COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-TS-01189

GUY "PHILP" RUFF, JR. **APPELLANT**

v.

THE ESTATE OF GUY P. RUFF, SR., MYRA EASON RUFF, IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF GUY P. RUFF, SR., MARGARET ANNE RUFF CARGO, IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF GUY P. RUFF, SR., and DAVID CLIFTON RUFF, IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF GUY P. RUFF, SR. **APPELLEES**

ON APPEAL FROM THE CHANCERY COURT OF BENTON COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEES

(ORAL ARGUMENT NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

1. Guy "Philp" Ruff, Jr., Appellant;
2. Edwin H. Priest, Attorney of Record for Appellant;
3. Myra Eason Ruff, Executrix of the Estate of George P. Ruff, Sr., Appellee;
4. Margaret Anne Ruff Cargo, Executrix of the Estate of George P. Ruff, Sr., Appellee;
5. David Clifton Ruff, Executor of the Estate of George P. Ruff, Sr., Appellee, and Co-manager of Big Oaks, LLC;
6. Stephan Land McDavid, Attorney of Record for Appellees.
7. R. Neville Webb, Attorney of Record for Appellees below.

SO CERTIFIED, this the 21st day of February, 2008.

STEPHAN LAND MCDAVID, MSB#[redacted]
Attorney of Record for Appellees

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STATEMENT OF THE ISSUES

1. Did the chancellor abuse his discretion in denying injunctive relief to Plaintiff/Appellant, Guy "Phil" Ruff, Jr. ("Phil Ruff"), against the Estate of Guy P. Ruff, Sr. et al. (the "Estate")?

The chancellor did not issue an opinion and made no findings of fact, and Appellant did not appeal any action taken by the chancellor during the trial on the merits. However, the Appellant does assert two additional errors by claiming that the chancellor made implicit findings: (1) that the Estate had the legal right to payments from Big Oaks Farm, LLC ("Big Oaks") made under an assignment from Phil to the Estate, and (2) that payments that Big Oaks withheld from Phil due to the assignment, should not be counted as payments under a Chancery Court Order. The chancellor did not make either of these findings, even implicitly, and they were not required to support his holding. The only finding required to deny the injunction was whether Phil's asserted unilateral mistake would excuse his failure to perform under a prior Chancery Court Order.

STATEMENT OF THE CASE

NATURE OF THE CASE: Phil seeks injunctive relief from his failure to properly make payments under a Chancery Court order, and the resulting actions of the Estate undertaken pursuant to the Consent Orders, in particular the filing of a deed in lieu of forclosure.

COURSE OF THE PROCEEDINGS: Phil filed his Motion for Preliminary and Mandatory Injunction, Temporary Restraining Order and for Permanent and Mandatory Injunction on January 19, 2007, in the Chancery Court of Benton County, Mississippi (R. at 1). The lower court filed Plaintiff/Appellant's motion as cause number 07-0009. A trial was held on June 18, 2007, and a transcript was made thereof (Tr. 1 *et seq.*).

DISPOSITION IN TRIAL COURT: On June 18, 2007, the trial court entered a written order denying Phil's Motion for Preliminary and Mandatory Injunction, Temporary Restraining Order and for Permanent and Mandatory Injunction and set the supercedes bond in the amount of $285,000 (R. at 80). The lower court did not issue a memorandum to accompany its written order and made no oral findings of fact at the conclusion of the hearing.

STATEMENT OF THE FACTS

Phil Ruff borrowed money from his parents[1] and executed two promissory notes in exchange for a loan to complete the development of his Benton County farm. (Tr. Exhibits at 25-26.) Phil failed to make any payments under the promissory notes and was in default on May 22, 2002, when Guy P. Ruff, Sr. filed his Complaint in the Chancery Court of Benton County seeking a judgment and equitable relief. (Tr. Exhibits at 20.) Guy Ruff, Sr. passed on, and his estate ("the Estate") then moved for and was granted a Default Judgment, and subsequently an Equitable Lien was imposed by Order of the Benton County Chancery Court, dated March 28, 2003. (R. at 47-52.) The Estate set foreclosure on February 5, 2004, and Phil filed bankruptcy on February 4, 2004.

