IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KATHERINE GRAHAM ABERCROMBIE
AND I. H. ABERCROMBIE — APPELLANTS

VS. — CASE NO. 2010-CA-00874

GRAYLING CARTER AND WIFE, TAMMY GRAVES CARTER, STANLEY PARKER, LAWRENCE TRIGG AND WIFE ESTER P. TRIGG, AND ANY AND ALL UNKNOWN PARTIES IN INTEREST WHOSE NAMES AND ADDRESSES ARE UNKNOWN TO THE PLAINTIFFS AFTER DILIGENT SEARCH AND INQUIRY THEREFORE — APPELLEES

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REPLY BRIEF OF APPELLANTS

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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. TRIGG — APPELLEES

CASE # 2010-CA-00874

REPLY BRIEF OF APPELLANTS

COME NOW Katherine Graham Abercrombie and I. H. Abercrombie Appellants, replying to the Brief of Appellees, say:

APPELLEES STATEMENT OF ISSUES

Appellants agree that Appellees have correctly identified the issues in this case in addition to Appellants issues.

STATEMENT OF THE CASE

Contrary to what the Appellees contend, the Appellants had given much consideration to the fences and how long they had been established prior to filing their lawsuit. They notified the Parkers and Grayling by letter and hired a surveyor. The Abercrombies both testified that there were no fences between their property and the Parker property before Grayling built his fence in 1998. (Page 101 - 107 - Transcript)

(Page 120-121 - Transcript).

The fence post that the court used to establish the common boundary line was based primarily upon the testimony of Appellee, Bill Walton. (Pages 62-66 Transcript) All of Mr. Walton's testimony was in reference to properties belonging to his family and the Triggs located in Section 3, south of the township line which is in question in this lawsuit. Appellees offer no citation of authority for their argument that the fence post testified to by Mr. Walton represents the common boundary line between the appellants and the appellees. In the case of MYRTLE IRENE COOK V. FRED H. ROBINSON AND DIANE ROBINSON, NO. 2004-CA-01340, PAGE 592, this Judge, Hon. J. Larry Buffington, said that the existence of a fence between two properties did not establish that neighboring property owner possessed the land in question and the mere existence of a fence near the actual boundary line does not establish that the fence is the accepted boundary between properties. That the evidence showed that the fences going east and west and south from the township line was not built to delineate properties but, rather, to separate cattle. DAVIS V. CLEMENT, 468 SO.2D 58, 63 (MISS.1985) and ELLISON V. MEEK, 820 SO.2D 730 (MISS 2002).

Mr. Abercrombie testified that he knew of the post in question but never knew it to be a land line, that it was just a pasture line. (Pages 124-126 Transcript). So, Mr. Walton's testimony that there was a "gentleman's agreement" regarding

the post (Page 66 - Transcript) was not shared by the Abercrombies.

Although Mr. Walton testified that many surveyors had used this corner post as a starting point, no surveyors testified nor were any surveys introduced into evidence to prove his point.

The only fence running north and south between the Appellants and Appellee Grayling is the fence built by Grayling in 1998, six years prior to the filing of this lawsuit. And the only fence reflected on Exhibit 12 running north and south between the parties is the fence that Grayling built.

Neither of the surveys, Saul's, (Exhibit 11), and Forrestry Services, (Exhibit 12), depict any other fence running north and south between the two quarter sections. Saul testified that he saw no fence going north except the Grayling fence. (Page 78 - Transcript)

The Judge failed to make a ruling on adverse possession and according to the Supreme Court's ruling in the case of BLANKINSHIP V. PAYTON, 605 So.2d 817, (Miss. 1992), the court said:

> "In the absence of an established claim for adverse possession, the only competent proof of the proper boundary is the Saul survey."

That surveyor was John Saul. We make the same argument for Appellants's surveyor, Harvey Saul.

ARGUMENT

Issue 1 - Default Judgment: When no answer is made to a complaint it is presumed that the Defendants concur with

the allegations of the complaint and when a default judgment is entered "...it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits. RULE 55, MISSISSIPPI RULES OF CIVIL PROCEDURE (commentary). It was only after the Appellants filed for default judgment that the Parkers deeded their property to Tammy Graves Carter. The Parkers never claimed any property in the SE 1/4 of Section 34 which belonged to the Abercrombies. (Page 33 Transcript) (Page 7 Appellees's Brief).

Issue 2 - The Judge in his ruling in his Final Judgment (Page 181 Record) overruled the motions to strike the testimony of Surveyor Saul who testified fully concerning his survey and the difference between his survey (Exh. 11) and that of Forrestry Services (Exh. 12). (T73-95). Based upon the comments by Judge Buffington that he intended to get another surveyor to compare the two surveys, Saul urged the Court to do so. This in no way obviated the testimony of Saul, (Page 90 Transcript) who was the only surveyor to testify.

Issue 3 - Mr. Saul testified that he began his survey at known markers and used the original survey and field notes of record in the Chancery Clerk's office. (Page 75 - Transcript)

Issue 4 - Contrary to what Appellees state, the Judge did base his decision in part upon the altered survey filed out of time after the trial was over by accepting said survey. (Page 182 - Record) and the Appellants did object to the reopening

of the case to receive other surveys. (Page 167 and Page 178 - Record)

CONCLUSION

The Saul survey and the Forrestry Services survey are virtually the same except for the difference of thirty feet which occurred because of the beginning point of each survey. Saul came and personally testified. No one testified as to the Forrestry Services survey to which the Appellants objected. (Page 72 - Transcript)

The Chancellor failed to rule on the Appellants claim of adverse possession. When adverse possession is not established then the survey of Saul should have been competent proof of the proper boundary line. (Blankinship v. Payton, supra).

Appellee Bill Walton offered no witnesses to testify as to his testimony regarding the use of the fence post as a common boundary line and introduced no surveys to substantiate his testimony.

The Appellees have cited no authority as to their claim that the fence post should be declared to be the common boundary line among the various Defendants.

The Appellants have met their burden of proof that the fence built by Grayling in 1998, is encroaching upon their property in the southwest corner by two surveys, Exhibit 11 and Exhibit 12, and should be removed.

This case should be reversed and the relief sought by the Complainants should be granted.

Respectfully submitted,

KATHERINE GRAHAM ABERCROMBIE
AND I. H. ABERCROMBIE

BY Mary K. Burnham
MARY K. BURNHAM, ATTORNEY

CERTIFICATE OF SERVICE

I, Mary K. Burnham, Counsel of Record for the Appellants do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing APPELLANTS REPLY BRIEF to Kathy Gillis, Clerk of the Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39205-0249, the Honorable Larry Buffington, Chancellor, the presiding Judge in this case, at Post Office Box 924, Collins, Mississippi 39428 and to Hon. William H. Jones, Attorney for the Appellees, P. O. Box 282, Petal, Mississippi 39465.

This 23 day of March, 2011.

Mary K. Burnham
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... by affidavit unless there is a specific provision to that ... rule or statute. See Rules 27(a) and 65.

... pleadings and willful violations are disciplined ... with past Mississippi procedure. See Sherrill ... 197 Miss. 880, 21 So.2d 11 (1945).

The final sentence of Rule 11(b) is intended to ensure that ... court has sufficient power to deal forcefully and ... with parties or attorneys who may misuse the ... pleadings system effectuated by these rules. ... standard is employed in determining whether ... sanctions should be imposed. See, Tricon Metals & ... v. Topp, 537 So.2d 1331 (Miss.1989).

[Comment amended effective March 13, 1991.]

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When Presented. A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within thirty days after service of the answer or, if a reply is ordered by the court within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) if the court grants a motion for a more definite statement the responsive pleading shall be served within ten days after the service of the more definite statement.

The times stated under this subparagraph may be extended once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(d) Preliminary Hearings. The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no respon-

sive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.

Comment

The purpose of Rule 12 is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases. The periods of time referred to in Rule 12(a) relate to service of process, motions, pleadings or notices, and not to the filing of the instruments. Because of the nature of divorce cases, Rules 12(a)(1) and (2) do not apply to such proceedings. See also MRCP 81(b). Rule 12(a) represents a marked change from the former procedures which linked the return date or response date to a term of court. See Miss.Code Ann. §§ 11-5-17; 11-7-121; and 13-3-13 (1972).

Rules 12(b)(6) and 12(c) serve the same function, practically, as the general demurrer. See Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida, 434 F.2d 871, 874 (5th Cir. 1970). They are the proper motions for testing the legal sufficiency of the complaint; to grant the motions there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim.

If the complaint is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable unless the dismissal relates to only one of several claims. See Ginsburg v. Stern, 242 F.2d 879 (3rd Cir. 1957).

A motion pursuant to Rule 12(c) may be granted if it is not made so that its disposition would delay the trial; the moving party must be clearly entitled to judgment. See Greenberg v. General Mills Fun Group, Inc., 478 F.2d 254, 256 (5th Cir. 1973).

Under 12(d), the decision to defer should be made when the determination will involve the merits of the action, thus making deference generally applicable to motions on Rules 12(b)(6) and (c).

Rule 12(e) abolishes the bill of particulars. Miss.Code Ann. § 11-7-97 (1972). The motion for a more definite statement requires merely that—a more definite statement—and not evidentiary details. The motion will lie only when a responsive pleading is required, and is the only remedy for a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend. Rule 12(f) is generally consistent with past Mississippi procedure. See Miss.Code Ann. § 11-7-59(3) (1972); Parish v. Lumbermen's Mut. Cas. Co., 242 Miss. 288, 134 So.2d 488 (1961).

Rule 12(g) allows the urging of all defenses or objections in one motion with no waiver. There are three important qualifications which permit at least two rounds of motions: (1) the requirement of consolidation applies only to defenses and objections then available to the moving party; (2) the requirement applies only to defenses and objections which this rule permits to be raised by motion; (3) the prohibition against successive motions is subject to the exceptions stated in Rule 12(h).

Rule 12(h)(1) states that certain specified defenses which may be available to a party when he makes a pre-answer motion, but which he omitted from the motion, are waived. A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of Rule 12(g) forbidding successive motions. 5 Wright & Miller, Federal Practice and Procedure, Civil § 1391 (1969).

Rule 12(h)(2) preserves three defenses against waiver during the pleading, motion, discovery, and trial stages of an action; however, such defenses are waived if not presented before the close of trial. 5 Wright & Miller, supra, § 1392.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under MRCP 60(b)(4) or may be presented for the first time on appeal. Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930); Brown v. Bank, 31 Miss. 454 (1856). This provision preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. §§ 157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and 162 (all causes that may be brought in the chancery court whereof the circuit court has exclusive

ment for the fees paid by the party in whose favor the cost award is made.

Expenses include all the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants. 10 Wright & Miller, supra § 2666. See also 6 Moore's Federal Practice ¶¶ 54.01–.43 (1972).

[Comment amended effective February 1, 1990.]

RULE 55. DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. In all cases the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice. If in order to enable the court to enter judgment or to carry it into effect it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing with or without a jury, in the court's discretion, or order such references as it deems necessary and proper.

(c) Setting Aside Default. For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, and Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitation of Rule 54(c).

(e) Proof Required Despite Default in Certain Cases. No judgment by default shall be entered against a person under a legal disability or a party to a suit for divorce or annulment of marriage unless the claimant establishes his claim or rights to relief by evidence, provided, however, that divorces on ground of irreconcilable differences may be granted pro confesso as provided by statute.

Comment

The purpose of Rule 55 is to provide a uniform procedure for acting upon and setting aside actions upon parties' defaults.

Prior to obtaining a default judgment, Rule 55(b), there must be an entry of default as provided by Rule 55(a). An entry of default may be made by the clerk only with regard to a claim for affirmative relief against a party who has failed to plead or otherwise defend; see MRCP App. A, Form 36. These elements of default must be shown by an affidavit or other competent proof.

