IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEMPSEY SULLIVAN **APPELLANT**

v. **NO. 2011-CA-00820**

STEVE MADDOX and SAMUEL MADDOX **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

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 Mississippi Supreme Court and Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Dempsey Sullivan is the sole Appellant.
2. Terrell Stubbs is the attorney of record for Dempsey Sullivan, the Appellant.
3. Samuel Maddox is an Appellee.
4. Steve Maddox is an Appellee.
5. James B. (Rus) Sykes III is lead attorney for Appellees.
6. L. Wesley Broadhead is an attorney for Appellees.
7. David Ringer is a former attorney for Appellees.
8. The Honorable David Shoemake, Chancery Court Judge 13th District.
9. The Honorable Larry Buffington, former Chancery Court Judge 13th District.

RESPECTFULLY SUBMITTED BY:

James B. (Rus) Sykes III (MSB [redacted])
Attorney for Appellees, Steve Maddox and Samuel Maddox

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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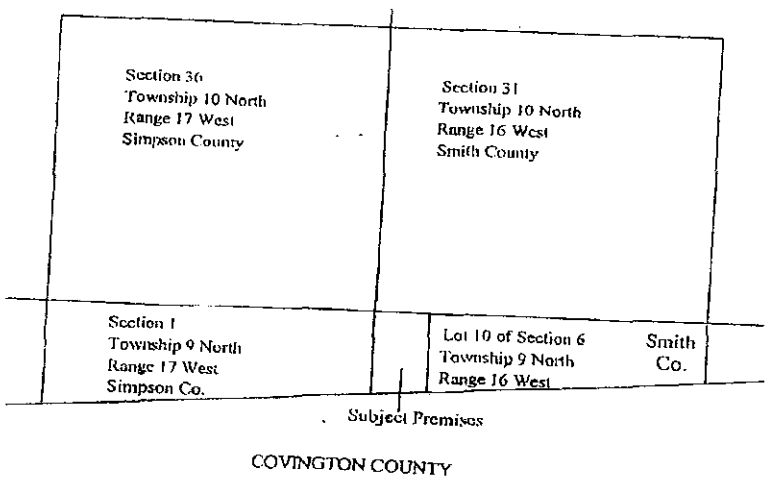
STATEMENT OF THE CASE

A. Nature of the Case

This matter instigated by Appellant's complaint seeking to quiet/confirm his title to approximately eleven acres (hereinafter referred to as the "Land") by adverse possession; the location of the Land is depicted on the illustration below:



The Land can be described as being located west of the most easterly line of Section 1, Township 9 North, Range 17 West, St. Stephens Meridian, Mississippi, as shown on the 1821 GLO survey plat.

The Land was ceded to the United States and became part of the Public Domain; however because it has not been surveyed, platted, and patented, the Land remains part of the Public Domain. The main issue disposed of by the lower court is that it did not have subject matter jurisdiction to confirm/quiet title to the Land, which is part of the Public Domain, i.e. title to lands

vested in the United States. The Chancellor found Appellants complaint, motion for recusal, and allegations of unreported campaign contributions to be frivolous and/or brought without substantial justification under Rule 11 Miss. Rules Civ. Pro. and the Litigation Accountability Act Miss. Code Ann. § 11-55-7.

B. Course of Proceedings Below

On August 26, 2005, Appellant filed his complaint. (R.E. Tab 7 pp. 1-4; R. pp. 8-11). At the time the complaint was filed Appellant and his counsel knew title to the Land was vested in the United States, but proceeded to file the complaint knowing it had no hope of success. "I told him, in the initial outset, that there was weakness in their case because there was no patent, and there was no government survey." (T. p. 102, 104).

On October 7, 2005, the Appellees filed their answer to complaint. (R. pp. 27-31).

On February 22, 2011, the Court set this matter for trial on the merits on May 3, 2011.

On April 6, 2011, the Appellees filed their motion for summary judgment. (R. pp. 250-301).

On April 12, 2011, Appellant filed his motion for recusal. (R. pp. 311-313).

On April 18, 2011, Appellees filed their response to Appellant's motion for recusal (R. pp. 315A-315C). The motion for recusal was fatally defective because it did not comply with the express dictates of Uniform Chancery Court Rule 1.11; more specifically, it was not filed timely and it did not include the mandatory affidavit.

On May 3, 2011, the lower court held hearings on Appellant's motion for recusal and Appellees' motion for summary judgment. (T. pp. 57-82).On May 3, 2011, the order denying Appellant's motion for recusal was filed. (R.E. Tab 1, p. 1; R. pp. 330).

On June 2, 2011, summary judgment was filed. (R.E. Tab 3, pp. 1-5; R. pp. 385-389). In summary the court found, ordered, and adjudged that title to the Land was vested in the United States; that title to the Land could not be confirmed/quieted by adverse possession because title to the Land was vested in the United States and the claims dismissed due to lack of subject matter jurisdiction; and in its sound discretion imposed Miss. Rules Civ. Pro. Rule 11 sanctions against Dempsey Sullivan and Terrell Stubbs.

