IN THE SUPREME COURT
OF MISSISSIPPI

ORVILLE LEE JOHNSON, APPELLANT,

v. CASE NO. 2008 -CA-01418

RITA FRANCES BURFORD HERRON,
JOHN CAL BURFORD JR., and
PATRICIA A. GRANTHAM, APPELLEES.

Appeal from the Chancery Court of DeSoto County, Mississippi
Cause No. 05-04-587 (ML)

BRIEF OF THE APPELLANT

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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 Supreme Court may evaluate possible disqualification or recusal.

1. John T. Lamar Jr.: Appellees' counsel, who is the husband of Justice Ann Hannaford Lamar
2. David Slocum: Appellees' counsel
3. Rita Frances Burford Herron: Appellee
4. John Cal Burford Jr.: Appellee
5. Orville Lee Johnson: Appellant
6. James W. Amos: Appellant's counsel
7. Dan Little: Appellant's counsel
8. Sherry P. Thompson: Appellant's counsel

SO SUBMITTED AND CERTIFIED on this 10th day of January 2009.

Sherry P. Thompson, Esquire
Attorney of Record for Appellant

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3. Did the Chancery Court err in awarding summary judgment to Defendants and overruling Plaintiff's Motion to Set Aside, for Reconsideration or Rehearing?

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17. Did the Chancery Court err in applying the equitable doctrine of laches to the facts in this case where the statute of limitations had not run?

STATEMENT OF THE CASE

I. Nature Of The Case, Course Of Proceedings, And Disposition In The Court Below.

This controversy arose due to a dispute regarding (1) who rightfully owns two parcels of real estate located in Mississippi (the "DeSoto Property," consisting of approximately 24 acres, situated in DeSoto County, and the "Tate Property," consisting of approximately 150 acres, situated in Tate County), (2) what ownership interest passed to Plaintiff from the estate of his father, Chester

Johnson ("Chester"), as an omitted spouse and pretermitted heir of the estate his wife, Mary B. Rowland Johnson ("Mary"), and (3) whether Defendant Rita Frances Burford Herron ("Rita") breached her fiduciary duties to Chester by failing to assert and to protect Chester's interests as a pretermitted heir and omitted spouse in his wife Mary's Estate because of Rita's conservatorship over Chester during his incapacity, because of being executrix of Mary's estate during the same time, and because of being a primary beneficiary under the deeds and will. (C.R. pp. 7 - 15.)

This action was filed by Plaintiff Orville Lee Johnson ("O.L.") in the Chancery Court of DeSoto County, Mississippi, on April 5, 2005 against the purported current owners of these properties, Defendants Rita Frances Burford Herron ("Rita"), John Cal Burford Jr. ("John Cal"), and their then grantee Patricia A. Grantham ("Grantham"). In his Amended Petition filed on December 2, 2005, Plaintiff O.L. prayed for relief against the Defendants, and an adjudication from the Court that (1) the deed from Mary dated August 18, 1986, purporting to convey the DeSoto Property to Defendants Rita and John Cal, was void due to Chester's incompetence, and therefore Plaintiff O.L. is the actual sole owner of the DeSoto property as the sole heir of the surviving joint tenant, Chester; (2) in the alternative, if the trial court were to find the 1986 DeSoto County deed valid, then Chester retained his protected homestead and marital rights in one-half of the DeSoto and the Tate Properties because he did not sign the deeds and as an omitted spouse and a pretermitted heir under his wife's will; (3) Defendant Rita, as conservator of Chester Johnson during incapacity, breached her fiduciary duties to Chester in failing to assert and protect his interests in the DeSoto and Tate Properties and the estate of his wife as a pretermitted heir and omitted spouse under Mary's will, her breaches and omissions inuring to Rita's personal benefit as a primary beneficiary and purported owner of said property, and Rita should thus pay Chester's estate for the financial losses she caused him; (4) Defendants Rita and John Cal's deed of sale of the DeSoto Property to Patricia A. Grantham

on January 5, 1998 failed to pass fee simple title, as Rita and John Cal held no, or at most an undivided one-half, ownership interest in this tract, and therefore, Plaintiff should be adjudicated the fee simple owner, or in the alternative the one-half owner of the DeSoto parcel, and Plaintiff is entitled to collect any remaining mortgage indebtedness on the property owed by purported buyer Patricia A. Grantham (now moot); and (5) as an omitted spouse and pretermitted heir under his wife's will, Chester became the one-half owner of all property held by his wife's estate at death, and at Chester's death in 1998, his sole living son, Plaintiff O.L., was vested with ownership rights in these personal and real properties. (C.R. p. 7.)

On August 2, 2007, Defendants moved for summary judgment. (C.R. p. 148.) By its ruling from the bench on February 6, 2008, and written order dated April 9, 2008, Chancellor Mitchell M. Lundy Jr. found in favor of Defendants, granting summary judgment against Plaintiff, and expressly holding that "the Court does hereby render its decision and finds that there is no genuine issue as to a material fact and the motion for summary judgment to dismiss this action shall be granted." (C.R. p. 259.)

Plaintiff timely filed a Motion to Set Aside, for Reconsideration or Rehearing on April 11, 2008, enumerating no less than 22 instances of material facts disputed by the parties, despite the Chancellor's ruling that no issues of material fact existed and other errors. (C.R. p. 274.) By Order filed July 22, 2008, the Chancellor overruled Plaintiff's Motion to Set Aside, for Reconsideration or Rehearing. (C.R. p. 449.)

On August 18, 2008 Plaintiff filed his Notice of Appeal from the lower court's order granting summary judgment and denying Plaintiff's postjudgment Motion to Set Aside, for Reconsideration or Rehearing and from the Court's final Order. (C.R. p. 451.)

II. Statement Of Facts.

Chester and Mary Rowland Johnson were married on August 31, 1958 and lived together as husband and wife until shortly before the death of Mary Rowland Johnson on December 26, 1986. (C.R. p. 9.) It was only a month before Mary's death that Chester was placed in the State Hospital at Whitfield as being a person likely to cause harm to himself or others. (C.R. p. 174.) Chester was adjudicated *non compos mentis* in September of 1987 and remained at the State Hospital until his death on May 23, 1998. (C.R. pp. 140, 178, 179, 182.) The DeSoto Property was purchased shortly before the couple's marriage in Mary's name alone with the intent that this realty was to be their marital residence and homestead. (C.R. pp. 9, 156.) By deed dated May 7, 1963, Mary conveyed the DeSoto property to herself and Chester, to be held in tenancy by the entireties. (C.R. pp. 9, 25, 68.) Chester and Mary had no children of their own, natural or adopted, but Chester had a son from a previous marriage, Plaintiff O.L. Johnson. (C.R. pp. 9, 25, 68.)

On December 28, 1977, Mary executed a Last Will and Testament leaving all of her property to her niece and nephew, Rita and John Cal. The property specifically devised consisted of three rings, personalty, and the Tate Property, in which Mary held an interest through inheritance. This will made no mention of her husband Chester, nor even acknowledged Mary's marital status, clearly leaving Chester as an omitted spouse and pretermitted heir of his wife as an undisputed fact. (C.R. p. 158.)

Prior to 1978, Chester received treatment for colon cancer, developed an alcohol and drug dependency problem, and began to suffer from mental disease and incompetency. (C.R. pp. 10, 161, [Defendants' Exhibit "D", see ln. 23, 24 on pg. 15].)

By deed dated March 30, 1978, Mary and Chester purported to convey the DeSoto Property to Mary alone. Plaintiff contends that this deed was invalid due to Chester's incompetency, while

Defendants aver that this transfer was validly accomplished by Mary, who held power-of-attorney for her incapacitated husband. In fact the power of attorney was not used in the transfer. (C.R. pp. 47, [Defendants' Exhibit "C"], 160.) Despite this purported conveyance, Chester continued to maintain and believe that he was an owner of the DeSoto Property, and the couple continued to live there as their homestead until close to Mary's death. (C.R. p. 223.)

On August 18, 1986, shortly before her death from lung cancer, Mary signed three deeds not signed by her husband purporting to unilaterally deed the DeSoto and Tate Properties to her niece and nephew, Defendants Rita and John Cal. (C.R. pp. 166 - 171.) The DeSoto Property was the homestead of Mary and Chester at the time of the August 18, 1986 conveyance, and none of these deeds of gift even acknowledged the marital status of the grantor Mary. (C.R. pp. 166 - 171.)

Shortly thereafter, at the instigation and direction of Defendant Rita, Chester was involuntarily confined in a convalescent home, from which records show that Chester tried to escape so as to return to his DeSoto homestead. (C.R. p. 172, ¶3.) In November 1986, again at the instigation of Rita, legal proceedings were initiated to have Chester committed to the Mississippi State Hospital by reason of insanity, which was done. (C.R. p. 174.)

Mary died on December 27, 1986. (C.R. p. 175.) Her will was admitted to probate on January 12, 1987. (C.R. pp. 363, 364.) Although Mary's will failed to acknowledge her marital status, thus leaving her institutionalized and incompetent husband Chester as an omitted spouse and a pretermitted heir, no guardian ad litem was appointed to protect Chester's interests in his wife's estate. (*Id.*) Rita, as Conservator of Chester, failed to assert his marital and homestead rights in the probate of Mary's estate. Rita was also serving as the administrator of Mary's estate, which estate remains open to this day. (C.R. pp. 178, 179.)

