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

No. 2007-CA-00823

BILLY MACK SULLIVAN; TERESA SULLIVAN RANKIN; BILLY H. SULLIVAN; ALICE M. LOWTHER; JAMES H. LOWTHER, JR.; JULIAN BARRY LOWTHER; PAUL EDWARD LOWTHER, and SHERRI LYNN LACY — **APPELLANTS**

VERSUS

EUGENE C. TULLOS and JOHN RAYMOND TULLOS, Individually and d/b/a Tullos & Tullos; CRYMES G. PITTMAN; BILLY MEANS, and JOHN DOES 1-10 — **APPELLEES**

Appeal from Order Granting Summary Judgment
Circuit Court of Hinds County, Mississippi
First Judicial District
Case Number 251-06-496CIV

ORAL ARGUMENT IS NOT REQUESTED

BRIEF FOR APPELLEES, CRYMES G. PITTMAN, INDIVIDUALLY AND d/b/a PITTMAN, GERMANY, ROBERTS & WELSH, L.L.P.

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I. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings Below and Disposition Below.

1. Nature of the Case:

This case arises out of the sale of real property. Though Plaintiffs allege that they were fraudulently induced to sell their interest in the property for less than its fair market value, this case is really nothing more than an effort by counsel for the Plaintiffs to harass the Defendants as evidenced by the fact that he has already been sanctioned once in this case.

The Plaintiffs allege that between them they owned a 1/3 interest in the real property in question. They further allege that Crymes G. Pittman, individually and d/b/a Pittman, Germany Roberts & Welsh, LLP (hereinafter collectively referred to as the "Pittman Defendants") participated in a scheme which caused them to sell their interest in the real property for less than its true value. Plaintiffs make this allegation despite the fact that no Pittman Defendant had any contact with the Plaintiffs before or after the sale of the property and the Plaintiffs received $710 per acre for the property when it had been appraised for only $500 per acre.[1, 2]

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[1] Plaintiffs, Billy Mack Sullivan, Teresa Sullivan Rankin and Billy H. Sullivan were not parties to the real estate transaction. They are the heirs at law of Juliette Lowther Sullivan who owned a 1/9 interest in the property at the time it was sold. Though not currently before the Court, there is a serious standing issue as to these Plaintiffs.

[2] It should be noted that the Complaint (R.3) named both Crymes G. Pittman, individually and d/b/a Pittman, Germany, Roberts & Welsh, L.L.P. as Defendants. The Notice of Appeal (R. 209) also references both Defendants. The Brief of Appellants and Appellants' Record Excerpts do not include the law firm in the caption. The law firm is also not mentioned in the Certificate of Interested Persons contained in the Brief of Appellants. This, coupled with Plaintiffs' failure to cite any authority as to the law firm, is a procedural bar to the appeal as it relates to the law firm. *Blevins v. Bardwell*, 784 So.2d. 166, 180 (Miss. 2001).

The owners of the remaining 2/3 of the real property, Donald Boone via the estate of Annie M. Boone and Vernon Tullos McAlpin, not only have no complaint regarding the sale of the property, they were named as defendants by Plaintiffs in an effort to manufacture venue in this case. Both have been dismissed from this case. Vernon Tullos McAlpin was voluntarily dismissed. (R. 121)[3] Donald Boone was dismissed by the trial court and sanctions were awarded against Plaintiffs and their counsel. (R. 127)

2. Course of Proceedings Below:

The Complaint was filed on April 8, 2005 in the Circuit Court of Simpson County, Mississippi (R. 3; RE. 8) On May 2, 2005, Circuit Judge Robert G. Evans recused himself from the case because certain of the defendants, including Crymes G. Pittman, had active practices in the 13th Circuit Court District. (R. 26) Honorable Lillie Blackmon Sanders was appointed by the Supreme Court of Mississippi on May 16, 2005, to preside over the case. (SR. Exhibit "B")

Crymes G. Pittman and Pittman, Germany, Roberts & Welsh, L.L.P. filed MRCP 12(b)(6) motions to dismiss on May 23, 2005. (R. 40; 45) On August 26, 2005, the Plaintiffs filed a Motion to Transfer Venue wherein they admitted that venue was not proper in Simpson County and sought to move the case to the Circuit Court of Rankin County, Mississippi. (R. 66) On February 6, 2006, Judge Sanders heard arguments on the Motion to Transfer Venue and on February 21, 2006 her Order transferring venue to the First Judicial District of Hinds County, Mississippi was entered by the clerk. (R. 132)

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[3] The designation "R" refers to the record on appeal which consists of 4 volumes, including a supplemental volume designated as "SR" in this brief. The designation "RE" refers to the Appellants' Record Excertps.

