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

BRIEF OF APPELLANT, PHILLIP MORROW

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Phillip Morrow	Appellant
Joel E. Morrow	Appellee
Ron E. Morrow	Appellee
Trustmark National Bank	Lienholder
Chancellor Talmadge D. Littlejohn	Trial Judge
Casey L. Lott, Esq.	Counsel for Appellant
Michael D. Tapscott, Esq.	Counsel for Appellee
A. Rhett Wise, Esq.	Trial Counsel for Appellee & Estates
Roger M. Tubbs, Esq.	Trial Counsel for Appellant
Michael D. Ferris, Esq.	Trial Counsel for Trustmark
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STATEMENT OF THE ISSUES

I. Whether the effective date of the deeds in question is the date of delivery or the date of execution.

II. Whether the date of execution memorialized on the 1996 deed from Gocher and Reba Morrow to Phillip Morrow should be reformed to reflect an execution date of April 23, 1996 instead of March 23, 1996.

III. Whether title to the property in question vested in Phillip Morrow on April 22, 1996 pursuant to the Doctrine of After-Acquired Property ("DAAP") and, if so, whether Phillip Morrow provided opposing parties with sufficient notice of his reliance on the DAAP.

IV. Alternatively, whether Phillip Morrow is entitled to an equitable lien against the property.

STATEMENT OF THE CASE

The parties, Phillip Morrow, Ronald Morrow and Joel Morrow, are the only children and legal heirs of Gocher Morrow and Reba Morrow. Gocher Morrow passed away in January 1999 and his widow, Reba Morrow, passed away in January 2000. Tr. 26. However, both estates were opened on the same day in 2000.[1]

On October 6, 1993, Gocher and Reba Morrow deeded their homestead in Itawamba County, Mississippi to their son, Phillip Morrow.[2] Ex. 1 (02/18/04); R.E. 53. This homestead consisted of approximately 200 acres, a 160 acre tract and a 40 acre tract (hereinafter "the property").[3] Bench Opinion at 5 (05/11/04). However, Gocher and Reba continued living on the property until they passed away.

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[1] For the most part, the pleadings in both files are identical and are concurrently numbered. However, the record in Reba's estate is slightly larger than that in Gocher's estate. For simplicity purposes, all citations to the record contained in this brief will refer to the record of the Estate of Reba Eloise Sparks Morrow, Trial Court Cause No. 2000-0286. However, the trial court's order denying appellant's motion for a new trial contained in appellant's record excerpts is not contained in the record of pleadings filed in the Estate of Reba Eloise Sparks Morrow. Therefore, a copy of that order filed in the Estate of Gocher Morrow is included in the record experts.

[2] The Chancellor found that the Morrows deeded this property to Phillip because they feared they would lose the property as a result of litigation by the wrongful death heirs of a motorist who was killed in a collision with Reba Morrow. First, the Chancellor excluded evidence of this collision at trial and the only proof introduced on this subject was made under a proffer. Tr. 53-68. Regardless of whether the proof supports such a finding, it is irrelevant to the inquiry before this Court. Bench Opinion at 5-6 (05/11/04).

[3] The last three deeds in the deraignment of title of the 160 acre tract and the last three deeds in the deraignment of title of the 40 acre tract are the same and will be referred to as one tract or the "Property."

At one point, Phillip and his brothers all moved away from home and lived in other states. However, Phillip moved back to Itawamba County, Mississippi in the late 1980s to help his father with the farm. Tr. 25-26. Phillip's move was prompted by an offer his father extended to all three brothers in the late 1980s wherein Gocher offered to give the property to whichever son came back to Mississippi and helped him with the farming operations. Tr. 42-44. Joel Morrow declined this offer and Ron Morrow was only in Mississippi approximately one month before deciding that farming was not for him. *Id.*; Ex. 6 (02/18/04); R.E. 59. Ultimately, the responsibility to help their aging father with the farm rested solely with Phillip.

In 1980, Phillip even cosigned a business loan with his father, Gocher, to secure capital for their farming operations. Ex. 5 (10/23/06); R.E. 85. As previously stated, Gocher and Reba always promised the property to Phillip because he moved back to Mississippi to help his father with the farming operations. Tr. 35-38. Ultimately, Gocher and Reba deeded the property to Phillip as set forth below.

