

**IN THE SUPREME COURT OF MISSISSIPPI**

**DISMISS HOLDING, INC.**

**APPELLANT**

**VERSUS**

**NO. 2007-TS-00042**

**E. HAROLD KNIGHT**

**APPELLEE**

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**APPEAL FROM THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI  
JACKSON COUNTY CHANCERY COURT CAUSE NO. 2004-1838**

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**APPELLANT'S BRIEF**

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**ATTORNEYS FOR APPELLANT**

**ORAL ARGUMENT IS NOT REQUESTED**

### CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of records certifies that the following listed persons have an interest in the outcome of this case. These presentations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. Representative agent for Disposal, Inc., Pam McNair.
2. W. Harvey Barton, Attorney for Appellant.
3. Brandon C. Jones, Attorney for Appellant.
4. Matthew G. Mestayer, Attorney for Appellee.
5. Honorable Neil Harris, Chancery Court Judge, Jackson County, Mississippi.
6. Honorable Pat Watts, Chancery Court Judge, Jackson County, Mississippi.
7. E. Harold Knight, Appellee.

SO CERTIFIED this the 14<sup>th</sup> day of September, 2007.

  
W. HARVEY BARTON, MSB #2104

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## **STATEMENT OF THE ISSUE**

A. Did the trial Court err by awarding attorney's fees to the Appellee, E. Harold Knight?

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This case was originally filed as *E. Harold Knight and Benny Knight v. Dismiss Holdings, Inc. and John Doe Defendants A,B,C and D*, No. 2004-1838-PW in the Chancery Court of Jackson County. The underlying cause of action was trespassing.

On December 12, 2006, the Chancery Court awarded Appellee damages in the amount of Two Thousand One Hundred and Eight Dollars (\$2,108.00) and attorney's fees in the amount of Nine Thousand Five Hundred Dollars (\$9,500.00).

Appellants contend on appeal that the Chancery Court of Jackson County erred in awarding attorney's fees to Appellee.

### **B. Course of Proceedings and Disposition Below**

On February 26, 2003, Red-D-Arc, Inc., a creditor of Appellee's business, Knight's Piping, Inc., obtained an Agreed Judgment of Twenty-Five Thousand Seven Hundred and Fifty-Five Dollars and Nineteen Cents (\$25,755.19) against Knight's Piping, Inc. Believing that property located at 5309 Industrial Road in Pascagoula, Mississippi belonged to Knight's Piping, Inc., attorneys for Red-D-Arc, Inc. requested that the Jackson County Sheriff issue execution against the subject property. On August 17, 2004, Appellant, Dismiss Holdings, Inc., became the highest bidder for the subject property and obtained a quitclaim deed to same.

On August 23, 2004, Appellee, along with his brother with whom he owned the property at issue, filed his Complaint for Injunctive Relief and Damages with the Jackson County Chancery Court. On August 25, 2004, the Chancery Court entered a Temporary Restraining Order prohibiting the destruction or removal of any property from the subject property. On September 9, 2004, the Chancery Court entered an Agreed Order which stipulated that Appellee and his brother, Benny R. Knight, were the record owners of the subject property; that Appellant waived any right, title or interest in the subject party; and that the quitclaim deed issued by the Jackson County Sheriff on August 17, 2004 should be canceled and held naught. The Agreed Order also provided that the amount paid by Appellants for the property, Thirty-one Thousand Dollars (\$31,000.00), should remain with Joe Martin, Jackson County Circuit Clerk, until such time as the issue of damages could be determined.

This action came on for trial on August 14, 2006, before the Chancery Court of Jackson County. The issue before the Chancery Court was whether damages should be awarded to the Appellee and his brother and, if so, whether those damages should be deducted before the return of the money paid by the Appellant for the subject property.

On October 12, 2006, the Court entered an Opinion awarding damages in the amount of Two Thousand One Hundred and Eight Dollars (\$2,108.00) to Appellee and his brother. Additionally, the Court awarded Nine Thousand Five Hundred Dollars (\$9,500.00) in attorney's fees to Appellee and denied Appellee's brother's claim for attorney's fees.

It is from the Chancery Court's Opinion of October 12, 2006 and the Court's subsequent judgment of December 12, 2006 that this appeal is perfected. Specifically, the Appellant appeals the Jackson County Chancery Court's award of attorney's fees to Appellant.

