In The COURT Of APPEALS

Of

The STATE Of MISSISSIPPI

Cause No. 2007-CP-02081

WAYMON B. TATUM and HARLD E. TATUM,

APPELLANTS,

VS.

ESTATE OF ELDRIDGE V. TATUM, DECEASED,

APPELLEE.

BRIEF OF THE APPELLEE

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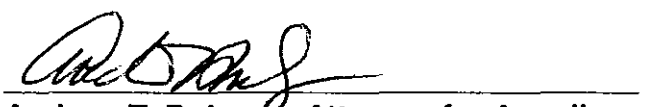
CERTIFICATE OF INTERESTED PARTIES
WAYMON B. TATUM, ET AL. VS.
ESTATE OF ELDRIDGE V. TATUM, DECEASED

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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Helen A. Wells, heir of Robert A. Tatum;
2. Mary C. Alexander, heir of Robert A. Tatum;
3. Stenson Tatum, heir of Robert A. Tatum;
4. Robert E. Tatum, heir of Robert A. Tatum;
5. Lawrence Tatum, heir of Robert A. Tatum;
6. Charles E. Tatum, heir of Robert A. Tatum; and
7. Tonia Edmond (Tonia Edmond is the sole surviving child of Edwin V. Tatum, a son of Robert A. Tatum, who is deceased.)

The above named individuals are the heirs at law of Robert A. Tatum who will own the property that was the subject of this litigation pending the outcome.



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B. Exercise of reasonable diligence

Whether an interested party or their issue have failed to exercise "reasonable diligence" in discovering "concealed fraud" as required by Section 91-7-23 of the Mississippi Code of 1972, as amended, when the heirs at law made no claim of ownership in land for more than forty (40) years after the death of testator, and and the issue of the interested parties have not attempted to claim ownership for more than twenty-five (25) years after the death of all interested parties.

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Whether the Chancellor properly granted Appellee's Motion for Summary Judgment on the issue of concealed fraud when Appellants presented no evidence that the will was forged, or that the alleged forger sought to concealed the existence of the will.

II. STATEMENT OF THE CASE

The will of Eldridge V. Tatum was admitted to probate in Tunica County, Mississippi on October 2, 1967, over forty (40) years ago. The clerk, acting under the provisions of Section 1248 of the Mississippi Code of 1942, now, Section 9-5-141 of the Mississippi Code of 1972, as amended, entered and order for probate; and the Chancellor on November 28, 1967, entered an order approving the actions by the clerk

in vacation as authorized by Section 1248 of the Mississippi Code of 1942, now, Section 9-5-151 of the Mississippi Code of 1972, as amended. In all of these years no one contested the will nor questioned these judicial proceedings that were a matter of public record in Tunica County where the deceased owned land. And now, after all these years, ignoring the statute of limitations, an attack is mounted against the will and these proceedings by individuals who have no standing to do so, knowing that the key witnesses are all dead.

The Last Will and Testament of Eldridge V. Tatum clearly devised all property of Eldridge V. Tatum to his son, Robert A. Tatum. This case involves the ownership of the South Half (S ½) of the South Half (S ½) of the Northeast Quarter (NE 1/4) of Section Sixteen and the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section Sixteen (16) in Township Three (3) South, Range Ten (10) West, Tunica County, Mississippi. The will was properly witnessed and duly admitted to probate. As noted by the final order that is the subject of this appeal, the original will was and remains on file in the Chancery Clerk's office of Tunica County. It was examined by all parties and the Court at the hearing.

In 2004 Robert A. Tatum's heirs sought to deed a parcel from the above described property, so that one of the heirs could build a home on the property. To satisfy a requirement of a title insurance company with regard to having title insurance issued, a motion was filed to appoint Helen A. Wells as Executrix of the Estate of Eldridge V. Tatum, so that she could then move forward with the routine matter of simply closing the estate. At this point, a challenge was made by the Appellee's cousins requesting that the Will be set aside based on a theory of concealed fraud, and asking that the estate of Eldridge V. Tatum be administered as if he had died intestate.

