

**IN THE COURT OF APPEALS**

**STATE OF MISSISSIPPI**

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**2008-CA-01579-COA**

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**CHARLES T. SCARBOROUGH**

*APPELLANT*

*vs.*

**MILDRED P. ROLLINS**


*APPELLEE*

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**APPEAL FROM THE CHANCERY COURT OF  
OKTIBBEHA COUNTY, MISSISSIPPI**

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**REPLY BRIEF OF THE APPELLANT**

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## ARGUMENT

**1. The actual boundary line between Scarborough 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.**

Rollins argues that the principal issue before the trial court was the location of the boundary between the parties and that the Chancellor correctly determined the gravel road to be that boundary. The following is in answer to the points raised by Rollins:

A. Rollins asserts that Scarborough filed this case to muddy the waters in a criminal case against him. According to Rollins, Scarborough's lawsuit to ascertain the true boundary between the parties is a mere ruse to avoid legal consequences in the criminal case. The best evidence to support a claim of "ruse" would be engineering evidence which directly contradicts the King survey (Exhibits P-3 and P-4) and which showed the distance from the Southeast corner of the Lutheran Church to either the nail placed by Goodman or Rollins' monumented Southeast corner. But the only evidence cited by Rollins for this proposition is that Scarborough employed a surveyor only after he was arrested. Such an argument is specious on its face. Scarborough testified that he wanted to build a fence and so he needed to have the boundary defined before he built the fence. (Tr. 166 line 22 through Tr. 167 line 4) The date on which Scarborough employed Mr. King to define that boundary is irrelevant. A relevant question is, why did Rollins choose to criminalize a boundary dispute?

If it makes sense that Scarborough filed this case just to muddy the waters in the criminal case against him, then it makes as much sense to argue that Rollins had him arrested in an attempt to intimidate him from defending his property.

B. Rollins maintains that Scarborough's surveyor, Herbert King, testified to three "scenarios" as to where the boundary is located, and came up with a different description at trial from the one that was used in Scarborough's complaint to quiet and confirm title. The insinuation is that Mr. King's work is somehow not credible. An examination of Mr. King's testimony exposes the fallacy of that claim.

Mr. King testified that the brown line on Exhibit P-4 represents Rollins' monumented South boundary as actually called for her in the body of her deed, as opposed to Goodman's incorrect survey plat. (Tr. 30, lines 6-12) Mr. King also surveyed Scarborough's North boundary as called for in his deed and King's plat shows that it goes from Scarborough's Northwest corner (point of the brown arrow North of Rollins pre-Goodman survey monumented South boundary) East toward the right of way of Mississippi Highway No. 25 where King set an iron pin in the ditch North of the gravel drive (I.P.S., i.e. "iron pin set"). Mr. King pointed out that Rollins' monumented South boundary as called for in her deed and Scarborough's North boundary as called for in his deed intersect and cross (Tr. 31 lines 12-15) a fact which can be discerned from an examination of Exhibits P-3 and P-4. Finally, Mr. King located the quarter section line – the dashed line shown on Exhibit P-3 and P-4 - which was at one time the common boundary between the parties. The degree of care which he applied to this endeavor is fully described in the Brief of Appellant, pages 17-20.

Mr. King provided the court with a wealth of data and engineering evidence showing (1) the location of Rollins monumented South boundary as called for in her deed, (2) Scarborough's North boundary as called for in his deed<sup>1</sup>, and (3) credible evidence of the most

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<sup>1</sup> Not shown as a drawn line on Exhibits P-3 or P-4. However, its location lies between the tip of the brown arrow on the West end and the "I.P.S." on the East end.

likely location of the quarter section line.<sup>2</sup> All of these lines pass well North of the culverts, as shown on Exhibits P-3 and P-4. Scarborough argues that the quarter section line as found by Mr. King – the dashed line shown on Exhibit P-3 and P-4 - is the most reasonable boundary between the parties.

