NO. 2007-CA-00868

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PATRICK DELIMAN AND JANE DELIMAN
Appellants

vs.

ANTHONY CLARKE THOMAS AND
ACT ENVIRONMENTAL, INC.,
Appellees

On Appeal From the Chancery Court
of Madison County, Mississippi
Docket No. 2005-0744

BRIEF OF APPELLEES

Oral Argument is not requested

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record hereby certifies pursuant to Mississippi Appellate Rule of Procedure 28(a)(1) that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeal may evaluate possible disqualification or recusal.

Honorable Cynthia Brewer
Chancellor, Madison County

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Appellants

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STATEMENT OF THE ISSUES

This a simple and succinct matter where the Appellants, Patrick and Jane Deliman ("the Delimans") are appealing the Chancellor's Judgment and Order Quashing and Dissolving Writ of Garnishment, Quashing Subpoenas, and Awarding Attorneys' Fees to Appellees, Anthony Clarke Thomas ("Thomas") and ACT Environmental, Inc ("ACT"). Despite the simplicity of the matter, the Delimans have gone to great lengths to confuse and complicate the issues that are before the Court on appeal. The only two (2) issues before the Court are:

I. Whether the Chancellor abused her discretion in finding that Thomas and ACT Environmental, Inc. were not in default regarding the judgment owed to the Delimans, when the evidence undisputedly showed that Thomas and ACT Environmental, Inc. had mailed their payment to the Delimans on December 22, 2006?

II. Whether the Chancellor abused her discretion in awarding Thomas and ACT Environmental, Inc. attorneys' fees, where the evidence undisputedly showed that Thomas and ACT Environmental, Inc. were not in default *and* that the Delimans had received all four (4) payments due to them when they initiated collection efforts?

The Delimans have raised a third issue in their Brief regarding the unclean hands doctrine. Since it was not an issue raised below, and thus, not appealed, Thomas and ACT Environmental, Inc. respectfully request the Court not consider it as an issue before the Court pursuant to *R.W. Aiken Insurance Agency v. SevenOaks Capitol Corporation*, 930 So.2d 444, 448 (Miss. 2006) ("It is well-settled law in Mississippi that a trial judge will not be found in error for an issue that was not presented to him for a decision.").

STATEMENT REGARDING ORAL ARGUMENT

The parties' positions are clear and the Record is uncomplicated. Issues presented can be determined upon the Record and Transcript of the March 9, 2007 hearing. Oral argument is unnecessary as it will needlessly consume judicial and private resources.

STATEMENT OF THE CASE

The issues before the Court solely arise from a Judgment and Order Quashing and Dissolving Writ of Garnishment, Quashing Subpoenas, and Awarding Attorneys' Fees ("the Judgment") by the Honorable Cynthia Brewer of the Chancery Court, Madison County. The Judgment was entered because Judge Brewer determined, after considering testimony and evidence, that the Appellants, Patrick and Jane Deliman ("the Delimans") had engaged in bad faith efforts to pursue collection on their judgment against Appellees, Anthony Clarke Thomas ("Thomas") and ACT Environmental, Inc. ("ACT). (Record ("R.") at 431) In an effort to explain the procedural posture of this matter and the putative basis for appeal, Thomas and ACT will concisely recite the background proceedings leading up to the Judgment.

The Delimans filed a Complaint against Thomas and ACT on August 15, 2005, arising from disputes involving the sale of real property. (R. at 1-8) A Default Judgment was entered against Thomas and ACT on February 13, 2006, for failure to answer the Complaint and for failure of counsel to appear at the default hearing.[1] (R. at 111-112) Thomas and ACT made several unsuccessful attempts to have set aside the Default Judgment Set Aside. (R. 114; 230-239) A hearing on damages was conducted on August 2, 2006, by the Honorable William J. Lutz. After considering the testimony and evidence, Judge Lutz rendered an Opinion on

[1] Thomas and ACT were represented by another law firm at the time the Default Judgment was entered.