On or about July 30, 1987, Defendant Rita filed her Petition for Appointment of Conservator

for Chester. Chester was adjudicated to be incompetent, and Rita was nominated conservator of Chester on September 2, 1987, serving in this fiduciary role until Chester's death eleven years later. (*Id.*)

Chester died while still involuntarily confined in the Mississippi State Hospital, on May 23, 1998. (C.R. p. 182.) No will was located upon Chester's death, although Rita and John Cal contended that Chester did have a will devising to them one-half of his estate. The *known* assets of Chester's estate consisted of funds held in a checking account in the sum of $27,659.22, and two insurance policies with benefits totaling $20,454.86. (C.R. p. 390.) O.L. believed that Chester died possessed of interests in realty as well, but Rita and her attorney affirmatively asserted that no such real property interest existed, failing to disclose the deeding of the DeSoto and Tate Properties to Rita and John Cal by Mary in 1986. (C.R. p. 183, 184.) Pursuant to a Settlement Agreement dated August 1, 2001, the estate of Chester was distributed through intestacy, with O.L. as the sole heir receiving 60% of the estate, and the remaining 40% distributed to Rita and John Cal. (C.R. p. 255, 256.) On May 14, 2002, Plaintiff O.L. and Defendant Rita were appointed as co-executors of Chester's estate, as stated in the Order to Distribute Estate Assets dated September 11, 2002. (C.R. p. 409.) The Settlement Agreement did not include unknown assets but was limited to the division of the bank accounts and insurance proceeds, as clearly admitted by C. Gaines Baker, then attorney for Rita and John Cal. (C.R. p. 344 [Deposition of C. Gaines Baker, p. 37, ln. 6 - 15, p. 38.)

After the known assets of Chester's estate had been distributed pursuant to the compromise agreement, Chester's interests in the realty in the DeSoto and Tate Properties were discovered.

On or about January 5, 1998, Defendants Rita and John Cal purportedly conveyed by warranty deed the DeSoto Property to purchaser Patricia A. Grantham ("Patricia"), also a defendant in this action. (C.R. pp. 96, 97, 98.) Patricia then granted a deed of trust in the sum of $172,000 for

this land, payable in 240 amortized payments of $1,438.68, the first mortgage payment coming due on January 15, 1998, with monthly payments continuing until December 15, 2017. (C.R. pp. 99 - 102.) Patricia took bankruptcy and deeded the property back to Rita and John Cal.

SUMMARY OF THE ARGUMENT

As a primary basis for grating summary judgment, the Court found as an undisputed fact that the prior Settlement Agreement between the Plaintiff and Defendants making division of the known bank accounts and two insurance policies and the distribution of the bank accounts and two insurance policies in the Estate of Chester Johnson estopped the Plaintiff from claiming the later discovered real property. This finding was erroneous because the Settlement Agreement and probate documents were limited to only the known assets and contained no other broad language to include unknown assets. O. L. Johnson clearly testified and claimed that the Settlement Agreement and probate documents were limited to the bank accounts and insurance policies. Gaines Baker, the former attorney for Rita and Cal who represented them in the Settlement Agreement and Chester Johnson Estate, testified clearly and unequivocally that it was never the intention to settle claims for real estate or any other assets not specifically listed. Not only was there much disputed evidence, there was almost no basis to justify any finding that the Settlement Agreement and Chester Johnson probate would constitute estoppel. Gaines Baker even specifically testified that "Mrs Rita" had told him there was no real estate in response to an inquiry by Dan Little, attorney for O. L. Johnson.

During the relevant periods of time it was also an undisputed fact that Rita had instigated the commitment of Chester Johnson to the State Hospital and had been appointed as his conservator from September 2, 1987 to his death in the State Hospital on May 23, 1998. In the Chester Johnson estate, Rita served as Co-Administratrix. In the Mary Johnson estate, Rita has served as the only

executrix, which estate is still open and in which no guardian ad litem was ever appointed for Chester Johnson.

It was also an undisputed fact that shortly before Mary's death she gave two deeds without consideration to her niece and nephew, Rita and John Cal, of the DeSoto County (homestead) and Tate County properties which deeds were not signed by Chester and which failed to state the marital status of Mary. On December 28, 1977, Mary made a will giving everything to Rita and John Cal without giving anything to Chester, without mentioning him in any way and without giving the marital status of Mary. Under Mississippi law, the deeds were void and Chester Johnson was a pretermitted heir.

Under Mississippi law, Rita had fiduciary duties as conservator of Chester Johnson from September 2, 1987 to his death and as Co-Administratrix of his estate and as Executrix of Mary's Estate. Rita failed and refused to disclose the real estate which had been deeded to her and her brother and failed to assert and to protect the claims and rights of Chester Johnson, failed to disclose, and failed to step aside from her three different fiduciary positions. Instead, Rita has followed a long, consistent pattern of breaches of her fiduciary duties to the detriment of Chester Johnson and now his only child, O. L. Johnson, for her own personal benefit and the benefit of her brother.

In addition to estoppel, the Court found laches against O. L. when in fact O. L. had no legal claim or standing until his father died in 1998. His action to recover the real property was brought within the ten-year statute of limitation and there is no basis whatsoever for laches against O. L. Johnson.

Based upon the disputed facts, summary judgment should be reversed. Based upon the undisputed facts pertaining to the deeds and will, partial summary judgment should be given to O. L. Johnson holding the deeds to be void and Chester Johnson to be a pretermitted heir entitled to

one-half of his wife's estate.

Because of her egregious breaches of her fiduciary duties and failure and refusal to disclose her personal benefits, the doctrines of estoppel and laches should be applied against Rita.

ARGUMENT

I. IN ITS RULING FROM THE BENCH AND ORDERS GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO SET ASIDE, FOR RECONSIDERATION OR REHEARING, THE COURT COMMITTED REVERSIBLE ERROR BY MAKING MULTIPLE ERRONEOUS FINDINGS OF FACT ON WHICH THE EVIDENCE WAS CLEARLY DISPUTED AND ERRONEOUS CONCLUSIONS OF LAW.

A. Standard Of Review.

The Mississippi Supreme Court employs a *de novo* standard of review in reviewing a lower court's grant of summary judgment. *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997). A motion for summary judgment "challenges the *legal sufficiency* of the claim." *Skelton ex rel. Roden v. Twin County Rural Elec. Ass'n*, 611 So.2d 931, 935 (Miss. 1992) (emphasis added) (citing Miss. R. Civ. P. 56). As a result, summary judgment should only be granted with great caution. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So.2d 790, 794 (Miss. 1995). "All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion." *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss. 1993). "A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the *plaintiff would be unable to prove any facts* to support his claim." *Burton v. Choctaw County*, 95-CA-00071-SCT (¶ 10), 730 So.2d 1, 3 (Miss. 1997).

Importantly, summary judgment cannot be employed to resolve any disputed, material factual issues:

> "A motion for summary judgment is *not a substitute for trial of disputed fact issues*. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried." *Coleman Powermate, Inc. v. Rheem Mfg. Co.*, 880 So.2d 329, 332-33 (Miss. 2004) (emphasis added).

"The evidence is considered in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that reasonably may be drawn therefrom." *James v. Mabus*, 574 So.2d 596, 600 (Miss. 1990). Similarly, when reviewing a lower court's award of summary judgment on appeal, "this Court views all evidence in the light most favorable to the non-movant . . . and will presume that *all evidence in the non-movant's favor is true*." *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 640 (Miss. 1996) (emphasis added).

"Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Carter v. Miss. Dep't of Corrs.*, 860 So.2d 1187, 1190 (Miss. 2003). "If *any triable issues* of fact exist, the lower court's decision to grant summary judgment will be reversed." *Merrimack Mut. Fire Ins. Co. v. McDill*, 674 So.2d 4, 7 (Miss. 1996) (emphasis added).

B. Errors Of Genuine Issues Of Material Fact And Erroneous Conclusions of Law.

1. Whether the Parties Intended That the Settlement Agreement and Petition to Close Chester's Estate Covered Any Assets Unknown at the Time of Execution is Disputed.

The chancery court found that the settlement agreement and Chester's estate was not limited to the known and listed assets but also included the unknown real estate by reason of which O.L. was estopped and precluded. (C.R. p. 264, [Ruling of the Court, p. 4, ln. 20-24].)

It is highly material whether the Settlement Agreement and Petition to Close Chester's Estate

only covered assets known to the parties at the time of the execution of the agreements, so that beneficiary O.L. would be able to assert his interest in any assets discovered following closure of Chester's decedent estate. On this issue the Chancellor stated that "O.L. Johnson joined in Petition to close the Estate, which asserted *all the assets of Chester had been determined* and were being distributed," supporting his legal conclusion that O.L. was thus estopped from changing positions to his benefit by now claiming an interest in probate assets not expressly divided by the Petition to close the estate. (C.R. p. 264, [Ruling of the Court, p. 4, ln. 20-24] (emphasis added).)

