IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00612-SCT

CENTRAL HEALTHCARE SERVICES P.A. AND
WENDALL HARRELL — APPELLANTS

vs.

CITIZENS BANK OF PHILADELPHIA, MISSISSIPPI — APPELLEE

ON APPEAL FROM THE CHANCERY COURT
OF LEAKE COUNTY MISSISSIPPI

BRIEF OF APPELLEE/CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

JAMES W. CRAIG, MB [redacted]
STRATTON BULL, MB [redacted]
B. LYLE ROBINSON, MB [redacted]
PHELPS DUNBAR LLP
111 East Capitol Street • Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300
Email: craigj@phelps.com
Email: bulls@phelps.com
Email: robinsol@phelps.com

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 justices of this Court may evaluate possible disqualification or recusal.

1. Citizens Bank of Philadelphia, Mississippi
   Appellee/Cross-Appellant

2. Central Healthcare Services P.A. and Wendell Harrell
   Appellants/Cross-Appellees

3. Honorable Janace Harvey-Goree
   Chancellor

4. J. Edward Rainer, Lora S. Gipson and Rainer Law Firm, P.A.
   Attorneys for Appellants/Cross-Appellees

5. Stratton Bull, James W. Craig, B. Lyle Robinson and Phelps Dunbar, LLP,
   Attorneys for Appellee/Cross-Appellant

6. Wilson H. Carroll and Wyatt, Tarrant & Combs, LLP
   Co-Counsel in Chancery Court for Appellee/Cross-Appellant

SO CERTIFIED, this the 1st day of August, 2008.

B. Lyle Robinson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

STATEMENT OF THE ISSUES

A. Whether the Chancery Court was manifestly wrong, clearly erroneous, or applied an erroneous legal standard in finding that title to the Crawford Lot, the property at issue in this dispute, was in the Whitten Group.

B. Whether the Chancery Court erred in dismissing Central Healthcare Services, P.A. ("CHS") and Wendall Harrell's ("Harrell") counterclaims against Citizens Bank of Philadelphia ("Citizens Bank") for abuse of process, malicious prosecution, defamation, and under the Litigation Accountability Act.

C. Whether the Chancery Court erred in finding that CHS and Harrell were not entitled to attorneys' fees.

D. Whether the Chancery Court erred in denying Citizens Bank's claims for deficiency on the loan to Harrell, attorneys' fees and premium paid to the Whitten Group to repurchase the Crawford Lot.

REQUEST FOR ORAL ARGUMENT

The legal issues in this appeal are straightforward. On the direct appeal brought by Wendall Harrell and Central Healthcare Services, P.A. the question is whether the Chancellor committed manifest error in holding, after a three-day trial, that title to a parcel of property known as the Crawford Lot is held by the Whitten Group, as the result of a foreclosure on a loan made by Citizens Bank to Harrell.[1] Affirmance of the Chancellor on that finding necessarily requires a similar result on the remainder of the direct appeal, in which Harrell and CHS challenge the dismissal of their claims for malicious prosecution, abuse of process, defamation, and under the Litigation Accountability Act. Logic dictates that if the Chancery Court correctly determined that the Crawford Lot was included in the property acquired by Citizens Bank through the foreclosure, then the Bank could not have committed any tortious wrongdoing by bringing this civil action.

On the cross-appeal, if this Court affirms the Chancery Court on the underlying question of the ownership of the Crawford Lot, then it should scrutinize the Chancellor's refusal to grant attorney's fees, a deficiency judgment to the Bank and the premium it paid to the Whitten Group in repurchasing the Crawford Lot under threat of litigation.

Although the legal issues in this case are not taxing, this Court would benefit from oral argument. The underlying evidence, particularly the various plats, maps, and legal instruments involved in this dispute, are best explored in the give and take of oral argument. This Court would be able to focus on particular factual questions involving the relevance and interpretation of the materials with the live assistance of counsel. For this reason, Appellees/Cross-Appellants respectfully request oral argument pursuant to Miss.R.App.P. 34.

[1] By reason of the doctrine of after acquired title and the Whitten Group's conveyance of one acre that included the Crawford Lot prior to the Chancery Court's Final Judgment, record title to the Crawford Lot is now vested in Citizens Bank.

STATEMENT OF THE CASE

A. Introduction.

At the center of this appeal and cross-appeal is a fairly simple dispute about title to a parcel of land known as the Crawford Lot, which faces Highway 16 just east of the intersection of Highways 16 and 35 in Leake County, Mississippi. In September of 2000, Citizens Bank of Philadelphia ("Citizens Bank" or "the Bank") loaned $954,081 to Harrell to consolidate several prior loans which had been used to purchase a group of lots on the southeast corner of that intersection. Harrell told the Bank that he planned to develop a shopping center at that location. The September 2000 loan was meant to be a "bridge" to any permanent financing Harrell might secure for the development of the shopping center.

As collateral for the loan, Harrell gave a Deed of Trust to the Bank. The Crawford Lot, and the adjoining Hardage Lot, were included in the description of the properties collateralized in this instrument. P-15, RE. 8.[2] Harrell's attorney gave a preliminary certificate of title to the Bank certifying that, upon acquisition of the Hardage Lot from CHS, an entity owned by Harrell's daughter, Blanche Gregory, in the September 2000 loan transaction, he would own both the Crawford Lot and the Hardage Lot. The debts encumbering the Hardage Lot and the Crawford Lot were satisfied from some of the proceeds of the Bank's September 2000 loan.

Harrell never developed the shopping center and never paid the principal of the September 2000 loan. After renewing this bridge loan once and extending the loan twice (for which it was criticized by bank examiners), Citizens Bank was obliged to call upon Harrell for repayment. Ultimately, the Bank foreclosed on the September 2000 Deed of Trust. During the foreclosure proceedings, Harrell conveyed the entire series of parcels, including the Crawford

[2] Citations to the eight record volumes, including the clerk's papers and transcript, are as follows: "[volume]:[page(s)]." Record Excerpts are cited as RE. [Tab Number] and exhibits are cited by exhibit number.

Lot, to a "straw man" entity which immediately declared bankruptcy. The Bank secured an order from the Bankruptcy Court allowing the foreclosure proceedings to continue, and after being the successful bidder at the foreclosure sale, the Bank sold the property to the Whitten Group.

At that point, Harrell contested whether he had actual title to the Crawford Lot. Likewise, CHS contended that it never conveyed the Crawford Lot to Harrell. Thus, Citizens Bank was forced to bring this civil action to secure title to the Crawford Lot for its purchaser, the Whitten Group.

B. Course of Proceedings.

This action was filed in the Chancery Court of Leake County, Mississippi on October 20, 2004. In the original complaint, Citizens Bank sued CHS to confirm title and cancel cloud on that property known as the Crawford Lot in Leake County, Mississippi. George L. Whitten, Joseph Kyle Welch, J.P. Culpepper and Greg Thaggard (the members of the Whitten Group) were named as involuntary plaintiffs in the complaint. Citizens Bank later filed an amended complaint naming Wendall Harrell as a defendant and alleged various claims against Harrell. CHS and Harrell asserted counterclaims against Citizens Bank for fraud, abuse of process, malicious prosecution, defamation and claims under the Litigation Accountability Act. Citizens Bank resolved the claims with the Whitten Group and they were dismissed as parties.

Trial on these pleadings was heard on April 17 and 18, 2006 and October 20, 2006, before the Honorable Janace Harvey-Goree. After all the evidence had been presented, the parties submitted post-hearing briefs to the Court. On March 3, 2007, Judge Harvey-Goree entered Final Judgment in this matter with a lengthy opinion discussing how the Court found the facts necessary to its judgment. CHS and Harrell moved for reconsideration by the

Chancery Court, which was denied. On April 16, 2007, CHS and Harrell served their Notice of Appeal.

