

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-TS-00878

IN THE ESTATE OF GEORGE WILLIAM MACE, DECEASED

PATTY M. MACE STEWART and
LYNETTE WINSTON O'NEAL

APPELLANTS

VS

PATRICIA HAYES GARDNER

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following 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. Hon. J. Dewayne Thomas, Hinds County Chancellor
2. Lynette Winston O'Neal, Appellant
3. Patty M. Mace Stewart, Appellant
4. Patricia Hayes Gardner, Appellee
5. R. Louis Field, Esq.

R. LOUIS FIELD
Attorney for Appellee

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STATEMENT OF ISSUES

1. The sufficiency of Appellants' Brief under Rule 28, Mississippi Rules of Appellate Procedure.
2. The propriety of the Chancellor's decision in granting Summary Judgment dismissing the Petition for Injunction and Restraining Order filed by Lynette Winston O'Neal and the Petition for Injunction and Restraining Order and Petition for Contesting the Last Will and Testament of George William Mace filed by Patty M. Mace Stewart.

STATEMENT OF THE CASE AND RELEVANT FACTS

George William Mace died testate in Hinds County, Mississippi on February 20, 2009. A Last Will and Testament made and declared by George William Mace on February 10, 2003 was admitted to probate by order of the Hinds County Chancery Court on May 13, 2009 in Chancery Court Cause Number P-2009-21 W/4. (RE 1A). Patricia Gardner (hereinafter referred to as "Gardner") was nominated by the decedent as his Executrix and was appointed and issued Letters Testamentary by the Chancery Court. The named devisees and legatees under the Last Will and Testament of George William Mace are his brother, Theodore Roosevelt Mace, who predeceased the testator, Ethel Mace, Queen Esther Jackson, Patricia Gardner, Shirley Thompson, Patty R. Patterson, Cynthia Wells, Nita Reed, Loreen Cross Tolliver and Rosetta Cross Gladney. Neither Patty M. Mace Stewart nor Lynette Winston O'Neal is a beneficiary, legatee or devisee. (RE 2).

On March 4, 2009, Lynette Winston O'Neal (hereinafter referred to as "O'Neal") filed her "*Petition For Injunction or Restraining Order In The Matter of the Estate of George*

William Mace, et ux" [sic]. This Petition was originally designated as Cause Number 2009-16 but was later consolidated with Chancery Cause Number 2009-21. (RE 3). Gardner, Executrix of the Estate of George William Mace, responded to the O'Neal petition by filing an Answer and Other Defenses on June 29, 2009. (RE 4).

On September 18, 2009 Patty M. Mace Stewart (hereinafter referred to as "Stewart") filed her "*Petition For Injunction and Restraining Order in the Matter of the Estate of George Mace, et al*" [sic]. The Stewart Petition was in substance identical to the Petition For Injunction filed by O'Neal on March 4, 2009. (RE 5). Gardner, Executrix, responded to the Stewart Petition by filing an Answer. (RE 6). On September 18, 2009 Patty M. Mace Stewart also filed a pleading styled "*Petition For Contesting the Last Will and Testament of George William Mace*". (RE 7). An Answer to the Petition For Contesting the Last Will and Testament of George William Mace was filed by Gardner, Executrix of the Estate of George William Mace on September 24, 2009. (RE 8). On September 24, 2009 Gardner, Executrix of the Estate of George William Mace, filed Motions For Summary Judgment seeking the dismissal of the Petitions For Injunction and Restraining Order filed respectively by O'Neal and Stewart. (RE 9, 10). On December 30, 2009, Gardner, Executrix of the Estate of George William Mace, deceased, filed a Motion For Summary Judgment seeking the dismissal of the Petition To Contest the Will of George William Mace filed by Stewart. (RE 11).