Before a default can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which also means that he must have been effectively served with process. Arnold v. Miller, 26 Miss. 152 (1853). If the court has jurisdiction over an action seeking affirmative relief, a default may be entered against any party who fails to plead or otherwise defend within the time allowed by Rule 12(a).

Entry of default for failure to plead or otherwise defend is not limited to situations involving a failure to answer a complaint, but applies to any of the pleadings listed in Rule 7(a).

Thus, plaintiff's failure to reply to a counterclaim may entitle defendant to an entry of default on the counterclaim. The same is true with regard to cross-claims.

The words "otherwise defend" refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading. The authority in Rule 55(a) for the clerk to enter a default does not require that to escape default the defendant must not only file a sufficient answer to the merits but must also have a lawyer or be present in court when the case is called for trial; thus, a motion challenging the complaint for failure to state a claim upon which relief can be granted is within the notion of "otherwise defend."

The mere appearance by a defending party will not keep him from being in default for failure to plead or otherwise defend, but if he appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default. This approach is in line with the general policy that whenever there is doubt whether a default should be entered, the court ought to allow the case to be tried on the merits.

Rule 55(a) does not represent the only source of authority in these rules for the entry of a default that may lead to judgment. As a result, a party who has filed a responsive pleading or otherwise defended may still find himself in default for noncompliance with the rules at some later point in the action. For example, Rule 37(b)(2)(C) and Rule 37(d) both provide for the use of a default judgment as a sanction for violation of the discovery rules.

When the prerequisites of Rule 55(a) are satisfied, an entry of default should be made by the clerk without any action being taken by the court. The clerk's function however, is not perfunctory. Before he can enter a default he must examine the affidavits filed and satisfy himself that they meet the requirements of Rule 55(a). The fact that Rule 55(a) gives the clerk the authority to enter a default is not a limitation on the power of the court to do so.

Although an appearance by a defending party does not immunize him from being in default for failure to plead or

otherwise defend, it does entitle him to at least three days written notice of the application to the court for the entry of a judgment based on his default. This enables a defendant in default to appear at a subsequent hearing on the question of damages and contest the amount to be assessed against him. Damages must be fixed before an entry of default can become a default judgment and there is no estoppel by judgment until the judgment by default has been entered.

When a judgment by default is entered, it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits. A judgment entered pursuant to Rule 55(b) may be reviewed on appeal to the same extent as any other judgment; however, an order denying a motion for a default judgment is interlocutory and not appealable. Rule 54(a).

The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements in Rule 55(b) that an application must be presented to the court for the entry of judgment and that notice of the application must be sent to the defaulting party if he has appeared. The latter requirement enables the defaulting party to show cause to the court why a default judgment should not be entered or why the requested relief should not be granted. A party's failure to appear or be represented at any stage of the proceedings following an initial appearance does not affect this notice requirement. Service of the notice must be made at least three days before the hearing on the application, and must afford the party an opportunity to appear at the hearing. The purpose of this portion of Rule 55(b) is simple: It is intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the thirty day period, have otherwise indicated to the moving party a clear purpose to defend the suit. On the other hand, when a defaulting party has failed to appear, thereby manifesting no intention to defend, he is not entitled to notice of the application for a default judgment under this rule.

In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record. Among these are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue, whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider whether the default was caused by a good-faith mistake or excusable neglect, how harsh an effect a default judgment might have, and whether the court thinks it later would be obliged to set aside the default on defendant's motion.

Once the default is established, defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his only recourse is to show good cause for setting aside the default under Rule 55(c) and, failing that, to contest the amount of recovery.

Once the court determines that a judgment by default should be entered, it will determine the amount and character of the recovery that should be awarded. If the defendant does not contest the amount prayed for in the complaint and the claim is for a sum certain or a sum that can be made certain by computation, the judgment generally will be entered for that amount without any further hearing.

If the sum is not certain or capable of easy computation the court may hold whatever hearing or inquiry it deems necessary; it may even direct an accounting or a reference to a master. See MRCP 58.

When defendant contests the amount of the claim, a full hearing may be required on the issue of damages since a default does not concede the amount demanded. This proceeding is the same as any other trial except that it is limited to the question of damages.

Rule 55(c) differentiates between relief from the entry of default and relief from a default judgment. This distinction reflects the different consequences of the two events and the different procedures that bring them about. The clerk of the court may enter a default upon the application of the nondefaulting party; the entry simply is an official recognition of the fact that one party is in default. The entry is an interlocutory step that is taken under Rule 55(a) in anticipation of a final judgment by default under Rule 55(b).

In sharp contrast, a final default judgment is not possible against a party in default until the measure of recovery has been ascertained, which typically requires a hearing, in which the defaulting party may participate; in some situations a trial may be made available to determine an issue of damages. Moreover, the entry of a default judgment is a final disposition of the case and is an appealable order.

The distinction between an entry of default and a default judgment also has significance in terms of the procedure for setting them aside. The party against whom a default has been entered typically will attempt to have his default set aside in order to enable the action to proceed. A motion for relief under Rule 55(c) is appropriate for this purpose even though there has not been a formal entry of default. For example, when defendant fails to answer within the time specified by the rules, he is in default even if that fact is not officially noted. Therefore, he must request that the default be "excused" and secure leave to answer before his responsive pleading will be recognized.

Relief from a default judgment must be requested by a formal application as required by Rule 60(b). Because the request is for relief from a final disposition of the case, the party in default must take affirmative action to bring the case before the trial court a second time. A motion for relief under Rule 55(c) is not the equivalent of or an alternative to appeal. Of course, if the motion is denied, it is ripe for immediate appeal, but the right to appeal may be lost for failure to pursue it in a timely fashion.

Rule 55(d) sets out two relatively straight-forward propositions. The first sentence of the subdivision states that the provisions of Rule 55 are applicable to any party seeking relief, whether a plaintiff, third-party plaintiff, counterclaimant, or cross-claimant. According to the second sentence of Rule 55(d), which simply serves as a cross-reference, a default judgment in any case is "subject to the limitations of Rule 54(d)." The latter provision states that a default judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

For detailed discussions of Federal Rule 55, after which MRCP 55 is patterned, see 6 Moore's Federal Practice ¶¶ 55.01–.11 (1972), and 10 Wright & Miller, Federal Practice and Procedure, Civil §§ 2681–2690, 2692–2701 (1973

paired damage caused by hurricane, built and repaired fish pond, paid taxes in all but 2 years, frequently visited property, and made other improvements; titleholder's nonpayment of taxes coupled with awareness that grass was planted and cattle were grazed on pastures gave rise to notice of adverse claim. Ramsey v. Copiah Bank, 678 So. 2d 637 (Miss. 1996).

5. —Tacking.

Period of adverse possession by remainderpersons could begin running against interests of third parties prior to date outstanding life estate on property was removed; life tenant's possession was hostile as to third parties and could be tacked on to remainderperson's interest. Ramsey v. Copiah Bank, 678 So. 2d 637 (Miss. 1996).

6. Color of title.

Statutes of limitation do not run in favor of the holder of the tax deed void on its face. Meyerkort v. Warrington, 19 So. 2d 433 (Miss. 1944), opinion withdrawn, 198 Miss. 29, 20 So. 2d 708 (1945).

14. Pleading.

In an action regarding a mineral interest deed claimants who had made an adverse entry onto the property could not utilize the statutes of limitations, Code §§ 15-1-7, 15-1-9, against others who had taken constructive possession of the property. Mills v. Damson Oil Corp., 686 F.2d 1096 (5th Cir. 1982), reh'g denied, 691 F.2d 715 (5th Cir. 1982), certified question answered, 437 So. 2d 1005 (Miss. 1983), answer to certified question conformed to, 720 F.2d 874 (5th Cir. 1983).

RESEARCH REFERENCES

ALR. What gives rise to right of rescission under state blue sky laws. 52 A.L.R.5th 491.

§ 15-1-9. Limitations applicable to suits in equity to recover land.

JUDICIAL DECISIONS

10. Pleading.

In an action regarding a mineral interest deed claimants who had made an adverse entry onto the property could not utilize the statutes of limitations, Code §§ 15-1-7, 15-1-9, against others who had taken constructive possession of the property. Mills v. Damson Oil Corp., 686 F.2d 1096 (5th Cir. 1982), reh'g denied, 691 F.2d 715 (5th Cir. 1982), certified question answered, 437 So. 2d 1005 (Miss. 1983), answer to certified question conformed to, 720 F.2d 874 (5th Cir. 1983).

§ 15-1-13. Ten years' adverse possession gives title; exceptions.

(1) Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.

(2) For claims of adverse possession not matured as of July 1, 1998, the provisions of subsection (1) shall not apply to a landowner upon whose property a fence or driveway has been built who files with the chancery clerk within the ten (10) years required by this section a written notice that such fence or driveway is built without the permission of the landowner. Failure to file such notice shall not create any inference that property has been adversely possessed. The notice shall be filed in the land records by the chancery clerk and shall describe the property where said fence or driveway is constructed.

SOURCES: Codes, Hutchinson's 1848, ch. 57, art. 6 (3); 1857, ch. 57, art. 3; 1871, § 2149; 1880, § 2668; 1892, § 2734; Laws, 1906, § 3094; Hemingway's 1917, § 2458; Laws, 1930, § 2287; Laws, 1942, § 711; Laws, 1998, ch. 504, § 1, eff from and after July 1, 1998, and shall apply to claims arising on or after July 1, 1998.

Amendment Notes — The 1998 amendment designated the existing text as subsection (1) and added subsection (2), providing an exception when notice has been filed with the chancery clerk.

JUDICIAL DECISIONS

1. Possession in general.

2. —Nature of possession, generally.

3. — —Separate estate in minerals.

After title to the surface estate has been severed from title to the underlying mineral estate, title to the minerals cannot be acquired by adverse possession of the surface alone. Huddleston v. Peel, 238 Miss. 798, 119 So. 2d 921 (1960), error overruled, 238 Miss. 803, 120 So. 2d 776 (1960).

4. — —Particular cases.

In an action by the record owner of land to remove defendant's claim thereto as a cloud upon its title, wherein defendant by cross bill asserted title to the land by adverse possession, the burden was upon the defendant to show that he was vested with title by adverse possession to the disputed area, and to do so it was necessary for him to show that he alone, or he and his predecessors in title together, had had actual open, hostile, peaceable, exclusive, continuous possession of the land for ten years, under claim of ownership thereto. Southern Naval Stores Co. v. Price, 202 Miss. 116, 30 So. 2d 505 (1947), error overruled, 202 Miss. 124, 32 So. 2d 575 (1947).

Only statute which purchaser at void tax sale could invoke in owner's suit was the 10-year statute of adverse possession, and this only as to land actually occupied by the purchaser and not to the calls of the deed. Meyerkort v. Warrington, 19 So. 2d 433 (Miss. 1944), opinion withdrawn, 198 Miss. 29, 20 So. 2d 708 (1945).

5. —Payment of taxes.

As a defense to an action by a successor in title to redeem encumbered land from

1

Olivia BACON

v.

[illegible] OF GREENVILLE, Greenville Municipal Airport Authority, and Wayne [illegible], Airport Director.

No. 89-CA-0330.

Supreme Court of Mississippi.

Aug. 26, 1992.

Appeal No. 11161 from Judgment dated [illegible] 2, 1989; Eugene M. Bogen, Ruling Judge, Washington County Circuit Court.

William C. Walker, Jr., Oxford, Stephen [illegible]. Henning, Baglan Bailey & Henning, [illegible], for appellant.

Thomas C. Gerity, Copeland Cook Taylor & Bush, Jackson, G. Kenner Ellis, Jr., Greenville, for appellees.

Before DAN M. LEE, P.J., and ROBERTSON and McRAE, JJ.

Affirmed.

ROY NOBLE LEE, C.J., and HAWKINS, P.J., and PRATHER, SULLIVAN, PITTMAN and BANKS, JJ., concur.

