IN THE SUPREME COURT OF MISSISSIPPI
NO; 2010-CA-02108

JULIA WHITE **APPELLANT**

VS.

BESSIE L. WHITE **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(b) of the Mississippi Rules of Appellant Procedure, the undersigned counsel of record certifies that the following listed parties and / or persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and / or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Appellants: Julia White, Hazel Cade, Lig White, Willie May Dowdy, Bessie Turner, and Shirley Moore.

2. Counsel for Appellants: David E. Rozier, Jr.
Jennessa Carter Hicks

3. Appellees: Bessie L. White, Widow of Sonny White, Mary White, Shellie White Kenton, Denice White Ward, Dianne White Fuller, Randy White, Shannon White, all of whom are Heirs of Sonny White, Deceased.

4. Counsel for Appellees: Preston Ray Garrett

5. Chancellor Edwin H. Roberts, Eighteen Chancery Court District of Mississippi, presiding Chancellor for the trial of this matter before the Chancery Court of Calhoun County, Mississippi.

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STATEMENT OF THE CASE

This cause arises out of a dispute regarding the ownership of a certain parcel of real property located in Calhoun County, Mississippi. This property was previously owned by the parents of the Appellants,[1] who are referred to in their brief as the "Bee White heirs" and who were the plaintiffs in the original action filed before the Chancery Court of Calhoun County, Mississippi and their sibling, Sonny White, who is now deceased. It is undisputed that the real property, which is the subject of this matter, was inherited by all of the children of Bee White and Birdie White upon the deaths of Bee White and Birdie White; Mrs. Birdie White having predeceased her husband Bee White. Upon the death of Bee White the real property in question passed to the seven (7) surviving children of Bee White and Birdie White, the same being Hazel Cade, Lig White, Willie May Dowdy, Bessie Turner, Julia White, Shirley Moore and Sonny White. It is undisputed by all parties that in the year 2000 the Plaintiffs being six (6) of the children of Bee White and Birdie White[2] conveyed their interest in the subject property by a *Warranty Deed with Reservations* to their brother, Sonny White. The remaining heir of Bee White and Birdie White, being Robbie Wimberly, died prior to the conveyance of the said real property to Sonny White without any heirs other than the parties to the aforesaid *Warranty Deed with Reservation* which conveyed the property formerly belonging to Bee White and Birdie White to Sonny White and who are also the parties to this appeal..

At the time of the execution of the aforesaid *Warranty Deed with Reservation*, the six (6) grantors therein and Sonny White, each owned an undivided one seventh (1/7) interest in

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[1] Appellants are hereinafter refereed to as "the Plaintiffs" as they were the plaintiffs in the original action before the Chancery Court of Calhoun County which gave rise to this appeal.

[2] These six children of Bee White and Bride White, namely, Hazel Cade, Lig White, Willie May Dowdy, Bessie Turner, Julia White, Shirley Moore are the Appellants in this appeal and were the plaintiffs in the original action before the Chancery Court of Calhoun County which gave rise to this appeal.

the property which was formerly owned by Bee White and Birdie White and upon the execution the said deed the Plaintiffs conveyed all of their interest in the subject real property to Sonny White and by terms of the aforesaid *Warranty Deed with Reservations* and reserved unto themselves a life estate in and to said property in the event that Sonny White should predecease any of them.[3] Thereafter, Sonny White, died predeceasing the other heirs of Bee White and Birdie White and accordingly, the Plaintiffs were possessed of the life estate which they had reserved in the subject property. However, subsequent to the death of Sonny White, the Plaintiffs unilaterally determined that they had not intended to convey the property to Sonny White reserving a life estate unto themselves but rather had only intended to convey a life estate to Sonny White while reserving the remainder interest unto themselves.

It is important to note that this determination was made by the Plaintiffs only after Sonny White, the only other party to the *Warranty Deed with Reservations* which conveyed the subject property to Sonny White, was deceased and accordingly, could not be heard as to what the terms of the original agreement between the siblings were. Thereafter, on or about the 5th day of June 2006, more than five (5) years after the execution of the aforesaid *Warranty Deed with Reservations*, the Plaintiffs caused to be a *Petition for Interpretation of a Deed or in the Alternative for Particion [SIC] and Other Relief* in Cause Number 2006-152 (R) before the Chancery Court of Calhoun County, Mississippi.[4] This action was brought against the Appellees who were the Defendants in the original chancery court action before the Chancery Court of

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[3] It is this *Warranty Deed with Reservations* that the plaintiffs originally filed suit concerning when they filed their original *Petition for Interpretation of a Deed or in the Alternative, for Particion [sic] and Other Relief* before the Chancery Court of Calhoun County in Cause Number 2006-152(R).

