IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-01025

In the Matter of the Estate of JOHN DAVIS, Deceased;

In the Matter of the Estates of DANIEL M. THOMPSON and LOUISE THOMPSON, Deceased, By: ALBERTA L. O'NEILL, Administratrix;

In the Matter of the Estate of LULA MAE DAVIS, Deceased; By: ALBERTA L. O'NEILL, Administratrix

ELDON LADNER and REGINA LADNER DAVENPORT **APPELLANTS**

v.

ALBERTA L. O'NEILL **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT
OF STONE COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

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v.

ALBERTA L. O'NEILL **APPELLEE**

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 disqualification or recusal.

Eldon Ladner and Regina Ladner Davenport
Appellants

Robin L. Robert, Esquire and Joel L. Blackledge, Esquire
Attorneys for Appellants

Alberta O'Neill
Appellee

Jack Parsons, Esquire and Tadd Parsons, Esquire
Attorneys for Appellee

Honorable Carter Bise, Chancellor
Presiding trial court Judge

TADD PARSONS, Attorney of Record for Appellee

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ELDON LADNER and REGINA LADNER DAVENPORT — **APPELLANTS**

v.

ALBERTA L. O'NEILL — **APPELLEE**

APPELLEE'S BRIEF

ISSUES TO BE CONSIDERED BY THE COURT

1. DID THE CHANCERY COURT ERR IN DENYING THE MOTION OF ELDON LADNER AND REGINA LADNER DAVENPORT FOR RELIEF FROM AND TO SET ASIDE JUDGMENT PURSUANT TO MISS. R. CIV. PRO. 60(b)?

2. BASED ON THE EVIDENCE PRESENTED, WERE THE DEFENDANTS SUBJECTED TO DURESS WHEN ENTERING INTO AN AGREED JUDGMENT UNDER THREAT OF CRIMINAL PROSECUTION FOR CONDUCT WHICH IS NOT A CRIME?

3. IS THE AGREED JUDGMENT VOID FOR LACK OF CONSIDERATION?

STATEMENT OF FACTS

Elson Ladner and Regina Ladner Davenport served as conservators and/or administrators for the estates herein. There has never been a sufficient accounting to show where the funds and assets were spent or used that was owned by the wards. The Appellants never filed an accounting for their actions and although receiving a letter form their attorney, James Hall, they never prepared an accounting or filed any sort of justification or accounting for their actions in the conservatorships and estates.

On April 7, 2006, Alberta L. O'Neil, filed a Motion to Remove Eldon Ladner and Regina Ladner Davenport and compel them to file an accounting and reimbursement for the funds wrongfully spent by them in their breach of their fiduciary duties to the estates. On September 28, 2006, an order was entered by the Chancery Court requiring Eldon Ladner and Regina Ladner Davenport to file a proper accounting in the estates in question. On April 3, 2008, approximately 18 months after ordered by the Court to make a detailed account and after the Appellee filed a Motion for Citation of Contempt an accounting was filed. This accounting was woefully deficient and didn't address monies collected, monies spent, and disbursement of other assets.

Subsequently, an agreed order was entered by the parties for Eldon Ladner and Regina Ladner Davenport to replace monies that were spent wrongfully and/or not properly accounted for by the Appellants when they were in control of the estates and owed a fiduciary duty to the decedents.

The Appellants failed to prove duress at the hearing on their Motion for Relief. In fact, there was not any showing that the Appellee or her attorney, Jack Parsons, made any sort of threats to convince them to sign the agreed judgment. There was no evidence introduced at the

hearing on the Appellants' Motion that there was any wrong-doing by the Appellee or her attorney that would induce the Appellants to sign the order. It should also be noted that Eldon Ladner and Regina Ladner Davenport are not unfamiliar with the inner workings of the legal system. Eldon Ladner was the Stone County Sherriff for 21 years and Regina Ladner Davenport has a Juris Doctorate from Mississippi College School of Law. Eldon Ladner and Regina Ladner Davenport contend that they were placed under duress by their attorney. This simply cannot be true. Eldon Ladner's testminony showed that he took the Agreed Judgment home and did not sign it immediately. If they were placed under duress there was time to consider this and seek other counsel.

