IN THE SUPREME COURT OF MISSISSIPPI
CASE NUMBER 2006-CP-02135

H.L. MERIDETH, JR. — APPELLANT

VS.

PHILIP T. MERIDETH, M.D. — APPELLEE

APPEAL FROM THE
CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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September 14, 2007

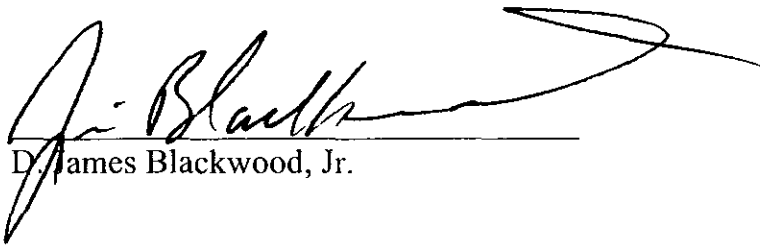
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. H.L. Merideth, Jr., Plaintiff below.

2. Philip T. Merideth, M.D., Defendant below.

3. Robert L. Goza, D. James Blackwood, Jr., and Lindsey M. Turk, Copeland, Cook, Taylor & Bush, P.A., attorneys for Philip T. Merideth, M.D., Defendant below.



D. James Blackwood, Jr.

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STATEMENT OF THE ISSUE

The following issue is presented for review on appeal:

1. Whether the lower court abused its discretion when it imposed sanctions on Appellant and awarded attorney's fees and costs to Appellee pursuant to the Mississippi Litigation Accountability Act and Rule 11 of the Mississippi Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Court Below

On February 21, 2006, Plaintiff below and Appellant herein, H.L. Merideth, Jr. ("Mr. Merideth"), filed suit against his son, Defendant below and Appellee herein, Philip T. Merideth, M.D. ("Philip"), in an attempt to cancel a quitclaim deed from Mr. Merideth to Philip conveying an undivided half-interest in twenty (20) acres of land in Madison County. R. 1-5.[1]

Philip, through counsel, and Mr. Merideth[2] reached a settlement of Mr. Merideth's claim. Specifically, Mr. Merideth and Philip agreed to enter into an Escrow Agreement whereby one of two things would occur: Either (1) Philip would deliver the warranty deed conveying his interest in the land to the Escrow Agent to be held until such time as Philip's monies for the sale of the land were tendered to the Escrow Agent, at which time the Escrow Agent would deliver the warranty deed to the purchaser of the land; or (2) if Philip failed to deliver the deed to the Escrow Agent, the Escrow Agent would present a Consent Judgment signed by both Philip and Mr. Merideth for entry by the court. R.E. 1, R. 120 (Escrow Agreement).

On June 1, 2006, Philip delivered an executed warranty deed to the Escrow Agent, and the Escrow Agent delivered the monies due to Philip. *Id.* Therefore, the Consent Judgment

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[1] References to "R." are to the record. References to "R.E." are to the Appellee's record excerpts. References to "TR." are to the hearing transcript.

[2] Mr. Merideth has at all times represented himself in these matters.

was never considered, signed or entered by the Court. R.E. 2, R. 123-125 (Consent Judgment). An order of dismissal was not entered at that time, pending a formal closing on the property and resolution of the issue of payment of Philip's attorney's fees. R. 156.

Six days after closing on the property, Mr. Merideth filed a new lawsuit against Philip, which matter is also on appeal to this Court under Case Number: 2007-CP-0051. Because the case below was frivolous from inception, and because the new lawsuit evidenced a continuing pattern of harassment, on August 29, 2006, Philip filed a Motion for Sanctions and Injunctive Relief. R.E. 3, R. 44-56 (Defendant's Motion for Sanctions and Injunctive Relief). In that motion, Philip requested the entry of an order awarding him attorneys' fees and expenses in connection with the defense of the lawsuit, and also sought to enjoin Mr. Merideth from filing any more lawsuits against Philip or his family unless Mr. Merideth first obtained leave of court to do so. *Id.*

Philip's motion came on for hearing on October 23, 2006, before the Madison County Chancery Court, the Honorable William Lutz presiding. R. 159. The court took the matter for advisement, and on October 31, 2006, entered an Opinion granting Philip's request for attorney's fees, but denied his request for an injunction. R.E. 4, R. 186-187 (Opinion).