Damages and awarded $44,163.163.75 to the Delimans. (R. at 315-318; 319-320) The court then amended the amount of damages owed to $45,163.75. (R. at 351-354; 355-357)

Per authorization by the court, Thomas and ACT elected to pay the judgment in monthly installments of $1,500.00 to the Tyner Law Firm. (R. at 321-323) Despite timely payments by Thomas, the Delimans filed a Suggestion for Writ of Garnishment on February 5, 2007 for numerous financial institutions seeking records of accounts held by Thomas and ACT and caused a Subpoena Duces Tecum to be issued to Citizens Bank.[2] (R. at 367-398, 427) On February 16, 2007, Thomas and ACT filed an Emergency Motion to (1) Quash or Alternatively Stay Enforcement of Writ of Garnishment; and (2) Enjoin Further Collection Activity. (R. at 399-409) After a hearing on the merits, Judge Brewer entered the Judgment against the Delimans and awarded $7,662.87 in damages, attorneys' fees and expenses to Thomas and ACT. (R. at 431-436) The Delimans timely filed their Notice of Appeal on May 16, 2007. (R. at 437)

STATEMENT OF THE FACTS

The facts pertinent and necessary for the Court's consideration involve whether Thomas and ACT violated Judge Lutz's Order by failing to timely make payment(s) to the Delimans.[3] On October 16, 2006, Judge Lutz entered his first Order awarding damages in the amount of $44,163.75 and gave Thomas the choice of either paying the amount in full or electing to make

[2] In fact, the evidence established that the Delimans had received all four (4) payments from Thomas. *Infra.*

[3] The Delimans have chosen to bring up irrelevant facts that relate to the issues of the default judgment (for failure to answer Complaint), attempts to set aside the default judgment (for same), and the hearing on damages—*none* of which is before the Court on appeal. As such, this Brief will not address the facts contained in pages 2-13 of Delimans' Brief as it is designed to convolute the issues on appeal. This Brief will only address the facts that are pertinent and necessary for the Court to render a decision on the issues on appeal. *See Transcript of March 9, 2007 Hearing*, p. 22, Transcript (T.) 364, lines 4-7 (Judge Brewer declined to consider Mr. Tyner's arguments regarding the prior proceedings to the default judgment and the hearing on damages).

monthly payments of $1,500 on or before the 30th of each month. (R. at 319-320) The exact language contained in Judge Lutz's first Order states:

> Execution of which is stayed, to allow Anthony Clarke Thomas and ACT Environmental, Inc. to pay the entire amount on or before October 30, 2006; or elect to *make* monthly payments to the Tyner Law firm of $1,500 a month, on or before the 30th of each month, until paid in full.
>
> . . .
>
> Should Anthony Clark[e] Thomas or ACT Environmental, Inc. miss one (1) payment or default on any payment or fail to make an election by October 20, 2006, the stay of execution will immediately lift and the Delimans may execute this judgment.

(R. at 320, ¶ VIII) Thomas and ACT timely filed their Notice of Election to Pay Judgment by monthly installments, which plainly states:

> It is acknowledged and understood that in accordance with the express terms of the Judgment, execution on the Judgment is stayed, so long as the Defendants *make* the $1,500 per month payments as required by the Court.

(R. at 321) (emphasis added). Judge Lutz entered a second order on December 8, 2006, the Amended Final Judgment on Damages, which increased the amount of damages, but did not alter or amend the responsibility of Thomas to *make payment* on or before the 30th of each month. (R. at 355-358, ¶ VIII)

The evidence is clear and not contradicted, as Judge Brewer found below, that that Thomas complied with Judge Lutz's Order by *making payment on or before the 30th of each month.* (R. at 432 ¶ 3 ("Defendants timely transmitted their December payment via certified mail.")); *See also* Exhibit 1, p. 3 admitted during the March 9, 2007 hearing ("Exhibit 1").[4] Thomas testified that he typically mailed payments on or about the 25th or 26th day of each

[4] Exhibit 1 undisputedly establishes that Thomas mailed the December payment on December 22, 2006. There were three attempts at delivery by the Postal Service before it was returned to Thomas as unclaimed. For the Court's convenience, Exhibit 1 is included in Appellees' Record Excerpts Brief.

