

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CAUSE NO. 2009-CA-00442**

**LAVADA THOMAS**

**APPELLANT**

**VERSUS**

**FIRST FEDERAL BANK FOR SAVINGS**

**APPELLEE**

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**BRIEF OF APPELLEE**

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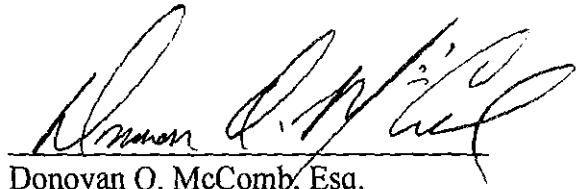
**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

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

1. Estate of Edward D. May, Deceased – Appellant
2. William L. Ducker, Esq., Purvis, Mississippi – Counsel for Appellant
3. First Federal Bank for Savings, now known as First Southern Bank - Appellee
4. Donovan O. McComb, Esq., Columbia, Mississippi - Counsel for Appellee
5. Nellie May
6. Lavada Thomas
7. Honorable Johnny L. Williams  
Chancellor, 10<sup>th</sup> Judicial District  
Marion County, Mississippi
8. William C. Callender, Esq., Columbia, Mississippi – Former Trustee for Appellee

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donovan O. McComb", written over a horizontal line.

Donovan O. McComb, Esq.  
Counsel for Appellee,  
First Federal Bank for Savings,  
now known as First Southern Bank

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### **STATEMENT OF THE ISSUES**

1. Whether the Marion County Chancery Court's decision to grant Summary Judgment in favor of First Southern Bank was proper.
2. Whether the Marion County Chancery Court's decision to overrule Plaintiff's jurisdictional question was proper.

### **STATEMENT OF THE CASE**

The issues inherent in this case involve a foreclosure by First Southern Bank (hereinafter referred to as "FSB"), which was formerly known as First Federal Bank for Savings, upon property originally owned by Edward D. May and FSB's actions surrounding that foreclosure. This appeal was brought in the name of Lavada Thomas, presumably as representative of the Estate of Edward D. May (hereinafter referred to as "May"). However, neither Lavada Thomas nor Nellie May (Nellie May's involvement in this case is explained later in this brief) joined in this suit in their individual capacities. The Estate of Edward D. May was the only Plaintiff. The original complaint sought to set aside the foreclosure sale conducted by FSB's Trustee. FSB filed two Motions for Summary Judgment seeking to dismiss the lawsuit in its entirety (RE 30 and Appellee's RE 1). In the hearing on the first Motion, David Hobgood, who was the high bidder at the foreclosure, was dismissed from the lawsuit as a bona fide purchaser for value without notice (RE 2). In addition, May was allowed to amend its Complaint to add a claim for damages (RE 9). FSB then filed a second Motion for Summary Judgment (RE 30).

With respect to the second Motion for Summary Judgment, a hearing was held before the Honorable Johnny L. Williams, Chancellor for Marion County, Mississippi on August 25, 2008. The parties initially met with Judge Williams in chambers. Upon this meeting and upon Judge Williams reviewing the documents filed by both parties, Judge Williams expressed his opinion that Summary Judgment was indeed proper. At that point, the parties proceeded in open Court (TR 1-6). At the conclusion of this open court session, the Chancellor granted FSB's Motion for Summary Judgment and overruled May's jurisdictional question (RE 49). Upon request by May, the Chancery Court entered an Amended Order Granting Summary Judgment (Appellee's RE 19). It is from this ruling on the second Motion for Summary Judgment that May appeals.

Edward D. May executed and delivered unto William C. Callender, trustee for FSB, a Deed of Trust dated October 18, 2000 and recorded in Book 1329 at Page 468 of the records of the Chancery Clerk of Marion County, Mississippi (Appellee's RE 12). Apparently, on or about January 26, 2002, Edward D. May died intestate (Appellee's RE 12). The loan secured by the Deed of Trust in question subsequently became in default and FSB began foreclosure proceedings. FSB's Trustee conducted the foreclosure sale on February 23, 2004. Although several of FSB's Requests for Admissions were inadvertently misquoted in Mays' answers, the sufficiency of the Deed of Trust and the default status of the loan were admitted and are not at issue in this case (Appellee's RE 12-13 and RE 11). At the time of the foreclosure, none of the heirs of Edward D. May had opened an estate or attempted to adjudicate heirs (Appellee's RE

16), but one of the heirs had apparently been paying, or attempting to pay, a portion of the past due loan (RE 11).

