IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KENNETH MOORE, AND WIFE
CAROLYN M. MOORE — APPELLANTS

VS. — NO. 2009-CA-01451

ROY D. McDONALD, ET AL — APPELLEES

APPEAL FROM THE CHANCERY COURT OF

PEARL RIVER COUNTY, MISSISSIPPI

CAUSE NO. 08-0318-GN-D

REPLY BRIEF OF APPELLANTS

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I. REPLY TO PROPOSITION 1

That no error was committed in granting the McDonalds and Bolton's Motion for Judgment on the Pleadings

Ore Tenus motions are treated no differently from written motions filed under the rules where proper notice is given and written responses are recorded Peeples v. Yarbrough, 475 So2d 1154 (Miss. 1985). The Court's Final Judgment is what is applicable, which Appellees acknowledge the Moores timely filed. (R.E. 44-58) When multiple parties are involved in a cause of action and separate claims are asserted, Rule 54(b) M.R.C.P. determines what is a Final Judgment. In his bench opinion the Chancellor acknowledged the arguments of counsel but granted judgment on the pleadings after a conference with counsel where Plaintiffs made their Motion and Defendants stated their objections. The Court's ruling on the Motions was a Final Judgment on August 17, 2009 and Defendant filed Notice of Appeal on August 31, 2009. (R.E. 1) Appellants, Moore assigned as error the Court stopping the hearing *de novo* for a Motion for Judgment on the Pleadings after issue had been joined. In their Brief, Plaintiffs acknowledged Exhibits 1, 2, 3, 4, and 12 were introduced into evidence before the conference between Court and counsel was held (R.E. 25-39). Plaintiffs cite Yancey v. Yancey, 752 So2d 1006 (Miss 1999) as authority that Defendants did not timely object to the Motion. Yancey is a domestic relations matter in which the Respondent complained about Notice of a contempt citation. The Court held that Rule 6(d) M.R.C.P. was controlling and Mr. Yancey did in fact receive his five days Notice for a Motion Hearing. In the instant case, there was no Notice, no Motion prior to trial and the Motion was made after the commencement of the hearing on the merits. Rule 12(c) M.R.C.P. clearly states that Motions for Judgment on the Pleadings are made after pleadings

are closed, but without such as not to delay the trial. Cunningham v. Lanier, 555 So2d 685 (Miss. 1989) Fortenberry v. City of Hattiesburg, 758 So2d 1023 (Miss. App. 2000) The Chancellor himself stated in his bench opinion

"... I've heard your arguments. We discussed these matters in chambers, and I understand your positions that you arrived at there, and I think as the ____ ____ it is a rather abrupt ruling, but my ruling is I'm going to grant the Motion for Judgment on the Pleadings." R.E. 7). Rule 15(a) allows amendments to pleadings when Judgment on the Pleadings is sustained where justice so requires provided matters outside the Pleadings are not presented. The Chancellor declared in his ruling that such ruling was a rather abrupt ruling, therefore justice would have required granting the Defendants at least ten (10) days to amend their pleadings in light of this unusual procedure. The Moores had Subpoenaed three (3) witnesses one (1) of whom was from out of State. The Defendants' witnesses were present and the hearing had begun. Thus they were summarily "shot on the ground before they could fight." Motions under "both Rules 12(b)(6) and Rule 12(c) are decided on the face of the pleadings alone." Jordan v. Wilson, 5 So3d 442 (Miss. App. 2008). The distinguishing factor in favor of the Defendants, Moore is that the pleadings themselves, which are all we really have in the case sub justice, contain genuine factual issues. The Cross-Complaint of the Moore's indicates a significant footage overlap between the properties, which is a factual dispute of Kenneth Moore's Deed vs. Roy McDonald's survey. (R.E. 36, 50-52) The Plaintiffs' Motion was not timely and the Court erred in not continuing with the hearing, which had already begun.

REPLY TO PROPOSITION 2

That pursuant to Miss. Code Ann. § 11-17-31 the Plaintiffs were entitled to have their tract of land quieted and confirmed against any claim by the Moores.

