

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case No. 2007-CA-01664

BORDMAN HUMPHREY, deceased, by and through
THE ESTATE OF BORDMAN HUMPHREY

APPELLANT

VERSUS

JEANETTE HUMHREY SMITH, Deceased, *et al.*

APPELLEES

APPEAL FROM THE CHANCERY COURT OF
PEARL RIVER COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

BRUCE AND ELAINE RAWLS

ORAL ARGUMENT NOT REQUESTED

JOHN D. SMALLWOOD, MSB [REDACTED]
TUCKER BUCHANAN, P.A.
Post Office Box 4326
Laurel, MS 39441

LARRY O. NORRIS, MSB# [REDACTED]
Larry O. Norris, PA
P.O. Box 8
Hattiesburg, MS 39403-0008

ATTORNEYS FOR APPELLEES' BRUCE AND ELAINE RAWLS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case No. 2007-CA-01664

BORDMAN HUMPHREY, deceased, by and through
THE ESTATE OF BORDMAN HUMPHREY

APPELLANT

VERSUS


JEANETTE HUMHREY SMITH, Deceased, *et al.*

APPELLEES

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 Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Bordman Humphrey, deceased; the Estate of Bordman Humphrey; and Nadine Stevens, Heir and Administratrix of the Estate of Bordman Humphrey, Appellants;
2. William Pettey, trial attorney for Appellants and Victor Ignatiev, appeal attorney for the Appellants;
3. Bruce and Elaine Rawls, Appellees
4. John D. Smallwood and Larry O. Norris, Esq., Attorneys for Rawls Appellees;
5. Jeanette Humphrey Smith, deceased, the Estate of Jeanette Humphrey Smith and William E. Smith, Executor of the Estate of Jeanette Humphrey Smith, Appellees;
6. Joe A. Herrin, Appellee.



JOHN D. SMALLWOOD
Attorney for Rawls Appellees

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	1
RE-STATEMENT OF ISSUES	2
RE-STATEMENT OF THE CASE	3
(i) Course of Proceedings and Disposition in the Court Below	3
(ii) Re-Statement of Facts	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Buelow v. Glidewell</i> 757 So. 2d 216 (Miss. 2000).....	7
<i>Century 21 v. Corson</i> 612 So. 2d 359 (Miss. 1992)	7
<i>Ewing v. Ewing,</i> 749 So. 2d 223 (COA 1999)	8
<i>Murphy v. Murphy</i> 631 So. 2d 812 (Miss. 1994)	8
<i>R.B.S. v. T.M.S.</i> 765 So. 2d 616 (COA 2000)	8
<i>Sanders v. Riverboat Corp.</i> 913 So. 2d 351 (COA 2005)	7
<i>Stewart v. Merchants</i> 700 So. 2d 255 (Miss. 1997)	8
 OTHER SOURCES	
Mississippi Rules of Civil Procedure, Rule 41(b)	7

RE-STATEMENT OF ISSUES

1. Did the trial court commit reversible error in determining that the Estate of Bordman Humphrey failed to meet its burden of proof in showing undue influence alleged against Jeanette Humphrey Smith.

2. Did the trial court commit reversible error in determining that the Estate of Bordman Humphrey failed to meet its burden of proof in showing that at the time of the execution of certain Warranty Deeds, Bordman Humphrey was suffering from a lack of testamentary capacity.

RE-STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

The Estate of Bordman Humphrey ["the Estate"] provides its interpretation of the Court of Appeals March 16, 2004 decision in *Bordman Humphrey I*. The decision of the Court of Appeals in *Bordman Humphrey I* speaks for itself, thus the Rawls will not delve into further interpretation.

The Estate's recitation of the proceedings after *Bordman Humphrey I* requires clarification. Since the Court of Appeals reversed and remanded the case in *Bordman Humphrey I*, there have been two hearings in this case. The first was on December 6, 2006, which was a hearing, as directed by the Court of Appeals on remand, to determine whether Bordman Humphrey was competent on September 17, 1997 when he executed the Rule 41(b) Voluntary Dismissal. After a hearing, the Chancellor entered an Order in which he found "the dismissal was not executed freely by Humphrey with the requisite mental state under the circumstances." (R. 57-58).

The second hearing was the trial held on August 16, 2007. The Estate states that it was not a full trial on the merits. This statement is perplexing. After the Pre-Trial Motions to Substitute Parties and Dismiss claims related to Ruby Humphrey were disposed of by Orders (R. 83 & 84)¹, the parties proceeded to trial. The court heard testimony from all witnesses called by the Estate. The Estate introduced numerous

¹ Neither Order has been appealed by any party.

documents into evidence. The Rawls, being the only Defendants present, were able to cross-examine each witness called by the Estate. After the Estate presented all evidence it had, the Rawls made a Motion to Dismiss. Juxtaposed to the contention of the Estate in Appellant's Brief, this Motion was based upon the Estate's failure to meet its burden of proof at trial. After oral argument by counsel, the Court rendered its bench opinion dismissing the Third Amended Complaint and entered its Final Judgment on August 21, 2007 (R. at 85-86).

