In the Supreme Court of Mississippi

Cause Number 2009-CA-01319

In Re: Estate of Gocher Morrow, Deceased
In Re: Estate of Reba Eloise Sparks Morrow, Deceased

PHILLIP MORROW,
Petitioner-Appellant,

V.

JOEL E. MORROW AND RONALD E. MORROW,
Respondents-Appellees.

APPEALED FROM THE CHANCERY COURT OF ITAWAMBA COUNTY, MISSISSIPPI
CASE NUMBERS 2000-0285-29-L AND 2000-0286-29-L

REPLY BRIEF OF APPELLANT, PHILLIP MORROW

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I. THE EFFECTIVE DATE OF THE DEEDS IS THE DATE OF DELIVERY, NOT THE DATE OF EXECUTION.

Generally, a deed only takes effect upon delivery, not upon signing. *See Crooker v. Hollingsworth*, 46 So.2d 541 (Miss. 1950). "But a deed is not delivered until the grantor either has actually placed it beyond his control, or has indicated an intention of so treating it." *Hall, et al. v. Waddill et al.*, 7 So. 936, 937 (Miss. 1900).

Phillip's deed to Gocher and Reba was delivered to the Chancery Clerk for recording and it was in fact recorded at 2:40 p.m. on April 22, 1996. Gocher and Reba's deed to Philip to the Chancery Clerk for recording and it was in fact recorded the following day at 2:45 p.m. on April 23, 1996. Thus, Phillip's deed to his parents was "delivered" the day before his parents' deed to him was "delivered." Consequently, Gocher and Reba effectively conveyed the property to Phillip based on the dates the deeds were recorded or "delivered."

Ronald and Joel Morrow claim Phillip Morrow "failed to offer any proof in support of his claim that there was any delay in delivery of the parents' deed to him." (Appellees Br. at 30). However, logic and common sense dictate that the deeds were not beyond Gocher and Reba's control until their attorney, Nell May, recorded the deeds. Further, Phillip Morrow testified at length about the intent of the parties to the transaction, which is consistent with the sequence in which the

deeds were recorded.[1] Tr. 35-48. That Gocher and Reba intended to convey this property to Phillip Morrow, while reserving a life estate for themselves, is **undisputed**. This is important because it is the intent of the parties that is ultimately determinative with regard to whether a deed has been delivered. 23 Am. Jur. 2d Deeds § 118.

Phillip Morrow cited *Wilbourn v. Wilbourn*, 37 So.2d 256, 258-59 (Miss. 1948),[2] among other cases, in support of his claim that the two 1996 deeds in question were not legally "delivered" until the date of their respective recordings. Ronald and Joel Morrow correctly note that *Wilbourn* does not stand for the proposition that the date of delivery is always determined by the date of recording.

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[1] Ronald and Joel Morrow disingenuously make much ado of the fact that Phillip Morrow did not call Nell May, the attorney who drafted the deeds, as a witness at trial. However, Ronald and Joel well know that Nell May, who was born in 1923, was eighty years old and in bad health at the time of the hearing. Phillip's trial counsel, Roger Tubbs, contacted Ms. May prior to the hearing but she was unable to recall anything about these events due to her diminished capacity. Ms. May passed away in 2006. Had Ms. May been able to testify at the hearing of this cause, she would have been called as a witness. Further, if Ms. May had any information tending to support the Ronald and Joel's theory of the case, then the they would have called her.

This is another attempt by Ronald and Joel Morrow to hold Phillip Morrow to an insurmountable burden of proof. If this Court adopts the Ronald and Joel's analysis of the legal issues in this case, it will impossible for trial courts to reform a deed or carry out the true intent of a grantor (even if the grantor's intent is undisputed) when the grantor and the attorney who prepared the deed are deceased or unable to testify. Hopefully, this Court will be reluctant to endorse such a rigid application of the law.

[2] In *Wilbourn*, a man and his wife conveyed land to their son while he was overseas at war. Prior to delivering the deed to their son, the mother burned the deed. Later, the parents filed suit seeking to invalidate the conveyance on two grounds: (1) the deed was never delivered and (2) the son, as grantee therein, never accepted the deed. This Court held that the deed was legally "delivered" when it was recorded and that the effective date of delivery is the date of recordation. The Court further held that acceptance of the deed was implied from the circumstances.