ARGUMENT

Standard for Review

It is well established law in the State of Mississippi that the Mississippi Supreme Court will only review a Chancellor's findings through the manifest error/substantial evidence rule. In Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005), this Court found, "This Court's 'review of a chancellor's findings of fact is the manifest error/substantial evidence rule.' This Court has held that a chancellor's finding of fact may only be disturbed if the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied the wrong legal standard." Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005) (citing (Med. Devices, Inc., 624 So. 2d at 989 and Denson v. George, 642 So. 2d 909, 913 (Miss. 1994)).

"We will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous. In other words, where the chancellor's factual findings are supported by trustworthy evidence, they are insulated from reversal on appellate review." In re Estate of Davis, 832 So.2d 534, 536 (Miss.App 2001). (citing Bowers Window and Door Co., Inc. v. Dearman, 549 So.2d 1309, 1312-13 (Miss.1989); Jones v. Jones, 532 So.2d 574, 581 (Miss.1988)). The Chancellor in this case had substantial evidence to render a judgment in favor of the Appellee and against the Appellants.

1. DID THE CHANCERY COURT ERR IN DENYING THE MOTION OF ELDON LADNER AND REGINA LADNER DAVENPORT FOR RELIEF FROM AND TO SET ASIDE JUDGMENT PURSUANT TO MISS. R. CIV. PRO. 60(b)?

Rule 60(b) of the Mississippi Rules of Civil Procedure states in pertinent part:

> (b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) fraud, misrepresentation, or other misconduct of an adverse party; ...
> (6) any other reason justifying relief from the judgment.

The Appellants wholly failed to prove any facts at the hearing on their Motion for Relief that would justify any relief under Rule 60(b) M.R.C.P. They rely on 60(b)(6) for the relief, however duress falls under 60(b)(1), misconduct of an adverse party. Their attorney merely advising them that there is potential for criminal charges and other sanctions is not duress, but actually a lawyer fully discharging his duties to his clients.

Duress must be created by actions of the adverse party. "To constitute duress by threats the actor's manifestation must be made for the purpose of coercing the other; must have for its object the securing of undue advantage with respect to the other; must be of such a character that it is adapted to overpower the will of the other and is reasonably adequate for the purpose; must in fact deprive the other to act to his detriment." Askew v. Askew, 699 So.2d 515, 518 (Miss,1997) (citing Libel v. Libel, 5 Kan.App.2d 367, 616 P.2d 306 (1980)). "There is no indication of sufficient evidence to conclude that [Alberta O'Neill] did anything to coerce [Eldon Ladner and Regina Ladner Davenport] into the agreed judgment. Thus, while there may be proof that [Eldon Ladner and Regina Ladner Davenport] did suffer emotionally during the proceedings, there is no suggestion of a legal basis to conclude that the duress he experienced was sufficient to set aside the agreed judgment. *Id.*

"Duress and compulsion go to the question of reality of consent to a contract. The ultimate fact for determination is whether the complaining party was deprived of free exercise of his own will. The conduct of the dominant party must have been such as to override the volition of the victim. It is not sufficient that one party insisted upon a legal right and the other party yielded to such insistence. It cannot be predicated upon a demand which is lawful, or upon doing or threatening to do that which a party has a legal right to do." Duckworth v. Allis-Chalmers Mfg. Co. 247 Miss. 198, 203-4 (Miss. 1963). (citing 17 C.J.S. Contracts § 168b; Wherry v. Latimer,

