IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PATRICK DELIMAN AND
JANE DELIMAN — **APPELLANTS**

V. — **NO. 2007-CA-00868**

ANTHONY CLARK THOMAS,
ACT ENVIRONMENTAL, INC.,
KENNETH G. ROBINSON, AND
LYNDA S. ROBINSON — **APPELLEES**

ON THE APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

ORIGINAL BRIEF OF APPELLANTS PATRICK AND JANE DELIMAN

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that he justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mitchell H. Tyner, Sr. and Mark T. McLeod, Attorneys for the Appellants Patrick and Jane Deliman

2. Patrick and Jane Deliman, Appellants

3. Keith W. Turner, Stephen W. Rimmer, F. Hall Bailey, Attorneys for the Appellees

4. Honorable Bill Lutz and Honorable Cynthia Brewer, Chancery Court Judges of Madison County

Respectfully Submitted,

BY: Mark T. McLeod

Mitchell H. Tyner, Sr. (MSB[redacted])
Mark T. McLeod (MSB[redacted])
Attorneys for **PATRICK AND JANE DELIMAN**

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2. WHETHER THE CHANCELLOR WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, AND APPLIED THE WRONG LEGAL STANDARD IN FINDING THAT THE DEFENDANTS WERE ENTITLED TO AN AWARD OF ATTORNEY'S FEES IN THE AMOUNT OF $ 7,662.87 UNDER THE PROVISIONS OF THE MISSISSIPPI LITIGATION ACCOUNTABILITY ACT, MISS. CODE ANN. § 11-55-1, *ET SEQ.*

3. WHETHER THE CHANCELLOR WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, AND APPLIED THE WRONG LEGAL STANDARD IN FAILING TO ESTOP THE DEFENDANTS' MOTIONS TO QUASH AND ABATE EXECUTION BECAUSE THE DEFENDANTS WERE NOT PROCEEDING WITH CLEAN HANDS AND WERE MAKING ARGUMENTS CONTRARY TO POSITIONS THEY PREVIOUSLY TOOK IN THE LITIGATION

STATEMENT OF THE CASE

A. Facts and Procedural History

Procedural Posture

This appeal arises from chancery court Orders quashing writs of garnishment and subpoena's *duces tecum,* and awarding to the Defendants (Appellees herein), Anthony Clark Thomas ("Thomas") and ACT Environmental, Inc. ("ACT"), attorneys' fees, damages and expenses in aggregate amount of $7,662.87 to be paid by the Appellants or their attorneys. R. at 434. Chancellor Cynthia Brewer mandated the penalty should be paid within fourteen days of April 16, 2007, the date of the orders. R. at 436. The Court imposed this punitive measure on the ground that Delimans' counsel had sought execution in bad faith on a previous Final Judgment on Damages (R. at 319) dated

October 16, 2006 awarding the Delimans judgment in the amount $44,163.75 in attorney's fees, damages and expenses. This expense arose from the onus of prosecuting their case against Thomas and ACT who wastefully and needlessly prolonged the litigation with dishonest conduct and frivolous motion practice. Up until the Defendants' motions to quash, the case had been handled by Chancellor William J. Lutz. On December 8, 2006 Judge Lutz amended the Final Judgment on motion of the Delimans to raise the award to $45,343.75. R. at 355-57.

The Lawsuit

This case commenced on August 15, 2005 when the Delimans filed action in the Chancery Court of Madison County against Thomas and ACT alleging these Defendants sold them property in a manner that breached contractual obligations and the covenant against encumbrances. R. at 1-16. The Complaint set forth the facts underlying the claim with attachments. On or about April 28, 2000, Thomas as President of ACT executed and delivered a Warranty Deed concerning a certain tract of land to a man name Robinson. R. at 2, 9. Robinson built a house and installed a waste disposal system on the land. R. at 2. On or about December 11, 2003, the Delimans as buyers and Thomas as seller executed an Acreage Contract for the purchase and sale of Lots 5 and 6 located in the subdivision of Madisonville Estate, located in Madison County, Mississippi. R. at 2, 12-13.

Paragraph 10 of the Acreage Contract provided in relevant part that "[t]itle shall be good and marketable, subject only to the following items recorded in the Chancery Clerk's office of said County; easements without encroachments, applicable zoning ordinances, protective covenants and prior mineral reservations..." R. at 2-3, 12.

Paragraph 11(c) of the Acreage Contract provided that "[i]f it becomes necessary to insure the performance of the conditions of this contract for either party to hire legal counsel, then the defaulting party agrees to pay reasonable attorney's fees and court costs in connection therewith." R. at 3, 12. Paragraph 12 of the Acreage Contract provided that all express representations, warranties, and covenants would survive closing, except where specified to the contrary in the agreement. R. at 3, 13.

On or about January 16, 2004, the Delimans paid ACT $162,802.50 for the Lots and Thomas as President of ACT executed a Warranty Deed and delivered it to them. R. at 3, 14-15. Thomas individually and as President of ACT failed to disclose unrecorded servitudes and conveyances burdening the property in breach of the contractual obligations and covenants the Defendants assumed. R. at 3. After buying the property, the Delimans observed waste water flowing onto the property and determined that the water originated from the adjoining north Robinson property. R. at 3. The Delimans sought damages and relief for Thomas' and ACT's breach of contract, breach of the covenant against encumbrances, trespass, private nuisance, slander of title, and declaratory judgment.

Service of Process and the Bad Faith Conduct of the Defendants

Thomas and ACT were personally served by hand delivery of the Complaint and Summons to their agent for service of process, Geraldine Harbin. R. at 29, 31, 33. Upon each filed Proof of Service, "personal service" is attested to with clarification of the fact that copies were deliver to "Geraldine Harbin on Behalf of Anthony Thomas" and "Geraldine Harbin on behalf of Anthony Thomas, agent" for ACT. *Id.* The Proofs indicated service took place on October 14, 2005. *Id.*

Upon Thomas' and ACT's complete failure to plead, answer, or otherwise defend the suit, the Delimans filed an Application to Clerk for Entry of Default and Supporting Affidavit on November 29, 2005. R. at 37-39. A Docket Entry of Default by Thomas and ACT was made and filed on this date. R. at 40-41. Nonetheless, the Defendants obtained representation of counsel and depositions of Thomas and ACT were noticed for January 12, 2006. R. at 42- 58. On December 20, 2005, Thomas and ACT through their counsel filed a consolidated Entry of Appearance for the Sole Purpose of Challenging Jurisdiction, and Motion to Dismiss. R. at 61. The Defendants alleged that they had not been properly served, contending that Geraldine Harbin was not authorized to accept service of process on behalf of either Defendant. *Id.* The motion was supported by affidavits of Thomas and the Defendants' attorney all alleging that Harbin did not have authority to accept service on behalf of either Defendant. R. at 59-63.