Phillip Morrow does not claim as much. Rather, Phillip claims the act of recording a deed is equivalent to "delivery" under Mississippi law when, as in this case,[3] the deed has not previously been delivered to the grantee. *Id.*[4]

Further, the record in this case does not warrant relating the effective date of the deeds back to the date of execution memorialized on the deeds. The Chancellor relied on Miss. Code Ann. § 89-5-13 to avoid addressing the issue of delivery in his opinion.[5] That statute has no bearing on the case *sub judice* because the deeds at issue herein do not contain a "defective acknowledgement" within the meaning of Miss. Code Ann. § 89-5-13. Phillip Morrow submits that Section 89-5-13 was likely only intended to "cure" deeds that were acknowledged but not properly sworn to in the presence of a notary public or other officers (e.g.,

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[3] Phillip Morrow testified that he did not know which of the two deeds was signed first. Obviously, if his parents' deed to him had been delivered to Phillip before it was recorded, then Phillip would have known that his parent's deed was signed first. Tr. 70.

[4] *See also Ladner v. Moran*, 1 So.2d 781 (Miss. 1941); *Young v. Elgin, Miss.*, 27 So. 595 (Miss. 1900); *Palmer v. Riggs*, 19 So.2d 807 (Miss. 1944); *Frederic v. Merchants & Marine Bank*, 28 So.2d 843, 846 (1947); 23 Am. Jur. 2d Deeds § 118 (fact that deed is recorded is prima facie evidence of delivery).

[5] That section reads as follows:

> (1) Concerning an interest in land, whenever an instrument of conveyance (including but not limited to a deed of trust or assignment), release, termination or cancellation which contains a defective acknowledgement has been of record seven (7) years or more in the land records of the county in which the said land is located, the acknowledgment shall be good without regard to the form of the certificate of acknowledgment.
>
> (2) Any such instrument which has been of record for ten (10) years and which bears no acknowledgement shall likewise be treated as if properly acknowledged.

deeds that were "witnessed" by a non-notary or non-officer). Indeed, this Court has noted that Section 89-5-13 "is a curative statute for deeds with defective acknowledgments, but otherwise has no bearing on a deed's validity." *Greenlee v. Greenlee*, 607 So.2d 97, 106 (Miss. 1992). Ironically, Ronald and Joel Morrow urge this Court to use Section 89-5-13 to endorse or solidify a defective acknowledgement, not to "cure" the defective acknowledgement. Such an application of this statute would be inconsistent with its purpose, as set forth in *Greenlee*.

Even if Section 89-5-13 applies to the facts of this case, which is specifically denied, the Chancellor himself acknowledged that this merely creates a rebuttal presumption that the deed is valid. Bench Opinion at 11-13; *see also Aron v. Reid*, 850 So.2d 108 (Miss. Ct. App. 2002). If such a presumption ever arose, it was certainly rebutted by the undisputed evidence at trial that Gocher and Reba Morrow intended to transfer the property at issue to Phillip Morrow. Tr. 25-26; 35-38; 42-44.[6]

Ronald and Joel Morrow cite *Hughes v. Pontotoc County*, 242 So.2d 438 (Miss. 1971) as a "factually similar case" where the trial court, and this Court, refused to reform a deed. However, *Hughes* is readily distinguishable from the

[6] Ronald and Joel Morrow claim "Phillip Morrow offered absolutely no proof as to any mistake by Nell May in acknowledging these Deeds other than his general testimony that his parents wished to retain a life estate during their lifetime." Appellees' Br. at 16.) Ronald and Joel Morrow, however, fail to acknowledge that this "general testimony" is: (a) undisputed and (b) actually substantiated by a letter Ronald Morrow wrote to his parents (see Tr. 46-49).

case at hand. In *Hughes*, the Court stated "we do not agree with the Appellant that the evidence was uncontradicted, it being our opinion that there was an issue of fact[7] properly presented to the Chancellor for his consideration..." *Id.* at 440. The same cannot be said for the case at hand where Phillip Morrow's testimony was uncontradicted, undisputed and actually supported by other evidence.

II. THE DEED FROM GOCHER AND REBA MORROW TO PHILLIP MORROW SHOULD BE REFORMED TO REFLECT AN EXECUTION DATE OF APRIL 23, 1996.

Courts may exercise their equitable powers to reform a deed to make it conform to the intention of the parties. 76 C.J.S. Reformation of Instruments § 14. A deed should be reformed when it does not comport with the intent of the parties, even if there is no ambiguity on the face of the deed. *Brimm v. McGee*, 80 So. 379 (Miss. 1919); *Whitney Central Nat. Bank v. First Nat. Bank*, 130 So. 99 (Miss. 1930) (equity will make the deed speak to the mutual intention of the parties). In an action to reform a deed based on a mistake theory, the petitioner bears the burden of proof beyond a reasonable doubt. *McCoy v. McCoy*, 611 So.2d 957 (Miss. 1992).

