IN THE SUPREME COURT OF MISSISSIPPI

No. 2001-CA-00908

BARRY POPE, INDIVIDUALLY, AND AS A SHAREHOLDER OF WORLDWIDE FOREST PRODUCTS, INC. — APPELLANTS

VS.

BRIAN SORRENTINO, DALE HILL, WORLDWIDE FOREST PRODUCTS, INC., KEMPER PRESSURE TREATED FOREST PRODUCTS, INC., LIFE2K.COM, INC., ALGONQUIN ACQUISITION CORPORATION, GENERATION ACQUISITION CORPORATION, GENERATION ACQUISITION CORPORATION, SYNDICATION NET.COM, INC., CASTLE SECURITIES CORPORATION AND JOHN DOES 1-5 — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY

APPELLANT'S PRINCIPAL BRIEF

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IN THE SUPREME COURT OF MISSISSIPPI

No. 2005-CA-02338

BARRY POPE, INDIVIDUALLY, AND AS A SHAREHOLDER OF WORLDWIDE FOREST PRODUCTS, INC. — APPELLANTS

VS.

BRIAN SORRENTINO, DALE HILL, WORLDWIDE FOREST PRODUCTS, INC., KEMPER PRESSURE TREATED FOREST PRODUCTS, INC., LIFE2K.COM, INC., ALGONQUIN ACQUISITION CORPORATION, GENERATION ACQUISITION CORPORATION, GENERATION ACQUISITION CORPORATION, SYNDICATION NET.COM, INC., CASTLE SECURITIES CORPORATION AND JOHN DOES 1-5 — APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order for the justices of the Supreme Court and the Court of Appeals to evaluate possible disqualification or recusal.

1. The Plaintiff and Appellant Barry Pope in his individual capacity and in his capacity as a shareholder of Worldwide Forest Products, Inc.
2. Barry Pope's attorney Clarence McDonald Leland of Brandon, Mississippi.
3. A Defendant and Appellee, Brian Sorrentino who is from Maryland.
4. A Defendant and Appellee, Dale Hill who is from Texas.

5. A Defendant and Appellee, Worldwide Forest Products, Inc. is a corporation organized under the laws of the State of Delaware.

6. A Defendant and Appellee, Kemper Pressure Treated Forest Products, Inc. is a corporation organized under the laws of the State of Mississippi.

7. A Defendant and Appellee, Life2K.com is a corporation organized under the laws of the State of Delaware.

8. A Defendant and Appellee, Algonquin Acquisition Corporation. is a corporation organized under the laws of the State of Delaware.

9. A Defendant and Appellee, Generation Acquisition Corporation is a corporation organized under the laws of the State of Delaware.

10. A Defendant and Appellee, Syndication Net.Com, Inc. is a corporation organized under the laws of the State of Delaware.

11. A Defendant and Appellee, Castle Securities Corporation is a corporation organized under the laws of the State of New York.

12. The defendants' attorneys H.D. Granberry, III, Esq., Attorney at Law, Nashville, Tennessee, Sam S. Thomas, Esq. Of the Underwood/Thomas firm, Jackson, Mississippi and Guy N. Rogers, Jr., Esq. Of the Rogers and Rogers firm in Pearl, Mississippi.

Respectfully submitted,

Clarence McDonald Leland

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STATEMENT OF THE ISSUES

This is a contract case which was dismissed on summary judgment in the trial court and there were attorney fees awarded because of a continuance granted when the plaintiff was proceeding *pro se*.

I. Was the trial court correct when it ruled that Barry Pope had put forth no genuine issue of material fact as to defendant Castle Securities.

II. Was the trial court correct when it granted summary judgment as to Brian Sorrentino, Dale Hill, Kemper Pressure Treated Products, Inc., Life2K.Com, Algonquin Acquisition Corporation, Generation Acquisition Corporation and Syndication Net.Com based upon the statute of limitations having run.

III. Was the trial court correct when it granted, in part, defendants Brian Sorrentino, Dale Hill, Kemper Pressure Treated Products, Inc., Life2K.Com, Algonquin Acquisition Corporation, Generation Acquisition Corporation and Syndication Net.Com, Inc.'s Motion For Payment of Attorney Fees and Expenses as a result of a continuance granted on September 22, 2004, when the plaintiff was proceeding *pro se* and defense counsel failed to object or raise the issue of attorney fees.

STATEMENT OF THE CASE

(A) Procedural History

Barry Pope filed his complaint in his individual capacity and as a shareholder of WorldWide Forest Products, Inc. (hereinafter referred to as "WFP") in the Circuit Court of Madison County on November 26, 2001. (R. 12) Mr. Pope filed his amended Complaint on January 6, 2003. (R. 64) He named as defendants Brian Sorrentino, Dale Hill, Worldwide Forest Products, Inc., Kemper Pressure Treated Forest Products, Inc., Life2K.Com, Inc. Algonquin Acquisition Corporation, Syndication Net.Com, Inc., Castle Securities Corporation, and John Does, 1-5 (R.12)

Barry Pope alleged, *inter alia,* that he had filed a civil action against WorldWide Forest Products, Inc. and David Wise, in the Circuit Court of Madison County on September 22, 1994. (R.66) This first suit arose out of WFP's failure to pay him $3.0 million dollars ($3,000,000) for work done on behalf of WFP asserting various claims such as breach of contract and fraud seeking both compensatory damages and punitive damages. (R.66)

