

2011-CA-347 T

CERTIFICATE OF INTEREST PERSONS

The undersigned counsel of record certifies that the following-listed persons and/or entities 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 disqualifications or recusal.

1. Samson Byrd
2. Lottie Woods, Cornelius Byrd, Jr., Jeremy Howell, Wendy McEwen Howell, Michael W. Byrd, G & G Outdoors, LLC
3. Steven Price Nixon, Esq., Attorney for the Appellant
4. Sean A. Milner, Esq., Attorney for the Appellant
5. Venecca G. Mason, Esq., Attorney for Appellee, Lottie Woods
6. Gene D. Berry, Esq., Attorney for Appellee, G & G Outdoors, LLC
7. E. Wayne Smith, Esq., Attorney for Appellee, G & G Outdoors, LLC
8. K. Maxwell Graves, Esq., Attorney for Appellees, Cornelius Byrd, Jr., Jeremy Howell individually and as attorney-in-fact for Cornelius Byrd, Jr. and Wendy McEwen Howell
9. Walter F. Beasley, Esq., Attorney for Appellees, Cornelius Byrd, Jr., Jeremy Howell individually and as attorney-in-fact for Cornelius Byrd, Jr. and Wendy McEwen Howell;
10. Hon. Debbra K. Halford, Chancellor

Respectfully submitted,

SAMSON BYRD, APPELLANT

By:

Steven Price Nixon, Attorney for Appellant

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## STATEMENT OF ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER SAMSON BYRD'S CLAIMS WERE TIME-BARRED UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE?
- II. WHETHER THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF THE LEGITIMACY OF CORNELIUS BYRD, JR.?
- III. WHETHER THE TRIAL COURT ERRED IN DISMISSING ALL CLAIMS AGAINST ALL PARTIES WITH PREJUDICE?

## **STATEMENT OF THE CASE**

The record reflects the following:

### **A. Nature of the Case**

Lottie Woods (hereinafter sometimes referred to as “Woods”) and Samson Byrd (hereinafter sometimes referred to as “Samson”) are siblings having the same father, one James Leslie Byrd. James Leslie Byrd and Cornelius Byrd, Sr. are also siblings having the same father, one Cherry Byrd. By order of the Franklin County Chancery Court, Cherry Byrd conveyed certain real property to his two sons by Will, and on October 5, 1972 a decree by the Franklin County Chancery Court was entered showing the same in Franklin County Chancery Cause No. 7697-A . Subsequently, James Leslie Byrd filed a partition suit against Cornelius Byrd, Sr. and the property was divided into two equal shares for equal value on February 28, 1975, in Franklin County Chancery Cause No. 8674. James Leslie Byrd then conveyed his share by Warranty Deed to his son, the appellant, Samson Byrd on February 21, 1978. Cornelius Byrd, Sr.’s share of this property is the subject of the instant case here on appeal.

On February 2, 2007, Woods filed a complaint in Franklin County Chancery Court claiming to own Cornelius Byrd, Sr.’s property by virtue of adverse possession. The parties to this suit filed by Woods, which was Franklin County Chancery Cause No. 2007-017, were Lottie Woods, the unknown heirs of Cornelius Byrd, the estate of Cornelius Byrd, and any and all other persons or entities claiming an interest in the property.

After various proceedings in Cause No. 2007-017, including notice by publication to the unknown heirs of Cornelius Byrd, Jr. and several hearings, a Judgment was finally entered on November 17, 2008 which vested fee simple title to a portion of the property of Cornelius Byrd,

Sr. in Lottie Woods and a portion of the property in one “Cornelius Byrd, Jr.,” who had appeared in the case claiming to be the sole heir at law of Cornelius Byrd, Sr.

