contained in appellant's excerpts at pages 27-29, wherein a continuance "until further orders of the court" was requested. This motion was granted by the court. Further, appellant brought out through his own testimony and exhibits the issue of the culverts. (Tr. 221, line 25 through Tr. 222, line 8) Then he brought out the criminal charges for taking the culverts and introduced the indictments. (Tr.223, line 1 through Tr. 224 line 14 and exhibits P-7 and P-8) Thereby opening the door as to those issues himself and placing the matters before the court, despite the courts gracious offer to keep those

issues out to the case. (Tr. 2, line 24 through Tr. 4, line 4). Therefore, appellant should not be heard from or allowed to complain of his own actions.

V.

APPELLANT'S STATEMENT OF ISSUE 5:

The lower court's award of actual and punitive damages and attorney's fees to Rollins should be reversed.

APPELLEE'S RESPONSE:

The chancellor's award of actual and punitive damages and attorney's fees to Rollins was amply supported by the evidence and should be affirmed.

The chancellor had direct proof that Scarborough came upon the land of Rollins and took the culverts by the letters Scarborough sent threatening to take the culverts if he was not paid his extortion money, which Scarborough testified to.(Tr. 225, line 28 through Tr. 226, line 3 and Tr. 229, lines 1-8) Scarborough even went so far as to park his vehicle in the yard of the apartments after this lawsuit was filed, and the police had to be called .(Tr. 179, lines 22-27; Tr. 180, lines 14–20 and Tr. 266, lines15 through Tr. 268 line 10 and Exhibit D8). Scarborough also went on to the property and talked with her apartment manager during the pendency of this suit in an attempt to get his assistance in settling the lawsuit. A letter was sent to his attorney objecting to this and Scarborough's attorney sent a reply letter indicating that Scarborough would not be doing that again. Scarborough again went back to talk to the apartment manager after the exchange of letters and assurance that conduct would not be repeated. (Tr. 192 line 29 through Tr. 195, line14). The Court found that Scarborough had maliciously and intentionally trespassed upon Rollins' property, took her culverts and converted them. Conversion requires proof of a

wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of a wrongful detention after demand, *Walker v. Brown,* 501 So.2d 358 (Miss. 1981), *Greenline Equip Co, Inc v. Covington County Bank,* 873 So.2d 950 (Miss. 2002). Whereas trespass occurs when there is an invasion which interferes with the right of exclusive possession of the land, which is the direct result of some act committed by the defendant, *Thomas v. Harrah's,* 821 So.2d 891 (Miss. App. 2002). Scarborough's actions were committed intentionally and maliciously, without any need or reason other than to harass Ms. Rollins, which supports a granting of punitive and compensatory damages, *Walker v. Murphree,* 722 So.2d 1277 (Miss. Ct. App. 1998) see also *Bowling v. A-1 Detective & Patrol Serv., Inc.,* 659 So.2d 586 (Miss. 1995). Damages, including attorney fees may be recovered, *Ellison v. Meek,* 820 So.2d 730 (Miss. Ct. App. 2002) see also *Walley v. Hunt,* 212 Miss. 294, 54 So.2d 393 (Miss. 1951). The chancellor has substantial discretion in the matter of determining whether an assessment of damages is warranted, *Aqua-Culture Tech., Ltd v Holly,* 677 So.2d 171 (Miss. 1996) (citing *Fought v. Morris,* 543 So.2d 167 (Miss. 1989).

Scarborough can not legitimately claim that he in any way acted in good faith. He did not have any survey that indicated that he owned the property in question at the time he demanded money from Rollins, whereas Rollins did have a survey which was attached to her deed. Scarborough had already made statements that they both owned the road. (Tr. 172, lines 6-14) He did not obtain a survey or file suit prior to taking Rollins' culverts. In fact he was warned to not take the culverts by Rollins' closing attorney, and took them anyway.(Exhibit D12) Rhetorically, what legitimate and valid reason does Scarborough have to try to claim a small portion of the yard of the apartments or to take up the culverts, other than to fulfill his threat to

take them if the extortion money was not paid and to harass his neighbor. Scarborough elected to take the law into his own hands, and should not be heard to complain of the consequences of his intentional and malicious actions.

CONCLUSION

The lower Court is entitled to differential review. The Chancellor was in the best position to observe the witnesses and judge their credibility. The Rollins property had been independently surveyed by two surveyors who both found the south line to be in the gravel road. Scarborough's surveyor changed his description from the one utilized in their complaint and had to give the Chancellor three possible lines for Scarborough's north property line. Scarborough admitted that he had suggested to Rollins that they both owned the road. Any claimed uncertainly as to Rollins ownership to the north of the gravel road was conclusively settled by the doctrine of adverse possession, which dated back to 1966, some eleven years prior to Scarborough's purchase of his property. Scarborough's chain of title is a title searchers nightmare utilizing different descriptions and contains a Quit Claim Deed which purports to correct the description. (Exhibit D4-BQ) Whereas Rollins chain of title is abundantly clear utilizing the same descriptions throughout. The evidence clearly demonstrated that Scarborough intentionally and maliciously trespassed upon Rollins' property on several occasions and on the first one he removed her culverts when she refused to pay him the money he demanded, even after being warned by her attorney. Scarborough was subsequently indicted for Grand Larceny. Scarborough took the law into his own hands and evidently thinks that he is somehow above the law.

CERTIFICATE OF SERVICE

I, CHARLES BRUCE BROWN, the undersigned attorney of record for Appellee herein, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLEE to the following attorneys, judges and parties of record:

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The Honorable Kenneth M. Burns
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SO CERTIFIED, this the 16th day of June, 2009.

Charles Bruce Brown