[4] R. 1-6; R.E. 1

Calhoun County, Mississippi.[5] In their *Petition* the Plaintiffs alleged that the *Warranty Deed with Reservation* which conveyed the property to Sonny White, reserving a life estate in the Plaintiffs, was erroneously drafted and should have been drafted so as to convey the property to Sonny White for life, reserving the remainder interest in the said real property in the Plaintiffs. This assertion, having been made for the first time, over five (5) years after the *Warranty Deed with Reservation* which conveyed title to the property which is the subject of this matter to Sonny White, was originally executed by all of the Plaintiffs and only after the death of Sonny White.

The defendants retained two attorneys to represent their interest in this matter and both the attorneys for the defendants filed Answers on behalf of the defendants the Answer filed by Dana J. Swan, Esq., on behalf of the defendants having been filed on or about the 7th day of July, 2006 and the Answer filed by Preston Ray Garrett, Esq.., on behalf of the defendants having been filed on or about the 28th day of July, 2006.[6] Thereafter, both sides are assumed to have prepared for a trial of the matter on the merits before the Chancery Court of Calhoun County, Mississippi however, prior to a trial of this matter, the parties through their respective attorneys entered into an *Agreed Order* resolving the issue whereby the plaintiffs agreed and acknowledged that the real property, which is the subject of this action, was conveyed to Sonny White with the plaintiffs reserving unto themselves a life estate. The *Agreed Order* entered into by the parties even went so far as to address the issue of rent which could have been charged by the plaintiffs as the life tenants in the property to the defendants who were in actual possession of

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[5] The Appellees are hereinafter referred to as "the Defendants" as they were the defendants in the original actions before the Chancery Court of Calhoun County which gave rise to this appeal.
[6] R. 9-19; R.E. 2

and occupying the subject property subject to the life estate of the plaintiffs in the property.[7] Accordingly, it is clear that all parties acknowledged, understood and accepted at the time the *Agreed Order* was entered that the *Warranty Deed with Reservation* as originally drafted correctly conveyed the real property, which is the subject of this action, to Sonny White reserving a life estate in the plaintiffs and that accordingly, the plaintiffs would have the right to occupy the property for their life but the remainder interest was vested in the heirs of Sonny White. This *Agreed Order* was executed by all three attorneys representing parties in the original chancery court action and was entered by the presiding Chancellor on or about the 23rd day of April 2007 and was subsequently filed with the Chancery Clerk of Calhoun County in Cause Number 2006-152(R).

Thereafter, more than three years later, on or about the 2nd day of August, 2010 the Plaintiffs caused to be filed a *Motion for Relief From Agreed Order*[8] seeking to have the *Agreed Order*, which had been previously entered into by all the parties, set aside. The plaintiffs alleged in their *Motion for Relief from Agreed Order* that the *Agreed Order* was contrary from the plaintiffs desires and intentions and that the plaintiffs never intended to provide the defendants with the remainder interest in and to the subject property as stated in the *Agreed Order*.[9] However, contrary to the assertions then made by the plaintiffs, this was the second time while represented by counsel that the plaintiffs had agreed that the property, which is the subject of this action, was to be vested in Sonny White subject to a life estate in the

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[7] R. 21-23; R.E. 3
[8] R. 24-26; R.E. 4
[9] R. 21-23; R.E. 3

plaintiffs with the remainder interest in the property going to Sonny White and / or his heirs. This was first done in the year 2000 when all of the persons who are plaintiffs in the original chancery court action conveyed their interest in the property to Sonny White subject to a life estate and then again in 2006 when the plaintiffs represented at all times by counsel caused to be entered an *Agreed Order* which confirmed that the property which is the subject of this matter, was the property of Sonny White and subsequent to his death, that of his heirs subject to a life estate in the plaintiffs.[10] The Plaintiffs in both their original *Petition Seeking Interpretation of a Deed or in the Alternative for Partician [sic] and Other Relief* and in their subsequent *Motion Seeking Relief from Agreed Order* assert that they made a mistake when conveying the property to Sonny White and / or his heirs and this was not their intent. In fact, the plaintiffs then asserted that they had again made the same mistake in 2006 after filing a lawsuit in which they had alleged that they had mistakenly conveyed the property to Sonny White in the year 2000 when they retained counsel to represent them in regard to the original conveyance of the subject real property.[11] It should be noted that the plaintiffs never alleged that a mistake was made until after the death of Sonny White,[12] the only person other than the plaintiffs who was actually a party to the transaction which addressed the conveyance and ultimate ownership of the property inherited by the plaintiffs and Sonny White from Bee White and Birdie White.