The evidence concerning the settlement agreement and this critical finding of the chancery court was clearly disputed. The testimony of Rita's former attorney in the Estate of Chester L. Johnson, C. Gaines Baker, unequivocally stated in deposition as follows in regard to the settlement agreement and estate distribution:

> A. "The only known assets that were - - that stayed at that time, the only proven, the only alleged assets as set out by the petition, all three parties signed the petition saying these are the assets of the estate, okay? That's a question for a Court to decide, if you will. But as far as the clear intent of the parties, it's my understanding and my representation to you and to the Court would be that at the time that this estate was administered, that the only thing that we knew of and the only thing that we were dividing up were these insurance policies. There was never any mention that there might be property to be divided up or whatever. We were dividing up the assets that were known and that were represented to the Court. * * * * No question in my mind, and I don't see how it could be a question in anyone's mind that there was some looming real estate question out there somewhere."
> (C.R. p. 344, [Deposition of C. Gaines Baker, p. 37, ln. 6 - 15, p. 38.)
>
> . . . . .
>
> A. ". . . And their intent was based on the amount that we were dividing up the known amount that we were dividing up. There was no question at that time. There was no question at that time that was brought forth to me in any formal manner of any dispute as to whether or not there was any real estate. My clients, Mrs. Rita, Mr. Burford were dividing up the assets that we knew to be at the time, and that was the monies. It was no question of any real estate. . . . All I can tell is this settlement agreement was formulated and signed off with the understanding and appreciation that the only thing that we were dividing at that juncture were the known assets that - - any real estate was not included in that. We didn't make any contingency about any

real estate.

Q. "And neither side is giving up or releasing any of their rights in regard to any other assets. Is that a fair statement?

A. "As far as releasing rights, there is not a release of any rights anywhere, okay? And I understand what your position is on it. What I'm telling you is these parties, both parties felt at this time that the only assets were - - the intent of both parties were to resolve the assets of the estate, and that's all - - all of the assets of the estate known at the time as it represented to the court." (Emphasis added).
(C.R. pp. 344, 345 , [Deposition of C. Gaines Baker, pg. 40, ln15 -23, pg. 41, ln 13 - 25, pg. 42, ln 1- 4].)

Orville Lee Johnson has always maintained that the *Settlement Agreement* was as to money accounts and insurance only, and did not address real property interests of Chester Johnson's Estate.

Q. "And, Mr. Johnson, you entered into an agreed stipulation and settlement aspect pertaining to your father's estate with John Cal and Rita that's sitting here in the room today?

A. We split a money to count, yes." [*sic*]
(C.R. pp. 402 [*Deposition of Orville Lee Johnson*, pg. 25, ln. 24, 25, pg. 26, ln. 1-3].),

"Request for Admission No. 22: Admit that the Settlement Agreement was a full and final release of any and all claims arising out of and in connection with the Estate of Chester L. Johnson, Deceased, between O. L. Johnson and the Defendants Rita Frances Burford Herron and John Cal Burford, Jr.

"Response: Denied. The Settlement Agreement dealt only with the money accounts and insurance proceeds of Chester L. Johnson, and not any interests in personal or real property."
(C.R. pp. 332, 333.)

No language in the Settlement Agreement supports Defendants' position by reference to unknown assets and the Settlement Agreement itself supports O.L.'s position that the only estate assets distributed were the known assets enumerated therein:

"The following assets belonging to the estate of Chester L. Johnson shall be divided . . to wit:

Money Market Account No. 9008225 and checking account at First

> Security Bank in the amount of $27,659.22 as of February 6, 2001, together with any accrued interest, and the proceeds from Southern Farm Bureau Life Insurance Company policies 45248F and 116659, together with any accrued interest." (C.R. pp.417, 418.)

That only the assets known to the parties at the time of the agreement were to be distributed under the Settlement Agreement is further supported by the Petition for Letters of Administration filed by Rita on February 22, 2002, wherein Rita stated "Petitioner would further show that at this time, the known assets of this estate" are four enumerated insurance and bank accounts. (C.R. pp. 389, 390.)

There is clearly disputed evidence on this critical Finding of Fact and on this basis alone the court should not have granted summary judgment. When C. Gaines Baker, attorney for Rita and John Cal during the probate, testified clearly that the Settlement Agreement and Order to Distribute Assets were limited to the known estate assets, the chancery court was in error to find that there is no disputed evidence that the Settlement Agreement and Order to Distribute Assets covered all assets, known and unknown. The evidence presented through O. L. Johnson and Dan Little was sufficient to create disputed issues of fact, but the testimony of C. Gaines Baker is so strong that it meets the burden of clear and convincing evidence that the Settlement Agreement and Order to Distribute Assets did not include unknown or as yet discovered assets. (C.R. pp. 227 - 232, 426 - 431, [Letters between Plaintiff's Counsel and Defendant's Counsel concerning Estate of Chester Johnson.].)

2. Whether Plaintiff Received a Benefit from the Settlement Agreement Regarding Chester's Estate is Disputed

The chancery court ruled: that "the plaintiff benefitted from . . . his change of position with regard to Chester's Estate" by agreeing to the 60/40% split of the intestate assets, because an after-discovered will granted Plaintiff only 50% of the estate. (C.R. p. 269, [Ruling of the Court p. 9,

ln.17-19].)

This finding is a disputed fact material to the resolution of this action, as the Chancellor supports assertion of estoppel against O.L. on this ground, thereby denying him the ability to advance his ownership claim. O.L. has consistently asserted that the DeSoto and Tate realty was properly part of Mary's estate at her death, as the deeds conveying these properties to Rita and John Cal were void for nonjoinder of the spouse, Chester. (C.R. p. 290, [Plaintiff's Motion to Set Aside, for Reconsideration or Rehearing at 17].) Thus, assuming O.L.'s contention is true, as the Chancery Court must when deciding a motion for summary judgment, then O.L.'s pecuniary interests were in fact harmed by the agreed-upon intestate distribution, as this valuable realty was not distributed to him.

Also, Rita and John Cal did not suffer a detriment in their continued possession of the subject matter real property which was in derogation of the rights of Chester Johnson. Under intestate succession, the Defendants had no rights to the Estate of Chester Johnson. The Order to Distribute Assets (C.R. p. 409.) and the Settlement Agreement ran to the benefit of Rita and John Cal, and to the clear detriment of O. L. With no will to be probated, O. L. as only heir-at-law of Chester was the only person who stood to inherit under Chester's intestacy. While the Court found that the copy of Chester's will, which was not found until 2007 when it showed up at the depositions of Rita and John Cal in the Lamar Law offices, supported the notion that O.L. benefitted from "his change of position with regard to Chester's Estate", unprobated wills have little if any probative value.

> [I]t is the general rule, both under statute and otherwise, that a probated will is admissible in evidence, and that an unprobated will is not receivable into evidence . . . . [A]n unprobated will, under governing statute or otherwise, may not be admissible as evidence affecting title to property, although it may be admissible for purposes other than that of a will. Thus, such an unprobated instrument has been held admissible to show an acknowledgment of liability on the part of the testator, as for services rendered, or to show that one called as a witness against a later will is

> interested, as a devisee under the former will, in having the latter will set aside, and is therefore incompetent. 95 C.J.S. Wills § 579 (1957) (footnotes omitted).

See also, *Robberson v. Burton*, 790 So.2d 226, 228 (Miss. App. 2001) and *Virginia Trust Co. v. Buford,* 86 So. 356, 357 (Miss. 1920).

3. Whether O.L. and Rita, as Coadministrators of Chester's Estate, Were Adverse Parties is Disputed

The chancery court ruled: "The parties were clearly adverse in . . . regards to the assets of the Estate and the respective interest[s] of the beneficiar[ies]." (C.R. p. 269, [Ruling of the Court, p.9, ln. 4-7].)

In applying judicial estoppel against Plaintiff, the Chancellor found that O.L. is barred from now asserting the position, supposedly contrary to the terms of the Settlement Agreement and the Petition to close the estate, that Chester's estate still contains assets yet to be distributed.

However, Plaintiff maintained in the court below that the probate proceedings regarding Chester's estate were in no way adversarial in the legal sense. The court record reveals no such pleading produced by Defendants regarding the estate of Chester L. Johnson. To the contrary, the record clearly shows that the parties cooperated and *agreed* through the 2001 Settlement Agreement how to distribute the estate. (C.R. p. 291.) Once the settlement agreement was reached, the estate and distribution were not contested and adversarial.

a) Error of Law: Judicial estoppel should not be invoked where the position first assumed was taken as result of mistake.

The chancery court ruled: "This Court believes that judicial estoppel precluded Orville Lee Johnson . . . The doctrine of judicial estoppel precludes a person from asserting a position, and benefitting from that position, and then when it becomes more convenient or profitable retreating

from that position later in litigation. . . . The parties were clearly adverse in the regards to the assets of the Estate and the representative interest of the beneficiary." (C.R. p. 268, 269 [Ruling of the Court p. 8, ln.7, 8, 13-19, p. 9, ln. 4-7].)

