IN THE SUPREME COURT OF MISSISSIPPI

JUSTIN WALTON — APPELLANT

versus — CASE NO. G-2009-TS-00136

JOHN WALTON and
KENNETH WALTON — APPELLEES

BRIEF OF APPELLANT

ORAL ARGUMENTS REQUESTED

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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.

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Respectfully submitted this the 30th day of July, 2009.

John P. Scanlon

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STATEMENT REGARDING ORAL ARGUMENT

Justin Walton, Plaintiff/Appellant, respectfully submits that this Court's decisional process would be significantly aided by oral argument, given the importance of the underlying substantive legal issue not yet litigated of whether a party, through his authority of power of attorney, can deed real property to himself and not be in breach of the fiduciary relationship created by the power of attorney; therefore, Walton respectfully requests same from this Court.

STATEMENT OF ISSUES

The issues before this Court today are as follows:

1. Whether the "minor savings" provision of the applicable statute, along with the doctrine of fraudulent concealment, prevent the Statute of Limitations time period from having run.
2. Whether Rule 11 sanctions were inappropriate in this matter, where Plaintiff filed suit in good faith and on the basis of fact and evidentiary support.
3. Whether policy considerations weigh in favor of remand to allow both parties' interests and rights in this matter to be fully litigated.

All of these questions must be answered in the affirmative, and this Court should reverse the lower court's decision and remand the matter back to the trial court for further proceedings consistent with any ruling this Court may make in this appeal.

STATEMENT OF THE CASE

I. Nature of the Case

This land-dispute action began when the Plaintiff Justin Walton filed a Petition to Set Aside Warranty Deed on September 26, 2008. (R. 1-2.) Defendants/Appellees John Walton and his brother Kenneth Walton are the uncles of the Plaintiff Justin Walton. (R. 1.) Jacqueline L. Hudson, deceased, was the mother to John and Kenneth Walton, and one other son, George Walton, deceased. (R. 1.) Plaintiff/Appellant Justin Walton is the son of George Walton, deceased, and the grandson of Jacqueline L. Hudson, deceased. (R. 1.)

John had obtained Power of Attorney over Jacqueline L. Hudson, John's and Ken's mother and Justin's grandmother. (R. 1, 5-8.) The Power of Attorney made it possible for John to – in essence – convey his mother's property to himself via an August 7, 1997, deed. (R. 1, 3.) The initial petition in this matter was attacking that August 7, 1997, deed purporting to convey certain real property of Jacqueline L. Hudson to her son John Walton. (R. 1.) The deed reads in part: "I, Jacqueline L. Hudson, by Johnnie L. Walton through Power of Attorney to hereby sell, convey and warrant and release all of my Life Estate in and to the above described lands." (R. 3.) The basis of the Petition was that John Walton improperly and unlawfully conveyed real property to himself by relying on the fiduciary role he had obtained via the power of attorney over his mother. (R. 2.)

The essential legal question of merit in this case – whether such a conveyance made to oneself through this fiduciary role obtained via a power of attorney is permissible under the law

– was never reached, as the case was dismissed when the Defendants Motion to Dismiss and for Rule 11 Sanctions was granted by the trial court. (R. 22-23.) Two of the three questions on appeal are issues of procedure, 1) whether the "minor savings" provision of the applicable statute, along with the doctrine of fraudulent concealment, prevent the Statute of Limitations time period from having run, and 2) whether Rule 11 sanctions were inappropriate in this matter, where Plaintiff filed suit in good faith and on the basis of fact and evidentiary support. The third question is whether policy considerations weigh in favor of remand to allow both parties' interests and rights in this matter to be fully litigated. Justin Walton respectfully submits that both questions must be answered in the affirmative.

II. Course of Proceedings

After the initial Petition was timely filed and served, Defendants filed a Motion to Dismiss and for Rule 11 Sanctions against Plaintiff Justin Walton. (R. 1-14.) The Defendants' basic arguments in those motions, respectively, were that 1) the case was time-barred by the applicable statute of limitations, and 2) the only interest conveyed was a life estate. (R. 13-14.) Defendants never once denied any wrongdoing on their part.

III. Disposition in the Court Below

Without any hearing of record, or substantive briefing on the matter, the trial court granted both the Motion to Dismiss and the Motion for Rule 11 Sanctions in a Judgment entered on December 18, 2008. (R. 22-23.) Plaintiff Justin Walton timely filed his Notice of Appeal from that December 18, 2008, Judgment. (R. 24). Justin now appeals from that Judgment in whole, and requests this Court reverse the lower court's decision and remand this matter back to the trial court for further proceedings.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Plaintiff/Appellant Justin Walton, born November 26, 1978, is the son of George Walton, and grandson of Edward Lee Walton and Jacqueline L. Hudson Walton (George's parents), all of whom are now deceased and all of whom died intestate. (R. 1.) Edward Lee Walton and Jacqueline L. Hudson Walton had three (3) children as a result of their union: George Walton, deceased; Johnnie Lee Walton ("John"); and Kenneth Paul Walton ("Ken"). (R. 1.) Of these three (3) sons, only John and Ken are still living. (R. 1.) George Walton, who died unmarried in or about 1984, pre-deceased both of his parents; George was also the father to Plaintiff/Appellant Justin Walton. Justin would have been a boy of only 5 or 6 years old at the time of his father's death. John and Ken, the uncles of Plaintiff Justin, are the named Defendants in this action. (R. 1.)

There are at least two (2) different deeds purporting to convey an interest in land which are the subjects of dispute between the parties. Both deeds conveyed property of Edward Lee Walton and Jacqueline L. Hudson either to John or to both of the Defendants, both deeds occurred after the death of their son George, and both deeds cut out Plaintiff Justin, who was an heir-at-law to both his grandparents Edward Lee Walton and Jacqueline L. Hudson, from receiving anything. The first, executed on December 12, 1989, is the subject of a separate, but related action currently filed in the Second Judicial District of the Hinds County Chancery Court under Cause No. G2009-60-T/1. (R. 15-17.) The second, executed on August 7, 1997, is the subject of the case at bar, and is not mentioned or referenced anywhere within the Complaint in the action concerning the 1989 deed. (R. 3-4.) However, to achieve a full understanding of this matter, this Court will likely benefit from the background facts of both deeds, as well as other related legal matters.