May has admitted the following facts, which fully appears in the record of this case: FSB properly published the notice of foreclosure sale in the newspaper (RE 12), FSB properly posted the notice of foreclosure sale on the bulletin board at the Marion County Courthouse (RE 12), and FSB properly followed the provisions of the Deed of Trust (Appellee's RE 15, Request No. 20). Therefore, despite anything May might say to the contrary, this action is founded on the allegation that the heirs of Edward D. May deserved some type of additional, "extraordinary" notice of the foreclosure sale beyond what is provided in the Deed of Trust or provided by statute.

### **SUMMARY OF THE ARGUMENT**

FSB followed the law. It is undisputed and even admitted that all of the statutory requirements and all contractual provisions have been met (RE 12 and Appellee's RE 15). The default status of the loan is also undisputed (RE 11). FSB is not required to go beyond the law by guessing who the debtor's heirs are and sending an additional notice to someone who has not executed the note and/or deed of trust. At the time of the foreclosure, FSB had received no Court decree informing it of the legal heirs of the debtor. It is well-established that notice of the foreclosure sale which meets the statutory requirements is always sufficient and that no other extraordinary requirements should be added. While FSB provided evidence that several of the alleged heirs had actual notice of the pending foreclosure (Appellee's RE 6-9), this fact is



actually irrelevant. FSB was not required to provide actual notice to any self-proclaimed heirs of the debtor. Whoever the heirs were at the time of the pending foreclosure, they received proper constructive notice by publication of said notice in the newspaper and on the Courthouse bulletin board. Therefore, there exists no genuine issue of material fact because even if May's arguments were true, which is denied, May still would not be entitled to the relief sought.

The fact that one of the debtor's self-proclaimed heirs made several payments to FSB during the time of the pending foreclosure is not an agreement by the bank to stop said foreclosure. Partial payment of a past due debt does not stop collection efforts. No additional consideration was given nor did FSB execute any separate agreement to delay the foreclosure. In fact, in this particular case, since a third party purchased the property at the foreclosure sale and paid more than what was owed to FSB, the payments made by any heir of the debtor only created more of a surplus of funds from the foreclosure sale that was remitted to the estate once that estate was opened several months after the foreclosure. As a result, once again, no genuine issue of material fact exists since the simple payment of a past due debt does not equal to any type of forbearance agreement. Furthermore, Nellie May, the person identified by Plaintiff as the one who began making payments to FSB (RE 11) was not included as a party Plaintiff in this case and has no right to a remedy.

May attempts to thwart the Chancery Court's ruling with a jurisdictional argument despite the fact that no genuine issue of material fact would exist in Circuit Court either. It has long been the rule that, once the Chancery Court's jurisdiction has been established, it may proceed to

the conclusion of the case even if the original equity complaints fail. It is undeniable that jurisdiction was proper in Chancery Court when the original complaint was filed. In that original complaint, May attempted to have the foreclosure sale set aside. After an adverse ruling, May then was allowed to amend its complaint to bring a claim for monetary damages (RE 9). May was fine with proceeding in Chancery Court until it became clear that it would receive additional adverse rulings. At that point, May began to push its jurisdictional claims. However, the Chancery Court's jurisdiction was already established and it had every legal right to proceed with this case until its conclusion.

### **ARGUMENT**

**(1) The Marion County Chancery Court's decision to grant Summary Judgment in favor of First Southern Bank was proper.**