O. L. Johnson inherited one-half of Mary Rowland Johnson's estate through the Mississippi laws of descent and distribution upon the death of his father Chester Johnson. *See* MCA §91-1-3 (1972). Judicial estoppel contains three essential elements: 1) the parties must have been adversaries in a prior litigation; 2) the parties to the prior litigation must be the same parties in the current litigation; and 3) one party, with full knowledge, asserts a position inconsistent with that taken in the prior litigation.

As co-administrators of Chester's estate, Johnson and Rita were not legally adversarial. There was no will contest, no adjudication to determine heirship nor litigation of any kind in connection with the probate of Chester's estate. O. L. made no claims against Rita and John Cal during the probate of Chester's estate, either in the pleadings or in the settlement agreement. Under equitable doctrines there can be no judicial estoppel unless the parties were in an adversarial position in the prior adjudication. *Thomas v. Bailey*, 375 So.2d 1049 (Miss. 1979). See also *Estate of Blanton*, 824 So.2d 558, 563-564 (Miss. 2002) (where parties never engaged in prior adversarial litigation judicial estoppel inapplicable).

> "It has been held that when the party making the prior statement, which is inconsistent with his position in the present action, has not benefitted by the assertion, the doctrine should not be applied. Finally, the doctrine is inapplicable unless the parties were adverse in the original proceedings" *Thomas* at 1053. (Citation omitted.)

Clearly, the party against whom estoppel is charged must have benefitted from an assertion made in the previous, adversarial, case. "[W]hen the party making the prior [inconsistent] statement, which is inconsistent with his position in the present action, has not benefitted by the assertion, the

doctrine should not be applied." *Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003), quoting *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 265 (Miss. 1999). O. L., as only heir-at-law, did not benefit from an agreement which did not dispose of the real property interests of Chester and split Chester's insurance and bank accounts 60%/40% with Rita and John Cal. "It has been held that when the party making the prior statement, which is inconsistent with his position in the present action, had not benefitted by the assertion, the doctrine should not be applied." *Thomas*, *supra*, at 1053. That benefit ran to Rita and John Cal, as neither of them could inherit from an intestate Chester under the Mississippi laws of descent and distribution, and no will was presented for probate. However, both Rita and John Cal benefitted greatly from omitting to disclose that Chester had been a pretermitted spouse under Mary's will and Mary had deeded by gift her real property to Rita and John Cal prior to her death and without benefit of Chester's joinder.

"[T]here can be no estoppel where the admissions or statements were made through mistake or without full knowledge." *Thomas*, *supra* at 1054. Mississippi law does not allow estoppel to be predicated on declarations touching an interest in property made in ignorance of the declarant's rights. *State v. Gardner*, 112 So.2d 362, 365 (Miss.1959), quoting *Yazoo Lumber Co. v. Clark*, 48 So. 516.

While O. L. had beliefs that his father owned land prior to his death, O. L. did not have "full knowledge" of all the material facts during the probate settlement negotiations. Whatever inquiry O. L. made about his father's interests in property was countered and denied by Rita and her attorney, and they strenuously denied that Chester had any property other than a checking account and insurance policies. "Judicial estoppel should not be invoked where the position first assumed was taken as a result of mistake." *Thomas*, *supra*, at 1053. At the time of the probate of Chester's estate O. L. did not possess full knowledge of the facts concerning his father's property interests,

which Rita knew and concealed from her own attorney. (C.R. p. 336, [Deposition of G. Baker, p.8, ln. 9-10]): "[B]ut at no time was I ever advised by Mrs. Rita that there was any real property."

b) Error of Law: Equitable estoppel was not applicable to the facts before the Chancery Court is Disputed.

The chancery court ruled: "Clearly equitable estoppel is appropriate in this matter." (C.R. p. 271[Ruling of the Court p. 11, ln.6, 7].)

The essential elements of an equitable estoppel are:

> "Conduct and acts, language or silence, amounting to a representation or concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation or silence, or concealment be relied upon, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence." *Chapman v. Chapman*, 473 So. 2d 467, 470 (Miss. 1985).

Estoppel may be asserted where "one has been induced by the conduct of another to do something different from what otherwise would have been done, and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow. * * * The law does not regard estoppels with favor, nor extend them beyond the requirements of the transaction in which they originate." *Turner v. Terry*, 799 So.2d 25, 37 (Miss. 2001). Equitable estoppel is based on fundamental notions of justice and fair play.

> "A party invoking the doctrine of equitable estoppel is also invoking the equity jurisdiction of the court, and he who comes to into equity must come with clean hands. The meaning of this maxim is to declare that no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question had been characterized by wilful inequity." *O'Neill v. O'Neill*, 551 So.2d 228, 233 (Miss. 1989) (internal citations omitted).

To assert the defense of equitable estoppel a party must show (1) that he has changed his position in reliance upon the conduct of another, and (2) that he has suffered detriment caused by his change of his position in reliance upon such conduct. *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss.1984). The Supreme Court explained equitable estoppel as follows:

> "In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done, and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow. But the doctrine of equitable estoppel is not applied except when to refuse it would be inequitable. The law does not regard estoppels with favor, nor extend them beyond the requirements of the transaction in which they originate." *Id.*

In *Birmingham v. Conger*, 222 So.2d 388 (Miss. 1969), a life tenant of stock shares under a will traded the shares for a different stock and retained a fee simple ownership of the new stock. The Court held that the plaintiff remainderman was not equitably estopped to assert his rights to the stock, and stated:

> "We find there is no change in position by appellee [defendant below] except that which was caused by her own acts. Her position has not changed nor has she suffered any detriment or injury in any way whatsoever * * * [her] rights * * * remain the same and she has suffered no injury by the failure of appellant to contest the will of Mr. Birmingham, Sr. or by joining in [defendant's] petition for discharge as executrix." *Birmingham*, at 393.

As with the defendant in *Birmingham*, Rita and John Cal did not change their position except by their own acts. A party asserting the doctrine of equitable estoppel must show that he has changed his position and suffered a detriment caused by the change of position. *Beyer v. Easterling*, 738 So.2d 221, 227 (Miss. 1999). Rita and John Cal suffered no detriment in the probate of Chester's estate.[1] The will being lost, they had no interest in Chester's intestate estate. There was no change in position based on any representation of O. L.; they lost nothing and gained a large portion of Chester's bank account and insurance proceeds. In order to retain the entire interest in the real property, they refused to disclose the void deeds and real estate in the probates of both

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[1] 31 C.J.S. §88: "Mere trouble and expense in bringing suit does not amount to prejudice necessary to invoke estoppel doctrine." citing *Missouri Ins. Guar. Ass'n. v. Wal-Mart Stores, Inc.*, 811 S.W.2d 28 (Mo. App. 1991), compare (C.R. p. 271, Chancery Court's Oral Ruling lines 3-7.).

Mary's and Chester's estates.

During Chester's probate, Rita represented to O.L. and the probate court that Chester's only assets were the proceeds of a checking account and two insurance policies. During the probate there was no controversy, or adjudication, or settlement of O. L.'s right to the real estate at issue. The settlement was as to the enumerated insurance and money accounts. O. L.'s interests in the properties were not included in the probate of Chester's estate, nor did Rita include them in any accounting as Chester's conservator during his incompetency. Having relied on the representations of Rita and John Cal, O. L. Johnson entered into the settlement agreement sharing the intestate estate with the defendants when they had no statutory right to Chester's estate under the Mississippi laws of descent and distribution. Based upon the great weight of the evidence, it is Rita and John Cal who should be estopped.

4. Whether Chester Voluntarily Abandoned His Homestead at the DeSoto Property is Disputed.

The chancery court ruled: "Chester voluntarily abandoned his homestead" at the DeSoto County property when he went to the Rosewood facility in Memphis, Tennessee in May of 1986. (C.R. p. 271, [Ruling of the Court, p. 11, ln 10-11].)

The Chancellor found in his Ruling that "Chester voluntarily abandoned his homestead" at the DeSoto County property when he went to the Rosewood facility in Memphis, Tennessee in May of 1986. (C.R. p. 270, [Ruling of the Court, p. 11, ln 10-11.) This fact is material in that if Chester indeed permanently abandoned his DeSoto homestead when he was moved to the convalescent home, then he could not assert statutory homestead rights to this realty.

However, the sworn deposition of Defendant Rita comports with Plaintiff's assertion that Chester's move to this convalescent home was motivated by his wife's concern for his well-being and

his deteriorating mental state, and not his intent to voluntarily and permanently abandon his homestead. Rita testified: "He needed to have care and Mary knew she couldn't do it." (C.R. p. 379, [Deposition of Rita Herron, p. 31, ln 1, 2.].) Indeed, the very Affidavit and Application for Commitment shows that Chester tried multiple times to escape and return home. (C.R. p. 172.) Plaintiff avers that Chester's removal from his homestead from approximately May 1986 until his death in May 1998 was wholly involuntary (as the very word "escape" implies) and never divested him of his statutory right to veto any unilateral transfers of the DeSoto property.