A. 2004 Bankruptcy Agreed Order

The Estate and Phil settled the bankruptcy case with a Consent Order dated August 26, 2004, (the "2004 Bankruptcy Order") where Phil agreed to pay $16,500.00 each quarter to the Estate. Phil also agreed to and entered into an assignment to the Estate of any disbursements due to Phil from Big Oaks; however, the assignment would not be affective unless Phil defaulted under his obligation under the Order to pay quarterly. (R. at 53-61.)

Phil did default, and counsel for the Estate sent Phil and Big Oaks notice of default and assignment on June 22, 2005, and July 19, 2005, respectively. (R. at 62-65.) After the default notices in 2005, Big Oaks suspended any distribution to Phil but did **not** pay these funds to the Estate. (R. at 78-79.) Despite the claims in Phil's Appellant Brief that the Estate received funds due to Phil, this is in fact not true and was not supported by the evidence at trial.[2]

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[1] In order to lend Phil the money, his parents had to take a loan themselves. Following his father's death, Phil's mother has been left saddled with the debt. (*See* Tr. 22:25-23:7.)

[2] See the discussion in Part III of the Argument, below.

Following the letters requesting assignment, Phil never asked Big Oaks to make the payments to him or to the Estate, and never sought reassignment of the funds back to Phil. (Tr. 46-47). Phil was clearly aware that distributions were being made from Big Oaks because Phil received distributions intended for his children, which would have, but did not, include his own distributions. (Tr. 46-47).

B. The Chancery Court Agreed Settlement Order

Due to Phils' default under the 2004 Bankruptcy Agreed Order, the Estate again began execution on the farm, and on October 26, 2005, Phil filed a Chancery Court Motion for Preliminary Injunction to stop foreclosure. (R. at 66-74.) The Estate and Phil reached another settlement in the Chancery Court as set forth in the Consent Order dated February 1, 2006 (the "2006 Chancery Order"). (Tr. Exhibits at 2-4.)

The 2006 Chancery Order required that Phil make payment of $2,000 on or before the fifth day of each month **and** to make each payment directly to Stephan McDavid, the attorney for the Estate. (Tr. Exhibits at 2.) The Consent Order provided that if Phil failed to pay Stephan McDavid by the fifth day, on the sixth day the Estate could file the escrowed deed in lieu of foreclosure covering the farm property. (Tr. Exhibits at 2-3.)

The 2006 Chancery Order expressly provided that indeed "Except as specifically stated herein, . . . all obligations under the . . . Consent Order of the Bankruptcy Court remain in full force and effect. Nothing in this Order shall be deemed to otherwise modify the obligations of the parties." (Tr. Exhibits at 4.)

Phil made proper payment, on time and to Stephan McDavid, each month from March 2006 through and including November 2006. However, Phil failed to make any payment to Stephan McDavid in December 2006, and has made no payment since. The Estate learned that a senior lienholder on the farm was attempting to foreclose at the end of December. Therefore, on

December 22, 2006, the Estate filed the deed in lieu of foreclosure and paid the senior lienholder current to prevent foreclosure.

C. Present Chancery Court Order Denying Injunction

After the deed in lieu of foreclosure was filed and after the senior lienholder was paid by the Estate, Phil filed this Chancery Court action on January 19, 2007. (R. at 1-5.) Phil asserted in his motion that his performance under the Chancery Consent Order was excused because he mistakenly believed that payment was coming from a third party—Big Oaks:

> 11. That during the course of 2006, the limited liability company, Big Oaks, LLC, authorized A unit disbursements. Despite the disbursements, no monies were ever forwarded to the Movant. As a result, the Movant **reasonably ascertained** that the disbursement(s) had been applied toward his indebtedness with the Respondent Estate of Guy P. Ruff, Sr.

(R. at 3 (emphasis added).)

