IN THE SUPREME COURT OF MISSISSIPPI

JUSTIN WALTON — **APPELLANT**

v. — **CASE NO. G-2009-TS-00136**

JOHN WALTON and KENNETH WALTON — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Appellant

Justin Walton

Appellant's Counsel

Jerry L. Mills
John P. Scanlon
PYLE, MILLS, DYE & PITTMAN
800 Avery Blvd., Ste. 101
Ridgeland, MS 39158

Appellees

John Walton
Kenneth Walton

Appellee's Counsel

John Fike, MSB [redacted]
FERGUSON & FIKE
P. O. Box 89
Raymond, MS 39154
Telephone: (601) 857-5282
Facsimile: (601) 857-2541

Other Interested Parties

Honorable William H. Singletary
P. O. Box 686
Jackson, MS 39205-0686

Respectfully submitted this the 2nd day of September, 2009.

JOHN D. FIKE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE SUPREME COURT OF MISSISSIPPI

JUSTIN WALTON — **APPELLANT**

v. — **CASE NO. G-2009-TS-00136**

JOHN WALTON and KENNETH WALTON — **APPELLEES**

STATEMENT REGARDING ORAL ARGUMENT

John Walton and Kenneth Walton, Defendants/Appellees, respectfully submit that this Court has previously determined the sole procedural issue required to dispose this case. In addition, it will be clearly shown that Appellant had no chance of gaining any interest in the property in question by filing this suit thereby making sanctions proper. Although no oral argument is necessary to show these facts and controlling law, Appellees reserve the right to oral argument should this Court deem it necessary.

STATEMENT OF ISSUES

The issues before this Court today are as follows:

1. Did the Appellant Justin Walton lacked standing to set aside the deed in question when he would gain no interest in the property by setting the deed aside?
2. Does the "minor savings" provision prevent a matter from being re-litigated where the minor's interests could have been and/or were previously represented by his mother and next friend?
3. Whether fraudulent concealment tolls the statute of limitations even when the alleged acts of fraud occur after the statute of limitations has run on the cause under which the plaintiff seeks relief?

4. Are Rule 11 sanctions proper where the plaintiff files a suit with no standing, no chance of success, and, if won, would gain no interest ?

STATEMENT OF THE CASE

On September 26, 2008, Appellant Justin Walton filed suit in the Chancery Court of Hinds County seeking to set aside a warranty deed conveying Jacqueline L. Hudson's interest in a life estate to her son, John Walton. (R. 1-2.) Jacqueline L. Hudson is the mother of Appellees, John Walton and Kenneth Walton, and George Walton, Appellant Justin Walton's father. (R. 1.) George Walton, unmarried, predeceased his mother thereby making Justin Walton the sole heir to his father's share of Jacqueline Walton's estate. (R. 1.)

Jacqueline L. Hudson appointed John with Power of Attorney. (R. 1, 5-8.) On August7, 1997, Jacqueline L. Hudson conveyed her life estate interest to John Walton via the Power of Attorney. (R 1,3.) At the point of this conveyance, John Walton and Kenneth Walton, held a retainer in fee simple absolute via the deed from Edward Walton and Jacqueline L. Hudson dated December 12, 1989. (R. 15-18.) At this point, this case becomes dispositive because even if this Court were to set aside this 1997 deed, no interest would pass to Justin Walton. As of the death of Jacqueline L. Hudson, the interest in the land would have passed to John Walton and Kenneth Walton in fee simple absolute. Therefore, in no way did Appellant stand any chance of gaining any relief whatsoever from this proceeding. Based primarily on these grounds, the trial court granted Appellees' Motion to Dismiss and Motion for Rule 11 Sanctions. (R. 13-19, 22-23.)

The other grounds for dismissal of this suit at the trial level was based on the grounds that because Appellant Justin Walton's mother and next friend Mary Lou Boles represented his interests in the matter closing the Estate of Edward L. Walton. Although Appellant Justin Walton was not served with process during the opening of the estate or named an heir, Appellees John Walton and Kenneth Walton did notice him, through his mother and next friend, Mary Lou Boles. Ret. of Serv.,

