IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00079 COA

IN THE MATTER OF THE ESTATE OF EMERSON STRONG, DECEASED: ROBERTA THOMAS AND MILLIE STRONG — **APPELLANTS**

v.

TRACY STRONG — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	12/20/95
TRIAL JUDGE:	HON. MELVIN MCCLURE
COURT FROM WHICH APPEALED:	DESOTO COUNTY CHANCERY COURT
APPELLANTS FOR APPELLANTS:	KENNETH E. STOCKTON
ATTORNEY FOR APPELLEE:	GERALD W. CHATHAM, SR.
NATURE OF THE CASE:	CIVIL - WILLS, TRUSTS AND ESTATES
TRIAL COURT DISPOSITION:	RULED THAT TRACEY STRONG WAS THE SON AND THE SOLE HEIR-AT-LAW OF EMERSON STRONG
DISPOSITION:	REMANDED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/23/98

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

This action involves a dispute over who is entitled to estate property. Tracy Strong, the Appellee, claims that he is the natural son and sole and only heir at law of Emerson Strong, deceased, although he was born out of wedlock. Roberta Thomas and Millie Strong, sisters of the decedent, argue that Tracy Strong is not the natural son of Emerson Strong and is therefore not entitled to any portion of the decedent's estate. Roberta Thomas is also the administratrix of the estate of Emerson Strong, who died intestate, but she appeals from an adverse decision of the Chancery Court of Desoto County, Mississippi in her individual capacity as one of the sisters and heirs at law of the decedent.

The trial court ruled that Tracy Strong was the sole and only heir at law of the decedent.

This action involves legal questions of substantial import. After a thorough review of the record and applicable law, we remand this action for further proceedings consistent with this opinion.

A. NATURE AND COURSE OF PROCEEDINGS

Emerson Strong died intestate on October 29, 1989. At the time of his death, the decedent was unmarried and left four living sisters. Roberta Thomas was appointed as administratrix of her brother's estate on May 27, 1990. The decedent's estate was valued to be worth approximately $30, 000, consisting largely of a ten acre tract of land. Tracy Strong, the Appellee, was not listed by the administratrix as one of the decedent's heirs at law.

Emerson Strong's estate remained open on August 6, 1993, when Tracy Strong filed a separate action and petition to determine the decedent's rightful heirs at law and to quiet title to the ten acre tract of land, pursuant to **Miss. Code Ann. § § 91-1-27 (1972) and 91-1-29 (Supp. 1991)**. Neither the decedent's estate, Roberta Thomas, nor Millie Strong were named as parties to this action, and the chancellor entered a judgment on August 19, 1994, in which he determined that Tracy Strong was indeed the sole and only heir at law of the decedent. However, the judgment was eventually set aside at the request of the decedent's estate, and a new hearing was held on the merits to determine who were Emerson Strong's heirs at law and who was entitled to the ten acre tract of land in Desoto County.

By a final judgment dated December 20, 1995, the trial court ruled (1) that Tracy Strong was the natural son and the sole heir at law of Emerson Strong, deceased, and (2) that Roberta Thomas and Millie Strong were entitled to be reimbursed for their payment of property taxes on the ten acre tract of land, plus certain other fees and costs incurred by them in the administration of Emerson Strong's estate.

B. THE ISSUES

The issues on appeal raised by Roberta Thomas and Millie Strong, as taken verbatim from their brief, are as follows:

I. THE APPELLANTS WOULD CONTEND THAT THE FIRST ASSIGNMENT OF ERROR IS THAT THE CHANCELLOR ERRED IN ALLOWING THIS MATTER TO BE HEARD IN THAT IT WAS TIME BARRED PURSUANT TO SECTION 91-1-15(3)(a) OF THE MISSISSIPPI CODE OF 1972, ANNOTATED, AS AMENDED.