Under MCA §85-3-21 persons over the age of sixty are not deemed to have abandoned their homestead by merely living in another location. "But husband or wife, widower or widow, over sixty (60) years of age, who has been an exemptionist under this section, *shall not be deprived of such exemption because of not residing there.*"

There is no evidence on record that either Mary or Chester abandoned their homestead rights, or abandoned or renounced their marriage in any manner that would destroy their homestead rights. Under MCA §85-3-21 it is immaterial whether Mary or Chester were physically present at the DeSoto property when the deeds of gift were executed to Mary Johnson's niece and nephew, as Mississippi recognized long ago that the sick and elderly may need to be away from their homes for long periods of time due to illness and infirmity. It is immaterial where Mary or Chester died.

Mississippi addressed abandonment of homestead in *Roberts v. Grisham,* 493 So.2d 940 (Miss. 1986). Roberts, a septuagenarian was incarcerated for life upon conviction for murder. The murder victim's family attempted to force the sale of Roberts' homestead in an effort to collect on a civil judgment. The Court discussed MCA §85-3-43 at length, and affirmed that abandonment of homestead is not created by an elderly homesteader's absence where that absence is "temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying it as soon as the

cause of his absence can be removed." The *Roberts* Court revisited the case of *Lindsey v. Holley,* 63 So. 222 (Miss. 1913) which discussed whether a man was deemed to have abandoned his homestead by reason of being incarcerated. After discussing *Lindsey*, the *Roberts* Court reaffirmed the *Lindsey* holding, stating:

> ". . .[I]ncarceration does not constitute abandonment of a homestead. Further more, §85-3-21 clearly states that *a widower over 60 years of age, does not have to reside on the property to maintain eligibility* * * * Under the law as it presently stands, absence occasioned by imprisonment - even a life sentence - does not defeat the claim of homestead." *Roberts* at 942. (Emphasis added).

Chester and Mary were both ill and were both over the age of 60 when they ceased living in their home in DeSoto County in early to mid 1986. Having been born in 1913, Chester, was 73 years of age, while Mary was 64. (C.R. p. 175, 182.) With Mary's diagnosis of cancer, and the necessity of Chester's care in a nursing home due to his increasingly mental instability, the couple's move from DeSoto County does not constitute abandonment of homestead under Mississippi law. On the August 1986 deeds of gift to Rita and John Cal, Jr. Mary gave her address as 7551 State Line Road, Walls, Mississippi, the address of Chester's and Mary's residence in DeSoto County. Additionally, Chester made several attempts to escape from the convalescent homes and to return to his home in Walls, DeSoto County. References to Chester's escape attempts are contained in his commitment papers of November 1986 and September 1987. (C.R. p. 172-174, 178, 179.) Chester's commitment was *involuntary*, and his intent was at all times to return home.

The contested issue of Chester having abandoned his homestead, one side swearing Chester did not abandon his homestead with supporting evidence, and the other side simply swearing that he did, is a dispute of material fact that precludes summary judgment.

5. Whether Rita Intentionally Misled O.L. Regarding the Disposition of the DeSoto Realty is Disputed.

The chancery court ruled: that O.L. Johnson demonstrated a "lack of diligence in ascertaining facts and/or evidence" regarding the existence of the deeds unilaterally made by Mary to Rita and John Cal in 1986, using this fact to support his legal conclusion that O.L. is now estopped from asserting any ownership interest in the DeSoto and Tate properties. (C.R. p. 266 [Ruling of the Court p. 6, ln.13-15].)

Another factual dispute exists regarding whether Rita intentionally misled O.L. in response to his multiple inquiries regarding his deceased father's interest in the DeSoto property. O.L. contends that Rita intentionally misled him regarding his father's interest in the properties so as to protect her individual interest in the parcels. Even Rita's prior attorney, C. Gaines Baker, testified that Rita did not tell him about any real estate. (C.R. pp. 344, [Deposition of C. Gaines Baker, pg. 40, ln15 -23].) This important factual dispute must also be relegated to the trier of fact. (See also paragraph 6 under Proposition II for a more detailed discussion of laches and why laches should not have been applied.)

II. THE CHANCERY COURT COMMITTED FURTHER REVERSIBLE ERROR BY FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED UPON EVIDENCE FAVORABLE TO PLAINTIFF WHICH SHOULD HAVE PRECLUDED SUMMARY JUDGMENT

1. Whether The Deeds of Gift are Presumed Void For Undue Influence And Whether Rita Breached Her Fiduciary Duties are Disputed.

The Chancery court committed error in failing to find that deeds are presumed void for undue influence by Rita and her breach of fiduciary duties as conservator of Chester and administratrix of

Mary's estate and primary beneficiary under the deeds and will.

Where there is a fiduciary or confidential relationship conveyances are presumed void when there is little or no adequate consideration. *Lancaster v. Boyd*, 803 So.2d 1285, 1289 (Miss. App.2002). "This is not because it is certain the transaction was unfair; to the contrary, it is because the Court *cannot be certain it was fair.*" *In Re Estate of McRae*, 522 So.2d 731, 737 (Miss. 1988)(emphasis in original). Mississippi has consistently held that "the law raises a presumption that the beneficiary has exercised undue influence and casts upon the beneficiary the burden of *disproving* undue influence by *clear and convincing evidence*." *Hendricks v. James*, 421 So.2d 1031, 1043 (Miss. 1982)(emphasis in original).

A confidential relationship has been defined as:

> "Whenever there is a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency upon the former, arising from either weakness of the mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character." *Spencer v. Hudspeth*, 950 So.2d 238, 241 (Miss. 2007) See also, *Wright v. Roberts*, 797 So.2d 992, 998 (Miss. 2001).

The Supreme Court clarified this with a list of factors to be considered when deciding if a confidential relationship exists: "(1) whether one person has to be taken care of by another, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains a joint checking account with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between one and the other." *Spencer*, at 241, *In Re Estate of Holmes,* 961 So.2d 674, 680 (Miss. 2007). Not all of these factors must be present in order to find the existence of a confidential relationship. As an example, no power of attorney was described or discussed in the cases of *In Re the Will of Launius*,

507 So.2d 27 (Miss. 1987), *Murry v. Laird*, 446 So.2d 575 (Miss. 1984) or *Hendricks v. James*, *supra.*

Clearly Rita had a confidential fiduciary relationship with her Aunt Mary in 1986. The relationship between Mary and Rita is characterized as close. (C.R. p.374, 377, [Deposition of Rita Herron, p. 11, ln.21, 21, and p. 21, ln. 18-22].) In the spring of 1986, sixty-four year old Mary was diagnosed with cancer and underwent surgery. (C.R. p. 378, [Deposition of Rita Herron, p. 27, ln. 7, 8].) After the surgery Mary was in a weakened state and was cared for by Rita and her family on the Tate County property. (C.R. p. 378, [Deposition of Rita Herron, p. 27, ln. 9 - 15].) Rita and her family provided transportation to medical appointments for Mary. Mary's husband of nearly thirty years was in a convalescent home, and could no longer be a companion, confidant or aid to her. A confidential fiduciary relationship need not be a legal relationship, but may be moral, domestic or personal and is applicable to *inter vivos* transactions. *Murry v. Laird*, 446 So.2d 575, 578 (Miss. 1984).

Mary conveyed her interest in the DeSoto and Tate County properties to her niece and nephew "For and In Consideration of the love and affection that I have for the grantee[s]" and nothing more. While the deeds were notarized by a DeSoto County notary, Mary was living at the Tate County property at the time of the execution of the deeds. (C.R. p. 378, [Deposition of Rita Herron, p. 27, ln. 8 - 14].) (C.R. pp. 166 - 171, [Deeds].) Rita and John Cal were legatees under Mary's will, (C.R. pp. 158, 159.) but the Deeds of Gift were executed just four months before Mary's death due to cancer. There is no evidence that Mary received any independent advice in the deeding of the properties. *Murry v. Laird, supra* at 579. (Independent advice means "advice separate and apart from the beneficiary, both in the initiation and execution of the instrument.") Advice and counsel must be rendered by a person who has:

> "(a) knowledge upon which to base advice . . . (b) know of the relationship of the grantor/testator to any beneficiary/grantee and the purpose or reason of an unequal division or distribution to donees/heirs of the same class, (c) the relationship of the non-blood donee and the duration of that relationship; (d) the relationship, or lack of relationship, to kinsmen, (e) knowledge of tax consequences (f) information as to the marital background, age, physical and mental health of a grantor/testator. (g) Inquiry by the advisor into whether the disposition is the free and voluntary act of an independent thinking, strong willed individual or whether the decision is imposed by the dominance of an over-reaching person will help him render better advice. All of these factors will help the advisor learn of antecedent agencies that gave rise to the presumption of undue influence." *Murry v. Laird, id.*

The Court in *Hendricks* looked for advice that was "competent"and "totally disconnected from the grantee, and devoted wholly to the grantor's interest." *Hendricks*, *supra*, at 1044.

