IN THE SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KATHERINE GRAHAM ABERCROMBIE AND I.H. AMBERCROMBIE — **APPELLANTS**

VS.

GRAYLING CARTER AND WIFE, TAMMY GRAVES CARTER, STANLEY PARKER, DORIS PARKER, HUGO WILLIAM (BILL) WALTON, MARY MITTLELEE WALTON MCCALL, LINDA ANN WALTON SMITH AND SANDEE JOYCE WALTON HENDRICKS, THE HEIRS AT LAW OF VONDEE WALTON, DECEASED, AND LAWRENCE TRIGG AND ESTER P. TRIG — **APPELLEES**

CASE NO. 2010-CA-00874

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellees certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or refusal.

APPELLANTS: I. H. AND KATHERINE GRAHAM ABERCROMBIE

APPELLEES: GRAYLING AND TAMMY GRAVES CARTER

STANLEY AND DORIS PARKER

LAWRENCE AND ESTER P. TRIGGS

HUGH WILLIAM (BILL) WALTON, MARY MITTLELEE WALTON MCCALL, LINDA ANN WALTON SMITH, AND SANDEE JOYCE WALTON HENDRICKS, HEIRS AT LAW OF VONDEE WALTON, DECEASED.

THIS THE 8th DAY OF FEBRUARY, 2011.

WILLIAM H. JONES
ATTORNEY FOR APPELLEES

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APPELLEES: GRAYLING AND TAMMY GRAVES CARTER

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THIS THE ____ DAY OF FEBRUARY, 2011.

WILLIAM H. JONES
ATTORNEY FOR APPELLEES

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CASE AUTHORITY

APPELLEES STATEMENT OF ISSUES

Appellants Brief contains no Statement of Issues as contemplated by MRAP 28 (a)(3). It does contain a *Statement Of Facts* that comprises the first five and a half (5½) pages of Appellants Brief. This *Statement Of Facts* contains many and numerous comments of counsel together with conclusory remarks and some detail of the various chronology of this litigation but does not appear to be a true Statement of Issues. That being the case, Appellees provide the following Statement of the Issues.

Whether or not the Chancery Court of Covington County, Mississippi, was justified in concluding after having considered the testimony presented at trial together with all exhibits as well as having actually viewed the property that the Southwest Corner of the Common Boundary Line between the parties is reflected by the fence lines and barbed wire found in the trees as reflected on Exhibit "16", the Court specifically finding that such corner should be and was established as the property line between the Abercrombie's and the Carter's all as reflected in the surveys of Forestry Services Inc., dated April 4, 2007, Ex. "12".

STATEMENT OF THE CASE

This litigation was commenced by Katherine Graham Abercrombie and husband, I.H. Abercrombie, against all the Appellees named which were adjacent land owners and whose adjoining fences appeared to Mr. and Mrs. Abercrombie to encroach upon their property. It appears that little or no consideration was given to how long the fences had been established nor the statutory scheme of adverse possession. Of course all Defendants, rather than fighting over what could or should be the proper corner or Common Boundary Line, filed responses to the suit filed by Mr. and Mrs. Abercrombie claiming right to ownership by virtue of the establishment of the fences, for more than ten (10) years, or adverse possession (T-13).

At the trial of this matter Appellees were heard first upon their claim to right of possession by adverse possession of all properties contained on their side of their respective fences.

In response Mr. and Mrs. Abercrombie called Harvey Saul, a surveyor. The Abercrombie's tried to prove that the Saul survey and surveying work validated their claim that the corner post involved was about thirty (30) feet off from the real property line. During cross examination (Surveyor Sauls testimony begins at T73 - T95) Saul never testified that he began his survey from a known point of beginning and finally admitted when asked if an additional survey was needed that "I urge you to get one." T 90. The Abercrombie's did not meet any known burden of proof with regard to their respective claims of encroachment.