II. THAT THE APPELLANTS WOULD CONTEND THAT THE SECOND ASSIGNMENT OF ERROR IS THAT THE CHANCELLOR ERRED IN ADMITTING INTO EVIDENCE A CONSENT ORDER FROM THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, TENNESSEE, THAT HAD NOT BEEN SIGNED OR EXECUTED BY A JUDGE, AND WHICH WAS NOT PROPERLY AUTHENTICATED AS REQUIRED BY THE MISSISSIPPI RULES OF EVIDENCE RULE NO. 902 (4) OR PURSUANT TO RULE 44(a) (1) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

III. THAT THE APPELLANTS WOULD CONTEND THAT THE THIRD ASSIGNMENT

OF ERROR IS THAT THE CHANCELLOR ERRED IN RULING THAT THE APPELLEE WAS THE SOLE HEIR AT LAW OF THE DECEDENT WHEN THE APPELLEE HAD FAILED TO PROPERLY ISSUE THE SUMMONS BY PUBLICATION AS REQUIRED BY SECTION 91-1-29 OF THE MISSISSIPPI CODE OF 1972, ANNOTATED, AS AMENDED.

IV. THAT, FINALLY, THE APPELLANTS' FOURTH ASSIGNMENT OF ERROR IS THAT THE CHANCELLOR ERRED IN FINDING THAT THE APPELLEE WAS THE SOLE HEIR AT LAW OF THE DECEDENT WITHOUT CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY SECTION 91-1-15(3) (c) OF THE MISSISSIPPI CODE OF 1972, ANNOTATED, AS AMENDED.

C. ANALYSIS

I. WAS THE ACTION TO DETERMINE HEIRS AT LAW AND TO QUITE TITLE FILED BY TRACY STRONG TIME BARRED PURSUANT TO THE PROVISIONS OF MISS. CODE ANN. § 91-1-15(3)(c) (Rev. 1994)?

In pertinent part, **Section 91-1-15(3)(c) of the Mississippi Code of 1972** reads as follows:

> (3) An illegitimate shall inherit from and through the illegitimate's natural father and his kindred, and the natural father of an illegitimate and his kindred shall inherit from and through the illegitimate according to the statutes of descent and distribution if:
>
> (a) The natural parents participated in a marriage ceremony before the birth
>
> of the child, even though the marriage was subsequently declared null and void or dissolved by a court; or
>
> (b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or
>
> (c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under sections 91-1-27 and 91-1-29. *However, no such claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors* to present their claims, whichever is less; and such time period shall run notwithstanding the minority of a child.

(emphasis added).

Emerson Strong died intestate on October 29, 1989. Tracy Strong's action seeking an adjudication of paternity was not filed until August 6, 1993, almost four years later. Thus, Roberta Thomas and Millie Strong correctly argue that Tracy Strong's action pursuant to Section 91-1-15(3) (c) was time-barred since the action was not filed within one year of Emerson Strong's death. Tracy Strong contends that the claim that his paternity action was time-barred has no merit because it was not raised at the trial court level and was only raised for the first time on appeal. Moreover, the Appellee contends that § 91-1-15(3)(c) is in the nature of a statute of limitations, which is waived pursuant to **Mississippi Rule of Civil Procedure 8(c)** if not plead or otherwise raised before the trial court as an

affirmative defense.

It is true that normally we need not address an argument made for the first time on appeal. ***R & S Development, Inc. v. Wilson*, 534 So. 2d 1008, 1012 (Miss. 1988)**. It is also true that parties who do not choose to raise affirmative defenses such as a statute of limitations at the trial court level are normally procedurally barred from raising such a defense on appeal for the first time. ***Goode v. Village of Woodgreen Homeowner's Assoc.*, 662 So. 2d 1064, 1076 (Miss. 1995)**. However, Section 91-1-15(3)(c) is not a statute of limitations. It is a "nonclaim statute" and as such, incapable of waiver by any party to this litigation. ***See Smith v. Estate of King*, 579 So. 2d 1250, 1253 (Miss. 1991)**, which specifically refers to Section 91-1-15(3)(c) as a nonclaim statute and further observes that the one-year period after a decedent's death to file for an adjudication of paternity is "self-executing." ***Id.* at 1254.**