month. (T. at 347) After making the first two (2) payments by regular mail for October and November, Thomas discovered that his payments were not being deposited by the Tyner Law Firm. (T. at 347) (October and November payments were not deposited until late December).[5] Also, on December 20 and 21, 2006, Mr. Tyner received letters from counsel for Thomas regarding the Tyner Law Firm's failure to promptly deposit Thomas' checks. (R. at 359, 361) Upon advice of counsel, Thomas mailed the December payment by certified mail. (T. at 350)

The December payment is what lies at the heart of this case, as it was timely mailed, but not accepted by the Tyner Law Firm despite three (3) separate attempts by the Postal Services to deliver it.[6] Thomas produced to the Court a copy of the certified mail envelope postmarked December 22, 2006, which unequivocally evidences that Thomas had timely mailed the payment. (T. at 353-54); Exhibit 1 In fact, the Postal Service made three (3) separate attempts to deliver the December payment to the Tyner Law Firm before it was returned to Thomas. (T. at 389); Exhibit 1.

Thomas further testified that when the certified mail was returned to him as unclaimed, he immediately called the Tyner Law Firm and explained to the office manager, Martha, the status of the December payment. (T. at 354) During that telephone conversation, Thomas learned that his January payment had already been received by the Tyner Law Firm and was

[5] Counsel for the Delimans did not dispute that the Tyner Law Firm had not promptly deposited Thomas' first two payments and offered no explanation for holding the checks. (*Accord* R. at 359, 361)

[6] The evidence shows that Deliman's attorney date stamped the letter accompanying the December payment on February 2, 2007, despite the Postal Services repeated attempts to deliver it by certified mail. Exhibit 2 admitted during the March 9, 2007 hearing and attached to Appellees' Record Excerpts; (T. at 367, 389)

instructed to place his December payment back into the mail.[7] (T. at 354) Thomas complied. *See* Exhibit 2 admitted during the March 9, 2007 hearing. ("Exhibit 2")

Notwithstanding the evidence that shows that the Tyner Law Firm had an opportunity to receive the December payment, the evidence also shows that the Tyner Law Firm had received Thomas and ACT's December and January payments prior commencing collection. (T. at 367); Exhibit 2 Thomas January 31, 2007 letter, which accompanied the unclaimed December payment was "date stamped" on February 2, 2007. Exhibit 2. Three days later, the Delimans maliciously filed numerous Suggestions for Writ of Garnishment seeking to freeze all the bank accounts maintained by Thomas and/or ACT on February 5, 2007. (R. at 367-398) The Delimans tacitly conceded to bad faith during the hearing when their attorney acknowledged that the problem with the December payment was due to the "mail mess[ing] up," and not the fault of Thomas in not *making* a timely payment. (T. 386, lines 15-17) Furthermore, the evidence showed that the Delimans undertook garnishment proceedings *after* all the payments had been received.

SUMMARY OF THE ARGUMENT

Judge Brewer did not abuse her discretion in finding that the Delimans' execution efforts were in bad faith, unwarranted and unauthorized, as there is substantial evidence to support a finding of no default by Thomas and ACT. The Order entered by Judge Lutz plainly required Thomas and ACT to *make payments on or before the 30th of every month*, until the judgment was paid in full. The testimony and undisputed evidence provided during the March 9, 2007

[7] The Delimans did not dispute that Thomas called and discussed the December payment with Tyner's office manager, Martha. According to Thomas, Martha said it was fine to place the December payment back in the mail, and no one was called to rebut this testimony.

hearing supported a finding that Thomas complied with Judge Lutz's Order by making payment on December 22, 2007.

Judge Brewer allowed both parties to discuss what each believed to be a reasonable interpretation of Judge Lutz's Order. The Delimans focused on the language that stated "the stay of execution will immediately lift" and equated that language with an automatic right to execute collection efforts on a unilateral and non-judicial determination of default. The gravamen of the Delimans' argument presupposes that there was an actual default, when there was none. As the evidence established, timely payment was made, rendering the issue of interpreting Judge Lutz's Order regarding execution moot. Nonetheless, Judge Brewer's interpretation of the Order was proper.

Finally, the Chancellor's decision to award damages, attorneys' fees and costs was not an abuse of discretion where the evidence reflected manifest bad faith on the part of the Delimans.