Thereafter, on November 3, 2006, Mr. Merideth filed a motion under Mississippi Rule of Civil Procedure 52(a) requesting that the court reconsider its Opinion to include an express finding of fact as to whether four letters attached to his own affidavit, purporting to place a condition on the transfer of the land, provided a reasonable basis for Mr. Merideth to file the

lawsuit. R. 189. The court examined all four letters and found specifically that "these letters are self-serving documents. We have no idea when Sonny produced these letters. The Court concludes that as a matter of law that none of the letters singularly, or in combination satisfies the requirements of the Statute of Frauds." TR. 56.

On November 28, 2006, the court held a hearing on the reasonableness of Philip's counsel's fees. On December 1, 2006, the court entered a judgment awarding Philip attorney's fees in the amount of eighteen thousand, seven hundred sixty-four dollars and forty one-cents ($18,764.41), plus interest at the legal rate and costs of court. R.E. 5, R. 234-241 (Final Judgment for the Recovery of Fees and Expenses). Mr. Merideth appealed.

B. Statement Of The Facts

1. *Merideth I*

This appeal arises from the second of three lawsuits filed by Mr. Merideth against his son, Philip, since April, 2005. The first lawsuit ("*Merideth I*") was filed by Mr. Merideth on April 21, 2005, in Madison County Chancery Court, requesting a declaratory judgment holding that Mr. Merideth was mentally competent to modify his Last Will & Testament. R. 57-58. Philip did not respond to that lawsuit and was willing to allow a default judgment to be entered against him on Mr. Merideth's unique request for relief. R.E. 6, R. 73 (Philip affidavit). Nonetheless, Mr. Merideth subpoenaed Philip and his wife to appear at Mr. Merideth's competency trial in Yazoo City on four business days notice when Mr. Merideth knew that Philip's wife was eight and a half months pregnant with a high-risk pregnancy and

under doctor's orders not to leave the Jackson area. *Id.* After a letter from Philip to the Chancery Clerk explaining why he could not appear, Mr. Merideth requested that the court hold Philip and his wife in contempt, and asked that sanctions be levied against them based on their failure to appear at the hearing. R. 59-60, R. 63. Thereafter, Mr. Merideth again subpoenaed Philip and his wife to appear at the continuation of his competency trial and to defend Mr. Merideth's motion for contempt, which came at a time when Mr. Merideth knew that Philip's wife was still under a physician's care for the Caesarian section delivery of her high-risk pregnancy that had occurred only a few days earlier. R.E.6, R. 73. (Philip affidavit). Philip ultimately resolved that issue by filing a *pro se* motion for entry of a default judgment in which he disclaimed any interest whatsoever in the matter. R. 65.

2. The Filing of the Case Below: *Merideth II*

Four months after the conclusion of *Merideth I*, Mr. Merideth filed a second lawsuit against Philip which case is the subject of this appeal (*"Merideth II"*). In *Merideth II*, Mr. Merideth claimed he was entitled to cancel a quitclaim deed from himself to Philip which conveyed an undivided half-interest in 20 acres of land in Madison County. R. 1-5. Philip's brother, David, owned the other undivided half interest in that property. R. 2.

In late 2005, Mr. Merideth entered into an agreement to sell 40 acres of adjacent land to a third-party, subject however, to the condition that Philip and David also agree to sell their contiguous 20 acres. *Id.* Philip was initially reluctant to sell his interest in the 20 acres, in the hopes that one day he would have the benefit of quiet use and enjoyment of the land

with his wife and three young sons. R.E. 6, R. 74 (Philip affidavit). However, Philip did not want to stand in the way of Mr. Merideth's (and David's) desire to sell the 20 acres, and, therefore, agreed to the sale. R.E. 6, R. 81 (Philip affidavit). Thereafter, David sent Philip a proposed sales contract. However, on January 17, 2006, soon after David sent Philip the contract, Philip received a cryptic, handwritten letter from Mr. Merideth that concluded with instructions to "tear up the contract David sent U [you]." R.E. 7, R. 43 (Handwritten note, Mr. Merideth to Philip, dated 1/22/06). To add further confusion to an already confusing scenario, Mr. Merideth subsequently sent a letter to Philip, dated February 17, 2006, chastising Philip for not agreeing to the sale (to which Philip had, in fact, agreed). R.E. 8, R. 44 (Letter, Mr. Merideth to Philip, dated 2/17/06); R.E. 6, R. 74 (Philip affidavit). Philip requested clarification on these contradictory positions by a handwritten note to his brother, David, dated February 19, 2006; however, no explanation was provided. R.E.9, R. 83 (Handwritten note, Philip to David, dated 2/19/06).