Subsequently, on or about August 4, 2009, Appellant Samson Byrd filed suit against Lottie Woods, Cornelius Byrd, Jr., and Jeremy Howell as attorney-in-fact for Cornelius Byrd, Jr., stating claims for Relief from Judgment pursuant to MS R. Civ. P. 60(b)(1), (4), and (6), and/or, in the alternative, an Independent Complaint for Relief from Judgment, and/or in the alternative for Injunctive Relief and/or, in the alternative, for Adverse Possession. This suit filed by Samson, which was Franklin County Chancery Cause No. 2009-135, also had as its subject the lands formerly owned by Cornelius Byrd, Sr., which were the lands that were the subject of Lottie Woods’s suit in Franklin County Chancery Cause No. 2007-017.

#### **B. Course of the Proceedings**

After being served with the Complaint, Cornelius Byrd, Jr. and Jeremy Howell as attorney-in-fact for Cornelius Byrd, Jr. through counsel answered the Complaint on September 25, 2009 stating affirmative defenses and denying the substantive allegations of the complaint. Shortly thereafter, Lottie Woods answered the Complaint on October 2, 2009 stating affirmative defenses and denying the substantive allegations of the complaint.

On October 15, 2009, Cornelius Byrd, Jr. and Jeremy Howell as attorney-in-fact for Cornelius Byrd, Jr. filed a Motion for Non-Joinder of Necessary and Indispensable Parties and Motion for Judgment on the Pleadings. On February 8, 2010, Samson filed his response to these motions and also filed a Motion for Leave to Amend the Complaint to join the additional necessary parties. Subsequently, on March 24, 2010, after the entry of an Agreed Order allowing the amendment to the Complaint, Samson filed his Amended Complaint naming Jeremy Howell,

individually, Wendy McEwen Howell, individually, Michael W. Byrd, and G & G Outdoors, LLC as defendants in addition to those previously named in the original complaint. These additional parties were necessary in that some of the subject lands had been conveyed to them after the Judgment was entered in Cause No. 2007-017.

On June 2, 2010, Wendy Howell, Jeremy Howell, Cornelius Byrd, Jr. and Jeremy Howell as attorney-in-fact for Cornelius Byrd, Jr., through their counsel, filed two motions: (1) a Motion for Summary Judgment, alleging simply that Samson's Rule 60(b) claims were time-barred for not having been filed within 6 months of the date of the Judgment, and (2) a Motion for Partial Summary Judgment alleging that there were no genuine issues of material fact as to the legitimacy of Cornelius Byrd, Jr., because he had presented a copy of an Illinois birth certificate for one "Cornelius Fred Byrd," whose father was listed as "Cornelius Byrd" and whose mother was listed as "Oquilla Cobb." On January 24, 2011, Samson filed his response with supporting authorities to both motions for summary judgment. These two motions for Summary Judgment were set by agreement of counsel to be heard on January 25, 2011.

### **C. Disposition in the Court Below**

After the hearing on these two motions for partial summary judgment, the lower court ruled that all claims as to all parties would be dismissed and directed counsel for defendants Jeremy Howell, Wendy Howell, and Cornelius Byrd, Jr. to draft an Order to that effect. Shortly thereafter, an Order for Dismissal and Final Judgment was entered on February 3, 2011 dismissing all of Samson's claims with prejudice as to all parties.

Samson filed a Motion for Reconsideration, but did not bring on that Motion for a hearing and, instead, timely filed his Notice of Appeal to this Honorable Court on March 4, 2011.

**D. Statement of Facts Relevant to the Issues Presented for Review**

In the Motion for Summary Judgment, the sole issue presented was whether Samson's claim for relief from judgment is time-barred by M.R.C.P. 60. *Record*, pp. 146-147. The sole issue presented in the Motion for Partial Summary Judgment was whether there was any genuine issue of material fact on the question of Cornelius Byrd, Jr.'s legitimacy in light of the Illinois birth certificate that had been produced as the sole and only evidence of legitimacy. *Record*, pp. 154-156.