LAW AND ARGUMENT

A. The Standard of Review is Abuse of Discretion

This Court employs a limited standard of review on appeals from a chancery court. *Miller v. Pannell*, 815 So.2d 1117, 1119 (Miss. 2002). Great deference is given to the chancellor in his or her findings of fact, and the Court should not disturb those findings unless they are found to be manifestly wrong or clearly erroneous, or where the chancellor applied an incorrect legal standard. *In re Estate of Ladner*, 909 So.2d 1051, 1054 (Miss. 2004). In doing so, the Court's job is to determine whether there was substantial, credible evidence supporting the chancellor's findings such that the decision was not manifestly wrong or clearly erroneous. *In re Estate of Carter v. Shackelford*, 912 So.2d 138, 143 (Miss. 2005).

The Appellees respectfully submit that this Court, in rendering its decision, should show deference to the chancellor as she was the only one to hear the testimony of witnesses, observe their demeanor and was in the best position to evaluate credibility. *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss. 1983).

The same deferential standard of review is also applied to the chancellor's award of attorneys' fees. *Cruse v. Nunley*, 699 So.2d 941 (Miss. 1997).

In regards to interpreting another chancellor's order, the review is *de novo*. *Meek v. Warren*, 726 So.2d 1292, 1293-94 (Miss. Ct. App.1998). The Court should look to the judgment as a whole to determine the intent of the chancellor:

> "When questions of meaning arise" as to a judgment, "answers are sought by the same rules of construction which appertain to other legal documents." *Estate of Stamper v. Edwards*, 607 So.2d 1141, 1145 (Miss.1992). "The determinative factor is the intent of the court ... as gathered ... from all parts of the judgment itself." 46 Am. Jur. 2d Judgments § 94 (1994). If the language of a judgment is unambiguous, construction is improper. *Id.*

Balius v. Gaines, 908 So.2d 791, 798(¶ 16) (Miss.Ct.App.2005) (internal quotations and citations in original).

B. There is substantial evidence to support the Chancellor's decision that Thomas and ACT were not in default of the December payment

Substantial evidence is defined as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion or to put it simply, more than a mere scintilla of evidence." *Tucker v. Prisock*, 791 So.2d 190, 192 (Miss. 2001). Judge Lutz's Order required Thomas "to make monthly payments to the Tyner Law Firm of $1,500 a month, on or before the 30th of each month, until paid in full." (R. at 356, ¶ VIII) The evidence is not only substantial, but is clear and convincing, showing that Thomas made his December payment on or before December 30th, which supports the Chancellor's finding that there was no default by Thomas.

1. The undisputed evidence established that Thomas *made* timely payments

The law supports a finding that payment was timely made when Thomas placed the check in the mail. As Judge Brewer correctly stated, "[T]here are more than many litigated issues regarding placing something into the Postal Service as being the date of delivery." (T. at 389, lines 16-18). Fundamental common law principles of contracts support the Chancellor's finding that when Thomas placed the check in the mail on December 22, 2006, payment was timely made. *See Lynch v. Miss. Farm Bureau Cas. Ins. Co.*, 880 So.2d 1065, 1071 (Miss. App. 2004) (citing *Estate of Beinhauer v. Aetna Cas. & Sur. Co.*, 893 F.2d 782, 786 (5th Cir. 1990).

The *Lynch* and *Beinhaeur* cases deal specifically with insurance contracts and making timely premium payments. In *Beinhaeur*, Chief Judge Charles Clark held that when the policy does not otherwise define the term payment, the mailing of the premium would suffice. 893 F.2d at 786. In *Lynch*, the policy itself and the notice of renewal "unambiguously" informed the defendants that the premium was to be "received" and not merely "made" by a certain date otherwise a lapse in coverage would occur. 880 So.2d at 1071.

Here, Judge Lutz did not define what was required by "make payment;" therefore, the the mailbox rule applies – making Thomas' payment on December 22, 2006 timely. *See* 17A Am. Jur. 2d Contracts § 99 ("If there is no direction as to the mode of communicating the acceptance of an offer, the acceptance may be accomplished through the mail, unless it can fairly and reasonably inferred from the offer or other prior communication that some other means is expected."). Thomas and the Delimans had already established that the submission of payment by the mail was acceptable for the two (2) payments preceding the December payment. Under the common principles of contract law, "the contract is completed at the moment the acceptor

deposits in the mail a letter of acceptance," if directed to the proper address with postage prepaid. *Id.*; *accord* Restatements, Contracts 2d § 66.