Mr. King surveyed seven properties and the East and North boundaries of a 1.7 acre tract adjacent to and West of Scarborough property. He not only surveyed these properties, his maps show the relationship between and among the properties (as shown on Exhibits P-3 and P-4). These properties are:

- |                                |   |
|--------------------------------|---|
| 1. Starkville Christian School | 5. Lutheran Church property                         |
| 2. Robert G. Sweet             | 6. Black Property and Rollins properties (together) |
| 3. Ferndale Manor Apartments   | 7. Scarborough property                             |
| 4. Starkville Grove Apartments | 8. Black property (1.7 ac.)                         |

Properties 1 through 4 lie to the West of Rollins' property and are listed here in order, from West to East. Properties 5 and 6 lie North of Scarborough's property and are listed here in order from North to South;. Property 8 lies West of and adjacent to Scarborough's property. The South boundaries of the two westernmost properties, 1 and 2, are both identified as the quarter section line in the plat filed with the deeds (Exhibits P-5K and P-5J). A. L. Goodman, Jr. is listed on the plats as the surveyor, the same Arthur. L. Goodman, Jr. who performed Rollins' survey. The deeds for properties 3 and 4 both recite that the quarter section line is the South boundary for each (Exhibits P-5I and P-5O). The monumented and fenced line from the Southwest corner of property 1 to the Southeast corner of property 4 is 1,293.41 ft., almost a quarter of a mile as shown on Exhibits P-3 & P-4, and is approximate-

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<sup>2</sup> The Scarborough description which King developed for purposes of filing the complaint is not what is called for in his deed; rather, it uses Rollins (pre-Goodman survey) monumented South boundary as Scarborough's North boundary.. The description which Scarborough urges for confirmation of his title, shown on Exhibits P-3 and P-4, contains the calls for his West, and South boundaries from his deed, and the quarter section line for his North boundary. This shortens his East boundary by a few feet.

ly a straight line. There is no material difference between the line of the fence and its projection and the monument line. It is therefore clear that the old fence line is the accepted quarter section line according to deeds and/or plats from properties 1, 2, 3, and 4. Evidence of common reputation as to the location of boundaries is relevant in this inquiry.<sup>3</sup> The dashed line is the line determined by two points, both located in the fence line approximately 906.25 ft. apart, and both labeled "Old Wire Fence Line Projection Match Point." Also, the fence line and its projection (the dashed line on the King maps) agrees with the fence line shown extending from the Northwest corner of property 8 to Old Highway 25 on the plat attached to the deed for property 8, Exhibit P-5N, a plat prepared by Arthur L. Goodman, Jr., the same surveyor who performed the Rollins' survey. Without dispute, the dashed line is the quarter section line.

Using the quarter section line as the boundary between the parties avoids the errors of prior descriptions which cause the lines to intersect and cross each other, and it is the actual South boundary called for by the calls in Rollins' deed.

Rollins further attempts to damage Mr. King's credibility by pointing out that Scarborough and King are friends, and accuses King of trying "to find a property line which absolves him [Scarborough] of the taking of Rollins' culvert." Rather than finding any error in his engineering work, Rollins seeks to discredit King by innuendo and accusation. A presentation of evidence by a licensed professional engineer that the data shown on Exhibits P-3 and P-4 is incorrect or nonexistent would have attacked Mr. King's credibility, but Ms. Rollins adduced no such evidence. Instead, Rollins offered the survey attached to her deed and a "layout," both of which are deficient. The survey plat attached to her deed (Exhibit D-4),

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<sup>3</sup> *Burrow v. Brown*, 190 So. 2d 855,857 (Miss. 1966)



with the field work done by Arthur L. Goodman, III (Tr. 114 line 20 – Tr. 115 line 17; 116 lines 1-21) (not to be confused with A. L. Goodman, Jr., the deceased former county surveyor) is simply incorrect, as discussed extensively in the Brief of Appellant. A. L. Goodman, III, is not a licensed engineer or surveyor but worked for his father, A. L. Goodman, Jr., who was a licensed professional engineer and surveyor. (Tr. 108 lines 19-22; 109 lines 12-22).