I. 1989 deed, and Edward Lee Walton's death and estate proceedings

Before Edward Lee Walton's 1990 death, the December 12, 1989, Warranty Deed was executed, purporting to convey land from Jacqueline and Edward Lee Walton to Defendants John and Ken, while reserving a Life Estate in the grantors Jacqueline and Edward Lee Walton. (R. 15-17.) Justin was not made aware of the execution of the December 12, 1989, deed at that time, or this inter vivos transfer, in any way by either Defendant John or Ken. When Edward Lee Walton died in 1990, the amount and value of his assets at the time of his death were disputed in the proceedings administering his estate.

Defendants John and Ken had the estate of their father Edward Lee administered in the Hinds County Chancery Court, Second Judicial District, under Cause No. P-9954-D/2. Under that civil proceeding administering the estate of Edward Lee, both the Petition for Appointment of Administrators and the Order Appointing Administrators list only Jacqueline, Ken, and John as Edward Lee's sole heirs at law. Neither Justin, nor his father George, are mentioned anywhere within those documents. Also under that civil proceeding administering the estate of Edward Lee, both John and Ken submitted sworn testimony in the form of affidavits on October 16, 1990, that they had made diligent effort to identify any persons having claim against the estate and had found none.

Under that civil proceeding administering Edward Lee's estate, only in the Petition for Final Account, to Discharge Administrators, and to Close Estate, filed April 2, 1991, was Justin mentioned in the pleadings for the first time, and was Justin purportedly served with notice of any of the proceedings. In the Petition for Final Account, to Discharge Administrators, and to Close Estate, John and Ken alleged that the only asset of the estate was one 1986 Chevrolet C-10 Truck. However, in her Response to the Petition for Final Account, to Discharge Administrators,

and to Close Estate, filed on or about May 9, 1991, Jacqueline Walton, conveyed in her pleadings that she was never advised by the petitioners there, John and Ken, that they had opened an estate for her husband, Edward Lee, that they did not make a true and correct representation of the assets of Edward Lee, and that they failed to make a proper accounting. Thus, Jacqueline Walton also filed a Petition for Widow's Allowance.

A Response to the Petition for Final Account, to Discharge Administrators, and to Close Estate, was also filed on behalf of Justin, a minor at the time, through his mother Mary Lou Boles on or about May 9, 1991; Mary Lou Boles, through her lawyer, conveyed in her pleadings that she did not have sufficient information to admit or deny the amount of assets of the estate, and prayed that the court refuse to approve the final accounting, discharge the administrators, and to close that estate. The attorney for Mary Lou Boles eventually withdrew from representation of her on January 27, 1992, on the grounds that he was unable to contact her or receive any response from her regarding the disposition of that cause, the administration of the estate of Edward Lee Walton.

Justin Walton, only thirteen (13) at the time of the estate proceedings, was not fully aware of these proceedings and did not have a full understanding of the import of these proceedings, or their consequences. In the Order Distributing Widow's Allowance, Discharging Co-Administrators and Closing Estate, filed on June 23, 1992, indicates that neither Justin, thirteen (13) at the time, nor his mother Mary Lou Boles, were present in court on the day the order was entered.

Five years later, Defendant John Walton had his mother Jaqueline Walton execute a Power of Attorney on June 16, 1995. (R. 5-8.) Through this Power of Attorney, the Defendants had the August 7, 1997, Warranty Deed executed, of which Justin was not made aware. (R. 3-4.)

From February of 1989, through January of 2000, Defendant John had had his mother Jacqueline committed for mental treatment four (4) different times, each time resulting in a discharge.

II. The present action

Justin Walton instituted this action on September 26, 2008, when he filed a Petition to Set Aside Warranty Deed. (R. 1-2.) The Petition was timely filed and served. (R. 9-12.) That Petition was attacking the August 7, 1997, deed purporting to convey certain real property of Jacqueline L. Hudson to her son, Defendant/Appellee John Walton. (R. 1.) John had this achieved under the Power of Attorney he had obtained two years earlier over his mother, Jacqueline L. Hudson. (R. 1, 5-8.) The Power of Attorney made it possible for John to – in essence – convey his mother's property to himself. (R. 1, 3.) The deed reads in part: "I, Jacqueline L. Hudson, by Johnnie L. Walton through Power of Attorney to hereby sell, convey and warrant and release all of my Life Estate in and to the above described lands." (R. 3.) The September 26, 2008, Petition instituting this action alleges that "it was improper and unlawful for John Walton to convey real property to himself by relying on the fiduciary role conferred on him by his mother's Power of Attorney." (R. 2.)

Thereafter Defendants John and Kenneth Walton filed their "Motion to Dismiss and Rule 11 Sanctions" (sic). (R. 13-14.) Defendants provided the trial court with a copy of the 1989 Warranty Deed and a printed title search result, as attachments to the Motion. (R. 15-19.) In their brief Motion to Dismiss, Defendants never contest whether John Walton improperly and unlawfully conveyed the property from their mother to themselves via John's Power of Attorney; instead, Defendants simply respond by stating that the "only interest Jacqueline L. Hudson had at that time was a Life Estate." (R. 13.) The Motion to Dismiss further states that the action complained of occurred on August 7, 1997, more than ten (10) years before Justin Walton filed

his Petition which is the subject of this appeal. (R. 13.) Thus, based on the ten-year statute of limitations time period under Section 15-1-7 of the Mississippi Code, Defendants argued that the action was time barred. See Miss. Code Ann. § 15-1-7 (Rev. 2003).

In their Motion for Rule 11 Sanctions, Defendants argue that the only interest Jacqueline L. Hudson had at the time John conveyed that interest to himself was a Life Estate because Edward Lee Walton and Jacqueline L. Hudson had earlier transferred all of her interests in the property, excepting her retained Life Estate, via a Warranty Deed to Defendants John Walton and Kenneth Walton executed on December 12, 1989. (R. 14, 15-17.) Defendants further allege that Justin Walton had not performed an investigation into the title history to discover the 1989 deed. (R. 14.)

In fact, as previously stated herein, that December 12, 1989, deed is the subject of a separate, but related action currently filed in the Second Judicial District of the Hinds County Chancery Court under Cause No. G2009-60-T/1. That action attacks the December 12, 1989, deed only, and in no way whatsoever raises any issue regarding the August 7, 1997, deed. Additionally, that action seeks different relief – including the establishment of a constructive trust – and sets forth specific allegations of fraud. That suit additionally alleges that Justin's interests were never fully litigated, in part because of the uncertainties surrounding the administration of Edward Lee's estate. Depending on the outcome of this appeal, future consolidation of these two cases may be appropriate by the common trial court.

The basis for the Rule 11 Sanctions requested appears to be allegations that the Petition was a "frivolous" action being brought by Justin Walton "with no hope of success, no basis in fact or evidentiary support . . . solely for the purpose of harassing Defendants and should be sanctioned accordingly." (R. 14.)

