CASE NO. 2007-CA-01402

IN THE
SUPREME COURT
For The State of Mississippi

W.D. RUSSUM
Appellant
vs.
UNITED PLUMBING & HEATING COMPANY
Appellee

BRIEF OF APPELLANT - W.D. RUSSUM

On Appeal from the Circuit Court of
Rankin County, Mississippi

ORAL ARGUMENT REQUESTED

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W.D. RUSSUM

March 20, 2008

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CERTIFICATE OF INTERESTED PERSONS

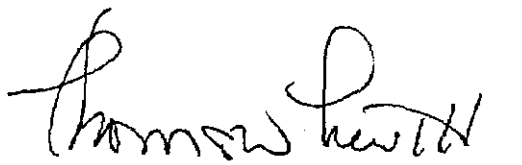
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. United Plumbing & Heating Company, Inc.;
2. Price's Glass & Mirror Co., Inc.;
3. James Thomas D/b/a T's Tile;
4. Carr Plumbing Supply, Inc.;
5. Ricky Jackson d/b/a Jackson Sheet Metal and Welding;
6. Tommy Meadows d/b/a F&m Construction;
7. Precision Ceiling, LIC. Defendants/appellees;
8. W.D. Russum, Plaintiff/Counter-Defendant/Appellant;

9. Honorable Dan H. Fairly- Brandon, Mississippi, Trial Judge;

10. William W. Fulgham, Appellees' counsel; and,

11. Thomas W. Prewitt, Plaintiff/Appellant's counsel.



THOMAS W. PREWITT

9. Honorable Dan H. Fairly- Brandon, Mississippi, Trial Judge;

10. William W. Fulgham, Appellees' counsel; and,

11. Thomas W. Prewitt, Plaintiff/Appellant's counsel.

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I. STATEMENT OF THE ISSUES

The issue presented to the Court for review is as follows:

I. Whether the Chancery Court erred in granting summary judgment on all of Mr. Russum's claims and dismissing Mr. Russum's claims with prejudice.

Issues presented within the main issue are:

A. Whether United and the Subcontractors, by improperly placing liens of record and filing a Notice of *Lis Pendens* claiming a right to Mr. Russum's property, clouded his property, and if so, whether they could escape the consequences therefore because they claimed that their interests paralleled the rights of a duly authorized Examiner in the bankruptcy proceeding?

B. Whether the Court erred when it ruled that Mr. Russum was required to demonstrate actual malice before he could recover damages even though the notice of construction lien filed by United and the Subcontractors was admittedly false?

C. When the Trial Court concluded as a matter of law that the filing of the construction liens and *lis pendens* were protected as privileged communications made in "ongoing litigation", did the Court err?

D. Whether the Court erred when it limited the time during which Mr. Russum may have been damaged to eight days in September, 2006?

E. Whether the Court erred when it disregarded Mr. Russum's claims for statutory damages and did not otherwise make any findings of fact or conclusions of law to support Dismissal of his claim for statutory damages?

F. When the Trial Court concluded that Mr. Russum was not entitled to attorneys' fees and costs, even though he had to file suit to have an improper *lis pendens* removed, and that 5 1/2 months of litigation ensued before that *lis pendens* was voluntarily removed, did the Court err?

G. When the Trial Court did not grant Mr. Russum's Motion to Dismiss United and the Subcontractors' Counterclaim, even though it denied the remedy sought in that Counterclaim, did the Court err?

II. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

This is appeal from a Summary Judgment granted United and the Subcontractors even though they filed an improper construction lien and then an improper *lis pendens* which created improper clouds on the title to the property of Mr. Russum.

Mr. Russum filed his Verified Petition and Complaint for Injunctive Relief and Other Relief on September 22, 2006 alleging, among other things, that United and the Subcontractors were improperly clouding the title to his Rankin County real estate and seeking damages for slander of that title and for the statutory damages identified in Miss. Code Ann. §85-7-201 (1972 & Supp. 2003), (Vol.1,R.3-38; R.E. 4).

They answered (Vol.1,R. 39-47; R.E.5) justifying their actions by alleging that Wee Care was in bankruptcy, and that Mr. Russum's Rankin County property was "the subject of a claim to rightful ownership by (Wee Care) which was and is in bankruptcy" and that they "had a right to protect their interests in the assets of the Bankruptcy Estate as being sources of funds to satisfy claims duly processed with the Bankruptcy Court" (Vol.1,R.45; R.E.5). They also filed a Counterclaim requesting attorney's fees and costs on the basis of an alleged violation of the Mississippi Litigation Accountability Act of 1988, Miss. Code Ann. § 11-55-5 (1)(Supp. 1999) (Vol.1,R.44-47; R.E.5).

Mr. Russum filed his Motion to Dismiss (Vol.1, R. 49-52). In due course, the Lower Court denied the Counterclaim, did not grant Mr. Russum's Motion to Dismiss but did deny "all other motions and prayers for relief not previously ruled upon." (Vol. 3, R. 359, R.E. 1).

United and the Subcontractors sought to stay the proceedings pending the outcome of proceedings in Bankruptcy Court involving Wee Care (Vol. 1, R. 61-66) and during the

hearing on that motion (Tr. 3-26), they agreed to cancel the *lis pendens,* which they had previously been unwilling to do (Tr. 25-26) and it was cancelled on February 16, 2007(Vol. 1, R. 85-87).

On May 22, 2007, the Chancellor heard United's and the Subcontractors' Motions to Dismiss (Tr. 28-63) and the Lower Court denied those motions with prejudice (Vol. 1, R. 91-93).