After the transfer to Hinds County, the trial court set all pending motions for hearing on November 3, 2006. The Plaintiffs' served their Plaintiffs' Amended Response to Defendants' Rule 12(b)(6) Motions to Dismiss on October 31, 2006. (R. 161) Plaintiffs attached four exhibits to the Amended Response. (R. 174-184) This filing by the Plaintiffs converted the pending motions to dismiss to motions for summary judgment. Plaintiffs did not request a continuance of the hearing set for November 3, 2006 nor did they file an affidavit as required by the provisions of MRCP 56 (f).

The trial court heard the motions on November 3, 2006. During the hearing, counsel for the Plaintiffs introduced an additional exhibit at which time the trial court announced that it was treating the motions as motions for summary judgment as required by MRCP 12(b). (Tr. 17; RE. 43)[4] At no time during the hearing did the Plaintiffs object to the procedure being followed by the trial court, or request additional time to submit papers in opposition to the motions, or submit a MRCP 56(f) affidavit. At the conclusion of the hearing, the trial court took the motions under advisement. (Tr. 23; RE. 44)

Counsel for the Plaintiffs sent the trial court a letter on November 7, 2006 setting forth additional unsworn allegations regarding the sale of the property. (SR. Exhibit "G") In the letter, Plaintiffs again failed to object to the procedure followed by the trial court, or request additional time to submit any other evidence in opposition to the motion, or file a MRCP 56(f) affidavit claiming they needed discovery from any of the defendants.

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[4] The designation "Tr." refers to the transcript of the proceedings in the Circuit Court of the First Judicial District of Hinds County, Mississippi on November 3, 2006.

The trial court entered its Memorandum Opinion on November 30, 2006 in which it found the Plaintiffs' claims were barred by the three year statute of limitations. The trial court further found that the Plaintiffs had failed to come forward with evidence on the substantive claims against the Pittman Defendants. (R. 185; RE. 50) On February 8, 2007, the trial court entered an Order wherein it dismissed the Plaintiffs claims against all Defendants, including the Pittman Defendants for the reasons set forth in its Memorandum Opinion. (R. 197; RE. 62) At no time between the entry of the Memorandum Opinion dated November 30, 2006 and the entry of the Order dismissing the Plaintiffs' claims dated February 8, 2007, did the Plaintiffs object to the procedure followed by the trial court, or ask for further hearing of the motions for summary judgment, or offer additional evidence in opposition to the motions for summary judgment, or file a MRCP 56(f) affidavit.

The Plaintiffs' filed their Plaintiffs' Motion to Alter, Amend or Reconsider on February 20, 2007. (R. 202) In that motion, Plaintiffs' did not point to a single mistake of law or fact as to the Pittman Defendants. On April 2, 2007, the trial court entered its Order Dismissing Plaintiff's (sic) Motion to Alter, Amend or Reconsider. (R. 208) The Plaintiffs filed a Notice of Appeal on November 27, 2007. (R. 209)

3. Statement of Facts:

The real issue in this case is whether Plaintiffs were paid fair market value for their interest in the property. The uncontradicted evidence is that Plaintiffs received $710 per acre for land that was appraised at $500 per acre.

The Plaintiffs allege that they were fraudulently induced into selling real property which they had inherited from Jeff Levi Wooley which resulted in their sustaining monetary damages in the sum

of $500,000. (R. 3; RE. 8) According to the Complaint the sale took place on August 21, 2000 (R. 6; RE. 11). The Complaint was not filed until April 8, 2005, more than 4 1/2 years after the sale. (R. 3; RE. 8)

The Wooley estate was the subject of proceedings in the Chancery Court of Smith County, Mississippi. Eugene Tullos ("Tullos") was the attorney of record for the estate. In their Complaint, Plaintiffs allege that on the date the estate was closed, August 21, 2000, Tullos told them that bids had been invited and accepted on the real property in question and that the high bidder was Crymes G. Pittman ("Pittman") at $750 per acre.[5] Plaintiffs further allege that Pittman was acting as a straw man on behalf of Tullos and that the two of them were acting together to deceive and defraud the Plaintiffs. (R. 3; RE. 8) There is no evidence in the record to support any of these allegations against Tullos or Pittman.