Unfortunately for Justin, his attorney at the time[1] did not file any response in opposition to the Defendants' Motions. After a hearing, at which Justin Walton was not present, the trial court entered Judgment in this matter against Justin Walton and in favor of John and Kenneth Walton, filed on December 18, 2008. (R. 22-23.) The short Judgment simply states that both defense Motions were granted, without providing any reasoning or analysis. (R. 22.) The Judgment further provides that the amount of the Judgment is one thousand dollars ($1,000), carrying with it an interest rate of eight percent (8%). Justin Walton timely filed his Notice of Appeal, through his new counsel, the undersigned, seeking relief from that Judgment.

III. Questions not yet reached in the lower court

Were this matter to have proceeded past the Defendants' Motion which gave rise to this appeal, the essential underlying substance of the suit to be litigated would involve several legal and factual questions – namely, whether such conveyance made to oneself through the fiduciary role obtained via a power of attorney is permissible under the law, whether the estate of Jacqueline Hudson did in fact contain only a Life Estate, and whether Justin was actually and properly entitled under the law to any of the assets of either the estate of Edward Lee Walton, or Jacqueline Hudson. None of these questions has been answered, or even litigated, in the lower court and thus, they are not presently issues on appeal, but discussing them will provide this Court a context for the importance of the first legal question. Though some of these facts are also the subject of the related law suit involving the 1989 deed referenced above, an understanding of the complete background is necessary.

Mississippi Code Annotated Section 91-1-3 provides in part that:

> When any person shall die seized of any estate of inheritance in lands, tenements, and hereditaments not devised, the same shall descend to his or her

[1] The undersigned did not represent Justin Walton in any way at that time.

> children, and their descendants, in equal parts, the descendants of the deceased child or grandchild to take the share of the deceased parent in equal parts among them.

Miss. Code Ann. § 91-1-3 (rev. 2004).

Thus, but for the deeds in dispute, under Mississippi Code Annotated Section 91-1-3, Justin's grandparents' estate would have been divided equally into three parts: one-third (1/3) to go to John Walton, one-third (1/3) to go to Ken Walton, and one-third (1/3) to go *per stirpes* to Justin Walton as the sole surviving heir to his father George Walton, deceased. Additionally, it was the intention of Justin's grandparents Jacqueline and Edward Lee Walton for Justin to take *per stirpes* the share that would have otherwise gone to Justin's father George Walton. Justin intends to prove at trial that his grandfather Edward Lee had personally and repeatedly expressed as much to Justin verbally. Justin also intends to prove several other important facts. Justin's uncles John and Ken had also repeatedly expressed to Justin on various occasions, both before and after the deaths of Edward Lee and Jacqueline, i.e., that Justin, as George's sole heir-at-law, would take *per stirpes* the share that would have otherwise gone to Justin's father George Walton.

Justin became closely acquainted with his uncles Ken and John when he was approximately 17 years old in approximately 1995 or 1996, and before the deed at issue was executed. Around this time, they began maintaining regular contact with Justin and began taking him along to maintain the land they had been purportedly conveyed by way of the December 12, 1989, deed, and to hunt and fish on some of it. As Justin began to spend more time with his uncles, Defendants John and Ken, Justin began to understand that his grandfather Edward Lee had owned substantial property, both real and personal in nature. During this time, Justin also relied on direct representations from them regarding the property and his interest in it.

Justin's uncles gave Justin a variety of versions of the events. Both Defendants said that once Justin became of age, Justin would get "a child's part," or the entirety of his father George's share. Justin was also led to believe that he would not get his portion until after his grandmother Jacqueline died, because the land could not be divided or partitioned until that time. In any event, Justin understood that he was assured a share of the land and other property, and of his grandfather's estate. Defendant Ken had even promised Justin that he would see to it personally that Justin would get a share of Edward Lee's estate, even if he, Ken, had to give it to Justin directly out of his own share. Before her death on or about May 18, 2006, Justin's grandmother Jacqueline had told Justin he was being wronged by his uncles and not getting his share of the land as the only heir at law of George Walton.

In about May of 2007, Justin's great-uncle, Paul Hudson, brother of Jacqueline, contacted Justin to assure he received a check for more than five-thousand dollars' ($5,000) worth of damages regarding mineral rights of real property in Pike County that had belonged to Justin's grandfather Edward Lee Walton. Paul Hudson also explained to Justin that he was entitled to one-third (1/3) of everything that had been a part of his grandfather's estate, including both personal and real property. Justin also came to understand that Defendants John and Ken had gained profit from the land they were purportedly deeded on December 12, 1989, including, but not limited to, the cutting and sale of timber from the real property of Edward Lee's estate. This was the first instance Justin was ever aware that a cause of action may have accrued in his favor to claim his portion of Edward Lee's estate as George Walton's only heir at law.

Defendants John and Ken had fraudulently represented to the chancery court the amount of assets in the estate of their father, Edward Lee, as well as the status of Edward Lee's heirs at law, under Cause No. P-9954-D/2 in the civil proceeding administering Edward Lee's estate.

Defendants John and Ken further exerted undue influence over both their mother and their father, Jacqueline and Edward Lee, in order to obtain all of the real and personal property of the estate of Edward Lee, and in order to prevent Justin from ever obtaining what would have been otherwise rightfully his under the law – the portion that would have gone to Justin's father George had he been living at the time of Edward Lee's death – and what Edward Lee had intended for Justin to receive.

Defendants John and Ken continue to attempt to deceive Justin that he will get his father's one-third (1/3) share of Edward Lee's estate after the children and heirs of John and Ken inherit John and Ken's portions of Edward Lee's estate. In fact, there is no guarantee whatsoever, legal or otherwise, that Justin will ever get his share of his father George's one-third (1/3) portion of the estate without pursuing a remedy with this Court. These questions were never litigated at the trial court level because of the grant of the Defendants' Motions; thus, Justin's rights in the family land are at stake in this appeal, and they will be forever stripped from him without having been properly and judicially determined if this Court affirms the lower court's decision.

Despite the passage of time in this matter, Justin is still within the lawful time period to bring forward this action, and Rule 11 Sanctions were inappropriate in this matter. This Court should reverse the lower court's decision and remand this matter back to the trial court so that the case can be fully litigated.

SUMMARY OF THE ARGUMENT

The "minor savings" portion of the statute, as well as the doctrine of fraudulent concealment, prevent the statute of limitations time period from having run in this matter. Thus, the action was not in fact time-barred as Defendants argue. Additionally, several meritorious

questions remain to be litigated concerning the estates of the Plaintiff's grandparents, as well as whether the conveyance challenged in this matter was proper under the law. The trial court constituted reversible error in finding otherwise. This Court should reverse that decision and remand this matter back to the trial court for further proceedings.