Beginning in March of 1996, the parties negotiated a settlement which resulted in a consent judgment and amended consent judgment which were executed and filed in that action. (R.67) Pope was to receive 30,000 shares of unrestricted common stock with a commitment price of at least $5.00 per share upon the public offering. (R.93) In the event that the price of the stock did not exceed $5.00 per share upon the public offering, WRP would issue additional shares of unrestricted common stock to Barry and his attorney to equal a cumulative value of $200,000.00 (R. 94) Barry Pope was also to receive 150,000

warrants with an exercise price of $1.00 each with a stipulation that the warrants would be reissued on their expiration date of December 1, 1996, if they had not been exercised. In addition, these warrants could not be diluted by WFP with a reverse split as to either the number of warrants or the $1.00 value.(R.95) WFP agreed to register these warrants and in the event WFP failed to perform, WFP would bear all expenses and fees incurred in connection with its obligations hereunder. (R.95)

On June 28, 1996, an Amended Consent Order was executed and filed modifying the previous Consent Order in that WFP would issue unrestricted certificates of registered shares of common stock in the same number as before, 30,000 to Barry Pope and setting forth the requirement that all warrants issued would be exercised by the effective date of the warrants with independent funds apart from those funds paid by WFP. (R. 98) WFP failed to perform under the terms of the Consent Judgment and the Amended Consent Judgment which brought about the case at bar.(R. 15)

On January 29, 2002, defendants filed separate answers and defenses with the exception of Castle Securities. (R.2) Castle filed its Answer on January 31, 2002, Various motions were filed seeking dismissal for lack of jurisdiction. (R. 3) An amended complaint was filed on January 6, 2003. (R. 5) On October 19, 2004, a Motion For Summary Judgment was filed by defendants other than Castle Securities. (R. 7) Castle Securities filed its Motion To Dismiss or For Summary Judgment on November 18, 2004. (R. 8) On October 21, 2004, several defendants filed a Motion for Payment of Attorney Fees and Expenses because of the granting of the continuance. Plaintiff filed his response on November 22, 2005, arguing that defendants agreed to the continuance and that the

motion was untimely and procedurally barred. (R. 197) Plaintiff then filed his response to Castle's motion on November 29, 2004. (R. 8)

On January 10, 2005, an Order was entered granting Defendant Castle Securities Corporation's Motion to Dismiss or for Summary Judgment, the court finding that there exists no genuine issue of material fact and that Castle was entitled to judgment as a matter of law. (R. 269) Summary judgment based on the statute of limitation was granted to the remaining defendants, except reserving Barry Pope's right to renew the Amended Consent Judgment against WorldWide Forest Products, Inc. (R. 269-270)

The Order granting dismissal to Castle and summary judgment to the other defendants did not set forth the reason for the Court's granting of the motions and Pope, on January 18, 2005, filed a timely Motion To Request Findings Of Fact And *Conclusions Of Law And For Clarification And Other Relief* because the Order did not contain sufficient information to all the Plaintiff to respond. (R.272) The Court responded on July 8, 2005, when an Amendment To Judgment Dated January 10, 2005, was filed. (R. 325)

The record reflects that Barry Pope filed his Motion To Reconsider on July 18, 2005, (R.9) although the file stamp shows that it was filed on June 20, 2005, which is obviously impossible. (R. 328) On September 7, 2005, an Order was filed which dismissed Barry Pope's cause with prejudice. (R. 350) On November 8, 2005, an Order Extending Time To File Notice Of Appeal was signed allowing Pope until December 5, 2005, to file his notice of appeal. (R. 355) On December 2, 2005, Plaintiff filed his Notice Of Appeal. (R.351) On December 9, 2005, Pope filed his Motion For Appeal In Forma

Paupis because he could not afford to pay the cost of the record in this matter. (R. 353)

On May 16, 2006, an Order was entered denying Barry Pope the right to appeal in forma pauperis finding that there was no authority that allowed the Court to facilitate an appeal in forma pauperis, but that the issue was so important to the plaintiff that the Mississippi Supreme Court should decide the issue. (R. 361) Pope's attempt to prosecute this appeal in forma pauperis was not successful and on July 21, 2006, Pope filed his Designation of the Record, Certificate of Compliance and deposited $4,000.00 with the Circuit Court for payment of copying the record. (R. 365) Pope's father provided the money for payment of copying costs.

(B) Facts

Barry Pope was a licensed stock broker dealer who had his own firm called Pope Investments. (Exhibit 1, p. 25) In June of 1991, Barry was solicited by David Wise, who was running WFP, to promote WFP as WFP needed its stock price to rise from $0.50 to at least $3.00. (Exhibit 1, pp. 30,61) Pope spoke with the NASD before promoting the stock of WFP to make sure what WFP wanted done was legal. (Exhibit 1 p. 65) Pope was able to get the stock price from 50 cents to $3.25, which he was hired to do, so that the stock could come off pink sheet listing and be traded on NASDAQ. (Exhibit 1, p. 63) At some time after the stock was listed on NASDAQ it carried a bid price of $4.50. (Exhibit 1, p. 107) The stock was actually traded on NASDAQ under the symbol of WOODE from March 5, 1992, until the middle of June of 1993, well over one year. (Exhibit 1, p. 103)