As stated in ***Burnett v. Conception Villaneuve*, 685 N.E. 2d 1103, 1107 (Ind. App. 1997),**an ordinary statute of limitations may be waived but a nonclaim statute cannot. As stated by the textwriter:

> A distinction exists between statutes of limitation and special statutory limitations qualifying a given right in which time is made an essence of the right created and the limitation is an inherent part of the statute out of which the right in question arises, so that there is no right of action whatever independent of the limitation; a lapse of the statutory period operates, therefore, to extinguish the right altogether.

***See* 54 C.J.S. 2d, *Limitations of Actions* § 4 (1987). *See also* 51 Am. Jur. 2d, *Limitations of Actions* § 15 (1970); *Haas v. Chater*, 79 F.3d 559, 562 (7th Circ. 1996); *Wylie v. Investment Management and Research Inc.*, 629 So. 2d 898, 902 (Fla. 1993)** ("the primary purpose of probate is to provide for payment of settled or resolved claims from a decedent's estate").

In light of the express referral to Section 91-1-15(3)(c) by our Mississippi Supreme Court as a nonclaim statute, we rule that Tracy Strong's paternity adjudication action based upon Section 91-1-15(3)(c) was time-barred. However, his action pursuant to Section 91-1-15(3)(b) was not time-barred. We will now address the issues raised on appeal in regard to Section 91-1-15(3)(b).

II. DID THE CHANCELLOR ERR WHEN HE ADMITTED INTO EVIDENCE A DOCUMENT PURPORTED TO BE A CONSENT ORDER FROM THE JUVENILE COURT OF SHELBY COUNTY, TENNESSEE, WHICH WAS NOT SELF-AUTHENTICATING AND WHICH HAD NOT BEEN SIGNED BY A JUVENILE COURT JUDGE?

According to **Miss. Code Ann. § 91-1-15(3)(b)** an illegitimate shall inherit from his natural father if: "(b) There has been an adjudication of paternity or legitimacy *before the death of the intestate,*. . . ." (emphasis added). Thus, even though the Appellee was time-barred to bring a paternity adjudication action pursuant to Section 91-1-15(3)(c), he was not time-barred to do so if he could prove that he had been adjudicated as the son of the decedent prior to the decedent's death. In this case, Tracy Strong presented undisputed evidence to show that he had regularly received Social Security benefits for a period of time prior to dropping out of high school at age nineteen. He also offered into evidence a document which, on its face, purported to be a "consent order" from the Juvenile Court of

Memphis and Shelby County, Tennessee. This order, which is reproduced in full in the appendix to this opinion, named as petitioner the Tennessee Department of Human Services as the assignee of Lillie Mae Strong and named Emerson Strong as the defendant. It is undisputed that Tracy Strong was the natural child of Lillie Mae Bell Strong of Memphis, Tennessee and that she later married Emerson Strong after the child's birth. Undisputed evidence also establishes that Tracy Strong was originally named Tracy Cruthird by his mother for some unexplained reason[(1)] and that she and Emerson Strong ultimately divorced but maintained close contact. A copy of the "consent order" offered into evidence, which appears to be consented to by signatures purporting to be those of Emerson Strong and William Justice as the representative of the Tennessee Department of Human Services, adjudges that Emerson Strong is the natural father of Tracy Cruthird, born February 28, 1972, and that by agreement, the decedent was required to pay all of the child's expenses of birth and to pay $50 semi-monthly to the court for the support of the child beginning on September 1, 1977. The child's name was changed to Tracy Strong. However, the consent order is *undated* and *unsigned*by the Juvenile Court Judge. Nevertheless, there is a stamped certification on the document which states "I certify that this is a true and correct copy of an order entered in the minutes of the juvenile court of Memphis and Shelby County, Tennessee." This certification is signed by the deputy clerk, Martha Duncan.