In the November 17, 2007 judgment (the judgment from which relief is being sought), the trial court found that Woods caused summons to be issued via publication to the unknown heirs of Cornelius Byrd, the estate of Cornelius Byrd, and all persons or entities claiming an interest in the property. *Record*, p. 25. The trial court further found that Cornelius Byrd, Jr. was the only party who responded to said summons by publication. *Id.*

Samson testified at the January 25, 2011 hearing on the motions for summary judgment that he had not received notice of the prior lawsuit filed by Woods. *Transcript of hearing dated January 25, 2011*, p. 14. Samson further testified that he initially learned of the lawsuit concerning the land sometime in September of 2008 through an individual named Woodrow Jones. *Id.* After learning of the lawsuit, Samson testified that he sent a letter to the court protesting the actions of Woods on September 28, 2008. *Transcript of hearing dated January 25, 2011*, p. 39. It was also pointed out at this hearing that the first attempt by Samson to have



any input into Woods' claims for adverse possession was a only four days after the final hearing which took place on September 24, 2008. *Transcript of hearing dated January 25, 2011*, pp. 39-40. The trial court found that even though Samson wrote the aforementioned letter to the court in September in an attempt to have some input into the litigation, that nevertheless, his claim was time-barred by the Mississippi Rules of Civil Procedure since he did not formally file his complaint for relief from judgment until approximately nine months later. *Transcript of hearing dated January 25, 2011*, p. 56-57.

In Woods' original complaint for adverse possession in Cause No. 2007-017, the subject property was purported to have been abandoned by Cornelius Byrd, the estate of Cornelius Byrd and any heirs of Cornelius Byrd and/or all parties claiming interest in the land. *Record*, p. 18. Woods further claimed that that she and her predecessors have been in possession of the subject property since 1987 and her father, James Leslie Byrd, since on or before 1975. *Record*, p. 18. However, her brother, Samson, has maintained that he has also been in continuous possession of the subject property well in excess of (10) years and it was only through the permission of Samson that Woods continued to reside on said property *Record*, p. 8.

Woods testified at the hearing on her complaint for adverse possession that she was the sole heir of Cornelius Byrd. *Record*, p. 23. This representation by Woods was later called into question (and ultimately determined to be a falsehood or misrepresentation to the Court) when Cornelius Byrd, Jr. made an appearance, and upon re-hearing on September 24, 2008, the trial court determined that through the evidence of the Illinois birth certificate that Cornelius Byrd, Jr. is the sole surviving heir of Cornelius Byrd, Sr. *Record*, pp. 25. At the January 25, 2011 hearing on the motions for summary judgment, the trial court re-visited this issue, and re-stated that

Court found Cornelius Byrd, Jr. to be the sole heir of Cornelius Byrd, Sr. based upon the copy of the Illinois birth certificate of “Cornelius Fred Byrd.” *Transcript of hearing dated January 25, 2011*, p. 11. However, in Samson’ Motion for Reconsideration, new documentary evidence was produced showing that the parents of Cornelius Byrd, Jr. were not married at the time of his birth (due to the marriage of Oquilla Cobb and Cornelius Byrd, Sr. being bigamous), and thus, Cornelius Byrd, Jr. was not the legitimate child of Cornelius Byrd, Sr. *Record*, p. 196 and 200-203.

At the conclusion of the January 25, 2011 hearing, which hearing was set by the parties for the purpose of arguing a Motion for Summary Judgment and a Motion for Partial Summary Judgment, both motions having been filed by less than all parties as to less than all of the claims stated in Samson’s Complaint, the trial court ruled that all of Samson’s claims—including his claims for adverse possession, for injunctive relief, and for relief from judgment independent of Rule 60—as to all parties should be dismissed, notwithstanding the fact that the only matters that were properly before the Court for resolution on that date were two motions for summary judgment that were filed by less than all of the parties and which touched upon less than all of the claims stated in Samson’s Amended Complaint. *Transcript of hearing dated January 25, 2011*, p. 58.

## **SUMMARY OF THE ARGUMENT**

As to the first issue presented regarding the motion for summary judgment as to whether Samson's claim is time-barred by Rule 60 of the MS Rules of Civil Procedure, Samson argues simply that his claims under Rule 60(b) are not time-barred in that they were filed within a "reasonable time" under the circumstances.