In return for his promoting WFP stock, Pope was to receive 200,000 one-dollar warrants (Exhibit 1, p. 86) and 200,000 shares of stock which would be worth $1 million

at the initial public offering price. (Exhibit 1, p. 87) Barry Pope had faith in the company and he purchased approximately 40,000 shares of non-restricted stock of WFP on his own for $40,000.00. (Exhibit 1, p. 103-105) Later, he gave the stock back to WFP and was to receive restricted stock, which he never received, (Exhibit 1, p.108) for his non-restricted stock because he wanted the company to have the money, Barry wanted to help the company. (Exhibit 1, p.105)

Pope was successful in promoting the WFP stock and getting to stock well over the $3.00 price target which had been agreed to. (Exhibit 1, p.107) The stock actually hit $4.50 bid on June 10, 1992. (Exhibit 1, p. 107) He was then asked, in the fall of 1992, to get the warrants exercised that were floating around. (Exhibit 1, p. 110) Barry's compensation for getting these warrants exercised was to be another 200,000 shares of stock at the secondary offering price of $5.00 per share, which put his compensation for his service so far at $2.8 million. (Exhibit 1, p. 111)

WRP needed to raise another $2 million in debt and it had tried to obtain a FMHA loan and had failed. Barry Pope had the contacts to obtain this loan he agreed to help with the process. For his help in obtaining the FMHA loan he was to be paid $200,000.00 for getting WFP $2 million. (Exhibit 1, p. 111) In addition to securing approval for the FMHA loan, Barry raised $5 million from Bernie Ebbers, bringing a check for that amount to David Wise who refused to cash the check. (Exhibit 1, p. 114, 115)

There were witnesses who heard Mr. Wise make the contracts with Mr. Pope, including Denise Jevne (Exhibit 1, p. 119), Mr. Milton Hall (Exhibit 1, p. 123) and Ed

Generes. (Exhibit 1, p. 124) In early 1993, Barry began to suspect that his contracts were not going to be honored and on March 11, 1993, his suspicions were confirmed as Brian Sorrentino, who had taken over as CEO of WFP from David Wise, and David Wise told Pope that his contracts would not be honored and that they would use their politics to see that he would never make it to court if he got an attorney. (Exhibit 1, p. 129)

Barry hired an attorney and his case was set for trial in May of 1995 in Madison County Circuit Court. (Exhibit 1, p. 130) The trial was recessed in order for the parties to confer and try to reach a settlement, which the parties eventually effectuated. The trial judge promised that the trial would resume if the parties did not settle. (Exhibit 1, p. 130, 131)

The settlement was memorialized in a Consent Order filed into the record on March 4, 1996. (R. 93) On June 28, 1996, an Amended Consent Order was filed which amended the original Consent Order in several ways. (R. 98) The basis of the instant action, in a nutshell, is that the settlement represented by these consent orders was procured by the defendants by fraudulent inducement in inducing the Plaintiff to settle his claims and that the stock and warrants that the Plaintiff owns should be converted to the successor company like everyone else's stock was converted. (Exhibit 1, p. 350)

Brian Sorrentino, who was running WFP, knew that there never would be a WFP public offering because he knew that the plant site was contaminated as early as November 11, 1994, when Brian Sorrentino testified under oath, in a deposition in another case, that the site was "worthless"....."a greasy contaminated spot in mud. That's really what it is." (R. 145, 146) proving that he knew well before he settled with Barry

that there never could be a WFP public offering. (Exhibit 1, p. 349) Sorrentino admitted to Pope in 1999 that he settled the case knowing that there would be no Worldwide stock deal ever. (Exhibit 1, p. 376) Barry did not find out about this deposition until the fall of 2002, after filing the instant suit. (Exhibit 1, p. 348)

The Plaintiff sued other entities and people other than Brian Sorrentino, and Worldwide Forest Products, Inc. (R.12) Barry also sued Dale Hill, Kemper Pressure Treated Forest Products, Inc., ("Kemper"), Life2K.Com.("Life2K"), Algonquin Acquisition Corporation ("Algonquin"), Generation Acquisition Corporation ("Generation"), Syndication Net.Com, Inc. ("Syndication") and Castle Securities Corporation ("Castle").

Barry sued Dale Hill because he guaranteed Barry's contracts with WFP and thereafter the conversion of WFP shares to Kemper (Exhibit 1, p. 306, 307, 341) which Hill and Sorrentino had purchased in 1995, without Pope's knowledge, to be the real stock deal instead of WFP. (Exhibit 1, p. 174) Hill and Sorrentino needed the Plaintiff to testify in two cases going on in federal courts in North Mississippi in after the settlement of the first lawsuit happened in 1996. (Exhibit 1, p. 282, 283)

Sorrentino called and asked the Plaintiff to testify in a bankruptcy cased in Aberdeen shortly after the settlement in 1996, wherein the previous CEO, David Wise, Wise's sister, Marilyn Webb, and Ed Generis were claiming to be owed money by WFP and Hill was trying to put the company in involuntary bankruptcy. (Exhibit 1, p. 282)

Hill called Pope shortly after Barry was called by Sorrentino as set forth above. Hill wanted Pope to testify in a case filed in federal court in Oxford in order to get rid of