Contrary to what is stated in the Complaint, the Plaintiffs knew and in fact swore under oath there was no bidding on the property. On August 21, 2000, Plaintiffs Alice Lowther, James Harvey Lowther, Jr., Julian Barry Lowther, Paul Edward Lowther and Sherri Lynn Lowther Lacy, all swore to and signed the Petition for Approval of Final Accounting and Closing of Said Estate. The Petition was filed that same day and makes no reference to any bids or acceptance of bids on the real property. The Petition signed by the Plaintiffs asks the chancery court to decree that the real property of Jeff Levi Wooley is now owned by heirs at law which included the Plaintiffs. Based upon the sworn representations of the Plaintiffs, the chancery court on August 21, 2000 entered its Judgment

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[5] The price was actually $710 per acre.

Approving Final Accounting, Closing Estate and Discharging Administratrix.[6]

Following the filing of the Complaint, on May 23, 2005 the Pittman Defendants filed motions to dismiss under Rule 12(b)(6). The grounds for dismissal included improper venue, failure to plead the specific acts making up the alleged fraud and conspiracy as required by MRCP 9(b), and failure to state a claim upon the which the relief sought could be granted.[7]

The motions to dismiss were set for hearing on November 3, 2006. The Plaintiffs filed their Plaintiffs' Amended Response to Defendants' Rule 12(b) Motions to Dismiss on October 31, 2006. (R. 161) Plaintiffs chose to attach exhibits to the amended response. Pursuant to MRCP 12(b), this voluntary act by Plaintiffs converted the motions to dismiss to motions for summary judgment.

Though he knew or should have known that the filing of exhibits converted the motions to dismiss to motions for summary judgment, counsel for the Plaintiff did not ask to have the November 3, 2006 hearing postponed or rescheduled, nor did he file an affidavit showing that he needed additional time for discovery as required by MRCP 56(f). Instead, the Plaintiffs went forward with the hearing, without any objection, during which they offered an additional exhibit and were advised by the trial court that it was now treating the motions as motions for summary judgment. (Tr. 17; RE. 43) At no time during the hearing did the Plaintiffs object to the trial court's

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[6] A copy of the Judgment Approving Final Accounting, Closing Estate, and Discharging Administratrix is attached as Exhibit "A" tothe Motion of Appellees, Crymes G. Pittman, Individually and d/b/a Pittman, Germany, Roberts & Welsh, L.L.P. to Supplement the Record on Appeal. A copy of the Petition for Approval of Final Accounting and Closing of Said Estate is attached as Exhibit "B" to the Motion of Appellees, Crymes G. Pittman, Individually and d/b/a Pittman, Germany, Roberts & Welsh, L.L.P. to Supplement the Record on Appeal.

[7] MRCP 9(b) provides that all averments of fraud, the circumstances constituting fraud shall be stated with particularity. The Complaint clearly does not meet this requirement as to the Pittman Defendants. (R. 3)

announced procedure or ask for additional time to submit other evidence in opposition to the now motions for summary judgment. At the conclusion of the hearing, the trial court advised the parties that it would take the matter under advisement. (Tr. 23-24; RE. 44)

By letter dated November 7, 2006, counsel for the Plaintiffs advised the Court that Plaintiffs had a witness, a Mr. Jennings, who was going to testify "... he was there with his money to pay more than what the property was sold for ..." but that Tullos told him the time for bids had expired. (SR. Exhibit "G) No further information was provided to the Court or the Defendants about this alleged witness and the Plaintiffs did not offer an affidavit from the witness as required by MRCP 56(e). In his letter, counsel for the Plaintiffs did not request that the trial court defer ruling on the motions for summary judgment, or ask for leave to conduct discovery, or file a MRCP 56(f) affidavit. As such Plaintiffs' chose, without objection, to rely on the record as it existed as of November 3, 2006.

