

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEMPSEY SULLIVAN

APPELLANT

VS.

CA NO. 2011-CA-00820

SAMUEL MADDOX AND STEVE 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 Supreme Court and the Court of Appeals may evaluate possible disqualification or recusal.

1. Dempsey Sullivan, Appellant/Plaintiff/Counter-Defendant
2. Terrell Stubbs, Esq., counsel of record for the Appellant/Plaintiff/Counter-Defendant
3. Samuel Maddox, Appellee/Defendant/Counter-Plaintiff
4. Steve Maddox, Appellee/Defendant/Counter-Plaintiff
5. James B. (Rus) Sykes, Esq., counsel of record for the Appellees/Defendants/Counter-Plaintiffs
6. L. Wesley Broadhead, Esq. counsel of record for the Appellees/Defendants/Counter-Plaintiffs
7. David Ringer, Esq., former counsel of record for the Appellees/Defendants/Counter-Plaintiffs
8. The Honorable David Shoemake, Chancellor
9. The Honorable Larry Buffington, Former Chancellor

Respectfully Submitted,

DEMPSEY SULLIVAN

By: 

TERRELL STUBBS (MSB No. 
Attorney for Dempsey Sullivan, Appellant

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STATEMENT OF THE ISSUES

- I. WHETHER 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 ,
- II. WHETHER 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 .
- III. WHETHER 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 ,
- IV. WHETHER 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 .
- V. WHETHER 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.
- VI. WHETHER THE ATTORNEYS FEES AWARDED TO THE MADDOXES ARE SUPPORTED BY THE EVIDENCE AND EXCESSIVE, IF THIS COURT FINDS THE CHANCELLOR DID NOT ERR IN FINDING SAID ACTION TO BE FRIVOLOUS.
- VII. WHETHER THE CHANCELLOR IMPROPERLY INJECTED HIMSELF INTO THE PROCEEDINGS, ADVOCATED FOR THE MADDOXES, AND WAS PARTIAL TO THE MADDOXES AND THEIR COUNSEL AND VIOLATED VARIOUS CANONS OF JUDICIAL CONDUCT.

STATEMENT OF THE CASE

A. Nature of the Case

This matter involves a complaint to quiet and confirm title, for adverse possession, for temporary restraining order and injunction filed by Dempsey Sullivan, Plaintiff, in the Chancery Court of Simpson County, Mississippi against Samuel Maddox and Steve Maddox (“the Maddoxes”).

Dempsey Sullivan claims to be the fee simple owner of approximately 11 acres of real property previously believed to be located in Smith County, Mississippi. However, in 2005 the Simpson County Tax Assessor’s Office determined that the subject real property should be located within the boundaries of Simpson County, Mississippi. More specifically, the subject property is located in Section 1, Township 9 North, Range 17 West.

The subject property has been under fences and maintained by Dempsey Sullivan for over thirty (30) years.

Dempsey filed his complaint on August 26, 2005 asserting:

- (1) That he was the fee simple owner of approximately 11 acres of real property now said to be located in the northeast corner of Simpson County, Mississippi; Said property has been under fences of Dempsey Sullivan for over thirty (30) years and has been used by Dempsey for over thirty (30) years; There is no accurate description of the subject real property and no survey has or could be made prior to filing complaint because of conflicts between Dempsey and Samuel and Steve;
- (2) That he also possessed the subject property by virtue of actual possession of the tenor that would fulfill the adverse possession requirements set out in Miss. Code Ann. §15-1-13;

- (3) That Samuel Maddox and Steve Maddox allegedly made a claim to the subject property;
- (4) That the Maddox's claim is unfounded and without merit;
- (5) That the Maddox's claim should be removed as a cloud on his title to the subject property and his title should be quieted and confirmed in said real property;
- (6) That a temporary restraining order be issued against Samuel Maddox and Steve Maddox to prohibit them from entering upon said land, stop them from threatening him and to prevent Samuel and Steve from blocking his access to said property, and that an emergency temporary hearing be held;
- (7) That a permanent injunction be issued by the court against Samuel and Steve Maddox prohibiting the same; and
- (8) That Samuel and Steve Maddox should have to pay his attorney's fees and all costs for him having to file the complaint.

Samuel Maddox and Steve Maddox responded to Dempsey's Complaint by filing a motion to dismiss and answering the same.

The trial court issued a temporary injunction on January 10, 2006, ordering the parties to remain on their respective sides of a fence which is on the subject premises of this litigation, and Dempsey shall be allowed to continue his use of the subject property on his side of the fence; and the Maddoxes shall be allowed use of the property on their side of the fence.

On May 11, 2007, the Maddoxes filed a counterclaim against Dempsey and a third-party complaint against the Mississippi Band of Choctaw Indians after obtaining leave of court. Dempsey timely responded to the counterclaim by filing a motion to dismiss and answering the same. On December 26, 2007, the Maddoxes filed a Motion to Amend Counterclaim and Third-Party Complaint.

The Honorable David Shoemake was elected in November of 2010 and took the office of Chancery Judge Post 1 for the 13th Chancery District of Mississippi in January of 2011.

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

Samuel Maddox and Steve Maddox filed a Joint Motion for Summary Judgment on April 6, 2011. Dempsey timely responded to said motion and filed a Motion for Recusal.

