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

BRIEF OF APPELLANTS

Prepared by:

William L. Ducker
MSB #[redacted]
P. O. Box 217
Purvis, MS 39475
(601) 794-8545

Counsel for Appellants:
Kenneth Moore, and wife,
Carolyn M. Moore

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CERTIFICATE OF INTERESTED PERSONS

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

1) Honorable Sebe Dale, Jr.,
Chancellor, 10th Judicial District
Lamar County, Mississippi

2) Kenneth Moore and wife, Carolyn Moore, Appellants

3) Harold Belton and wife, Ruth Belton, Appellees

4) Roy McDonald and wife, Donna McDonald, Appellees

5) Lamar Moore

6) Mrs. Annette Barbato

7) Estate of William Garrett, deceased

8) Nathan Farmer, Esq.
Attorney for Appellees

9) William L. Ducker, Esq.
Attorney for Appellants

Respectfully submitted,

WILLIAM L. DUCKER
Attorney at Law
P. O. Box 217
Purvis, MS 39475
MSB # 6201
601-794-8545
601-794-8546 Fax

Counsel for Appellant:

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STATEMENT OF THE CASE

The Defendants/Appellants, Kenneth and Carolyn Moore, appeared and announced ready for trial on June 23,2009. (R.E. 6, 7) The Court required a conference in chambers with the attorneys for the purpose of numbering exhibits and other logistical matters. Before the conference concluded and without any previous filing or notice of any Motion, Plaintiff's attorney moved for Judgment on the pleadings and after giving the attorney for defense a short response time the Chancellor sustained the Motion. The Defendants had an out-of-state witness and another local witness Subpoenaed ready to testify, but these persons were not afforded their day in Court. Defendants submit the Plaintiffs' Motion was not timely made and pursuant to MRCP 12(c) before the Court sustained such Motion the Chancellor should have allowed the Moores time to amend as per Rule 15(a).

A genuine issue of material facts exists between the parties.

The Defendants dispute the time honored procedure of first in time, first in right for filing of deeds and suggest that equity jurisdiction requires the Court to look at the deed of the parties' predecessor in title (R.E. 31-33) to determine the division of the 20.6 acres.

SUMMARY OF THE ARGUMENT

Proposition I.

The Honorable Chancellor erred in granting Plaintiffs' Motion for Judgment on the Pleadings.

Without notice or Motion filed during a pre-trial conference on the morning of the pre-set hearing, the Plaintiffs' attorney moved for and was granted Judgment on the pleadings (R.E. 3-12). The timing of the Motion is contested as well as the Chancellor's decision. According to Rule 12 (c) if the Court is inclined to grant such a Motion the non-moving party should be given the opportunity to amend as per Rule 15 (a). Instead the Court granted Judgment on the pleadings and in open Court a few minutes later made his ruling the Final Judgment. (R.E. 3-5) The Defendants had witnesses present to testify and the pleadings in this case certainly indicates a genuine factual dispute. (R.E. 50-56)

Proposition II.

The Honorable Chancellor erred by invoking the theory of first in time, first in right concerning the filing of the deeds in this cause.

In 1995, Lamar Moore and his brother, Defendant, Kenneth Moore approached Mr. William Garrett, deceased about buying and splitting a 20.6 acre tract on Tee Road in Pearl River County, Mississippi. Mr. Garrett and later his Estate did not deed property, but sold same on a Lease Purchase Agreement until the purchase price was paid in full. In 1998 Lamar Moore, and Mr. William Garrett, deceased sold Lamar Moore's 10.34 acres to Roy McDonald and wife, Donna McDonald. (R.E. 25, 26) Defendant, Kenneth Moore married and built a home on his side of the property, but did not finish out the Sales Contract until 2008.(R.E. 50-53) When his Deed was recorded Roy McDonald and his son-in-law, Harold

Belton immediately moved their driveway over encroaching on Moore's property by as little as eight (8) feet on Tee Road and as much as fifteen (15) feet on the back or North end of the subject real estate. Some surveys indicate there is a lack of footage for Kenneth and Carolyn Moore to have their full 10.34 acres. Since there was a written Contract, should Defendants be shorted an acre of ground because the McDonalds deed was filed first?

PROPOSITION I.

In the decision of Investors Syndicate of America v. City of Indian Rock Beach, FL, 434 F2d 871 (C.A.Fla. 1970) the Fifth Circuit held that the emphasis should be on resolving lawsuits on their merits rather than upon pleadings draftsmanship.