The plaintiffs then waited over three years from April 2007 until August 2010 to bring a *motion* seeking to have the *Agreed Order*, which they entered into set aside. It is important to note that in the testimony of Julie White, the only one of the Plaintiffs to actually testify at the

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[10] *See id.*; R.E. 3
[11] R. Transcript of Hearing Held on September 22, 2010 at 6-7; R.E. 5, at i
[12] R 1. 1-6 at 3, R.E. 1

hearing upon the plaintiffs' *motion* to have the *Agreed Order* set aside, she stated that it was the intent of the plaintiffs to have the property return to the way they then alleged it was supposed to be with the plaintiffs and the heirs of Sonny White each having their one seventh (1/7) share.[13] However, the record of these proceedings is devoid of any evidence or even any indication that the defendants being heirs of Sonny White had any knowledge of any assertion by the plaintiffs that the *Agreed Order* was entered erroneously or that plaintiffs did not agree with the terms of the *Agreed Order* which they caused to be entered by their attorney until after the plaintiffs attempted to sale property belonging to the defendants to a third party.[14] Despite the assertion by Julia White when testifying under oath that it was the intent of the plaintiffs that the property would revert to a status of being owned by the plaintiffs and the defendants in their respective equal shares of one seventh (1/7) each, the plaintiffs attempted to sale the property to a third party without any consultation with or even any notice to the defendants who if the plaintiffs are to now be believed would have had an undivided one seventh (1/7) interest in the real property they were attempting to sale. Accordingly, it is clear that the plaintiffs could not have believed that they were the owners of the property to the exclusion of the heirs of Sonny White if it was their stated intention that the property should have reverted to they and the defendants in equal shares.

Further, the Plaintiffs have asserted through the testimony of Julia White, the only witness called by the Plaintiffs in support of their *motion* to set aside the *Agreed Order* which was filed more than three (3) years after the *Agreed Order* was entered that they had rejected the *Agreed Order*, had notified their attorney that they rejected the *Agreed Order*, had paid him so as

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[13] R. Transcript of Hearing Held on September 22, 2010 at 16; R.E. 5, at ii
[14] *See id.* at 18-23; R.E. 5, at iii

to be able to discharge him from further representation of them as the plaintiffs now allege that they never authorized him to enter into the *Agreed Order* and only failed to assert their claim to the property through the courts because of the lack of funds to do so.[15] Yet when the plaintiffs found and opportunity to profit at the expense of the defendants they had the funds available to retain an attorney more than three (3) years later to attempt to have the *Agreed Order* set aside after having abided by the terms of the same from April of 2007 until July of 2009 and having never even provided any notice whatsoever to the defendants that they disputed the validity of the *Agreed Order* and the ownership of the subject property by the defendants.

It is undisputed that not only did the Plaintiffs not assert their claim that a mistake was made when the *Agreed Order* was entered and that they rejected the same through the courts. It is also can not be denied that never made any effort to advise the defendants that they were not in agreement with the terms of the *Agreed Order* which they had caused to be entered by the Court through their attorney and that they still claimed ownership of the property. For over three (3) years, the plaintiffs not only failed to assert their alleged claim of a mistake on the part of their attorney and thereby claim an interest in the property through the courts, they also never made this claim to the defendants. Regardless of whether they had the funds to retain an attorney to pursue the matter through the courts, they certainly had the means and the opportunity to place the defendants on notice that they did not consider the case to be resolved and that they had "rejected" the *Agreed Order* before they attempted to sale the property to a third party without even addressing the matter of the lawsuit which they at least would have to had considered to

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[15] *See id.* at 12-13; R.E. 5, at iv

still be pending if any credence is given to the version of events asserted by the plaintiffs when they sought to have the *Agreed Order* set aside..

The plaintiffs sought to have the *Agreed Order*, which they caused to be entered in this matter by the Chancery Court of Calhoun County, Mississippi set aside pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. Rule 60(b) states:

> On motion and upon such terms and / or just, the court may relieve a party or his legal representative from a final Judgment, Order or proceeding for the following reasons: (1) Fraud, misrepresentation, or other misconduct of an adverse party; (2) Accident or mistake; (3) Newly discovered evidence which due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (4) The judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) Any other reason justifying relief from the judgment.[16]

As noted in the *Decree*[17] entered by the Chancery Court of Calhoun County, Mississippi when ruling on the plaintiffs m*otion* to have the *Agreed Order* set aside, the Rule provides that "the m*otion* shall be made in a reasonable time, and for reasons (1), (2), and (3) not more than six months after the judgment, or proceeding was entered or taken.'[18] As the plaintiffs waited more than three (3) years to bring a *motion* seeking to have the *Agreed Order* set aside asserting either accident or mistake, they clearly did not bring their *motion* in a timely matter. Further, the testimony of Julia White, the only one of the plaintiffs to testify at the hearing on the plaintiffs *motion* to have the *Agreed Order* set aside, clearly reveals that the plaintiffs were aware of the

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[16] Miss R. Civ. P. 60(b)
[17] R 1. 65-67, R.E. 6
[18] R 1. 65-67 at 66; R.E. 6

form and content of the *Agreed Order* not more than thirteen (13) days after the *Agreed Order* was entered and they took no action whatsoever in regard to said *Agreed Order* and did not even attempt to discuss the matter with their attorney until contacted by their attorney regarding an unpaid bill for his services.[19] Clearly, the six (6) month timeframe asserting that the *Order* should be set aside based on accident or mistake was violated by the plaintiffs as even though they had full knowledge of the former content of the *Agreed Order*, they took no action in regard to having the same set aside and provided no notice whatsoever to the defendants regarding the same for more than three (3) years which is far in excess of the six (6) months allowed pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure and likewise the motion of the plaintiffs being brought for the first time more than three (3) years after the entry of the *Agreed Order* was not brought in a timely manner in consideration of any and all circumstances.