On February 21, 2006, despite having told Philip to "tear up the contract," Mr. Merideth filed *Merideth II* against Philip. R. 1-5. In support of *Merideth II*, Mr. Merideth alleged that he had conveyed Philip his interest in the 20 acre parcel upon an express oral condition that Philip build his residence on the land. R. 2. However, the deed clearly contained no such condition, and in truth, no such condition, oral or otherwise, was ever imposed on the transfer. R.E. 10, R. 84 (Quitclaim Deed).

Although under no obligation to do so, Philip nonetheless agreed to sell his interest in the 20 acres in an effort to avoid unnecessary litigation and further embarrassment. R.E. 6, R. 75 (Philip affidavit). To that end, on March 5, 2006, Philip sent David and Mr. Merideth a memo outlining the terms for the sale of Philip's interest in the 20 acres and again requesting clarification for the inconsistent instructions by Mr. Merideth. R.E. 11, R. 86 (Memo, Philip to David and Mr. Merideth, dated 3/5/06). No clarification was ever provided by Mr. Merideth or David. On March 26, 2006, Philip remitted to David an executed copy of the sales contract. R.E. 12, R. 87 (Contract for the Sale and Purchase of Real Estate). Despite having an executed contract for the sale of the land in his possession, on May 2, 2006, Mr. Merideth inexplicably applied for entry of default against Philip, in response to which Philip hired counsel and moved to set aside the entry of default. R. 9-10, R. 11-25.

Mr. Merideth's claim in *Merideth II* was resolved by an Escrow Agreement, dated June 1, 2006. R.E. 1, R. 120 (Escrow Agreement). Pursuant to the Escrow Agreement, Philip delivered an executed Warranty Deed to his interest in the property to an Escrow Agent with instructions to deliver the deed to the buyer once the Escrow Agent received the monies due to Philip. *Id.* Pursuant to the Escrow Agreement, Philip also tendered to the Escrow Agent an executed copy of a Consent Judgment which was to be submitted to the court ***if*** Philip somehow breached his agreement to deliver the deed to the Escrow Agent (which was not even possible because he had already delivered the deed to the Escrow Agent with instructions to deliver it to the buyer). *Id.* Thus, the Consent Judgment was never presented

to the lower court, never signed by the Judge, never entered into the Court file, and was rendered a nullity. R.E. 2, R. 123-125 (Consent Judgment). Although the parties entered the Escrow Agreement on June 1, 2006, *Merideth II* remained open pending closing on the transaction and resolution of the issue of Philip's attorney's fees.

The closing on Philip's interest in the 20 acres took place on July 18, 2006. Six days later, Mr. Merideth filed *Merideth III* claiming Philip was in breach of a nine year old promissory note R.E. 13, R. 133-143 (Defendant's Motion to Dismiss and Motion for Sanctions).[3]

Because the lawsuit filed by Mr. Merideth in *Merideth II* was frivolous from inception and filed solely for the purpose of harassment, and because *Merideth III* was obviously part of an ongoing pattern of harassment by Mr. Merideth, Philip filed a Motion for Sanctions and Injunctive Relief. R.E. 3, R. 44-56 (Defendant's Motion for Sanctions and Injunctive Relief). In that motion, Philip asked the court to award him his attorney's fees and expenses and to enjoin Mr. Merideth from filing any more lawsuits against him or his family without leave of court. *Id.*

Philip's motion came on for hearing on October 23, 2006, before the Madison County Chancery Court, the Honorable William Lutz presiding. On October 31, 2006, the court entered an Opinion wherein it made the following verbatim findings:

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[3] *Merideth III* was dismissed on a motion to dismiss filed by Philip on statute of limitations grounds. An award of attorney's fees in that case is now pending before this court under Case Number: 2007-CP-0051.

- *Merideth II* has not been voluntarily dismissed.

- The Agreed Judgment of Dismissal with Prejudice was not presented to the Chancellor. Therefore, this matter is still pending before the Court.

- Had the parties not reached an agreement regarding the underlying land dispute, this matter would not have survived a Motion for Judgment on the Pleadings or Summary Judgment.

- As a matter of law, Sonny's case was without merit or without substantial justification.

- Sonny's claim would be barred by the Mississippi Statute of Frauds.

- The Court is further convinced that Sonny filed *Merideth III* to harass Philip.

- The Court is convinced that Sonny wasn't suing Philip because he hadn't built a house on the land; Sonny was suing Philip because he had no other method to force/pressure Philip to sell his interest to Thomas W. Bobbitt.