A hearing before Chancellor J. Dewayne Thomas was conducted on March 30, 2010 for the purpose of considering the three (3) summary judgment motions filed by Gardner. On May 19, 2010 the Chancellor entered separate Memorandum Opinions and Orders thereby dismissing the Petition For Injunction and Restraining Order filed by O'Neal (RE

12), and the Petition for Injunction and Restraining Order and the Petition to Contest Will filed by Stewart (RE 13). On May 25, 2010 O'Neal filed with this Court a Notice of Appeal from the Order entered by the Chancellor on May 19, 2010. (RE 14). Likewise, on May 25, 2010 Stewart filed with this Court her Notice of Appeal from the Chancellor's Order dated May 19, 2010. (RE 15). Thereafter, on June 10, 2010 both O'Neal and Stewart filed with the Clerk of the Chancery Court their individual Motions To Reconsider together with attachments designated as Exhibits A through F. (Court Papers 349). These Motions to Reconsider were never presented to the lower court for hearing. O'Neal and Stewart on July 30, 2010 jointly filed with this Court their "Appellants's Brief" [*sic*] and attached thereto are Exhibits A through F, identical to the exhibits attached to the Motions to Reconsider.

SUMMARY OF THE ARGUMENT

The Appellants' Brief filed jointly by O'Neal and Stewart is non-compliant with Rule 28 M.R.A.P. in both form and content. Further, its non-compliance is so egregious that dismissal is warranted under the Rule. The separate and distinct designations of interested parties, brief content, identification of issues for review, procedural history and factual background and coherent elucidation of the contentions with respect to the issues presented and the reasons for those contentions supported by citations of case law, statutes or other authority are absent.

The Last Will and Testament of George W. Mace was properly admitted to probate by the Hinds County Chancery Court. Patricia Gardner was named by the decedent and appointed by the Court as Executrix of the Estate. Neither O'Neal nor Stewart is a party in interest under Rule 17(a) M.R.A.P., yet both filed wholly unfounded petitions slandering

Gardner by accusing her of fraud, theft, and unethical conduct in the handling of the Estate.

O'Neal and Stewart are not real parties in interest and the lower courts dismissal of their claims is proper. *Owen and Galloway, LLC v. Smart Corp.*, 913 So.2d 174, 176 (Miss. 2005); *Pruitt v. Hancock Medical Center*, 942 So.2d 797, 800, 801 (Miss. 2005).

Stewart also filed a Petition Contesting the Last Will and Testament of George William Mace. The lower court likewise dismissed this Petition, recognizing straightaway that Stewart's pleadings failed to raise any issue concerning the validity of the Will or the capacity of the testator to make a Will. Further, supporting affidavits, answers to discovery and statements by Stewart in open court make it plain that there was no genuine dispute concerning any issue of material fact and the Chancellor properly dismissed that Petition as well. Rule 56(c) Mississippi Rules of Civil Procedure; *Point South Land Trust v. Gutierrez*, 997 So.2d 967, 976 (Miss. 2008); *Price v. Purdue Pharma Co.* 920 So.2d 479, 483 (Miss. 2006).

ARGUMENT

1.

The sufficiency of Appellants' Brief under Rule 28, Mississippi Rules of Appellate Procedure.

Briefs filed and related to litigation before the Supreme Court or the Court of Appeals must comply with Rule 28, Mississippi Rules of Appellate Procedure. Rule 28 requires that the Brief of the Appellant include and contain separately and under appropriate headings a Certificate of Interested Parties, a Table of Contents, a Statement of Issues, a Statement of

the Case, a Summary of the Argument, the Argument and a Conclusion. The Appellants' Brief filed by Stewart and O'Neal is patently non-compliant. The Stewart-O'Neal Brief does not include a list of interested parties or a table of contents. There are no distinct and readily identifiable issues presented for review. There is no statement of the case as contemplated by the appellate Rule. Absent from the brief is a summary of the argument and likewise absent in the body of the document are rational, intelligible contentions concerning the issues presented for review. Most egregious is the absence of citations of authorities, statutes and parts of the record upon which O'Neal and Stewart rely. The brief submitted by Stewart and O'Neal may be best described as a rambling, incoherent diatribe of their attorney Gary Silberman interspersed with complaints of alleged fraud and misconduct which occurred sixty (60) years previous in the handling of the Estates of George Mace, Sr., and an Illinois Mace. In fact, in Paragraph 1 of the "Issues That Are Reasons For Appeal" Stewart affirmatively states that she is not asking for any inheritance from the deceased, George William Mace, but is only concerned about some alleged fraud related to the Estate of George Mace, Sr., sixty (60) years ago. Likewise, in Paragraph 9 thereof, O'Neal makes the same affirmative assertion. The brief and the appeal filed by O'Neal and Stewart should be dismissed for substantial non-compliance with Rule 28 M.R.A.P. *Zinn v. City of Ocean Springs*, 928 So.2d 915, 920 (Miss. 2006); *Taylor v. Kennedy*, 914 So.2d 1260, 1262 (Miss.App. 2005).