2

E.W. BLANKINSHIP and Wife, Velma Blankinship

v.

Lillie Mae PAYTON and Landmark Financial Services of Mississippi, Inc.

No. 89-CA-0650.

Supreme Court of Mississippi.

Sept. 2, 1992.

Appeal was taken from judgment of the Chancery Court, Jasper County, Dannye L. Hunter, Chancellor, establishing boundary to disputed property. The Supreme Court, Banks, J., held that neither party claiming ownership to disputed parcel established title by adverse possession.

Reversed and rendered.

1. Adverse Possession ⇐13, 114(1)

To establish title by "adverse possession" (virgin title), claimant must prove by clear and convincing evidence actual possession on each of the following six elements: under claim of ownership; actual or hostile; open, notorious, and visible; continuous and uninterrupted for a period of ten years; exclusive; and peaceful. Code 1972, § 15-1-13.

See publication Words and Phrases for other judicial constructions and definitions.

2. Adverse Possession ⇐44, 47, 70

Neither party claiming ownership to disputed parcel established title by adverse possession; both parties, by their deeds, constructively possessed land described in deed, and possession was intermittent, or alternated with use by true owner. Code 1972, § 15-1-13.

3. Adverse Possession ⇐13

"Possession" is defined as effective control over definite area of land, evi-

Digest

denced by things visible to eye or perceptible to senses; it includes control over land and intent to exclude others except with occupant's consent. Code 1972, § 15–1–13.

See publication Words and Phrases for other judicial constructions and definitions.

R.K. Houston, Bay Springs, for appellants.

Thomas L. Tullos, Bay Springs, for appellees.

Before HAWKINS, P.J., and PITTMAN and BANKS, JJ.

BANKS, Justice, for the Court:

I.

Here coterminous landowners in the Nazareth community of rural Jasper County seek judicial establishment of their east-west boundary. E.W. (Rip) Blankinship and wife, Velma Blankinship, claim the fence they built is the boundary based on fifty years of adverse possession, or, alternatively, that the "forty line" as surveyed is the boundary separating their property. Lillie Mae Payton defends and counterclaims that the line is neither location. She claims her adverse possession, and that of her grantor in her 1976 deed, is sufficient to establish the line where an old, but no longer standing, fence was located. She was allowed to amend, after Blankinships' case, to claim the true boundary is an imaginary line between a "telegraph pole and some pine trees." That is the boundary line established by Chancellor Hunter. The Blankinships appeal raising four issues:

I. The court erred in allowing the amendment;

II. The court erred in finding an imaginary line to be the boundary line;

III. The court erred in failing to adjudicate the quarter-section line as established by the survey to be the true boundary line; and

IV. The court erred in failing to admit in evidence the plat of James W. Saul, Surveyor.

We find error and reverse and render.[1]

II.

In 1948, the Blankinships were in possession of the land Rip's sister, Lillie Mae Lewis, deeded to his first wife, Marzela Blankinship, in 1952. After his first wife's death, Rip deeded the land to himself and his second wife, Velma, by deed dated in 1967. The land is described in those deeds as:

> N ½ of SW ¼ of the NW ¼ of Section 10, Township 1 North, Range 10 East, Second Judicial District of Jasper County, Mississippi less and except the oil, gas and minerals heretofore reserved.

Rip built a fence that he and George Millsaps (Payton's predecessor in title) agreed on, which was maintained until the Paulding–Taylorsville Road was paved in 1969. At that time a new fence was built by Rip. He and Millsaps agreed on the fence, but did not agree it was on the boundary line. Later, in 1976, Millsaps deeded Payton two acres adjoining the Blankinship property on the east. Payton tore down the Blankinships' fence, which the Blankinships rebuilt after several months. When Payton piled lumber on their property, the Blankinships employed counsel, and on December 18, 1987, filed this action "to cancel cloud upon the title" and to establish the boundary line.

Except for the Blankinships' alternative claim that the boundary be set on the sur-

1. United States of America, acting as the Farmers Home Administration, United States Department of Agriculture, is a party defendant because it is the beneficiary in five deeds of trust covering the land, all signed by Blankinships for loans having a balance of over $25,000 at the time of the trial. Stipulation protecting their interest at the beginning of the trial made it unnecessary that they participate. The Blankinships also had signed a deed of trust in favor of Landmark Financial Services of Mississippi, Inc., which was made a party, defaulted, and had a default judgment entered against it.

vey line, the parties' other claims are based on conflicting claims of adverse possession of the same parcel of land. No improvements are located on the parcel in question, which is part pasture (on the Blankinship side of the fence) and part trees (on the Payton side of the fence).

The Blankinships and their witnesses testified concerning possession of the contested parcel.

The Blankinships have cultivated the land in question raising corn, beans, watermelons, cane, and sweet potatoes. They maintained a large garden for about 30 years. Presently, they have the area in pasture, planting rye grass and grazing cattle on the parcel.

Payton and her witnesses testified to the following possessory action.

They picked blackberries; her children played on the land; their shetland pony grazed on it; and they planted pine trees and cut two cedars for Christmas trees. She claimed to have had a survey at the time she bought the property and had given it to her attorney, but none was introduced in evidence. She did testify that the fence was there when she bought the property and she was aware that the Blankinships claimed ownership of the land in question.

III.

Miss.Code Ann. § 15-1-13 (1972) provides:

> Ten years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten years after the removal of such disability, as provided in section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

[1, 2] To establish title by adverse possession (virgin title), the claimant must prove by clear and convincing evidence, *West v. Brewer*, 579 So.2d 1261 (Miss.1991), actual possession and each of the following six elements:

1) Under claim of ownership;

2) Actual or hostile;

3) Open, notorious, and visible;

4) Continuous and uninterrupted for a period of ten years;

5) Exclusive; and

6) Peaceful.

Thornhill v. Caroline Hunt Trust Estate, 594 So.2d 1150, 1153 (Miss.1992) (not yet reported); *West v. Brewer, supra*. Engineer and surveyor John Saul was employed by the Blankinships to survey the east line of the Blankinship property and determine the forty line and the corners. His plat, prepared the day of his testimony, was not received in evidence because it had not been supplied earlier to counsel opposite as required by discovery request. His survey revealed the north part of the existing fence encroached on the Blankinship property, and on the south encroached on the Payton property. The northeast corner was found 12.2 feet south of the east-west fence and north of the mobile home (of Payton) and east of the fence that runs in a northwest-southeasterly direction. Saul testified that the surveyed line was 52 feet east of the fence on the north and 51 feet west of the fence on the south. The fence line and the surveyed line formed a diagonal X with the fence crossing the line.

Clearly, neither the Blankinships nor Payton proved by clear and convincing evidence all the elements of adverse possession. In fact, neither proved continuous possession of the parcel in question. By their deeds, both the Blankinships and Payton constructively possessed the land described in the deed.

[3] Possession is defined as "effective control over a definite area of land, evi-

denced by things visible to the eye or perceptible to the senses. It includes control over the land and the intent to exclude others except with the occupant's consent." George A. Pindar, *American Real Estate Law*, § 12-13 (1976). Constructive possession is that which follows the title, and in this case would be bounded by the survey line of the forty. In this case, neither of the parties satisfied the requirement to be adverse possessors against the other because an adverse possessor "must unfurl his flag on the land, and keep it flying, so that the (actual) owner may see, and if he will, that an enemy has invaded his domains, and planted the standard of conquest." Walter G. Robillard and Lane J. Bouman, *A Treatise on the Law of Surveying and Boundaries*, § 22.08 (5th ed. 1987).

The possession of these neighbors against the other, if adverse, was inexplicably intermittent, or alternated with use by the true owner, which is not adverse possession. Richard R. Powell and Patrick J. Rohan, *Powell on Real Property*, § 91-27 (Supp.1989). Neither entered the property of the other claiming it as his own without interruption for the statutory period of time.

Because both the Blankinships and Payton failed to prove hostile and exclusive possession of the land to which each held record title for a period of ten years, we conclude the chancellor erred in holding that Payton acquired title to the disputed property through adverse possession.

IV.

In the absence of an established claim for adverse possession, the only competent proof of the proper boundary is the Saul survey. Appellee's attack on that survey, contending that there is no evidence of record that the pins placed by the surveyor remain in place is without merit. We reverse the trial court, and render judgment here establishing the Saul survey line as the true boundary line.

REVERSED AND RENDERED.

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and PRATHER, SULLIVAN, PITTMAN and McRAE, JJ., concur.

In the Interest of M.D., a Minor.

Cynthia MANN

v.

LEAKE COUNTY DEPARTMENT OF HUMAN SERVICES.

No. 92-CA-0022.

Supreme Court of Mississippi.

Sept. 24, 1992.

Rehearing Denied Oct. 15, 1992.

Appeal No. 500 from Judgment dated Dec. 31, 1991; Edward G. Cortright, Jr., Ruling Judge, Leake County Chancery Court/Youth Court Division.

Laurel G. Weir, Thomas L. Booker, Jr., Weir & Booker, Philadelphia, for appellant.

Michael C. Moore, Atty. Gen., J.D. Woodcock, Sp. Asst. Atty. Gen., Jackson, Alan D. Rhea, Smith Smith & Nettles, Carthage, Connie Collier Jones, Adams & Edens, Brandon, for appellee.

Before DAN M. LEE, P.J., and SULLIVAN and McRAE, JJ.

Affirmed.

VI. HELEN'S MOTION FOR ATTORNEY'S FEES ON APPEAL

[19] ¶ 32. Helen requests that this Court order Frank to pay her attorney's fees and expenses on this appeal. We agree.

[20, 21] ¶ 33. This Court has generally awarded attorney's fees on appeal in the amount of one-half of what was awarded in the lower court. *Monroe v. Monroe*, 745 So.2d 249, 253(¶ 17) (Miss.1999). Attorney's fees are based upon necessity rather than entitlement. *Id.*

¶ 34. The lower court found that Helen was unable to pay her attorney's fees because of her unemployment, based on Frank's actions, and her monthly expenses of $7007.68. We grant Helen's motion for attorney's fees on appeal in the amount of $9,695.98.

CONCLUSION

¶ 35. We find no error by the chancellor in the granting of periodic alimony, of the amount of support granted to Helen, the equitable distribution of the marital assets, or the awarding of attorney's fees. We do remand to the lower court and instruct the chancellor to enter a specific visitation schedule between Frank and the minor children. Helen's motion for attorney's fees on appeal is granted.

¶ 36. **THE JUDGMENT OF THE CHANCERY COURT OF THE SECOND JUDICIAL DISTRICT OF JONES COUNTY IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. THE MOTION OF HELEN LAURO REQUESTING ATTORNEY'S FEES ON APPEAL IS GRANTED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., LEE, P.J., SOUTHWICK, IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE, AND ROBERTS, JJ. CONCUR.

Myrtle Irene COOK, Appellant

v.

Fred H. ROBINSON and Dianne A. Robinson, Appellees.

No. 2004–CA–01340–COA.

Court of Appeals of Mississippi.

March 14, 2006.

Background: Property owners brought action against neighboring land owner to quiet title to portion of property, and neighboring land owner counterclaimed alleging title to portion of property by adverse possession. The Chancery Court, Jefferson Davis County, J. Larry Buffington, J., awarded neighboring land owner approximately forty percent of the contested property. Neighboring land owner appealed.

Holdings: The Court of Appeals, Roberts, J., held that:

(1) existence of fence between two properties did not establish that neighboring property owner possessed land in question, and

(2) neighboring land owner acquired adverse possession only as to those portions of property upon which land owner planted and cut timber.

Affirmed.

1. Adverse Possession ⇐31

The underlying question in determining adverse possession is whether the possessory acts relied upon by the would-be adverse possessor are sufficient to put the record title holder upon notice that the lands are held under an adverse claim of ownership. West's A.M.C. § 15-1-13(1).