As to the second issue presented regarding the motion for partial summary judgment on the issue of whether the legitimacy of Cornelius Byrd, Jr. was established by the copy of the Illinois birth certificate, Samson maintains that a birth certificate by itself is not clear and convincing proof of legitimacy or heirship under Mississippi Law. A birth certificate may be some proof of paternity, but a birth certificate does not clearly and convincingly prove (or at least it does not remove any genuine issue of material fact) that the mother and father listed were legally married at the date of the birth of the child, nor whether the listed mother and father had any other children or possible heirs. Accordingly, the mere production of a birth certificate should not be sufficient to establish that there are no genuine issues of material fact as to the question of legitimacy.

As to the third and final issue, very simply, Samson maintains that it was error for the trial court to enter a final judgment dismissing all claims as to all parties after a hearing where the only issues properly before the Court for hearing were issues raised by two motions for partial summary judgment filed by less than all parties as to less than all claims. Neither Samson nor his counsel, nor any other party or counsel appeared for trial on January 25, 2011. Rather, Samson and the other parties present appeared to argue two motions for summary judgment as to less than all parties and less than all claims. Nevertheless, the lower court essentially took the

case in hand and, *sua sponte*, required Samson to try all of his claims on essentially a couple of hours' notice. This was, very simply and clearly, a violation of the Rules of Civil Procedure as well as Samson's constitutional and other rights to fair notice and an opportunity to be heard.

In essence, Samson was required by the lower court to make the proverbial bricks without straw. Not surprisingly, the bricks he produced under such conditions were less than satisfactory. Samson maintains that a litigant should be entitled to the procedural safeguards of the Rules of Civil Procedure and of due process in order to be afforded a fair opportunity to present his or her proof to the trial court after notice and after having sufficient and procedurally proper time to prepare, and Samson maintains that a litigant should have such rights whether the trial court perceives the case to be strong or less than strong in terms of the burden of proof the litigant will face at trial. Under the Rules of Civil Procedure, a litigant simply can not be required, upon pain of dismissal, to prematurely try his or her case on the merits at a hearing on a motion for summary judgment.

## **ARGUMENT**

### **I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO THE ISSUE OF WHETHER SAMSON BYRD’S CLAIM WAS TIME-BARRED UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE?**

#### **A. STANDARD OF REVIEW**

The standard of review of the granting or denial of a Motion for Summary Judgment is de novo. *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 ¶8 (Miss. 2009) (citations omitted).

#### **B. APPLICABLE LAW**

A motion for summary judgment is proper when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Miss. R. Civ. P.* 56(c).

Once the moving party has made a showing that there are no triable issues of fact, in order to avoid summary judgment, the non-moving party is required to offer specific, probative evidence demonstrating that triable issues of material fact exist. *Smith v. First Fed. Sav. & Loan Ass’n of Grenada*, 460 So. 2d 786, 792 (Miss. 1984). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations of the complaint, but must set forth specific facts showing that there is a genuine issue for trial. *Miss. R. Civ. P.* 56(e).

Mississippi law interpreting Rule 60 of the Mississippi Rules of Civil Procedure has defined the time limits by which a movant may request relief from a judgment as being within (6) months if pled under M.R.C.P. 60(b)(1)-(3) or within a “reasonable time” if pled under

M.R.C.P. 60(b)(4)-(6). *MS R. Civ. P. 60; Briney v. United States Fidelity & Guaranty, Co.*, 714 So.2d 962, 966 (Miss. 1998); *Lose v. Illinois Cent. Gulf R.R.*, 584 So.2d 1284, 1286 (Miss. 1991), *Stringfellow v. Stringfellow*, 451 So.2d 219, 221 (Miss. 1984). The *Briney* case specifically states, “what constitutes reasonable time must of necessity depend upon the facts in each individual case.” *Briney*, 714 So.2d 962 at 967 (Miss. 1991) (citations omitted). The *Briney* court further stated, “The Courts consider whether the party opposing the motion has been prejudiced by the delay and whether the moving party has *some reason* for failing to take appropriate action sooner.” *Id.* (emphasis added).

