24-824

No. _____

In the Supreme Court of the United States

BERNICE M. RUTLAND,

Petitioner,

v.

REGIONS BANK,
AS TRUSTEE OF THE WILLIAM HUNTER RUTLAND FAMILY TRUST,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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January 16, 2025
SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

This case presents one of first impression and of national importance and significance because it conflicts with well-established rules and principles and conflicts with this Court and other federal and state courts. The Federal Rules of Evidence 201(e) and M.R.C.P. 201(e) both allow the party affected by taken Judicial Notice the Opportunity to be Heard, and Rule 56 Summary Judgement requires the moving party to meet its burden of production. *Celotex Corp. v. Catrett*, 477 U.S. 317, 333 (1986) and The Fourteenth Amendment's Due Process clause. The case below has questions of first impression.

1. Whether a Chancery Judge has jurisdiction or authority to change the Final Order of another Chancery Judge, thirteen (13) years after the order was signed by both parties, their attorneys and the Chancery Judge in the divorce hearing, where there was no Rule 59 motion to amend and was never appealed and both parties were deceased.

2. Whether the Chancery Court abused its discretion by denying defendants request for deposition of three (3) key witnesses, limiting Rule 56(f) relief to only producing relevant documents, preventing defendant from putting on a complete defense, then taking Judicial Notice, and doing its own research to reach a conclusion of law when reconsidering a dispositive motion and granting summary judgement to plaintiff, denying defendant Rule 201(e) Opportunity to be Heard, and the due process clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner

- Bernice Rutland

Respondents

- Regions Bank, as Trustee of the William Hunter Rutland Family Trust

LIST OF PROCEEDINGS

Supreme Court of Mississippi

No. 2022-CT-00720-SCT

Bernice M. Rutland, *Appellant,* v. Regions Bank as Trustee of the William Hunter Rutland Family Trust, *Appellee.*

Order Denying Petition for Review: August 24, 2024

Court of Appeals of the State of Mississippi

No. 2022-CA-00720-COA

Bernice M. Rutland, *Appellant,* v. Regions Bank as Trustee of the William Hunter Rutland Family Trust, *Appellee.*

Date of Final Opinion: January 16, 2024

Date of Rehearing Denial: May 21,2024

Chancery Court of Coahoma County Mississippi

No. 14CH1:21-cv-00120

Regions Bank as Trustee of the William Hunter Rutland Family Trust and Gwendolyn Kyzar as Trustee of the William Hunter Rutland Family Trust, *Petitioners,* v. Bernice Rutland, Individually and as Executrix of the Estate of William Rutland, Sr., Lady Ryals, Melanie Hinton and William Hunter Rutland, Jr., *Respondents.*

Date of Final Order: June 17, 2022

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JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bernice Rutland, Pro, Se, respectfully petitions for a writ of certiorari to review the judgement of the Mississippi Court of Appeals to reverse summary judgement and remand the decision below for a trial. Bernice acknowledges that review of a writ of certiorari is not a matter of right but of judicial discretion.

OPINIONS BELOW

The Opinion of the Court of Appeals, Case # 2022-CT-00720 was filed on January 16, 2024, affirming Summary Judgement. App.1a. A Motion for Rehearing was filed timely with the Court of Appeals and denied on May 21, 2024, App.35a. A Petition of a Writ of Certiorari to the Mississippi Supreme Court was timely filed and denied on August 21, 2024, App.17a. The Chancery Court of Coahoma County Final Order granting summary judgement of May 05, 2022, App.27a. Final Order of the chancery court after a motion for reconsideration June 17, 2022, App.19a. Order granting Extension of Time to file a Writ of Certiorari, application number 24A489, was granted by Justice Samuel Alito on November 19, 2024, which extended the filing deadline to January 03, 2024. App.37a. Order granting further extension of filing deadline for writ of certiorari was granted by Justice Samuel Alito on December 16, 2024, which extended deadline to January 18, 2015. App.38a.

JURISDICTION

The Court of Appeals in the State of Mississippi entered judgement on January 16, 2024, and denied a timely Motion for Rehearing on May 21, 2024. App.35a. A timely writ of certiorari to The Supreme Court of Mississippi was filed and denied on August 21, 2024. App.17a. On November 19, 2024, Justice Samuel Alito, granted the Petitioners application to extend the time to file a petition for a Writ of Certiorari up to and including January 03, 2025. App.37a. On December 16, 2024, Justice Samuel Alito granted a motion to further extend the filing deadline to January 18, 2025. App.38a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision

The Fourteenth amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutory Provisions

Section 1359 U.S. Code of Title 28 (Rules of civil procedure for the United States district courts, Rule 56 –Summary Judgment. The standard under F.R.C.P. 56, the moving party, "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrates the absence of a genuine issue of material fact." *Form of Affidavits*, Rule 56–Summary Judgment, Miss. R. Civ. P. 56, (e) provides that the records must be attached to the affidavit. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 333 (1986). If the moving party has not fully discharged his initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion

Federal Rules of Evidence, Judicial Notice Rule 201(e) Opportunity to be heard and M.R.C.P. 201(e), Opportunity to be heard.

