INDEX

SELECTED CASES (Con't)

Page

SANCTIONS

Sullivan v. Maddox, 2011-CA-00820-COA (Miss. 2013) 205

SUMMARY JUDGMENT

Nelson v. Holliday, 2011-CA-00101-COA (Miss. 2012) 217

TAX SALES

City of Bruce v. Borrego Springs Bank, 2011-CA-00276-COA (Miss. 2012) 223

Tofino Holdings, LLC. V. Donnell and Sons, LLC, 2011-CA-01408-COA (Miss. 2012) 226

Davis v. Estate of Tiblier, 2011-CP-01753-COA (Miss. 2013) 230

WILLS, TRUSTS AND ESTATES

Wilbourn v. Wilbourn, 2010-Ca-00014-COA (Miss. 2012) 234

Smiley v. Yllander, 2011-CA-00593-COA (Miss. 2012) 253

In Re Estate of Estes v. Estes, 2011-CA-01451-COA (Miss. 2012) 263

ZONING

Donovan v. City of Long Beach, 2010-CA-01985-COA (Miss. 2012) 274

Craig v. City of Yazoo City, 2011-CA-01465-COA Miss. 2012) 279

Riverside Traffic Systems, Inc. v. Bostwick, 2009-CT-00710-SCT (Miss. 2011) 284

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Court of Appeals of Mississippi.
Dempsey SULLIVAN and Terrell Stubbs, Appellants
v.
Samuel MADDOX and Steve Maddox, Appellees.

No. 2011–CA–00820–COA.
Jan. 22, 2013.
Rehearing Denied May 28, 2013.

Background: Plaintiff brought action against defendants to quiet title to property claiming ownership through adverse possession. The Chancery Court, Simpson County, David Shoemake, J., denied motion to recuse, granted defendants summary judgment, and issued sanctions against plaintiff. Plaintiff appealed.

Holdings: The Court of Appeals, Carlton, J., held that:
(1) chancery court lacked subject matter jurisdiction to hear claim to quiet title against the United States by virtue of adverse possession;
(2) recusal of chancellor was not warranted; and
(3) quiet title action and motion for recusal constituted frivolous filings warranting sanctions under Rule 11 and the Litigation Accountability Act.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

The determination of whether jurisdiction over a particular matter is proper is a question of law that appellate court must review de novo.

[2] Appeal and Error 30 ⇐1024.1

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)6 Questions of Fact on Motions or Other Interlocutory or Special Proceedings
30k1024.1 k. In General. Most Cited Cases

In applying the manifest-error standard of review to a denial of a recusal motion, appellate court acknowledges that the law presumes the impartiality of the trial judge.

[3] Appeal and Error 30 ⇐984(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(1) k. In General. Most Cited Cases

When reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act and Rule 11, the appellate court is limited to a consideration of whether the trial court abused its discretion. West's A.M.C. § 11–55–5; Rules Civ.Proc., Rule 11.

[4] United States 393 ⇐125(22)

393 United States
393IX Actions

393k125 Liability and Consent of United States to Be Sued

393k125(22) k. Property, Actions Relating to in General. Most Cited Cases

Quiet Title Act establishes a limited waiver of the United States' sovereign immunity for action to acquire title from the federal government. 28 U.S.C.A. § 2409a.

[5] Courts 106 ⚿489(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(B) State Courts and United States Courts

106k489 Exclusive or Concurrent Jurisdiction

106k489(1) k. In General. Most Cited Cases

A state court does not have jurisdiction to decide quiet title actions against the United States; exclusive jurisdiction in quiet title actions is vested in federal courts. 28 U.S.C.A. § 1346(f).

[6] Courts 106 ⚿35

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k34 Presumptions and Burden of Proof as to Jurisdiction

106k35 k. In General. Most Cited Cases

When a plaintiff's allegations of jurisdiction are questioned, the plaintiff bears the burden to prove jurisdiction by a preponderance of the evidence.

[7] Courts 106 ⚿489(1)

106 Courts

106VII Concurrent and Conflicting Jurisdiction

106VII(B) State Courts and United States Courts

106k489 Exclusive or Concurrent Jurisdiction

106k489(1) k. In General. Most Cited Cases

Chancery court lacked subject matter jurisdiction to hear claim to quiet title against the United States by virtue of adverse possession. 28 U.S.C.A. § 2409a(n).

[8] Appeal and Error 30 ⚿911

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k911 k. Organization of Lower Court. Most Cited Cases

In reviewing the denial of a motion to recuse, an appellate court must presume a judge to be qualified and unbiased, and that presumption must be overcome by evidence producing a reasonable doubt about the validity of the presumption.

[9] Judges 227 ⚿46

227 Judges

227IV Disqualification to Act

227k46 k. Relationship to Attorney or Counsel. Most Cited Cases

Fact that defendants' attorney in quiet title action represented the husband of the court administrator in a separate and distinct criminal proceeding did not warrant chancellor's recusal. Code of Jud.Conduct, Canon 3(E)(1)(a).

[10] Costs 102 ⚿2

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k2 k. In General. Most Cited Cases

Costs 102 ⚿194.44

102 Costs

102VIII Attorney Fees

102k194.44 k. Bad Faith or Meritless Litigation. Most Cited Cases

Plaintiff's quiet title action and motion for re-

cusal constituted frivolous filings made for the purposes of harassment and delay warranting sanctions under Rule 11 and the Litigation Accountability Act; plaintiff's attorney informed plaintiff that his case was weak due to the lack of a government survey, a patent issued by the United States, or a description of the boundaries of the land in dispute, and plaintiff's expert witness confirmed that the United States had issued no patent conveying the subject real property, and there was no evidentiary support for plaintiff's allegations of unreported campaign contributions to the chancellor from the defendants, which plaintiff alleged on the day of the summary-judgment and motion-for-recusal hearings in an attempt to delay the case or have the chancellor recuse himself. West's A.M.C. § 11–55–5(1); Rules Civ.Proc., Rule 11(b).

[11] Costs 102 ⚿194.44

102 Costs
102VIII Attorney Fees
102k194.44 k. Bad Faith or Meritless Litigation. Most Cited Cases

A claim is "frivolous" under the Litigation Accountability Act when objectively speaking, the pleader or movant has no hope of success. West's A.M.C. § 11–55–3(a).

[12] Costs 102 ⚿2

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In General. Most Cited Cases

Plaintiff and his attorney were presented with sufficient notice that the chancellor would make his findings regarding sanctions at hearing; both parties received notice of a May 31, 2011 hearing regarding the defendants' motion for sanctions, and the chancellor's May 25, 2011 order granting summary judgment provided that a hearing would be held on May 31, 2011, to address the matter of sanctions. West's A.M.C. § 11–55–5(1); Rules Civ.Proc., Rule 11(b).

[13] Costs 102 ⚿2

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In General. Most Cited Cases

Trial court did not abuse its discretion in awarding reasonable attorney fees as sanctions for plaintiff's frivolous action; the fees were charged by the hour, the fees and expenses were within the range customarily charged within the locality, services were rendered by one attorney at a time, and the fees were reasonable considering the time and labor required, the novelty and difficulty of the claims involved, and the skill required to perform the legal service properly. West's A.M.C. § 11–55–5(1); Rules Civ.Proc., Rule 11(b).

W. Terrell Stubbs, attorney for appellants.

James Burvon Sykes III, Jackson, L. Wesley Broadhead, Mendenhall, attorneys for appellees.

Before IRVING, P.J., CARLTON and MAXWELL, JJ.

CARLTON, J., for the Court:

*1 ¶ 1. Dempsey **Sullivan** and Terrell Stubbs (collectively, **Sullivan**) appeal the Simpson County Chancery Court's grant of summary judgment in favor of Samuel **Maddox** and Steve **Maddox** (collectively, the **Maddoxes**). **Sullivan** also appeals the chancellor's imposition of sanctions against **Sullivan** pursuant to Mississippi Rule of Civil Procedure 11, and also the chancellor's denial of **Sullivan's** motion to recuse.[FN1] This case concerns **Sullivan's** attempt to confirm and quiet title, by adverse possession, to property with a title vested in the United States. Finding no error, we affirm.

FACTS

¶ 2. On August 26, 2005, **Sullivan** filed a complaint in the Simpson County Chancery Court seeking to confirm and quiet his title to approximately

eleven acres of real property in Simpson County, Mississippi.[FN2] **Sullivan** filed his complaint in response to the **Maddoxes**' claim to the same parcel of land. In his complaint, **Sullivan** claimed that he possessed the subject property by virtue of actual possession, thus fulfilling the adverse-possession requirements set forth in Mississippi Code Annotated section 15–1–13 (Rev.2012). **Sullivan** acknowledged that no accurate description of the real property existed, asserting no survey had been made or could be made prior to the filing of his complaint. **Sullivan** also requested and received a temporary injunction requiring the **Maddoxes** to remain on their side of the fence on the property.

¶ 3. In response to the injunction, the **Maddoxes** filed a counterclaim and third-party complaint on October 7, 2005. The **Maddoxes** later filed a joint motion for summary judgment on April 6, 2011, asserting that title to the subject property was vested in the United States, and therefore, neither **Sullivan** nor the **Maddoxes** could make a claim to the property. In support of their argument, the **Maddoxes** provided an affidavit from Charles Hugh Craft, a licensed professional surveyor (PLS), who opined that the United States had never issued a patent conveying the property out of the public domain. **Sullivan** responded to this allegation by maintaining that he had possessed the property exclusively for thirty-nine years.

¶ 4. Then, on April 12, 2011, **Sullivan** filed a motion for the chancellor's recusal. The **Maddoxes** responded by asserting that the motion for recusal had fatal defects because it failed to comply with the express dictates of Uniform Chancery Court Rule 1.11. Specifically, the **Maddoxes** alleged that **Sullivan** had failed to timely file the motion[FN3] and that the motion did not include the mandatory affidavit "setting forth the factual basis underlying the asserted grounds for recusal." *See* UCCR 1.11.

¶ 5. On May 3, 2011, the parties appeared in the Simpson County Chancery Court for a hearing. The chancellor heard Sullivan's motion for recusal first. The motion for recusal alleged that Wesley Broadhead, one of the attorneys representing the Maddoxes, had previously represented the husband of the chancery court administrator in a criminal appeal pending in the Simpson County Circuit Court. The chancellor took judicial notice of this fact, and the chancellor also acknowledged to both parties in open court that Sullivan's counsel, Terrell Stubbs, had previously represented the chancery court administrator in a divorce action. The chancellor noted that Stubbs had failed to disclose this prior relationship. In ruling on the motion for recusal, the record shows the chancellor acknowledged "the question posed by the motion to recuse was if a reasonable person would doubt the court's impartiality to the litigants in this case because an attorney for the litigants represented the husband of the court administrator" in a pending criminal appeal. The chancellor denied the motion to recuse, finding that the motion for recusal failed to comply with Rule 1.11. The chancellor also held that the basis stated in the motion for recusal constituted insufficient grounds for recusal under Canon 3 of the Code of Judicial Conduct.

*2 ¶ 6. The chancellor's order granting summary judgment reflects that on the morning of trial, Sullivan's counsel attempted to make a proffer alleging an unreported campaign contribution to the chancellor, without providing a motion for recusal on this basis or a supporting affidavit setting forth any facts underlying the allegation. The chancellor determined that the unsubstantiated accusation directed at the chancellor constituted a derogatory remark alleging misconduct, and he determined that Sullivan's counsel asserted the remark as a threat.

¶ 7. After hearing oral argument on the Maddoxes' joint motion for summary judgment, the chancellor determined that title to the subject property had indeed previously vested in the United States, and thus held that pursuant to 28 U.S.C. § 2409a(n),[FN4] the parties could not adversely possess sovereign property. The chancellor also explained that the chancery court lacked jurisdiction to award title to real property if that property still

constituted part of the public domain and still vested in the United States.

¶ 8. In his May 25, 2011 judgment, the chancellor noted that after the hearing on May 3, 2011, Sullivan's counsel, Stubbs, informed the chancellor of the following:

> Prior to the filing of the complaint ... on or about August 26, 2005, [Stubbs] had informed [Sullivan] that he had a poor or weak case against the [Maddoxes] due to the fact that there was no government survey, [that] no patent issued out of the United States of America, that he had no description of the boundaries of the land in dispute[, that] he had no color of title and that he could not deraign title in the pleadings....

The record further reflects that Stubbs informed the chancellor that he had required Sullivan to sign a waiver acknowledging that Stubbs had advised him of the problems with Sullivan's claim. The chancellor acknowledged that Sullivan's expert witness, Bill Miller, PLS, confirmed in his deposition testimony that the United States had issued no patent conveying the subject real property.

¶ 9. Based on these findings, the chancellor entered an order granting summary judgment on May 25, 2011, dismissing the claims of all parties with prejudice. The chancellor ordered that sanctions would be assessed on May 31, 2011. On May 19, 2011, the Maddoxes filed a motion for sanctions against Sullivan and Stubbs, alleging that both Sullivan and Stubbs were aware prior to the commencement of the suit that the lawsuit "was without hope of success" and requesting sanctions under Mississippi Rule of Civil Procedure 11 and the Litigation Accountability Act.

¶ 10. On May 31, 2011, the parties appeared before the chancellor on the **Maddoxes'** motion for sanctions. The **Maddoxes** filed the sanctions motion after the chancellor had determined **Sullivan's** complaint and motion for recusal were frivolous. The **Maddoxes** called Steven **Maddox** and two practicing attorneys, Wayne Easterling and Robert Germany, as witnesses in support of the motion for sanctions. On direct examination, Steven's counsel moved to admit the following: a letter from the office of Attorney R.K. Houston; statements from the office of Attorney David Ringer; and invoices from the Maddoxes' attorney, Russ Sykes. The chancellor admitted this evidence over the objection of Sullivan's counsel.

*3 ¶ 11. On June 15, 2011, the chancellor entered a final judgment imposing sanctions by awarding the Maddoxes attorneys' fees, expenses, and costs in the amount of $42,922.91, to be paid jointly by Sullivan and his counsel, Stubbs. In sanctioning Sullivan and Stubbs, the chancellor specifically found that the following actions demonstrated frivolous pleadings had been filed and frivolous arguments had been made for the purposes of harassment and delay, without substantial justification, and with disrespect for the integrity of the court: (1) Stubbs's admission that before commencement of the action he had advised Sullivan of the weakness of his claim to confirm and quiet title; (2) Sullivan and Stubbs's failure to abandon the claim after their expert witness testified in his deposition that the United States had issued no patent for the subject property; (3) Sullivan and Stubbs's failure to make any effort to determine the validity of the claim before raising it; and (4) the filing of an improper motion for recusal and false allegations against the court. The chancellor held that these various actions constituted a willful violation of Rule 11 and the Litigation Accountability Act, as well as Rule 8.2(a) of the Rules of Professional Conduct (prohibiting a lawyer from making a statement that he knows to be false or making a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge).

¶ 12. On July 8, 2011, **Sullivan** appealed the final judgment, asserting seven assignments of error, which are listed in his brief as follows:

I. Whether the chancellor erred in precluding [

Sullivan from having] a fair opportunity to present evidence on his motion for recusal or make a proffer on the record, in considering ex parte communications, and [in] testifying against [**Sullivan**] and his counsel in denying said motion.

II. Whether the chancellor erred by granting the [**Maddoxes**'] 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 [**Sullivan** from receiving] a fair opportunity to present evidence on his motion for recusal on May 4, 2011 [,] and denying said motion.

IV. Whether the chancellor erred by denying [**Sullivan**] and his counsel due process of law when the chancellor found [**Sullivan's**] complaint and motion for recusal to be frivolous.

V. Whether the chancellor's finding that [**Sullivan'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 [whether they are] excessive, if this [C]ourt 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.

***4** For purposes of clarity in our discussion, we have combined several of Sullivan's issues.

STANDARD OF REVIEW

[1] ¶ 13. The determination of whether jurisdiction over a particular matter is proper is a question of law; therefore, this Court must apply a de novo standard of review to this issue. *Sanderson Farms, Inc. v. Gatlin,* 848 So.2d 828, 841 (¶ 38) (Miss.2003) (citing *Entergy Miss., Inc. v. Burdette Gin Co.,* 726 So.2d 1202, 1204–05 (¶ 5) (Miss.1998)).

¶ 14. Similarly, this Court employs a de novo standard of review for a trial court's grant or denial of summary judgment. *Butler v. Upchurch Telecomms. & Alarms, Inc.,* 946 So.2d 387, 389 (¶ 8) (Miss.Ct.App.2006). Our review involves examining all the evidentiary matters before the trial court "in the light most favorable to the party against whom the motion has been made." *Id.; see also* M.R.C.P. 56(c). In the event that no genuine issue of material fact appears, and the moving party is entitled to a judgment as a matter of law, then the trial court should enter summary judgment in favor of the moving party. *Butler,* 946 So.2d at 389 (¶ 8). "Otherwise, the motion should be denied." *Id.* Additionally, the moving party bears the burden of demonstrating that no genuine issue of fact exists. *Id.* "We have also held that the non-moving party must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Id.* at 390 (¶ 8).

[2] ¶ 15. Regarding motions for recusal, the supreme court has clarified that appellate court must apply the manifest-error standard when reviewing a judge's refusal to recuse himself. *Bredemeier v. Jackson,* 689 So.2d 770, 774 (Miss.1997) (citing *Davis v. Neshoba Cnty. Gen. Hosp.,* 611 So.2d 904, 905 (Miss.1992)). In applying this standard of review to a denial of a recusal motion, we acknowledge that the law presumes the impartiality of the trial judge. *Bredemeier,* 689 So.2d at 774.

[3] ¶ 16. The supreme court has clearly stated that the proper standard of review for the question of whether to apply sanctions is an abuse-of-discretion standard. *Ill. Cent. R.R. v. Broussard,* 19 So.3d 821, 823 (¶ 8) (Miss.Ct.App.2009). "Rule 11 states ... that the decision to award sanctions is within the discretion of the trial court." *Broussard,*

19 So.3d at 823 (¶ 8). In addition, "[w]hen reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, this Court is limited to a consideration of whether the trial court abused its discretion." *Id.*

DISCUSSION

I. Summary Judgment

¶ 17. Sullivan argues that the Maddoxes failed to demonstrate that no genuine issue of material fact existed, and that the chancellor erred in granting summary judgment. Sullivan further asserts that the Maddoxes lacked proper standing to assert that title to the property at issue was vested in the United States. Sullivan also submits that "all of the parties to this action were properly before the court[,] and all parties were claiming title to the subject property."

***5** ¶ 18. The moving party shall be granted summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." M.R.C.P. 56(c). "Otherwise, the motion should be denied." *Butler,* 946 So.2d at 389 (¶ 8). Additionally, the moving party bears the burden of demonstrating that no genuine issue of fact exists. *Id.*

[4][5] ¶ 19. The Quiet Title Act, 28 U.S.C. § 2409a, establishes a limited waiver of the United States' sovereign immunity for action to acquire title from the federal government. However, the United States Court of Appeals for the Ninth Circuit has explained that "[e]xclusive jurisdiction in quiet [-]title actions against the United States is vested in federal courts.... A state court does not have jurisdiction to decide quiet[-]title actions against the United States." *McClellan v. Kimball,* 623 F.2d 83, 86 (9th Cir.1980) (citing 28 U.S.C. § 1346(f)); *see also Brown v. Johnson,* 373 F.Supp. 973, 974–75 (S.D.Tex.1974).

¶ 20. Furthermore, 28 U.S.C. § 2409a(n) provides: "Nothing in this section shall be construed to permit suits against the United States based upon adverse possession." In following federal statutory law, the United States Court of Appeals for the Fifth Circuit has acknowledged that "[t]itle by adverse possession ... may not be asserted against the [United States]." *United States v. Denby,* 522 F.2d 1358, 1364 (5th Cir.1975). In *United States v. Lemon,* 632 F.Supp. 431, 435 (D.Colo.1986), a party sued the United States and claimed title to real property by virtue of adverse possession. The *Lemon* court dismissed the claim, explaining: "Although Congress has waived sovereign immunity in suits against the United States to quiet title, *see* 28 U.S.C. 2409a(a), Congress expressly conditioned that waiver to preclude a claim based upon adverse possession." *Lemon,* 632 F.Supp. at 435.

[6] ¶ 21. In addressing whether the circuit court possessed jurisdiction to hear the present matter, we note that our supreme court has previously stated that "[s]ubject[-]matter jurisdiction is a threshold inquiry which must be determined before a court may proceed to the merits." *Schmidt v. Catholic Diocese of Biloxi,* 18 So.3d 814, 821 (¶ 13) (Miss.2009). "When a plaintiff's allegations of jurisdiction are questioned, the plaintiff bears the burden to prove jurisdiction by a preponderance of the evidence." *Id.* at 822 (¶ 14) (citations omitted).

[7] ¶ 22. Upon review and in light of 28 U.S.C. § 2409a(n), we find that Sullivan provided no proof that the Simpson County Chancery Court possessed subject[-]matter jurisdiction to hear Sullivan's claim to quiet title against the United States by virtue of adverse possession. We thus affirm the chancellor's grant of summary judgment because the chancery court lacked jurisdiction to hear the matter, and no factual grounds supported the claims raised by Sullivan.

II. Motion for Recusal

***6** ¶ 23. Sullivan next claims that the chancellor erred in denying him an opportunity to present any evidence in support of his motion for recusal.

Sullivan also argues that the chancellor erred in refusing to allow Sullivan to present what he claims as "new evidence of unreported campaign contributions" to the chancellor by the opposing party, the Maddoxes.

¶ 24. Uniform Chancery Court Rule 1.11 allows a party to move for the recusal of a chancellor "if it appears that the judge's impartially 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." Rule 1.11 mandates that a motion for recusal must be filed with an affidavit "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." Additionally, the motion must "be filed with the judge who is the subject of the motion within 30 days following notification ... of the judge assigned to the case" or "within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted."

[8] ¶ 25. As stated, the Mississippi Supreme Court has established that the manifest-error standard of review applies to the appeal of the denial by a trial judge of a motion to recuse. *Bredemeier,* 689 So.2d at 774. Pursuant to the Code of Judicial Conduct, a judge must disqualify himself when that judge's "impartiality might be questioned by a reasonable person knowing all the circumstances ... including but not limited to instances where: ... the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]" *See* Code of Judicial Conduct, Canon 3(E)(1)(a). The supreme court has established the test for recusal as follows: Would "a reasonable person, knowing all the circumstances, ... harbor doubts about [the judge's] impartiality?" *In re Conservatorship of Bardwell,* 849 So.2d 1240, 1247 (¶ 20) (Miss.2003) (citations omitted). An appellate court must presume a judge to be qualified and unbiased, and that presumption must be overcome by evidence producing a "reasonable doubt ... about the validity of the presumption [.]" *Turner v. State,* 573 So.2d 657, 678 (Miss.1990).

[9] ¶ 26. The record shows that the chancellor denied Sullivan's motion for recusal after ruling that the motion failed to comply with Rule 1.11 due to its untimely filing and because it did not contain the requisite supporting affidavit. Sullivan has provided no explanation on appeal for this defect in the record. During the hearing on the motion for recusal, the chancellor referenced the Canons of Judicial Conduct, specifically Canon 3(E), and the chancellor stated: "I don't find the fact that Mr. Broadhead represented ... the husband of the court administrator[ ] falls within the purview of Canon 3(E)." The chancellor acknowledged Sullivan's failure to attach the requisite Rule 1.11 supporting affidavit to his motion, stating the following:

> *7 All I can gather from the motion is that Mr. Broadhead represented ... the husband of the court administrator.... And I don't see that that is any evidence of bias or impartiality on the court's part.
>
> So based on the motion, based on the failure to file the an affidavit setting forth grounds, I'm not going to entertain testimony from witnesses or any other facts not alleged in that motion. The purpose of the affidavit is to place the court on notice of the facts and to place opposing counsel and parties on notice of the facts so that a determination can be made before trial on what to do. Here there are not any facts. No affidavit. This is the day of trial. So I'm not going to take up the court's time by taking testimony[,] and I'm going to enter an order denying [Sullivan's] motion for recusal.

In his order denying the motion for recusal, the chancellor reiterated that he:

> ha[d] no personal bias or prejudice concerning any part of this action nor any personal knowledge of the disputed evidentiary facts concerning

> the proceeding. The motion alleged that Wesley Broadhead, one of the attorneys of record, represented the court's administrator's husband in a criminal proceeding. The husband is not a party to this proceeding[.]

¶ 27. Sullivan based his motion for recusal on the professional relationship of the Maddoxes' attorney in the representation of the husband of the court administrator in a separate and distinct criminal proceeding. The chancellor acknowledged these facts and reminded Sullivan that the husband of the court administrator was not a party to the present proceeding. *See Murphree v. Cook,* 822 So.2d 1092, 1100 (¶ 29) (Miss.Ct.App.2002) (This Court found no abuse of discretion where the chancellor failed to recuse himself after the chancery clerk of the county testified as a witness in the trial.). Regarding the assertions raised in the recusal motion, the chancellor also specifically stated on the record that he possessed no bias or prejudice concerning the parties or the proceedings. Upon review of the record, we find that Sullivan failed to present evidence in support of his motion for recusal raising a question as to the chancellor's impartiality. We therefore find that Sullivan failed to provide any proof to show reasonable doubt as to the presumption that the chancellor was unbiased and qualified. We also note that the record contains no second motion for recusal filed by Sullivan to address the "new evidence" of an alleged campaign contribution.

¶ 28. Therefore, based on the record before us and the applicable law, we find no manifest error in the chancellor's denial of the motion to recuse.

III. Sanctions

¶ 29. Sullivan also argues that the chancellor erred in finding Sullivan's complaint and motion for recusal frivolous, resulting in sanctions imposed on Sullivan and his legal counsel, Stubbs, with an award of attorneys' fees to the Maddoxes pursuant to Mississippi Code Annotated section 11–55–5 (Rev.2012) (Litigation Accountability Act) and Rule 11. Sullivan argues that the award of attorneys' fees and sanctions denied Stubbs and him due process of law. As previously stated, this Court reviews the chancellor's award of sanctions under Rule 11 and the Litigation Accountability Act (the Act) for an abuse of discretion. *Broussard,* 19 So.3d at 823 (¶ 8); *Choctaw, Inc. v. Campbell–Cherry–Harrison–Davis and Dove,* 965 So.2d 1041, 1045 n. 6. (Miss.2007).

*8 [10] ¶ 30. In identifying the factual basis supporting the imposition of sanctions in this case, the chancellor specifically found that the following actions evidenced that frivolous pleadings had been filed and frivolous arguments had been made for the purposes of harassment and delay, without substantial justification, and with disrespect for the integrity of the court: (1) Stubbs's admission that he had advised Sullivan of the weakness of his claim prior to commencing the action; (2) Sullivan and Stubbs's continued pursuit of the claim after their expert witness testified in his deposition that the United States had issued no patent for the subject property; (3) Sullivan and Stubbs's failure to make any effort to determine the validity of the claim before commencing the action; and (4) the filing of an improper motion for recusal and false allegations against the court. The chancellor held that these actions constituted a willful violation of Rule 11 and the Act, as well as Rule 8.2(a) of the Mississippi Rules of Professional Conduct. The chancellor awarded attorneys' fees, expenses, and costs in the amount of $42,922.91 to the Maddoxes. The chancellor clarified that the award should be a judgment against Sullivan and his attorney, Stubbs, jointly.

¶ 31. Both Rule 11 and the Act authorize an award of attorneys' fees and expenses as a sanction for certain filings. According to Rule 11(b), the trial court may award expenses or attorneys' fees "[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...." M.R.C.P. 11(b). Similarly, the Act states in part:

> in any civil action commenced or appealed in any court of record in this state, the court shall award

> ... reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action ... that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment....
>
> Miss.Code Ann. § 11–55–5(1).

[11] ¶ 32. The Act defines a claim brought "without substantial justification" to be one that is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss.Code Ann. § 11–55–3(a) (Rev.2012). This Court employs the same test to determine whether a filing is frivolous under both Rule 11 and the Act. *Leaf River Forest Prods., Inc. v. Deakle,* 661 So.2d 188, 197 (Miss.1995). A claim is frivolous when "objectively speaking, the pleader or movant has no hope of success." *Id.* at 195 (citation omitted); *see also Broussard,* 19 So.3d at 823–24 (¶¶ 10–11).

¶ 33. We find the record reflects uncontradicted and clear evidence showing that **Sullivan** and Stubbs were aware before commencing the action that their claim had no hope of success. Specifically, we note the chancellor's order granting summary judgment reflects that Stubbs admitted to the chancellor that he had informed **Sullivan** the case against the **Maddoxes** was weak due to the lack of the following: a government survey; a patent issued by the United States; or a description of the boundaries of the land in dispute. The chancellor also acknowledged that **Sullivan's** expert witness, Bill Miller, PLS, testified in his deposition and confirmed that the United States had issued no patent conveying the subject real property. The record similarly provides no evidentiary support for **Sullivan's** allegations of unreported campaign contributions to the chancellor from the **Maddoxes**, which **Sullivan** alleged on the day of the summary-judgment and motion-for-recusal hearings in an attempt to delay the case or have the chancellor recuse himself. We thus find no abuse of discretion in the chancellor's finding that **Sullivan's** complaint and motion for recusal constituted frivolous filings made for the purposes of harassment and delay.[FN5] Accordingly, we find that the chancellor was within his discretion to impose sanctions against **Sullivan** and Stubbs and to award attorneys' fees to the **Maddoxes**.

***9** [12] ¶ 34. **Sullivan** also asserts that the chancellor's award of sanctions deprived him of his property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. Specifically, **Sullivan** claims that the chancellor ruled on the issue of sanctions while all of the parties to the present case stood before the chancellor on an unrelated matter. **Sullivan** argues that the chancellor failed to provide the parties with proper notice of the chancellor's intention to "reopen the case sua sponte" and rule on the issue of sanctions.