Mary was under a great deal of stress at the time with Chester's mental, health, and behavioral problems requiring his placement in convalescent homes from which he repeatedly tried to escape, his violence toward nursing staff, and her own concerns about her impending death from inoperable lung cancer. There was a fiduciary or confidential relationship between Rita and Mary when the deeds of gift were executed. Under these circumstances, when there is little or no adequate consideration, these conveyances are presumed void.

2. Whether the Presumption of Undue Influence was Rebutted by Rita and John Cal is Disputed.

The Chancery court committed error in failing to find that the presumption of undue influence in the *inter vivos* transfer of property was not rebutted by Rita and John Cal.

When examining the facts of a case for the existence of a confidential relationship and the exertion of an undue influence, Mississippi Courts have noted that such evidence is usually:

> "lacking that affirmative and positive character which is claimed to be necessary [for proof]. It follows, from the very nature of the thing, that evidence to show undue influence must be largely, in effect, circumstantial. It is an intangible thing, which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact, universally recognized, that he

> who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, that same precautions if he seeks by cajolery, flattery, or other methods to obtain power and control over the will of another, and direct it improperly to the accomplishment of the purpose which he desires." *Hendricks*, *supra* at 1044.

"When a confidential relationship is found to exist in a situation where an *inter vivos* transfer was made, a presumption of undue influence is established." *Lancaster v. Boyd*, 803 So.2d 1285, 1289 (Miss. 2002). The burden of rebutting this presumption of undue influence is on the part of the grantee. There must be clear and convincing evidence of good faith; that the grantor had full knowledge and deliberation of his actions and the consequences of those actions; and the grantor received the advice of a competent person who was disconnected from the grantee and devoted entirely to the grantor's interest. This last prong may be proved by evidence that the grantor exhibited independent consent and action. *Id.* "Independent advice is but one way independent consent and action may be shown." *In Re Estate of Holmes*, *supra* at 681.

> "The law watches with the greatest jealousy transactions and dealings between persons occupying a fiduciary relationship, in which the person in a position of influence receives some financial benefit. The law will not permit them to stand, unless the circumstances demonstrate the fullest deliberation on the part of the dependant party. In such transactions the law, upon a principle of public policy, to protect against the infirmities of a hasty, precipitate judgment, presumes the existence of undue influence on the part of the dominant party, and such transactions are *prime facie* voidable, unless the dominant party shows by the clearest proof that he took no advantage of the dependant party, and that the latter's action was a result of his own free will, and upon the fullest deliberation." *Hendricks*, *supra* at 1042, 1043.

There is no evidence of deliberation by Mary, nor is there evidence that she obtained independent counsel or advice. A competent advisor would have alerted Mary to the consequences of the deeds of gift within the probate of her estate, how the homestead laws would be implicated, the consequences of her partial intestacy, and the effect on Chester and his estate. *Lancaster, supra* at 1288.

The advice and counsel given to a person in Mary's position must be "meaningful", and independent of the beneficiary of the deeds. The presumption of undue influence can not be rebutted simply by pointing out that there were opportunities to receive advice. "The inquiry is whether the independent counselor did in fact give meaningful advice or counsel." *McRae*, *supra* at 738.

> "In those cases where you admittedly have a confidential relations transfer from a dependent to a dominant party, it seems to me that the ultimate test should be something in the order of the following: Excluding the testimony of the grantee, those acting in the grantee's behalf (such as the attorney), and any others who could have a direct or indirect interest in upholding the transfer (such as grantee's family), is there any other substantial evidence, either from the circumstances, or from a totally disinterested witness from which the court can conclude that the transfer instrument represented the true, untampered, genuine interest of the grantor? If the answer to this question is yes, then it becomes a question of fact whether or not there was undue influence. If the answer is no, then as a matter of law the transfer is voidable." *In Re Estate of Holmes*, *supra* at 681.

Proof of independent counsel was not presented to this Court by Defendants. The presumption of undue influence arising from the confidential relationship between Mary and her niece and nephew was not rebutted, therefore the deeds of gift from Mary to Rita and John Cal are void, leaving the properties properly in Mary's estate upon her death.

3. Whether Joinder in the Deeds was Necessary to Transfer the property is Disputed.

The Chancery court committed error in failing to find that joinder of non-owning spouse was necessary to convey homestead property to any third party.

There must be joinder by the non-owning spouse if a deed is to be "valid or binding."

> "A conveyance, mortgage, deed of trust or other incumbrance upon a homestead exempted from execution shall not be valid or binding unless signed by the spouse of the owner if the owner is married and living with the spouse or by an attorney in fact for the spouse." MCA §89-1-29 (1972).

Chester did not sign the August 1986 deeds attempting to transfer the Tate County and DeSoto

County properties from Mary Johnson to Rita Herron and John Cal Burford, Jr. The 1986 deeds do not even declare Mary's marital status. Under the laws of Mississippi, the deeds are void *ab initio*. *Thornhill v. Caroline Hunt Trust Estate*, 592 So.2d 1150, 1152 (Miss. 1992).

In *Hendry v. Hendry*, 300 So.2d 147 (Miss. 1974), the widow of a deceased grantor sought to remove a cloud upon the title to the land where she and the deceased had lived while he was alive, which property he had purchased prior to the marriage. Much like Defendants' claims against Chester, the widow did not own any interest in the property prior to the death of her spouse. Shortly before his death, the deceased deeded the property to a third party without the signature or knowledge of his spouse. The Mississippi Supreme Court very clearly stated the meaning of MCA §89-1-29 (1972):

> "In order to be valid, the wife must sign her husband's conveyance of homestead property pursuant to the requirements of Mississippi Code Annotated section 89-1-29. Appellees correctly point out that the deceased in this case had not made any declaration or designation of his homestead property in accordance with Mississippi code Annotated section 85-3-25 (1972). Since the deceased had not made any such selection of designation of his homestead, designation is made by law under Mississippi Code Annotated section 85-3-31 (1972)." *Hendry, supra*, at 148).

Mississippi reaffirmed the joinder requirement in *Ward v. Ward*, 517 So. 2d 571 (Miss. 1987), holding that while husband and wife may convey their homestead interests *to one another*, no married person may convey homestead property *to third parties* during the lifetime of their spouse without that spouse joining in the conveyance.

> "Obviously a wife may convey any interest or right she has in the homestead to her husband, however the statutory mandate still applies to any conveyance by the husband to a third party. Our legislature has chosen to place a restriction on the transfer or encumbrance of homestead and therefore, homesteads in Mississippi may not be alienated except in compliance with those restrictions. There can be no operative conveyance or effectual release of the exemption unless the method pointed out by the statute is pursued with strictness and no requirement of the statute may be waived by the husband and wife or by either of them. Chancery will not interfere to give relief where by express law there is a limitation on the power of alienation of the

> homestead and the final relief sought is merely to relieve that limitation. Mississippi has such an express law which prohibits the transfer of homestead property without the signature of both the husband and the wife." *Id.*, at 573.

The *Ward* Court held that it was error to grant summary judgment upon a finding by the court below that one spouse could transfer property without the other spouse joining in that transfer; there can be no operative conveyance or effective release of the homestead exemption unless the method pointed out in Mississippi Code Annotated §85-3-31 is strictly followed. No requirement of MCA §85-3-31 may be waived by the husband and wife or either of them. "Therefore the statute mandates that any conveyance of that homestead estate without the joinder both spouses is invalid. We have consistently held that such a conveyance is null and void 'as to both the husband and the wife.'" *Ward, supra* at 572.

While the homestead interest is grounded in an assignable interest in land, actual ownership need be held by only one spouse. The statutes contain no mandate that ownership be in fee simple, or joint tenancy or tenancy in common or any other type of joint ownership. Most reported cases discussing the joinder requirement for the conveyance of homestead property deal with property wholly owned by one spouse who conveys or encumbers that property without the signature of the non-owning spouse.

> "The lower court erred in dismissing Cynthia's request to set aside the deed which conveyed their homestead to Cecil Courtney. *While it is true Cynthia herself did not own the land, or have an ownership interest in the land, she did have a homestead right or interest in the land.* The Snoddys were married and both lived on the land prior to its conveyance by deed in 1986. Thus, under Mississippi law, the deed conveying the land to Cecil Courtney should have been signed by Cynthia. *Since she did not sign it, the deed, and the conveyance itself, is void.* For this reason, the deed should have been set aside." *Snoddy v. Snoddy*, 791 So.2d 333, 341 (Miss. 2001) (emphasis added).

This ability of a non-owning spouse to prevent conveyance of homestead property by the owning spouse has been referred to as a "veto power". *Kimbrough v. Powell*, 108 So. 498 (Miss.

1926); *Ward v. Ward, supra.*; *Alexander v. Daniel*, 904 So.2d 172 (Miss. 2005). "[T]he wife has a mere veto power on the sale of the husband's homestead and not a property right, subject to bargain and sale. Nevertheless, the statute declares that *the conveyance shall not be valid or binding unless signed by the wife of the owner if he be married* and living with his wife." *Hughes v. Hahn,* 46 So.2d 587, 590 (Miss. 1950) (emphasis added). The chancellor's finding that Chester did not hold title to any interest in the subject matter properties is immaterial to the issue of Chester's non-joinder in the deeds of gift.

