

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEMPSEY SULLIVAN

APPELLANT

VS.

CA NO. 2011-CA-00820

SAMUEL MADDOX AND STEVE MADDOX

APPELLEES

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STATEMENT OF THE CASE

C. Statement of Facts

The Maddoxes have misrepresented to this Honorable Court that William (Bill) Miller, PLS, a potential witness of Dempsey's, opined that the United States had not disposed of its title to the land. This is a misrepresentation and is not included in the record before this Court, and therefore should be stricken from the Maddoxes' brief. (R. pp. 250 – 301).

SUMMARY OF THE ARGUMENT

The Maddoxes have failed to offer any substantive legal argument or record evidence to controvert the errors assigned by Dempsey in the Appellant's Brief.

The Maddoxes contend that the Chancellor properly dismissed this action on motion for summary judgment for lack of subject matter jurisdiction. This position is misguided as the Chancellor found that the court had jurisdiction of the parties and the subject matter in the Summary Judgment. Moreover, the Maddoxes do not cite any authority that would allow them to assert the interests of the federal government. Therefore, summary judgment was not appropriate in this matter because Dempsey claims title to the property and the Maddoxes are claiming title to the property. However, the Maddoxes now contend title is vested in the federal government.

According to correspondence solicited by the Chancellor, if a federal patent does not exist on the subject real property, the prevailing party can apply to the federal government for a patent. The State of Mississippi does not have jurisdiction over the federal government, and therefore, any court order would not be binding on the federal government and its interest would be superior to any subsequent titleholder.

The Maddoxes also argue that the Chancellor properly found that Dempsey's complaint and motion for recusal were frivolous. However, the underlying premise of their position is based on representations made by Dempsey's counsel to the lower court that a United States patent could not be located on the subject property. If this Court accepts the reasoning put forth by the Maddoxes on the issue of frivolousness, then by the same reasoning the Maddoxes' counterclaim must be frivolous. Counsel for the Maddoxes made the same representations to the lower court and they alleged the same in their counterclaim.

Furthermore, the Chancellor's finding that only Dempsey's complaint was frivolous and not the Maddoxes counterclaim indicates that the Chancellor was partial to the Maddoxes and their counsel and should be recused from this case. Therefore, Dempsey respectfully requests that this Court reverse and remand this case and recuse the Chancellor from this matter.

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 CONSIDERING EX PARTE COMMUNICATIONS, AND TESTIFYING AGAINST DEMPSEY AND HIS COUNSEL IN DENYING SAID MOTION

The Maddoxes contend that the Chancellor did not manifestly abuse his discretion in precluding Dempsey a fair hearing on the record on his motion for recusal, in considering ex parte communications, and testifying against Dempsey and his counsel in denying his motion for recusal. In support of this position the Maddoxes assert that: (1) Dempsey did not attach an affidavit to his motion pursuant to Uniform Chancery Court Rule 1.11; (2) Dempsey did not timely file his motions for recusal; (3) the Chancellor held a hearing on the motion and gave due consideration to the factual basis; (4) the Chancellor properly applied the reasonable person

standard; and (5) the Chancellor properly took judicial notice of ex parte communications conducted with his administrator.

The Maddoxes' position that the Chancellor properly denied Dempsey's motion for recusal on the grounds that Dempsey failed to attach an affidavit and timely file his motion pursuant to UCCR 1.11 incorrectly places the burden on Dempsey to ascertain opposing counsel's client list and the contributors to the Chancellor's campaign for office. Conflicts of interest of the nature complained about in this case should be disclosed by the party, counsel, or the judge with knowledge of the potential conflict.

An attorney has a duty to make full disclosure to the court. *Barrett v. Mississippi Bar*, 648 So.2d 1154, 1159 (Miss. 1995) (citing Miss. Code Ann. § 73-3-35). "When representing a client before a court, an attorney has a duty to conduct himself 'according to the best of my learning and ability, and with all good fidelity as well to the court as to the client.'" *Id.* Attorney, Wesley Broadhead knew that he was representing the Court Administrator's husband in a criminal matter pending in the Simpson County Circuit Court. However, he did not disclose this relationship to the Court or the opposing party.