In response to the challengers petition, the Chancellor ordered that a date for trial be set on the limited issue of whether a "concealed fraud" as contemplated by Section 91-7-23 of the Mississippi Code of 1972, as amended, was perpetrated. After the hearing on the issue of concealed fraud, the Chancellor entered and order granting the Appellee's Motion for Summary Judgment on September 4, 2007.

October 17, 2007 the Chancellor entered Judgment Approving Final Report of Administrator and Petition for Discharge in the Estate of Eldridge V. Tatum. The Judgment appointed the Appellee, Ms. Helen A. Wells, Administrator of the estate which consisted of the property located in Tunica County which is the subject of this dispute. The Judgment held that the all the formal requirements for probate had been met and distributed the property to the heirs at law of Robert A. Tatum as the sole beneficiary under the will.

Also on October 17, 2007, the Chancellor entered Final Judgment Approving Final Report of Administratrix and Petition for Discharge in the Estate of Robert A. Tatum. The Judgment appointed Appellee as the Administrator. Subsequent to a hearing and publication of a summons to the unknown heirs at law of Robert A. Tatum the Chancellor determined the heirs at law of Robert A. Tatum to be as follows: Helen A. Wells, Mary C. Alexander, Stenson Tatum, Robert E. Tatum, Lawrence Tatum, Charles E. Tatum, and Tonia Edmond. The Chancellor found that Robert A. Tatum died intestate with an estate that consisted of real property located in Tunica County, Mississippi. The Judgment held that the all the formal requirements for probate had been met. The order instructed Ms. Wells as Administratrix to distribute the property to the heirs at law of Robert A. Tatum as a requirement for her discharge.

This appeal, by only two (2) of the litigants below, is from an Order of the

Chancery Court of Tunica County, dated September 4, 2007, granting Helen A. Wells Motion for Summary Judgment which held that the issues raised by Waymon B. Tatum, *et al* were without merit.

III. SUMMARY OF THE ARGUMENT

A. Appellants are not "parties interested" as defined by Section 91-7-23 of the Mississippi Code of 1972, as amended, and the relevant precedent. As a result, Appellants lack standing to contest the will of Eldridge V. Tatum. The term "parties interested" under the statute has been interpreted by the Mississippi Supreme Court to mean an individual with a direct pecuniary interest determined at the time the will is entered into probate. For this reason, the interested parties are an exclusive class that is determined on the date the will is entered into probate by the clerk. Thus, the statute confers standing only to this class of individuals and no others.

Here, that group includes the heirs at law of the testator, the five children of Eldridge V. Tatum who were living on October 2, 1967. The two Appellants are the grandchildren of Eldridge V. Tatum. Their father, John Tatum (who died over 25 years ago), was the proper party to have timely challenged the Will. Not a single one of the Appellants or any of the litigants below had a direct pecuniary interest on October 2, 1967 when the will was accepted by the clerk for probate more than forty (40) years ago. Thus, Appellants lack standing to contest the will, because the statute does not confer standing upon the issue of the heirs at law, nor do the cases interpreting statute.

B. Neither the Appellants nor the heirs at law of the testator have exercised reasonable diligence to investigate the public records that have been on file in this matter at the Tunica County Courthouse for more than forty (40) years. Had Appellants been under the belief that their father shared an interest in the property, as alleged, they

have failed exercise "reasonable diligence" as required by Section 91-7-23 of the Mississippi Code of 1972, as amended. Having "slumbered on their rights" for more than forty (40) years with notice the testator's ownership of property in Tunica County Mississippi, Appellants now ask the Court to void their Grandfather's will and redistribute the estate. Moreover, upon the death of the Appellants father more than twenty-five (25) ago, none of the property subject to this litigation passed under Appellants father's estate. At this point, Appellants had actual notice that their father did not have colorable title. Even after these fact were know, the Appellants failed to assert a claim to the subject property. Thus, Appellants failure to exercise reasonable diligence to discover the alleged concealed fraud with no credible explanation for their long and prejudicial delay bars the Appellant's claims.