C. Statement of the Facts.

Harrell purchased the Crawford Lot on September 4, 1987 by Warranty Deed from Robert Lee Crawford, recorded in Deed Book 174, Page 533, on file and of record in the Leake County Chancery Clerk's Office. 6:100; P-1, RE. 1. Its legal description is as follows:

> All that part of Lots 1 and 2, Block 9, Henderson, Hogue, Harrell Addition to the Town of Carthage, Mississippi, that is found lying and being situated South of New Highway No. 16; LESS AND EXCEPT, beginning at the point on the South property line of New Mississippi Highway No. 16, where the same intersects the East boundary line of Block 9 of the said Henderson, Hogue, Harrell Addition to said town, and run Westerly along the South line of said Highway No. 16, a distance of 75 feet; thence run in a Southerly direction a distance of 159 feet to the South boundary of said Block 9 of said addition, thence run East 60 feet along the South boundary of said Block 9 to the SE corner of said Block 9; thence run North along the East boundary of said Block 9 a distance of 194 feet to the Point of Beginning on the South side of said Highway; conveying to Grantee herein all property owned by Grantor herein in Henderson, Hogue, Harrell Addition to the Town of Carthage, Leake County, Mississippi, that is lying and being situated South of New Highway No. 16, Mississippi, whether correctly described or not.

CHS purchased the Hardage Lot on November 7, 1994 by deed from Mrs. Nonie Lee Hardage, recorded in Deed Book 212, Page 27, on file and of record in the Leake County Chancery Clerk's Office. 7:259-260; P-7, RE. 3. Its legal description is as follows:

> A tract of land with all improvements thereon situate located in the City of Carthage, Mississippi, more particularly described as begin at the point where the South right of way boundary line of new Highway No. 16 intersects the East boundary line of Block 9, Henderson-Hogue-Harrell Addition to said City, and run thence Westerly along the South boundary line of said highway right of way a distance of 75 feet; thence run Southerly a distance of 159 feet to a point on the South boundary of said Block 9, Henderson-Hogue-Harrell Addition, which point is 60 feet West of the Southeast corner of Block 9, Henderson-Hogue-Harrell

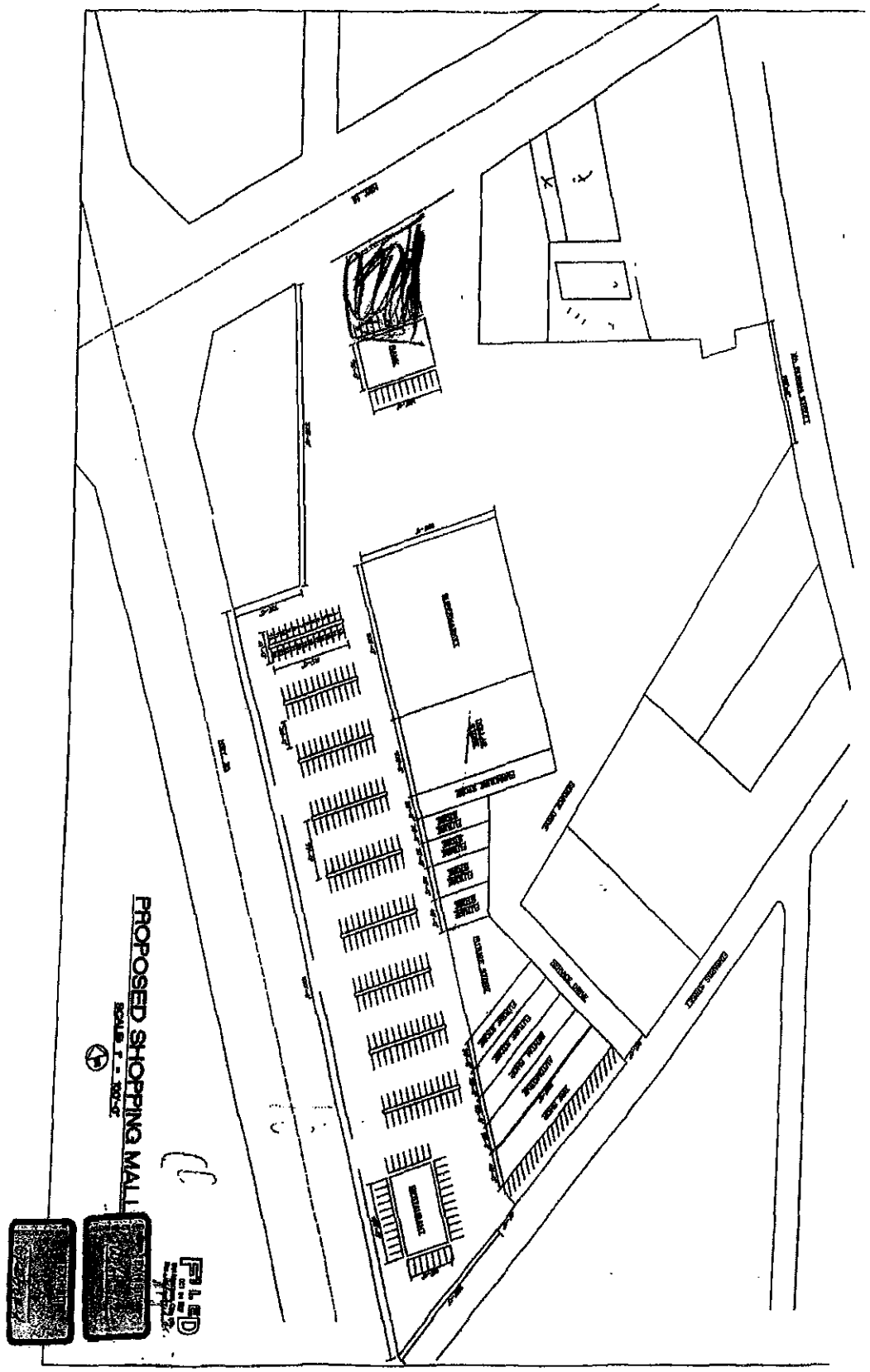
> Addition of said City; thence run East for 60 feet along the South boundary of said Block 9, Henderson-Hogue-Harrell Addition to the Southeast corner thereof; thence run North along East boundary of said Block 9, Henderson-Hogue-Harrell Addition for 194 feet to Point of Beginning, and being a part of and located wholly within Lots 1 and 2 of Block 9, Henderson-Hogue-Harrell Addition to the City of Carthage, Mississippi, a plat of which survey is of record in the Office of the Chancery Clerk of Leake County, State of Mississippi . . .

Harrell conveyed the Crawford Lot to CHS on May 24, 1989 by Warranty Deed recorded in Deed Book 182, Page 668, on file and of record in the Leake County Chancery Clerk's Office. 6:100; P-5, RE. 2.