More importantly, Canon 3 E of the Code of Judicial Conduct places the burden on the judge to recuse himself in a proceeding where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Miss. Code of Judicial Conduct Canon 3E.

The Chancellor did not disclose or deny any campaign contributions by the Maddoxes and the Chancellor denied Dempsey an opportunity to produce any evidence into the record regarding the same. (T. pp. 57-66; R.E. Tab 3 pp. 3-5; R. p. 387- 388). The Chancellor summarily denied Dempsey's motion because he did not comply with the technical provisions of UCCR 1.11. (T. p. 66).

Additionally, the Chancellor did not disclose that he was conducting ex parte communications with the Mississippi Secretary of State's Office regarding disputed facts in this case until after the court's ruling on summary judgment and the award of attorneys' fees to the Maddoxes. (R.E. Tab 12; R. 348 – 353). Canon 3 E of the Miss. Code of Judicial Conduct mandates that the Chancellor should have recused himself when he improperly initiated the ex parte communications with the Office of the Secretary of State. The fact that the Chancellor did not take the proper steps to recuse himself or disclose the communications should reflect negatively on the Chancellor.

The burden to disclose the issues raised by Dempsey rests with opposing counsel and the Chancellor. Therefore, these issues should not be summarily dismissed on a technicality, but rather Dempsey should have a fair opportunity to present evidence on the record concerning the Chancellor's partiality pursuant to UCCR 1.11. Because Dempsey was denied a hearing on his motion for recusal, the record is devoid of any evidence for which to apply the reasonable person standard.

Next, the Maddoxes contend that a proper hearing on Dempsey's motion for recusal was held by the Chancellor on May 3, 2011. When Dempsey was precluded from adducing any evidence into the record, not even allowed an opportunity to make a proffer. (T. pp. 57 – 66).

A reasonable person standard is employed in reviewing a trial court's denial of a motion for recusal. *Robinson v. Burton*, 49 So.3d 660, 667 (Miss. Ct. App. 2010) (quoting *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1141 (Miss. 2002)). Again, the record is devoid of any evidence for which to apply the reasonable person standard because the Chancellor denied Dempsey the opportunity to offer any evidence in support of his motion.

Next, the Maddoxes argue that the Chancellor properly took judicial notice of an allegation learned through ex parte communications with his court administrator and did not improperly inject himself into the proceedings.

The Chancellor consistently referred to Dempsey's counsel's representation of his Court Administrator in a divorce action. (T. p. 76, 86, 142). This allegation was not provided by any party or their respective counsel. This is in direct violation of Miss. Code of Judicial Conduct Canon 3(B)(7) which states "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding" and goes onto provide some exceptions. Miss. Code of Judicial Conduct Canon 3(B)(7).

The Chancellor consistently testified as to Dempsey's counsel's alleged representation of the Court Administrator in a divorce action. This is in violation of Miss. R. Evid. 605 and Miss. Code of Judicial Conduct Canon 2B.

Miss. R. Evid. 605 states "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Miss. R. Evid. 605.

The Chancellor wrongfully injected himself into the proceedings on the motion for recusal precluding Dempsey a fair opportunity to offer evidence to the contrary and placing Dempsey and his counsel in the awkward position of disputing the judge and his administrator. See *Nichols v. Munn*, 565 So.2d 1132 (Miss. 1990) and *Young v. Anderson*, 163 So.2d 253, 256 (Miss. 1964).

Because Dempsey was denied a hearing on his motion for recusal, the record is devoid of any evidence for which to apply the reasonable person standard. Additionally, the Chancellor improperly considered ex parte communications and testified against Dempsey and his counsel on the motion for recusal. The Chancellor's findings in the Summary Judgment entered in this

matter are clearly unsupported by any record evidence because the Chancellor denied Dempsey an opportunity to offer any evidence. Therefore, this Court should reverse and remand for a hearing on the issue of recusal in compliance with the Canons of Judicial Conduct and the Rules of Evidence.