In 2005 the Mississippi Supreme Court reaffirmed the necessity of joinder by a non-owning spouse, going so far as to void a tax sale by the state where the property had been sold by one spouse without the joinder of the another, the grantee had not paid property taxes, and property was sold at a tax sale. The Court held that the unilateral conveyance of homestead property by one spouse without the joinder of the non-owning spouse was void. *Alexander v. Daniel*, 904 So.2d 172 (Miss. 2005).

Hendry v. Hendry, supra, not only affirmed the necessity of joiner; the Mississippi Supreme Court also clarified MCA §85-3-31, holding that the State would make the designation of homestead where the property owner had not, and went on further to state that the value of a homestead property and whether or not it was contiguous was "immaterial" to the right to homestead.

> "In order to be valid, the wife must sign her husband's conveyance of homestead property pursuant to the requirements of Mississippi Code Annotated section 89-1-29 (1972). Appellees correctly point out that the deceased in this case had not made any declaration of his homestead property in accordance with Mississippi Code Annotated section 85-3-25 (1972). Since the deceased had not made any such selection of designation of this homestead, *designation is made by law under* Mississippi Code Annotated section 85-3-31 (1972). Land so designated is not required to be of a particular shape or composed of contiguous parcels."
> * * *

> "The record does not show * * * [the] widow of the deceased, had abandoned or in any sense renounced her husband, who without her signature attempted to convey the sixty-eight acre tract so that title would eventually be vested in his relatives, the appellees. * * * [T]here was nothing in the case at bar to indicate that the appellant had any intent to abandon a conjugal relationship with her husband or to abandon the occupancy of the property. *The deed attacked here was signed only by Esmarada Hendry without his wife's knowledge or approval. It described homestead property and is void.*" *Hendry, supra* at 148, 149 (citations omitted, emphasis added).

MCA §85-3-31 (1972) states:

> "The homestead of every citizen entitled to such an exemption who shall not select or who has improperly selected his homestead by declaration, shall be, namely: A tract of land in the form of, first, a square, or second, a parallelogram, if practicable, and composed, if practicable, of contiguous parcels, including the dwelling house * * * and not to exceed one hundred sixty (160) acres in area * * * * "

As affirmed in *Hendry* the Mississippi courts will designate homestead property if no designation has been made. Mary and Chester lived in their home on the DeSoto property for nearly 37 years, ever since their marriage in August of 1959. Chester survived Mary by ten years. To deny him homestead, a place to return to if he had returned to health, is contrary to Mississippi law.

4. Whether As Matter of Law One-Half of Mary's Estate had Vested in Chester As An Omitted Spouse Under Her Will is Disputed.

The Chancery court committed error in not finding that Mary's will omitted her spouse Chester Johnson, and that Chester therefore had, as a matter of law, the right of a pretermitted spouse under Mississippi law, being the right to inherit an undivided one-half interest in her estate, including the DeSoto and Tate County real estate.

Contrary to Defendants' assertions, Mary's estate contained the two subject matter properties because the deeds were void for lack of joinder, and also void under the unrebutted presumption of

undue influence. As Mary's estate contained over 120 acres of real property it was larger than Chester's estate at the time of her death. Being omitted from Mary's will, Chester's interest in one-half of Mary's estate vested in him by operation of law at the moment of Mary's death.

Mississippi protects the property rights of spouses by statute. MCA §91-5-27 states:

> "If the will of the husband or wife shall not make any provision of the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in the case of unsatisfactory provision in the will of the husband or wife for the other of them. In such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory and it had been renounced."

Under Mississippi law in the case of a pretermitted spouse, the will is *automatically renounced by operation of law*, just as though there had been an intentional renunciation by the spouse for an unsatisfactory provision. This has been the law in Mississippi for over 100 years.

The facts in *Caine v. Barnwell*, 120 Miss. 209, 82 So. 65 (Miss. 1919) are similar to the facts in this case. There the Court held that deeds conveying homestead property without joinder are void, and the spouse for whom no provision is made in the decedent's will is entitled to an undivided one-half interest in the estate of the decedent, even where the real property had been conveyed to one of the devisees who would have taken the same tract of land under the decedent's will. In the *Caine* case, the husband *had no property of his own*, and no ownership interest in the real property of his deceased wife. The wife devised her real property to nephews in her will, which omitted her spouse. Later she executed deeds granting the same property described in the will to her nephews *without obtaining the joinder of her husband.* The Supreme Court was clear in stating that the "only infirmity in the deed is the fact that the husband did not sign the conveyance, and the deed being for the exempt homestead is condemned by our statutes." *Caine*, at 66. The Court continued:

> "There is no provision in the will for the surviving husband, and under the averments of the bill section 5087, Code of 1906, section 3375, Hemingway's Code, applies.

> The surviving husband as complainant relies upon his statutory rights, and by an alternative prayer in the bill asks that he be declared and adjudged the owner of an undivided one-half of the property described and sued for. Under the averments of the bill he is entitled to his relief, and for that reason the demurrer was properly overruled." *Id.*, at 68.

Even though the deed gave the same parcel of property to the same persons who were to have inherited it under the decedent's will, the court held that due to the lack of joinder by the non-owning spouse, "Complainant likewise has a right to have the void deed canceled." *Id.*

In *Bullock v. Harper*, 239 So.2d 925 (Miss. 1970), a husband waited 13 months before attempting to renounce the will of his deceased wife. The Supreme Court held that as the deceased wife's will had made no provision for the husband, he would take of the deceased wife's estate as an omitted spouse.

The case of *Tillman v. Williams*, 403 So.2d 880 (Miss. 1981) holds that by operation of law the right of a husband omitted under his wife's will to take his legal share of a deceased wife's estate vests in him at the wife's death without any action on his part. In *Tillman*, the husband and wife did not live in the same home, but there had been no divorce or renunciation or abandonment of the marriage by either the husband or the wife. The Court held:

> "* * * [U]nder Section 91-5-27 the surviving spouse, where no provision is made for him or her in the will of the deceased, is entitled to either a child's share or *if no children, one-half of the deceased spouse's estate*, the same as if 'the will had contained a provision that was unsatisfactory and it had been renounced.' We made this plain in the case of *Bullock v. Harper*, 239 So.2d 925 (Miss. 1970). We reiterated this positive principle in the case of *McBride v. Haynes*, 247 So.2d 129, (Miss. 1971). Again, we stated: 'We are of the opinion that Section 669 (s 91-5-27) specifically relieves the surviving spouse from taking any affirmative action and the law automatically renounces the will.'" *Tillman*, at 881, (emphasis added).

In *McBride v. Haynes*, 247 So.2d 129, (Miss. 1971) a husband who had been omitted from his wife's will died three weeks after the wife. The Court held that the husband's portion of the wife's estate was exercisable by the executor the husband's estate without having to take any

affirmative action to renounce the wife's will.

> "The question is: Does the estate of the deceased husband have the right to share in the estate of the predeceased wife as a matter of law when the wife's will made no provision for the husband and the husband died without taking any affirmative action to claim an interest in the wife's estate? We answer affirmatively . . . Where no provision is made, * * * [Now MCA §91-5-27] provides that 'and in such a case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory, and it had been renounced.' *We hold that the right to take his legal share of his deceased wife's estate vested in [him] as a matter of law, and the right, thus vested, became a part of his estate upon his death.*" *McBride*, at 130, 131, (emphasis added).

MCA §91-5-25 sets out that a husband faced with a will containing unsatisfactory provisions, and where there are *no children of the marriage*, "may renounce the will of his deceased wife under the same circumstances, in the same time and manner, and with the same effect upon his right to share in her estate as herein provided for the widow." The statutory widow's provision or portion under MCA §91-5-25 is for one-half of the real and personal estate of the deceased where the decedent has no children or descendants. Defendants argue that a child's share is appropriate, but this is in conflict with the statutory provisions under §91-5-25 which clearly states that the portion is one-half where there are *no children or descendants*. (C.R. p. 150.) Mary's will completely omitted Chester, therefore, by operation of Mississippi law, without Chester having to make an election nor take any affirmative action whatsoever, one-half, or the widow's portion of the estate, vested in Chester at the very moment of Mary's death.

In *Tomsche v. Fort*, 616 So.2d 322 (Miss. 1993), the Court again explained that the omission of provision for a spouse creates the right to share in the decedent's estate as though there had been an unsatisfactory provision in the will, and:

> "[*f*]*ormal renunciation of the will is not necessary*, although the will shall be treated as though it had been renounced. A pretermitted spouse is entitled to fifty percent (50%) of his deceased spouse's estate when there are no children or descendants of children." *Tomsche.*, at 328, emphasis added.

MCA §91-5-27 makes it unnecessary for an omitted spouse to actually go through the renunciation procedures, and therefore, all the deadlines and other procedural steps contained in MCA §91-5-25 are unnecessary. The omitted spouse takes half of the estate of the deceased spouse by operation of law as explained in *McBride*.