The Delimans filed an Application for Default Judgment on January 19, 2005. R. at 67. The Delimans informed the Court that after being served with process, the Defendants called them to discussed possible settlement of the lawsuit. R. at 70. However, the Defendants never filed an Answer or other responsive pleading to the Complaint even though they were aware of the action. R. at 70. Having deliberately and willfully abstained from responding to or defending the suit, the Defendants further created unnecessary delay and expense by unilaterally deciding not to attend the depositions that had been scheduled. R. at 72. An Order was issued setting the Application for Default Judgment for hearing at 1:00 p.m., February 13, 2006. R. at 106. The Certificate of Service reflected that the Order setting the hearing was mailed to counsel for the Defendants on January 23, 2006. R. at 107

On February 13, 2007 the Delimans' counsel appeared before the Honorable William J. Lutz, Chancellor, prepared to proceed on the Application for Default Judgment. T. at 11. Judge Lutz noted that the Defendants' counsel was not present. T. at 11. Delimans' counsel and Judge Lutz discussed the fact that the Defendants had been given notice of the hearing by mail, with a copy of the Court's Order enclosed. T. at 12. The Court noted the Certificate of Service proving the fact. T. at 12. Judge Lutz was further informed that notice of the hearing, with the offer to amicably schedule for an alternative date, had been given to the Defendants on three occasions. T. at 13.

Nonetheless, the Plaintiffs put on the evidence of proper service and default. T. at 13. Process server Martha Via testified to her credentials and with specificity about the fact that she served the Defendants and that they accepted it through their agent Ms. Harbin. T. 13-16. Of particular note was the fact that the description of a man Ms. Via talked to identifying Ms. Harbin as the Defendants' agent fit that of Thomas. T. at 16. Mrs. Deliman corroborated Ms. Via's Description. T. at 18. Default Judgment was entered against Defendants Thomas and ACT on February 13, 2006. R. at 111-112. An Order was issued setting a hearing on damages for 9:00 a.m., April 12, 2006, "to determine the amount of damages to be included in a Final Default Judgment against the Defendants Anthony Clark Thomas and ACT Environmental, Inc. (emphasis added) R. at 113.

On March 10, 2006, The Defendants filed another Entry of Appearance for the Sole Purpose of Challenging Jurisdiction, and Amended Motion to Set Aside Default Judgment. R. at 114-128. The Defendants unilaterally set this motion for hearing on

April 12, 2006. R. at 129-30. The hearing on the Defendants' motion went forward on April 12. T. at 27.

Defendants' counsel first called Ms. Harbin to the stand to testify. T. at 28. She was asked if Thomas had authorized her to receive service on his behalf regarding any lawsuit. T. at 30. She answered, "Not that I can remember, no." *Id.* She was also asked if ACT had authorized her to receive service on its behalf. T. at 31. She responded, "Not that I recall, no." *Id.* She denied having received service of the process after being given authority to do so. *Id.*

On cross examination Ms. Harbin was asked if she recalled the occasion when Ms. Via came into the office and personally served the Defendants by delivering her copies of process. T. at 32. She balked at the question, inquiring "What date was that?" *Id.* She was reminded of the date of October 14, 2005. *Id.* She responded that, because there are so many runners that come to the office, people delivering envelopes, she would say she really did not recall the occasion. *Id.* She was impeached by her own affidavit. T. at 31-34. Suddenly, she could remember Ms.Via coming in to serve the process. *Id.* However, Ms. Harbin had convenient lapses of memory. She could not recall where she was when Ms. Via came in, and regressed into the assertion that she could not remember anything specific. T. at 35. She was unwilling to acknowledge that Mr. Thomas, in fact, had been at the front door and pointed out that Ms. Via could serve the Defendants by delivering process to Ms. Harbin. T. at 35.

Thomas was the next to testify. He denied giving Ms. Harbin authority to accept process for him personally or on behalf of ACT. T. at 40, 50. On cross Mr. Thomas' lack of respect for his wrongful actions and for the fact that he had been served was

evident. He asserted the lawsuit was "frivolous" and refused to authorize his attorney to receive service because of his opinion. T. at 51, 53. He received and read the Complaint and recalled the day the process server came to his office. T. at 54. He was asked if he remembered standing next to the front door where the process server entered on that day. *Id.* He responded, "Not to my knowledge." *Id.* He denied standing at the front door and directing Ms. Harbin to accept service for the Defendants. *Id.* He admitted he would call Ms. Harbin "Geri or Ms. Geri." T. at 55.

Ms. Via testified with specificity about the details of serving the process, including running into a male that fit Thomas' description when she entered the office to serve the process. T. at 62-64. She told him she was there to see Anthony Clark Thomas, and he lied that "He is not here." T. at 64. He then told Ms. Via that "Mrs. Geri can probably help you." *Id.* He motioned in Ms. Geri's direction and Ms. Via spoke with her about serving Thomas. T. at 64-5. Ms. Harbin glanced at Mr. Thomas and she misrepresented within earshot of Mr. Thomas that "he is not here." T. at 65. Ms. Via clarified she was serving process on Thomas and ACT, and Ms. Harbin clarified she could take the process for both. *Id.*

The Defendants' attorney took the stand and testified that he did receive the Application for Default Judgment. T. at 73. However, he claimed he did not receive the notice setting the February 13, 2006 hearing on the Application. *Id.* He admitted to receiving the Application and a letter offering to withdraw the Entry of Default if the Defendants would file an Answer. T. at 74. He denied getting another letter thereafter again offering to withdraw the Entry of Default in exchange for a substantive Answer. *Id.*

The Delimans' co-counsel, James Sykes, took the stand to testify about the circumstances in which notice of the hearing for the Application of Default was given to the Defendants. He testified that he drafted and mailed a letter on January 18, 2006 advising the Defendants' counsel of the hearing date, and enclosed copies of the Application for Default Judgment and the Notice of Hearing. T. at 76-77. Mr. Sykes also testified that he advised the Defendants' counsel that if he had a conflict, the Delimans would gladly work with the Defendants to reset the matter. T. at 77. The letter also contained an offer to withdraw the Clerk's Entry of Default if the Defendants would file an Answer to the Complaint by January 30th, 2006. *Id.* The same offer was made by letter dated January 23, 2006. *Id.* The letter contained a copy of the Court's Order setting the hearing. T. at 78. Mr. Sykes indicated that he had only made the offer to withdraw the Entry of Default in the two letters, and had never communicated such to the Defendants' counsel outside of the written correspondence. *Id.* Mail and postage records kept by Mr. Sykes verified that he had forwarded the letters to the Defendants' counsel on the two dates indicated. T. at 79.