II. THE CHANCELLOR ERRED BY GRANTING THE DEFENDANTS'/COUNTER-PLAINTIFFS' 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 Maddoxes have taken a position contrary to their interests arguing that the lower court lacked subject matter jurisdiction and therefore, dismissal of their claim and Dempsey's claim with prejudice was proper. This position is without merit because: (1) the Chancellor found in the Summary Judgment that the court had jurisdiction of the parties and subject matters; (2) the parties were properly before the court; (3) all of the parties were asserting title to the property; and (4) the Maddoxes do not have standing to represent the interest of the United States. Therefore, summary judgment is not proper because genuine issues of material fact exist.

This Honorable Court is well versed on the summary judgment standard. In this case we have one party swearing to one version of the matter in issue and another swearing to an opposite version. *See Vaughn ex rel. Vaughn v. Estate of Worrell*, 828 So.2d 780, 782 (Miss. 2002). Dempsey has had open and notorious, adverse, hostile exclusive and continuous possession of the property for thirty-nine (39) years. (R.E. Tab 11; R. pp. 316 – 319). The Maddoxes claimed they owned the property but then filed to have their claim dismissed as a matter of law asserting title to the property remained in the federal government. (R.E. Tab 9; R pp. 108 – 137; R. pp. 250 – 253).

It is difficult to understand why the Maddoxes argue contrary to their interests and in favor of dismissal of their claim to this property with prejudice. If this Court accepts the

Maddoxes' position, then they will be barred from asserting title to the subject property by the doctrines of res judicata and collateral estoppel. Notwithstanding this fact, the Maddoxes argue that summary judgment was proper because the trial court lacked subject matter jurisdiction. This position is misplaced. The Chancellor found in the Summary Judgment that the court had jurisdiction of the parties and the subject matters. (R.E. Tab 3 p. 1; R. p. 385). The Chancellor went on to adjudge that the Maddoxes as well as Dempsey could not maintain a claim to the subject property as a matter of law and dismissed all claims with prejudice. (R.E. Tab 3 pp. 1 – 5; R. pp. 385 – 389).

The United States government is not a party to this action, and there is no authority that would grant a state court jurisdiction over the United States government. Thus, the federal government's interest in the land would be superior to all subsequent titleholders. Moreover, the Maddoxes do not have standing to assert the interest of the United States government.

Again, if there was no patent issued on the property, then the prevailing party in this action can file an application with the U.S. Bureau of Land Management requesting a patent. When reviewing the letter solicited by the Chancellor from Mr. Nelson with the U.S. Bureau of Land Management, any party authorized to hold title to land in the State and who believes he or she has a valid claim under color of title may file an application with the Bureau requesting a patent. (R.E. Tab 12 pp. 3 - 4; R. pp. 351 – 352). Said claims are recognized under the Color of Title Act of December 22, 1928. (R.E. Tab 12 pp. 3 – 4; R. pp. 351-352). In order for a party to protect their claim to the land, the chancery court should have the authority to adjudicate the claims of parties asserting an interest in the subject land. Said judgment by the chancery court should be valid in order to allow the prevailing party to apply for a patent to said property with the United States government.

Under these circumstances, the patent transferring the property from the U.S. to the claim holder is a defect in the chain of title for which the claim holder may cure under the Color of Title Act. To hold otherwise, would require these parties to re-litigate their claims of adverse possession. But, the Chancellor has precluded the parties from their right to relief because he dismissed all parties' claims with prejudice. If this Court finds dismissal was appropriate, then this Court should reverse on the issue of dismissal of Dempsey's claim with prejudice.

The Maddoxes' argument that summary judgment was proper because the court lacked subject matter jurisdiction is without merit. Summary Judgment was not proper as to Dempsey Sullivan because the Maddoxes did not demonstrate that no genuine issue of material fact existed as to Dempsey's claim to the property by adverse possession. All parties made a claim to the land through adverse possession. Moreover, the Maddoxes did not have standing to assert that title was vested in the United States of America. Therefore, this Court should reverse and remand for a trial on the merits. However, if this Court should find that dismissal was appropriate, then this Court should reverse on the issue of dismissal of Dempsey's claim with prejudice.

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 argument that Dempsey was afforded a hearing on May 3, 2011 is meritless. Dempsey's counsel renewed his motion for recusal on May 4, 2011. And once again, Dempsey was denied the opportunity to put on any evidence or even make a proffer on the record to question the Chancellor's partiality.