Under Fed. R. Civ. P. 56, summary judgment may only be granted, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment . . . a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 249 (1986). Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light

most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

INTRODUCTION

The issues raised below are questions of well settled laws established by this Court and conflicts not only with this court but also other federal and state courts on the rules and principles of Summary Judgement Rule 56 and the rules of evidence, F.R.C.P. 201(e). The case below also raises a question of first impression and presents one of national importance and significance on whether a Chancery Court Judge has jurisdiction or authority to change a Final Order of another Chancery Judge, thirteen (13) years after a Property Settlement Agreement was signed by both parties, their attorneys and the chancery judge in the divorce hearing. There was no rule 59 motion to amend, and the divorce decree was never appealed and became a Final Order on December 06, 2010.

The case below has many questions of law. However, Bernice will address three (3) that involve Summary Judgement, Judicial Notice and the Fourteenth Amendment constitutional due process.

Regions Bank and Gwendolyn Kyzar[1], on April 06, 2021, initiated a declaratory judgement petition as Trustees of a presumed irrevocable trust of William

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[1] Gwendolyn Kyzar, Williams Rutland's sister and Bernice's sister-in-law, Bernice pointed to the court that Mrs. Kyzar was not able mentally to file a lawsuit. Mrs. Kyzar deceased on November 16, 2023.

Rutland, Sr., filed against Bernice Rutland, the widow and executrix of William Rutland, Sr. Estate, Et, Al., stating; it was an irrevocable trust and could not be divided in a divorce. On May 19, 2021, Bernice filed a response. On June 18, 2021, Regions filed their reply. However, the issues raised in the case below are more about a contract than an irrevocable trust. The Rutland's divorce and the Property Settlement Agreement of December 03, 2010, was a contract between William Rutland, Sr. and JoAnn Sparks Rutland and the Final Divorce Decree was filed with the court on December 06, 2010, "R.153-161". Both William and Jo Ann in the divorce had competent counsel, and the Honorable William G. Willard Jr., presided over the divorce. "R.153-154." In Rutland's divorce, everything was split 50/50, including the life insurance policy in the trust. *See Financial Statement* "R.163-164" and Chancery Court findings of fact, Final Order, line 5, App.21a.

Regions Bank, before any depositions were scheduled, filed a motion for summary judgement on August 23, 2021, and on October 20, 2021, Bernice notified Regions Bank of the need to depose three (3) key witnesses. App.41a. On November 03, 2022[2], Bernice filed a motion for extension of time to respond to the motion for summary judgement and stated her desire to depose at least three (3) key witnesses to properly prepare a response to the Motion for Summary Judgement. Regions opposed the motion on November 10, 2021, and The Chancery Court Judge denied the request for depositions on November 29, 2021 and filed on December 03, 2021. granted Bernice Rutland limited

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2 This date is corrected from the July 15, 2021, date in the motion for further extension. App.38a.

Rule 56(f) relief only to produce relevant documents. App.39a-40a,

The discovery process is a crucial component of a civil case, allowing both parties to access information to fairly prepare their cases. The chancery court, by limiting discovery from the beginning tied Bernice's hands and prevented defendant from putting on a full defense.

Regions Bank provided the court with a copy of the trust agreement, with the asset section, Schedule "A" however, Schedule "A" was a blank sheet of paper, there was nothing in the asset section. "R. 97". Regions Bank also relied on the affidavit of Misty Singletary[3], which was provided only in Regions Bank Rebuttal in support of its Motion for Summary Judgement, "R. 225-226." Since it was in the last rebuttal of Regions, Bernice never got a chance to respond. Although, Ms. Singletary's affidavit sworn under oath stated, that three (3) documents[4] were attached to the affidavit; however, they were not attached and were never part of the record. Neither Regions Bank or Ms. Singletary have any first-hand knowledge of any of these documents and they were never presented to the trial court. Regions cannot point to anywhere in the record where these three (3) documents were presented to the trial court.

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[3] Misty Singletary, one of the key witnesses that Bernice was denied the right to depose. Ms. Singletary had communications with Bernice and Williams attorney, Joseph Dulaney. Depositions were crucial to Bernices response to Summary judgement.

[4] On October 01, 1991 William Rutland, Sr's., signed Policy request form transferring ownership of the policy to the trust; 2. On October 02, 1991 a signed change of beneficiary form changing the beneficiary from United Southern Bank (now Regions Bank) and; 3. an ownership change was recorded from Central Life to Athene Life.

However, Ms. Singletary was only an employee of Regions Bank, the documents listed in the affidavit were from other individuals and was subject to the hearsay rules of evidence. "Producing evidence not supported by evidentiary proof on these records would be inadmissible at trial. The moving affidavits should be from witnesses with actual personal knowledge; lack of personal knowledge is fertile ground for reversal." *See, e.g., Dorsey v. Les Sans Culottes*, 43 A.D.3d 261 (1st Dept 2007).

Regions Bank did not meet the burden of production under Rule 56 Summary Judgement, *Celotex Corp. v. Catrett*, 477 U.S. 317, 333 (1986). Regions Bank also claims that the adult children of William Rutland, Sr. and JoAnn Sparks Rutland did not approve of the 50/50 split, however, Regions provided no proof or affidavits from the three (3) adult children to that effect.

The Chancery Court then took Judicial Notice in (ii) (availability of new evidence). App.25a, by doing its own research, *sua sponte*, to reach a conclusion of law when reconsidering a dispositive motion and settled disputed material facts then granting summary judgement to Regions Bank, in the final order of June 17, 2022, denying defendant, Rule 201(e) Opportunity to be heard, and changed the Final Order of the Honorable William G. Willard, Jr., thirteen (13) years after the divorce decree became a final order. There was no Rule 59 motion to amend and was never appealed.