In addition, Mississippi Law makes clear that when an independent cause of action is sought under Rule 60 of the Mississippi Rules of Civil Procedure, there is no time limit as to when the action may be brought save laches. *MS R. Civ. P. 60; Hester v. State*, 749 So.2d 1221, 1223 (Miss.App.1999) (citing *In re Casco Chem. Co.*, 335 F.2d 645, 652 (5th Cir. 1964)).

### **C. DISCUSSION**

It is undisputed and the record will reflect that Samson filed his complaint for relief from judgment on August 4, 2009, approximately nine months after the November 17, 2008 judgment was entered. In Samson’s complaint, he requested relief under M.R.C.P. 60(b)(1); (b)(4); and (b)(6); thus, at the outset, to the extent that the trial court based its ruling on the conclusion that Samson had to file his Rule 60 motion within six months, the trial court to that extent committed reversible error, because the claims under Rule 60(b)(4) and (6) are not subject to the 6 months time limit applicable to other subsections of Rule 60(b). The Rule 60(b)(4) and (6) claims asserted by Samson are, instead, required to be filed within “a reasonable time.”

The question is, therefore, not whether Samson filed within 6 months, but whether he filed within a reasonable time under the circumstances. Samson maintains that, under the holding of *Briney*, 9 months can be and in fact was a reasonable time under the circumstances of this case. *Briney*, 714 So.2d 962 at 967 (Miss. 1991).

Samson testified that he originally learned of the litigation in Cause No. 2007-017 not through publication notice (or another form of appropriate procedural notice under M.R.C.P. 4), but rather through a third party bringing the original litigation to his attention shortly after the final hearing. To make matters worse for Samson, Lottie Woods' is his sister who knew of Samson's interest in the subject property well before the litigation began and yet proceeded to undermine this by ignoring that fact. After all, it was Samson who allowed Woods' to reside on the subject property through permission. At all times, and long before this litigation began, Woods was very much aware that Samson had direct ties and interest in the subject property, but still sought to only issue the bare minimum publication notice as if Samson were a non-resident potential unknown heir (he is in fact a resident of MS and also a known potential heir of Cornelius Byrd, Sr., who was his uncle). M.R.C.P. 4(c)(4)(D) makes clear that publication summons may properly be issued to non-residents, including *unknown* heirs, or other persons not to be found within this State upon diligent search and inquiry. *MS. R. Civ. P.*, 4(c)(4)(D) (emphasis added). No affidavit as to the non-residence of Samson or of his being not to be found upon diligent search and inquiry was filed in any of the relevant proceedings.

Furthermore, Samson, through a letter he personally sent to the court a few days after the final hearing on Woods' complaint, attempted to interject himself into the litigation. This attempt was done, *pro se*, in a good faith attempt to get some objection on record in the file of

the case, and this was done prior to the final judgment being entered on November 17, 2008.

However, even though it later became apparent that all parties were aware of the letter of protest Samson filed, no correspondence or notice or communication of any kind appears in the record in response to the filing of his letter of protest. It was after this apparently failed first attempt to become part of the litigation, that he sought legal counsel. In light of particular facts and circumstances in this case and in keeping with the spirit of *Briney*, Samson filed his complaint for relief from judgment within a “reasonable time” and for “some reason.” *Briney*, 714 So.2d 962 at 966-967 (Miss. 1991) (emphasis added).

