IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

H. L. MERIDETH, JR. — APPELLANT/PLAINTIFF

V. — CAUSE NO. 2006-CP-02135

PHILIP T. MERIDETH, M.D. — APPELLEE/DEFENDANT

APPEAL FROM THE CHANCERY COURT
OF
MADISON COUNTY, MISSISSIPPI

CAUSE NO. 2006-147

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

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TABLE OF AUTHORITIES

REFERENCES TO PARTIES

1. The appellant, plaintiff, H. L. Merideth, Jr., will be referred to herein as "Sonny." The appellee/defendant, Philip T. Merideth, M.D., will be referred to as "Philip," which are the same identities used by the trial court. M.R.A.P. 28(d)

REFERENCE TO RECORD

2. Citation or references to the record prepared by the clerk will be referred to as "C" followed by the reference to the page of the record. References to the court reporter's transcript will be referred to as "C.R." followed by the page number. References to the record excerpts will be referred to as "R.E." followed by the page number. The record excerpt page numbers are located in or near the left margin at the bottom of each page.

ORAL ARGUMENT REQUESTED

3. Statement under M.R.C.P. 34(b). Oral argument permits a party on appeal to answer any question the Court may have that is not covered or inadequately covered in the Brief.

STATEMENT OF THE FACTS

Pages 4-9 of Philip's Brief.

4. There appears to be no material conflict in the facts except as to:

(1) Why Merideth II was filed;

(2) Whether or not Goza received the *Order of Dismissal*; and

(3) Whether or not Merideth II was settled.

REASONS FOR FILING MERIDETH II

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5. The contract for the sale of the lands on Livingston Road to a third party is dated January 13, 2006. (R.E. 42) David signed the contract on January 23, 2006. Merideth II was filed on the 21st day of February 2006. (R.E. 49) Philip did not sign the contract for sale until March 26, 2006. (R.E. 42)

6. While the record may not show the details, it does clearly show that there was activity between and among the parties about the sale of the Livingston Road property that crystallized in the drafting of a sales contract following the negotiations that was in final form not later than January 13, 2006. Approximately a month had passed after Sonny and David signed the contract, but Philip had not, before Merideth II was filed on February 21, 2006. It developed that Philip wanted two things. He wanted to "net" Two Hundred Thousand Dollars ($200,000) from the sale of his interest in the Livingston Road property after the payment of the capital gains tax. (R.E. 45, par. 2) Sonny agreed to pay Philip's capital gains tax in the amount of Forty Three Thousand Ninety Dollars and Sixty-Three Cents ($43,090.63). (R.E. 46,50) Philip also imposed a condition upon his sale of his interest in his Livingston Road property that could not be unilaterally accepted by Sonny, or at all, because it involved, as a condition for the sale of Philip's interest in Livingston Road, a sale of his undivided ½ interest in Conant Creek in Idaho. (R.E. 45, Par. 3) The Conant Creek property was owned entirely by David and Philip. (R.E. 46, par. 1)

7. What Philip actually did by way of responding as required by law in Merideth I led Sonny to believe that Philip probably would act the same way about the sale of his interest in his lands on Livingston Road, i.e. and that he would not cooperate and probably would frustrate the sale of the Livingston Road property. For example, Merideth I was filed on the 21st day of April 2005 (C. 66) Process was issued to Philip. (C. 67 par. 4) Philip failed to timely answer, as required by The Rules. (C. 67 par. 6) Sonny addressed a *Request for Admissions* for Philip. He declined to answer. (C. 67 par. 6) Sonny issued a Subpoena for Philip to appear at the trial. (C. 67 par.6) He refused to appear. (C. 68 par 6) Merideth I was set for trial on the 27th day of October 2006. Philip, at 10:29 p.m., by fax, on the 26th day of October 2006, filed a response more or less disclaiming any interest in Merideth I. (C. 65) See *Final Judgment* in Merideth I. (C. 66-71)

THE ORDER OF DISMISSAL

8. The undisputed facts about the *Order of Dismissal* show that:

(1) An *Order of Dismissal with Prejudice* was prepared; (R.E. 56, C.R. 65)

(2) The *Order of Dismissal with Prejudice* was prepared by Philip's attorney; (R.E. 65)

(3) *The Order of Dismissal* was delivered by Goza in someway to Sonny along with the *Consent Judgment* and the *Order of Dismissal.* (R.E. 65) Each was returned by Sonny to Goza. (R.E 64-65)