2. Adverse Possession ⇐31

Mere possession is not sufficient to satisfy the requirements of open and notorious possession; the adverse possessor must fly the flag over the land and put the true owner upon notice that his land is held under an adverse claim of ownership. West's A.M.C. § 15-1-13(1).

3. Adverse Possession ⇐19

Existence of fence between two properties did not establish that neighboring property owner possessed land in question under an adverse claim of ownership, as would entitle her entitled to adverse possession of portion of property held by title owners in title owners' action to quiet title; evidence showed that fence was not built to delineate properties but, rather, to separate cattle, and a dry creek bed would have prevented fence from being placed directly on line in question. West's A.M.C. § 15-1-13(1).

4. Adverse Possession ⇐19

The mere existence of a fence near the actual boundary line does not establish that the fence is the accepted boundary between properties for purposes of establishing adverse possession. West's A.M.C. § 15-1-13(1).

5. Adverse Possession ⇐13

Neighboring land owner acquired adverse possession to portions of property which property was in dispute in title holders' action to quiet title, only as to those portions of property upon which land owner planted and cut timber, which constituted actual and hostile possession that was open, notorious and visible. West's A.M.C. § 15-1-13(1).

John T. Armstrong, Hazlehurst, Christopher Andrew Ardis, attorneys for appellant.

Joe Dale Walker, Monticello, attorney for appellees.

Before KING, C.J., BARNES and ROBERTS, JJ.

ROBERTS, J., for the Court.

¶1. In June of 2002, Fred and Dianne Robinson filed a complaint against Myrtle Irene Cook in the Jefferson Davis County Chancery Court. In their complaint, Fred and Dianne sought to quiet title to 2 acres of real property. Ms. Cook responded with an answer and a counterclaim. By her counterclaim, Ms. Cook alleged that she acquired title to the property by adverse possession. On October 28, 2003, the Robinsons and Ms. Cook presented their cases before the Jefferson Davis County Chancery Court. At the conclusion of the proceedings, the chancellor viewed the property and took the matter under advisement. On June 3, 2004, the chancellor recorded his final judgment.

¶2. According to the chancellor's final judgment, "there was a dry creek bed or gully situated in the property in question that would have prevented a fence being placed directly on the line in question." Further, the chancellor's found that Ms. Cook planted trees along a road situated near the property. Consequently, the chancellor found that Ms. Cook acquired title to a portion of the land by adverse possession. As for the remainder of the property at issue, the chancellor held that

Ms. Cook did not adversely possess that property. Thus, the chancellor quieted title in favor of the Robinsons.

¶ 3. Aggrieved by the chancellor's ruling, Ms. Cook appeals and raises three "points." Put briefly, Ms. Cook claims that the chancellor erred when he awarded her a portion of the property, but not the whole. Ms. Cook remains adamant that she acquired title to all the property by way of adverse possession. Finding no error in the chancellor's decision, we affirm.

FACTS

¶ 4. In 1937, two brothers, John F. Smith and Houston Smith, acquired title to 120 acres in Jefferson Davis County. John predeceased Houston and, in 1970, Houston split the property into two parcels. Houston kept the north half of the property. As for the south half, Houston conveyed that parcel to Edna Smith, John's widow.

¶ 5. In 1972, Edna conveyed her parcel to Luther Steverson. In 1977, Houston built a fence to separate the two parcels along the boundary line. Houston Smith died in 1978. Houston's daughter, Myrtle Irene Cook, inherited Houston's parcel.

¶ 6. In 2000, Luther Steverson conveyed his parcel to Durham Auctions. The week before he actually sold his parcel, Luther and the Cooks measured their property line. They determined that Houston's 1977 fence was not on the boundary line. Durham Auctions had the south parcel surveyed. In 2000, Durham Auctions sold the south parcel of land to Fred and Dianne Robinson.

¶ 7. After the Robinsons bought the property, Fred called Ms. Cook and told her that he intended to build a new fence along the proper boundary line, as set by the most recent survey. Fred put the fence s up, but Ms. Cook took them down. On April 5, 2001, the Robinsons had their property surveyed by Speights Engineering. That survey showed that the 1977 fence was not on the boundary line.

¶ 8. In June of 2002, the Robinsons filed a complaint to quiet title to 7.61 acres. As mentioned, Ms. Cook counterclaimed and alleged that she acquired title to the property by adverse possession. The chancellor entered his judgment and found that Ms. Cook acquired title to some, but not all of the 7.61 acres by adverse possession. According to Ms. Cook's brief, the chancellor awarded her approximately forty percent of the contested property. Aggrieved, Ms. Cook claims that she adversely possessed all of the 7.61 acres.

STANDARD OF REVIEW

¶ 9. This Court has a limited standard of review in examining and considering the decisions of a chancellor. *Ellison v. Meek*, 820 So.2d 730(¶ 11) (Miss.2002). "When reviewing a chancellor's decision, we will accept a chancellor's findings of fact as long as the evidence in the record reasonably supports those findings. In other words, we will not disturb the findings of a chancellor unless those findings are clearly erroneous or an erroneous legal standard was applied." *Peagler v. Measells*, 743 So.2d 389(¶ 6) (Miss.Ct.App.1999). "The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Ellison*, 820 So.2d at (¶ 11). The standard of review for questions of law is de novo. *Id.*

ANALYSIS

I. DID MS. COOK ACQUIRE TITLE TO [THE ENTIRE PROPERTY] BY ADVERSE POSSESSION?

¶ 10. Our legislature provided a definition of adverse possession at Section 15-1-

13(1) of the Mississippi Code. According to that definition, "[t]en (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title...." Miss.Code Ann. § 15-1-13(1) (Rev.2003).

¶ 11. Our supreme court has firmly established the following six essential elements which must be met in order to successfully make a claim of adverse possession: the property must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful. *Ellison*, 820 So.2d at (¶ 13). The burden of proof is on the adverse possessor to show by clear and convincing evidence that each element is met. *Id.*

[1, 2] ¶ 12. "In most cases, the underlying question is whether the possessory acts relied upon by the would-be adverse possessor are sufficient to put the record title holder upon notice that the lands are held under an adverse claim of ownership." *Id.* at (¶ 14). "[M]ere possession is not sufficient to satisfy the requirements of open and notorious possession." *Id.* The adverse possessor must "fly the flag over the land and put the true owner upon notice that his land [is] held under an adverse claim of ownership." *Id.*

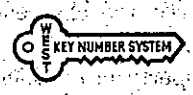
[3, 4] ¶ 13. Ms. Cook submits that she possessed the land under a claim of ownership when her father built the barbed wire fence in 1977. At trial, Buddy Steverson disagreed with Ms. Cook's characterization of the 1977 fence. According to Ms. Cook, that fence was intended to distinguish the borders of their properties. According to Mr. Steverson, the fence was not built to delineate their two properties. Rather, the fence was built to separate their cattle. Clearly, there was a dispute as to the character of the fence. The chancellor weighed the conflicting testimony and determined that the mere existence of the fence did not, in and of itself, establish adverse possession on Ms. Cook's behalf. "[T]he mere existence of a fence near the actual boundary line does not establish that the fence is the accepted boundary between the properties." *Ellison*, 820 So.2d at (¶ 16). As in *Ellison*, the chancellor found that Ms. Cook did not prove by clear and convincing evidence that, when Ms. Cook's father erected the fence, that act established that the property was exclusive to the Cooks or Mr. Steverson, or that Ms. Cook made a claim to ownership. What is more, after the chancellor inspected the property, the chancellor held that "there was a dry creek bed or gully situated in the property in question that would have prevented a fence being placed directly on the line in question." As such, we cannot conclude that the chancellor was clearly erroneous, or that he applied an improper legal standard.

[5] ¶ 14. To establish the next two elements, possession that is actual or hostile and possession that is open, notorious, and visible, Ms. Cook notes that she (a) planted timber on part of the land on the west side of the disputed property, (b) walked on the property, (c) her family members hunted on the land, (d) Mr. Steverson raised cattle and cut hay on the south side of the fence, (e) in 1995, Mr. Steverson sold the timber on the South side of the fence, and (f) after 1995, nearly all the property south of the fence was an open pasture. The chancellor found that Ms. Cook removed trees and planted trees on a portion of the property in question which was situated along a road. The

chancellor held that the act of cutting and planting pine trees resulted in Ms. Cook's adverse possession. However, where Ms. Cook did not cut or plant pine trees, the chancellor held that Ms. Cook did not adversely possess that property. There is substantial evidence in the record that supports the chancellor's findings of fact. Accordingly, we find no error in the chancellor's decision.

¶ 15. THE JUDGMENT OF THE JEFFERSON DAVIS COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

KING, C.J., LEE AND MYERS, P.JJ., SOUTHWICK, IRVING, CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR.



William Lloyd LOFTON, Appellant

v.

Irma Joyce LOFTON, Appellee.

No. 2004-CA-01448-COA.

Court of Appeals of Mississippi.

March 14, 2006.

Background: Husband residing in Florida filed petition requesting dismissal of separate maintenance obligation set forth in prior Mississippi order, because he had since obtained a divorce in Florida, and wife residing in Mississippi filed cross-petition to convert separate maintenance obligation into alimony obligation. The Chancery Court, Lincoln County, Edward E. Patten, Jr., J., granted wife's petition, and husband appealed.

Holding: The Court of Appeals, Griffis, J., held that Florida divorce action was not entitled to full faith and credit and was thus not res judicata as to wife's Mississippi alimony petition because Florida court lacked personal jurisdiction over wife.

Affirmed.

Irving, J., dissented.

1. Divorce ⇐235, 240(1), 286(3.1)

Award and amount of alimony is within discretion of chancellor and will not be reversed by appellate court absent manifest error and abuse of discretion.

2. Appeal and Error ⇐893(1)

Appellate court reviews questions of law de novo.

3. Judgment ⇐540

Doctrine of res judicata reflects the refusal of the law to tolerate a multiplicity of litigation and is designed to avoid expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing possibility of inconsistent decisions.

4. Judgment ⇐584, 713(2), 720

Res judicata bars all issues that could have been raised and decided, and all issues that were actually decided, in initial suit.

5. Judgment ⇐815, 818(1)

Judicial proceedings of other states are only entitled to full faith and credit where rendering court has subject matter and personal jurisdiction. U.S.C.A. Const. Art. 4, § 1.

6. Divorce ⇐363(1), 367

A party to a divorce may not collaterally attack a foreign divorce decree if foreign court had personal jurisdiction over parties, present where (1) defendant

C.
Davis v. Clement
Miss.,1985.

Supreme Court of Mississippi.
Boyd L. DAVIS and Ray Ellis Davis
v.
Diana H. CLEMENT, Ronald R. Lott, Emelda B. Lott, Artis Mark, Jr., Sharon N. Mark, Jane W. Melton, William E. Melton, Mary Gaston Melton Buchler, Julius W. Melton, Jr., Crown Zellerbach Corporation, C.O. Trest, Marion T. Hardwick, Elizabeth W. Trest and Suellen T. Verger.
No. 55239.

April 24, 1985.

Plaintiffs brought action to confirm in them title to adjacent land by adverse possession. The Chancery Court, Walthall County, R.B. Reeves, Chancellor, sustained defendants' motion to dismiss made at the close of plaintiffs' case, and plaintiffs appealed. The Supreme Court, Robertson, J., held that mere existence of old barbed wire fence which one of the plaintiffs helped his grandfather patch and repair around the disputed land was insufficient to support finding that plaintiffs had acquired title to the land by adverse possession.

Affirmed.