### **C. Statement of the Facts**

The Appellant is a holding company for the real estate interest of Disposal, Inc., a multi-state corporation specializing in the collection and removal of waste products. (R. 89). In 2004, Appellants were of the opinion that its business location in Gautier, Mississippi was inadequate in that it did not have the necessary facilities to perform truck maintenance. (R. 90). As such, Appellant began the process of finding a suitable location to conduct its business. When the Jackson County Sheriff's Department began accepting bids for the property located at 5309 Industrial Road in Pascagoula, Mississippi, Appellant thought it had found such a location. Appellant prevailed in the bidding process, obtained a quitclaim deed to the property and promptly hired a locksmith to gain entrance to the property by removing the existing lock and replacing it. (R. 92).

The representative agent for Disposal, Inc., Pam McNair, testified that her intentions were to move the entire Disposal, Inc. operation to the Industrial Road facility, where all offices and maintenance could be done under one roof. (R. 92) As the Appellant was anxious to start the process of relocating the business, they immediately placed a port-a-let on site for bathroom facilities. (R. 95). A plumber was hired to make repairs to the bathrooms and replace a hot water heater. The Sheriff informed Appellant that it had a duty to call Knight's Piping, Inc. and give the company thirty (30) days to remove its personal property. (R. 94). In compliance with the duty owed Knight's Piping, Inc., Appellant removed no personal property and retained all records on site. (R. 94).

On August 20, 2004, Appellee and his brother, Benny Knight, advised Appellants that Knight's Piping, Inc., was not the record owner of the property. (R. 66). Three (3) days later, on

August 23, 2004, Appellees filed their Complaint for Injunctive Relief and Damages. This initial action resulted in a Temporary Restraining Order of August 25, 2004, prohibiting the destruction or removal of any property from the Industrial Road location. (R. 32-34). On September 9, 2004, the Jackson County Chancery Court conducted a hearing on the merits which resulted in an Agreed Order which stipulated that the Appellee and Benny R. Knight were the record owners of the Industrial Road property and provided that Appellant waived any right, title and interest to any real or personal property located at Industrial Road. Additionally, the parties stipulated that the quitclaim deed issued by the Sheriff should be canceled and held naught. The September 9, 2004 Order also provided that the \$31,000.00 paid by Appellant for the property should remain with Joe Martin, Jackson County Circuit Clerk, until such time as the issue of damages could be determined. (R. 35-37).

Early in these proceedings, Appellant stipulated that Knight's Piping, Inc. never owned the property which was the subject of the underlying lawsuit. (R. 35). As such, ownership of the property located on Industrial Road in Pascagoula is not an issue before this Court.

### **SUMMARY OF THE ARGUMENT**

Under Mississippi law, a court cannot assess attorney's fees in an action for trespass in the absence of "willful, grossly negligent or wanton conduct." Appellant's actions in the case at bar demonstrated none of these characteristics. Therefore, the Jackson County Chancery Court's assessment of attorney's fees was improper and the Chancery Court's judgment should be reversed in this respect.



## ARGUMENT

### I. STANDARD OF REVIEW

This Court adheres to a limited standard of review of the decisions of a chancellor.

*Nichols v. Funderburk*, 883 So.2d 554, 556 (¶7) (Miss. 2004). A chancellor should be reversed when the chancellor's determinations were manifestly wrong or clearly erroneous. *Id.*

### II. THE APPELLANT DID NOT ACT IN A WILFUL, GROSSLY NEGLIGENT OR WANTON MANNER.

The general rule concerning the award of attorney's fees is set forth in *Cooper v. United States Fidelity & Guaranty Co.*:

The rule in this state is that, in the absence of statute, attorney's fees are not recoverable, unless the facts are of such gross or willful wrong as to justify the infliction of punitive damages.

186 Miss. 116, 122 (Miss. 1939).

In its opinion, the Jackson County Chancery Court cited *R & S Development, Inc. v. Wilson*, 534 So. 2d 1008 (Miss. 1988) in support of the proposition that if a trespass is willful, grossly negligent or wanton, it can assess attorney fees. However, the facts justifying attorney's fees in *Wilson* are vastly different than those in the present case. In *Wilson*, a developer attempted to construct a duplex in a twenty (20) foot alleyway against the advice of a Jackson City Engineer. *Id.* at 1010. When the developer began to bulldoze the alleyway which was used by a number of his neighbors, the neighbors objected and eventually brought suit. *Id.* The Chancery Court assessed attorney's fees against the developer and this Court affirmed the lower Court's ruling. *Id.* at 1014. Unlike the developer in *Wilson*, Appellant did not conduct itself in a way that could be characterized as "willful, grossly negligent or wanton." Pam McNair, the representative of Disposal, Inc., the parent company of Appellant, testified that she saw a legal

notice in the newspaper advertising a sheriff's sale. (R. 90). She and the general manager of the company went to the sale and bid on the property. (R. 90). Being the highest bidder, she obtained \$31,000.00 cash, and gave it to the Sheriff's officer. (R.90). In exchange for the cash, she received a quit claim deed. (R. 91). As such, Appellant reasonably believed it made a good faith purchase for a significant sum of money under the apparent authority of the local government.