In *McCoy*, this Court declined to reform a deed between a deceased grantor and a deceased grantee because "no witness ever heard these two discuss with each

[7] The Court noted the Appellant's contention that the deed was delivered on October 2, 1961 was contradicted, not only by the deed itself, **but also** by the resolution of the board of supervisors of October 3, 1961. *Id.* at 440.

other their intent." *Id.* at 961. The same cannot be said for the case at hand in which Phillip's testimony regarding the intent of the grantors and grantee is undisputed. Tr. 25-26; 35-38; 42-44. Accordingly, the deed in question should be reformed to comport with that intent.

A consistent theme throughout Ronald and Joel Morrow's brief is that courts cannot "presume upon the proof." No one is asking this Court to presume upon the proof. Rather, Phillip Morrow is asking this Court to accept his testimony (which is "proof") regarding the parties' intent as true because it was uncontradicted and undisputed. Indeed, "evidence which is uncontradicted or undisputed should ordinarily be taken as true by the trier of facts, if it is not inherently improbable or unreasonable. It cannot be arbitrarily disregarded." *Shivers v. Biloxi-Gulfport Daily Herald*, 110 So.2d 359, 361 (Miss. 1959).

Ronald and Joel Morrow cite *Holliman v. Charles L. Cherry & Associates, Inc.*, 569 So.2d 1139 (Miss. 1990) in support of their contention that Phillip Morrow failed to meet his burden of proving a mutual mistake. *Holliman* is also easily distinguishable from this case.[8] In *Holliman*, this Court affirmed a Chancellor's denial of the Hollimans' request to reform a deed to add six acres of land that was not referenced in a deed to them because:

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[8] *Holliman* does, however, state that "if mutual mistake...is properly pled, then prior oral representations/negotiations are admissible to prove the real intent of the contracting parties." *Id.* at 1146. This is exactly what Phillip Morrow did at the trial court level and, as previously noted, this testimony was undisputed.

> Unfortunately for the Hollimans, they offered no proof of "mutual mistake" between themselves and **C.N. Dale, Jr., E.S. Dale and their respective wives**, all of whom were the signatory parties to that certain 1967 warranty deed which the Hollimans seek to reform. Instead, the Hollimans attempted to testify to certain alleged oral negotiations between themselves and **C.N. Dale, Sr. (now deceased)**, in which Dale, Sr. supposedly communicated his intention to include the disputed six acres in the sale of land to the Hollimans in 1967.

Id. at 1144 (emphasis added).

Thus, this Court refused to reform the Holliman's deed because they offered no proof regarding a mutual mistake between themselves and four other living signatories to the deed the Hollimans sought to reform. The same cannot be said for the case *sub judice* where Phillip Morrow offered undisputed testimony regarding the intention of **every** party to both of the 1996 deeds at issue. Thus, *Holliman* offers no support to Ronald and Joel Morrow.

III. THE DOCTRINE OF AFTER-ACQUIRED PROPERTY VESTS TITLE TO THE PROPERTY IN PHILLIP MORROW.

Even if the 1996 deed from Gocher and Reba Morrow to Phillip Morrow is not reformed and the effective date of the deed is the date it was purportedly executed, title to the property should have vested in Phillip pursuant to the Doctrine of After-Acquired Property ("DAAP"). Mississippi recognizes the DAAP where a grantor, having no title to a particular tract of land, purports to convey it to a grantee by warranty deed and, in fact, later acquires valid title to the property. *Butler v. City of Eupora*, 725 So. 2d 158, 160 (Miss. 1998). In such a

situation, the grantor's after-acquired title will automatically pass to the grantee without further conveyance by way of estoppel. *Id.*; *see also* William E. Burby, Handbook of the Law of Real Property § 128 (3d ed. 1965).

This Court addressed the DAAP in *Butler v. City of Eupora, supra.* In that case, the Mississippi Department of Transportation (MDOT) conveyed the Butler's property to the City of Eupora before MDOT acquired its own title to the property. *Butler*, 725 So. 2d at 158. In reality, the Butlers still owned the land at the time MDOT conveyed the property to the City of Eupora. *Id.* The Butlers did not relinquish title to MDOT, the grantor, until after the City of Eupora, the grantee, began to lay water pipes on the property for developmental purposes. *Id.* The Court held that since MDOT later acquired title, and because the City of Eupora relied on this title to their detriment by laying the water pipes, the DAAP applied under principles of equitable estoppel. *Id.* at 162.