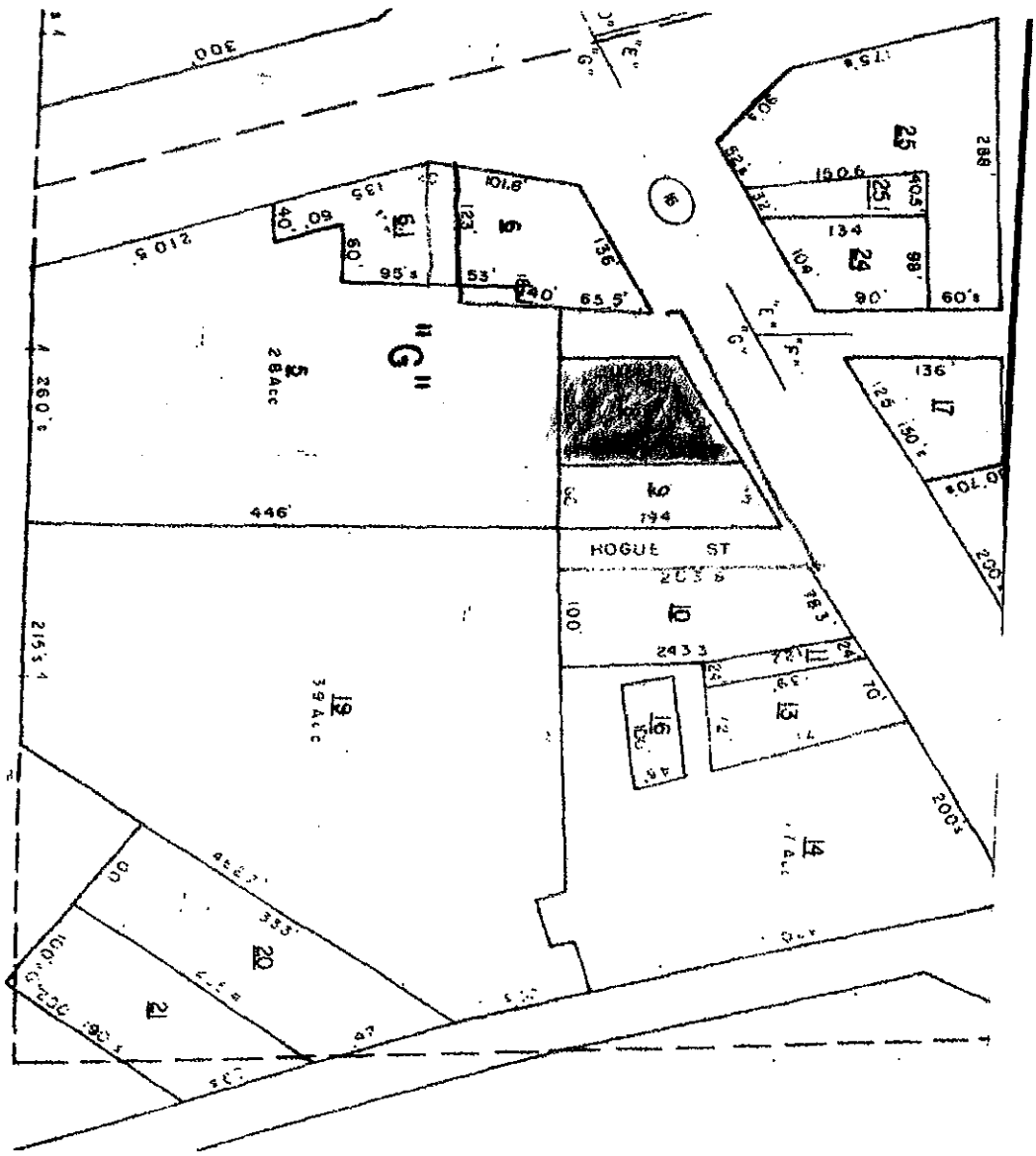
Harrell had hoped to develop a small retail shopping center on property he and his daughter's company, CHS, owned at the intersection of Highways 35 and 16 in Carthage, Mississippi. 6:8-9. Harrell developed a site plan which included a bank, supermarket, "dollar store" and other such retail outlets. 6:68-69; D-4, RE. 30. Harrell, a previous loan customer at Citizens Bank, approached the Bank for a loan on this project. 6:9.

However, Citizens Bank did agree to give Harrell a "bridge loan" to consolidate the debt on the lots acquired by him, which would give Harrell time to find permanent financing for the project. To this end, Citizens Bank required that Harrell provide a deed of trust in favor of Citizens Bank covering all of the property to be used in the project, including the Crawford Lot, before Citizens Bank would agree to provide the loan. 6:45-47.

Harrell provided Citizens Bank with the site plan along with an appraisal report, title certificates and a deed of trust. 6:16-17, 26, 31-34, 36-39, 68-69. Each of these items included a property description which covered and included both the Crawford Lot and the Hardage Lot, which are adjacent to one another. D-4, RE. 30; P-11, RE. 5; P-15, RE. 8; P-19, RE, 10; P-20, RE. 11. A portion of Harrell's site plan is included below:


PROPOSED SHOPPING MALL
FILED

D-4, RE. 30. Harrell's proposed development contemplated the use of the Crawford Lot. 6:8-9. Mike Brooks, President and Branch Manager of Citizens Bank's Carthage branch, testified that Harrell used a map to indicate the property to be included in the project. 6:50-52; P-24, RE. 13.[3] Brooks testified that Harrell drew a line on the map indicating part of the property for the project. This line showed that the property included the Crawford Lot. 6:51-54.



[3] P-24 has been made into a blown up exhibit and is part of the official record.

The Deed of Trust provided by Harrell to Citizens Bank provided that the Crawford Lot was included in the property deeded as security for Citizens Bank's loan to Harrell. 6:51-52; P-15, RE. 8. The Deed of Trust contained a warranty of title that Harrell was conveying all property including the Crawford Lot as security for Citizens Bank's loan to Harrell. P-15, RE. 8. Further, the Deed of Trust provided that Harrell would pay Citizens Bank's attorneys' fees for collection of the amounts owed under the promissory note entered into between the parties. P-15, RE. 8.

On September 14, 2000, Citizens Bank loaned Harrell $954,081.00. P14. In return, Harrell gave a deed of trust on the property to be included in the development. 6:51-52; P-15, RE. 8. Citizens Bank required CHS to transfer title to Harrell of the lots that Harrell did not then have record title as part of the agreement to loan the money. 6:45-46 A portion of the proceeds of the loans from Citizens Bank to Harrell was used to pay off the mortgages on the Hardage Lot and the Crawford Lot for CHS. 8:302. Harrell's attorney, Roy Wright ("Wright"), failed to discover that record title to the Crawford Lot was in CHS, not Harrell. Thus, the required transfer from CHS to Harrell only occurred to the Hardage Lot. Record title to the Crawford Lot erroneously remained in CHS. This was not disclosed to, or known by, Citizens Bank at the time the loan to Harrell was made.

On September 22, 2000, after Citizens Bank loaned Harrell $954,081.00, he provided Citizens Bank with a certificate of title which certified his ownership in the Crawford Lot and the Hardage Lot and that Citizens Bank held a first lien deed of trust on the Harrell property which included the Crawford Lot. P-19, RE. 10; P-20, RE. 11. Previously, on September 1, 2000, CHS executed a land deed to Harrell conveying the Hardage Lot to Harrell. 6:141; P-12,

RE. 6. The property description contained in the land deed, however, only covered the Hardage Lot. 7:205-206.

Subsequent to the loan closing, Harrell and Gregory both took actions consistent with (1) the inclusion of the Crawford Lot in the development of the shopping center; (2) Harrell's ownership of the Crawford Lot; and (3) the Crawford Lot securing Harrell's note to Citizens' Bank. Harrell provided Citizens Bank with a site plan for the development of the shopping center, which included the Crawford Lot. D-4, RE. 30. Other actions taken by Harrell and Gregory included the demolition of the building located on the Crawford Lot. 7:264. To that end, CHS and Gregory had vacated the building located on the Crawford Lot and allowed Harrell to completely demolish the building which she had previously used in her business. *Id.* In addition, in financial statements given to Citizens Bank by Gregory for her own loans, she stopped reporting the value of the real estate, which included the Crawford Lot, as an asset in her annual financial reports. 8:304-305; P-48, RE. 28.

Harrell did not develop the shopping center. 8:307-310. When the loan came due, Citizens Bank granted a renewal and two extensions on the loan to Harrell. 6:48-49; 6:56-57; P-23, RE. 12; P-27, RE. 14; P-28, RE. 15. Harrell made some interest payments on the loan. 6:47. He made no payments toward the principal on the loan. 6:57. Because Harrell had made no payments towards the principal on the loan, the loan was criticized by federal regulators. 6:57-58; P-30, RE. 16.

Eventually, Harrell defaulted on the loan with Citizens Bank. 6:57-60 Citizens Bank began foreclosure proceedings on the property in July, 2004. 6:61; P-32, RE. 17. To prevent the foreclosure, Harrell conveyed all of the property in the project, including the Crawford Lot, to a newly formed entity, Cotton Place Corporation, on August 23, 2003. 6:61-63; P-33, RE.

18. Shortly after the conveyance to Cotton Place Corporation, Cotton Place Corporation filed for bankruptcy, which stayed the pending foreclosure. Citizens Bank was required to move the Bankruptcy Court to lift the automatic stay in the Bankruptcy Court so that it could proceed with the foreclosure on the property. 6:62-63; P-34, RE. 19. After the Bankruptcy Court gave it permission to do so, Citizens Bank then started foreclosure proceedings on Harrell's loan a second time. 6:63; P-36, RE. 21.