Bernice Rutland, being limited to producing documents only, presented the following documents to the court,

1. The Property Settlement Agreement. Exhibit "A," "R.155-162"

2. Final Divorce decree. "R.153-154"
3. A case that Mr. Rutland presented to the judge in his divorce of 2010, from the Supreme Court of Montana, which was similar. "R.145-152"
4. A copy of the Trust, where the asset section page "A", is a blank sheet of paper. R.118-140
5. Financial statement of William Rutland, which includes the trust. "R.163-164".
6. Four (4) notarized statement one each from Joann Sparks Rutland and the three (3) children, William Jr., Melanie and Lady, being together during the time of the divorce in M. Lee Graves office planning on suing William for dissolution of the family farm dated December 01, 2010, and filed the day after the divorce was filed on December 07, 2010. R.165-170 and knew the trust was divided 50/50. Another complaint in 2017 as further proof the family desinagrated.
7. Two (2) letters of communication between their attorneys, three (3) months after the final order of divorce, "R. 178-181" and,
8. Bernice questioned whether Gwendolyn was mentally able to join Regions in the lawsuit since being her sister-in law, Bernice knew she had been under supervised care from her illness for over 3 years.
9. Argued that the children knew about the 50/50 split in the divorce.

Regions did not produce any evidence or documents that negated any of the above possible inferences by which a jury could find in favor of the defendant.

The chancery judge in the divorce case, the honorable William G. Willard, Jr., specifically stated in his findings of December 03, 2010; (3). "That the Court has reviewed the Divorce Settlement Agreement entered into by and between the parties hereto marked Exhibit "A". "R.155-162". Next, the court decreed, "that the Divorce Settlement Agreement entered into by and between the parties hereto, shall be and hereby is approved by the Court, and is adopted and incorporated in this Final Decree of Divorce" on December 03, 2010. R. 153-164."

This case requires this Court to determine whether the Chancery Court has jurisdiction to revisit a case over ten years old, that was a final judgement and take judicial notice and changing the terms of the PSA. Whether Regions Bank satisfied its initial burden of production under the rules and laws of Summary Judgement, whether the Chancery Court settled disputed material facts and whether the Chancery Court by taking judicial notice in the Final Order denied Bernice due process under the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Statutory Background

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this court clarified F.R.C.P. Rule 56 in more detail by holding that a defendant cannot get summary judgment through a conclusory assertion that the plaintiff does not have evidence to support the complaint. Instead, the defendant must show the absence of evidence in the discovery records. *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986). It is the defendant's task to negate, if he can, the claim basis for the suit. *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986). In *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), A party seeking summary judgment on the basis that no evidence supports a claim must negate all the possible inferences by which a jury could find in favor of the opponent.

II. Judicial Notice 201, F.R.C.P. 201(e) and M.R.C.P 201(e)

Both are the same, it gives the litigants the Opportunity to be Heard. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 249 (1986). This Court's decision states, "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment . . . a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

A. Constitutional Background

The Fourteenth Amendment and the Fifth Amendment both have the due process clause and prohibits the states from depriving "any person of life, liberty or

property without due process of law." The Second Circuit Court of Appeals also underscores the due process concerns raised by judicial notice. In *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009), the Second Circuit noted that an immigration judge erred in taking judicial notice without providing an opportunity to rebut the officially noticed fact. The appellate court acknowledged that the Federal Rules of Evidence did not apply to immigration removal proceedings and to the immigration judge's administrative notice of the existence of adult strip clubs in Buffalo, "but concluded that the Fifth Amendment due process standard did apply".

B. Factual Background

Regions argue that the trust was irrevocable, and the court should rule the trust irrevocable, and the trustee must administer the trust in accordance with the terms. However, proof of the very strained relationship between William and all the adult children is in the fact they had already planned to file a Complaint for Partition and Dissolution of the Rutland Family Farm which was an indication that the trust was divided. "165-170." The litigation of Jo Ann and the three (3) adult children on December 01, 2010, the Complaint was signed by Jo Ann, William, Jr., Melanie and Lady and was notarized on December 01, 2010, just two (2) days before the Rutland's Divorce Decree was signed. After the desolation of the family farm the trust could not be distributed according to the terms since William Rutland, Jr's share of the trust was to be reduced by the value of his share in Rutland Farms. There is no Rutland Farms as it was partitioned, through no fault of William, after the partition of the family farm, the trust had no further purpose.

At the time of the creation of this presumed trust, William Rutland, Sr. had no idea that his own grown children would turn hostile toward him and someday take him to court to deplete the assets and dissolve the family farm. This was Williams only means of income and was still farming. The Complaint to Partition the farm was filed on December 07, 2010, one day after the Final Divorce Decree was filed with the court. Dissolving the family farm was more proof that the trust had been divided in the Property Settlement Agreement and as further proof that the family had disintegrated was another Complaint filed by the three adult children on February 02, 2017, against William and Bernice for property owned by Bernice, However, William Rutland, Sr. passed away in the middle of this lawsuit. "R.182-188."

Section 91-8-410(a) In addition to the methods of termination prescribed by Sections 91-8-411 through 91-8-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful or impossible to achieve.