On June 8, 2011, Appellant, Dempsey Sullivan, filed his notice of appeal of the Summary Judgment. (R. pp. 395-396). Terrell Stubbs did not file a notice of appeal of the Summary Judgment, or join the one filed by Dempsey Sullivan. See also p. 5 Appellant's brief, "On June 8, 2011, Dempsey timely filed his notice of appeal in this matter, appealing the trial court's Summary Judgment..."

On June 15, 2011, the final judgment was filed. (R.E. Tab 5, pp. 1-7; R. pp. 401-407). And after considering the motion for sanctions, response to motion for sanctions, other pleadings, testimony, and arguments from counsel, the Court, in its sound discretion, awarded judgment against Dempsey Sullivan and Terrell Stubbs in the amount of $42,922.91 for their willful violations of Miss. Rules Civ. Pro. Rule 11 and the Litigation Accountability Act § 11-55-5, 7 Miss. Code Ann. (1972, as amended).

On July 8, 2011, the Appellant, Dempsey Sullivan, filed his notice of appeal of the final judgment. (R. pp. 424-425). Terrell Stubbs did not file a notice of appeal of the Final judgment, or join the one filed by Dempsey Sullivan. See also p. 6 Appellant's brief, "On July 8, 2011, Dempsey timely filed his notice of appeal in this matter, appealing the trial court's Final Judgment entered

in this case on June 15, 2011. (R. pp. 424-425)."

C. **Statement of Facts**

Title to the Land is vested in the United States. (R.E. Tab 10 pp. 1-2; R. pp. 268-271; R.E. Tab 3, pp. 1-5; R. pp. 385-389; T. p. 80).

In addition to presenting the affidavit of Charles Hugh Craft, PLS in support of their motion for summary judgment, attached as an exhibit the deposition of Appellant's expert, William (Bill) Miller, PLS, who opined the United States had not disposed its title to the Land. (R. pp. 250-301).

Appellant filed a complaint seeking to confirm/quiet his title to the Land by adverse possession. For the trial court's findings pertaining to the complaint's numerous fatal defects see: (T. pp. 78-80).

The trial court dismissed the civil action because it lacked jurisdiction to confirm/quiet title by adverse possession because title to the Land is vested in the United States. (R.E. Tab 3, pp. 1-5; R. pp. 385-389; T. pp. 80-81).

Appellant's motion for recusal did not include the mandatory affidavit and was not filed timely. After the motion was denied, Terrell Stubbs accused the Chancellor of not reporting certain campaign contributions, but to date neither Appellant or Terrell Stubbs have filed a motion to recuse based on this accusation. (T. pp. 64-66)

The Chancellor imposed sanctions against Appellant and Terrell Stubbs for their willful violations of Rule 11 and Litigation Accountability Act. (T. pp. 137-149).

Terrell Stubbs did not notice his appeal of the trial court's Summary Judgment or the Final Judgment, and there is a motion pending before this Honorable Court seeking to have Terrell

Stubbs dismissed from the appeal.

SUMMARY OF THE ARGUMENT

Appellees humbly submit the Court's analysis start with the date Appellant filed his complaint, August 26, 2005. At the time of filing Appellant and Terrell Stubbs knew it had no hope of success because title to the Land was vested in the United States. Come forward to November 2010, when Appellant and Terrell Stubbs learned that Hon. David Shoemake defeated Hon. Larry Buffington in the general election for Chancery Court Judge, 13th District, P/1. The Appellant did not file his motion for recusal until April 12, 2011, which was after the filing and service of Appellees motion for summary judgment, but Appellant and Terrell Stubbs did not make any attempt to set the motion for recusal for hearing on a date before the noticed hearing on the motion for summary judgment/trial. Therefore, as to Uniform Chancery Court Rule 1.11, the motion for recusal was not timely filed. Moreover, the motion for recusal was fatally defective because it did not include the mandatory affidavit. The unsupported motion for recusal was based on the allegation that an attorney for Appellees had, at one time, represented the court administrator's husband in a unrelated criminal matter. The Chancellor did not find that the fact that an attorney for Appellees represented the court administrator's husband falls within the purview of the applicable Judicial Canon(s). (T. pp. 61-65).

After the motion for recusal was denied, Terrell Stubbs accused the Chancellor of taking unreported campaign contributions, which he "learned of days before" but did and has not filed and motion and/or affidavit to that effect. (T. p. 66).

As to the allegation pertaining to ex parte communications between the Chancellor and

the court administrator, Appellees assume Appellant is referring to the Chancellor taking judicial notice of the fact that Terrell Stubbs represented the court administrator, Donna Stuckey, in a divorce action. (T. pp. 76, 86-87). By doing so the Chancellor did not improperly inject himself into the case nor did the Chancellor show any partiality to Appellees because one of their attorneys represented the court administrator's husband in an unrelated criminal matter. The judicial notice shined light on the absurdity of the argument in support of the motion to recuse.

As previously stated, Appellant filed his motion for recusal on April 12, 2011, and after the Chancellor denied said motion on May 3, 2011, Appellant's counsel asked the Court to allow testimony about the Chancellor taking unreported campaign contributions. Heretofore the Appellant has not filed a motion for recusal to include this allegation, with or without affidavit, nor did Appellant file a motion for continuance. It is important to note that Terrell Stubbs represented to the Chancellor that he learned of this allegation days before the hearing on May 3, 2011. (T. p. 61).