At foreclosure on March 22, 2004, Citizens Bank was the successful bidder on the property which included the Crawford Lot. P-37, RE. 22. It bid $963,649.97, which was Harrell's unpaid principal balance and costs associated with his defaults. 6:64-66. After the foreclosure sale, there was a deficiency balance owed by Harrell to Citizens Bank in the amount of $81,611.03 which was the accrued but unpaid interest. 6:89; D-9, RE. 31.

After foreclosure, Citizens Bank sold the property in its entirety to J.P. Culpepper, George Whitten, Kyle Welch and Greg Thaggard (the "Whitten Group") for $963,649.97 which was what Citizens Bank bid at the foreclosure. 6:67; P-39, RE. 23.

After the sale of the property to the Whitten Group, Citizens Bank learned that Harrell did not have clear title to the Crawford Lot at the time it was given by Harrell as security for the September 2000 loan; and thus CHS still had colorable title to the Crawford Lot. 6:71.

Roy Wright ("Wright"), the attorney who prepared the title certificate, was the attorney for Harrell "throughout the transaction." 8:342-344. Wright billed Harrell for his work and was paid for his services by Harrell out of the loan proceeds. 8:345; P-18, RE. 9. The title certificates prepared by Harrell's attorney and supplied to Citizens Bank failed to reflect the fact that the Crawford Lot had not been conveyed to Harrell by CHS, the company owned by Harrell's daughter. P-19, RE. 10.

When the lack of title to the Crawford Lot was discovered, Wright contacted Harrell about the problem with the deed of trust and the Crawford Lot. 6:150, 7:151. Harrell stated that he would do whatever was right to get this problem resolved. 7:151. Harrell directed Wright to draw the deed to convey the Crawford Lot to the Whitten Group and to contact Ms. Gregory. 6:173.

Wright contacted Gregory about the problem with the title to the Crawford Lot and the transfer of the Crawford Lot. 6:152. On July 28, 2004, Gregory executed a Quitclaim Deed in her capacity as President of CHS conveying the Crawford Lot to the Whitten Group. P-44, RE. 24. The 2004 Quitclaim Deed contained the following legal description:

> All of that part of Lots 1 and 2, Block 9, of the Henderson-Hogue-Harrell Addition to the City of Carthage, Leake County, Mississippi, that lies South of Mississippi State Highway No. 16, according to plat of said Addition recorded in Plat Book 1, Page 5, in the Leake County Chancery Clerk's Office

P-44, RE. 24. The September 14, 2000 deed of trust executed by Wendall Harrell to Citizens Bank contained the same legal description as the 2004 Quitclaim Deed signed by Gregory on behalf of CHS. 8:365; P-15, RE. 8; P-44, RE. 24. This description includes both the Hardage Lot and Crawford Lot.

Wright testified that the purpose of the 2004 Quitclaim Deed was to clear up the title on the Crawford Lot so that the property could be transferred to the Whitten Group. 7:153. Wright further testified that, when he prepared the 2004 Quitclaim Deed, he included an acquisition clause containing the following language:

> Grantor intends to convey herein, the property she acquired by deed from Ms. Nonie Lee Hardage, dated November 7, 1994, recorded in Deed Book 212, Page 27, records of the Leake County Chancery Clerk.

P-44, RE. 24. He included the acquisition clause as a convenience to other attorneys who might search the title to the property in the future. 7:157. Instead, he realized that he should have included an acquisition clause for the Crawford Lot or not have any acquisition clause at all. 6:174.

The Whitten Group was joined as involuntary plaintiffs in this lawsuit. 6:76. After the lawsuit was filed, the Whitten Group made a demand on Citizens Bank to purchase a one acre tract of land which included the Crawford Lot from the Whitten Group. 6:76-60. Citizens Bank had the one acre lot appraised. The appraised value was $230,000. 6:83; P-46, RE. 26. Citizens Bank had the Crawford Lot appraised and its appraised value was $60,000. 6:87. In order to avoid litigation with the Whitten Group, on June 9, 2005, Citizens bank purchased the one acre lot for $264,000, the amount demanded by the Whitten Group to avoid litigation. 6:83-85; P-47, RE. 27; P-45, RE. 25. In addition, Citizens Bank forgave part of the interest owed by the Whitten Group on its loan with Citizens Bank.

James Townsend ("Townsend"), a registered land surveyor, testified at trial as an expert witness. Townsend personally surveyed the property after Citizens Bank sold the property to the Whitten Group. 7:194-195. Townsend testified that the description in the 2004 Quitclaim Deed identified both the Hardage Lot and the Crawford Lot. 7:207.

Chris Wade ("Wade"), a certified appraiser, testified at trial as an expert witness. Wade testified that the appraised value of the Crawford Lot was $60,000. 7:246-247. He testified that the value of the remaining part of the one acre, which included the Hardage Lot, was $80,000. 7:255-256. He further testified that the value of the one acre lot purchased by Citizens Bank from the Whiten Group was $230,000. 7:244-246, 256. Wade stated that the reason for the sharp increase in the price of the one acre lot over the combined separate values

of the Crawford Lot and Hardage Lot was because of the amount of usable land available for construction on the site. 7:256.

SUMMARY OF THE ARGUMENT

DIRECT APPEAL

1. When the Court is construing a deed, the primary goal is to "ascertain and effectuate the party's intent." *Pursue Entergy Corp. v. Perkins*, 558 So.2d 349, 351 (Miss. 1990). To that end, the Supreme Court has set forth a three-tiered process which begins with examination of the four corners of the instrument in dispute. *Id.* at 352. If a deed is determined to be ambiguous, the Court will, if possible, "harmonize the provisions in accord with the parties' apparent intent." *Id.* at 352. In this case, there is no ambiguity in the deed at issue. Appellants have provided no evidence of an ambiguity in the deed. Thus, the parties' intent can be determined from a review of the deed itself. That review supports the Chancellor's findings that title to the Crawford Lot passed to the Whitten Group.

2. Even if this Court were to determine that there were contradictory terms within the deed, the Supreme Court has held "where there is conflicting language found in the granting clause and the descriptive or recital [acquisition] clause, the granting clause controls." *McDonald v. Mississippi Power Co.*, 732 So.2d 893, 898 (Miss. 1999). Because the granting clause provided that the Crawford Lot was transferred pursuant to the deed, that clause controls and the Crawford Lot was transferred to the Whitten Group.

3. The Appellants' claims of abuse of process, malicious prosecution, defamation, and claims under the Litigation Accountability Act are necessarily without merit in order to succeed on those claims, Appellants would have had to have been successful on the issues resolving the cloud on title. Because the Chancellor ruled that the title was vested in the Whitten Group, as

asserted by Citizens Bank in the lower court, Appellants' counterclaims against Citizens Bank are without merit.

CROSS APPEAL

4. Attorney's fees may be recoverable where there has been a breach of a warranty deed. *Howard v. Clanton*, 481 So.2d 272, 276-77 (Miss. 1985). Here, Harrell clearly breached the provisions of the warranty deed by warranting that Harrell was the record holder of title to the Crawford Lot. Thus, Citizens Bank is entitled to attorney's fees. Further, Citizens Bank is entitled to the deficiency amounts on the loan to Harrell. *Mississippi Valley Title Ins. Co. v. Horn Construction Co., Inc.*, 372 So.2d 1270, 1272 (Miss. 1979).

5. Citizens Bank is entitled to a judgment for the premium amount it paid to repurchase the Crawford Lot from the Whitten Group in the amount of $34,000.00. Citizens Bank was under a threat of litigation over the Crawford Lot if it did not repurchase the lot. For that reason, Citizens Bank repurchased the Crawford Lot as part of a one acre tract of land in order to avoid further litigation and to be in a better position to resell the property.