(Emphasis added). R.E. 4, R. 186-187. (Opinion). Based on these findings, the court granted Philip's request for attorney's fees and expenses, but denied his request for injunctive relief. *Id.*

On November 28, 2006, the court heard argument on the reasonableness of Philip's attorney's fees and expenses. On December 1, 2006, the court entered a Final Judgment for the Recovery of Fees and Expenses and awarded Philip $18,764.41 in reasonable attorney's fees, plus interest at the legal rate and costs. R.E. 15, R. 234-236 Final Judgment for the

Recovery of Fees and Expenses).

SUMMARY OF THE ARGUMENT

The court did not abuse its discretion in awarding Philip his reasonable attorney's fees pursuant to Rule 11 of the Mississippi Rules of Civil Procedure and the Mississippi Litigation Accountability Act.

Mr. Merideth's claim in *Merideth II* was frivolous and without substantial justification because it was clearly barred by Mississippi's Statute of Frauds. The substance of *Merideth II* was predicated on Mr. Merideth's allegation that a transfer to Philip of an undivided half-interest in twenty (20) acres of property was conditioned on Philip building a house on the land. The deed clearly contained no such condition; therefore, Mr. Merideth's initial claim was barred by Mississippi's Statute of Frauds. Mr. Merideth subsequently attempted to establish that such a condition existed by producing an affidavit with four unsigned letters that he contended evidenced the condition on the transfer. Because those letters were not signed by Philip, much less the author, Mr. Merideth, there was absolutely no legal basis for Mr. Merideth to have asserted this claim. Therefore, Mr. Merideth's claim in *Merideth II* was frivolous and filed without substantial justification or legal merit, and warranted the imposition of sanctions under Rule 11 and the Act.

Philip was also entitled to an award of attorney's fees because *Merideth II* was filed for purposes of harassment. Simply stated, Mr. Merideth entered a deal to sell forty (40) acres of land. However, that deal was contingent upon Philip and his brother agreeing to also

sell their contiguous twenty-acre tract. When Philip expressed a reluctancy to sell his interest in the land, Mr. Merideth filed *Merideth II* in an attempt to force or pressure Philip to sell his half-interest in the land. The theory that Mr. Merideth advanced in support of this claim was that he transferred to Philip his interest in the land on a condition that Philip had not fulfilled. As stated above, there was no legal justification for that claim, which led the court to further conclude that the case had been filed for no reason other than harassment. The fact that *Merideth II* was filed for the purposes of harassment is further evidenced by the fact that Mr. Merideth has filed three lawsuits against his son in a fifteen month period, all of which had questionable legal merit. Therefore, the court correctly held that *Merideth II* was frivolous and/or without substantial justification and was filed for the purpose of harassment, thereby justifying the imposition of sanctions.

Mr. Merideth advances a number of unique arguments for why he should not have been sanctioned. First, he contends that he was the "prevailing party" in *Merideth II.* Clearly, there was no ruling in Mr. Merideth's favor which disposed of the case on its merits, rather, the parties reached a mutually beneficial agreement which concluded the substance of the litigation, but not the litigation in its entirety. Because an agreement was reached between Mr. Merideth and Philip that was financially beneficial to both, Mr. Merideth does not meet the definition of "prevailing party," and the settlement between the parties did not foreclose the court's authority to sanction Mr. Merideth based on the frivolous and harassing nature of *Merideth II.*

Next, Mr. Merideth argues that Philip improperly filed his motion for sanctions after the case had concluded. In support of that argument, Mr. Merideth points to a Consent Judgment that was prepared as an alternative remedy if Philip did not satisfy the terms of an Escrow Agreement which had been prepared as part of the settlement of the claim. However, the Consent Judgment to which Mr. Merideth refers was never presented to the lower court, never signed by the judge, and never entered into the court file because Philip satisfied his obligations under the Escrow Agreement. Because a consent judgment is not enforceable *until* it is presented to, and entered by the court, the Consent Judgment never took effect, was null and void in its entirety, and did nothing to facilitate the conclusion of *Merideth II.* Similarly, the Agreed Judgment of Dismissal had no impact on the conclusion of *Merideth II.* Mr. Merideth claims he returned a signed copy to Philip's counsel, Mr. Goza; however, Mr. Goza did not sign it and denies ever receiving it, much less having agreed to have it entered, and Mr. Merideth did not produce any evidence to support this allegation.

Mr. Merideth's estoppel by silence argument may not be raised on appeal because it was never brought before the lower court, and is not found in the record. As such, Mr. Merideth has improperly presented the issue to the Court.

Finally, Mr. Merideth is entitled to an award of his reasonable attorney's fees incurred in the defense of this appeal pursuant to the Mississippi Litigation Accountability Act and Rule 38 of the Mississippi Rules of Appellate Procedure. This appeal is frivolous and filed without substantial justification on the same grounds raised in the case below.