The trial court did not issue its ruling until November 30, 2006 at which time it entered its Memorandum Opinion. (R. 185; RE. 50) Plaintiffs did not request that the trial court defer its ruling, or permit additional discovery, or file a MRCP 56(f) affidavit at any time between November 7, 2006 and the entry of the Memorandum Opinion on November 30, 2006. In its Memorandum Opinion the trial court found that Plaintiffs' claims were barred by the three year statute of limitations and that Plaintiffs had failed to offer evidence of their substantive claims against the Pittman Defendants. (R. 185)

On February 9, 2007, the trial court entered its Order Granting Summary Judgment Pursuant to MRCP Rule 12 (B) Motions Filed by Defendants Converted by the Court to MRCP Rule 56 Motions for Summary Judgment. (R. 197) At no time between the entry of the Memorandum Opinion on November 30, 2006 and the entry of the aforesaid Order on February 9, 2007, did

Plaintiffs ask the trial court to allow discovery or file a MRCP 56(f) affidavit.

The Plaintiffs filed their Plaintiffs' Motion to Alter, Amend or Reconsider on February 20, 2007. (R. 199) They did not attach a Rule 56(f) affidavit or any other evidence to their motion. According to the motion, the only alleged error made as to the Pittman Defendants was the failure of the trial court to allow discovery prior to ruling on the motions for summary judgment.

II. SUMMARY OF THE ARGUMENT

The trial court was compelled to treat the motions to dismiss as motions for summary judgment pursuant to the clear and unambiguous provisions of MRCP 12 (b) which states that:

> 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 ... .

Plaintiffs complain that they were not given the requisite ten days notice of motions for summary judgment as well as adequate time for discovery. This position ignores the undisputed facts in the record.

First, it was the Plaintiffs' act of filing exhibits with their Plaintiffs' Amended Response to Defendants' Rule 12(b) Motions to Dismiss on October 31, 2006 that converted the motions to dismiss to motions for summary judgment. Despite this, Plaintiffs did not ask the trial court to continue the hearing or file a MRCP 56(f) affidavit.

Second, at the hearing of the motions, Plaintiffs did not object to the procedure followed by the trial court or ask the trial court to defer ruling on the motions for summary judgment. This is true even though Plaintiffs introduced an additional exhibit during the hearing at which time the trial court advised the parties it would now treat the motions to dismiss as motions for summary

judgment. Also, Plaintiffs did not ask the trial court for time to conduct discovery.

Third, after the trial court took the motions for summary judgment under advisement, the Plaintiffs failed to come forward with any evidence in opposition to the motions. This is true even though counsel for the Plaintiffs sent the trial court a letter dated November 7, 2006 in which he claimed that the Plaintiffs had a witness, a "Mr. Jennings," who would testify that he would have paid more for the property and that Tullos told him the time for bids had passed. As of the service of this brief, the Plaintiffs have not produced an affidavit from this alleged witness.

Fourth, the trial court did not enter its Memorandum Opinion until November 30, 2006. In the 27 days between the hearing on the motions and the date of the opinion, the Plaintiffs submitted only counsel's letter dated November 7, 2006. If in fact "Mr. Jennings" existed and was going to provide the evidence claimed in the letter, there was more than sufficient time to obtain an affidavit from him and file it with the trial court. In addition, Plaintiffs did not request time to conduct discovery.

Fifth, the trial court did not enter its Order Granting Summary Judgment Pursuant to MRCP Rule 12 (B) Motions Filed by Defendants Converted by the Court to MRCP Rule 56 Motions for Summary Judgment until February 9, 2007. In the 97 days between the hearing and the entry of the Order, the Plaintiffs provided the trial court with nothing new, except counsel's letter discussed above.

Sixth, the Plaintiffs filed their Plaintiffs' Motion to Alter, Amend or Reconsider on February 20, 2007. They did not attach any evidence to that motion in opposition to the motions for summary judgment. This is true even though 108 days had passed since the hearing on the motions for summary judgment.

Seventh, the trial court did not rule on the Motion to Alter, Amend or Reconsider until April 2, 2007. Plaintiffs offered no evidence to the trial court between the filing of their Plaintiffs' Motion to Alter, Amend or Reconsider and the entry of the Order. By the time the Order Dismissing Plaintiff's (sic) Motion to Alter, Amend or Reconsider was entered, 149 days had passed since the hearing on the motions for summary judgment and the Plaintiffs had still not offered any evidence in opposition to the motions. It can hardly be said that Plaintiffs had insufficient time to respond to the motions for summary judgment.