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[19] R. Transcript of Hearing Held on September 22, 2010 at 11; R.E. 5, at v

SUMMARY OF THE ARGUMENT OF BESSIE L. WHITE, ET AL

The plaintiffs in this case allege that an *Agreed Order* was entered without their consent in this case by the Chancery Court of Calhoun County, Mississippi yet at all times the plaintiffs were represented by counsel. The plaintiffs assert that this *Agreed Order* should be set aside based on their position that it was entered by accident or a mistake. However, Rule 60(b) of the Mississippi Rule of Civil Procedure requires that for an order to be set aside because of an accident or mistake a motion to set aside the order must be filed within six (6) months of the entry of the same. In this case, the plaintiffs can not allege that they did not know of the existence of the *Agreed Order* or what they now allege to be a mistake because the testimony of Julia White, who was the only one of the plaintiffs to testify at a hearing of this matter, establishes that at the latest, the plaintiffs knew the full form, content and effect of the *Agreed Order* by May 6, 2007 more than three (3) years prior to the filing of their *motion* seeking to have the *Agreed Order* set aside on or about the 2nd day of August 2010 and certainly far in excess of the six (6) month window in which they had to file such a motion.[20] Accordingly, the plaintiffs should not be granted any relief from the *Agreed Order* entered by the Chancery Court of Calhoun County, Mississippi in this matter which was entered into by the plaintiffs through their attorney at the time.

The plaintiffs further assert that the interest of justice and equity required the Chancellor to set aside the *Agreed Order* more than three (3) years after the fact, because the failure to do so would deny them an equitable and just resolution of this matter in their favor. In all cases Rule 60(b) of the Mississippi Rule of Civil Procedure requires that any motion for relief from a

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[20] See id at 18-19; R.E. 5, at vi

judgment or order be filed in a timely manner. Certainly more than three (3) years after the fact with full knowledge of the fact that the *Agreed Order* had been entered, can not be considered timely and accordingly, the plaintiffs should not be awarded any relief in this matter as a court of equity does not and should not allow a party to simply set on his or her hands rather than take action to correct any situation which may exist.

Finally, plaintiffs assert that because this action involves real property that their interest in the property is an interest in a unique and irreplaceable thing to which they have strong family ties. The plaintiffs further assert that their strong ties to this property mean that no resolution other than the return of the property to them would properly satisfy what they claim to be their right to the property as the same is irreplaceable. However, plaintiffs should not be allowed to use Rule 60(b) to right what they now allege is an inequitable and unjust result, the same being they do not have title to a particular tract of real property that they claim is theirs as a family right when they only asserted a claim to this property seeking to have the *Agreed Order* overturned after they found they could not sell property which they do not own. Certainly, Rule 60(b) of the Rules of Civil Procedure was never contemplated to be a back door method of obtaining property because to deprive a party of an alleged interest in property which is unique in nature would be unjust and inequitable when it is a stated intention of that party to divest themselves of their interest in the property for monetary gain. Accordingly, the plaintiffs assertion in their Brief that a monetary recovery from their attorney for their alleged loss would not be sufficient is simply not a valid basis in this matter for this honorable Court to issue a

ruling in favor of the plaintiffs.

At all relevant times to this matter the plaintiffs were represented by counsel and / or were fully aware of the existence of, the contents of and the impact of the *Agreed Order* which they seek to now have set aside. For more than three (3) years they took no action whatsoever to have the *Agreed Order* set aside and did not place the defendants on notice that they disputed the validity of this *Agreed Order* much less bring an action before the court. For this reason and for the other reasons set forth herein the plaintiffs should not be granted any relief in this matter by this honorable Court and the prior ruling of the Chancery Court of Calhoun County, Mississippi should be upheld.

ARGUMENTOF BESSIE L. WHITE, ET AL

The plaintiffs in the initial proceeding before the Chancery Court of Calhoun County, Mississippi which gave rise to this appeal, assert in their argument that they are entitled to a de novo review of their claims by this honorable Court. If this matter is to be reviewed de novo by this honorable Court then this honorable Court has an obligation to consider the actions of the plaintiffs in this matter which are set forth in some detail in the *Statement of the Case* herein above. As this honorable Court is well aware, chancery courts are a court of equity following long standing and often cited maxims among which are "He who seeks equity must do equity"[21] and "He who comes into equity must come with clean hands."[22] The underlying actions of the plaintiffs in this matter clearly establish that they do not come before this honorable Court seeking to do equity nor do they come before this honorable Court with clean hands.