In closing, the Delimans' counsel pointed out to the Court that the evidence unequivocally showed that notice of the February 13, 2006 hearing had been given, because the only way the Defendants' counsel could have known about the offer to withdraw the Entry of Default was to look at the January 18 and 23 letters that Mr. Sykes had sent him. T. at 86. These correspondences contained The Notice of Hearing as well as the Court's Order setting the hearing, along with the Application for Default. The Defendants' attorney admitted receipt of the first letter. All of the correspondences sent to the Defendants' attorneys can be found at R. 147-155, and the mail records verifying

the mailings can be found at R. 156-57. Accordingly, there was nothing for the Court to do but dismiss the arguments of the Defendants and uphold the Default Judgment. The Court informed the parties it would consider the evidence and rule after the hearing. T. at 88.

A Notice of Hearing on Plaintiffs' Damages setting the matter for June 7, 2006 at 9:00 a.m. was forwarded to the Defendants' counsel on April 28, 2006. R. at 165-66. Judge Lutz issued his Opinion on the Defendants' special Entry of Appearance and Motion to Set Aside Default Judgment on April 27, 2006. R. at 168-175. The Court commenced its opinion with a review of the procedural background, noting the Proofs of Service indicating that both Defendants appeared to have been effectively served by Ms. Via through their agent, Geraldine Harbin. R. at 168. Under the "Notice of Hearing" Section, Judge Lutz concluded after review of the evidence and testimony of the Defendants' attorney that, "The Court is convinced that Ernest Stewart, Esq. (counsel for Defendants) was properly noticed of the February 13, 2006 Default Judgment Hearing." R. at 170.

The Court then broached the issue of whether Ms. Harbin was authorized to accept service of process on behalf of Thomas, individually, and as registered agent for ACT. R. at 171. The Court ruled that "Geraldine Harbin...was not a credible witness." *Id.* The Court observed that Ms. Harbin "tended to have selected moments of clarity regarding the events of October 14, 2005," but the Court found "it highly suspect that she was unable to recall or remember any events which could be unfavorable to her employer, Anthony Clark Thomas." *Id.* The Court then reviewed specific items of testimony about the circumstances of service, noting such deceptions as her "complete

lapse in memory" and her appearance "to the Court to be playing ignorant." T. at 171-72. Specifically, the Court found that, consistent with the facts she set forth in her affidavit, "Geraldine Harbin is fully aware of what her affidavit is and its importance in legal proceedings." R. at 172. The Court concluded:

> ...Geraldine Harbin's memory of events became quiet (sic.) clear. She was able to describe in detail her conversation with the process server (Martha Via). Then her memory failed again. Geraldine Harbin was unable to recall if she was in the reception area or had been summoned to the reception area by Anthony Clarke Thomas. She was also unable to recall if Anthony Clarke Thomas was present when the exchange between her and the process server occurred. Once again, Geri's selective memory of events further discredited her testimony. Geri remembered only events that bolstered her employees (sic.) position and couldn't "recall' or "remember" anything else.
> R. at 173.

As to Martha Via, the Court found her to be an extremely credible witness. The Court gave credence to her testimony concerning the actions she took to effect service, the presence and conversation with Mr. Thomas, and her claim that Mr. Thomas and Ms. Harbin lied about his identity and presence. R. at 173-74.

The Court did not find Thomas to be a credible witness and found that Ms. Harbin, acting as an apparent agent, accepted service of process for Thomas individually and as agent for ACT. R. at 174-5.

On May 25, 2006, new counsel entered an appearance on behalf of the Defendants. R. at 185. On June 14, 2006, on the eve of the June 15 damages trial hearing, the Defendants filed yet another Amended Motion to Set Aside Default Judgment. R. at 235. The grounds advanced in the motion did not materially differ from those of the previous motions, but the Defendants attempted to raise the specter of

incompetence of their prior counsel as a new basis to set aside the Default Judgment. However, there can be little doubt that this motion, like the previous ones, was intended by Thomas and ACT to further delay the Delimans' rights to relief and needlessly run up the cost and expense of the litigation. The Plaintiffs filed a response to this 11th hour motion on June 28, 2006, pointing out the infirmities and lack of clean hands evident in the Defendants' new motion. R. at 268-74.

The result was that on June 15, rather than reaching a final resolution in the case by trying the damages and completing the litigation, Judge Lutz, whose work throughout the case exhibited more than a high degree of fairness and levity in consideration of the Defendants' dilatory tactics, was forced to recon with another frivolous motion. T. 95-96. The Delimans' counsel pointed out that the focus was to get the damages paid, but the Defendants' conduct had created a litigation-prolonging vortex that was creating additional damages. T. at 97. Defendants' counsel attempted to suggest that the Delimans did not have a basis to claim the ever increasing amount of attorney's fees they were absorbing owing the Defendants' escapades, but Judge Lutz was quick to state that:

> One thing. One thing, please understand this. I want your client to understand this, if I come to the conclusion, upon hearing your motion, if I come to the conclusion that your entitled to a trial on the merits, then that is not, whether you win on the merits or not, is not going to do anything to the costs and expenses that they have had to go to because of what has happened before you got into this case. I mean, they have gone to the extraordinary expenses because of the problems with your side of the case, what has now become your side of the case, whoever those problems were created by. And fees that they have incurred to that, even if you – win on the merits, I'm going to allow them to put on a case for damages as to – certainly, to that piece of the case.
> T. at 98-99.

Judge Lutz then commented that "I have bent over backwards to try and to be fair in this case to Mr. Thomas and his side of the case." T. at 99. Because the motion could potentially allow the Defendants to get a "do-over" if the Plaintiffs went forward on damages, Plaintiffs' counsel was forced to recognize that it would neither be procedurally proper nor in the best interests of his clients to conduct a damages trial that the pending motion could render moot. T. at 101, 103, 106. Consequently, Judge Lutz had no alternative but to continue the hearing and permit additional expensive, wasteful litigation concerning another dilatory tactic by the Defendants.