David Wise which would close the Worldwide issue, that his contracts would be honored and that he, Dale Hill, would see to it because he was "the money man." (Exhibit 1, p. 339, 340, 341) and again in April of 1999, Hill promised that Pope's shares would be converted to Kemper shares like everyone else's. (Exhibit 1, p. 341)

The other corporate defendants were corporations which were successors to Worldwide. Worldwide went to a corporation called Kemper, to a company called Life2K to a company called Algonquin to a company called Generation Acquisition Corporation, which used a name change to become Syndication Net.Com in what is called a "roll up." (Exhibit 1, p. 34)

The Plaintiff agreed to settle his first suit in March of 1996, when the first Consent Order was entered. During the period of time from March 1996, up to April of 1999, Barry Pope was continually reassured by Brian Sorrentino and Dale Hill that his settlement was secure and that he would get his stock and his warrants if he helped protect WFP from David Wise and others. Barry spoke to Dale Hill on the phone some 39 times during that period of time and Dale Hill always told him he was guaranteed. (Exhibit 1, p. 173)

Brian Sorrentino as well continued to reassure Barry Pope that his stock was secure. From the time of settlement until April 12, 1999, continued his pattern of deception as to the WFP initial public offering being assured. Sorrentino told Pope that the registration statement for the WFP stock was to be filed as soon as the Oxford case that Pope testified in was over. (Exhibit 1, p. 394) Once the Oxford verdict came out, Pope knew that WFP was a toxic waste dump but Sorrentino continued to reassure him

that the WFP stock deal was going forward saying that he was going to make a deal with the EPA to get the plant open. (Exhibit 1, p. 154) Pope had reason to believe that the EPA could be dealt with because Sorrentino's father was an EPA lobbyist who could get the site open. (Exhibit 1, p.16) Barry had reason to believe that Sorrentino was telling the truth about the WFP stock offering because Sorrentin was continuing to raise money, some $4 million between the settlement date and April of 1999. (Exhibit 1, p. 391) Pope, being a licensed broker knew that Sorrentino could go to prison for raising money if he knew there would be no stock deal. (Exhibit 1, p. 392) Barry was told there was never going to be a WFP deal, that it was Kemper all the time and that he (Pope) f'd up trusting him (Sorrentino). (Exhibit 1, p. 39)

The Plaintiff sued Castle because Mike Studor, a managing underwriter for the WFP stock deal had assured Pope that the WFP stock deal was a firm commitment underwriting. (Exhibit 1, p. 4,5) A firm commitment underwriting is one in which the underwriter guarantees that the stock will sell at a given price, in this case $6.00 per share and if the stock doesn't sell all of the shares at that price, then the underwriter will purchase the shares that did not sell. (Exhibit 1, p. 388) Because the deal was represented as a firm commitment offering, Barry wasn't worried about getting his money for his stock as he would be guaranteed $6.00 per share for his stock at the initial public offering. (Exhibit 1, p. 346, 388) Pope was shown a registration statement at the settlement negotiations which said that the WFP stock deal was a firm commitment offering by Castle. (Exhibit 1, p. 388, 389) Mike Studor of Castle, told Barry that there had been a firm commitment letter issued and that the terms were $6.00 per share.

(Exhibit 1, p. 4,4)

In addition, Mike Studor told Pope, in April of 1999, that Castle did not do due diligence before it agreed to underwrite the WFP stock deal. If it had done proper due diligence, it would have found that there were toxic waste problems with the company and Castle would not have issued the firm commitment letter on which Pope relied. (R. 267, 268) Barry Pope would not have agreed to settle the first lawsuit had he known the firm commitment letter would be no good. (R. 267, 268)

Brian Sorrentino never intended to take WFP public as he knew and told the plant manager at Kemper, Robert Dugan, that Sorrentino was going public with Kemper.(R. 129) He made these statements to Mr. Dugan in January through March of 1996 (R. 129), before Barry's first lawsuit was settled for WFP stock and warrants, March 4, 1996, (R. 93) and the Amended Consent Order of June 28, 1996. (R. 97) In addition to this, Sorrentino told Mr. Dugan that he would have to get rid of WFP so that the EPA would clean it up. (R.129)

Mr. Dugan also testifies that Brian Sorrentino was well aware of the waste liability and he directed wastes from Kemper to WFP for disposal. (R. 129). This is further evidence of Sorrentino's pattern of deception and deceit that he never intended to fulfill Barry's contracts and induced the settlement by fraud. Perhaps the most telling fact is that Sorrentino allowed WFP to be administratively dissolved even before the Oxford case went to trial. WFP was administratively dissolved two months before the November of 1997 court date. (Exhibit 1, p. 417) Even after the Oxford verdict in February of 1999, Sorrentino continued to assure Barry Pope that there would be a WFP public offering,

which he knew was impossible because the company no longer existed. (Exhibit 4, p. 8,9), (R. 342-344)

SUMMARY OF THE ARGUMENT

The trial court erred as a matter law when it ruled that Castle Securities Corporation was entitled to judgment as a matter of law because there was no genuine issue of material fact. This is error in that a jury could determine that Barry Pope was assured by Castle Securities' managing underwriter, Mike Studor, that a firm commitment underwriting was in place for WFP stock which would have assured Pope a minimum sales price for his stock of $6.00 per share for his stock at the initial public offering.