Originally, the plaintiffs entered into an agreement with their brother, Sonny White, who was the father of the defendants, whereby they transferred the real property, which is the subject of this matter, by a *Warranty Deed with Reservations* to Sonny White, reserving unto themselves a life estate. For six (6) years, as long as Sonny White lived, the plaintiffs did not raise any claim that there had been any type of mistake, confusion or other complaint concerning the *Warranty Deed with Reservation* which they all signed, conveying the subject property to Sonny White while reserving unto themselves a life estate in the year 2000. It was not until the year 2006 after the death of Sonny White, that the plaintiffs asserted that there had been a mistake in the drafting of the *Warranty Deed with Reservation* which they had signed and that they had not meant to convey the property to Sonny White but had in fact had only meant to convey a life

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[21] Warner's Griffith, Mississippi Chancery Practice (Rev. Ed.), §43
[22] Id.., §42

estate to Sonny White.[23] Conveniently, this issue was not raised by the plaintiffs until after the death of the only person who was a party to the transaction in which the plaintiffs engaged other than the plaintiffs themselves. Further, after filing a lawsuit in which the plaintiffs through their attorney entered into an *Agreed Order* which established for a second time that the defendants were the true owners of the property, the plaintiffs, then unilaterally acted as if they were the sole owners of the property and had the right to sale the same.[24] Although, the testimony of the only plaintiff to actual testify in this matter, was to the effect that it was their intention to give the defendants as the heirs of Sonny White an equal share in the property;[25] However, when they determined to sale the property which they now allege they were uninformed as to the status of the ownership of, they attempted to convey the property without any notice to the heirs of Sonny White whatsoever and so obviously, did not believe that the matter of ownership of the property had been resolved in such a way as to provide that the defendants as the heirs of Sonny White received an equal share although that is alleged to have been their intention at the time of filing the lawsuit. Further, even if this honorable Court were to accept the premise that the plaintiffs rejected and did not accept the terms of the *Agreed Order*, which was entered by the Court after their agreement to the same through their attorney, they have clearly acknowledged that they were fully aware that the *Agreed Order* had been entered and that the same confirmed ownership of the property in the defendants as the heirs of Sonny White and not in the plaintiffs who had only a life estate.[26] Therefore, when the plaintiffs attempted to sale the property, which is

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[23] R. Transcript of Hearing Held on September 22, 2010 at 16; R.E. 5, at ii
[24] See id. at. 12-13; R.E. 5, at iv
[25] See id. at. 16; R.E. 5, at ii

the subject of this matter, to a third party they clearly attempted to do so with full knowledge of the true status of the ownership of the property therefore, they are not before this Court with clean hands as they only came back before the Court seeking to have the *Agreed Order* of which they had full knowledge of overturned after they were made aware of the fact that they were liable for damages suffered by the defendants to their property as a result of the plaintiffs' actions. Likewise, the failure of the plaintiffs to consult with or provide notice to the defendants of the attempted sale of the property clearly shows that they were not attempting to treat the defendants in an equitable manner by providing them with an equal share to the property which is what the plaintiffs have alleged was their intention.

In short, a de novo review of this matter clearly shows that the plaintiffs in this matter have at all times acted to the detriment of the defendants have disregarded the terms of an *Agreed Order*, which was entered into by and through their attorney, and although they claim to have rejected the same, they did not provide the defendants with any notice of their alleged rejection of the terms of the *Agreed Order* which they caused to be entered into by their attorney nor did they advise the Court in any way of their alleged dissatisfaction with the terms of the *Agreed Order* until more than three (3) years had passed from and after the time the *Agreed Order* was entered. If the plaintiffs wish for this Court to consider this matter de novo alleging that equity and justice require that they be relieved of an *Agreed Order* which they entered into more than three (3) years prior to attempting to have the same set aside, it becomes clear that the plaintiffs have no legitimate argument that the interest of equity and justice require or even remotely justify the setting aside of the *Agreed Order* previously entered into by the parties and

entered by the Chancery Court of Calhoun County in this matter on or about the 23rd day of April, 2007 as they have never sought to deal with the defendants in an equitable manner and are before this honorable Court with unclean hands.

I. Whether the Chancery Court of Calhoun County, Mississippi erred when it found that Mississippi Rule of Civil Procedure of 60(b) prohibited the Bee White Heirs from obtaining relief from an Order with which they have now asserted they expressly did not agree.