On June 29, 2006 Judge Lutz conducted the hearing to address the Defendants' Second Amended Motion to Set Aside Default Judgment. Judge Lutz heard the Defendants' argument in support of the motion and subsequently announced that he would not set aside the default. T. at 117-123. He then addressed the Defendants' counsel and the parties as follows:

> I think you're going to find that your client (Thomas and ACT) is the biggest problem in this case. And, at any rate, quite frankly, I don't think your client is being prejudiced by this at all. Any prejudice to your client was his own doing, in my opinion....And I'm glad you're in the case, Mr. Bailey (Defendants' new counsel). I feel certain that things will work as good as they can for your client, considering what he gave you to work with.
> T. at 124

In one fell swoop, the Judge made clear how the balance of equity stood between the parties and denied a motion which should never have been brought before the Court in the first place. If this had not been made clear to the Defendants by the Judge's comments in the June 29th hearing, it must be said that in his written Order Denying (Second) Amended Motion to Set Aside Default Judgment he sought to memorialize his

disgust with the Defendants' ploys and conduct throughout the case. R. at 300. In Section 1 of his analysis of the Defendants' motion, "The Nature and Legitimacy of the Defendant's Reasons for Default (Whether the Defendant has Good Cause for Default), Judg Lutz stated, "The Court is convinced that Thomas lied under oath during the April 12, 2006 hearing." (emphasis added) R. at 300. The Court was of the opinion that Thomas had been dishonest throughout the case, in pleadings and before the Court.[1]

Damages Trial

The trial on damages went forward on August 2, 2006. T. at 130. The Court rendered an Opinion on Damages on October 16, 2006, finding that the Delimans were entitled to attorney's fees and that the lawsuit had been necessitated by the Defendants' actions. R. at 315, 317. Reviewing the evidence to determine a "reasonable" amount of attorney's fees the Defendants' should be liable for, Judge Lutz determined the Delimans were entitled to $44,163.75 in fees from ACT and Thomas jointly. R. at 318. A Final Judgment awarding this amount in fees with strict terms of payment and providing for automatic acceleration and lifting of the stay of execution in the event the Defendants defaulted was rendered on October 16, 2006. R. at 319, 320. The Defendants' expressly filed an Election to pay the Judgment in monthly installments on October 20, 2006. R. at 321. On October 27, 2006, the Delimans filed a Miss. R. Civ. P. 59 Motion to Alter or

[1] The Court found the following concerning Thomas' conduct in the case and before the Court:
A. "Thomas lied about the events that transpired at his office." (when Martha Via served Geri Harbin) R. at 300;
B. "The Court believes that Thomas was present when Geri Harbin accepted service of process on his behalf and with his implied authority." R. at 300-1;
C. "The Court is further convinced that the only person present Thomas'/ACT's office who testified fully and truthfully during the April 12, 2006 hearing Martha Via (the process server)." R. at 301;
D. "Thomas has lied to the Court through his sworn pleadings and testimony. Had Thomas been forthcoming and truthful with his former attorney, an answer may well have been filed. This default was not secured solely by the inattention, forgetfulness or neglect of Thomas' attorney." *Id.*;
E. "Thomas through his deception and manipulation, has made this litigation necessary....The Court is convinced that the Delimans are and would continue to be harmed if the Default Judgment is set aside." R. at 304.

Amend a Judgment, seeking the inclusion of additional fees and costs not included in the originally awarded amount of $44,163.75. R. at 324-345. This is the only request any party ever filed to modify a provision of the October 16 Judgment.

The Court issued an Amended Opinion on Damages on December 8, 2006, and added certain amounts to raise the total award to $45,343.75, and memorialized this increase in its Amended Final Judgment on Damages. R. at 351-358.

After the Damages Trial

The October 16, 2006 Judgment and December 8, 2006 Amended Judgment were very clear in what Thomas and ACT were required to do to pay the damages owed to the Delimans.[2] On October 20, 2006 Thomas and ACT filed their election as required by the October 20, 2006 Judgment to pay in monthly installments by the 30th of each month, with the express acknowledgment that "[s]hould Defendants miss any payments or otherwise default with respect to payment, the stay will be immediately lifted and Plaintiffs may proceed with execution on this Judgment." (emphasis added) R. at 321. On October 27, 2006 the Delimans filed a Rule 59 Motion to Alter or Amend Judgment seeking an increase in the award to add certain costs and other sums. R, at 324-54. The Court issued an Amended Judgment raising the amount awarded to $54,343.75. R.356. Under Mississippi law and the terms of the two orders the result for failure to actually pay an installment by the 30th on a given month was that the remaining debt would

[2] The October 8, 2006 Judgment ordered as follows (R. 320): "IT IS FURTHER ORDERED AND ADJUDGED that Patrick N. Deliman and Jane M. Deliman are awarded a judgment of $44, 163.75 plus interest at eight percent (8%), Execution of which is stayed, to allow Anthony Clarke Thomas and ACT Environomental, 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. Anthony Clarke Thomas and ACT Environmental, Inc. shall select a plan of payment by no later than October 20, 2006; by making an election in writing to the Tyner Law Firm and filing a copy of the election with the Court. Should Anthony Clark 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." (emphasis added)

immediately be executable by permissible statutory methods as delineated in Miss. R. Civ. P. 69(a).

The attorney's fees and costs awarded to the Defendants in the April 16, 2007 Order are completely unwarranted and result from an abuse of the Chancellor's discretion. As noted in the order, the Court erroneously determined that the Delimans had violated the provisions the Mississippi Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1, *et seq.*[3] R at 435. Thomas and ACT filed an Emergency Motion to (1) quash or, alternatively, stay the enforcement of the Delimans' writ of garnishment and enjoin further collection activity. R. at 399. The motion asserted without citation to statutes or case law that the Delimans had proceeded "without substantial justification" in seeking execution on their Final Judgment. R. at 400. The motion also conclusorily asserted that the Thomas and ACT had "timely made" all payments as contemplated by the Court's orders, and that the collection activity of the Delimans must have been "in bad faith" and "solely for the purposes of harassment." R. at 400. Thomas and ACT

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[3] In relevant part Miss. Code Ann. § 11-55-1 provides as follows: "Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, 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, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure." Miss. Code Ann. § 11-55-3(a) defines without substantial justification as meaning any action, claim, defense or appeal, or any motion, that is "frivolous, groundless in fact or in law, or vexatious, as determined by the Court." An award of attorney's fees under this section is not appropriate when it has not been established, and the record does not otherwise reflect, that the subject action was taken for the purposes of vexation, or was without an arguable hope of success. *Smith v. Malouf,* 597 So.2d 1299, 1303-4 (Miss. 1992). "A claim is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *Anderson v. B.H. Acquisition, Inc.,* 771 So.2d 914, 922 (Miss. 2000); *Scruggs v. Saterfiel,* 693 So.2d 924, 927 (Miss. 1997).

speciously argued that as a precursor to the right to pursue execution by way of garnishment, the Delimans were required to seek a "judicial determination". R. at 401.