On September 20, 2007, Nadine Stevens, Executrix for the Estate of Bordman C. Humphrey ["Ms. Stevens"] filed a Notice of Appeal (R. at 89). Five days later, Ms. Stevens filed a Motion for Findings of Fact and Conclusions of Law (R. at 91). Ms. Stevens never brought her Motion before the Court.

(ii) *Re-Statement of Facts*

At the time of trial, Bordman Humphrey ["Bordman"] and his daughter and defendant Jeanette Humphrey Smith ["Ms. Smith"] were deceased. The Estate called four (4) witnesses at trial. The Estate called the original attorney for Ms. Smith, namely, Kevin R. Roberts; Ms. Stevens herself; Herman A. Barber, Jr, Ms. Stevens' son; and Homer Lewis, Ms. Stevens' uncle.

The "facts" cited by the Estate in the Appellant's Brief are more than are needed to understand the issues. The facts germane to the issues in this appeal and elicited at trial

are straight forward.

On March 27, 1992, Bordman executed two Warranty Deeds transferring certain real property located in Pearl River, Mississippi to his daughter, Ms. Smith. Both Deeds were prepared personally by another daughter, Ms. Stevens, and duly notarized by a Notary Public (Tr. at 116-118; Trial Ex. 2 & 3). Neither Deed contained any language indicating that Bordman was reserving a life estate.

On October 5, 1992, Bordman executed a Power of Attorney appointing Ms. Stevens as his attorney in fact (Trial Ex. 1). As with the Warranty Deeds, the Power of Attorney was prepared by Ms. Stevens and notarized by a Notary Public (Tr. at 114-115). On or before September 10, 1993, Bordman met with his original attorney, Sam Cooper, and signed the original complaint filed in this matter (Tr. at 113-114, 120). Thereafter, in January 1994, Bordman assisted his attorney in preparing and signed responses to discovery in this matter (Tr. at 122-123). On May 23, 1994, after the issue of Bordman's competency had been raised, the Court appointed Guardian Ad Litem, Hon. Erik Lowrey, advised the Court by letter opinion that Bordman "is a capable, able litigant who has a firm grasp of the issues before this Court." (R. at 93).

Neither Ms. Stevens nor any other family members sought to establish a Conservatorship for Bordman until a Judgment Appointing Conservatrix was entered on November 13, 1997 (Tr. at 119-120). On March 4, 1999, the Third Amended Complaint was filed herein which included defendant innocent third party purchasers, including Joe

A. Herrin and Bruce and Elaine Rawls ["the Rawls").

SUMMARY OF THE ARGUMENT

At the trial of this matter, the Estate had the burden of proof to establish that when the Warranty Deeds at issue were executed, Bordman lacked testamentary capacity and that Ms. Smith imposed undue influence over Bordman. No witness presented by the Estate could establish Bordman's state of mind when he signed the Deeds. His actions in the next year also indicated that he had testamentary capacity. The trial court was likewise not convinced that Ms. Smith was guilty of undue influence over Bordman when he signed the Deeds, especially considering that Ms. Stevens personally prepared the Deeds.

The Court heard from each witness whom testified. The learned Chancellor was in the best position to evaluate the veracity and testimony of the witnesses. Ms. Stevens has an obvious financial stake. Other than Ms. Smith's original attorney testifying, the other two witnesses are related to Ms. Stevens. The testimony of the witnesses amounted to conjecture and speculation. The Estate failed to meet its burden of proof and the Court dismissed the Complaint.

ARGUMENT

STANDARD OF REVIEW

At the conclusion of the Estate's case-in-chief at trial, the Rawls made their Motion to Dismiss based "on the ground that upon the facts and the law the plaintiff has shown no right to relief." MRCP Rule 41(b). "In considering a motion to dismiss, the judge should consider "the evidence fairly, as distinguished from in the light most favorable to the plaintiff," and the judge should dismiss the case if it would find for the defendant. *Stewart v. Merchants*, 700 So. 2d 255, 258-259 (Miss. 1997), citing, *Century 21 Deep S. Properties, LTD. v. Corson*, 612 So. 2d 359, 369 (Miss. 1992); see also *Sanders v. Riverboat Corp.*, 913 So. 2d 351 (COA 2005).

"The court must deny a motion to dismiss only if the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case." *Stewart* at 259. "Unlike the standard of review for a motion for a directed verdict, a motion to dismiss in a non-jury case requires the trial court to consider the evidence fairly and to give it such weight and credibility as the trial judge finds is appropriate." *Buelow v. Glidewell*, 757 So. 2d 216, 220 (Miss. 2000). "The motion should be denied if the evidence viewed in that light and left un rebutted would entitle the plaintiff to judgment." *Id.* "On the other hand, the motion should be granted if the plaintiff has failed to prove one or more essential elements of his claim or if the quality of the proof offered is insufficient to sustain the plaintiff's burden of proof." *Id.*

* "This Court applies the substantial evidence/manifest error standards to an appeal of a grant or denial of a motion to dismiss pursuant to M.R.C.P. 41(b)." *Stewart* at 259.