In re Estate of Walton, No. P-9954 (Ch. 2d Dist. Miss. Apr. 10, 1991). On May 9, 1991, Appellant Justin Walton appeared before the Chancery Court in the estate proceedings challenging the final accounting of the assets of the estate. Resp. To Pet. for Final Account, to Discharge Adm'rs and to Close Estate, *In re Estate of Walton*, No. P-9954 (Ch. 2d Dist. Miss. May 9, 1991). On January 27, 1992, J. Tayloe Simmons, Jr., attorney for Mary Lou Boles as Mother and Adult Next Friend of Justin Walton filed his Motion to Withdraw as counsel due to the inability to maintain contact with Appellant Justin Walton through his mother. Mot. to Withdraw, *In re Estate of Walton*, No. P-9954 (Ch. 2d Dist. Miss. Jan. 27, 1992). The court entered an order approving the withdrawal of counsel and giving Mary Lou Boles thirty days to obtain new counsel. Order, *In re Estate of Walton*, No. P-9954 (Ch. 2d Dist. Miss. Feb. 6, 1992). Appellees John Walton and Kenneth Walton allowed until June 15, 1992 before setting the hearing on the estate closing for June 23, 1992; Appellees notified Mary Lou Boles and Justin Walton, by and through his mother, of the hearing; and more than four months had elapsed to allow Mary Lou Boles to obtain new counsel. Not. of Hearing, *In re Estate of Walton*, No. P-9954 (Ch. 2d Dist. Miss. June 15, 1992). After than hearing, the Chancellor found that the accounting was proper and closed the estate. Order Dist. Widow's Allowance, Discharging Co-Adm'rs and Closing Estate, *In re Estate of Walton*, No. P-9954 (Ch. 2d Dist. Miss. June 23, 1992). Appellant Justin Walton failed to assert any interest in the estate of Edward L. Walton at the appropriate proceeding and should be barred for continuing to re-litigate these issues some sixteen years later.

SUMMARY OF THE ARGUMENT

Appellant has understated and misapplied the law throughout his argument in a continuing effort to avoid the obvious frivolousness of his lawsuit. First, the review of the dismissal should be

treated as one for summary judgment because the Chancellor considered evidence outside the pleadings. Second, the award of sanctions was proper because Appellant stood no chance of winning the suit nor had any interest whatsoever in the outcome of the suit. Third, because Appellant had no interest in the outcome of the suit, he lacked the standing to sue in the first place. Fourth, Appellant's interests have already been litigated in the closing of the estate on which he was noticed by and through his mother. Finally, the statute of limitations concerning the facts surrounding of fraudulent concealment occurred after the allowably two year period to bring a suit based on the underlying facts. However obvious it is that Appellant's argument fails on all of these grounds, he continues to harass Appellees out of his own personal vindictiveness.

ARGUMENT

I. STANDARD OF REVIEW

A. The Summary Judgment Standard Applies Because the Trial Court Considered Matters Outside the Pleadings.

The Chancellor in the trial court considered Appellees' Motion to Dismiss when considering the Judgment issued on December 18, 2008. In addition to the exhibits to Appellants' Petition in this matter, Appellees' Motion to Dismiss introduced an additional warranty deed (the 1989 deed conveying the future fee simple absolute interest). (R. 15-17.) A motion made under Mississippi Rules of Civil Procedure Rule 12(b) will be treated as a motion for summary judgment under Rule 56 where matters outside the pleadings are presented and not excluded by the trail court. *Jordan v. Wilson*, 5 So. 2d 442 (Miss. 2008) (citing *Huff-Cook, Inc. v. Dale*, 913 So.2d 988, 990-91(¶ 11) (Miss.2005); *Westbrook v. City of Jackson*, 665 So.2d 833, 836 (Miss.1995)). In reviewing the trial court's grant of summary judgment, the standard of review is de novo. *Duckworth v. Warren*, 10 So.

3d 433, 436 (Miss. 2009) (citing *One South, Inc. v. Hollowell*, 963 So.2d 1156, 1160 (Miss.2007)). In reviewing the grant of summary judgment, the appellate court must review "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* The burden of the moving party is to show that no genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact. *Id.* at 437. Further, summary judgment is inappropriate when an undisputed fact may have multiple interpretations. *Id.* Finally, this Court has determined that it will not reverse the decision of a chancery court unless that decision was manifestly wrong, clearly erroneous, or if the chancellor applied an incorrect legal standard. *Moore v. Marathon Asset Mgmt., LLC*, 973 So. 2d 1017, 1019 (Miss. 2008) (citing *Nichols v. Funderburk*, 883 So. 2d 554, 556 (Miss. 2004). This last standard should also be kept in mind when considering the finality of the chancery court's findings on the closing of the Estate of Edward L. Walton.

B. The Rule 11 Sanction Was Applied Properly.

Appellees, John Walton and Kenneth Walton concur with Appellant's conclusion that review of an award of Rule 11 sanctions is the abuse of discretion standard. Additionally, "In the absence of a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors, the judgment of the court's imposition of sanctions will be affirmed.." *Wyssbrod v. Wittjen*, 798 So.2d 352, 357 (Miss.2001).