William Rutland and Jo Ann Sparks Rutland divorced on December 03, 2010, and the Final Divorce Decree was filed on December 06, 2010. The agreement was presented to the Honorable William G. Willard, Jr., who presided over the case. The decision of the honorable William G. Willard, Jr., who was the trier of the facts stated, (3) "That the court has reviewed the Divorce Settlement Agreement entered into by and between the parties hereto marked Exhibit "A" and attached hereto. "R. 153-154." The divorce was taken on the grounds of irrevocable differences and there

was no substantive testimony on this case as it was negotiated between the Rutland's and their attorneys.

The hearing on the divorce was on December 03, 2010, and the Final Decree of Divorce upon irreconcilable difference was signed by both William Rutland, Sr. and Jo Ann Sparks Rutland, their attorneys and the Honorable William G. Willard Jr. approved and was adopted and incorporated in the Final Decree of Divorce, filed on December 06, 2010. In the Property Settle Agreement "R.160-161", under COMPLETE AGREEMENT:

> "The parties hereto covenant and agree that this is the complete and final agreement of the parties. That each of the parties has read and does understand this agreement, and that the agreement fully and completely contains all their agreements. That there are no unwritten or verbal agreement that are not contained in this document."

While Mississippi is not a community property state, William and Jo Ann agreed to split everything 50/50 including all insurance policies, including the one listed in the presumed trust as noted in the Financial Statement, "R.163-164." After Williams death, Regions Bank filed suit on April 06, 2021, against Bernice Rutland, William Rutland's widow, individually and as the Executrix of William Rutland Estate, Et, Al., with the Chancery Court, over eleven (11) years after the Property Settlement Agreement was signed by all parties.

The Property Settlement Agreement was intentionally written as it was considering all circumstances, the asset section states that Jo Ann Sparks Rutland

shall receive one-half or 50% of the assets of W.H. Rutland[5], as shown in Exhibit "B" of the 8.05 Financial Declaration attached hereto and incorporated herein by reference", it included all insurance policies "R.163-164," the court could have easily excluded the trust but didn't. However, the Real Property section was written separately from the asset section which specifically EXCLUDED the real property, the twenty (20) acres that William Rutland, Sr., inherited from his father. Because this distinction was set out in the Real Property section, we know also that the parties, their attorneys and the court could have clearly stated the same in the asset section, and could have excluded the trust, but did not.

The Property Settlement Agreement was made between William Rutland and Jo Ann Sparks Rutland and their attorneys, carefully going over every detail and even making handwritten adjustments in Jo Ann Sparks Rutland's attorney's office, M. Lee Graves. It is undisputed that William Rutland's attorney was not there when the changes were made. Jo Ann Rutland's attorney hand signed or initialed the changes along with William Rutland, Sr. who initialed the changes "WHR." The trust insurance policy could have easily been excluded at that time also but was not. "R.159."

Regions Bank now argues the trust was not included in the divorce Property Settlement Agreement and could not be divided, however the 50/50 was agreed on by the Rutland's. Since there was no Rule 59 motion to amend the divorce decree and no appeal was

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[5] The court also pierced the two (2) Corporation of William Rutland in the 50/50 division, Exhibit B of the Financial statement. 163-164.

taken it became a Final Order. To change now, thirteen (13) years after the Property Settlement Agreement was signed and the only PSA that was signed by both William and Jo Ann, would be an injustice to William Rutland, Sr., and his estate, since he is now deceased, and he did not have the Opportunity to be Heard while he was still living and able to speak for himself, had there been a rule 59 motion to amend or notice of appeal in 2010 or 2011.

Whether the trust was split 50/50 in the divorce of December 06, 2010, because,

(1) there were no assets in schedule "A",

(2) the trust was meant to be estate planning, and the estate was split 50/50,

(3) William Rutland never completed the trust,

(4) it was an equitable division, and the court approved.

(5) Court case *In re Marriage of Epperson*, 2005 MT 46, 107 P.3rd 1268, 326 Mont. 142 (Mont. 2005) which was similar to The Rutland's where the family was estranged.

(6) "because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust," as described in Miss. Code Ann. § 91-8-412(a).

(7) After dividing everything 50/50, there would be a need now to protect both William and Jo Ann's estate.

For any of the reasons stated above, The Chancery Judge William G. Willard, Jr., by his presence in the divorce proceedings, was the best to determine that issue

and stated, "That the court has reviewed the Divorce Settlement Agreement entered into by and between the parties", and did not exclude the trust insurance policy and now should not be second guessed and change the Final Order of December 06, 2010, thirteen (13) years after the agreement was signed by both parties their attorneys and approved by the court.

The chancery court finding that the trust was "not Included" in the December 03, 2010, divorce, was clearly a disputed material fact and the court did its own research to resolve that material fact for the movant, and was clearly a reversable error of law and a due process violation at the Summary Judgement stage, which is only for the court to determine if there are disputed facts, not to resolve them.

C. Procedural Background

On April 06, 2021, two (2) years after William Rutland, Sr., deceased, and eleven (11) years after the divorce of William Rutland Sr. and Jo Ann Sparks Rutland on December 03, 2010, the estate had not been settled yet when Regions Bank initiated a declaratory judgement against Bernice Rutland, Individually and as Executrix of the estate of William Rutland ET AL. The complaint claimed that an irrevocable trust insurance policy that was divided in the Rutland's divorce of 2010 could not be divided in the divorce and the adult children of William Rutland, Sr., did not consent to the division of the trust 50/50 in the divorce. On May 19, 2021, Bernice filed a response to petition for declaratory judgement. Regions filed a reply to response on June 18, 2021.

Before depositions could be scheduled, Regions filed a motion for summary judgement on August 23, 2021.