The summary judgment was proper upon the Chancellor finding that title to the Land is vested in the United States, and the trial court did not have subject matter jurisdiction to quiet/confirm title by adverse possession to title to the Land vested in the United States. Miss. Code Ann. § 15-1-13, *United States v. Denby*, 522 F.2d 1358 (5th Cir. 1975).

Simpson County Chancery Court cause number 2010-0133 is not on appeal to this Honorable Court, and Appellant's references thereto may be misleading.

The sanctions awarded against Appellant and Terrell Stubbs were fair and reasonable in light of the totality of the trial court's findings, including without limitation the admission by Terrell

Stubbs to the Chancellor that there was really no basis in filing this suit and motion for recusal.

ARGUMENT

I. THE CHANCELLOR ERRED IN PRECLUDING DEMPSEY A FAIR OPPORTUNITY TO PRESENT EVIDENCE ON HIS MOTION FOR RECUSAL OR MAKE A PROFFER ON THE RECORD, IN COMMENCING EX PARTE COMMUNICATIONS, AND TESTIFYING AGAINST DEMPSEY AND HIS COUNSEL IN DENYING SAID MOTION

The trial court did not manifestly abuse its discretion in denying Appellant's motion for recusal, and in support Appellees would show the following:

In determining the question of recusal, the propriety of the judge's sitting is to be decided by the judge and is subject to review only in case of manifest abuse of discretion. *Hubbard v. State*, 919 So.2d 1022 (Miss. Ct. App. 2005).

Uniform Chancery Court Rule 1.11 states that, "A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true." (Emphasis added).

Appellant's motion for recusal does not include the mandatory affidavit. (R. pp. 311-313).

Further referring to Uniform Chancery Court Rule 1.11, Appellant's motion for recusal was not filed with the Chancellor 30 days following notification that Hon. David Shoemake, the newly elected Chancellor, was the assigned judge. Hon. David Shoemake was elected in November 2010 and began his term in January 2011. In a conference with all counsel of record, the Chancellor set this matter for trial on the merits on May 3, 2011. The Appellant did not file his motion for recusal

until April 12, 2011, and notice it for hearing on May 3, 2011. Appellant did not make any effort to have a hearing on the motion for recusal on a date before May 3, 2011, which was the day of trial. Furthermore, neither Appellant or Terrell Stubbs has filed a motion for recusal based on their allegation of unreported campaign contributions.

A hearing on the motion for recusal was held on May 3, 2011; therefore Appellant's allegation that he was denied a hearing is without merit. (T. pp. 57-82). Also, Appellant argues that the Chancellor erred by precluding him from producing any evidence whatsoever in support of his motion for recusal. This argue is without any merit because at the hearing the Chancellor gave due consideration to the underlying alleged factual basis of the motion for recusal, to wit: the fact that an attorney for Appellees representation of the court administrator's husband in an unrelated criminal matter-even though the motion for recusal did not comply with Uniform Chancery Court Rule 1.11's mandatory provisions.

Irrespective of Uniform Chancery Court Rule 1.11's mandatory provisions, the Chancellor considered the underlying alleged factual basis of Appellant's motion for recusal and did not find that the fact that an attorney for Appellees representation of the court administrator's husband in an unrelated criminal matter was within the purview of Code of Judicial Conduct Canon 3(E)(1)-(2). As to the alleged factual basis for the motion for recusal: (T. p. 61). As to Chancellor's application of alleged factual basis to Code of Judicial Conduct Canon 3(E)(1)-(2) and *Washington Mutual Finance Group LLC vs. Blackman*, 925 So.2d 780 (Miss. 2004): (T. pp. 61-65). As to Chancellor's finding that his impartiality would not be questioned by a reasonable person knowing that his court administrator's husband was represented in an unrelated criminal matter at one

time by an attorney for Appellees: (T. p.65).

Appellant argues that the Chancellor erred in considering the fact that Appellant's counsel, Terrell Stubbs, represented the court administrator in a divorce action. The record is clear that the Chancellor took judicial notice, per Rule 201 Miss. Rules of Evidence, of this fact in open court. (T. pp. 76, 86-87, and 142-143). The Chancellor's taking judicial notice of a fact does not run afoul of Miss. Rules Evid. 605, Code of Judicial Conduct Canons 2(B), 3(B)(7).

Lastly, Appellant argues that he should have been allowed to make an offer of evidence as to the allegation of unreported campaign contributions; however, the allegation was not set out in his motion for recusal, which he had time to seek leave to amend and/or file another motion for recusal; in fact, Appellant did not seek to cure the defective nature of his motion for recusal even after being put on notice via the response thereto that his motion did not include the mandatory affidavit. Hence, one can safely conclude the motion for recusal was filed only for the purposes of delay and/or harassment.

Appellant and his counsel did not offer up this new allegation until the trial court began the hearing on the motion for recusal. The trial court properly refused taking up this new allegation because it was not contained in the motion for recusal or affidavit. Uniform Chancery Court Rule 1.11.

The Chancellor did not manifestly abuse his discretion in denying the motion for recusal, and this issue is without merit.