6. For these reasons, the Chancery Court's judgment should be affirmed on the issue of finding that the Crawford Lot was conveyed by the 2004 Quitclaim Deed to the Whitten Group and the dismissal of Harrell and CHS's counterclaims against Citizens Bank. The Chancery Court judgment should be reversed on its denial of an award of attorney's fees, deficiency judgment and premium paid on the purchase of the Crawford Lot.

LAW AND ARGUMENT ON HARRELL AND CHS' DIRECT APPEAL

I. THIS COURT GIVES GREAT DEFERENCE TO THE CHANCELLOR'S RULING.

On appeal, this Court applies "a limited standard of review when addressing appeals from a chancery court." *Buford v. Logue*, 832 So.2d 594, 600 (Miss. Ct. App. 2002). "[U]nless

the chancellor was manifestly wrong, clearly erroneous, or there was an application by the chancellor of an erroneous legal standard" this Court should affirm the Chancery Court's decision. *Kennedy v. Anderson*, 881 So.2d 340, 345 (Miss. Ct. App. 2004) (citation omitted). "Great deference is given to the chancellor as both finder of fact and trier of law." *Buford*, 832 So.2d at 600.

II. THE CHANCELLOR FAITHFULLY FOLLOWED THE APPLICABLE PRINCIPLES GOVERNING CONSTRUCTION OF LEGAL INSTRUMENTS; THUS THE CHANCELLOR'S INTERPRETATION OF THE 2004 QUITCLAIM DEED WAS NOT MANIFESTLY ERRONEOUS, NOR WAS IT BASED ON AN ERRONEOUS LEGAL STANDARD.

The operative document controlling the title to the Crawford Lot is the 2004 Quitclaim Deed. That Deed was executed to effectuate the warranty of title that Harrell had given in the September 2000 Deed of Trust, which represented that all of the property contemplated for the shopping center, including the Crawford Lot, would be used as security for the Citizens Bank bridge loan.

Harrell had intended to develop a small retail shopping center on the property which is located at the intersections of Highways 35 and 16 in Carthage, Mississippi. In order to develop the property, Harrell obtained a loan of $954,081.00 from Citizens Bank. Before Citizens Bank would agree to provide the loan, Citizens Bank required that Harrell provide a Deed of Trust in favor of Citizens Bank covering all property to be used in the project, including the Crawford Lot.

After Citizens Bank's foreclosure on the Harrell loan and its sale of the property to the Whitten Group, it was determined that at the time Harrell provided the Deed of Trust to Citizens Bank, Harrell was not the record title holder of the Crawford Lot. Harrell's attorney, Roy Wright, approached Blanche Gregory, the principal of CHS, about signing a Quitclaim Deed in which the Crawford Lot would be transferred to the Whitten Group. The Quitclaim

Deed, which was executed by Ms. Gregory, included the following legal description and acquisition clause:

[legal description]

> All that part of Lots 1 and 2, Block 9, of the Henderson-Hogue-Harrell Addition to the City of Carthage, Leake County, Mississippi, that lies South of Mississippi State Highway No. 16, according to the plat of said Addition recorded in Plat Book 1, page 5, in the Leake County Chancery Clerk's Office.

[acquisition clause]

> Grantor intends to convey herein, the property she acquired by deed from Ms. Nonie Lee Hardage, dated November 7, 1994, recorded in Deed Book 212, Page 27, records of the Leake County Chancery Clerk.

Because Harrell and CHS later claimed that CHS did not intend to convey the Crawford Lot to the Whitten Group, the construction of the 2004 Quitclaim Deed was central to this case. The Chancery Court, after hearing the testimony and viewing all of the evidence, determined that the 2004 Quitclaim Deed conveyed title to the Crawford Lot to the Whitten Group. The Chancery Court's ruling on this point is correct and should be affirmed.

A. Rules of Construction

When construing deeds, the primary goal is to "ascertain and effectuate the parties' intent." *Pursue Entergy Corp. v. Perkins*, 558 So.2d 349, 351 (Miss. 1990). The Supreme Court has set forth a three-tiered process which begins with an examination of the "four corners" of the instrument in dispute. *Id.* at 352; *see also Gilich v. Mississippi State Highway Comm'n*, 574 So.2d 8 (Miss. 1990). The parties' intent is arrived from the language of the document itself. *Pfisterer v. Noble*, 320 So.2d 383, 384 (Miss. 1975) (*citing Rogers v. Morgan*, 250 Miss. 9, 164 So.2d 480 (1964). In determining the parties' intent, "particular words . . . should not control; rather the entire instrument should be examined." *Pursue*, 558 So.2d at 352

(citation omitted); *Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n.*, 672 So.2d 1235 (Miss. 1996) (the instrument is considered as a whole to ascertain the parties' intent.). Unambiguous and clear deeds are construed as written. *Cavanaugh v. O'Connell*, 732 So.2d 912 (Miss. 1999).

Where a deed is considered to be ambiguous, "the court will, if possible, harmonize the provisions in accord with the parties' apparent intent." *Pursue*, 558 So.2d at 352. Prior to resorting to parole evidence, the Court will employ applicable cannons of contract construction. One of the most commonly cited rules of construction is that "uncertainties should be resolved against the party who prepared the instrument." *Id.* at 352-53; *see also Ouber v. Campbell*, 202 So.2d 638 (Miss. 1967) (where controversy arise over construction of deed, deed is to be resolved most strongly against grantor); *Hamilton v. Transcontinental Gas Pipe Line Corp.*, 236 Miss. 429, 110 So.2d 612 (Miss. 1959) (instruments drawn by a party in interest must be construed most strongly against him). Another rule of construction is that "[w]here there is conflicting language found in the granting clause and the descriptive or recital clause, the granting clause controls." *McDonald v. Mississippi Power Co.*, 732 So.2d 893, 898 (Miss. 1999) (citation omitted). Further, "the deed must be read in light of the circumstances surrounding the parties when it was executed." *Thornhill v. System Fuels, Inc.*, 523 So.2d 983, 990 (Miss. 1988) (citation omitted); *Salmen Brick & Lumber Co. v. Williams*, 210 Miss. 560, 50 So.2d 130 (Miss. 1951). The circumstances which guide the Court's interpretation of a deed include "the practical construction placed thereon by the parties." *Thornhill*, 523 So.2d at 990 (citation omitted). Parole evidence is inadmissible to vary the terms of a written contract. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584

So.2d 1254, 1257 (Miss. 1991); *Clow Corp. v. J.D. Mullican, Inc.*, 356 So.2d 579 (Miss. 1978); *Fuqua v. Mills*, 221 Miss. 436, 73 So.2d 113 (Miss. 1954).

B. When construed as a whole and all provisions of the 2004 Quitclaim Deed are given full effect, the Crawford Lot was conveyed to the Whitten Group.

It is a primary rule of construction that in construing deeds, "each word and clause therein should be reconciled and given a meaning, if that can be reasonably done." *Thornhill v. System Fuels, Inc.*, 523 So.2d 983, 990 (Miss. 1988); *Harris v. Griffith*, 210 So.2d 629, 633 (Miss. 1968) (overruled on other grounds) ("the construction should be upon the entire instrument, and each word and clause therein should be reconciled and given a meaning, if that can reasonably be done.").

Roy Wright, the attorney who prepared the deed, testified that the purpose of the 2004 Quitclaim Deed was to clear up the title on the Crawford Lot so the title could be transferred into the name of the Whitten Group. Roy Wright was Harrell's attorney "throughout this transaction." 8:342-344. Mr. Wright prepared the 2004 Quitclaim Deed at the express direction of Mr. Harrell who told him to draw the deed.

Mr. James Townsend, a registered land surveyor with extensive experience performing surveys in Leake County, testified as an expert witness at trial. Mr. Townsend personally surveyed the property after Citizens Bank sold it to the Whitten Group. Mr. Townsend testified that the 2004 Quitclaim Deed contained the description of both the Crawford Lot and the Hardage Lot. CHS and Harrell put forth no credible testimony which contradicted Mr. Townsend's testimony.