On June 8th, 2007, United and the Subcontractors filed their Motions for Summary Judgment (Vols. 1& 2, R. 94-283; R.E. 6) asserting that the Bankruptcy Court had invested them with the necessary authority to file the *Lis Pendens* by observing that "as the 'Construction Claimants', (United et al). . . have got a right to have the corporate funds preserved and spent properly" (Vol. 1, R. 95; R.E. 6). However, the Bankruptcy Court had not then nor did it ever grant them specific authority to take any action on behalf of the bankruptcy estate (Vol. 3, R. 354-357; R.E. 8).[1]

Mr. Russum filed his Response to the Rule 56 Motion on June 18, 2007 (Vols. 2 & 3, R. 284- 357, R.E. 7). A hearing on those motions was conducted on June 19, 2007 (Tr. 64-121) during which the learned Chancellor, after making oral findings of fact, concluded as a matter of law that no genuine issues of material facts were present and that United and the Subcontractors were entitled to judgment as a matter of law, and granted Summary Judgment against all of Mr. Russum's claims. The Chancellor's findings and conclusions are the subject of this appeal.

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[1]A full discussion concerning United and the Subcontractors' misplaced reliance on the Bankruptcy proceedings are found on pgs. 30-35 of this Brief.

On July 16th, 2007, the Final Judgment of Dismissal with Prejudice was entered incorporating the findings and conclusions made during the June 19th, 2007 hearing (Vol. 3, R. 358-359; R.E. 2).

On August 14th, 2007, Mr. Russum filed his Notice of Appeal from the Court's Final Judgment of Dismissal with Prejudice dated July 16th, 2007 (Vol. 3, 360-361; R.E. 10).

B. Mr. Russum's Statement of the Facts

A more detailed identification of the parties and certain non parties is required.

1. The players and the property

Mr. Russum owned real property in Rankin County, Mississippi and he also is the sole stockholder of Wee Care Child Care Center, Inc. ("Wee Care") which he placed in voluntary bankruptcy in the summer of 2004 (Tr. 110; R.E. 3). Wee Care and United Plumbing, Inc. ("United") entered into a construction contract, effective in the spring of 2003, which required United, as the general contractor, to build a child day care center for Wee Care on property owned by Wee Care in Byram, in the 2nd district of Hinds County (Vol. 1, R. 5; R.E. 4)(Vol. 2, R. 294; R.E. 9)(Tr. 110; R.E. 3). United subcontracted some of that work to the Subcontractor appellees, here.

No one made any allegation designed to pierce the Wee Care corporate veil.

2. Wee Care once owned the Rankin County property

Prior to 1999, Wee Care, previously had an interest in Mr. Russum's Rankin County property, but transferred that interest back to him via a Corrected Quitclaim Deed (Vol. 2, R. 232-233; R.E. 10), in 1999. Mr. Russum had purchased the entire Rankin County property individually much earlier than 1999, and had transferred the property to Wee Care to be used as additional collateral; on a Wee Care loan (Vol. 3, R. 295; R.E. 9). This was

not the loan related to the construction of the Wee Care facility on the Wee Care property in the 2nd district of Hinds County. Once Wee Care no longer had the need to use the Rankin County property as collateral, Wee Care transferred the property back to Mr. Russum (Vol. 3, R. 295; R.E. 9).[2] This 1999 transfer predated the voluntary bankruptcy for Wee Care by 5 years and the execution of the Wee Care/United contract by 3 years.

Wee Care's prior record ownership of the title to the Rankin County property was the fuel which allegedly primed United's and the Subcontractors' pump since they, and later the Bankruptcy Examiner, asserted that the transfer by Wee Care to Mr. Russum in 1999 failed for want of adequate consideration and was therefore fraudulent. As noted, this transfer predated the initiation of the bankruptcy proceedings by 5 years!

3. United and the Subcontractors performed their work for Wee Care on the Second District Property

All of the work United and the Subcontractors performed related to the 2nd District of Hinds County Project for Wee Care and they did not perform any work at or related to Mr. Russum's Rankin County property (Vol. 1, R. 5-6; R.E. 4)(Vol. 2, R. 294; R.E. 9). Neither United nor any of the Subcontractors had ever performed any work for Mr. Russum and had never had a contract with Mr. Russum (Vol. 2, R. 294; R.E. 9).

4. A dispute arose and a lawsuit was filed

While the work was being performed on the Wee Care property in Hinds County, disagreements arose and Wee Care terminated the United Contract (Vol.1, R. 6; R.E. 4). One subcontractor subsequently sued United's payment bond surety in the County Court

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[2] The validity of the transfer is not germane to this appeal, but the issue of United and the Subcontractors's use of it under the auspices of the Bankruptcy Court in order to cloud Mr. Russum's property is pertinent. Mr. Russum was never personally "in bankruptcy".

of Rankin County and United and the Subcontractors joined in naming Wee Care and Mr. Russum as Defendants (Vol. 1, R. 6, 19-32; R.E. 4). That lawsuit was then transferred to the Circuit Court for the Second Judicial District of Hinds County, Mississippi,(the 2nd District or the Hinds County litigation) and all of the claims in that litigation involved Wee Care's construction project (Vol. 1, R. 6; R.E. 4).

5. The Hinds County litigation doesn't have a thing to do with the Rankin County Property

Neither United nor any Subcontractor has ever alleged in that 2nd District litigation or elsewhere that they were entitled to, had any right in or claimed an interest in Mr. Russum's Rankin County property. In fact, none of them even claimed any interest in the Hinds County property(Vol. 1, R. 19-32; R.E. 4)(Vol. 2, R. 294; R.E. 9). The Complaint in the 2nd District litigation doesn't even mention the Rankin County property.