On May 4, 2011, the parties to this matter were before the Chancellor on a completely different case, Simpson County Chancery Court Cause No. 2010-133 *Dempsey Sullivan & Billie Joyce Sullivan v. Steve Maddox & Sam Maddox*. On that date, The Chancellor sua sponte and

without notice amended the order that was dictated into the record in this cause on May 3, 2011 and thereafter, Dempsey renewed his motion for recusal, which the Chancellor summarily denied. (T. pp. 82 – 93).

Parties should not be denied a fair hearing on motions for recusal based on technicalities. The proponent should have the opportunity to produce evidence on the record for purposes of preserving the error for appeal. To hold otherwise, would contradict Miss. Code of Judicial Conduct Canon 3(B)(7), Uniform Chancery Court Rule 1.11, and fundamental principles of due process of law.

Dempsey incorporates the argument above replying to the argument of the Maddoxes in their Appellee brief. Dempsey was denied any opportunity to adduce or proffer any evidence on his motion for recusal; therefore the record is devoid of any evidence for which to apply the reasonable person standard. Additionally, the Chancellor offered unsworn testimony against Dempsey and his counsel on the motion for recusal. Therefore, this Court should reverse and remand for a hearing on the issue of recusal in compliance with the Canons of Judicial Conduct and the Rules of Evidence.

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

In response to the Maddoxes' position that the Chancellor complied with the fundamental principles of constitutional due process, Dempsey and his counsel incorporate their arguments in their Appellant's Brief herein.

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

The Maddoxes' position on this issue is quite puzzling. Most, if not all of the arguments put forth by the Maddoxes claiming Dempsey's complaint is frivolous can be used to make the same argument that the Maddoxes' counterclaim is also frivolous. The Maddoxes completely discount the litigation of their counterclaim arguing that they did nothing more than serve a copy of the pleading on counsel opposite. This contention is clearly not reflected in the record. However, the Maddoxes requested and the Chancellor ordered Dempsey and his counsel to pay the attorneys fees and expenses related to the litigation of their counterclaim.

First, the Maddoxes argue that Dempsey and his counsel filed the subject complaint knowing the title thereto was vested in the United States. They do not point to any record evidence to support this contention. However, on April 16, 2007 at the hearing on the Maddoxes' Motion to File a Counterclaim and Third Party Complaint, counsel for the Maddoxes represented to the court that a patent had not been issued on the property. (T. pp. 5 – 8). Notwithstanding this representation, the Chancellor granted leave to the Maddoxes so that they could file their counterclaim and third-party complaint. (R. p. 106; T. pp. 5 – 25). Knowing that a patent did not exist, the Maddoxes filed their counterclaim and third-party complaint. (R. pp. 108 – 137). Therefore, the Maddoxes' counterclaim is frivolous according to their reasoning.

Next, the Maddoxes argue that Dempsey's complaint is frivolous because Dempsey's counsel advised him that there may be some weakness in his case due to the absence of a patent. This would appear to be sound advice that the Maddoxes' counsel should have rendered to them before filing their counterclaim. Therefore, the Maddoxes' counterclaim is frivolous according to their reasoning.

Next, the Maddoxes argue that Dempsey did not take corrective action and cite the Chancellor's finding in the transcript for support. The same facts that the Chancellor based this finding on were known by the Maddoxes as well. This case has been litigated since August of 2005. (R.E. Tab 7; R. pp. 8 – 11). The Maddoxes were asserting a claim to this property until the date the parties appeared for a trial on the merits, and they brought forth their Joint Motion for Summary Judgment seeking dismissal of their claim and Dempsey's claim as a matter of law with prejudice. (R.E. Tab 9 pp. 1-30; R. pp. 108 – 137).

Again, it is puzzling as to why the Maddoxes filed a motion completely contrary to their interests in the property. If the Chancellor's Summary Judgment is upheld, the Maddoxes will be forever barred from asserting title to the property as a matter of law. The Chancellor did not dismiss the claims for lack of subject matter jurisdiction. The Chancellor found that the court had jurisdiction over the parties and the subject matter then dismissed all claims filed by the parties with prejudice. (R.E. Tab 3 pp. 1; 5; R. pp. 385; 389).