On May 3, 2011, the parties appeared for trial. However, the Court took up the pending Motion for Recusal and Joint Motion for Summary Judgment. Dempsey's Motion for Recusal was denied and the Maddoxes' Joint Motion for Summary Judgment was heard. Following oral argument, the Court granted Samuel Maddox and Steve Maddox's Joint Motion for Summary Judgment finding that title to the subject property was vested in the United States of America and therefore, neither party could maintain an action in adverse possession against the United States of America.

B. Course of Proceedings Below

On May 3, 2011, the parties appeared in Mendenhall, Mississippi for a trial on the merits. (T. p. 57). However, Dempsey's counsel moved the Court to hear and dispose of the pending Motion for Recusal. (T. pp. 57 – 60). The Court denied Dempsey's Motion for Recusal after denying him a hearing to present any evidence in support of his motion for recusal and denying him an opportunity to make a proffer on the record. (T. pp. 60-66; R.E. Tabs 1 & 2; R. pp. 330, 390-391).

Samuel Maddox and Steve Maddox then moved the Court to hear and dispose of their pending Joint Motion for Summary Judgment. (T. p. 66). After oral argument, the Court granted summary judgment in favor of Samuel Maddox and Steve Maddox; however, the Court found that neither Dempsey nor the Maddoxes could assert a claim to the property because title remained with the United States of America. (T. p. 81; R.E. Tab 3; R. pp. 385-389).

On May 4, 2011, the parties happened to be before the Chancellor on Simpson County Chancery Court Cause No. S2010-133 *Dempsey Sullivan & Billie Joyce Sullivan vs. Steve Maddox & Samuel Maddox*, a completely different case with different parties. (T. p. 82 – 93). Without notice or a motion from either party, the Court reopened *Sullivan vs. Samuel Maddox and Steve Maddox* Cause No. 2005-256(1) to amend its order that was dictated into the record on May 3, 2011. (T. p. 82 – 93). After the Court amended its order in Cause No. 2005-256, Dempsey Sullivan renewed his Motion for Recusal filed in Cause No. 2010-133(1) and the Court denied the same. (T. pp. 84 – 93). In denying the Motion for Recusal in Cause No. 2010-133(1), the Court ventured back into Cause No. 2005-256(1) and found that cause of action to violate Rule 11 of the Mississippi Rules of Civil Procedure based on alleged statements by Dempsey's counsel on May 3, 2011 in chambers after the summary judgment hearing and the motions for recusal filed by Dempsey. (T. pp. 84 – 93; R.E. Tab 3 pp. 3-5; R. pp. 387-389).

On May 19, 2011, Samuel Maddox and Steve Maddox filed a Motion for Sanctions and Other Relief. (R. pp. 354 – 376). Dempsey timely filed his response to said Motion. (R. pp. 381 – 384).

On May 31, 2011, the parties appeared on Samuel Maddox and Steve Maddox's Motion for Sanctions and Other Relief and presented evidence both oral and documentary. (T. pp. 95).

Summary Judgment was filed with the Clerk on May 31, 2011. (R.E. Tab 3; R. pp. 385 – 389). Also, on said date, the Order Denying Dempsey Sullivan's Motion for Recusal was filed with the Clerk. (R.E. Tabs 1 & 2; R. pp. 390 – 391). On June 2, 2011, Dempsey Sullivan filed his Motion to Reconsider, Alter or Amend Summary Judgment. (R. pp. 392 – 394). Said Motion to Reconsider was denied by the Court on June 8, 2011. (R.E. Tab 4; R. p. 395). On June 8, 2011, Dempsey timely filed his Notice of Appeal in this matter appealing the trial court's

Summary Judgment entered in this case on May 31, 2011 and the denial of the Motion to Reconsider, Alter or Amend. (R. p. 396).

On June 15, 2011, a Final Judgment was filed with the Clerk. (R.E. Tab 5; R. pp. 401 – 407).

On June 24, 2011, Dempsey filed his Motion to Declare Final Judgment Void, To Stay All Proceedings In Simpson County Chancery Court or In The Alternative for New Trial, To Reconsider, Alter or Amend Final Judgment Entered June 15, 2011. (R. pp. 413 – 416).

On June 28, 2011, Dempsey and his counsel filed an Appeal Bond To The Supreme Court of Mississippi. (R. pp. 417 – 418).

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. 421 – 422).

On July 13, 2011, the Maddoxes filed their response to Dempsey's Motion to Declare Final Judgment Void, To Stay All Proceedings In Simpson County Chancery Court or In The Alternative for New Trial, To Reconsider, Alter or Amend Final Judgment Entered June 15, 2011. (R. pp. 428 – 434).

On August 15, 2011, an Order Denying Plaintiff's Motion to Declare Final Judgment Void, To Stay All Proceedings In Simpson County Chancery Court or In The Alternative for New Trial, To Reconsider, Alter or Amend Final Judgment Entered June 15, 2011 prepared by the Maddoxes' counsel was entered and filed with the Clerk. (R.E. Tab 6; R. pp. 454 – 455).