Plaintiffs also claim the trial court erred in finding their claims were barred by the three year statute of limitations. The sale took place on August 21, 2000 and the Complaint was not filed until April 8, 2005. Clearly this was well outside the three year limitations period. For the reasons set forth in the trial court's Memorandum Opinion, there was no tolling of the statute of limitations.

Plaintiffs also claim that the trial court erred in granting a summary judgment in favor of the Pittman Defendants on the substantive claim. The only evidence presented by the Plaintiffs was a copy of the warranty deed in which the Plaintiffs and others conveyed the property to Crymes G. Pittman, copies of checks from Eugene C. Tullos to the Plaintiffs and others, a copy of the warranty deed from Crymes G. Pittman to Eugene C. Tullos, and a copy of a letter from Plaintiffs' counsel to Crymes G. Pittman. The trial court correctly found that this evidence did not establish the existence of a conspiracy or any agreement between Pittman and Tullos to defraud the Plaintiffs. Further, the trial court correctly found that the only evidence in the case indicated that Pittman had paid either $210 or $250 per acre more than the appraised value of the property.

III. ARGUMENT

A. The Trial Court was Correct in Treating the Motions to Dismiss as Motions for Summary Judgment and the Plaintiffs were Provided with Proper Notice.

The trial court set all pending motions for hearing on November 3, 2006. Plaintiffs then served their Plaintiffs' Amended Response to Defendants' Rule 12(b) Motions to Dismiss on October 31, 2006. (R. 161). Plaintiffs attached four exhibits to their Amended Response for the trial court to consider in opposition to the motions to dismiss. (R. 174-184) Pursuant to MRCP 12(b), this voluntary act by the Plaintiffs converted the pending motions to dismiss to motions for summary judgment unless the trial court excluded the exhibits. Plaintiffs' counsel was charged with knowledge of this rule and its potential implications.

After voluntarily submitting the matters outside the pleadings to the trial court and prior to the hearing, the Plaintiffs did not submit a MRCP 56(f) affidavit setting forth reasons why they could not present by affidavit facts to support their opposition to the motions nor did they ask the trial court to continue the hearing.

The hearing went forward as scheduled on November 3, 2006. During the hearing counsel for the Plaintiffs introduced an exhibit into the record. (Tr. 16-17; RE. 43) At that time the trial court announced its intent to treat the motions as motions for summary judgment. (Tr. 17; RE. 43) At no time during the hearing did Plaintiffs object to the trial court proceeding on the motions as motions for summary judgment, or ask for a continuance of the hearing, or ask for additional time to submit to submit evidence in opposition to the motions. As such, under Mississippi law Plaintiffs waived any objection to the procedure followed by the trial court during the hearing on November 3, 2006. At the conclusion of the hearing, the trial court took the motions under advisement.

A similar procedural question arose in *Koestler v. Mississippi College*, 749 So. 2d 1122 (Miss. App. 1999). In that case, Koestler sued the college for breach of its contractural duty of good faith and fair dealing because she received a failing grade in her internship. The college filed a MRCP 12(b)(6) motion to dismiss for failure to state a claim on August 8, 1997, to which was attached a letter regarding the termination of Koestler from her internship position. On October 13, 1997, the college filed an affidavit in support of its motion to dismiss. A hearing was held on October 17, 1997, and the trial court entered an order dismissing the case on October 21, 1997. On appeal Koestler argued that she did not have a "reasonable opportunity" to present pertinent matters in opposition to the motion. The Court of Appeals found that it was procedurally barred from hearing the issue because Koestler had the affirmative duty to "... timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion." 749 So. 2d at 1125 citing *MST, Inc. v. Miss. Chemical Corp.*, 610 So.2d 299, 305 (Miss. 1992).

In *MST, Inc.* the Supreme Court noted that MRCP 56(f) provides a haven for those litigants who are unable to adequately oppose a motion for summary judgment. However, the Court emphasized that litigants who do not seek the haven of the rule are precluded from complaining on appeal that they did not have adequate discovery to respond to the motion. 610 So.2d at 305.

Koestler was cited with approval in *Russell v. Williford*, 907 So.2d 362, 369 (Miss. App. 2004). In *Russell* the defendants filed motions to dismiss arguing the claim was barred by the statutue of limitations. Matter outside of the pleadings was placed before the court and thus converted the motions to dismiss into motions for summary judgment. Russell did not object to the hearing or move the court to continue the hearing. The Court of Appeals found that Russell had waived any objections to the procedure followed by the trial court and in its opinion said:

> If Russell was indeed fully aware that the posture of the motions had changed to that of summary judgment and desired to submit affidavits, he was required to object or move for continuance at the hearing. Our review of the record indicates that Russell took no such action. Therefore, any objection he may have had to the way the court conducted the hearing on the motion for summary judgment has been waived.

