

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2003-TS-02115

E

KENNETH MOORE, ET AL

APPELLANTS

VERSUS

ROY D. MCDONALD, ET AL

APPELLEES

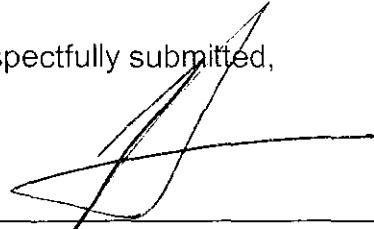
CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of record for the Appellees certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Sebe Dale, Jr.
Pearl River County Chancery Court Judge
10th Chancery District
2. Kenneth Moore (Appellant)
3. Carolyn M. Moore (Appellant)
4. Harold Belton (Appellee)
5. Ruth Belton (Appellee)
6. Roy D. McDonald (Appellee)
7. Donna McDonald (Appellee)
8. Lamar Moore
9. Estate of William Garrett, Deceased
10. William L. Ducker, Esq., Attorney for Appellants

11. Nathan S. Farmer, Esq., Attorney for Appellees

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Nathan S. Farmer', written over a horizontal line.

Nathan S. Farmer, Esquire

MSB [REDACTED]

Post Office Box 1608

Picayune, MS 39466

Telephone: (601) 749-8745

Facsimile: (601) 749-7045

E-Mail: nathanfarmer1@bellsouth.net

Counsel for Appellees

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	-i-
TABLE OF CONTENTS	-iii-
TABLE OF AUTHORITIES	-iv-
STATEMENT OF ISSUES	-1-
STATEMENT OF THE CASE	-1-
A. NATURE OF THE CASE	-1-
B. COURSE OF THE PROCEEDINGS	-2-
C. STATEMENT OF THE FACTS	-3-
SUMMARY OF THE ARGUMENT	-6-
ARGUMENT OF APPELLEES	-8-
A. STANDARD(S) OF REVIEW	-8-
B. GRANTING OF MOTION FOR JUDGMENT ON THE PLEADINGS	-8-
C. LEGAL ENTITLEMENT OF THE MCDONALDS AND BELTONS TO HAVE THEIR TITLES QUIETED AND CONFIRMED AS AGAINST THE CLAIMS OF MOORES	-11-
CONCLUSION	-14-
CERTIFICATE OF SERVICE	-15-

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE NUMBER</u>
<i>A & F Properties, LLC v. Madison County</i> , 933 So.2d 296 (Miss. 2006)	9,10,13,14
<i>Buras v. Shell Oil Co.</i> , 666 F.Supp. 919 (S.D. Miss. 1987)	13
<i>Craig v. Osborn</i> , 134 Miss 323, 98 So. 598 (Miss. 1923)	13
<i>Fletcher v. Lyles</i> , 999 So.2d 1271 (Miss. 2009)	7,8,11
<i>Harbin v. Chase Manhattan Bank</i> , 871 So.2d 764 (Miss. Ct. App. 2004)	7,9
<i>In Re Pinetree, Ltd.</i> , 876 F.2d 34 (5 th Cir. 1989)	13
<i>Long v. Stanley</i> , 79 Miss. 298, 30 So. 823 (Miss. 1901)	7,8,11,12,14
<i>Merideth v. Merideth</i> , 987 So.2d 477 (Miss. Ct. App. 2008)	7,11
<i>Morgan v. Mars, et al.</i> , 207 Miss. 848, 43 So.2d 563 (Miss. 1949)	13
<i>Netterville v. Weyerhaeuser Co.</i> , 963 So. 2d 38 (Miss. Ct. App. 2007)	8,11,12,14
<i>R.J. Reynolds Tobacco Company, et al. v. King, et al.</i> , 921 So.2d 268 (Miss. 2005)	8
<i>Yancey v. Yancey</i> , 752 So.2d 1006 (Miss. 1999)	7,9,10
 <u>STATUTES</u>	
Miss. Code Ann. §11-17-31	7,11
Miss. Code Ann. §89-5-1	12,13

Miss. Code Ann. §89-5-3	13
Miss. Code Ann. §89-5-5	13
Miss. Code Ann. §89-5-7	13

RULES

Rule 7(b)(1) M.R.C.P.	10
Rule 12(c) M.R.C.P.	8,10
Rule 15(a) M.R.C.P.	8,11

STATEMENT OF ISSUE(S)