C. Statement of Facts

Dempsey has had exclusive use of the subject property for over 30 years. (R.E. Tab 7 p. 2; R.E. Tab 11; R. p. 319). The Maddoxes made a claim to the property, which prompted Dempsey to file for relief in Chancery Court. (R.E. Tab 7 p. 9; R. pp. 8-11). The trial court

entered a temporary injunction requiring the parties to remain on their side of the fence on said property. (R.E. Tab 8; R. p. 58). After the injunction was entered and after the Maddoxes filed their counterclaim and third-party complaint, this case sat idle for several years. (R.E. Tab 9; R. pp. 108 – 137).

The Maddoxes later filed a Joint Motion for Summary Judgment asserting that title to the subject property is vested in the United States of America, and therefore, neither Dempsey nor the Maddoxes could make a claim to the property. The Maddoxes primarily relied on the affidavit of Charles Hugh Craft, a licensed professional surveyor, wherein he opines that the United States of America has never issued a patent conveying the property out of the Public Domain. (R.E. Tab 10; R. pp. 268 – 269). Dempsey responded with an affidavit stating that he has been in exclusive possession of the property for 39 years. (R.E. Tab 11; R. p. 319).

Prior to May 3, 2011 when the parties appeared for trial, the Chancellor had conducted an undisclosed ex parte communication with the Office of the Mississippi Secretary of State inquiring into the status of the property at issue. (R.E. Tab 12; R. pp. 350 – 353). The Office of the Secretary of State in turn sent a research request to the United States Department of the Interior Bureau of Land Management. (R.E. Tab 12; R. pp. 351 - 353) The Bureau of Land Management responded and that response was forwarded to the Chancellor on May 3, 2011 via email. (R.E. Tab 12 p. 2; R. p. 353).

On May 3, 2011, the parties appeared before the Chancellor in Simpson County for the trial of this matter. However, the Chancellor took up Dempsey's Motion for Recusal and the Maddoxes' Joint Motion for Summary Judgment. The Chancellor denied Dempsey the opportunity to present any evidence in support of his motion for recusal, and also denied a proffer of the same. (T. pp. 57-66; R. E. Tabs 1 & 2; R. p. 330). Later, after hearing the Maddoxes' Joint Motion for Summary Judgment, the Chancellor added that Dempsey's counsel

had previously represented the Court's Administrator in a divorce action. (T. p. 76). Dempsey's counsel did not agree with the Chancellor's allegation. (T. p. 76). This statement by the Court was not alleged or disclosed by any of the parties.

The Chancellor then took up the Maddoxes' Joint Motion for Summary Judgment on May 3, 2011. After hearing oral argument and considering the motions, the Chancellor found that title was vested in the United States of America, and the parties could not adversely possess the property from the United States. (T. pp. 77 – 81). Based on said findings, the Chancellor granted summary judgment dismissing the claims of all parties with prejudice, including the Maddoxes' counterclaim. (T. p. 81).

On May 4, 2011, this case took an interesting turn. Dempsey Sullivan and Sam Maddox and Steve Maddox 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*. This case involved an easement dispute over a separate and distinct parcel of land owned by Dempsey Sullivan and his wife. (T. pp. 82 – 93). Mrs. Billie Joyce Sullivan was not a party to this case, Cause No. 2005-256.

During a hearing on Cause No. 2010-133, Dempsey's counsel brought forward a motion for recusal filed in Cause No. 2010-133, but based on the same allegations as the previous motion for recusal filed in Cause No. 2005-256 and other newly obtained evidence. (T. p. 84). The Chancellor again summarily denied the motion and denied the opportunity for even a proffer. (T. p. 84).

Although this motion was made during a hearing on Cause No. 2010-133, a completely separate matter, the Chancellor went on to amend his order in this matter, Cause No. 2005-256, during this hearing, therefore, making this motion for recusal relevant to this case. (T. pp. 85 – 93).

On May 3, 2011, the Chancellor disposed of all issues in this case by granting summary judgment as to all parties. On May 4, 2011, the parties to this cause happened to be in front of the Chancellor on a completely different matter, Simpson County Chancery Court Cause No. 2010-133 *Dempsey Sullivan & Billie Joyce Sullivan v. Steve Maddox & Sam Maddox*. On May 4, 2011, at the hearing on Cause No. 2010-133, the Chancellor without notice held that Dempsey's complaint and motion for recusal in this matter, Cause No. 2005-256, were frivolous and awarded the Maddoxes attorneys' fees. (T. p. 90; R.E. Tab 3; R. pp. 385-389).

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 the Final Judgment, the Chancellor awarded the Maddoxes attorneys fees, expenses and costs in the amount of \$42,922.91 to be paid jointly by Dempsey and his counsel, Terrell Stubbs. (R. pp. 401 – 407).

SUMMARY OF THE ARGUMENT

The Chancellor erred in denying Dempsey an opportunity to present any evidence, not even a proffer, in support of his motion for recusal filed in this matter. The Chancellor also erred in considering ex parte communications with his court administrator in disposing of Dempsey's motion for recusal.

The Chancellor erred in granting the Maddoxes' Joint Motion for Summary Judgment as to all parties because the Maddoxes did not demonstrate that no genuine issue of material fact existed. Furthermore, the Maddoxes did not have standing to assert that title was vested in the United States of America. All of the parties to this action were properly before the court and all parties were claiming title to the subject property. By those facts alone, summary judgment was clearly improper.

