

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

NO. 2011-CA-00101

HUDSON HOLLIDAY and
DARRIN HARRIS

PLAINTIFFS/APPELLEES

VERSUS

BETTY MARIE NELSON
and EARL LAVON NELSON

DEFENDANTS/APPELLANTS

APPEAL FROM THE
CHANCERY COURT OF PEARL RIVER COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT IS NOT REQUESTED

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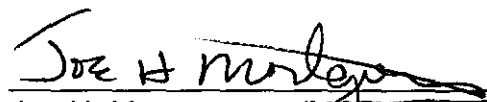
DEFENDANTS/APPELLANTS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed 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. Betty Marie Nelson and Earl Lavon Nelson - Appellants
2. Hudson Holliday and Darrin Harris - Appellees
3. Jack Parsons, Tadd Parsons & Dawn Smith, Parsons Law Office -
Attorneys for Appellants
4. Joe H. Montgomery, Williams, Williams & Montgomery, P.A. -
Attorneys for Appellees
5. Judge Sebe Dale, Jr. - Chancery Court Judge

Respectfully submitted,


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I.

STATEMENT OF ISSUES FROM APPELLEES

When presented with *Motion for Summary Judgment* and *Cross-Motion for Summary Judgment* in which both Appellants and Appellees asserted there were no genuine issues of material fact, the lower court correctly granted summary judgment to the Plaintiffs/Appellees.

II.

STATEMENT OF THE CASE FROM APPELLEE

The Nelsons chose to file a *Motion for Summary Judgment* contending there were no genuine issues of material fact asserting they were entitled to win based on their evidentiary submission, which included only a one page unsworn letter from the State Fire Marshall to a mobile home dealer, not a party to this litigation, and a letter from Holliday clarifying "modular" housing was permissible under the applicable covenant.

Appellants recognized that this case was proper for disposition on summary judgment and cross-summary judgment motions rather than trial, and executed the *Agreed Order* allowing this procedure on October 27, 2010. (Supplemental RE 04) Appellees then filed their *Cross-Motion for Summary Judgment* and submitted sworn affidavit indicating that the mobile home was not placed upon a permanent foundation, as required in order to be defined as a modular home. (Supplemental RE 05)

Having first asserted that this was a case ripe to be decided without trial and on summary judgment, and that there were no genuine issues of material fact, and only after they lost the summary judgment motion battle, did Appellants first contend there is any genuine issue of material fact.

III.

SUMMARY OF ARGUMENT

Appellants chose to proceed on the summary judgment route rather than by trial to conclude this litigation. Having failed in their submission to establish they were entitled to summary judgment, they now argue the exact opposite position to this Court asserting there are material issues of fact when they urged before the lower court there were none.

The moveable home in controversy is manufactured housing not modular housing. This Court should enter judgment affirming the lower court's decision so holding.

IV.

ARGUMENT

Summary Judgment Standard

Appellees submit this Court's review of the order granting Holliday and Harris' *Cross-Motion for Summary Judgment* is *de novo*. PPG Architectural Finishes, Inc. v. Lowery, 909 So.2d 47, 49 (Miss. 2005) (citing Hurdle v. Holloway, 848 So.2d 183, 185 (Miss. 2003)). Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. M.R.C.P. 56 (c)

The mere presence of fact issues in the record does not preclude summary judgment. Hudson v. Courtesy Motors, Inc., 794 So.2d 999, 1002 (Miss. 2001) (citation omitted). The Court must be convinced that any factual issue is a material one, one that matters in an outcome determinative sense. Shaw v. Burchfield, 481 So.2d 247, 252 (Miss. 1985). A party opposing summary judgment may not create issue of fact by arguments and assertions in briefs or legal memoranda. Magee v. Transcontinental Gas Pipe Line Corp. 551 So.2d 182, 186 (Miss. 1989).