¶ 35. The record reflects that both parties received notice of a May 31, 2011 hearing regarding the Maddoxes' motion for sanctions. The record also reflects that the chancellor's May 25, 2011 order granting summary judgment provided that a hearing would be held on May 31, 2011, to address the matter of sanctions. The order further stated that the chancellor would retain jurisdiction over the matter for the consideration of sanctions. The transcript reflects that on May 31, 2011, the date set forth in the order granting summary judgment, the chancellor rendered his opinion from the bench on the issue of sanctions and attorneys' fees in the present matter. The record also reflects that the chancellor rendered this opinion after the conclusion of a different and unrelated case involving the same parties to the present action.

¶ 36. Stubbs objected to proceeding with the matter of sanctions until the parties had time to conduct discovery. The record reflects that the chancellor agreed repeatedly to give Sullivan and Stubbs thirty days to conduct discovery regarding attorneys' fees, stating at one point on the record: "Your request for thirty days to do discovery is granted." However, after further discussion, Stubbs

responded, "Judge, if we're going—going to [be] pinned down with any more costs, we'd just [as] soon go ahead today. Let's just get it done today. I'd rather just withdraw that, and get it done today." The chancellor then proceeded with the hearing on the matter of sanctions.

[13] ¶ 37. During the hearing, the chancellor heard testimony from Steven Maddox. The Maddoxes also presented expert testimony from Robert Germany and Wayne Easterling [FN6] regarding the reasonableness and necessity of attorneys' fees. The chancellor proceeded to make findings on the record and impose sanctions against Sullivan and Stubbs based on the frivolous suit pursuant to Rule 11 and the Act. The chancellor acknowledged, "[I]f the court awards attorney[s'] fees as part of the sanctions, I think I'm required to go through certain factors to determine the amount and the reason behind the amount." In his final judgment entered June 13, 2011, the chancellor stated:

> The exhibits and testimony of the witnesses, who were subject to cross [-]examination, satisfies the court that the [attorneys'] fees are reasonable as required by Rule 1.5 of the [Mississippi] Rules of Professional Conduct in that the fees were charged by the hour, the fees and expenses were within the range customarily charged within the locality, services were rendered by one attorney at a time, the time and labor required, the novelty and difficulty of the claims involved, and the skill required to perform the legal service properly.

***10** The supreme court stated in *Mabus v. Mabus,* 910 So.2d 486, 489 (¶ 9) (Miss.2005), that where a trial judge relies "on substantial credible evidence in the record regarding attorney's fees," the trial judge has not abused his discretion. We thus find that the chancellor in this case did not abuse his discretion in awarding reasonable attorneys' fees to the Maddoxes. *See McKee v. McKee,* 418 So.2d 764, 767 (Miss.1982).

¶ 38. After reviewing the record, we find that Sullivan and Stubbs were presented with sufficient notice that the chancellor would make his findings regarding sanctions on May 31, 2011. *See* M.R.C.P. 6(d).[FN7] Additionally, the transcript reflects that although the chancellor agreed to Stubbs's request for additional time to conduct discovery, Stubbs then requested to proceed with the matter as scheduled.[FN8] This issue lacks merit.

¶ 39. In affirming the judgment imposing sanctions against Sullivan and Stubbs, we deny the motion Sullivan and Stubbs filed with this Court on May 17, 2012, seeking an injunction to remove the trial court's judgment from the judgment roll and also seeking sanctions.

¶ 40. THE JUDGMENT OF THE SIMPSON COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, MAXWELL AND FAIR, JJ., CONCUR. JAMES, J., NOT PARTICIPATING.

FN1. With respect to the Maddoxes' motion to correct the record and supplement the record with the deposition of Bill Miller, a licensed professional surveyor, we find that Miller's deposition testimony that is the subject of the motion to supplement was attached to the Maddoxes' original motion for summary judgment as an exhibit and is therefore appropriate to include in the record. Evidencing its inclusion as an exhibit to the original summary-judgment motion, the trial judge referred to Miller's deposition testimony in finding that the United States had issued no patent conveying the property at issue out of the public domain. The Maddoxes' motion to supplement the record is therefore granted.

FN2. The record reflects that Sullivan previously believed the subject property to be

located in Smith County, Mississippi. However, in 2005 the Simpson County Tax Assessor's Office determined that the property was located within the boundaries of Simpson County, Mississippi.

FN3. Uniform Chancery Court Rule 1.11 provides, in pertinent part:

> Such motion [for recusal] 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.

FN4. "Nothing in this section shall be construed to permit suits against the United States based upon adverse possession." 28 U.S.C. § 2409a(n).

FN5. *Broussard,* 19 So.3d at 823–24 (¶¶ 10–11).

FN6. As stated, Sullivan objected to the expert witnesses' testimony, arguing that the Maddoxes had failed to designate the experts within the sixty days required by the Uniform Chancery Court Rules. The chancellor overruled the objection, stating:

> [The Maddoxes are] calling witnesses to offer evidence as required by ... *McKee v. McKee,* [418 So.2d 764, 767 (Miss.1982)]. And I think this is a ... situation ... where attorney[s'] fees is an issue after a case comes on for trial. So, I'm going to allow these witnesses to testify about attorney[s'] fees. They're not normal expert witnesses designated [in] anticipation of trial.

FN7. Mississippi Rule of Civil Procedure 6(d) provides:

> A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than five days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court.

FN8. *See Swington v. State,* 742 So.2d 1106, 1112 (¶ 14) (Miss.1999) ("Failure to make a contemporaneous objection waives the issue on appeal.").

Miss.App.,2013.
Sullivan v. Maddox
--- So.3d ----, 2013 WL 221454 (Miss.App.)

END OF DOCUMENT

83 So.3d 454
(Cite as: 83 So.3d 454)

C

Court of Appeals of Mississippi.
Betty Marie **NELSON** and Earl Lavon **Nelson**, Appellants
v.
Hudson **HOLLIDAY** and Darrin Harris, Appellees.

No. 2011–CA–00101–COA.
March 20, 2012.

Background: Property developers brought action to enforce protective covenant to prevent landowners from having manufactured home on the property. The Chancery Court, Pearl River County, Sebe Dale Jr., J., granted developers summary judgment. Landowners appealed.

Holding: The Court of Appeals, Griffis, P.J., held that genuine issue of material fact regarding whether residence was manufactured home or modular home precluded summary judgment.

Reversed and remanded.

Carlton, J., concurred in result only without writing.

West Headnotes

Judgment 228 ⚿185.3(1)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(1) k. In general. Most Cited Cases

Genuine issue of material fact was in dispute regarding whether residence was a modular home allowed under protective covenant or a manufactured home and thus subject to removal under protective covenant, precluding summary judgment; landowners presented letter from fire marshal stating residence was considered a modular home, while property developers submitted evidence suggesting home was not placed on a foundation.

*455 Tadd Parsons Dawn Smith, attorneys for appellants.

Joseph H. Montgomery, Poplarville, attorney for appellees.

Before GRIFFIS, P.J., MAXWELL and RUSSELL, JJ.

GRIFFIS, P.J., for the Court:

¶ 1. This case turns on whether a residence is a "modular" home as opposed to a "manufactured" or "mobile" home. Hudson **Holliday** and Darrin Harris, the property developers, seek to enforce protective covenants on the property. They claim the current landowners placed a disallowed "manufactured" home on the property. Betty Marie and Earl Lavon **Nelson** claim that they placed a "modular" home on their property, which was within the protective covenants. After both parties filed motions for summary judgment, the chancellor granted summary judgment in favor of **Holliday** and Harris without a hearing. The **Nelsons** now appeal. We find a genuine issue of a material fact in dispute. Therefore, we reverse and remand for further proceedings.

FACTS

¶ 2. **Holliday** and Harris developed a parcel of real property located on H. Burge Road in Pearl River County, Mississippi. They properly executed and recorded protective covenants that covered the property.

¶ 3. On February 24, 2006, **Holliday** and Harris conveyed to James and Suzanne Vareha by warranty deed a parcel of the property subject to the protective covenants. On January 14, 2008, the Varehas conveyed the parcel by warranty deed, subject to the protective covenants, to Betty and

Earl Nelson. On February 27, 2008, the Nelsons placed a residential structure on the parcel.

¶ 4. On April 7, 2008, Holliday and Harris filed a complaint for enforcement of declaration of protective covenants, for removal of manufactured housing, and for preliminary and permanent injunction. The complaint alleged that the protective covenants provided that "[m]anufactured housing will not be allowed on the property." FN1 The complaint also alleged that the residence the Nelsons placed on the property was "manufactured housing" and in violation of the protective covenants.

FN1. Paragraph V of the complaint indicates that a copy of the protective covenants was attached. Yet the record before this Court does not include a copy of the protective covenants. In an action to enforce restrictive or protective covenants on land, a full and complete copy of such document should be attached to the complaint. M.R.C.P. 10(d). Likewise, a complete copy should be part of the record presented to this Court on appeal. M.R.A.P. 10(a).

Nevertheless, in Paragraph VI of the complaint, the complaint alleged that "[s]aid Declaration of Protective Covenants contains the following language, 'Manufactured housing will not be allowed on the property.' " The Nelsons' answer admitted the allegations of Paragraph VI except they denied that they were in violation of the covenants.

¶ 5. On April 29, 2008, the Nelsons filed their answer and counterclaim. Both Betty and Earl Lavon Nelson signed this pleading, their signature was acknowledged*456 and it was stated under oath that the "matters, facts, and things set out in the above and foregoing complaint are true and correct." In this pleading, the Nelsons denied that the residence was a "manufactured home" and claimed that it was a "modular home." The Nelsons attached three documents. Exhibit "A" was a letter from the State Fire Marshal that stated this "Frankin-built structure, bearing serial number ..., is considered a modular home." Exhibit "B" was a compilation of plans and specifications for the residence, which were approved by the State Fire Marshal. Exhibit "C" was a letter dated November 29, 2007, from Hudson **Holliday**, which read "[t]his is to clarify that it is permissible to construct or place a modular home on the property that we sold along H. Burge Road." The **Nelsons**' counterclaim asked for damages and sanctions under the Litigation Accountability Act.

¶ 6. On January 15, 2010, the **Nelsons** filed a motion for summary judgment. In the motion, the **Nelsons** argued that they were entitled to summary judgment because the residence in question was a "modular home," which did not violate the covenant.

¶ 7. On November 3, 2010, **Holliday** and Harris responded and filed a cross-motion for summary judgment. They argued that the residence was "manufactured housing" and in violation of the covenant. To support their motion, **Holliday** and Harris attached several documents including the **Nelsons**' response to the requests for admissions, and they cited the statutory definitions in Mississippi Code Annotated section 75–49–3 (Rev.2000). The record does not contain a response from the **Nelsons**.

¶ 8. The record does not include a transcript of a hearing on the motions for summary judgment. On December 23, 2010, the chancellor denied the **Nelsons**' motion and granted **Holliday** and Harris's motion for summary judgment. The chancellor found the **Nelsons**' residence was manufactured housing, found that the residence was in violation of the covenants, and ordered the immediate removal of the residence. It is from this judgment that the **Nelsons** now appeal.

STANDARD OF REVIEW

¶ 9. The standard of review of an order granting summary judgment is de novo. *PPG Architec-*

tural Finishes, Inc. v. Lowery, 909 So.2d 47, 49 (¶ 8) (Miss.2005) (citing *Hurdle v. Holloway,* 848 So.2d 183, 185 (¶ 4) (Miss.2003)). It is well settled that "[a] summary judgment motion is only properly granted when no genuine issue of material fact exists. The moving party has the burden of demonstrating that no genuine issue of material fact exists within the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." *Id.* (internal citations and quotations omitted).

ANALYSIS

¶ 10. The ultimate issue presented in this case will be decided based on whether the **Nelsons**' residence is considered a "modular" home or a "manufactured" home. The chancellor determined that it was a "manufactured" home and granted **Holliday** and Harris's motion for summary judgment. The **Nelsons** argue that the chancellor's summary judgment should be reversed because there were genuine issues of material fact in dispute. Thus, this Court must determine whether there are any genuine issues of material fact in dispute and whether **Holliday** and Harris are entitled to a judgment as a matter of law. M.R.C.P. 56. We must determine whether there are any issues to be tried.

¶ 11. The **Nelsons** refer the Court to their sworn pleading and the documents *457 attached. In the pleading, the **Nelsons** stated that the residence was a "modular home." They included three attachments. First, they offered a letter a letter dated April 16, 2008, from the Chief Deputy State Fire Marshal to the seller of the residence, Lonnie Woods of Woods Home Center, LLC. The letter stated that "the noted Franklin-built structure, bearing the serial number ALFRH–038–13636 AB, is considered a modular home." The Chief Deputy State Fire Marshal is authorized by statute to implement and enforce the regulations involving this chapter of the statute. *See* Miss.Code Ann. § 75–49–3(g). Second, the Nelsons offered approximately twenty-three pages of engineering plans and specifications for the residence. Third, they offered a letter from Holliday; this letter stated that "it is permissible to construct or place a modular home on the property."

¶ 12. Holliday and Harris offered three documents to support their motion for summary judgment. First, they offered what they refer to as the "affidavit of Gregory Rodriguez ... indicating that the home could be moved in a matter of hours at a reasonable expense and is not placed upon a foundation." The document states:

> DROD Mobile Home Transport
> [address and phone no.]
>
> Movement of 32 x 80 on homeowners land. Breakdown would consist of 6 to 8 hours depending on inside trim, and carpet. Average estimate is between $4,500.00 to $4,800 within 50 mile radius. Any attachments such as porches, decks, would consist in more time and labor which would alter estimate.
>
> State of Mississippi
>
> County of Pearl River
>
> Personally appeared before me, the undersigned authority in and for the above referenced county and state, the within named Darren Rodriguez, who, after being by me first duly sworn, states on his oath that the matters, facts and things set out in the above and foregoing are true and correct as therein stated.
>
> This, the 13th day of October, 2010.
>
> [Signed and notarized]

This "affidavit" does not state whether "Gregory Rodriguez" and "Darren Rodriguez" are the same person. The document appears to be a bid to remove a "mobile" home. However, the "affidavit" does not identify the Nelsons' residence as the "mobile" home that is to be removed. This Court does not read the "Affidavit of Gregory Rodriguez" as Holliday and Harris characterize it in their motion. Indeed, the "affidavit" does not

provide much specificity as to the personal knowledge of Rodriguez. This "affidavit" offers little if any information to support the motion for summary judgment.

¶ 13. Second, Holliday and Harris attached the Nelsons' responses to requests for admissions. The Nelsons admitted the following:

REQUEST NO. 2: Do you admit that Defendants received the attached correspondence from Plaintiffs' counsel? [No correspondence is in the record.]

RESPONSE: Admitted.

REQUEST NO. 3: Do you admit the home in controversy does not have a power meter physically attached to the exterior of the home?

RESPONSE: Admitted.

REQUEST NO. 4: Do you admit that the power meter for the home in controversy is located on a separate wooden pole near the home?

RESPONSE: Admitted.

REQUEST NO. 5: Do you admit that no chain wall was constructed as a foundation for the home?

RESPONSE: Admitted.

***458** *REQUEST NO. 6:* Do you admit that tie-downs or anchor straps were used to anchor the home to the ground?

RESPONSE: Admitted.

REQUEST NO. 7: Do you admit that the anchor straps used to secure the home were screwed into the earth?

RESPONSE: Admitted.

REQUEST NO. 14: Do you admit that the steps for the dwelling are not attached to the home, but rather are either fiberglass or concrete structures placed there to provide access?

RESPONSE: Admitted.

REQUEST NO. 16: Do you admit that no crane was used in the location of the home in controversy on the property?

RESPONSE: Admitted.

REQUEST NO. 17: Do you admit that the home in controversy was delivered by transport truck in two sections?

RESPONSE: Admitted.

REQUEST NO. 19: Do you admit that the home vendor advised Defendants the Hampton Bay home they purchased was a "modular" home?

RESPONSE: Admitted.

REQUEST NO 20: Do you admit that the home vendor advised Defendants the Hampton Bay home they purchased was not "manufactured" housing?

RESPONSE: Admitted.

Holliday and Harris argued that these admissions established that the residence was not permanently fixed to the foundation. Several of the responses seem to indicate that the home placed on the Nelsons' property was not permanently affixed to the land. However, the response to requests no. 19 and 20 seem to support the Nelsons' argument that the home was a "modular" home and thus permissible to be placed on the property.

¶ 14. Third, Holliday and Harris attached a "copy of the advertisement of Woods Home Gallery where the mobile home was purchased dated June 6, 2008, that appeared in *Swap Shop News* indicating that Woods had the largest selection of 'manufactured' homes in Southwest Mississippi." There is no supporting affidavit or any information to indicate how it is relevant to the home involved

in this case.

¶ 15. Holliday and Harris's motion for summary judgment argued the definitions of certain relevant terms in section 75–49–3, which states:

> (a) "Manufactured home" means a structure defined by, and constructed in accordance with, the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 USCS 5401 et seq.), and manufactured after June 14, 1976.
>
> (b) "Mobile home" means a structure manufactured before June 15, 1976, that is not constructed in accordance with the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 USCS 5401 et seq.). It is a structure that is transportable in one or more sections, that, in the traveling mode, is eight (8) body feet or more in width and thirty-two (32) body feet or more in length, or, when erected on site, is two hundred fifty-six (256) or more square feet, and that is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes any plumbing, heating, air conditioning and electrical systems contained therein; except that such term shall include any structure which meets all the requirements and with respect to which the manufacturer voluntarily files a certification required by the commissioner and *459 complies with the standards established under this chapter.
>
> (c) "Modular home" means a structure which is: (i) transportable in one or more sections; (ii) designed to be used as a dwelling when connected to the required utilities, and includes plumbing, heating, air conditioning and electrical systems with the home; (iii) certified by its manufacturers as being constructed in accordance with a nationally recognized building code; and (iv) designed to be permanently installed at its final destination on an approved foundation constructed in compliance with a nationally recognized building code. The term "modular home" does not include manufactured housing as defined by the National Manufactured Housing Construction and Safety Standards Act of 1974.

In essence, Holliday and Harris argue that there is no genuine issue of material fact in dispute and they are entitled to a judgment as a matter of law because the Nelsons' residence is not on a permanent foundation so it cannot be determined to be "modular."

¶ 16. Our de novo review requires that we examine the pleadings, admissions and affidavits and determine whether there is a genuine issue of a material fact in dispute. Neither party has objected to the consideration of the materials offered by the other. Therefore, we must consider all of the evidence submitted to determine whether a factual dispute exits. Having done so, we conclude that there is a genuine issue of a material fact in dispute over whether the residence was a "modular" or "manufactured" home. Finding a genuine issue of material fact in dispute, we conclude that this matter was not proper for a summary judgment. Therefore, we reverse the chancery court's judgment, and we remand this case for further proceedings consistent with this opinion.

¶ 17. **THE JUDGMENT OF THE CHANCERY COURT OF PEARL RIVER COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

LEE, C.J., IRVING, P.J., BARNES, ISHEE, ROBERTS, MAXWELL AND RUSSELL, JJ., CONCUR. CARLTON, J., CONCURS IN RESULT ONLY. FAIR, J., NOT PARTICIPATING.

Miss.App.,2012.
Nelson v. Holliday
83 So.3d 454

Return to Index Page

END OF DOCUMENT

93 So.3d 59
(Cite as: 93 So.3d 59)

H

Court of Appeals of Mississippi.
CITY OF BRUCE, Appellant
v.
BORREGO SPRINGS BANK, N.A., Appellee.

No. 2011–CA–00276–COA.
March 20, 2012.
Rehearing Denied July 24, 2012.

Background: Lienholder, which purchased debtor's real property during auction in debtor's bankruptcy case, brought action to hold tax deed issued by **city** void and to declare property to be free of any encumbrances. The Circuit Court, Calhoun County, Andrew K. Howorth, J., granted lienholder's motion for summary judgment. **City** appealed.

Holding: The Court of Appeals, Griffis, P.J., held that **city's** failure to publish redemption notice in county newspaper 45 days before redemption period expired rendered tax sale void.

Affirmed.

West Headnotes

[1] Taxation 371 ⚿2942

371 Taxation
371III Property Taxes
371III(L) Sale of Land for Nonpayment of Tax
371k2942 k. Mode of sale. Most Cited Cases

Any deviation from the statutorily mandated procedure renders a tax sale void. West's A.M.C. § 27–43–3.

[2] Taxation 371 ⚿3019

371 Taxation
371III Property Taxes
371III(M) Redemption from Tax Sale
371k3012 Notice to Redeem
371k3019 k. Publication. Most Cited Cases

City's failure to publish redemption notice in county newspaper 45 days before redemption period expired rendered tax sale void. West's A.M.C. § 27–43–3.

[3] Taxation 371 ⚿3018

371 Taxation
371III Property Taxes
371III(M) Redemption from Tax Sale
371k3012 Notice to Redeem
371k3018 k. Service in general. Most Cited Cases

Taxation 371 ⚿3019

371 Taxation
371III Property Taxes
371III(M) Redemption from Tax Sale
371k3012 Notice to Redeem
371k3019 k. Publication. Most Cited Cases

Statute governing notice of tax sales requires redemption notice to be given by personal service, by mail, and by publication in an appropriate newspaper, and all three requirements must be met for the redemption notice to be complete and in accordance with the statute. West's A.M.C. § 27–43–3.

[4] Taxation 371 ⚿2946

371 Taxation
371III Property Taxes
371III(L) Sale of Land for Nonpayment of Tax
371k2945 Notice of Sale
371k2946 k. In general. Most Cited Cases

Court of Appeals must strictly construe the notice statutes regarding tax sales in favor of the landowners. West's A.M.C. § 27–43–3.

*60 Jeffrey Carter Smith, attorney for appellant.

Stephan L. McDavid, attorney for appellee.

Before GRIFFIS, P.J., ROBERTS and CARLTON, JJ.

GRIFFIS, P.J., for the Court:

¶ 1. **Borrego Springs Bank**, N.A. filed suit to hold the tax deed issued by the **City** of **Bruce**, Mississippi void and declare **Borrego's** property to be free of any encumbrances. The circuit judge declared the tax sale void because the **City** had failed to met the statutory notice requirements under Mississippi Code Annotated section 27–43–3 (Rev.2010). On appeal, the **City** argues the circuit judge erred because the required notice was substantially provided. We find no error and affirm.

FACTS

¶ 2. **Borrego** was a first position lienholder on property owned by Skuna River, LLC. Skuna filed for bankruptcy shortly after **Borrego** financed the property purchase. The ad valorem taxes outstanding on the land were listed in the bankruptcy schedule. The bankruptcy court auctioned the land once owned by Skuna, and **Borrego** bought the land free and clear of all liens.

¶ 3. After **Borrego** purchased the property, the **City** went forward with a tax sale of the property on August 28, 2006, during the bankruptcy period. After the tax sale on September 1, 2006, Skuna issued a deed transferring the property to **Borrego**, which filed the deed.

¶ 4. The **City** concedes that prior to the expiration of the redemption period it did not publish notice of the sale in a public newspaper in the county in which the land was located. However, **Borrego** did receive a certified letter stating the redemption period was nearing expiration. **Borrego** filed for summary judgment declaring the tax sale void because the notice requirements of section 27–43–3 had not been met. The circuit judge granted the motion for summary judgment based on the **City's** failure to comply with the notice requirements of section 27–43–3, and there by rendering the tax sale void.

STANDARD OF REVIEW

¶ 5. The standard of review of an order granting summary judgment is de novo. *PPG Architectural Finishes, Inc. v. Lowery,* 909 So.2d 47, 49 (¶ 8) (Miss.2005) (citing *Hurdle v. Holloway,* 848 So.2d 183, 185 (¶ 4) (Miss.2003)). It is well settled that "[a] summary judgment motion is only properly granted when no genuine issue of material fact exists. The moving party has the burden of demonstrating that no genuine issue of material fact exists within the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." *Id.* (internal citations and quotations omitted).

[1] ¶ 6. Further, when an appeal concerns property sold in a tax sale, this Court has held: "Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners." *Brown v. Riley,* 580 So.2d 1234, 1237 (Miss.1991). "Any deviation from the ***61** statutorily mandated procedure renders the sale void." *Roach v. Goebel,* 856 So.2d 711, 716 (¶ 29) (Miss.Ct.App.2003) (citing *Hart v. Catoe,* 390 So.2d 1001, 1003 (Miss.1980)).

ANALYSIS

[2] ¶ 7. The issue is whether the circuit court erred in granting summary judgment declaring the tax sale void based on the **City's** failure to comply with the notice requirements of section 27–43–3. The **City** argues it substantially complied with the statutory requirements, and **Borrego** received actual notice. **Borrego** argues the statute is clear and must be strictly construed and that failure to comply with each of the notice requirements renders the tax sale void.

¶ 8. Section 27–43–3 provides:

The clerk shall issue the notice to the sheriff of

the county of the reputed owner's residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the courts are served, and make his return to the chancery clerk issuing same. The clerk shall also mail a copy of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only that can be ascertained, and he shall note such action on the tax sales record. *The clerk shall also be required to publish the name and address of the reputed owner of the property and the legal description of such property in a public newspaper of the county in which the land is located, or if no newspaper is published as such, then in a newspaper having a general circulation in such county. Such publication shall be made at least forty-five (45) days prior to the expiration of the redemption period.*

If said reputed owner is a nonresident of the State of Mississippi, then the clerk shall mail a copy of said notice thereto in the same manner as hereinabove set out for notice to a resident of the State of Mississippi, except that personal notice served by the sheriff shall not be required.

....

The failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them.

Should the clerk inadvertently fail to send notice as prescribed in this section, then such sale shall be void and the clerk shall not be liable to the purchaser or owner upon refund of all purchase money paid.

(Emphasis added).

[3] ¶ 9. "Section 27–43–3 requires redemption notice to be given by personal service, by mail, and by publication in an appropriate newspaper." *DeWeese Nelson Realty, Inc. v. Equity Servs. Co.*, 502 So.2d 310, 312 (Miss.1986). All three requirements must be met for the redemption notice to be complete and in accordance with the statute. *Id.*

¶ 10. In *Moore v. Marathon Asset Management, LLC,* 973 So.2d 1017, 1021 (¶ 15) (Miss.Ct.App.2008), this Court held the chancery court clerk failed to meet the statutory notice requirements, and the tax sale was void. In *Moore,* the clerk sent notice via certified mail, but the record failed to show notice published in the county newspaper. *Id.*

¶ 11. Here, the record is clear the municipal clerk failed to publish the redemption notice in the county newspaper forty-five days before the redemption period expired. The City does not dispute its failure to publish notice in the county ***62** newspaper. Because of the failure to publish the redemption notice, the statutory notice requirement was not met.

[4] ¶ 12. We must strictly construe the notice statutes in favor of the landowners. Accordingly, we find that the circuit judge did not err as a matter of law by voiding the tax sale as the municipal clerk did not comply with the statutory notice requirements.

¶ 13. **THE JUDGMENT OF THE CALHOUN COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING, P.J., BARNES, ISHEE, ROBERTS, CARLTON, MAXWELL, RUSSELL AND FAIR, JJ., CONCUR.

Miss.App.,2012.
City of Bruce v. Borrego Springs Bank, N.A.
93 So.3d 59

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--- So.3d ----, 2012 WL 5908897 (Miss.App.)
(Cite as: 2012 WL 5908897 (Miss.App.))

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Only the Westlaw citation is currently available.

Court of Appeals of Mississippi.
TOFINO HOLDINGS, LLC, A Mississippi Limited Liability Corporation, Appellant
v.
DONNELL AND SONS, LLC, A Mississippi Limited Liability Corporation, Appellee.

No. 2011–CA–01408–COA.
Nov. 27, 2012.
Rehearing Denied April 30, 2013.

Background: Record owner filed a complaint to set aside a conveyance of real property to purchaser who acquired the property in a tax sale. The Chancery Court, Marion County, Johnny Lee Williams, J., set aside the tax deed to purchaser. Purchaser appealed.

Holding: The Court of Appeals, Irving, P.J., held that the chancery clerk failed to fully comply with redemption notice requirements.

Affirmed; remanded.

West Headnotes

[1] Appeal and Error 30 ⚿1009(2)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(2) k. Sufficiency of Evidence in Support. Most Cited Cases

An appellate court will not disturb the chancery court's factual findings unless such findings are manifestly wrong, clearly erroneous, or the chancery court applied an erroneous legal standard.

[2] Taxation 371 ⚿3017

371 Taxation
371III Property Taxes
371III(M) Redemption from Tax Sale
371k3012 Notice to Redeem
371k3017 k. Form and Requisites. Most Cited Cases

Taxation 371 ⚿3072(1)

371 Taxation
371III Property Taxes
371III(N) Tax Titles
371III(N)1 Title and Rights of Purchaser at Tax Sale
371k3069 Effect of Defects or Irregularities in Levy or Assessment, Judgment, Decree, or Sale
371k3072 Proceedings for Enforcement
371k3072(1) k. In General. Most Cited Cases

Chancery clerk failed to fully comply with redemption notice requirements following tax sale, and thus, the chancery court did not err in setting aside the tax sale as void; personal service by the sheriff was within 60 days of the expiration of the period of redemption. West's A.M.C. §§ 27–43–1, 27–43–3.

David Ringer, attorney for appellant.

James C. Rhoden, Columbia, attorney for appellee.

Before IRVING, P.J., ISHEE and ROBERTS, JJ.

IRVING, P.J., for the Court:

*1 ¶ 1. On April 28, 2009, **Donnell** and **Sons LLC** (**Donnell**) filed a complaint to set aside a conveyance of real property to **Tofino Holdings LLC** (**Tofino**). **Tofino** had acquired the property in a tax sale. Following a hearing on the matter, the Marion County Chancery Court found that the attempt of **Donnell's** predecessor in title—The First, a National Banking Association (the Bank)—to redeem the property, along with the chancery court clerk's failure to comply with the notice requirements of Mississippi Code Annotated section 27–43–3 (Rev.2010), warranted setting aside the tax deed to Tofino.