The Delimans' Brief repeatedly asserts that the evidence is undisputed that Thomas was in default and then embarks upon a tedious, convoluted and fallacious series of arguments in an effort to give credibility to their position. However, the Delimans' Brief offers no citations in the record or transcript or citations to any case law which support that a payment will be considered untimely due to the inactions of the party seeking to enforce the payment. Despite Delimans assertion that Thomas was in default, the transcript is replete with evidence and testimony that Thomas mailed his December payment on December 22, 2006. (T. at 354); Exhibit 1 (the postmark date on the unclaimed certified mail containing Thomas' December payment states "December 22, 2006). Also, the only witness called by the Delimans, Patrick Deliman, agreed that December 22nd was the date payment was made. (T. at 372-373) (*see also* Delimans' closing argument T. at 386, lines 15-17, admitting that Delimans "actually believed [Thomas] did send it and somehow the mail messed up, and so it didn't get there on time.").

2. The Chancellor's interpretation of Judge Lutz's Order was proper

As a threshold matter, should the Court determine that the Chancellor did not abuse her discretion in finding Thomas' payment was timely, it need not address what the correct interpretation of Judge Lutz Order is regarding execution and garnishment. In other words, by affirming the Chancellor's finding of no default, the second issue, in effect, becomes moot. Nonetheless in case the Court finds that the Chancellor abused her discretion and was clearly erroneous in her evaluation of the evidence, the judgment should still be affirmed based on the Chancellor's proper interpretation of Judge Lutz's Order.

The Delimans' assert several times in their brief that they were entitled to an immediate right to execute the judgment pursuant to the language of the Order. However, such an assertion presupposes that Thomas and ACT were in default and presupposes that Judge Lutz authorized the Delimans to make a unilateral and non-judicial determination of default.

Thomas and ACT concede that *had* there been a judicial determination regarding default, the Delimans would have had a right to execute the judgment for payment in full. However, absent of such a judicial determination to authorize execution, the Delimans had no right to seek collection in such a manner.

The Delimans have not relied on any case law to support their contention that they had an immediate right to execute judgment and even admit that the law is not exactly clear regarding garnishment proceedings. *See Appellants' Br.* p. 25 stating "it *seems* that Mississippi law embraces immediate execution by use of garnishment to enforce chancery decrees awarding money.") (emphasis added). As such, the Delimans rely on common principles of statutory construction in determining the plain meaning of Judge Lutz's Order, which is exactly the interpretation method and means applied by the Chancellor. During the March 9, 2007 hearing, the following argument was made by the Delimans:

> THE COURT: Counsel, what privilege did your client or you have to use the avenues of collection without further order of this Court?
>
> MR. TYNER: It's by operation of the Judgment.
>
> THE COURT: No, it's not. It doesn't say the Judgment could be collected or would be rendered in collectionability at that time. It just says that it would be due and owing, which means – if you study your collection law – that you had the privilege of ignoring payment plans and immediately begin execution. But execution requires order of privilege of the Court.
>
> . . .
>
> And I don't see any efforts in your file that shows the Judgment was immediately executable, therefore, requests the right of garnishment. I don't see anything in there. And that's my problem with you making this argument is that if we

> disregard the lateness or the inability to get it there because of the Postal Service, whatever the case may be, then there was a duty incumbent upon your representing your client to come back to Court and say that is now a judgment in the full sum of [said amount].

(T. at 384-85)

The Supreme Court has held that Mississippi Code Annotated Sections 11-35-1 through 11-35-61 provide the procedural rules for a party who seeks to enforce or assail the enforcement of a garnishment. *First Miss. Nat'l Bank v. KLH Indus., Inc.*, 457 So.2d 1333, 1338 (Miss. 1984). A thoughtful review of those statutes does not establish that a judgment creditor has an immediate right to execute on a judgment by the judgment creditor's unilateral determination that there was a default in payment. In fact, Mississippi Code Annotated Section 11-5-81 states:

> Whenever the court shall render an order, judgment, or decree for the payment of money against any executor, administrator, or guardian or any other party litigant therein, the compliance with such order, judgment or decree *may be enforced* by process fieri facias or garnishment.