No genuine issue of material fact exists in this case, and even looking at the issues in a light more favorable to the non-moving party, May is simply not entitled to any recovery under the circumstances. When FSB began its foreclosure proceedings, the loan involved in this suit was in default. The original debtor, Edward D. May, had died, and no Estate or Adjudication of Heirship had been opened (Appellee's RE 16). FSB posted notice of the foreclosure sale on the bulletin board at the Marion County Courthouse and published the notice in the Columbian-Progress, a paper of general circulation in Marion County, Mississippi. These facts have been admitted and are not in dispute (RE 12). Therefore, May does not claim that FSB failed to follow the statutory requirements nor does May claim that FSB failed to meet its contractual

obligations in the Deed of Trust. To the contrary, May admits that all of these legal requirements have been met. May, instead, claims that FSB should have gone beyond the statutory and contractual requirements to provide the heirs of Edward D. May, who had not yet been legally established, an additional copy of the notice of the foreclosure sale. To require this would put FSB in the impossible position of "guessing" as to who the legal heirs were of its original debtor. Furthermore, even knowing who those heirs were would not have changed the law or the fact that FSB was not required to send them notice. In addition, the person who claims she made payments to FSB, Nellie May, and claims that those payments somehow imposed some type of additional duty on the part of FSB in her favor, was not included as a party Plaintiff in the suit and is not entitled to seek any remedy.

The only requirements of Law as to notice involve the publishing of the notice in the newspaper as well as on the bulletin board at the County Courthouse. May has already admitted this procedure was properly followed (RE 12). The Encyclopedia of Mississippi Law, Volume 6, citing Section 89-1-55 of the Mississippi Code Annotated, states, "Mississippi Law does not require the trustee to notify the mortgagor of the foreclosure. The Code only requires the posting and publication of the Notice of Sale." Encyclopedia of Mississippi Law, Section 51:12, Volume 6, 2001. It is undisputed that Mississippi Law was correctly followed.

In the case of EB, Inc. v. Allen, a similar allegation was posited. The Plaintiffs alleged that the bank owed him notice in addition to that required by statute. The Court found in favor of the bank and stated:

Under the power of sale provisions set forth in Mississippi Code Annotated Section 89-1-55, 89-1-57, and 89-1-59 (1991) EB did all that it was required to do. In fact, Allen did not allege and the chancellor did not find that EB had failed to comply with the statutory notice provisions...Notice that meets the statutory requirement is always sufficient and additional requirements are not to be added.

EB, Inc. V Allen, 722 So.2d 555, 561 (Miss. 1998). No notice other than what is provided in statute and in the Deed of Trust itself is required. A similar situation exists in the case before this Court. May admitted that the statutory requirements and Deed of Trust requirements were followed. Any un-established heirs of Edward D. May had sufficient notice under the law by virtue of FSB following the statutory requirements and the provisions of its Deed of Trust.

Despite the affidavit provided by FSB (Appellee's RE 6-9), May disputes that the heirs had actual notice of the pending foreclosure. However, this dispute is not enough to prevent summary judgment. In Gorman-Rupp Co. v. Hall and in Vaughn, ex rel. Vaughn v. Estate of Worrell, both cited by May as an attempt to argue that this dispute alone should prevent summary judgment, the Court makes clear that a factual dispute, in and of itself, will not prevent summary judgment. The factual issue must be a *material* one. In discussing this point, the Court stated,

Of importance here is the language of the rule authorizing summary judgment "where there is no genuine issue of *material* fact." The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense ... the existence of a hundred contested issues of fact

will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact.

Gorman-Rupp Co. v. Hall, 908 So.2d 749, 754 (Miss. 2005) AND Vaughn, ex rel. Vaughn v. Estate of Worrell, 828 So.2d 780, 784 (Miss. 2002). In both cases, the Court determined that summary judgment was indeed proper. In the case before this Court, even if the un-established heirs of Edward D. May had not received actual notice of the pending foreclosure sale, it would not change the fact that the foreclosure was legally conducted in the proper manner. It is not an issue of material fact. Even if actual notice were not present, the admission that all statutory and contractual provisions were followed is enough, by itself, to warrant summary judgment.

May also alleges that FSB's acceptance of past due payments somehow obligates the bank to postpone the foreclosure. Even though some partial payments were made, the loan remained in default up to and including the time of the actual foreclosure sale itself. It is undisputed that these payments made by an un-established but alleged heir of Edward D. May did not bring the loan current (RE 11). Partial payments of a past due debt do NOT constitute any agreement to stop or postpone the collection of a debt. According to Hattiesburg Production Credit Association v. Smith,

...partial payment of the amount named in a contract after such payment is due is not sufficient consideration for an agreement of the creditor to extend the time for payment of the balance owing under the contract, because such payment is merely a partial performance of a duty already existing.