1. The Chancellor did not commit error in granting the McDonalds and Beltons' Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Mississippi Rules of Civil Procedure.
2. That pursuant to Miss. Code Ann. §11-17-31, as amended, the McDonalds and Beltons, as a matter of law, were entitled to have title to their respective tracts of real property quieted and confirmed against any claims of the Moores.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case deals with the efforts of the Plaintiffs, Roy D. McDonald, Donna R. McDonald, Harold Belton and Ruth Belton, to have, pursuant to Miss. Code Ann. §11-17-31, title to their respective tracts of real located in Pearl River County, Mississippi, quieted and confirmed against any and all claims of asserted by the Defendants, Kenneth Moore and wife, Carolyn M. Moore. The presiding Chancellor, Sebe Dale, Jr., entered a Final Judgment of the Court in this matter on August 17, 2009, in favor of the McDonalds and Beltons. This Final Judgment sustained the McDonalds and Beltons' Motion for Judgment on the Pleadings made pursuant to Rule 12(c) M.R.C.P. As to the McDonalds, the Chancellor found that as a matter of law the McDonalds were entitled to have title to their tract of real property described in that Warranty Deed dated September 15, 1998, of record in Land Deed Record Book 704, Page 594, quieted and confirmed against any claims of the Moores. As to the Beltons, the Chancellor also found that as a matter of law the Beltons were entitled to have title to their tract of real

property described in that Warranty Deed dated March 20, 2007, of record in Land Deed Record Book 929, Page 469, quieted and confirmed against any claims of the Moores. In arriving at his decision, the Chancellor disposed of the issues in dispute between the Parties based upon the Chancellor's interpretation and application of the law regarding the effect of the September 15, 1998, Warranty Deed executed by William C. Garrett and Lamar Moore which granted fee simple title to the McDonalds to approximately 10.43 acres of real property located in Pearl River County, Mississippi, of record in Land Deed Record Book 704, Page 594. The Chancellor found this September 15, 1998, Warranty Deed was absolute and was clear, concise and free of any ambiguity; this Warranty Deed conveyed title to the real property to the McDonalds as described therein by a metes and bounds description; and, the unrecorded Land Purchase Agreement of the Moores was insufficient, as a matter of law, to defeat the title of the McDonalds and also the Beltons.

B. COURSE OF PROCEEDINGS IN CHANCERY COURT

The action before the Pearl River County Chancery Court was initiated on June 17, 2008, by the McDonalds and Beltons pursuant to the filing of their Complaint to Quiet and Confirm Title and to Remove Cloud on Title and for Other Relief. (R. 1, 2-23). Process was issued for the Defendant, Kenneth Moore, on July 9, 2008, with same being served upon Mr. Moore on July 10, 2008. (R. 1). On September 2, 2008, Mr. Moore filed his Answer with Affirmative Defenses unto the Complaint of the McDonalds and Beltons. (R.1, 24-28). Additionally, Mr. Moore along with his wife, Carolyn M. Moore, sought intervention for Ms. Moore in this action pursuant to their Motion to Intervene as Party Defendant dated February 10, 2009. (R. 1, 29-30). Subsequently,

the Moores filed their Cross-Complaint on February 10, 2009. (R. 1, 31-43). Trial of this cause was set for June 23, 2009, pursuant to Notice of Trial Setting dated February 23, 2009. (R. 1). At June 23, 2009, trial, the record was opened to allow admission of Exhibits "1", "2", "3", "4" and "12" into evidence with the McDonalds and Beltons subsequently making a Motion for Judgment on the Pleadings pursuant to Rule 12(c) M.R.C.P. on the issues of law pending before the Chancellor. (R. 44-58). The Chancellor sustained the Motion for Judgment on the Pleadings in part and disposed of this matter on the issues of law relating to the Moores failure to defeat the title in the McDonalds and Beltons as set in the deraignment in the Complaint. (R. 2-23, 44-58). Final Judgement was entered in this matter on August 17, 2009. (R. 1, 44-58). The Moores timely appealed this action to the Supreme Court of Mississippi pursuant to the filing of the Notice of Appeal on August 31, 2009. (R. 1, 59-60).