(emphasis added). The words "may be enforced" are a far cry from an "immediate right to execute without a judicial determination of default." Furthermore, the law is well established that the burden is on the garnishor to prove that the garnishee is liable to the judgment creditor. *State Farm Mut. Auto. Ins. Co. v. Eakins*, 748 So.2d 765, 767 (Miss. 1999) (citing *Grenada Bankv. Seligam*, 143 So.474, 475 (Miss. 1932). Without a judicial determination of default, the Delimans had no right to commence collection efforts.

The language of the Order itself provides that *should* Defendants default, the Plaintiffs will be awarded a judgment. (R. at 320, ¶ 8) This language was interpreted by Judge Brewer to anticipate that the issue of whether Thomas defaulted first needed to judicially determined, making it a two-step process. Judge Brewer's interpretation is correct as it prevents the

Delimans, and others similarly situated, from unilaterally determining default and in effect, arrogating judicial authority.

C. The Chancellor Did Not Abuse Her Discretion in Awarding Attorneys' Fees, Damges and Costs Against the Delimans

Mississippi Code Annotated Section 11-55-5 states in pertinent part that:

> the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court . . . . finds that an attorney or party brought an action . . . that is without substantial justification, or that the action . . . was interposed for delay or harassment . . .

Substantial justification is defined as any action "frivolous, groundless in fact or in law, or vexatious, as determined by the Court." Miss. Code Ann. § 11-55-3(a). The determination of attorney fees is largely within the sound discretion of the chancellor. *Adcock v. Van Norman*, 918 So.2d 747 (Miss. Ct. App. 2005), *cert. granted*, 920 So.2d 1008 (Miss. 2005) and judgment aff'd in part, rev'd in part, 917 So.2d 86 (Miss. 2005).

The evidence presented during the March 9, 2007 hearing established that the Delimans' collection actions were taken for the purpose of vexation and were wholly unreasonable. There was no default because Thomas had "made payment" by placing his December payment into the mail via certified mail on December 22, 2006. In addition, when Thomas' December payment was returned unclaimed he immediately called the Tyner Law Firm and spoke with the office manager, demonstrating utmost good faith on his part. (T. at 390, lines 19-22) ("And the Court finds that the Judgment Debtor attempted and in a good faith effort sought to utilize what Judge Lutz gave him pursuantto the December 8, 2006, Order.)

The Court found it "burdensome that when addressed certified mail, which is very clear to the Court as to the address, and the Postal service documents three reasonable efforts to deliver a certified mail to a reasonably addressed document, that the Judgment Creditor, through

counsel, would disregard the duties to begin collection efforts." (T. at 389, lines 18-24). On top of the evidence presented regarding the December 22 mailing and Thomas' telephone conversation with the office manager about getting the payment to the Tyner Law Firm,[8] it is clear that at the time collection efforts were begun, the Delimans had received all four (4) payments. Clearly, it was not an abuse of discretion for the court to assess damages and attorneys' fees regarding the Delimans' bad faith efforts to execute on a judgment for which they had already obtained all payments due.

Finally, the Delimans take issue that the Court awarded attorneys' fees without an evidentiary hearing to determine the propriety and reasonableness of the award. *Appellants' Br.* p. 27. The propriety of the attorneys' fees was established during the March 9, 2007. *Supra.* To require the court to conduct another hearing to determine the appropriateness of the attorneys' fees where the court had already found the Delimans' actions in bad faith is a waste of private and judicial resources. Furthermore, the Delimans' were afforded an opportunity to oppose the reasonableness of Thomas and ACT's attorneys' fees, and chose not to do so. (R. at 436) (Order "transmitted for Review to Mr. Tyner on March 15, 2007—Not Returned").