Of course Mr. and Mrs. Abercrombie testified they did not know how long the fences had been there (T 117) and never paid attention to the corner post that held the merging barbed wires (T 18). With regard to the gravel pit that is supposedly on the Abercrombie property, access which is across the Stanley Parker/Tammy Graves Carter property, one of the named Defendants, Mr. Abercrombie admitted that he had not complained about the hauling of gravel out of that dirt pit that he now claims is on his property (T 122). He described the fence coming out of the corner post as a "pasture line" "That don't mean nothing, as far as any marker or anything." (T 126) The Chancellor was free to conclude that the Abercrombie's claimed ownership was inconsistent with their actions and that their attitude, or respect of existing fence lines was that of indifference.

At the end of the testimony the Judge indicated (T 127) that he would appoint another surveyor to look at the field notes and the two surveys provide him an opinion as to whether or not they are right or wrong. He made no ruling with regard to Appellants evidence regarding adverse possession. He allowed the parties if they wished to get another survey to do so and he would leave the record open (T 128).

Defendants/Appellants here did file another survey of Jerry Miller dated January 11, 2009, that the Judge marked as Ex. "A" for inclusion in the record to determine that the true corner of the property after actually viewing the property and hearing the various testimony and considering surveys and photographic evidence was that as established by the survey of Forestry Services Inc., dated April 4, 2007, Ex. "12".

SUMMARY OF ARGUMENT

The Abercrombie's argue before this Court that the lower Court Chancellor erred as followed:

With regard to Issue 1 counsel for the Abercrombie's seems to think that granting a default judgment against Stanley and Doris Parker would somehow resolve the issues in this case. The record plainly indicates however the Parker property was deeded to Graying Carter's wife, Mr. Carter being the son of Stanley Parker. As a result, subsequent title to that property was vested in the Defendant, Tammy Graves Carter, wife of the Defendant, Grayling Carter. See testimony T 10- T16. Argument of Abercrombie's ignore the fact proof was still necessary to establish the existence of a valid survey indicating the fence lines were on their property, not to mention that Defendant's multiple claims for adverse possession of property on their side of those fences was pending. It was not improper for the Judge to refuse to grant default judgment because Stanley Parker and wife had not answered the Complaint. They had sold their interest in the affected real property to another Defendant, Tammy Graves Carter.

With regard to Issue 2 the Abercrombie's ignore the fact that their surveyor, Mr. Saul, upon whose survey they advance this argument (Ex. "11") indicated that in his opinion another survey was needed. T90 This obligated the value of his testimony and survey.

With regard to Issue 3 the Abercrombie's complain that the Court should have accepted that survey of Saul Engineering (Ex. "11") as the true and accurate description of

the property. Based upon the testimony of Mr. Saul he said he used a survey that is two hundred (200) years old and that is not a good way to survey property. But that is exactly what he did in this instance. See Saul testimony T89. He also indicated that a survey is nothing more than an opinion (T92). There is also a discussion of an effort to *proportionate* but "I don't think that would really tell you anything." "You've got to hang your hat on something at the end of the day." T92. The Chancellor cannot be faulted for ignoring the survey and testimony of Mr. Saul.

Regarding Issue 4, the survey of Miller Staking dated January 11, 2009, was admitted (Ex. "A") by the Chancellor. However his decision is not based upon that survey. See Final Judgment R. 181, pg. 2.

ARGUMENT

1. WHETHER OR NOT THE COURT SHOULD HAVE GRANTED DEFAULT JUDGMENT AGAINST STANLEY AND DORIS PARKER.

The Chancellor was entirely justified in not granting default judgment against Stanley and Doris Parker.