II. THE CHANCELLOR ERRED BY GRANTING THE DEFENDANT/COUNTER-PLAINTIFF'S JOINT MOTION FOR SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AND THE MADDOXES DID NOT HAVE STANDING TO ASSERT THE INTERESTS OF THE UNITED STATES OF AMERICA

The Land can be described as being located west of the most easterly line of Section 1, Township 9 North, Range 17 West, St. Stephens Meridian, Mississippi, as shown on the 1821 GLO survey plat.

The Land could have been included in the land ceded by the Choctaw in the Treaty of Mount Dexter (1805) and/or the Treaty of Doak's Stand (1816); however any doubt the Land was ceded by the Choctaw to the United States is removed by Article III of the Treaty of Dancing Rabbit Creek (1830) in which the Choctaw nations of Indians cede to the United States the entire country they own and possess east of the Mississippi River.

At the end of the Revolutionary War the Continental Congress passed the Land Ordinance Act of May 20, 1785, authorizing the Treasury Department to survey and sell Public Domain land as a source of revenue to payoff substantial debt. The Public Domain is all the land acquired by the United States for purposes of national expansion; the original Public Domain states were Ohio, Indiana, Illinois, Michigan, Florida, Wisconsin, Alabama, Mississippi, Louisiana, Minnesota, Iowa, Missouri, and Arkansas. The Act established the policy of "survey before settlement"– a policy continuing today. The rectangular survey system was adopted so lands could be identified with certainty by a legal description. The survey of the public lands is the first step in the public land disposal system. Upon completion of a survey, a plat, which is a graphic drawing, is prepared reflecting the boundaries created by each survey and contain the official acreage used in the legal description of the public lands. Thereafter, when the public lands were sold land "patents" were issued. In other words, patents are deeds transferring land ownership from a sovereign (the United States Government) to a buyer. Patents are the first records in a chain of title to a piece

of the Public Domain.

It is undisputed that the title to the Land is vested in the United States. (R.E. Tab 10 pp. 1-2; R. pp. 268-271; R.E. Tab 3, pp. 1-5; R. pp. 385-389; T. p. 80).

On August 26, 2005, Appellant filed his complaint seeking to confirm/quiet his title to the Land by adverse possession. (R.E. Tab 7 pp. 1-4; R. pp. 8-11). As previously stated, at the time of filing Appellant and Terrell Stubbs knew the complaint had no hope of success, e.g. no survey, no patent, and cannot claim title by adverse possession against the United States.

28 U.S.C.A. § 2409(n) provides, "Nothing in this section shall be construed to permit suits against the United States based upon adverse possession." One cannot gain title to land of the United States through adverse possession or through Government's acquiescence. *U.S. v. Pappas*, 814 F.2d 1342.

Because subject matter jurisdiction was questioned, the Appellant bears the burden to prove jurisdiction by a preponderance of the evidence, and as parties to the case Appellees, as well as the Chancellor, have standing to raise the issue of whether or not the trial court has subject matter jurisdiction. *Schmidt v. Catholic Diocese of Biloxi*, 18 So.3d 814 (Miss. 2009).

The Appellant did not prove the trial court had subject matter jurisdiction pertaining to 28 U.S.C.A. § 2409.

The Chancellor dismissed the action because (1) title to the Land is vested in the United States, (2) Appellant's complaint demanded his title to the Land be quieted and confirmed by adverse possession, and (3) under 28 U.S.C.A. § 2409 the trial court does not have authority to quiet and confirm title by adverse possession to the exclusion of all others, which by Mississippi

law would by definition include the interest vested/claimed by the United States.

The Appellant did not show in either his response to the joint motion for summary judgment or at the hearing thereon that there is a genuine issue as to any material fact. The only material fact, the existence of which was not disputed by Appellant, is that title to the Land is vested in the United States, and as a matter of law the matter was dismissed.

Therefore, the trial court did not err by granting the joint motion for summary judgment.

III. THE CHANCELLOR ERRED IN PRECLUDING DEMPSEY A FAIR OPPORTUNITY TO PRESENT EVIDENCE ON HIS MOTION FOR RECUSAL ON MAY 4, 2011 AND IN DENYING SAID MOTION

The hearing on Appellant's motion for recusal filed in Simpson County Chancery Court cause number 2005-256, which is the matter on appeal before this Honorable Court, was held on May 3, 2011, and Appellees incorporate by reference their argument in response to Issue I above.

Appellees incorporate by reference their arguments above in response to Issue, and refer to: (T. pp. 86-88).

Appellant would respectfully point out that Appellant did not file a second motion for recusal based on the "newly discovered evidence" referred to on May 3 and/or May 4, 2011.

This issue is without merit.

IV. THE CHANCELLOR ERRED BY DENYING DEMPSEY AND HIS COUNSEL DUE PROCESS OF LAW WHEN THE CHANCELLOR FOUND DEMPSEY'S COMPLAINT AND MOTION FOR RECUSAL TO BE FRIVOLOUS

Attorney who files papers with no basis in fact does not need any more notice prior to imposition of Rule 11 sanctions than that which is provided by existence of Rule 11. *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339 (1990). But, Appellees would show that Appellant and

counsel opposite received notice of motion for sanctions and hearing on May 31, 2011. (R. pp. 354-380). At the hearing, Appellant withdrew his request for a continuance and announced they were ready to proceed. (T. p. 105). Appellees submit this issue is without merit.