West Headnotes

[1] **Trial 388 ⇐384**

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k381 Rulings on Weight and Sufficiency of Evidence
388k384 k. Dismissal or Nonsuit. Most Cited Cases

On motion to dismiss filed by defendants after plaintiff has presented his case, trial court sitting without a jury is not required to look at evidence in light most favorable to plaintiff, giving plaintiff the benefit of all reasonable favorable inferences; question presented is whether, considering evidence which has been offered by plaintiff, and giving it such weight and credibility as it would be entitled to were trial judge engaged in making final findings of fact and rendering final judgment, trial judge concludes that plaintiff has made out a case which, if not rebutted, would entitle him to judgment. Rules Civ.Proc., Rule 41(b) .

[2] **Trial 388 ⇐384**

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause

388k381 Rulings on Weight and Sufficiency of Evidence
388k384 k. Dismissal or Nonsuit. Most Cited Cases

Trial judge sitting without a jury, as matter of law, must deny motion to dismiss made after plaintiff has presented his case and require defendant to go forward with his evidence if, and only if, considering that evidence offered by plaintiff were all of the evidence to be offered in the case, trial judge would be obligated to find in favor of plaintiff. Rules Civ.Proc., Rule 41(b) .

[3] Trial 388 ⇐384

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k381 Rulings on Weight and Sufficiency of Evidence
388k384 k. Dismissal or Nonsuit. Most Cited Cases

On motion to dismiss made after close of plaintiff's case, if, considering evidence fairly, trial judge would find for defendant, proceedings should be halted at that time and final judgment should be rendered in favor of defendant. Rules Civ.Proc., Rule 41(b) .

[4] Trial 388 ⇐384

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k381 Rulings on Weight and Sufficiency of Evidence
388k384 k. Dismissal or Nonsuit. Most Cited Cases

When there is doubt, trial judge generally ought to deny motion to exclude and dismiss made at close of plaintiff's case, but such is the exercise of sound discretion, not obligation imposed by law. Rules Civ.Proc., Rule 41(b) .

[5] Trial 388 ⇐384

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k381 Rulings on Weight and Sufficiency of Evidence
388k384 k. Dismissal or Nonsuit. Most Cited Cases

Where motion to exclude and dismiss has been granted at end of plaintiff's case, trial judge sitting without a jury has necessarily performed his fact finding function and has made judgment that, in absence of evidence offered by defendant, facts are such that under applicable law, plaintiff is entitled to no relief.

[6] Appeal and Error 30 ⇐866(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict
30k866(1) k. Appeal from Ruling on Motion for Dismissal or Nonsuit. Most Cited Cases

On appeal from order granting motion to dismiss and exclude made at end of plaintiff's case by trial judge sitting without a

jury, Supreme Court does not consider evidence de novo, but rather applies same substantial evidence/manifest error standards as are generally applicable when reviewing findings of trial judges. Rules Civ.Proc., Rule 41(b) .

[7] **Trial 388 ⇐388(3)**

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k388 Duty to Make in General
388k388(3) k. Dismissal or Nonsuit. Most Cited Cases

When trial judge sitting without a jury grants motion to dismiss at close of plaintiff's case, he should enter into the record his findings of fact and conclusions of law; failure to do so leaves appellate court in position of having to guess at trial judge's reason for granting the motion and may result in finding of manifest error when in truth there was none. Rules Civ.Proc., Rule 41(b) .

[8] **Adverse Possession 20 ⇐16(1)**

20 Adverse Possession
20I Nature and Requisites
20I(B) Actual Possession
20k16 Acts of Ownership in General
20k16(1) k. In General. Most Cited Cases

Adverse Possession 20 ⇐16(3)

20 Adverse Possession
20I Nature and Requisites
20I(B) Actual Possession
20k16 Acts of Ownership in General
20k16(3) k. Wild Lands. Most Cited Cases

Both quality and quantity of possessory acts necessary to establish claim of adverse possession may vary with characteristics of land; in case of wild or unimproved lands, adverse possession may well be established by evidence of acts that would be wholly insufficient in case of improved or developed lands. Code 1972, § 15-1-13 .

[9] **Adverse Possession 20 ⇐19**

20 Adverse Possession
20I Nature and Requisites
20I(B) Actual Possession
20k19 k. Inclosure. Most Cited Cases

Mere existence of old barbed wire fence which one of the plaintiffs helped his grandfather patch and repair around the disputed land was insufficient to support finding that plaintiffs had acquired title to the land by adverse possession. Code 1972, § 15-1-13 .

*59 Conrad Mord, Tylertown, for appellants.

John T. Armstrong, Jr., Edward E. Patten, Jr., Armstrong & Hoffman, Hazlehurst, Joseph M. Stinson, Tylertown, John Mark Weathers, James D. Johnson, Aultman, Tyner, McNeese, Weathers & Gunn, Hattiesburg, for appellees.

Before WALKER, P.J., and HAWKINS and ROBERTSON, JJ.ROBERTSON, Justice, for the Court:

I.

In this action the owners of an 80 acre tract of land in Walthall County, Mississippi, claimed that they had adversely possessed some 70 additional and adjacent acres and sought to confirm in them title thereto. At the conclusion of the would be adverse possessers' proof, the chancery court sustained the record title holders' motion to dismiss, holding the adverse possessors' purported acts of possession sporadic and ineffectual and, as a matter of law, insufficient to fly the flag of ownership over the disputed acres for the requisite ten year period. For the reasons set forth below, we affirm.

II.

Boyd L. Davis and Ray Ellis Davis, Plaintiffs below and Appellants here, commenced this civil action on February 12, 1982, by filing in the Chancery Court of Walthall County, Mississippi, their complaint to quiet and confirm title. After various pretrial proceedings, the matter was called for trial on July 25, 1983, Honorable R.B. Reeves, Chancery Judge, presiding.

The evidence reflects that Boyd L. Davis and Ray Ellis Davis are the owners of record title to an eighty acre tract of land consisting of the east one-half of the northwest quarter of Section 27, Township 1 North, Range 13 East, Walthall County, Mississippi. This is some two to two and a half miles southeast of Improve, Mississippi.

The disputed lands with respect to which the Davises have asserted a claim of adverse possession comprise approximately seventy (70) additional acres and lie adjacent to the Davises' land to the south, east and north. Record title to various portions of the disputed lands and various interests therein lie in Diana H. Clement, Ronald R. Lott, Emelda B. Lott, Artis Mark, Jr., Sharon N. Mark, Jane W. Melton, William E. Melton, Mary Gaston Melton Buchler, Julius W. Melton, Jr., Crown Zellerbach Corporation,*60 C.O. Trest, Marion T. Hardwick, Elizabeth W. Trest and Sue Ellen T. Verger. These parties were the Defendants below and are the Appellees here.

The Davises sought to prove adverse possession of the disputed 70 acres for a period in excess of thirty-five (35) years. Through only two witnesses, Boyd L. Davis and a surveyor, W.I. Connerly, the Davises sought to establish that they had kept the lands under fence, had grazed cattle and grown timber thereon, and had sold gravel therefrom. The testimony on each of these points was vague, imprecise and incomplete.

The thrust of the Davises' case centers upon the testimony of Boyd L. Davis regarding the fence. Davis testified that in 1946 he helped his grandfather patch and repair a fence around the disputed land. He stated further that several years later he was on the property to help plant trees and the fence was still there. In time, however, Davis concedes that the fence fell into a state of disrepair or disappeared altogether. A timber cutting operation destroyed much of the fence. Other parts were destroyed as gravel was removed.

Importantly, the Davises never established that the disputed area had been effectively fenced for ten consecutive years. Further, the Davises offered no testimony to the effect that either they or their predecessors in title ever intended that the fence establish a claim of ownership to the property. W.I. Connerly, the surveyor, testified that he surveyed the fence line around the disputed property in 1971. He found remnants of an old fence that had fallen into alternate states of disrepair or disuse. He could not remember if he was working for Davis or for Clements/Trest.

The Davises also rely upon the gravel sales made to Walthall County. Apparently this occurred on several occasions over a period of years, although the record is devoid of evidence of dates, identity of the parties engaging in the gravel removal operations, and the precise location of the lands from which the gravel was removed. One exhibit reflects sales from a gravel

pit located partly on lands the record title of which is vested in the Davises and partly on the lands of Appellee Clement. No evidence reflected from which part of the pit the gravel was taken when sold. For aught that appears, it could have come solely from the lands record title of which is vested in the Davises.

Davis testified that he planted some trees on the disputed property within a year or two after 1948. There is no evidence reflecting the number of trees planted or the exact area where they were planted. Further there is no evidence showing Davis' intent to possess the lands in dispute by this planting. There is no evidence that the Davises or their predecessors ever cut, sold or removed any timber from the disputed property.

The evidence reflects that the Davises leased the eighty (80) acre tract which he owned to a Mrs. Strogner from 1948 or 1949 until 1973 or 1974 and to a Harold Lott in 1976. There is no direct evidence, however, that either Mrs. Strogner or Mr. Lott ever went on the disputed property or used it for any purpose. Indeed, there is no evidence that Davis ever went on the property other than the incident in 1946 when he helped his grandfather repair fences, the incident in 1948 where he planted trees and in 1982 when he took photographs in preparation for trial. The record is silent as to whether other members of the Davis family, Mary Lee Davis or Ray Ellis Davis, ever went on the property.

The record reflects that the Davises paid taxes consistently on only eighty (80) acres of land. They never made any attempt to have the full one hundred and fifty (150) acres placed on the tax roles or have the additional acreage assessed to them.

Once their two witnesses, Boyd L. Davis, who is one of the plaintiffs, and W.I. Connerly, a surveyor, had completed their testimony, Plaintiffs rested, whereupon all Defendants moved the Court to dismiss the action by reason of Plaintiffs' failure to establish a prima facie case. In a bench opinion, the Chancellor granted the motion. On August 18, 1983, a final decree was *61 entered carrying into effect the Chancellor's bench ruling. In due course thereafter, the Davises perfected this appeal.

III.

We emphasize the procedural posture of the case. The Plaintiffs Davis presented their case and rested. At that point the Defendants moved the trial court that, as a matter of law, the Davises had failed to make out a prima facie case. Applying the controlling rules of law-including that regarding the burden of proof-the thrust of Defendants' motion was that, considering the evidence then before the Court, Defendants were entitled to entry of judgment. Such a motion invokes Rule 41(b), Miss.R.Civ.P .

[1] We emphasize that this motion was presented to a trial judge sitting without a jury. In such a setting, the trial court is not required to look at the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable favorable inferences. Notions emanating from *Paymaster Oil Mill Co. v. Mitchell,* 319 So.2d 652 (Miss.1975) , and many other similar cases-whether arising in the context of a motion for a directed verdict, a request for a peremptory instruction or a motion for judgment notwithstanding the verdict-have no application here. Those familiar rules apply only in jury trials where we are concerned that rights secured by Miss. Const. Art. 3, § 31 (1890) (right to trial by jury in civil cases) be respected. *See City of Jackson v. Locklar,* 431 So.2d 475, 478 (Miss.1983) .

Put differently, *Paymaster Oil* and progeny require that the evidence be viewed in the light most favorably to the non-moving party, solely because this is the only means we have devised for protecting the non-moving party's constitutional right to have a jury pass on the factual questions in the case. When the trial judge sits without a jury, no such constitutional rights come into play.

[2] Here the question presented to the trial judge, sitting without a jury, is whether, considering the evidence which has been offered by the plaintiff (which, of course, is all of the evidence then before the court), and giving it such weight and credibility as it would be entitled to were the trial judge engaged in making final findings of fact and rendering final judgment, the trial

judge concludes that plaintiff has made out a case which if not rebutted would entitle him to judgment. The trial judge must, as a matter of law, deny the motion to dismiss and require the Defendant to go forward with his evidence if, and only if, considering that the evidence offered by the plaintiff were all of the evidence to be offered in the case, the trial judge would be obligated to find in favor of the plaintiff.