103 Miss. 524, 60 So. 563, 642 (1913); Clark v. Magee, 234 Miss. 252, 105 So.2d 753 (1958); Cunningham v. Lockett, 216 Miss. 879, 63 So.2d 401 (1953). 17A Am.Jur., Duress and Undue Influence, sec. 7; 17 C.J.S. Contracts § 177, p. 536; 5 Williston, Contracts (rev. ed. 1937), sec. 1618; Anno., 79 A.L.R. 655 (1932)). The dominant party in this analysis is the Appellee, not the attorney for the Appellants. As stated before and totally absent in the brief of the Appellants there was no duress by Alberta O'Neill. The allegations of the separate agreement outside of the judgment reciting the amount that was settled upon by the parties was a favor of the Appellee to Regina Ladner Davenport to keep the amount secret so it would not have an impact on her if she decided to run for Mayor of Wiggins. Making the agreement public could not be duress, as Alberta O'Neill and her attorney, Jack Parsons, had every right to do since there was no confidentiality agreement between the parties. In fact, the confidentiality was suggested by the attorney for Alberta O'Neill so as to help Regina Ladner Davenport should she have political aspirations.

The law is clear that no duress was applied to Eldon Ladner or Regina Ladner Davenport to sign the agreed judgment and obligate themselves to repay monies that were misappropriated from the underlying estates. Further, the amount of $110,000.00 was a negotiated figure between the parties.

"Rule 60(b) provides for ['']extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances, and neither ignorance nor carelessness on the part of an attorney will provide grounds for relief.['] A party is not entitled to relief merely because he/she is unhappy with the judgment. The party must make a showing that he/she was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules, or ignorance of the law is not enough." Jenkins v. Jenkins, 757 So.2d 339, 343 (Miss.App 2000).

(citing Stringfellow v. Stringfellow, 451 So.2d 219, 220 (Miss.1984)). There was no showing by the Appellants at the hearing, nor has any been shown here that there are exceptional circumstances to set aside the agreed judgment to which they consented.

2. BASED ON THE EVIDENCE PRESENTED, WERE THE DEFENDANTS SUBJECTED TO DURESS WHEN ENTERING INTO AN AGREED JUDGMENT UNDER THREAT OF CRIMINAL PROSECUTION FOR CONDUCT WHICH IS NOT A CRIME?

Simply stated there was no evidence introduce that the Appellants were threatened with criminal prosecution. The Appellants argument fails due to the fact that the perceived threat of criminal prosecution was never threatened by the Appellee or her representatives. The Court held in Service Fire Ins. Co. of N. Y. v. Reed, "[A] release is obtained by threats of criminal prosecution under such circumstances that the one executing the release is deprived of the free exercise of his will, such release may be avoided on the ground of duress. Service Fire Ins. Co. of N. Y. v. Reed, 2 So.2d 197, 198 (Miss 1954). (citing 7 Am.Jur., Duress and Undue Influence, Par. 11). This case is different than the case at bar. In Service Fire Ins. Co. of N. Y. v. Reed, an agent of the opposing party had made the threats. There has been no evidence proffered by the Appellants that the Appellee or her representatives made any threat of prosecution. This standard would not be applicable to the agreed judgment which was knowingly, intelligently and voluntarily entered into by the Appellants.

The Court has held that threats of an investigation are not enough to deprive a party of their free will. "It is true that appellant admitted at the trial, which was several years after the execution of the original note and the renewals thereof, that it was in fact his intention to turn the matter over to the proper authorities for investigation, but it is not shown that this intention was communicated to the signers of the notes prior to the execution thereof, unless it can be said that the statement in his letters to the effect that he intended to have an investigation made amounted

to such a communication, and we are of the opinion that the statements contained in the letters do not amount to a threat of criminal prosecution or to such duress under the law as to have deprived the signers of the note of the exercise of their free will, discretion, and judgment when they signed the same." Milstead v. Maples, 177 So. 790, 791 (Miss 1938). There was no threats, actions or any wrongdoing by the Appellee to deprive the Appellants of their free will, discretion, and judgment when they signed the agreed judgment. Further, if the Appellants had properly managed the conservatorships and estates why would they fear any sort of prosecution?