V. THE CHANCELLOR'S FINDING THAT DEMPSEY'S COMPLAINT AND MOTION FOR RECUSAL WERE FRIVOLOUS IS NOT SUPPORTED BY THE EVIDENCE AND IS PREJUDICIAL, UNREASONABLE, ARBITRARY, AND INCONSISTENT WITH SUBSTANTIAL JUSTICE

An abuse of discretion standard is applied when reviewing the imposition of sanctions under Miss. Rules Civ. Proc. 11 and Miss. Code Ann. § 11-55-7. *In re Spencer*, 985 So.2d 330, 337 (Miss. 2008). In considering whether an action is frivolous, so as to trigger the possibility of sanction, the Supreme Court looks to the facts known at the time of filing the complaint. *Eatman v. City of Moss Point*, 809 So.2d 591 (Miss. 2000). A motion or pleading is frivolous "...only when, objectively speaking, the pleader or movant has no hope of success." *In re Spencer*, 985 So.2d 330, 339 (Miss. 2008).

The record supports the Chancellor's finding the Appellant's complaint is frivolous, to wit:

On August 26, 2005, Appellant and Terrell Stubbs filed the complaint seeking to confirm/quiet his title to the Land by adverse possession knowing the title thereto was vested in the United States. Appellant cannot and does not argue against this point of fact. Instead, in duty of candor to the court, Terrell Stubbs admitted same on numerous times during the hearings held on May 3, 4, and 31 2011; all of which are cited to below. The complaint does not comply with Miss. Code Ann. § 11-17-35 because it does not contain a deraignment of title from the United States or a common source to the claimant. (R.E. Tab 7 pp. 1-4; R. pp. 8-11; T. p. 78). Also, the complaint does not contain a legal description,

survey, a claim of color or title.

Title to the Land is vested in the United States. (R.E. Tab 10 pp. 1-2; R. pp. 268-271; R.E. Tab 3, pp. 1-5; R. pp. 385-389; T. p. 80).

28 U.S.C.A. § 2409(n) provides, "Nothing in this section shall be construed to permit suits against the United States based upon adverse possession." One cannot gain title to land of the United States through adverse possession or through Government's acquiescence. *U.S. v. Pappas*, 814 F.2d 1342.

Appellant's counsel admitted to the Chancellor that he knew the case was weak and that there was really no basis in filing the suit. (T. p. 89).

Appellant's counsel admitted to the Court, "That's why I had my client sign the complaint because I told him, in the initial outset, that there was weakness in their case because there was no patent, and there was no government survey." (T. p. 102, 104).

Appellant did not take corrective action to dismiss his complaint or to amend the complaint. (T. p. 140).

No action was taken by the Appellant to reduce the number of claims. (T. p. 145).

On August 25, 2005, all pertinent facts were a matter of public record. (T. p. 146).

The action was prosecuted or defended, in whole or in part, in bad faith or for improper purposes. (T. p. 146).

Appellant did not offer a new theory of law. (T. p. 146).

Appellees submit the complaint and motion for recusal are frivolous because, at all times, it has had no hope of success, and that the Chancellor did not abuse his discretion in using this finding as a basis to impose sanctions against Appellant and Terrell Stubbs.

Appellees did file a counterclaim against Appellant; however it was not prosecuted beyond serving a copy on counsel. Appellees did not serve the third party complaint against the Mississippi Band of Choctaw Indians because of subsequent research showing the Choctaw conveyance to the United States via treaty, federal jurisdictional issues, and that the action against the Choctaw would be without substantial justification in light of Article III of the Treaty of Dancing Rabbit Creek (1830). As such, the Appellees were mindful of and compliant with Rule 11 Miss. Rules Civ. Pro. and Miss. Code Ann. § 11-55-7.

On October 7, 2005, Appellees filed their answer which contained a motion to dismiss based on the lack of subject matter jurisdiction. Appellant and his counsel, Terrell Stubbs, knew at the time the complaint was filed that the United States had not conveyed title via patent and that title remained vested in the United States. Despite the aforementioned and Appellees' motion to dismiss based on the lack of subject matter jurisdiction, Appellant and counsel continued prosecution of the suit without taking any mitigating action as contemplated by Miss. Code Ann. § 11-55-7. Appellant's argument that, "...if his complaint is frivolous, then one can only conclude that the Maddoxes' counterclaim and third-party complaint are also frivolous." Appellant does not cite any legal authority in support of this argument, and the Appellees would show that it was Appellant who initiated the frivolous suit.

Complying with Rule 3.3 Rules of Professional Conduct, Appellant's counsel admitted to the Court, "That's why I had my client sign the complaint because I told him, in the initial outset, that there was weakness in their case because there was no patent, and there was no government survey." (T. p. 102, 104).

The record supports the trial court finding the Appellant's motion for recusal frivolous, to wit:

Appellant's motion for recusal does not include the mandatory affidavit. (R. pp. 311-313).