Bernice notified opposing counsel on October 20,2021 the need to do depositions, App.41a-42a, and Bernice Rutland filed a motion for extension of time to respond to the motion for summary judgement on November 03, 2021 and stated her desire to depose at least three (3) key witnesses, Misty Singletary, a Regions Bank trust employee that had originally contacted Bernice Rutland and Williams Rutland's Attorney Joseph Dulaney, attorney for the estate of William Rutland, who also communicated with Misty Singletary and also, Gwendolyn Kyzar, co-administrator of the presumed trust and sister to William Rutland, Sr.

Regions Bank filed a motion in opposition on November 10, 2021, The Chancery Court Judge denied the request for depositions and only granted Bernice limited Rule 56(f) relief, only to produce relevant documents. App.39a, 40a.

From the very start the court tied Bernices hands by preventing full discovery. Bernice, being limited to documents only, presented several documents from William Rutland's divorce file of 2010 to the chancery court. One was William Rutland, Sr. and Jo Ann Sparks Rutland's Property Settlement Agreement and Divorce Decree of December 03, 2010, where they divided everything 50/50 including the insurance policy presumed to be in the trust. The Financial Statement that included the trust insurance policy, the asset section, Schedule "A" of the trust was a blank sheet of paper, the fact that the list of assets is blank amplifies the question regarding assets of the trust. In 1991, the intention of the trust was merely a part of their estate planning and tax management strategy. The purpose of the trust at the time, if completed, was to protect the estate of William

Rutland, Sr's family farm and now would be defeated if his estate did not receive his 50%.

Bernice also presented two (2) letters of communication between William's attorney, Joseph Dulaney, and Jo Ann's attorney M. Lee Graves that were written three (3) months after the Divorce Decree became a Final Order, among other items. These letters were only communication between two attorneys and not adjudicated facts.

D, Coahoma County Chancery Court

Regions Bank never provided any admissible evidence to the Chancery Court that would disprove Bernices evidence however, the chancery court gave weight to the letter from Jo Ann's attorney written three months after the divorce decree was signed stating, "Bernice provided evidence attached to her Response that Joanne Sparks Rutland was not of the impression that the trust would be a part of the divorce, More specifically, the letter was from Jo Anne Rutland's attorney expressing that they believed the trust was irrevocable and could not be a part of the divorce settlement". Then used the letter along with the Judicially Noticed documents, the consent order and the contempt order, which are both questionable and not adjudicated facts and ruled that the irrevocable trust was not divided in the divorce and granted Region summary judgement and altered the Final Order of the Rutland's 2010 divorce decree after settling disputed material facts in favor of Regions Bank.

The letter which Bernice presented from Williams Rutland's attorney, included the trust in the division and the letter from Jo Ann's attorney only stated the opinion of Jo Ann, not adjudicated facts, while her attorney M.

Lee Graves gave no opinion in the letter himself and appears that Jo Ann had maybe changed her mind about the trust, However, that was three months after she had already signed the Property Settle Agreement.

These letters were not adjudicated facts, and only communication between the attorneys, three (3) months after the Final divorce decree of December 06, 2010. The consent order and the contempt order that was judicially noticed were not adjudicated facts and was not a part of the record and easily questionable and Bernice was not given the opportunity to be heard on the judicially notice documents.

The chancery court gave weight to Jo Anns attorney letter and none to Williams Rutland, Sr's attorney letter that included the trust. The Chancery Court noted in its Conclusion of Law that to alter or amend a judgement would take a M.R.C.P. 59 motion. App.23a. William and Jo Ann's divorce decree of December 03, 2010, would have required a Rule 59 motion or an appeal to alter, there was no Rule 59 motion or an appeal taken in 2010. However, now in 2022 the chancery court changes the Final Order of the Divorce Decree by using a letter of communication between the two (2) attorneys and not adjudicated facts, and by taking Judicial Notice in the final order introducing new evidence not in the record.

The Chancery Court on page 2, of the Final Order for Reconsideration of Order Granting Motion for Summary Judgement and Request for Specific Findings of Fact and Conclusion of law actually concluded the trust was divided when it stated, "Attached to the property settlement agreement is a page from a financial statement that includes the insurance policy that makes up the irrevocable trust created on April

11, 1991[6]. Line 5, App.21a, at that point Bernice had proven that the trust was divided in the divorce. However, instead of ruling the trust had been divided, the chancery court in (¶¶ 6,8) of the final order takes judicial notice and sets out new facts and evidence not in the record by doing its own research, *sua sponte*, to reach a conclusion of law and settled disputed material facts in favor of the moving party, without allowing the non-moving party, Bernice Rutland, the Opportunity to be Heard, under the Fed. Rule of Evidence, Rule 201(e) and denied Bernice her due process under the Fourteenth Amendment. The contempt order and the consent order were never a part of the record and not adjudicated facts. The court makes note of the letters being filed on March 03, 2011, by M. Lee Graves. App.21A. However, the letters were written three (3) months after the divorce decree was signed. The letter was written to William's attorney, Joseph Dulaney, and not to the court and could not have been used by the court to change a final order of another chancery judge. It appears highly dubious as to why Jo Ann Rutland's attorney would even file these letters of communication from both attorneys with the court on March 03, 2011, instead of filing a Rule 59 motion to amend or a notice of appeal.