C. STATEMENT OF THE FACTS

The McDonalds, Beltons and Moores all derive title to their respective tracts of real property through the late William C. Garrett, who is the common source of title for all the Parties. (R. 14-19). Mr. Garrett took title to various tracts of real property located in Pearl River County, Mississippi, pursuant to that Warranty Deed dated April 17, 1989, of record in Land Deed Record 513, Pages 488-492. (R. 14-19). The Parties' real property involved in this dispute are contained in Tract No. 4 set out in the Garrett Warranty Deed which is specifically located in Section 33, Township 1 South, Range 14 West, Pearl River County, Mississippi. (R. 14-19). It is undisputed that Mr. Garrett is the common source of title for the Parties involved in this matter (R. 4, 9-19, 36-38).

On September 15, 1998, Mr. Garrett, along with Lamar Moore, executed a Warranty Deed unto the McDonalds which was filed of record on September 16, 1998, in Land Deed Record Book 704, Pages 594-595. (R. 9-10). This Warranty Deed described the same tract of real property by way of two (2) metes and bounds legal descriptions of 10.34 acres and 10.43 acres. (R. 9-10). This conveyance was absolute on the face of the Warranty Deed reserving specifically a twenty-five (25) foot easement along the North boundary of the subject real property. (R. 9-10). There is no assertion the September 15, 1998, Warranty Deed was not clear or ambiguous. (R. 44-58). Lamar Moore joined into the September 15, 1998, Warranty Deed in order to convey any interest to the subject real property which Lamar Moore may have acquired pursuant to an unrecorded Contract for the Sale and Purchase of Real Property dated December 23, 1997. (R. 9-10). Further, the Moores admitted the McDonalds are the record title owners to the real property described in the September 15, 1998, Warranty Deed. (R. 3, 24). The Beltons derive title to their real property through the McDonalds pursuant to that Warranty Deed dated March 20, 2007, of record in Land Deed Record Book 929, Pages 469-471. (R. 11-13). At the time of the conveyance from Mr. Garrett unto the McDonalds, Mr. Garrett was the only record title owner for the real property that was conveyed to the McDonalds. (R. 2-28). It is undisputed the Moores did not receive title to their tract of real property until August 29, 2008. (R. 36-38).

The Moores acquired title to approximately 10.34 acres of real property, more or less, pursuant to that certain Co-Executrices' Deed dated August 29, 2008. (R. 36-38). This instrument was not a general warranty deed, but was a special warranty deed. (R. 36-38). This instrument was executed by Mr. Garrett's estate unto the Moore pursuant

to a an Order Granting Petition for Authority to Convey Real Property entered in the Hancock County Chancery Court in Civil Action No. 99-0964. (R. 39-52). This Order cited that this conveyance was being authorized pursuant to a Contract for the Sale and Purchase of Real Property entered into between Mr. Garrett and Mr. Kenneth Moore dated December 23, 1997. (R. 39-52). A copy of this December 23, 1997, Contract was admitted into evidence at the trial of this matter as Exhibit "12". (Exhibit "12" - Contract for the Sale and Purchase of Real Property).

The real property of the McDonalds and Beltons share a common boundary line with the Moores' real property. (R. 19). This common boundary line is the East line for the McDonalds and Beltons; with this line being the West boundary line for the Moorers. (R. 19).

As found by the presiding Chancellor in this matter, this Contract for the Sale and Purchase of Real Property executed by Kenneth Moore and Mr. Garrett was never recorded in the office of the Pearl River County Chancery Clerk. (R. 49, Exhibit "12" - Contract for the Sale and Purchase of Real Property). Further, on Page 5 of the Contract executed between Mr. Garrett and Mr. Kenneth Moore, it was represented by Mr. Garrett the property being sold pursuant to the subject Contract had, "...NOT BEEN SURVEYED." (Pg. 5, Exhibit "12" - Contract for the Sale and Purchase of Real Property). Additionally, the Garrett/Kenneth Moore Contract provided that adjustments would be made between Mr. Garrett and Mr. Kenneth Moore should a survey demonstrate a deficiency in the amount of acreage set out in the subject Contract. (Pg. 5, Exhibit "12" - Contract for the Sale and Purchase of Real Property). The only parties

to the Garrett/Kenneth Moore Contract were the late Mr. Garrett and Kenneth Moore. (Exhibit "12" - Contract for the Sale and Purchase of Real Property).

