

IN THE SUPREME COURT OF MISSISSIPPI

HILDA JANE ROBY KELLY

APPELLANT

VS.

CAUSE NO. 2010-TS-00639

THERESA A. ROBY, MARY PHYFER, d/b/a SRT INVESTMENTS,
GARON ROBY, SHANE ROBY and SHARON ROBY SARGENT,
Individually and as Administratrix of the
ESTATE OF JIMMY DALE ROBY, DECEASED

APPELLEES

Appeal from the
Chancery Court of Pontotoc County, Mississippi,
Civil Case No. CV1998-177BP2 (Hon. Jacqueline E. Mask, Chancery Judge)

BRIEF OF APPELLEE MARY PHYFER

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure the undersigned counsel for the Appellee, Mary Phyfer, certifies that the following persons and entities have an interest in the outcome of this proceeding:

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TRIAL JUDGE:

Honorable Jacqueline E. Mask

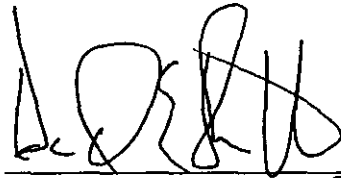
Chancery Judge

1st Chancery District

Post Office Box 7395

Tupelo, MS 38802 Presiding Chancery Judge

THIS, the 15th day of September, 2010.



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STATEMENT REGARDING ORAL ARGUMENT:

Oral Argument is NOT Requested

The Appellee Mary Phyfer believes that this case may be fully considered upon the record and written briefs, and oral argument is not requested.

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

Hilda Jane Roby Kelly has brought this appeal against Theresa Roby, Mary Phyfer, Garon Roby, Shane Roby and Sharon Roby Sargent, in her individual capacity and also as Administratrix of the Estate of Jimmy Dale Roby, Deceased.¹ Until recently, the only party-appellee appearing in this appeal was Mary Phyfer, d/b/a SRT Investments.²

JIMMY DALE ROBY AND HILDA ROBY KELLY DOMESTIC CASE - CHANCERY COURT OF PONTOTOC COUNTY

Jimmy Dale Roby and the Appellant, Hilda Kelly (sometimes hereinafter referred to as *Jimmy Dale* and *Hilda*), were granted an irreconcilable differences divorce by the Chancery Court of Pontotoc County, Mississippi, on December 10, 1979. (PR 15-22) During the 1990s, Jimmy Dale Roby experienced financial difficulties and became delinquent in his child support obligations for Hilda's and his son, Michael Shane Roby. Almost 19 years after their divorce, on September 24, 1998, and at a time when Shane was already a fully emancipated 21 year old, Hilda commenced a contempt action against Jimmy Dale for past-due, unpaid child support and medical bills that had accumulated for at least the previous five (5) years. (PR 24-29) On March 30, 1999, Jimmy Dale Roby agreed to a \$6,000.00 judgment, which Hilda subsequently enrolled in Monroe County, Mississippi, on May 28, 1999. (PR 37-38; 8-6-09 T 32, 36, 39, Exh. 2)

For over three years and three months between the entry and enrollment of her judgment and Jimmy Dale Roby's death on August 4, 2002, the Appellant did nothing to execute or otherwise satisfy

¹ Appellee has expanded the Record Excerpts in this appeal, but has not duplicated those designated by the Appellant. Throughout this brief, all references to the Pontotoc record shall be "PR," to the Monroe record shall be "MR." References to the three (3) hearing transcripts shall be preceded by the hearing date to better identify said hearing; e.g., "7-8-09 T, pp. 10-12".

² On August 18, 2010, five (5) days following the filing of the Appellant's Brief and Designation of Record herein, A. Rhett Wise, Esq. served his appearance form on behalf of Sharon Roby, Individually and as Administratrix of her deceased father's estate. None of the other Roby heirs have appeared in this appeal.

her judgment. Instead, she waited until after Jimmy Dale's death to act. On September 13, 2004, more than two (2) years after Jimmy Dale's death, the Appellant filed in her Pontotoc divorce case her Petition for Writ of Execution and Appointment of Special Commissioner and for Sale of Real Property under Execution against Jimmy Dale's widow, Theresa Roby, and Theresa's sister, Mary Phyfer. (PR 39-45, RE 1-7) The Appellee, Mary Phyfer, was served with process by certified mail at a Bartlesville, Oklahoma address on or about December 17, 2004. (PR 48-52)

The Pontotoc proceeding, as it relates to the aforementioned Petition for Writ of Execution, is procedurally difficult to follow, and all of the parties involved in that litigation played a significant role in the confusion. Although Michael Malski, an attorney who practiced in Amory, Mississippi, previously filed motions and appeared for Mary Phyfer and her sister, Theresa Roby, and even helped Mary Phyfer with responses to discovery that had been propounded to her, no answer or other affirmative pleading was ever filed on Mary Phyfer's behalf. (PR 55-56, 161-77, 178-84)³

Even though the Appellant complains that no responsive pleading was ever filed on Mary Phyfer's behalf, like her inaction in satisfying the enrolled judgment, the Appellant did not follow through with any action on this until this case was heard by the trial court on August 6, 2009. (8-6-09 T 42-43) On or about March 16, 2005, Hilda filed a Motion for Default Judgment, or alternatively, for Summary Judgment. That same day, she also made applications for default against Mary Phyfer and Theresa Roby, but the Pontotoc docket does not reflect that the clerk ever entered a default against either Mary Phyfer or Theresa Roby. (PR 58-70) On May 20, 2005, the Appellant abandoned that motion by filing a Motion for Joinder and to Amend her Petition for Writ of Execution, which was later granted and an Amended Petition later filed. (PR 74-83, RE 8-15) Hilda filed a second motion for

³ At some point during the litigation, Mr. Malski ceased representing Mary Phyfer and Theresa Roby, but he never formally withdrew as the Appellee's attorney. It is believed that during this time, Mr. Malski was appointed to a Chancery judgeship in the First Chancery District, a position that he still holds. It also appears from certificates, pleadings and other aspects of the record that the other parties and the trial court were fully aware of Mr. Malski's discontinued representation.

default judgment, but did not pursue that one either. (PR 113-37) This Court will also note that Hilda also never sought a judgment on the pleadings, which is the prescribed course of action according to Miss.R.Civ.P. 15.