The record discloses that Tracy Strong referred to this consent order as his juvenile papers which apparently led to his receiving Social Security benefits. It is also noteworthy that Roberta Thomas, who testified after the consent order had been admitted into evidence by the trial court, testified that she and Emerson Strong were both aware of the consent order during his lifetime and "laughed" about it. By this she apparently meant that although the decedent publicly acknowledged to many that Tracy Strong was his son, he privately told her that the child was not his, but he gave support to all of Lillie Mae Bell Strong's children because of his affection for her.

The consent order which was admitted into evidence is crucial to Tracy Strong's contention that he is the natural son and therefore the sole and only heir at law of Emerson Strong, deceased. Without the consent order, the Appellee has no case since his petition for a paternity adjudication pursuant to Section 91-1-15(3)(c) is otherwise time-barred. Thus, we must analyze whether the trial court correctly admitted the consent order into evidence and properly considered it in arriving at its decision in the case *sub judice*.

As stated in Mississippi Rule of Evidence 103, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Moreover, a ruling on the admission or exclusion of evidence is left to the discretion of the trial court, and we will not overturn such a ruling absent an abuse of discretion which prejudices the objecting party. ***Young v. City of Brookhaven*, 693 So. 2d 1355, 1358 (Miss. 1997).**

The chancellor ruled that the consent order was self-authenticating and admissible pursuant to **Mississippi Rule of Evidence 902(4)**, which states that a copy of an official record is admissible if "certified as correct by the custodian or other person authorized to make a certification, by certificate complying with any act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority." The certification in this case was not made under seal as required by Rule 902(1) and 902(2). Rule 902(3) deals with documents from foreign countries. Thus, we disagree with the chancellor that the consent order was self-authenticating and admissible pursuant to Mississippi Rule

of Evidence 902(4). However, we can nevertheless affirm the trial court's ruling on the admissibility of the consent order if we determine that it is admissible for different reasons and that the document, if admissible, is actually an adjudication. ***See Yates v. Yates*, 284 So. 2d 46, 47 (Miss. 1973).**

Mississippi Rule of Civil Procedure 44(a) allows the admissibility of a public document held outside the State of Mississippi if the document is simply accompanied by a certificate *under oath* of a person that he is the legal custodian of the document and holds it pursuant to law. However, the certificate in the case *sub judice* is not given under oath as required by Rule 44(a). Nevertheless, Rule 44(c) makes clear that which is commonly accepted when determining the admissibility of public records: "(c) This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law." Rule 44(c) is consistent with court decisions across the United States that have adopted Uniform Rules 44 and 902 and hold that self-authentication is not the exclusive method to authenticate a public document. See, for example, ***Sunnyvale Maritime Co., v. Gomez,* 546 So. 2d 6, 8 (Fla. 1989)**, which states:

> Federal decisions interpreting Federal Rules of Evidence 901 and 902 (upon which the Florida Rules are based) quite clearly hold that self-authentication is only one of several ways to authenticate documents. "The FRE offers generous opportunity to authenticate by presentation of sufficient evidence to support the authenticity of a document."

See also ***Spear v. McDermott,* 916 P.2d 228, 233 (N.M. App. 1996)**, which rules that if a public document is not self-authenticating under Rule 902, it may still be authenticated and admitted pursuant to Rule 901 if supported and authenticated by an "adequate witness." (citing 5 Jack B. Weinstein et al., **Weinstein's Evidence** § 901(b)(7)[01] at 901-188-120 (1995)) (stating that judicial records are public records as contemplated by the rule). The New Mexico Supreme Court went on to say that "[a]ll that is necessary is the testimony of a witness who knows that the documents in fact came from the legal custodian of the document." ***Spear,* 916 P.2d at 233**(holding a children's court to be in error when it refused to authenticate tribal court documents). In the case *sub judice*, as in *Spear,* counsel for Tracy Strong attempted to authenticate the consent order through his own statement to the court, in which he described how he contacted the Tennessee Department of Human Services and ultimately received the purported consent order in question.