Further referring to Uniform Chancery Court Rule 1.11, Appellant's motion for recusal was not filed with the Chancellor 30 days following notification that Hon. David Shoemake, the newly elected Chancellor, was the assigned judge. Hon. David Shoemake was elected in November 2010 and began his term in January 2011. In a conference with all counsel of record, the Chancellor set this matter for trial on the merits on May 3, 2011. The Appellant did not file his motion for recusal until April 12, 2011, and notice it for hearing on May 3, 2011. Appellant did not make any effort to have a hearing on the motion for recusal on a date before May 3, 2011, which was the day of trial.

A hearing on the motion for recusal was held on May 3, 2011; therefore Appellant's allegation that he was denied a hearing is without merit. (T. pp. 57-82). Also, Appellant argues that the Chancellor erred by precluding him from producing any evidence whatsoever in support of his motion for recusal. This argue is without any merit because at the hearing the Chancellor gave due

consideration to the underlying alleged factual basis of the motion for recusal, to wit: the fact that an attorney for Appellees representation of the court administrator's husband in an unrelated criminal matter-even though the motion for recusal did not comply with Uniform Chancery Court Rule 1.11's mandatory provisions.

The Chancellor considered the underlying alleged factual basis of Appellant's motion for recusal and did not find that the fact that an attorney for Appellees representation of the court administrator's husband in an unrelated criminal matter was within the purview of Code of Judicial Conduct Canon 3(E)(1)-(2) or proved a prima facie case necessitating an evidentiary hearing. As to the alleged factual basis for the motion for recusal: (T. p. 61). As to Chancellor's application of alleged factual basis of the motion for recusal to Code of Judicial Conduct Canon 3(E)(1)-(2) and *Washington Mutual Finance Group LLC vs. Blackman*, 925 So.2d 780, see: (T. pp. 61-65). As to Chancellor's finding that his impartiality would not be questioned by a reasonable person knowing that his court administrator's husband was represented in an unrelated criminal matter at one time by an attorney for Appellees, see: (T. p.65).

Appellant argues that the Chancellor erred in considering the fact that Appellant's counsel, Terrell Stubbs, represented the court administrator in a divorce action. The Chancellor found that this showed that there was no effort to determine the validity of the motion for recusal. (T. p. 143). The record is clear that the Chancellor took judicial notice, per Rule 201 Miss. Rules of Evidence, of this fact in open court. (T. pp. 76, 86-87, and 142-143). The Chancellor's taking judicial notice of a fact does not run afoul of Miss. Rules Evid. 605, Code of Judicial Conduct Canons 2(B),

3(B)(7).

Appellant argues that he should have been allowed to put on evidence of an allegation that was not set out in his motion for recusal. Appellant and his counsel did not offer up this new allegation until the trial court began the hearing on the motion for recusal. The Chancellor properly refused taking up this new allegation because it was not contained in the motion for recusal filed and presented to the court. Uniform Chancery Court Rule 1.11.

Appellant's counsel admitted to the Chancellor that he knew the case was weak and that there was really no basis in filing the suit, that Appellant insisted on filing the motion for recusal, and that counsel made verbal accusations of unreported campaign contributions, without supporting affidavits. (T. p. 91, 143-144). The motion for recusal was baseless and filed for the purposes of delay or harassment. (T. pp. 88, 144-145).

Appellees submit the motion for recusal is frivolous because, at all times, it has had no hope of success, and that the Chancellor did not abuse his discretion in using this finding as a basis to impose sanctions against Appellant and Terrell Stubbs.

VI. EVEN IF THIS COURT FINDS THE CHANCELLOR DID NOT ERR IN FINDING SAID ACTION TO BE FRIVOLOUS, THE ATTORNEYS FEES AWARDED ARE NOT SUPPORTED BY THE EVIDENCE AND ARE EXCESSIVE

A trial judge is to determine a reasonable attorney fee, based on the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate, and consider the eight factors enumerated in Rule of Professional Conduct that requires attorneys to charge

reasonable fees. *Collins v. Koppers*, 59 So.3d 582 (Miss. 2011), Miss. Rules Pro. Conduct 1.15. Standard review of an award of attorneys fees is abuse of discretion. *Bounds v. Lawrence*, 34 So.2d 1124 (Miss. Ct. App. 2010). The Appellant argues that if the Court does not overturn the Chancellor on imposing sanctions, that the amount of attorneys fees awarded are not supported by the evidence and are excessive.

However, Appellant withdrew its objection to Appellees calling Robert (Bob) Germany Esq., Wayne Easterling Esq. as witnesses, and his request for time to do discovery in this matter. (T. pp. 96, 105).

Appellant argues that Exhibit 1 (original letter received from R. K. Houston, Esq.) should not have been admitted because the witness, Appellee Steve Maddox, did not sign the letter; "It's not his letter." (T. p. 109). Appellant argues that the invoice admitted as Exhibit 2 (original invoices received from David Ringer, Esq.) should not have been admitted because, " These documents were not generated by Mr. Maddox. They're not his documents. They're documents generated by Mr. Ringer. (T. p. 111). Appellant argues that the invoice admitted as Exhibit 3 (invoices received from James B. (Rus) Sykes III, Esq.) should not have been admitted because, "...object under same basis." (T. p. 111).