¶ 2. Feeling aggrieved, Tofino appeals and argues that the chancery court erred in its interpretation and application of the statutory notice requirements. We find that the chancery clerk did not follow the statutory notice requirements. We also find that the Bank's payment of the amount that the tax collector advised would be needed to redeem the property from all prior tax sales and past-due taxes constituted a timely and legal redemption of the property from sale for past-taxes, although there was an error in the amount tendered through no fault of the Bank. Therefore, we affirm the chancery court's judgment and remand the case to the chancery court for further proceedings consistent with this opinion.

FACTS

¶ 3. Todd Phillips Investments Inc. (Phillips) owned three parcels of land in Marion County, Mississippi: a metes-and-bounds parcel and Lots C8 and C9 of the Bellewood Park Subdivision. Because all three parcels had the same owner, the Marion County Tax Assessor combined the three parcels into one.

¶ 4. Lot C9, along with the other two parcels, had been conveyed to Phillips via warranty deed from Brett Jones on May 26, 2004. The deed stated that the 2004 ad valorem taxes were to be prorated between Phillips and Jones. However, the 2004 ad valorem taxes on lot C9 were not paid. Accordingly, the tax assessor scheduled a tax sale of the property for August 29, 2005. The sale was postponed as a result of Hurricane Katrina and later held on September 26, 2005. Tofino purchased the property at the tax sale for $174.42.

¶ 5. Phillips declared bankruptcy on September 8, 2006. On May 10, 2007, the Bank, which held a secured interest in the metes-and-bounds parcel, Lot C8, and Lot C9 in the form of a deed of trust, purchased the properties at a credit bid held by the bankruptcy trustee. On May 23, 2007, the trustee conveyed all three properties to the Bank via a trustee's deed. The deed was recorded on May 25, 2007, and purported to convey the properties free of any liens, interests, encumbrances, or claims. However, the deed also expressly stated that it was prepared "without the benefit of a title examination."

¶ 6. Following its acquisition, the Bank attempted to pay the outstanding taxes on the properties. The Bank contacted the tax collector's office and obtained the amount of taxes due for 2004, 2005, and 2006. However, the tax collector's office neglected to inform the Bank of the outstanding taxes for 2004 due on Lot C9.[FN1]

*2 ¶ 7. On April 23, 2008, the Bank conveyed the property via special warranty deed to **Donnell**. The deed was recorded on the same day. This deed was also prepared without a title examination. At some point following the sale, **Donnell** discovered that Lot C9 had been previously sold in a tax sale to **Tofino**, which prompted him to file the instant action.

¶ 8. Additional facts, as necessary, will be related in our analysis and discussion of the issue.

ANALYSIS AND DISCUSSION OF THE ISSUE

[1] ¶ 9. An appellate court will not disturb the chancery court's factual findings unless such findings are manifestly wrong, clearly erroneous, or the chancery court applied an erroneous legal standard. *Reed v. Florimonte,* 987 So.2d 967, 971 (¶ 11)

(Miss.2008).

[2] ¶ 10. Tofino argues that the chancery court erred in its interpretation and application of the notice requirements of Mississippi Code Annotated section 27–43–1 (Rev.2010). Section 27–43–1 provides, in pertinent part:

> The clerk of the chancery court shall, within one hundred eighty (180) days and not less than sixty (60) days prior to the expiration of the time of redemption with respect to land sold, either to individuals or to the state, be required to issue notice to the *record owner of the land sold as of 180 days prior to the expiration of the time of redemption* [.]

(Emphasis added). Redemption notice must be given in accordance with the procedures set forth in section 27–43–3. Section 27–43–3 requires that the redemption notice be given to the reputed owner in three ways: (1) personal service delivered by the sheriff, (2) registered or certified mail, and (3) publication in the appropriate newspaper.

¶ 11. In this case, the redemption period expired on September 26, 2007. [FN2] Under section 27–43–1, the record owner was entitled to notice no sooner than 180 days prior to the expiration of the redemption period and no later than 60 days before that date. Arguably, Phillips may not have been the record owner of the property 180 days before the expiration of the redemption period.[FN3] Nevertheless, the chancery clerk sent Phillips a notice of forfeiture on April 2, 2007, via certified mail and received a return receipt. [FN4] On May 10, 2007, the Bank purchased the property at a credit bid held by the bankruptcy trustee. The trustee's deed was recorded on May 25, 2007. On August 1, 2007, the chancery clerk mailed a second notice of forfeiture to Phillips. Additionally, the sheriff personally served the notice on Phillips on August 16, 2007.

¶ 12. Tofino argues that under the plain language of section 27–43–1, only the owner of record title as of 180 days prior to the expiration of the redemption period is entitled to notice. We need not decide this question for two reasons. First, there is no record of Phillips being personally served by the Sheriff of Marion County between March 25, 2007, and July 25, 2007, as required by sections 27–43–1 and 27–43–3. The personal service by the sheriff on August 16, 2007, was within sixty days of the expiration of the period of redemption. Therefore, even if Phillips were the record owner on the 180th day (March 25, 2007) prior to the expiration of the period of redemption, service on Phillips did not comport with the requirements of sections 27–43–1 and 27–43–3. Second, we find that the Bank was the record owner of the property for four months prior to the expiration of the period of redemption and that prior to the expiration of the period of redemption it paid $21,197.58 to redeem the property from all prior tax sales and delinquent taxes. This was the exact amount that the tax collector advised was due. The evidence adduced before the chancery court establishes that had the Bank been advised of a different amount, it was ready, willing, and able to pay it and would have tendered that amount. Specifically, the Bank stated that had it been told that taxes owed on the property for 2004 had not been paid, it would have tendered that amount also.

*3 ¶ 13. Because the chancery clerk failed to fully comply with the redemption notice requirements of sections 27–43–1 and 27–43–3, the chancery court did not err in setting aside the tax sale as void. Therefore, we affirm the chancery court's judgment. However, because of an error or oversight on the part of the tax collector in computing the taxes owed, we remand this case to the chancery court for a proper computation of the taxes owed for 2004. Donnell shall be required to pay that amount.

¶ 14. **THE JUDGMENT OF THE CHANCERY COURT OF MARION COUNTY IS AFFIRMED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE AP-**

PELLANT.

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS, MAXWELL AND RUSSELL, JJ., CONCUR. CARLTON AND FAIR, JJ., NOT PARTICIPATING.

FN1. As stated the tax assessor combined the parcels into one parcel due to common ownership. However, this combination did not occur until 2005. In 2004, the parcels were taxed separately.

FN2. The tax sale took place on September 26, 2005. In Mississippi, the owner of property sold in a tax sale may redeem the property "at any time within two (2) years after the day of [the] sale." Miss.Code. Ann. § 27–45–3 (Rev.2010). Therefore, Phillips's right to redeem Lot C9 expired on September 26, 2007—two years after the tax sale.

FN3. March 30, 2007, was 180 days prior to September 26, 2007. At this time, title to the subject property was vested in the Chapter 11 Bankruptcy Trustee, because, as noted, Phillips was in bankruptcy.

FN4. No notice was sent to the Chapter 11 Bankruptcy Trustee.

Miss.App.,2012.
Tofino Holdings, LLC v. Donnell and Sons, LLC
--- So.3d ----, 2012 WL 5908897 (Miss.App.)

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107 So.3d 181
(Cite as: 107 So.3d 181)

Court of Appeals of Mississippi.
Debra L. **DAVIS**, Appellant
v.
The **ESTATE** OF Kay **TIBLIER**, Deceased, Hannah **Tiblier**–Weiss, Administrator, Appellee.

No. 2011–CP–01753–COA.
Jan. 29, 2013.

Background: After real property was sold at a tax sale, **estate** of the record owner of the property brought action against purchaser to set aside the tax deed. The Chancery Court, Jackson County, Jaye A. Bradley, J., awarded summary judgment to **estate** on the ground that chancery clerk failed to strictly comply with statutory notice requirements. Purchaser appealed.

Holding: The Court of Appeals, Fair, J., held that notice of the expiration of the redemption period that was mailed to record owner and returned "unclaimed" was "undelivered" for purposes of notice statute.

Affirmed.

West Headnotes

[1] Taxation 371 ⚿2901

371 Taxation
371III Property Taxes
371III(L) Sale of Land for Nonpayment of Tax
371k2901 k. Constitutional and statutory provisions. Most Cited Cases

Taxation 371 ⚿2942

371 Taxation
371III Property Taxes
371III(L) Sale of Land for Nonpayment of Tax
371k2942 k. Mode of sale. Most Cited Cases

Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners; any deviation from the statutorily mandated procedure renders the sale void.

[2] Taxation 371 ⚿3018

371 Taxation
371III Property Taxes
371III(M) Redemption from Tax Sale
371k3012 Notice to Redeem
371k3018 k. Service in general. Most Cited Cases

Notice of the expiration of the redemption period that was mailed to the record owner of property that was sold at a tax sale, but that was returned "unclaimed," was "undelivered" for purposes of statute governing notice of redemption, and thus chancery clerk's failure to produce affidavits documenting any subsequent efforts to locate the record owner invalidated the sale; "unclaimed" meant that the Postal Service was unsuccessful in delivering the mailing. West's A.M.C. § 27–43–3.

[3] Taxation 371 ⚿3169

371 Taxation
371III Property Taxes
371III(N) Tax Titles
371III(N)3 Actions to Confirm or Try Title
371k3166 Pleading
371k3169 k. Answer and reply. Most Cited Cases

Purchaser of real property at a tax sale waived, for purposes of appeal, her argument that suit to set aside the tax deed was not timely filed by the estate of the record owner of the property; statute of limitations was an affirmative defense that was waived by the failure to timely raise it in the trial court.

[4] Taxation 371 ⚿3183

371 Taxation

371III Property Taxes
371III(N) Tax Titles
371III(N)3 Actions to Confirm or Try Title
371k3183 k. Appeal. Most Cited Cases

Purchaser of real property at a tax sale waived, for purposes of appeal, her argument that chancellor should have been recused from hearing suit to set aside the tax deed brought by **estate** of record owner of the property, where purchaser did not object in the trial court. Uniform Circuit and County Court Rule 1.11.

* Debra L. **Davis**, appellant, pro se.

Jeffrey Ward Bertucci, Biloxi, attorney for appellee.

Before GRIFFIS, P.J., MAXWELL and FAIR, JJ.

FAIR, J., for the Court:

¶ 1. Kay **Tiblier**, a resident of California, failed to pay the 2006 ad valorem taxes on real property in Jackson County, Mississippi. On August 27, 2007, Debra **Davis** purchased the property at a tax sale. **Tiblier**, who had been suffering from Alzheimer's disease, died on June 22, 2009. The chancery clerk mailed notice of the expiration of the redemption period to **Tiblier's** last known address on June 26, 2009. The notice was returned "unclaimed." **Davis** subsequently received a tax deed to the property, and **Tiblier's estate** filed this action to set it aside.

¶ 2. The chancery court granted summary judgment to the **estate**, finding that the chancery clerk had failed to strictly adhere to the statutory notice requirements. **Davis** appeals, and we affirm.

STANDARD OF REVIEW

¶ 3. We review the grant of a summary judgment de novo. ***Davis*** *v. Hoss,* 869 So.2d 397, 401 (¶ 10) (Miss.2004). Summary***183** judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admission 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." M.R.C.P. 56(c). Evidence is viewed in the light most favorable to the party opposing the motion. *Davis,* 869 So.2d at 401 (¶ 10).

DISCUSSION

¶ 4. Mississippi Code Annotated section 27–43–1 (Rev.2010) states that in a tax sale:

> The clerk of the chancery court shall, within one hundred eighty (180) days and not less than sixty (60) days prior to the expiration of the time of redemption ... be required to issue notice to the record owner of the land....

The requirements of the notice of redemption are laid out in Mississippi Code Annotated section 27–43–3 (Rev.2010). For non-resident owners, notice must be published in the county where the property is located. Notice must also be attempted by mail:

> The clerk shall also mail a copy of [the notice] to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only that can be ascertained....
>
> ....
>
> Notice by mail shall be by registered or certified mail. In the event the notice by mail is returned undelivered ... the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address. If the reputed owner's street or post office address is ascertained after the additional search and inquiry, the clerk shall again issue notice as hereinabove set out.... [I]f notice by mail is again returned undelivered, then the clerk shall file an affidavit to that effect and shall specify therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action

shall be noted on the tax sales record. If the clerk is still unable to ascertain the reputed owner's street or post office address after making search and inquiry for the second time, then it shall not be necessary to issue any additional notice but the clerk shall file an affidavit specifying therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sale record.

Id.

¶ 5. At issue is the adequacy of the chancery clerk's attempt to notify **Tiblier** by mail. The notice was timely mailed to **Tiblier** at an address in California she had used in the past. It was returned "unclaimed," presumably because **Tiblier** had moved from that address some years before and had died before the notice was mailed. The chancery clerk treated the notice as "undelivered" per the statute but neglected to produce affidavits documenting any subsequent efforts to locate **Tiblier**.

[1] ¶ 6. Assuming the first mailing was properly treated as undelivered, the chancery clerk clearly failed to comply with the statute. "Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners. Any deviation from the statutorily mandated procedure renders the sale void." ***184** *Reed v. Florimonte,* 987 So.2d 967, 973 (¶ 15) (Miss.2008) (citations omitted).

[2] ¶ 7. Davis's argument on appeal is that the notice, returned "unclaimed," was not "undelivered" under the statute. Thus, she contends the statutory notice requirements were met and no affidavits were required. However, Davis has presented no authority to support her position. Our own review of the caselaw shows that we have repeatedly treated unclaimed mail as undelivered under the statute. *See Johnson v. Ferguson,* 58 So.3d 711, 713 (¶ 3) (Miss.Ct.App.2011); *Moore v. Marathon Asset Mgmt., LLC,* 973 So.2d 1017, 1021 (¶ 15) (Miss.Ct.App.2008); *Lawrence v. Rankin,* 870 So.2d 673, 675 (¶ 7) (Miss.Ct.App.2004). Moreover, we have no reason to believe that treating unclaimed as undelivered is unfair or inconsistent with the statute's purpose: " '[U]nclaimed' simply means that the Postal Service was unsuccessful in delivering the mailing ..., whether because delivery was attempted at the wrong address, the [addressee] simply was not home at the time the Postal Service attempted delivery, or some other reason." *Bloodgood v. Leatherwood,* 25 So.3d 1047, 1050 (¶ 15) (Miss.2010). In fact, the United States Supreme Court has held that when the mailed notice of a tax sale is returned "unclaimed," additional efforts to locate the owner are constitutionally required. *Jones v. Flowers,* 547 U.S. 220, 225, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006) (also equating unclaimed and undelivered). We find no merit to Davis's argument on this issue.

[3] ¶ 8. Davis also contends, apparently for the first time on appeal, that the estate's suit to set aside the tax deed was not timely filed. The statute of limitations is an affirmative defense that was waived by the failure to timely raise it in the trial court. *See Spann v. Diaz,* 987 So.2d 443, 448 (¶ ¶ 13–15) (Miss.2008). This argument is also without merit-**Davis** confuses the statute of limitations for filing a lawsuit with the redemption period following a tax sale.

[4] ¶ 9. **Davis** next alleges impropriety in a Jackson County chancellor hearing the case because a former Jackson County supervisor—apparently a relative of **Tiblier**—was involved in the dispute. There is no evidence in the record to support these claims, and this contention is without merit. Moreover, motions for recusal of a chancellor must be filed within "30 days after the filing party could reasonably discover the facts underlying the grounds" for recusal. UCCR 1.11. Davis's failure to object in the trial court waives any objection on appeal. *See Foster v. State,* 716 So.2d 538, 540 (¶ 7) (Miss.1998).

¶ 10. Finally, Davis argues that the result is simply unfair. She complains of the expense of this litigation and of her being blameless for the failure to provide notice, while having no recourse against the chancery clerk. On this point, we can only direct Davis to the decision of the Mississippi Supreme Court in *Everett v. Williamson,* 163 Miss. 848, 854–55, 143 So. 690, 692 (1932), where it was held:

> At a tax sale the bidders or purchasers of the land or property offered for sale are chargeable with notice and knowledge of the existing statutory requirements for a valid sale, and the statutory conditions upon which a valid deed may be acquired; and must be held to have purchased subject to such statutory provisions.
>
> It has also been said:
> The rule of caveat emptor applies with all its force to a purchaser at [a tax sale], who pays his money voluntarily, with the expectation of procuring the property at a grossly inadequate price, ***185** or of securing an exorbitant profit upon the investment in case the property is redeemed. Knowing that tax titles are to some extent uncertain, and that they usually depend upon numerous contingencies, he engages his means in speculation, and assumes the liability of having his title prove to be worthless[.]

Foster v. Malberg, 119 Minn. 168, 137 N.W. 816, 817 (Minn.1912).

¶ 11. **THE JUDGMENT OF THE CHANCERY COURT OF JACKSON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, CARLTON AND MAXWELL, JJ., CONCUR. JAMES, J., NOT PARTICIPATING.

Miss.App.,2013.
Davis v. Estate of Tiblier

107 So.3d 181

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106 So.3d 360
(Cite as: 106 So.3d 360)

H

Court of Appeals of Mississippi.
Richard E. WILBOURN III, Appellant
v.
Deanna A. WILBOURN, Elizabeth W. Williamson and Garnett W. Hutton, Appellees.

No. **2010– CA– 00014– COA.**
April 24, 2012.
Rehearing denied Sept. 25, 2012.
Certiorari Denied Jan. 31, 2013.

Background: Decedent's son, who was co-trustee of testamentary trust brought action to remove other co-trustee, who was his mother, and claimed trust beneficiaries' written notice of his removal was ineffective. Trust beneficiaries counterclaimed seeking removal of son as co-trustee. The Chancery Court, Lauderdale County, Lawrence Primeaux, J., concluded there were multiple justifications for judicially removing son as co-trustee, while no cause existed to remove mother. Son appealed.

Holdings: The Court of Appeals, Maxwell, J., held that:
(1) co-trustee's surreptitious tape recordings of his mother, who was other co-trustee of testamentary trust, justified his removal as co-trustee;
(2) co-trustee's refusal to vote the marital trust shares violated both his fiduciary duties and also his duties as co-trustee, warranting his removal as trustee;
(3) letter, which was part of settlement discussions to resolve dispute between holding company and co-trustee of marital trust, was admissible in removal action;
(4) memorandum of agreement between co-trustee of marital trust and his father was admissible in action to remove co-trustee;
(5) evidence about co-trustee's interactions with bank's chief executive officer and the bank was admissible in action to remove co-trustee; and
(6) removal of co-trustee of marital trust was warranted based on his hostility toward the trust beneficiaries.

Affirmed.

West Headnotes

[1] Venue 401 ⚿3

401 Venue
401I Nature or Subject of Action
401k3 k. Constitutional and statutory provisions. Most Cited Cases
Venue is a function of statute.

[2] Venue 401 ⚿10

401 Venue
401I Nature or Subject of Action
401k10 k. Actions by or against parties in representative capacity. Most Cited Cases
Venue in action seeking to remove co-trustee from testamentary trust was proper in county in which defendant resided. West's A.M.C §§ 11–5–1, 91–9–203.

[3] Trusts 390 ⚿165

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k165 k. Power to remove. Most Cited Cases
A court has inherent power to remove the trustee for good cause, such power being incidental to the court's paramount duty to see that trusts are properly executed, and the trust estate preserved, and as broad and comprehensive as the exigencies of the case may require. Restatement (Third) of Trusts § 37.

[4] Trusts 390 ⚿165

390 Trusts

390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k165 k. Power to remove. Most Cited Cases
On sufficient grounds and pleadings a testamentary trustee may be removed, and a court of equity has the power to remove a testamentary trustee in protecting the beneficiaries.

[5] Trusts 390 ⚿166(1)

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k166 Grounds
390k166(1) k. In general. Most Cited Cases
If a trustee has an interest in the administration of a trust that would interfere with the duty of complete loyalty, removal may be warranted.

[6] Appeal and Error 30 ⚿949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases
Appellate court reviews the chancellor's decision to remove co-trustee for abuse of discretion.

[7] Appeal and Error 30 ⚿1009(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(1) k. In general. Most Cited Cases
To disturb a chancellor's factual findings, the Court of Appeals must determine that the chancellor's factual findings are manifestly wrong, clearly erroneous, or the chancellor abused his discretion.

[8] Appeal and Error 30 ⚿893(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(2) k. Equitable proceedings. Most Cited Cases
Court of Appeals reviews chancellor's questions of law de novo.

[9] Trusts 390 ⚿231(1)

390 Trusts
390IV Management and Disposal of Trust Property
390k231 Individual Interest in Transactions
390k231(1) k. In general. Most Cited Cases
One in a fiduciary position, such as a trustee, cannot take advantage of that position of trust in administering the assets entrusted to him or her.

[10] Attorney and Client 45 ⚿32(7)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(7) k. Miscellaneous particular acts or omissions. Most Cited Cases
Supreme Court does not impose a per se ban on surreptitious tape recordings by attorneys; instead, the Court looks at the secret tape recording within the context of the circumstances then existing to determine whether the recording rises to the level of dishonesty, fraud, deceit, or misrepresentation.

[11] Attorney and Client 45 ⚿32(7)

45 Attorney and Client
45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(7) k. Miscellaneous particular acts or omissions. Most Cited Cases

An attorney who uses a secret recording for blackmail or to otherwise gain unfair advantage has clearly committed an unethical, if not illegal, act.

[12] Trusts 390 166(2)

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k166 Grounds
390k166(2) k. Mismanagement or misconduct in execution of trust. Most Cited Cases

Co-trustee's surreptitious tape recordings of his mother, who was other co-trustee of testamentary trust, justified his removal as co-trustee based on breach of his fiduciary duty; co-trustee, who was also his mother's attorney, breached his duty of loyalty to mother by was secretly tape recording mother for his own purposes, and it was mother's learning about the recordings that led to the breakdown of communication between her and son as co-trustees.

[13] Trusts 390 166(2)

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k166 Grounds
390k166(2) k. Mismanagement or misconduct in execution of trust. Most Cited Cases

Co-trustee's refusal to vote the marital trust shares violated both his fiduciary duties and also his duties as co-trustee, warranting his removal as trustee; by refusing to vote the shares, co-trustee endangered his family's control of the bank, allowing his immediate family's votes to drop from a 52% majority to only 30%, and his intentional and calculated inaction also prominently displayed his self-interest of ensuring he had sufficient votes to remain on the holding company board.

[14] Evidence 157 213(1)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k212 Offers of Compromise or Settlement
157k213 In General
157k213(1) k. In general. Most Cited Cases

Rule baring the use of compromise evidence to prove the validity or invalidity of a claim that was the subject of the compromise did not apply to letter from co-trustee of marital trust to member of holding company board and trust beneficiary; the letter was not about settling the co-trustee removal issue, which was the subject of the litigation, but rather was about co-trustee's claim against the holding company board for his removal as chairman and for his removal from the bank board. Rules of Evid., Rule 408.

[15] Evidence 157 213(1)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k212 Offers of Compromise or Settlement
157k213 In General
157k213(1) k. In general. Most Cited Cases

Letter, which was part of settlement discussions to resolve dispute between holding company and co-trustee of marital trust, in which co-trustee of marital trust proposed not voting the marital trust shares in holding company because without them he would be re-elected to the holding company board through his and his uncle's shares was admissible in action to remove him as co-trustee as proof of the instrumentality of his breach of his fi-

duciary duties as co-trustee. Rules of Evid., Rule 408.

[16] Trusts 390 ⚿167

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k167 k. Proceedings. Most Cited Cases

Memorandum of agreement between co-trustee of marital trust and his father was admissible in action to remove co-trustee; the agreement was relevant to whether co-trustee was managing marital trust in a way that promoted father's intention.

[17] Trusts 390 ⚿167

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k167 k. Proceedings. Most Cited Cases

Evidence about co-trustee's interactions with bank's chief executive officer and the bank was admissible in action to remove co-trustee since it was relevant to his actions as co-trustee of marital trust; co-trustee's actions as bank board chairman were relevant because at the time he was simultaneously co-trustee, owing complete loyalty to his beneficiaries, and his actions indicated that he violated his duty of loyalty by choosing his interest over the interests of his beneficiaries, when those interests were in conflict.

[18] Trusts 390 ⚿167

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k167 k. Proceedings. Most Cited Cases

Evidence regarding marital trust co-trustee's assistance in the purchase of a condominium in Florida, his attempt to secure a loan for another family business through mother's personal guarantee, and his creation of the another trust and his plans to purchase the marital trust shares in bank holding company were all relevant in action to remove co-trustee since the transactions all showed co-trustee's self-dealing and abuse of his mother's trust for his own financial gain.

[19] Trusts 390 ⚿166(2)

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k166 Grounds
390k166(2) k. Mismanagement or misconduct in execution of trust. Most Cited Cases

Removal of co-trustee of marital trust was warranted based on his hostility toward the trust beneficiaries which included secretly tape recording the other co-trustee and refusing to vote the trust shares of a bank holding company at the company's board meeting; by refusing to vote the shares, he defeated one of the purposes of the trust, which was to keep father's shares in the control of his immediate family until their distribution at mother's death, by diminishing the family's power over the holding company board.

[20] Trial 388 ⚿384

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k381 Rulings on Weight and Sufficiency of Evidence
388k384 k. Dismissal or nonsuit. Most Cited Cases

When a defendant moves for an involuntary dismissal at the close of plaintiff's case the judge should consider the evidence fairly, as distinguished from in the light most favorable to the plaintiff, and the court should dismiss the case if it

would find for the defendant. Rules Civ.Proc., Rule 41(b).

[21] Trial 388 ⚷384

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k381 Rulings on Weight and Sufficiency of Evidence
388k384 k. Dismissal or nonsuit. Most Cited Cases

The judge must deny a defendant's motion for involuntary dismissal at the close of plaintiff's case only if the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case. Rules Civ.Proc., Rule 41(b).

[22] Appeal and Error 30 ⚷866(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict
30k866(1) k. Appeal from ruling on motion for dismissal or nonsuit. Most Cited Cases

Court of Appeals applies the substantial evidence/manifest error standards to an appeal of a grant or denial of a motion for involuntary dismissal filed at the close of plaintiff's case. Rules Civ.Proc., Rule 41(b).

[23] Trusts 390 ⚷167

390 Trusts
390III Appointment, Qualification, and Tenure of Trustee
390k164 Removal
390k167 k. Proceedings. Most Cited Cases

Chancellor did not err in granting involuntary dismissal of co-trustee's claim seeking removal of other co-trustee, who was his mother, at the close of co-trustee's case; the chancellor found credible the mother's and daughter's explanations for why they attempted to remove co-trustee under the terms of the will and for why mother attempted to vote the marital trust shares of holding company in an effort to maintain family control of the holding company. Rules Civ.Proc., Rule 41(b).

[24] Trusts 390 ⚷315(1)

390 Trusts
390VI Accounting and Compensation of Trustee
390k314 Compensation
390k315 In General
390k315(1) k. In general. Most Cited Cases

Trusts 390 ⚷321

390 Trusts
390VI Accounting and Compensation of Trustee
390k314 Compensation
390k321 k. Forfeiture or deprivation. Most Cited Cases

A trustee is entitled to receive compensation for such services and expenditures as are within the line of his duties, but compensation may be forfeited or reduced in the discretion of the court for bad faith, conversion, commingling of funds, or other improper conduct.

***363** Glenn Gates Taylor, Henry Palmer, Christy Michelle Sparks, attorneys for appellant.

Kathryn H. Hester, William C. Hammack, W. Wayne Drinkwater Jr., Mary Clay Wadlington Morgan, Kacey Guy Bailey, attorneys for appellees.

Before LEE, C.J., BARNES and MAXWELL, JJ.

MAXWELL, J., for the Court:

¶ 1. Deanna Wilbourn and her son Richard Wilbourn III were co-trustees of a testamentary trust created by the late Richard Wilbourn II. In his will, Richard II, the largest shareholder of Citizens National Bank of Meridian (Bank), left his Bank shares to the trust. Deanna is the sole income beneficiary, while Richard III and his sisters, Elizabeth Williamson and Garnett Hutton, are to receive the principle when Deanna dies.

¶ 2. Believing Richard III was not acting in their best interest, Deanna, Elizabeth, and Garnett attempted under the terms of the trust to remove Richard III as co-trustee. Richard III sued them, arguing his removal was ineffective, and urged the chancery court remove Deanna instead. Deanna, Elizabeth, and Garnett counterclaimed, asking the chancery court to remove Richard III if their written notice of removal had not effectively removed him.

¶ 3. Over a nineteen-day trial, the chancellor heard testimony about Richard III's secret tape recordings of conversations with Deanna, his protection of his seat on the Bank board at the expense of his family's majority voice in board elections, his fractious relationship with the Bank's chief executive officer, and his attempts to have Deanna declared incompetent while at the same time steering her to make significant financial decisions that would benefit Richard III. The chancellor concluded there were multiple justifications for judicially removing Richard III as co-trustee, while no cause existed to remove Deanna.

¶ 4. On appeal, Richard III argues the chancellor's fact findings demonstrate bias and were based on irrelevant and inadmissible evidence and an erroneous application of trust law. Our review reveals no error. Thus, we affirm the chancery court's judgment.

FACTS AND PROCEDURAL HISTORY

¶ 5. Richard II was a successful attorney and businessman. During his life he amassed a substantial amount of property, mostly shares in Citizens National Bank. He left a detailed will. But despite his efforts to provide for the management of his interest in the Bank after he was gone, less than four years of his death, his immediate*364 family had sued each other over the control of the trust he created.

I. Bank and Holding Company

¶ 6. At the end of Richard II's life, he along with his wife and children were the largest shareholders of Citizens National Bank. As Richard II built his influence over the Bank, he often butted heads with the Bank's chief executive officer, Archie McDonnell Sr. But in 1999, Richard II and Archie Sr.'s son, Archie McDonnell Jr., came together to create a strategic plan for the Bank. Under this plan, Richard II became chairman of the board and Archie Jr. president and CEO of the Bank. This led to a prosperous time for the Bank, with Archie Jr. managing the day-to-day operations and Richard II controlling the board.