With regards to the June 23, 2009, trial date, the record before this Court reveals no objections were tendered by the Moores regarding the Chancellor's decision to take up the McDonalds and Beltons' Motion for Judgment on the Pleadings. (R. 44-58). The Moores did not object on the record as to the timing of notice regarding the hearing of the subject Motion for Judgment on the Pleadings; did not object as to the form of the subject Motion for Judgment on the Pleadings; and, did not request either a continuance and/or leave to amend their pleadings filed in the action pending in the Pearl River County Chancery Court. (R. 44-58).

As to the McDonalds and Beltons' Motion for Judgment on the Pleadings, the Chancellor granted judgment in favor of the McDonalds and Beltons' based upon the fact the September 15, 1998, Warranty Deed from Mr. Garrett to the McDonalds, as a matter of law, was clear, concise, free of ambiguity and was a valid conveyance of the real property described by metes and bounds. (R. 44-58). Further, the Chancellor found as a matter of law, the McDonalds and Beltons title was properly deraigned and the Moores' pleadings did not set forth any claim which was superior to the title of the McDonalds and Beltons as set out in their Warranty Deeds. (R. 44-58).

SUMMARY OF ARGUMENT

- 1. The Chancellor did not commit error in granting the McDonalds and Beltons' Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Mississippi Rules of Civil Procedure.**

The Moores did not tender an objection on the record before this Court as to the form and timing of the Motion for Judgment on the Pleadings made by the McDonalds

and Beltons on the day of trial and therefore, the Moores have waived any objections they might have with regards to the form and timing of such motion. *Yancey v. Yancey*, 752 So.2d 1006, P.15 (Miss. 1999). The failure of the Moores to preserve these issues on the record during the proceedings before the Chancellor constitutes a waiver of same on appeal and the Moores are procedurally barred from raising these issues for the first time on appeal before this Court. *Yancey*, 752 So.2d at P. 20; *Harbin v. Chase Manhattan Bank*, 871 So.2d 764, P.6 (Miss. Ct. App. 2004). Finally, since no matters were presented outside the scope of the pleadings with regards to the Motion made by the McDonalds and Beltons, the Chancellor did not commit error when he did not allow the allow the Moores to amend their pleadings pursuant to Rule 15(a) M.R.C.P. because the granting of an amendment would be futile. *Merideth v. Merideth*, 987 So.2d 477, P.12-14 (Miss. Ct. App. 2008); *Fletcher v. Lyles*, 999 So.2d 1271, P.26-27 (Miss. 2009). Following the granting of the Motion for Judgment on the Pleadings in favor of the McDonalds and Beltons, allowing the Moores to amend their pleadings would be futile, in that, the Moores would not be able to establish title to their property obtained by the Moores on August, 2008, which is superior to the McDonalds and Beltons under Miss. Code Ann. §11-17-31. *Long v. Stanley*, 79 Miss. 298, 300-01, 30 So. 823 (Miss. 1901).

2. **That pursuant to Miss. Code Ann. §11-17-31, as amended, the McDonalds and Beltons, as a matter of law, were entitled to have title to their respective tracts of real property quieted and confirmed against any claims of the Moores.**

Pursuant to Miss. Code Ann. §11-17-31, it was demonstrated that as a matter of law the Moores did not have a title superior to that of the McDonalds and Beltons. The

Moores were required to demonstrate that they had title from a source superior to the McDonalds and Beltons in order to defeat their claims. *Long*, 79 Miss. at 300-01; *Netterville v. Weyerhaeuser Co.*, 963 So. 2d 38, P. 12-14 (Miss. Ct. App. 2007). A review of the record demonstrates the Moores did not have a superior title to the title received by the McDonalds by virtue of the September 15, 1998, Warranty Deed, from the Mr. Garrett, the common source of title. (R. 9-10, 44-58).