Additionally, Rule 11 sanctions were not appropriate in this matter as this law suit was instituted in good faith, and with basis in fact, not simply as a means of harassing the Defendants. As mentioned above, all of the substantive factual questions in this matter are yet to be tried. The trial court abused its discretion in awarding sanctions and this Court should reverse that decision in favor of the Plaintiff Justin Walton.

ARGUMENT

I. STANDARD OF REVIEW

A. Motion to Dismiss

The appellate standard of review as to dismissals of actions on the pleadings is de novo. *Thiroux v. Austin,* 749 So. 2d 1040, 1041 (Miss. 1999) (citing *Young v. State,* 731 So. 2d 1120, 1122 (Miss. 1999)). Specifically, this Court reviews the trial court's grant or denial of a motion to dismiss under a de novo standard of review. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 988(¶ 54) (Miss. 2004). "When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Id.* (citing *T.M. v. Noblitt,* 650 So. 2d 1340, 1342 (Miss. 1995)). See also *Rebuild America, Inc. v. Milner*, 7 So. 3d 972, 975 (Miss. Ct. App. 2009). This Court has specifically stated:

> A motion to dismiss under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure raises an issue of law, which is reviewed under a de novo standard. *Cook v. Brown,* 909 So. 2d 1075, 1077-78 (Miss. 2005). A Rule 12(b)(6) motion

> to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Id.* at 1078 (citing *Little v. Miss. Dep't of Human Servs.*, 835 So. 2d 9, 11 (Miss. 2002)). The allegations in the complaint must be taken as true, and there must be no set of facts that would allow the plaintiff to prevail. *Ralph Walker, Inc. v. Gallagher,* 926 So. 2d 890, 893 (Miss. 2006). This Court need "not defer to the trial court's ruling." *Id.* (citing *Roberts v. New Albany Separate Sch. Dist.*, 813 So. 2d 729, 730-31 (Miss. 2002)). This Court must find that there is no set of facts that would entitle a defendant to relief under the law in order to affirm an order granting the dismissal of a claim on a Rule 12(b)(6) motion. *Id.* (citing *Lowe v. Lowndes County Bldg. Inspection Dep't,* 760 So. 2d 711, 713 (Miss. 2000)).

Rose v. Tullos, 994 So. 2d 734, 737(¶ 11) (Miss. 2008). See also *Campbell v. Davis*, 8 So. 3d 909, 911 (Miss. Ct. App. 2009). Thus, to affirm the trial court under this de novo standard of review, this Court must take all allegations in the Complaint must be taken as true, and hold that no set of facts exists that would allow the Plaintiff to prevail.

B. Motion for Rule 11 Sanctions

As discussed above, this Court is to employ a de novo standard of review for dismissals of actions on the pleadings pursuant to Rule 12. *Tubwell v. Grant*, 760 So. 2d 687, 690 (Miss. 2000) (citing *Young v. State*, 731 So. 2d 1120, 1122 (Miss. 1999). However, the Court of Appeals has noted the Supreme Court has also clearly stated that the proper standard of review for the award of Rule 11 sanctions is an abuse of discretion standard. *Illinois Cent. R. Co. v. Broussard*, 2008 WL 4405166, 1 (Miss. Ct. App. 2008). See also *Hemba v. Miss. Dept. of Corr.*, 848 So. 2d 909, 915 (¶ 22) (Miss. Ct. App.2003). This rule is not restricted to case law; both the Litigation Accountability Act of 1988 [Miss. Code Ann. § 11-55-1, et. seq.] and Rule 11 state that the decision to award sanctions is within the discretion of the trial court. *Id.* (citing Miss. Code Ann. § 11-55-7 (Rev. 2002); Miss. R. Civ. P. 11(b)). The Supreme Court is in accord. "An extensive number of cases state that the proper standard of review regarding the imposition of sanctions is abuse of discretion." *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So. 2d 1041, 1045 n.6 (Miss. 2007). The Court continued, "[w]hen

reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, this Court is limited to consideration of whether the trial court abused its discretion." *Id.* at 1045(¶ 8) (citation omitted). Thus, the standard of review of a trial court's decision to grant costs and attorney fees is clearly abuse of discretion. *City of Madison v. Bryan*, 763 So. 2d 162, 167 (Miss. 2000); *Wallace v. Jones*, 572 So. 2d 371 (Miss. 1990); *Vicksburg Refin., Inc. v. Energy Resources, Ltd.*, 512 So. 2d 901 (Miss. 1987); *Ladner v. Ladner*, 436 So. 2d 1366, 1370 (Miss. 1983).

This Court has said that "[i]n order to warrant the imposition of Rule 11 sanctions, a claim must not only be without merit, it must also be frivolous. *Id.* at 690 (citing *Tricon Metals & Servs., Inc. v. Topp*, 537 So. 2d 1331, 1335 (Miss. 1989)). "A pleading or motion is frivolous within the meaning of Rule 11 only when, objectively speaking, the pleader or movant has no hope of success." *Milliken & Michaels Inc., v. Fred Netterville Lumber Co.*, 676 So. 2d 266, 270 (Miss. 1996) (quoting *Tricon Metals*, 537 So.2d at 1335). "Rule 11 sanctions are used as a barrier and enforcer in hopes of keeping frivolous suits at a minimum because they impose unnecessary costs on individuals, the courts, and the public as a whole." *Tubwell*, 760 So. 2d at 690 (citing *Milliken,* 676 So.2d at 270).

II. THE "MINOR SAVINGS" PORTION OF THE APPLICABLE STATUTE, ALONG WITH THE DOCTRINE OF FRAUDULENT CONCEALMENT, PREVENT THE STATUTE OF LIMITATIONS TIME PERIOD FROM HAVING EXPIRED IN THIS MATTER.

The Defendants' Motion to Dismiss was based on the fact that "[m]ore than ten (10) years have elapsed and any action is barred by the Statute of Limitations," pursuant to Section 15-1-7. (R. 13.) The Defendants also state in their Motion that "the only interest [Plaintiff's grandmother] Jacqueline L. Hudson had at that time was a Life Estate." (R. 13.) The Defendants argued in their Motion to Dismiss that, were the deed to be judicially set aside, "no

interest would pass to the Estate of Jacqueline L. Hudson." (R. 13.) The trial court, in its Judgment prepared by the Defendants' attorney, briefly granted both Motions and awarded sanctions of $1,000 with no legal or factual analysis whatsoever. (R. 22-23.) However, neither of these arguments proffered by the Defendants and accepted by the trial court is dispositive.