The trial court erred as a matter of law when it granted defendants Brian Sorrentino, Dale Hill, Kemper Pressure Treated Product, Inc., Life2K.Com, Algonquin Acquisition Corporation, Generation Acquisition Corporation and Syndication Net.Com, Inc.'s Motion For Summary Judgment based upon the Statute of Limitations except as to the right of the Plaintiff, Barry Pope, to renew the Amended Consent Judgment against WorldWide Forest Products, Inc. because what Barry Pope knew and when he knew it are jury questions and not questions of law for the court to determine.

The trial court erred as a matter of law when it ruled that Brian Sorrentino, Dale Hill, Kemper Pressure Treated Product, Inc., Life2K.Com, Algonquin Acquisition Corporation, Generation Acquisition Corporation and Syndication Net.Com, Inc.'s Motion For Payment of Attorney Fees and Expenses should be granted in part. The trial court found that these defendants were entitled to attorney fees an expenses as a result of

the latest continuance of the trial date on September 22, 2004, wherein Barry Pope was granted a continuance to obtain counsel without objection of defendants' counsel and without defense counsel asking for attorney fees and expenses at that time and in fact defense counsel said, "Your Honor, I'm not going to argue about a continuance because that's a matter within discretion . . . ." (Supp. Volume 1, p. 20)

ARGUMENT

I. There are genuine issues of material fact for trial regarding Barry Pope's claims against Castle Securities Corporation.

A. Standard of Review

The appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. The Court employs a *de novo* standard of review of the lower court's grant or denial of summary judgment and examines all the evidentiary matters before it including admissions in the pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. The evidence in this case must be viewed in the light most favorable to Barry Pope. *Partin v. North Mississippi Medical Center,* 929 So.2d 924(¶37) (Miss. App. 2005)

If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in his favor. If there is even one genuine issue of material fact, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment are present where one

party swears to one version of the matter in issue and another says the opposite. *Heigle v. Heigle*, 771 So.2d 341, 345(¶ 8) (Miss. 2000)

In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, in this case, the defendants must demonstrate that there are no genuine issues of material fact for the jury to consider. The plaintiff, Barry Pope, should be given the benefit of the doubt. *Williamson ex rel. Williamson v. Keith*, 786 So.2d 390, 393(¶ 10) (Miss. 2001) (quoting *Heigle v. Heigle*, 771 So.2d 341, 345(¶ 8) (Miss. 2000)). The non-moving party, here the plaintiff, must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Dailey v. Methodist Medical Center*, 790 So.2d 903, 915-16(¶ 15) (Miss.Ct.App. 2001).

Motions for summary judgment should be viewed with a skeptical eye, and in questionable cases, the trial court should deny the motion. *Dailey*, 790 So.2d at 907 (¶ 3); *Burkes v. Fred's Stores of Tennessee, Inc.*, 768 So.2d 325, 328(¶ 7) (Miss.Ct.App. 2000). All the non-moving party, Barry Pope, need do in order to defeat a motion for summary judgment is to establish a genuine issue of material fact. *Dailey*, 790 So.2d at 918(¶ 23). Barry Pope, the plaintiff in this case does not have to *prove* all of the elements of its case in order to survive a pre-trial, summary judgment motion. The non-moving party only has to demonstrate that there are genuine issues of material fact. *Id.* The trial court does not try the case on summary judgment evidence, but only determines whether a genuine issue is present based on the issues made material by substantive law. *Murphree v. Federal Ins. Co.*, 707 So.2d 523, 529 (Miss. 1997).

B. There are genuine issues of material fact to be considered by a jury as to Barry Pope's claim against Castle Securities Corporation.

Mike Studor, a managing underwriter for Castle who was handling the WFP deal assured Pope that the WFP stock deal was a firm commitment underwriting. (Exhibit 4, p.4) Mike Studor told Pope, in April of 1999, that Castle did not do due diligence before it agreed to underwrite the WFP stock deal. If it had done proper due diligence, it would have found that there were toxic waste problems with the company and Castle would not have issued the firm commitment letter. (R. 267, 268) Barry Pope would not have agreed to settle the first lawsuit had he known the firm commitment letter would be no good. (R. 267, 268)

These are genuine issues of material fact which a jury could decide in Barry Pope's favor. A dispute over a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Page v. Wiggins,* 595 So.2d 1291, 1295 (Miss 1992). Summary judgment is improper unless it can be shown that no reasonable juror could decide the material fact in favor of the nonmoving party. *Drummond v. Buckley,* 627 So.2d 264, 271 (Miss. 1993).

In addition, Mike Studor told Pope that there had been a firm commitment letter issued and that the terms were $6.00 per share. (R. 132) This was done before Barry settled the first lawsuit in March of 1996. (R. 338). Barry did not discover that this was not true until after the Oxford verdict in February of 1999 and when Sorrentino admitted that the firm commitment letter was used to deceive him until April of 1999. (R. 268) The statute of limitations is triggered by the discovery rule. Barry Pope discovered the

pollution problems, as well as the deception and negligence of Castle and Sorrentino in April of 1999. Therefore, the instant suit was timely filed on November 26, 2001. M.C.A. § 15-1-49, 15-1-67.