[3] If, considering the evidence fairly, as distinguished from in the light most favorable to the plaintiff, the trial judge would find for the defendant-because plaintiff has failed to prove one or more essential elements of his claim, because the quality of the proof offered is insufficient to sustain the burden of proof cast upon the plaintiff, or for whatever reason-the proceeding should be halted at that time and final judgment should be rendered in favor of the defendant.[FN1]

> FN1. We regard the contrary suggestion in *Richardson v. Langley,* 426 So.2d 780, 782 (Miss.1983) , that in this procedural setting in a non-jury case the trial judge was required to consider the evidence in the light most favorable to plaintiff, as inadvertent dicta.

[4] Obviously, when there is doubt, the trial judge generally ought to deny the motion to exclude and dismiss but such is the exercise of sound discretion, not obligation imposed by law.

The construction we here give Rule 41(b), Miss.R.Civ.P ., is wholly consistent with that given Federal Rule 41(b) upon which our rule has been patterned. *See, e.g., Hersch v. United States,* 719 F.2d 873, 876-877 (6th Cir.1983) ; *Cox v. C.H. Masland & Sons, Inc.,* 607 F.2d 138, 144 n. 8 (5th Cir.1979) ; *Woods v. North American Rockwell Corporation,* 480 F.2d 644, 645-646 (10th Cir.1973) ; **62*Emerson Electric Co. v. Farmer,* 427 F.2d 1082, 1086 (5th Cir.1970) .

Other states, like Mississippi, have adopted rules of civil procedure derived from the Federal Rules of Civil Procedure. A sampling of the manner in which our sister states have construed their Rule 41(b) is likewise consistent with and supportive of the view we take here. *See, e.g., Sevin v. Shape Spa For Health & Beauty, Inc.,* 384 So.2d 1011, 1013 (La.Ct.App.1980) ; *Metropolitan New Orleans Chapter of Louisiana Consumer's League v. Council of City of New Orleans,* 423 So.2d 1213, 1215 (La.Ct.App.1983) ; *Lumbee River Electric Membership Corporation v. City of Fayetteville,* 309 N.C. 726, 741-42, 309 S.E.2d 209, 218-219 (1983) ; *Mackey-Woodard, Inc. v. Citizens State Bank of Cheney,* 197 Kan. 536, 550-52, 419 P.2d 847, 858-860 (1966) ; *Baker v. R.D. Andersen Construction Co., Inc.,* 7 Kan.App.2d 568, 579, 644 P.2d 1354, 1363 (1982) .

[5] [6] A corollary principle informs our scope of review in cases such as this. Where, as here, a motion to exclude and dismiss has been granted at the end of the plaintiff's case, the trial judge sitting without a jury has necessarily performed his fact finding function and has made a judgment that, even in the absence of evidence offered by the defendant, the facts are such that under the applicable law the plaintiff is entitled to no relief. He has found the facts the same as in other cases. For this reason, we do not consider the evidence de novo, but rather we apply the same substantial evidence/manifest error standards as are generally applicable when we are reviewing the findings of trial judges. *See McNair v. Capital Electric Power Association,* 324 So.2d 234, 238-239 (Miss.1975) ; *Culbreath v. Johnson,* 427 So.2d 705, 707-709 (Miss.1983) ; *Cotton v. McConnell,* 435 So.2d 683, 685 (Miss.1983) ; *Neal v. State,* 451 So.2d 743, 753 (Miss.1984) ; *see also, Woods v. North American Rockwell Corporation,* 480 F.2d 644, 646 (10th Cir.1973) ; and *Lumbee River Electric Membership Corporation v. City of Fayetteville,* 309 S.E.2d 209, 219 (N.C.1983) ; see also, *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (Mar. 19, 1985) .

[7] We call the trial judges' attention to the fact that when he grants a motion to dismiss at the close of the plaintiff's case, he should enter into the record his findings of fact and conclusions of law. The failure to do so leaves an appellate court in the position of having to guess at the trial judge's reason for granting the motion and may result in a finding of manifest error when in truth there was none.

IV.

The Davises sought to establish their claim of adverse possession under Miss.Code Ann. § 15-1-13 (1972) . That statute by its terms requires adverse occupancy continuously and uninterruptedly for a period of ten (10) years or more. Our case law has established beyond peradventure that the party claiming under this statute must prove not only his possession but that his possession is (1) actual; (2) hostile and under claim of ownership; (3) open, notorious and visible; (4) exclusive; (5) peaceful, and (6) continuous and uninterrupted for a period in excess of ten years. *Kayser v. Dixon,* 309 So.2d 526, 528 (Miss.1975) ; *Eady v. Eady,* 362 So.2d 830, 832 (Miss.1978) ; *Gadd v. Stone,* 459 So.2d 773, 774 (Miss.1984) .

[8] The rule is well settled that both the quality and quantity of possessory acts necessary to establish a claim under Section 15-1-23 may vary with the characteristics of the land. In the case of "wild" or unimproved lands, adverse possession may well be established by evidence of acts that would be wholly insufficient in the case of improved or developed lands. *Kayser v. Dixon,* 309 So.2d 526, 529 (Miss.1975) ; *McCaughn v. Young,* 85 Miss. 277, 292-93, 37 So. 839, 842 (1904) .

The question is whether the possessory acts relied upon by the would be adverse possessor are
*63 sufficient to fly ... [his] flag over the land and put the true owner upon notice that his land is held under an adverse claim of ownership.
Snowden & McSweeny Co. v. Hanley, 195 Miss. 682, 687, 16 So.2d 24, 25 (1943) .

[9] There is no need to dawdle over how the voluminous authorities regarding adverse possession construe each of the above elements. The Davises' claim fails on practically every score. The evidence reflects only an intermittent involvement with this land on the part of the Davises-the word "possession" is even too strong. It is not clear that the evidence would be sufficient even to sustain the notion that the Davises have established a "scrambling possession" of the lands. *See Fairley v. Howell,* 159 Miss. 668, 674, 131 So. 109, 110 (1930) .

Despite protestations to the contrary, the record reveals that all the Davises really have to base their claim on is an old barbed wire fence. In this sense, the case is analogous to *Peoples Realty & Development Corp. v. Sullivan,* 336 So.2d 1304, 1305 (Miss.1976) , which held:
"Sporadic and temporary activity on the property is not sufficient to give notice of an adverse claim, nor is an owner put upon such notice by occasional pasturing of cows, or by occasional cutting of timber."
336 So.2d at 1305 .

In *Peoples,* the fence ran across a reed break, could not be seen by the record title holder and was not sufficient to put him on notice. Also, occasional pasturing of cows and cutting of timber were sporadic and insufficient to fly the flag of ownership.

A quick perusal of this Court's recent pronouncements in much closer cases will suffice to show the inadequacy of the fallen and meandering fence to support the Davises' claim. *See Gadd v. Stone,* 459 So.2d 773, 774-75 (Miss.1984) (mere existence of fence and arguably permissive use insufficient for adverse possession); *Trotter v. Gaddis & McLaurin, Inc.,* 452 So.2d 453, 456-57 (Miss.1984) (degree to which existence of fence must be supplemented by other evidence); *Pittman v. Simmons,* 408 So.2d 1384, 1386 (Miss.1982) (what activity within fenced area shows open and hostile possession).

Having in mind the standards described in Section III, we hold that the chancellor's decision granting Defendants' motion to dismiss at the end of the Davises' case was well within the evidence, considered under the controlling rules of substantive law.

AFFIRMED.

PATTERSON, C.J., WALKER and ROY NOBLE LEE, P.JJ., and HAWKINS, DAN M. LEE, PRATHER, SULLIVAN and

ANDERSON, JJ., concur.
Miss.,1985.
Davis v. Clement
468 So.2d 58

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ly or knowingly, which modifies or changes existing rights, or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right. To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived. *Ewing v. Adams*, 573 So.2d 1364, 1369 (Miss.1990) (quoting *Ballantine's Law Dictionary* 1356 (3d ed.1969) (citations omitted)). The chancellor found it significant that each of the five renewal options are separately set forth in individually numbered sections of the lease and amendment. The terms and conditions are repeated in each section. The chancellor held that not following the correct procedure under the option for the third renewal term did not constitute a waiver of the requirements under the separately listed fourth renewal term.

¶ 14. We find the chancellor's decision to be supported by the evidence and not manifestly wrong. Mitchell Associates, Inc., did not waive the written notice requirement for the fourth renewal term and was within its rights in terminating the leasehold rights.

III. DID THE CHANCELLOR ERR IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL?

[6] ¶ 15. "Trial judges are vested with considerable discretion in ruling on motions for new trial, and it has been noted on numerous occasions that '[t]his Court will reverse a trial judge's denial of request for new trial only when such denial amounts to a[sic] abuse of that judge's discretion.'" *Muhammad v. Muhammad*, 622 So.2d 1239, 1250 (Miss.1993) (citing *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So.2d 129, 132 (Miss. 1989)). The chancellor was able to examine the evidence and make specific findings in his opinion. We find that the chancellor should be affirmed as his findings were supported by the substantial evidence in the record and there was no abuse of discretion.

¶ 16. THE JUDGMENT OF THE CHANCERY COURT OF HARRISON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, LEE, IRVING, MYERS, CHANDLER AND BRANTLEY, JJ., CONCUR.

James David ELLISON and Rebecca E. Ellison, Appellants/Cross–Appellees,

v.

Walter Buchanan MEEK and Patsy H. Meek, Appellees/Cross–Appellants.

No. 2001–CA–00834–COA.

Court of Appeals of Mississippi.

June 18, 2002.

Landowners filed complaint to remove adjoining landowners' quitclaim deed from record as cloud upon landowners' title. The Chancery Court, Webster County, William L. Griffin, Jr., Chancellor, found that quitclaim deed was null and that no adverse possession occurred. Adjoining landowners appealed. The Court of Appeals, Thomas, J., held that: (1) fence was not boundary line, and (2) adjoining landowners did not

...e title to property by adverse pos-...n.

Affirmed.

Equity ⇐348

Chancellor, as trier of fact, evaluates ...ency of proof based on credibility of ...sses and weight of their testimony.

Appeal and Error ⇐847(1), 1009(1)

Chancellor's findings will not be dis...ed upon review by Court of Appeals ...ss chancellor was manifestly wrong, ...y erroneous, or applied wrong legal ...dard.

Appeal and Error ⇐949

Standard employed by Court of Ap... for review of chancellor's decision is ... of discretion.

Appeal and Error ⇐893(1)

Standard of review for questions of ... is de novo.

Adverse Possession ⇐114(1)

Burden of proof is on adverse posses... to show by clear and convincing evi...e that each element of adverse posses... is met. West's A.M.C. § 15–1–13(1).

Adverse Possession ⇐31

Adverse possessor must fly flag over ...d and put true owner upon notice that ... land is held under adverse claim of ...ership. West's A.M.C. § 15–1–13(1).

Adverse Possession ⇐31

Landowner must have notice, actual ...putable, of adverse claim to his prop... in order for it to ripen against him, ... mere possession of land is not suffi...t to satisfy requirement of open and ...rious possession. West's A.M.C. § 15–1–13(1).

8. Adverse Possession ⇐19, 106(4)

If fence encloses property for period of at least ten years, under claim of adverse possession, title vests in claimant and possessor, even though fence was subsequently removed or fell into disrepair. West's A.M.C. § 15–1–13(1).

9. Adverse Possession ⇐60(2)

Permissive use by possessor of property in question defeats claim of adverse possession. West's A.M.C. § 15–1–13(1).

10. Adverse Possession ⇐19, 29

Actual activity within fenced area shows open and hostile possession, for purpose of adverse possession claim. West's A.M.C. § 15–1–13(1).

11. Adverse Possession ⇐22, 23, 29

Acts of cutting of timber and occasional pasturing of land are insufficient to constitute open and hostile possession, for purpose of adverse possession claim. West's A.M.C. § 15–1–13(1).