A. The "minor savings" provision

Defendants attempt to craft an argument that the statute of limitations time period began to run against Justin Walton in 1991, some nine (9) years before he legally ceased to be a minor. To attempt to achieve this sleight-of-hand trickery, Defendants raise section 15-1-7 of the Mississippi Code, yet fail to state the substance of the statute completely. That section of the code does in fact provide for a limitations period of ten (10) years in all actions to recover land as Defendants represented to the trial court; however, the text also provides for a "minor savings" time period[2] of any person who was under the disability of infancy, or minorship, at the time the action first accrued. This is directly applicable to the case at bar.

The pertinent part of the statute reads:

> [I]f, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability . . . .

[2] The Mississippi Supreme Court has consistently recognized that the "minor savings statute," Miss. Code Ann. § 15-1-59, et. seq., prevents certain statute-of-limitation time periods from running against Plaintiffs who were, by virtue of being younger than twenty-one (21) years old, under the disability of infancy at the time their causes of action accrued. *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 764, 770 (Miss. 2007); *Lee v. Thompson*, 859 So. 2d 981, 987-88 (Miss. 2003); *Thiroux ex rel. Cruz v. Austin ex rel. Arceneaux*, 749 So. 2d 1040, 1041-42 (Miss. 1999). The statute in question here operates identically to the "minor savings statute."

Miss. Code Ann. § 15-1-7 (rev. 2003). Thus, despite the passage of time in this matter, Justin is still within the lawful time period to bring forward this action. Justin was born on November 26, 1978, and was therefore a minor at the time of this fraudulent conveyance of land executed under the December 12, 1989, deed. Under Section 15-1-7, Justin has a period of (ten) 10 years to bring an action to recover this land, beginning from the time he ceased to be a minor.

State courts have consistently held: "The disability of infancy is removed when a person attains the age of twenty-one years." *Anderson v. R & D Foods, Inc.*, 913 So. 2d 394, 397 (Miss. Ct. App. 2005) (citing *Lawler v. Gov't Employees Ins. Co.*, 569 So. 2d 1151, 1153 (Miss. 1990)). Thus, Justin remained a minor under the law for purposes of bringing this action until the date of his twenty-first (21st) birthday on November 26, 1999.

Therefore, the statute of limitations time period will not expire against Justin until November 26, 2009, at a minimum, when he reaches thirty-one (31) years of age. This Court should therefore reverse the trial court's grant of the Motion to Dismiss.

B. Fraudulent concealment

However, the statute of limitations time period did not begin running against Justin until even later, well after his twenty-first (21st) birthday, because Justin had been unaware of the existence of a claim as he had relied on the direct representations from his uncles that he was indeed going to be given the share that would have otherwise gone to his father George, as he was George's only heir-at-law. This is a fact that Justin plans to prove to the trial court as this proceeding continues, but has not yet arisen in discovery because of the trial court's grant of the Motion to Dismiss, leading to this appeal. Remand would permit Justin to prove this fact at the trial court level. Thus, remand is the appropriate remedy in this case.

Those direct representations from Defendants John and Ken to Justin, that Justin would receive his share as the sole heir-at-law of George Walton, constitute fraudulent concealment of the existence of a possible claim by Defendants.

Mississippi Code Annotated Section 15-1-9 provides in part:

> However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

Miss. Code Ann. § 15-1-9. Additionally, Mississippi Code Annotated Section 15-1-67 provides

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Miss. Code Ann. § 15-1-67.

Further, and as herein discussed in more detail above, Justin was completely unaware of the administration of his grandfather's estate, because his uncles, the Defendants, John and Ken ensured that he was not mentioned in either the Petition for Appointment of Administrators or the Order Appointing Administrators as an heir at law of his grandfather Edward Lee Walton. Neither Justin Walton, nor his mother as his guardian, was ever served in any way with the initial petition to administer the estate or the order that followed that petition. Thus, he could not have known – even with reasonable diligence – that a possibility existed that his uncles were perpetrating fraud against him.

Only for the first time in May of 2007, when Paul Hudson contacted Justin about the damage check from the mineral rights of the Pike County land and about the cutting and sale of timber from the real property of Edward Lee's estate, or possibly in the end of 2007 when Defendants offered the inferior tract of land, was Justin ever aware that a cause of action may

have accrued in his favor against John and Ken. This was the first time Plaintiff Justin Walton could have discovered the fraud the Defendants perpetrated against him with reasonable diligence.

Because of the fraudulent concealment from Justin Walton of any knowledge of a possible cause of action, the statute of limitations time period did not begin to run until he could have discovered the fraud the Defendants perpetrated against him with reasonable diligence – which first occurred in 2007. The grant of Defendants' Motion must therefore be reversed.

C. The land interest transferred through the deed

The Defendant also argued in their Motion that "the only interest [Plaintiff's grandmother] Jacqueline L. Hudson had at that time was a Life Estate," and that, were the deed to be judicially set aside, "no interest would pass to the Estate of Jacqueline L. Hudson." (R. 13.) This however, does not overcome the black-letter law that Justin is not precluded by the statute of limitations from bringing suit because of the "minor savings" provision at issue and the doctrine of fraudulent concealment. Presumedly, Defendants raise this argument that only a life estate remained in Jacqueline's estate to attempt to obtain a ruling that the Petition failed to state a claim upon which relief can be granted.

As previously stated, when this Court reviews the trial court's grant of the Motion to Dismiss under a de novo standard of review, all allegations in the complaint are to be taken as true. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 988(¶ 54) (Miss. 2004). Such a motion should not be granted "unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Id.* Not only must the allegations in the complaint must be taken as true, but there must also be no set of facts that would allow the plaintiff to prevail. *Ralph Walker, Inc. v. Gallagher,* 926 So. 2d 890, 893 (Miss. 2006). In so

finding, this Court need "not defer to the trial court's ruling," as it can make the determination on a de novo review. *Id.* This simply cannot be said of the case at bar.

First, this Court must presume the following allegations in the Complaint as true: 1) it was both improper and unlawful for John Walton to convey real property to himself by relying on the fiduciary role conferred on him by his mother's Power of Attorney, and 2) no previous petition or application has been made for the relief sough in this Petition. (R. 2.) Clearly, if the allegations are taken as true, then it cannot be said that no set of facts exists to grant Justin relief and the Petition will survive 12(b)(6) scrutiny. Thus, the Petition should not be dismissed under Rule 12.