The Estate argued that his mistake was not reasonable and should not excuse his failure to perform. The Chancery Court agreed and denied the Motion in a written order, without findings of fact or a memorandum opinion. (R. at 80.)

At trial, the Chancery Court ruled:

> THE COURT: Mr. Priest [Attorney for Phil], your argument, you made a good argument, but here's the problem. Mr. Ruff has not lived up to any of his obligations on this loan from the very beginning. His father had to take him to court and get an equitable lien, he got that, and then he ran to Bankruptcy Court, and then he stopped at that, and then -- then went into court to -- in, what, 2002? (...)
>
> And now he's back before the court again today. He's lived up to none of it. He's even behind on the Federal Land Bank. If it was just the simple fact of a $2,000 payment in November and that was it, I think you would have some merit. You say, [y]es, it was an oversight. But the truth of the matter is he did not have the money, he didn't have the money to pay the Bank of Holly Springs, that debt was due in September. He didn't have the money to pay the Federal Land Bank, that debt is due now. I'm going to deny your motion. I think that's the only fair thing to do. And I'm going to allow the deed in lieu.

(R. at 63:12-64:7.)

The Court did not make any findings with regard to the argument under the (legality or enforceability of the) Bankruptcy Court Order of 2005.

SUMMARY OF THE ARGUMENT

Phil was well aware that his payments from Big Oaks had been suspended in 2005 when he failed for the second time to live up to his obligations to repay his father and mother. It was under the Bankruptcy Order and Assignment that Phil executed in 2005 that his payments were suspended. When Phil later entered into the 2006 Chancery Court Consent Order and agreed to pay $2000 a month to Stephan McDavid, he was well aware that his interest in Big Oaks had already been assigned and was suspended. In his 2007 Motion for An Injunction, he ask the chancellor to excuse his "mistake" in that he claims he thought suspended payments from Big Oaks somehow paid his $2000 obligation to Stephan McDavid. The chancellor, after hearing the evidence and testimony from witnesses found that Phil's asserted unilateral mistake was not reasonable and denied the motion.

Despite Phil's argument that the chancellor found that the Estate had the right to these payments and such payments cannot be considered payment of the $2000 due, the chancellor made no such findings. The only findings that the chancellor implicitly made was that Phil did not present sufficient evidence to excuse his mistake. Such a finding by the Court after considering all the evidence and testimony is not an abuse of discretion, and Phil cannot point to any abuse.

ARGUMENT

STANDARD OF REVIEW

This Court "will not disturb the factual findings of a chancellor when supported by substantial evidence unless the Court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." *Chalk v. Lentz*, 744 So. 2d 789, 791 (Miss. Ct. App. 1998) (quoting *Cummings v. Benderman*, 681 So. 2d 97, 100 (Miss.1996)).

I. THE CHANCELLOR WAS WITHIN HIS DISCRETION TO DENY INJUNCTIVE RELIEF

On appeal, Phil argues that the chancellor abused his discretion by not permitting Phil to avoid his obligations because of an asserted "unilateral mistake." Phil advances the argument that if he was able to make a prima facie case, the chancellor was **required** to grant injunctive relief.[3] Putting aside the dubious claim of mistake, it is apparent that Phil fundamentally misunderstands Mississippi law on unilateral mistake. The chancellor is not required to issue an injunction if he finds that a unilateral mistake occurred, even if some injustice to one party will occur. As Phil cites *Rotenberry v. Hooker*: "equity will interfere, **in its discretion**, in order to prevent **intolerable** injustice." (Br. of Appellant 15 (quoting *Rotenberry v. Hooker*, 864 So.2d 266, 271 (Miss. 2003)).) Therefore, the chancellor still retains the discretion to grant or deny an injunction, even if the evidence presented might have been sufficient to *permit* the chancellor to grant relief, which it was not.

The true question for this appeal is whether chancellor abused his discretion in finding that Phil had not suffered a "fundamental injustice," when for the third time Phil defaulted on his third promise to repay a debt to his parents. The Court noted:

[3] *See* Br. of Appellant 19 ("All four prongs set forth in *Rotenberry* are met and supported by [substantial evidence]. Therefore, the ruling of the lower court should be reversed . . . .").