C. Appellants have failed to establish the original fraud by introducing any evidence that the will of Eldridge V. Tatum was forged, or to explain how Robert A. Tatum circumvented our laws governing will formalities, or why the will was then approved by the clerk for probate more than forty (40) years ago. The Appellants admit that publication was made. The Appellants do not contest that the will has been a matter of public record for more than forty (40) years. Although Appellants allege the will is a forgery, no evidence was introduced during the hearing to buttress this claim; Appellants only make statements alleging the forgery, but for good reason this does not make a proof. The Appellants have made sweeping broad, unsupportive statements to "prove" their case such as "All of Eldridge's children knew he was a resident of Illinois when he died." (Brief of Appellants, page 4). The fact is that all of Eldridge's children died more than 15 years ago so that we will not ever really know what they knew other than that they did not challenge the Will.

While Appellants maintain that the Appellee continued to conceal the alleged fraud, the Chancellor found that the evidence presented regarding her concealment was without merit. The Appellants have failed to explain the allegations made or offer any evidence to show why they have been unable to discover the purported fraud until 2004, when they have had constructive notice of the will for more than forty (40) years; and when they have had actual notice since Appellants father died more than twenty-five (25) ago and his purported interest in the property did not pass through his estate. Appellants never questioned who was paying the property taxes. Appellants never questions why they were not receiving their share of the income. Appellants did not produce any income tax returns which would at least show they, themselves, even thought they owned a portion of the property.

IV. ARGUMENT

A. Facts

Eldridge V. Tatum (Eldridge) was the father of six children: (1) John Eldridge Tatum, who died on May 11, 1982; (2) Robert A. Tatum, who died on April, 18, 1969; (3) Dorothy Tatum Anderson, who died on March 24, 1992, (4) James Tatum, deceased, date not specified. (5) Coiteen (sic) Tatum Maxwell, who died on June 28, 1985; and (6) Fred Tatum; who drowned at age 13. Pl.'s Answer to Interrogs. no. 6 & 7.

Of Eldridge's six (6) children four (4) also had children: (1) John Eldridge Tatum's children are Harold Tatum (Appellant), Charles H. Tatum, Waymon Tatum (Appellant), JohnElla Allen, Narlon Tatum, and Fred Tatum who is survived by a son Kenneth Jenkins; (2) Robert A. Tatum's children are Helen Wells, Mary Alexander, Stenson Tatum, and Robert Tatum; (3) Dorothy Tatum Anderson's children are James Anderson and Lorraine Daniels; and (4) James Tatum's children are Audrey Tatum, Keith Tatum,

Brian Tatum, and Christina Tatum. Pl.'s Answer to Interrogs. No. 6 & 7.

On November 3, 1960 Eldridge made a will appointing his son, Robert A. Tatum, as Executor. The will devised all of Eldridge's property that he owned at the time of his death to Robert A. Tatum. At the time of his death, Eldridge V. Tatum owned property in Tunica County, Mississippi located on Highway 304 east of Robinsonville. The property is described as follows: The South Half (S ½) of the South Half (S ½) of the Northeast Quarter (NE 1/4) of Section Sixteen and the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section Sixteen (16) in Township Three (3) South, Range Ten (10) West, Tunica County, Mississippi. Robert was the only child that remained in Tunica County, Mississippi.

Prior to his death, Eldridge conveyed an acre of land from the above described parcel by warranty deed signed on July 17, 1964 to Robert A. Tatum and to Robert's wife, Margret Tatum, in fee simple. Thus, Eldridge's intent was that Robert A. Tatum would enjoy ownership of the entire parcel described above upon Eldridge's death.

Eldridge died on December 14, 1966. Robert A. Tatum, Executor for Eldridge's estate, presented the will to the Chancery Clerk of Tunica County for probate on October 2, 1967, the cause was styled "Matter of the Last Will and Testament of Eldridge V. Tatum, Deceased" and was assigned Cause No. 7575. Robert A. Tatum was appointed Executor of the estate, and took his Oath of Office, a copy of which was filed in the court file on October 2, 1967 and was thereafter issued Letters Testamentary. Also, an Affidavit of Witnesses was filed in this matter, having been signed and sworn to by Martin Garner and Mary Helen Nelson stating that they witnessed Eldridge V. Tatum on November 3, 1960, make, publish, declare, and sign his Last Will and Testament. On November 27, 1967 the Chancellor signed an order approving the acts of the clerk in

vacation. As required by law, a Notice to Creditors was duly published in *The Tunica Times-Democrat*, a newspaper having general circulation in Tunica County, Mississippi. Said Notice to Creditors was published on October 5, 1967, on October 12, 1967, and on October 19, 1967. The original Proof of Publication was filed in this matter on November 7, 1967.