Attached to the Stewart-O'Neal brief as Exhibits A through F are various extraneous extrajudicial documents which first appear in the record as exhibits to Motions to Reconsider filed by Stewart and O'Neal respectively in the Chancery Court of Hinds County. Curiously,

both of these motions were filed on June 10, 2010 some fifteen (15) days after O'Neal and Stewart filed their Notices of Appeal. (Court Papers 349). Notwithstanding and aside from the apparent jurisdictional issue created by the filing of these motions in the Chancery Court following the appeal, these motions were never presented to the lower court for adjudication. Having never been properly admitted into evidence nor considered by the lower court, the Exhibits attached to the Appellant's Brief should be stricken. ***Rogers v. State***, 994 So.2d 792, 801, 802(Miss.App. 2008); Mississippi Rules of Appellate Procedure, Rule 28(a)(3).

Rule 30, Mississippi Rules of Appellate Procedure makes mandatory the filing of Record Excerpts bound and indexed to include at a minimum (1) a true copy of the trial court docket; (2) the judgment or interlocutory order appealed from; (3) all other orders or rulings sought to be reviewed; and (4) all supporting opinions, findings of fact or conclusions of law filed or delivered orally by the trial court. O'Neal-Stewart failed to file record excerpts. The appeal should be dismissed under Rule 30 M.R.A.P.

2.

The propriety of the Chancellor's decision in granting Summary Judgment dismissing the Petition for Injunction and Restraining Order filed by Lynette Winston O'Neal and the Petition for Injunction and Restraining Order and Petition for Contesting the Last Will and Testament of George William Mace filed by Patty M. Mace Stewart.

While Gardner strongly believes and so submits to the Court that O'Neal and Stewart have failed under Rule 28, M.R.A.P to properly present any relevant substantive issue for the Court's review, prudence requires a response on the merits of the trial court's decision to grant summary judgment in favor of Gardner.

O'Neal filed a pleading which was styled, "Petition For Injunction Or Restraining Order In The Matter Of The Estate Of George William Mace, et ux" [sic]. Stewart filed a pleading identical in substance styled "Petition For Injunction Or Restraining Order In The Matter Of The Estate Of George William Mace, et al" [sic]. (RE 3, 5) The gravamen of both petitions seems to be that by probating the Last Will and Testament of George William Mace Gardner and her attorney acted unethically, and committed fraud. They both further contend in their pleadings that Gardner as Executrix of the Estate of George William Mace acted unethically, committed fraud, wasted and stole property of the Estate. The Last Will and Testament of George William Mace was presented for probate in the Chancery Court of Hinds County. The Will was thereafter admitted to probate by Order of the Chancery Court and Gardner was appointed Executrix. (RE 1,2). Summary Judgment motions questioning the standing of Stewart and O'Neal were filed by Gardner. (RE 9, 10)

The Last Will and Testament of George William Mace having been admitted to probate by the Chancery Court, a prima face case was made by its proponents that the form of the Will was legally sufficient and that the testator was of sound and disposing mind. *In RE: Estate of McQueen*, 918 So.2d 864, 867, 870 (Miss. 2005). Thereafter, it became incumbent upon any putative interloper including Stewart and O'Neal to first allege and then to bear the burden of persuasion showing that the Will was somehow deficient in form or that its maker lacked testamentary capacity or was influenced unduly. Neither O'Neal or Stewart raises the issues of the validity of the Will or the competence of George William Mace in their pleadings or supporting documents. At the hearing before Chancellor Thomas on March 30, 2010 Gary Silberman representing O'Neal made not one remark about Gardner's