The Construction Lien statute, Miss. Code Ann. §85-7-131 (1972 & Supp. 2003), extends its benefits only to those who have performed work for the owner of the property on the property itself (Emphasis added). Since United did not have a contract with Mr. Russum and had never worked for him on his Rankin County property, neither of those prerequisites existed then or ever!

Addressing United's and the Subcontractors' claims against Mr. Russum on the Wee Care project, the Circuit Judge ruled that he was not personally liable to them (Vol. 2, R. 295; R.E. 9).

6. United filed a notice of a construction lien in Rankin County

On June 9, 2006, United filed a "Statutory Notice of Construction Lien" in the Land Records' Construction Liens Book in Rankin County (Vol. 2, R. 228-233; R.E. 10) claiming a construction lien against "W.D. Russum/ Wee Care" in the amount of $690,000.00 (Vol. 2, R. 228-233; R.E.10) and identified Mr. Russum's Rankin County property as the property to which the lien was addressed.[3] As previously noted, however, United never had a contract with Mr Russum and had not performed work for him on his Rankin County property (Vol. 2&3, R. 294-295; R.E. 9).

The $690,000 claimed lien amount was based solely upon United's claim against Wee Care allegedly arising under Miss. Code Ann. §85-7-131 (1972 & Supp. 2003), for breach of contract claims (Vol. 2, R. 228; R.E. 10). United's professed entitlement to a lien is represented on the lien document to have arisen out of a "suit filed in Hinds County 2nd District" (Vol. 2, R. 228; R.E. 10) which is the lawsuit described in ¶'s 4 & 5 above, the Complaint for which is attached to Mr. Russum's Verified Complaint as an exhibit (Vol. 1, R. 19-32; R.E.4).

During a hearing, United and the Subcontractors acknowledged that the construction lien contained some "technical irregularities" (Vol. 1, R. 100). Since United had never performed work on the property involved and never had a contract with the

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[3] Attached to the Notice was a description of Mr. Russum's Rankin County Property (Vol. 2, R. 229-231; R.E. 10), along with the February 2nd, 1999 Corrected Quitclaim deed discussed on page 2 above (Vol. 2, R. 232-233; R.E. 10).

owner of the property involved to perform any work related to the property, the "irregularities" were more than "technical". They were devastating and should have destroyed its viability.

7. United and the Subcontractors file a *lis pendens* notice in Rankin County

Mr. Russum vigorously protested the existence of the construction lien against his property. So, on September 5, 2006, United's counsel advised Mr. Russum's lawyer that the Notice of Construction Lien had been cancelled (Vol. 2, R. 217); however, United's counsel neglected to say that on the same day, only moments after the construction lien had been removed, United and the Subcontractors, had replaced the improper construction lien with a *Lis Pendens* Notice which was itself filed in the land records in Rankin County (Vol. 2, R. 225-227; R.E. 11). Because they were required to identify the lawsuit in which claims to the subject property were being made, United and the Subcontractors falsely represented that they were entitled to a *lis pendens* based upon the pending 2nd District lawsuit stating:

> the filing and pendency of the following claim or suit in the County Court of Rankin County, Mississippi, in Cause No. 2004-604, was filed November 29, 2004 and subsequently transferred to the Circuit Court for the Second Judicial District of Hinds County, Mississippi, Cause No. 2005-31 for which this Notice need be filed in the *Lis Pendens* Notice Book of Rankin County, Mississippi...(Vol. 2, R. 225; R.E. 11).

Reference to that lawsuit was manifestly wrong since the Rankin County property was not involved in any way and since they were not claiming any right to or interest in the Rankin County property in that lawsuit!

Then, when the form required them to state the "basis/nature of the claim, lien, right and/or interest" which they asserted to Mr. Russum's Rankin County property, they magnified the wrong by falsely representing to the world that their right to a *lis pendens* arose from a:

> Civil suit for damages pursuant to Miss. Code Ann. § 85-7-131 et seq., for which a lien has been recorded, and 85-7-181 et seq., for which stop payments have been served, and other applicable law and equity, against Defendants for the wrongful termination/removal from the construction project, the failure to pay monies due and owing, wrongful withholding of construction funds, and related claims as more fully set forth in aforesaid Complaint...(Vol. 2, R. 226; R.E. 11).

The litigation in the 2nd District of Hinds County had absolutely nothing to do with any such assertion of or any claim of a right and their statement that it did is an outright falsehood.

Further, they also justified their right to a *lis pendens* by referring to the construction lien which had been voluntarily removed only moments earlier, (Vol. 2, R. 217)(Emphasis added).

Mr. Russum, of course, objected (Vol. 2, R. 215-216).

8. The *lis pendens* had its desired effect. It prevented a sale of the Rankin County property

United et al were informed that their *lis pendens* was interfering with sale of the Rankin County property (Vol. 2, R. 216). The fact that Mr. Russum was injured by United and the Subcontractors as a result of the improper filing of the Statutory Notice of Construction Lien and *Lis Pendens*, is beyond dispute although the Lower Court disregarded that proof (Vol. 2, R. 298-299; R.E. 9). Those damages include:

1. Mr. Russum had a contract to sell the land but the buyers backed out when they discovered the *lis pendens* filed by the appellees (Vol. 3, R. 298; R.E. 9), a copy of the contract is provided (Vol. 3, R. 349-352);

2. Having Uniteds' and the Subcontractors' *lis pendens* on record cost Mr. Russum several hundred thousand dollars (Vol. 3, R. 299; R.E. 9);

3. Mr. Russum had to reduce his contract price for the sale of the property (Vol. 3, R. 299; R.E. 9);

4. Mr. Russum was denied use of the sale proceeds for a long time (Vol. 3, R. 299; R.E. 9); and,

5. Mr. Russum had to incur additional costs in the Rankin County Chancery Court and in the Bankruptcy Court (Vol. 3, R. 299; R.E. 9).