12. Adverse Possession ⇐19

Fence was not boundary line between properties, for purpose of adverse possession claim, where landowners who had burden of proving that they gained ownership of land by adverse possession failed to show that fence ever enclosed property or that party who erected fence was making claim of ownership. West's A.M.C. § 15–1–13(1).

13. Boundaries ⇐48(2)

Mere existence of fence near actual boundary line does not establish that fence is accepted boundary between properties.

14. Adverse Possession ⇐114(1)

Chancellor acted was within his discretion in considering witness testimony in determining whether landowners gained property in question by adverse possession.

15. Adverse Possession ⇐19

Landowners did not acquire title to adjoining property by adverse possession, where, even if landowners were mistaken as to borderline of their property, they did not make clear claim of ownership and did not show that fence ever enclosed property at issue or that party who erected fence made claim of ownership. West's A.M.C. § 15–1–13(1).

16. Adverse Possession ⇐65(1)

Land can be adversely possessed due to mistaken belief that it was within calls of deed. West's A.M.C. § 15–1–13(1).

17. Adverse Possession ⇐29, 30

Sporadic use of another's property does not constitute open and notorious possession, for purpose of adverse possession claim. West's A.M.C. § 15–1–13(1).

18. Appeal and Error ⇐173(5)

Landowners could not raise for first time on appeal claim that chancellor erred in holding that adjoining landowners were entitled to relief confirming title to land in them.

19. Appeal and Error ⇐169

Party cannot raise issue for first time on appeal.

20. Appeal and Error ⇐204(7)

Landowners could not raise for first time on appeal challenge to expert witness's testimony involving instruments used by expert to survey property line.

21. Evidence ⇐546

It is up to chancellor to decide qualifications of experts.

22. Appeal and Error ⇐756, 761

Court of Appeals would not consider landowners' claim that expert witness did not begin at accepted point for his property line survey, where landowners presented no argument or authority to support claim.

23. Appeal and Error ⇐756

Failure to cite relevant authority related to issues obviates appellate court obligation to review such issues.

24. Evidence ⇐268

Chancellor did not abuse his discretion in allowing under state of mind exception to hearsay rule landowner's testimony with respect to adverse possession claim that, prior to adjoining landowner's death, adjoining landowner stated that he wanted to buy some of landowner's property. Rules of Evid., Rule 803(3).

25. Libel and Slander ⇐130

Slander of title may consist of conduct which brings or tends to bring in question right or title of another to particular property.

26. Libel and Slander ⇐132, 139

Malicious filing of instrument, known to be inoperative and disparaging title to land in another, is false and malicious statement for which damages, including attorneys fees, may be recovered.

George M. Mitchell, Jr., Eupora, attorney for appellants.

Armis E. Hawkins, Houston, Buchanan & Meek, Eupora, attorneys for appellees.

Before SOUTHWICK, P.J., THOMAS and IRVING, JJ.

THOMAS, J., for the Court.

¶ 1. On May 9, 2001, the Webster County Chancery Court held that the Ellis had no interest in the property that they purchased by quitclaim deed which is located on the western border of the M

...ly. Aggrieved, the Ellisons present ... assignments of error, which we ... clarified and summarized as follows:

THE LOWER COURT ERRED IN ITS APPLICATION OF ADVERSE POSSESSION.

THE LOWER COURT ERRED IN ALLOWING THE TESTIMONY OF MIKE GORALCZYK.

THE LOWER COURT ERRED IN ALLOWING HEARSAY EVIDENCE OF THE DECEASED MR. BRIGHT.

...ing no error, we affirm.

... The Meeks have filed a cross-appeal, ...ing two assignments of error, ... we have clarified and summarized as ...ws:

THE ELLISONS HAVE SLANDERED PROPERTY OWNED BY THE MEEKS, THUS ENTITLING THE MEEKS TO DAMAGES INCLUDING ATTORNEY'S FEES AND SURVEYOR'S FEES.

...ing no error, we affirm.

FACTS

... In 1953, Charlie and Kavis Lollar ...ased 14.64 acres of land on the south ... of Highway 82, just outside the city ... of Eupora, Mississippi. The de...ion of this piece of property was very ...ise, as it was likely prepared by a ...yor. One border of the property was ...way 82 for a specified distance; one ...er of the property was the south line ... a specified distance; and the third ...er was a straight line connecting the ... two, which made up the east side of ...ce.

... On August 17,1961, the Lollars sold ... to C.A. Walker. On December 4, ... Walker sold the lot to the Brights. ... same description used in the Lollar ...ase was used when the Lollars sold the lot to Walker and when Walker sold the lot to the Brights.

¶ 5. On January 20, 1969, the Meeks purchased 18.5 acres of land which was adjacent to the Bright property. The deed issued in this purchase listed the west line of the lot as the exact same line listed as the east line of the Lollar deed, the Walker deed and the Bright deed.

¶ 6. On July 13, 1994, Ms. Bright, who had recently become a widow, sold her lot to the Ellisons. The same description used in the Lollar deed, the Walker deed and the Bright deed was also used in the warranty deed when Ms. Bright sold the lot to the Ellisons.

¶ 7. Ms. Bright also sold the Ellisons an additional piece of property that was located to the east of the property listed in the warranty deed. Because this additional property was not included on the warranty deed, Ms. Bright made the sale by a quitclaim deed. This additional property was mainly timberland, which enhanced the value of the total property the Ellisons were purchasing. The quitclaim deed described the property conveyed in the same manner as the warranty deed, with exception to the eastern border line. Rather than listing the surveyed border line that was in the warranty deed, the quitclaim deed listed an old fence line as the eastern border. This old fence line can be found several feet east of the eastern border line listed in the warranty deed. The old fence line does not completely enclose the property. Rather, it is a meandering old barbed wire fence.

¶ 8. On April 1, 1994, the Meeks hired Mike Goralczyk to survey the property line between the Meek property and the Ellison property. On January 25, 2000, the Meeks filed a complaint to remove the Bright/Ellison quitclaim deed from the record as a cloud upon the Meeks' title. This complaint further asked for compensation

for attorney's fees as well as surveyor's fees.

¶ 9. The Ellisons' answer to this complaint asserted that the Ellisons and their predecessors in title had acquired the property in question by adverse possession. The answer further asked the court to confirm title in the property in question to the Ellisons.

¶ 10. After hearing all of the evidence from both parties, the lower court found that the quitclaim deed was null and that no adverse possession occurred. Even though the lower court held in the Meeks' favor, it declined to award them compensation for attorney's fees and surveyor's fees.

STANDARD OF REVIEW

[1–4] ¶ 11. This Court has a limited standard of review in examining and considering the decisions of a chancellor. *McNeil v. Hester*, 753 So.2d 1057 (¶ 21) (Miss.2000). "The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Fisher v. Fisher*, 771 So.2d 364, 367 (Miss.2000) (citing *Richard v. Richard*, 711 So.2d 884, 888 (Miss.1998)). A chancellor's findings will not be disturbed upon review by this Court unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *Bank of Mississippi v. Hollingsworth*, 609 So.2d 422, 424 (Miss.1992). "The standard of review employed by this Court for review of a chancellor's decision is abuse of discretion." *McNeil*, 753 So.2d at 1063 (¶ 21). The standard of review for questions of law is de novo. *Consolidated Pipe & Supply Co. v. Colter*, 735 So.2d 958, 961 (Miss.1999).

ANALYSIS

I. DID THE LOWER COURT ERR IN ITS APPLICATION OF ADVERSE POSSESSION?

¶ 12. Mississippi Code Annotated § 15-1-13(1) defines adverse possession as follows:

> Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7.

Miss.Code Ann. § 15-1-13(1) (Supp.2[illegible]

[5] ¶ 13. Our supreme court has [illegible]ly established the following six essential elements which must be met in order to successfully make a claim of adverse possession: the property must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful. *Sharp v. White*, 749 So.2d 41 (¶ 7–8) (Miss.1999); *Stallings v. Bailey*, 558 So.2d [illegible] 860 (Miss.1990); *Pieper v. Pontiff*, [illegible] So.2d 591, 594 (Miss.1987); *Johnson v. Black*, 469 So.2d 88, 90 (Miss.1985). The burden of proof is on the adverse possessor to show by clear and convincing evidence that each element is met. *West v. Brewer*, 579 So.2d 1261, 1262 (Miss.[illegible]

[6, 7] ¶ 14. In most cases, the underlying question is whether the possessory acts relied upon by the would-be adverse possessor are sufficient to put the record title holder upon notice that the lands are held under an adverse claim of ownership. *Peagler v. Measells*, 743 So.2d 389, [illegible] (Miss.Ct.App.1999). "[M]ere possession is not sufficient to satisfy the requirement

open and notorious possession." *Craft Thompson*, 405 So.2d 128, 130 (Miss. [illegible]; *see also People's Realty & Dev. v. Sullivan*, 336 So.2d 1304 (Miss. [illegible]; *Trotter v. Gaddis & McLaurin*, 452 So.2d 453 (Miss.1984); *Coleman v. French*, So.2d 796, 796 (Miss.1970). The adverse possessor must "fly the flag over the and put the true owner upon notice his land [is] held under an adverse of ownership." *Snowden & McSweeCo. v. Hanley*, 195 Miss. 682, 687, 16 24, 25 (1943). "[A] land owner must notice, actual or imputable, of an erse claim to his property in order for ripen against him, and the mere possession of land is not sufficient to satisfy requirement of open and notorious." *People's Realty*, 336 So.2d at 1306.

[9–11] ¶ 15. "If a fence encloses the property for a period of at least ten years, under a claim of adverse possession, title vests in the claimant and possessor, even though the fence was subsequently removed or fell into disrepair." *Roy v. Kay*, 501 So.2d 1110, 1112 (Miss.1987) (quoting *Cole v. Burleson*, 375 So.2d 1046, 1048 (Miss.1979)). The existence of an "old barbed wire fence," as sole evidence does not constitute adverse possession. *Davis Clement*, 468 So.2d 58, 63 (Miss.1985). The permissive use by the possessor of the property in question defeats the claim of adverse possession. *Gadd v. Stone*, 459 So.2d 773, 774 (Miss.1984). The actual activity within the fenced area shows open and hostile possession." *Pittman v. Simmons*, 408 So.2d 1384, 1386 (Miss. [illegible]). However, the acts of cutting of timber and occasional pasturing of the land are insufficient to constitute open and hostile possession. *Roy*, 501 So.2d at 1112.

[12, 13] ¶ 16. The Ellisons first assert that the chancellor did not properly apply adverse possession law when he found that the fence was not a boundary line. In making this assertion, the Ellisons cite several cases where the appellate court found that an old fence composed a boundary line which played a part in acquiring property by adverse possession. The Meeks respond that Mississippi law dictates that the presence of a fence is only evidence to be considered when considering the issue of the location of a property boundary line. It is true that the mere existence of a fence near the actual boundary line does not establish that the fence is the accepted boundary between the properties. *Stringer v. Robinson*, 760 So.2d 6, 10 (Miss.Ct.App.1999); *Davis*, 468 So.2d at 60; *Gadd*, 459 So.2d at 775.

¶ 17. There are several problems with the Ellisons' contention that they gained ownership of the land in question by adverse possession. Most notable is their reliance on the old barbed wire fence. The Ellisons, who have the burden of proving by clear and convincing evidence that they have gained ownership by adverse possession, have not shown such evidence to establish that the fence ever enclosed the property, when the fence was erected, the property was exclusive to the Brights and Ellisons or that the party erecting the fence was making a claim of ownership.

[14] ¶ 18. The Ellisons also argue that the chancellor erred when he considered witness testimony in his determination of whether the Ellisons had gained the property in question by adverse possession. The chancellor sits as a fact-finder in resolving disputes and "is the sole judge of the credibility of witnesses." *Murphy v. Murphy*, 631 So.2d 812, 815 (Miss.1994); *Polk v. Polk*, 559 So.2d 1048, 1049 (Miss. 1990). The chancellor was within his discretion in allowing the testimony that the Ellisons complain of in this issue.

