IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01875

KEVIN DUFRENE — APPELLANT

VS.

RANDALL A. SLADE, KEN W. SLADE and RODNEY G. SLADE — APPELLEES

APPEAL FROM THE CHANCERY COURT OF

PEARL RIVER COUNTY, MISSISSIPPI

CAUSE NO. 07-0450-GN-D

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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REPLY TO APPELLEE'S PROPOSITION 1.

The normal standard of review argument used to uphold judgment from Chancery Court does not apply in the instant case because a procedural bar occurred prior to the hearing on the merits. (See Reply to Appellee's Proposition #2, pages 2 – 3, infra) Although great weight is given to a Chancellor's decision, the Appellate Courts do reverse for plain error. Selman v. Selman, 727 So2d 547 (Miss. 1998). Appellees have offered no proof that they complied with Rule 40 (b) M.R.C.P. and in defending the Judgment before this Court the burden is Randal and Rodney Slades to prove they complied with the pre-requisite of said rule. "An Appellate Court may reverse a Chancellor's finding of fact only when there is not substantial, credible evidence justifying his finding." Pearson v. Pearson, 761 So2d 157 (Miss. 2000). The Court's Order in (R.E. 11) was neither mailed nor delivered to the Defendant. He had no official notice of the trial date, August 19, 2008, when Judgment was entered against him. (R.E. 6-8) Circumventing the rules or just not abiding by them gives rise to the erroneous legal standard argument, which is reviewed de novo by the Appellate Courts. Harrison County v. City of Gulfport, 557 So2d 780 (Miss. 1990).

REPLY TO APPELLEE'S PROPOSITION 2.

M.R.C.P. 40(b)

... Clerk shall mail or personally deliver Notice of date and time of trial within three (3) days to any party not present at setting. In the case at bar, Appellant attended a motion hearing on April 30, 2008 and agreed to a hearing on the merits for June 23, 2008, which the Court's Administrator quickly sought to change. Counsel for Plaintiff wrote the Defendant and sent an Order Setting the trial for August 19, 2008. (R.E. 11) This is when the problem with the compliance with Rule 40(b) M.R.C.P. occurs. This case had been continued on prior occasions and the Defendant was always noticed or served another process. (R.E. 21-24, R.E. 26-28) On this instance he signed the Order setting the case for August 19, 2009, but was never mailed a copy of the Order or positively notified that the case would proceed on August 19, 20008. The cause had several continuances and Kevin Dufrene was always notified. Since he received no further notification from the Plaintiffs' lawyer or a signed Order from the Clerk, Defendant incorrectly assumed that the date must have been changed again. Kevin Dufrene was agreeable to this trial date, but he never received a signed Order designating that trial date as required by King v. King, 556 So2d 716 (Miss. 1990). While Defendant, acting Pro Se, acknowledged that he was responsible for following the rules of civil procedure, Kevin Dufrene submits that the rules were not adhered to and therein the predicate was laid for his confusion and the Judgment (R.E. 6-8). In Stinson v. Stinson, 738 So2d 1259 (Miss. App. 1999) the Court distinguished between required Notice to those who have appreared by filing an Answer and those who were basically in default. Kevin Dufrene did everything he was responsible for to the Court and the counsel opposite. He never knew the Order he agreed to was entered on May 21, 2008, setting the trial because, he never

received a copy of same. Appellees' counsel is quick to point out everything Kevin Dufrene did not do, but fails to offer any explanation as to why he didn't favor Appellant with a signed copy of the Order after he and the Court approved it. The Rule 40(c) exception does not apply because Kevin Dufrene in open Court agreed to the June 23rd date. Defendant, Dufrene never heard whether the August 19th date was ordered by the Court or not. Either the Clerk or Appellee's counsel by not serving a copy of the Order on Defendant, prevented Kevin Dufrene from waiving the requirement. Isn't it interesting that Plaintiffs' counsel immediately upon receiving his signed Judgment, filed August 28, 2008, sent a copy to Defendant? Why didn't said attorney bother to send a copy of the Order dated May 21, 2009, setting the case for trial? The Plaintiffs had meticulously noticed and processed the Defendant more than the rules demand, but when the most important pre-trial Notice, the Agreed Order of Continuance (R.E. 11) was entered by the Court, Appellant was not notified as required by the rules. (R.E. 17)