Second, a presumption of undue influence exists in this case against Defendants as the existence of such a fiduciary or confidential relationship created by a power of attorney "gives rise to the presumption of undue influence." *Arnold v. Dubose*, 740 So. 2d 979, 984 (Miss. Ct. App. 1999) (citing *Vega v. Estate of Mullen,* 583 So. 2d 1259, 1263 (Miss. 1991)). To overcome the presumption, the proponents of a general power of attorney and deed, are required to present clear and convincing evidence that they acted in good faith, that the person granting the power of attorney "had full knowledge and deliberation of precisely what [he] was doing and its consequences when he executed the general power of attorney," and that the grantor "showed independent consent and action when she expressed her desire to convey her interest in the real property." *Id.* (citing *Madden v. Rhodes*, 626 So. 2d 608, 619, 621 (Miss. 1993)). The record must be found to contain sufficient proof to satisfy each of the three prongs: good faith, full knowledge, and independent consent and action. *Arnold v. Dubose*, 740 So. 2d 979, 985 (Miss. Ct. App. 1999).

The Defendants have clearly not presented clear and convincing evidence to this effect. In fact, the only record evidence presented, and relied on, by the Defendants are the deeds which themselves are the subject of the judicial scrutiny in this matter at the trial court. As such, those deeds of course do not constitute reliable evidence. Thus, these questions have not yet been answered in the present matter, and Justin has accordingly been denied his day in court as a result of the trial court's grant of the Defendants' Motions.

"[I]n order to survive a Rule 12(b)(6) motion, the complaint need only state a set of facts that will allow the plaintiff 'some relief in court.'" *State v. Dampeer*, 744 So. 2d 754, 756 (Miss. 1999) (quoting *Weeks v. Thomas*, 662 So. 2d 581, 583 (Miss. 1995)). The Petition in this matter easily survives this level of scrutiny. Taking the allegations in the complaint as true, it cannot be said beyond a reasonable doubt that there is no set of facts that would allow Justin Walton to prevail, or entitle Defendants to relief. Accordingly, the trial court's decision is reversible error. As this Court is to take all of the allegations in the initial petition in this matter as true, the Petition unquestionably states a claim upon which relief can be granted. Further, the Defendants have not – and cannot – overcome the rebuttable presumption of undue influence which exists in this case. The matter must return to the trial court for continuation of the litigation; this Court must reverse and remand.

III. RULE 11 SANCTIONS WERE INAPPROPRIATE IN THIS MATTER, WHERE PLAINTIFF FILED SUIT IN GOOD FAITH AND ON THE BASIS OF FACT AND EVIDENTIARY SUPPORT.

The Defendants base their Motion for Rule 11 Sanctions on the earlier Warranty Deed executed in 1989, which Defendants allege transferred the property in question from Edward L. Walton and Jacqueline L. Hudson to the Defendants, leaving Jacqueline with nothing more than a life estate. (R. 14.) Defendants claim that "[h]ad Justin Walton done even a cursory

investigation of the title history, he would have discovered the 1989 deed." (R. 14.) Arguing for Rule 11 Sanctions, Defendants characterize the action as "frivolous," and as one "with no hope of success, no basis in fact or evidentiary support," which was allegedly filed "solely for the purpose of harassing John Walton." (R. 14.) The trial court apparently accepted this argument in executing its short Judgment, and granted the motion, awarding sanctions of $1,000, again with no legal or factual analysis whatsoever. (R. 22-23.)

The trial court abused its discretion and committed reversible error in granting Defendants' Motion for Rule 11 Sanctions. Those Rule 11 sanctions were inappropriate in this matter, where Plaintiff Justin Walton filed suit in good faith and on the basis of fact and evidentiary support

A. The 1989 deed is currently in dispute in litigation.

The subject of this action is the 1997 deed. Defendants argue that Justin should have discovered the 1989 Warranty Deed, as he was on constructive notice at that time, and suggest that he neglected to perform any investigation into the title history. This is of course nonsensical. Naturally, Justin Walton did perform adequate investigation to reveal the December 12, 1989, deed, as it is one of the primary events which gave rise to the causes of action which are the subject of the separate, but related case which is still at the trial court level. The Complaint in that case sought other relief based on other causes of action – such as the establishment of a constructive trust based on fraud – besides simply setting aside that deed. Again, for the sake of repetition, consolidation of the two lawsuits may become appropriate in the near future, depending on the outcome of the current law suit which surrounds the 1989 deed.

Plus, Justin was born November 26, 1978, and thus was eleven years old (11) at the time Defendants allege he was on constructive notice and should have been performing an

investigation of the title history. This averment is almost laughable. Alleging that an eleven-year-old boy was on constructive notice to be performing title searches is nothing short of preposterous.

In keeping with their continued mischaracterization of this law suit, Defendants specifically state, in paragraph 1 of their Motion for Rule 11 Sanctions: "John Walton only transferred his mother's Life Estate in the property to himself in 1997." (R. 14.) This is misleading to this Court, however, as the question of what assets were properly in the estate, and which if any were properly deeded away in 1989, has not been fully resolved or litigated as it is the subject of the related, ongoing lawsuit at the trial court level as discussed in greater detail, below. This statement is therefore not a proven fact. The allegation that only a life estate was deeded would be true *only if the defense allegations are taken as true*, and only if Justin fails in his pursuit of relief in the separate, related law suit concerning the 1989 deed. As previously discussed herein, this is not the proper legal standard for this Court. The deed which purportedly transferred "only" a life estate is suspect as a rebuttable presumption of undue influence exists against the Defendants as having deeded themselves the land interest through an abuse of the fiduciary relationship conferred on them via the power of attorney at issue.

Because of the existence of the rebuttable presumption of undue influence against the Defendants, and the unresolved questions of the related litigation surrounding the 1989 deed, this action is clearly not "frivolous," or one "with no hope of success, no basis in fact or evidentiary support." The trial court's grant of Defendants' Motion for Sanctions was therefore inappropriate and must be reversed.

B. Defendants misapply Rule 11.

Rule 11 reads in pertinent part: "If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties *the reasonable expenses incurred by such other parties and by their attorneys*, in and by their attorneys, including reasonable attorneys' fees." Miss. R. Civ. P. 11(b) (emphasis added). Thus, the maximum that could be awarded in the first place is the amount of "reasonable expenses," not an arbitrary number of $1,000 selected by defense counsel, a number which is not justified or supported. The Court of Appeals recently found filed motion to be frivolous and non-meritorious and assessed sanctions of $250. *McIntosh v. Victoria Corp.*, 877 So. 2d 519, 525 (Miss. Ct. App. 2004). Those reasonable expenses, however, would be appropriate only if the pleading is frivolous or filed for the purpose of harassment or delay.