[15] ¶ 19. Next, the Ellisons assert that the chancellor "did not correctly un-

derstand nor apply the law as to how adverse possession and transfer or sale of land actually could be accomplished when the land might not be within the call of the deed of the party who was doing the adverse possessing." We can only attempt to interpret this assertion, as the argument is brief and vague. The Ellisons argue that the Brights, although mistaken, believed that the land in question was covered in their deed. The Brights held this belief as well as the possession of the land for the statutory period of ten years. Thus, the Meeks contend that although the Brights were mistaken that the land in question was within the calls of the deed, the Brights fulfilled the elements of adverse possession for the requisite period of time.

[16] ¶ 20. It is true that land can be adversely possessed due to the mistaken belief that it was within the calls of the deed and following possession. *Alexander v. Hyland*, 214 Miss. 348, 58 So.2d 826, 829 (1952). However, the problem with this theory is that there is a lack of convincing evidence to show that the Ellisons or any of their predecessors acquired the property by adverse possession, as we have stated above. It would be a stretch to find that any of the six elements necessary to gain ownership by adverse possession were met. Even if the Brights had been mistaken as to the borderline of their property, they did not "fly the flag" of ownership on the property in order to make a clear claim of ownership. Nor have the Ellisons shown that the fence ever enclosed the property, when the fence was erected, the property was exclusive to the Brights and Ellisons or that the party erecting the fence was making a claim of ownership. Further, the chancellor made a proper and fair application of adverse possession law to the case at hand.

[17] ¶ 21. The case at hand is reminiscent of *Stewart v. Graber*, 760 So.2d [illegible] (Miss.Ct.App.2000). While the Stewarts claimed that they used the contested area to enclose livestock, cut hay and garden, they did not meet the burden of proof that there was ever an enclosure. *Id.* at [illegible]. The chancellor aptly found that even if livestock were permitted to graze on the area, cut hay and garden, occasional use of someone else's property without an enclosure does not pass the test of adverse possession. *Id.* Sporatic use of another's property does not constitute open and notorious possession. *Cook v. Mason*, [illegible] Miss. 811, 814, 134 So. 139 (1931). The same is true in the case at hand.

[18, 19] ¶ 22. The Ellisons also argue that the chancellor erred in holding that the Meeks "have fully sustained the allegations in their complaint and were entitled to the relief confirming title in them." The Ellisons go on to argue that the Meeks did not properly deraign title. The Meeks respond by pointing out that the Ellisons did not make an objection and thus, failed to raise this issue at trial. A party cannot raise an issue for the first time on appeal. *First Investors Corp. v. Rayner*, 738 So.2d 228, 239(¶ 51) (Miss. 1999); *Zimmerman v. Three Rivers*, [illegible] So.2d 853, 858(¶ 16) (Miss.Ct.App.[illegible]). Therefore, this issue will not be considered. Regardless of this fact, the record reflects that the Meeks deraigned the title themselves in their pleadings.

II. DID THE LOWER COURT ERR IN ALLOWING THE TESTIMONY OF MIKE GORALCZYK?

¶ 23. The Mississippi Rule of Evidence 702 states:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge.

experience, training, or education, may testify thereto in the form of an opinion or otherwise.

M.R.E. 702.

¶24. The Ellisons complain that the chancellor erred when he allowed and considered the testimony of Mike Goralczyk as an expert. The Ellisons point to four specific instances that Goralczyk's expert testimony should not have been allowed and considered: "(1) his not showing how accurate instruments were used nor if, in fact, they were proper under the circumstances; (2) as to the Ellisons' deed not closing and ignoring the basic law as to matters involving measurements, distances and monuments; (3) declaring that the surveyor was an expert as to the depth of ditches trees without requiring any kind of certificate, history, or qualification; [and] (4) he did not begin at an accepted point of beginning for his surveys."

¶25. The Meeks responded to this assertion involving the use of instruments by pointing out that Goralczyk did testify as to the calibration of his instruments to insure their accuracy. The Meeks also point out that despite a lengthy cross-examination, the Ellisons did not object to the testimony involving the instruments used. As we stated earlier, a party cannot raise an issue for the first time on appeal. *First Investors Corp.*, 738 So.2d at 255; *Zimmerman*, 747 So.2d at 855. Therefore, this issue will not be considered.

¶26. As the Meeks point out, the assertion involving Goralczyk's testimony about the deed closing is merely a late attempt at discrediting the witness. The chancellor acts as a fact-finder in resolving disputes and "is the sole judge of the credibility of witnesses." *Murphy*, 631 So.2d at 1049; *Polk*, 559 So.2d at 1049. This is left to the chancellor's discretion, and we see no error in his judgment here.

[21] ¶27. The Meeks respond to the argument that Goralczyk's testimony involving tree growth by asserting that the chancellor allowed this testimony as the opinion of a lay person rather than expert testimony due to the fact that it was out of his field of expertise. It is up to the chancellor to decide the qualifications of experts. *Couch v. City of D'Iberville*, 656 So.2d 146, 152 (Miss.1995); *Sheffield v. Goodwin*, 740 So.2d 854, 857 (¶ 10) (Miss. 1999); *Seal v. Miller*, 605 So.2d 240, 243 (Miss.1992). In its answer to the Ellisons' objection to Goralczyk's testimony as to the tree growth, the chancellor stated: "I'm going to let him give his estimate based on his experience as a surveyor."

[22, 23] ¶28. The Ellisons offered no argument or authority to support the fourth part of this issue. Failure to cite relevant authority obviates the appellate court's obligation to review such issues. *Williams v. State*, 708 So.2d 1358, 1362–63 (Miss.1998); *Grey v. Grey*, 638 So.2d 488, 491 (Miss.1994); *McClain v. State*, 625 So.2d 774, 781 (Miss.1993); *Smith v. Dorsey*, 599 So.2d 529, 532 (Miss.1992). Therefore, we will not consider it.

III. DID THE LOWER COURT ERR IN ALLOWING HEARSAY EVIDENCE OF THE DECEASED MR. BRIGHT?

[24] ¶29. The Mississippi Rule of Evidence 803(3) states that:

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

¶ 30. At trial, Mr. Meek offered the following testimony during direct examination:

> I would say between one and two years prior to Mr. Bright's death. I made no written memorandums. William [Bright] saw me up town one day and told me, "Buck [Meek], I need you to sell me a small amount of land over near my house because it comes very close to my house, and it would help me a lot if you will do it. The line comes very close to my house." So I told him, "Well, let's go out there and see, William, where we—what you're talking about." We got in our cars, and we drove out there and walked out to along that line there. We found the stake in front on the highway right-of-way, and it was true. Since he had expanded his house out toward the east, it was a lot closer to the line than it was. And then we went back to where he had constructed a dog kennel, and he told me, "I may have put this kennel on some of your property. Would you like for me to move it, or is it satisfactory with you for me to leave it here?" I said, "William, we need to get a survey made so we can see exactly where this line goes. Then I'll talk with you about trying to sell you some of this land." He said, "Is it all right for me to leave this dog kennel here while we—although I know it's on your land, and I'm not trying to claim it," he told me that. And I said, "Yes, that's fine. We need to get it surveyed as soon as possible so that we can come to an agreement on selling it to you." And, as quite often happens, the time slipped by; and, the next thing I know, William was dead.

The Ellisons objected to this testimony, arguing that it was hearsay. The lower court overruled the objection, holding that the testimony fell within the M.R.E. 803(3) hearsay exception. Again, "[t]he chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the cred[illegible] of witnesses and the weight of their t[illegible] mony." *Fisher*, 771 So.2d at 367.

¶ 31. The Ellisons now assert that [illegible] statements made by the deceased [illegible] Bright did not qualify as an exce[illegible] the hearsay rule under the "state of [illegible] exception. Mr. Meek testified about [illegible] conversation that he had with the dec[illegible] Mr. Bright. The Meeks argue that [illegible] conversation in question showed the [illegible] plan, motive and design of Mr. B[illegible] The Meeks further assert that his [illegible] plan, motive and desire was to acquire [illegible] to land by purchasing it from Mr. M[illegible] rather than acquiring it by adverse p[illegible] sion. The chancellor did not abuse [illegible] discretion in allowing this hearsay tes[illegible] ny as the testimony presented was [illegible] stricted to Mr. Bright's state of mind.

CROSS-APPEAL

DID THE ELLISONS SLAN[illegible] PROPERTY OWNED BY THE MEE[illegible] THUS ENTITLING THE MEEKS [illegible] DAMAGES INCLUDING ATTOR[illegible] FEES AND SURVEYOR'S FEES?

[25, 26] ¶ 32. Slander of title [illegible] consist of ... conduct which bring[illegible] tend[s] to bring in question the ri[illegible] title of another to particular prop[illegible] *Walley v. Hunt*, 212 Miss. 294, 54 [illegible] 393, 396 (1951). *See also Welford v. E[illegible] erson*, 524 So.2d 331 (Miss.1988). [illegible] malicious filing of an instrument, kn[illegible] be inoperative and disparaging the [illegible] land in another, is a false and mal[illegible] statement for which damages, incl[illegible] attorneys fees, may be recovered." *[illegible] ley v. Hunt*, 212 Miss. 294, 54 So.2d [illegible] 396 (1951). *See also Dethlefs v. [illegible] Maison Dev. Corp.*, 511 So.2d 112 [illegible] 1987). The chancellor has substanti[illegible] cretion in the matter of deter[illegible] whether an assessment of damages is

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677 So.2d 171, 185 (Miss.1996) (citing
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ss.1989)). We hold that the chancellor
not abuse his discretion in denying the
eeks' demand for damages.

¶ 33. **THE JUDGMENT OF THE CHANCERY COURT OF WEBSTER COUNTY IS AFFIRMED AS TO DIRECT AND CROSS-APPEAL. ALL COSTS OF THE APPEAL ARE ASSESSED TO THE APPELLANTS.**

McMILLIN, C.J., KING AND THWICK, P.JJ., LEE, IRVING, ERS AND BRANTLEY, JJ., NCUR. BRIDGES AND HANDLER, JJ., NOT RTICIPATING.

KEY NUMBER SYSTEM

George A. COLE, Appellant,

v.

METHODIST MEDICAL CENTER, Appellee.

No. 2000-CA-01233-COA.

Court of Appeals of Mississippi.

June 18, 2002.

Patient brought medical malpractice action against medical center alleging that fell and sustained injury due to lack of assistance by center personnel. The Circuit Court, Hinds County, James E. Graves, Jr., granted center's motion for summary judgment. Patient appealed. The Court of Appeals, King, P.J., held that center did not breach duty of care to patient.

Affirmed.

1. Appeal and Error ⇐863

The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court. Rules Civ.Proc., Rule 56(c).

2. Appeal and Error ⇐893(1)

An appellate court conducts a de novo review of orders granting or denying summary judgment and looks at all the evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. Rules Civ.Proc., Rule 56(c).

3. Appeal and Error ⇐934(1)

When reviewing a grant of summary judgment, the evidence must be viewed in the light most favorable to the party against whom the motion has been made. Rules Civ.Proc., Rule 56(c).

4. Appeal and Error ⇐934(1)
Judgment ⇐185(2)

When making a motion for summary judgment, the burden of showing that no genuine issue of material fact exists lies with the moving party, and on review an appellate court gives the benefit of every reasonable doubt to the party against whom summary judgment is sought. Rules Civ.Proc., Rule 56(c).

5. Appeal and Error ⇐863

When reviewing a grant of summary judgment, an appellate court does not try issues; rather, it only determines whether there are issues to be tried. Rules Civ. Proc., Rule 56(c).

6. Judgment ⇐178

Motions for summary judgment are to be viewed with a skeptical eye, and if a