For the foregoing reasons, and those set forth in detail in the "Argument" section below, the court did not abuse its discretion in awarding Philip reasonable attorney's fees and costs incurred in the defense of *Merideth II*, and the court's decision should be affirmed.

ARGUMENT

A. Standard Of Review

The standard of review for a decision imposing sanctions pursuant to the Mississippi Litigation Accountability Act and Rule 11 of the Mississippi Rules of Civil Procedure is abuse of discretion. *Jackson County Sch. Bd. v. Osborn*, 605 So. 2d 731, 735 (Miss. 1992). *See also Foster v. Ross*, 804 So. 2d 1018, 1022 (Miss. 2002) ("when reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, this Court is limited to a consideration of whether the trial court abused its discretion"); *Scruggs v. Saterfiel*, 693 So. 2d 924, 927 (Miss. 1997) (the Court may ***only*** reverse a chancellor's decision regarding the imposition of sanctions pursuant to the Mississippi Litigation Accountability Act when the chancellor abused her discretion).

Mr. Merideth contends that there is a conflict in the case law regarding the appropriate standard of review and that the proper standard is *de novo*. *See e.g., Estate of Ladner v. Ladner*, 909 So. 2d 1051 (Miss. 2004) (citing *Amiker v. Drugs for Less, Inc.*, 796 So. 2d 942, 945-46 (Miss. 2001)). However, the "conflict," to the extent one exists, arises only where the trial court employs the wrong legal standard in imposing sanctions. *Compare Leaf River Forest Products, Inc. v. Deakle*, 661 So. 2d 188, 196 (Miss. 1995) *with Estate of*

Ladner, 909 So. 2d at 1055.

Here, the standard employed by the lower court under Rule 11 of the Mississippi Rules of Civil Procedure ("Rule 11") was whether Mr. Merideth's claim was ***"frivolous or filed for the purpose of harassment."*** Under the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-5 (the "Act"), the standard employed by the court was whether the case had been filed ***"without substantial justification,"*** or ***"interposed for delay or harassment."*** Pursuant to both Rule 11 and the Act, the court applied the correct legal standards. *Foster*, 804 So. 2d at 1022. Therefore, the standard of review for this appeal is whether the trial court abused its discretion in granting Philip his attorney's fees and expenses under Rule 11 and the Act.

In applying the abuse of discretion standard, the Court should affirm the trial court's decision unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached on the weighing of relevant factors," *Amiker*, 796 So. 2d at 948 (citing *Cooper v. State Farm Fire & Cas. Co.*, 568 So. 2d 687 (Miss. 1990)). The court clearly did not abuse its discretion in this case; therefore, its decision should be affirmed.

B. *Merideth II* Was Filed Without Substantial Justification, Was Frivolous In Nature, And Filed For Purposes Of Harassment

The questions before the lower court under Rule 11 and the Act were whether the claim asserted by Mr. Merideth in *Merideth II* was frivolous, filed without substantial justification, or interposed for the purpose of harassment or delay. Philip's arguments on

The letters Mr. Merideth claimed were part of the terms of the contract are not referenced in the original contract between Philip and Mr. Merideth, nor did Mr. Merideth produce any evidence that any additional terms should have been incorporated into the signed agreement. R.E. 11, R. 84 (Quitclaim Deed). Therefore, the letters Mr. Merideth produced in an attempt to support a finding of substantial justification did not legitimize Mr. Merideth's claim against Philip.

The lower court agreed with the foregoing analysis, and specifically found:

- Sonny claims he conveyed Philip the land on the condition that Philip would build a house on the land.
- The quitclaim deed does not include a condition that Philip must build a house on the land.
- Sonny has not presented a writing, memorandum or note that was signed by Philip which includes such a condition.
- Sonny's claim would be barred by the Mississippi Statute of Frauds; and
- Sonny brought *Merideth II* without substantial justification.

R.E. 4, R. 184-188 (Opinion). Thus, the lower court followed the controlling law, applied the correct legal standard, and did not abuse its discretion in awarding Philip attorney's fees pursuant to the Act and Rule 11.

2. *Merideth II* was Filed for Purposes of Harassment

Philip was also entitled to an award of reasonable attorney's fees on the grounds that

Merideth II was filed for purposes of harassment. Mr. Merideth filed three frivolous lawsuits against his son in a fifteen month period (April, 2005 to July, 2006) and pursued them in an abusive manner. Mr. Merideth need not have filed *Merideth I* to simply modify his will, and his attempts to force Philip and his family to appear for that trial, when they (1) agreed to the default judgment, (2) were not needed as witnesses, and (3) were under the physical and emotional pressures of a high-risk pregnancy and delivery is nothing short of mean-spirited.