The Chancery Court of Calhoun County, Mississippi correctly ruled that the length of time between the entry of the *Order* in this case and the Rule 60(b) *Motion* filed by the plaintiffs was excessive and was not reasonable. The Court correctly cited the case *Jenkins v. Jenkins*[26] to support its finding in this regard. As has been noted by the plaintiffs this Court found in *Jenkins* that a lapse of two (2) years and nine (9) months was not reasonable.[27] In the current case the lapse was more than three (3) years and the plaintiffs undeniably had full knowledge of the true status of this matter pursuant to the *Agreed Order* which was entered by this Court after the same was agreed to by the plaintiffs through their counsel not more than thirteen (13) days after the *Agreed Order* was entered. Having full knowledge of the content and effect of the *Agreed Order*, which the plaintiffs now claim to have rejected although they never gave any notice to the Court or the defendants of their rejection as they did not seek to have the same set aside for more than three (3) years. The plaintiffs in their Brief assert that the case in *MAs v. Miss Dept. of Human Services*[28] should form a basis for this honorable Court to overturn the ruling of the Chancery Court of Calhoun County in this matter as in the case of *MAs,* a delay of nine years was found to not be unreasonable.[29] However, the Plaintiffs failed to point out to this Court that

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[26] 757 So. 2d 339 (Miss. Ct. App. 2000)
[27] Id. at 343
[28] 842 So. 2d 527 (Miss. 2003)
[29] Id.

while the plaintiffs in this instant case were all adults and at all times were represented by counsel and undeniable had full knowledge of the entry of the *Agreed Order* and the form and content of the same not more than thirteen days after the same was entered and did nothing is in direct contradiction to the facts in *MAs* in which the appealing party was under age at the time the *Order* was entered, being a minor, was unrepresented by counsel at the time the *Order* was entered, and was the victim of fraud perpetrated upon him by the other party through the court of which he was entirely unaware of for nine years.[30]. Once the appealing party in *MAs* became aware of the true nature of the situation as result of a DNA test revealing he was not the father of the child in question, he immediately took action to obtain relief from the judgment which had been entered against him. Certainly given that he was under age at the time the judgment was entered, was not represented by counsel and was the victim of a fraudulent misrepresentation, which in fact represented a fraud upon the court, the interest of equity and justice did in that case require that the judgment be set aside after an inordinate amount of time had passed. In the matter presently before this Court such is simply not the case. The plaintiffs allege that an *Agreed Order* was entered either through accident or mistake without the agreement of the plaintiffs by their attorney who had represented them in all stages up unto that point however, regardless of what the plaintiffs now allege that they did or did not intend, it is undisputed that not more than thirteen (13) days after the *Agreed Order* which they now seek to have set aside was entered, they were fully aware of the terms and affect of the Agreed *Order*[31] Despite being fully aware of the existence and nature of the Agreed Order the plaintiffs took no action to have the same set aside nor did they even advise the defendants in this matter that they were

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[20] Id. at 528

[31] R. Transcript of Hearing Held on September 22, 2010 at 18-19; R.E. 5, at vi

supposedly not in agreement with the *Agreed Order* which they had caused to be entered through their attorney as they were represented by an attorney at all times in these proceedings.

In MAs our Supreme Court again set out that "What constitutes reasonable time must of necessity depend upon the facts in each individual case."[32] Therefore, the question of whether not the plaintiffs acted in a reasonable time and manner should be reviewed based upon the facts in the this case. Further, in the same opinion the Court further noted that "...whether the moving party has some good reason for his failure to take appropriate action sooner" (quoting 11 Wright & Miller, Federal Practice and procedure 2866)[33]. Obviously, the plaintiffs should not be allowed to now use the all inclusive final provision of Rule 60(b) of the Mississippi Rules of Civil Procedure as an out to avoid an *Agreed Order* which they entered into and for all intents and purposes abided by and represented to the world that they agreed to for more than three (3) years after the same was entered having had full knowledge of the entry and impact of the same for almost the entire time between the entry of the *Agreed Order* on April 23, 2007 until the filing of their *motion* seeking relief of the same on August 2, 2010. From the time the *Agreed Order* was entered until the plaintiffs sought relief from the same a total of more than thirty-nine (39) months passed yet it is undisputed that the plaintiffs had full knowledge of the entry of the *Agreed Order* and the effect of the same within thirteen (13) days of its entry.

Plaintiffs are correct that the *Agreed Order* which was entered into by the parties through their attorney avoided an actual trial of this matter however, it can not be said that they did not have an opportunity to litigate the case as they were the party who initiated the filing of the

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[32] Briney v. United Stats Fidelity & Guaranty Co., 714 So. 2d 962, 966-67 (Miss. 1998)
[33] id.