Robert A. Tatum then died on April 18, 1969, eighteen (18) months after the probate of Eldridge V. Tatum's will on October 2, 1967. As a result, Eldridge's estate was never formally closed, because the two (2) year statutory period for contesting the will under Section 505 of the Mississippi Code of 1942, now, Section 91-7-23 of the Mississippi Code of 1972, as amended, had not run. However, since that time the children of Robert A. Tatum paid off the mortgage, leased the property, paid the taxes and generally exercised all incidents of ownership to the complete exclusion of all others including the Appellants.

On April 25, 2006, Helen A. Wells filed a Petition requesting that she be appointed as Executor in the Matter of the Estate of Eldridge V. Tatum, in place and instead of her father (Robert A. Tatum). Ms. Wells's Petition requested further that a final hearing be set such that the estate could be closed, so that the requirements of a title insurance company could be met allowing her brother to build a house.

On August 8, 2006, a document was filed entitled "Answer to Petition for Appointment of Executor and Other Relief and Affirmative Defenses." On August 17, 2006, the "First Amended Answer to Petition for Appointment of Executor and Other Relief and Affirmative Defenses" was filed. The petitions alleged that Robert A. Tatum had forged the will signed by Eldridge V. Tatum and concealed the existence of the will from his other brothers and sisters. The petitions further alleged that the Appellee knew

of the forgery and has continued to conceal the existence of the will. The Chancery Court of Tunica County ordered that a date for trial be set on the limited issue of whether a "concealed fraud" as contemplated by Section 91-7-23 of the Mississippi Code of 1972, as amended, was perpetrated.

The Chancellor reviewed the evidence presented by the attorney for the Appellants. Appellant's attorney stated that the primary evidence of concealed fraud was an Affidavit of Heirship executed on April 28, 1969, recorded in Deed Book P-3, beginning at page 399 of the records of the Chancery Clerk's office of Tunica County, Mississippi. Appellant's attorney stated that this proved Ms. Wells knew of the existence of the Last Will and Testament of Eldridge V. Tatum, but failed to disclose it or the pending estate to the Appellants. Appellant's attorney asserted that an affidavit signed by Ms. Wells, proved that she knew of the existence of her grandfather's will. The court considered the proof of concealed fraud as proffered Appellant's attorney. Appellant's attorney stated that there was no other evidence of concealed fraud that he or his clients could provide to support the allegation that Robert A. Tatum or his heirs perpetrated a concealed fraud on the Appellants or their parents.

The Chancellor ruled that the affidavit, and/or implications arising from it, failed to prove concealed fraud. On September 4, 2007, the Chancellor granted the Appellee's Motion for Summary Judgment. Two of the testator's grandchildren, two of the children of John Eldridge Tatum, Waymon Tatum and Harold Tatum, filed this *pro se* appeal on their own behalf.

B. Law and Analysis

1. The Appellants are not "parties interested" and have no standing to contest the will

The first issue presented for review is whether Section 91-7-23 of the Mississippi Code of 1972, as amended, confers standing on the Appellants allowing them to move under the statute. *See City of Madison v. Bryan*, 763 So. 2d 162, 166 (Miss. 2000) (citing *Williams v. Stevens*, 390 So. 2d 1012, 1014 (Miss. 1980) ("[S]tanding is a jurisdictional issue which may be raised by any party or the Court at any time.")). Section 91-7-23 confers standing on "[a]ny person interested," to object to a will probated in common form within two (2) years from the time the Chancery Clerk enters the will into probate. *Fields v. Harris*, 570 So. 2d 1202, 1203 (Miss. 1990) (holding that the limitation period of Section 91-7-23 begins to run when the clerk accepts the will for probate). Thus, an interested person may have standing if that person acts within the statutory period or under one of the exceptions named in the statute.