Throughout the Plaintiff's Brief, McDonald and Belton refer to their superior title. Neither Long v. Stanley, 79 Miss. 298, or 30 So. 823 (Miss. 1901) nor Netterville v. Weyerhause Co., 963 So2d 38 (Miss. App. 2007) support that proposition. Appellants, Moore and Appellees, McDonald and Belton, derive their title from the same source, really at the same time. Plaintiffs obviously were aware of Kenneth Moore's contract with the Garrett Estate because their title came from Lamar Moore (Kenneth's brother) and William Garrett, deceased. The original twenty acre tract was divided between the Moores by Contract in 1997 (R.E. 9-10). In 1998, Lamar Moore sought to sell his tract to Roy McDonald with William Garrett, deceased joining in this conveyance. (R.E. 13) The descriptions were the same as what was contained in the original Sales Contract and everyone seemed satisfied until the Plaintiffs McDonald sold a four (4) acre parcel from his tract to Harold and Beth Belton in 2007. (R.E. 27) McDonald obtained a survey and soon the friction between neighbors began. (R.E. 29) McDonald and Belton claimed from 8 ft to 12 ft or more of the land which Kenneth Moore had under contract and was finally deeded in 2008. (R.E.50-52) When the Beltons were deeded their property and received their survey, the Plaintiffs moved the railroad ties that marked the driveway between the properties over onto Kenneth Moore's land. Plaintiffs alleged to the Chancery Court this was completely legal because their deed was filed first and they have superior title. The Moore's have cross-claimed to recover their lost footage and say unto the Court "first in time, first in right" does not apply when the two (2) competing tracts of land come out of the same tract and circumstances. Both Lamar

Moore and Kenneth Moore had Contracts for Purchase of Real Estate with the Garretts. Lamar, along with William Garrett sold to Roy McDonald exactly what Lamar had been granted at the same time as his brother, Defendant, Kenneth Moore. Using the Appellees' logic, if Kenneth Moore, et ux, had filed their Deed first, then McDonald and Belton would have from 8 ft to 12 ft less real estate along the 1123 feet boundary between them. The Defendants Moore had Mrs. Annette Barbato (Dwyer) present to testify and introduce all documents from the William Garrett Estate file necessary to clear any ambiguity concerning what was done at the time of the original division of the 20+ acre tract divided between Kenneth Moore and his brother, Lamar Moore. Surveys must conform to the calls of the Deed and follow closely the recognized lines of occupancy, Jones v. Graham, 963 So2d 581 (Miss. App. 2007).

Appellees, McDonald and his son-in-law, do not come before the Court with clean hands and are not entitled to the confirmation of title they request. Mountain Investments, LLC v. U.S., 2009 WL 3747205 (S.D. Miss. 2009). Plaintiffs cannot stand behind § 89-5-1 et seq. of the Mississippi Code of 1972, as amended when one of their grantors was party to the original contractual division. Lamar Moore was a Subpoenaed witness present to testify about his Contract with William Garrett, deceased and Appellees, McDonalds' notice of Kenneth Moore's land purchase agreement with the Garrett Estate.

Referring back to the procedural question addressed in Proposition I, it becomes obvious why the Plaintiffs waited until Trial to file the Motion for Judgment on the Pleadings. Had McDonald and Belton filed for Summary Judgment, ten (10) days Notice would have been required and the Moores would have had time to secure Affidavits from Annette Barbato Dwyer as well as that of Kenneth Moore. Using theses documents the

Defendant would have been able to show the Court a genuine issue of material facts and overcome Summary Judgment. The big mystery here is why the Honorable Chancellor didn't

just go ahead and try the case. Everybody was present and the case could have been tried in one (1) day. Neither Judgment on the Pleadings nor Summary Judgment are allowed when there are genuine issues of material fact. Stewart, ex rel. Womack v. City of Jackson, 804 So2d 1041 (Miss. 2002)

CERTIFICATE

I, William L. Ducker, do hereby certify that I have mailed the original and three (3) copies plus the CD of the above Reply Brief of Appellants to:

Hon. Betty Septon
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and I have also mailed a true copy, postage pre-paid to:

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This the 5th day of January, 2010.

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