lawsuit and while at all times being represented by counsel they caused an *Agreed Order* to be entered into through their counsel which even if this Court accepts they did not intend to enter, they still had full knowledge of the entry and affect of the same for more than three (3) years and took no action seeking relief from the same. In cases of accident or mistake, Rule 60(b) provides that the party seeking relief from the judgment must bring their motion for relief from the same within six (6) months. There simply is not an argument that the Chancery Court of Calhoun County erred when it found that Mississippi Rule of Civil Procedure 60(b) prohibited the Bee White Heirs from obtaining relief from the *Agreed Order* which they now allege they expressly did not agree to. Rule 60(b) requires that relief be sought in a case of accident or mistake within six (6) months as the plaintiffs were fully aware of the true status of this case not more than thirteen (13) days after the *Agreed Order* was entered, even if it is assumed that they did not intend for the *Order* to be entered they were certainly aware of it almost immediately and took no action to correct this alleged accident or mistake on their part or on the part of their counsel. The fact that the plaintiffs had full knowledge of this situation and took no action for more than three (3) years, not even giving notice to the defendants of their claim, that they did not agree with or accept the *Agreed Order* certainly establishes that the plaintiffs did not seek to have the same overturned in a reasonable time. Accordingly, in the absence of extraordinary circumstances their motion for relief from an Agreed Order of which they had full knowledge was properly denied by the Chancery Court of Calhoun County.

II. Whether the Chancery Court of Calhoun County, Mississippi erred when it found that the Order was not void because former counsel for the Bee White Heirs acted within the scope of his agency relationship with his clients by binding them with the terms of an Order with which they have now asserted they expressly did not agree.

As the plaintiffs note under ordinary circumstances an attorney is the agent of his client, Certainly, the Court and the defendants in this matter were entitled to rely upon the apparent and actual authority of the attorney representing the plaintiffs in this matter in the absence of any assertion by the plaintiffs that their attorney had exceeded his authority or had bound them to an *Agreed Order* to which they did not agree. The plaintiffs did not take any action at the time of the entry of the *Agreed Order* to have the same set aside. They allege that they thought they were going to Court but when they were told by their attorney that the matter had been settled that they never asserted to the Chancery Court of Calhoun County that they did not agree to the settlement of this matter until more than three years had passed. In fact, the testimony of Julia White the only plaintiff to actually testify at the hearing on the Plaintiffs' *Motion Seeking Relief from the Agreed Order*, establishes that they did not even complain to their attorney until after he asked why he had not been paid for his services only when paying his fee did Julia White, and she alone of all the plaintiffs, allegedly expressed dissatisfaction with their attorney's services in this matter.[34] Further, the plaintiffs did not even assert to the defendants that they did not accept the terms of the *Agreed Order* which had been entered into on their behalf by their attorney. For more than three (3) years there apparently was no effort on the part of the plaintiffs to assert dominion and control over the property which is the subject of this lawsuit. There apparently was no assertion by the plaintiffs to anyone and in particular not to the defendants and the Chancery Court of Calhoun County, Mississippi that the Plaintiffs claimed to be the owners of the property. The clear and apparent status of this matter was allowed to remain undisputed and unchallenged by all six (6) of the plaintiffs for more than (3) years.

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[34] R. Transcript of Hearing Held on September 22, 2010 at 18-23; R.E. 5, at iii

The plaintiffs can not reasonably assert that after more than three (3) years, their attorney did not have the actual authority to act on their behalf as he was their attorney at the time, and they did not take any action whatsoever to advise the Court or the defendants that their attorney had acted outside the scope of his actual authority. After having allowed an *Agreed Order* entered into by their attorney as their attorney and representative to stand unchallenged for such a length of time the plaintiffs certainly can not argue that the defendants and the Chancery Court of Calhoun County, Mississippi acted unreasonably in their reliance upon the attorney for the plaintiffs' apparent authority to enter an *Order* on their behalf as the same was undisputed and unchallenged by the plaintiffs for more than three (3) years. As none of the plaintiffs other than Julia White testified or offered any other evidence at the hearing on the plaintiffs *Motion Seeking Relief from the Agreed Order* and as the plaintiffs did not call their former attorney to testify or offer any evidence of what authority he had or did not have when acting on behalf of the plaintiffs in entering an *Agreed Order* before the Chancery Court of Calhoun County, Mississippi it can not be known what actually transpired between the plaintiffs and their attorney at the time the *Agreed Order* was entered. What is undisputed is that having full knowledge of the entry of the *Agreed Order*, the plaintiffs did not take any action to seek relief from the same for more than three (3) years and rather than asserting that their attorney had acted beyond the scope of his authority they actually paid him for his services and took no further action. Certainly, if at the time of the entry of the *Agreed Order* or even if this honorable Court accepts the idea that the plaintiffs did not know the terms of the *Agreed Order* until after the same was entered, surely they would have challenged the authority of their attorney acting on their behalf in this regard had they not been in agreement with the terms of the *Agreed Order* entered into by

their attorney on their behalf at that time. Accordingly, the Chancery Court of Calhoun County, Mississippi did not err when it found that the *Order* was not void because former counsel for the plaintiffs acted within the scope of his agency relationship with his clients by binding them to the terms of the *Agreed Order* to which they now allege expressly did not agree. All of the cases cited by the plaintiffs in an effort to justify the relief they seek under Rule 60(b) require that in an action is not taken to have the judgment or order set aside within six (6) months then the relief sought may only be granted in exceptional circumstances. In the absence of any authority to the contrary and given the undisputed fact that the plaintiffs had full knowledge of the facts and circumstances of the *Agreed Order* there is not a basis for granting the relief sought by the plaintiffs. Rule 60(b) is clear on its face and the plaintiffs have failed to establish a basis for circumventing its requirements.