C. The trial court erred in granting summary judgment to defendants based on the statute of limitations.

Defendants claim that Plaintiffs' claims are barred by the statute of limitations. However, Plaintiffs' claims are not barred by the statute of limitations because the claims were brought within the applicable time period and the period was tolled by the concealment of the wrongful acts by the Defendants. Miss. Code Ann. §15-1-67 specifically provides the following:

> **Effect of fraudulent concealment of cause of action**. If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time in which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

The basis of this suit is that at no time were the materially false and misleading statements or omissions of material facts corrected or disclosed by the Defendants until April of 1999. The Defendants affirmatively and actively concealed the misrepresentations and omissions of material fact or, in the alternative, committed the subject misrepresentations and omissions of material fact in such a manner that it concealed said misrepresentations and omissions of material fact. Plaintiffs could not, through reasonable diligence, have discovered the misrepresentations and omissions of material fact since the violations and wrongdoing were "self-concealing" and the pertinent information was **exclusively** within the knowledge and possession of

Defendants until Barry Pope obtained a copy of the Oxford verdict in March of 1999 and found out that the plant site of WFP had major pollution problems. Sorrentino continued to deceive Barry until finally admitting, in April of 1999, that there was never to be a WFP stock deal, that it had always been a deal for Kemper. (R. 132-135)

The thrust of Plaintiffs' case is based on misrepresentations and concealment of current, existing and material facts. Generally, "[u]nder Mississippi law, a cause of action for fraud accrues on completion of the [event] induced by the false representation or upon consummation of the fraud." *Black v. Carey Canada, Inc.*, 791 F. Supp. 1120, 1123 (S.D. Miss. 1990). However, Plaintiff has provided sufficient proof of specific acts of fraudulent concealment which would act to toll the statute of limitations pursuant to the provisions of Miss. Code Ann. § 15-1-67 as well as § 15-1-49 which contains a discovery provision for when Barry Pope discovered he was not going to be paid for his services under his contracts, which all but one were unwritten and would be covered by § 15-1-49, which covers professional services. *In re Estate of Stewart,* 732 So.2d 255(¶ 9) (Miss. 1999).

The responsibilities owed by the Defendants required that they disclose any information in their possession or discoverable with reasonable diligence that is material to the transaction. See *Stewart v. Gulf Guaranty Life Insurance Company.*, 846 So.2d 192(¶43) (Miss. 2002). Moreover, Defendants knew, or should have known, that Barry Pope was relying on Defendants' duty of disclosure and loyalty. Defendants intended for the Pope to rely upon the disclosures, and simply **decided** not to make the necessary disclosures. There is no excuse for Brian Sorrentino to have knowledge of material facts

which may affect whether or not Worldwide Forest Products, Inc. would go public and to withhold that information from Barry Pope and other shareholders and take affirmative actions to conceal such facts from Pope. There is no excuse, other than fraud, for Sorrentino to fail to tell Pope that WFP had been administratively dissolved, that he was converting other WFP shareholders to Kemper as late as 1999, (Exhibit 3, p.10-11) that there never would be a WFP deal because of toxic waste at the plant and that he never intended to do a deal with WFP, that Kemper was the deal all the time. (R. 132-135)

The evidence shows Barry Pope has alleged and established material questions of fact concerning the fraudulent concealment and omissions by the Defendants which toll the statute of limitations in this case. This case has always been about a pattern or practice of deceitful practices and not a contract claim. In the present case, the Plaintiffs have shown the following:

(1) The Defendants had a duty to disclose the fact that the there were hazardous wastes which would effectively prevent Worldwide Forest Products, Inc. from going public.

(2) The Defendants had a duty to disclose that they never intended that WFP would go public and that the successor company was the one that would go public;

(3) The Defendants had a duty to disclose that the plaintiffs that investment in WFP stock was essentially worthless because of the toxic wastes on the plant site;

(4) The Defendants had a duty to disclose that as a result of the contamination WFP would never be worth $5.00 per share;

(5) That Sorrentino intended to purchase a majority and controlling interest in Kemper and then convert WFP to Kemper shareholders to the exclusion of Barry Pope;

(6) Sorrentino failed to explain to Barry Pope that he had directed business opportunities to Kemper rather than WFP;

(7) Sorrentino failed to tell Pope that officers from WFP had been hired by Kemper in anticipation of abandonment of WFP.

(8) Sorrentino failed to disclose to Barry that he was dumping waste from Kemper on the WFP plant site.

The facts were concealed from Barry Pope and other investors. Pope never found out about the toxic wastes until after the Oxford verdict in 1999, and the Defendants should not be allowed to profit from their own affirmative acts of concealment and acts of deception.