The Subcontractors justified the *lis pendens* "... by virtue of the pursuit of their various claims both in state court and in the Wee Care bankruptcy matter" (Vol. 2, R. 211-212) and then refused to remove it. They voluntarily removed the *lis pendens* in February 2007 "given that the bankruptcy examiner's [*lis pendens*] " had been filed (Tr. 25). In other words, because they were creditors in Wee Care's bankruptcy, they said that they were entitled to pursue Mr. Russum on behalf of the bankrupt's estate.

9. Wee Care's Bankruptcy did not provide a legitimate platform for any of United's or the Subcontractors' activity

As discussed later, the learned Chancellor made several findings of fact and conclusions of law having as a basis activities in Wee Care's bankruptcy. Yet, Marc C. Brand, an experienced bankruptcy lawyer and active in Wee Care's bankruptcy proceeding, provided expert testimony establishing that they had no right to do anything

on behalf of the bankrupt's estate (Vol. 3, R. 354-357; R.E. 8). His affidavit testimony was neither challenged nor objected to nor was it the subject of a motion to strike but was simply ignored.

His testimony alone was sufficient to create genuine issues of obviously material facts and demonstrated that United and the Subcontractors were not entitled to judgment as a matter of law. Mr. Brand testified that:

1. Judge Ellington (the Bankruptcy Judge) did not authorize [United and the Subcontractors] to take any action [or right to protect the assets of the bankruptcy estate] in any court and if such authority had been granted, it would have been in the court records and was not (Vol. 3, R. 355; R.E. 8);

2. Creditors don't have the authority, without being specially authorized by the Bankruptcy Court, to act for the bankrupt's estate and that there is no record of any delegation of any such authority to United et al(Vol. 3, R. 356; R.E. 8);

3. Neither United nor the Subcontractors were ever appointed Examiner, did not become a Creditors Committee and were not the Bankruptcy trustee (Vol. 3, R. 356; R.E. 8);

4. On July 11,2006, the Bankruptcy Court granted the Examiner power to file any complaint that it deemed necessary concerning claims predating Wee Care's bankruptcy and therefore from July of 2006, United and the Subcontractors knew that they had not been so appointed (Vol. 3, R. 356; R.E. 8); and,

5. He could not locate any authority that United et al possessed to file a construction lien and/or any *lis pendens* "in anticipation of the later action of an Examiner and/or Trustee" (Vol. 3, R. 356-357; R.E. 8).

Thus, this uncontested testimony proved to a certainty that United et al did not enjoy the privileges, rank and authority which the Chancellor subsequently found that they possessed (Emphasis added).

The Wee Care bankruptcy proceedings are still pending.

10. They knew that the Examiner was the one to act

In fact, United and the Subcontractors represented to the Chancellor that:

> we needed [the *lis pendens*] in place until we could get the bankruptcy examiner actually appointed by the Court,...[and] [w]e couldn't get an examiner appointed immediately, so we took a step of getting a *lis pendens* filed and then pursued getting the examiner appointed to pursue this property [s]o the *lis pendens* was necessary at the time (Tr. 24-25).

Thus, they acknowledged that the Examiner was the one to file the *lis pendens* if one was to be filed. Additionally, the representation that "we needed [the *lis pendens*] in place until we could get the bankruptcy examiner actually appointed by the Court..." was false since the docket revealed that the Examiner had been appointed and given power to act earlier, significantly earlier, than September 5th when they filed their *lis pendens* (Vol. 3, R. 354-357; R.E. 8)! Mr. Brand's unchallenged testimony was that the examiner was appointed with the necessary power on July 11, 2006 (Vol. 3, R. 356; R.E. 8). Thus, when they filed the *Lis Pendens* in September, they knew that the Examiner had already been granted the authority to file the lawsuit!

The Chancellor disregarded these misrepresentations, as well as others, and instead crafted a previously unknown remedy.

11. There were two other *lis pendens* but because he had deals with them, they didn't present an obstacle to Mr. Russum

The Examiner filed a *lis pendens* Notice on September 13, 2006 (Vol. 2, R. 207-210) which was two plus months after United filed its construction lien on June 9th, 2006 and days after the United *lis pendens* was filed; however, the Examiner's *lis pendens* was not a problem for Mr. Russum and did not damage him because he and the Examiner both

wanted the proceeds of the sale of the Rankin County property to be made available to the bankruptcy estate[4] and not just to United! Mr. Russum testified without objection and without contradiction that:

> Mr. Russum and the Examiner had an understanding that if the land was to be sold, that the Examiner and Mr. Russum would agree on some figure for the sales price to place in escrow until the Examiner's argument with Mr. Russum was resolved (Vol. 3, R. 298; R.E. 9).

The record reveals that Am South also had filed a *lis pendens* but it was likewise no problem for Mr. Russum since he also had a deal with it. Mr. Russum also had an understanding with the bank that if the land sold, AmSouth would agree to a figure to put in escrow until the dispute and differences in opinion as to AmSouth's entitlement to the proceeds was determined (Vol. 3, R. 298; R.E. 9). Notwithstanding this uncontradicted evidence, the Chancellor found the contrary as a fact and then this finding formed the basis of its conclusion that Mr. Russum was not damaged because of the existence of these *lis pendens* (Tr. 103-104;Tr. 116-117,R.E.3).