Argument

The main thrust of Appellants' argument is because "they say" the mobile home is a modular home and "Appellees say" the home is a manufactured home in the pleadings, that this automatically makes a genuine issue of material fact. This argument is exactly the opposite of what they argued before the trial court when they asserted there were none. The doctrine of judicial estoppel was developed to prevent actions such as that being taken by Appellants. The doctrine is known as the "doctrine of preclusion against

inconsistent positions.” 18 Charles A. Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE §4477 (Supp. 1992). See also Coral Drilling, Inc. v. Bishop, 260 So.2d 463 (Miss. 1972)

All the evidence of record submitted in this case, including the admissions by Appellants, support the lower court's judgment that the transportable home was not a modular home.

Appellants' *Answers to Request for Admissions* clearly establish that it is set up like every other mobile home in South Mississippi with tie downs screwed into the ground and is not attached to a permanent foundation.

The fact that the home could be moved within a fifty mile radius for a cost of less than \$5,000.00 in about half a day indicates that it is not a modular home. Appellants filed no counter-affidavit to this and thus the housing was conclusively established as manufactured before the lower court (Supplemental RE 05)

The issue in this case is very straightforward: Is the transportable housing in controversy “manufactured” or “modular” housing? The test to determine whether housing is “manufactured” is also very straightforward. If it is placed upon a permanent installed foundation it is “modular.” If it is not placed upon a permanent foundation then it is “manufactured.”

Holliday and Harris are land developers who burdened the property they sold with a restrictive covenant that prohibited “manufactured housing.” Appellants concede this covenant is applicable to their property and prohibits them from placing “manufactured” housing on this land. Appellees' rationale behind imposing the property in their

development with this covenant is that in areas where moveable homes are located or manufactured housing is located, property values tend to decline.

Appellants, not being sophisticated in the distinction between “manufactured” and “modular” homes, were misled by a mobile home dealer that they were purchasing a “modular” home and not “manufactured” housing. If the Court affirms the judgment of the lower court, they have a very valuable claim against this vendor. Evidently after the dispute arose the mobile home dealer tried to solve his mistake with a letter from someone in the State Fire Marshall’s office.

Appellants attempted to establish that this was a “modular” home with this letter from the State Fire Marshall to their dealer, but it is not in affidavit form, is unsworn, is not addressed to them, and amounts to no evidence whatsoever on a motion for summary judgment. (Supplemental RE 01)

This case turns on whether the Nelsons placed “manufactured” or “modular” housing on their property. If it is “manufactured” housing, they are in violation of the protective covenants. If it is a “modular” home, they are in compliance. As Hudson Holliday and Darrin Harris showed by their submission in support of their *Cross-Motion for Summary Judgment* and in opposition to the Nelsons’ *Motion for Summary Judgment* and assert in this brief, the home placed on the Nelsons’ property is, without a doubt, a “manufactured” home and not a “modular” home and they are in violation of the covenants. Appellants did not respond to Appellees’ *Cross-Motion for Summary Judgment* and memorandum and submission in support thereof, standing on their original submission.

In order to decide this case, it is only necessary to examine the controlling statute §75-49-3 of the Mississippi Code of 1972 Annotated which contains the following definitions:

- (a) *"Manufactured home" means a structure defined by, and constructed in accordance with, the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 USCS 5401 et seq.), and manufactured after June 14, 1976.*
- (b) *"Mobile home" means a structure manufactured before June 15, 1976, that is not constructed in accordance with the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 USCS 5401 et seq.). It is a structure that is transportable in one or more sections, that, in the traveling mode, is eight (8) body feet or more in width and thirty-two (32) body feet or more in length, or, when erected on site, is two hundred fifty-six (256) or more square feet, and that is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes any plumbing, heating, air conditioning and electrical systems contained therein; except that such term shall include any structure which meets all the requirements and with respect to which the manufacturer voluntarily files a certification required by the commissioner and complies with the standards established under this chapter.*
- (c) *"Modular home" means a structure which is: (i) transportable in one or more sections; (ii) designed to be used a dwelling when connected to the required utilities, and includes plumbing, heating, air conditioning and electrical systems with the home; (iii) certified by its manufacturers as being constructed in accordance with a nationally recognized building code; and (iv) designed to be permanently installed at its final destination on an approved foundation constructed in compliance with a nationally recognized building code. The term "modular home" does not include manufactured housing as defined by the National Manufactured Housing Construction and Safety Standards Act of 1974.*

. . .