When the Appellant's Petition for Writ of Execution was heard on the merits on August 6, 2009, her attorney made an *ore tenus* request for default judgment against Mary Phyfer, who was not at that hearing. Counsel's request included asking that the Amended Petition for Writ of Execution be taken as confessed by Mary Phyfer as part of the default. During Theresa Roby's testimony and time on the stand that day, it was revealed that Mary Phyfer was not given notice of the hearing because Appellant's counsel had unilaterally set the hearing with the court and apparently attempted to mail Mary notice of it at the former Bartlesville, Oklahoma address where service of process was obtained several years earlier, but where, according to Theresa Roby, Mary Phyfer had not lived in what she believed to be over six (6) years. It was revealed that Appellant's counsel used Oklahoma as Mary Phyfer's last known address, even though Theresa Roby had testified during an earlier deposition in the estate case, that Mary was no longer in Oklahoma but was living in Cheyenne, Wyoming. Counsel also represented to the trial court that he subsequently sent notice of the hearing to Mary Phyfer in care of Theresa Roby. (8-6-09 T 44-45)

The trial court declined to grant the Appellant's request for default judgment during the August 6, 2009 hearing. The Pontotoc and Monroe records lack any indication that the Appellant had obtained the prerequisite defaults under Miss.R.Civ.P. 55(a), and the trial court was correct in declining those *ore tenus* requests. The trial court took the Pontotoc matter under advisement and requested applicable law from the parties within 10 days of the hearing. (8-6-09 T 50-51) It does not appear that during this time or any other time prior to issuance of judgment, the Appellant provided the trial court with any legal authority supporting her claims sought below, or any of those argued here now. The Court then conducted its own thorough research on the issues presented and eventually issued its ruling on

November 3, 2009. (PR 207-16)

JIMMY DALE ROBY ESTATE - CHANCERY COURT OF MONROE COUNTY

It was not until October 21, 2005, more than three (3) years after Jimmy Dale Roby's death, that his children, Sharon Roby Sargent, Garon Roby and Shane Roby, opened the intestate estate of their father in the Chancery Court of Monroe County, Mississippi, and Sharon Roby Sargent was appointed Administratrix. (MR 5-6)

Almost a year later, on September 20, 2006, more than four (4) years after Mary Phyfer recorded the four deeds from Jimmy Dale Roby and Theresa Roby, the Administratrix filed an Objection to the Claim of Mary Phyfer, d/b/a SRT Investments and Motion to Set Aside Conveyances. (MR 31-37, RE40-46) The style of this pleading is somewhat misleading, because Mary Phyfer never filed or otherwise made any claim against Jimmy Dale Roby's estate. Her debt had been satisfied since 1999. Even though Jimmy Dale's children and the Appellant were fully aware of the conveyances to Mary Phyfer, they never made any effort to include her as a party to their proceeding as required by Mississippi law. A review of both trial dockets and all of the hearing transcripts plainly show that the trial court was never asked to decide this motion. Each of the three different hearings in the estate action, July 8, 2009, August 6, 2009, and August 28, 2009, dealt with the efforts by Jimmy Dale's children to account for and reclaim personal assets of Jimmy Dale Roby's estate from their father's widow. None of them include any attempt to have heard their 2006 Motion to Set Aside the land conveyances to Mary Phyfer. In its November 3, 2009 Order in the Pontotoc case, the trial court correctly noted that the Objection was not properly before the court for consideration. (PR 206-16)

The Pontotoc domestic action and the Monroe estate action were assigned to the same Chancellor for disposition, but it was not until the August 6, 2009 hearing involving both cases, that the trial court announced it was consolidating the two cases. (8-6-09 T 25) An order to that effect was entered the following day. (PR 191-92)

DISPOSITION BY THE COURT BELOW

Following the aforementioned July and August 2009 hearings, the trial court issued the following opinions and judgments:

- a. October 23, 2009, Opinion and Judgment of Personal Property of the Estate, dated October 23, 2009, in the Monroe estate case (PR 103-98, RE 33-39); and
- b. November 3, 2009, Opinion and Judgment on Petition for Writ of Execution and Other Relief in the Pontotoc divorce case (PR 207-16).

Because most of the Monroe estate case issues are not central to the issues raised in this appeal, this brief will focus more on the trial court's rulings in the Pontotoc divorce case, and the Monroe judgment will be included for those issues relevant to the Pontotoc divorce. However, a review of the two above referenced Opinions shows that both were meticulously thorough. Although the trial judge requested supporting authority from all of the parties before preparing the orders, it does not appear that any was provided. The lower court then conducted its own thorough search for law controlling the complex legal issues that were presented. It then combed through the court files and reviewed the evidence that had been offered at various hearings. Mary Phyfer would submit that the lower court properly applied the correct law to the case facts and reached the only logical and reasonable results that the evidence supported.