Appellees respectfully submit that the objections were based on the requirement of authentication or identification of, in this instance, invoices from attorneys. Appellees submit the Chancellor did not err in overruling the objections because Rule 901(b)(1) Miss. Rules Evid. allows

authentication or identification by testimony of a witness with knowledge that a matter is what it is claimed to be. Appellee, Steve Maddox, by and through his testimony satisfactorily showed the Chancellor the items of evidence were genuine.

In his brief the Appellant argues for the first time the invoices are not admissible under any hearsay exception. At the hearing, Appellant did not base his objections, in whole or in part, on hearsay. Specific grounds for an objection must be stated contemporaneously with the objection, and all objections not made at the time of testimony are deemed waived. *Jackson v. State*, 832 So.2d 579 (Miss. Ct. App. 2002). Failure to object based on the specific ground of hearsay but raising it on appeal prejudices Appellees because, assuming for the sake of argument, if such objection had been made at trial Appellees could submit the invoices were excepted under Rule 803 Miss. Rules Evd. or called additional witnesses.

In support of the reasonableness of the attorneys fees the Appellees offered the testimony of two (2) Mississippi licensed attorneys, Robert (Bob) Germany and Wayne Easterling. Mr. Germany was admitted to the bar in 1981, and Mr. Easterling was admitted to the bar in 1968.

Based on his review of the docket sheet and pleadings Mr. Germany testified the charges and hourly rates were reasonable. (T. pp. 126-127). Mr. Easterling testified that an hourly rate between $175.00-$225.00 is reasonable. The hourly rates of Appelles' attorneys fall within this range, as reflected by Exhibits 1-3. Also, the hourly rate of Appellant's attorney falls within this range, as reflected by Exhibit 4. The Chancellor's findings as to the reasonableness of the fees are located: (T. pp. 137-149). This issue is without merit.

VII. THE CHANCELLOR ERRED IN NOT RECUSING HIMSELF IN THIS CASE BECAUSE HE CLEARLY INJECTED HIMSELF INTO THE PROCEEDINGS, ADVOCATED FOR THE MADDOXES, WAS PARTIAL TO THE MADDOXES AND THEIR COUNSEL AND VIOLATED VARIOUS CANNON OF JUDICIAL CONDUCT

Appellees respectfully submit this issue is a restatement of prior issues raised by the Appellant; however, out of an abundance of caution, the Appellee responds to the recycled allegations as follows:

(1) The motion for recusal did not allege the Chancellor was in receipt of unreported campaign contributions. Rule 7(b) Miss. Rules Civ. Pro. Appellant's motion for recusal did not comply with Uniform Chancery Court Rule 1.11 by including an affidavit or being filed timely. Also, Appellant did not comply with Rule 48 (B) Miss. Rules App. Pro. *Whitley v. City of Pearl*, 994 So.2d 857 (Miss. Ct. App. 2008). Moreover, the Appellant, who has to rebut the presumption of impartiality beyond a reasonable doubt, failed to provide any affidavits in support of his motion for recusal, and therefore failed to produce evidence rebutting the presumption of impartiality. *Attaberry v. State*, 11 So.3d 166 (Miss. Ct. App. 2009).

(2) The Chancellor did not testify against Appellant at the hearing on Appellant's motion for recusal. Appellant is referring to the Chancellor taking judicial notice that Appellant's attorney, Terrell Stubbs, represented the court administrator in a divorce action. Appellant alleged in his motion for recusal that the Chancellor should recuse himself because an attorney for Appellees represented his court administrator's husband in an unrelated criminal matter. This being the argument, the Chancellor took judicial notice that counsel for the Appellant represented his court administrator in a divorce action. Among other things, the judicial notice showed the

absurdity of Appellant's argument. (T. pp. 86-87).

(3) It is undisputed that an attorney for Appellees represented the court administrator's husband in an unrelated criminal matter. This was alleged in the motion for recusal and acknowledged by Appellees' lead attorney. The Chancellor did consider the motion for recusal, and ruled that the fact that an attorney for Appellees represented his court administrator's husband in an unrelated criminal matter did not necessitate his recusal under the applicable Canons of the Code of Judicial Conduct or law.

(4) The records does show that prior to May 4, 2011, the Chancellor did contact Gerald McWhorter with the office of the Mississippi Secretary of State. (R.E. Tab 12, p. 83, R. p. 353). Chancellor was not required to recuse herself from proceeding to determine proper beneficiaries of testamentary trust, although she had ex parte communications with life beneficiary just prior to his death; there was no evidence that bias, prejudice, or ex parte contacts affected chancellor's decision. *Weissinger v. Simpson*, 861 So.2d 984 (Miss. 2003); Code of Judicial Conduct Canons 2(B), 3(C)(1), and 3(A)(4)(2001).

Appellant did not offer any argument or evidence toward this ex parte communication affecting the Chancellor's decision to dismiss the case on summary judgment.

(5) As to Summary Judgment the Appellees incorporate by reference their previous arguments in support thereof.