Moreover, Mr. Brent's "layout" (Tr. 141 lines 9 – 28) is nothing more than a drawing identifying monuments that were inaccurately placed by Goodman, and contains much less data than King showed on his plats. This "layout" does not purport to be a survey, and Mr. Brent did not represent it to be one. (Tr. 141 lines 25-28) In response to a question about whether his layout accurately depicts the description of Rollins' property, Brent said:

A It depicts the Rollins property based on the deed of record - - the most current deed of record that we had in our hands, yes, sir. I believe it was the one you spoke about earlier to Mildred Kemp.

Q I'm showing you [Exhibit] D4-A. Would that be the deed you mean?

A Yes sir. With that attachment, yes, sir. (Tr. 144 lines 11-18) (Emphasis supplied)

"That attachment" is the defective Goodman survey attached to Exhibit D4-A. (See Brief Of Appellant, pages 22-24) Though Rollins asserts that her South boundary "was clearly established by two independent non-biased licensed surveyors," that is not the case. Goodman mis-surveyed Rollins' legal description and showed her South boundary incorrectly on his plat, and Brent simply confirmed that the monuments cited by Goodman are there, irrespective of whether they are right or wrong, as shown on Goodman's flawed plat. In truth both Brent and Goodman identified the property Rollins claims by adverse possession, and did not correctly identify her property as described in her *written* deed description.

The adjudication of the location of a boundary line must be based on a preponderance of the evidence.<sup>4</sup> Mr. King's survey is superior to Mr. Brent's layout and to Goodman's survey, attached to Rollins' deed, and represents more than a preponderance of the survey evidence. Indeed, the most likely location of the boundary line has been shown by clear and convincing evidence to be the quarter section line, the dashed line shown on Exhibits P-3 and P-4. The calls in the parties' deeds cause the boundary lines to cross, leaving disputed areas at each end. As pointed out in the Brief of the Appellant:

The survey description of Scarborough's property printed on King's surveys (Exhibits P-3 and P-4) describes Scarborough's North line as being the quarter section line, and it is this description which Scarborough urged the Court to use in quieting and confirming his title. Using this survey description would return matters to where they had been for many years – the boundary between the parties will be the quarter section line. (Brief of Appellant, page 28)

By adopting the quarter section line, the dashed line shown on Exhibits P-3 and P-4, as Rollins' South boundary and Scarborough's North boundary, this Court will remedy the current conflict between the parties' deeds and is the most reasonable solution to the boundary dispute.

C. Rollins' points out that her description has remained the same in the instruments in her chain of title. No one contests this assertion. And Mr. Brent's work and Mr. Goodman's work would look the same as Mr. King's work had Brent and Goodman surveyed properly. It is unchallenged that the descriptions contained in the instruments in Rollins chain of title place her South boundary on the quarter section line. The engineering evidence in the record which accurately shows the location of the quarter section line is that supplied by Mr. King.

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<sup>4</sup> *Briggs v. Carley*, 919 So.2d 109, 111 (Miss. App. 2005)

D. Rollins asserts that neither party is paying taxes on the gravel driveway. This assertion is patently incorrect. The tax map reveals that Scarborough is assessed for 4.60 acres. In its Final Judgment the trial court gave Scarborough 4.205 acres south of the gravel drive. The gravel driveway was surveyed by Brent incident to the formulation of the Final Judgment and was found to contain .17 acres, more or less (R. 248; R. E. 21). In order to reach the 4.60 acres on which Scarborough is paying taxes we add 4.205 acres and .17 acres which equals 4.38 acres (rounded to two decimal places). It is clear Scarborough is paying taxes on the 4.205 acres south of gravel drive plus the 0.17 acres constituting the gravel drive, plus .22 acres to the North of the gravel drive. The 4.60 acres upon which Scarborough is paying taxes will not fit South of the gravel drive.

Linear distances may be used to arrive at the same conclusion. The tax map shows Scarborough's boundaries on the West and East to be 339 feet and 335 feet, respectively. Scarborough is being taxed on the land South of what may be called the "tax line" connecting the Northern termini of his 339-foot and 335-foot tax boundaries. Since Scarborough's West and East boundaries are 329.50 feet and 331.60 feet, respectively (Exhibits P-3 and P-4), the "tax line" lies North of the quarter section line (the dashed line) which lies North of Rollins' South boundary as set out in the Final Judgment. (R. 242-250; R. E. 15-22)

A similar argument can be made using the King and Brent maps attached to the Final Judgment. It can be shown that, by scaling off the distances on those maps<sup>5</sup>, the Northern termini of Scarborough's western and eastern tax map boundaries of 339 feet and 335 feet respectively, lie above the line North 89 degrees 51 minutes West and its extension to the

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<sup>5</sup> The scale is 1 inch = 150 feet.