The Complaint to partition Rutland Farms, the family farm, was presented to the chancery court, filed one day after the divorce was filed with the court, as an indication of the split of the insurance policy 50/50. "R.165-177. As further proof that the family had disintegrated was another Complaint that was filed

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[6] In 1991 the adult children were 25-35 at the time of the divorce they were approximately 44-54 years old.

on February 02, 2017, by the three (3) adult children against William and Bernice for property owned by Bernice. "R. 182-188." William Rutland, Sr. passed away in the middle of this lawsuit.

The Chancery Court never analyzed any of the evidence of Regions Bank and never ruled whether Regions had or had not met their burden of production. *Celotex Corp. v. Catrett*, 477 U.S. 317, 333 (1986). The chancery court overlooked the fact that the Divorce was on December 03, 2010, and the letter written three (3) months after the fact could not be allowed to change the final order without proper due process to William Rutland.

E. Mississippi Court of Appeals

On ¶ (2) App.2a the court below found that, "the trial court granted summary judgement to the trustee, after finding that the trust was irrevocable, was not terminated, and that the contents of the trust should be disbursed to his children, and affirmed." However, Regions Bank never provided any proof that the trust was not divided 50/50, the contents of the trust, the asset section, Schedule "A" was a blank sheet of paper. It appears that nothing was ever put in the trust.

¶ 8, App.3a. The affidavit of Misty Singletary was not first-hand knowledge and Regions Bank proffered nothing, the affidavit of Misty Singletary dated March 22, 2022, where Ms. Singletary swore under oath that (# 5) On October 01, 1991, Mr. William Hunter Rutland, Sr. signed a policy Service Request form transforming ownership of the life insurance policy to the trust. A true and correct copy of the Policy Service Request form is attached hereto. "R. 255"

(# 6) On October 02, 1991, United Southern Bank (now Regions Bank), as Trustees and Owner, signed a change of Beneficiary form changing the beneficiary of the Policy to the Trust. A true and correct copy of the Change of Beneficiary form is attached hereto. "R. 256"

(7) on October 21, 1991, the ownership change was recorded at the carrier, then known as Central Life Assurance Company, now Athena Annuity & Life Company. "R. 256," However, none of these forms were attached to the affidavit and there was never any proof that William Rutland, Sr. signed any of these forms and they were not in the record, *Form of Affidavits* Rule 56–Summary Judgment, Miss. R. Civ. P. 56, (e) provides that the records must be attached to the affidavit. Under Miss Rules of Civ. P. 56(e), Regions did not meet their burden of proof for Summary Judgement.

¶ 8 App.3a. The court below gave credibility to Misty Singletary's Affidavit, stating; "it was uncontested proof,"[7] From the start, the Chancery Court denied Bernices request for deposition of Misty Singletary, However, now the court below gives credibility to Ms. Singletary's affidavit with which she had no first-hand knowledge. Bernices evidence outweighed Regions Bank affidavit of Misty Singletary's list of documents with no first-hand knowledge and the documents were not attached to the affidavit and also a blank schedule "A." from the asset section of the trust. Regions Bank never presented any evidence that it was William

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[7] The affidavit of Misty Singletary was only filed in Regions Bank's Rebuttal in Support of its Motion for Summary Judgement, "R. 237-241". Bernice never had a chance to reply to the missing documents in the affidavit.

Rutland, Sr. who put the life insurance policy in the trust. Regions Bank did not produce any evidence that the three adult children opposed the 50/50 division, therefore, did not meet their burden of proof under Summary Judgement, Rule 56.

¶ 18 App.6a, the court below stated, of the chancery court, "it recounted details from the divorce action between William and Joanne." However, the current chancery judge was not the one that was in the divorce action and could not have known any details, that judge was William G. Willard, Jr.

¶ 30 App.9a,10a. The lower court conclude, "this subsection cannot apply, as all the beneficiaries did not consent to the Trust's modification or termination." However, Regions Bank never submitted any proof that the three (3) adult children did not approve and never foreclose that possibility. In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

(¶ 43) App.14a. The lower court states: "Second, it was Bernice herself who continued to argue that the various documents and letters surrounding William and Joanne's divorce warranted modification or termination of the Trust." And "She cannot now complain the trial court committed error by reviewing the docket of the divorce to see if it impacted the claim in this case. *See, e.g.*, *Edwards v. State*, 441 So.2d 84, 90 (Miss. 1983) (stating that "[i]t is an old principle that an attorney who invites error cannot complain of it"). App.14a. Limiting Bernices discovery to documents only and then noting that Bernice was "culling" evidence from the divorce record, and this invited error, is error by itself. With the chancery court denying depositions, gathering

documents was Bernices only option and was not a consent for the chancery judge to do its own research of the record for evidence to help the moving party and not allow the Opportunity to be heard.

The letters of communication Bernice submitted, between two attorneys, were written three (3) months after the Divorce decree became a final order and would support that Williams attorney knew the trust was included. To amend or change the final order of 2010, would have required a motion to alter or amend Rule 59 or a notice of appeal at that time.