Like the Butlers, Gocher and Reba Morrow allegedly conveyed property to Phillip Morrow before they acquired a valid title to that property (March 23, 1996 deed). Under the DAAP, the title later acquired by Gocher and Reba on April 22, 1996 actually vested title to the property in Phillip by operation of law.

The DAAP is founded upon the principles of equitable estoppel. 23 Am. Jur. 2d Deeds § 277 (2011). In *Butler*, this Court stated that the DAAP precludes a party from denying a material fact upon which he has previously induced another

to rely, whereby the second party changed his position to his detriment in reliance thereon. *Butler*, 725 So. 2d at 160 (acknowledging the connection between the DAAP and equitable estoppel in Mississippi).

Phillip Morrow changed his position to his detriment the moment he signed the deed conveying the property at issue to his parents. He testified at trial that he would not have executed the deed without the understanding that the property would be conveyed back to him subject to his parents' life estate. Tr. 35-36; 41. He invested time, labor, and money to improve the property because he believed the property belonged to him. R. 378, ¶ 11; R.E. 42; Ex. 1, 3, 4 (10/23/06); R.E. 64, 82, 84. Thus, the principles of equitable estoppel upon which the DAAP was founded require this Court to vest title to the property in Phillip Morrow.

Ronald and Joel Morrow argue that Phillip Morrow should not be allowed to rely on the DAAP because "[h]e was not the victim of some misconduct of his parents so as to be entitled to claim equitable relief." Appellees Br. at 25. The fact is that **if** Gocher and Reba Morrow "duped" Phillip Morrow into conveying this property back to them, then the principles of equitable estoppels certainly apply to this case.[9] Ronald and Joel Morrow argue that Phillip Morrow "failed to provide

[9] Phillip Morrow does not believe his parents intended to trick him into conveying this property back to them for two reasons: (1) he loved and trusted his parents and does not believe they would do such a thing and (2) it defies logic and common sense. If Gocher and Reba Morrow intended to "dupe" Phillip into conveying this property back to them, then why would they have executed a deed back to Phillip at all? And why would they have

any proof whatsoever that either of these Deeds failed to reflect the intention of his parents." Appellees' Br. at 14. Ronald and Joel cannot have it both ways. Assuming, *arguendo*, that Ronald and Joel are correct and Gocher and Reba Morrow actually intended to trick their son into conveying this property back to them by executing their deed to Phillip **before** Phillip executed his deed to them, then the principles of equitable estoppel, and the DAAP, should apply to this case.

In his Bench Opinion, the Chancellor relied on 23 Am. Jur. 2d Deeds § 343 (changed to 23 Am. Jur. 2d Deeds § 279 since being reduced to print) and held that the DAAP is not applicable to cases where the grantee himself is the source of the after-acquired title. 23 Am. Jur. 2d Deeds § 279 provides, in pertinent part, as follows:

> Generally, if the grantor subsequently acquires a title, which he has purported to convey, *from other than the grantee himself or one claiming under or deriving title from him*, it makes no difference, in respect to the application of the after-acquired title rule, how the grantor acquires his belated title, whether through enforcement of a mortgage, enforcement of a vendor's lien, by purchase on foreclosure of a tax lien, or on an execution sale to satisfy a judgment. (Emphasis added; citations omitted.)

However, the language of this secondary source is plainly rebuked by *Garner*, a case cited in the footnotes of this same secondary source.

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instructed Nell May to record this deed **after** Phillip's deed to them was recorded? They would not, of course, and any argument to the contrary is a knowing distortion of the truth.

In *Garner*, this Court held, unequivocally, that "[i]t makes no difference how the grantor acquires his belated title..." *Garner v. Garner*, 78 So. 623 (Miss. 1918) (cited in 23 Am. Jur. 2d Deeds § 279 (2011)). In that case, two brothers, Starlin Garner and W.C. Garner, were tenants in common of two separate tracts of real estate, one known as the home place and the other as the Blessingham place. The two brothers ultimately decided to "trade" tracts and Starlin Garner executed and delivered to his brother, W. C. Garner, a warranty deed for the entire Blessingham place (including the one-half he did not own) while W. C. Garner and his bride executed and delivered to Starlin Garner a warranty deed to the entire home place (including the one-half he did not own). The Blessingham place was encumbered by a Deed of Trust that was not referenced on the face of the deed from Starlin to W.C. Ultimately, the bank foreclosed on the Blessingham place and Starlin purchased the property at the foreclosure sale. *Id.* at 623-24.