West. Thus, the “tax line” connecting the Northern termini of the West and East tax map boundaries lie above Rollins South boundary as determined in the Final Judgment.

A belief that Scarborough has not been paying taxes on all the land he claims is to believe a physical and mathematical absurdity.

Though the Chancellor was the trier of the facts in this case, his findings of fact on conflicting evidence may be disturbed by this Court on appeal if those findings are manifestly wrong and against the overwhelming weight of the evidence.<sup>6</sup> In the final analysis, the Chancellor’s findings of fact on the issue of the location of the boundary between the parties are manifestly wrong and against the overwhelming weight of the evidence.

**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.**

Rollins’ contention on this issue is that the substantial credible evidence before the trial court shows that Rollins and her predecessor in title owned property down to the north side of the gravel road by adverse possession. This contention is in error.

A. Rollins states that all but two of the apartment buildings located on Rollins’ property predated Scarborough’s acquisition of the property to the South. While perhaps relevant, this fact doesn’t support a determination that Rollins and her predecessors adversely possessed down to the North edge of the gravel driveway. Scarborough is certainly not claiming any portion of the apartment buildings.

B. Evidence adduced from Black, Fultz, Goodman, and herself, Rollins insists, reflects her and her predecessors’ dominion and control over the area just North of the gravel

road for the statutory period. Ms. Rollins' principal argument is that she and her predecessors obtained title to the area of yard North of the gravel road by adverse possession, stating, "[I]t's been mowed and maintained since 1966." (Tr. 344 lines 22-23) The incidents of adverse possession relied upon by Rollins are:

- (1) paying taxes
- (2) mowing of grass North of the gravel road by her and her predecessors in title
- (3) Black's spraying Round-Up in the ditch
- (4) Black's installing a gas line in the ditch North of the gravel road
- (5) Water and sewer lines for the apartment buildings are located (somewhere) in the area South of the buildings and North of the gravel drive.

Rollins is paying taxes on 2.88 acres, Exhibit D-9. Her lot is a rectangle 200 feet by 628 feet. (Exhibits D-4A and D-4B) Her lot fits on Exhibits P-3 and P-4 where the plat shows it to be. Thus Rollins is paying taxes only on land well North of the ditch which is located North of the gravel drive. But in the context of adverse possession Rollins' claim that she is paying taxes down to the North edge of the gravel driveway (which Scarborough does not concede) is weak, since "payment of taxes is simply one incident to possession and whether an adverse possessor has paid property taxes on the land in controversy is not dispositive of the claim of ownership."<sup>7</sup>

The location of the water and sewer lines lying four to six feet from the apartment buildings (Black's testimony, Tr. Page 244, lines 14-26) suggests that they were placed there with the nearby South property line in mind. Scaling Exhibits P-3 and P-4 (using the scale printed on the face of the plats) discloses that any utility lines which serve the buildings lie

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<sup>6</sup> *In re Extension and Enlarging of Boundaries of the City of Laurel, Mississippi*, 922 So. 2d 791, 795 (Miss. 2006).

<sup>7</sup> *Nosser v. Buford*, 852 So. 2d 57, 61 (Miss. App. 2002)

well North of the gravel driveway, they lie well North of the quarter section line (the dashed line), and they lie well North of the solid line, which is Rollins' pre-Goodman survey monumented South boundary.