In applying this standard our Courts maintain that "[t]he chancellor sits as fact-finder and his conclusions regarding witness credibility and what weight and worth to assign to the testimony of the various witnesses are entitled to substantial deference.

R.B.S. v. T.M.S., 765 So. 2d 616, 619 (COA 2000); *Ewing v. Ewing*, 749 So. 2d 223 (COA 1999). "Only if, for reasons that we find persuasive, we are convinced that the chancellor was manifestly wrong or clearly erroneous in his findings may we intercede." *R.B.S. v. T.M.S.*, 765 So. 2d 616, 619 (COA 2000); *Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994)

1. The Estate of Bordman Humphrey failed to meet its burden of proof in showing undue influence alleged against Jeanette Humphrey Smith.

The Estate maintains that "Bordman brought enough evidence to create the presumption" to meet its burden of proof. The Estate maintains that the testimony of the witnesses presented proved that in March of 1992, Bordman was mentally and physically weak and unable to manage his affairs. The facts, supported by documents and cross-examination testimony of the witnesses contradict the Estate's contentions herein and support the learned Chancellor's decision to dismiss the 3rd Amended Complaint.

Bordman executed the Warranty Deeds at issue in the presence of Ms. Stevens, Ms. Smith and a Notary Public (Tr. at 116-118; Trial Ex. 2 & 3). Regardless of Ms.

Stevens testimony as to the reason for executing the Deeds, neither contained any language which indicated anything other than a complete transfer of real property by warranty deed. Seven months later, Bordman executed the Power of Attorney again before Ms. Stevens and a Notary Public (Trial Ex. 1). As with the Warranty Deeds, the Power of Attorney was prepared by Ms. Stevens (Tr. at 114-115).

Nearly one year later, Bordman executed the original complaint filed in this matter (Tr. at 113-114, 120). Thereafter, in January 1994, Bordman assisted his attorney in preparing and signing responses to discovery in this matter (Tr. at 122-123). On May 23, 1994, the Court appointed Guardian Ad Litem, opined that Bordman was competent. (R. at 93). It was not until 1997 that anyone sought to open a Conservatorship for Bordman. (Tr. at 119-120).

After considering these documents and these facts, the trial court made a determination that viewing the evidence fairly, the Estate failed to prove that Ms. Smith was guilty of undue influence. In addition, the learned Chancellor after hearing from all of the Estate's witnesses and weighing their testimony and credibility, came to the same conclusion.

2. The Estate of Bordman Humphrey failed to meet its burden of proof in showing that at the time of the execution of certain Warranty Deeds, Bordman Humphrey was suffering from a lack of testamentary capacity.

The Estate maintains that "the only testimony adduced at trial was that Bordman suffered a complete mental and physical breakdown at the beginning of 1992." The key

element here is "testimony". This is the Estate's sole basis used to support this portion of the appeal.

The Court heard and carefully considered the "testimony" of Ms. Stevens, Mr. Barker, and Mr. Lewis. The learned Chancellor was in the best position to weigh the credibility of each witness. A careful review of the Transcript will reveal to the reader, that none of them could truthfully state whether in March 1992 Bordman had testamentary capacity. All "testimony" was general and speculative and could not be pinned to a specific time frame.

Regardless of the testimony, the cold hard documents from this time period speak loudly to his mental capacity. As shown hereinabove from March 1992 through May 1994, Bordman executed documents before Notaries Public, he filed a complaint, he assisted and signed discovery documents and a Guardian Ad Litem considered him capable to assist in this case.

After considering these documents and these facts, the trial court made a determination that viewing the evidence fairly, the Estate failed to prove that Ms. Smith was guilty of undue influence. In addition, the learned Chancellor after hearing from all of the Estate's witnesses and weighing their testimony and credibility, came to the same conclusion.

CONCLUSION

For the reasons stated above, the Rawls respectfully request that the Court affirm the judgment of the trial court in all respects.

Respectfully submitted:



JOHN D. SMALLWOOD

Attorney for Appellees – Bruce and Elaine Rawls

JOHN D. SMALLWOOD, MSB# [REDACTED]
TUCKER BUCHANAN, P.A.

Post Office Box 4326

Laurel, MS 39441

T: 601-649-8000

LARRY O. NORRIS, MSB# [REDACTED]

Larry O. Norris, PA

P.O. Box 8

Hattiesburg, MS 39403-0008

T: 601-545-2011

CERTIFICATION OF SERVICE

I hereby certify that I served a copy of the foregoing Brief of Appellees on all parties to this matter by first class mailing to the following:

Honorable James H.C. Thomas
Chancellor
PO Box 807
Hattiesburg, MS 39401

Alexander Ignatiev, Esq.
206 Thompson Street
Hattiesburg, MS 39401
Fax: 601-914-5662
Attorney for Appellant

Joe A. Herrin
39 Richburg Road
Purvis, MS 39475
Appellee

William E. Smith
Executor for Estate of Jeanette Humphrey Smith
2375 East Lucas
Beaumont, TX 77703
Appellee

This the 18th day of June, 2008.



JOHN D. SMALLWOOD