CHS and Harrell claim that there is a conflict between the granting clause and the recital/acquisition clause contained in the 2004 Quitclaim Deed. CHS and Harrell have provided no authority for their position that the acquisition clause is controlling over the

granting clause. The granting clause, as set forth above, clearly and unambiguously includes both the Crawford and the Hardage Lot. However, the acquisition clause contains only the Hardage Lot.

There is no inherent conflict between the granting clause and the recital clause. The deed legal description and granting clause describe both the Crawford Lot *and* Hardage Lot. As clearly demonstrated by the testimony of Townsend, the property description in the granting clause conveys the Crawford *and* Hardage Lots. The language in the recital clause says that the CHS intended to convey the Hardage Lot. However, it does not say that she intended to convey *only* the Hardage Lot, which logically leaves open the possibility that more was being conveyed. The granting clause and the recital clause can be easily reconciled by understanding that the deed conveys both the Crawford Lot and the Hardage Lot. Any other interpretation would require reading the Crawford Lot property description out of existence. In other words, to accept Harrell and CHS's position, one would have to pretend that the Crawford Lot description in the granting clause does not exist. This would violate this most fundamental rule of construction.

C. In the event of a conflict, the granting clause controls over the recital clause.

In the event the granting clause and the recital clause were contradictory (which they are not), the Supreme Court has held "[w]here there is conflicting language found in the granting clause and the descriptive or recital [acquisition] clause, the granting clause controls." *McDonald v. Mississippi Power Co.*, 732 So.2d 893, 898 (Miss. 1999) (citation omitted); *Dossett v. New Orleans Great Northern R.R. Co.*, 295 So.2d 771, 774 (Miss. 1974); *Mississippi Central R.R. Co. v. Ratcliff*, 214 Miss. 674, 683-84, 59 So.2d 311, 314 (1952); *Jones v. New Orleans & N.E.R. Co.*, 214 Miss. 804, 815, 59 So.2d 541, 543 (1952). In *Ratcliff*, the deed in

question warranted and conveyed a parcel described in metes and bounds, but then the recital clause referred to the estate being conveyed as a mere "right of way." 59 So.2d at 313. The grantor claimed that the deed did not, in fact, convey simple ownership, citing the language of the recital clause, but the Court rejected this argument, saying:

> If, however, importance is to be attached to the use of the words "right of way" in the recital clause, the most that could be said is that it creates a repugnant and irreconcilable conflict between the granting clause and the recital clause, in which situation the granting clause controls. "Relatively to the granting clause, recitals in a deed stand in much the same position as the habendum – that is, the granting clause, if clear and specific, will prevail over recitals, whether such recitals precede or succeed the granting clause."

59 So.2d at 314 (citation omitted).

When Roy Wright prepared the 2004 Quitclaim Deed, he included a short paragraph which he called an "acquisition clause." The acquisition clause stated, "Grantor intends to convey herein, the property she acquired by deed from Ms. Nonie Lee Hardage, dated November 7, 1994, recorded in Deed Book 212, Page 27, records of the Leake County Chancery Clerk." Mr. Wright testified that he included the acquisition clause, as he commonly does, as a convenience to other attorneys who might be searching title in the future. He stated it was never intended the acquisition clause limit the property being conveyed to the Hardage Lot. Instead, he testified that he should have also included an acquisition clause regarding the Crawford Lot, but failed to do so, or not have any acquisition clause. Thus, the granting clause and the acquisition clause were not contradictory. An acquisition clause is not necessary for a valid and complete conveyance of real property.

Gregory testified that she never intended to convey the Crawford Lot in the 2004 Quitclaim Deed. However, the Chancery Court heard this testimony, as well as the testimony of the other witnesses, and determined that the intent was to convey the Crawford Lot. The

Chancellor, as the finder of fact, was within its discretion in disregarding Ms. Gregory's self-serving testimony, particularly given the weight of the documentary and other evidence disproving Ms. Gregory's assertions. 5:711.

D. When a deed contains two conflicting clauses, the first must prevail.

"In a deed where there are two repugnant clauses, the first must prevail." *Thornhill v. System Fuels, Inc.*, 523 So.2d 983, 988 (Miss. 1988). Assuming the granting and recital clauses are in conflict (which, as set forth above, they are not), the first clause, the granting clause, would prevail over the latter clause, the recital clause. Further, in the case of ambiguous contracts, "terms are construed more strongly against the party preparing the instrument." *Clark v. Carter*, 351 So.2d 1333, 1336 (Miss. 1977). The 2004 Quitclaim Deed was prepared by Roy Wright. Wright was Harrell's attorney throughout the transaction. The fact that Citizens Bank contacted Wright after the conveyance issues with the Crawford Lot was discovered makes no difference. Wright had represented Harrell in the loan process and Citizens Bank contacted Mr. Wright to address the problems associated with the conveyance of the Crawford Lot.

E. The practical construction placed on the deed by the parties clearly demonstrates an intent to convey the Crawford Lot.

It is well established that "if the wording of the deed is ambiguous, the practical construction place thereon by the parties will have much weight in determining the meaning." *Thornhill*, 523 So.2d at 990 (citing *Richardson v. Moore*, 198 Miss. 741, 22 So.2d 494 (1945)); *Holifield v. Perkins*, 233 Miss. 876, 879-80, 103 So.2d 433, 434 (1958) (great weight should be given to practical construction which the party has placed upon the instrument). "[C]onsideration of the totality of the circumstances attendant the devising of an instrument

may help reveal the parties' intent." *Pursue Entergy Corp. v. Perkins*, 558 So.2d 349, 353 (Miss. 1990).

Both Blanche Gregory, the principal for CHS, and Harrell, her father, acted at all times after September 2000 as if CHS had conveyed the ownership of the Crawford Lot to Harrell for his shopping center development and upon which Citizens Bank had a Deed of Trust. Those actions consisted of CHS vacating the building where Ms. Gregory had carried out her business for many years, Harrell's demolition of the building and re-grading of the site, making it indistinguishable for the rest of the development, and Gregory deleting any reference of the Hardage Lot and Crawford Lot on her annual financial statements given to Citizens Bank for her loans after the year 1999. Finally, following Citizens Bank's initiation of the foreclosure proceedings, Harrell transferred all of the property used in the project, which included the Crawford Lot, to Cotton Place Corporation. If, as Harrell suggests, he did not believe that he owned the Crawford Lot, Harrell would not have transferred the Crawford Lot to Cotton Place Corporation. The actions of both Gregory and Harrell make it clear that Gregory no longer owned the property and the execution of the 2004 Quitclaim Deed simply confirmed her prior understanding of the situation.

Further, there is no dispute that the only title problem which had been discovered, and which needed correction, involved the ownership of the Crawford Lot. The 2004 Quitclaim Deed which forms the basis of this appeal was prepared expressly to address this problem by conveying ownership from CHS to the new owners, the Whitten Group. There was no question about the ownership of the Hardage Lot and, thus, no need for any additional documentation of its transfer. Therefore, the only issue to be resolved was the ownership of the Crawford Lot.

The totality of the circumstances clearly demonstrates the 2004 Quitclaim Deed was prepared and executed for the express purpose of conveying title to the Crawford Lot.

F. Conclusion

Given the deference this Court gives to the Chancellor's factual findings, the only real issues on the quiet title claims are (1) did the Chancellor correctly apply the rules of construction? and (2) was there evidence, taken in the light most favorably to Citizens Bank, to support the Chancery Court's findings? Because, as set forth above, the answer to both of these questions is an unequivocal "YES," this Court should affirm the Final Judgment to the extent that the Chancery Court held that good title to the Crawford Lot is held by the Whitten Group.

III. THE CHANCERY COURT CORRECTLY DISMISSED THE COUNTERCLAIMS OF HARRELL AND CENTRAL HEALTHCARE SERVICES.

Harrell and CHS both filed a variety of counterclaims against the bank. The counterclaims asserted that the bank filed this action without substantial justification, resulting in abuse of process, malicious prosecution,[4] defamation, and in violation of the Litigation Accountability Act pursuant to MISS. CODE ANN. §§ 11-55-1 – 11-55-15. The Chancery Court correctly dismissed Harrell and CHS's counterclaims against Citizens Bank.