Phillip farmed this property for many years, paid taxes on the property and the mortgage on the house, and worked to improve the property, even after his father and mother passed away in 1999 and 2000, respectively. R. 378, ¶ 11;

R.E. 42. Phillip performed these acts because he believed the property belonged to him. Tr. 26-27.

The issues in this case may be attributed to the 1996 conveyances of title to the property. Phillip testified that he wanted his parents to have a life estate in the property so they could claim a homestead exemption on the property. Therefore, he proposed deeding the property back to his parents so they could, in turn, deed the property back to Phillip and reserve a life estate for themselves. Tr. 32-33, 35-36; Bench Opinion at 6 (05/11/04). In 1996, Gocher and Reba agreed to do so and hired the late Nell C. May, Esq. to draft these deeds. Tr. 37-38.

On April 22, 1996, a Warranty Deed from Phillip to Gocher and Reba was recorded in the office of the Chancery Clerk in Itawamba County, Mississippi. The following day, a Warranty Deed transferring the property from Gocher and Reba to Phillip Morrow, but reserving a life estate for Gocher and Reba, was recorded in the office of the Chancery Clerk in Itawamba County, Mississippi. This would have effectuated the intent of the parties involved if it had not been for the dates on the deeds.

Apparently, the deeds were prepared in March, 1996 but were not signed until April, 1996. Although the notary crossed out the preprinted "March" notation on the deed from Phillip to Gocher and Reba, she did not do the same for

the deed from Gocher and Reba to Phillip. This oversight resulted in the following deraignment of title to the property:

10/06/93: Gocher and Reba convey the property to Phillip. Ex 1 (02/18/04); R.E. 53.

03/23/96: Gocher and Reba convey to Phillip the same property reserving a life estate for themselves (Note: The property was never conveyed back to Gocher and Reba after the initial 10/06/93 conveyance. This deed likely should have been dated 04/23/96 and was recorded on that date). Ex 3 (02/18/04); R.E. 57.

04/22/96: Phillip conveys the property back to Gocher and Reba. The deed is recorded the same day. Ex 2 (02/18/04); R.E. 55.

04/23/96: The deed erroneously dated 03/23/96 was recorded. Ex 3 (02/18/04); R.E. 57.

The Chancellor correctly noted that attorney Nell May, who is now deceased, acknowledged both of these 1996 deeds and was not called as a witness at the trial of this cause. Bench Opinion at 6-7 (05/11/04).

However, Phillip testified that he deeded the property back to his parents so they could reserve a life estate in the property with the understanding that he would have the exclusive right of ownership and possession of the property when his parents passed away. Tr. 35-36; 41. Phillip testified that he would not have executed the Deed without this understanding. *Id.*

Phillip's Complaint to Quiet and Confirm Title to this property, and all amendments thereto, reflect that Phillip Morrow has consistently claimed sole ownership of the property. R. 369-381; R.E. 33. The bases for this claim of

ownership is (a) the deed dated March 23, 1996 was not effective until it was recorded or (b) the deed should be reformed to reflect the true date of execution or (c) title to the property vested in Phillip under the DAAP on April 23, 1996. R. 384-392; R.E. 45. Phillip also identified the DAAP as the bases for his claim in his expert witness designations, though he did not call the doctrine by name. R. 253-255, 322-324; R.E. 29, 31.

On May 11, 2004, the Honorable Talmadge D. Littlejohn vested title to the property in the Estates of Phillip's deceased parents. Bench Opinion (05/11/04); R. 397-400; R.E. 19. In reaching its conclusion, the trial court held that Phillip could not rely on the DAAP because his reliance on that doctrine was not adequately pled. *Id.* The trial court further held that the DAAP is not applicable when the grantee, in this case Phillip, is the source of the after-acquired title. *Id.*

Phillip Morrow farmed this property, planted trees on the property, paid the property taxes, paid mortgage payments, made improvements, and paid numerous expenses related to the property and its upkeep. R. 378, ¶ 11; R.E. 42. He also invested a tremendous amount of time and labor in the property and the farming operation because he believed he owned the property. *Id.* Phillips seeks and should be entitled to an equitable result.