¶ 7. Also in 1999, Richard II brought his son Richard III onto the board—but not without limitations. The two executed a "memorandum of agreement." If Richard II believed Richard III's services were "no longer advantageous to the Wilbourn's family overall interest," then Richard III would resign and not run for re-election during his father's lifetime. Richard III also agreed that, upon Richard II's death or resignation, he would nominate a Wilbourn family member to replace Richard II on the board, in order to protect the family's significant financial interest in the Bank. The agreement also detailed how Richard II had gained his interest in the Bank and how he had arranged for his children to obtain individual interests as well.

¶ 8. In 2003, as a mechanism to raise capital, the Bank formed a holding company, Citizens National Bank Corp. All the Bank stock was exchanged for holding company stock. Bank shareholders became holding company shareholders, and the holding company became the sole shareholder of the Bank. Richard II became a 30% owner of the holding company. His shares combined with the

shares of his immediate family gave the Wilbourns 52% ownership and majority control. The McDonnell's owned 16.5%. Another 10% was owned by Richard II's siblings, with the rest owned by neither Wilbourns nor McDonnells.

¶ 9. The holding company board selects the Bank board, which actually governs the Bank's operations. The only other role of the holding company is to determine dividends. When Richard II died unexpectedly in October 2004, the holding company's board of directors had five members: Richard II (who was chairman), Richard III, Archie Sr., Archie Jr., and Garnett. At the time, there had been no plans about who would replace Richard II as chairman of both the holding company and Bank boards. With some reluctance, Deanna, Elizabeth, and Garnett supported Archie Jr.'s nomination of Richard III for both positions. In November 2004, Richard III replaced his father as chairman of the Bank board and Elizabeth replaced her father as Bank director. And the next month, Richard III replaced his father as chairman of the holding company board, and Deanna replaced her husband as director.

II. Marital Trust B

¶ 10. In his will, Richard II left all his Bank shares to Richard III and Deanna to hold in trust for the use and benefit of Deanna. Because the holding company had been formed after the execution of the will, the Lauderdale Chancery Court granted Richard III and Deanna's petition to place Richard II's 41,910 shares of holding company stock in the testamentary trust (Marital Trust B, or Trust) to fulfill the purposes of the will. The 41,910 holding company shares are the only assets of Marital Trust B.

***365** ¶ 11. Under the terms of Marital Trust B, the co-trustees are to distribute annually all the net income to Deanna. They are also prohibited from "appoint[ing] any part of the property constituting the trust to any person other than [Deanna] during her lifetime." At Deanna's death, the property is to be equally divided between Richard III, Elizabeth, and Garnett.

¶ 12. Richard II expressed within the terms of the Trust his intention regarding his family's ownership and control of the Bank:

> I am committed during my lifetime to voting against any mergers of the bank that would dilute my interest and to opposing the sale of the stock to another bank, bank holding company or individual. I believe that I have acquired enough stock to be able to unilaterally prevent this. Having expressed these thoughts and desires, ... neither the Co–Trustees nor the proxy of the trust shall sell this stock or vote in favor of any merger or other corporate action which is calculated to lead to a merger which would dilute the voting power or ownership of the stock in The Citizens National Bank of Meridian or would lead to the sale or exchange of this stock without the unanimous consent in writing of all the beneficiaries of the income and the principal of this trust.

Richard II also provided for trustee removal:

> If Richard E. Wilbourn, III or Deanna A. Wilbourn shall be or become for any reason unable or unwilling to serve as Co–Trustee of this trust, I hereby appoint Elizabeth W. Williamson as Successor Co–Trustee, to serve as if originally appointed. In the event that Elizabeth W. Williamson shall be or become for any reason unable or unwilling to serve as Trustee of this trust, I hereby appoint Garnett W. Hutton as Successor Co–Trustee, to serve as if originally appointed. Notwithstanding the foregoing, and if and only if a Co–Trustee shall become incompetent, unable to serve or grossly mismanages the trust, my wife and children, other than the child serving as Co–Trustee, acting unanimously, shall have the power to remove any Co–Trustee or Successor Co–Trustee and to appoint a Successor Trustee or Co–Trustee, such action to be accomplished by the execution and acknowledgment of a written instrument to that affect, and delivery of that instrument to all Co–Trustees.

¶ 13. In both March 2005 and March 2006, Richard III and Deanna, as co-trustees of the 41,190 holding company shares, agreed how to vote the stock in the election of holding company board members. But they were not able to agree how to vote the stock in March 2007. As a result, the shares were not voted.

III. Family Dispute

¶ 14. The voting impasse grew out of a conflict that began brewing in 2006 and eventually led to this lawsuit. From the time Richard III became chairman of the Bank board, his relationship with CEO Archie Jr. was not as cooperative as his father's. The chancery court found Richard III's actions upset the board-management balance between the Wilbourns and the McDonnells. Several Bank employees testified about what they perceived to be Richard III's interference with Archie Jr.'s daily bank management and the negative effect Richard III's mistrust of Archie Jr. had on employee morale. A consultant hired by the Bank testified Richard III had voluntarily spoken of his mistrust of Archie Jr., calling Archie Jr. a "silver-tongue devil."

¶ 15. After an unsuccessful conversation with Richard III, Archie Jr. took his ***366** concerns to Deanna. Elizabeth testified she had interviewed Bank officers, who verified what Archie Jr. had said. In February 2006, Deanna, Elizabeth, and Garnett spoke to Richard III about the complaints and expressed their support of Archie Jr. Richard III wrote his family an apologetic letter, and for several months the looming crisis appeared to have abated. But in October 2006, Archie Jr. approached Deanna with the same concerns.

¶ 16. On October 24, 2006, Deanna met with Richard III and told him she feared Richard III's actions were damaging the family's relationship with the Bank and its employees. She also expressed concern about Richard III's dealings in other family matters, questioning whether he was acting in the family's best interest. She gave Richard III an ultimatum—cooperate with Archie Jr. or resign from both boards.

¶ 17. On January 1, 2007, Deanna learned Richard III had been secretly tape recording their conversations. In some conversations, Richard III can be heard making asides about Deanna's behavior, as if building a case against her. Richard III's first responded by telling his mother she should assume she is being recorded. But later he sent a written apology promising not to record any more conversations—a promise he did not keep. Deanna testified this discovery severely damaged her ability to trust Richard III, who was not only her son and co-trustee of the Trust that provided her annual income but also had been acting as her lawyer.

¶ 18. The chancellor's findings of fact went into detail about the various ways in which Richard III had legally represented Deanna—advising her on buying a condominium in Florida and on a potential lawsuit connected with Katrina damage; becoming a partner in the law firm that had represented Deanna for decades; and working with an estate-planning attorney to create a trust, the Providence Trust, that would own life insurance to pay estate taxes upon Deanna's death.

¶ 19. Richard III was the irrevocable family trustee of the Providence Trust. He appointed a non-family member, Kirk Reasonover, as co-trustee. The Providence Trust never bought life insurance, but Deanna did place her personal shares of the holding company in the trust. At the time the conflict with her son emerged, Richard III had been inquiring about transferring the Marital Trust B shares to the Providence Trust, despite the fact Richard II had not authorized the transfer of Marital Trust B property to anyone other than Deanna. Richard III proposed that Deanna sell the holding company stock to the Providence Trust. In exchange Deanna would receive interest on a promissory note guaranteed by her children, instead of the annual dividends from the Marital Trust B property as Richard II had directed. Deanna never went through with the proposal. Richard III acknowledged the proposal violated the terms of Marital Trust B, but testified at the time his family thought

the proposal was a good way to avoid tax consequences at Deanna's death. If Deanna had gone through with Richard III's plan, he and Reasonover, as co-trustees, would have controlled how both the Marital Trust B and Deanna's holding company shares were voted—without any other family input.

¶ 20. On January 9, 2007, Deanna, Garnett, Archie Sr., and Archie Jr.—four of the five members of the holding company—voted to remove Richard III as chairman of the holding company board, chairman of the Bank board, and member of the Bank's board. At this same meeting, the holding company board nominated a slate of directors to be elected by the *367 shareholders in March 2007. On this slate were Archie Sr., Archie Jr., Deanna, Garnett, and Elizabeth's husband, Russell Williamson.

¶ 21. On January 30, 2007, Richard III sent Archie Jr. and Deanna a letter, in which he proposed to settle the dispute between himself and the holding company board. As part of his proposal: "The shares of Trust B will not be voted in March 2007. I have been promised the support of [my uncle's] family. With that I will be elected to the Holding Company Board." Archie and Deanna offered to revise the slate, nominating Richard III instead of Garnett, so that the Marital Trust B shares could be voted. Richard III declined. Over the next month, both Richard III and Deanna made unsuccessful attempts to resolve how the shares would be voted. In March, the day of the vote, Deanna asked Richard III to agree to a ballot that included Archie Sr., Archie Jr., Williamson, Deanna, and Richard III. When Richard III refused, Deanna asked whom he wanted nominated. Richard III suggested Reasonover and another non-family member.

¶ 22. Deanna submitted the ballot, which was not counted because it did not contain both trustees' signatures. Richard III was reelected to the holding company board by his and his uncle's votes. Williamson and Deanna were elected through Elizabeth and Garnett's votes and non-family shareholders. Archie Sr. and Archie Jr. were also elected.

¶ 23. In April 2007, Deanna, Elizabeth, and Garnett executed a written notice of removal of Richard III as co-trustee of Marital Trust B. The notice charged Richard III with "incompetence" based on his use the his voting power of the Marital Trust B shares for his own benefit.

IV. Lawsuit

¶ 24. On May 17, 2007, Richard III sued Deanna, Elizabeth, and Garnett. His complaint requested: (1) a declaratory judgment that the April 2007 notice of removal is void, (2) the removal of Deanna as co-trustee based on her incompetence and/or gross mismanagement of the trust and that she be replaced by "independent" co-trustee (i.e., not Elizabeth or Garnett), (3) a full accounting of the trust, and (4) unpaid trustee fees. The first claim was resolved prior to trial. The chancellor granted summary judgment in Richard III's favor on his claim that the April 2007 written notice of removal did not in fact remove him as co-trustee. Deanna, Elizabeth, and Garnett counter-claimed, asking the chancery court to exercise its common-law authority to remove Richard III as co-trustee.

¶ 25. Trial began on December 15, 2008. Richard III presented his case-in-chief over eighteen days spread throughout December 2008, May 2009, and August 2009. At the end of his presentation of the evidence, the chancellor granted Deanna, Elizabeth, and Garnett's motion to dismiss the claims against them. The trial proceeded on their counterclaim to remove Richard III as co-trustee.

¶ 26. At the close of trial, the chancellor granted their counterclaim and removed Richard III as co-trustee. The chancellor issued a seventy-one page opinion, finding eleven separate legal justifications for Richard III's removal and disqualification from service as co-trustee:

a. *Serious breach of trust.* His conduct has violated the intent of the trust, which is to ensure and promote Wilbourn family influence and control

of the Bank. Furthermore, he failed, refused and neglected to cooperate in voting the shares of *368 Marital Trust B, which is the sole discretionary function of the trust.

b. *Lack of cooperation among co-trustees that substantially impairs administration of the trust.* He has failed, refused and neglected to cooperate with the co-trustee, so that the shares of Marital Trust B have not been voted, and the lack of cooperation has been Richard III's fault. The court finds that there is no other way to accomplish proper administration of the trust other than by removal of Richard III as co-trustee.

c. *Unfitness, unwillingness or persistent failure of the co-trustee to administer the trust effectively, and the court finds that removal of the co-trustee would best serve the interests of the beneficiaries.* His conduct has made effective administration of the trust impossible, and his removal would best serve the interest of the beneficiaries.

d. *A substantial change in circumstances.* Since Richard II's death, Richard III set himself in an adversarial posture to Bank management, which is contrary to the situation established by the settlor and threatens the intent of Marital Trust B.

e. *Removal is requested by all of the qualified beneficiaries, removal would be in the best interest of the beneficiaries, and removal will not be inconsistent with the purpose of the trust, and a suitable trustee is available.* Removal has been requested by all of the qualified trustees, removal would be in the best interest of the beneficiaries, removal will not be inconsistent with the purpose of the trust, and a suitable co-trustee—Elizabeth Williamson—is available.

f. *In cases where the trustee breaches his duty of loyalty by dishonest or improper acts, including engaging in professional misconduct.* Richard III's surreptitious tape recording of the co-trustee and at least one of the beneficiaries, and his attempts to persuade his mother to enter into various business arrangements that were not in her best interest, during a time when he claims she was incompetent, was disloyal, dishonest, and improper.

g. *Engaging in self dealing or in actions that create a conflict between the trustee's fiduciary duties and personal interests.* Richard III has used the trust to promote his own self interest to the detriment of the trust and its beneficiaries.

h. *Where the trustee has violated his duty of impartiality to multiple beneficiaries by failing to communicate with them according to their differing interests.* By using the ploy of not voting the Marital Trust B shares to further his own interest, Richard III violated his fiduciary duties, including the duty to act impartially with respect to multiple beneficiaries.

i. *Where there exists hostility by the trustee toward the beneficiary or mutual hostility created by the trustee, and the hostility has the potential to defeat the purposes of the trust.* Richard III has acted adversarially and with hostility toward the beneficiaries, and they no longer trust or have confidence in him as a co-trustee.

j. *In case of serious breakdown of communication between a trustee and the beneficiaries, especially where *369 the trustee is responsible or the breakdown appears to be incurable.* There has been a serious breakdown in communication stemming from Richard III's actions, which have caused a breakdown in the relationship among the parties, and that breakdown appears to be, and is, incurable.

k. *Where the trustee's continuation in that role would be detrimental to the interests of the beneficiaries.* The court finds that Richard III's continuation as co-trustee would definitely be detrimental to the interests of the beneficiaries.

ISSUES ON APPEAL

¶ 27. Richard III appeals both the grant of

Deanna, Elizabeth, and Garnett's counterclaim to remove him as co-trustee and the dismissal of his claims to remove Deanna as co-trustee and for unpaid co-trustee fees.

[1][2] ¶ 28. In the event this court were to find reversible error and remand this case to chancery court, Richard III also appeals the transfer of venue from Madison County to Lauderdale County, arguing the case should be retried in Madison County, his venue of choice. Because we affirm the judgment, it is not necessary to address his venue argument. But we do note that venue properly lay in Lauderdale County.[FN1]

FN1. "Venue is a function of statute." *Park on Lakeland Drive, Inc. v. Spence,* 941 So.2d 203, 206 (¶ 8) (Miss.2006) (quoting *Flight Line, Inc. v. Tanksley,* 608 So.2d 1149, 1155 (Miss.1992)). Mississippi Code Annotated section 11–5–1 (Rev. 2002) governs venue for chancery actions. It states, in pertinent part, "suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found [.]" *Id.*

Contrary to Richard III's assertion, his lawsuit was not merely about ownership of the personal property belonging to the trust, establishing venue where the stock certificates were located. *Cf. Herring Gas Co. v. Newton,* 941 So.2d 839, 841–42 (¶ 7) (Miss.Ct.App.2006) (holding, because action to compel issue of stock certificates was an action involving personal property, venue lay in county where certificates were located and not just in county were corporation located). Instead, the suit was about a testamentary trust—its administration, the enforcement of its terms, and performance and payment of its trustees. Thus, the "all cases not otherwise provided" language governs, making venue proper in Lauderdale County, where Deanna, the only resident defendant and only necessary party, lived. *See* Miss.Code Ann. § 11–5–1; *see also* Miss.Code Ann. § 91–9–203 (Rev. 2004) ("In any court proceeding to designate a successor trustee or to settle the accounts of the existing trustee, only the beneficiaries then entitled to participate in income and those principal beneficiaries who have a vested interest in the trust estate shall be necessary parties thereto.").

DISCUSSION

I. Removal of Richard III as Co–Trustee

¶ 29. As with any dispute, there are always two sides to the story. And Richard III's version of what happened in 2006–2007 vastly differs from his family's. According to Richard III, his family "teamed up" against him to have him removed as co-trustee, despite not being able to show Richard III mismanaged the trust or caused the Bank to lose profitability. The chancellor heard from both sides. He observed the demeanor and weighed the credibility of each family member involved, as well as other witnesses. And he concluded the evidence clearly and convincingly supported Deanna, Elizabeth, and Garnett's claim.

*370 ¶ 30. Richard III acknowledges our deferential standard of review and that a reversal of the chancellor's decision would require us to find no legal reason and no supporting factual basis for removal existed for *any* of the chancellor's multiple findings of good cause to remove. With such a steep hill to climb, Richard III makes two general arguments about the chancellor's findings: (1) the chancellor's strong negative reaction to Richard III's secret tape recordings biased the chancellor's view of all the other evidence; and (2) the chancel-

lor based his decision on actions by Richard III that had no relevance to his administration of Marital Trust B.

¶ 31. We find Richard III's justifications for secretly tape recording his mother/fiduciary unpersuasive. And we find no error in the chancellor's consideration of Richard's actions beyond his ministerial duties as co-trustee as evidence of Deanna, Elizabeth, and Garnett's distrust of Richard III as co-trustee. We also conclude the chancellor permissibly weighed Richard III's self-dealing in other family matters as evidence of self-interest in administering Marital Trust B. Because substantial evidence supports the chancellor's findings of breaches of fiduciary duties and hostility, we affirm the removal of Richard III as co-trustee.

A. Chancellor's Authority to Remove

[3][4] ¶ 32. A court "has inherent power to remove the trustee for good cause, such power being incidental to the court's paramount duty to see that trusts are properly executed, and the trust estate preserved, and as broad and comprehensive as the exigencies of the case may require." *Walker v. Cox,* 531 So.2d 801, 803 (Miss.1988) (quoting *Yeates v. Box,* 198 Miss. 602, 612, 22 So.2d 411, 415 (1945)); *see also* Restatement (3d) of Trusts § 37 (2003) ("A trustee may be removed (a) in accordance with the terms of the trust; *or* (b) for cause by a proper court."). "On sufficient grounds and pleadings a testamentary trustee may be removed, and a court of equity has the power to remove a testamentary trustee in protecting the beneficiaries." *Magee v. Estate of Magee,* 236 Miss. 572, 589, 111 So.2d 394, 400–01 (1959) (citing *Woods v. Chrissinger,* 230 Ala. 678, 163 So. 318 (Ala.1935)).

[5] ¶ 33. The Mississippi Supreme Court has held "hostility of the trustee toward the successor income beneficiary could defeat the purpose of the trust," giving the chancellor sufficient ground to remove the trustee for good cause. *Walker,* 531 So.2d at 804. A chancellor may also remove a trustee for a conflict of interest. *McWilliams v. McWilliams ex rel. Weathersby,* 994 So.2d 841, 846 (¶ 19) (Miss.Ct.App.2008) (citing 76 Am. Jur. 2d *Trusts* § 233 (2007)). "If a trustee has an interest in the administration of a trust that would interfere with the duty of complete loyalty, removal may be warranted." *Id.* Further, "a serious breakdown in communications between beneficiaries and a trustee may justify removal, particularly if the trustee is responsible for the breakdown or it appears to be incurable. Serious friction between co-trustees may also warrant removal of one or both of them." Restatement (3d) of Trusts § 37 cmt. e(1) (2003).

[6][7][8] ¶ 34. We review the chancellor's decision to remove Richard for abuse of discretion. *See McWilliams,* 994 So.2d at 846 (16) (citing *Walker,* 531 So.2d at 803). "To disturb a chancellor's factual findings, this Court must determine that the chancellor's factual findings are manifestly wrong, clearly erroneous, or the chancellor abused his discretion." *Id.* at 844 (13) (citing *Hollon v. Hollon,* 784 So.2d 943, 946 (¶ 11) (Miss.2001)). But we review questions of law de novo. ***371** *McNeil v. Hester,* 753 So.2d 1057, 1063 (¶ 21) (Miss.2000) (citations omitted).

B. Breach of Fiduciary Duties

[9] ¶ 35. "[A] trustee has a duty to act with due regard to his obligation as a fiduciary." Miss.Code. Ann. § 91–9–107(2) (Supp.2011). A "fiduciary" is "required to act for the benefit of another person on all matters within the scope of their relationship," owing "the duties of good faith, trust, confidence, and candor." Black's Law Dictionary 658 (8th ed. 2004). "The touchstone of the fiduciary relationship between the trustee and his beneficiaries is loyalty." Jeffrey Jackson & Mary Miller, Encyclopedia of Mississippi Law § 73:8 (2001). This fundamental duty "underlies the relationship and imposes limitations upon the trustee in discharging his or her responsibilities." *Id.* "The interests of the beneficiaries are paramount, and nothing should be done that would diminish their rights under the terms of the agreement and granted by law. One in a fiduciary position, such as a trustee, cannot take advantage of that position of trust in administering the assets en-

trusted to him or her." *Id.* (citing *Holmes v. Jones,* 318 So.2d 865 (Miss.1975)).

¶ 36. The chancellor found (1) Richard III's secret tape recordings of his co-trustee and beneficiary, Deanna, (2) his use of the trust in a way to ensure his position on the holding company board, (3) his conduct that caused his family to worry about the Wilbourn family's influence over the Bank, and (4) his attempts to persuade Deanna to make business decisions that were not in her best interest while at the same time trying to get her declared incompetent were all breaches of his duties of trust and impartiality. We address Richard III's arguments against each of these findings.

1. Secret Tape Recordings

¶ 37. The chancellor dedicated twelve pages of his opinion to his findings regarding Richard III's secret tape recordings. According to Richard, the chancellor's strong reaction against the tape recordings was disproportionate and tainted all the chancellor's remaining factual findings. Richard III claims the chancellor erroneously applied the law to find that an attorney's secret tape recording is always unethical. Had the chancellor applied the correct test, Richard argues, the chancellor would have concluded Richard III's actions were reasonable.

[10][11] ¶ 38. Richard III is correct that the Mississippi Supreme Court does not impose a per se ban on surreptitious tape recordings by attorneys. *Attorney M v. The Miss. Bar,* 621 So.2d 220, 223–24 (Miss.1992) (finding attorney's tape recording of a conversation with an expert witness was not unethical). Instead, the supreme court looks at the secret tape recording "within the context of the circumstances then existing" to determine whether the recording "rise[s] to the level of dishonesty, fraud, deceit or misrepresentation." *Id.* at 223 (quoting *Netterville v. Miss. State Bar,* 397 So.2d 878, 883 (Miss.1981)). "Ethical complications arise not so much from surreptitious recordings per se as from the manner in which attorneys use them." *Id.* at 224. And "an attorney who uses a secret recording for blackmail or to otherwise gain unfair advantage has clearly committed an unethical—if not illegal—act." *Id.*

[12] ¶ 39. In reading the chancellor's opinion, it is clear he applied the correct test, considering the manner in which Richard III intended to use the recordings. The chancellor rejected Richard III's explanation—that his purpose for secretly recording his mother was to have a "true record" of their conversations—as ***372** not supported by the evidence. Instead, the chancellor found Richard III's purpose was to gather negative evidence against his mother, whom he was trying to have declared incompetent and, later, to have removed as co-trustee. Under the circumstances, in which Richard III was simultaneously acting as his mother's attorney, advisor, and co-trustee, the chancellor found Richard III was taking an unfair advantage of Deanna.

¶ 40. We find the evidence that Richard III was secretly tape recording Deanna for his own purposes sufficient to support the chancellor's finding Richard III had breached his duty of loyalty. As Deanna's fiduciary, Richard III owed her duties of good faith, trust, and candor. Deanna testified that Richard III's actions destroyed her trust in him. And it was her learning about the recordings that led to the breakdown of communication between her and Richard III as co-trustees, which the chancellor found was another reason for removal. *See* Restatement (3d) of Trusts § 37 cmt. e(1) (2003). Further, Richard III continued taping his mother after he promised he would stop, adding to Deanna's distrust of him. Thus, we find no error in the chancellor's holding Richard III's surreptitious tape recordings justified his removal as co-trustee based on breach of his fiduciary duty.

2. Failure to Vote Shares

a. Diluting Control / Ensuring He Remained on the Board

[13] ¶ 41. According to Richard III, voting the Marital Trust B's shares was merely "incidental" to his administrative duties of managing the Trust. So the voting impasse in March 2007 cannot be a basis for removal because the administration of the trust

was not substantially impaired by the co-trustees' failure to vote. The chancellor saw the events surrounding March 2007 very differently. It was not that Richard III failed in his ministerial duties as co-trustee or merely had an honest disagreement with this co-trustee over the holding company board's slated directors. Instead, the chancellor found Richard III "exploit[ed] the benefit he stood to gain in the impasse" and "put his own personal interests ahead of those of the trust and its beneficiaries." And Richard III's misuse of his co-trustee power was a violation of his fiduciary duties that in itself justified removal.

¶ 42. Further, the chancellor found voting the shares was an important discretionary function of Marital Trust B. He reasoned that by casting their votes, the co-trustees would effect Richard II's intent that his immediate family continue control over the Bank. Because Richard II clearly intended that his family maintain their significant investment in the Bank, the terms of the trust restricted the co-trustees from voting Trust shares in a manner that would dilute his family's "voting power of ownership" over the Bank without unanimous consent. By refusing to vote the shares, Richard III endangered his family's control of the bank, allowing his immediate family's votes to drop from a 52% majority to only 30%. His intentional and calculated inaction also prominently displayed his self-interest of ensuring he had sufficient votes to remain on the holding company Board. The chancellor found Richard III's actions not only violated the terms of the trust but also evidenced his putting his interests before his beneficiaries. Under the circumstances, we find no error in the chancellor holding Richard III's refusal to vote the Marital Trust B shares violated both his fiduciary duties and also his duties as co-trustee.

b. The January 30, 2007 Letter

¶ 43. Richard III also claims the chancellor relied on inadmissible evidence to *373 support the conclusion Richard III refused to vote the shares as a means to promote his own interest. According to Richard III, the January 30, 2007 letter to Archie Jr. and Deanna was part of a settlement negotiation and, thus, inadmissible under Mississippi Rule of Evidence 408. Under Rule 408:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

[14] ¶ 44. For two reasons, we find the January 30, 2007 letter falls outside the scope of Rule 408. First, "Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim." Charles Alan Wright and Kenneth W. Graham Jr., 23 Fed. Prac. & Proc. Evid. § 5314, at n. 25 (1st ed. 1980); *see also Broadcort Capital Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1194 (10th Cir.1992) (holding "Rule 408 did not bar ... evidence ... related to settlement discussions that involved a different claim than the one at issue in the current trial"); *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 277 (8th Cir.1983) (holding " Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity of the claim under negotiation"). The January 30, 2007 letter was not about settling the co-trustee removal issue—the only issue at trial. Instead, the letter was about Richard III's claim against the holding company board for his removal as chairman and for his removal from the Bank board, as evidenced by its recipients, Deanna *and* Archie Jr., a member of the holding company board who has no role in Marital Trust B. While the letter may not be admissible in a dispute between the holding company and Richard III, we find Rule 408 does not apply to its admissibility in the dispute between Richard III and his family.

[15] ¶ 45. Second, "Rule 408 is also inapplic-

able when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., libel, assault, breach of contract, unfair labor practice, and the like." Wright & Graham, 23 Fed. Prac. & Proc. Evid. § 5314 (1st ed. 1980). *See also Avary v. Bank of Am., N.A.,* 72 S.W.3d 779, 799 (Tex.Ct.App.2002) (holding Texas's version of Rule 408, which is identical to Mississippi's, "does not prevent a party from proving a separate cause of action simply because some of the acts complained of took place during compromise negotiations"); *Fletcher v. W. Nat'l Life Ins. Co.,* 10 Cal.App.3d 376, 396, 89 Cal.Rptr. 78 (Cal.Ct.App.1970) (finding settlement letter from insurer admissible because it was not used to prove liability under the policy but instead "proof of the instrumentality of the tort" of intentional infliction of emotional distress). Deanna, Elizabeth, and Garnett's claim was that Richard III misused his authority as co-trustee to gain leverage in his attempt to regain his seat on the holding company board. In the letter he proposed not voting the Marital Trust B shares because without him he would be re-elected to the holding company board through his and his uncle's shares. Thus, the letter was admissible as "proof of the instrumentality" of his breach of his fiduciary duties as co-trustee. *Fletcher,* 10 Cal.App.3d at 396, 89 Cal.Rptr. 78.

***374 3. 1999 Memorandum of Agreement**

[16] ¶ 46. Richard III also argues the chancellor improperly considered the 1999 memorandum of agreement between himself and his father. Because this agreement was personal to Richard II, Richard III claims it could not be used to impose additional duties on Richard III as co-trustee and certainly could not be used to find a breach of those duties.

¶ 47. Richard III is correct that the agreement could not be used to prove Richard III had additional co-trustee duties that he did not fulfill. *See e.g., Hous. Auth., City of Laurel v. Gatlin,* 738 So.2d 249, 251 (¶ 10) (Miss.Ct.App.1998) (quoting *Allen v. Allen,* 175 Miss. 735, 741, 168 So. 658, 659 (1936)) ("Parol evidence is not admissible to contradict, vary, alter, add to, or detract from, the instrument."). But that does not make the document inadmissible for other purposes. Deanna, Elizabeth, and Garnett testified they were hesitant when Archie Jr. nominated Richard III to succeed his father, citing their father's reservations about putting Richard III on the board, as shown in the agreement. Further, the agreement did not contradict the terms of the trust. Both the agreement and the will were executed the same year. Both expressed Richard II's belief in the importance of the Bank to his family's long-term financial success. Thus, the agreement was relevant to whether Richard III was managing Marital Trust B in a way that promoted Richard II's intention. Because the chancellor did not use the agreement to add to the terms of the trust, we find no abuse of discretion in the chancellor's consideration of the agreement, particularly when Richard III did not object to its admission at trial.