A. Abuse of Process

Amazingly, CHS and Harrell continue to pursue their claim for abuse of process against the Bank even though the Chancery Court found that "they put on no proof tending to support their position." 5:711. Abuse of process has been defined by the Mississippi Supreme Court as follows:

[4] In their Brief, Harrell and CHS allege a cause of action for malicious prosecution. However, a review of the counterclaims asserted reveals that no such claim was ever alleged in the lower court. In fact, the Chancery Court did not address a claim of malicious prosecution in the Final Judgment.

> The action of abuse of process consists in the misuse or misapplication of a legal process to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a regularly issued civil or criminal process, for a purpose and to obtain a result not lawfully warranted or properly attainable thereby, and for which perversion an action will lie to recover the pecuniary loss sustained.

Williamson ex rel. Williamson v. Keith, 786 So.2d 390, 393-94 (Miss. 2001) (quoting *State ex rel. Foster v. Turner*, 319 So.2d 233, 236 (Miss. 1975) (footnote omitted)).

The elements of abuse of process are: (1) a party made an illegal use of a legal process, (2) the party had an ulterior motive, and (3) damage resulted from the perverted use of process. *Ayles v. Allen*, 907 So.2d 300, 303 (Miss. 2005) (citing *McLain v. West Side Bone and Joint Center*, 656 So.2d 119, 123 (Miss. 1995)). CHS and Harrell have provided no proof to support any of the three elements of abuse of process.

Citizens Bank filed the quiet title action in order to remove the cloud on title to the Crawford Lot. The problems that arose regarding the ownership of the Crawford Lot were not caused by Citizens Bank, but rather were caused due to an error in the certificates of title and the warranty of deed of trust. Those problems arose, not by the actions of Citizens Bank but, rather, because Harrell warranted that he had clear and marketable title to the Crawford Lot, when record title was not in Harrell. Further, Roy Wright, Harrell's attorney, certified that Harrell was the owner of the Crawford Lot when record title was not in Harrell. These were not actions of Citizens Bank and it had no ulterior motive other than to remove the clouds so that the property could be rightly conveyed to the Whitten Group.

B. Malicious Prosecution

The basis of CHS and Harrell's assertions regarding the claim of malicious prosecution is that Citizens Bank filed the quiet title action to coerce CHS to again convey the Crawford Lot to the Whitten Group in order for CHS to be divested of record title to the Crawford Lot.

The malicious prosecution claim was properly dismissed by the Chancery Court because CHS and Harrell did not meet the elements to support the claim.

The elements of malicious prosecution are: (1) the institution of a proceeding, (2) by, or at the instance of the plaintiff, (3) the determination of such proceedings in the defendant's favor, (4) malice in instituting the proceedings, (5) want of probable cause for the proceedings, and (6) the suffering of injury or damages as a result of the prosecution. *Richard v. Supervalu, Inc.*, 974 So.2d 944 (Miss. Ct. App. 2008) (citing *Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d 709, 721 (Miss. 2001). Neither CHS nor Harrell were able to establish all the elements of the tort of malicious prosecution.

First, with reference to the elements of a claim for malicious prosecution, CHS and Harrell were not successful in the Chancery Court proceeding. Further, they have presented no evidence indicating malice on the part of the Bank. Rather, the testimony of both Harrell and Blanche Gregory, as well as the testimony provided by Citizens Bank's own witnesses, prove that it had a valid claim on title to the Crawford Lot. Thus, CHS and Harrell failed to establish the elements to prevail on the tort of malicious prosecution and the claims were appropriately dismissed.

Yet, CHS and Harrell seek to have this Court reverse the Chancery Court's ruling on the quiet title action and then find that this supports a claim for malicious prosecution. The fact that a Chancellor, having reviewed all of the evidence produced at trial and finding in the Bank's favor, should be reason enough to deny CHS and Harrell relief. CHS and Harrell offered no evidence to fulfill the required elements of a malicious prosecution cause of action.

C. Defamation

The Chancery Court appropriately dismissed the claim for defamation because CHS and Harrell failed to establish the elements of defamation. In order to establish a defamation

claim, CHS and Harrell must establish: (1) a false and defamatory statement concerning CHS and Harrell, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) actionability of the statement irrespective of a special harm or the existence of special harm caused by the publication. *Richard v. Supervalu, Inc.*, 974 So.2d at 949.

CHS and Harrell claim that the filing of the action in the Chancery Court amounts to defamation because Citizens Bank made allegations against both CHS and Harrell which they claim are false. However, "[s]tatements made in connection with judicial proceedings, including pleadings, are, if in any way relevant to the subject matter of the action, absolutely privileged and immune from attack as defamation, even if such statements are made maliciously and with knowledge of their falsehood." *McCorkle v. McCorkle*, 811 So.2d 258, 266 (Miss. Ct. App. 2001) (citation omitted). Thus, the allegations contained in the pleadings in the Chancery Court cannot be the basis for CHS and Harrell's defamation claims. Even if the allegations contained in the pleadings could be the basis for a defamation claim, as the Chancery Court found, Citizens Bank had sound reasons for filing the action.

D. Litigation Accountability Act

Harrell and CHS claim that the Bank filed its Complaint "without substantial justification" and that the claim is frivolous and groundless in law. They further claim that under the Litigation Accountability Act they are entitled to attorneys' fees and costs in defense of the claims. As this Court has stated, "Miss. Code. Ann. § 11-55-3(a) provides that a claim is without substantial justification when it is 'frivolous, groundless in fact or in law, or vexatious, as determined by the court.'" *Scruggs v. Saterfiel*, 693 So.2d 924, 927 (Miss. 1997) (footnotes omitted). In determining whether a claim is frivolous, the Court looks to the definition of frivolous found in Miss.R.Civ.P. 11. *Leaf River Forest Products, Inc. v. Deakle*, 661 So.2d

188, 197 (Miss. 1995). Under Rule 11, a claim is frivolous "only when, *objectively* speaking, the pleader or movant has no hope of success." *Stevens v. Lake*, 615 So.2d 1177, 1184 (Miss. 1993) (emphasis added), *quoting Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331, 1335 (Miss. 1989); *Smith v. Malouf*, 597 So.2d 1299, 1303 (Miss. 1992) (applying Rule 11 definition to Litigation Accountability Act context). Even where a case may be weak, "that is not sufficient to label it frivolous." *Deakle*, 661 So.2d at 195 (citation omitted).

Harrell and CHS argued that this Court should reverse the Chancery Court's decision regarding the title to the Crawford Lot. They then argued that after a reversal of the decision of the Chancery Court, that they would be entitled to attorneys' fees and costs under the Litigation Accountability Act because they claim that the filing of the Complaint by the Bank was frivolous and without substantial justification. They further claimed that Citizens Bank had no hope of success even though the Chancery Court found in Citizens Bank's favor.

Based on the testimony in evidence produced at trial, the Chancery Court found that Citizens Bank had a valid claim on title to the Crawford Lot and appropriately confirmed its title. It cannot be said that Citizens Bank had no hope of success on its claims in the quiet title action. In fact, after hearing all of the evidence, the Chancery Court held in Citizens Bank's favor on its claims in the quiet title action. In essence, CHS and Harrell's position is that this Court should reform the Quitclaim Deed and Citizens Bank's Deed of Trust to hold that title to the Crawford Lot is in CHS and then hold that Citizens Bank filed this case without substantial justification. Even in the event the Court were to hold at CHS held title to the Crawford Lot, Citizens Bank's filing of the action would not be without substantial justification. The Chancery Court heard the testimony of both Harrell and Blanche Gregory, as well as the

testimony of Citizens Bank's witnesses and found that the Bank had a valid claim to title to the Crawford Lot.

LAW AND ARGUMENT ON CITIZENS BANK'S CROSS-APPEAL

I. THE CHANCERY COURT ERRED IN DENYING CITIZENS BANK'S CLAIMS FOR DEFICIENCY, ATTORNEY'S FEES, AND PREMIUM.

Citizens Bank appeals the denial of certain claims it asserted in the underlying action against Harrell. These claims are all based on Harrell's breach of warranty of title, breach of contract and breach of the covenant of good faith and fair dealing. The Chancery Court committed manifest error in denying the relief sought by Citizens Bank.