The question of who qualifies as "person interested" has been reviewed the by Mississippi Supreme Court. In 1927 the Court settled the issue by reviewing cases from several jurisdictions and found agreement with the Supreme Court of Tennessee which had held:

> No one can question the validity of a will, or any provision in it, unless he stands in such relation to the testator that, in the event the provision is invalid, he will be entitled to an interest in the property involved in the controverted provision.

Cajoleas, v. Attay, 111 So. 359, 361 (Miss. 1927) (citing *Bowers v. McGavock*, 85 S.W. 893, 896 (Tenn. 1905)). The Court held in *Hoskins v. Holmes County Comty. Hosp.*, [t]he words *interested parties* in the statute mean parties who have a *pecuniary interest in the subject of the contest* and under all of the authorities the heirs at law who would take the property of the deceased in the absence of a valid will are interested parties. 99 So. 570, 573 (Miss. 1924) (emphasis added). In *Cajoleas,* the Court also found that a

pecuniary interest must exist at the time the will is entered into probate. 111 So. at 361.

The moving parties in this case were not heirs at law of Eldridge V. Tatum. The heirs at law were Eldridge's children and not his grandchildren. Based upon the response to Interrogatory No. 6, all of the children of Eldridge V. Tatum have been deceased for over fifteen (15) years. Thus, Appellants admitted that their father, John Eldridge Tatum, survived his father, making him the heir at law at the time the will was entered into probate; and based upon the discovery all of the litigants below are issue of an heir at law, and in each case the heir at law was living when the will was entered into probate. Thus, it was the children of Eldridge V. Tatum upon which Section 505 of Mississippi Code of 1942 conferred standing to contest the will. Since the Appellants were not the heirs at law at the time the will was entered into probate, the statute and the case law do not confer standing on Appellants.

Appellants had no direct pecuniary interest in the estate of Eldridge V. Tatum and they are not "persons interested" under the statute, and for this reason the Appellants have no standing to contest the will.

2. The Appellants failed to prove fraud was committed by Robert A. Tatum or that he or the Appellee attempted to conceal the fraud

To prevail on a claim of concealed fraud, first the Appellants must prove that a fraud was perpetrated, and, secondly, that the fraud was concealed. In Mississippi, the elements which must be proved, by clear and convincing evidence, in order to succeed on a fraud claim are as follows:

> The plaintiff must prove (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) its intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) its reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury.

Franklin v. Lovett Eqmt. Inc., 420 So. 2d 1370, 1373 (Miss. 1982).

The Court held that a movant cannot prove a charge of fraud without facts "specifically stated with full definiteness of detail." *Weir v. Jones,* 36 So. 533, 534 (Miss. 1904); *Hamilton v. McGill*, 352 So. 2d 825, 831 (Miss. 1977); *McMahon v. McMahon*, 157 So. 2d 494, 501 (Miss. 1963). Discussing the detail required to meet burden of proof for fraud the *Weir* Court held:

> No general averment of a fraudulent course of business, and no bare statement of a corrupt design on the part of the defendant, is sufficient. The acts themselves which are claimed to be fraudulent must be clearly set out. It must further appear by definite averment in what manner the fraudulent acts wrought injury to the complainant. Fraud cannot be inferred, but must be distinctly charged, and with such fullness and precision that a court of chancery would be enabled to grant full and complete relief and redress should the bill of complaint be taken as confessed. A court of equity, from a mere vague and indefinite statement that a certain course of conduct was in pursuance of a fraudulent scheme, will not infer fraud on the part of the defendant, and consequent injury to the complainant.

Weir, 36 So. at 534.

Notwithstanding, the difficult burden and standard to prove fraud in Mississippi, Appellants are required to prove that the fraud was concealed or "concealed fraud" in order to successfully contest a will after the statutory period has run. Miss. Code Ann. § 91-7-23 (1972). Thus, in *Wilson v. Wilson*, the Mississippi Supreme Court adopted the following definition of concealed fraud:

> [C]oncealed fraud is a case of designed fraud by which a party knowing to whom the right belongs, concealed the circumstances given the right and by means of concealment enable himself to enter and hold.