In fact, sanctions are not even contemplated in this portion of the rule. Instead, the earlier portion of the rule provides that "disciplinary action" is to be contemplated for willful violation of not signing a pleading or motion, or signing a pleading or motion with the intent to defeat the purpose of paragraph (a) of Rule 11, which requires pleadings and motions be signed by a party's attorney. This is clearly inapplicable to the case at bar, as all pleadings were properly signed. The attack against the Petition is that it is "frivolous," not that it was not signed.

In any event, the sanctions do not apply to this matter. Defendants allege that this lawsuit is a "frivolous" action being brought by Justin Walton "with no hope of success, no basis in fact or evidentiary support," which was allegedly filed "solely for the purpose of harassing John Walton." (R. 14.) A motion or pleading should be considered "frivolous" under Rule 11 only

when the pleader or movant has no chance of success. *Little v. Collier*, 759 So. 2d 454, 458 (¶ 20) (Miss. 2000). This case cannot be one with no chance of success.

However, this averment is first objectionable – and likely offensive to counsel at the time for Plaintiff Justin Walton – as a first matter because Justin's counsel at that time, as an officer of this Court provided his signature to the Complaint, in accordance with Rule 11(a) as a certificate that the undersigned attorney believed – to the best of his knowledge, information, and belief – there was good ground to support it, and that it was not interposed for delay.

Additionally, Justin Walton clearly did not bring this suit solely for the purpose of delay as there is a reasonable basis for the suit. The rebuttable presumption alone gives basis for this suit. That presumption has not been overcome by Defendants, and has not even been tried. Lastly, as also discussed in greater detail herein, below, there remain substantive questions to be litigated concerning the rights and interests of both parties which have not been adjudicated in any way yet, because of the trial court's grant of the Motion to Dismiss.

A rebuttable presumption of undue influence exists against the Defendants as a matter of law. As this matter is based on that rebuttable presumption, this action is clearly not "frivolous," or one "with no hope of success, no basis in fact or evidentiary support." The trial court's grant of Defendants' request for Rule 11 sanctions was an improper abuse of discretion and should be reversed. This Court should reverse the trial court's grant of Defendants' Motion for Sanctions, and remand the matter for further consideration.

IV. POLICY CONSIDERATIONS WEIGH IN FAVOR OF REMAND TO ALLOW BOTH PARTIES' INTERESTS AND RIGHTS IN THIS MATTER TO BE FULLY LITIGATED.

Conveyances such as those which occurred in this matter have long been frowned upon by the Mississippi Supreme Court, as the possibility existed that the Defendants abused their

fiduciary relationship with the now-deceased family members and did not serve the best interests of those family members. This matter should be fully litigated to determine if the conveyance was improper under the law.

Clearly, any conveyance made through a power of attorney must meet certain procedural standards. The Mississippi Supreme Court has stated that "where a conveyance by an attorney [in fact] is in execution of letters of attorney, so acknowledged or proved and recorded, it shall pass the interest of the principal though not formally executed in his name." *Estate of Dykes v. Estate of Williams*, 864 So. 2d 926, 932 (Miss. 2003) (quoting Miss. Code Ann. § 87-3-3 (1999)). The Court's specific concern there was that before someone operating through a power of attorney may execute and deliver a valid deed which was "prior in right to the interests of (a) subsequent purchasers for value and without notice or (b) subsequent judgment lien creditors, the written power of attorney must be acknowledged and recorded in conformity with the requirements generally applicable to instruments of conveyance of interests in land." *Id.* (quoting *Kountouris v. Varvaris,* 476 So. 2d 599, 603 (Miss. 1985)). Thus, the legal concerns there were largely procedural in nature.

However, the *Dykes* Court has also recognized that "[i]t is one of the oldest maxims of the law that no man shall, in a court of justice, take an advantage which has his own wrong as a foundation for that advantage." 864 So. 2d at 932 (quoting *Collins v. Collins*, 625 So. 2d 786, 789 (Miss. 1993). See also *Patterson v. Koerner*, 220 Miss. 590, 71 So. 2d 464, 466 (1954)). The Court continued: "To employ this maxim, the conduct need not be of such a nature as to be criminal or justify any legal proceedings, but there must simply be a "wilful act concerning the cause of action which can be said to transgress equitable standards of conduct." *Id.* (quoting *Collins*, 625 So. 2d at 789; *Thigpen v. Kennedy*, 238 So. 2d 744, 746-47 (Miss. 1970)). This

describes precisely the kind of act alleged in these law suits, though not yet litigated because the matter was improperly dismissed by the trial court on procedural grounds.

Generally, a party with the authority conferred by a power of attorney is always to act with the interests of the person granting the power of attorney in mind. *Estate of Dykes*, 864 So. 2d at 933. The Mississippi Supreme Court has held that "[a]n agent is to act in the best interest of and not to the detriment of his principal." *Id.* (citing *In re Estate of Hardy,* 805 So. 2d 515, 519 (Miss. 2002)). See also *McKinney v. King,* 498 So. 2d 387, 388 (Miss. 1986). "In addition, general powers of attorney that authorize agents to sell and convey property imply a sale for the benefit of the principal." *Id.* (citing *Hardy,* 805 So. 2d at 519). The conveyance at issue in the case at bar can hardly be said to have benefited the interests of principal, Jacqueline Walton. In fact, the conveyance was only a detriment to her, and to the estate of her husband Edward Lee.

In *McKinney*, on which the *Dykes* Court relied, a husband who was dying of cancer granted power of attorney to his wife. *McKinney*, 498 So. 2d at 388. The husband had willed that the property go to their daughter, but allowed that his wife also be entitled to use and possess the property so long as she remained a widow and resided there. *Id.* Later, the wife executed a deed granting her and her husband a tenancy in common with right of survivorship, in essence deeding herself the land, similar to the situation in the case at bar. *Id.* Because the wife was simply unable to provide any argument to the trial court there as to how such a transaction was in the best interest of her husband, the chancellor canceled the deed. *Id.*

The *Hardy* matter cited by *Dykes* was actually before the Mississippi Supreme Court two times, and arose out of a mother's conveyance of her daughters' interest in real property to her son. The daughters/sisters there had authorized their mother to act on their behalf through a power of attorney, and it was through that power of attorney that the mother deeded away the

sisters' interest. The *Dykes* Court noted that in *Hardy I*, the mother had acted outside the scope of her powers when deeding the land interests of the daughters/sisters to their brother "as those actions in no way helped the sisters, but only harmed them by taking their land and giving it to another." (*Dykes*, 864 So. 2d at 933 (citing *Hardy*, 805 So. 2d at 519-20). Later, in *Hardy II*, the Mississippi Supreme Court noted that the conveyance of the sisters' interest in the property at stake there to their brother could not "work to the benefit of the sisters in any way." *In re Estate of Hardy*, 910 So. 2d 1052, 1056 (Miss. 2005). The Court noted their interest in the land was taken away from them "without their receipt of anything in return," and that even if the deeds at issue there had been valid, the conveyances did not benefit the sisters who granted the power of attorney." *Id.* The Court therefore found the deed to be void ab initio insofar as it pertained to the sisters' interest in the land. *In re Estate of Hardy*, 910 So. 2d 1052, 1056 (Miss. 2005).