After giving a careful, detailed and accurate history of the two proceedings, the lower court determined that Hilda's Petition for Writ of Execution "should be construed as a creditor's petition to sell property of the estate to satisfy an outstanding lien." (PR 213) After stating the applicable standard for considering such petition, as provided by Miss. Code Ann. §91-7-199, the court found that personal assets of Jimmy Dale's estate existed which could be liquidated or collected to satisfy Hilda's judgment lien, which should be accomplished before selling any of the realty belonging to the estate, and directed that such sufficient personal property be sold or debts due the estate be collected to first satisfy Hilda's

judgment.⁴ (PR 214)

The court then examined whether any of the realty that Jimmy Dale and Theresa had owned as co-tenants was in fact an asset of his estate which might have been utilized to satisfy Hilda's judgment lien, assuming the personalty was insufficient. (PR 215) Having determined that Jimmy Dale's and Theresa's 1999 conveyances were void and of no force and effect against Hilda's prior enrolled judgment under Miss. Code Ann. §89-5-3, the court reasoned that as far as Hilda was concerned, the void conveyance language of the statute meant that Jimmy Dale and Theresa still owned their five pieces of realty as either joint tenants with right of survivorship or as tenants by the entirety on the same terms. (PR 215-16) The Court then concluded that due to the survivorship rights applicable to each piece of property, none of the real estate in question was subject to the execution proceedings by Hilda which weren't commenced until more than two (2) years after Jimmy Dale's death. (PR 216) The lower court even suggested that it might have reached a different result had Hilda begun to execute on her judgment before Jimmy Dale died. The court referred to *American Standard Life and Acc. Ins. Co. v. Speros*, 494 N.W.2d 599, 606 (N.D. 1993). (PR 216) Accordingly, the lower court denied Hilda's petition to execute on the aforescribed realty. (PR 216)

Dissatisfied with the Pontotoc trial court's November 3rd Opinion and Judgment, the Appellant filed her Motion to Alter or Amend Judgment and Motion for Amended Findings of Fact and Conclusions of Law on November 11, 2009. (PR 202-06) The Appellant did not file any supporting memorandum of applicable legal authority contemporaneously with her motion. It was at this point that the undersigned counsel entered their appearance on behalf of Mary Phyfer (PR 223-24). They filed a response to the Appellant's post-trial motion, including a supporting memorandum brief (PR 225-37),

⁴ Theresa Roby returned various items of personal property to the Administratrix of the estate on August 29, 2009. The value of those assets, according to numbers placed on them by the estate, total \$11,000.00. It is believed that the Appellant has done nothing to any part of her judgment from any of these estate assets. (PR 197, 218-19)

part of which was in response to inquiry from the trial court regarding particular legal issues about which it had questions. Both sides responded to the court's inquiry and briefed the post-trial issues raised.

Oral argument was heard by the trial court in New Albany on March 24, 2010, and the trial court issued its Order Denying Post-Trial Motion and Other Relief on March 30, 2009. (PR 238-43) Finding that the Appellant's post-trial assertions "were fully and maturely considered in formulating its prior opinions . . ." Hilda's motion had not cited "an intervening change in law [or] newly discovered evidence not previously available . . .," nor did she "demonstrate that manifest injustice would result from the Court's prior decision." (PR 239) However, so that its findings would be complete, the trial court did address "Hilda's assertion that her judgment attached to the subject property prior to its conveyance to Phyfer and continued as a lien thereon in its conveyance to Phyfer." (PR 239-41) After giving a studied and detailed explanation of her reasons for doing so, the lower court rejected Hilda's argument that her judgment lien attached to Jimmy Dale's property and continued thereon in the conveyance to Mary from and after May 3, 1999, even though that conveyance date to Mary occurred prior to the creation date of Hilda's judgment lien. (PR 241-42)

It is from the November 3, 2009 Opinion and Judgment on Hilda's Petition for Writ of Execution and Other Relief, and the trial court's March 30, 2010 denial of the Appellant's post-trial motions, from which Hilda Jane Kelly appeals.⁵ (PR 245-47)

STATEMENT OF RELEVANT FACTS

Jimmy Dale and Theresa Roby were married not too long after the 1979 divorce from the Appellant, and they lived together as husband and wife for over 24 years until Jimmy Dale's death on or about August 4, 2002. The marriage to Theresa was Jimmy Dale's fourth and longest marriage. (MR

⁵ Only Mary Phyfer and Hilda Jane Kelly participated in the Appellant's post-trial motions. Neither the Estate of Jimmy Dale Roby, any of his children-heirs, nor Theresa A. Roby took part in the briefing or argument of those motions.

88) Sharon Roby Sargent and Garon Roby are Jimmy Dale's children from his first marriage. There were no children born out of a brief second marriage. The Appellant was Jimmy Dale's third wife, and as mentioned above, Shane is their son. Jimmy Dale and Theresa had no children.

Jimmy Dale Roby made his living as a musician, and was an accomplished pedal steel guitarist. According to his daughter, Sharon Roby Sargent, Jimmy Dale began playing guitar around age 13, and his whole life centered around music. He even played with Elvis Presley once at the old armory in Amory, Mississippi, and toured with such notable performers as Waylon Jennings and Loretta Lynn. (7-8-09 T 10) Unfortunately, fame and financial success eluded Jimmy Dale throughout his musical career.

For all of his musical talent, Jimmy Dale's abilities as a wage earner and provider for his family were inconsistent, and financial difficulties were always nearby. The Appellant has already pointed out that Jimmy Dale became delinquent in his child support obligations for his son, Shane, but these unpaid child support obligations were not the only financial burden that Jimmy Dale Roby bore.