Dempsey contends that he has had the subject property under his use and control for over thirty-nine (39) years. (R. p. 319). The Maddoxes have asserted title to the property prior to and throughout this litigation. The Maddoxes' claim to the property is what initiated this litigation. (R.E. Tab 7 p. 2; R. p. 9). They never withdrew or amended their counterclaim to the property. Instead, they filed a Joint Motion for Summary Judgment completely against their interest. If a patent has not been issued on the property, the prevailing party can apply for a patent to cure the defect in the title. (R. pp. 350 – 353.).

Next, the Maddoxes recite conclusory statements that are not supported by evidence or legal argument asserting that: (1) no action was taken by Dempsey to reduce the number of claims; (2) all pertinent facts were a matter of public record; (3) the action was prosecuted in bad faith or for improper purpose; and (4) Dempsey did not offer a new theory of law.

Again, these same arguments can be used to find the Maddoxes' counterclaim frivolous as well. The Chancellor found this case to be a one of first impression, only to reverse himself within the month and find that Dempsey did not offer a new theory of law. (T. pp. 77 - 81; 146). In educating himself in this case, the Chancellor also initiated ex parte communications with the Mississippi Secretary of State's Office in violation of Miss. Code of Judicial Conduct Canon 3(B)(7). (R. pp. 350 – 353). The Chancellor intentionally initiated this communication and failed to disclose or recuse himself pursuant to Canon 3 E of the Code of Judicial Conduct.

The Maddoxes' argument that they did not prosecute their counterclaim is clearly not reflected by the record and is misleading to this Honorable Court. This case has been litigated for a number of years. Moreover, a reading of the record index and the invoices attached to and offered at the hearing the Maddoxes' motion for sanctions and other relief do not support this position. (R. pp. 354 – 374). The Maddoxes filed numerous motions, propounded discovery in support of their counterclaim, and filed additional pleadings. For example, one invoice from Ringer & Simmons, Attorneys at Law dated January 29, 2007 in the amount of \$19,133.80 reflects fees and expenses incurred in preparing the counterclaim and discovery requests. (R. pp. 370 – 374). According to the record, the Maddoxes pursued their counterclaim until they filed their joint motion for summary judgment, which is contrary to their interests.

The Maddoxes argue that Dempsey failed to cite any legal authority to support the argument that if Dempsey's complaint is frivolous, then one can only conclude that the Maddoxes' counterclaim and third-party complaint are also frivolous. Dempsey invoked principles of logic and common sense in forming this conclusion.

Dempsey and the Maddoxes are making separate claims to the subject property. However, the Maddoxes requested the court to dismiss both claims as a matter of law alleging a third-party owns the property. The two claims were dismissed with prejudice pursuant to the

same court order based on the same reasoning. Therefore, both claims are not mutually exclusive; the two claims have to be frivolous or not frivolous based on the Chancellor's reasoning. (R.E. Tab 3 pp. 1 – 5; R. pp. 385 – 389).

With regard to Dempsey's motion for recusal, the Maddoxes contend said motion was baseless and filed for the purposes of delay or harassment. However, the Maddoxes admitted in their response to the motion that the allegations contained in the motion were true. (R. pp. 315-A – C). The fact that counsel for the Maddoxes was currently representing the court administrator's husband in a criminal matter is a conflict or relationship that should have been disclosed by Mr. Broadhead. The Maddoxes have somehow saddled Dempsey with this burden when the burden should lie with Mr. Broadhead.

The Maddoxes go on to contend that the Chancellor did not run afoul of the Canons of Judicial Conduct and Miss. R. Evid. 605 and did not improperly inject himself into the proceedings when the Chancellor took judicial notice of an alleged ex parte communication with his court administrator in justifying denial of Dempsey's motion for recusal. (T. pp. 88 – 91). They cite Miss. R. Evid. 201 for support.

Dempsey would argue that the exparte communication with the court administrator would not fall under Miss. R. Evid. 201(b), which states: “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Miss. R. Evid. 201(b). The allegation that Dempsey's counsel represented the court administrator in a previous divorce action is (1) not generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Therefore, this argument is without merit.