Upon completing what it believed was a lawful purchase and before the question of ownership arose, Appellant took immediate steps to possess the property by calling a locksmith to change locks and paying a plumber \$460.00 to get the toilets working. (R. 92, 95). The facts are that by August 25, 2004, an Injunctive Order was entered after which the Appellants were not on the property. (R. 32, 33). Of the actual damages found by the Court of \$2,108.00, the majority of that amount of \$1,823.00 was for a repair bill that was speculative in nature. (R. 68). Recognizing that this Court will not overturn the lower Court's finding of actual damages unless there was manifest error, Appellant does not contest the award of actual damages.

In *Seismic Petroleum Services, Inc. v. Ryan*, this Court held that for punitive damages to be allowed, "the proof must show that the trespass was willful, grossly negligent or wanton and punitive damages may be allowed as punishment for that type of trespass." 450 So. 2d 437, 440 (Miss. 1984). Only with this type of finding will an allowance of attorney's fees be lawful. The lower Court rejected Appellants argument that it was an "innocent purchase who by honest contract or agreement, purchases property or acquires an interest therein, without knowledge or *means of knowledge* sufficient to charge him in law with knowledge of an infirmity in the title for the seller." (R.66). The lower Court, by adding its emphasis to "means of knowledge,"

opined that Appellant had "means of knowledge" to determine if it had acquired title to the property prior to entering thereon. (R. 67). According to the Court, the "means of knowledge" would have been by obtaining a title opinion on the property, before going upon the property. (R. 67).

Was the Appellant naive in this process? Certainly. Was the Appellant unsophisticated in this sale? Most assuredly. Was the Appellant even negligent? Possibly. While hindsight might suggest that Appellants should have chosen a different course of action, it is incorrect to characterize Appellants actions as *grossly* negligent.

Whether there is negligence involved with a trespass has already been answered in Mississippi. In *Strawbridge v. Day*, 232 Miss. 42, 52-53 (Miss. 1957), this Court held as follows:

The phrase "good faith", as used in a statute such as we have here, denotes honesty of purpose, freedom from intention to defraud or to deprive others of rights or property to which in equity and good conscience they are entitled. In order to avoid liability for the statutory penalty in a case of this kind the defendant is not required to prove freedom from negligence, but only that the trespass was not willful, or did not result from wantonness or recklessness. As stated by the Court in *Dartmouth College v. International Paper Co.*, 132 Fed. 92, which was an action of trover for the conversion of timber cut and removed by the defendant from the plaintiff's land, "The good faith which will protect the defendant is not incompatible with some degree of negligence. Almost any trespass upon the rights of another which is not willful arises, in whole or in part, from the defendant's ignorance of something which he might have discovered had he exercised a certain degree of care. Trespasses on the land of another, not willful, always imply some degree of negligence. *Franklin Coal Co., v. McMillan*, 49 Md 549, 559, 33 Am. Rep. 280."

There are no facts, however, to suggest that Appellant's actions were grossly negligent. There is no legal duty to have a title opinion before taking possession of property as a sheriff's sale. If gross negligence was committed it was by the creditor Red-d-Arc, Inc., for initiating the sale on property not owned by their judgment defendant. The Appellee's search for a responsible party

to pay their attorney's fees is misplaced as concerns the Appellant's. Further, it should be noted that the vast majority of these fees were incurred as a result of trying to prove a nominal damage claim at best.

### **CONCLUSION**

All of the Mississippi case law deals with actions after the initial trespass to give rise to actual and/or punitive damages. While Appellants are sure there are some factual scenarios that exist giving rise to gross negligence for actions performed before the trespass occurs, this set of facts is not one of them.

For the above and foregoing reasons, Appellants submit that the lower Court erred by assessing attorney's fees against Appellant and that the case should be reversed in this respect.

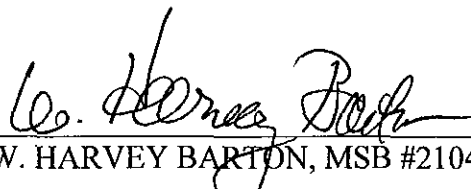
# **CERTIFICATE OF SERVICE**

I, W. HARVEY BARTON, do hereby certify that I have this day served, via Facsimile and/or United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:



Matthew Mestayer, Esquire  
Byrd & Wiser  
P. O. Box 1939  
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Honorable Neil Harris  
Jackson County Chancery Court  
P. O. Box 998  
Pascagoula, MS 39568-0998

SO CERTIFIED this the 14<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
W. HARVEY BARTON, MSB #2104

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