SUMMARY OF THE ARGUMENT

Generally, a deed only takes effect upon delivery, not upon signing. 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. The deeds were not beyond Gocher and Reba's control until their attorney, Nell May, recorded the deeds. Although, the act of recording a deed is equivalent to "delivery" under Mississippi law, it is the intention of the parties that is ultimately determinative with regard to whether a deed has been delivered. Because the deeds in question were not "delivered" until they were recorded (and Gocher and Reba did not intend for the deeds to be delivered before they were recorded), title to the property should be vested in Phillip, not the estates. Alternatively, the deed from Gocher and Reba to Phillip erroneously dated March 23, 1996 should be reformed to reflect the actual date of execution, which was April 23, 1996.

Alternatively, Phillip acquired title to the property when the March 23, 1996 deed was recorded on April 23, 1996 pursuant to the DAAP. Generally, a person cannot convey title to land he does not own. However, the DAAP is the exception to this rule. The DAAP validates a grantor's otherwise invalid conveyance of real property that he did not actually have title to at the time of the conveyance when the grantor later acquires title to that same property. This is exactly what happened

in the case at hand. Therefore, the chain of title to the property vested title in Phillip pursuant to the DAAP.

The DAAP is a well established rule of law in this state and is founded upon principles of equity. Under the DAAP, not only is such a grantor estopped from claiming title after he has conveyed it to the grantee, his descendants are estopped as well. Hence, the DAAP estops Ron Morrow and Joel Morrow from asserting a claim of ownership in the property.

In Mississippi, the source of the after-acquired title does not matter. Although at least one secondary source implies that the DAAP does not apply to cases where the after-acquired title is acquired from the grantee, precedent from this Court indicates exactly the opposite. In Mississippi, the source of the grantor's title is irrelevant. Thus, the fact that the after-acquired source of Gocher and Reba's deed was Phillip himself is without consequence.

This Court has also held that the DAAP is not an affirmative defense that must be pled or waived. Thus, Phillip was only required to comply with the notice pleading requirements of the Mississippi Rules of Civil Procedure and he did so.

If title to the property did not vest in Phillip pursuant to any of the above referenced theories, then Phillip should, at the very least, be awarded an equitable lien on the property for his labor and expenses associated with the upkeep of and improvements to the property. Equitable liens are awarded to prevent unjust

enrichment like that which would befall Ron and Joel Morrow if title to the property remained with the estates.

STANDARD OF REVIEW

A chancellor's findings "are subject to an abuse-of-discretion standard on review." *Carlisle v. Allen*, 40 So.3d 1252, 1256 (Miss.2010) (citing *Barton v. Barton*, 790 So.2d 169, 175 (Miss.2001)). Unless the chancellor findings are "manifestly wrong, clearly erroneous, or applied the wrong legal standard[,]" they will not be disturbed on appeal. *Miller v. Parker McCurley Props., L.L.C.*, 36 So.3d 1234, 1239 (Miss.2010) (quoting *Powell v. Campbell*, 912 So.2d 978, 981 (Miss.2005)). "Questions of law, however, are reviewed de novo." *Id.*

ARGUMENT

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); *Cannon v. Holburg Mercantile Co.*, 66 So. 400 (Miss. 1914). "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). To be sure, the deeds were not beyond Gocher and Reba's control until their attorney, Nell May, recorded the deeds.

The act of recording a deed is equivalent to "delivery" under Mississippi law. *See Wilbourn v. Wilbourn*, 37 So.2d 256, 258-59 (Miss. 1948); *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); and 23 Am. Jur. 2d Deeds § 118 (fact that deed is recorded is prima facie evidence of delivery). While this is the general rule, it is the intention of the parties that is ultimately determinative with regard to whether a deed has been delivered. 23 Am. Jur. 2d Deeds § 118.

Attorney Nell May presented Phillip's deed to Gocher and Reba to the Chancery Clerk for recording and it was in fact recorded (i.e., delivered) at 2:40 p.m. on April 22, 1996. Attorney May presented Gocher and Reba's deed to Philip to the Chancery Clerk for recording and it was in fact recorded (i.e., delivered) 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." 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[4] to avoid addressing the issue of delivery in his opinion. 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.

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. A deed must be acknowledged before a notary public or other officer as provided by statute in order for it to be eligible for recording. *See* Miss. Code Ann. §§ 89-3-3, 89-3-5, 89-3-9. Appellant 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., deeds that were "witnessed" by a non-notary or non-officer). This common sense interpretation of Section 89-5-13 avoids the harsh and inequitable result reached by the Chancellor in this case. Indeed, this Court previously limited the scope of

[4] The Chancellor notes in page 7 of his Bench Opinion (05/11/04) that neither party relied on or cited this statute at trial.