In 1989, Jimmy Dale wanted to get into a trucking business and needed \$30,000.00 to help him get started. He saw opportunities for real estate investments in 1991, and needed \$10,000 toward the purchase of some land, and another \$25,000.00 to help buy some apartments. 1992 was another difficult year for Jimmy Dale and Theresa. They had to pay the Internal Revenue Service \$20,000.00 in past-due taxes that were owed. The Robys bought a house that year and needed \$45,000.00 towards its purchase price. 1993 saw banks calling for a \$32,000.00 building and land payment, and there were \$3,500.00 in bad checks to be taken care of. One of Jimmy Dale Roby's business ventures was a night club that he and Theresa operated in Monroe County, and during this time they owed and had to pay sales and property tax bills totaling \$26,000.00 to the Mississippi State Tax Commission and Monroe County. (PR 165, RE 20) Theresa provided additional details of these debts in her interrogatory answers in the estate case. (MR 46-47)

The Robys' financial needs were significant, and during these years, whatever the need was, Jimmy Dale and Theresa Roby repeatedly called upon Theresa's sister, Mary Phyfer, to assist them through their financial difficulties. The Pontotoc record shows that between 1989 and 1993, Mary Phyfer loaned Jimmy Dale and Theresa Roby approximately \$191,500.00 to bail them out of various and sundry financial crises detailed above. (PR 165, RE 20) The Robys were unable to repay Mary Phyfer, in large part due to their being out of work. (MR 88)

The trial court noted in its November 3, 2009 Opinion and Judgment that, by November 10, 1997, Jimmy Dale Roby and Theresa Roby had acquired five different parcels of real property in Monroe County, Mississippi. (PR 207-16). They apparently had some significant help from Mary Phyfer. The Monroe County properties had been conveyed to Jimmy Dale and Theresa at various times by four separate deeds. Two of these deeds vested title in Jimmy Dale and Theresa as joint tenants; the other two deeds, as tenants by the entirety. (8-6-09 T, Exh. 1) Nonetheless, their ownership of all these properties included the right of survivorship.

On November 10, 1997, Jimmy D. Roby and Theresa R. Roby executed four (4) Promissory Notes for varying principal amounts and with different maturity dates in favor of Mary Phyfer, d/b/a SRT Investments. The total of these notes was \$200,000.00. (8-6-09 T, Exh. 1) On December 1, 1997, Jimmy D. Roby and Theresa R. Roby executed Deeds of Trust corresponding to the earlier promissory notes in favor of Mary Phyfer, d/b/a SRT Investments, to secure payment of the Promissory Notes. (8-6-09 T, Exh. 1) Contrary to the Appellant's claims in her Brief⁶, these Promissory Notes and Deeds of Trust were recorded in Monroe County on February 11, 1998, almost 9 months before the Appellant initiated her contempt proceeding.

With both Jimmy Dale and Theresa unemployed and unable to repay Mary Phyfer, on March

⁶ Although the Appellant's Statement of Facts details the February 11, 1998 recording of Mary Phyfer's notes and deeds of trust (Brief of Appellant, p. 3), she later misstates (p. 10) that these instruments were never recorded.

3, 1999, before Jimmy Dale the date of the \$6,000.00 judgment, Jimmy Dale Roby and Theresa Roby executed four (4) General Warranty Deeds to Mary Phyfer, d/b/a SRT Investments. (8-6-09 T, Exh. 1) It is undisputed that these deeds were not recorded in Monroe County until after Jimmy Dale's death. The recording date was August 20, 2002. Theresa Roby explained that the reason for the delay in recording the deeds was because Jimmy Dale begged Mary Phyfer not to do so. He still hoped to get a recording contract that would provide him with sufficient funds to repay the debt to Mary. (MR 88)

SUMMARY OF THE ARGUMENT

The Appellant has raised three issues for this Court to consider. The first issue, whether the conveyances from Jimmy Dale and Theresa to Mary Phyfer were fraudulent under Miss. Code Ann. §15-3-3, was not raised at any time in the lower court proceedings, and the Appellant should be estopped from having it heard here. The Appellant never sought, in either of her petitions, to set aside and/or cancel the conveyances from Jimmy Dale and Theresa Roby to Mary Phyfer. What she repeatedly asked the lower court to do was to set aside the four deeds of trust from the Robys to Mary Phyfer that pre-date her judgment, so that her judgment lien would take priority over those instruments.

In 2006, Jimmy Dale Roby's estate and children filed an objection to what they perceived to be Mary Phyfer's claim against the estate, and moved the Chancery Court of Monroe County to set aside the conveyances from Jimmy Dale and Theresa Roby, and the Appellant joined in the relief sought by that motion. However that pleading was never heard by the trial court, nor was it considered in the Orders and Judgments that were entered. There are at least two glaring defects in the Objection/Motion to Set Aside. First, the moving parties failed to include all of the parties in interest, particularly Mary Phyfer, who was the current record owner of the properties at the time of filing, and second, the Objection/Motion was filed beyond the applicable statute of limitations. Therefore, the trial court was correct to not consider that pleading.