III. Whether the Chancery Court of Calhoun County, Mississippi erred when it determined that the interest of equity and justice did not prohibit the allegedly erroneously entered Order from continuing to bind the parties.

In their third and final argument the plaintiffs assert that the interest of justice and equity require that the *Agreed Order* which they entered into through their attorney in this matter in 2007 when this matter was before the Chancery Court of Calhoun County and which they did not seek to have set aside until August 2010 unfairly and unjustly deprives them of their interest in a unique and a one of a kind possession, the same being land, which the plaintiffs assert is the ultimate possession of families being passed from generation to generation. This argument asserted by the plaintiffs rings hollow when one considers the true facts of this case, the plaintiffs having asserted in their argument that this honorable Court should conduct a de novo review of this matter. Accordingly, this honorable Court should note that the plaintiffs did not seek to take possession of the property for their own use, they did not assert that they were being prohibited

from occupying the property or enjoying it in any manner. Rather they only challenged the *Agreed Order* which was entered into by their attorney of record when they attempted to sale the property to a third party. Whether the plaintiffs have a cause of action which would result in and award money damages against their former attorney is not before this Court however, the plaintiffs do allude to such and raise this possibility of the same their argument, stating that "no cause of action against their former attorney would permit the outcome which is contemplated under the guidance of the Mississippi Chancery practice. Any cause of action would simply provide the Bee White Heirs monetary damages. As the Bee White Heirs, being the plaintiffs in this matter, only raised the issue of ownership of the property when they intended to sale the property to a third party the only type of damages which they could legitimately claim to have suffered, had they suffered any all, which they have not, at the hands of their former attorney would be the loss of the funds they would have received upon the sale of the property to a third party. Therefore, their argument that the interest of equity and justice require that this Court overturn the ruling of the Chancery Court of Calhoun County so as to place the plaintiffs in a position to again possess the subject property is simply not valid. The plaintiffs did not seek to possess the property as a unique and one of a kind possession they sought to sale the property so as to derive monetary gain.

Again the validity of any claim that the plaintiffs may have against their former attorney arising out of the entry of an *Agreed Order* in this matter is not before this honorable Court. However, the plaintiffs certainly are not entitled to relief from this Court from an *Agreed Order* of which they were fully aware and took no action to have set aside nor took no action to place the defendants or anyone else on notice of their alleged disagreement with the same for more than three (3) years. Accordingly, the plaintiffs assertion that they are entitled to relief under the

catch all provision of Rule 60(b) of the Mississippi Rules of Civil Procedure so as to uphold the interest of equity and justice simply is not valid and given the fact that the plaintiffs only complained against the *Agreed Order* when they attempted to sell the property, their assertion that they require relief from this honorable Court because of the unique one of a kind characteristics of the property, which is the subject of this matter, is not valid.

Accordingly, this honorable Court should uphold the prior ruling of the Chancery Court of Calhoun County, Mississippi finding that the *motion* of the plaintiffs seeking relief from an *Agreed Order* that was entered more than three (3) years prior to the filing of their *Motion for Relief from Agreed Order* was properly denied.

CONCLUSION

An Agreed Order was entered in this matter and more than three (3) years passed before there was any attempt by the plaintiffs to obtain relief from the same or even an attempt to place the Chancery Court of Calhoun County or the defendants on notice that they disputed the validity of the Agreed Order. Regardless of the circumstances under which the Agreed Order was or was not entered it is undisputed that the plaintiffs had full knowledge of the same and took absolutely no action to obtain relief from the Agreed Order or challenge the same in any way. In the absence of exceptional circumstances Rule 60(b) of the Mississippi Rules of Civil Procedure requires that the a motion to set aside or otherwise obtain relief from the judgment or order shall be brought within six (6) months. The plaintiffs waited for three years and accordingly, in the absence of any justification for extraordinary relief which they have failed to demonstrate the Agreed Order entered by the Chancery Court of Calhoun County in this matter must be and should be upheld..

Respectfully submitted this the 29th day of July, 2011.

BESSIE L. WHITE, ET AL
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BY: _____

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CERTIFICATE OF SERVICE

I, Preston Ray Garrett, attorney for the Appellees in this matter, do hereby certify that I have this day mailed a true and correct copy of the Brief of Appellees, Bessie L. White, et al and the accompanying Record Excerpts to:

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This the 25th day of July, 2011.

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