The Chancellor clearly abused his discretion when he found Dempsey's claim and motion for recusal frivolous because the Maddoxes were asserting the same claim against Dempsey and also filed a complaint against the Mississippi Band of Choctaw Indians. Furthermore, the Chancellor erred in primarily relying on alleged ex parte communications in making his finding. The Chancellor's finding on this issue is not supported by the record evidence and is clearly arbitrary. Therefore, this Court should reverse the Chancellor's finding that Dempsey's complaint and motion for recusal are frivolous and in violation of Miss. R. Civ. Proc. 11.

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.

The Maddoxes contend that the attorneys' fees and expenses awarded to them are supported by the record because Steve Maddox was a proper sponsoring witness for the documents submitted in support of the award and they produced evidence on the reasonableness of the fees charged. Their position on the admissibility of the documents is contrary to the rules of evidence and relevant caselaw. And, the expert witnesses only testified as to the usual and customary charge in the community and did not actually represent the Maddoxes at any time in this case. (T. pp. 127 – 128; 131 -132).

On May 31, 2011, the parties appeared before the Chancellor on the Maddoxes' motion for sanctions which was filed after the Chancellor found Dempsey's complaint and motion to be frivolous and awarded attorneys' fees. (T. p. 93). Mr. Steven Maddox was called as the sole factual witness in support of his motion. On direct examination, his counsel moved to admit: (1) a letter from the office of Attorney, R.K. Houston; (2) Statements from the office of Attorney, David Ringer; and (3) Invoices from Attorney, Russ Sykes. The Chancellor admitted them over the objection of Dempsey's counsel. (T. pp. 108 -112; R. pp. 356 – 375).

In *Bower v. Bower*, 758 So.2d 405, 414 (Miss. 2000), the Supreme Court of Mississippi construed Miss. R. Evid. 803(6) & 901 and held that a divorcing husband was not qualified to authenticate an internet provider's billing documents, where the husband was not involved in the documents' preparation, did not work directly for the provider, and could not testify to the accuracy of documents. *Id.*

The Maddoxes admit that the documents are hearsay, and contend that Steve Maddox is a proper sponsoring witness. However, Steve Maddox was not involved in the preparation of these documents, he did not work for any of the attorneys, nor could he testify to the accuracy of the documents. See *Bower v. Bower*, 758 So.2d 405, 414 (Miss. 2000). Thus, the documents were not properly authenticated and inadmissible. However, the Chancellor admitted them over the contemporaneous objection of Dempsey's counsel. (T. pp. 108 -112). Dempsey was denied the opportunity to confront any witnesses that generated the documents, which the Chancellor used as the basis for determining the award of attorneys' fees.

The admission of these documents resulted in prejudice and harm to the property rights of Dempsey and his counsel warranting reversal by this Court. *Bower v. Bower*, 758 So.2d 405, 414 (Miss. 2000).

As for the *McKee* factors relevant to an award of attorney fees and expense, the Maddoxes failed to point this Court to any record evidence on: (1) the relative financial ability of the parties, (2) the skill and standing of the attorney(s) employed, (3) the nature of the case and novelty and difficulty of the questions at issue, (4) as well as the degree of responsibility involved in the management of the cause, (5) the time and labor required, and (6) the preclusion of other employment by the attorney due to the acceptance of the case that justify the award of \$42,922.91 in attorneys' fees, expenses and costs. *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982).

The Maddoxes failed to respond to the fact that the Chancellor precluded Dempsey's counsel from cross-examining Steve Maddox on the subject of his counterclaim against Dempsey and his complaint against the Mississippi Band of Choctaw Indians. (T. pp. 115-117). Therefore, denying Dempsey an opportunity to differentiate between fees and expenses incurred in defending Dempsey's claim and prosecuting their counterclaim. *Id.*

The documents submitted in support of the fees and expenses are inadmissible hearsay and the Maddoxes failed to produce any evidence that would justify the award of \$42,922.91 in attorneys' fees, expenses and costs to the Maddoxes. Therefore, this Court should reverse and remand for further hearings on reasonable attorneys' fees.

VII. THE CHANCELLOR ERRED BY 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 CANONS OF JUDICIAL CONDUCT.

The Maddoxes dismiss this issue as a restatement of prior issues and refer to the facts outlined in the Appellant brief as "recycled." When the record is examined in totality, it is obvious that the Chancellor injected himself into this case, became an advocate for the Maddoxes, and showed partiality to the Maddoxes and their counsel. The Maddoxes have attempted to explain away each fact outlined in the Appellant's brief, so Dempsey will now respond to the Maddoxes argument item by item.