> "If there is any doubt as to what the parties meant, a trial should be had, not to contradict the Contract but to show what the parties meant by the Contract."

This is precisely the situation in the case at bar. The Court called the parties in Chambers at the commencement of proceedings on the morning of the trial to discuss the objections to the Exhibits that would be presented. After looking at the Deeds of the parties and discussing the other the surveys that were being marked, Plaintiffs' counsel moved the Court for Judgment on the pleadings, which the Court sustained (R.E. 3-12) The Defendant had Subpoenaed witnesses present to testify as to the differences in the descriptions, but the Court granted the Plaintiff Judgment on the Pleadings immediately. Defendant, Moore would submit this was improper use of Rule 12(c) MRCP. The timing of the Motion was wrong. The parties had announced ready for trial and were about to commence the hearing. Defendants had no opportunity to defend the Motion other than an impromptu argument, but more particularly according to the Rule 12(c) the defense should have been given time to amend pursuant to Rule 15 (a) MRCP.

According to this Courts ruling in the case of Huff-Cook, Inc. v. Dale, 913 So2d 988 (Miss. 2005) and MRCP 12 (c) since no matters outside the pleadings were presented by Plaintiffs' Motion and the Chancellor sustained the Motion, then Defendants should have been afforded leave to amend in accordance with MRCP 15(a). Rule 56 requires the serving

of said Motion at least ten (10) days before the hearing. While no time limit is set by Rule 12 (c) Appellants submit that this Court does not contemplate a Motion for Judgment on the Pleadings being made *ore tenus* after both parties have announced ready for trial.

The Defendants had Subpoenaed Mrs. Annette Barbato representing the Garrett Estate, which was the predecessor in title for all the parties to explain the procedures followed in the Lease Purchase Agreement with Lamar Moore and Kenneth Moore to prove the division by the seller that neither party had any claim to more real estate than the other. After reviewing the exhibits of the parties the Chancellor granted Plaintiffs Judgment on the Pleadings without the taking of any testimony (R.E 3-17). All parties were present and ready for trial. Pre-Trial Orders had been entered. The Defendants should have been given their day in Court. Just like responding to a Summary Judgment Motion when there is a conflict in the evidence and a genuine factual dispute exhibited between the parties, a *trial de nova* should have proceeded. Defendants were cut off at the knees without prior notice. In Circuit Court, Plaintiffs were not awarded pre-emptory instructions without presenting any evidence. Diamondhead Country Club and Property Owners Assn, Inc. v. Montgomery, 820 So2d 676, (Miss App, 2000) Although this is Chancery Court, the procedure is the same. 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).

In further support of this Court's position that the trial of lawsuits is favored the Court held in McClinton v. Delta Pride Catfish, Inc.,792 So2d 968 (Miss. 2001) that the burden is on the moving part to prove there is no set of facts under which the Appellant could prevail.

"Even when the Trial Court finds there is nothing before it that indicates

a genuine issue of material fact and finds that the Movant is otherwise entitled to Summary Judgment, the Trial Court may nevertheless be justified in denying Summary Judgment when, in the view, a full exposition of the facts may result in a triable issue or is warranted in the interest of justice."

Great Southern Nat'l Bank v. Minter, 590 So2d 129 (Miss. 1991) Where has there ever been a more perfect situation for the application of this ruling. All parties are present and when called announced ready. The witnesses are in the witness rooms and the Court calls counsel into chambers to go over the Exhibit list. After discussing the issues for about fifteen (15) minutes the Plaintiff moves the Court for Judgment on the Pleadings and after very little argument the Court sustains the Motion and goes onto the bench and rules. (R.E. 7-10) This case should have gone to trial. The Defendants were entitled to their day in Court and there was no reason not to proceed at that time. This was improper use of Motion for Judgment on the Pleadings without giving Defendants time to amend or just to present their evidence. Cause should be reversed for error in improper use of Rule 12 (c).

PROPOSITION II.

The Honorable Chancellor erred by invoking the theory of first in time, first in right concerning the filing of the Deeds in this case.