In addition, as mentioned above, the *Briney* court held that courts will look to see if the time periods involved in the filing would be so long as to prejudice the non-moving party. *Id.* at 967. Samson would maintain that the parties to the action in Cause No. 2007-017 would not suffer any prejudice by a filing that was done (9) months after the final judgment. The record does reflect that the appellees precipitously conveyed parts of the subject land to third parties almost immediately after the entry of the Judgment in Cause No. 2007-017. Thus, even if Samson had filed his 60(b) motion within a very short time, such as a month or two, the parties would still face the same issue with having so quickly conveyed the property to third parties. Further, the third parties to whom the property was conveyed were not unrelated, innocent purchasers with no knowledge of the history of the land and the litigation surrounding it. Rather, the third parties were (1) Lottie Woods’s son, (2) Jeremy Howell and his wife, Wendy Howell, and (3) G&G Outdoors, LLC a company that had already been actively seeking and using the subject land under lease for recreational and/or hunting purposes. Thus, the third parties all received their conveyances with some level of actual or constructive knowledge of the history of



the land and the potential for further conflict. Thus, the conveyance of the land so quickly after the entry of the Judgment was done at their own peril knowing that some interested party may show up claiming interest especially in a time period of under (1) year from final judgment. *See, Briney v. United States Fidelity & Guaranty, Co.*, 714 So.2d 962, 967 (Miss. 1998) (quoting *Heirs-at-Law & Beneficiaries of Gilbert v. Dresser Industries, Inc.*, 158 F.R.D. 89 at 95-96) (N.D.Miss. 1993). Furthermore, all parties knew or should have known of the attempt by Samson to interject himself into the proceedings prior to the November 17, 2008 judgment. Therefore, any prejudice appellees may attempt to claim will lack merit in light of the facts and circumstances of this case.

As the record reflects, in addition to the Rule 60(b) motions for relief from judgment claimed by Samson, he stated independent claims for relieve from judgment. Under the case of *Hester v. State*, the Court held that when independent claims for relief from judgment are sought, there is *no time limit* save laches. *Hester v. State*, 749 So.2d 1221, 1223 (Miss.App.1999) (citing *In re Casco Chem. Co.*, 335 F.2d 645, 652 (5th Cir. 1964)) (emphasis added). Thus, here again, to the extent that the lower court's ruling was in error to the extent that it failed to consider the doctrine of laches in finding that Samson's independent claim for relief from judgment was time barred.

In light of this, Samson maintains that this Court should find that the lower court committed reversible error in granting appellee's motion for summary judgment based simply on the fact that Samson filed his complaint (9) months after the final judgment was entered. From the facts, Samson filed his complaint not solely based on M.R.C.P. 60(b)(1), but also under M.R.C.P. 60(b)(4) and (6), and also on independent grounds for relief from judgment. In

keeping with the standard as set forth in *Briney* and *Hester*, this court should find Samson, in all aspects and under the relevant circumstances, filed his complaint within a reasonable time and/or within allowable time periods under the doctrine of laches. *Briney*, 714 So.2d at 966-967; *Hester*, 749 So.2d at 1223.

**II. WHETHER THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT AS TO THE ISSUE OF THE LEGITIMACY OF CORNELIUS BYRD, JR. AS SOLE SURVING HEIR OF CORNELIUS BYRD, SR.?**

**A. STANDARD OF REVIEW**

The standard of review of the granting or denial of a Motion for Summary Judgment is *de novo*. *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 ¶8 (Miss. 2009) (citations omitted).

**B. APPLICABLE LAW**

A motion for summary judgment is proper when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Miss. R. Civ. P. 56(c).

Once the moving party has made a showing that there are no triable issues of fact, in order to avoid summary judgment, the non-moving party is required to offer specific, probative evidence demonstrating that triable issues of material fact exist. *Smith v. First Fed. Sav. & Loan Ass’n of Grenada*, 460 So. 2d 786, 792 (Miss. 1984). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations of the complaint, but must set forth specific facts showing that there is a genuine issue for trial. Miss. R. Civ. P. 56(e).

Under Miss. Code. Ann. §91-1-15, to establish legitimacy and heirship, it must be shown (a) whether the natural parents were legally married prior to the birth of the child; (b) whether there has been an adjudication of paternity prior to the death of an intestate; or (c) whether there has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under Sections 91-1-27 and 91-1-29 within one (1) year after the death of the intestate. *Miss. Code. Ann.* § 91-1-15.