4. Bank Operations

[17] ¶ 48. At both the trial and on appeal, Richard III has argued that all evidence about his interactions with Archie Jr. and the Bank is irrelevant to his actions as co-trustee of Marital Trust B. Further, he suggests there is no evidence Richard III's behavior threatened the Bank's bottom line. As with the failure to vote the shares, the chancellor found Richard III's interactions with the Bank to be part of the bigger picture of Richard III choosing his interests when they were found to be in conflict with his family's.

¶ 49. The chancellor found Richard III's enmity toward Archie Jr. was a "legitimate cause of anxiety and concern" for Deanna, Elizabeth, and Garnett. As beneficiaries to Marital Trust B, they had a right to be concerned with the Bank's profitability. The chancellor did not conclude Richard III had to be removed as co-trustee because he made the Bank unprofitable. The chancellor concluded Richard III breached his fiduciary duties to his beneficiaries because he refused to listen to his family's concerns

and insisted on placing his own interest before theirs. We reject Richard III's argument that the chancellor should have compartmentalized Richard III's various roles. Richard III's actions as Bank board chairman are relevant because at the time he was simultaneously co-trustee, owing complete loyalty to his beneficiaries. *See McWilliams,* 994 So.2d at 846 (¶ 19). And we find the chancellor's conclusion that Richard III violated his duty of loyalty by choosing his interest over the interests of his beneficiaries, when those interests were in conflict, is supported by the evidence of Richard III's reactions to their concerns.

5. Other Family Matters

[18] ¶ 50. Equally irrelevant to the chancellor's decision, according to Richard III, were Richard III's actions in "other family and business matters"—namely, (1) the purchase of a condominium in Florida and a potential lawsuit connected with it; *375 (2) the attempt to secure a loan for another family business, Inn Serve, though Deanna's personal guarantee; and (3) the creation of the Providence Trust and Richard III's plans to purchase the Marital Trust B shares. Just as he attempts to minimize his interactions with the Bank, Richard III argues his actions in these other matters have no bearing on his performance as co-trustee. Again, we find no error in the chancellor's refusal to view Richard III's actions in these family matters in a vacuum.[FN2]

FN2. Richard was simultaneously arguing for his mother's removal and his sisters' ban as co-trustees. In making his case for his mother's breach of duties and/or hostility, Richard III points out his mother's actions beyond her administrative duties as co-trustee. For example, one issue listed in the pretrial order is whether Deanna breached any duties by paying for Richard III's wife's attorney in his wife's unsuccessful attempt to obtain a divorce. If the totality of Deanna's actions were relevant to Richard III's claim against Deanna, then it stands to reason the same is true for Deanna's claim against Richard III.

¶ 51. The Florida condominium was relevant because the evidence showed Richard III legally represented Deanna concerning this property. So Richard III and Deanna were in an attorney-client relationship, reinforcing Richard III's ethical duties to his mother, which the chancellor found Richard III breached.

¶ 52. The Inn Serve loan's relevance centers on Richard III's request to his mother that she guarantee a $12 million loan for a business she did not own. And at the time Richard III made the request, he was gathering evidence to build a case for his mother's incompetence. The chancellor found Richard III was self-dealing and had abused his mother's trust for his own financial gain. We find no error in the chancellor concluding that if Richard III's family could not trust him in these other roles, they could not trust him as co-trustee of Marital Trust B.

¶ 53. Like the chancellor, we too find "the fact Richard III wanted the Marital Trust B shares put under his control in the Providence Trust is a matter of concern." Despite Richard III's argument that all the beneficiaries initially responded positively to his proposal, seeing it as a way to avoid estate taxes upon Deanna's death, we cannot ignore that Richard III's proposal clearly violated the express terms of the trust. The trust restricted Richard III and Deanna from selling the stock to "any person other than [Deanna] during her lifetime." And had Deanna gone through with the plan, she would not have received the annual dividends of Richard II's Bank shares, as Richard II directed in the terms of the trust. Also, Richard III, Elizabeth, and Deanna would not have received the shares upon Deanna's death, as Richard II directed. Further, Richard II created Marital Trust B to have two co-trustees, both of whom could be revoked under the terms of the trust and had to be replaced by another immediate family member if available. In contrast, Richard III was the only family-member trustee of the

Providence Trust. He could not be revoked, and he had the authority to appoint a non-family member as his co-trustee. Thus, we agree with the chancellor that the "fact Richard III, as co-trustee with and fiduciary of Deanna, would try to convince Deanna to enter into such an arrangement is evidence ... that Richard III put his own interest ahead of his beneficiar[ies'] and that he was not willing to adhere to [his] father's intent in setting up Marital Trust B."

C. Hostility Created by the Trustee

[19] ¶ 54. The chancellor also found hostility created by Richard III formed another basis for removal.

***376** ¶ 55. In *Walker v. Cox,* the Mississippi Supreme Court considered hostility between trustee and beneficiary as a reason to remove a trustee. The supreme court quoted a treatise for the following proposition:

> Disagreement and unpleasant personal relationships between the trustee and the beneficiaries are not usually enough to warrant removal. The beneficiary often conceives that he could manage the trust better than the trustee, resents failure to follow his advice, is dissatisfied with returns, thinks that the trustee is too conservative in his investment policies, and otherwise finds fault with the trustee. Thus, friction develops. But the settlor has entrusted the management to the trustee and not to the beneficiaries. The very fact that he created a trust showed that he did not want the beneficiaries to be the controlling factor in the management of the property. *However, in some instances the hostile relationship between the trustee and the beneficiary have gone so far that the court feels a new trustee should be appointed.*

Walker, 531 So.2d at 804 (quoting George G. Bogart, The Law of Trusts and Trustees § 160 (5th ed. 1973)) (emphasis added). The supreme court also considered the Court of Appeals of Arkansas's position on hostility, noting: "[M]utual hostility between the beneficiaries and the trustee is a sufficient ground for the court to remove the trustee if 1) the provisions of the instrument creating the trust require mutual interchange of ideas, and 2) if the hostility tends to defeat the purpose of the trust." *Id.* (quoting *Ashman v. Pickens,* 12 Ark. App. 233, 674 S.W.2d 4, 5 (1984)). "Finding the reasoning of *Ashman* persuasive," the Mississippi Supreme Court determined "the better rule to be that hostility *of the trustee toward the successor income beneficiary* could defeat the purpose of the trust." *Id.* (emphasis added). Thus, the supreme court appeared to reject mutual hostility as a ground to remove. Instead the test appears to be hostility of the trustee toward the beneficiary that defeats the purpose of the trust. *See id.*

¶ 56. In *McWilliams,* the removed trustee argued that if hostility existed it was not created by the trustee. This court reversed the chancellor's finding of hostility as a basis to remove the trustee. *McWilliams,* 994 So.2d at 849 (¶ 28). *But see id.* at 849–50 (¶¶ 28–30) (affirming the chancellor's removal of the trustee for conflict of interest). This court held "[w]here evidence shows that a guardian of a beneficiary or the actual beneficiary creates hostility as a part of a greater goal to have a trustee removed, that guardian or beneficiary will be sorely disappointed." *Id.* (citing 76 Am. Jur. 2d *Trusts* § 235 (2007)).

¶ 57. Relying on *Walker* and *McWilliams,* Richard III asserts the chancellor misapplied the law on hostility. He argues, because Deanna, Elizabeth, and Garnett created the hostility in an effort to have Richard III removed as co-trustee, they were not entitled to removal on this ground. But the chancellor did not find Deanna, Elizabeth, and Garnett had created the hostility. Instead, the chancellor found Richard III had created the hostility through his adversarial acts—his secret tape recordings, his interactions with Bank officers that made his family uneasy, and his refusal to cooperate with Deanna to vote the shares of Marital Trust B. We find substantial evidence supports that Deanna, Elizabeth, and Garnett's April 2007 attempted removal of Richard III was a reaction to Richard III's

actions, not the type of beneficiary-initiated friction that *McWilliams* held could not be a basis to remove.

*377 ¶ 58. Richard III next argues the hostility between himself and his family did not defeat the purpose of the Trust. We have already rejected Richard III's argument that voting the shares in the March 2007 holding company meeting was a mere "incidental" duty. One of the purposes of the Marital Trust B was to keep Richard II's shares in the control of his immediate family until their distribution at Deanna's death. Not voting the shares diminished the Wilbourn family's voting power over the holding company board. But even under Richard III's argument that the purpose of the Trust was to provide dividends, not voting the shares affected this purpose. It is the holding company board that determines the annual dividend—which Richard II provided would be Deanna's income until her death. By not being able to agree how to vote the Trust shares, one of the purposes of the Trust—overseeing the annual income of Trust property through electing the holding company board—was defeated.

¶ 59. Finding the chancellor properly applied the law from *Walker* and *McWilliams* to the facts, we affirm the chancellor's holding Richard III should be removed as co-trustee based on his hostility toward his beneficiaries that defeated the purpose of the Trust.

II. Dismissal of Richard III's Claims

¶ 60. Richard also appeals the involuntary dismissal under Mississippi Rule of Civil Procedure 41(b) of his claims (1) to remove Deanna as co-trustee and prevent Elizabeth or Garnett from replacing her and (2) to be compensated for his services as co-trustee.

[20][21][22] ¶ 61. Rule 41(b) permits:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

M.R.C.P. 41(b). A motion to dismiss is different than a motion for directed verdict. When a defendant moves for an involuntary dismissal under Rule 41(b), "the judge should consider '*the evidence fairly,* as distinguished from in the light most favorable to the plaintiff,' and the court should dismiss the case if it would find for the defendant." *In re Adoption of D.N.T.,* 843 So.2d 690, 711 (¶ 50) (Miss.2003) (quoting *Century 21 Deep S. Props., Ltd. v. Corson,* 612 So.2d 359, 369 (Miss.1992)). "The [judge] must deny a motion to dismiss only if the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case." *Id.* "This Court applies the substantial evidence/manifest error standards to an appeal of a grant or denial of a motion to dismiss pursuant to [Rule] 41(b)." *Id.*

A. Removal of Deanna

[23] ¶ 62. Richard III argues the chancellor manifestly erred by finding, at the end of his case, that the evidence did not oblige him to remove Deanna and prevent Elizabeth and Garnett from serving as successor trustees. In the midst of very general assertions about his evidence, Richard III specifically claims: (a) his mother and sisters' attempt in April 2007 to remove him as co-trustee is evidence of their self-dealing and hostility; and (b) Deanna disregarded "the distinct identity of the Trust," by asking that the trust statements be sent to her, by refusing to meet with Richard, and by trying to vote the trust shares without Richard III's consent.*378 We must ask whether this evidence, *fairly viewed,* is substantial enough to require the chancellor to rule in Richard III's favor if no other evidence was presented. *See id.*

¶ 63. Richard III called all three defendants as

hostile witnesses during his case-in-chief. The chancellor found credible their explanations for why they attempted to remove Richard III as co-trustee under the terms of the will and for why Deanna attempted to vote the shares in an effort to maintain family control of the holding company. The chancellor held all three defendants had acted in good faith. As this is a fair view of their testimony, we find no error in the chancellor's dismissal of Richard III's claim to remove Deanna.

B. Trustee fees

[24] ¶ 64. Richard III also appeals the dismissal of his claim for trustee fees for the time period of April 2007 (time of the attempted removal by his family) through the end of 2008. If there is record evidence Richard III provided trustee services during this period, then this court must ask whether Richard III's actions warranted forfeiture of that fee:

> Obviously a trustee is entitled to receive compensation for such services and expenditures as are within the line of his duties. [B]ut [compensation] may be forfeited or reduced in the discretion of the court for bad faith, conversion, commingling of funds, or other improper conduct.... "Each case must be determined largely on its own peculiar facts, due weight being given by the appellate court to the findings of the lower tribunal. The facts justifying forfeiture must be clearly shown; and in the absence of sufficient evidence thereof, the right to compensation is not forfeited."

Sunflower Farms, Inc. v. McLean, 238 Miss. 168, 184, 117 So.2d 808, 815 (1960) (quoting 90 C.J.S. *Trusts* § 397) (internal citations omitted). Richard III briefly claims he is entitled to $90,663.88 plus interest. But he does not argue that during this time period he performed any work for the trust or point to any evidence supporting this claim. The terms of Marital Trust B provide for a 6% fee "for normal services of disbursement and voting said stock, execution of proxies or other services of a minor or profunctory [sic] nature." In April 2007, when the removal letter was sent, Deanna took control of the trust's bank account. And while the lawsuit was pending, Richard III was enjoined from voting the trust shares. Because Richard III has presented no record evidence of trust services and expenditures during the relevant time period entitling him to compensation, we find no manifest error in the chancellor's dismissal of this claim.

¶ 65. **THE JUDGMENT OF THE LAUDERDALE COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING, P.J., BARNES, ISHEE, CARLTON, RUSSELL AND FAIR, JJ., CONCUR. GRIFFIS, P.J., AND ROBERTS, J., NOT PARTICIPATING.

Miss.App.,2012.
Wilbourn v. Wilbourn
106 So.3d 360

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105 So.3d 1171
(Cite as: 105 So.3d 1171)

C

Court of Appeals of Mississippi.
Gary Lamar **SMILEY** and Mary Ann **Smiley**, Appellants
v.
Richard **YLLANDER**, Margaret Y. Jackson, Lynn **Smiley** Baker, Dan **Smiley**, Otto **Yllander**, Linda Y. Toler, Albert **Yllander** Jr., Kathryn S. MacDonald, Robert A. **Smiley** III and Mary Helen **Smiley** Shannon, Appellees.

No. 2011–CA–00593–COA.
Dec. 11, 2012.

Background: Aunt conveyed a 90–acre parcel of property to nephew and his wife, "trusting" that nephew would follow the dictates of aunt's will, which bequeathed the parcel to other nieces and nephews. After aunt died, grantor nephew and wife began clear-cutting the parcel, and other nieces and nephews brought action against various parties seeking damages for the wrongful harvest of timber. After other defendants settled, the Chancery Court, Amite County, Debbra K. Halford, J., entered judgment against grantor nephew and wife, and they appealed.

Holdings: The Court of Appeals, Maxwell, J., held that:
(1) Court of Appeals' inability to determine whether chancellor applied the clear and convincing evidence standard in determining that trust was established warranted remand, and
(2) Chancellor's failure to consider the percentage of fault of settling defendants and nonparties warranted remand.

Affirmed in part, reversed in part, and remanded.

Barnes, J., concurred in part and dissented in part.

West Headnotes

[1] Appeal and Error 30 ⚿847(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k847 Trial in Equitable Actions
30k847(1) k. In general. Most Cited Cases

Appeal and Error 30 ⚿1009(2)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(2) k. Sufficiency of evidence in support. Most Cited Cases
Court of Appeals will not disturb a chancellor's findings if supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, or applied an incorrect legal standard.

[2] Appeal and Error 30 ⚿893(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(2) k. Equitable proceedings. Most Cited Cases
Court of Appeals reviews a chancellor's legal conclusions de novo.

[3] Trusts 390 ⚿1

390 Trusts
390I Creation, Existence, and Validity
390I(A) Express Trusts
390k1 k. Nature and essentials of trusts. Most Cited Cases

Trusts 390 ⚿62

390 Trusts
390I Creation, Existence, and Validity
390I(B) Resulting Trusts
390k62 k. Nature of resulting trust. Most Cited Cases

Trusts 390 ⚿91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

Generally, trusts are classified under two broad categories: (1) express trusts and (2) implied trusts.

[4] Trusts 390 ⚿1

390 Trusts
390I Creation, Existence, and Validity
390I(A) Express Trusts
390k1 k. Nature and essentials of trusts. Most Cited Cases

Express trusts arise from a party's manifestation of an intention to establish such an agreement and are created by a trust instrument. West's A.M.C. § 91–9–103(a).

[5] Trusts 390 ⚿17(3)

390 Trusts
390I Creation, Existence, and Validity
390I(A) Express Trusts
390k17 Validity of Oral Trusts, and Requirement of Statute of Frauds
390k17(3) k. Trusts in lands in general. Most Cited Cases

If a trust holds real property as an asset, the trust agreement must be in writing and signed by the grantor. West's A.M.C. § 91–9–1.

[6] Trusts 390 ⚿62

390 Trusts
390I Creation, Existence, and Validity
390I(B) Resulting Trusts
390k62 k. Nature of resulting trust. Most Cited Cases

Trusts 390 ⚿91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

While an express trust must be written, implied trusts differ in that they arise by implication of the law or are presumed from the circumstances.

[7] Trusts 390 ⚿62

390 Trusts
390I Creation, Existence, and Validity
390I(B) Resulting Trusts
390k62 k. Nature of resulting trust. Most Cited Cases

Trusts 390 ⚿91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

Mississippi recognizes two types of implied trusts: (1) resulting trusts and (2) constructive trusts.

[8] Trusts 390 ⚿62

390 Trusts
390I Creation, Existence, and Validity
390I(B) Resulting Trusts
390k62 k. Nature of resulting trust. Most Cited Cases

A "resulting trust" is designed to give effect to the unwritten but actual intention of the parties at the time of the acquisition of title to the affected property.

[9] Trusts 390 ⚿91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

A "constructive trust" is a judicially imposed remedy used to prevent unjust enrichment when one party wrongfully retains title to property.

[10] Trusts 390 ⚿62

390 Trusts
390I Creation, Existence, and Validity
390I(B) Resulting Trusts
390k62 k. Nature of resulting trust. Most Cited Cases

Trusts 390 ⚿91

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k91 k. Nature of constructive trust. Most Cited Cases

The primary difference between a resulting trust and a constructive trust is that in a resulting trust, the acquisition is mutually agreeable, and the inequity arises out of the trustee's subsequent unwillingness to honor the terms of the parties' original agreement, whereas a constructive trust may be imposed when acquisition of title is somehow wrongful as to the purported beneficiary.

[11] Appeal and Error 30 ⚿1177(8)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(8) k. Insufficiency of verdict or findings. Most Cited Cases

Court of Appeals' inability to determine whether chancellor applied the clear and convincing evidence standard in determining that trust was established when aunt conveyed 90 acres to nephew "trusting" that he would follow the dictates of her will, which bequeathed the property to other nieces and nephews, warranted remand to ensure chancellor considered issue under proper standard; chancellor stated that other nieces and nephews had established their claim for wrongful removal of timber by a preponderance of the evidence, and did not specifically state that she had considered the trust issue separately under the clear and convincing evidence standard.

[12] Trusts 390 ⚿44(3)

390 Trusts
390I Creation, Existence, and Validity
390I(A) Express Trusts
390k40 Evidence to Establish Trust
390k44 Weight and Sufficiency
390k44(3) k. Degree of proof. Most Cited Cases

Trusts 390 ⚿89(5)

390 Trusts
390I Creation, Existence, and Validity
390I(B) Resulting Trusts
390k85 Evidence to Establish Trust
390k89 Weight and Sufficiency
390k89(5) k. Degree of proof required. Most Cited Cases

Trusts 390 ⚿110

390 Trusts
390I Creation, Existence, and Validity
390I(C) Constructive Trusts
390k106 Evidence to Establish Trust
390k110 k. Weight and sufficiency. Most Cited Cases

Regardless of the type of trust implicated, to establish a trust, the evidence must be more than a

mere preponderance; the proof must be clear and convincing.

[13] Trespass 386 ⚿61

386 Trespass
386II Actions
386II(D) Damages
386k59 Grounds for Multiple Damages
386k61 k. Cutting and removal of trees. Most Cited Cases

The fair market value of uncut timber on the stump is lower than that of timber already cut and hauled, for purposes of trespass statute entitling an owner to double the fair market value of wrongfully-cut timber; and, if any processing has occurred in the yard, value is further enhanced. West's A.M.C. § 95–5–10(1).

[14] Trespass 386 ⚿52

386 Trespass
386II Actions
386II(D) Damages
386k52 k. Cutting and removal of trees. Most Cited Cases

Where trees have been cut and removed through inadvertence or mistake, the proper measure of damages for trespass is the "stumpage value," the value of the standing trees, unenhanced by any labor of the trespasser; but when a trespass is willful, the value of the timber as enhanced by the trespasser's labor in cutting, loading, and hauling the timber, which is commonly known as the timber's "delivered value," is the appropriate measure of damages. West's A.M.C. § 95–5–10(1).

[15] Trespass 386 ⚿52

386 Trespass
386II Actions
386II(D) Damages
386k52 k. Cutting and removal of trees. Most Cited Cases

The delivered value of wrongfully cut timber is the appropriate quantum of damages when an unknowing party purchases converted timber from a willful trespasser.

[16] Trespass 386 ⚿52

386 Trespass
386II Actions
386II(D) Damages
386k52 k. Cutting and removal of trees. Most Cited Cases

Chancellor properly used the delivered value of timber harvested from 90–acre parcel of property, rather than its stumpage value, as the measure of damages for the alleged wrongful cutting of the timber by nephew of the original owner, assuming nephew held the parcel in trust for other nieces and nephews, as found by chancellor, where chancellor also found that nephew and his wife clearly knew the parcel was not theirs when they clear-cut it. West's A.M.C. § 95–5–10(1).

[17] Appeal and Error 30 ⚿1177(6)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(6) k. Issues not passed on below. Most Cited Cases

Trespass 386 ⚿31

386 Trespass
386II Actions
386II(A) Right of Action and Defenses
386k31 k. Joint and several liability. Most Cited Cases

Chancellor's failure to consider the percentage of fault of settling defendants and nonparties to action arising out of the clear-cutting of timber from 90–acre parcel of property that one nephew of original owner allegedly held in trust for other nieces and nephews warranted remand for findings as to the respective percentages of fault, if any, attributable to settling defendants and nonparties. West's A.M.C. § 85–5–7(5).

[18] Appeal and Error 30 ⚿994(3)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k994 Credibility of Witnesses
30k994(3) k. Province of trial court. Most Cited Cases

The chancellor has sole authority to determine the credibility of the witnesses and what weight to give to the evidence.

*1173 Gene Horne, Centreville, attorney for appellants.

Wayne Smith, Liberty, attorney for appellees.

Before IRVING, P.J., CARLTON and MAXWELL, JJ.

MAXWELL, J., for the Court:

¶ 1. This case involves damages imposed against Gary Lamar **Smiley** and his wife, Mary Ann **Smiley**, for the wrongful removal of timber from property the chancellor found they held in trust for the plaintiffs'/appellees' benefit. While Mississippi law requires clear and convincing evidence to establish the existence of a trust, here, we are uncertain whether the chancellor employed this standard when deciding the trust issue. We remand for the chancellor to consider whether clear and convincing evidence supports the existence of a trust. And if so, the chancellor must determine what portions of fault on the timber-removal claim, if any, should be attributable to settling defendants or nonparties. We affirm the misappropriation award.

Facts and Procedural History

¶ 2. Jeanette Smiley, an eighty-four-year-old retired bank employee with no children, executed a will on October 14, 2004, leaving her home in Amite County and fifty of the 140 acres on which it stood to her nephew, Gary, and his wife, Mary Ann. Jeanette expressly conditioned the devise on Gary and Mary Ann moving into her home and caring for her until her death. Jeanette's will left the remaining ninety acres to fifteen other nieces and nephews.

¶ 3. On May 23, 2005, approximately five months after Gary and Mary Ann had moved into Jeanette's home, Jeanette executed a general durable power of attorney in the couple's favor, authorizing them to act on her behalf. Then, on November 28, 2005, Jeanette executed a warranty deed conveying all 140 acres of her property in Amite County, including the ninety-acre tract, to Gary and Mary Ann. Jeanette made the conveyance "trusting" Gary would follow her will. The warranty deed specifically expressed that:

> *This conveyance is executed trusting that Gary Lamar **Smiley** will follow the dictates of my Last Will and Testament with regard to the disposition of the *1174 above described property.* In the event, however, that said Gary Lamar **Smiley** should predecease me, then, in that event, his executor/administrator shall follow the dictates and dispose of said property according to my Last Will and Testament.
>
> (Emphasis added).

¶ 4. Jeanette died on July 5, 2006. And less than a month later, Gary and Mary Ann began clear-cutting the property's timber. Though Jeanette's will left the couple only fifty of the 140 acres, Gary and Mary Ann concentrated their timber-cutting efforts on the separate ninety-acre tract—the property Jeanette had reserved in her will for other family members.

¶ 5. The plaintiffs—ten devisees of the ninety-acre tract—sued Gary and Mary Ann; Timberland Management Services Inc.; Eddie Franklin; and Buffalo Wood, Land, and Timber Inc. The plaintiffs sought damages for the wrongful harvesting of timber on this tract, alleging that Gary and Mary Ann held the ninety-acre tract in trust for their benefit. They also claimed Gary and Mary Ann had misap-

propriated over $100,000 from Jeanette. The plaintiffs settled with Timberland, Franklin, and Buffalo Wood for a total of $98,000 for their role in harvesting timber on the ninety acres. But the plaintiffs proceeded to trial against Gary and Mary Ann.

¶ 6. After holding a trial, during which she reviewed the will and warranty deed, the chancellor found the deed to Gary and Mary Ann had created some sort of trust, subject to the express terms of Jeanette's will. Finding Gary and Mary Ann held the ninety-acre tract in trust for the plaintiffs' benefit, the chancellor awarded the plaintiffs $292,319.32 for wrongful timber removal.[FN1] She also awarded the plaintiffs $44,692.62 on their misappropriation claim.

FN1. The chancellor awarded $235,268.22 for the harvested timber and $14,850 for reforestation costs, and assessed $80,001.90 in punitive damages. The chancellor also awarded $11,100 for expert-witness fees and $49,099.02 in attorneys' fees. The total judgment for the wrongful removal of timber was $390,319.32, which the chancellor reduced to $292,319.32, after crediting Gary and Mary Ann for the $98,000 the plaintiffs had already received from settling codefendants.

Discussion

¶ 7. On appeal, Gary and Mary Ann argue the chancellor erred in (1) applying damages set forth in Mississippi Code Annotated section 95–5–10 (Rev.2004), (2) determining a trust arose from the warranty deed, (3) valuing the damages, and (4) finding they misappropriated Jeanette's funds.

Standard of Review

[1][2] ¶ 8. We will not disturb a chancellor's findings if supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, or applied an incorrect legal standard. *Sanderson v. Sanderson,* 824 So.2d 623, 625–26 (¶ 8) (Miss.2002) (citation omitted). We review a chancellor's legal conclusions de novo. *Joel v. Joel,* 43 So.3d 424, 429–30 (¶ 18) (Miss.2010).

I. Wrongful Removal of Timber

A. Applicability of Section 95–5–10

¶ 9. As to the wrongful-timber-removal claim, Gary and Mary Ann argue the chancellor erred in applying section 95–5–10 [FN2] ***1175** rather than assessing damages under the doctrine of waste. Both parties agree section 95–5–10 provides the exclusive remedy for cutting trees without consent. *See Stockstill v. Gammill,* 943 So.2d 35, 47 (¶ 24) (Miss.2006). However, Gary and Mary Ann argue section 95–5–10's statutory damages were not available since they owned the ninety-acre tract as either cotenants or life tenants with the plaintiffs. As they see it, due to their claimed co-ownership, any damages resulting from their authorization to cut the trees should have instead been assessed under the common-law doctrine of waste. *See Tolbert v. Southgate Timber Co.,* 943 So.2d 90, 98–99 (¶ 29) (Miss.Ct.App.2006) ("[W]hen some but not all with ownership interests authorized agents to conduct the cutting, those claims are for waste whether against the contracting owners or against their agents as joint tortfeasors.").

FN2. Section 95–5–10(1) provides, in pertinent part:

> If any person shall cut down, deaden, destroy or take away any tree without the consent of the owner of such tree, such person shall pay to the owner of such tree a sum equal to double the fair market value of the tree cut down, deadened, destroyed or taken away, together with the reasonable cost of reforestation, which cost shall not exceed Two Hundred Fifty Dollars ($250.00) per acre. The liability for the damages established in this subsection shall be absolute and unconditional[,] and the fact that a person cut down, deadened, destroyed or took away any tree in good faith or by honest mistake shall not be an

> exception or defense to liability. To establish a right of the owner prima facie to recover under the provisions of this subsection, the owner shall only be required to show that such timber belonged to such owner, and that such timber was cut down, deadened, destroyed or taken away by the defendant, his agents or employees, without the consent of such owner. The remedy provided for in this section shall be the exclusive remedy for the cutting down, deadening, destroying or taking away of trees and shall be in lieu of any other compensatory, punitive or exemplary damages for the cutting down, deadening, destroying or taking away of trees but shall not limit actions or awards for other damages caused by a person.

¶ 10. But a claim for waste only applies against those involved in the cutting of *commonly owned* timber. And here, the chancellor found the couple did not hold the ninety-acre tract as cotenants with the plaintiffs but were instead trustees "who owed an ever higher duty to them." Based on this "trust" relationship, the chancellor determined the plaintiffs could recover for wrongful timber removal from the ninety-acre tract. Since the existence or imposition of this claimed trust is material to our review of the chancellor's findings on the appropriate remedy for tree removal, we must closely examine the trust issue.

B. The Trust for Plaintiffs' Benefit

[3][4][5] ¶ 11. Generally, trusts are classified under two broad categories: (1) express trusts and (2) implied trusts. Express trusts arise from a party's manifestation of an intention to establish such an agreement and are created by a trust instrument. Miss.Code Ann. § 91–9–103(a) (Supp.2012). If the trust holds real property as an asset, the trust agreement must be in writing and signed by the grantor. Miss.Code Ann. § 91–9–1 (Rev.2004); *Alvarez v. Coleman,* 642 So.2d 361, 366–67 (Miss.1994).