The *Garner* court held that the entire interest Starlin purchased at the foreclosure sale passed straight through Starlin and automatically vested valid title in W.C. pursuant to the DAAP. *Id.* at 625. The Court was not concerned with the fact that W.C., the original grantee, was the source of Starlin's after-acquired title. Thus, the binding precedent of this Court is directly at odds with the language of 23 Am. Jur. 2d Deeds § 279 relied upon by the Chancellor.

Ronald and Joel Morrow attempt to distinguish *Garner* on the basis that Starlin (who like Gocher and Reba Morrow was the original grantor) re-obtained his title by way of W.C.'s Deed of Trust, as opposed to directly from W.C. himself. This is a distinction without a difference. The fact remains that Starlin obtained title to the Blessingham place through W.C., his grantee and predecessor in title. The fact that Starlin obtained title to the Blessingham place a second time because W.C. failed to make his mortgage payments, as opposed to executing a deed directly to Starlin, is without consequence. The *Garner* court held "[i]t makes no difference how the grantor acquires his belated title; a title through an outstanding deed of trust operates in favor of the grantee." *Id.* at 624. Contrary to Ronald and Joel Morrow's interpretation of *Garner*, the Court did not state that it would have reached a different conclusion had Starlin obtained his title directly from W.C. as opposed through W.C.'s Deed of Trust. Indeed, such a holding would be inexplicable and defy logic.

Accordingly, this Court should confirm title to the property at issue in Phillip Morrow pursuant to the DAAP.

IV. PHILLIP MORROW PROVIDED APPELLEES WITH SUFFICIENT NOTICE OF HIS CLAIM AND WAS NOT REQUIRED TO PLEAD THE DOCTRINE OF AFTER-ACQUIRED PROPERTY AS AN AFFIRMATIVE DEFENSE.

The Chancellor found that Phillip "waived" the right to rely on the DAAP at trial because his trial counsel failed to identify the doctrine by name in his

Complaint or Answer to the counter-claims filed by his brothers. Bench Opinion (05/11/04) at 17-19. However, the Chancellor proceeded to analyze Phillip Morrow's claim to title under the DAAP and ultimately found that the DAAP could not be applied to the facts of this case in any event. *Id.* at 22-23. Phillip Morrow submits the Chancellor erred on both counts.

The Mississippi Rules of Civil Procedure govern the pleading requirements of this case and Phillip Morrow complied with the notice requirements of these rules. Further, this Court has held that the DAAP is not a claim that must be affirmatively pled as a defense. *Butler*, 725 So.2d at 160.

In *Butler*, this Court held that the DAAP is not an affirmative defense, despite its close association with equitable estoppel, which is an affirmative defense. *Butler*, 725 So.2d at 160. Specifically, the Court noted:

> This Court has recognized that equitable estoppel is an affirmative defense. *See Board of Education of Lamar County v. Hudson*, 585 So.2d 683, 684 (Miss.1991); *Phillips Petroleum Co. v. Stack*, 246 So.2d 546, 546 (Miss.1971). However, the Butlers have not cited, and we are wont to find, any precedent for their argument that a claim of right under the after-acquired title doctrine is a defense that must be pleaded affirmatively. Nonetheless, we have addressed the finding of equitable estoppel by a chancellor when the party benefitting from the finding never asserted such a defense. In *Christian Methodist Episcopal Church v. S & S Construction Co.*, 615 So.2d 568, 572 (Miss.1993), this Court stated that "the purpose of a pleading 'is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice.' " See Comment to Miss. R. Civ. P. 8.

Id.

Obviously, *Butler* does not require the DAAP, or even equitable estoppel, to be pled as an affirmative defense. Thus, even if Phillip were relying on the DAAP in the defensive sense, as opposed to offensively to support his original petition, he is, nevertheless, not required plead the DAAP as an affirmative defense.

At the trial of this cause, the Chancellor erroneously found that Phillip Morrow did not meet the notice requirements set forth in *Butler* and *Christian Methodist Episcopal Church v. S & S Const. Co., Inc.*, 615 So.2d 568 (Miss. 1993) because he did not identify the DAAP by name in his pleadings and did not place opposing counsel on notice of his equitable estoppel claim. Bench Opinion (05/11/04) at 17-18.