The judicial concern in these questions has always centered on the fact that the existence of such a fiduciary or confidential relationship created by a power of attorney "gives rise to the presumption of undue influence." *Arnold v. Dubose*, 740 So. 2d 979, 984 (Miss. Ct. App. 1999) (citing *Vega v. Estate of Mullen,* 583 So. 2d 1259, 1263 (Miss. 1991)). To overcome the presumption, the proponents of a general power of attorney and deed, are required to present clear and convincing evidence that they acted in good faith, that the person granting the power of attorney "had full knowledge and deliberation of precisely what [he] was doing and its consequences when he executed the general power of attorney," and that the grantor "showed independent consent and action when she expressed her desire to convey her interest in the real property." *Id.* (citing *Madden v. Rhodes*, 626 So. 2d 608, 619, 621 (Miss. 1993)). These questions have not yet been answered in the present matter, and Justin has accordingly been denied his day in court as a result of the trial court's grant of the Defendants' Motions.

Considering the contention in the *Arnold* case that the deed at issue there executed by the grantor's attorney-in-fact conveying interest real property, the Court agreed and declared the deed invalid. *Id.* at 985. To rebut the presumption of undue influence, the evidence presented must have shown by clear and convincing evidence that (1) good faith in the fiduciary relationship created by the power of attorney existed; (2) the grantor of the land acted with knowledge and deliberation when conveying the property; and (3) the grantor exhibited independent consent and action in requesting the conveyance. *Id.* (citing *Murray v. Laird,* 446 So. 2d 575, 578 (Miss. 1984)). None of these issues have been yet litigated, but must be determined for the matter to be fully adjudicated on its merits. In any case, they are sufficient as pleaded to withstand a 12(b)(6) attack against them.

To determine whether a grantee/beneficiary has acted in good faith the Mississippi Supreme Court suggested consideration of several factors: "(a) the identity of the initiating party in seeking preparation of the instrument, (b) the place of the execution of the instrument and in whose presence, (c) what consideration was paid, if any, and (d) by whom paid, and (e) the secrecy and openness given the execution of the instrument." *Id.* (citing *Murray,* 446 So.2d at 578). There remain many factual questions surrounding these factors of good faith in this case. Further judicial proceedings would allow for discovery and adjudication of these unresolved issues.

These are not the only unresolved questions, however. In addition to the determination of whether the transfer was proper, issues remain of the amount of assets in Jacqueline's estate, as well as in Edward Lee's estate, and whether – if the deeds in dispute were set aside – Justin would be entitled to the property of those estates under the law, namely Section 91-1-3. Some of these questions are the subject of the related law suit regarding the 1989 deed and can only be

answered as that case moves forward. The amount of assets in Edward Lee's estate was unquestionably disputed. In Jacqueline's Response to the Petition for Final Account, to Discharge Administrators, and to Close Estate of her husband Edward Lee Walton, she conveyed in her pleadings that she was never advised by the petitioners there, John and Ken, that they had opened an estate for her husband, Edward Lee, that they did not make a true and correct representation of the assets of Edward Lee, and that they failed to make a proper accounting of the estate and its assets.

Further, both the Petition for Appointment of Administrators and the Order Appointing Administrators list only Jacqueline, Ken, and John as Edward Lee's sole heirs at law. Neither Justin, nor his father George, were mentioned anywhere within those documents, despite the fact that both Defendants were aware of Justin's existence and his interest in the family land as it existed before the Defendants had the disputed deeds executed. Yet, both John and Ken submitted sworn testimony in the form of affidavits on October 16, 1990, that they had made diligent effort to identify any persons having claim against the estate and had found none.

A Response to the Petition for Final Account, to Discharge Administrators, and to Close Estate, was also filed on behalf of Justin, a minor at the time, through his mother Mary Lou Boles, conveying that she did not have sufficient information to admit or deny the amount of assets of the estate, and even prayed that the court refuse to approve the final accounting, discharge the administrators, and to close that estate. Thus, there are many facets to this matter which simply do not pass the "smell test," and should be fully litigated.

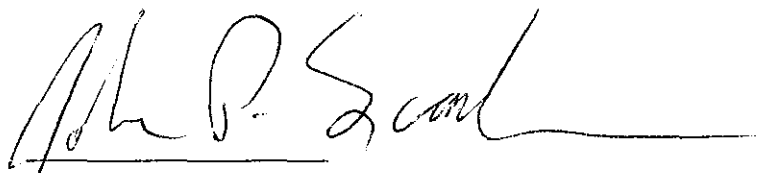
Again, though not the principal issues in this appeal, all of these legal considerations have been truncated by way of the trial court's grant of the Defendants' Motions. Justin's interest has not been litigated or adjudicated in any way in this matter and is in danger of being forever lost if

this Court were to uphold the trial court's ruling. This matter should be remanded so that all of the above questions can be properly litigated. Thus, Justin respectfully requests that this Court reverse the decision of the lower court and remand the matter back to the trial court for further proceedings consistent with the ruling this Court will make in this appeal.

CONCLUSION

Taking all allegations in the Complaint as true, it cannot be said beyond a reasonable doubt that no set of facts exists that would allow the Plaintiff to prevail. For the above reasons, Walton respectfully requests this Court reverse the decision of the lower court, and also remand for further proceedings consistent with the opinion this Court will issue in this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Miss. R. App. P. 25(c) and (d), I, JOHN P. SCANLON, attorney for Appellant, Justin Walton, do hereby certify that I have this day filed an original and three (3) bound copies of this Brief of Appellant, as well as one (1) electronic copy, prepared on a data CD, and have sent, via U.S. Mail, a copy of the bound brief to opposing counsel at the address listed below:

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Respectfully submitted, this the 30th day of July, 2009.

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