[6][7][8][9][10] ¶ 12. While an express trust must be written, implied trusts differ in that they arise by implication of the law or are presumed from the circumstances. Mississippi recognizes two types of implied trusts: (1) resulting trusts and (2) constructive trusts. A resulting trust "is designed to give effect to the unwritten but actual intention of the parties at the time of the acquisition of title to the affected property." *In re Estates of Gates,* 876 So.2d 1059, 1064 (¶ 17) (Miss.Ct.App.2004) (quoting Robert E. Williford, Trusts, 8 Encyclopedia of Mississippi Law § 73:2, at 422 (2001)). A constructive trust is a judicially imposed remedy used to prevent unjust enrichment when one party wrongfully retains title to property. ***1176***McNeil v. Hester,* 753 So.2d 1057, 1064 (¶ 24) (Miss.2000) . The primary difference between the two is that "in a resulting trust, the acquisition ... is mutually agreeable[,] and the inequity arises out of the trustee's subsequent unwillingness to honor the terms of the parties' original agreement"; whereas a constructive trust may be imposed when "acquisition of title is somehow wrongful as to the purported beneficiary [.]" *Simmons v. Simmons,* 724 So.2d 1054, 1057 (¶ 7) (Miss.Ct.App.1998).

¶ 13. Here, the chancellor found a trust existed but did not distinguish the particular type. Though both parties insist the chancellor imposed a constructive trust, or something akin to it, a plain reading of her order shows she likely found Jeanette had intended to create an express trust by executing the deed "trusting" Gary would follow the dictates of her will—which did in fact leave the ninety-acre tract to the plaintiffs. According to the chancellor, the deed "was subject to the terms of the will and did not serve to vest fee title in the Smiley Defendants." That the chancellor likely believed an express trust, rather than implied trust, arose is further supported by her finding that Gary and Mary Ann had "knowingly and willfully violated the *explicit* terms of that trust."

[11][12] ¶ 14. But regardless of the type of

trust implicated, "to establish a trust, the evidence must be more than a mere preponderance. The proof must be *clear and convincing.*" *Lee v. Yeates,* 256 So.2d 371, 372 (Miss.1972) (emphasis added). And here, it is not at all obvious whether this standard was employed. We note that in the chancellor's order indicates she found:

> Plaintiffs have met their burden of proof *by a preponderance of the evidence* on all necessary elements and are entitled to recover for the wrongful removal of the timber from the acres devised to them under the terms of the will. Even though the property was conveyed to the **Smiley** Defendants, such conveyance was specifically subject to a trust for Plaintiffs' benefit, and the **Smiley** Defendants knowingly and willfully violated the explicit terms of that trust.

(Emphasis added). While the chancellor may have indeed considered the trust issue separately under the clear-and-convincing-evidence standard, she did not specifically say so in her order. This omission, coupled with the chancellor's reference to the preponderance standard when describing the burden of proof "on all necessary elements," supports our decision to remand to ensure the chancellor considers the trust issue under the clear-and-convincing-evidence standard. *See Estate of Langston v. Williams,* 57 So.3d 618, 622 (¶ 17) (Miss.2011).

C. Measure of Damages

¶ 15. Gary and Mary Ann also take issue with chancellor's use of the delivered value of the timber in crafting the damages award. In Mississippi, the appropriate measure of damages in a wrongful-timber-removal case is the value of the harvested timber. Under section 95–5–10(1), an owner is entitled to double the fair market value of any timber wrongfully cut and removed from his property. While the fact an owner can recoup double damages is clear enough, the tricky part is determining the fair market value.

[13][14][15] ¶ 16. Obviously, the fair market value of "uncut timber on the stump" is lower than that of timber already cut and hauled. *Bay Springs Forest Prods., Inc. v. Wade,* 435 So.2d 690, 696 (Miss.1983). "And, if any processing has occurred in the yard, value is further enhanced." *Id.* Recognizing the inherent difficulties in determining the appropriate quantum of damages for wrongfully cut timber, our supreme court has looked to ***1177** the culpability of the timber trespasser to set the measuring stick. "Where trees have been cut and removed through inadvertence or mistake, the proper measure of damages is the stumpage value, the value of the standing trees, unenhanced by any labor of the trespasser." *Masonite Corp. v. Williamson,* 404 So.2d 565, 568 (Miss.1981) (citations omitted). But "when a trespass is willful, ... the value of the timber as enhanced by the trespasser's labor in cutting, loading, and hauling the timber"—commonly known as the timber's "delivered value"—is the appropriate measure of damages. *Id.* (citations omitted). The delivered value is also the appropriate quantum of damages when an unknowing party purchases converted timber from a willful trespasser. *Id.*

[16] ¶ 17. Here, the plaintiffs' forestry expert testified the harvested timber's delivered value was $178,233.50, while its stumpage value was $120,836.16. The chancellor adopted the delivered value as the appropriate measure of damages, which Gary and Mary Ann claim was an erroneous decision. But the chancellor found the couple had clearly known the ninety-acre tract along with its timber, was not theirs when they clear-cut it. As evidence, she pointed to a May 5, 2006 email from Gary supporting this knowledge. Since we cannot say the chancellor abused her discretion in finding Gary and Mary Ann willfully removed the timber, we find use of the timber's delivered value when deciding damages was proper.

¶ 18. Still, we cannot affirm the damages award for two reasons. First, as discussed, we find remand is appropriate to ensure the trust issue is decided under the clear-and-convincing-evidence standard.

If on remand the chancellor finds the evidence is not clear and convincing that a trust existed or should be imposed, there would be no damages owed to the plaintiffs. And second, the chancellor erred in deciding that apportionment of fault is impermissible in timber-removal cases, which we discuss next.

D. Apportionment of Fault

¶ 19. Gary and Mary Ann sought to apportion fault to settling defendants and nonparties. The chancellor considered their request, ultimately denying it. [FN3] Mississippi Code Annotated section 85–5–7(5) (Rev.2011) instructs that, in cases involving joint tortfeasors, "the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint [tortfeasor] is immune from damages." The Mississippi Supreme Court has stated "that the term 'party,' as used in [section 85–5–7(5)], refers to any participant to an occurrence which gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial." *Estate of Hunter v. Gen. Motors Corp.*, 729 So.2d 1264, 1276 (¶ 44) (Miss.1999).

FN3. The chancellor's denial of Gary and Mary Ann's claim was made off the record but is obvious from the context of the trial testimony.

[17] ¶ 20. Timberland, Franklin, and Buffalo Wood settled with the plaintiffs prior to trial for $98,000. While the chancellor properly offset the plaintiffs' recovery by this amount, she found apportionment did not apply in timber-removal claims. So she neither considered the percentage of fault of the settling defendants, nor any nonparties, as required by section 85–5–7(5). Therefore, we remand for specific findings of the respective percentages of fault, *if any,* attributable to settling defendants and nonparties.

II. Misappropriation

¶ 21. The chancellor found that during the two years Gary and Mary Ann had ***1178** lived with Jeanette, the couple had deposited $110,732.43 of Jeanette's funds into their personal bank accounts. The chancellor credited Gary and Mary Ann $39,224.25 for funeral expenses, nursing home expenses, and the cost of Jeanette's sitters, but found the couple had misused and misappropriated the remaining $71,508.18. She found the plaintiffs were 10/16ths (62.5%) owners of the estate's personal assets and awarded $44,692.62 in damages for misappropriation. Gary and Mary Ann argue the chancellor erred in not further reducing this amount $20,508.38 for repairs to Jeanette's home, and $11,976.74 for Jeanette's living expenses.

[18] ¶ 22. The chancellor has sole authority to determine the credibility of the witnesses and what weight to give to the evidence. *Joel,* 43 So.3d at 435 (¶ 41). And though Gary and Mary Ann claimed Jeanette had been pleased with the renovations to her home and had approved of the couple's lavish spending, the chancellor obviously disbelieved their testimony. The chancellor reasoned that because the couple had known they would receive the home and fifty acres, any funds spent repairing the home had ultimately benefitted them. The chancellor also found there had been no accounting for the mineral lease. We find no reason to either question these findings or disturb her decision not to credit Gary and Mary Ann additional monies they claim were utilized for Jeanette's living expenses. We affirm the misappropriation award.

Conclusion

¶ 23. On remand, the chancellor should analyze the trust issue under the clear-and-convincing-evidence standard. If after doing so, the chancellor determines a trust exists or should be implied, then she should make specific findings of the respective percentages of fault attributable to the settling defendants and non-parties, if any, and enter a final judgment accordingly.

¶ 24. **THE JUDGMENT OF THE AMITE COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED IN PART, AND THIS CASE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.**

ALL COSTS OF THIS APPEAL ARE TO BE DIVIDED EQUALLY BETWEEN THE APPELLANTS AND THE APPELLEES.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS, CARLTON, RUSSELL AND FAIR, JJ., CONCUR. BARNES, J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION.

Miss.App.,2012.
Smiley v. Yllander
105 So.3d 1171

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111 So.3d 1223
(Cite as: 111 So.3d 1223)

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Court of Appeals of Mississippi.
In the Matter of the **ESTATE** OF Joe Howard **ESTES**, Deceased:
Greg **Estes** and Jeff **Estes**, Appellants
v.
Sarah **Estes**, Appellee.

No. 2011–CA–01451–COA.
Dec. 11, 2012.
Rehearing Denied April 30, 2013.

Background: Co-executors of testator's **estate** brought action to probate testator's will. Testator's widow renounced will and filed petition for appointment of appraisers and for one-year's support. The Chancery Court, Lee County, C. Michael Malski, Chancellor, awarded $12,000 widow's allowance and 1/5 elective share in testator's estate. Co-executors appealed.

Holdings: The Court of Appeals, Maxwell, J., held that:
(1) award of widow's allowance was abuse of discretion, and
(2) widow was estopped from asserting claim for 1/5 elective share of testator's estate if she had clearly deserted or abandoned marriage prior to testator's death.

Reversed, rendered, and remanded.

Carlton, J., filed dissenting opinion.

Russell, J., filed opinion concurring in part and dissenting in part in which Irving, P.J., joined.

West Headnotes

[1] Executors and Administrators 162 ⚿188

162 Executors and Administrators
162V Allowances to Surviving Wife, Husband, or Children
162k183 Bar, Waiver, or Relinquishment
162k188 k. Misconduct, separation, or divorce. Most Cited Cases

Widow was not supported by testator at time of his death, and thus, one-year widow's allowance in amount of $12,000 was abuse of discretion; widow had left testator of her own volition shortly after they married when he suffered multiple health issues, and widow had been living in her own home at time of death. West's A.M.C. §§ 91–7–135, 91–7–141.

[2] Executors and Administrators 162 ⚿194(1)

162 Executors and Administrators
162V Allowances to Surviving Wife, Husband, or Children
162k194 Allowance by Court
162k194(1) k. In general. Most Cited Cases

The appraisers' one-year widow's allowance is advisory to, but not binding upon, the chancellor, in whose sound discretion falls the determination of a widow's allowance for one year's support. West's A.M.C. § 91–7–135.

[3] Executors and Administrators 162 ⚿180

162 Executors and Administrators
162V Allowances to Surviving Wife, Husband, or Children
162k180 k. Persons entitled. Most Cited Cases

Executors and Administrators 162 ⚿194(5)

162 Executors and Administrators
162V Allowances to Surviving Wife, Husband, or Children
162k194 Allowance by Court
162k194(5) k. Evidence. Most Cited Cases

The widow's allowance statute places on the

widow the burden of establishing her claim to a year's support, by showing either that she was being supported by her husband at the time of his death or that she was away from him without fault on her part. West's A.M.C. §§ 91–7–135, 91–7–141.

[4] Wills 409 ⚷785.5(4)

409 Wills
409VII Rights and Liabilities of Devisees and Legatees
409VII(K) Election
409k785.5 Waiver, Release, or Forfeiture of Right
409k785.5(4) k. Abandonment, desertion, nonsupport, separation, or divorce. Most Cited Cases

Testator's widow was estopped from asserting claim for 1/5 elective share of testator's estate if she had clearly deserted or abandoned marriage prior to testator's death. West's A.M.C. § 91–5–25.

[5] Appeal and Error 30 ⚷181

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k181 k. Necessity of objections in general. Most Cited Cases

Plain-error review is properly utilized for correcting obvious instances of injustice or misapplied law. Rules App.Proc., Rule 28(a)(3).

***1224** T.K. Moffett, attorney for appellants.

Rhett R. Russell, attorney for appellee.

EN BANC.

MAXWELL, J., for the Court:

¶ 1. The Mississippi Legislature has conferred upon widows and widowers a statutory allowance of one year's support for maintenance of the surviving spouse and children. But to receive this so called "widow's allowance," the surviving spouse must show he or she was supported by the decedent. Here, Sarah Young Estes (Young) was widowed when her husband, Joe Howard Estes (Estes), to whom she had only been married for nine months, died without providing for Young in his will. Young—who was seeking a divorce from Estes at the time of his death and had been living apart from Estes since his health began sharply declining soon after they married—sought a statutory allowance. Because Young failed to show she was being supported by Estes, we find the chancellor erred by awarding her a $12,000 widow's allowance. Thus, we reverse and render this award.

¶ 2. Because we find the chancellor erroneously applied the law regarding a widow's right to take a child's share of the ***1225** estate, we also reverse the chancellor's award to Young of one-fifth of Estes's estate, or $68,927.63. When a widow has clearly deserted or abandoned the marriage, she is estopped from claiming a statutory right to an inheritance. And while the chancellor heard evidence of Young's abandonment, he made no finding concerning estoppel. We therefore remand for a determination of whether Young clearly deserted or abandoned the marriage and, thus, was estopped from claiming a statutory right to an inheritance.

Background

¶ 3. Estes married Young on August 3, 2006. Shortly after they married, Estes suffered multiple health complications, requiring an amputation of one leg and surgery to clear a blocked artery. In late 2006, Young permanently moved from Estes's residence back into her own home. She filed for divorce from Estes a few months later.

¶ 4. While the divorce was still pending, Estes died testate on May 18, 2007, leaving Young and four children, who were not born of the marriage between Estes and Young. Estes's will named as co-executors his two sons, Greg Estes and Jeff Estes, who immediately probated Estes's will in the Lee County Chancery Court. Because the will contained

no provision for Young, she renounced it and filed a petition to appoint appraisers and for one year's support.[FN1]

FN1. She also filed a petition for exclusive possession of the marital home, homestead property, and exempt property.

¶ 5. Four years of contentious probate ensued. During this protracted fight, the co-executors challenged both the appraisal of Estes's estate and Young's separate property, as well as Young's right to a statutory widow's allowance and child's share of the estate. At a April 26, 2011 hearing, the co-executors put on lengthy testimony of Young's abandonment and mistreatment of Estes. The co-executors argued Young's desertion and dereliction of her marital duties should result in her having no interest in their father's estate. As they saw it, Young's acts were akin to those of the wife in *Byars v. Gholson,* 147 Miss. 460, 465, 112 So. 578, 578–79 (1927), in which the Mississippi Supreme Court held that a voluntarily estranged wife was not entitled to a widow's allowance. Having considered the evidence of desertion in determining whether Young should receive a widow's allowance under Mississippi Code Annotated sections 91–7–135 and 91–7–141 (Rev.2004), the chancellor ordered Estes's estate to pay Young an allowance of $12,000.

¶ 6. But the chancellor did not consider evidence of Young's abandonment of the marriage when ordering that Young was entitled to one-fifth of the estate under Mississippi Code Annotated section 91–5–27 (Rev.2004). Though acknowledging the co-executors' argument—that because of Young's actions, she was not entitled to inherit—had factual support, the chancellor held it lacked legal support. According to the chancellor, "like it or not," Young had an "automatic" right to inherit under the statute, without any legal exception.

¶ 7. Subtracting the $12,000 widow's allowance from the estate, the chancellor then calculated Young's one-fifth portion to be $68,927.63.[FN2] With the allowance, Young was to receive a total of $80,927.63.

FN2. In his original June 22, 2011 order, the chancellor had calculated Young's share of the estate without taking out the widow's allowance, giving her $70,427.63. After the co-executors filed for reconsideration under Mississippi Rule of Civil Procedure 59, the chancellor corrected this figure by order dated August 31, 2011.

*1226 ¶ 8. The chancellor later entered a final judgment resolving the remaining disputed issues.[FN3] The co-executors timely appealed, arguing the chancellor improperly awarded Young a widow's share despite her abandonment of the marriage and improperly valued both **Estes's** and Young's **estates** when awarding Young a one-fifth share of **Estes's estate**. Because we find the chancellor abused his discretion and applied an erroneous legal standard when considering the evidence of Young's abandonment of the marriage and its effect on her statutory rights as **Estes's** widow, we need not reach the valuation issue.

FN3. In this judgment, the chancellor denied Young's motion for exclusive possession of the marital home, homestead property, and exempt property.

Discussion

¶ 9. The chancellor made two findings regarding Young's statutory rights as Estes's widow—(1) that she was entitled to $12,000 as a widow's allowance for one year's support and (2) that she had an automatic right to one-fifth of the estate. We will not disturb a chancellor's findings "when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong [or] clearly erroneous[,] or [applied] an erroneous legal standard[.]" *Sanderson v. Sanderson,* 824 So.2d 623, 625–26 (¶ 8) (Miss.2002) (quoting *Kilpatrick v. Kilpatrick,* 732 So.2d 876, 880 (¶ 13) (Miss.1999)).

I. Widow's Allowance

[1] ¶ 10. A widow or widower who was dependent on the surviving spouse is statutorily entitled to a year's allowance for his or her maintenance and that of the children, if any. Section 91–7–135 imposes a duty on "the appraisers [of an estate] to set apart out of the effects of the decedent, for the spouse and children who were being supported by the decedent, or for the spouse if there be no such children, or for such children if there be no spouse, one (1) year's provision[.]" Miss.Code Ann. § 91–7–135. This provision may take the form of money "necessary for the comfortable support of the spouse and children, or spouse or children, as the case may be, for one (1) year." *Id.*

[2] ¶ 11. Under section 91–7–141, the chancery court has discretion to "apportion the one year's allowance, or any part of it, according to the situation, rights, and interests of any of the children or the widow, and may direct the payment of any portion of the allowance which may be found necessary or proper to any of them." Miss.Code. Ann. § 91–7–141; *see also Bryan v. Quinn,* 233 Miss. 366, 368, 102 So.2d 124, 125 (1958) (citations omitted) ("The rule is well settled in this State that the widow's allowance for one year's support is within the sound discretion of the chancellor."). FN4

> FN4. Indeed, the appraisers' one-year allowance under section 91–7–135 "is advisory to, but not binding upon, the [c]hancellor," in whose sound discretion falls the determination of a widow's allowance for one year's support. *Bryan,* 233 Miss. at 368, 102 So.2d at 125 (quoting *Moseley v. Harper,* 202 Miss. 442, 444, 32 So.2d 192, 193 (1947)).

¶ 12. While the chancellor relied on this statutory authority to award Young a $12,000 widow's allowance, Young was not "being supported by the decedent" and, thus, not in need of provision from Estes's estate to make her comfortable. *See* Miss.Code Ann. § 91–7–135. So we find the award an abuse of discretion.

[3] ¶ 13. Our supreme court has clarified that the statute "relative to the widow's allowance provides that such allowance shall be set aside to the widow and children *who were supported by the decedent.*" *1227*In re Marshall's Will,* 243 Miss. 472, 479, 138 So.2d 482, 484 (1962) (emphasis added). The statute places on the widow "the burden of establishing her claim to a year's support, [by] showing either that she was being supported by [her husband] at the time of his death or that she was away from him without fault on her part." *Id.* Here, Young clearly failed to meet this burden.

¶ 14. It is undisputed that Young left Estes's home by her own volition after his leg was amputated. And she was living in her own home at the time Estes died. In *Byars,* the Mississippi Supreme Court held that a widow who had been living apart from her husband, without his fault, and who was not supported by him, was not entitled to one year's support from his estate. *Byars,* 147 Miss. at 465, 112 So. at 578. We find the same is true here.

¶ 15. Because we find the widow's allowance was not supported by substantial evidence of Young's financial dependence on Estes at the time he died, the chancellor abused his discretion in awarding Young one-year's support. We reverse the award of a $12,000 widow's allowance and render judgment against Young's claim to one-year's support.

II. Child's Share of the Estate

[4][5] ¶ 16. The statutory right of a spouse to inherit when not provided for in the deceased spouse's will does not arise when there is clear desertion and abandonment. Yet the chancellor incorrectly believed it was automatic. So he reasoned he was bound to award Young one-fifth of the estate regardless of whether she had deserted or abandoned the marriage. Since this was a misapplication of law, we reverse the award of $68,927.63 and remand to determine whether Young's actions met the clear-abandonment standard and estopped her from inheriting from Estes's estate. FN5

FN5. While the co-executors did not raise as a separate issue Young's renunciation of the will, they raised the issue of Young's abandonment of the marriage and its effect upon Young's rights, as well as challenged the amount of the award of one-fifth of the estate. Thus, we find the question of the will's renunciation and Young's right to inherit a child's share is before us. But even were it not, reversal based on the chancellor's misapplication of the law would be warranted under plain-error review. "Plain-error review is properly utilized for 'correcting obvious instances of injustice or misapplied law.' " *Smith v. State,* 986 So.2d 290, 294 (¶ 10) (Miss.2008) (quoting *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981)); *see also* M.R.A.P. 28(a)(3) (permitting this court to "notice a plain error not identified or distinctly specified" in the appellants' statement of issues).

¶ 17. Mississippi Code Annotated section 91–5–25 (Rev.2004) allows a widow whose deceased husband "does not make satisfactory provision" for her in his will to renounce the unsatisfactory provision and elect to take the a child's share of the estate. *See also Bolton v. Barnett,* 131 Miss. 802, 827, 95 So. 721, 726 (1923) (holding second husband not provided for in his deceased wife's will was entitled to inherit a child's share of his wife's real property). Under section 91–5–27, when the husband's will makes no provision at all for his widow, no renunciation is required—it will be assumed that the widow has elected to take her share of the estate. Miss.Code Ann. § 91–5–27. Thus, the chancellor was correct in one sense that the right to inherit under 91–5–27 is "automatic" because, in contrast to the right under section 91–5–25, no act of renunciation or election of a child's share is required.

¶ 18. But the chancellor was incorrect that this automatic right to inherit, as if the deceased husband died without a will, arises in every situation without exception. The record shows the chancellor believed ***1228** his hands were tied regarding Young's renunciation of Estes's will and right to inherit one-fifth of the estate. Although acknowledging the evidence supporting Young's abandonment of the marriage, the chancellor nonetheless awarded her a child's portion of the estate because he was not aware "of any case law at all that would reflect ... that [Young] somehow would not be entitled to a child's portion[.]"

¶ 19. But there is Mississippi precedent of this nature. Our supreme court has previously acknowledged the operation of estoppel when a spouse trying to take a child's share of the estate has deserted or abandoned the marriage. *In re Marshall's Will,* 243 Miss. at 478, 138 So.2d at 484; *Walker v. Matthews,* 191 Miss. 489, 511–12, 3 So.2d 820, 826 (1941); *Williams v. Johnston,* 148 Miss. 634, 636–37, 114 So. 733, 733–34 (1927). In *Tillman v. Williams,* 403 So.2d 880, 881 (Miss.1981), the supreme court clarified what was required for estoppel: "Our Legislature has not seen fit to enact any legislation on this abandonment question. It is, therefore, obvious that the statute has to be strictly construed unless there is a clear desertion and abandonment that sets up the estoppel."

¶ 20. While he acknowledged evidence showing Young's desertion or abandonment of the marriage, the chancellor did not make a finding of clear desertion or abandonment. This was because he mistakenly believed such an estoppel-type finding would have no legal effect on Young's right to inherit. Since the award of a child's share of the estate was based on an erroneous application of the law, we reverse the award to Young of one-fifth of the estate and remand for a determination of whether Young's action met the clear-abandonment standard of *Tillman,* thus estopping her from inheriting from the Estes's estate.[FN6]

FN6. While we agree with Judge Russell that the chancellor legally erred by reject-

ing the co-executors' argument that Young was not entitled to inherit, we disagree that rendering is the proper disposition for this portion of the judgment. With the widow's allowance, the chancellor's finding that Young was entitled to an allowance was unsubstantiated. Young had the burden to prove she was being supported by Estes, which she failed to do, making rendering the appropriate disposition. But with the child's share of the estate, the chancellor made *no* finding—let alone a finding of clear abandonment, as required by *Tillman*—making remand proper, so that the chancellor, as the fact-finder, may determine whether Young is estopped from claiming an inheritance though sections 91–5–25 and 91–5–27.

¶ 21. **THE JUDGMENT OF THE LEE COUNTY CHANCERY COURT IS REVERSED, RENDERED AND REMANDED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS AND FAIR, JJ., CONCUR. CARLTON , J., DISSENTS WITH SEPARATE WRITTEN OPINION. RUSSELL, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING, P.J.

CARLTON, J., dissenting:

¶ 22. I respectfully dissent from the majority's opinion. I submit that the chancellor erred by failing to make a finding regarding the final accounting of Estes's estate before reducing the gross estate by the widow's allowance and the expenses of the estate. However, I find no evidence in the record that the chancellor abused his discretion in awarding Young a $12,000 widow's allowance or in determining the date-of-death value of Young's ***1229** property. Therefore, I would reverse the chancery court's judgment in part and affirm in part.

¶ 23. The record reflects that Estes died testate on May 18, 2007, making no provision in his will for his widow, Young. Young renounced the will and sought one year's support, otherwise known as a widow's allowance. The chancery court granted Young a one-fifth share of the estate and a widow's allowance. The co-executors of the estate now appeal, arguing: (1) Young was not entitled to a widow's allowance; (2) the chancery court erred in valuing Young's property; and (3) and the chancery court prematurely apportioned the estate prior to a final accounting.

¶ 24. Young renounced the will and filed a petition to appoint appraisers and for one year's support and a petition for exclusive possession of the marital home, homestead property, and exempt property. On February 9, 2009, the chancery court issued an order appointing three commissioners to hire an appraiser to conduct an appraisal of Estes's estate and the date-of-death value of Young's property. The commissioners filed their report, and the co-executors filed an objection to the report, arguing that the commissioners improperly valued Estes's real property and Young's personal and real property. After a hearing on September 8, 2010, the chancery court denied the objection of the co-executors and confirmed the report. The chancery court stated that the co-executors were allowed to retain an expert to appraise Young's separate property, as long as it was completed and filed in a timely manner. The co-executors filed their expert's appraisal of Estes's estate on April 13, 2011. The expert's appraisal did not contain a valuation of Young's property.

¶ 25. On June 22, 2011, the chancery court issued an order reaffirming the valuation provided in the commissioners' report, rejecting the appraisal of the co-executor's expert, and ruling that Young was entitled to $70,427.63—representing her one-fifth share of Estes's estate. The court also awarded her $12,000 as a widow's allowance.

¶ 26. On August 31, 2011, the chancery court issued an order correcting the prior judgment and reducing the value of Estes's estate by the $12,000

widow's allowance prior to apportioning the estate to Young. The court then adjusted Young's one-fifth interest to reflect that deduction, reducing her share to $68,927.63. Young was to receive a total of $80,927.63, which included her widow's allowance. Additionally, the court denied Young's motion for exclusive possession of the marital home, homestead property, and exempt property.

I. WIDOW'S ALLOWANCE

¶ 27. Before turning to the issue of the widow's allowance, I must preface my discussion by recognizing that a chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. *Consol. Pipe & Supply Co. v. Colter,* 735 So.2d 958, 961 (¶ 13) (Miss.1999). "This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong [or] clearly erroneous[,] or [applied] an erroneous legal standard[.]" *Sanderson v. Sanderson,* 824 So.2d 623, 625–26 (¶ 8) (Miss.2002) (citations omitted).

¶ 28. The record reflects that the chancery court granted Young a widow's allowance of $12,000 under Mississippi Code Annotated section 91–7–135 (Rev.2004). This section empowers the chancery court to apportion the one year's allowance "necessary for the comfortable support of the spouse and children, or spouse or children[.]" *Id.* The co-executors challenge ***1230** the $12,000 allotment on the grounds that Young and Estes were separated at the time of Estes's death and that Young was not supported by Estes at the time of his death.

¶ 29. A widow's allowance is considered to be "a matter of right whatever may be the condition of the estate, and the application therefor [is] a matter with which the administrator has no concern." *Harwell v. Woody,* 206 Miss. 863, 868, 41 So.2d 35, 36 (1949) (quoting *Morgan v. Morgan,* 36 Miss. 348, 350 (1858)) (internal quotations omitted). The Mississippi Supreme Court has held that an administrator's opposition to a widow's allowance "is not contemplated by the statute, and should not be tolerated...." *Morgan,* 36 Miss. at 350. Permitting the administrator to challenge the allowance would be counter to the reason behind the statute, which is to give immediate support to widows, widowers, and children. *Id.* Litigation of this support would delay the allowance, "depriving the parties of the humane provisions of the law at the very time when they [stand] most in need of it." *Id.*

¶ 30. The co-executors argue on appeal that Young is not entitled to an allowance, because the husband's duty to support the wife "is coupled with reciprocal obligations upon the wife to perform her duty imposed by such marital relations." *Byars v. Gholson,* 147 Miss. 460, 465, 112 So. 578, 579 (1927). Accordingly, because Young had moved from the marital home by her own free will and had relinquished all her marital obligations, she was not entitled to support in the form of a widow's allowance.

¶ 31. The chancery court heard testimony of Young's failure to perform her marital obligations and heard the argument that under *Byars,* Young was not entitled to a widow's allowance. However, there is no evidence in the record that the chancellor abused his discretion or was clearly erroneous. Therefore, I find no error in the chancellor's award of a $12,000 widow's allowance to Young.

II. DATE–OF–DEATH VALUE OF YOUNG'S PROPERTY

¶ 32. The commissioners submitted their report on the appraisal of Estes's estate and the date-of-death value of Young's property, and the chancery court confirmed the report, denying the objections raised by the co-executors. However, the court gave the co-executors the opportunity to retain a separate appraiser to assess Young's property. The co-executors were directed that the report should be conducted and filed with the clerk of the court within a reasonable time from the October 11, 2010 hearing.