(¶ 44) App.14a,15a, the court below, cited two (2) cases that stated: "it is well settled that a trial court may take judicial notice of available evidence in its own court files." *See In re J.C.*, 347 So. 3d 1188, 1194 (¶ 12 (Miss. Ct. App. 2022) *see Peden v. City of Gautier*, 870, So. 2d 1185, 1186-87 (¶(¶) 3,7) (Miss. 2004). However, with all due respect, these two (2) cases cited by the lower court, Bernice is of the opinion that the lower court overlooked the fact that the chancery court took judicial notice for the first time in a Final Order. Respectfully, Bernice also believes the lower court may have misapprehended the difference in the two (2) cases. In the two cases cited, judicial notice was taken in the proceedings before a decision was made where each litigant, plaintiff and defendant, both had the Opportunity to be Heard. F.R.C.P. 201(e) and M.R.C.P 201(e). In the case below, judicial notice was taken in a Final Order and Bernice did not have the Opportunity to be Heard and was denied her due process. The two cases that were cited by the court below were misapplied and went against case law of its own court, The Supreme Court of Mississippi, that reversed the lower court in another case when judicial

notice was taken in a final order. *See Enroth v. Memorial Hospital at Gulfport*, 556 So.2d 1377 (Miss. 1990) (unpublished opinion), *see Tricon Metals Services, Inc. v. Topp,* 516 So.2d 236, 239 and *Enroth v. Memorial Hosp. at Gulfport*, 566 So. 2d 202, 204 (Miss. 1990).

In (¶ 50) App.16a. the court below in its conclusion states; "Furthermore, it was not improper for the trial court to review prior proceedings upon its docket when this was the central thrust of Bernice's argument." While Bernice was prohibited from deposing three-key witnesses, it was an abuse of discretion for the chancery court to have done their own research and use the information, not in the records, to find a conclusion of law to help the moving party.

However, the thrust of the argument by Bernice was that the trust was divided in the divorce hearing of December 03, 2010, and Regions never proffered anything that would disprove those facts. Without substantive testimony in the divorce hearing, a different Chancery Judge, over ten years later, could not know what the other Chancery Judge did or why in 2010.

While the chancery court and the court below found every way to counter Bernices evidence, respectfully, while ignoring the ruling of this Court. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Regions proffered nothing.

REASONS FOR GRANTING THE PETITION

The case below raises a question of first impression and presents one of national importance and significance on whether a Chancery Court Judge has jurisdiction or authority to change a Final Order of another Chancery Judge, thirteen (13) years after a Property Settlement Agreement was signed by both parties, their attorneys and the chancery judge in the divorce hearing after both parties are deceased.

I. JUDICIAL NOTICE

The chancery court and the decision of the court below conflict with this court and other federal and state courts, including the Supreme Court of Mississippi's decision that reversed the lower court when judicial notice was taken in a final order. *See Enroth v. Memorial Hospital at Gulfport,* 556 So.2d 1377 (Miss. 1990) (unpublished opinion), *see Tricon Metals Services, Inc. v. Topp,* 516 So.2d 236, 239 and *Enroth v. Memorial Hosp. at Gulfport,* 566 So. 2d 202, 204 (Miss. 1990). Stating, "Because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b)." *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) (citations omitted); *see also Holloway v. Lockhart,* 813 P.2d 874, 879 (8th Cir. 1987) (citing Fed. R. Evid. 201(b) advisory committee notes). *American Prairie Const. v. Hoich,* 560 F.3d 780, 797 (8th Cir. 2009).

¶ 44. App.14a,15a, In the two (2) cases cited by the court below, *In re J.C.*, 347 So. 3d 1188, 1194 (¶ 12) (Miss. Ct. App. 2022) And *Peden v. City of Gautier*, 870 So. 2d 1185, 1186-87 (¶¶ 3, 7) (Miss. 2004), judicial notice was taken at the hearing, when both litigants, plaintiff and defendant, both had an opportunity to be heard. In the case below, judicial notice was taken in the Final Order without Bernice having an opportunity to be heard. F.R.C.P. 201(e) and M.R.C.P. 201(e). In *Id. Enroth v. Memorial Hospital, the* Supreme Court of Mississippi also stated, "If the finding is predicated upon Judicial Notice, the Court should of course, allow a reasonable opportunity to be heard in opposition." The Supreme Court of Mississippi further stated, one further point requires note. "Rule 201(e) provides that a party affected by the Court's taking Judicial Notice of a fact is entitled to an opportunity to be heard."

This decision below also conflicts with the Federal Rule of Evidence 201(b) and with the decision in, *American Prairie Const. v. Hoich*, 560 F.3d 780, 796-97 (8th Cir. 2009). The 8th circuit stated, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In the case below the court took judicial notice of a contempt order and a consent order not in the record.

In *Baker v. Barnhart*, 457 F.3d 882, 891 (8th Cir. 2006)." *American Prairie Const. v. Hoich*, 560 F.3d 780, 796 (8th Cir. 2009), the 8th Circuit stated, "We review a district court's decision to take judicial notice for abuse of discretion." the Eighth Circuit emphasized that because there was no document expressly stating

that the accountant was an agent, the trial court's post-trial judicial notice violated rules of evidence, including hearsay rules, and did not afford the parties an opportunity to respond."

II. SUMMARY JUDGEMENT

Under Fed. R. Civ. P. 56, summary judgment may only be granted, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment . . . a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 249 (1986).

Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In the case below, Misty Singletary provided an affidavit, however, did not attach any of the documents she swore under oath were attached, that were signed by William Rutland, Sr., United Southern Bank and Athene insurance company. Even if they had been provided, they would not be first-hand knowledge and subject to the hearsay rule. For evidentiary purposes, unauthenticated evidence cannot be considered by the trier of fact. Fed. R. Evid. 901. Even moving affidavits should be from witnesses with actual personal knowledge; lack of personal knowledge is fertile ground for

reversal. *See, e.g., Dorsey v. Les Sans Culottes,* 43 A.D.3d 261 (1st Dept 2007). Regions Bank failed to meet its burden under Fed. R. Civil Procedure 56. Neither Regions Bank nor Misty Singletary produced the documents nor did not have firsthand knowledge. *Form of Affidavits*, Rule 56–Summary Judgment, Miss. R. Civ. P. 56(e) provides that the records must be attached to the affidavit.