Mississippi Rule of Evidence 901(a) is identical to New Mexico Rule 901(a) and states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." By way of illustration, Rule 901(b)(7) states that such a public document would be admissible under Rule 901(a) upon the presentation of evidence that "a purported public record, report, statement or data compilation, *in any form,* is from the public office where items of this nature are kept." (emphasis added). ***See also* Mississippi Rule of Evidence 1005.**

All things considered, we conclude that sufficient evidence has been presented to authenticate and render admissible the unsigned document which is labeled a "consent order" from Tennessee, pursuant to Rule 901(a), consistent with Rule 901(b)(7). There is no doubt that the document was used to gain Social Security benefits for Tracy Strong and that Emerson Strong was aware of and complying with the order by making payments to Lillie Mae Bell Strong in support of the Appellee during his lifetime. However, notwithstanding the document's admissibility, the "consent order"

which we have before us is unsigned and undated. Thus, we cannot say with assurance that there has been a paternity adjudication pursuant to Mississippi Code Section 91-1-15(b) (Rev. 1994). Consequently, we must remand this action to the trial court to determine, if it can, whether a paternity adjudication actually took place in the Tennessee Juvenile Court prior to the death of Emerson Strong. If so, then Tracy Strong has met the requirements of § 91-1-15(b) and must be adjudged by the trial court to be an heir at law of the decedent. If no consent order was ever executed by the trial judge prior to the decedent's death, Tracy Strong's claim must be dismissed with prejudice. It is unfortunate that what would have been a simple matter had either Mississippi Rule of Civil Procedure 44(a) or Mississippi Rule of Evidence 902(4) been followed, has taken up so much time of the trial and appellate courts in this action. Nevertheless, we conclude that a remand with instructions for further proceedings consistent with this opinion is appropriate. ***See* Miss. Code Ann. § 11-3-7 (Rev. 1991).**

III. DID THE CHANCELLOR ERR IN RULING THAT THE APPELLEE WAS THE SOLE HEIR AT LAW OF THE DECEDENT, WHEN THE APPELLEE FAILED TO PROPERLY ISSUE A SUMMONS BY PUBLICATION TO INTERESTED PARTIES AS REQUIRED BY SECTION 91-1-29 OF THE MISSISSIPPI CODE OF 1972?

Roberta Thomas and Millie Strong contend that the summons by publication filed by Tracy Strong was defective in that it failed to state the name of the decedent. In support of this argument, the Appellants cite ***High v. High*, 186 So. 2d 196 (Miss. 1966)**, wherein the Mississippi Supreme Court held that "summons by publication is jurisdictional and that compliance with the statutory method of obtaining process must be strictly followed." The Appellants argue that by failing to place the name of Emerson Strong on the summons, Tracy Strong failed to "strictly comply" with the statute.

Tracy Strong argues that this issue is procedurally barred, pointing out that the Appellants first raised this issue on appeal. In support of this argument, he calls our attention to Mississippi Rules of Civil Procedure 12(h)(1) which holds that objections to sufficiency of process are waived if the objection was never made a part of a pre-trial motion or a responsive pleading. We agree. The Mississippi Supreme Court has held that the failure to raise one of the Rule 12(h)(1) "defenses in an answer, motion or other pre-responsive pleading is a waiver that will be enforced." ***See Young v. Huron Smith Oil Co.*, 564 So.2d 36, 39 (Miss. 1990).** Thus, this issue has no merit.

IV. DID THE CHANCELLOR ERR IN FINDING THAT THE APPELLEE WAS THE SOLE HEIR AT LAW OF THE DECEDENT WITHOUT CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY SECTION 91-1-15(3)(c) OF THE MISSISSIPPI CODE OF 1972?