(6) The Chancellor based, in part his finding that Appellant's case was frivolous on the

admissions made by Appellant's attorney. For instance, "That's why I had my client sign thecomplaint because I told him, in the initial outset, that there was weakness in their case because there was no patent, and there was no government survey." (T. p. 102, 104). In light of the admissions concerning the weakness of the case and the lack of a patent and government survey, the existence of the waiver is immaterial because the admissions by counsel for Appellant goes to prove the complaint never had hope of success.

(7) The Chancellor based, in part his finding that Appellant's case was frivolous on the admissions made by Appellant's attorney. For instance, "That's why I had my client sign the complaint because I told him, in the initial outset, that there was weakness in their case because there was no patent, and there was no government survey." (T. p. 102, 104). In light of the admissions concerning the weakness of the case and the lack of a patent and government survey, the existence of the waiver is immaterial because the admissions by counsel for Appellant goes to prove the complaint never had hope of success.

(8) It is undisputed that after the hearing on May 3, 2011, counsel for Appellant made unsolicited admissions to the Chancellor in the presence of the court administrator. Counsel for Appellant does not dispute that he admitted to the Chancellor that he knew the case was weak and that there was really no basis in filing the suit. (T. p. 89). Confirmed via "That's why I had my client sign the complaint because I told him, in the initial outset, that there was weakness in their case because there was no patent, and there was no government survey." (T. p. 102, 104). The Chancellor's question to the court administrator concerned the existence of a waiver, which is not

part of the record because if it does exist, it was not produced by Appellant's counsel. In light of the admissions concerning the weakness of the case and the lack of a patent and government survey, the existence of the waiver is immaterial because the admissions by counsel for Appellant goes to prove the complaint never had hope of success.

(9) The Order Appellant refers to was filed on April 16, 2007 (R. p. 106) clearly states, "This matter is not set for trial." The record does not contain a notice or order setting it for trial on April 16, 2007, and Appellees respectfully submit this matter is irrelevant to the issues on appeal.

(10) A mistake was made when Appellee, Steve Maddox, was not sworn in; however, this did not interfere with Appellant's cross examination. Thereafter, Appellee, Steve Maddox, was sworn in and testified that his previous testimony was truthful. Appellant did not conduct a second cross examination of Appellee, Steve Maddox. If Appellant had any reservations about the truthfulness of Appellee's testimony, he could have addressed on cross examination, but he did not do so. Swearing in witness in trial after giving unsworn testimony was effective where witness was sworn in immediately once error was discovered and was required to attest under oath that testimony already given was true and correct. *Harbit v. Harbit*, 3 So.2d 156 (Miss. Ct. App. 2009).

(11) Appellant withdrew its objection to Appellees calling Robert (Bob) Germany Esq., Wayne Easterling Esq. as witnesses, and his request for time to do discovery in this matter, and did not object to the admission of invoices on the ground of hearsay.

(12) The reasonableness of the fees is supported by the substantial weight of the evidence.

CONCLUSION

The final judgment imposed sanctions on Dempsey Sullivan and Terrell Stubbs; however Terrell Stubbs did not notice his appeal from the final judgment; therefore pursuant to Rule 2 Miss. Rules App. Pro. Terrell Stubbs must be dismissed from this appeal.

Appellant, Dempsey Sullivan, did not make any argument that his complaint and motion for recusal were not frivolous and without substantial justification, or that they were not filed for the purposes of delay or harassment.

Appellant, Dempsey Sullivan, did not carry his burden to prove the lower court had subject matter jurisdiction or make a showing of a genuine issue as to any material fact.

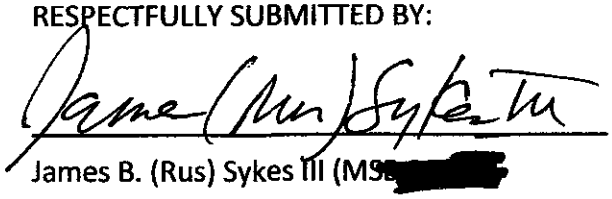
Appellant, Dempsey Sullivan, did not comply with the law and rules governing a party seeking to recuse a judge. That the motion for recusal was absurd, and the oral allegations that the Chancellor did not report campaign contributions were reckless and made without any regard for the integrity of the Court.

Appellant did not contest the reasonableness of the attorneys fees awarded by the Chancellor, and the attorneys fees are supported by the substantial weight of the evidence.

Appellees respectfully request that this Honorable Court affirm summary judgment and the

final judgment.

RESPECTFULLY SUBMITTED BY:



James B. (Rus) Sykes III (MS[redacted]
Attorney for Appellees, Steve Maddox and Samuel Maddox

CERTIFICATE OF SERVICE

I, James B. (Rus) Sykes III, lead attorney for Appellees, do hereby certify that I have this day mailed via U.S. mail, postage fully pre-paid, a true and correct copy of the foregoing *Brief of Appellees* to the following:

Honorable Judge David Shoemake
13th District Chancellor, Post 1
Post Office Box 1678
Collins, MS 39428

Hon. Terrell Stubbs
The Stubbs Law Firm, PLLC
Post Office Box 157
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So certified this the 5th day of April 2012.

James B. (Rus) Sykes III