First, in this land line dispute, a grant of judgment requesting all the relief sought by Plaintiffs against Mr. and Mrs. Parker would have solved nothing. There wash the property of the Walton's, the Triggs, and Grayling Carter and wife, that still opposed the relief sought by Mr. and Mrs. Abercrombie. Slightly after application for default was entered, Stanley and Doris Parker conveyed their interest in the affected real property to their daughter-in-law, Tammy Graves Carter. See Ex. "6". Stanley and Doris Parker were no longer parties to the litigation and the issue with regard to property lines that would have affected the legal descriptions on the deeds,(Ex.'s "5" & "6"), remain the same issues applicable to Grayling Carter and wife. Grayling Carter and wife were represented by counsel and their Answer was on file. Ex. "5" is dated March 30, 2005. Counsel for the Abercrombie's complained that her default was not granted on the day this matter went to trial on April 15, 2009. Under the facts of this case, even if default had been formally been granted prior to the trial date of April 15, 2009, it certainly would have been no abuse of discretion to set aside the default judgment, if it would have been entered. It was no abuse not to grant a default judgment under the existing facts. *Windmon v. Marshall*, 926 So. 2d, 867 (Miss. 2006).

The Abercrombie's cannot show how granting default against Stanley and Doris

Parker would have resolved the issues, or how any issue, or burden of proof disappeared because another Defendant subsequently acquired title to the property.

Appellants Abercrombie advanced this Issue 1 without any citation of authority. This Court has held it will not consider issues on appeal with no citation of authority. *Armstrong v. Armstrong*, 618 So. 2d, 1278 (Miss. 1993); *Estate of Mason*, 616 So. 2d, 322 (Miss. 1993); and *Smith v. Dorsey*, 599 So. 2d, 529 (Miss. 1992).

2. WHETHER OR NOT THE COURT SHOULD HAVE ADJUDICATED THE APPELLANTS TO BE OWNERS IN FEE SIMPLE OF THEIR PROPERTY LOCATED IN THE SE¼ OF SECTION 34, TOWNSHIP 7 NORTH, RANGE 15 WEST, COVINGTON COUNTY, MISSISSIPPI, BY ADVERSE POSSESSION.

It was totally unnecessary for the Court to have adjudicated any ownership of Appellants Abercrombie with regard to property located in the SE¼ of Section 34, Township 7 North, Range 15 West, Covington County, Mississippi, by Adverse Possession.

No Defendant to this proceeding challenged the ownership of the Ambercrombie's to property owned by the Abercrombie's as reflected in their respective deeds. This assignment of error (Issue 2) is not understood. The Chancellor concluded the litigation by finding that the SW¼ of the Common Boundary Line of Plaintiffs property is reflected by the fence lines and barbed wire found in the trees reflected in Ex. "16" and as shown on Ex. "12", survey of Forestry Services, Inc., dated April 4, 2007. The Abercrombie's simply have no complaint that the lower court Chancellor did not decree they were entitled to ownership of their property as reflected by their deeds, pursuant to a claim of adverse possession.

Appellants Abercrombie advanced this argument without any citation of authority.

This Court has held it will not consider issues on appeal with no citation of authority. *Armstrong v. Armstrong*, 618 So. 2d, 1278 (Miss. 1993); *Estate of Mason*, 616 So. 2d, 322 (Miss. 1993); and *Smith v. Dorsey*, 599 So. 2d, 529 (Miss. 1992).

3. WHETHER OR NOT THE COURT SHOULD HAVE ACCEPTED THE SURVEY OF SAUL ENGINEERING AS THE TRUE AND ACCURATE DESCRIPTION OF PROPERTY OWNED BY THE APPELLANTS WHICH WAS ENCROACHED UPON BY THE CARTERS.

Appellants Abercrombie advanced this argument without any citation of authority. This Court has held it will not consider issues on appeal with no citation of authority. *Armstrong v. Armstrong*, 618 So. 2d, 1278 (Miss. 1993); *Estate of Mason*, 616 So. 2d, 322 (Miss. 1993); and *Smith v. Dorsey*, 599 So. 2d, 529 (Miss. 1992). The lower court Chancellor was fully justified in not accepting the survey of Saul Engineering as the true and accurate description of property owned by Appellants as containing encroachments by the Carters.