The Appellant's second and third issues are interrelated and center on the trial court's application of Miss. Code Ann. §89-5-3 to the five pieces of realty that Jimmy Dale and Theresa Roby owned and conveyed to Mary Phyfer. The Appellant received and enrolled her \$6,000.00 judgment against Jimmy Dale Roby after Jimmy Dale and Theresa executed the deeds to Mary Phyfer. Mary Phyfer, at Jimmy Dale's request, delayed in recording her warranty deeds and did not record them until after Jimmy Dale's death. The trial court held that according to the express language of Miss. Code Ann. §89-5-3, the conveyances to Mary Phyfer were void as to the Appellant's judgment lien, but as the statute further provided, the conveyances between the Robys and Mary Phyfer were valid. This ruling meant that Mary's title was initially subject to the Appellant's judgment. Because the statute provided that the conveyances were void as to the Appellant, meaning that as far as she was concerned, Jimmy Dale and Theresa had never deeded the property and still held the five pieces of realty as joint tenants with right of survivorship or as tenants by the entirety on the same terms. Though she could have, the Appellant did not attempt to execute on her judgment until more than a year after Jimmy Dale Roby's death. Upon Jimmy Dale's death, title to the properties passed to Theresa, his survivor, and did not become part of Jimmy Dale's estate, as provided by Mississippi law. By the time the Appellant finally filed her Petition for Writ of Execution, neither Jimmy Dale nor his estate owned any interest in the real estate against which the Appellant could execute. Even though she did not provide the trial court with any authority to support her position, the Appellant complains that the trial court failed to apply Miss. Code Ann. §89-5-3 to the action below. The reality, however, is that the lower court thoroughly researched these issues and made the only reasonable and logical application of that statute to the facts of this case that the law supports. Accordingly, the Appellant's second and third issues on appeal must fail, too.

ARGUMENT

STANDARD OF REVIEW

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In applying the appropriate standard of review to a Chancellor's decision, this Court has said that it "will not disturb the factual findings of a chancellor unless such findings are manifestly wrong or clearly erroneous." *Estate of Dykes v. Estate of Williams*, 864 So.2d 926, 930 (Miss. 2003) (citing *In re Conservatorship of Bardwell*, 849 So.2d 1240, 1245 (Miss. 2003))

Further, "[i]f there is substantial evidence to support the chancellor's findings of fact, those findings must be affirmed." *Id.* "However, [an appellate court] reviews questions of law *de novo*." *Estate of Dykes*, 864 So.2d at 930 (citing *Morgan v. West*, 812 So.2d 987, 990 (Miss. 2002)); cited in *Morgan v. Lawrence*, 909 So.2d 99, 102 (Miss. App. 2005)

Though it requested the parties' input for law controlling, none was provided prior to issuing the November 3, 2009 Opinion and Judgment which is appealed here. A review of the record clearly reveals that the trial court thoroughly researched the law relative to those issues the Appellant presented, and correctly applied that law to the hearing transcripts and other evidence in the record. Substantial evidence exists to support the trial court's findings, and its rulings appealed here should be affirmed.

I. HILDA KELLY'S ARGUMENT THAT THE LOWER COURT ERRED IN FAILING TO SET ASIDE AND HOLD FOR NAUGHT, AS TO HILDA, THE CONVEYANCES BY JIMMY DALE IN FAVOR OF HIS SISTER-IN-LAW, MARY PHYFER, ASSERTED TO HAVE BEEN ENTERED INTO WITH THE INTENTION TO HINDER, DELAY OR DEFRAUD HILDA, AS HIS JUDGMENT CREDITOR, IN SATISFACTION OF A QUESTIONABLE ANTECEDENT INDEBTEDNESS OF WHICH THE REQUISITE BURDEN OF PROOF WAS NOT MET BY SHOWING BY CLEAR AND SATISFACTORY EVIDENCE NOT ONLY THAT THE INDEBTEDNESS WAS BONA FIDE WITH INTENTIONS TO BE ENFORCED, BUT ALSO THAT THE AMOUNT THEREOF WAS NOT MATERIALLY LESS THAN THE FAIR AND REASONABLE VALUE OF THE PROPERTIES CONVEYED MUST FAIL

This issue and multiple arguments included within it were not raised by the Appellant before the trial court. They are making their first appearance here. This Court has consistently and repeatedly ruled that new issues not properly raised in the lower court may not be raised for the first time on appeal. *Estate of Haynes v. Steele*, 699 So.2d 918, 926 (Miss. 1997) An appellant such as Hilda Kelly is not

entitled to raise a new issue on appeal. *Crowe v. Smith*, 603 So.2d 301, 305 (Miss.1992).

Hilda alleges that she asked the lower court to set aside, as to her, what she has suggested to be fraudulent conveyances by Jimmy Dale to Mary Phyfer.⁷ In poring through both petitions and other pleadings and all of the motions filed by the Appellant in the Pontotoc case and the August 6, 2009 hearing transcript where the Appellant presented her case-in-chief to the lower court, there are no instances where Hilda ever made such a request.

Neither the original nor amended Petitions filed by Hilda contained any prayer requests by which she asked to set aside Jimmy Dale's 1999 conveyances to Mary.⁸ (PR 43-44, RE 5-6; PR 9, RE

⁷ Brief of Appellant, p. 9

⁸ In both versions of her Petition, the Appellant asked the Chancery Court of Pontotoc County to grant her the following specific relief:

1. Recognize that Petitioner's aforesated monetary judgment is a valid lien as to each of the aforescribed parcels of real property;
2. Shall recognize that the Judgment lien of Petitioner as to the aforesaid real property has priority over any claim or demand of any one or more of the Respondents and of SRT Investments;
3. Shall issue its order directing the Circuit Clerk of Monroe County, Mississippi, to issue execution directed to the Sheriff of Monroe County, Mississippi, returnable before this Court, appointing a special commissioner who shall sell so much or all of the aforescribed real property so as to satisfy the monetary Judgment in favor of Petitioner, as well as costs of such sale by execution and all costs incurred by Petitioner herein, including a reasonable attorney fee; and

The variances between the prayers in the two Petitions begin with ¶4. The Original seeks the following:

4. Subsequent to such sale that a confirmation proceeding be had by this Court.

Followed by the following unnumbered request for alternative relief:

. . . Should this Court find and conclude that the aforesated Deeds to SRT Investments recorded on the 20th day of August, 2002, do not legally cancel and hold for naught the aforesated Real Estate Deeds of Trust in favor of SRT Investments recorded on the 11th day of February, 1998, as to each of the aforescribed parcels of real property; then alternatively, Petitioner would pray that each said Real Estate Deed of Trust be set aside in that each such transaction was an attempt to defraud Petitioner as a creditor.