907 So.2d at 369.

The procedural issue before the Court in this appeal is no different from that in *MST, Inc.*, *Koestler*, and *Russell*. If anything, the post hearing actions of the Plaintiffs are further reason for the Court to conclude that Plaintiffs have waived any objections to the procedure used by the trial court.

Following the hearing on November 3, 2006, counsel for the Plaintiffs on November 7, 2006 sent a letter to the trial court. The substantive part of the letter is set forth in its entirety below:

> At the Motion hearing, Friday, November 3, 2006, you asked about damages and perhaps I did not make clear to you my clients' position on damages. If you will refer to the Complaint, paragraph 10, Plaintiffs were told that when people came to bid on the property that the bid time was closed. However, no bids were ever taken at all. We have a witness, Mr. Jennings, who is going to testify he was there with his money to pay more than what the property was sold for, but the way Mr. Tullos got around that was, he simply said that the time for bids had expired when actually no bids had been taken by him. Others who wanted to bid on the property were also told by Mr. Tullos they could not.
>
> Should you have any questions, please give me a call.

SR. Exhibit "G".

In the letter, counsel for the Plaintiffs claimed to have a witness with information related both to the bidding process and the value of the land. The witness is identified only as "Mr. Jennings". Counsel did not request leave to depose Mr. Jennings and did not ask the trial court to defer ruling on the motions. Incredibly, counsel did not obtain and file an affidavit from "Mr. Jennings". This is true

even though the trial court did not rule on the motions for summary judgment until November 30, 2006 and did not enter its Order until February 9, 2007. Plaintiffs had a much greater opportunity to present evidence in opposition to the motions for summary judgment than the plaintiffs in *MST, Inc.*, *Koestler* and *Russell.*

Plaintiffs also claim they were denied discovery and for this reason the trial court erred in granting the motions for summary judgment. The Plaintiffs have likewise waived this alleged error by the trial court. As previously discussed, Plaintiffs by attaching exhibits to their Amended Response to Defendants' Rule 12(b) Motions to Dismiss served on October 31, 2006, three days before the hearing, voluntarily set in motion the process which led to the motions to dismiss being converted to motions for summary judgment. Plaintiffs' counsel had the obligation to know the implication of this filing and had the obligation to file an affidavit pursuant to MRCP 56(f) if he believed he needed discovery to respond to the motions. This requirement is mandatory and the failure to use this procedural tool precludes Plaintiffs from claiming that the trial court erred in not permitting discovery prior to ruling on the motions. *MST, Inc. v. Miss. Chemical Corp.*, 610 So.2d 299, 304-305 (Miss. 1992). In addition, during the November 3, 2006 hearing, Plaintiffs failed to ask the Court for leave to present more evidence or to conduct discovery. These failures also amount to a waiver of any objection to the trial court proceeding on the motions for summary judgment. *Koestler v. Mississippi College*, 749 So.2d 1122, 1125 (Miss. App. 1999); *Russell v. Williford*, 907 So.2d 362, 369 (Miss. App. 2004).

Plaintiffs contend they did not get adequate notice that the trial court would treat the motions to dismiss as motions for summary judgment. (R. 161) This position is not supported by the record. First, it was the Plaintiffs' act on October 31, 2006 of serving their Plaintiffs' Amended Response