9. It is undisputed that the *Consent Judgment* was also prepared by Goza at the same time that the *Order of Dismissal with Prejudice* was prepared. (R.E. 65) The disputed

fact is whether or not Sonny returned the *Order of Dismissal with Prejudice* to Goza. (R.E. 65)

10. Sonny argued to the Court, in Goza's presence, unequivocally that he delivered the *Order of Dismissal* and the *Consent Judgment* to Goza. (C.R. 39, R.E. 65)

11. Goza's denial that he received the *Order of Dismissal* was equivocal. (R.E. 65)

12. But Goza, in arguing to the court, refused to deny that Sonny sent the *Order of Dismissal* to him. Sonny said unconditionally that the *Order of Dismissal* was returned to Goza with the *Consent Judgment*. (R.E. 65)

13. The hard evidence, and the inferences from the hard evidence, strongly preponderates in favor of the conclusion that the *Order of Dismissal* was delivered to Goza, but never presented by Goza to the court.

SETTLEMENT

14. There can be no doubt that Merideth II was settled for all purposes.

15. First, we have the documents that all relate to resolving the issues in dispute, and there is no savings or reservations clause expressed or implied about any later relief from Sonny in favor of Philip. (R.E. 52, 56) Finally, we have Philip's attorney who, on more than one occasion, told the court that Merideth II was "settled." (C.R. 71, R.E. 57) Philip takes the position, apparently, that he could settle Merideth II and then when Merideth III was filed, he could come back and ask for sanctions against Sonny in Merideth II. (R.E. 63, Lines 13-15) Yet, he cites no authority to support this specific proposal or procedure that sanctions can be imposed after a case is settled.

STANDARD OF REVIEW

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16. Each party has stated their position on this point with clarity, but the position of each party shows, at least arguably, that there is still uncertainty in interpreting the case law as to whether a review of the imposition of sanctions is "de novo" (*Estate of Ladner v. Ladner*, 2002-CA-01705-SCT(¶15), 909 So. 2d 1051, 1055 (Miss. 2004)) or "abuse of discretion" (*Jackson County Sch. Bd. v. Obsorn,* 605 So. 2d 731, 735 (Miss.1992)). These cases appear to be in conflict with each other. They are clearly confusing regarding "de novo" and "abuse of discretion."

17. Counsel suggests that it would be helpful to The Bar and The Judiciary for the court, in this case, to address whether the "imposition" of sanctions under M.R.C.P. 11 and/or The Mississippi Litigation Accountability Act is "de novo" and all other issues involving the imposition sanctions under these authorities are "abuse of discretion."

MERIDETH II WAS FILED WITHOUT SUBSTANTIAL JUSTIFICATION

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18. The factual answer to this question is whether or not the four letters from Sonny to Philip and/or David constituted a reasonable basis upon which to file suit against Philip in Merideth II. (R.E. 29, 32-38) The trial court brushed these letters aside because the letters were not signed by Sonny or signed or acknowledged by Philip. (R.E. 10-13) The court totally and completely ignored Sonny's Affidavit stating that:

> (2) "Each of said exhibits are copies of the original of each of said letters and were dictated by HLM and sent by regular United States mail, postage prepaid, to the address shown on each of the exhibits. None of said letters were returned."(R.E. 32)

19. The legal question, aside from the statute of fraud, is whether or not the letters were written and received as indicated. Philip does not deny receiving the letters. Sonny concedes that under the statute of frauds the condition (building the residence) should have been included in the Deed. However, what Sonny failed to get the trial court to understand was that he could have relief under the law not withstanding and outside of the statute of frauds.

20. There are three substantive counts in the Complaint. They are:

(1) Count 1, Paragraph 15 – PTM has breached the terms and conditions upon which said lands were conveyed to him by HLM (C. 3)

(2) Count II, Paragraph 17 – That the representations by PTM that he would sign a contract with a developer if the sales price for his part of the land was increased by $30,000[1] was a contract with HLM. (C. 3)

(3) Count III, Paragraph 20 – That the representations by PTM that he would sign and enter into said contract if[2] the developer were material and PTM knew and should have known that HLM would rely upon said representations. (C. 4)

21. The statute of frauds is not all-inclusive in this case. Philip cites no case holding that any conditions imposed on the transfer of lands must be included in the Deed to the exclusion of all other ways of imposing conditions.