On May 4, 2011, this case took an interesting turn. Dempsey Sullivan and Sam Maddox and Steve Maddox 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*. This case involved an easement dispute over a separate and distinct parcel of land owned by Dempsey Sullivan and his wife.

During a hearing on Cause No. 2010-133, Dempsey's counsel brought forward a motion for recusal filed in Cause No. 2010-133, but based on the same allegations as the previous motion for recusal filed in Cause No. 2005-256 and other newly obtained evidence. The Chancellor again erred by summarily denying the motion and denying the opportunity for even a proffer on the record.

Although this motion was made during a hearing on Cause No. 2010-133, a completely separate matter, the Chancellor went on to amend his order in this matter, Cause No. 2005-256, during this hearing, therefore, making this motion for recusal relevant to this case.

On May 4, 2011, at a hearing on a completely different case, Cause No. 2010-133, the Chancellor reopened this case, Cause No. 2005-256, and found that Dempsey's complaint and motion for recusal violated Miss. R. Civ. Proc. 11 and awarded the Maddoxes attorneys' fees. Dempsey and his counsel were denied any due process of law as required by the Fourteenth

Amendment to the United States Constitution and Article 3 of the Mississippi Constitution when the Chancellor found that his case was frivolous and awarded the Maddoxes attorneys' fees

Dempsey's complaint cannot be frivolous because the Maddoxes are claiming ownership of the subject property by adverse possession as well. The Maddoxes never once asserted that Dempsey's claim to the property was frivolous, therefore, entitling them to attorneys' fees. The Chancellor eventually granted the Maddoxes' Joint Motion for Summary Judgment finding that title remained in the United States of America, thus the parties could not adversely possess the property against the USA. Interestingly, the Chancellor found that Dempsey's complaint and motions for recusal were frivolous, but did not find the Maddoxes' counterclaim frivolous. This finding by the Chancellor is completely undermined by the fact that the Maddoxes filed and pursued a counterclaim and third-party complaint against the Mississippi Band of Choctaw Indians involving the subject property. Based on the above, the Chancellor's ruling is completely prejudicial, unreasonable, arbitrary, and inconsistent with substantial justice.

Even if this Court finds the Chancellor did not err in finding this cause to be frivolous, the attorneys' fees awarded are not supported by the evidence and are excessive. The Chancellor erred in considering inadmissible hearsay evidence and inadmissible expert testimony when awarding the Maddoxes attorneys' fees in the amount of \$42,922.91. The Chancellor did not differentiate between the defense of Dempsey's claim and the prosecution of the Maddoxes' counterclaim and third-party complaint, nor did he allow Dempsey's counsel to cross-examine Steve Maddox on this issue.

It is obvious from the record that the chancellor improperly injected himself into this case and showed partiality to the Maddoxes and their counsel. Therefore, this Court should reverse, remand and recuse the Chancellor from this case.

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 Chancellor erred in denying Dempsey an opportunity to present any evidence in support of his motion for recusal filed in this matter. Furthermore, the Chancellor erred in denying Dempsey an opportunity to make a proffer of evidence for the record in support of his motion for recusal. Additionally, the Chancellor erred in considering ex parte communications with his administrator in disposing of the motion.

Uniform Chancery Court Rule 1.11 sets out the standard and procedure for bringing a motion for recusal. It states:

Any party may move for the recusal of a judge of the chancery court if it appears that the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. 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. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

Uniform Chancery Court Rule 1.11

A reasonable person standard is employed in reviewing a trial court's denial of a motion for recusal. The inquiry focuses on whether a "reasonable person, knowing all the facts and circumstances, would harbor doubts about the trial judge's impartiality." *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)).

Dempsey's counsel filed a motion requesting the Chancellor recuse himself in this matter on April 12, 2011 asserting that Wesley Broadhead, counsel for the Maddoxes, was currently representing the court administrator's husband in a criminal matter and requested a hearing on the issue. (R. p. 311-313). The Maddoxes' counsel responded admitting that Mr. Broadhead was representing the Court Administrator's husband in a criminal appeal in the Circuit Court of Simpson County. (R. pp. 315A-315C). Defendants'/Counter-Plaintiffs' counsel also alleged that because Dempsey's counsel filed a motion for recusal based on facts that were true and should have been disclosed by Mr. Broadhead that said motion was in violation of Miss. R. Civ. Proc. 11(b) (R. pp. 315A-315C).

On May 3, 2011, the parties appeared for trial and Dempsey's counsel brought forth his motion for recusal and to present some new evidence of unreported campaign contributions to the Chancellor by the Maddoxes (T. p. 57 - 59).

Dempsey's counsel called Mr. Broadhead as his first witness on the motion for recusal, but before any testimony was put on, the Chancellor summarily denied Dempsey's motion for recusal finding that Mr. Broadhead's representation of the Court Administrator's husband would not cause him to be partial and Dempsey failed to file an affidavit with the motion as required by the UCCR 1.11 (T. pp. 57-66; R.E. Tabs 1 & 2; R. p. 330). Later, after hearing the Maddoxes' Joint Motion for Summary Judgment, the Chancellor added that Dempsey's counsel had

previously represented the Court's Administrator in a divorce action. (T. p. 76). Dempsey's counsel did not agree with the Chancellor's allegation. (T. p. 76). This was not alleged or disclosed by any of the parties.