Section 89-5-13[5] and appellant requests the Court embrace this opportunity to do so once more.

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. At trial, Phillip testified at length about the agreement he had with his parents regarding the transfer of the property at issue. Tr. 25-26; 35-38; 42-44. This testimony was undisputed and is sufficient to rebut any presumption that may have arisen pursuant to Miss. Code Ann. § 89-5-13.

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

The general rule is that a court may exercise its 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). That is, equity will make the deed speak to the

[5] *See Goodwin v. McMurphy* 435 So.2d 639 (Miss. 1983)(Section 89-5-13 does not create presumption that signature on deed was authorized).

mutual intention of the parties. *Whitney Central Nat. Bank v. First Nat. Bank*, 130 So. 99 (Miss. 1930).

In an action to reform a deed based on a mistake theory, the petitioner must demonstrate a mutual mistake among the parties or a unilateral mistake in combination with fraud or inequitable conduct on the part of the benefitting party. *Perrien v. Mapp*, 374 So.2d 794, 796 (Miss.1979). In such an action, 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 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. The intent of the grantors is obvious and the deed in question should be reformed to comport with that intent.

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

Even if the 1996 deed from Gocher and Reba to Phillip is not reformed and the effective date of the deed is the date is was purportedly executed, title to the property should have vested in Phillip when Phillip conveyed the property back to Gocher and Reba on April 22, 1996.

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).

Appellant contends the DAAP applies to the 1996 conveyances involving Gocher, Reba and himself. The trial court, however, found that the doctrine was not applicable to this case. Bench Opinion (05/11/04) at 22-24. The trial court's attempt to determine the title to this property by using dates alone was an impermissible endorsement of form over substance and contrary to well established Mississippi law.

This Court recently had an opportunity to address 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 conveyed property to Phillip 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.

American Jurisprudence defines the DAAP and explains its foundation in equitable estoppel. 23 Am. Jur. 2d Deeds § 277 (2011) (explaining that "one of the chief theories upon which the doctrine rests is that the deed operates on the after-acquired title by way of an estoppel").

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).

The principles of estoppel not only apply to the grantor, but also extend to the grantor's descendents. *McSwain v. Griffin*, 67 So. 2d 479 (Miss. 1953). One

who is "privy in blood" is one who derives his title to property by descent. *Id.* Those who acquire title in such a manner are also estopped from asserting adverse claims of ownership against those who received title from the deceased grantor. *Id.* Therefore, Ron and Joel Morrow are also precluded from claiming title by descent alone.

Phillip Morrow changed his position to his detriment the moment he signed the warranty deed conveying the land 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 in reliance that it belonged to him. R. 378, ¶ 11; R.E. 42; Ex. 1, 3, 4 (10/23/06); R.E. 64, 82, 84. The principles of equitable estoppel upon which the DAAP was founded require this Court to vest title to the property in Phillip Morrow.

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.

In *Garner*, the Mississippi Supreme Court held 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)). Thus, the source of the grantor's title is irrelevant to the DAAP analysis in this state.

In *Garner*, two Prentiss County 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 Starlin was W.C.'s original grantor or that the two men were brothers. 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. The Chancellor was, therefore, in error when he found that the DAAP did not apply to the facts of this case.

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. However, 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.

The purpose of a pleading "is to give notice, not to state facts and narrow the issues." *Christian Methodist Episcopal Church v. S & S Construction Co.*, 615 So.

2d 568, 572 (Miss. 1993); *see also* Comment to Miss. R. Civ. P. 8. A complainant must only place opposing counsel on notice of his claims.[6]

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* 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.

First, requiring litigants who rely on the DAAP to identify it by name would be an endorsement of form over substance, which is contrary to the spirit of Rule 7. *See* Comment to Miss. R. Civ. P. 7 (purpose of Rule 7 is to facilitate the court's ability to reach a just decision on the merits of a case by providing for a simple and elastic pleading and motion procedure which emphasizes substance rather than form).

Furthermore, the Chancellor erred in finding that Phillip did not comply with the notice requirements of the Mississippi Rules of Civil Procedure.

