

**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**

REPLY 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

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LAW AND ARGUMENT

**I. CITIZENS BANK IS ENTITLED TO AN AWARD OF ATTORNEY'S
FEES AGAINST HARRELL.**

In the First Amended Complaint, Citizens Bank asserted claims against Harrell for breach of warranty and breach of contract. Following the trial, the Chancery Court found that Harrell breached the express warranty of title given in the Deed of Trust dated September 14, 2000. 5:711. In addition, the Court found that Harrell breached his contract with Citizens Bank when he failed to pay the balance of the Promissory Note after receiving demand from the Bank. *Id.* Due to the breaches of warranty of title and contract, Citizens Bank is entitled to an award of attorney's fees against Harrell. *Howard v. Clanton*, 481 So. 2d 272, 276-77 (Miss. 1985). Further, because Citizens Bank proved its entitlement to remove the cloud on title in the face of Harrell's opposition, it should be entitled to attorney's fees.¹

In his response to Citizens Bank's Cross-Appeal, Harrell asserted that Citizens Bank did not pray for attorney's fees in its First Amended Complaint and did not put forth evidence in its case-in-chief regarding attorney's fees. Contrary to Harrell's assertion, Citizens Bank asserted a claim for attorney's fees in its original Complaint and its First Amended Complaint. The

¹ Harrell disputed Citizens Bank's right to the judgment confirming title to the Crawford Lot saying that the acquisition clause in the July 28, 2004 Quitclaim Deed limited the conveyance to the Hardage Lot. However, as the Chancery Court correctly found, the legal description in the July 28, 2004 Quitclaim Deed clearly conveyed the Crawford Lot. See Brief of Appellee/Cross-Appellant at pp. 19-24. There was no need to convey the Hardage Lot in the Quitclaim Deed, as it had previously been conveyed.

First Amended Complaint specifically states in its prayer for relief that it is seeking attorney's fees and costs incurred in bringing this action. 2:195

While Harrell is correct that Citizens Bank did not originally offer proof in its case-in-chief regarding its attorney's fees, Citizens Bank moved the Court to reopen the proof to allow Citizens Bank to provide evidence of its attorney's fees in this case. 8:432; 8:447. The Chancery Court, after hearing argument of counsel and taking the matter under advisement, allowed Citizens Bank to put on proof of its attorney's fees in this matter. 8:448. Harrell has failed to set forth any precedent that holds the Chancellor in error for reopening proof to allow evidence of attorney fees. This is so because the decision to reopen the case for further proof is left to the sound discretion of the chancery court. *Estate of Hathorne v. Griffin*, 987 So. 2d 486, 489 (Miss. 2008) (citing *Kelly v. Shoemaker*, 460 So. 2d 811, 815 (Miss. 1984)).

In his brief, Harrell argues at length regarding the reasonableness of the attorney's fees sought by Citizens Bank in this matter. However, the Chancellor denied attorney's fees in toto; thus, the reasonableness of Citizens Bank's request for attorney's fees is not at issue before this Court. Rather, Citizens Bank seeks in its Cross-Appeal to reverse the denial of fees and that this Court remand this case to the Chancery Court with instructions that the Chancellor determine an appropriate amount of attorneys' fees.

II. CITIZENS BANK IS ENTITLED TO A JUDGMENT AGAINST HARRELL FOR THE DEFICIENCY AMOUNTS OWED BY HARRELL

Citizens Bank loaned Harrell money on the property and agreed to a renewal of the loan as well as two extensions of the loan. Brief of Appellee/Cross-Appellant at p. 10. Harrell has only paid a small part of the interest on the loan, with no payments made towards principal. At foreclosure, Citizens Bank purchased the property and sold it to the Whitten Group for the amount it bid at the public auction. The sales price received by Citizens Bank from the Whitten

Group was insufficient to cover the deficiency amount of the loan to Harrell. Thus, Citizens Bank is entitled to a judgment of the deficiency amount of \$81,611.03.

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). In addition, Miss. Code Ann. § 11-5-111 states that a deficiency judgment may be obtained at the confirmation of the foreclosure sale.

Harrell claims and the Chancery Court found, that Citizens Bank is not entitled to a deficiency judgment because the land appraised at a higher value than the price received by Citizens Bank by the Whitten Group. However, the fact that there is a difference between the sales price and the appraised value of the property, does not foreclose Citizens Bank’s right to a deficiency judgment against Harrell. As this Court has noted, the fair market value of a piece of property is defined as “[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.” *Hartman v. McInnis*, 2007 WL 4200613 *5 (Miss. 2007) (quoting *Black’s Law Dictionary* 414 (6th ed. 1991)).

There is no evidence that there was a buyer who was willing to pay any amount in excess of the amount the Whitten Group paid for the purchase of the land. Further, there is no evidence that either the Whitten Group or Citizens Bank were under any compulsion in the sale of the property. Thus, Citizens Bank sold the property to the group that was willing to pay what Citizen Bank paid at the foreclosure sale. Harrell agreed to repay the loan and to pay any deficiency amount in the event of foreclosure. Harrell has failed to do so and Citizens Bank is entitled to a judgment for the amount of the deficiency.

III. CITIZENS BANK IS ENTITLED TO A JUDGMENT AGAINST HARRELL FOR THE AMOUNT PAID TO REPURCHASE THE CRAWFORD LOT FROM THE WHITTEN GROUP.

Contrary to the Appellants' contention and the Chancery Court's finding, Citizens Bank did not simply settle the matter with the Whitten Group and seek to collect the amount from Harrell. Rather, Citizens Bank was under the compulsion of defending a lawsuit from the Whitten Group regarding their purchase of the property if Citizens Bank did not repurchase the Crawford Lot from the Whitten Group. Faced with the threat of further drawn out litigation with the Whitten Group, Citizens Bank decided to resolve those issues with the Whitten Group.

According to Appellants' argument, Citizens Bank was required to litigate the matter with the Whitten Group before it could then seek reimbursement from Harrell. However, this Court has stated "indemnifying parties . . . have no right to insist that their indemnity endure the hazards of trial by jury as a condition for enforcing the indemnity agreement." *Keys v. Rehabilitation Centers, Inc.*, 574 So. 2d 579, 584 (Miss. 1990) (citing *Mississippi Farm Bureau Mutual Ins. Co. v. Garrett*, 487 So. 2d 1320, 1323 (Miss. 1986)). In *Keys*, the Court went on to state that the indemnitee "was entitled to use its own good judgment and effect such settlement of the wrongful death claim as it deemed prudent, provided only that when proceeding to enforce the indemnity agreement that it prove that it was indeed liable to the Killen survivors and that the amount paid in settlement was reasonable." *Id.*

Here, Citizens Bank was liable to the Whitten Group because it made representations to the Whitten Group that the Bank was the record title holder of the Crawford Lot. Because of the misrepresentations of Harrell, the representations by the Bank to the Whitten Group were incorrect. Therefore, it is clear that Citizens Bank could have been liable to the Whitten Group if the other elements of the Whitten Group's claim were proved.

In addition, the testimony at trial clearly establishes that the amount paid by Citizens Bank to the Whitten Group was reasonable. Chris Wade, the expert appraiser who testified at trial, explained that due to the size of the Crawford Lot, more property than the Crawford Lot was needed in order to have a piece of property with enough usable land. 7:254-56. 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. 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

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 10th day of December, 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@phelp.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 10th day of December, 2008.


B. LYLE ROBINSON