The Chancellor erred by precluding Dempsey from producing any evidence whatsoever in support of his motion for recusal, not even a proffer. (T. pp. 57-66; R.E. Tab 3 pp. 3-5; R. p. 387- 388). Dempsey specifically requested a hearing in order to produce evidence in support of his motion because the material witness was opposing counsel and Dempsey and his counsel discovered that there may have been unreported campaign contributions to the Chancellor by the Maddoxes. (R. pp. 311 - 313). Denial of this hearing was in direct violation of Miss. Code of Judicial Conduct Canon 3(B)(7), which states "[a] judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law." Miss. Code of Judicial Conduct Canon 3(B)(7). Uniform Chancery Court Rule 1.11 provides for a hearing on a motion for recusal and Dempsey requested a hearing on said motion.

The Chancellor denied Dempsey a hearing on his motion for recusal because Dempsey did not attach an affidavit setting forth the factual basis for the motion. (T. pp. 57-66; R.E. Tab 3 pp. 3-5; R. p. 387- 388). The factual basis was set out in the motion itself. Moreover, the filing of an affidavit is purely technical and does not cure doubts about the judge's impartiality.

The Chancellor also erred by considering ex parte communications with his Court Administrator in denying Dempsey's motion for recusal. (T. p. 76, 86, 142). 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 also in 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

It was error to grant summary judgment as to all parties because the Maddoxes did not demonstrate that no genuine issue of material fact existed. Furthermore, the Maddoxes did not have standing to assert that title was vested in the United States of America. All of the parties to this action were properly before the court and all parties were claiming title to the subject property. By those facts alone, summary judgment was clearly improper.

Summary Judgment “shall be rendered forthwith if 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. Proc 56. “On motion for summary judgment, if there is doubt as to whether or not a fact issue exists, it should be resolved in favor of the non-moving party.” *Lee v. Golden Triangle Planning & Development Dist., Inc.*, 797 So.2d 845, 848 (Miss. 2001). “The party moving for summary judgment has the burden of demonstrating there is no genuine issue of material fact, while the non-moving party should be given the benefit of every reasonable doubt.” *Vaughn ex rel. Vaughn v. Estate of Worrell*, 828 So.2d 780, 782 (Miss. 2002). “Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite.” *Vaughn ex rel. Vaughn v. Estate of Worrell*, 828 So.2d 780, 782 (Miss. 2002).

The Maddoxes filed a Joint Motion for Summary Judgment asserting that this cause of action should be summarily dismissed as to **all parties**, including their counterclaim, because there is no genuine issue of material fact that title to the subject piece of land is vested in the United States of America. (R. pp. 250 – 301). They supported this position with an affidavit

from Charles Hugh Craft, a licensed professional surveyor, opining based on his experience, training, education, examination of certain documents, that title to the subject property is vested in the United States of America. (R.E. Tab 10; R. pp. 268 – 269).

Dempsey timely responded to the Maddoxes' Joint Motion for Summary Judgment asserting that the Maddoxes did not have standing to assert that title to the subject property was vested in the United States and that 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 parties appeared for trial on May 3, 2011, however, the Chancellor allowed the Maddoxes to present their Joint Motion for Summary Judgment requesting dismissal of all claims in this cause of action. (T. pp. 66 – 82). After hearing oral argument and considering the motions, the Chancellor found that title was vested in the United States of America, and the parties could not adversely possess the property from the United States. (T. pp. 77 – 81). Based on said findings, the Chancellor granted summary judgment as to all parties, including the Maddoxes' counterclaim. (T. p. 81).

The United States was not a party to this action, nor is there any record evidence that the United States claimed possession of the subject property. However, unbeknownst to Dempsey, the Chancellor had been conducting undisclosed ex parte communications with the Office of Mississippi Secretary of State, who in turn contacted the Mississippi Attorney General's Office, who in turn contacted the United States Department of the Interior Bureau of Land Management regarding the subject property. (R.E. Tab 12; R. 348 – 353). Correspondence solicited by the Chancellor from the Bureau of Land Management was forwarded to the Chancellor on May 3, 2011 at 10:38AM via email. (R.E. Tab 12; R. pp. 348 – 353). The Chancellor did not disclose these ex parte communications at the hearings on May 3rd or 4th. However, he did disclose them

by letter to counsel on or around May 13, 2011. (R.E. Tab 12 p. 1; R. pp. 348 – 353). This conduct by the Chancellor is in direct violation of Miss. Code of Judicial Conduct Canon 3(B)(7). Even if this Court finds the communications to fall under an exception, the Chancellor did not give the proper notice under Canon 3(B)(7).

The Chancellor erred in granting the Maddoxes' Joint Motion for Summary Judgment because they clearly did not meet their burden of demonstrating no genuine issue of material fact existed. All parties to this action were claiming title to the property by adverse possession. The chancery court had the authority to adjudicate the interests of the parties before it. All parties were adult resident citizens of Simpson County. (R.E. Tab 7 p. 1; R.E. Tab 9 p. 2; R. pp. 8, 28). Therefore, summary judgment was not proper.

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 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.

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.