Appellees also agree with Appellant that the claim must be frivolous in order to warrant an award of attorney's fees and costs. Because of the clear lack of standing of Appellant to bring this claim, the absence of any relief which any court could possibly grant, and the recurring litigation on

this matter, this Court should find that the suit was frivolous and warranted sanctions to the filing party.

II. APPELLANT JUSTIN WALTON LACKED STANDING TO BRING THIS SUIT TO SET ASIDE THE DEED.

At the time of the filing of the suit, and currently, Appellant Justin Walton had not interest in the property or deed in question and the outcome of the suit, regardless of what it is, would not vest any interest in the property or deed in question to Appellant Justin Walton. The issue of standing is to be determined at the commencement of the suit. *Delta Health Group, Inc. v. Estate of Pope*, 995 So. 2d 123 (Miss. 2008). A party has standing to sue "when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law." *Moore*, 973 So. 2d at 1021. In relation to a deed, it is necessary that the plaintiff prove title in himself, or such interest as will warrant the action. *Rebuild America, Inc. v. Milner*, 7 So. 3d 972, 975 (Miss. App. 2009). A competent attorney in his complaint will be wise enough to establish facts for the court to conclude he has standing to sue. *Osborn v. Harrison*, 447 So. 2d 122, 123 (Miss. 1984).

Because the court determines standing at the time of the filing of the suit, any other pending suit or suit later filed, as was in this case concerning the 1989 deed, is not determinative. Appellant had no interest in the property at the time of filing, and no interest would pass to Appellant regardless of the outcome of this suit. Because of this, and the fact that the property would, today, be vested in the Appellees regardless of whether the court finds any breach of fiduciary duty on the part of John Walton because all John Walton transferred was Jacqueline L. Hudson's life estate, Appellant could not have suffered any adverse effect caused by Appellees. Finally, Appellant has

raised no other law which would give him standing to sue in this matter. The chancery court properly dismissed this matter for lack of standing to sue.

III. THE "MINOR SAVINGS" STATUTE PREVENTS APPELLANT FROM RE-LITIGATING AN ISSUE WHERE HIS INTERESTS WERE PREVIOUSLY REPRESENTED THROUGH HIS MOTHER AND NEXT ADULT FRIEND.

In essence, through this case and the subsequent case filed challenging the 1989 deed, Appellant is attempting to long-shot his way into an interest in his grandparent's estate. However, this attempt is barred by the statute of limitations because he was served with process through his mother who made an appearance on his behalf to litigate his interest in the estate in 1992. When a parent brings an action for an interest who are qualified to sue on behalf of their minor children, the statute of limitations is not tolled under the minor saving's statute until minor children reach maturity. *See Curry v. Turner*, 832 So. 2d 508, 514 (Miss. 2002). "Even if there had been a savings in favor of the children, there being but a single cause of action, such savings would operate in their favor only when there was no person *in esse* who could sue on their behalf. *Arender v. Smith County Hosp.*, 431 So. 2d 491, 493 (Miss. 1983).

In *Arender*, Dewitt Arender, father of two minor children, filed suit for wrongful death of his wife, and the case was dismissed because the suit was filed after the running of the statute of limitations. *Id.* at 492. The plaintiffs appealed the decision claiming that the statute of limitations was tolled based on the minor savings provision. *Id.* That minor savings statute reads just as the one before the court today:

> If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one years.

Miss. Code Ann. § 15-1-59 (1972). The Court found that Mr. Arender was under no disability of mind during any of the time in which he could have filed the suit on behalf of his minor children. *Id. Arender* points to a quote which takes into consideration the policy considerations and legislative intent concerning the minor savings provision: "Certainly, the legislature never intended that actions of this character might be brought 20 years after the accrual of the right....The statutory saving on behalf of the infant is only intended to apply where there is no one in being who has power to sue. *Id.* at 493-94 (citing *Louisville & N. R. Co. v. Sanders*, 5 S.W. 563 (Ky. 1887).

The Appellant urges this Court to make bad law from bad facts. While it is unfortunate that Appellant's mother may not have put forth the most diligent effort to secure Appellant's interests in the matter closing the estate in 1992, establishing a rule of law that permits the challenging of an estate some 20 years later by any minor whose interest was represented would be detrimental to the integrity and finality of the court system. If the minor savings statute allows such untimely litigation, no estate which involve a minor could be closed and final until all of those minors reach majority plus ten years. The rule as it stands is much more practical and protects the justice and integrity of this Court.