13) The Estate's Objection to what it characterized as Mary Phyfer's claim also sought to have the conveyances from Jimmy Dale and Theresa set aside, and Hilda joined with Jimmy Dale's children in that 2006 pleading. (MR 31-37, RE 33-38) However, from the transcripts of all the hearings in both actions below, it is clear that the estate never asked the trial court to consider this motion. In fact, the estate's counsel represented to the court that his clients were only pursuing the decedent's personal assets. (8-28-09 T 62-63)

In its October 23, 2009 Opinion and Judgment of Personal Property of Estate in the Monroe County case, the trial court specifically stated that she was not addressing "the issues raised in the Petition for Writ of Execution, Appointment of Special Commissioner and for Sale of Real Property under Execution and subsequent pleadings filed in Pontotoc County. . ." (PR 195, RE 35) The court apparently understood that those issues would be addressed by separate opinion in the Pontotoc case, and they were.

The November 3, 2009 Opinion and Judgment on Petition for Writ of Execution and Other Relief in the Pontotoc case specifically referred to the September 20, 2006 Objection to Claim of Mary Phyfer, d/b/a SRT Investments as Alleged Creditor and Motion to Set Aside Conveyances filed in the Monroe County estate as "not properly [being] before the Court at this time and which are not specifically considered in this opinion." (PR 210)

The trial court correctly decided that it would have been improper to address the estate's objection as part of Hilda's petition, and two primary reasons support this. The estate and Jimmy Dale's

¶4 of the Amended Petition's prayer for relief asks for:

4. Shall grant Petitioner judgment against Theresa A. Roby and Mary Phyfer, jointly and severally, for any portion of Petitioner's attorney's fees and other costs of litigation not satisfied from such sales proceeds, as well as punitive damages in an amount deemed reasonable and appropriate by this Court.

There is no request for alternative relief in the Amended Petition, as it was evidently abandoned by the Appellant.

children objected to Mary's "claim" pursuant to Miss. Code Ann. §91-7-167, but they failed follow the requirements of Miss. Code Ann. §91-7-195, to include all of the "parties necessary" by summons or publication. (PR 213) Mary Phyfer, as record owner of the properties, was never summoned or otherwise included in that proceeding, and the August 2009 joinder of these two cases did not cure this defect.

A second compelling reason supporting the trial court's decision not to consider the 2006 Objection/Motion was that the pleading was untimely filed. Mary Phyfer recorded her deeds from Jimmy Dale and Theresa Roby on August 22, 2002, at which time the time period within which to contest them began to run. However, Jimmy Dale's children and his estate, joined in by Jimmy Dale's ex-wife, did not file their Objection/Motion until more than four (4) years later. The action to set aside the conveyances from Jimmy Dale and Theresa to Mary Phyfer is governed by the three (3) year statute of limitations, Miss. Code Ann. §15-1-45. See *O'Neal Steel, Inc. v. Millette*, 797 So.2d 869 (Miss. 2001) Accordingly, the Objection/Motion is time barred.

Hilda's use of Miss. Code Ann. §93-11-71 to classify herself as a judgment creditor of Jimmy Dale, beginning as early as May 1, 1995, was never explained or provided to the lower court. That statute and related argument are making their first appearances before this Court, and because of Hilda's failure to raise them below, the trial court should not be put in error on a matter which was not presented to it for decision. See *Parker v. Game and Fish Commission*, 555 So.2d 725, 730 (Miss.1989), and *Mills v. Nichols*, 467 So.2d 924, 931 (Miss.1985). The Appellant should be estopped from raising Issue I. This is especially true where the trial court asked the Appellant for controlling authority, and none was submitted. It was also not furnished after the trial court, based on its own research, issued its ruling that was unfavorable to the Appellant. Thereafter the Appellant filed her post-trial motion asking the court to rectify its mistake, but again failed to present this argument, or even furnish the court with the authority she utilizes now.

Despite the Appellant's lack of clarity in stating her first issue, Mary Phyfer, out of an abundance of caution, will quickly address what she understands it to be. For reasons similar to those provided in the trial court's November 3rd Opinion and Judgment – that due to the survivorship rights applicable to all five pieces of realty, there was no interest in these jointly held properties following Jimmy Dale Roby's death to which the Appellant's judgment could attach – this argument must also fail.

Continuing with the provisions of Miss. Code Ann. §93-11-71, immediately following the language quoted by the Appellant is the following: [the judgment lien under this statute] “shall be perfected as to third parties without actual notice thereof only upon enrollment on the judgment roll.” There was no proof below that Mary Phyfer had actual notice of Jimmy Dale's unpaid child support obligations for Shane, and it is undisputed that the judgment was not enrolled in Monroe County until May 28, 1999. It is also uncontroverted that this enrollment was subsequent to Jimmy Dale's and Theresa's November 1997 execution of the promissory notes, the December 1997 deeds of trust, and the four March 3, 1999 warranty deeds to Mary Phyfer.