ARGUMENT

A. STANDARD(S) OF REVIEW

Since a Motion made pursuant to Rule 12(c) M.R.C.P. raises an issue of law, the standard of review by this Court is de novo. *R.J. Reynolds Tobacco Company, et al. v. King, et al.*, 921 So.2d 268, P. 10 (Miss. 2005). This Court sits in the same position as the Chancellor in considering the granting of the Motion under Rule 12(c) M.R.C.P. *R.J. Reynolds Tobacco Company*, 921 So.2d at P. 10. When a Rule 12(c) motion is made, the allegations of the Moores pleadings are take as true and the motion should not be granted unless the pleadings before the Court demonstrate beyond a reasonable doubt that the Moores would be unable to prove any set of facts in support of their claim. *R.J. Reynolds Tobacco Company*, 921 So.2d at P. 10.

When a party is denied the opportunity to amend their pleadings under M.R.C.P. 15(a) following dismissal pursuant to Rule 12(c) M.R.C.P., such a denial is considered under the abuse of discretion standard. *Fletcher*, 999 So.2d at P. 26.

B. GRANTING OF MOTION FOR JUDGMENT ON THE PLEADINGS

The McDonalds and Beltons would assert the record before this Court does not present any facts upon which this Court could consider with regards to the Moores'

assignment of error that they were not timely notified of the subject Motion for Judgment on the Pleadings. *Yancey*, 752 So.2d at P.20. As such, the only facts that could be considered in this matter are those actually set out in the record and not the mere assertions contained in the Moores' Brief. *Yancey*, 752 So.2d at P.20.

The Moores did not tender an objection on the record before this Court as to the form and timing of the Motion for Judgment on the Pleadings made by the McDonalds and Beltons on the day of trial and therefore, the Moores have waived any objections they might have with regards to the form and timing of such motion. *Yancey*, 752 So.2d at P.15. The failure of the Moores to preserve these issues on the record during the proceedings before the Chancellor constitutes a waiver of same on appeal and the Moores are procedurally barred from raising these issues for the first time on appeal before this Court. *Yancey*, 752 So.2d at P. 20; *Harbin*, 871 So.2d at P.6. Therefore, the Court should not consider these assignments of error.

Assuming the Moores' assignments of error are to be considered on the merits before the Court, the McDonalds and Beltons would assert the Mississippi Rules of Civil Procedure and the role of the Chancellor as the finder of all matters of law result in such errors being without foundation. The Chancellor in this matter is empowered with the discretion to interpret, apply and resolve all issues of law. *A & F Properties, LLC v. Madison County.*, 933 So.2d 296, P. 11-12. (Miss. 2006). In this matter the facts were undisputed the McDonalds received title to their acreage pursuant to the September 15, 1998, Warranty Deed from Mr. Garrett; that said Warranty Deed was valid, absolute on its face and was unambiguous; that Mr. Garrett had the right to execute the Warranty Deed; that said Warranty Deed conveyed title to the McDonalds; the Moores did not

receive title to their tract from Mr. Garrett's estate until August, 2008; and, the Purchase Contract executed between Mr. Kenneth Moore and Mr. Garrett was never recorded. (R. 44-58). In determining the legal effect of clear and unambiguous deed or contracts the Chancellor should enforce the written instruments in accordance with the language without resorting to parol evidence. *A & F Properties, LLC*, 933 So.2d at P. 11-12. Thus, the Chancellor was well within his authority to resolve this particular matter on the merits without any resort to factual testimony.

With regards to the timing of the McDonald's and Belton's Motion for Judgment on the Pleadings, Rule 7(b)(1), and Rule 12(c) M.R.C.P. allow a Motion for Judgment on the Pleadings may be made at the close of the pleadings but within such time as to delay trial. It is the position of the McDonalds and Beltons the Motion for Judgment on the Pleadings served as the vehicle by which the Chancellor could exercise his authority to construe and give legal effect to the various instruments that were before the Court without having to resort to factual testimony. Rule 7(b)(1) M.R.C.P; *A & F Properties, LLC*, 933 So.2d at P. 11-12. Specifically, Rule 7(b)(1) allows for the making of a motion during the hearing or trial. By virtue of the Parties' pleadings in this matter, the Moores were put on notice that the effect of the September 15, 1998, Warranty Deed unto the McDonalds was crucial in the resolution of all issues in contest between bye Parties without factual testimony. *A & F Properties, LLC*, 933 So.2d at P. 11-12. There was no undue surprise to the Moores, in that the issue of the legal effect of the September 15, 1998, Warranty Deed was long pending before the Court, and the Moores waived any objections to notice as the Motion for Judgment on the Pleadings. *Yancey*, 752 So.2d at P. 15-16.