22. Mississippi recognizes a conditional conveyance, even if the condition is not set forth in the Deed. In *Harris v. Kemp*, 451 So. 2d 1362, 1366 (Miss. 1984) the proof showed that a deed was intended as a mortgage, but the condition was not in the deed. Other jurisdictions permit parole evidence to show that a deed conveying property was

[1] This figure was later calculated too be $43,090.63
[2] "If" is an error. "If" should have alleged "with."

delivered on condition. See e.g. *Seaton v. Dye*, 263 S. W. 2d 544, 549 (Tenn. App. 1953). (Recognizing premise, but finding it inapplicable due to failure to plead in lower court). The Colorado Court of Appeals considered an instance in which a man gave a deed to a woman he intended to marry. *In re. Marriage of Heinzman*, 579 P. 2d. 638, 639(Colo. App. 1977), *aff'd* 596 P. 2d. 61 (Colo. 1979). The court found that there was sufficient evidence to support a finding that the conveyance was made on the condition that the grantee marry the grantor. *Id.* at 641. The court imposed an equitable trust and rejected the argument that the oral condition failed to satisfy the statute of frauds. *Id.*

23. So the question is not whether Sonny would have prevailed in Merideth II. The question is whether or not the letters constituted a reasonable or arguable basis upon which to file suit against Philip in Merideth II at the time the suit was filed. Finally, if the Court concludes that the letters are sufficient for Philip to understand that the conveyance from Sonny to Philip of the Livingston Road property was on condition that he build a residence on the lands, then Merideth II is not frivolous or filed without substantial justification. How can a lawsuit be frivolous or without substantial justification when there is an undisputed fact to support the allegations in the *Complaint*? "Though a case may be weak or "light-headed," that is not sufficient to label it frivolous." *City of Madison v. Bryan*, 97-CA-01205-SCT (¶27), 763 So. 2d 162, 167 (Miss. 2000).

CLAIM BARRED BY STATUTE OF FRAUDS

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24. Even if the statute of frauds is controlling, this does not mean that Sonny could not recover against Philip under some other theories of law. See paragraphs 18-23 above.

MERIDETH II WAS FILED FOR PURPOSES OF HARASSMENT

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25. Philip contends that Merideth I – III were all frivolous lawsuits. This position is absolutely ridiculous. Just because Philip elects to call Merideth I frivolous does not, in fact, make it frivolous. A review of the *Final Judgment* in Merideth I shows why Merideth I was filed. If a party is going to file an action for *Declaratory Judgment*, then he is certainly not going to leave the adverse party or defendant any wiggle room to later contend or challenge the relief granted. In other words, it is not harassment for the party seeking relief to insist that the opposing party follow The Rules of Civil Procedure and do something to preclude a challenge later, such as, sign a *Waiver of Process* and *Entry of Appearance*, sign and file an *Answer to the Request for Admissions*, or file an *Answer*. (C. 61, 66-68) Philip did nothing until 10:29 p.m., on the day prior to the date that the case was set for trial. (C. 65)

26. As to Merideth II, if the court can say that the three letters (R.E. 32-38) from Sonny to Philip, as a matter of law, could not constitute a reasonable basis upon which to file Merideth II under any theory or rule of law, then Merideth II should not have been filed. But, the answer to this question should not be made at a later date. The question should be answered as to whether or not the letters constituted a reasonable basis to assert a claim to Sonny on the date Merideth II was filed. In examining sanctions under both Rule 11 and The Litigation Accountability Act, the court noted in *Leaf River Forest Prods. v. Deakle*, 661 So. 2d 188, 197 (Miss. 1995) as follows:

> "As this court looks to the M.R.C.P. 11 definition of "frivolous" for purposes of the Act, it follows that Rule 11 interpretations of when claims are interposed for harassment or delay will also apply to The Litigation Accountability Act. Pursuant to Rule 11, the harassment or delay standard generally cannot be met

'when a plaintiff has a viable claim.' *Springer*, 608 So. 2d 1359, quoting *Bean*, 587 So. 2d 913. Under M.R.C.P. 11, the fact that a case is weak is not sufficient to find that it was brought to harass. *Brown*, 606 So. 2d 127. The same hold true when sanctions are requested pursuant to the Act." (emphasis added)

27. The fact that a case may be weak or "light headed" is not sufficient to label it frivolous. *Mississippi Department of Human Services v. Shelby*, 2000-CA-00033-SCT(¶33), 802 So. 2d 89, 96 (Miss. 2001).