status as Executrix. There were no assertions of unethical conduct, fraud or theft. No argument was made questioning the validity of the Last Will and Testament or the testamentary capacity of the maker of the Will. His only advice to the Court was that his client, O'Neal, was somehow fraudulently excluded from the Estate of George Mace, Sr., who died in Hinds County some sixty (60) years previous. Having submitted no brief with supporting authority of his client's position to the Court prior to the summary judgment hearing, the Chancellor allowed Mr. Silberman ten (10) additional days to brief the Court. No brief was ever filed by Mr. Silberman or by O'Neal. As outsiders looking in, O'Neal and Stewart simply engaged in mud slinging, leveling unfounded and scandalous charges of fraud and theft against Gardner and asking the Court to remove her as Executrix. Neither O'Neal nor Stewart is a legatee or devisee under the Will or a creditor of the Estate. Neither has standing to seek the injunctive relief so sought. Rule 17(a) M.R.C.P. ; *Pruitt v. Hancock Medical Center*, 942 So.2d 797 (Miss. 2005); *Owen and Galloway, LLC v. Smart Corp.*, 913 So.2d 174 (Miss. 2005).

Stewart also filed a Petition which she called a "Petition For Contesting The Last Will and Testament Of George William Mace". (RE 7). Although so styled, the pleading in fact sets forth no allegation that puts the validity of the George William Mace Will at issue. Rather, Stewart incorporates in this pleading the identical scandalous charges of waste and fraud leveled against Gardner as in her Petition For Injunction and Restraining Order. (RE 5).

Gardner filed a Motion For Summary Judgment seeking to have Stewart's second Petition dismissed as having failed to set forth a genuine dispute as to any material fact. (RE

11). Considered by the Chancellor at the hearing on summary judgment on March 30, 2010 were the pleadings of the parties, Stewart's answers to discovery and affidavits submitted by the parties. At that hearing Gardner clearly demonstrated and convinced the Court that Stewart had failed to establish the existence of any essential element of her claim. As mentioned previously Stewart's pleadings are silent as to any defect in the Will or lack of testamentary capacity. The uncontradicted affidavit of Patricia Gardner establishes that the Mace Last Will and Testament was prepared by the law firm of Stamps and Stamps, that it was executed by George William Mace on February 10, 2003, that George William Mace died on February 20, 2009, that the Will was admitted to probate on May 13, 2009, that Gardner was nominated by the testator as Executrix and duly appointed by the Court, that Stewart is not a devisee, legatee or beneficiary under the Will and that allegations of unethical conduct, fraud and theft are false. (RE 11)

Additional evidence supporting the Chancellor's decision to summarily dismiss Stewart's claim may be found in Stewart's responses to discovery. Interrogatories 2, 9, 10 and 11 were asked and answered as follows:

INTERROGATORY NO. 2: Please state for any and all individuals whom you will and/or might call to testify at trial or any hearing the following:

- a) Name;*
- b) Residence address and telephone number*
- c) Business address and telephone number*
- d) The substance of the testimony he or she might be expected to give at trial or any hearing in this matter.*

RESPONSE NO. 2: We've hired Attorney Gary Silberman to handle the case for us. All material has been turned over to him. He will have to determine who will be called to testify. I cannot speculate what he plans to do and I will not be right to say who I suggested, not knowing if he will use them. Therefore, this information is currently in the possession of Attorney Gary Silberman. Attorney Silberman's mailing address is; P. O. Box 4877, Jackson, MS 39296.

INTERROGATORY NO. 9: Please describe in detail the "abusive history" of Patricia Hayes Gardner which you allege in Paragraph 11 of your Complaint and in your answer include dates of every event and names, addresses and phone numbers of each witness who will testify.

RESPONSE NO. 9: Please refer to the response to no. 2. This information is in the possession of Attorney Gary Silberman.

INTERROGATORY NO. 10: Please describe in detail the "irresponsible ways of handling the estate" by Patricia Hayes Gardner which you allege in Paragraph 11 of your Complaint and in your answer include dates of every event and names, addresses and phone numbers of each witness who will testify.

RESPONSE NO. 10: Please refer to the response to no. 2. This information is in the possession of Attorney Gary Silberman.

INTERROGATORY NO. 11: Please describe in detail the "unethical, disrespectful, and abusive conduct" of Patricia Hayes Gardner and the incidents of "fraud and theft" committed by Patricia Hayes Gardner which

you allege in Paragraph 12 of your Complaint and in your answer include dates of every event and names, addresses and phone numbers of each witness who will testify.

RESPONSE NO. 11: Please refer to the response to no. 2. This information is in the possession of Attorney Gary Silberman.

