

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBBIE R. EUBANKS BURNSED

APPELLANT

VERSUS

CAUSE NUMBER 2009-CA-00051

BILL A. MERRITT

MARY JACQUILYN MERRITT

APPELLEES

BRIEF OF APPELLEES

GERALD A. DICKERSON
ATTORNEY AT LAW
346 Cox Street
Lucedale, Mississippi 39452
(601) 947-8127
FAX: (601) 947-7891
Email-GADLAWYER@AOL.COM

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STATEMENT OF ISSUES

1. THE CIRCUIT COURT WAS VESTED WITH EXCLUSIVE JURISDICTION BY VIRTUE OF SECTION 65-7-201, MISSISSIPPI CODE OF 1972, AS AMENDED.
2. ALL OTHER PROCEEDINGS BETWEEN THESE PARTIES ARE OUTSIDE THE RECORD TO BE CONSIDERED BY THE CIRCUIT OR SUPREME COURT AND ARE MOOT, STALE OR NOT PURSUED BY APPELLANT.
3. SHOULD THE APPELLANT PAY ATTORNEY FEES FOR A FRIVOLOUS APPEAL AND DAMAGES IF THE LOWER COURT IS AFFIRMED DUE TO THE FACT THAT THIS APPEAL CONCERNS LAND.
4. THE ISSUES IN THIS APPEAL ARE A MATTER OF LAW AND DO NOT STAND IN EQUITY AS SET FORTH IN THE APPELLANT'S APPEAL.

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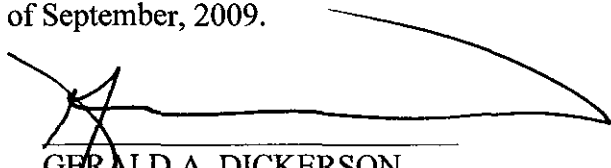
APPELLEES

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) of the Mississippi Supreme Court Rules, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made pursuant to said rule.

1. Bill Merritt, Appellee.
2. Mary Jacquelyn Merritt, Appellee.
3. Robbie A. Eubanks, Appellant.
4. Counsel of record.
5. Judge Dale A. Harkey, Circuit Court Judge.

WITNESS MY signature this the 11th day of September, 2009.



GERALD A. DICKERSON
Attorney for Appellees

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STATEMENT OF THE CASE

The Appellees would show that this Case is one of Pleadings, Procedure, Jurisdiction and compliance with Section 65-7-201, Mississippi Code of 1972, as amended, and would show the follow matters of record in the lower proceeding:

1. The suit in the lower Court was filed on July 27, 2006, alleging that the Appellees were requesting a private way under Section 65-7-201, across lands where there was no record title holder (R. 10, a plat) and joined John Does 1-100 and requested process by publication. (R. 4. 10.)
2. The process was duly published in the George County Times, a publication regularly published in George County, Mississippi, the venue of this case. (R.13.)
3. On September 6, 2006, a Motion for Time was filed by the Appellant Motion stated that she needed time to plead and other matters, and her appearance was entered. She did not challenge Jurisdiction or appear Specially. She was in the case. (R. 15.)
4. No response to the Compliant was filed after this or at any time during the proceedings other than a Motion to Transfer for a case in Chancery Court that was stale for lack of process.
5. The Appellant then on October 27, 2006, filed an action in Chancery Court regarding title to her land and admitted that the land in question was "No Man's Land", but never served process on the Appellees and after 120 days that case became stale and to this date there has been

no process. (R. 23)

6. On July 27, 2007, a Motion for Judgment on the Pleadings was filed. (R. 41.)

7. No response was filed to these Pleadings.

8. On July 30, 2009, the Appellees filed a Plat and Appraisal that they had obtained and paid for to cross the "No Man's Land" and asked for a trial. (R. 42.)

9. On July 30, 2009, Jury Instruction No. 1 was filed asking for a directed verdict granting a Private Way and assessing damages at \$960.00 for the small tract of land to be acquired for the Private way. (R. 43.)

10. No response were filed to these actions.

11. On August 2, 2007, the Court executed a Judgment in favor of the Appellees on their Motion for a Judgment on the Pleadings and assessed damages at \$960.00 to be tendered to the Chancery Court Clerk in Cause No. 2006-0324, the action filed by the Appellant on October 27, 2006, and to the date of this filing there is still no process in that stale case and the Appellees money is in the registry of the Chancery Clerk. (R. 46.)

12. On the 30th day the Appellant filed a Motion to Set Aside the Judgment of August 2, 2007, and still no answer or response to the Complaint, but in the Motion the Appellant state that she had not been served with process. The truth of the matter that, as stated above, she entered her appearance on her Motion for Time on September 6, 2006, and never filed a single pleading contesting Jurisdiction, an Answer, or Defenses, or one single pleading showing why, if any, the Court did not have Jurisdiction under 65-7-210. (R. 49.)

13. The Appellee's response to this Motion sets forth that the Appellee obtained process by publication, the former action of the Appellant in the Chancery Court action was dismissed, the subsequent case filed in Chancery Court on October 27, 2006 was stale for lack of process, that

the lower Court had jurisdiction, that the appraisal and damages were paid by Appellees and the Appellant had entered her appearance. (R. 54.)

14. Each time as shown by the record to bring the matter on for hearing, all of these request setting, were set by the Appellant numerous Motions for Time were filed from nurse training, sick and other reasons.

15. As set forth in the Appellants Brief, the matter was set in Pascagoula and Counsel for the Appellant contacted Counsel for the Appellees that the matter would not be heard.