Finally, the fact that Black installed a gas line in the ditch does not bolster his or Rollins' adverse possession of the property. The record reflects Black acquired the house and property to the West of Scarborough in 1990 (Exhibit P-5N), and the deed granted him an easement for ingress and egress over and across the North end of Scarborough's property to get to that property, within the North thirty-five feet of Scarborough's property, in which area the gravel drive is located. Black's installation of a gas line in the ditch to serve this house merely installed a utility within his easement for ingress and egress, which the Supreme Court says is a legitimate use of an easement for ingress and egress.<sup>8</sup>

The evidence upon which Rollins relies to prove her and her predecessors' control over land and their intent to exclude others is meager and is not clear and convincing. The possessory acts testified to by Rollins and her witnesses took place for a period of time in excess of the statutory ten years, but they are not the kind and character of possessory acts which have been found to be sufficient to sustain a claim of adverse possession, as illustrated on pages 31-32 of the Brief Of Appellant.

In a recently decided case this Court found that the following are among the kinds of possessory acts which are sufficient, collectively, to sustain a finding of adverse possession<sup>9</sup>:

1. The predecessor in title grazed cattle on the property;

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<sup>8</sup> *Bivens v. Mobley*, 724 So. 2d 458, 465 (Miss. 1998)

<sup>9</sup> *Webb v. Drewrey*, 4 So.3d 1078 ( Miss.App.2009)

2. The predecessor sold one acre to hunters who built a cabin on the West side of the property;
3. The adverse possession claimants cut firewood, cut and sold timber, and bush hogged the property;
4. The adverse possession claimants allowed a group of hunters to hunt and to build a cabin on the East side of the disputed property.

This Court determined that these possessory acts were sufficiently open, notorious, and visible to put the other parties on notice that there was an adverse claim against the property. This Court also pointed out that a claim of adverse possession cannot trigger the ten-year clock unless the landowner has actual or constructive knowledge that there is an adverse claim against his property. (*Drewrey, supra*, 4 So. 2d at 1083) In our case, nothing done by Rollins and her predecessors in title was sufficiently open, notorious, and visible that it would have put Scarborough or his predecessors in title on notice that someone else was claiming his property.

Further, Rollins also argues that where title to a disputed area has been acquired by adverse possession at the time of a survey, it is immaterial that the surveyor did not locate the true section line. *Kersh v. Lyons*, 195 Miss. 598, 15 So.2d 768 (Miss. 1943) The rather convoluted facts of that case are inapposite to this case, and cannot be relied upon to show that the location of the quarter section line in this case is in some way irrelevant. Rollins declares in her Motion For Summary Judgment (R. 48-51) that her South boundary is the quarter section line, and she remains bound by that assertion.

In the final analysis Rollins was unable to prove by clear and convincing evidence that her possession of the disputed grassy area down to the Northern edge of the gravel driveway has been hostile, open, notorious, visible, continuing, exclusive, and peaceful. There-

fore her adverse possession claim South of the quarter section line down to the grassy area North of the gravel driveway must fail.

### **3. The gravel road is not a boundary line.**

Rollins' response is that a road, gravel or paved, can be a boundary between properties. And it is true that a road can be a boundary. Property can certainly abut the right of way of a road, but Rollins is arguing that the gravel driveway at issue is either a current public road or, in the alternative, is an abandoned public road. If the gravel driveway is a public road, then the lower court could, upon proper evidence, use the limits of its right of way as a boundary between the parties. If the gravel driveway is an abandoned public road, title to it now rests in Scarborough and it cannot serve as a boundary between the parties.

Bill Webb, former City Engineer for the City of Starkville, never testified that the gravel drive was a public road. When he was questioned on cross examination about the term "old abandoned road" in Scarborough's deed, it was Rollins' counsel who drew the conclusion, "So, clearly, in the past, it was a road." (Tr. 12, line 19) It is this evidence, together with a reference to a deed in Scarborough's chain of title that mentions "the Old Starkville-Louisville Road" (Exhibit P2-F) and the fact that the gravel driveway is shown as a road on the 1974 Michael Baker Official Map of the City of Starkville<sup>10</sup>, that Rollins maintains is clear and convincing evidence that the gravel drive is a public road, arguing that any attempt to refute this claim is disingenuous.