Strangely, there is no language to be found in the October 16 or December 8 Final Judgments imposing additional burdens upon the Delimans to pursue the right of execution upon default. The plain language of both orders suggests that default automatically would lift the execution stay. The Defendants arguments conjure limitations and shifts of burden to the disadvantage of the Delimans, without any reference to the actual language of the orders. Further, the positions of the Defendants and the rulings of the Court regarding the Delimans' rights to seek execution for monies owed under the Final Judgment squarely violated Miss. R. Civ. P. 69(a) as well as Miss. Code Ann. § 11-5-81. The Defendants cited no authority backing up their arguments in the motions or at the March 9, 2007 hearing. In fact, the Defendants' counsel knew or should have known that the Defendants' motion was frivolous and completely contrary to Mississippi law, for he purportedly got involved because he routinely dealt with "a lot of judgment collection, creditor's rights issues." T. at 377. This may be why he plead on behalf of the Defendants an obviously willful mischaracterization of the language of the Final Judgments as requiring a "judicial determination" of the right to execute, and chose not to mention any of the case law or statutory provision regarding execution by garnishment or the actual standard under the Litigation Accountability Act. In the end, there is only the vague, undemonstrated assertion that the Delimans had violated "sound principles of due process." R. at 401. Of course, those "principles" were never specifically articulated by the Defendants in pleadings or at the March 9th hearing for the

benefit of the Court and the Delimans. The Defendants' motions present a true case of the pot calling the kettle black.

There is no dispute that Thomas and ACT failed to timely make the payment due on December 30, 2007. The testimony in the March 9 hearing is rife with acknowledgements by Thomas that he understood that the Final Judgments imposed a strict obligation. For instance, Thomas testified that he understood "[t]his is a legal matter. It's not a car note or mortgage payment or whatever. It's something that has to be there at a certain time." T. at 350. He had previously admitted in his payment election that should he miss a payment or default, the stay of execution would *immediately* lift. R. at 321. Having acknowledged this, clearly Mr. Thomas, ACT and his attorneys know that they engaged in activity subject to judicial estoppel when they argued that "good faith efforts" to pay were sufficient and that a "judicial determination", not immediate termination of the stay, would be the next step. As will be more fully discussed, the Chancellor erroneously decided not to consider the previous dishonesty and double-talk of Thomas in the litigation in weighing whether he was proceeding with his motions with clean hands. However, Thomas' willingness to lie and contradict his prior positions was obviously intended to escape the Delimans' immediate right of execution, and unfortunately the Chancellor tolerated this absurd ploy.

The overarching issue in this case is the Chancellor's failure to do equity by permitting the Delimans to proceed with execution because the Defendants' default had lifted the stay of execution. The Judgments indicated that the consequence of default would be acceleration of the amount due, immediate rights of execution, and self-executing judgment for the remaining amount.

STANDARD OF REVIEW

On appeal this Court will review a chancellor's decision under an abuse of discretion standard. The Court on appeal will not interfere with the chancellor's decision unless it was "manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Bell v. Parker,* 563 So.2d 594, 596-97 (Miss. 1990). The chancery court's interpretation and application of the law is reviewed under a *de novo* standard. *Tucker v. Prisock,* 791 So.2d 190, 192 (Miss. 2001)(citing *In re Carney,* 758 So.2d 1017, 1019 (Miss. 2000)); *Weissinger v. Simpson,* 861 So.2d 984, 987 (Miss. 2003).

SUMMARY OF THE ARGUMENT/FINDINGS/RULINGS SOUGHT TO BE REVIEWED

The Delimans would submit that the following findings and rulings by the chancellor violated the applicable standard of review, and as such, must be reversed:

1. The Chancellor's finding of fact that the Defendants timely transmitted, under the terms of the Final Judgment, their December payment, and that Mr. Thomas made "good faith efforts" efforts to ensure payment was made in a timely manner. See R. at 432.

2. The Chancellors' findings that the Delimans' execution pursuits were unwarranted and unauthorized under the Original and Amended Judgments. R. at 433. The Chancellor reasoned that the Judgments did not authorized execution or collection efforts. *Id.* The Chancellor interpreted that Judge Lutz had contemplated a "two-step process" must be complied with before resort to execution could be taken by the Delimans: (1) The Delimans were apparently "required to submit an additional judgment to the Court specifying the default and requesting that they be authorized to pursue

measures to collect the judgment," and (2) execution could be pursued only after "authorization" and expiration of 10 days pursuant to Miss. R. Civ. P. 62(a). R. at 433.

3. The Chancellor's findings: (1) that Delimans' counsel acted in a manner that was "premature, overly aggressive, and in bad faith," and (2) that "no just reason existed under the law and facts" for the Delimans' counsel to seek execution of the judgment by writ of garnishment. R. at 433. The Chancellor predicated these findings upon the supposition that the Delimans' had not complied with Mississippi law or Judge Lutz's Judgments in proceeding with execution through writs of garnishment. The Chancellor opined the execution efforts were "wholly unreasonable", that the Defendant's "good faith efforts" to tender payment apparently met the strict requirements of Judge Lutz's Judgments, and that Deliman's counsel "either knew, or should have known, of the Defendants' efforts to tender the payment in question." *Id.*

4. The Chancellor's findings that the Defendants were entitled to an award of attorneys fees in the amount of $7,662.87 under the provisions of the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1, *et seq.* and Miss. R. Civ. P. 45(f), to be paid within fourteen (14) days of the entry of the chancellor's order. R. at 435.

5. The Chancellor's finding that $7,662.87 was a reasonable, proper and justified amount of attorney's fees to award. R. at 434-435. Judge Brewer failed to conduct even a minimally adequate evidentiary hearing to determine this amount of fees or whether such was reasonable or proper.