> Mr. Priest, your argument, you made a good argument, but here's the problem. Mr. Ruff has not lived up to any of his obligations on this loan from the very beginning. His father had to take him to court and get an equitable lien, he got that, and then he ran to Bankruptcy Court, and then he stopped at that, and then -- then went into court to -- in, what, 2002?
> (...)
> And now he's back before the court again today. He's lived up to none of it. He's even behind on the Federal Land Bank. If it was just the simple fact of a $2,000 payment in November and that was it, I think you would have some merit. You say, [y]es, it was an oversight. But the truth of the matter is he did not have the money, he didn't have the money to pay the Bank of Holly Springs, that debt was due in September. He didn't have the money to pay the Federal Land Bank, that debt is due now. I'm going to deny your motion. I think that's the only fair thing to do. And I'm going to allow the deed in lieu.

(R. at 63:12-64:7.)

An abuse of discretion is not merely reaching a different result than the one that the appellant asked for; where the chancellor's decision is not manifestly wrong, clearly erroneous or unsupported by substantial credible evidence it is not an abuse of discretion, and [the reviewing court] is therefore obligated to affirm it." *Collins by Smith v. McMurry*, 539 So. 2d 127, 129-30 (Miss. 1989).

The chancellor, who has overseen much of the more than five years of protracted litigation in this matter, clearly found that Phil had not suffered an injustice and did not deserve equitable relief.[4] There was substantial evidence to support this conclusion, including: that Phil was represented by competent counsel when agreed to the orders he violated "by mistake" (Tr. Exhibits at 4, 11); that his case for excuse as a unilateral mistake was insufficient, or very weak; that this was not Phil's first, or even his second default on his obligations; that Phil had other obligations, and was in default to other creditors (*see, e.g.*, Tr. 39:18-40:6); that Phil's farm was not generating income, and Phil's income prospects were insufficient to pay his debts (*see, e.g.*, Tr. 30:20-34:22, 63:12-64:7); that the Estate and its dependents, including Phil's elderly mother, were suffering hardship as a result of his continued defaults and resort to persistent, expensive

[4] *See, e.g.*, Tr. 42:22-43:27, 57:10-11, 63:12-64:7.

litigation to avoid taking responsibility (*see* Tr. 22:21-23:6); that the Estate has continued to act in good faith; and that Phil's actions, even if pursuant to a mistake, were unreasonable under the circumstances (*see* Tr. 42:22-43:13).

This Court cannot and should not step into the lower court's shoes to second-guess the chancellor's decision. The exercise of discretion is not an abuse of discretion. This issue is without merit.

II. PHIL'S ISSUES ON APPEAL ARE IMPROPER

Phil argues two issues on appeal that are not proper—that the chancellor made implicit findings: (1) that the Estate had the legal right to payments from Big Oaks made under an assignment from Phil to the Estate under the 2005 Bankruptcy Order, and (2) that payments which Big Oaks withheld from Phil under the 2005 assignment, but did not pay to the Estate, should not be counted as payments on under the 2006 Chancery Consent Order. The chancellor did not make either finding or ruling.

These issues are not proper on appeal for two reasons.[5] First, the chancellor did not issue a written opinion and made no findings of fact on these issues. These asserted "findings" are not required in order for the chancellor to have denied the motion for an injunction based on unilateral mistake. Because the chancellor could have based his Order on a number of factual findings, and not exclusively these two asserted by Phil, this Court should not review on appeal issues not determined below. "With respect to issues of fact where the chancellor made no specific finding, [a reviewing court is] required by our prior decisions and by sound institutional considerations to proceed on the assumption that the chancellor resolved all such fact issues in favor of appellee." *Cotton v. McConnell*, 435 So. 2d 683 (Miss. 1983).

[5] Furthermore, this Court is not obligated to address any issues for which the appellant cites no supporting authority. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993).