Miss. Code Ann. §15-3-3, repealed as of July 1, 2006, and replaced by the Uniform Fraudulent Transfer Act, §§ 15-3-101 *et. seq.*, was also not raised by the Appellant until the filing of her brief here, and Hilda should likewise be estopped from asserting that statute and any case authority flowing from it. *Estate of Haynes*, at p. 926.

The Appellant goes to great length in arguing that under *Blount v. Blount*, 95 So.2d. 545 (Miss. 1957), that under Miss. Code Ann. §15-3-3, the burden of proving that the 1998 conveyances from Jimmy Dale and Theresa Roby to Mary Phyfer were in good faith and not for the alleged purpose of defrauding the Appellant, had shifted to Mary Phyfer. However, neither §15-3-3 nor *Blount* were applicable to the instant action, because the relief Hilda sought against Mary was not setting aside the conveyances from the Robys to Mary, but the Appellant, in both petitions, asked the court to declare the liens created by Mary's deeds of trust invalid or inferior to Hilda's judgment lien. In short, Hilda

wanted to be in a first, priority position so that she could execute on her judgment without being subject to the liens created by the prior recorded deeds of trust.

Assuming *arguendo*, that Miss. Code Ann. § 15-3-3 does apply here and Hilda shouldn't be estopped from asserting it, the Appellant conveniently omits the consequence that this Court must adopt if the conveyances to Mary Phyfer are, in fact, fraudulent under the statute. Essentially, if the conveyances from Jimmy Dale and Theresa Roby are fraudulent, then they are to be considered void. Though she has quoted the definition of this term, the Appellant has had great difficulty understanding what a "void" conveyance means. A void conveyance is one that never occurred, and if that is the case, then Jimmy Dale and Theresa Roby continued to own the five parcels of property as either joint tenants or tenants by the entirety, and upon Jimmy Dale's death, his interests immediately passed to Theresa, his survivor. Under this scenario, there was no remaining interest in the real properties against which Hilda could execute by the time she got around to doing so in September 2004.

For the reasons stated above, the Appellant's argument of this issue should fail.

**II. THE APPELLANT'S ARGUMENT THAT THE LOWER COURT ERRED
IN FINDING THAT THE REAL PROPERTIES IN QUESTION WERE ASSETS OF,
OR REACHABLE BY, JIMMY DALE'S PROBATE ESTATE, AND WHETHER
CONTRADICTORILY, FINDING THAT THE REAL PROPERTIES IN QUESTION
AS OF JIMMY DALE'S DEATH WERE OWNED BY HIM AND THERESA
AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, OR AS TENANTS
BY THE ENTIRETIES, RESULTING IN HIS OWNERSHIP THEREIN PASSING
IMMEDIATELY UPON HIS DEMISE TO HER MUST ALSO FAIL**

As Appellant's Issues II and III are understood, Mary Phyfer believes that these two issues are extremely intertwined and she apologizes to the Court if her arguments of these two issues overlap. In its November 3, 2009 Opinion and Judgment, the trial court carefully analyzed the "void conveyance" effect of Miss. Code Ann. §89-5-3 on Hilda's right to execute on the Robys' former properties. The trial court opined that as far as Hilda was concerned, Jimmy Dale and Theresa Roby continued to concurrently own said joint tenancy and tenancy by the entirety parcels, and during Jimmy Dale's life,

they were still subject to Hilda's right to execute on her judgment. When Hilda did not act while Jimmy Dale was alive, she lost the opportunity to do so after Jimmy Dale's death on August 4, 2002. Hilda's inaction is a prime example of the longstanding maxim of equity followed by Mississippi Chancery Courts is that "equity aids the vigilant and not those who slumber on their rights." *In re Estate of Davis*, 510 So.2d 798, 800 (Miss. 1987) Because she slumbered on her rights while Jimmy Dale was alive, the Appellant lost her right to do so once he died.

The trial court also correctly held that under Mississippi law, a surviving joint tenant takes jointly owned property free and clear of claims of creditors of the deceased tenant. See *Wallace v. United Mississippi Bank*, 726 So.2d 578 (Miss. 1998), *Weaver v. Mason*, 228 So.2d 591 (Miss. 1969) Even though the bulk of Mississippi cases have dealt with the survivorship issue as it relates to joint bank or investment accounts, rather than real property, this Court has seen no reason to distinguish between joint tenancies in real property and joint investments or accounts when analyzing the creation of such concurrent ownership estates. *Estate of Huff v. Metz*, 676 So.2d 264, 265 (Miss. 1996)

Whatever interest Jimmy Dale Roby had in the jointly owned realty ceased to exist after his death, and that property passed free and clear to his surviving tenant. The trial court thoroughly and correctly analyzed and explained this issue in its November 3, 2009 Opinion and Judgment, and the Appellant failed to provide the trial court with any applicable authority to the contrary.

**III. THE APPELLANT'S ARGUMENT THAT THE TRIAL COURT
ERRED IN NOT RULING THAT BY APPLICATION OF MISS CODE ANN.
§89-5-3, THE UNRECORDED CONVEYANCES TO MARY PHYFER
WERE VOID AS TO HILDA KELLY, JIMMY DALE ROBY'S
JUDGMENT CREDITOR, MUST ALSO FAIL**

The pertinent parts of Miss. Code Ann. §89-5-3 are as follows:

All . . . conveyances whatsoever of lands, . . . shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county, to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded. . . . But as between the parties and their heirs,

... said instruments shall nevertheless be valid and binding.