As Scarborough argues in the Brief Of Appellant, a public road may be created in three ways: by prescription, by dedication, or pursuant to statutory provisions, i.e. condem-

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<sup>10</sup> That map does not specify whether the gravel driveway is a public or private road.



nation.<sup>11</sup> There is no evidence in this record that the driveway-road was ever dedicated as a public road, nor is there any evidence in this record that the gravel driveway was designated as a public road pursuant to any statute, or by condemnation, or that it was abandoned by any public body. There is no credible evidence that the driveway became a public road through dedication or prescription. There is no credible evidence in the record that the driveway was habitually used by the public in general for a period of ten years. Rather, the credible evidence shows that the gravel driveway was part of a dirt road which was interior to the Lanier estate. (Exhibit P-2A)

There is no convincing evidence in this record showing that the gravel driveway is now or has ever been a public road. But even if the gravel drive had been a public road at one time, as Rollins argues, its abandonment would have operated to confer on the owner of the abutting lands the entire title as against all other persons.<sup>12</sup> In today's case, the weight of the evidence shows that Scarborough and his predecessors abutted the gravel road on both the North and South sides. If there had been an abandonment, title to the road would have reverted to Scarborough and his predecessors.

Rollins asserts that Scarborough's surveyor admitted that the tax map shows the gravel drive to be a public road. Mr. King did not state that the tax map showed the gravel drive to be a public road. Rather, he testified that on the tax map public roads appear to be delineated from private property by red lines. (Tr. 69, line 20 through Tr. 70, line 1) There is no evidence that shows that the red lines on the tax map delineate public roads only – indeed, there is no difference in how public roads and private roads are shown on a tax map, when

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<sup>11</sup> *George County v. Davis*, 721 So.2d 1101, 1106 (Miss.1998) (citing *Coleman v. Shipp*, 223 Miss. 516, 530, 78 So.2d 778, 784 (1955)) (citing *Armstrong v. Itawamba County*, 195 Miss. 802, 16 So.2d 752, 757-58 (1944)); *Miss. Code Ann.* § 65-7-57 (1991)

<sup>12</sup> *Jones v. New Orleans & Northeastern R. Co.*, 214 Miss. 804,819, 59 So.2d 541, 545 (Miss. 1952)

they are depicted. At any rate, tax maps are not intended to be used for conveyances or to fix the actual location of boundaries or to show what is public property and what is private property. A tax map is not a survey, and its utility in the context of this case, which involves a great quantity of engineering evidence, is limited.

The city street map introduced as Exhibit P-1 is the only map that distinguishes public streets from private roads, and that map does not show the gravel drive to be any kind of road. If the gravel driveway was at one time a public road, it is highly unlikely that it was missed by the city department performing street maintenance, and has remained missing, since annexation of the disputed area into the City of Starkville.

Finally, as illustrated earlier, Scarborough is paying taxes on the gravel drive – it cannot be a public road while an owner simultaneously pays taxes on it.

The lower court found that the gravel drive located in the North several feet of Scarborough's land "is akin to a fence, or in this case, a road, recognized by all as a boundary [and] is a strong indication of the boundary between the parties . . . ." The lower court's judgment treats the gravel road as a fence. The gravel road boundary line as decreed by the lower court is not a line on a map: it has length and width, and an area of approximately .17 acres. (Court's Final Order, R. 248; R. E. 21) The road isn't a fence, and it was error to suppose that the road has the same properties as a fence.

**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.**

Rollins argues that the Court granted a continuance and that Scarborough, by not requesting further continuances, waived any objection. Moreover, Rollins contends, Scarborough first mentioned the culverts and cannot now complain that Rollins walked through the door he opened.

When the criminal case against Scarborough was presented to the grand jury for the first time, the case was no-billed. (Exhibit P-7) After the no bill was handed down, Scarborough and his counsel expected that the civil case would move forward and that a determination of the location of the boundary between the parties would settle all issues regarding the ownership of the property on which Rollins installed the culverts. Without waiting for the civil case to be decided, the matter was again presented to the grand jury in January of 2008. On this second trip through the system the grand jury issued a true bill indicting Scarborough for grand larceny (Exhibit P-8), eight days after the trial court had set this matter for trial. (R. 148) Scarborough filed a Motion For Continuance (R. 162; R. E.23) and the lower court continued the trial of the case for twenty days (R. 191; R. E. 29), clearly not enough time for the criminal charges against Scarborough to be resolved. It would have been technically possible for Scarborough to have made continuing motions for a continuance – or remain mute and decline to offer any evidence. One motion for continuance, however, should be sufficient under the unusual circumstances of this case.