The testimony of Saul begins on page 73 of the transcript. It ends at page 95. He described the methods used to obtain his survey, one of which was relying upon a prior survey two hundred years old. T89. "...that's not a good way to survey in this instance because your following a survey that is two hundred years old. It's like I go out here on 49 and I have to take a tape and measure five hundred feet - -". When asked whether or not another survey might be needed, something the Chancellor ordered, Saul testified "I urge you to get one." T90. The real philosophy of Surveyor Saul with regard to the accuracy of surveys appears at T92. Accordingly to Surveyor Saul at the end of the day, you've got to hang your hat on something, and that is what he did. The Abercrombie's gave the Chancellor practically no information or testimony from Surveyor Saul upon

which the Court should have concluded or accepted the survey of Saul Engineering as a true and accurate description of the property owned by Appellants Abercrombie, or that their property was encroached upon by the Carters. Decisions of a Chancellor will not be reversed absent an abuse of discretion. *Blake v. Clein*, 903 So. 2d, 710 (Miss. 2005) (Quoting *Church of God Pentecostal Inc. v Freewill Pentecostal of God, Inc.*, 716 So. 2d, 200 (Miss. 1998); *Kazery v. Wilkinson* 2011 WL 294393, Miss. App. Feb. 1, 2011 (No. 2009 - CA - 101391-COA).

4. WHETHER OR NOT THE COURT SHOULD HAVE ALLOWED THE SURVEY OF MILLER STAKING DATED JANUARY 11, 2009, WHICH WAS SUBMITTED AFTER THE TRIAL AND RECEIVED INTO EVIDENCE BY THE COURT WITHOUT FURTHER TESTIMONY. (EX. "A")

Appellants Abercrombie advanced this argument without any citation of authority. This Court has held it will not consider issues on appeal with no citation of authority. *Armstrong v. Armstrong*, 618 So. 2d, 1278 (Miss. 1993); *Estate of Mason*, 616 So. 2d, 322 (Miss. 1993); and *Smith v. Dorsey*, 599 So. 2d, 529 (Miss. 1992).

Argument of counsel with regard to this Issue rambles, and is very difficult to follow. Regardless, the argument supporting Appellant Abercrombie's claim that the Chancellor erred in admitting this survey, after the trial, ignores the fact that the Court did not use the Miller survey to decide the issues in this case. The Court relied upon the Forestry Services, Inc. survey, Ex. "12", dated April 4, 2007. See page 2 of the Final Judgment, R.181. Furthermore the trial transcript indicating the record would be left open to receive such survey, T127 - 129, indicates no objection whatsoever from counsel for the Abercrombie's.

CONCLUSION

The Brief and Appeal of the Abercrombie's before this Court, and their claim of error committed by the Judge is really difficult to discern. The bottom line is, the survey testimony of Mr. Saul is not that testimony upon which the numerous fences should have been ordered to have been moved, and accordingly, the Abercrombie's did not meet the burden of proof, and cited no authority in support of the claim the Saul survey should have been accepted, and did not demonstrate why or how the Chancellor abused any discretion and otherwise resolving this lawsuit. Without citation of authority it is difficult to even respond. But the record reveals and the plain facts show the Chancellor visited the property, he heard the testimony presented, reviewed numerous surveys and photographs and although he did not expressly say so, had to conclude the claim of the Abercrombie's was not supported by sufficient proof. He simply did this by concluding the survey of Forestry Services, Inc., dated April 4, 2007 (Ex. "A") was accurate, or at least a whole lot more accurate that any of the other surveys. There was accordingly no need to decide anyone's claim with regard to the issue of adverse possession.

When presented with no better evidence than that of Surveyor Saul, the learned Chancellor cannot be faulted for denying relief from Plaintiffs such as the Abercrombie's. the Chancellor has committed no abuse of discretion, and made no errors of law, and accordingly his decision in this case should be affirmed.

Respectfully submitted,

WILLIAM H. JONES
ATTORNEY FOR THE APPELLEES

CERTIFICATE OF SERVICE

I, William H. Jones, Attorney for the Appellees, certify that I have this day mailed United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of Appellees to the following named persons at these addresses:

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This the 8 day of Feb 2011.

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