Phillip's Complaint requests the trial court "declare and adjudge that Phillip Morrow owns a fee simple interest in the property, and is entitled to the quiet and peaceful possession of said real property, and the Respondents, and all persons claiming under them, have no estate, right, title, lien, or interest in or to the real property or any part thereof." R. 379; R.E. 43. While Phillip's Complaint did not identify the DAAP by name, it certainly placed the Ronald and Joel Morrow on notice that Phillip was claiming sole ownership of the property.

The basis for Phillip's claim was also set forth in his amended designation of expert witnesses, which was filed 29 days prior to the hearing. His amended designation states that attorney Tommy McElroy will be tendered as an expert in

the field of property law and will testify that "Phillip Morrow is the owner of the real property..." R. 322; R.E. 31. The designation further provides that Mr. McElroy will testify that "the second deed from Reba and Gocher Morrow to Phillip Morrow vested title to the subject property...in Phillip Morrow." R. 323; R.E. 32. Finally, the designation provides that "[t]he grounds for [Mr. McElroy's] opinions are the three deeds between Reba and Gocher Morrow and Phillip Morrow and that the facts contained in the deeds speak for themselves." *Id.*

It is also worth noting that Ronald and Joel Morrow were admittedly placed on notice that Phillip Morrow intended to rely on the DAAP no later than February 18, 2004. However, the Chancellor did not issue his Bench Opinion finding that Phillip "waived" his right to rely on the DAAP until May 11, 2004 – almost three months later. Being purely an issue of law,[10] three months was more than enough time for Ronald and Joel to file a response to the Trial Brief Phillip submitted on February 18, 2004. Thus, Ronald and Joel would not have been prejudiced by Phillip's reliance on the DAAP, whether they were placed on notice before February 18, 2004 or not.

Ronald and Joel Morrow do not even attempt to distinguish *Butler* from the facts of this case. Rather, they totally ignore the facts of *Butler* and, instead, note that the *Butler* court cited *S & S Const.* for its authority that the DAAP did not

[10] The Deeds dates of attestation and recording and the deraignment of title were not in dispute.

have to be pleaded by name and then turn their attention to distinguishing *S & S Const.* Ronald and Joel note that in "*S & S Construction*, this court did, indeed, conclude that equitable estoppels is not required to be specifically named as an affirmative claim or defense if the complaint actually recited all the elements of equitable estoppel. Appellees Br. at 20 (citing *S & S Const.*, 615 So.2d at 572). Ronald and Joel misinterpret *S & S Const.* and totally ignore *Butler*, which directly contradicts their proposed interpretation of *S & S Const.*

In *S & S Const.*, this Court did state that "[t]he complaint of S & S clearly put CME on notice that S & S changed its position, detrimentally, in reliance on the assurance of CME..." *S & S Const.*, 615 So.2d at 572. However, it did not hold that a litigant must include this "magical language" in her Complaint to comply with the notice requirements of Rule 8.

Indeed, the City of Eupora, who successfully relied on the DAAP in *Butler*, failed to use any magical language such as "detrimental reliance" or the like, yet this Court affirmed the trial court's reliance on the DAAP to vest title in the City of Eupora. Specifically, this Court noted:

> It is clear that in this case, the City of Eupora began to lay the water pipe (changed its position, detrimentally) in reliance on the permit from MDOT (an assurance that they had permission to do so). Just as we found that the complaint of S & S, which clearly put the Christian Methodist Episcopal Church on notice that S & S changed its position, detrimentally, in reliance on the assurance of the church that funds for completion of the construction project were in hand, *Id.* at 572, we also find that the City's pleadings, which state that MDOT had the right to

> grant a permit and that the City operated within its rights based on the MDOT's permit to locate the water line, were sufficient to put the Butlers on notice regarding equitable estoppel. Additionally, the Butlers were aware through interrogatory responses that the City relied wholly on its permit from MDOT. "That is all that our rules of civil procedure require." *Id.* Accordingly, we find that the chancellor was not erroneous in concluding that the doctrine of equitable estoppel (or after-acquired title) should be enforced.

Butler, 725 So.2d at 161.

Thus, *S & S Const.* does not offer any assistance to Ronald and Joel Morrow and *Butler* directly contradicts the position they urge this Court to adopt.

Accordingly, this Court should find that the Chancellor erred in finding that Phillip Morrow "waived" his right to rely on the DAAP because it was not affirmatively pleaded by name in his Complaint or in his Answer to the counter-claims filed by his brothers.