"In determining whether a judge should have recused himself, this Court must consider the trial *in its entirety* and examine every ruling to determine if those rulings were prejudicial to the moving party." *Copeland v. Copeland*, 904 So.2d 1066, 1072 (Miss. 2004) (citing *Jones v. State*, 841 So.2d 115, 135 (Miss.2003)). This Court has made clear that it "will not hesitate to reverse where the trial judge displays partiality, becomes an advocate, or, in any significant way,

conveys to the jury the impression that he has sided with the prosecution.” *Layne v. State*, 542 So.2d 237, 242 (Miss. 1989); *West v. State*, 519 So.2d 418, 422–24 (Miss.1988); *see also Shelton v. Puckett*, 483 So.2d 354, 357 (Miss.1986).

The following facts support this position:

- (1) The Maddoxes contend that the Chancellor properly denied Dempsey a hearing on his motions for recusal because he did not allege the Maddoxes contributed to the Chancellor’s campaign for office, the motion was not timely filed, nor did the motions contain the affidavits rebutting the presumption of impartiality. Assuming arguendo that the Maddoxes did contribute to the Chancellor’s campaign, the reasoning offered by the Maddoxes would not cure this conflict of interest beyond a reasonable doubt. Moreover, it places the burden of disclosing conflicts of this nature on the parties before the court.
- (2) The Maddoxes improperly argue that the Chancellor took judicial notice of an allegation that was not disclosed by either party and would not fall under Miss. R. Evid. 201. The Chancellor testified against Dempsey at two hearings on Dempsey’s motions for recusal (T. p. 76, 86);
- (3) The Chancellor allowed opposing counsel to make representations about Wesley Broadhead’s representation of the court administrator’s husband in a criminal matter as opposed to allowing Dempsey’s counsel to cross examine him (T. pp. 59 – 66). The Maddoxes argument is not responsive to this fact;
- (4) The Maddoxes maintain that the ex parte communications initiated by the Chancellor with Mississippi Secretary of State’s Office did not bias, prejudice, or affect his decision in this case referencing *Weissinger v. Simpson*, 861 So. 2d 984 (Miss. 2003). The *Weissinger* court found that there was no evidence indicating that

bias, prejudice or ex parte proceedings persuaded the Chancellor's decision. This case is entirely distinguishable in that the Chancellor's decisions were solely based on the finding that title remained vested in the United States government. (R.E. Tab 3; R. pp. 385 – 389; R.E. Tab 5; R. pp. 461 – 407; R.E. Tab 12; R. 348 – 353).

Therefore, the Chancellor was mandated to recuse himself pursuant to Miss. Code of Judicial Conduct 3(E)(1). Moreover, the Chancellor did not disclose the fact that he had initiated ex parte communications regarding disputed evidentiary facts in this case until well after his ruling on all issues in this case. (R. pp. 350). This should reflect negatively on the Chancellor.

- (5) The Maddoxes did not provide any authority that would allow them to assert the interests of the United States government. Therefore, the Chancellor was biased in ruling in favor of the Maddoxs based on their allegations that title was vested in the United States government. (T. pp. 77 – 82; R.E. Tabs 3 & 5);
- (6) The Maddoxes argue that the Chancellor's finding that Dempsey's complaint is frivolous is proper because Dempsey's counsel represented to the court that a patent on the property could not be located. This position by the Maddoxes is a complete misrepresentation to this Honorable Court. On April 16, 2007 at a hearing on the Maddoxes' motion for leave to file a counterclaim and third-party complaint, counsel for the Maddoxes made the same representations to the court and proceeded to file and pursue a counterclaim and third-party complaint in this matter. (T. pp. 5 - 8). Moreover, they alleged the same in their counterclaim. (R. p. 110). By their reasoning, the Maddoxes' counterclaim is also frivolous if this Court finds Dempsey's complaint frivolous. However, the Chancellor only found Dempsey's

complaint to be frivolous, and therefore, would cause a reasonable person to harbor doubts as to the Chancellor's impartiality. (T. 82 – 93; R.E. Tabs 3 & 5);