D. The Unclean Hands Argument Was Not Preserved On Appeal

It is a well established law in Mississippi "that a trial judge will not be found in error for an issue that was not presented to him for a decision" *R.W. Aiken Ins. Agency v. SevenOaks Capitol Corp.*, 930 So.2d 444, 448 (Miss. 2006) (citing *Jones v. State*, 606 So.2d 1051, 1058 (Miss. 1992). The Delimans *never* presented to the court below that Thomas and ACT were not entitled to seek relief from the Delimans' bad faith execution because of the unclean hands

[8] The Delimans claim that the office manager did not refuse to sign for certified mail, but do not dispute that the office manager spoke to Thomas regarding the December payment when it was returned to Thomas unclaimed. (*See* T. 392, lines 22-29).

doctrine. On several occasions during the hearing, the Delimans argued their belief that Thomas was not a credible witness. (T. at 364, lines 2-7; p. 381, lines 24-29 and 382, lines 1-14, 17-21; p. 385, lines 20-23)[9] The Chancellor, in the best position to hear and weigh the testimony of the witnesses, had wide discretion to decide what evidence to consider in making her decision.

It seems as though the Delimans have equated their belief regarding Thomas' credibility with invoking the unclean hands doctrine. However, one's credibility or lack thereof being challenged at trial does not in and of itself incite the unclean hands doctrine. Holding otherwise would mean that every time a witness' credibility is questioned, the party conducting the examination, in effect, is raising unclean hands as a defense. Without the unclean hands doctrine being explicitly argued below and preserved on appeal, the Court should not consider it now.[10]

CONCLUSION

There is an abundance of substantial evidence in the record to support the Chancellor's factual finding that Anthony Clarke Thomas did not default in his payment obligations to the Delimans pursuant to Judge Lutz's Order. The Order required that "payment be made on or before the 30th of each month" and the undisputed evidence supports that payment was made December 22, 2006. Without a default, the Delimans had no immediate right to commence collection efforts. If they believed a default had occurred, the Judgment required them to seek a judicial determination regarding whether there was a default before proceeding with collection.

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[9] Despite the Delimans' attempt to make Thomas out to be a non-credible witness, the documents presented to the court speak for themselves and clearly establish that Thomas had made timely payment of the December loan. Exhibit 1

[10] In fact, the undisputed evidence shows that it was Delimans who came before the Chancellor with unclean hands, as they had received all (4) payments from Thomas when they sought to maliciously execute judgment without a judicial determination of default. It is the Delimans who refused to accept three (3) notices for certified mail and then assert an unfettered right to claim Thomas and ACT are in default. Exhibit 1; (T. at 389)

There is also substantial evidence to show that the Delimans' actions were taken in bad faith, thus supporting the Chancellor's award of attorneys' fees. Therefore, the Court should affirm the Chancellor on all grounds asserted.

Also, pursuant to Mississippi Rule of Appellate Procedure 38, the Court should award costs to the Appellees, Thomas and ACT Environmental, Inc., for having to respond to the Delimans' filing of this frivolous appeal. By their own admission on March 9, 2007, the Delimans, through their attorney, conceded that the December 22, 2006 payment had been lost in the mail (T. at 386, lines 15-17),[11] yet they decided to challenge Thomas and ACT's motion to quash the writ of garnishment and quash the subpoenas, resulting in the March 9, 2007 hearing and now, this appeal. The Delimans' have continued to challenge the Chancery Court's finding without relying on any case law or evidence to suggest that it was manifest error or clearly erroneous. This appeal is a product of the Delimans continued bad faith collection efforts which should be sanctioned.

WHEREFORE, the Chancellor's decision should be affirmed in its entirety and the chancery court should be mandated to enter a judgment in favor of Thomas and ACT for the $7,662.87 plus interest running forward after April 16, 2007, the date the Order and Judgment Quashing and Dissolving Writ of Garnishment, Quashing Subpoenas and Awarding Attorneys' Fees was entered, plus reasonable attorneys' fees for Thomas and ACT's defense of this unwarranted and frivolous appeal.

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[11] Mr. Tyner argued that the payment was lost in the mail due to the mail "messing up," however, the evidence shows that three (3) attempts had been made by the Postal Services to deliver the payment. (T. at 389, lines 20-21) ("the Postal Service document[ed] three reasonable efforts to deliver...")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been mailed postage pre-paid by United States mail to the following:

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This, the 23rd day of April, 2008.

Karen Gwinn Clay

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