V. ALTERNATIVELY, PHILLIP MORROW IS ENTITLED TO AN EQUITABLE LIEN ON THE PROPERTY FOR HIS COST AND LABOR.

If this Court finds that the intent of the decedents should not prevail and Phillip is not the sole owner of the property at issue, then awarding Phillip an equitable lien would at least make him whole and avoid unjustly enriching Ronald and Joel Morrow. This Court has previously impressed equitable liens when necessary to prevent unjust enrichment and where it would be contrary to equity and good conscience for a person to retain a property interest acquired at the

expense of another. *Dudley v. Light*, 586 So.2d 155, 159 (Miss.1991); *Lindsey v. Lindsey*, 612 So.2d 376 (Miss. 1992).

In his complaint, Phillip states that he:

> "...has farmed the subject property, has planted trees on the property, has paid taxes on the subject property for years, has paid mortgages payments on the subject property, has improved the property, has paid numerous expenses related to the property and the upkeep of improvements to include utilities...."

R. 378, ¶ 11; R.E. 42.

At trial, Phillip provided the trial court with voluminous documentation of farming expenses incurred by him and of the hours he devoted to working the farm. R. 543-44; R.E. 25. Phillip's testimony at trial regarding the money and sweat equity he invested in the property was not refuted. However, the Chancellor found this proof was insufficient to establish an equitable lien because "awarding the farm or a larger portion of it to Phillip Morrow would result in undue and unjust enrichment to Phillip Morrow." R. 544; R.E. 26.

In support of this opinion, the Chancellor noted that Phillip's possession of the farm allowed him to participate in the United States Conservation Program "which resulted in federal subsidy payments to him exceeding $30,000.00 over the past 6 years and his ability to claim farming losses on his tax returns dating back to the late 1980s." *Id.* Therefore, the Chancellor concluded, "it would be inequitable to now award Phillip Morrow a lien against or a greater share of the farm." *Id.*

However, the trial court's order fails to mention any of the undisputed evidence which clearly establishes that Phillip's investment in this property far exceeds any funds he received from the Conservation program.

For example, Phillip paid the mortgage and taxes on the property for a decade or more, and incurred other expenses related to the upkeep and maintenance of the home and farm such as utilities, insurance, seed and trees. Altogether, Phillip invested approximately $527,387.46 in labor and expenses in the farm and home from 1988 to 2005. See Ex. 1, 3 and 4 (10/23/06); R.E. 64, 82, 84.

Phillip also introduced evidence that the value of the timber Phillip planted on the land was $23,051.17 five years after he planted the timber. Tr. 146-48; Ex. 10 (10/23/06); R.E. 87. This appraisal was conducted on February 14, 2005 and included 63.3 acres of pine and 18.6 acres of hardwood. Appellant's expert, Mike Williams, testified that the pine would appreciate approximately $50 per acre per year and the hardwood would appreciate approximately $10 per acre per year. Tr. 149. Thus, the timber has appreciated in value approximately $23,457.00 over the last seven years and would be valued at approximately $46,508.17 in February, 2012. Mr. Williams further testified that the landowners would not receive lease payments from the Conservation Program but for Phillip's efforts in planting these trees. Tr. 148.

But for Phillip making the mortgage payments on the property, the property would have been foreclosed upon and this appeal would be moot. Further, Phillip maintained the property and even made a number of improvements to the property to increase its value. Consequently, Ronald and Joel Morrow will receive a windfall and will indeed be unjustly enriched thanks to Phillip's efforts if this Court affirms the trial court's order vesting title to the property in the estates. This is the type of unjust enrichment an equitable lien was designed to remedy.

Ronald and Joel Morrow argue that the $527,387.46 figure was "seriously discredited" because Phillip "arbitrarily assigned an hourly rate to his claimed labor over a seventeen-year period without any supporting proof as to the reasonableness of the rate" and he "conceded during cross-examination that the farm expenses identified in his annual tax returns were approximately $140,000 less than the expenses he was claiming in support for his equitable lien." Appellees Br. at 32.

However, these arguments speak to the weight of the evidence and to what extent an equitable lien should be imposed -- not **whether** an equitable lien should be imposed. Phillip Morrow certainly invested money and time into the upkeep and maintenance of this property for many years – this much is undisputed. Whether an equitable lien should be imposed for $527,387.46 or some lesser sum is a question the trial court never answered. Instead, the Chancellor found this

proof was insufficient to establish an equitable lien because "Phillip Morrow admitted that he did not have a written contract with either of his parents, only a verbal agreement that he was to have the farm."[11] R. 544; R.E. 26. This is a misstatement of the law and is reversible error.