### **C. DISCUSSION**

In the case *sub judice*, the trial court granted partial summary judgment in favor of appellees on the issue of the legitimacy of Cornelius Byrd, Jr. based solely on a copy of an Illinois birth certificate for “Cornelius Fred Byrd.” The father’s name on this birth certificate is listed as “Cornelius Byrd, Sr.” and the mother’s name is listed as “Oquilla Cobb.” This was the only evidence presented (other than the testimony of Cornelius Byrd, Jr. in Cause No. 2007-017) to prove the legitimacy and heirship of Cornelius Byrd, Jr.

On of the key issues raised by Samson in his complaint, is the issue of the legitimacy of Cornelius Byrd, Jr. Despite efforts by Samson through discovery to have Cornelius Byrd, Jr. or one of the parties acting on his behalf to produce a marriage certificate or license, appellees failed and/or refused to produce any marriage license or any other record that would prove that Cornelius Byrd, Sr. and Oquilla Cobb were legally married at the birth of Cornelius Fred Byrd, as required by Miss. Code. Ann. §91-1-15. Instead, the appellees and the lower court in its ruling relied solely and exclusively on the copy of the birth certificate and also on the fact that Samson did not have any documentary proof to show that Cornelius Byrd, Sr. and Oquilla Cobb were not legally married. How Samson was supposed to prove the non-marriage of two people

by documentary evidence (especially in light of the fact that States do not typically maintain registries of people who are not legally married) was never entirely clear. Nevertheless, the Court insisted that Samson produce some documentary evidence of non-marriage to contradict the birth certificate, or else face the granting of summary judgment (and this was required even though the birth certificate does not state (a) whether the mother and father were legally married, and (b) whether there were any other children born to this mother and/or father, even if they were legally married).

It can be found nowhere under Mississippi statutory law concerning legitimacy and heirship that a mere recording of a birth certificate can be used as the sole determining factor of legitimacy and heirship. Yet, from the transcript of the hearing held on January 25, 2011, this is exactly what the trial court did in this case. From that transcript, the trial court stated, “Well, this Court has found in the previous action affirmatively *based on the birth certificate produced*, only evidence produced, that Cornelius Fred Byrd was the son of Cornelius Byrd.” *Transcript of January 25, 2011 hearing*, p. 55 (emphasis added).

In spite of the near impossibility of finding documentary proof of non-marriage, Samson did, in fact, locate such proof several days after the January 25, 2011 hearing. In Samson’s Motion for Reconsideration, the marriage license of Cornelius Byrd, Sr. was attached as an Exhibit and tends to prove that Cornelius Byrd, Sr. was, in fact, not married to Oquilla Cobb at the time of Cornelius Fred Byrd’s birth. From this marriage license, it appears that (1) Cornelius Byrd, Sr. was legally married to “Willie Taylor” at the time of the alleged birth of Cornelius Fred Byrd; and (2) that he was purported to be married also to Oquilla Cobb at the same time, which

would make the marriage to Oquilla Cobb void *ab initio* on grounds of bigamy. *MS Code Ann.* 97-29-13.

Therefore, very simply, the trial court committed reversible error in holding that there was no genuine issue of material fact as to the legitimacy of Cornelius Byrd, Jr. because (1) a proper adjudication of legitimacy and/or heirship was never entered as per Miss. Code. Ann. §91-1-15 (in that the Judgment from Cause No. 2007-017 which adjudicated paternity was a purported Agreed Judgment based upon a settlement reached between Woods and Cornelius Byrd, Jr.; thus, the question of legitimacy could not have been adjudicated since the case and that particular issue was not fully tried); and (2) Cornelius Byrd, Sr. was legally married to one Willie Taylor at the time of the purported birth of Cornelius Fred Byrd thereby making his marriage to Oquilla Cobb void *ab initio*. *Stutts v. Stutts Estate*, 194 So. 2d 229 (Miss. 1967).