¶ 33. On December 17, 2010, Young filed a statement notifying the court that neither she nor

her attorney had received any notification that the co-executors had retained an expert. The co-executors filed their expert's appraisal of Estes's estate on April 13, 2011. The appraisal did not contain a valuation of Young's property.

¶ 34. The chancery court held a hearing on April 26, 2011, and noted that the co-executors never requested that Young allow their appraiser to inspect her personal property; therefore, the appraisal of the date-of-death value of Young's property was never performed. The chancellor also stated from the bench that it was inherently unfair for the co-executors to wait until the day the estate was set to close to attest that Young possessed property of significant value, which the co-executors attempted to do at the April 26 hearing.

¶ 35. The co-executors were given every opportunity to provide supporting evidence for their objections to the special commissioners' reported appraisal of *1231 Young's property. They failed to do so in a timely manner.

¶ 36. Accordingly, I find that the chancery court did not err in confirming the special commissioners' report. The co-executors failed to comply with the court's directive allowing their appraiser to value Young's property. Because the chancery court did not err in determining the date-of-death value of Young's property, I would therefore affirm the chancery court's judgment in part as to this issue.

III. APPORTIONMENT OF THE ESTATE

¶ 37. Young renounced the will and was granted a one-fifth share of the estate under Mississippi Code Annotated section 91–5–25 (Rev.2004). The co-executors do not raise the issue of Young's right to renounce the will and receive a one-fifth share. Because it was not raised, I will not address the issue.

¶ 38. The co-executors contend that the trial court erred when it apportioned the estate into one-fifth shares prior to deducting the estate's debts from the gross estate. Young does not respond to this issue in her brief. If the appellee fails to address an issue in her brief, and the appellant's brief clearly shows that the trial court erred, this Court is not obligated to search the record on the appellee's behalf in order to counter or subvert the appellant's argument. *Westinghouse Credit Corp. v. Deposit Guar. Nat'l Bank,* 304 So.2d 636, 637 (Miss.1974).

¶ 39. To determine the **estate** to be divided among the heirs, the chancery court must first ascertain the gross value of the **estate**. And from that value, the chancellor must deduct the "debts of the decedent, administrative expenses [,] and funeral expenses[,] leaving the net value of decedent's **estate**." *Banks v. Junk,* 264 So.2d 387, 392 (Miss.1972); *see also* ***In re Estate*** *of Hollaway,* 631 So.2d 127, 137 (Miss.1993).

¶ 40. The special commissioners reported the value of **Estes's estate** to be $555,561.41 and the date-of-death value of Young's property to be $39,990.65. The chancellor then divided **Estes's estate** by five, apportioning it equally to Young and the four children, which came to $111,112.28. Additionally, the court subtracted the value of Young's property from her one-fifth share and reduced the share further by $694 for her proportionate share of the fees from the special commissioners and the appraiser, making Young's share $70,427.63.

¶ 41. The co-executors moved for the court to reconsider the judgment, arguing in part that if Young were to be granted a widow's allowance, then the allowance should have been subtracted from the value of Estes's estate prior to dividing it among the heirs. The co-executors also asserted that although the final accounting for the estate had not been filed at that time, certain expenses such as taxes and funeral expenses should have been paid from the estate before Young's share was apportioned.

¶ 42. On August 31, 2011, the court altered its prior judgment, deducting the widow's allowance from Estes's estate prior to division into one-fifth shares. Young's share was reduced from $70,427.63

to $68,927.63 ($555,561.41 - 12,000 = $543,561.41 / 5 = $108,712.28 - $39,990.65 = $68,721.63). Including her widow's allowance, the estate was ordered to pay Young a total of $80,927.63. Clearly, the math is incorrect. The judgment amount is $206 greater than the mathematically accurate amount. Additionally, the August 31 judgment does not reduce Young's award by the $694 amount of fees subtracted in the June 22 judgment. Including*1232 the fees the correct judgment should be for $68,027.63 plus the $12,000 widow's allowance, totaling $80,027.63.

¶ 43. Both the June 22, 2011 judgment and the August 31, 2011 corrected judgment use the special commissioners' estate valuation of $555,561.41. Although $4,985 in funeral expenses were included in that valuation, a final accounting of the estate was not conducted in compliance with Mississippi Code Annotated section 91–7–291 (Rev.2004).

¶ 44. The co-executors moved for a continuance to give them time to file a petition for a final accounting and for the chancery court to have a hearing on the matter. The chancery court did not respond to the co-executors' request. The co-executors should have been given leave to file a petition for a final accounting within a reasonable time period. Then, the chancery court should have determined if any remaining debts of the estate should be reduced from the gross estate prior to dividing the estate into one-fifth shares.

¶ 45. I find that the chancery court was premature in apportioning Estes's estate. The court should have made a finding regarding the final accounting of the estate before reducing the gross estate by the widow's allowance and the expenses of the estate. Therefore, I would reverse the chancery court's judgment in part and remand this issue to the chancery court for findings consistent with this opinion.

RUSSELL, J., concurring in part, dissenting in part:

¶ 46. I agree with the majority that Young is not entitled to an award of a widow's allowance and that we should reverse and render on this issue. I also agree with the majority that the chancellor erroneously applied the law in awarding the widow a child's share of Estes's estate and reverse its decision as to that issue. I disagree with the majority's holding that the chancellor heard evidence but made no finding regarding Young's abandonment, and that remand is the proper disposition for this portion of the judgment. I would find that Young is estopped from inheriting from Estes's estate and reverse and render on this issue as well. The chancellor acknowledged that Young abandoned Estes but felt his hands were tied by the law. Therefore, I respectfully dissent.

RIGHT TO RENOUNCE WILL

¶ 47. It is undisputed that Mississippi law allows a widow or widower to renounce the will of a deceased spouse if she or he is left unprovided for in the will. Miss.Code Ann. § 91–5–25 (Rev.2004). A surviving spouse's right to renounce the will of a deceased spouse is a personal right that abates at the death of the surviving spouse. *Shattuck v. Estate of Tyson,* 508 So.2d 1077, 1081 (Miss.1987).

¶ 48. While the right to renounce the will of a deceased spouse is provided for by statute, certain circumstances will prohibit a spouse from exercising this right. Under Mississippi law, willful desertion or abandonment of the marriage will estop a spouse from inheriting from the other spouse. *In re Marshall's Will,* 243 Miss. 472, 478, 138 So.2d 482, 484 (1962). In the present case, it was established during trial that prior to Estes's death, Young relinquished all her marital obligations and permanently moved from the marital home by her own free will. A review of the record indicates that Young and Estes were married only a couple of weeks before his leg was amputated above the knee on August 17, 2006. Young stated that she would not take care of a cripple. The evidence is undisputed that the Estes family, not Young, provided for the primary care and maintenance of Estes following his amputation and subsequent surgery in October 2006 for eighty percent blockage of his *1233 carotid artery. By the end of November,

Young had left the marital home and moved back to the home she occupied prior to the marriage to Estes, and she did not return to the marital home until the death of Estes in May 2007. In the interim before Estes's death, Young refused to provide basic assistance and support to Estes while she attempted to have Estes declared mentally incompetent, allegedly attempted to poison him, allegedly attempted to hit him on at least two occasions, and filed for divorce on March 7, 2007. The record is replete with overwhelming evidence that Young voluntarily abandoned and deserted her marriage to Estes. "[D]esertion or abandonment is generally held to be a bar to any right to share in the estate of the deceased spouse." *Walker v. Matthews,* 191 Miss. 489, 3 So.2d 820, 826 (1941).

¶ 49. This bar includes the right of the surviving spouse to renounce or contest the will of a deceased spouse. *Williams v. Johnston,* 148 Miss. 634, 114 So. 733 (1927). "[W]here the willful conduct of one of the parties to [a] marriage contract is such as will estop him or her from claiming any property rights of the other, the doctrine of estoppel will apply against the offending party." *Id.* at 635, 114 So. at 734.

¶ 50. In *Williams v. Johnston,* a wife died testate, leaving her entire estate to her daughter. *Id.* at 634, 114 So. at 733. The husband sought to renounce the will to obtain his statutory one-half share of the wife's estate. The court ruled that the husband was estopped from claiming a child's share of his wife's estate because he had deserted and lived apart from his wife for a number of years until her death. *Id.* The court further held that the husband's general conduct in willfully deserting his wife estopped him from claiming a right to share in her estate. *Id.* The husband was barred from any right he may have had to renounce or contest the will due to his willful desertion of the marriage. *Id.*

¶ 51. The majority cites *Tillman v. Williams,* 403 So.2d 880, 881 (Miss.1981), which provides that a clear desertion and abandonment of the marriage must be shown in order for estoppel to apply. However, in *Tillman,* there was doubt as to whether the widower had completely abandoned the marriage, and there was no evidence alluding to the parties' reason for separation. The couple simply separated for a number of years, but never showed any intention of obtaining a divorce. The opinion states, "None of the witnesses had any positive knowledge as to the reason for the separation of the parties or any relevant fact other than [that] he left." *Id.* at 880. That is not the case here, as the record shows that after Estes encountered health problems following his leg amputation, Young refused to provide any care for him, permanently moved from the marital home in late 2006, and filed for divorce two months later. Here, the record is overflowing with evidence that Young voluntarily left Estes prior to his death with absolutely no intention of returning. Young's abandonment of Estes is clear and definitive throughout the record. Thus there is no need for a remand to determine whether a clear desertion and abandonment took place.

¶ 52. The Mississippi Supreme Court's reasoning in the above-cited cases applies to the present case. Prior to **Estes's** death, Young stopped caring for **Estes** while he was ill, left the marital home, and returned to her own home. Young made it perfectly clear that she wanted nothing more to do with **Estes** after his leg amputation. Young completely abandoned the marriage, relinquished her marital duties, and had no intention of returning. Such willful conduct serves as a bar to Young's ***1234** right to renounce **Estes's** will and her right to inherit from his **estate.**

¶ 53. For these reasons, I agree with the majority that the chancery court erred in awarding Young a one-fifth share of **Estes's estate.** However, I would reverse and render on this issue based on the overwhelming evidence that Young abandoned **Estes.**

IRVING, P.J., JOINS THIS OPINION.

Miss.App.,2012.

In re Estate of Estes
111 So.3d 1223

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104 So.3d 166
(Cite as: 104 So.3d 166)

C

Court of Appeals of Mississippi.
Jack **DONOVAN** and Diane (Dianna) **Donovan**, Appellants
v.
The **CITY** OF **LONG BEACH**, Mississippi, Appellee.

No. 2010–CA–01985–COA.
Nov. 27, 2012.

Background: Over neighboring landowners' protest, **city** board rezoned property from residential to commercial by four to three margin. Protestors appealed. The Circuit Court, Harrison County, Lawrence Paul Bourgeois Jr., J., affirmed. Protestors appealed.

Holding: The Court of Appeals, Russell, J., held that supermajority vote was required.

Reversed and rendered.

West Headnotes

[1] Administrative Law and Procedure 15A 763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. Most Cited Cases

Administrative Law and Procedure 15A 784.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak784.1 k. In general. Most Cited Cases

In reviewing an administrative agency's findings of fact, courts are limited by the arbitrary and capricious standard of review.

[2] Administrative Law and Procedure 15A 763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. Most Cited Cases

Agency action is "arbitrary or capricious" if it entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

[3] Zoning and Planning 414 1188

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(B) Proceedings to Modify or Amend
414k1185 Enactment and Voting
414k1188 k. Number of votes required. Most Cited Cases

Burden is upon party invoking requirement of three-fifths vote of members of legislative body for rezoning of property to affirmatively prove that owners of twenty percent or more of area adjacent to or directly opposite to property have protested the rezoning. West's A.M.C. § 17–1–17.

[4] Zoning and Planning 414 1188

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(B) Proceedings to Modify or Amend
414k1185 Enactment and Voting
414k1188 k. Number of votes required. Most Cited Cases

Supermajority vote of city's board of alderman was required to rezone property from residential to commercial, because of protest by owners of twenty percent or more of land immediately adjacent to rear of the property, as shown by maps, surveys and site plans. West's A.M.C. § 17–1–17.

***166** Wynn E. Clark, Pascagoula, attorney for appellants.

James C. Simpson Jr., Biloxi, attorney for appellee.

Before LEE, C.J., MAXWELL and RUSSELL, JJ.

RUSSELL, J., for the Court:

¶ 1. Jack and Diane **Donovan** appeal the **Long Beach** Board of Aldermen's (Board) decision to rezone portions of property owned by Ira Woodfield from residential to commercial. They assert three issues on appeal: (1) whether the Board erred in rezoning Woodfield's property under Mississippi Code Annotated section 17–1–17 (Rev.2012) without a supermajority vote; (2) whether there was clear and convincing evidence of a substantial change in the character of the neighborhood and a public need for the rezoning, and whether the Board improperly considered hardship as a factor in its decision; and (3) whether the Board's decision to rezone Woodfield's property constituted improper spot zoning. ***167** Upon review, we find that a supermajority vote was required because the Donovans protested, and the Donovans' land comprised more than twenty percent of the land adjacent to the rear of Woodfield's property. Therefore, we reverse and render the Board's decision to rezone the property. Because the first issue is dispositive, we do not reach the other issues raised on appeal.

FACTS AND PROCEDURAL HISTORY

¶ 2. Woodfield entered into a contract to sell certain land owned by her to Keesler Federal Credit Union (Keesler). The contract was contingent upon rezoning the land from residential to commercial FN1 for the purpose of allowing Keesler to build a new local branch on the property. Woodfield owned 13.4 acres, but sought to resubdivide the property and sell approximately 2.47 to 2.53 acres (subject property) to Keesler.

FN1. Specifically, the property would need to be rezoned from residential office/single family zoning (R–0/R–1) to commercial zoning (C–2).

¶ 3. On January 15, 2009, Woodfield filed an application to resubdivide the property into three parcels. On January 22, 2009, the Long Beach Planning Commission (Commission) voted to approve the certificate of resubdivision. On January 30, 2009, Keesler and Woodfield requested that the Board disregard their resubdivision request because their intent was to create two parcels rather than three. On February 3, 2009, the Board noted in its minutes that the previous approval for the resubdivision was withdrawn and of no effect.

¶ 4. On February 4, 2009, Keesler and Woodfield submitted a second application seeking to resubdivide the property into two parcels. On February 12, 2009, the Commission voted to recommend approval of the resubdivision application, and it was approved by the Board on February 17, 2009.

¶ 5. Woodfield also filed a case-review application requesting that the subject property be rezoned from residential to commercial. On April 9, 2009, the Commission held a public hearing to consider Woodfield's application to rezone the subject property. The Commission determined that there was no substantial change in the character of the neighborhood. Therefore, the Commission declined to recommend approval of the rezoning application to the Board by a vote of four to two.

¶ 6. On April 17, 2009, Woodfield and Keesler appealed the Commission's decision, and a public hearing was held on June 3, 2009. The minutes reflect that Woodfield "declared a hardship, as she is an aging widow living on a limited income" and that Woodfield felt "it has become necessary to sell

off a portion of her property in order to remain independent, pay her bills and taxes, and maintain a home."

¶ 7. Also at the June 3, 2009 hearing, the Donovans, Johnny and Patricia Goodman, and other citizens filed a petition protesting Woodfield's request to rezone the subject property, which contained several signatures with each person's residential address. The Donovans owned two acres immediately adjacent to, and to the west of, the rear of Woodfield's property. The Goodmans owned three acres immediately adjacent to, and west of, the Donovans' property. The minutes reflect the protest as follows:

> [T]he Donovans are protesting, under the auspices of [section] 17–1–17, on behalf of 20% or more of the property ***168** owners immediately adjacent to the rear of the subject Woodfield property within 160 feet. **Th[e] property owners include those that contain more than 20% of the property adjacent to the rear of the subject Woodfield property.** [Counsel for the Donovans, Abner Oglesby,] contends the Donovans have met the requirements of [section] 17–1–17, which requires a 3/5 [supermajority] vote of the Board ... to approve the proposed change.
>
> ....
>
> Considerable discussion was held regarding the issue of a vote calling for a simple majority or a [supermajority].
>
> ....
>
> Upon further discussion, Alderman Holder stated that the protesters had not presented any documentation regarding the actual interest owned by them by survey or otherwise, such as would allow the Board to accurately determine whether they owned in excess of 20% of the property within the adjoining 160 feet to the west of the subject property. [The protestors] [f]ailing in such burden, Alderman Holder made [a] motion seconded by Alderman Lishen to conduct the vote as a simple majority, as the proper or adequate documentation and calculations have not been provided to substantiate the need for a [supermajority].
>
> ....
>
> Alderman Holder restated his position that the protestors had not presented any documentation regarding the actual interest owned by them by survey, or otherwise provided sufficient proof as would allow the Board to accurately determine whether they owned in excess of 20% of the property within the adjoining 160 feet to the west of the subject property. Alderman Notter disagreed with the position of Alderman Holder, stating that he felt the 20% showing had been made[.]
>
> (Emphasis added).

¶ 8. At the public hearing, several documents were introduced. Woodfield and Keesler submitted a survey performed by Menhennett surveying dated January 9, 2009, which laid out the dimensions of the Donovans' property as follows: 150 feet for the run of the north margin; 580.15 feet for the run of the east margin; and 580.19 feet for the run of the west margin.

¶ 9. Woodfield and Keesler also submitted a site plan, which provided the dimensions of the proposed parcel on Woodfield's property as 275 feet on the east property margin fronting Klondyke Road and approximately 390 feet running west on the north and south margins of the property toward the **Donovans**' property, and then closing the rectangle of the property by a 275–foot west property margin adjacent to the **Donovans**' property. To the west, the site plan indicates that the **Donovans**' property begins at the northeast corner of Woodfield's property and shows the dimensions of 150 feet for the run of the north margin of the **Donovans**' property and 580.14 feet for the run of the east margin of the **Donovans**' property. A letter dated February 12,

2009, from the **City's** consulting engineer stated that the proposed parcel would have approximately 275 feet of frontage on Klondyke Road and would be about 390 feet deep. The **Donovans** introduced a map showing that their property directly abuts the subject property, and that the **Donovans'** and Goodmans' properties together stretch 364 feet from the rear of the subject property.

¶ 10. The Board determined that the character of the neighborhood had changed to such an extent as to justify rezoning. Specifically, the Board found:

> ***169** The [a]pplicant has shown factually that there has been a change in the character of the neighborhood by increased traffic, [Hurricane] Katrina growth to the north, Klondyke Road being a major transportation artery and new, expanding commercial uses along Klondyke Road and other changes [having been] presented by [the] applicant.
>
> The City's newly developed comprehensive plan shows Klondyke Road as a major commercial area[,] and the change will be in conformance with the new plan.
>
> There is a need for new commercial properties north of the railroad tracks due to Hurricane Katrina. Insurance and safety is forcing development north [,] and this area is part of that growth.
>
> Due to the existing commercial property located directly across the street from the proposed project, this rezoning would not constitute a situation of spot zoning.
>
> Finally, the applicant has conformed to ... the **Long Beach** Zoning Ordinance [,] which outlines the requirements for a zoning change.

Therefore, by a four to three margin, the Board voted to grant the requested zoning change.

¶ 11. On June 12, 2009, the **Donovans** appealed to the circuit court, arguing, among other things, that the zoning change required a supermajority vote because twenty percent or more of the land owned by protestors in the area immediately adjacent to the rear of Woodfield's property had protested the rezoning. The circuit court heard oral argument on May 20, 2010. On November 2, 2010, the circuit court entered an order affirming the Board's decision to rezone the property, which stated in part:

> Appellants presented a petition at the public hearing containing a number of signatures, many of which were illegible, and what they claim is their residential address. Bearing in mind the standard set forth by the Mississippi Supreme Court, this [c]ourt does not find that Appellants met their burden as "the protesting landowners to affirmatively show that they were within the statutory class who could validly object."

On December 1, 2010, the Donovans appealed.

DISCUSSION

[1][2] ¶ 12. "In reviewing an administrative agency's findings of fact, our courts are limited by the arbitrary and capricious standard of review." *Citizens Ass'n for Responsible Dev., Inc. v. Conrad,* 859 So.2d 361, 365 (¶ 7) (Miss.2003). An agency action is arbitrary or capricious if it "entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

[3] ¶ 13. The Donovans argue that a supermajority vote was required because they own twenty percent or more of the area immediately adjacent to the rear of Woodfield's property and protested Woodfield's application to rezone the property. The relevant statute states:

> In case of a protest against such change signed by the owners of twenty percent (20%) or more, either of the area of the lots included in such pro-

posed change, or **of those immediately adjacent to the rear thereof, extending one hundred sixty (160) feet therefrom** or of those directly opposite thereto, extending one hundred sixty (160) feet **from the street frontage of such opposite *170 lots,** such amendment shall not become effective except by the favorable vote of three-fifths (3/5) of the members of the legislative body of such municipality or county who are not required by law or ethical considerations to recuse themselves.

Miss.Code Ann. § 17–1–17 (emphasis added). "The burden is upon the party invoking the [supermajority] vote requirement to affirmatively prove that the owners of 20% or more of the area specified in [section] 17–1–17 have protested the rezoning." *Fondren N. Renaissance v. Jackson,* 749 So.2d 974, 981 (¶ 23) (Miss.1999). "Where that party fails to meet the burden, a majority vote by the Board will be sufficient to require rezoning of the property." *Id.*

[4] ¶ 14. In this case, the question before us is whether twenty percent or more of those immediately adjacent to the rear of Woodfield's property, extending one hundred sixty feet, protested the rezoning. In *Fondren North Renaissance,* 749 So.2d at 981 (¶ 22), our supreme court held that land outside the 160–foot area specified in section 17–1–17 is not considered toward the twenty percent threshold. An attorney general opinion provides further guidance in determining what land counts toward the twenty percent requirement:

> **[A] petition in protest of a rezoning must be signed by the owners of twenty percent of the total area of lots (in any one of those separate described areas)** before [s]ection 17–1–17 requires the governing authorities to approve the rezoning measure by a ... supermajority.... [T]he twenty percent figure should be calculated on the basis of the **percentage of land owned by the protestors,** whatever their number, within the area entitled to be included for purposes of the statute compared to the total amount of land included in that area.

Miss. Att'y Gen. Op., 2001–0067, 2001 WL 283647, *Clark* (Feb. 9, 2001) (emphasis added).

¶ 15. In this case, it is clear from reviewing the Menhennett survey, the site plan, and other maps that the **Donovans** own at least twenty percent of the land immediately adjacent to the rear of Woodfield's property. Nothing prohibits the **Donovans** from relying upon the maps, surveys, and site plans submitted by Woodfield and Keesler. In fact, the **City's** Zoning Ordinance No. 344 states that the **City** "**shall consider all information** provided during the public hearing and examine all ... applications, reports, and recommendations transmitted to it prior to any official action." (Emphasis added). Because the maps, surveys, and site plans clearly show that the **Donovans** own twenty percent or more of the area immediately adjacent to the rear of Woodfield's property, a supermajority vote was required under Mississippi Code Annotated section 17–1–17. Since there was not a supermajority vote approving Woodfield's request to rezone the property, we are compelled to reverse and render.

¶ 16. **THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ROBERTS, CARLTON, MAXWELL AND FAIR, JJ., CONCUR. BARNES AND ISHEE, JJ., NOT PARTICIPATING.

Miss.App.,2012.
Donovan v. City of Long Beach
104 So.3d 166

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104 So.3d 172
(Cite as: 104 So.3d 172)

C

Court of Appeals of Mississippi.
Bruen L. **CRAIG**, Appellant
v.
CITY OF YAZOO CITY, Mississippi; McArthur Straughter, Mayor; Mickey O'Reilly, Alderman; Jack Varner, Alderman and Hattie Williams, Alderman, Appellees.

No. 2011–CA–01465–COA.
Dec. 11, 2012.

Background: Landowner filed an application requesting a variance from the ten-foot setback zoning requirement, along with a request for a special exception to operate a beauty salon on the property. City's Board of Aldermen denied landowner's request for a variance and ordered him to remove the building within thirty days, and landowner appealed. The Circuit Court, Yazoo County, Jannie M. Lewis, J., affirmed, and landowner appealed.

Holdings: The Court of Appeals, Russell, J., held that:
(1) Board's decision, denying landowner's request for zoning variance, was neither arbitrary nor capricious and was supported by the evidence, and
(2) doctrine of equitable estoppel was not applicable.

Affirmed.

Carlton, J., dissented.

West Headnotes

[1] Zoning and Planning 414 ⚿1492

414 Zoning and Planning
414IX Variances and Exceptions
414IX(A) In General
414k1489 Architectural and Structural Designs
414k1492 k. Building or setback lines. Most Cited Cases

City Board of Aldermen's decision, denying landowner's request for zoning variance from the ten-foot setback requirement, was neither arbitrary nor capricious and was supported by the evidence; location of building generated complaints from neighbors because of landowner's intent to use the building for commercial purposes, despite it being located in a single-family residential neighborhood, and Board determined that, based on numerous complaints of the commercial building being stationed in a residential area, granting a variance for the building was not justified.

[2] Estoppel 156 ⚿52(1)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(1) k. In general. Most Cited Cases

Under the doctrine of "equitable estoppel," party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.

[3] Zoning and Planning 414 ⚿1770

414 Zoning and Planning
414XI Enforcement of Regulations
414k1767 Defenses to Enforcement
414k1770 k. Estoppel or inducement. Most Cited Cases

Doctrine of equitable estoppel was not applicable, and thus, city was not prohibited from enforcing its zoning ordinance against landowner, whose request for zoning variance from ten-foot setback requirement was denied; nothing in record indicated that code enforcement officer knew that the

building was not within the required setback prior to or after its completion or that he represented to landowner that such a zoning violation was permissible, and landowner did not show how code enforcement officer's issuance of a plumbing permit amounted to the city's endorsement of landowner's placement of building in violation of its zoning ordinance.

[4] Estoppel 156 ⇐52(5)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(5) k. Application in general. Most Cited Cases

When applying the doctrine of equitable estoppel, the test is whether it would be substantially unfair to allow a person to deny what he has previously induced another to believe and take action thereon.

***173** Julie Ann Epps, Canton, E. Michael Marks, Jackson, attorneys for appellant.

Sarah Alicia O'Reilly–Evans, Jackson, attorney for appellees.

Before IRVING, P.J., BARNES and RUSSELL, JJ.

RUSSELL, J., for the Court:

¶ 1. Bruen **Craig** appeals the order of the **Yazoo** County Circuit Court affirming the decision of the mayor and Board of Aldermen ("Board") of the **City** of **Yazoo** County, Mississippi, denying his request for a variance of the **City's** ten-foot setback zoning requirement and ordering him to remove a storage building located on the subject property. **Craig** claims the circuit court's order affirming the Board's decision was unreasonable, arbitrary, and not supported by substantial evidence. **Craig** further contends the **City** should be equitably estopped from enforcing the zoning ordinance due to his detrimental reliance on the representation of the **City's** Code Enforcement Officer. Finding no error in the proceedings below, we affirm the order of the circuit court.

FACTS AND PROCEDURAL HISTORY

¶ 2. At some point prior to June 27, 2009, **Craig** contacted Code Enforcement Officer Danny Neely about placing a portable storage building on his property located at 1613 Grand Avenue in **Yazoo City**, Mississippi. Neely advised **Craig** that he could place a portable storage building on the property. On or about June 27, 2009, **Craig** purchased a 10' x 18' portable building to be delivered at a later date. After noticing that **Craig** had begun digging on the property, Neely informed **Craig** that he would need to obtain a plumbing permit. On July 28, 2009, **Craig** paid Neely the required $10 permit fee, and Neely granted the plumbing permit. Thereafter, **Craig** poured a slab on the site where the building was to be placed.

¶ 3.On August 27, 2009, the portable building was delivered, and the tie ends were completed. By November 2009, the interior of the building was completed, and sidewalks and a parking lot were constructed. Shortly after completion of the building, the Board began receiving complaints from adjacent property owners who opposed the placement of the storage building. A regular meeting of the Board ***174** was held on April 12, 2010. **Craig**, as well as the neighbors in opposition of his building, were present during the meeting. At the meeting, Alderman Jack Varner instructed **Craig** to provide a survey at the next meeting to show that the building was in compliance with the **City's** zoning ordinance.FN1

FN1. The relevant portion of the **City's** zoning ordinance provides: "The side building setback line shall be a minimum of ten (10) feet from the side of the property line."

¶ 4. The next Board meeting was held on April 26, 2010. **Craig** did not appear. The Board reques-

ted that its attorney pursue legal action against **Craig** for non-compliance with the **City's** ordinance. **Craig** subsequently filed an application requesting a variance from the ten-foot setback zoning requirement, along with a request for a special exception to operate a beauty salon on the property. **Craig** withdrew his request for a special exception on May 24, 2010, during a hearing before the Board. After hearing from all parties involved in the matter, the Board denied **Craig's** request for a variance from the ten-foot setback requirement and ordered him to remove the building within thirty days. The Board waived removal of the adjacent parking lot and sidewalks.

¶ 5. On June 2, 2010, **Craig** filed his notice of appeal and a proposed Bill of Exceptions. The **City's** mayor filed a Corrected Bill of Exceptions on July 6, 2010. **Craig** later filed a request for the **City** to delay or abandon the cause on the ground that other citizens in the residential area were allegedly in violation of the zoning ordinance. On August 9, 2010, **Craig** filed a Motion to Correct and Amend Bill of Exceptions to include a list of the residents who were allegedly in violation of the **City's** ordinance. Oral arguments on the matter were presented before the circuit court on November 22, 2010. The circuit court denied **Craig's** motion because the information **Craig** sought to include was not a part of the record before the **City**. On September 14, 2010, the circuit court entered an order affirming the Board's denial of **Craig's** request for a variance of the ten-foot setback. The court found that the Board's decision was not arbitrary, capricious, illegal, discriminatory, or without a substantial evidentiary basis. The court further held that equitable estoppel was not warranted. From this order, Craig now appeals.

