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

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

(1) Kevin Dufrene, Appellant

(2) Randall A. Slade, Appellee

(3) Ken W. Slade, Appellee

(4) Rodney G. Slade, Appellee

(5) Hon. Sebe Dale, Jr., Chancellor
10th District, Pearl River County, Mississippi

(6) Mr. Benjamin Holland, Esq.
Attorney for Appellees

(7) Mr. William L. Ducker, Esq.
Attorney for Appellant

(8) Mr. Joe Stuart

(9) Mr. Kenneth Moore

RESPECTFULLY SUBMITTED,

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STATEMENT OF THE ISSUES

The following constitutes the issues presented for review by the Appellant, Kevin Dufrene:

I.

The Honorable Chancellor erred in granting the Judgment on August 22, 2008.

II.

Was the Defendant, Kevin Dufrene overreached by Plaintiffs?

STATEMENT OF THE CASE

Plaintiffs, Slade, and Defendant, Dufrene have an ongoing dispute about the size and location of the easement, which is common to both their tracts of land. Several Court dates have been set and continued with the parties agreeing to a trial date of August 22, 2008. The Order was prepared by Plaintiffs' counsel and mailed to Defendant, Dufrene, who had previously appeared *pro se*. Although Plaintiffs had established a methodology of summonsing the Defendant to each Court date, they neither noticed Defendant nor mailed him a signed copy of the Order setting the trial. Defendant, Dufrene, did not appear and judgment was taken against him for general damages over and above the expense of litigation after an *ex parte* conference was held between the Court and Plaintiffs' counsel.

Defendant, Dufrene, believes he was overreached because of his cooperation with the Plaintiffs in setting the trial and the Judgment rendered in his absence. Dufrene requested a confirmation of the hearing date and since he did not secure a signed copy of the Order and Plaintiffs had not responded to his discovery, Defendant incorrectly considered the matters continued again. Kevin Dufrene is asking the Court to set aside this Judgment like a default judgment and give him his day in Court.

SUMMARY OF THE ARGUMENT

Appellant, Dufrene presents two (2) propositions to the Court:

I.

The Honorable Chancellor erred in granting the Judgment dated August 22, 2008.

The Judgment (RE 6-8) does not indicate whether the Defendant was called or was present. It is a completely one-sided document with the Plaintiffs being granted everything the Slades prayed for and more. The Judgment even discusses an *ex parte* conference between the Court and Plaintiffs' counsel at the beginning of the contested matter.

The Defendant, Kevin Dufrene had signed an Order for Plaintiffs' counsel and requested a confirmed dated copy back. (RE 17-18). He also had requested discovery from the Plaintiffs after answering the Slades' discovery request. (RE 29-30) When Dufrene did not receive his Order back he incorrectly determined the case had been continued again as it has on several occasions. (RE 21–28)

II.

Was the Defendant, Kevin Dufrene, overreached by Plaintiffs?

Appellant submits the Judgment and the subsequent Order dated October 27, 2008, (RE 9-10) are drafted in a manner that exudes superior knowledge and bargaining power and takes undue advantage of a layman who tried to cooperate with the Plaintiffs in getting a trial set. (RE 17-18) Kevin Dufrene has a viable defense and asks the Court to grant him his day in Court, which will not prejudice the Plaintiffs or interfere with their use of the subject right-of-way.

PROPOSITION I

The Honorable Chancellor erred in granting the Judgment on August 22, 2008.

The Court's Judgment dated August 22, 2008, does not indicate whether the Defendant, Dufrene, appeared or was even called in open Court. (RE 6-8) What the Judgment does reveal is an *ex parte* conference was had between Plaintiffs' counsel and the Court. After discussing the case with the Court the Plaintiffs' counsel in open court offered the three (3) Plaintiffs as witnesses obviously leading them through the entire scenario and having the Court award not only the location of the easement, attorney fees, and litigation expenses, but also general damages of $3,000.00. *Ex parte* communications should not be allowed under any circumstances. Porter v. State, 732 So2d 899 (Miss. 1999). The Judgment of August 19, 2008 begins as follows:

> "This cause comes on to be heard on the 19th day of August, 2008, and the Court having called the matter for hearing and the Plaintiffs answered they were ready for trial and after conference with the Court and the attorney for the Plaintiffs and after testimony by the Plaintiffs, the Court finds, rules and orders the following things and matters, to-wit:" (RE 6)

Although it is clear the Defendant was not present, nothing in the record indicates he was called or any excuse for his absence ascertained. However, the matter was contested and the Judgment clearly states that an *ex parte* conference between the Court and Plaintiffs' lawyer occurred prior to the evidentiary hearing. This Honorable Court as reviewing authority should not allow the Slade Plaintiffs to make their case on appeal based on a disputed Order dated two (2) months later, (RE 9-10) which attempts to explain what the original Judgment does not.

Upon receiving the Judgment dated August 22, 2008, Defendant, Kevin Dufrene timely filed his Motion to Set Aside Judgments pursuant to Rule 60 (b)(2) M.R.C.P. (RE 12-13) In Mississippi jurisprudence a Movant is charged with the duty of timely presenting his Motion to the Court. Failing to do so renders such Motion mute unless prejudice can be demonstrated. Cowart v. Hargett, 16 F3d 642 C.A.5 (Miss. 1994).