In Mississippi, as in a number of other states, deceptive practices cases do state valid causes of action for fraud. See *Myers v. Guardian Life Ins. Co.*, 5 F. Supp.2d 423 (N.D. Miss. 1998). In *Myers*, the district court flatly rejected the argument advanced by the Defendant regarding "merger-integration", "disclaimers" and other contract related issues. The court stated: "Mr. Myers does not claim that Guardian wrongfully denied coverage under the policy. Indeed, Mr. Myers does not assert a claim for breach of contract. Instead, Mr. Myers claims that Guardian's sales practices regarding vanishing premium insurance policies constitute torts such as fraud and misrepresentation." The *Myers* Court held that the case may state a claim for fraudulent concealment and

fraudulent inducement even "assuming arguendo that the terms of Myers' policy are unambiguous and that they contradict his claims." 5 F. Supp.2d at 430-31. (emphasis added). As such, the Defendant's disclosure defense wherein they argue that Barry Pope knew in 1994 or 1996 has no merit and should be disregarded. Barry in fact filed suit in that time period and was induced by the fraud of defendants to settle that case while defendants knew and failed to disclose material facts not know to Pope that would have kept him from settling his claim, had he known of the material facts being concealed. A jury question exists as to when Barry Pope knew or should have known that there would be no WFP deal and if Sorrentino convinced Pope that there would be a deal and that it would happen by April of 1999.

In *Seaboard Planning Corp. v. Powell*, 364 So. 2d 1091, 1094 (Miss. 1978), the Mississippi Supreme Court stated: "The very nature of fraud is such that it can not be discovered until some time after the fraudulent act is committed." The question of when, by the use of reasonable diligence, the fraud could have been discovered is an issue of fact that must be resolved by the jury. *In re Catfish Antitrust Litigation*, 826 F. Supp. at 1031 ("the believability of this and related evidence . . . **is for the jury to determine**, and this evidence creates precisely the types of factual questions that should be resolved for resolution at trial.")(emphasis added). See also *Sweeney v. Preston,* 642 So. 2d 332, 336 (Miss. 1994); *Equitable Life & Casualty Ins. Co. v. Lee*, 310 F.2d 262, 270 (9th Cir. 1962). Resolution of such an issue even on a Rule 12(b)(6) motion to dismiss is inappropriate. *Crummer Company v. DuPont*, 255 F.2d 425, 432 (5th Cir. 1958)(question of whether Plaintiffs lacked knowledge of the alleged fraudulent conspiracy for the

purpose of tolling the statute of limitations, was a "fact question" which should have been left to the jury).[1] Accordingly, the Defendant's statute of limitations arguments are wholly without merit and should be rejected because it is for the jury to decide what Barry knew and when he knew it.

As Charles Dunn swore in his affidavit, "During the entire time of my representation of Barry Pope, Brian Sorrentino continued to assure both Barry and me that he was doing everything possible to effectuate a public offering of Worldwide Forest Products, Inc." Dunn went on to say that "Neither Barry Pope nor I knew of any breach of Barry's agreement with Brian Sorrentino and Worldwide Forest Products, Inc. until after the Oxford verdict was rendered." He also said "Barry Pope and I continued to expect Worldwide Forest Products, Inc. to go public until Barry's conversation with Brian Sorrentino in March of 1999." (R 342-344)

II. The trial court erred as a matter of law in granting attorney fees and expenses to defendants as a result of a continuance when defendants failed to object to the continuance or ask for attorney fees or expenses at the hearing on the continuance.

A. STANDARD OF REVIEW

On appeal, the standard of review for the award of attorney fees is the abuse of

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See also *Buford v. Howe*, 10 F.3d 1184, 1188 (5th Cir. 1994)("It is for the jury to resolve when [plaintiff], exercising reasonable diligence, knew or should have known of the injury"; the district court erroneously granted summary judgment on the basis of a medical malpractice statute of limitations which contained similar provision as to when negligence "with reasonable diligence might have been first known or discovered"). In addition to the above, the Defendant's argument relative to the statute of limitations is totally without merit because questions of when Plaintiff should have discovered the fraud, or whether Plaintiff should have discovered the fraud sooner, are "question[s] of fact. *In re Catfish Antitrust Litigation*, 826 F. Supp. 1019, 1031 (N.D. Miss. 1993).

discretion standard. *Glover v. Jackson State University,* 755 So.2d 395(¶ 24) (Miss. 2000).

B. The trial court abused its discretion in awarding attorney fees and expenses to the defendants when there was no objection to a continuance raised nor was the motion for attorney fees made at the hearing on the continuance.

A week before the scheduled September 22, 2004, trial date there was a status conference in trial court. Pope's attorney had filed a motion to withdraw and the trial court, at the status conference, was advised that his attorney would be allowed to withdraw. The purpose of the status conference was, as the court said, was to determine whether Mr. Pope wished to pursue the September 22, 2004, trial date since he did not or would not have an attorney at that time. (Supp. Vol. p. 6) The court ordered that the transcript of that hearing be transcribed and made a part of the record. (Supp. Vol. p. 7)

Mr. Pope did not want to abandon his trial date and was trying to obtain the services of an attorney to represent him as he prosecuted his case. Pope filed an emergency motion to the Mississippi Supreme Court on September 20, 2004, *pro se*, asking that the trial judge be replaced as the special judge and asking for a continuance of the September 22, 2004, trial date. The motions were denied. (Supp. Vol. p. 7)

The trial court considered both motions and denied the motion asking for the special trial judge to be replaced. The trial judge, however, said that this was the most uncomfortable case that he had ever been exposed to. (Supp. Vol. p. 8) The court paraphrased Mr. Pope's *pro se* motion in saying that Mr. Pope was complaining about his attorney withdrawing from the case, and the court allowing him to withdraw and that Mr.