Similarly, *Merideth II* was clearly filed as a coercive tactic. He had no standing or legal basis for filing his claim. He interfered with Philip's right of quiet use and enjoyment of his property, and he required Philip to incur significant expenses and fees in preparing a defense to a claim that simply never should have been filed.

To add insult to that injury, Mr. Merideth filed *Merideth III* a mere six days after the closing on the land which is the subject of this appeal in Hinds County Chancery Court. R. 157. That claim, as was the case in *Merideth I* and *Merideth II*, was without substantial justification or legal merit, was clearly barred by the statute of limitations, and appears to have been filed for no purpose other than spite.

Once again, the court, in considering this ground for Philip's motion found:

- It was clear from Sonny's oral argument, that he wanted to sell his forty (40) acres and his potential sale was dependant on Philip agreeing to sell his interest;

- Sonny wasn't suing Philip because he hadn't built a house on the land; Sonny was suing Philip because he had no other method to force/pressure Philip to sell his interest to Thomas W. Bobbitt

- Sonny filed Merideth II to harass Philip.

R.E. 4, R. 187 (Opinion). The lower court's ruling is clearly supported by the record. The court did not abuse its discretion in granting Philip his attorney's fees and expenses, and the court's ruling should be affirmed.

C. Mr. Merideth Was Not The Prevailing Party In *Merideth II*

Mr. Merideth argues that because he was the prevailing party in *Merideth II*, sanctions may not be imposed upon him. Appellant Br. at 9-10. This argument lacks merit in at least two respects. First, Mr. Merideth was ***not*** the prevailing party in *Merideth II*. Second, the language cited by Mr. Merideth in *Randolph v. Lambert*, 926 So. 2d 941 (Miss. Ct. App. 2006) to stand for the proposition that sanctions may only be awarded to the prevailing party is permissive, rather than mandatory in nature.

Merideth II was not resolved on the merits. Rather, Philip and Mr. Merideth reached an agreement that was financially beneficial to each of them. R.E. 1, R. 120 (Escrow Agreement). A "prevailing party" "is commonly defined as a party in whose favor a judgment is rendered, regardless of the amount of damages awarded; while this definition encompasses those situations where a party receives less relief than was sought, or even nominal relief, its application is limited to those circumstances in which the fact finder declares a winner and the court enters judgment in that party's favor, ***and does not accompany a compromise or settlement***." *Profit Wise Marketing v. Wiest*, 812 A.2d 1270, 1275-76 (Pa. Super. Ct. 2002). *See also* 20 Am. Jur. 2d Costs § 11 (stating the prevailing

party to a suit is the one who successfully prosecutes the action or successfully defends against it, prevailing on the merits of the main issue, i.e., the prevailing party is the one in whose favor the decision or verdict is rendered and the judgment entered).

Similarly, in claims for malicious prosecution, the courts have held that settlement precludes a party from satisfying the "favorable resolution" element of the claim. *See State v. United States Fid. & Guar. Co.*, 64 So. 2d 697, 702 (Miss. 1953) (holding that "one of the requirements for the maintenance of an action for malicious prosecution is the termination of the original proceeding in the plaintiff's favor ***not*** brought about by ***settlement*** or compromise and agreement of the parties thereto").

Based on the foregoing, Mr. Merideth was not the "prevailing party" in *Merideth II* because there was not a ruling in his favor which disposed of the case on its merits. Settlement clearly does not satisfy the definition of "prevailing party," nor does it preclude the imposition of sanctions when a lawsuit is frivolous from inception. *See Cooper Tire and Rubber Co. v. McGill*, 890 So. 2d 859, 869 (Miss. 2004) (noting "a settlement between the parties does not foreclose the trial court's authority to sanction a party or administer its proceedings").

Mr. Merideth has cited *Randolph v. Lambert* to stand for the proposition that sanctions cannot be awarded against a prevailing party. 926 So. 2d 941 (Miss. Ct. App. 2006). However, Mr. Merideth's confidence in this case is misplaced. In *Randolph*, the Mississippi Court of Appeals stated that the "Litigation Accountability Act ***allows*** the court

to award the prevailing party for encountering unnecessary expenses in order to vindicate a state protected right." 926 So. 2d at 944. This language is permissive rather than mandatory, and consistent with the holding in *Cooper* (cited *supra*) and does not foreclose the lower court's ability to impose sanctions when a case is frivolous or filed without substantial justification.