> "An Order dismissing an appeal on a Writ of Precendo, which does not affirmatively show that the Defendant was called in open court and thereby given an opportunity to prosecute his appeal constitutes reversible error" Lee v. State, 357 So2d 111 (Miss. 1978)

Defendant, Dufrene, acknowledges that he signed and agreed to the Order dated May 12, 2008, however, the Order was entered two (2) weeks after he agreed to same and he never received a copy as requested. (RE 17-18) The Plaintiffs had established a routine of summonsing the Defendant to each hearing. As counsel for Plaintiffs remarked "out of an abundance of caution." (RE 14) The most peculiar situation occurred when the case finally, after numerous delays by Plaintiffs, got to a trial setting. No Summons was issued and the Defendant was not even afforded a copy of the Order he had consented to and had formally requested a copy of. While the M.R.C.P. certainly do not require repeated issuances of Service of Process once a cause of action is commenced, the Court can readily see when with all the different court dates that had been noticed the Defendant would expect another process or some notice to be served. The salient point is that the letter attached to Plaintiffs' counsel's Order for Continuance and Trial Setting (RE 17-18) Defendant, Dufrene, thanked opposing counsel for cooperation in returning a signed copy of the Judge's Order confirming the trial date. Defendant, whether layman or through an attorney, was entitled to expect a

copy of that Order from the Clerk or Plaintiffs' lawyer within a reasonable period of time. As is reflected by the record excerpts, pages 21 – 28, this case had been continued on a number of dates. Since Defendant did not receive the Order or any further notice, he incorrectly assumed the matter was continued again. This was especially emphasized because discovery continued between the parties in July and Plaintiff never responded to Defendant's Interrogatories or Requests for Production. (RE 29-30)

This Court has sympathized with laymen representing themselves on certain occasions, but always holds them to the same standards for application of the rules as attorneys are held to. Perry v. Andy, 858 So2d 143 (Miss. 2003) In the case at bar, Defendant, Dufrene, declares he did not have proper notice of the trial. While the Appellant is mindful that this Court only reverses a Chancellor as the trier of fact for manifest error or abuse of discretion, this is one of those situations that in the interest of justice the case should be reversed and remanded for a new trial because Kevin Dufrene has not had his day in Court and the Appelles were granted more than they pled for.

PROPOSITION II.

Has Defendant, Kevin Dufrene, been overreached?

This Court has defined overreaching as taking advantage of another by superior bargaining power. Lowery v. Lowery, 919 So2d 1112 (Miss. App. 2005) When Defendant, Dufrene, raised the issue of his awareness of the trial date, Plaintiffs responded that Defendant's Motion was a "flat-out misrepresentation to the Court." (RE 15) A quick perusual of the record excerpts or the entire court file indicates this case was called, set, postponed, etc. on several occasions. What does appear in the documents that causes concern is the Defendant's note to counsel opposite requesting a signed copy of the Order Setting the Cause for Trial. (RE 17) Why Plaintiff was not furnished with a copy of what he agreed to is a mystery. The parties had agreed on an earlier hearing date, but Defendant cooperated with Plaintiffs' attorney who said, according to the Court Administrator, the date had to be changed. Since Plaintiffs had been so cautious about summons and proper notification for all Motions, etc., why did they fail to send what is actually required by precedent and common courtesy between members of the bar?

The Judgment entered on August 28, 2008, (RE 9-10) is so one-sided that it has to be deemed unfair to the Defendant, Dufrene. In Re: Dissolution of Marriage of De. St. Germain, 977 So2d 412 (Miss. App. 2008) Just because the Defendant was not present at the hearing, did not give the Plaintiffs *cart blanche* to get everything they pled for and then some. Whenever an attorney is unopposed he obviously proceeds from a position of superior bargaining power, but throwing in "the kitchen sink" for general damages just because Plaintiffs faced no opposition at trial is patently unfair. Plaintiffs and the Court were aware of those pleadings filed by Kevin Dufrene individually and this was a contested matter. Why

the *ex parte* conference and presentation by counsel like a non-contested divorce? In Capital One Services, Inc. v. Rawls, 904 So2d 1010 (Miss. 2004) the Court refused to set aside a Default Judgment but seriously modified same. This Court then established a three-prong balancing test for trial judges to go by in deciding whether to set aside a Default Judgment pursuant to Rule 60(b) M.R.C.P.

1) "the nature and legitimacy of the Defendant's reasons for Default;

2) whether the Defendant has a colorable defense to the merits of the claim; and,

3) the nature and extent of prejudice which may be suffered by the Plaintiff if the Judgment is set aside."

Since there is a bona fide dispute about notice in this case, this Court should consider its criteria from Rawls in considering whether reversal and remand for another trial is proper. Defendant, Dufrene, says he requested the trial setting be confirmed by a copy of the Judge's signed Order. (RE 17) Without the Order and the fact that the Plaintiffs had not completed his discovery requests, Defendant did not believe or understand his case was docketed. Point number two is Dufrene has an absolute defense and the Plaintiffs have extended their right-of-way over and across his land. Finally there would be no prejudice to the Plaintiffs because they are already utilizing a larger easement than they were granted by Warranty Deed.

CONCLUSION

Defendant/Appellant, Kevin Dufrene, was not present in Court on August 28, 2008, and the question is whether or not he was properly notified and if so, did Plaintiffs/Appellees go too far in their demands in a contested case when their proof went uncontradicted? All this took place by the language of the Judgment, after an *ex parte* conference was held. Kevin Dufrene believes he was overreached and humbly requests this Court to reverse and remand this case for another hearing to insure he has due process of law.

Respectfully submitted,

KEVIN DUFRENE, Appellant

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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 Brief of Appellant to:

Hon. Betty Septon
Supreme Court Clerk
P. O. Box 117
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and I have also mailed a true copy, postage pre-paid to:

Honorable Sebe Dale, Jr.
Chancellor, Tenth District
P. O. Box 1248
Columbia, MS 39429-1248

Hon. Benjamin Holland
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This the 6th day of February, 2009.

William L. Ducker