16. The Appellant filed the transcript of the hearing on December 4, 2008, and a reading of transcript and the Order of the lower Court indicates in this writer's opinion, that the Court had grown weary of all the last minute Motions for Continuances and wanted to control his docket, as is the province of the Court. (Record Excerpts 12. 13.)

16. The Appellees will not file Record Excerpts as the ones file by the Appellant as the same pertains to this Cause Number, 2006-0134 (3) will clearly in Argument show that the Circuit Court had Jurisdiction, that other references to legal matters between the parties are immaterial, moot and stale.

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ARGUMENT

By way of background, the Appellees (Merritts) submit that they should repeat some of the series of events in the lower Court proceedings.

1. Suit was filed on July 27, 2006. (R. 4.)
2. The Appellant enter her appearance by the filing of a Motion for Time on September 6, 2006. (R. 15.)
3. On October 27, 2006, Appellant filed another suit in Chancery Court and there was no process in that case. (R. 23.)
3. Appellees notices of Trial Settings:
September 14, 2006 (R. 17.), January 12, 2007 (R. 38.), and April 20, 2007. (R. 39.)
4. Judgment sustaining Motion for Judgment on the Pleadings and granting private way on August 2, 2007. (R. 46.)
5. Appellees notices of Trial Settings on Appellant's Motion:
September 10, 2007 (R. 57.), February 11, 2008 (R. 59.), May 16, 2008 (R. 64.)and September 16, 2008. (R. 65.) In all three settings there was a Motion for Continuance filed shortly before the hearing date and the last Motion for Continuance was filed the day before the hearing.

Appellees note these events to show that even though the Appellant was in the case by the filing of her Motion for Time, she never filed any pleadings and was not present when the Court entered it's Judgment on August 2, 2007.

Section 65-7-201 is clear that the Court sitting without a jury shall determine the reasonableness of the application for a private way. The Appellant record on appeal admits that the 75 foot by 1320 foot tract of land had no record title holder and this fact had been adjudicated on appeal by this Court and the Chancellor was reversed for "splitting the baby" in Cause No. 2000-453, the Chancery Court case set forth in Appellant's Record Excerpts.

Although the Appellees do not think that the matters set forth in the Appellant's Record Excerpts are properly a part of this appeal, nothing in the two Chancery Cases set forth in her Record Excerpts help her. In the 2000-453 case it was adjudicated that the land sought to be crossed by a private way was "no man's land". Thus, process by publication. The Appellant can not complain about this process by publication as she filed a Motion for Time on September 6, 2006, and entered her appearance in the case, but never filed any pleading contesting the Compliant for Private Way although her Motion stated "Movants are in need of additional time in which to answer, plead" This never happened.

The other Chancery Court case set forth in Appellant's Record Excerpts had no process, not only for 120 days, but years, and still to this date there is no process.

The Court had exclusive jurisdiction to enter it's Judgment. There was a proper notice of trial setting given to the Appellant although she was mute as far as the pleadings were concerned. There was a proper Motion for a Judgment on the Pleadings and Filing of Right Away Plat across no man's land, and the paying by Appellees of the appraisal of Dennis Moffett in the sum of \$960.00 to be paid into the registry of the Chancery Court in the event that title should some day

be determined and it remains there to this day and other than the Private Way granted to Appellees there remains to this date a strip of “no-man’s land” adjacent to the Appellees and Appellant lands.

CONCLUSION


Nothing has been argued by the Appellant that would divest the Circuit Court of Jurisdiction under the provisions of Section 65-7-201. The lower Court was very careful in applying the law even to the point of accommodating the Appellant in the numerous Motions, reset Orders, and other matters, and it was time for the Court to finally lay the issue to rest. The Appellant had, according to the records on file in the lower Court, over eleven (11) months to file a response opposing Jurisdiction before the Judgment of the lower Court, but she remained silent.

It is respectfully submitted that she was not on the outside looking in, but was in by virtue of her Motion for Time filed on September 6, 2006, and various and repeated Motions for Time a party, but sat on her laurels and now it is submitted that the matter set forth in her brief still does not state one reasonable reason that the lower Court did not have Jurisdiction under Section 65-7-201.

Abuse of discretion is not a law question and has in many cases been the rule regarding decisions of Chancellors sitting in Chancery Court. In the present case the lower Court Judge simply followed the law as set forth in Section 65-7-201.

This Court is respectfully requested to affirm.

WITNESS MY signature this the 11th day of September.

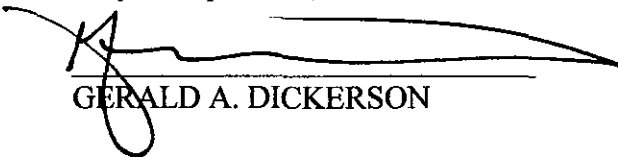


GERALD A. DICKERSON
Attorney for Appellees

CERTIFICATE

This will certify that I, GERALD A. DICKERSON, Attorney for the Appellees has on this date forwarded to JUDGE DALE HARKEY and DARRYL A. HURT, JR., a true copy of these pleadings, argument and conclusions.

WITNESS MY signature this the 11th day of September, 2009.



GERALD A. DICKERSON

GERALD A. DICKERSON
Attorney at Law
346 Cox Street
Lucedale, MS 39452
(601)-947-8127
(601)-947-7891, Fax
EMAIL: GADLAWYER@AOL.COM
STATE BAR NP. [REDACTED]