Pope did not believe that he was able to adequately prosecute his case *pro se.* (Supp. Vol. p.9)

Mr. Pope informs the court that he has found counsel who asked that he obtain a continuance and that "I will be ready in court with counsel in 30 days, or you may throw my case out with prejudice." (Supp. Vol. p. 11) Mr. Pope argued to the court that he had lost four court dates, three court dates that he objected to, because of what the defendants had done. (Supp. Vol. p.18) The trial court, without objection of defense counsel, granted Mr. Pope's motion for continuance. (Supp. Vol. p. 19) The court then, after granting the continuance, asked defense counsel if there was some objection. (Supp. Vol. p. 20)

Defense counsel then said, "Your Honor, as I understand it, what he's – what he's said here on the record is that he has identified a lawyer and if this lawyer does not take his case and agrees to take it through to the end, that he is agreeing that this Court can dismiss his case with prejudice." To which Mr. Pope replied, "Absolutely.

To which defense counsel replied, "Now, Your Honor, I'm not going to argue about a continuance because that's a matter within discretion, but I have my clients here and we are all ready to go, but I would like for this attorney to be identified here on the record and if this particular attorney doesn't take the case, as I understand an offer has been made by Mr. Pope, that this court will be authorized without further proceedings to dismiss his case with prejudice." The Court replied, "Well, he said he'd let me know within 48 hours. I'll allow him to do that." (Supp. Vol. p. 20)

Nearly a month later, after Pope was represented by counsel, defendants filed a

Motion For Payment Of Attorney Fees And Expenses, even though they agreed to the continuance, apparently convinced that Pope would not be able to obtain counsel. Had the defense objected at the hearing and Mr. Pope been able to address the objections, he would have had the opportunity to choose between the prospects of trying his case *pro se* and a continuance which could cost him more than seven thousand dollars, which he did not have. Mr. Pope observed that the defendants had previously caused continuances and had never been charged with Pope's attorney fees.

Mississippi law is that failure to lodge an objection waives that objection. Defense counsel failed to object to the continuance or put Pope on notice that they would be asking for attorney fees and their failure to object amounts to a waiver under Mississippi law. *Walker v. State,* 913 So.2d 198, 238 (¶148) (Miss. 2005).

In *Poyner v. State,* 2005-KA-01919-COA (¶ 16) (Miss. App. 11-21-2006), Poynor failed to object to the indictment during the voir dire discussion regarding peremptory challenges for cause. Poynor also did not raise this issue in his motion for JNOV. The Court of Appeals stated, "It is well stated that failure to make a contemporaneous objection waives that issue for the purposes of an appeal." In *City of Natchez v. Jackson,* 2005-CA-00043-COA (¶14) (Miss. App. 11-3-2006), the Court of Appeals ruled that failing to object specifically to a ruling admitting evidence waives the objection to expert or opinion evidence and to an objection that the opinion states a legal conclusion.

In *Chasez v. Chasez*, 2004-CP—01956-COA (¶15) (Miss. 2-13-2007), the Supreme Court ruled that when Mr. Chasez made no objection to lack of notice he waived that objection. When a party fails to make a contemporaneous objection, the procedural

bar operates and the error, if any, is waived. *Jackson v. State,* 2004-KA-01460-COA (¶81) (Miss. App. 2-27-2007). Likewise, in *Bailey v. State,* 2004-KA-00640-COA (¶37) (Miss. App. 2-27-2007), the Court of Appeals ruled that failing to raise the issue of unauthenticated telephone records as a contemporaneous objection at trial waives the right to raise that issue in a motion for new trial.

The same result in *Fugate v. State,* 205-KA-02175-COA (¶43) (Miss. App. 3-13-2007) where the Court of Appeals ruled that Fugate, claiming that the prosecutor made improper comments during closing arguments in describing a witnesses' testimony as "lies", waived that objection when the objection was not made contemporaneously. Consequently, the procedural bar operated and the issue was deemed waived. The defendants agreed to the continuance hoping that Pope would not be able to obtain the services of an attorney for trial, choosing not to object at the hearing and have waived their right to collect those fees and expenses.

There was never a hearing held on the reasonableness of the attorney fees or the expenses claimed by the defendants. The only testimony in the record is the Affidavit of Sam Thomas setting forth the time spent on preparing for trial. There was no testimony regarding reasonableness of those fees and Barry Pope was not given an opportunity to object to nor was any testimony taken on the attorney fees and expenses. This was error on the part of the trial court, the trial court abused its discretion as well. *Setser v. Piozza,* 644 So.2d 1211, 1216 (Miss. 1994).

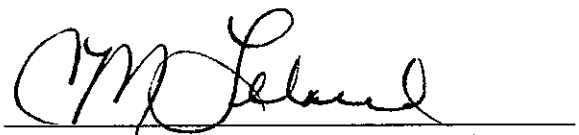
CONCLUSION

There are genuine issues of material fact for a jury to consider in this cause and the

trial court's order should be overturned and a trial on the merits should be ordered for Barry Pope.

Respectfully submitted,

BARRY POPE



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CERTIFICATE OF SERVICE

I, the undersigned, Clarence McDonald Leland, attorney of record for Barry Pope, do hereby certify that I have this day mailed by U.S. Postal Service, first class, postage prepaid, a true and correct copy of the Appellant Brief to:

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This the 26th day of March, 2007.

CLARENCE MCDONALD LELAND