12. <u>Waiting 5 months to remove the *lis pendens* was malicious</u>

The Trial Court found that:

> on September the 5th, 2006, the defendants filed their *lis pendens* notice, ...[and] that eight days later the examiner likewise filed a *lis pendens* notice in the records of the Chancery Clerk of Rankin County, Mississippi... that the *lis pendens* filed by the defendants in this case was removed five months and ten days after it was filed(Tr. 113; R.E. 3).

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[4] The Examiner's lawsuit had the 1999 transfer from Wee Care to Mr. Russum as its target. Mr. Russum denied the claim or that it was a preference and later, for economic reasons, not the least of which is that he was the sole stockholder and would profit from having the property proceeds in the Wee Care coffers, settled (Vol. 3, R. 296; R.E. 9).

They did not explain why they waited to remove the *lis pendens* for over 5 months after the *lis pendens* they sought from the Examiner had been filed. Obviously, the intent was to harm Mr. Russum.

13. The Chancellor granted summary judgment to United et al

During the June 19, 2007 hearing on the Motions for Summary Judgment, the Chancellor found and concluded that United and the Subcontractors had not acted with malice but were justified since their interests paralleled those of the Examiner:

> The Court finds that– and believes that its' an undisputed fact that the parities who were defendants here, while not named as parties in this adversary proceeding [the Examiner's lawsuit claiming the Property was fraudulently conveyed] that certainly their interest paralleled that of the examiner in making that assertion and that claim, that the 1999 transfer of this subject property from Wee Care to Mr. Russum, may well have been a fraudulent transfer; that because of the – the parallel interest of the defendants in this case with the examiner in the bankruptcy case that– and because they were so closely aligned, the Court finds that that fact is–weighs heavily in its decision making today (Tr. 112-113; R.E. 3)(Emphasis added);
>
> and, further
>
> that by virtue of the proceedings in the bankruptcy court by the defendants in this case, they're– as unsecured creditors... of their aligned and paralleled interest with the examiner, and I presume– I would say the trustee in bankruptcy, that there filing of the *lis pendens* in this county on the subject property was not malicious (Tr. 115; R.E. 3);

The Chancellor went on: "I think it's clear and I find that it was the protection of probable assets of the corporation that led to the filing of the *lis pendens*, and there I cannot find that it was malicious" (Tr. 116; R. E. 3). Finally, the Chancellor concluded that "the fact that these defendants here were claimants in the bankruptcy court, that they

pursued alongside the examiner a claim... I think totally eliminates any notion that the filing of the *lis pendens*... was malicious" (Tr. 117; R.E. 3). These findings ignored Mr. Brand's testimony. – Mr. Brand's testimony was that they did not have the right to do it – NOT that it was malicious

Also, ignoring Mr. Russum's uncontroverted testimony, the Chancellor also concluded that Mr. Russum did not suffer any damages indicating that " ... beating the examiner by eight days is– it's just going to be hard for me to find, number one, that that factor alone caused damage to Mr. Russum"(Tr. 103-104; R.E. 3).

Addressing the *lis pendens* filed by Am South, the Chancellor simply disregarded Mr. Russum's clear and unchallenged testimony concerning it. In fact, the Court noted that:

> in fact, [Mr. Russum] says that he recognizes the existence of the *lis pendens* by Amsouth when he states that the fact that Amsouth had a *lis pendens* was of no concern to him, and he likewise says that the *lis pendens* filed by the examiner did not make the Rankin County real estate unavailable for sale, but yet the– but somehow claims that the *lis pendens* filed before the examiner's, that it somehow created a damage for him" (Tr. 116-117; R.E. 3).

The Chancellor therefore either did not understand or disregarded the fact, that Mr. Russum, who owned the property, was concerned, that having the money go to the bankruptcy estate and therefore to all the creditors, was different from the money going to United and the Subcontractors, and therefore only a portion of the unsecured creditors. Likewise, the Court apparently did not understand or disregarded the fact that a lien by a prior lien holder (the Bank), which by virtue of its deed of trust was first anyway, did not harm Mr. Russum. Mr. Russum wanted the Bank, to which he owed the deed of trust, to get paid from the sale of that property. He wanted the equity in the land to go to the estate to pay all creditors and to have operating money left over.

He couldn't stand United and the Subcontractors being preferred over the other creditors when he was vigorously contesting their entitlement to a dime of any of Wee Care's money! Yet, the Chancellor did not credit the realities presented by his testimony and instead found that Mr. Russum hadn't been harmed! That is error which needs correcting.

The Judge further incorrectly concluded that because the *lis pendens* was filed under judicial proceedings in bankruptcy, that the improper filings were privileged;

> the defendants in this case, because they were proceeding judicially in the bankruptcy court, were privileged to the extent that they filed the *lis pendens* in this county or in the records of the Chancery Clerk of Rankin County, Mississippi, and because of that privilege that there's no way that it would sustain an action for slander of title" (Tr. 117; R.E. 3).

Thus, the Court believed, and therefore found that United and the subcontractors were "proceeding judicially in the bankruptcy court" and yet there is not one bit of evidence to support that finding and the conclusion which the Trial Court attached to it (Emphasis added). In fact, Mr. Brand said that they were not acting with the authority of the Bankruptcy Court and that there was no such authority shown in the record of that court (Vol. 3, R. 355; R.E. 8). Thus, since fact finding and fact disregarding are exercises forbidden to the Trial Court when considering a motion for summary judgment, the summary judgment should be reversed, and in this case should be rendered.

III SUMMARY OF THE ARGUMENT

Mr. Russum sought and is entitled to the damages identified in the expungement statute, Miss. Code Ann. § 85-7-201 (1972 & Supp. 2003), as well as damages for slander of title. The statute provides relief against "Any person who shall falsely and knowingly

file the notice mentioned in Section 85-7-197...". The Trial Court only addressed the slander of title claim and did not consider the statutory claim.