146 So. 855, 856 (Miss. 1933). In *Stephens v. Equitable Life Assur. Society of U.S.,* the Court held that the movant is under two-fold obligation to prove a fraudulent concealment, and must prove first affirmative conduct that prevented discovery of a

claim, and second, that the movant was diligent in the discovery of the concealment. 850 So. 2d 78, 81 (Miss. 2003) (discussing the application of Miss. Code. Ann. § 15-1-67 titled "Fraudulent Concealment of Claim"). *Stephens* also holds that a cause of action for fraudulent concealment accrues when the person, with reasonable diligence, first knew or first should have known of the fraud. *Id.* at 81.

Further burdening the cause advanced by the Appellants, is the stated rule that in Mississippi concealed fraud cannot be based upon a matter of public record. In *O'Neal Steel, Inc. v. Millette*, O'Neal obtained a judgment lien against Millette and sought to have a conveyance by Millette to his son set aside as a fraud designed to frustrate collection of the judgment. 797 So.2d 869, 872 (Miss. 2001). O'Neal argued that concealed fraud tolled the three (3) statute of limitations applicable under the "catch all" limitations statute, Section 15-1-49 of the Mississippi Code of 1972, as amended. *Id.* at 874-75. However, the Court held that concealed fraud cannot apply to matters of the public record, where with reasonable diligence the fraud could have been discovered during the limitations period:

> [W]here the alleged fraudulent conveyance is recorded, the circumstances are public and the means of finding out the character of the transaction is available. Consequently, the running of the statute of limitations is not prevented.
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> * * * * *
>
> Reasonable diligence requires the plaintiff to, at the very least, check the land records in the county where the judgment debtor resides. Had O'Neal done so, it would have easily discovered the filing of the deed and the transfer of the property at issue. There is no evidence that O'Neal undertook any review of the land records until the filing of the lawsuit.
>
> O'Neal argues that Ted Millette committed perjury and that perjury tolls the statute of limitations. Such a contention lacks merit in this case. O'Neal cites no authority for this position. Additionally, even presuming that perjury did occur, it did not rise to the level of concealed fraud because at the time of the judgment debtor examination, Ted Millette had already duly filed and properly recorded the subject deed. Had O'Neal exercised the

required diligence, it would have discovered the transferred property.

Id. at 875 (internal citations omitted), *see also*, *McMahon v. McMahon*, 157 So. 2d 494, 500 (Miss. 1963) (citing *Thornton v. City of Natchez*, 41 So. 498 (Miss. 1906) (*"Moreover, the rule of concealed fraud cannot apply to those things that were here openly done or which appear of record."*) (emphasis in citied opinion)).

Here, the estate was opened as a matter of public record. The Court reviewed the matter and accepted the will for probate. The Executor at the time went further in complying with the statutory requirements and caused Notice to Creditors to be published in *The Tunica Times*, a newspaper having general circulation in Tunica County. Any one of the movants and/or their parents, at any time, could have traveled to the Tunica County Courthouse and reviewed the public records such that they would have been aware of the situation. Obviously, they knew to do this, as they have now done it, albeit approximately thirty-eight (38) years too late.

Appellants allege that Robert A. Tatum forged his father's will, and, having done so, entered the will into probate in Tunica County after the testator's death in an attempt to conceal the existence of the will from his other siblings who were not included in the will. The Appellants have offered no evidence or testimony that proves their allegations. Regardless, the probate of the will was a matter of public record, and Appellants argument that Robert A. Tatum concealed the will fails because it has been on the public record for over forty (40) years.

The Appellants also allege, Helen A. Wells, continued to conceal the existence of the will that had been entered into probate on October 2, 1967. Appellants allege that Helen A. Wells participation in a presentation given by Dorothy Anderson in July of 1977 proves concealed fraud. During a presentation given during a family reunion, Ms. Wells

made statements to the effect that the property continued to be the home place of the family. Appellants argue that by her statements she meant to conceal the existence of the will and the claim of ownership made by the heirs of Robert A. Tatum. The Chancellor never ruled on this statement, because it was not presented during the hearing. Little more than a kind gesture of goodwill made to a large family that is geographically dispersed, the Appellants ask the Court to construe Ms. Wells statements as an effort to conceal the true ownership of the property. This argument was not made in the hearing before the Chancellor, and should not be considered on Appeal. Mrs. Anderson herself died over 15 years ago and there is no evidence that either Appellant was at the meeting.