Hattiesburg Production Credit Association v. Smith, 1 So.2d 768, 769 (Miss. 1941). Again, FSB had no real obligation to the heirs of Edward D. May. Even if this Court placed an arbitrary duty

upon FSB, partial payment by Plaintiff of a past due debt does not stop a foreclosure. FSB was simply receiving a partial payment of what was already owed. Furthermore, these payments simply created more of a surplus at the foreclosure sale. This surplus was then remitted to the Estate of Edward D. May some time after the estate was finally opened approximately four (4) months after the foreclosure sale (RE 2). Again, regardless of the protests of May, it does not create a genuine issue of *material* fact. FSB was not required to stop the foreclosure.

**(2) The Marion County Chancery Court's decision to overrule Plaintiff's jurisdictional question was proper.**

After filing this action in Chancery Court and receiving an adverse ruling that dismissed the third-party purchaser at the foreclosure sale from the suit, May was allowed to amend its Complaint. In its Amended Complaint, May mentioned the jurisdictional question but stated, "...Plaintiff has no problem proceeding in Chancery," and went further to state that the reason for even mentioning the jurisdictional issue was to prevent the *Defendant* from raising this question on appeal in the event of an adverse judgment (RE 10). May further filed a Motion for Trial Setting indicating approval of the Chancery Court's jurisdiction (RE 1). Only after it became apparent that May would receive an additional adverse ruling did May press the jurisdictional argument. The Chancery Court's jurisdiction had been established early on in this case. It was May's choice to file in Marion County Chancery Court and, once that jurisdiction was established, the Chancery Court had every legal right and obligation to see the case through to its conclusion.

As stated in McClendon v. Miss. State Highway Comm'n:

It has long been settled in this state, as one of the pre-eminent principles of equity procedure, that the Chancery Court having taken jurisdiction on any one ground of equity, will thereupon proceed in the one suit to a complete adjudication and settlement of every one of all the several disputed questions materially involved in the entire transaction, awarding by a single comprehensive decree all appropriate remedies, legal as well as equitable, although all the other questions involved would otherwise be purely of legal cognizance; and in this state, the rule goes even to the extent that if the ground of equity fail under the proof, the cause may still be retained to a complete final decree on the remaining issues although the latter present legal subjects only and the decree would cover only legal rights and grant none but legal remedies, - that having taken jurisdiction the power of the court to administer full relief is limited by nothing but justice itself.

McClendon v. Miss. State Highway Comm'n, 205 Miss. 71, 78, 38 So.2d 325, 327 (1949). The Chancery Court's jurisdiction was proper at the filing of this suit and was proper to its conclusion. May can not now complain about the jurisdiction it chose simply because its ground of equity failed under the proof. Having taken jurisdiction, the Chancery Court had every right to proceed to complete adjudication. The Court's jurisdiction does not change simply because May received adverse rulings.

The Chancery Court's grant of summary judgment is a decree that can not be challenged solely through a claim of lack of jurisdiction. Other factors must be present. The judgment or decree of any chancery court rendered in a civil action can not be reversed or annulled simply on the ground of want of jurisdiction as to whether the cause was one of equity or common-law. Penrod Drilling Co. v. Bounds, 433 So.2d 916, 922 (Miss. 1983) (citing Article 6, Section 147 of the Mississippi Constitution). Only if other issues are present that warrant reversal may a case then be remanded to a different court.

May cites Tyson Breeders v. Harrison as grounds for removal of this action from Chancery Court to Circuit Court. However, the case now before this Court is distinguishable from Tyson Breeders. Tyson Breeders was fundamentally a contractual claim and was not tied to a foreclosure sale procedure. Also, unlike Tyson Breeders, the Defendant, FSB, at no time objected to jurisdiction. Tyson Breeders, Inc. v. Harrison, 940 So.2d 230 (Miss. 2006).

The Marion County Chancery Court had proper jurisdiction from the beginning of this case and had every right to proceed with the case to its conclusion even after May's equity claims failed. May also has no standing under the law to challenge the Court's grant of summary judgment on the ground that jurisdiction magically disappeared. The Court's decree, in accordance with the Mississippi Constitution and case law, can not be reversed on that ground.