to Defendants' Rule 12(b) Motions to Dismiss which had the effect of converting the motions from motions to dismiss to motions for summary judgment. (R. 161) Second, at the hearing on November 3, 2006, the trial court advised all counsel that it was treating the motions to dismiss as motions for summary judgment because the Plaintiffs put an exhibit into evidence. (Tr. 17; RE. 43) Plaintiffs did not object to the trial court's proposed procedure, or ask for additional time to submit evidence, or ask the trial court to defer its ruling pending the receipt of additional evidence. Third, Plaintiffs' counsel clearly thought the record was still open as evidenced by his letter dated November 7, 2006. (SR. Exhibit "G") Fourth, the trial court did not issue its Memorandum Opinion until November 30, 2006, which was 30 days after Plaintiffs' submission of the Plaintiffs' Amended Response to Defendants' Rule 12(b) Motions to Dismiss which converted the motions to dismiss to motions for summary judgment and 27 days after the trial court advised counsel that it was converting the motions to dismiss into motions for summary. (R. 185; RE. 50) At no time during that 27 day period did Plaintiffs submit any competent evidence in opposition to the motions, or file a MRCP 56(f) affidavit claiming they could not present facts essential to justify their opposition to the motions for summary judgment, or ask the trial court for time to conduct discovery, or ask the trial court to defer its ruling pending the receipt of discovery. The Plaintiffs had more than sufficient notice of the motions for summary judgment and simply failed to offer any evidence in opposition to the motions.

B. The Trial Court was Correct in Finding that Plaintiffs Claims were Barred by the Statute of Limitations.

One of the many elements Plaintiffs must prove in this case is that the land in question was worth more than $710 per acre on August 21, 2000, the date the property was sold. This issue is of particular importance in analyzing whether the trial court was correct in holding that the Plaintiffs'

claims were barred by the three year statute of limitations.

There can be no dispute that this case falls under the three year statute of limitations found in Miss. Code Ann. § 15-1-49. As pointed out by the trial court in its Memorandum Opinion, the statute of limitations begins to run on a claim for fraudulent inducement upon the completion of the sale induced by the fraud. (R. 189; RE. 54) This includes sales of real property. *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934). *Dunn* was recently cited with approval in *Stephens v. Equitable Life Assurance Society the United States*, 850 So. 2d 78, 82 (Miss. 2003).

In the present case, the land transaction was completed on August 21, 2000 at the price of $710 per acre. The three year statute of limitations began to run on that date. Plaintiffs' claim against the Pittman Defendants was barred three years later on August 21, 2003. Plaintiffs' did not file their Complaint against the Pittman Defendants until April 8, 2005. (R. 3; RE. 8) There is no question that the Complaint is time-barred unless for some reason the limitation period was tolled.

In order for the limitations period to be tolled, the Plaintiffs must prove that "... (1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed on their part to discover it." 850 So.2d at 84. See also *Russell v. Williford*, 907 So. 2d 362, 365 (Miss. App. 2004) citing *In re Catfish Antitrust Litigation*, 826 F.Supp. 1019, 1031 (N.D. Miss. 1993), "... plaintiffs need not have actual knowledge of the facts before the duty of due diligence arises; rather, knowledge of certain facts which are 'calculated to excite inquiry' give rise to the duty to inquire."

The issue in the present case is whether the Plaintiffs received a fair price for the property. There is no allegation that the Pittman Defendants tried to conceal the price paid for the property. In fact, Plaintiffs knew the amount being paid for the property ($710 per acre) on August 21, 2000.

No one tried to hide that fact from them. There is no evidence in the record that the property was worth more than $710 per acre. To the contrary, the only evidence in the record establishes that the property was worth $500 per acre at the time of the sale. (R. 194; RE. 59)

Plaintiffs have also failed to come forward with any evidence of "due diligence" on their part. There is no evidence of any attempt by the Plaintiffs to determine the fair market value of the property between August 21, 2000 and August 21, 2003. Significantly, Plaintiffs have provided no evidence that the property was worth more than $710 per acre at the time of sale or even now. This conduct can hardly be described as rising to the level of "due diligence".

IV. CONCLUSION

The trial court was correct in granting summary judgment in favor of the Pittman Defendants on both the statute of limitations and the substantive claims in the Complaint. The summary judgments should be affirmed by this Court.

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CERTIFICATE

A true copy of the foregoing Brief for Appellees, Crymes G. Pittman, individually, d/b/a Pittman, Germany, Roberts & Welsh, L.L.P., has been mailed, postage prepaid, to the Honorable Bobby B. DeLaughter, Circuit Court Judge, Seventh Judicial District, Post Office Box 327, Jackson, Mississippi 39205-0327; to the Honorable W. Terrell Stubbs, Post Office Box 157, Mendenhall, Mississippi 39114-0157; to the Honorable S. Wayne Easterling, Post Office Box 1471, Hattiesburg, MS 39403-1471; and the Honorable G. David Garner, Post Office Box 789, Raleigh, Mississippi 39153-0789, on this 17th day of January, 2008.

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