3. IS THE AGREED JUDGMENT VOID FOR LACK OF CONSIDERATION?

This argument by the Appellants holds no merit, the consideration for the agreed judgment was to forego any further litigation and pursuit of the Appellants if they would reimburse the misappropriated amounts to the estates in question. There was no communication between the parties related to criminal prosecutions. It seems striking to the Appellee that the Appellants want to blame everyone but themselves. The Appellants are quick to blame James Hall, their first attorney for the failure to file an accounting when the letter introduced into evidence at the hearing was from him to them instructing Eldon Ladner and Regina Ladner Davenport that they must file an accounting. Then, after being confronted through the court by Alberta ONeill the Appellants want to blame their next attorney, Richard Smith, for 'forcing' them to sign an agreed order which they were able to take home and think about before signing. It is only after being served with a Complaint for Citation of Contempt for their failure to abide by the terms of their agreement that the "duress" angle is pursued by the Appellants.

"In any contract, ['][a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration.[']" Covenant

Health & Rehabilitation of Picayune, LP v. Lumpkin ex rel. Lumpkin, 23 So.3d 1092, 1097 (Miss.App 2009). (citing Theobald v. Nosser, 752 So.2d 1036, 1040 (Miss.1999)). The consideration was to forego any further pursuit of Eldon Ladner and Regina Ladner Davenport for their misdeeds and misappropriation of assets and funds from the estates, for which they owed a fiduciary duty, herein upon payment of the agreed amount. There was over $100,000.00 in collected rents alone in these estates and underlying conservatorships that have yet to be properly accounted.

"The elements of a valid contract are: (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with the legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contract formation." Gandy v. Estate of Ford, 17 So.3d 189, 193 (Miss.App 2009). (citing Mauldin Co. v. Lee Tractor Co. of Miss., Inc., 920 So.2d 513, 516 (Miss.Ct.App.2006)). The agreed judgment in the case at bar had all of these elements. The Appellants and Appelles were parties to this agreed judgment. Aberta O'Neill agreed to not pursue Eldon Ladner and Regina Ladner Davenport any further for funds owed the estates. The terms of the agreed order were definite and not ambiguous. All parties had legal capacity to contract, there has been no allegations of nay incapacity of the parties. All parties agreed to the judgment. Finally, there is no legal prohibition on the agreed judgment or the terms contained therein. "Mere inadequacy of price is not sufficient to set aside a contract, unless it is so gross as to furnish evidence of fraud. There must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." *Id.*

In the case of Fetterman v. Lumber & Manufacturing Company, it was held that the forbearance to assert a valid claim or right is sufficient consideration to support a promise. And

in the case of Stanley et al. v. Sumrall, 167 Miss. 714, 147 So. 786, 788, the court went further in applying the rule, in order to determine the issue there involved, and approved as a further correct statement thereof, the following language: "That forbearance to assert a claim which might reasonably be doubtful is sufficient consideration to support a promise." Milstead v. Maples, 177 So. At 791 (citing Fetterman v. Lumber & Manufacturing Company, 162 Miss. 547, 139 So. 406 (Miss 1932); Stanley et al. v. Sumrall, 167 Miss. 714, 147 So. 786, 788, (Miss 1933)). The simple agreement to forego pursuing further claims against the Appellants is enough consideration to support the agreed judgment.

CONCLUSION

The Court rightfully found that there was no duress and the agreed judgment was freely and voluntarily signed. Had there been no action for contempt and enforce the judgment the Appellants would have never filed the motion in question. There was adequate consideration for the agreed judgment for both parties. Further, there was never any evidence proffered of ay threat or duress by the Appellee or her representatives. Given the weight and credibility of evidence presented this Court should affirm the Chancellor's ruling and dismiss the appeal.

ALBERTA O'NEILL

By: PARSONS LAW OFFICE

By: _____

TADD PARSONS
MS Bar #[redacted]

CERTIFICATE OF SERVICE

I, TADD PARSONS, of counsel for Appellants, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing APPELLEE'S RECORD EXCERPTS to the following at their respective addresses listed below:

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THIS, the 5th day of March, 2010.

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