PREVAILING PARTY

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28. Cases cited by Philip defining a "prevailing party" are factually dissimilar to Merideth II. Philip cites no case where sanctions were imposed against a party where the case was settled.

29. In closing on this point, Sonny wants to emphasize that *Cooper Tire and Rubber Co. v. McGill*, 2003-CA-00234-SCT (¶43), 890 So. 2d. 859, 869 (Miss. 2004) is completely inapplicable here. Sanctions were not imposed under Rule 11 or The Mississippi Litigation Accountability Act in *Cooper*. Sanctions were imposed under the discovery rules. The trial court there had addressed before settlement the question of the defendant's failure to timely comply with discovery but deferred action until later. The parties settled. It goes without saying that the parties could not settle a matter still in the hands of court without the consent of the court.

MOTION FOR SANCTIONS WAS NOT FILED UNTIL AFTER MERIDETH II WAS CONCLUDED

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30. Factually, Merideth II was concluded before the *Motion for Sanctions* was filed. This is true because Philip's counsel told the trial court, on more than one occasion, that

Merideth II was settled. (C.R. 71 lines 28-29, R.E. 57) How can a case be settled and yet remain open for additional relief not reserved or excluded in the settlement? It is presumed that the parties to a stipulated judgment intended to settle all aspects of the controversy between them, including all the issues raised by the papers comprising the record. *Connecticut Water Co. v. Beausoleil*, 526 A 2d. 1329, 1335 (Conn. 1987). This is similar to the reasoning in *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 452 (5th Cir. 2003) in which an offer of judgment was accepted in a Fair Debt Collection Practices Act case. After entry of the Judgment one party moved for attorney's fees and costs. *Id.* at 452 n.3. The Court of Appeals concluded that the circumstances surrounding the offer, if not the text itself, strongly supported the position that it was intended to settle all claims, including attorney fees. *Id.* at 454. The court noted that the surrounding circumstances, including the fact that the party seeking attorney fees participated in preparing the offer, showed an intention of the parties to finally resolve the entire matter. *Id.*

PHILIP NOT COLLATERALLY OR CONTRACTUALLY ESTOPPED

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31. Philip, in his Memo to David and Sonny, dated March 5, 2006, wrote as follows:

"I intend to sign the contract for the sale of the Livingston Road land after receiving confirmation that:

(1) All pending litigation regarding my share of the Livingston Road land has been dismissed with prejudice and expungment on Motion of the Plaintiff. (Emphasis added)" (R.E. 45 par. 1)

32. Sonny accepted Philip's offer to dismiss the action with prejudice as follows, to wit:

(4) "I hereby covenant that I will dismiss with prejudice the action now pending in the Chancery Court of Madison County, Mississippi, concurrent with your signing a Deed to the broker and/or his designee conveying your undivided ½ interest in the east 20 acres of the 60 acre tract on Livingston Road." (R.E. 46)

33. First, Sonny contends that the above offer by Philip, and acceptance by Sonny, constituted a contract. See *McInnis v. Southeastern Sprinkler Co.* 233 So. 2d 219, 221 (Miss. 1970) (acceptance of a contract as binding upon a party may be shown by his actions). If the above constitutes an offer and acceptance, which is undisputed, then it is a contract and Philip is bound by it. Philip should not be heard to impose a condition that the action be dismissed with prejudice, that was accepted, and then later contend that he is entitled to additional relief postdating Sonny's approval of the *Order of Dismissal with Prejudice*. It is immaterial that Philip's attorney may not have actually received the *Order of Dismissal with Prejudice* or that said *Order of Dismissal* was never presented to the court.