Regardless, however, of whether the Court was examining Mr. Russum's claim for statutory damages or his slander of title claim, in order to decide for United and the Subcontractors on their Motion for Summary Judgment, the Court completely disregarded a lengthy affidavit of Mr. Russum (Vol. 2&3, R. 293- 299; R.E. 9) and another, less lengthy, of Hon. Marc Brand (Vol. 3, R. 354-357; R.E. 8), a lawyer of experience and repute. Both witnesses established numerous facts which obviously created genuine issues of material facts concerning the relationship between the parties, the "malice" issue and the existence of damages suffered by Mr. Russum.[5] They established numerous facts which stood in the way of the facts found by the Chancellor. Yet, the Chancellor made numerous findings of fact and based numerous conclusions of law on those facts even though the facts found by the Chancellor were vigorously contested by Mr.Russum and put in issue by the affidavits he and Mr. Brand filed.

We have no really good explanation why this learned Chancellor made findings concerning contested issues although we believe that confusion concerning Wee Care's bankruptcy proceeding may have contributed to that forbidden activity.

United filed an improper notice of construction lien. It deliberately clouded the title to Rankin County real estate. It had performed no work in Rankin County nor did it have

[5] The Chancellor was aware of the affidavits, in fact he identified them as "crafty lawyering".

a contract with Mr. Russum. The construction lien statute, Miss. Code Ann. § 85-7-131 (1972 & Supp. 2003) requires both if the cloud created by the construction lien is to be justified under the statute.

United and the Subcontractors likewise used a *lis pendens* to cloud Mr. Russum's title claiming that Miss. Code Ann. §11-47-3 (1972 & Supp. 2003) justified their actions. It doesn't! Necessary prerequisites to a valid *lis pendens* were deliberately misrepresented by United et al, and the statute offers no protection to them whatsoever. They identified the underlying basis upon which the *lis pendens* was to be legitimized as the 2nd District lawsuit; however, they never claimed an interest in or right to the Rankin County property in that lawsuit, or for that matter in any lawsuit. They simply made up 'facts' and propounded those to a Court of equity and then urged that Court to provide relief around those 'facts' which were admittedly false!

Then they exaggerated their arrogance and misrepresentations, when they refused to remove the *lis pendens* for 5 months after the Examiner did what they say that they wanted done! No, they wanted to punish Mr. Russum.

The facts establishing the slander to Mr. Russum's title and a violation of the construction lien statute were sufficient to withstand a motion to dismiss and the motions for summary judgment; in fact, United and the Subcontractors did not argue that the allegations of the Complaint and the statements in the affidavits were insufficient as a matter of law. Yet, and in spite of these admitted facts, the Chancellor improperly found as a fact that they had not acted with malice and granted the motion for summary judgment on that basis.

That was clear, reversible error-the Trial Court should not have made any findings of fact and, if it was going to do so, it certainly should not have found facts which were contested by testimony and evidence to the contrary. The Chancellor gave them a pass. What makes it worse is that even after the invalidity of the *lis pendens* was exposed, they refused to remove the lis pendens for 5 and ½ months. All of this in a court of equity! Lies and refusals to eliminate harm are not the activities of one entitled to equity.

The Chancellor also wrongfully concluded that Mr. Russum was required to prove "special damages" and then found that Mr. Russum didn't have any and offered that alleged lack as a ground to grant the summary judgment. However, Mr. Russum's affidavit by itself more than created a genuine issue of whether he had been damaged by the unwarranted clouds on his title.

The Chancellor's finding that Mr. Russum had not been harmed because the Examiner had its own *lis pendens* of record (Vol. 3, R. 298; R.E. 9) completely disregarded Mr. Russum's affidavit testimony that he had an agreement with the Examiner, emphasizing the Examiner's desire sell the property as soon as possible, and that the Examiner's *lis pendens* was not a problem and didn't damage him (Vol. 3, R. 298; R.E. 9). The Court should not have made any finding of facts on this or any fact issue at this stage of the proceeding. Same goes for the Am South *lis pendens.*

Mr. Brand's affidavit testimony and the Bankruptcy Court record created genuine issues of material facts which run contrary to Chancellor's factual determination that somehow United and the Subcontractors were acting in a "parallel" course with the Examiner and therefore they had not acted "maliciously" and were thus entitled to deliberately, wrongfully and intentionally cloud Mr. Russum's title. The Chancellor decided

that United and the Subcontractors were without malice; however, the question of whether malice exists or not, is not to be resolved at this stage of a summary judgment proceeding.

They were not on a parallel course and Mr. Brand's testimony proves it. United and the Subcontractors did not have any authority to act on behalf of the bankrupt's estate in any regard much less by clouding Mr. Russum's property. They acted without authority of the Bankruptcy Court (Vol. 3, R. 354-357; R.E. 8). Nowhere, nowhere did United and the Subcontractors secure approval from the bankruptcy court to act on behalf of the estate. In fact, they knew, having been the parties who sought the appointment of an Examiner, that the authority they exercised when they filed the *lis pendens* resided in the Examiner and the Examiner alone (Emphasis added). Their dissatisfaction with what he chose to do, did not cloak them with the right to do for him what he chose not to do for himself!

The Chancellor's findings that their course was parallel to that of the bankruptcy examiner is just plain wrong and was a finding which should never have been made at this point anyway.

The Chancellor's findings and conclusions mean, if followed here, that every creditor would be empowered to act willy nilly and then ask the Trustee or the Examiner to follow along and when those actions were legally impermissible, the creditor nonetheless would be forgiven and not even spanked on the hands for the attorney's fees those actions cost the third party! That result if just not right nor is it recognized in Mississippi or bankruptcy jurisprudence.