Requests for Production of Documents Number 6, 7 and 8 were submitted and responded to as follows:

REQUEST NO. 6: Please produce a copy of any document or statement which any witness of the Petitioner will use at a trial of this cause.

RESPONSE NO. 6: Please refer to the response to Interrogatory no. 2. This information is in the possession of Attorney Gary Silberman.

REQUEST NO. 7: Please produce any and all document and tangible things whose production has not been requested pursuant to any other item in this Request which you intend to offer into evidence at the time of the trial of this case.

RESPONSE NO. 7: Please refer to the response to Interrogatory no. 2. This information is in the possession of Attorney Gary Silberman.

REQUEST NO. 8: Please provide all documents you relied upon in preparation of your answers to Interrogatories.

RESPONSE NO. 8: Please refer to the response to Interrogatory no. 2. This includes title research work, birth records, affidavits, and other archived information that was done by my husband and I. This information is in the possession of Attorney Gary Silberman.

Requests For Admissions 1, 2, 3, and 4 were asked and answered as follows:

REQUEST NO. 1: Admit that you are not a named devisee, legatee or beneficiary in the Last Will and Testament of the decedent, George William Mace.

RESPONSE NO. 1: Admit, being that George William Mace is my great uncle, who he has in his Last Will and Testament is not the bases for my contesting it.

REQUEST NO. 2: Admit that you have no proof or evidence of "abusive history" as alleged in Paragraph 11 of your Complaint.

RESPONSE NO. 2: Deny. There are and has been mineral leases existing on the said property alleged to belong to George William Mace, but records will show that portions of said property, mineral, etc. is not and was not his to use at his discretion.

REQUEST NO. 3: Admit that you have no proof or evidence of "irresponsible handling of the Mace Estate" as alleged in Paragraph 11 of your Complaint.

RESPONSE NO. 3: Deny. There are research documents made available to you and the Courts to prove otherwise.

REQUEST NO. 4: Admit that you have no proof or evidence of unethical conduct or fraud, or theft as alleged in Paragraph 12 of your Complaint.

RESPONSE NO. 4: Deny. Within the same research, you will find that not only Patricia Hayes Gardner, but including but not limited to, George William Mace, was also aware of such unethical conduct and/or fraud, or theft. (RE 16)

During this hearing, Gary Silberman advised the court that he did not represent Stewart. Stewart therefore spoke for herself at the Summary Judgment hearing. The crux of her in court comments were that there were “three (3) George Maces. George Mace, Sr., George Mace, Jr., and George William Mace.” George Mace, Sr., died intestate and her grandfather, George Mace, Jr., did not receive his inheritance from George Mace, Sr., who died in 1939. (Summary Judgment Trans. 11, 12, 19-20). There is no expression, assertion, allusion, innuendo, inference or scintilla of evidence that puts at issue the validity of the George William Mace Last Will and Testament or the capacity of George William Mace to make a Will. The chancellor’s Order of Summary Judgment dismissing Stewart’s Petition To Contest Will was proper. *Townsend v. Estate of Gilbert*, 616 So.2d 333 (Miss. 1993).

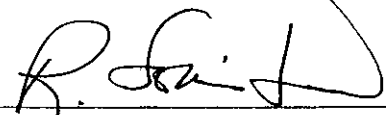
CONCLUSION

Neither O’Neal or Stewart have legal standing to question Gardner’s status as Executrix of George William Mace. Stewart failed to demonstrate to the Court the existence of a genuine dispute of material fact with respect to the validity of the Last Will and Testament of George William Mace or the testamentary capacity of George William Mace. The chancellor’s orders dismissing all claims of O’Neal and Stewart should be affirmed.

Respectfully submitted,

PATRICIA GARDNER, Appellee

BY:



R. Louis Field, MSB# [REDACTED]
Counsel for Appellee

CERTIFICATE OF SERVICE

I, R. Louis Field, do hereby certify that I have this date sent by regular U.S. Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellee to:

Chancellor J. Dewayne Thomas
P. O. Box 686
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Lynette Winston O'Neal,
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3591 Canada Cross Road
Edwards, MS 39066

SO CERTIFIED this the 2nd day of November, 2010.



R. LOUIS FIELD