### **III. WHETHER THE TRIAL COURT ERRED IN DISMISSING ALL CLAIMS AGAINST ALL PARTIES WITH PREJUDICE?**

#### **A. STANDARD OF REVIEW**

Appellant maintains that on this issue, as with the others that the standard of review should be de novo, because the Court's ruling was based upon two motions for summary judgment. *Estate of Northrop v. Hutto*, 9 So. 3d 381, 384 ¶8 (Miss. 2009) (citations omitted).

#### **B. APPLICABLE LAW**

A motion for summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c).

Once the moving party has made a showing that there are no triable issues of fact, in order to avoid summary judgment, the non-moving party is required to offer specific, probative evidence demonstrating that triable issues of material fact exist. *Smith v. First Fed. Sav. & Loan Ass'n of Grenada*, 460 So. 2d 786, 792 (Miss. 1984). When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations of the complaint, but must set forth specific facts showing that there is a genuine issue for trial. Miss. R. Civ. P. 56(e).

### **C. DISCUSSION**

As the record reflects, the January 25, 2011 hearing was set for the appellees' Motion for Summary Judgment and Motion for Partial Summary Judgment. The hearing was set and noticed between counsel only for the specific motions and issues of (1) Appellee's Motion for Summary Judgment as to the issue of the timing of Samson's Complaint under M.R.C.P. 60; and (2) Appellees' Motion for Partial Summary Judgment as to the issue of the legitimacy of Cornelius Byrd, Jr. No other motions were before the Court or set to be heard on that day.

In light of this, Samson maintains that the trial court committed reversible error on issuing a Final Judgment dismissing all claims as to all parties when the only motions before the Court were motions between less than all parties for less than all claims.

If the Court's final judgment on all issues was ultimately the result of her finding that summary judgment was appropriate as to the other claims and parties as well, then the lower court committed reversible error in not giving Samson at least 10 days' notice before hearing those other issues that were not noticed for January 25, 2011.

It is well-settled and requires little discussion that under Mississippi Law ten (10) days' notice is required prior to a hearing on a motion for summary judgment. *MS. R. Civ. P. 56(c)*;

*Jones v. Regency Toyota, Inc.*, 798 So.2d. 474, 476 (Miss. 2001); *Palmer v. Biloxi Regional Medical Center, Inc.*, 649 So.2d 179, 181 (Miss. 1994). In *Palmer*, this Court reversed the decision by the trial court to rule on an *ore tenus* motion for summary judgment without the requisite notice. *Palmer v. Biloxi Regional Medical Center, Inc.*, 649 So.2d 179 (Miss. 1994).

The facts in the record reveal that at the January 25, 2011 hearing on the motions for summary judgment, the trial court dismissed all claims with prejudice, including Samson's claim for adverse possession. This was done notwithstanding the fact that counsel for the movants themselves readily conceded that there were disputed fact issues as to the adverse possession claims, at least as to the subject property in Section 10. *See Trans. p. 5, lns. 25-29, and p. 6, lns. 1-4 and p. 6, lns. 20-27.* In addition, counsel for Woods stated that they also found there to be disputed fact issues as to the judgment from which relief was being sought. *See Trans. p. 7, lns. 1-29 and p. 8, lns. 1-6.*

Therefore, the trial court clearly committed reversible error when it dismissed all claims as to all parties with prejudice, when the only matters that were properly before the Court that day were the two specific motions for summary judgment, discussed above.

## CONCLUSION

In light of the above and foregoing, Samson respectfully prays that this Honorable Court will reverse the trial court's judgment and remand the case back to the trial Court for further proceedings and a trial on the merits.

Respectfully submitted, this the 12th day of October, 2011.

SAMSON BYRD

BY:

  
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**CERTIFICATE OF SERVICE**

I, Steven Price Nixon, do hereby certify that I have this day caused to be mailed via U.S. Mail, first class, and postage pre-paid, and to be transmitted via email (where an email address is indicated), a true and correct copy of the above and foregoing document to the following:

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This the 12<sup>th</sup> day of October, 2011.



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