The determination of heirship made by the chancellor in the case *sub judice* is a finding of fact. As such, this finding will only be reversed if manifestly erroneous or unsupported by substantial evidence in the record. ***Bullock v. Thomas*, 659 So.2d 574, 576 (Miss. 1995)**. However, we have already ruled that Tracy Strong's effort to establish an adjudication of paternity pursuant to Section 91-1-15(3)(c) was time-barred. All that is necessary is that we find by clear and convincing evidence that an adjudication of paternity occurred prior to Emerson Strong's death pursuant to Miss. Code Ann. § § 91-1-27 and 91-1-29. We decline to do so until the chancellor receives admissible evidence that such a paternity adjudication actually exists.

The dissent filed in this action by Judge McMillin takes the position that Tracy Strong should not be given a second opportunity to present the trial court with a valid court order from Tennessee which adjudged Emerson Strong to be the natural father of the Appellee. We understand and appreciate this reasoning. However, we have before us a strong indication that the decedent was adjudged during his lifetime to be the natural father of Tracy Strong. Under these circumstances and in the interest of justice, we are of the opinion that the proper course to take is to simply have the trial court determine, if possible, whether such an adjudication of paternity was in fact made.***See Witherspoon v. State ex.rel. West,* 138 Miss. 310, 327, 103 So. 134, 139 (Miss. 1925).**

THE JUDGMENT OF THE CHANCERY COURT OF DESOTO COUNTY IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL TO BE ASSESSED TO THE APPELLEE.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, AND PAYNE, , JJ., CONCUR. McMILLIN, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, J.

McMILLIN, P.J., DISSENTING:

The majority has concluded that Tracy Strong was not entitled to prevail on his claim under the theory advanced by him at trial and argued on appeal. The majority found this to be so because Tracy's right to proceed under section 91-1-15(3)(c) had been extinguished by the passage of time prior to his filing suit. Having so decided, the majority then looked at the possibility that Tracy may have been entitled to relief because he proved an adjudication of paternity predating Emerson Strong's death. This would have allowed relief under section 91-1-15(3)(b) -- a claim that does not have the same time bar as subsection (c). This is a proposition that Tracy did not specifically advance at trial or on appeal. Nevertheless, the inquiry seems proper under the accepted precept of appellate review that if the reviewing court determines that the right result has been reached, even though for the wrong reason, justice requires that the case be affirmed. ***Rawls v. Parker,* 602 So. 2d 1164, 1170 (Miss. 1992).**

The majority concluded that Tracy came tantalizingly close to proving such an adjudication when he introduced into evidence an undated, unsigned copy of an instrument that, if properly executed and authenticated, would have been the pre-death adjudication of Tracy's lineage contemplated by subsection (b). The majority ultimately concluded that the document, in the form introduced, did not prove the existence of an adjudication with sufficient certainty to affirm the chancellor. Nevertheless, it proposes to remand the cause to give Tracy a second opportunity to prove that such an adjudication occurred.

It is at this point that the majority and I part ways. This course of action seems to provide an inappropriate and unfair advantage to the plaintiff in this case for which I can find no justification. A plaintiff is charged with the duty of gathering and presenting such evidence as he deems appropriate to prove his right to relief. The Court has no cause to advise or assist in that process. There is no claim that Tracy was hindered in presenting evidence to support his claim by an erroneous evidentiary

ruling by the chancellor. Neither can it be fairly said that he was lulled into refraining from offering better evidence of an adjudication by a suggestion from the chancellor that he had met his burden on the point. Many plaintiffs walk away from trial without relief because they are unable to prove, by a preponderance of the credible evidence, their entitlement to relief. Such a determination is not, and need not be, the equivalent of a determination that evidence sufficient to meet that burden does not exist. It is not the job of this Court to determine that had Tracy presented irrefutable proof of a paternity adjudication, he would have prevailed, and then, because his evidence raises the possibility that such an adjudication exists, remand to see if he can uncover that proof. That is what the majority proposes to do, and I am opposed to it.

I would reverse and render.

SOUTHWICK, J., JOINS THIS SEPARATE WRITTEN OPINION.

1. The Appellee testified that his mother just "liked" the name Cruthird.