With regards to the failure to allow the Moores to amend their pleadings pursuant to Rule 15(a) M.R.C.P. following the granting of the Motion for Judgment on the Pleadings, the McDonalds and Beltons would assert the granting of such an amendment would be futile. *Merideth*, 987 So.2d at P.12-14; *Fletcher*, 999 So.2d at P.26-27. Following the granting of the Motion for Judgment on the Pleadings in favor of the McDonalds and Beltons, allowing the Moores to amend their pleadings would be futile, in that, the Moores would not be able to establish title to their property obtained by the Moores on August, 2008, was superior to the title of the McDonalds and Beltons under Miss. Code Ann. §11-17-31. *Long*, 79 Miss. at 300-01.

C. LEGAL ENTITLEMENT OF THE MCDONALDS AND BELTONS TO HAVE THEIR TITLES QUIETED AND CONFIRMED AS AGAINST THE CLAIMS OF MOORES

Pursuant to Miss. Code Ann. §11-17-31, both sets of the Parties were required to demonstrate that their respective source of title was superior to the other. *Long*, 79 Miss. at 300-01; *Netterville*, 963 So. 2d at P. 12-14. In order to demonstrate their superior title over the other, the Parties were required by deraignment of title to show either, to-wit:

1. Title in claimant from the government down, or,
2. Title in the claimant by virtue of adverse possession, or,
3. Title in the claimant from the other party, or,
4. Title from a common source with the claimant having a better title from the common source.

Long, 79 Miss. at 300-01; *Netterville*, 963 So. 2d at P. 12-14.

It is uncontested the common source of title for Parties is Mr. William C. Garrett. (R. 9-10, 36-38). It is also uncontested that the first deed out of Mr. Garrett was to Mr. and Mrs. McDonald dated September 15, 1998, filed of record on September 16, 1998, in the office of the Pearl River County Chancery Clerk in Land Deed Record Book 704, Pages 594-595. (R. 9-10). The September 15, 1998, Warranty Deed was unambiguous and absolute on its face and described in particularity a metes and bounds legal description to real property of approximately 10.34 to 10.43 acres. (R. 9-10). As found by the Chancellor, there were no defects on face of the September 15, 1998, Warranty Deed, and there were no facts specifically plead that would bring into question the validity or effect of the conveyance. (R. 9-10, 50). The Court found September 15, 1998, Warranty Deed to the McDonalds to be properly executed and that same conveyed title to the real property described in therein. (R. 9-10, 49). As to the un-recorded Contract to Purchase executed between Mr. Moore and Mr. Garrett on December 23, 1997, same was not of record and did not impart notice to the McDonalds. (R. 49). Therefore, based upon the timing of conveyances, the McDonalds have, pursuant to the September 15, 1998, Warranty Deed a title superior to that of the Moores who acquired title to their real property on August, 2008. (R. 36-42). *Long*, 79 Miss. at 300-01; *Netterville*, 963 So. 2d at P. 12-14.

Additionally, the title of the McDonalds and the Beltons are superior over the attempt of the Moores to utilize an alleged oral agreement between Mr. Garrett, Kenneth Moore and Lamar Moore with respect to purchase and division of acreage between themselves; and, the attempt of the Moores to use the un-recorded Garrett/Kenneth Moore Contract to Purchase as a mechanism to alter the legal

description contained in the September 15, 1998, Warranty Deed to the McDonalds. (R. 31-32, Exhibit 12 - Contract for the Sale and Purchase of Real Property).

Mississippi law is clear that an un-recorded contract and/or deed is void as against subsequent purchasers for value without notice pursuant to Miss. Code Ann. §89-5-1; §89-5-3; §89-5-5; and §89-5-7. *Craig v. Osborn*, 134 Miss 323, 98 So. 598 (Miss. 1923); *Morgan v. Mars, et al.*, 207 Miss. 848, 852-54, 43 So.2d 563 (Miss. 1949); *In Re Pinetree, Ltd.*, 876 F.2d 34, 36 (5th Cir. 1989); *Buras v. Shell Oil Co.*, 666 F.Supp. 919, 921-22 (S.D. Miss. 1987). The September 15, 1998, Warranty Deed from Mr. Garrett to the McDonalds was not made subject to these purported agreements between Mr. Garrett, Kenneth Moore and/or Lamar Moore and neither were these agreements of record in the office of the Pearl River County Chancery Clerk at the time of the execution of the September 15, 1998, Warranty Deed. (R. 9-10,49). Therefore, the records of the Pearl River County Chancery Clerk did impart notice to the McDonalds of these un-recorded Contracts and the title conveyed to the McDonalds pursuant to the September 15, 1998, Warranty Deed was unaffected by these un-recorded Contracts. Miss. Code Ann. §89-5-1; §89-5-3; §89-5-5; and §89-5-7; *Craig*, 134 Miss 323; *Morgan*, 207 Miss. at 852-54; *In Re Pinetree, Ltd.*, 876 F.2d at 36; *Buras*, 666 F.Supp. at 921-22.