Second, in the court below, the chancellor was not asked to make a finding on the legality of the assignment of Big Oaks payments, and was not asked to make a finding that the withholding of payments by Big Oaks was considered payment of Phil's obligation under the 2006 Chancery Court Consent Order. These issues were not issues on which Phil sought a ruling from the lower court, and are therefore improper on appeal. *Alexander v. Daniel*, 904 So. 2d 172, 183 (Miss. 2005).

1. There were no findings by the chancellor upholding the assignment

The Plaintiff's Motion only asked for an injunction requiring the Estate to rescind its Deed in Lieu of Foreclosure and refrain from interfering with Phil's providing for his livestock. (R. at 4.) The Appellant's theory of the case was that Phil should be excused from that obligation because of a unilateral mistake that a payment due, but unpaid, from Big Oaks, somehow fulfilled his obligation to pay $2,000 to Stephan McDavid by the 5th day of December. (*See* R. at 3 ("[Phil] reasonably ascertained that the disbursement(s) had been applied toward his indebtedness . . . .").)

Phil never asked the chancellor to consider the issue of whether the Estate had the right to "intercept" the disbursements from Big Oaks. Contrary to the assertions of the Appellant's Brief, the lower court, while it may have expressed an opinion on the matter (*see* Tr. 13:4-7, 59:13-28)[6] did not expressly find one way or the other. Nor did the lower court, as Phil may assert, necessarily have to make this finding implicitly, because it is simply irrelevant to the issue of unilateral mistake. The issue of who is entitled to the disbursements is a separate and distinct issue, one that was simply not presented to the lower court for decision.

[6] In fact, on request of counsel for the Estate, the chancellor stated, "Well, that's not a part of the pleadings." (Tr. 59:21-22.) The trial court then noted, "That the assignment is still in effect as far as the Court is concerned." (Tr. 59:27-28.)

"[Reviewing courts] need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review." *Alexander v. Daniel*, 904 So. 2d 172, 183 (Miss. 2005). Furthermore, "A trial court cannot be put in error on a matter which was not put to it for decision." *Taylor v. State*, 744 So. 2d 306, 316 (Miss. Ct. App. 1999). Phil may not now raise this issue on appeal.[7]

2. There was no finding by the chancellor that Big Oaks' suspension under the assignment was not payment of the 2006 Chancery Order obligation.

Phil never asked the chancellor to consider the issue of whether the disbursements withheld by Big Oaks could actually serve as $2000 monthly payments under the terms of the 2006 Chancery Order. Again, the scope of the original pleading and the trial was to decide Phil's claim for equitable relief based on unilateral mistake. The chancellor correctly pointed out that if Phil wanted to contest the assignment (or attempted assignment/withholding) of the disbursements, he should do so a different and distinct action. (*See* Tr. 42:22-25.)

Since no decision was made by the lower court and the question was outside the scope of the trial, this Court should not consider it now.

III. IN THE ALTERNATIVE, PHIL'S ISSUES ON APPEAL ARE WITHOUT MERIT

Again, the Estate would bring to this Court's attention that it did not "intercept" the disbursements, and that it in fact never received the disbursements. Phil simply assumes that the disbursements assigned to the Estate were actually paid by Big Oaks to the Estate. However, this is not the case. The Appellant's Brief apparently relies on this exchange from trial to assert that the Estate received Phil's disbursements:

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[7] Alternatively, this Court may dismiss the second and third issues raised on appeal as procedurally barred because the order (*see* R. at 80) from which appeal was taken (*see* R. at 81) did not address these issues. *Allen v. Nat'l R.R. Passenger Corp.*, 934 So. 2d 1006, 1015 (Miss. 2006).

Q. And the fact of the matter is, that disbursement was made in November, correct?
A. First part of November.
Q. The very first part, correct?
A. I show a deposit to the estate on **behalf of the estate** around November the 7th, November the 8th, something like that.

(Tr. 15:5-11 (emphasis added).)