Contrary to the argument made by the Appellant, the trial court did apply Miss. Code Ann. §89-5-3 to the relevant circumstances of this action and held that under the plain language of the statute, the March 3, 1999 deeds from Jimmy Dale and Theresa Roby to Mary Phyfer, which weren't recorded until August 20, 2002, were "void" as to Hilda and had no effect on her prior enrolled judgment lien. However, the Appellant wants a part and parcel reading of the applicable statute that would, in effect, ignore the long standing effect of what "void" conveyances mean. Instead, she would prefer to refer to them as "invalid" or "unenforceable" or something similar.

In its opinion, the trial court thoroughly researched and cited several Mississippi cases that have interpreted and applied Miss. Code Ann. §89-5-3, and its earlier versions. It specifically cited *Herrington v. Heidelberg*, 244 Miss. 364, 141 So.2d 717 (1962); *Sack v. Gilmer Dry Goods Co.*, 149 Miss. 296, 115 So. 339 (1928); *Austin Clothing Co. v. Posey*, 105 Miss. 724, 64 So. 5 (1914); and *Levis-Zukoski Mercantile Co. v. McIntyre*, 93 Miss. 806, 47 So. 435 (1908), and based on this case law, the trial court found that "the deeds recorded after the enrollment of Hilda's judgment against the decedent would be void as to Hilda." (PR 212)

Other jurisdictions consistently hold that because no title passes pursuant to a void conveyance, the joint tenancy or tenancy by the entirety, such as those held by Jimmy Dale and Theresa, is not severed or terminated. See generally Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 Neb. L. Rev. 1, 27-28 (1998)

Based on the Court's application of Miss. Code Ann. §89-5-3 to the relevant circumstances of this action, the deeds from Jimmy Dale and Theresa Roby to Mary Phyfer were "void" and had no effect on Hilda's judgment lien. The void deeds, under Mississippi law, meant that none of the co-tenancies with survivorship rights were terminated and no title passed to Mary Phyfer that would have been superior to Hilda's judgment lien. As far as the Appellant was concerned, Jimmy Dale and Theresa

Roby continued to concurrently own the joint tenancy parcels, subject to her right to execute, and at any time between May 28, 1999, and August 4, 2002, the Appellant could have satisfied her judgment by executing on Jimmy Dale's undivided interest in the joint tenancy properties. However, the Appellant's right to execute on the joint tenancy parcels ended after Jimmy Dale died and his interest in the five pieces of land passed to his surviving co-tenant, Theresa Roby. The Court correctly applied the law to these issues, and this argument by Hilda must also fail.

CONCLUSION

Reviewing the lower court's November 3, 2009 Opinion and Judgment on the Appellant's Petition for Writ of Execution and Other Relief will leave this Court with the firm belief that the correct law was applied to the facts of this case. The Appellant also did not provide the trial court with any compelling reason to reconsider or amend that November ruling, and the court correctly denied the Appellant's post-trial motion.

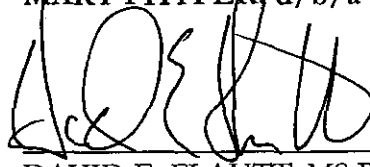
The pertinent language in Miss. Code Ann. §89-5-3 is quite clear and unequivocal, and the legislature's use of the term "void" to describe the unrecorded conveyances that Jimmy Dale and Theresa Roby made to Mary Phyfer is very precise and renders a definite, nullatory effect. The Appellant had an ample window of opportunity within which to execute on one of the properties and to satisfy her judgment. However, her inaction, and nothing that Mary Phyfer or anyone else did, caused that window to close. However, despite her procrastination in the pursuit of the real properties, all is not lost, and the Appellant can still pursue the personal property of Jimmy Dale Roby that has been reclaimed.

The Appellant should be estopped from presenting issues to this Court that were not provided to the trial court for decision. For all of the reasons set forth hereinabove, this Court should affirm the trial court's rulings appealed here, and assess all costs of this appeal against the Appellant.

Respectfully submitted, this the 15th day of September, 2010.

MARY PHYFER, d/b/a SRT INVESTMENTS

BY:



DAVID E. FLAUTT, MS BAR # [REDACTED]
LAWYER

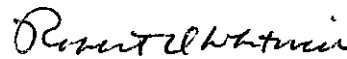
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CERTIFICATE OF SERVICE

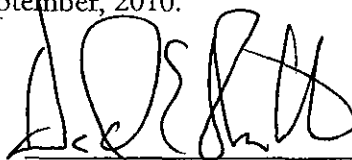
I, David E. Flautt, one of the attorneys for the Appellee, Mary Phyfer, do hereby certify that I have this day served by first class United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLEE MARY PHYFER upon the following:

Hon. Jacqueline Mask
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CERTIFIED, this the 15th day of September, 2010.

A handwritten signature in black ink, appearing to read 'D. E. Flautt', written over a horizontal line.

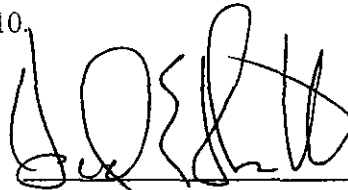
DAVID E. FLAUTT

CERTIFICATE OF MAILING

I, David E. Flautt, one of the attorneys for the Appellee, Mary Phyfer, hereby certify that I have this date placed the original of the above and foregoing *Brief of Appellee Mary Phyfer and Record Excerpts of Appellee Mary Phyfer*, together with three (3) copies of the same and an electronic disk containing the text of the brief in WordPerfect 12.0 format, in first class United States Mail, postage pre-paid, addressed to:

Honorable Kathy Gillis
Office of the Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, the 15th day of September, 2010,

A handwritten signature in black ink, appearing to read 'D. E. Flautt', written over a horizontal line.

DAVID E. FLAUTT (MS Bar [REDACTED])
Attorney for Appellee Mary Phyfer