D. The Motion For Sanctions Was Not Filed After The Conclusion Of The Case

1. *Merideth II* was not Concluded by the Consent Judgment or the Agreed Judgment of Dismissal

Mr. Merideth also argues that Philip's motion for sanctions was improper because it was filed after the "conclusion" of the case. Mr. Merideth's argument that the case had been "concluded" is incorrect. As stated above, the dispute over Philip's interest in the 20 acres of land was resolved by the Escrow Agreement between Philip and Mr. Merideth. Under the Escrow Agreement, Philip was to deliver an executed Warranty Deed conveying his undivided half-interest in the land to an Escrow Agent to hold until the monies due Philip were received. R.E. 1, R. 120 (Escrow Agreement). Upon that occurrence, the purchaser was to deliver the purchase proceeds to the Escrow Agent, and the Escrow Agent was to deliver the Warranty Deed to the purchaser. Further, the Escrow Agent was instructed to deliver the Consent Judgment to the court for entry ***if, and only if***, Philip breached his agreement to convey his interest in the land. *Id.* True to his word, Philip delivered an executed Warranty Deed to the Escrow Agent. R.E. 1, R. 120 (Escrow Agreement).

The Consent Judgment clearly did not conclude the litigation in this case. The Consent Judgment was prepared only as an alternative remedy if Philip did not deliver the deed to the Escrow Agent, which Philip clearly did. The Consent Judgment was never presented to the lower court, never signed by the Judge, and never entered into the court file. R.E. 2, R. 123-125 (Consent Judgment). As such, the Consent Judgment had no effect on the conclusion of the case below.

Similarly, the unsigned Agreed Judgment of Dismissal had no impact on the resolution of *Merideth II*. While Mr. Merideth claims that he signed the Judgment and forwarded it to Philip's counsel, Mr. Robert L. Goza for entry, Mr. Goza stated that he never received it back from Mr. Merideth, and never agreed to approve or present it to the court. TR. 41. Further, Mr. Merideth did not present any proof such as a fax receipt, cover letter or return receipt that would indicate that Mr. Goza ever received the signed Agreed Judgment of Dismissal with Prejudice. R.E. 4, R. 184-188 (Opinion).

There is no basis upon which the lower court, or this Court, could conclude that Philip's Motion was filed after *Merideth II* concluded. The lower court correctly held that because the Consent Judgment and Agreed Judgment of Dismissal had not been presented to the court at the time that Philip filed his motion for sanctions, the case remained open, and the court correctly ruled that it had jurisdiction over the parties and the case. R.E. 4, R. 185 (Opinion).

2. Philip is not Collaterally or Contractually Estopped From Seeking Relief Above and Beyond What the Consent Judgment Provides

Mr. Merideth further argues that Philip is estopped from requesting any relief over and above the terms of the Consent Judgment because a consent judgment is binding and conclusive and acquires all incidents of, and will be given the same force and effect as judgment rendered after litigation. Appellant Br. at 13. In support of that argument, Mr. Merideth cites *Smith v. Malouf*, 826 So. 2d 1256 (Miss. 2002) and *Taylor v. Taylor*, 835 So. 2d 60 (Miss. 2002). Mr. Merideth's reliance on *Smith* and *Taylor* is misplaced because both cases concern scenarios where a consent judgment (decree) was presented to, and entered by the court. *See Smith*, 826 So. 2d at 1259 (stating "a consent judgment acquires the incidents of, and will be given the same force and effect as, judgment rendered after litigation...is binding and conclusive, operating as res judicata and an estoppel to the same extent as judgments after contest"); *Taylor*, 835 So. 2d at 65 ("consent judgments receive the same force as regular judgments, in binding parties under collateral estoppel and res judicata"). Moreover, the holding in both cases turned on whether a valid consent judgment (i.e., one that has been signed and entered by the court) precluded the parties from later relitigating the same issues and/or claims.

Mr. Merideth argues, citing *Guthrie v. Guthrie*, that the Consent Judgment acted as a contract between the parties to preclude Philip from pursuing his fees. *See Guthrie*, 102 So. 2d 381 (Miss. 1958). However, this argument fails as well. Assuming that a consent judgment can constitute a contract, the condition precedent to the Consent Judgment/contract

in this case never came to pass. *Turnbough v. Steere Broad. Corp.*, 681 So. 2d 1325, 1327 (Miss. 1996) (defining "condition precedent" as "a condition which must be performed before the agreement of the parties shall become a binding contract"). The only basis upon which Philip agreed to have a Consent Judgment against him is if he failed to deliver the deed to the Escrow Agent. Because Philip delivered the deed, it is not possible for the Consent Judgment to have contractually bound Philip to its terms. R.E. 1, R. 120 (Escrow Agreement).