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

On May 4, 2011, this case took an interesting turn. Dempsey Sullivan and Sam Maddox and Steve Maddox 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*. This case involved an easement dispute over a separate and distinct parcel of land owned by Dempsey Sullivan and his wife. (T. pp. 82 – 93). Mrs. Billie Joyce Sullivan was not a party to this case, Cause No. 2005-256.

During a hearing on Cause No. 2010-133, Dempsey's counsel brought forward a motion for recusal filed in Cause No. 2010-133, but based on the same allegations as the previous motion for recusal filed in Cause No. 2005-256 and other newly obtained evidence. (T. p. 84). The Chancellor again summarily denied the motion and denied the opportunity for even a proffer. (T. p. 84).

Although this motion was made during a hearing on Cause No. 2010-133, a completely separate matter, the Chancellor went on to amend his order in this matter, Cause No. 2005-256, during this hearing, therefore, making this motion for recusal relevant to this case. (T. pp. 85 – 93).

Dempsey incorporates the argument above regarding the error assigned to the first denial of the motion for recusal herein. 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

Dempsey and his counsel were denied due process of law when the Chancellor found that his case was frivolous and awarded the Maddoxes attorneys' fees as required by the Fourteenth Amendment to the United States Constitution and Article 3 of the Mississippi Constitution.

The Fourteenth Amendment to the United States Constitution prohibits the State, including its courts, from depriving "any person of life, liberty, or property without due process of law..." U.S. Const. Amend. XIV §1. The same requirement is found in the Mississippi Constitution. Miss. Cont. Art. 3, §14.

On May 3, 2011, the Chancellor disposed of all issues in this case by granting summary judgment as to all parties. On May 4, 2011, the parties to this cause happened to be in front of the Chancellor on a completely different matter, Simpson County Chancery Court Cause No. 2010-133 *Dempsey Sullivan & Billie Joyce Sullivan v. Steve Maddox & Sam Maddox*. On May 4, 2011, at the hearing on Cause No. 2010-133, the Chancellor without notice held that Dempsey's complaint and motion for recusal in this matter, Cause No. 2005-256, were frivolous. (T. p. 90; R.E. Tab 3 pp. 3 – 5; R. pp. 385-389).

The record reflects that neither Dempsey nor his counsel were provided proper notice of the Chancellor's intention to reopen this case sua sponte and amend its previous order to find his complaint and motions frivolous. Moreover, Dempsey was denied a hearing on this issue. Dempsey was denied any opportunity to put on any evidence to support his claim to the property and his motion for recusal. This action by the Chancellor is in direct violation of the Fourteenth Amendment to the United States Constitution and Section 14 Article 3 of the Constitution of the State of Mississippi, and requires reversal and remand for hearings on the issues of recusal and the merits of Dempsey's claim.

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

Dempsey and the Maddoxes are both claiming ownership of the subject property by adverse possession. The Maddoxes never once asserted that Dempsey's claim to the property was frivolous, therefore, entitling them to attorneys' fees. The Chancellor eventually granted the Maddoxes' Joint Motion for Summary Judgment finding that title remained in the United States of America, thus the parties could not adversely possess the property against the USA. Interestingly, the Chancellor found that Dempsey's complaint and motions for recusal were frivolous, but did not find the Maddoxes' counterclaim and/or third-party complaint frivolous. This finding by the Chancellor is completely undermined by the fact that the Maddoxes filed and pursued a counterclaim and third-party complaint against the Mississippi Band of Choctaw Indians involving the subject property. As for the motion for recusal, the Chancellor did not allow Dempsey or his counsel to present any evidence in support of Dempsey's motion; therefore, the evidence does not support a finding of frivolousness. Furthermore, the

Chancellor's ruling is completely prejudicial, unreasonable, arbitrary, and inconsistent with substantial justice.

An abuse of discretion standard is applied when reviewing the imposition of sanctions under Miss. R. Civ. Proc. 11 and Miss. Code Ann. § 11-55-7. *In re Spencer*, 985 So.2d 330, 337 (Miss. 2008).

Miss. R. Civ. Proc. 11(b) states in part “[i]f any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.” Miss. R. Civ. Proc. 11(b). 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) (quoting *City of Madison v. Bryan*, 763 So.2d 162, 168 (Miss.2000)).

Dempsey filed his complaint in this matter on August 26, 2005. (R.E. Tab 7; R. pp. 8 – 11). On May 11, 2007, the Maddoxes filed their counterclaim against Dempsey and Third-Party Complaint against the Mississippi Band of Choctaw Indians. (R.E. Tab 9; R. pp. 108 – 137). In their counterclaim, the Maddoxes asserted that the United States of America had not issued a patent on the subject property. (R.E. Tab 9 p. 3; R. p. 110). All parties were claiming title to the property by adverse possession and color of title. The Maddoxes never made a 12(b) motion or a motion to dismiss for lack of jurisdiction at any point during the five years this case was being litigated based upon their assertion that a patent was never issued. On April 6, 2011, the Maddoxes filed a Joint Motion for Summary Judgment requesting the court grant summary judgment to them as well as to Dempsey alleging that title to the property was vested in the United States of America. (R. pp. 250 – 253). The Maddoxes did not withdraw their

counterclaim. Dempsey expended funds and incurred expenses in defending the Maddoxes' counterclaim and third-party complaint.