STANDARD OF REVIEW

¶ 6. With regard to decisions made by the governing body of a municipality, our scope of review is limited. *Perez v. Garden Isle Cmty. Ass'n,* 882 So.2d 217, 219 (¶ 7) (Miss.2004). "[Z]oning decisions will not be set aside unless clearly shown to be arbitrary, capricious, discriminatory, illegal or without substantial evidentiary basis." *Id.* at (¶ 6) (quoting *Petition of Carpenter v. City of Petal,* 699 So.2d 928, 932 (¶ 13) (Miss.1997)). In reviewing zoning cases, "the circuit court acts as an appellate court ... and not as the trier of fact." *Heroman v. McDonald,* 885 So.2d 67, 70 (¶ 5) (Miss.2004) (citing *Perez,* 882 So.2d at 219 (¶ 6)). Where the point at issue is fairly debatable, the zoning authority's decision will not be disturbed on appeal. *Id.*

DISCUSSION

[1] ¶ 7. Craig claims that the circuit court erred in affirming the Board's denial of his request for a variance from the ten-foot setback requirement because the decision was arbitrary, capricious, and not based on substantial evidence. We disagree. A review of the record indicates that Craig's building was not in compliance with the City's ten-foot setback zoning requirement, as evidenced by his request for ***175** a variance. The record also shows that the location of the building generated complaints from neighbors because of Craig's intent to use the building for commercial purposes despite it being located in a single-family residential neighborhood.[FN2] Included in the record is a petition to the mayor and Board of Aldermen signed by seventeen residents requesting that Craig's variance not be granted for this reason. Craig was given the opportunity to provide the Board with justification for granting the variance, and the Board properly took his request into consideration. After the matter was discussed among the Board, the mayor, and the City's building inspector, the Board unanimously determined that granting Craig's request would be detrimental to the public welfare and contrary to public interest. The Board also noted that it would investigate the allegations that other buildings in the area were not within the setback requirement, and that it would take necessary action to assure that all residents were in compliance with the ordinance.

FN2. The record shows that Craig's intended use for the building was to operate a

nail/beauty salon.

[2][3] ¶ 8. Craig also contends that the City should be prohibited from enforcing its zoning ordinance against him based on the doctrine of equitable estoppel. Under the doctrine of equitable estoppel,

> a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.

*Mayor & Bd. of Aldermen, **City** of Clinton v. Welch,* 888 So.2d 416, 424 (¶ 43) (Miss.2004) (quoting *Koval v. Koval,* 576 So.2d 134, 137 (Miss.1991)).

¶ 9. **Craig** claims that the **City** sanctioned the building when Neely gave **Craig** permission to place the building on the property and granted **Craig** a plumbing permit. According to **Craig**, the **City** should not be allowed to enforce the ordinance against him due to his reliance on Neely's representation. Our supreme court has held that "[**c]ities** are not immune from the doctrine of equitable estoppel." *Id.* However, we find that the doctrine is not warranted in the present case. **Craig** believes that Neely's permission to place a portable building on the property and his subsequent grant of a plumbing permit somehow amounted to Neely giving **Craig** the authorization to place a building in violation of the **City's** zoning ordinance. Unfortunately, **Craig** is mistaken in this regard. While Neely properly informed **Craig** that he could place a portable storage building on his property, there is no evidence that there was a discussion regarding the actual placement of the storage building. A review of the record shows that Neely was not aware of the zoning violation prior to the Board meeting on April 26, 2010, when Craig failed to provide a survey showing that the building was in compliance with the ordinance as requested. Neely issued Craig a plumbing permit long before the building was placed on the property, the concrete slab was poured, or the parking lot and sidewalks were installed. Nothing in the record indicates that Neely knew that the building was not within the required setback prior to or after its completion or that he represented to Craig that such a violation was permissible.

[4] ¶ 10. "When applying the doctrine of equitable estoppel, 'the test is whether it would be substantially unfair to allow a ***176** person to deny what he has previously induced another to believe and take action thereon.' " *Welch,* 888 So.2d at 427 (¶ 51) (quoting *Koval,* 576 So.2d at 138)). Craig claims that in reliance on Neely's statement and issuance of the permit, he incurred substantial expenses from purchasing the building, pouring the slab, and constructing the adjacent parking lot and sidewalks. The record shows that the Board waived removal of the sidewalks and parking lot; therefore, Craig's assertion of equitable estoppel based on expenses incurred from these items is moot. With regard to any expenses incurred from the placement of the building, as we previously stated, Craig has not shown how Neely's issuance of a plumbing permit amounts to the City's endorsement of Craig's placement of a building in violation of its zoning ordinance. The City's grant of a plumbing permit does not give a permit-holder the authority to act in complete disregard of the City's codes and regulations. Applying the doctrine of equitable estoppel to the facts of the present case, we cannot say that it would be substantially unfair to allow the City to enforce its zoning ordinance against Craig.

¶ 11. After a thorough review of the record, we find that the Board carefully considered arguments from all parties involved in the matter and made an informed decision based on the evidence placed before it. The placement of Craig's building was not in compliance with the City's zoning ordinance. The Board determined that based on numerous complaints of the commercial building being stationed in a residential area, granting a variance for the building was not justified. Therefore, we cannot

say that the Board's decision was arbitrary or capricious, or that it lacked evidentiary support. Accordingly, this issue is without merit.

CONCLUSION

¶ 12. The decision of the Board was not arbitrary, capricious, or without a substantial evidentiary basis. Furthermore, we find that the doctrine of equitable estoppel is not warranted. For these reasons, we affirm the order of the circuit court affirming the Board's decision to deny **Craig's** request for a variance.

¶ 13. **THE JUDGMENT OF THE CIRCUIT COURT OF YAZOO COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, MAXWELL AND FAIR, JJ., CONCUR. CARLTON, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION.

Miss.App.,2012.
Craig v. City of Yazoo City
104 So.3d 172

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78 So.3d 881
(Cite as: 78 So.3d 881)

H

Supreme Court of Mississippi.
RIVERSIDE TRAFFIC SYSTEMS, INC., Lehman–Roberts Company and David Boyd Farr, Executor of the Last Will and Testament of Booker Farr, Deceased
v.
Robin **BOSTWICK**, Eric Frohn, Allen Maxwell, Herbert G. Rogers, III and Ray Tate.

No. 2009–CT–00710–SCT.
Nov. 17, 2011.
Rehearing Denied Feb. 16, 2012.

Background: Petitioners filed petition asking city to correct zoning map showing that owner's property was zoned for agricultural use rather than industrial use. City denied petition. Petitioners filed bill of exceptions. Owner and owner's predecessor in interest intervened. The Circuit Court, Union County, Henry L. Lackey, J., reversed and ordered city to amend zoning map. Owner and predecessor appealed, and the Court of Appeals, 78 So.3d 907, reversed and rendered. Petitioners sought a writ of certiorari.

Holdings: Upon grant of certiorari, the Supreme Court, Randolph, J., held that:
(1) city acted arbitrarily and capriciously when it decided that property had been legally rezoned for industrial use, and
(2) city's failure to provide any notice before reclassifying property zoning from agricultural to industrial violated petitioners' due process rights.

Vacated.

West Headnotes

[1] Municipal Corporations 268 ⚿104

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k104 k. Appeal from decisions. Most Cited Cases

The proper standard of review in appeals from a circuit court's review of a municipal authority's decision is substantial evidence, the same standard which applies in appeals from decisions of administrative agencies and boards.

[2] Administrative Law and Procedure 15A ⚿741

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak741 k. In general. Most Cited Cases

The decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence, was arbitrary or capricious, was beyond the agency's scope or powers, or violated the constitutional or statutory rights of the aggrieved party.

[3] Zoning and Planning 414 ⚿1167

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(A) In General
414k1158 Particular Uses or Restrictions
414k1167 k. Agricultural uses, woodlands and rural zoning. Most Cited Cases

Zoning and Planning 414 ⚿1180

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(B) Proceedings to Modify or Amend
414k1179 Notice and Hearing
414k1180 k. In general. Most Cited Cases

City acted arbitrarily and capriciously when it decided that property had been legally rezoned for industrial use; there was no evidence that the zon-

ing designation was ever properly reclassified from agricultural to industrial, and the city did not provide the required notice for a change in zoning. West's A.M.C. § 17–1–17.

[4] Estoppel 156 ⚿55

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k55 k. Reliance on adverse party. Most Cited Cases

For the doctrine of equitable estoppel to apply, the plaintiff must have relied on a misrepresentation by the defendant and not on a misrepresentation by some other individual or entity.

[5] Estoppel 156 ⚿54

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k54 k. Knowledge of facts. Most Cited Cases

As an essential prerequisite to application of the doctrine of estoppel, the party to be estopped must have had knowledge of the situation.

[6] Constitutional Law 92 ⚿3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In general. Most Cited Cases

Due process clause in Mississippi Constitution guarantees minimum procedural due process consisting of notice and opportunity to be heard. West's A.M.C. Const. Art. 3, § 14.

[7] Constitutional Law 92 ⚿500

92 Constitutional Law
92I Nature and Authority of Constitutions
92k500 k. In general. Most Cited Cases

The Mississippi Constitution applies to municipalities and their subdivisions.

[8] Constitutional Law 92 ⚿4096

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4091 Zoning and Land Use
92k4096 k. Proceedings and review. Most Cited Cases

Zoning and Planning 414 ⚿1180

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(B) Proceedings to Modify or Amend
414k1179 Notice and Hearing
414k1180 k. In general. Most Cited Cases

Zoning and Planning 414 ⚿1590

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1584 Right of Review; Standing
414k1590 k. Waiver or estoppel. Most Cited Cases

City's failure to provide any notice before reclassifying property zoning from agricultural to industrial violated petitioners' due process rights, and thus, petitioners were not estopped from contesting the reclassification; a newspaper article that was published four years after the purported zoning change occurred did not provide advance notice to satisfy due process. West's A.M.C. Const. Art. 3, § 14.

***882** Kathryn H. Hester, Edward Patrick Lancaster, Anthony Rhett Wise, attorneys for appellants.

William O. Rutledge, III, Valarie Blythe Hancock Laurance Nicholas Chandler Rogers, attorneys for appellees.

EN BANC.

ON WRIT OF CERTIORARI

RANDOLPH, Justice, for the Court:

¶ 1. Today, this Court is called upon to determine whether the Union County Circuit Court erred in finding that the City of New Albany Board of Aldermen's ("the City") decision that a tract of land ("Farr tract") had been legally rezoned from agricultural to industrial was arbitrary and capricious and that the City failed to give statutorily required notice before changing the zoning designation. We find that the circuit court did not err in finding that the City acted arbitrarily and capriciously, in finding that the City failed to give statutorily required notice, and in concluding that the property should remain zoned for agricultural use. Accordingly, we vacate the Court of Appeals' holding and reinstate the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

¶ 2. The land at issue ("the Farr tract") was annexed into the City of New Albany in or around 1968. At that time, the City zoned the Farr tract for agricultural use.

¶ 3. In 1996, the owner of a tract adjacent to the Farr tract applied for and received a zoning change, changing that tract's zoning designation from agricultural to industrial. Following that zoning change, an asphalt plant was built on the adjacent tract.

¶ 4. In 1997, the City of New Albany adopted a Comprehensive Zoning Plan, including a new zoning map. The 1997 zoning map erroneously showed the Farr tract as zoned for industrial use. The 1997 map is the first time the Farr tract was described as zoned for industrial use. The record reveals no evidence that, prior to the 1997 zoning map, the City sought a change in the zoning of the Farr tract or undertook any other prescribed procedures for changing the land's zoning designation.

¶ 5. In 1999 and 2000, the City undertook a round of property annexations. The City prepared a new City zoning map to include the newly annexed property, which once again erroneously shows the Farr tract as zoned industrial.

¶ 6. On July 6, 2001, *The New Albany Gazette* published a front-page article describing the City of New Albany's proposed zoning changes and a color-coded proposed zoning map. The article provided that:

> A large version of the map, which appears with this story, can be inspected at City Hall, and the hearing will be Thursday, July 26, at 6 p.m. in City Hall. *Zoning has not been changed in the part of the city not annexed,* but aldermen stressed that people from throughout *883 the city are invited to the hearing to make comments if they wish.

(Emphasis added.) The City based its 2001 map on the 1997 zoning map, erroneously marking the Farr property as zoned for industrial use.

¶ 7. In 2007, Booker Farr agreed to sell the Farr tract to Lehman–Roberts Company, an asphalt-paving company. Lehman–Roberts intended to build an asphalt plant on the Farr tract. On June 5, 2008, Lehman–Roberts applied for a building permit from the City. Before Lehman–Roberts purchased the land, the use of the Farr tract was consistent with agricultural zoning. There is no evidence in the record that surrounding landowners had any reason to know or suspect that the Farr tract was zoned industrial.

¶ 8. Five days later, on June 10, 2008, surrounding landowners Robin **Bostwick**, Eric Frohn, Allen Maxwell, Herbert G. Rogers III, and Ray Tate ("Petitioners") filed a petition with the New Albany Board of Aldermen to correct the City's zoning map, which depicted the Farr tract as zoned industrial. Petitioners claimed that the Farr tract had been incorrectly labeled as zoned industrial and that its actual zoning was agricultural.

¶ 9. The New Albany Board of Aldermen held a hearing on August 29, 2008, and concluded that the Farr tract was zoned industrial. In its findings based on the August 29 hearing, the City recognized that "[t]he official minutes of the City of New Albany ... *do not contain an entry wherein it was requested that the subject tract be rezoned from agricultural to industrial* although it was shown as being zoned industrial on the official zoning map" and that "[b]ut for the minutes for the July 16, 2001 public hearing, when the current zoning map was adopted, the minutes of the City of New Albany *do not contain any reference to a rezoning of the subject property.*" (Emphasis added.) Nonetheless, the City found that "[t]he article appearing on the front page of the *New Albany Gazette* constituted sufficient legal notice of the public hearing on the proposed zoning map" and that "[f]ollowing the July 16, 2001 public hearing, the subject property was properly zoned industrial."

¶ 10. In September 2008, Petitioners filed a Bill of Exceptions in the Circuit Court of Union County appealing the New Albany Board of Aldermen's decision, claiming that the City had failed to give notice of the change of the Farr tract's zoning from agricultural to industrial, and therefore, that "[a]ny attempts to rezone the land ... would have been void due to the fact that the City failed to follow proper procedure." The circuit court found that the City's action "declaring the Farr tract to be classified as Industrial rather than Agricultural is arbitrary and capricious and should be reversed." In April 2009, **Riverside**; David Farr, executor of Booker Farr's estate; and Lehman–Roberts ("**Riverside**") filed their "Notice of Appeal." FN1

FN1. After the circuit court ruled that the Farr tract was zoned agricultural and **Riverside** filed its notice of appeal, Farr filed a petition with the New Albany Board of Aldermen requesting that the City change the zoning of the Farr tract from agricultural to industrial. The City held a hearing on June 15, 2009, and issued findings on November 2, 2009, declaring that the Farr tract was zoned agricultural. The City recognized the circuit court's finding that "notice was never adequately given under the requirements of state law, due in part to the fact that the City had failed to follow its own ordinances" and that "on both the prior and current maps, the subject property was *mistakenly shown as industrial.*" (Emphasis added.)

On March 15, 2010, Petitioners filed a motion to dismiss, arguing that Farr was "judicially estopped and barred by election of remedies from pursuing this appeal" because, in seeking to change the property's zoning from agricultural to industrial, "he ha[d] signed a petition stating that [the Farr tract] is zoned agricultural." In response, **Riverside** pointed out that "[t]he issue on this appeal is whether the Union County Circuit Court erred in finding that the City of New Albany acted arbitrarily and capriciously when the City held that the Farr Property had been classified Industrial through the adoption of the City's 1997 and 2001 Comprehensive Plans and Official Zoning Maps." Riverside argued that Petitioners' motion to dismiss sought "to bring before the Court matters that are outside the issue of whether the Union County Circuit Court was correct in finding that the City of New Albany's September 2008 decision was arbitrary and capricious." Petitioners' motion to dismiss was denied.

***884** ¶ 11. In February 2011, the Court of Appeals rendered judgment, reversing the circuit court's ruling and stating that Petitioners are "estopped from untimely challenging any technical failings of the zoning ordinance." As the Court of Appeals found this issue dispositive, it did not address whether the City had provided the required

notice for a change in zoning. Following the Court of Appeals' decision, this Court granted Petitioners' petition for writ of certiorari.

THE MISSISSIPPI COURT OF APPEALS

¶ 12. On appeal, the Mississippi Court of Appeals addressed only whether the Petitioners are estopped from challenging the change in zoning, and did not address whether the City gave the required notice before changing the zoning of the Farr tract from agricultural to industrial.

¶ 13. The Court of Appeals recognized that "[t]he record is not clear as to how the subject property was initially rezoned from agricultural to industrial use." Nonetheless, the Court of Appeals found that "it is undisputed that the change in zoning was reflected on the City's official zoning map in 1997. *Since then, the property has been zoned industrial use.*" (Emphasis added.) The court did not address whether the City had complied with the notice and hearing requirements to change the zoning designation prior to the 1997 putative zoning change, nor did it explain how the property could have been rezoned for industrial use without the City complying with the procedural requirements for changing the zoning designation.

¶ 14. The Court of Appeals construed the Petitioners' claim as "[i]n essence, [an] attempt to challenge the 2001 zoning map[,]" which the Court of Appeals found was untimely, so that Petitioners "are now estopped from bringing such challenge." The Court of Appeals based its decision on two cases, *Walker v. City of Biloxi,* 229 Miss. 890, 92 So.2d 227 (1957), and *McKenzie v. City of Ocean Springs,* 758 So.2d 1028 (Miss.Ct.App.2000). In *Walker,* this Court found that a challenge to an ordinance establishing zoning districts, made seventeen years after the ordinance went into effect, was untimely. *Walker,* 92 So.2d 227. The *Walker* Court provided that a "[p]roperty owner cannot attack ... [a] zoning ordinance because of noncompliance with formal requirements in [the] manner of its enactment, where it has been *recognized by him* and has been in effect for more than nine years at the time the objections are asserted." *Id.* at 229 (emphasis added). In *McKenzie,* the Court of Appeals considered an argument that a zoning amendment was invalid because the City gave only fourteen days' notice of the hearing adopting the amendment, in violation of Mississippi law's fifteen-day-notice requirement. *McKenzie,* 758 So.2d 1028. Citing *Walker,* the *McKenzie* court stated that "[o]nce an ordinance, though technically noncompliant with statutory dictates in its publication and recordation, *has been recognized and* ****885*** *relied upon by the community* and given effect by the local government for many years, it will not be struck down due to technical failings." *Id.* at 1032 (emphasis added). The *McKenzie* court concluded that providing notice fourteen, rather than fifteen, days before a hearing was an "error ... of the most technical variety" and declined to strike down the zoning amendment. *Id.*

¶ 15. The Court of Appeals concluded that:

> the subject property had been zoned industrial use for twelve years. The [Petitioners] did not attack the zoning ordinance until seven years after the adoption of the current zoning plan. Just as in *McKenzie* and *Walker,* the [Petitioners'] challenge cited technical failings in the adoption of the zoning map.... These alleged technical failings are insufficient to invalidate the City's official zoning map that has been relied upon by the City and the property owner for many years. The City correctly concluded that the property is zoned for industrial use. The [Petitioners] are estopped from bringing such a remote challenge to the zoning ordinance.

Riverside v. Bostwick, 78 So.3d 907, 911–12 (Miss.Ct.App.2011).

ISSUES

¶ 16. This Court will consider:

1. Whether the City was required to provide notice before rezoning the Farr tract.

2. Whether the City violated Petitioners' due-process rights by failing to provide the required notice before rezoning the Farr tract.

ANALYSIS

[1][2] ¶ 17. "[T]he proper standard of review in appeals from a circuit court's review of a municipal authority's decision ... is substantial evidence, the same standard which applies in appeals from decisions of administrative agencies and boards." *Wilkinson County Bd. of Supervisors v. Quality Farms, Inc.*, 767 So.2d 1007, 1010 (Miss.2000) (citation omitted). " 'The decision of an administrative agency is not to be disturbed unless the agency order was unsupported by substantial evidence; was arbitrary or capricious; was beyond the agency's scope or powers; or *violated the constitutional or statutory rights* of the aggrieved party.' " *Id.* (citation omitted) (emphasis added).

I. Whether the City was Required to Provide Notice Before Rezoning the Farr Tract.

¶ 18. Under Mississippi Code Section 17–1–17, a city must provide notice before it may change a zoning designation:

> Zoning regulations, restrictions and boundaries may, from time to time, be amended, supplemented, changed, modified or repealed *upon at least fifteen (15) days' notice* of a hearing on such amendment, supplement, change, modification or repeal, said notice to be given in an official paper or a paper of general circulation in such municipality or county specifying a time and place for said hearing.

Miss.Code Ann. § 17–1–17 (Rev.2003) (emphasis added). We have provided that "[t]he required notice must set forth the pertinent information unambiguously so as to inform interested persons of the proposed action." *Ridgewood Land Co. v. Simmons*, 243 Miss. 236, 137 So.2d 532, 538 (Miss.1962).

[3] ¶ 19. The record provides no evidence that the City of New Albany provided any notice before putatively changing the zoning status of the Farr tract on its maps from agricultural to industrial. The *886 record does not include any evidence of how the purported zoning change came about: whether it was by an intentional act of the City, or, rather, by the City mistakenly marking the Farr tract as zoned for industrial use on the 1997 zoning map and carrying that mistake forward to the 2001 map. There being no proof of a legal change supported by compliance with statutorily required procedures for changing the zoning designation, we are not faced with a failure to comply technically, but rather a zoning change without any statutorily required notice.

¶ 20. The July 6, 2001, article in *The New Albany Gazette* did not remedy the City's failure to provide notice of the purported 1997 zoning change for the Farr tract. The article was published after the alleged change, did not comply with statutory notice requirements, and did not "set forth the pertinent information unambiguously." The article's headline reads: "Aldermen discuss *zoning for new area* [,]" and its first sentence stated that "[t]he new city administration encountered a long agenda at its first official meeting Tuesday, with one of the most discussed being zoning designations for the *newly annexed part of the city.*" (Emphasis added.) The article specifically provided that "*[z]oning has not been changed in the part of the city not annexed.* ..." The Farr tract was "in the part of the city not annexed[,]" as it had been annexed into the City in or around 1968. Thus, the 2001 article did not provide legal notice of a change to the Farr tract's zoning designation.

¶ 21. Petitioners never had legal notice of a change in the Farr tract's zoning designation, and the affected property was not used in a manner to alert surrounding landowners that a zoning change had occurred. Prior to Lehman–Roberts's 2008 application for a permit to build an asphalt plant, the use of the Farr tract and surrounding tracts was consistent with an agricultural-use designation. As the 2001 newspaper article did not provide notice

of a zoning change of the Farr tract from agricultural to industrial, and as the Farr tract was not used in a manner suggesting industrial use, Petitioners had no notice, or even reason to suspect, that the Farr tract had been rezoned for industrial use. Petitioners filed a petition with the City to address the proper zoning designation within five days of Lehman–Roberts's application for a city permit to build an asphalt plant on the property. We discern no evidence that Petitioners should have been aware of the Farr tract's industrial-zoning designation before that time, and Petitioners could not have been expected to challenge the industrial-zoning designation before they became aware of it.

[4][5] ¶ 22. The Court of Appeals erred in finding that Petitioners are estopped from challenging the purported zoning change. We have defined equitable estoppel as "the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed." *Kimball Glassco Residential Center, Inc. v. Shanks,* 64 So.3d 941, 947–48 (Miss.2011) (citation omitted). Generally, "[f]or the doctrine of equitable estoppel to apply, [Riverside] must have relied on a misrepresentation by the [Petitioners] and not on a misrepresentation by some other individual or entity." *Id.* At the very least, "as an essential prerequisite to application of the doctrine of estoppel[,] the party to be estopped must have had knowledge of the situation." *Suggs v. Town of Caledonia,* 470 So.2d 1055, 1058 (Miss.1985). Riverside has not alleged that Petitioners ever misrepresented the zoning of the Farr *887 tract as industrial, and the record reveals no evidence that Petitioners had any reason to know of the industrial zoning.

¶ 23. The Court of Appeals' reliance on *Walker* and *McKenzie* to find that Petitioners are estopped is misplaced. *Walker* concerned a commercial business, opened in 1952, on land zoned for residential use. *Walker,* 92 So.2d at 228. The landowner in that case argued that a 1940 ordinance establishing the property's residential zoning was void, because the City had provided less than fifteen days' notice before adopting the ordinance. *Id.* In that case, we recognized that the ordinance had not complied with the fifteen-day notice requirement when it went into effect, but we noted that the ordinance had since been amended thirty-two times, that 7,100 permits had been issued under it, and that the landowner challenging the ordinance had herself obtained permits and licenses under the ordinance. *Id.* at 229. It was in view of these facts that we stated that a "[p]roperty owner cannot attack [the] validity of [a] zoning ordinance because of noncompliance with formal requirements in [the] manner of its enactment, where it has been recognized by him and has been in effect for more than nine years at [the] time the objections are asserted." *Walker v. City of Biloxi,* 92 So.2d at 229 (citation omitted) (emphasis added). The record in this case does not include any evidence of a "zoning ordinance" changing the Farr tract's zoning to industrial that Petitioners could have recognized. The record does not include any evidence of when or how the zoning of the Farr tract was changed, or that the City gave the required notice before making the zoning change. Unlike the landowner in *Walker,* who had herself obtained permits and licenses under the zoning ordinance that she challenged, there is no evidence that Petitioners had relied on the change. Instead, the use of the Farr tract remained consistent with agricultural zoning until Lehman–Roberts began seeking permits to build an asphalt plant on the property, at which time Petitioners timely took action to challenge the industrial zoning.

¶ 24. In *McKenzie,* the Mississippi Court of Appeals found that fourteen days' notice, instead of the required fifteen days' notice for a zoning amendment, was merely a "technical failing" and declined to strike down the challenged zoning amendment. *McKenzie,* 758 So.2d at 1032. Unlike the one-day discrepancy in *McKenzie,* the City's failure to provide notice in this case was more than a mere "technical failing." The record does not

show that the City or the property owner had relied on an industrial zoning designation for many years, as the use of the Farr tract was consistent with agricultural zoning until Lehman–Roberts applied for a city permit to construct and operate an asphalt plant, when Petitioners challenged the industrial zoning.

¶ 25. The City's failure to provide *any* notice of a change in the Farr tract's zoning from agricultural to industrial is more than a mere "technical failing." The record does not include any evidence of an official change in zoning from agricultural to industrial, as the only suggestion of the Farr tract's purported industrial zoning consists of labels on the 1997 and 2001 zoning maps. The record includes no evidence of an application for a zoning change from the owner of the Farr tract, of public notice of a zoning change for the Farr tract, or of a hearing on a zoning change regarding the Farr tract. Finding no evidence that the zoning designation was ever properly reclassified from agricultural to industrial, and finding that the City did not provide the required notice for a change in zoning, we agree with the circuit court that the City acted arbitrarily and capriciously ***888** when it decided that the Farr tract had been legally rezoned for industrial use.

II. Whether the City Violated Petitioners' Due Process Rights by Failing to Provide the Required Notice Before Rezoning the Farr Tract.

[6][7] ¶ 26. The Mississippi Constitution provides that "[n]o person shall be deprived of life, liberty or property except by due process of law." Miss. Const. art. III, § 14. This clause guarantees "minimum procedural due process ... consisting of (1) notice and (2) opportunity to be heard." *Miss. Gaming Comm'n v. Freeman,* 747 So.2d 231, 246 (Miss.1999). The Mississippi Constitution applies to municipalities and their subdivisions, such as the City of New Albany Board of Aldermen. *See Myers v. City of McComb,* 943 So.2d 1, 6 (Miss.2006) ("we must determine if the Mississippi Constitution ... [is] applicable to municipalities and the persons or collection of persons which compose same. This Court has answered ... in the affirmative for at least a century.").

[8] ¶ 27. Applying due-process requirements to a municipal zoning decision, we have stated that "the essence of the due process rights ... is reasonable advance notice of the substance of the rezoning proposal together with the opportunity to be heard at all critical stages of the process." *Thrash v. Mayor and Comm'rs of City of Jackson,* 498 So.2d 801, 808 (Miss.1986). The record includes no evidence, and no party has argued, that Petitioners were given the statutorily required notice of a change in the Farr tract's zoning designation. We find that a newspaper article that was published four years after a purported zoning change occurred did not provide "advance notice" to satisfy due process. We further find that the article did not provide notice of "the substance of the zoning proposal" to change the Farr property's zoning designation to industrial use, for the article repeatedly stated that the zoning changes applied only to newly annexed property, not to land that had been in the City for many years, such as the Farr tract. Accordingly, we find that the City's failure to provide any notice before reclassifying the Farr tract's zoning from agricultural to industrial violated Petitioners' due process rights, and thus, Petitioners were not estopped from contesting the reclassification, based on the facts as presented in this case.

CONCLUSION

¶ 28. We conclude that the Circuit Court of Union County did not err in finding that the New Albany Board of Aldermen acted arbitrarily and capriciously in deciding that the Farr tract was properly rezoned for industrial use and in failing to provide notice of the rezoning. We further conclude that the City's failure to provide notice violated Petitioners' due-process rights. Accordingly, we vacate the decision of the Court of Appeals, and reinstate and affirm the ruling of the circuit court overturning the City's decision.

¶ 29. **THE JUDGMENT OF THE COURT OF APPEALS IS VACATED AND THE JUDG-**

MENT OF THE CIRCUIT COURT OF UNION COUNTY IS REINSTATED AND AFFIRMED.

WALLER, C.J., CARLSON AND DICKINSON, P.JJ., LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR. KING, J., NOT PARTICIPATING.

Miss.,2011.
Riverside Traffic Systems, Inc. v. Bostwick
78 So.3d 881

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