In like cases from Craig v. Osborn, 98 So2d 598 (Miss. 1923) to Johnson v. Johnson, 248 So2d 444 (Miss. 1971) the Theory was, "he who files first places the world on notice of his claim to the exclusion of others." First in time, first in right. Defendant, Moore submits to this Court that their Deed is the exception to the old tradition. (R.E. 50-52) William Garrett, deceased and his Estate sold property by Lease Purchase Agreements. The Moore brothers, Kenneth and Lamar purchased land from William Garrett, deceased on the Tee Road in Pearl River County and were making monthly payments. Lamar Moore and William Garrett, deceased sold Lamar's 10.34 acres to Ray D. McDonald and wife, Donna McDonald (R.E. 25,26) saving the other 10.34 acres for Kenneth Moore, who did not complete paying for the land until Spring, 2008, and receive his Deed August 28, 2008. (R.E. 50-56) However, the property descriptions were fixed by Contract in 1995). (R.E. 57-62)

From its earliest beginnings Chancery Court is a Court of equity. To strip Kenneth Moore, et ux from the ownership of an acre or more of their property merely because Roy McDonald and Donna McDonald's Deed was recorded first does not do equity. The Court's attention is called to both Deeds in question. The original description divided the 20.68 acre parcel equally into two (2) parcels (R.E. 25, 26) from McDonald and saving the other 10.34 acre for Kenneth Moore (R.E. 50-52). The predecessor in title acknowledged Kenneth Moore was paying for his parcel before Lamar Moore commenced, but when Lamar Moore in conjunction with William Garrett, deceased sold the Western tract to Roy McDonald, Kenneth Moore's acreage was diminished. "He who would seek equity must do equity."

Thigpen v. Kennedy, 238 So2d 744, (Miss. 1970). "He who comes into equity must come with clear hands." Ellzey v.James, 970 So2d 193 (Miss. App. 2007). In the case at bar Roy McDonald and his son-in-law, Harold Belton are asking this Court to confirm their title to more than 10.34 acres despite the original Agreement between William Garrett, deceased and Lamar and Kenneth Moore. What is basically being said to the Court is confirm me the bigger half because I filed my Deed first. Had the Chancellor heard the case *de novo*, the representative of the Garrett Estate, Mrs. Barbato was here to explain the division of the property and to introduce the original Lease Purchase Agreement.

The real difference in Chancery jurisdiction and Circuit Court jurisdiction is evident here. In a Court of equity, which was the forum selected by the Plaintiffs, Kenneth Moore and his wife, have a chance to be heard concerning their claim. In Chancery more can be considered than just the Statutes and Stare Decisis as opposed to the more rigid requirements of the law court.

The Moores have no problem with McDonald and Belton confirming their titles. Just don't give them more than was first intended. Surveys do not determine ownership, Deeds do. Burgess v. Trotter, 840 So2d 762 (Miss. App. 2003). The amount of acreage was determined by Contract in 1995 (R.E. 57-62) Just because Lamar Moore's successor in title, Roy D. McDonald filed his Deed first does not negate Kenneth Moore's Contract of which McDonald had been made aware.

CONCLUSION

Defendant, Kenneth Moore and wife, Carolyn Moore, were denied their day in Court at the commencement of their trial. The parties announced ready and the Chancellor stated that prior to calling any witnesses there would be a short conference in Chambers to discuss and number the exhibits to be offered in evidence. After a conference of approximately fifteen (15) minutes, the attorney for the Plaintiff moved the Court for Judgment on the Pleadings and the Court, after hearing the Defendant's attorney's argument sustained the Motion. No prior notice was given, and the Court did not allow Defendants time to amend. There certainly was a genuine issue of material fact, the dispute about footage in Deeds and surveys. Everyone was present; the Defense had out-of-state witnesses prepared to testify, but was precluded by a Motion that was not timely made.

Plaintiffs received their Deed in 1998. Defendants were granted theirs in 2008. However, the original tract of 20.6 acres was divided by the parties' predecessor in title with a Sales Contract to both Kenneth Moore and Lamar Moore in 1995. The old custom of first in time, first in right does not apply here. The parties equally divided a 20.68 acre parcel by Contract. Therefore, Plaintiffs cannot be heard to say their parcel surveys out more than the Defendants. The Chancellor's failure to allow the hearing on the merits of the issue constitutes reversible error.

CERTIFICATE

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

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

and I have also mailed a true copy, postage pre-paid to:

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

Nathan S. Farmer, Esq.
Attorney at Law
P. O. Box 1608
Picayune, MS 39466

This the 23rd day of November, 2009.

William L. Ducker

William L. Ducker

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