At a hearing on the joint motion for summary judgment, the Chancellor granted summary judgment and dismissed the claims of all parties with prejudice. (T. pp. 77 – 81). At a hearing on a completely different case, the Chancellor found that Dempsey's complaint and motion for recusal were frivolous. (T. pp. 82 – 93). The Chancellor set out his findings on this issue in the Summary Judgment and Final Judgment entered in this matter. However, the Chancellor's reasoning is flawed. All of the Chancellor's findings in the Final Judgment could apply to the Maddoxes in pursuing their counterclaim and third-party complaint. (R.E. Tab 3 pp. 3 – 5; R.E. Tab 5; R. pp. 387-388, 401-407).

Under the circumstances in this case, if Dempsey's complaint is frivolous, then one can only conclude that the Maddoxes' counterclaim and third-party complaint are also frivolous. However, the Chancellor only sanctioned Dempsey and his counsel. Moreover, Dempsey was denied a hearing to adduce any evidence in support of his claim and motion for recusal.

In finding that Dempsey's complaint and motion were frivolous, the Chancellor primarily relied on alleged ex parte statements made by Dempsey's counsel in chambers after the case was disposed of on summary judgment. (T. pp. 88 – 91; R.E. Tab 3 pp. 3 – 5; R.E. Tab 5; R. p. 387-388, 401-407). The Chancellor and his administrator testified against Dempsey and his counsel regarding the alleged statements. (T. pp. 88 – 91). The Chancellor improperly injected himself into the proceedings and his conduct was also in violation of Miss. Code of Judicial Conduct Canons 2(B) & 3(B)(7).

Canon 2(B) states in pertinent part, "[j]udges shall not testify voluntarily as character witnesses." In this case the Chancellor and his administrator testified against Dempsey and his counsel in violation of Canon 2(B).

Canon 3(B)(7) 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...”. The Chancellor’s finding that Dempsey’s complaint and motion were frivolous was primarily based on alleged statements made by Dempsey’s counsel in chambers after the hearing and privileged communications between Dempsey and his counsel. (T. pp. 88 – 91; R.E. Tab 3 pp. 3 – 5; R. p. 387). According to Canon 3(B)(7), the Chancellor is not permitted to consider such statements.

Additionally, the unsworn testimony on the part of the Chancellor precluded Dempsey from a fair opportunity to offer evidence to the contrary 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).

The Chancellor also violated Miss. R. Evid. 605, when he testified against Dempsey and his counsel on several occasions throughout the record.

The Chancellor clearly acknowledged the complexity of this case before making his findings on the record at the conclusion of the hearing on the joint motion for summary judgment. (T. pp. 77-78).

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.

Even if this Court finds the Chancellor did not err in finding this cause to be frivolous, the attorneys' fees awarded are not supported by the evidence and are excessive. The Chancellor erred in considering inadmissible hearsay and inadmissible expert opinion evidence when awarding the Maddoxes attorneys' fees in the amount of \$42,922.91. The Chancellor did not differentiate between the defense of Dempsey's claim and the prosecution of the Maddoxes' counterclaim and third-party complaint, nor did he allow Dempsey's counsel to cross-examine Steve Maddox on this issue.

The matter of determining attorneys' fees is largely entrusted to the sound discretion of the trial court. *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982). The attorneys' fees of \$42,922.91 awarded by the Chancellor are not supported by admissible record evidence and are excessive.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Miss. R. Evid. 801(c). "Hearsay is not admissible except as provided by law." Miss. R. Evid. 802.

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).

Steve Maddox is not qualified to sponsor these documents under any hearsay exception nor authenticate the documents under Miss. R. Evid. 901. 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).

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).

Moreover, the Maddoxes failed to adduce any evidence to support the appropriateness of the amount of attorneys' fees awarded. According to *McKee* (which the Chancellor relied on in making his findings), the fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case. *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982).

The Maddoxes failed to offer any evidence in support of the factors to consider in determining the appropriate fee. (T. pp. 108-112). Not one attorney that represented the Maddoxes testified in support of their fees for services rendered or expenses incurred. However, the Chancellor made several findings in his Final Judgment based on the *McKee* factors, which were not supported by any record evidence. (T. pp. 137 – 151; R.E. Tab 5; R. pp. 401-407). Logically, if the findings in the Final Judgment are found to be supported by the evidence, then

those findings would equally apply to the Maddoxes and the litigation of their counterclaim and third-party complaint.

The Chancellor also 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).

Further, the Maddoxes called two attorneys, Mr. Robert Germany and Mr. Wayne Easterling, to give expert opinions on the reasonableness of the fees, but neither attorney was designated as an expert witness pursuant to Uniform Chancery Court Rule 1.10(A). (T. pp. 124 – 131). UCCR 1.10(A) states “[a]bsent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.” Uniform Chancery Court Rule 1.10(A). As the Maddoxes did not comply with UCCR 1.10(A), it was error for the Chancellor to allow and consider the opinions offered by said experts over the objections Dempsey's counsel.

If this Court finds that the Chancellor did not abuse his discretion in finding Dempsey's complaint and motion frivolous and the documents were admissible, the attorneys' fees awarded by the Chancellor are not supported by the evidence and are excessive. The Chancellor failed to differentiate between the fees incurred in defending Dempsey's claim and prosecuting their counterclaim and third-party complaint against the Mississippi Band of Choctaw Indians. 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.