In her responses to the *Request for Admissions* propounded to them, Appellants admitted the following:

- 1) They admitted that the home in controversy does not have a power meter physically attached to the exterior of the home. See response to Request No. 3.
- 2) They admitted that the power meter for the home in controversy is located on a separate wooden pole near the home. See response to Request No. 4.
- 3) They admitted that no chain wall was constructed to the foundation for the home. See response to Request No. 5.
- 4) They admitted that tie-downs or anchor straps were used to anchor the home to the ground. See response to Request No. 6.
- 5) They admitted that the anchor straps used to secure the home were screwed into the earth. See response to Request No. 7.
- 6) They admitted that the steps for the dwelling are not attached to the home, but rather are either fiberglass or concrete structures placed there to provide access. See response to Request No. 14.
- 7) They admitted that no crane was used in the location of the home in controversy on her property. See response to Request No. 16.
- 8) They admitted that the home in controversy was delivered by transport truck in two sections. See response to Request No. 17.
- 9) They admitted that the home vendor advised them the Hampton Bay home they purchased was a modular home. See response to Request No. 19.

- 10) They admitted that the home vendor advised them the Hampton Bay home they purchased was not “manufactured” housing. See response to Request No. 20. (Supplemental RE 06-09)

Also relevant is the advertisement of Woods Home Gallery where the mobile home was purchased dated June 6, 2008, that appeared in Swap Shop News indicating that Woods had the largest selection of “manufactured” homes in Southwest Mississippi. (Supplemental RE 10)

CONCLUSION

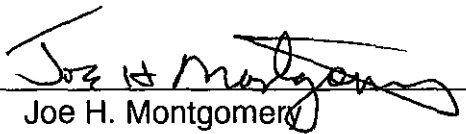
In order to be a "modular" home in Mississippi, according to the definition contained in §75-49-3, the home had to be ". . . (iv) *designed to be permanently installed at its final destination on an approved foundation constructed in compliance with a nationally recognized building code.*" The term "modular" home does not include "manufactured" home as defined by NATIONAL MANUFACTURING HOUSING AND CONSTRUCTION ACT OF 1974. The sworn affidavit of DROD Mobile Home Transport indicates that the home could be moved in a matter of hours at a reasonable expense and is not placed upon a permanent foundation. (Supplemental RE 05)


The housing in controversy in order to be a modular home rather than being tied to the earth with straps like Appellants' structure would have to be placed on a pre-made permanent foundation which it was not.

WHEREFORE, PREMISES CONSIDERED, Hudson Holliday and Darrin Harris assert, for the above reasons, there was no genuine issue of material fact for the lower court to try and the pleadings, answers to interrogatories, admissions, and other admissible submissions on file establish that Hudson Holliday and Darrin Harris are entitled to a judgment as a matter of law. Hudson Holliday and Darrin Harris respectfully request that this Court affirm the judgment of the lower court.

Respectfully submitted, on this, the 16th day of June, A.D., 2011.

HUDSON HOLLIDAY and
DARRIN HARRIS, **APPELLEES**

By: 
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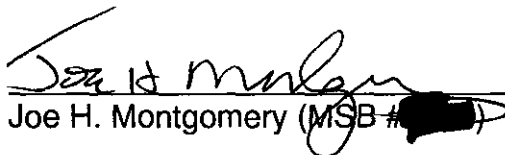
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CERTIFICATE OF SERVICE

I, Joe H. Montgomery, attorney for the Appellees, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the *Brief of Appellees and Appellees' Supplemental Record Excerpts* to:

HON. SEBE DALE, JR.
POST OFFICE BOX 1248
COLUMBIA, MS 39429-1248

This, the 17th day of June, A.D., 2011.


Joe H. Montgomery (MSB # [REDACTED])