IV. THE STATUTE OF LIMITATIONS RAN BEFORE ANY ALLEGED ACTS OF FRAUDULENT CONCEALMENT TOOK PLACE.

Although fraudulent concealment was never an issue at the trial level on this matter, Appellant urges that his statute of limitations was tolled due to fraudulent concealment. Not only do the facts of this case show that the requirements of fraudulent concealment were not met, but also the alleged acts of fraud took place after the statute of limitations had run on this claim.

A. Because Appellant's Mother and Adult Next Friend Could Sue on Appellant's Behalf, the Statute of Limitations Ran on June 23, 1994.

The statute of limitations for challenging the falsity of the administrator is two years from the closing of the estate. Miss. Code Ann. § 91-7-309. The estate closed on June 23, 1992. Appellant and Appellees, by admission of Appellant, had no contact until some time after 1995. Therefore, it would have been impossible for Appellees to make any fraudulent statements withing the two year time period. Mary Lou Boles could have sued on behalf of Appellant at any time withing that period. Because this is essentially an action to reopen the estate of Edward L. Walton, this statute of limitations prevents and further litigation on the matter. This law goes further to show that regardless of the outcome of this case, Appellant cannot gain any interest by filing this suit.

B. Because Appellant Did Not Exercise Due Diligence, He Is Barred from Asserting Fraudulent Concealment.

In order to show fraudulent concealment, the plaintiff must show that the defendant took affirmative actions to prevent discovery of the claim and that due diligence was performed on the part of the plaintiff to discover the claim. *Watts v. Horrace Mann Life Ins. Co.*, 949 So. 2d 833 (Miss. Ct. App. 2006) (citing *Stephens v. Equitable Life Assurance Soc'y of U.S.*, 850 So.2d 78, 84(¶ 18) (Miss.2003). The deed in question was recorded with the Hinds County Chancery Clerk on August 7, 1997. At this point and at all time thereafter, Appellant, whether through Mary Lou Boles as mother and next adult friend or through himself, has been on constructive notice of the conveyance. Both were also on notice of the court proceedings in the estate closing. Had either performed even a cursory search of the title records and the court records for the closing of the estate, they would have been aware of the status of his grandfather's estate. It cannot be said that Appellant satisfied this requirement when the notice was given to the world through recording.

Further, Appellant does not allege that Appellees made any representations as to exactly what

Appellant would receive, only that he would receive his share of Edward L. Walton's estate. At the closing of the estate, the chancery court determined that the only asset of the estate was a pick-up truck which it gave to Jacqueline L. Hudson. Since nothing else was left in the estate, it would be fair to say that Justin Walton did, in fact, get his share of the estate.

V. BASED ON THE FOREGOING ARGUMENTS, THE ORDER ISSUING RULE 11 SANCTIONS ON APPELLANT WERE PROPER BECAUSE THIS SUIT HAD NO CHANCE OF SUCCESS.

Rule 11 sanctions were specifically made to prevent this type of frivolous, unwarranted suit aimed only at harassing Appellees and abusing the court system. Appellant knew, or should have known, before filing this suit that he stood no chance of success. Appellant makes a feeble attempt to bring in the subsequent suit filed five moths later to justify the filing of this suit. Had Appellant intended to sue under the 1989 deed, amending the complaint in this action would have been the appropriate response. Instead, Appellant chose to file two separate actions attacking the deeds. Both of these actions are an attempt to circumvent the two year statute of limitations related to the closing of an estate by asserting faulty conveyances which carry a ten year statute of limitations. Appellant is the party responsible for misleading and abusing the court system, and sanctions were proper.

A. The 1989 Deed Litigation Has Been Involuntarily Dismissed and Sanctions Were Also Awarded in That Matter.

On July 29, 2009, Chancellor Dewayne Thomas issued an Order establishing that the statute of limitations had run on the claim against the 1989 deed with regards to both the minor savings provision and the fraudulent concealment allegations. Order, *Walton v. Walton*, G2009-60 T/1 (Ch. Ct. 2d Dist. July 29, 2009). The Chancellor also opined that the matter would also have been dismissed, although it was not necessary to do so, on the grounds that court lacked subject matter

jurisdiction due to the fact that this issue was resolved in the estate of Edward L. Walton. Based on these grounds, the court awarded Appellants attorney's fees and costs as a sanction upon Appellant.