When the Court found and concluded that United and the Subcontractors were privileged to do what they wanted to do because they had a claim in Wee Care's bankruptcy proceeding, it improperly created a new class or type of creditor whose genes

and DNA are unknown elsewhere and to do so was clear error. Every creditor has a claim and has an interest in seeing that the bankrupts' estate has as much money as is right but surely that interest can't justify unapproved actions on the bankrupts' behalf against third parties!

This Court should reverse and render on the liability and statutory damage issues and send the case back for a determination of the attorney's fees issue. Surely, Mr. Russum is entitled to recover the attorney's fees he incurred protecting his private property from United and it Subcontractors. Mr. Russum should have his claim for damages heard and determined.

Additionally, the Court did not address all of the issues raised before it and erred when it failed to consider the effects of United's Statutory Notice of Construction Lien.

Thus, the existence of genuine issues of numerous critical fact issues should have prevented the Court from granting the summary judgment. The Court further erred in the conclusions of law expressed and identified above.

IV ARGUMENT

A. The Applicable Standard of Review

This Court conducts a de novo review of the Trial Court's grant or denial of summary judgment, *Saucier, ex rel., Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So. 2d 1351, 1354 (Miss.1998). "This entails reviewing all evidentiary matters in the record: affidavits, depositions, admissions, interrogatories, etc." *id.* (quoting *Townsend v. Estate of Gilbert*, 616 So. 2d 333, 335 (Miss.1993)(citations omitted). The Trial Court may only grant summary judgment "if the pleadings, depositions, answers to interrogatories and

admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law", Miss. R. Civ. P. 56 (c), and "the non-moving party should be given the benefit of every reasonable doubt", *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So.2d 969, 976 (Miss. 2007), quoting *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990). A fact is material if it "tends to resolve any of the issues properly raised by the parties", *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss.1995).

The same de novo standard is applicable when passing on questions of law, *G.B. "Boots" Smith Construction v. Cobb*, 860 So. 2d 774, 776-777 (Miss. 2003) and this includes the Trial Courts application of an incorrect legal standard, *Joiner v. Haley*, 777 So.2d 50, 52 (Miss. Ct. App. 2001).

B. Introduction to Argument

Mr. Russum asserted claims for damages for "slander of title" and for damages arising under Miss. Code Ann. § 87-5-201 (1972 & Supp. 2003) "Penalty for False Filing". Each claim will be discussed separately, although the Chancellor totally disregarded the statutory claim for damages. The other issues will also be presented within this framework. Attorneys' fees will be discussed separately from the slander of title and statutory claims. Finally, the Chancellor's failure to grant Mr. Russum's Motion to Dismiss United and the Subcontractors' Counterclaim, while denying the relief that was requested in the Counterclaim, requires Mr. Russum to briefly address that issue also.

C. They "slandered " his title

During the hearing on the summary judgment motion, the Trial Court correctly described a slander of title cause of action as: "The malicious filing for record of an instrument known to be inoperative and which disparages the title of land is a false and malicious statement for which damages may be recovered", *Walley v. Hunt*, 212 Miss. 294 at 305, 54 So.2d 393 at 397 (Miss. 1951). Mr. Russum's evidence satisfied those requirements.

United and the Subcontractors do not argue that Mr. Russum's title was not "slandered" or that the construction lien was proper. Instead, they persuaded the Lower Court that the requisite degree of 'malice' was missing, that they were 'permitted' by the bankruptcy court to act on behalf of the other creditors, that Mr. Russum wasn't damaged, and the somehow, their actions were privileged because they had a claim, identified in the bankruptcy proceedings, to protect the bankruptcy fisc.

So the fact that Mr. Russum's title was slandered and the construction lien statute was violated are ~~not at issue~~. The Lower Court did not suggest otherwise.

1. The Construction Lien and *lis pendens* were intentionally false

A slander of title suit raises a "question (of) the right or title of another to particular property", *Ellison v. Meek*, 820 So.2d 730,738 (Miss. Ct. App.2002). Did the construction lien and the *lis pendens* question Mr. Russum's ownership of or title in the Rankin County property? Certainly, that is the very office of a notice of construction lien or a *lis pendens*.

Those documents are put of record so that a purchaser won't be "innocent" but will instead necessarily have to deal with a third party, in this case United et al, concerning that property.

Here, they advised anyone who looked at the title, that they were claiming an interest in the property and had valued that interest at $690,000. That was just not true!

They did not deny that Mr. Russum owned the Property and in fact, the Bankruptcy Judge later confirmed that record title was to remain in him (Vol. 3, R. 332). United admitted that the Construction Lien notice contained "technical irregularities" (Vol. 1, R. 100; R.E. 6) as well it should, for United had never had a contract with Mr. Russum to perform work on his property, and had never worked for Mr. Russum on his property in Rankin County (Vol. 2&3, R. 293-299; R.E. 9)(Vol. 1, R. 3-38; R.E. 4), both of which were necessary requirements if it was to possess a valid construction lien.

a. A proper claimant must have a contract with the Owner and had to have performed work on the property involved

Mississippi's Construction Lien statute, Miss. Code Ann. § 85-7-131 (1972 & Supp. 2003), is only available to laborers (prime or general contractors) who have direct contracts with the owner, Miss. Code Ann. §85-7-135 (1972 & Supp. 2003). If the contractor performed work on that property and has not been paid, it is entitled to file a Statutory Notice of Construction Lien Miss. Code Ann. § 85-7-141 (1972 & Supp. 2003).