6. The Chancellor's failure to recognize the Defendants' breach of Judge Lutz's Judgments, and permit execution to proceed as permissible under Mississippi law

and as contemplated by the plain terms of Judge Lutz's Orders. Judge Brewer apparently felt that the law or the orders set up preconditions to the right of execution in this case (T. at 384-85, 389), but she wholly failed to explain how Judge Lutz's orders required a "two-step process" and cites not authority at any point showing that additional preconditions existed.

7. The Chancellor's failure to judicially estop the Defendants from denying default and their motions seeking dissolution of the Delimans collection efforts, in light of (1) Thomas' explicit acknowledgement in his Election under the terms of the Original Judgment, that upon default, the stay of execution would immediately lift and execution would thereafter be available, (2) Thomas' testimony at the March hearing that he understood the nature of the obligation and that everything would become due if he defaulted (T. at 364) and (3) The fact that Thomas did not come to the Court of equity with "clean hands" in filing his motions, given the protracted and bad faith conduct the Defendants had exhibit throughout the action, and which was acknowledged by Judge Lutz throughout the case.

8. The Chancellor's repeated refusals to allow the Delimans to present the Defendants' previous conduct and dishonesty in the case for the proper purposes of credibility impeachment (T. 22) or test the merits of the Defendants' motions (T. at 40). It is clear the history of the case was relevant to the merits of the motions, as Judge Lutz's determinations were central to the controversy, as well as the credibility of Thomas, because the Judge Brewer was clearly relying on the veracity of Thomas' testimony. T. at 383.

ARGUMENT

1. THE CHANCELLOR WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, AND APPLIED THE WRONG LEGAL STANDARD IN ABATING THE DELIMANS' EXECUTION EFFORTS AND FAILING TO RECOGNIZE THAT, IN LIGHT OF INDISPUTABLE EVIDENCE OF THE DEFENDANTS' DEFAULT, THE DELIMANS HAD IMMEDIATE RIGHT TO EXECUTE UNDER THE FINAL JUDGMENTS AND MISSISSIPPI LAW

Concerning the propriety and the right of the Delimans to proceed with execution in this case, it is quite clear that two sources of law control: (1) Judge Lutz's October 16 Final Judgment and December 8 Amended Final Judgments and (2) Mississippi substantive law of execution. It is clear from the previous review of the October 16 Final Judgment (See R. at 319) that Judge Lutz from the outset would allow the Defendants to elect to pay the Delimans in monthly installments, with interest, but in the event of default, the remaining amount would become due and the stay of execution would immediately lift.

While there are no special rules of construction governing how Judges should interpret the language of Orders written by other Judges, a Court by analogy should endeavor to comply with rules of statutory construction. When asked to apply statutes to specific factual situations, a Court is to apply the statutes literally according to their plain meaning, and there is no occasion to resort to rules of statutory construction where the language used by the legislature is plain, unambiguous, and conveys a clear and definite meaning. *Davis v. Public Employees' Retirement System,* 750 So.2d 1225 (Miss. 1999); *Chandler v. City of Jackson,* 687 So.2d 142, 144 Miss. 1997) (citing *Jones v. Mississippi Employment Sec. Comm'n,* 648 So.2d 1138, 1142 (Miss. 1995); *Marx v. Broom,* 632 So.2d 1315, 1318 (Miss. 1994); *City of Natchez v. Sullivan,* 612 S.2d 1087, 1089 (Miss. 1992); *Forman v. Carter,* 269 So.2d 865, 868 (Miss. 1972). The Mississippi Supreme

Court is acutely aware that "...we are bound by the words and provisions of the statutes that our Legislature enacts." *Delta and Pine Land Co. v. Burns,* 926 So.2d 901, 905 (Miss. 2006). If construction of the meaning of words is necessary, the Court will assume all words and phrases contained in the statutes are used according to their common and ordinary acceptance and meaning, and will apply meanings in their popular sense to determine statutory intent. Miss. Code Ann. § 1-3-65; *Davis v. Public Employees' Retirement System,* 750 So.2d 1225 (Miss. 1999). The Mississippi Supreme Court has also noted that courts "have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature." *Marx v. Broom,* 632 S.2d 1315, 1318 (Miss. 1994). Further, "an exception cannot be created by construction, when none is necessary to effectuate the legislative intention....Ordinarily, an exception must appear plainly from the express words and necessary intendment of the statute. Where no exception in positive words is made, the presumption is the legislature intended to make none." *Miss. Dept. of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement,* 740 So.2d 925, 932 (Miss. 1999)(quoting *State v. Heard,* 246 Miss. 774, 151 So.2d 417 (Miss. 1963). These common-sense principles, with "plain meaning" as the polestar consideration, indicate that Judge Brewer practically rewrote Judge Lutz's Judgments with her "interpretations" and did not following the plain meaning of his promulgations.

There is little dispute that the Defendants actually failed to effectively pay the December payment in a timely manner; rather, it was clear from the Defendants' Motions and arguments (See R. at 399, T. at 376) that they were attempting to convince the Court that Judge Lutz's Final Judgments allowed for "good faith" efforts to try and make timely

payments. The Defendants cited no authority justifying such an interpretation, nor could they point to any language in either of the Final Judgments indicating that good faith efforts would excuse default. In fact, the Original Final Judgment stated that should the Defendants miss one payment or default on any payment, the stay of execution would immediately lift and the Delimans would be permitted to execute on the Judgment. The December 8 Amended Final Judgment stated that judgment "will be awarded" in the event a payment is missed. As previously mentioned, the only reason an Amended Judgment was created was to raise the award as moved for by the Delimans.

There is no compelling reason to think that Judge Lutz would modify the immediate execution provisions of his Original Final Judgment and supplant them with a "two-step process", when there is no law or other motion justifying such an amendment. The Defendants made clear in their Election to pay the judgment in monthly installments that, "[s]hould Defendants miss any payments or otherwise default with respect to payment, the stay will be immediately lifted and Plaintiffs may proceed with execution on this Judgment." (emphasis added) R. at 321. The Election was made prior to the time the December 8 Amended Final Judgment was issued, and the Amended Judgment did not expressly or implicitly cancel the promulgations of the Original Judgment. Yet, the Defendants and Judge Brewer elected to ignore the obvious terms of the Original Judgment, and decided to construe the provisions of the Amended Judgment in a way that directly contradicted the execution provisions of the Original Judgment. It is impossible to reconcile "good faith efforts" or "two-step process" with "immediate" lifting of the stay if the Defendants "miss one payment or default on any payment." Absent some indication that Judge Lutz was compelled, by force of law or motion, to change his mind,

his Judgments must be construed *in pari materil,* or in harmony with each other. *See Lamar County School Bd. of Lamar County v. Saul*, 359 So.2d 350, 353 (Miss. 1978).