3. Neither the heirs at law, nor the Appellants exercised reasonable diligence in attempting to discover the alleged concealed fraud

Section 91-7-23 of the Mississippi Code of 1972, as amended, provides two (2) exceptions that allow an interested party to object to the probate of a will following the running of the two (2) year statutory period of limitations. Relevant here is the exception for concealed fraud: "In case of concealed fraud, the limitation shall commence to run at, and not before, the time when such fraud shall be, or with *reasonable diligence* might have been, first known or discovered." Miss. Code Ann. § 91-7-23 (1972) (as amended) (emphasis added). The requirement for reasonable diligence is placed in the statute to codify long standing equitable principles:

> *Equity aids the vigilant and not those who slumber on their rights.* . . . There is no principle of equity sounder or more conservative of peace and of fair play than this, which requires a party who has a claim to prefer or a right to assert to do so with a conscientious promptnesses *while the witnesses to the transaction are yet available* and before the facts shall have faded from their memories. It is a fact of universal experience that men will generally use diligence to get what rightfully belongs to them, and

> will unreasonably delay only as to false or inequitable claims, --thus in the hope that fortuitous circumstances may improve their otherwise doubtful chances.

V. A. Griffith, *Mississippi Chancery Practice* 43 (2nd ed. 1950) (footnotes omitted) (emphasis added), *see also, Southwest Mississippi Electrical Power Association v. Harragill*, 182 So.2d 220, 223 (1966). The maxim instructs, as does the statute, that when a party fails to be diligent and delays unreasonably to assert his rights, a high burden is placed upon him to avoid injustice to the other party. *Id.*

Appellants brief admits that they themselves held a belief that their father owned an interest in the subject property as early as 1977. Appellants father, John Eldridge Tatum, died on May 11, 1982. When Appellants father died and his estate was administered, title to his property should have passed by devise or by intestate succession. Thus, when no property in Tunica County Mississippi passed through their father's estate, Appellants were put on notice that their expectations of land ownership in Tunica County had been frustrated. Curiously, Appellants made no attempt to inform themselves regarding the ownership of the land at that time.

At the time of their father's death any of the omitted children could have traveled to the Tunica County Courthouse and reviewed the public records as diligence would dictate in questions concerning the ownership of real property. Had one of the children made such an investigation the omitted children would have been made aware situation, just as Appellant, Waymon Tatum, became aware in October of 2004 when he finally traveled to Tunica County and found the will for himself.

The Court will never know for sure what knowledge the children of Eldridge V. Tatum had as they have all been deceased for more than fifteen (15) years, and we will only have the self-serving hearsay testimony of certain grandchildren. No documents or

testamentary records have been produced by Appellants to support the claim of fraud or that a fraud was concealed. In addition, Appellants offer no records or documents showing anyone other than the children of Robert A. Tatum have ever received income and/or paid any expense on the property.

V. CONCLUSION

The probate of the Appellants grandfather's will has been a matter of public record for over forty (40) years, giving notice to all the world of the testator's intended disposition of his estate. The true parties in interest could have moved during the statutory period following the probate of the will, but they took no action, and Appellants have no standing to challenge the validity of the will. The Chancellor considered all of the evidence in the complaint, the answer, and the discovery and ruled in favor of the Appellee. The Appellee ask the court to affirm the Chancellor's decision, because Appellants have made no assertion that the Chancellor was clearly or overtly wrong in granting Appellee's Motion for Summary Judgment.

Respectfully submitted:

Andrew T. Dulaney

Attorney for Appellee

MSB#[redacted]

CERTIFICATE OF SERVICE

I, Andrew T. Dulaney, Attorney for Appellee, do hereby certify that I have this day mailed postage prepaid a true and correct copy of the above and foregoing Brief of Appellee to:

Mr. Waymon B. Tatum
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Cerritos, CA 90703

Hon. Jon M. Barnwell, Chancellor
P.O. Box 1579
Greenwood, MS 38930

This the 14th day of May, 2008.

Andrew T. Dulaney