In is undisputed that Mary omitted Chester from her will. By operation of law, Chester was vested in one-half of Mary's estate the moment she died. As the deeds purporting to convey title to the DeSoto and Tate County properties were void *ab initio* for lack of joinder and the presumption of undue influence, those properties were correctly in Mary's estate at her death. Chester's right in the DeSoto and Tate County properties passed to him *outside of probate*, without the necessity of any action on his part, and the court below should have so held.

5. Whether Rita's Dual Positions as Executrix and Chester's Conservator Created a Conflict of Interest for Her is Disputed.

The Chancery court committed error in not finding that Rita had conflicts of interest and violated her fiduciary duties as conservator of Chester Johnson and as executrix of the estate of Mary Rowland Johnson in that she failed to protect the rights and interests of Chester Johnson to her own direct benefit. As conservator Rita failed to protect her incompetent ward. As executrix Rita failed to protect the pretermitted spouse who was her own ward and failed to have a guardian ad litem appointed. As co-administrator of Chester's estate, she failed to disclose the real estate assets or any information relating thereto, even to her own attorney, all to her benefit. Her actions of omission and commission in her three different fiduciary positions were egregious. (See earlier discussions of Mississippi law on breach of fiduciary duties under Proposition I, parts 1 and 2.)

6. Whether it Was Error to Apply the Equitable Doctrine of Laches to the Facts in This Case is Disputed.

The chancery court ruled: "It will be - - it will require a much stronger case to move the Court to action, than if the matter has been seasonably presented and if on account of the delay a serious injustice would result to the opposite party, the Court may decline to proceed at all." (C.R. p. 267, 268.)

The Chancery court committed error in finding that the equitable doctrine of laches was applicable in this case where the Statute of Limitations did not begin to run until the death of Chester Johnson.

The legal maxim used by the court in its Oral Ruling (C.R. p. 266.) that "equity aids the vigilant, not those who slumber on their rights," is a maxim concerning laches. 30A C.J.S §128. "[T]he doctrine of laches is inapplicable where a claim has not yet been barred by an applicable statute of limitations."[2] The doctrine of laches is inappropriate in this matter where the statute of limitations has not barred the action. If anyone was to be estopped or guilty of laches, it would be Rita as conservator of Chester and executrix of Mary's estate, which estate has never been closed.

> "A party may not rely on his own conduct, from which an estoppel may have arisen against him and in favor of the other party, for his own protection . . . A right cannot arise to anyone out of his own wrong. The doctrine of estoppel is for the protection of the innocent person, and only the innocent may invoke it. A party cannot predicate an estoppel in his favor on his own dereliction, omission, or inadvertence where there is no concealment, misrepresentation or other inequitable conduct on the part of the

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West End Corp. v. Royals, 450 So.2d 420, 420 (Miss. 1984); also, *Glass v. Glass*, 726 So.2d 1281, 1288 (Miss. 1998); *Nicholas v. Nicholas*, 841 So.2d 1208, 1212 (Miss.App. 2003)(laches does not apply when claim not barred by statute of limitations); *Mississippi Department of Human Services v. Molden,* 644 So.2d 1230, 1232 (Miss. 1994)(laches does not apply when claim not barred by statute of limitations); *Greenlee v. Mitchell*, 607 So.2d 97, 111 (Miss. 1992)(laches does not apply when claim not barred by statute of limitations).

other party. And where the other party does not claim estoppel, a litigant cannot become entitled to rely on his own wrong by asserting that he estopped himself thereby." *Jefferson Life & Casualty Co. v. Johnson*, 120 So.2d 160, 163 (Miss.1960).

The applicable statutes of limitations are MCA §§15-1-7 and 15-1-9, calling for a limitation of ten years on actions to recover land, and tolling that limitation during the term a person is of unsound mind.

> "However, if, at the time at which the right of any person to make an entry or bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within the ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened." MCA §15-1-7 (1972).

Chester Johnson's cause of action to recover his interest in the properties did not accrue until the death of his wife Mary. The statute of limitations was then tolled for Chester by his adjudication of incompetence in September of 1987. Chester's incompetence was not removed until his death on May 23, 1998.

Furthermore, O. L. had absolutely right or no interest to the properties until *after* the death of his father on May 23, 1998. "In order to charge a party with laches in delaying to assert a right, an opportunity to have acted sooner must have existed." 30A C.J.S.§140. In *Estate of Kimble*, 447 So.2d 1278, 1282 (Miss. 1984), the Supreme Court affirmed:

> "A cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested." In addressing the claims of an illegitimate child to the father's estate, the Court continued: "*It is undoubted law that a child, during the lifetime of the father, has no interest in his estate* * * * At the death of a person, dying intestate, *eo instanti* the title of the heirs accrues."(Emphasis in original).[3]

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[3] See also, *Rice v. McMullen*, 43 So.2d 195 (Miss. 1949), (Complaintant not entitled to recover

Simply put, O. L.'s cause of action accrued once Chester had died and not at any time before. Any questioning or investigation done or not done prior to Chester's death can not be construed as creating the question of laches or a "slumbering" upon his rights because O. L. Johnson had no legal rights in his father's property to protect until his father's death.

Laches involves three independent criteria which must be satisfied: 1) delay in asserting a right or claim; 2) the delay is inexcusable; and 3) there was undue prejudice to the party against whom the claim is asserted. *Allen v. Mayer*, 587 So.2d 255, 260 (Miss. 1991). As discussed above, laches is not available where the statute of limitations has not run. Therefore the first two criteria for the application of laches fail. The next criteria for the application of laches is not met either as there has been no prejudice to Rita and John Cal in this matter. They have held the disputed property since 1986. Rita and John Cal sold the DeSoto property and received the down payment and monthly payments. After the purchaser defaulted and took bankruptcy, she deeded the property back to Rita and John Cal. O.L. had no knowledge or involvement and cannot be blamed or penalized. "Delay is not laches unless it results in hardship to another." *Id.*

Additionally, any delay in the assertion of a right "will not operate as an estoppel unless such delay puts the opposite party at a disadvantage or hardship in making his defense." *Baily v. Sayle*, 40 So.2d 618, 773 (Miss. 1949) (Action against executor for legatee's share of estate was not barred by laches though commenced almost twenty-eight years after death of testatrix.).

Laches does not apply where there has been a concealment of facts by the defendant. "Laches is excused, within this rule, where defendant remains silent and fails to disclose facts which he is under an obligation to disclose without inquiry, or where plaintiff has suspicions but they are

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from estate until after death of testator.); *Heirship of McLeod*, 506 So.2d 289 (Miss. 1987), (Cause of action to determine heirship can not be made prior to death of decedent.).

lulled by explanations by defendant." 30A C.J.S. §151. (Emphasis added.). (C.R. pp. 183, 184, 426 - 431.) It is Rita who has been guilty of conflicts of interest, breach of fiduciary duties and failure to disclose.

CONCLUSION

Because of the multiple erroneous findings of fact based on clearly disputed evidence and multiple errors of law in applying estoppel and laches, the summary judgment should be reversed and the case remanded for trial. It is within the power of this Court pursuant to MCA §9-3-37 to make its own findings of fact and conclusions of law based upon the admitted and undisputed evidence pertaining to the deeds being void because they were not signed by the spouse and to the will because Chester was a pretermitted heir, which would be most helpful in the further trial of this case and which could be helpful in avoiding a second appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that I have this the 10th day of January, 2009, forwarded a true and correct copy of the foregoing Brief of the Appellant to all counsel of record, via United States mail, first-class postage prepaid, to their usual business addresses as stated below: I have also this 10th day of January, 2009 forwarded the original and 3 true and correct copies of the foregoing Brief of the Appellant to the Clerk of the Supreme Court of Mississippi.

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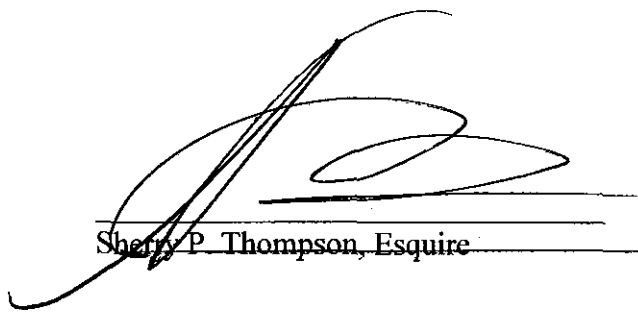

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The undersigned counsel does hereby certify that I did this the 14th day of January, 2009, forwarded a true and correct copy of the Plaintiff's Brief and Record Excerpts to the Honorable Mitchell M. Lundy, Chancellor of the 3rd Circuit, DeSoto County, Mississippi, via United States mail, first-class postage prepaid, to the address as stated below:

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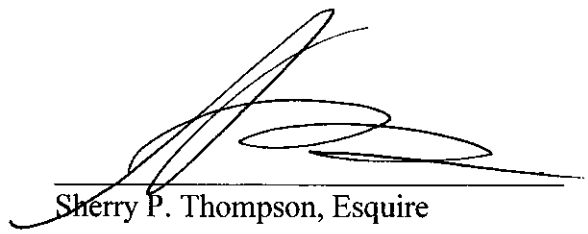

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