David Ruff testified that he knew *when* the disbursements were made because the Estate had received a disbursement *on behalf of the estate*, but David Ruff did not testify that the Estate received Phil's disbursement. Phil was well aware that the Estate denied having received the disbursements prior to trial,[8] but no evidence whatsoever was presented at trial indicating that the Estate ever received Phil's disbursements. In fact, the Estate produced an affidavit from the President of Big Oaks which stated that Big Oaks was holding Phil's disbursements—not paying them to the Estate. (R. at 78-79.)[9]

Phil's Appellant Brief argues that his default under the 2004 Bankruptcy Order, and the assignment of his payments from Big Oaks to the Estate, was "effectively canceled" by the 2006 Chancery Order. However, the 2006 order *expressly* stated that all obligations it did not specifically address would remain in effect:

9. Except as specifically stated herein, the Note and Deed of Trust, and all obligations under the same and the Consent Order of the Bankruptcy Court remain in full force and effect. Nothing in this order shall be deemed to otherwise modify any other obligations of the parties.

(R. at 77.)

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[8] *See* R. at 31 (Defendant's Supplemental Brief in Opposition to Motion for Injunction ¶ 13) ("Big Oaks has not paid Phil any A Unit income since 2005 and has also never paid these funds to The Estate."). It was also made abundantly clear at trial that the Estate did not concede and continued to deny this allegation. (*see* Tr. 46:11-48:21.)

[9] Also pertinent to this issue is that no proof was put forward at trial that Big Oaks is a closely held limited liability company. It is also unsupported in the record that Big Oaks or the Estate were acting as agents of David Ruff, so as to make him a "principal" of either, in any capacity in his dealings with Phil. This Court might dismiss these issues as barred because the facts upon which they rely are not supported by the record. *Taylor v. State*, 744 So. 2d 306, 316 (Miss. Ct. App. 1999).

Having agreed to this 2006 order, Phil may not now argue that his disbursements from Big Oaks should not be assigned to the Estate or should be counted as payments under the 2006 Consent Order. Furthermore, the fact that Phil took *no* action to recover these disbursements,[10] either before or after the 2006 Order, evidences an understanding that any Big Oaks payments to the Estate are not effected by the 2006 Consent Order.

Consent Orders or Judgments have been held by the Mississippi Supreme Court to be the equivalent of "judgments rendered after litigation" which are "binding and conclusive" and operate as res judicata and estoppel. *Guthrie v. Guthrie*, 102 So. 2d 381, 383 (Miss. 1958). Consent Orders/Judgments are "in the nature of a contract" and "should be construed as a written contract." *Id.* Unless fraud, mutual mistake or collusion can be proved, the consent order is "binding and conclusive upon the parties and those in privity with them." *Id.* Further, "a consent judgment or decree is res judicata to the same extent as if entered after contest." *Id.*

Phil was bound by the 2004 Bankruptcy Order and the 2006 Chancery orders to which he agreed. He could not argue otherwise now or at trial, and if the chancellor relied on such a finding, he was not in error.

[10] Phil also took no action to investigate whether the disbursements were being paid to the Estate, which they were not.

CONCLUSION

The chancellor was well within his discretion in finding that Phil suffered no injustice after dragging his parents through three defaults and five years of litigation. Phil can cite to no errors of fact or law in reaching that decision, and his assignments of error are without merit. Therefore, the Order of the Chancery Court of Benton County denying injunctive relief should be affirmed.

Respectfully submitted, this the 21th day of February, 2008.

Stephan Land McDavid, MSB #[redacted]
Attorney for Appellees

CERTIFICATE OF FILING AND SERVICE

I, Stephen Land McDavid, attorney for Appellees, The Estate of Guy P. Ruff, Sr, *et al.*, certify that I have this day filed this Brief of Appellees with the Court of Appeals of Mississippi, and have served a copy of the same by U.S. Mail, postage prepaid, to the following:

Honorable V. Glenn Alderson
Benton County Chancery Court Judge
P.O. Drawer 70
Oxford, Mississippi 38655-0070
Trial Court Judge

Edwin H. Priest, Esq.
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Attorney of Record for Appellant

This the 24th day of February, 2008.

Stephan Land McDavid, MSB #[redacted]
Attorney for Appellees