Further, the title of the McDonalds and Beltons is superior to the Moores, in that, the Moores are attempting to utilize the above-described oral and written un-recorded Contracts in an attempt to use extrinsic or parol evidence to alter and/or impeach the clear and unambiguous September 15, 1998, Warranty Deed. *A & F Properties, LLC*, 933 So.2d at P.12. When the language of a deed or contract is unambiguous, the

Court will not alter or rewrite such deed or contract. *A & F Properties, LLC*, 933 So.2d at P.12.

Finally, on Page 5 of the Contract executed between Mr. Garrett and Mr. Kenneth Moore, it was represented by Mr. Garrett the property being sold pursuant to the subject Contract had, "...NOT BEEN SURVEYED." (Pg. 5, Exhibit "12" - Contract for the Sale and Purchase of Real Property). Thus, the precise boundaries of the Kenneth More acreage had not been set at the time of the execution of this Contract. The Garrett/Kenneth Moore Contract provided that adjustments would be made between Mr. Garrett and Mr. Kenneth Moore should a survey demonstrate a deficiency in the amount of acreage set out in the subject Contract. (Pg. 5, Exhibit "12" - Contract for the Sale and Purchase of Real Property). The only parties to the Garrett/Kenneth Moore Contract were the late Mr. Garrett and Kenneth Moore. (Exhibit "12" - Contract for the Sale and Purchase of Real Property). As found by the Chancellor, the Moores' remedy for any deficiency in receiving less acreage than what was contracted for pursuant Garrett/Kenneth Moore Contract lies against Mr. Garrett's estate and not in any attempt to alter the September 15, 1998, Warranty Deed from Mr. Garrett to the McDonalds. (R. 49-50). Again, this demonstrates the title of the McDonalds and Beltons is superior to that of the Moores. *Long*, 79 Miss. at 300-01; *Netterville*, 963 So. 2d at P. 12-14.

CONCLUSION

Based upon the above, the McDonalds and Beltons would respectfully request this Court to affirm in all respects the Final Judgment of the Court dated August 17,

2009, (R. 44-58) rendered by the Chancellor in this matter with all costs of this appeal being taxed against the Appellants.

Respectfully submitted,

ROY D. MCDONALD, DONNA R.
MCDONALD, HAROLD BELTON, AND
RUTH BELTON
APPELLEES

BY: 

Nathan S. Farmer, Esquire

MSB 

Post Office Box 1608

Picayune, MS 39466

Telephone: (601) 749-8745

Facsimile: (601) 749-7045

E-Mail: nathanfarmer1@bellsouth.net

Counsel for Appellees

CERTIFICATE OF SERVICE

I, Nathan S. Farmer, Esquire, Counsel for the Appellees, Roy D. McDonald, Donna McDonald, Harold Belton and Ruth Belton, hereby certify that I have this day caused to be mailed via United States mail, postage prepaid, the original and three (3) copies plus the CD of the Brief of Appellees to:

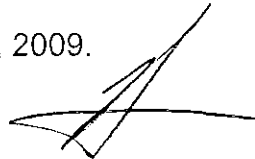
Hon. Betty Septon
Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

and, I have also mailed a true copy, postage prepaid of the Brief of Appellees to:

Honorable Sebe Dale, Jr.
Chancellor, Tenth Chancery District
P.O. Box 1248
Columbia, MS 39429-1248

Honorable William L. Ducker
P.O. Box 217
Purvis, MS 39457

This, the 28th day of December, A.D., 2009.



NATHAN S. FARMER