The lower court manifested its intent to go forward with the case. The chancellor stated into the record that the issue of who took the culverts was not be mentioned (Tr. 3, line 1 through Tr. 4, line1), clearly an attempt to preserve Scarborough's rights incident to the criminal case. But doing so turned out to be messy, and deprived Scarborough of the ability to adequately defend Rollins' claims.

The first appearance of the culvert issue actually occurred when Rollins' counsel asked Scarborough, "Well, what caused the problem that kicked this all in gear?" (Tr. 166, lines 20-21) A colloquy between the court, the witness and counsel ensued concerning how this question might lead to the mention of the culverts. It became increasingly clear throughout Scarborough's cross-examination as well as his direct testimony that, in order to preserve his rights in the criminal case, Scarborough was required to walk on eggshells – not an enviable position, since he was effectively precluded from adequately defending against Rollins' claims of adverse possession and her claims for punitive damages.

Scarborough's indictment changed the calculus of the civil case, and the trial court should have continued the civil case until the criminal case was resolved.

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

Rollins argues that the Chancellor's award was amply supported by the evidence. Scarborough, on the other hand, contends that the evidence that his conduct was willful and wanton, justifying an award of punitive damages and attorney's fees, is meager and falls well below the required standard.

The lower court found that Scarborough converted the culverts and that his conduct in so doing was willful and wanton, in spite of the court's stated intent in a telephone hearing to try only boundary line issues and would determine issues involving the culverts and damages at later date. This reveals the difficulty in which Scarborough found himself at trial. Scarborough was unaware that his intent was being litigated in this trial. A mention of the

culverts in order to put an answer in context does not open up the issues of the taking of the culverts or Scarborough's intent.

Rollins argues that a chancellor has substantial discretion in the matter of whether an assessment of damages is warranted, citing *Aqua-Culture Tech, Ltd. v. Holly*, 677 So. 2d 171 (Miss. 1996). That is true, and the cited case stands for the proposition that an abuse of discretion standard is appropriate in judging whether or not punitive damages should have been awarded. On the other hand, that same case declares that the facts must be highly unusual because punitive damages are only awarded in extreme cases. (*Aqua-Culture Tech, Ltd. v. Holly, supra*, 677 So. 2d at 184)

*Mississippi Code Annotated*, § 11-1-65(1)(a) requires that a party seeking an award of punitive damages must prove by "clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." It has been held that there must be "ruthless disregard for the rights of others, so as to take the case out of the ordinary rule." *Gamble ex rel. Gamble v. Dollar General Corp.*, 852 So.2d 5, 15 (Miss. 2003) Even if the lower court properly addressed the issue of damages and attorney's fees, the evidence reveals neither willfulness, oppression, fraud, or wantonness in Scarborough's conduct, nor a ruthless disregard of Rollins' rights. This is not an "extreme case." Hence, Rollins is not entitled to punitive damages or an award of attorney's fees. The lower court's award of punitive damages and attorney's fees should be reversed.


Once again, it is Scarborough's request that this Court reverse and render the lower court's award of actual damages, punitive damages, and attorney's fees, render on the boundary line issue, and remand this case to the lower court with directions to confirm the par-

ties' respective titles based upon a boundary line between Rollins and Scarborough that lies on the quarter section line (the dashed line shown on Exhibits P-3 and P-4) between the Northwest Quarter and the Southwest quarter of Section 10.

Respectfully submitted,

CHARLES T. SCARBOROUGH,  
Appellant

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### CERTIFICATE OF SERVICE

I, DOLTON W. McALPIN, undersigned attorney of record for Appellant herein, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF OF THE APPELLANT to the following attorneys, judges and parties of record:

The Honorable Kenneth M. Burns  
P.O. Drawer 110  
Okolona, MS 38860

Charles Bruce Brown, Esq.  
P.O. Box 228  
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SO CERTIFIED this the 30<sup>th</sup> day of July, 2009.

  
DOLTON W. McALPIN