- (7) The Maddoxes now admit that the Chancellor's findings of frivolousness were based solely on alleged remarks made by Dempsey's counsel. Based on this reasoning, the Chancellor erred in finding Dempsey's complaint frivolous and not the Maddoxes counterclaim. As discussed above, counsel for the Maddoxes made similar representations to the court on April 16, 2007 and also in their counterclaim. (T. pp. 5-8; R. p. 110) . This finding by the Chancellor would cause a reasonable person to harbor doubts as to the Chancellor's impartiality.
- (8) The Maddoxes admit that the Chancellor had the court administrator testify against Dempsey's counsel during the Chancellor's amendment of his order (T. p. 90)
- (9) According to the counselors at the hearing on April 16, 2007, this matter was set for trial when the Maddoxes took up their motion to amend their answer and file a counterclaim and third-party complaint. (T. pp. 5 – 25).
- (10) The Chancellor allowed unsworn testimony to be given by Mr. Steven Maddox on the issue of attorneys' fees (T. pp. 107 – 123);
- (11) The Maddoxes have admitted that the documents the Chancellor considered as evidence are hearsay, but Steve Maddox was not a proper sponsoring witness. However, the Chancellor allowed the documents into evidence over the objection of counsel. (T. pp. 108 – 112). This conduct should cause a reasonable person to harbor doubts as to the impartiality of the Chancellor.
- (12) The fact that the Chancellor precluded Dempsey's counsel from cross-examining Steve Maddox on the fees and expenses associated with his counterclaim and then awarding an excessive and unsubstantiated amount of attorneys' fees to the

Maddoxes should cause a reasonable person to harbor doubts as the Chancellor's impartiality. (T. pp. 115 – 118, 137 – 151; R.E. Tab 5).

The Chancellor's actions in this case clearly indicate that he has improperly injected himself into the proceedings, became an advocate for the Maddoxes, and showed partiality to the Maddoxes. Therefore, this Court must reverse, remand, and recuse the Chancellor from this case.

CONCLUSION

The Maddoxes have failed to offer any substantive legal argument or record evidence to controvert the errors assigned by Dempsey in the Appellant's Brief. The Maddoxes contend that the Chancellor properly dismissed this action on motion for summary judgment for lack of subject matter jurisdiction. This position is misguided as the Chancellor found that the court had jurisdiction of the parties and the subject matter in the Summary Judgment. Moreover, the Maddoxes do not cite any authority that would allow them to assert the interests of the federal government. Therefore, summary judgment was not appropriate in the matter because Dempsey claims title to the property and the Maddoxes are claiming title to the property. However, the Maddoxes now contend title is vested in the federal government.

The Maddoxes also argue that the Chancellor properly found that Dempsey's complaint and motion for recusal were frivolous. However, the underlying premise of their position is based on representations made by Dempsey's counsel to the lower court that a United States patent could not be located on the subject property. If this Court accepts the reasoning put forth by the Maddoxes on the issue of frivolousness, then by the same reasoning the Maddoxes' counterclaim must be frivolous. Counsel for the Maddoxes made the same representations to the lower court and they alleged the same in their counterclaim.

Furthermore, the Chancellor's finding that only Dempsey's complaint was frivolous and not the Maddoxes counterclaim indicates that the Chancellor was partial to the Maddoxes and

their counsel and should be recused from this case. Therefore, Dempsey respectfully requests that this Court reverse and remand this case and recuse the Chancellor from this matter.

Respectfully submitted,

DEMPSEY SULLIVAN

BY: 

TERRELL STUBBS, Attorney
For Appellant

CERTIFICATE OF SERVICE

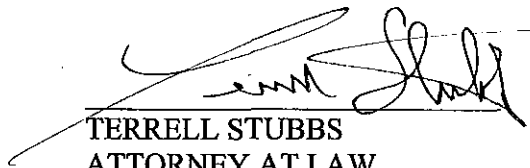
I, TERRELL STUBBS, attorney of record for **APPELLANT, DEMPSEY SULLIVAN**, do hereby certify that I have this day mailed postage prepaid a true and correct copy of the above and foregoing Brief of Appellant to the following:

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This the 18th day of May, 2012.


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