Even if it made sense to permit a contrary interpretation, it cannot be said the Amended Judgment provided for anything other than immediate entry of Judgment awarding acceleration of the entire amount. Such an interpretation still would not militate against the undisputed fact that the Defendants missed a payment and defaulted on their obligations under Judge Lutz's Judgments. If an additional Judgment was required, then Chancellor Brewer should have recognized that a payment was missed and defaulted upon, and that "good faith efforts" or "trying to make timely payment" would not suffice. To the extent an additional judgment may have been required by Judge Lutz, Judge Brewer should have immediately entered the same.

Since Judge Lutz was never asked by any party to undo his original order that default would result in immediate right to execute on the Judgment, it is important to address Judge Brewer's assertion that "Mississippi law" mandates that a party must return to court to seek a judicial determination prior to pursuing execution on a final judgment. Miss. R. Civ. P. 69(a), "Enforcement of Judgments", provides:

> (a) Process to enforce a judgment for the payment of money shall be by such procedures as are provided by statute. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution, shall be as provided by statute.

Miss. Code Ann. 11-5-81, "*fieri facias* and garnishment to enforce chancery decrees for money", provides:

> 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.

Miss. Code Ann. 11-5-79, "Decree as circuit court judgment", provides:

> The decree of a court of Chancery shall have the force, operation, and effect of the judgment at law in the circuit court.

Miss. Code Ann. 11-35-1, "On judgment or decree", provides:

> On the suggestion in writing by the plaintiff in a judgment or decree in any court upon which an execution may be issued, that any person, either natural or artificial, including the state, any county, municipality, school district, Board or other political subdivision thereof, is indebted to the defendant therein, or has effects or property of the defendant, or who has effects or property of the defendant and he is, her or its possession, it shall be the duty of the clerk of such court to issue a writ of garnishment, directed to the sheriff or proper officer, commanding him to summon such person, the state, county, municipality, school district, Board or other political subdivision thereof, as the case may be, as garnishee to appear at the term of court to which the writs of garnishment may be returnable, to answer accordingly.

Indeed, it seems that Mississippi law embraces immediate execution by use of garnishment to enforce chancery decrees awarding money. There is nothing in the law of execution that would have compelled Judge Lutz to extinguish or alter the Delimans' right to seek immediate execution by garnishment when the Defendants' missed a payment or defaulted. This may explain why neither the Defendants nor Judge Brewer could present any authority for the proposition that the Delimans would have to hop through a two-step process, or seek "authorization", as condition precedent to the right of

execution which Mississippi law states is available to enforce compliance with decree awarding money. To the extent Judge Brewer set up such preconditions, her ruling not only runs counter to the provisions of Judge Lutz's Final Judgments, but it also violates the Mississippi law of execution.

In summation, Judge Brewer erred in finding that the Defendants' good faith efforts, or effort to "try", and timely pay the December installment at issue were sufficient to comply with their obligations under the Judgments. The clear terms of both Judgments speaking in terms of "missing" a payment and "defaulting on any payment" are not qualified by any exceptions of "good faith efforts." Judge Brewer erred in determining that the Judgments and Mississippi law required the Delimans to jump through additional procedural hoops as a condition to the right to seek execution on the Judgment immediately after the Defendants defaulted. First, it is clear the Defendants defaulted. Second, the Judgments read harmoniously together, as they should be, contemplated a right of immediate execution. Third, Mississippi law expressly provides for a right of immediate execution on chancery decrees for money through measures such as Writ of Garnishment. Further, if an additional judgment was required, Judge Brewer should have recognized that the fact of default by the Defendants mandated immediate entry of a Judgment granting acceleration of the remaining amount. Under any scenario, Judge Brewer erred in not permitting the Delimans to exercise their right to execution on the Judgments.

Accordingly, this Court should reverse her determinations and render an order mandating acceleration of the amounts due to the Delimans and permitting execution as allowed by law.

2. THE CHANCELLOR WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, AND APPLIED THE WRONG LEGAL STANDARD IN FINDING THAT THE DEFENDANTS WERE ENTITLED TO AN AWARD OF ATTORNEY'S FEES IN THE AMOUNT OF $ 7,662.87 UNDER THE PROVISIONS OF THE MISSISSIPPI LITIGATION ACCOUNTABILITY ACT, MISS. CODE ANN. § 11-55-1, *ET SEQ.*

The Chancellor found that the Delimans' execution pursuits were unwarranted and unauthorized under the Original and Amended Judgments. R. at 433. The Chancellor further opined that (1) that Delimans' counsel acted in a manner that was "premature, overly aggressive, and in bad faith," and (2) that "no just reason existed under the law and facts" for the Delimans' counsel to seek execution of the judgment by writ of garnishment. R. at 433. The Chancellor predicated these findings upon the supposition that the Delimans had not complied with Mississippi law or Judge Lutz Judgments in proceeding with execution through writs of garnishment. The Chancellor opined the execution efforts were "wholly unreasonable", that the Defendants' "good faith efforts" to tender payment apparently met the strict requirements of Judge Lutz's Judgments, and that Delimans' counsel "either knew, or should have known, of the Defendants' efforts to tender the payment in question." *Id.* This resulted in an award of attorney's fees to the Defendants in the amount of $7, 662.87, without evidentiary hearing to determine the propriety or reasonableness of such award, under the supposed force of the Mississippi Litigation Accountability Act. In draconian and ironic fashion, though Judge Lutz had graciously permitted the Defendants to pay their obligations in installments, Judge Brewer tersely commanded that the fees would have to be paid within fourteen days of her order, and that failure to pay the penalty during that time frame would constitute contempt. A "good faith efforts" exception or some sort of

preconditional requirement to seek a judicial determination of contempt is noticeably lacking; indeed, the penalty of contempt appears to be self-executing.

Miss. Code Ann. 11-55-5, "Costs awarded for meritless action", provides:

> Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, 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, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

A claim is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *Anderson v. B.H. Acquisition, Inc.,* 771 So.2d 914, 922 (Miss. 2000); *Scruggs v. Saterfiel,* 693 So.2d 924, 927 (Miss. 1997). Miss. Code Ann. 11-55-3(a) defines without substantial justification as meaning any action, claim, defense or appeal, or any motion, that is "frivolous, groundless in fact or in law, or vexatious, as determined by the Court." An award of attorney's fees under this section is not appropriate when it has not been established, and the record does not otherwise reflect, that the subject action was taken for the purposes of vexation, or was without an arguable hope of success. *Smith v. Malouf,* 597 So.2d 1299, 1303-4 (Miss. 1992).