In *Lindsey v. Lindsey*, 612 So.2d 376 (Miss. 1992), this Court awarded the wife an equitable lien on her husband's one-half interest in their marital home because she made most of the contributions to the improvement and the building of the home. *Id.* at 377. An important note in *Lindsey* is that there was no contract or agreement that Ms. Lindsey would be repaid for her additional contributions to the home. *Id.* No such understanding or meeting of the minds is necessary to the award of an equitable lien. *Neyland v. Neyland*, 482 So.2d 228, 230 (Miss.1986).

Ronald and Joel Morrow attempt to distinguish *Lindsey* and *Neyland* on the grounds that they are "divorce" cases – as if the equitable lien analysis is different

[11] The Chancellor did inexplicably state that Phillip Morrow's proof was insufficient to establish an equitable lien because "awarding the farm or a larger portion of it to Phillip Morrow would result in undue and unjust enrichment to Phillip Morrow." R. 544; R.E. 26. In support of this opinion, the Chancellor noted that Phillip participated in the United States Conservation Program "which resulted in federal subsidy payments to him exceeding $30,000.00 over the past 6 years and his ability to claim farming losses on his tax returns dating back to the late 1980s." *Id.* However, as noted above, the trial court's order fails to mention any of the undisputed evidence which clearly establishes that Phillip's investment in this property far exceeds any funds he received from the Conservation program or tax deductions. The trial court failed to state what part, if any, of Phillip's lien itemization it found to be non-compensable and to what degree or in what amount that proof should be offset by the federal subsidy payments and tax deductions Phillip received. Therefore, this matter should be remanded to the trial court with instructions to make detailed findings of fact and conclusions with regard to the foregoing, assuming this Court finds an equitable lien should be imposed.

in divorce cases than it is in other civil actions. Appellees Br. at 33. Not surprisingly, Ronald and Joel offer no authority supporting this claim.

Ronald and Joel Morrow also argue that they were not unjustly enriched by Phillip's efforts because: "(a) the overwhelming majority of the exaggerated expenses claimed by Phillip Morrow did not permanently improve the property so as to enrich Joel Morrow and Ron Morrow; and (b) the uncontroverted evidence was that Phillip Morrow derived exclusive financial benefits from his use and occupation of the farm despite his limited interest in the property."

Any argument that planting marketable timber did not permanently improve the land is disingenuous, at best. Further, while paying the mortgage on the home may not have permanently improved the land, it dang sure stopped the bank from foreclosing on the property. Ronald and Joel Morrow's claim that they were not unjustly enriched by Phillip Morrow being solely responsible for making mortgage payments on real property in which they collective owned a 2/3 interest strains credibility, to say the least.

Further, Phillip Morrow's tax returns reflect a net **loss** for his farming operations. Thus, whether Phillip enjoyed any "exclusive financial benefits from his use and occupation of the farm" is subject to debate. Nevertheless, these arguments relate to the amount of the lien, not the existence of a lien.

Again, the trial court failed to state what part, if any, of Phillip's lien itemization it found to be compensable and to what degree or in what amount that proof should be offset by the federal subsidy payments and tax deductions Phillip received. Therefore, this matter should, at the very least, be remanded to the trial court with instructions to make detailed findings of fact and conclusions with regard to what part, if any, of Phillip's lien itemization is compensable in the form of an equitable lien and to what extent, if any, that amount should be offset.

CONCLUSION

The deed from Gocher and Reba to Phillip dated March 23, 1996 was not legally effective until it was recorded on April 23, 1996 and, therefore, it vested title to the property in Phillip upon recording. Alternatively, the deed dated March 23, 1996 should be reformed to reflect the actual date of its execution, April 23, 1996.

Even if the Court finds said deed was legally effective on March 23, 1996 and should not be reformed, the Court should, nevertheless, find that title is vested in Phillip rather than the estates pursuant to the DAAP.

Alternatively, Phillip Morrow is entitled to an equitable lien on the property for the labor and expenses he invested in the upkeep, maintenance and improvement of the property dating back to the late 1980s. Otherwise, Ronald and

Joel Morrow will be unjustly enriched by Phillip's significant investment of time and money into the property.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant, Phillip Morrow, has been served upon the following individuals via First Class Mail, postage prepaid, this 27th day of January, 2012:

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