It is obvious from the record that the chancellor injected himself into this case, became an advocate for the Maddoxes, and showed partiality to the Maddoxes and their counsel. Therefore, this Court should reverse, remand and recuse the Chancellor from this case.

“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 Chancellor did not allow Dempsey to put on any evidence in support of his motions for recusal in this matter and refused a proffer;
- (2) 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;
- (4) The Chancellor conducted ex parte communications with the Mississippi Secretary of State regarding disputed facts in this case and did not disclose those

communications 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);

- (5) The Chancellor granted the Maddoxes' joint motion for summary judgment based on grounds for which the Maddoxes did not have standing to assert; specifically, that the property is owned by the United States of America, which was obviously not a party to this action (T. pp. 77 – 82; R.E. Tabs 3 & 5), thus there existed a genuine issue of fact as to who possessed property; moreover there is no documentary or testimonial evidence to support this finding;
- (6) The Chancellor granted the Maddoxes' joint motion for summary judgment as to **all** parties completely disposing of all issues in the case and reopened the case with no notice to Dempsey, found Dempsey's case frivolous although the Maddoxes filed a counter claim asserting possession of the property at issue and awarded the Maddoxes attorneys fees (T. 82 – 93; R.E. Tabs 3 & 5);
- (7) The Chancellor primarily based his decision that the action was frivolous and award of attorneys' fees solely on alleged remarks made by Dempsey's counsel in chambers after the matter was disposed of and the motions for recusal filed by Dempsey, which were denied by counsel; (T. pp. 89- -90; R.E. Tab 3 p. 3; R. p. 387),
- (8) The Chancellor had the court administrator testify against Dempsey's counsel during the Chancellor's amendment of his order (T. p. 90)
- (9) The Chancellor did not consider that this matter was set for trial on April 16, 2007, when the Maddoxes filed a Miss. R. Civ. Proc. 15 Motion to amend their answer to file a counterclaim and third party complaint against the Choctaw Indian Nation, which was never served nor any communications from the Choctaw Nation filed in the court file (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 Chancellor considered inadmissible hearsay and inadmissible expert opinion evidence to support the attorneys' fees awarded to the Maddoxes over the objection of Dempsey's counsel (T. pp. 108 – 112);
- (12) The Chancellor awarded an excessive amount of attorneys' fees to the Maddoxes—the Chancellor did not differentiate between fees for defending the complaint and fees for prosecuting the Maddoxes' counterclaim and third party complaint and also limited Dempsey's counsel scope of cross examination into this issue (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 record is devoid of any evidence for which to apply the reasonable person standard to the Chancellor's denial of Dempsey's motion for recusal. 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 on his motion for recusal, not even a proffer. Therefore, this Court should reverse and remand for a hearing on the issue of recusal.

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.

Dempsey was denied any opportunity to adduce or proffer any evidence on his motion for recusal filed in Cause No. 2010-133; 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.

The record reflects that Dempsey nor his counsel were provided proper notice of the Chancellor's intention to reopen this case sua sponte and amend its previous order to find Dempsey's complaint and motions frivolous. Moreover, Dempsey was denied a hearing on this issue. Dempsey was denied any opportunity to put on any evidence to support his claim to the property and his motion for recusal. This action by the Chancellor is in direct violation of Fourteenth Amendment to the United States Constitution and Section 14 Article 3 of the Constitution of the State of Mississippi, and requires reversal and remand for hearings on the issues of recusal and the merits of Dempsey's claim.

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 findings on this issue are not supported by the record evidence and are 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.

If this Court finds that the Chancellor did not abuse his discretion in finding Dempsey's complaint and motion frivolous and the documents and expert testimony were admissible, the

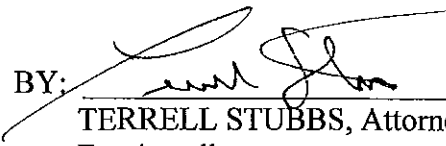
attorneys' fees awarded by the Chancellor are not supported by the evidence and are excessive. The Maddoxes failed to offer any evidence in support of the appropriateness of the fees, costs and expenses their attorneys charged in defending Dempsey's claim. The Chancellor failed to differentiate between the fees incurred in defending Dempsey's claim and prosecuting their counterclaim and third-party complaint against the Mississippi Band of Choctaw Indians. Therefore, this Court should reverse and remand for further hearings on reasonable attorneys' fees.

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

Respectfully submitted,

DEMPSEY SULLIVAN

BY:


TERRELL STUBBS, Attorney
For Appellant

CERTIFICATE OF SERVICE

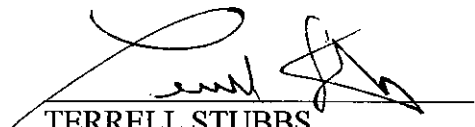
I, TERRELL STUBBS, attorney of record for **APPELLANT, DEMPSEY SULLIVAN**, do hereby certify that I have this day mailed postage prepaid a true and correct copy of the above and foregoing Brief of Appellant to the following:

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Honorable Judge David Shoemake
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This the 2nd day of Feb., 2012.



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