Judge Brewer erred in awarding attorney's fees. Delimans' attorney's actions were pursued with the good faith and legally accurate belief that, in light of the

Defendants' default, the Delimans enjoyed a right of immediate execution. There is certainly a good faith argument in the law and in consideration of the language of Judge Lutz's orders that such a right existed. Objectively speaking, there was clearly hope that the Delimans successfully had such a right under the law. There is nothing in the record indicating that the Delimans pursued execution remedies for the purposes of vexation or without an arguable hope of success; indeed, the Delimans would submit the law was and is squarely behind the execution measures they took.

Delimans' counsel's acts were not premature, overly aggressive, or in bad faith; he was representing his clients in pursuing rights they had upon the Defendants' default. The Court reasoned that Delimans' counsel knew or should have known of the Defendants' effort to tender the payment. The Defendants elected to tender the payment by certified mail, a method that would have enabled Thomas to check the status of delivery. It was Thomas' obligation under Judge Lutz's Judgments, not the Delimans', to ensure timely payment. Thomas clearly pled in his Election and testified in hearings that he understood the consequences of the failure to timely tender a payment. Judge Brewer affectively shifted the burden to the Delimans to know whether or not Thomas was making efforts to tender payment. The act of payment, however, not failed efforts to that effect, is what Judge Lutz required. There is no evidence that the Delimans or their counsel knew or should have known prior to expiration of the deadline for payment that Thomas was making "good faith efforts" to pay. There is no evidence they caused Thomas to fail to check the status of delivery for his payment, or that they caused him to default. Thomas failed in his obligation on his own, and the Delimans reacted appropriately and reasonably within their right to pursue execution.

The Delimans, as Judge Lutz repeatedly acknowledged, were forced to proceed in this case by the actions, manipulations and dishonesty of Thomas. The Delimans and their counsel reasonably acted because Thomas in fact defaulted. Further, they reasonably were skeptical of his post-deadline indications that he had mailed a payment. They had been victim time and against of his lies and inequitable conduct throughout the history of the case. To find that they and their counsel acted without substantial justification is to dismiss the law of the case and the history of the litigation justifying the actions the Delimans took. The Court did not consider the law of this case or the Defendants' history in its granting attorney's fees, and it if had, it would have realized the Litigation Accountability Act was unoffended and that such an award was not justified.

This Court should reverse the Chancellor's determinations on this issue.

3. THE CHANCELLOR WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, AND APPLIED THE WRONG LEGAL STANDARD IN FAILING TO ESTOP THE DEFENDANTS' MOTIONS TO QUASH AND ABATE EXECUTION BECAUSE THE DEFENDANTS WERE NOT PROCEEDING WITH CLEAN HANDS AND WERE MAKING ARGUMENTS CONTRARY TO POSITIONS THEY PREVIOUSLY TOOK IN THE LITIGATION

The doctrine of judicial estoppel is based on expedition of litigation between the same parties by requiring orderliness and regularity in pleadings. *Great Southern Box Co. v. Barrett*, 231 Miss. 101, 94 So.2d 912 (1957). It arises from the taking of a position by a party to a suit that is inconsistent with a position previously asserted in prior litigation. *Banes v. Thompson*, 352 So.2d 812 (Miss.1977); *Wright v. Jackson Municipal Airport Authority*, 300 So.2d 805 (Miss.1974); *Sullivan v. McCallum*, 231 So.2d 801 (Miss.1970). The doctrine may be invoked against a party who, knowingly and with full knowledge of the facts, asserts a position which is inconsistent with a position taken in prior judicial proceedings. *Thomas v. Bailey*, 375 So.2d 1049, 1053-54 (Miss. 1979).

The doctrine of unclean hands mandates that he who comes into equity must come with clean hands. *Cook v. Whiddon,* 866 So.2d 494, 498 (Miss. App. 2004); *Thigpen v. Kennedy,* 238 So.2d 744, 746 (Miss.1970). In other words, the clean hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue. *Bailey v. Bailey,* 724 So.2d 335, 337 (Miss.1998).

Delimans' counsel moved for directed verdict on the Defendants' motions on the ground that there was simply no basis for the Defendants to come into Court, particularly in light of the Defendants' admitted default, and seek relief and sanctions. Delimans' counsel on multiple occasions attempted to have the Court consider the prior actions, pleadings and testimony of the Defendants to establish that the motions were inequitable and without basis. As previously discussed, Judge Lutz found that the Defendants had lied in pleadings and in open court, and that wasteful and unnecessary litigation had resulted and caused the Delimans to absorb significant costs in attorney's fees in obtaining relief. Yet, the Defendants in bringing their motions came to the Court with unclean hands, having defaulted, and with a significant history of bad faith conduct and deceit in the litigation. Under the doctrine, they were not entitled to seek equitable relief in the Court and should have been estopped by Judge Brewer from doing so.

Further, it is obvious that Thomas as early as his Election took the position and recognized that upon default the Judgment would become subject to immediate execution. He admitted default, but then wanted to take the contrary position that "good faith efforts" would militate against the Delimans' rights to immediately execute on the Judgment. He even testified that he understood that Judge Lutz ruled that, in the event a

payment was missed, everything would become due. Thomas' good faith efforts arguments as well as his assertion that some two step process was required prior to execution are contrary to previous positions he took and his testimony in the March 9, 2007 hearing. He knowingly contradicted his prior positions and knew the facts of what the Judgments provided for and the fact of default. This sort of acrobatic manipulation to try and give life to an unjustified motion was the very sort of conduct Judge Lutz had previously expressed such contempt for and refused to tolerate.

Accordingly, Judge Brewer should have refused to consider the Defendants' motions because the Defendants came to her with unclean hands. Further, she should have judicially estopped the Defendants' motions and arguments, because they contradicted prior positions the Defendants had taken in the case.

CONCLUSION

For all the reasons and premises presented in this brief, this Court should reverse the Chancellor on all grounds asserted and order that the Plaintiffs' may immediately proceed with execution of their Judgment.

RESPECTFULLY SUBMITTED, this the 31st day of January, 2008.

By: _____
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CERTIFICATE OF SERVICE

I, the undersigned counsel for Patrick and Jane Deliman do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document by U.S. Mail, postage prepaid thereon, to the following:

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THIS, the 31st day of January, 2008.

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