A. Citizens Bank is entitled to an award of attorneys' fees against Harrell.

Citizens Bank is entitled to an award of attorneys' fees due to Harrell's breach of warranty of title and breach of contract. The Chancery Court found that Harrell breached the express warranty of title given in the Deed of Trust dated September 14, 2000. 5:711. Further, the Court found that Harrell breached his contract with the Bank when he did not pay the balance of the promissory note after receiving demand from the Bank. *Id.* However, the Court erroneously relied on the case of *White v. Usry*, 800 So.2d 125 (Miss. Ct. App. 2001), in holding that there is no authority for attorneys' fees in this case, as *White* dealt with merely a suit to remove cloud on title. Here, the Bank has asserted claims of breach of warranty and breach of contract.

The Deed of Trust executed by Harrell on September 14, 2000, expressly stated that, "Debtor hereby conveys and warrants unto Trustee the land described below . . . ." P-15, RE. 8. Mr. James Townsend, the registered land surveyor who testified as an expert in this matter, confirmed that the property description in Harrell's Deed of Trust covered and included the Crawford Lot.

Miss. Code Ann. § 89-1-33 provides that, "[t]he word 'warrant' without restrictive words in a conveyance shall have the effect of embracing all of the five covenants known to common law, to wit: seizing, power to sell, freedom from encumbrance, quite enjoyment and warranty of title." In *Howard v. Clanton*, this Court interpreted Miss. Code Ann. § 89-1-33 to provide that attorneys' fees may be recoverable where there has been a breach of a warranty deed and the purchaser was not divested of the land while adjudicating title. 481 So.2d 272, 276-77. As the Court in *Howard* stated "[t]o hold that a covenantee is not entitled to attorney's fees in a case such as this would have the effect of dissolving the 'power to sell' covenant, for what is the purpose of a covenant if, when breached, the covenantor is not held responsible for that breach?" *Id.* at 276. In failing to convey clear title to Citizens Bank, Harrell breached the warranty of title which he expressly provided under the Deed of Trust. Thus, Citizens Bank is entitled to an award of attorneys' fees due to Harrell's breach of the warranty of title and breach of contract.

B. Citizens Bank is entitled to a judgment against Harrell for the deficiency amounts owed by Harrell.

The Bank is entitled to the deficiency amount of the loan to Harrell after the sale of the subject property. The Chancery Court held that it would be inequitable to award a deficiency judgment against Harrell because the land had been appraised at over $1,715,000.00 and the difference between the sale price and the appraised price was $751,350.03. Thus, the Court found that there was more than enough equity in the land to satisfy the debt from the land sale.

This Court has held that, where a mortgagee "satisfies equity that it would be equitable, in light of the sale price, to authorize a deficiency judgment," a right to a deficiency judgment may exist. *Mississippi Valley Title Ins. Co. v. Horne Construction Co., Inc.*, 372 So.2d 1270, 1272 (Miss. 1979). Further, Miss. Code Ann. § 11-5-111 states that a deficiency judgment may

be obtained at the confirmation of the foreclosure sale. *See also Lake Hillsdale Estates, Inc. v. Galloway*, 473 So.2d 461 (Miss. 1985). A deficiency judgment in the Bank's behalf is equitable and just in this matter.

Citizens Bank loaned Harrell money on the property and agreed to a renewal of the loan as well as two extensions of the loan. Harrell has only paid some of the interest on the loan, with no payments made toward principal. When it became apparent that Harrell would be unable to make the payment due to Citizens Bank on the loan and Citizens Bank had commenced foreclosure proceedings, Harrell conveyed the property, including the Crawford Lot, to Cotton Place Corporation in order to avoid the foreclosure on the land by taking Cotton Place Corporation into bankruptcy. Following the lifting of the stay in Bankruptcy Court, Citizens Bank was able to foreclose on the property and sell it at the foreclosure sale. Citizens Bank purchased the property and sold it to the Whitten Group for the amount it bid at the public auction. The fact that there was a difference between the sales price at foreclosure and the appraised value, as provided by Harrell for the purposes of the September 2000 loan to Harrell, has no bearing on whether there is a deficiency amount. Citizens Bank should not be made to absorb the deficiency amount of Harrell. This is so especially in light of the fact that Citizens Bank sold the property to the Whitten Group after the foreclosure at the same price Citizens Bank bid at the foreclosure. Harrell agreed to repay the loan and to pay any deficiency amount in the event of foreclosure. Harrell was unable to do so and Citizens Bank is entitled to a judgment for the amount of the deficiency of $81,611.03.

C. Citizens Bank is entitled to a judgment against Harrell for the amount paid to repurchase the Crawford Lot from the Whitten Group.

The Chancery Court held that Citizens Bank was not entitled to an award of the premium it had to pay to purchase the Crawford Lot from the Whitten Group because Citizens

Bank voluntarily paid the price in the settlement with the Whitten Group. The Chancery Court committed manifest error in this regard.

Citizens Bank asserted the claims against Harrell based on Harrell's breach of the covenant of good faith and fair dealing, breach of warranty, and breach of contract. Due to Harrell's breaches against Citizens Bank, Citizens Bank was damaged significantly.

However, contrary to the Chancery Court's ruling, Citizens Bank did not simply settle the matter with the Whitten Group and then seek the amount from Harrell. Rather, Citizens Bank was under a threat of litigation with the Whitten group if it did not repurchase the Crawford Lot. Citizens Bank did not wish to get involved in another lawsuit and under that compulsion decided to resolve the issues with the Whitten Group.

As part of the resolution with the Whitten Group, Citizens Bank agreed to purchase one complete acre of land which included the Crawford Lot, the Hardage Lot and a small parcel adjoining the two lots. The purchase of the property containing more than the Crawford Lot was done in order for Citizens Bank to be in a position to resell the property because the larger, one acre tract of property was more easily marketable than the smaller Crawford Lot standing alone. As such, Citizens Bank purchased the one acre tract of land for $264,000, when it was appraised at $230,000. Thus, Citizens Bank is entitled to recover the premium amount of $34,000 paid to purchase the one acre tract of land from the Whitten Group.

CONCLUSION AS TO BOTH DIRECT AND CROSS-APPEAL

The Chancery Court's judgment should be affirmed as to the following issues:

1. Affirm the Chancellor's finding that the Crawford Lot was conveyed by the 2004 Quitclaim Deed to the Whitten Group; and

2. Affirm the Chancellor's dismissal of Harrell and CHS's counterclaims against Citizens Bank.

The Chancery Court's judgment should be reversed as to the following issues:

1. Reverse the Chancellor's denial of an award of attorneys' fees to Citizens Bank and remand for further hearing on this issue;

2. Reverse the Chancellor's denial of the deficiency judgment claims and render judgment in the amount due of $81,611.03 against Harrell; and

3. Reverse the Chancellor's denial of the premium paid on the purchase of the Crawford Lot and render judgment for $34,000 against Harrell.

RESPECTFULLY SUBMITTED, this the 1st day of August, 2008.

CITIZENS BANK OF PHILADELPHIA

BY: _____

JAMES W. CRAIG, MB [redacted]
STRATTON BULL, MB [redacted]
B. LYLE ROBINSON, MB [redacted]
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300
Email: craigj@phelps.com
Email: bulls@phelsp.com
Email: robinsol@phelps.com

CERTIFICATE OF SERVICE

I do hereby certify that I have this date mailed through the United States Postal Service, postage prepaid, a true and correct copy of the above and foregoing to the following:

J. Edward Rainer
Rainer Law Firm, PLLC
Post Office Box 258
2006 Courtside Drive
Brandon, MS 39043-0258

Hon. Janace Harvey-Goree
Chancellor, District 11
Post Office Box 39
Lexington, MS 39095

This, the 1st day of August, 2008.

B. LYLE ROBINSON