By showing the Appellant was on constructive notice does not imply that he, as an eleven year old boy should have made an inquiry into the records. Appellant disregards that he is not still eleven years old, but has in fact aged since the filing of this deed. At all times since the recording of this deed he has been on constructive notice, whether at age 11, age 21, or age 31. In addition, his mother, who represents her minor child's interests, has been on notice. To plead ignorance of this deed up until the time Appellant's uncle notified him of some out-dated interest and use that as the basis for an argument flies in the face of the law.

As stated before, the fact that the conveyance was only a transfer of a life estate to those who held the retainer in fee simple to that present interest shows that Appellant lacked any standing to file the suit. Although this may not have been obvious to Justin Walton, it is one of the first analysis steps a qualified attorney takes prior to filing suit. A reasonable attorney would have realized this fact and advised his client that he could not sue on these grounds. A reasonable attorney and/or his client would not file the instant case, have it dismissed, wait four more months to file the case which attempts to the basis for the instant case only to have it dismissed basically on the same grounds. The abuse and disrespect for the court system here is apparent, even more so that this dismissal was appealed.

B. Appellee Has Properly Applied Rule 11.

Firstly, the portion of Rule 11 concerning the signature of the attorney of record is relevant to the issuance of sanctions in this matter. Rule 11 states that by signing the pleading, the attorney represents that the attorney has read the pleading; that grounds exist to support the claim; and that

it is not interposed for delay. Miss. R. Civ. P. Rule 11(a). By signing the petition in this matter, the attorney of record has certified these allegations, which has been shown above to be wholly unjustified and solely for the purposes of harassment and delay. Again, a reasonable attorney should have realized after diligent research that the Appellant had no standing to bring this suit and that it was barred by the statute of limitations.

Second, the assessment of $1,000.00 as reasonable attorney's fees and costs was proper. The assessment of reasonable attorney's fees is an issue within the discretion of the court. *Ford Motor Co. v. Tennin*, 960 So. 2d 379, 390 (Miss. 2007) (citing *Smotherman v. Columbus Hotel Co.*, 741 So.2d 259, 269 (Miss.1999). This Court has ruled that it will not reverse an award of attorney fees unless there is manifest abuse of discretion in making the allowance. *Id.* (citing *Deer Creek Constr. Co. v. Peterson*, 412 So.2d 1169, 1173 (Miss.1982). This Court also ruled that an award of attorney fees must be supported by evidence. *Id.* (citing *Regency Nissan, Inc. v. Jenkins*, 678 So.2d 95, 103 (Miss.1995).

Although the evidence of reasonable attorney's fees is not present in the record, a statement can be produced evidencing the time spent and hourly rate either to this Court or at the trial level. However, $1,000.00 is more than reasonable as it represents five hours of billable time at a rate of $200.00 per hour. Appellant cites to *McIntosh v. Victoria Corp.* asserting that the defense of a frivolous motion was assessed $250.00. In distinguishing the instant case from that one, *McIntosh* assessed fees in relation to the defense of a motion. Motions are generally focused on a limited number of issues which require much less time to research and defend. The instant case involves dismissing a case based on the initial pleading which required research into more areas of law. Second, Appellant does not specify the hourly rate for representation in *McIntosh*. Lastly, had

Second, Appellant does not specify the hourly rate for representation in *McIntosh*. Lastly, had Appellant continued to clarify the ruling in *McIntosh*, he would have alerted the Court to the fact that the assessment of $250.00 "represent[ed] a *portion* of the attorney's fees expended to defend McIntosh's frivolous motion." 877 So. 2d 519, 524 (Miss. Ct. App. 2004). This is yet another attempt by Appellant to squirm his way out of the backlash he has created by filing this frivolous suit.

CONCLUSION

All of the foregoing grounds make it clear that Appellant had no basis for bringing this suit. He had no standing to bring the suit in the first place. Noticed by and through his mother and represented by an attorney, his interests were litigated at the closing of his grandfather's estate. Appellant hopes to convince this Court to take bad facts to make bad law and allow the minor savings statute to allow him to re-litigate his interests in his grandfather's estate. However, as shown above, this Court has agreed that the purpose of the minor savings provision is not to allow litigation of matters where the minor's interest have been or could have been represented prior to the running of the statute of limitations. In essence, Appellant has, is, and continues to harass Appellees with this matter. This Court can save Appellees for any further harassment with the proper ruling in this matter.

Respectfully submitted,

John D. Fike (MSB [redacted]
FERGUSON & FIKE
P. O. Drawer 89
Raymnond, MS 39154
Phone: (601) 857-5282
Fax: (601) 857-2541

John D. Fike
Attorney for Defendants/Appellees
John Walton and Kenneth Walton