In ¶ 16, App.5a, 6a the lower Court states, "Absent a showing that the trust was terminated," the trial court found the trust to be irrevocable. However on line 5, of the Chancery Courts Findings of Facts and Conclusion of Law, Final Order of June 17th 2022, the court did determine that, "Attached to the property settlement agreement is a page from the financial statement that includes the insurance policy that makes up the irrevocable trust created on April 11, 1991," App.21a, at this point Summary Judgement should have been denied or rule that the trust was divided 50/50 in the divorce.

In *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) this court held, "[o]n summary judgment, the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion," 398 U.S. 159, *United States v. Diebold, Inc.*, 369 U.S. 654, 369 U.S. 655 (1962). "We think respondent's failure to show there was no policeman in the store requires reversal." In the case below Regions Bank failed to foreclose the possibility that the three (3) adult children did not agree to the 50/50 split, why Schedule "A" the asset section of the trust was blank and there were no documents attached to Misty Singletary's affidavit. The primary holding in *Adickes v. S. H. Kress*

& Co., 398 U.S. 144 (1970), A party seeking summary judgment on the basis that no evidence supports a claim must negate all the possible inferences by which a jury could find in favor of the opponent. Regions Bank did not meet their burden under *Id. Adickes v. S. H. Kress & Co.*

The ruling of the court below conflicts with this Court's ruling on Summary Judgement. This court held, "A defendant cannot get summary judgment through a conclusory assertion that the plaintiff does not have evidence to support the complaint. Instead, the defendant must show the absence of evidence in the discovery record." *Celotex Corp. v. Catrett,* 477 U.S. 317, 333 (1986).

Fifth Circuit states, in *International Shortstop, Inc. v. Rally's*, 939 F.2d 1257, 1263 (5th Cir. 1991). We are guided by the procedural framework of Rule 56 of the Federal Rules of Civil Procedure and two recent Supreme Court cases ironing out its wrinkles. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Under Fed. R. Civ. P. 56, summary judgment may only be granted, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment . . . a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 249 (1986). The chancery court and the court below assigned a positive degree of credibility to the letter of Jo Ann's

attorney written to William's attorney three months after the Property Settlement Agreement was signed and none to William's attorney letter and the affidavit of Misty Singletary.

In the case below there were several material fact disagreements between the parties and clearly the fact the court felt the need to do its own research to find a conclusion of law to settle disputed facts for the movant, Regions Bank, should make evident that material facts existed and summary judgement at this point was improper. "[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 248 (1986).

III. FOURTEENTH AMENDMENT – DUE PROCESS

The Fourteenth Amendment of the Constitution states,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By the chancery court and the court below affirming, taking Judicial Notice in the final order, Bernice was

denied her due process by not being allowed the Opportunity to be Heard. The case below should have the same equal protection and case law should have been applied equally, and the court below should have allowed Bernice to have the same equal protection under the law by the Fourteenth amendment. *Id. Enroth*, and *Anderson v Liberty Lobby, Inc.*, 477 U.S. 249 (1986).

In ¶ 41. The court below stated, to the extent Bernice claims it was error for the trial court to curtail her attempts to conduct more discovery before granting summary judgment, stating, "[t]he control of discovery is a matter committed to the sound discretion of the trial judge." *Morton*, 984 So. 2d at 342 (¶46). Citing *Holloway v. Nat'l Fire & Marine Ins. Co.*, 360 So. 3d 671, 677 (¶15) (Miss. Ct. App. 2023). However, with all due respect, the court below has misapprehended the facts, Bernice was not seeking to conduct more discovery, Bernice was never allowed to depose any of the three (3) key witnesses. The request to do depositions, which was denied, prevented full discovery from the beginning. The chancery court by denying depositions from the beginning, tied Bernices hands behind her back and was denied a full and fair opportunity to put on a defense and denied due process.

Another case from the Second Circuit Court of Appeals also underscores the due process concerns raised by judicial notice. In *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009), the Second Circuit noted that an immigration judge erred in taking judicial notice without providing an opportunity to rebut the officially noticed fact. The appellate court acknowledged that the Federal Rules of Evidence did not apply to immigration removal proceedings and to the immigration judge's administrative notice of the existence of adult strip

clubs in Buffalo, "but concluded that the Fifth Amendment due process standard did apply."

The chancery court never analyzed or mentioned the inadmissible evidence presented by Regions Bank. The trust asset section, schedule "A" was a blank sheet of paper, Ms. Singletary's affidavit was not first-hand knowledge, the documents were not attached and Regions never provided proof that the adult children did not approve of the 50/50 split. It is the movant's task to negate, if he can, the claim basis for the suit. *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986). Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In *International Shortstop, Inc. v. Rally's*, 939 F.2d 1257, 1268 (5th Cir. 1991).

The Fifth Circuit stated, "Summary judgment is a lethal weapon. We must afford prospective victims some protective armor if we expect them to properly defend against it." A litigant nor a prospective victim or an attorney can properly defend itself against summary judgement if they start out with their hands tied.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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