The Appellees contend that Kevin Dufrene's argument that ex parte communications were conducted is absurd. Reading the first paragraph of the Plaintiffs' own Judgment indicates that a conference was held between Plaintiffs' counsel and the Court and then testimony from Plaintiffs' witnesses was taken. (R.E. 6) This was a contested matter. Kevin Dufrene was not present, but he had filed pleadings and has presented his reason for not being there. Dufrene had neither received the Order (R.E. 11) designating the trial date, nor had he received his discovery responses, which he submitted to the Plaintiff on June 30th. (R.E. 29) Sanford v. Arinder, 800 So2d 1267 (Miss. App. 2001)

REPLY TO APPELLEE'S PROPOSITION 3.

This Court has to look no further than Appellees' exhibits, which are attached to their Brief and (R.E. 17) to find evidence of overreaching. Exhibit "B" and Exhibit "C" along with the Slades' previous manner of noticing or processing Kevin Dufrene at every step of the proceeding (R.E. 21-24 & R.E. 26-28) clearly indicate Plaintiffs' intentions to notify. However, the most important notification of all was not delivered. The Defendant in (R.E. 17) asked for a copy of the executed Order and since he never received same with the discovery process continuing, Appellant incorrectly assumed the case was continued again. Plaintiffs knew they were in litigation with a layman and to fail to supply Defendant with a copy of the Agreed Order of Continuance and Trial Setting (R.E. 11) was a change in strategy and a violation of Rule 40(b) M.R.C.P. Plaintiffs' exhibits have provided Defendant the ammunition Plaintiffs' counsel declared Kevin Dufrene omitted from his original Brief.

Appellants' Motion to Set Aside Judgment (R.E. 12) should have been treated by the Court as a Motion pursuant to Rule 60(b)(1)(2). Overreaching occurs when an inequality of bargaining power or other circumstances such that there was no meaningful choice on the part of the disadvantaged party. Price v. Price, 2009 WL 678630 (Miss. App. 2009) What was before the Court was a boundary dispute over a right-of-way location. Plaintiffs' counsel said the cause should not be treated like a Default Judgment. If that was not the case, how would Plaintiffs been awarded general damages of $3,000.00 in addition to attorney and surveyor's fees? (R.E. 7)

REPLY TO APPELLEES PROPOSITION 4

In the immortal words of Yogi Berra, "it ain't over, till its over." After waltzing thru Defendant's propositions that the hearing was conducted like a Motion for Default, Plaintiffs objected but failed to cite any authority for their scenario. However, Plaintiffs, make one erroneous argument that the matter is now *res judicata* and for it be reversed and remanded for retrial would "go against the clear mandates of Mississippi Law." Plaintiffs here discuss their various expenses and Court costs. The doctrine of *res judicata* applies to a defining decision by the judiciary. As long as there is a forum left to hear Defendant's continued pleadings of the case, and he has a genuine argument, there is no final decision. *Res judicata* "reflects the refusal of the law to tolerate a multiplicity of litigation." Little v. V. & G. Welding Supply, Inc., 704 So2d 1336 (Miss. 1997)

Appellant, continues to submit that general damages were improper and had Appellant appeared and been represented, such damages would not have been awarded.

CONCLUSION

Kevin Dufrene has not had has day in Court. Maybe it was an accident; maybe it was by overreach. Either way the Appellant did not receive his Rule 40(b) Notice of Hearing and did not appear. A Judgment was rendered against him not only for the disputed easement, but also for some $7,000.00 in damages, fees, and Court costs. Had Mr. Dufrene been at the hearing he could have presented a worthy defense. Maybe the Chancellor would have ordered the easement in the Appellees' favor anyway, but Dufrene would certainly not be looking at a expensive money Judgment. In the interest of justice Appellant prays this Honorable Court reverse and remand this case for another hearing *de novo.*

CERTIFICATE

I, William L. Ducker, do hereby certify that I have mailed the original and three (3) copies plus the 3 x 5 floppy disc of the above Reply Brief of Appellant to:

Hon. Betty Septon
Supreme Court Clerk
P. O. Box 117
Jackson, MS 39205

and I have also mailed a true copy, postage pre-paid to:

Honorable Sebe Dale, Jr.
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Wiggins, MS 39577

This the 21st day of April, 2009.

William L. Ducker