ESTOPPEL BY SILENCE

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34. Finally, Philip contends that the issue of estoppel was not presented to the trial court and consequently cannot be presented to this court. This is the law. However, these are not the facts in Merideth II. This statement is clearly untrue. Sonny, in his response to Philip's Motion for Sanctions, expressly said as follows:

> "PTM should be collaterally estopped now from taking any action inconsistent with what he agreed to in the Consent Judgment." (C. 180 at C. 182)

35. Estoppel was, in fact, argued to the trial court. The express argument on estoppel related to the *Order of Dismissal with Prejudice*. Estoppel was expressly mentioned. (C.R. 26, Lines 8-11). The four letters from Sonny to Philip were introduced into

evidence as Exhibits 1-4. (C.R. 18, Lines 11-13) The significance of these letters was argued to the court. (C.R. 20, (Line 14), 21, (Lines 1-28). Correct nomenclature is not essential to the pleading of a claim. Alleging a promise and reliance upon that promise was found sufficient to raise an equitable claim of promissory estoppel in *Hinson v. Capitol Inn & Const. Co.*, 2002-CA-01353-COA (¶¶16-17), 890 So 2d. 65, 68 (Miss. App. 2004). The issue was deemed preserved despite a failure to specifically allege promissory estoppel.

36. The rational of *Hinson* that alleging the elements of estoppel is efficient to properly raise the issue should apply to the present case. By providing the trial court with evidence that Philip knew of the conditions upon which the lands were deeded to him, silently accepted the benefits of the gift of land while knowing of the conditions, and for years retaining the property without objection to the conditions, Sonny placed the question of estoppel by silence before the trial court, even though that specific term was not used in the argument.

ATTORNEY FEES AND EXPENSES ON APPEAL

Page 26-27 of Philip's Brief.

37. M.R.A.P. 38 allows an appellate court to award damages against an appellee if an appeal is "frivolous." The fact that the trial court imposed sanctions does not mean that this court must award damages under Rule 38. A case is frivolous under M.R.C.P. 11 if the party has no hope of success. *Tricon Metals & Services, Inc. v. Topp*, 537 So. 2d, 1331, 1335 (Miss. 1985). In fairness to Sonny, this test (success) should be applied at the time Sonny decided to appeal and not based upon the conclusions of this court after a careful analysis of the entire record or the Judgment of the trial court. Sonny's position

would be otherwise if the trial court had addressed all of the issues raised by Sonny instead of the sole issue of the statute of frauds. If Sonny has any hope of success on this appeal, damages should not be imposed even if the case is affirmed. Sonny admits that he has been unable to find any authorities to support this specific point.

38. If this court should conclude that Sonny, prior to filing Merideth II, knew, or should have known, the statute of frauds was applicable and controlling, then the trial court was correct. On the other hand, if at the time of filing suit, a reasonably skilled attorney thought that there were theories of recovery against Philip, outside of the statute of frauds, then the trial court should be reversed and this case dismissed. Finally, Philip should be held to what he did and what he was reasonably required to do by reference to what he did. He signed and delivered the *Warranty Deed.* He signed and delivered the *Consent Judgment* to the escrow agent. His attorneys prepared and delivered the *Order of Dismissal with Prejudice* to Sonny. Philip's attorneys raised the question of attorney's fees with Sonny, but Sonny declined to pay Philip's attorney's fees. A provision was included to the *Order of Dismissal* addressing costs and attorney's fees. Philip accepted Two Hundred Forty Three Thousand Dollars ($243,000). This was Forty Three Thousand Dollars ($43,000) plus more than his pro rata share. Finally, the record is clear. Philip was satisfied with the outcome in Merideth II until Merideth III was filed and then, and only then, he contends that Merideth II was file without substantial justification. This point (substantial justification) was never mentioned as to Merideth II until Merideth III was filed. While Merideth III is not before the court, filing a claim on a Promissory Note that is unpaid, even though arguably the statute of limitations has run does not, in itself, make the claim frivolous or without justification. The statute of

limitations does not "time-kill" a cause of action. A claim barred by the statute of limitations is still actionable, unless and until the adverse party **pleads** the statute of limitations. *See Alexander v. Womack*, 2002-CA-01431-SCT (¶11), 857 So. 2d 59, 62 (Miss. 2003)(Statute of limitations is an affirmative defense which must be plead. A party relying on a M.R.C.P. 8(c) defense must affirmatively plead it.)

CONCLUSION

39. For multiple reasons (prevailing party, *Consent Judgment*, *Order of Dismissal*, settlement and estoppel) this case could be reversed and rendered.

DATED THIS THE 11TH DAY OF OCTOBER 2007

H. L. MERIDETH, JR.

CERTIFICATE OF SERVICE

I, H. L. Merideth, Jr., Appellant, certify that I have this day served a copy of this *Reply Brief of Appellant* on the following persons:

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SO CERTIFIED this the 11th day of October, 2007.

H. L. MERIDETH, JR.