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

[6] The Mississippi Rules of Civil Procedure, adopted January 1, 1982, implemented the "notice pleading" requirements of the Federal Rules of Civil Procedures.

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 appellees on notice that Phillip was claiming sole ownership of the property to the exclusion of the appellees.

The basis for Phillip's claim was also set forth in his designation of his expert witnesses, filed four months and four days prior to the hearing, and amended and 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.*

The fact that Phillip's trial counsel, Roger Tubbs, Esq., failed to identify the DAAP by name in his Complaint or expert designations is without consequence. The Mississippi Rules of Civil Procedure do not require such.

Finally, Phillip was not required to identify the DAAP as an affirmative defense in his answer to the appellees' counter-complaints.

This property dispute began when Phillip Morrow filed a Petition to Quiet and Confirm Title against the appellees and his parents' estates. The appellees then filed counter-claims seeking to quiet and confirm title in the estates. Phillip answered those counter-claims but did not assert the DAAP as an affirmative defense. The Chancellor ultimately held that Phillip was precluded from asserting the DAAP as a ground for relief because it was not pled as an affirmative defense. Appellant submits the Chancellor erred in this regard.

In the instant case, the DAAP is relied on offensively by Phillip and not defensively such that it must be raised as an affirmative defense under Miss. R. Civ. P. 8(c). When the DAAP is being used offensively to support a claim, such as in this case, the pleading requirements are governed by Rule 7 which merely requires notice pleading. The comment to Rule 7 notes that "[t]he purpose of Rule 7 is to facilitate the court's ability to reach a just decision on the merits of a case by providing for a simple and elastic pleading and motion procedure which emphasizes substance rather than form." The Chancellor in this case did exactly the opposite.

Even if Phillip was relying on the DAAP in a defensive sense (he is not), the DAAP is not an affirmative defense and need not be pled as such. 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.[7] 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.

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

If the Court finds that title to the property at issue was properly vested in the estates and, therefore, passes to the three brothers share and share alike, then the Court should, at the very least, award Phillip an equitable lien on the property.

[7] The Chancellor found "that notice was not given in accordance with *Butler* by the plaintiff in this case to the defendants." Bench Opinion (05/11/04) at 18.

"The doctrine of equitable liens furnishes a ground for the specific remedies that equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law." 51 Am. Jur. 2d Liens § 82 (2011). "Thus, a trial court may enforce an equitable lien by whatever means it deems appropriate to do justice between the parties." *Id.*

In *Dudley v. Light*, 586 So.2d 155, 159 (Miss. 1991), this Court wrote:

> (1) [A] lien may also be impressed out of recognition of general principles of right and justice, (citations omitted)
>
> (2) A principal reason for impressing an equitable lien is to prevent unjust enrichment, i.e., where it would be contrary to equity and good conscience for an individual to retain a property interest acquired at the expense of another. (citations omitted)
>
> Section 161 of the Restatement of Restitution states that "where property of one person can by a proceeding in equity by [sic] reached by another as security on the ground that ***otherwise the former would be unjustly enriched, an equitable lien arises***."

Dudley v. Light, 586 So.2d 155, 159 (Miss.1991) (quoting *Neyland v. Neyland*, 482 So.2d 228, 230 (Miss.1986) (emphasis added)).

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. *Id.*

One such example is the case of *Lindsey v. Lindsey*, 612 So.2d 376 (Miss. 1992). In that case, this Court awarded Ms. Lindsey 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[8] 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. *See Neyland*, 482 So.2d at 230.

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 the appellees. 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

[8] The trial court's order denying Phillip's request for an equitable lien notes that "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." R. 544. First, the agreement was not merely verbal – Phillip's parents actually deeded this property to him. Second, the existence of a written, or even a verbal, contract is irrelevant to Phillip's equitable lien claim.

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. Consequently, appellees 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.

If the Chancellor's conclusions of law are affirmed, then the appellees will clearly become the beneficiaries of and be unjustly enriched by Phillip's efforts. 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.

Therefore, Phillip, like Ms. Lindsey, is entitled to an equitable lien on the property in an amount sufficient to compensate him for the time and money he spent maintaining and improving the property.

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 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, appellees 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 Brief of Appellant has been served upon the following individuals via First Class Mail, postage prepaid, this 21st day of October, 2011:

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