Based on the foregoing, the lower court was correct in holding that *Merideth II* was not voluntarily dismissed because neither the Consent Judgment, nor the Agreed Judgment of Dismissal was tendered to the court or entered. R.E. 4, R. 185-186 (Opinion). The court likewise was correct in rejecting Mr. Merideth's contract argument. Therefore, the decision of the lower court should be affirmed.

E. Mr. Merideth Did Not Present The Issue Of Estoppel By Silence To The Lower Court

Mr. Merideth contends that Philip is estopped from contending that the deed which conveyed to Philip an interest in the lands was unconditional and as such, is estopped from asserting a statute of frauds defense. Appellant Br. at 11. Mr. Merideth did not raise this issue in the proceedings below. The law is well-settled in Mississippi that since a trial judge cannot be put in error on a matter which was not presented to him, then issues not raised at trial cannot be raised on appeal. *Southern v. Miss. State Hosp.*, 853 So. 2d 1212, 1214-15 (Miss. 2003). This issue is not properly before the Court.

However, if the Court were to consider this issue, Mr. Merideth's argument is without merit for two reasons: (1) it presumes the condition existed, and (2) there was never a condition placed on the transfer of the land in the first place. The letters produced by Mr. Merideth purporting to place the condition on the transfer were not signed by Philip, much less Mr. Merideth, and Mr. Merideth was unable to produce any other evidence memorializing the alleged condition which would satisfy the Statute of Frauds. Therefore, Mr. Merideth could not have relied on Philip's silence in acquiescing to a condition which Mr. Merideth cannot prove existed, and which did not, in fact exist.

F. The Court Should Award Philip Attorney's Fees And Expenses Incurred In Connection To Defending This Frivolous Appeal

Miss. Code Ann. § 11-55-15 provides in pertinent part: "This chapter shall apply to any suit or claim or defense ***or appeal*** filed or perfected subsequent to the effective date of this chapter..." Additionally, Rule 38 of the Mississippi Rules of Appellate Procedure provides the following: "In a civil case if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee." Courts have evaluated Rule 38 frivolity by reference to Miss. R. Civ. Pro. 11. *McCoy v. City of Florence*, 949 So. 2d 69, 85 (Miss. Ct. App. 2006) (citing *Roussel v. Hutton*, 638 So. 2d 1305, 1318 (Miss. 1994)). Since violations of the Act apply to appeals as well as the original lawsuit, and Rule 38 of the Mississippi Rules of Appellate Procedure is evaluated in terms of the Rule 11 standard, this Court should award Philip his attorneys' fees and expenses incurred in the defense of this appeal for the same grounds raised in the

case below.

Awarding Philip his reasonable attorney's fees and expenses in connection with defending this appeal is consistent with the underlying policy of Rule 11 and the Act. Stated simply, a defendant should not be put through the burden and expense of defending against a frivolous appeal any more than a frivolous lawsuit. If the Court concludes the trial court did not abuse its discretion, the Court would create an inconsistent result by requiring Philip to incur the fees of an equally frivolous appeal. The prosecution of this appeal is frivolous, was pursued without substantial justification, and is part of an ongoing pattern of harassment by Mr. Merideth of his son. Therefore, the Court should grant Philip his reasonable expenses and attorney's fees in his defense of this appeal.

Because this matter is ongoing, and Philip will incur additional fees and expenses if oral argument is granted, Philip requests that if the Court finds it appropriate to award him the attorney's fees incurred in the defense of this appeal, he be allowed thirty days from the date of the Court's Opinion to submit an affidavit delineating his attorney's fees and expenses. *See McCoy*, 949 So. 2d at 85.

CONCLUSION

For the reasons enumerated above, the Court should affirm the chancery court's grant of Philip's Motion for Sanctions and Final Judgment for the Recovery of Fees and Expenses in Philip's favor in the amount of eighteen thousand, seven hundred sixty-four dollars and forty-one cents ($18,764.41), together with interest at the legal rate from and after November

CERTIFICATE OF SERVICE

I, D. James Blackwood, Jr., do hereby certify that I have this day served, via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

The Honorable Cynthia L. Brewer
Madison County Chancery Court Judge
Post Office Box 404
Canton, MS 39046

H. L. Merideth, Jr., Esq.
407-B West Parkway Place
Ridgeland, MS 39157

This the 14th day of September, 2007.

D. James Blackwood, Jr.