### **CONCLUSION**

May has admitted that FSB followed all statutory requirements and contractual obligations in the foreclosure. The law imposes no other "extraordinary" notice requirements. At the time of the foreclosure, no heirs of Edward D. May had been legally established. FSB is not required to file an action to establish the heirs at law of the debtor. FSB contends that several of the un-established heirs had actual notice. However, even if they did not, May can not claim the existence of a genuine issue of material fact. FSB had no obligation under the law to send an actual notice to the un-established heirs of Edward D. May. Also, due to FSB meeting all requirements of statute and contract, any heirs of the debtor had constructive notice.



Furthermore, any acceptance by FSB or any creditor of partial payment on a past due debt is not the equivalent of a forbearance agreement. At no time was the loan in question brought current. The loan remained in default up to and including the time of the foreclosure sale. Since the loan was never brought current, which fact has been admitted by May, and FSB executed no separate forbearance agreement, FSB had no duty to stop the foreclosure. In addition, the person Plaintiff claims began making payments to FSB, Nellie May, was not included as a party Plaintiff and is not entitled to seek any remedy or relief. Therefore, based on the facts present in this case, and looking at the issues in a light more favorable to May, even if the items claimed by May were true, FSB's handling of the foreclosure sale was proper and FSB would still be entitled to summary judgment as a matter of law.

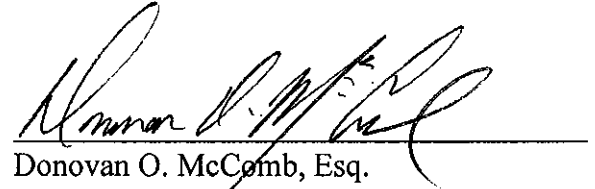
Jurisdiction was proper in Marion County Chancery Court. Having established jurisdiction upon the initial complaint of May, the Chancery Court's jurisdiction continued through the conclusion of the case even though May's equity claim eventually failed. May is not entitled to cry lack of jurisdiction simply because of an adverse ruling. Furthermore, in accordance with the Mississippi Constitution and case law, May should not be allowed to attack the decree of the Chancery Court simply on the ground that it lacked jurisdiction. May even indicated that it had no problem proceeding in Chancery. The Chancery Court had continuing jurisdiction that did not change because of rulings against May.

As a result of the above, the Marion County Chancery Court's grant of summary judgment in favor of FSB was proper. Even reviewing the case in a light more favorable to May,

no genuine issue of material fact exists and FSB is entitled to judgment as a matter of law. Therefore, FSB respectfully requests that this Court affirm the Marion County Chancery Court's grant of summary judgment.

Respectfully submitted,

FIRST SOUTHERN BANK, F/K/A  
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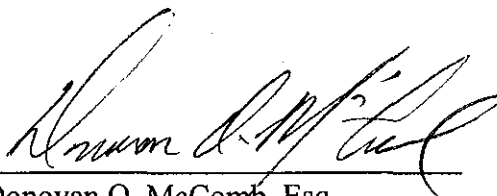
**CERTIFICATE OF SERVICE**

I, Donovan O. McComb, attorney for Appellee, do hereby certify that I have this day mailed, by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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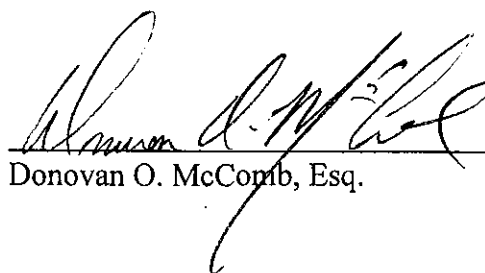
This, the 18<sup>th</sup> day of August, 2009.

  
\_\_\_\_\_  
Donovan O. McComb, Esq.  
Attorney for Appellee

**CERTIFICATE OF FILING**

I, Donovan O. McComb, do hereby certify that I have this day mailed, by U. S. Mail, postage prepaid, the foregoing original Appellee's Brief with three (3) copies of said Brief, four (4) copies of Appellee's Record Excerpts, and one (1) CD-ROM containing a copy of Appellee's Brief in PDF format, addressed to Betty W. Sephton, Clerk of the Supreme Court, P. O. Box 117, Jackson, Mississippi 39205.

This, the 18<sup>th</sup> day of August, 2009.

  
Donovan O. McComb, Esq.