The statutory requirement that the claimant have a contract with the owner was not and could not be satisfied here. United's contract was with Wee Care and involved property in Hinds County and not Rankin County. The construction lien was always improper (Tr. 110; R.E. 3). Mr.Russum's affidavit testimony established that he had never

had a contract with United and the Subcontractors and that they had never performed work on the Rankin County property (Vol. 2, R. 294; R.E.9).

In his verified Petition, Mr. Russum swore that:

> ¶ 5 United was to build a child care facility for Wee Care, as the Owner, which was located in Byram, in the Second Judicial District of Hinds County. United subcontracted some to the work to the other defendants. All of the work which they performed was in Hinds County, and none of the work related to his Rankin County property. None of their work was performed in Rankin County (Vol. 1, R. 5-6; R.E. 4).
>
> ¶ 6 Wee Care terminated the contract with United. Later, United and the Subcontractors filed a lawsuit against Wee Care in the County Court of Rankin County, Mississippi which was transferred to the Circuit Court for the Second Judicial District of Hinds County, Mississippi That case was assigned # 2005-31 (Vol. 1, R. 6; R.E. 4).

Thus, the work which was the alleged basis for the construction lien was performed on the Wee Care Project in the 2nd Judicial district of Hinds County under a contract with Wee Care and not Mr. Russum; nonetheless, United clouded Mr. Russum's title to his Rankin County property by filing its notice of an alleged construction lien concerning his land in Rankin County.

None of the alleged facts underlying and allegedly justifying the use of the Construction Lien statute, except the representation that Mr. Russum owned the real estate, existed (Emphasis Added).

b. Use of the *lis pendens* was absolutely improper

United and the Subcontractors improperly and falsely represented to the world that they were entitled to a *lis pendens* based, upon the pending the 2nd District Hinds County Lawsuit, even though that case had absolutely nothing to do with the Rankin County property.

The *Lis Pendens* statute, Miss. Code Ann. § 11-47-3 (1972 & Supp. 2003), provides:

> When any person shall begin a suit in any court ...to enforce a lien upon, right to, or interest in, any real estate ... in the county in which the real estate is situated, such person shall file with the clerk of the chancery court of each county where the real estate, or any parte thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced...

Thus, according to the statutory requirements, the *lis pendens* is filed in the county in which the land in which the plaintiffs claim a right is located. It is to include the source of the claimed right, the lawsuit in which the claimed right is being litigated, and a description of the property involved in the *lis pendens* notice. The plaintiff in the lawsuit which is identified in the *lis pendens* must be claiming a right in that property (Emphasis Added).

The *lis pendens* here identified the property involved as being Mr. Russum's (Vol. 2, R. 225-226; R.E. 11), and in that document, the *Lis Pendens,* United and the Subcontractors provided that:

> You are hereby notified of the filing and pendency of the following claim or suit in the County court of Rankin County, Mississippi, in Cause No. 2004-604, was filed November 29, 2004, and subsequently transferred to the Circuit Court for the Second Judicial District of Hinds County, Mississippi, Cause No. 2005-31 for which this Notice need be filed in the Lis Pendens Notice Book of Rankin County, Mississippi, to wit:(Vol. 2, R. 225; R.E. 11); and
>
> *The basis/nature of the claim, lien, right and/or interest is as follows*:
>
> Civil suit for damages pursuant to Miss. Code Ann. § 85-7-131 et seq., for which a lien has been recorded, and 85-7-181 et seq., for which stop payment notice have been served, and other applicable law and equity, against Defendants [Wee Care and Mr. Russum] for the wrongful

termination/removal from the construction project, the failure to pay monies due and owing, wrongful withholding of construction funds, and related claims as more fully set forth in aforesaid Complaint (Vol. 1, R.19-32; R.E. 4).

Yet, nowhere in that lawsuit do they assert that they have an interest or claim or even hint at having any interest in Mr. Russum's Rankin County property (Vol. 1, R. 19-32: R.E. 4). No, what they did was pick the only lawsuit they had against Mr. Russum and then misrepresented the truth about it. That is wrong and such conduct should not be rewarded.

United and the Subcontractors have never challenged Mr. Russum's testimony that the work which United and the Subcontractors say justified the construction lien and the *lis pendens* was performed on the Wee Care project and was not performed on or related to his Rankin County property (Vol. 1, R. 5-6; R.E. 4).

To demonstrate their arrogance and their intent to disregard right and use wrong when it helped them, United and the Subcontractors also relied in the *lis pendens*, as part of its justification, upon the construction lien which was acknowledged as having some "technical irregularities". This is the same construction lien which United had voluntarily removed only moments earlier, the same day! (Vol. 2, R. 217).

A party using a *lis pendens* must at least claim rights in the *subject matter property* (Emphasis added). *51 Am.Jur.2d, Lis Pendens,* § 17, states:

> Although the extent to which particular property must be "involved in", or "affected by", litigation in order to render the doctrine of *lis pendens* applicable may, of course, be governed by statute, it is clear that some form of identifiable "property" must be directly involved in the litigation, and, further, that the litigation to which the doctrine is sought to be applied must "involve" the particular property to which the doctrine is sought to be applied (Emphasis added).

To this end, in *W.H. Hopper & Associates, Inc. v. Dunaway*, 396 So.2d 43, 44 (Miss. 1981) the Court held that it was improper to place a *lis pendens* notice on an adjacent piece of property since the bill of complaint, which sought specific performance or money damages, did not actually concern the adjacent property. In other words, the bill of complaint was not filed "to enforce a lien upon, right to, or interest in the next-door property of the corporation" *id.* That same failure exists here. United and the Subcontractors have never attempted to claim or enforce a lien on "the property in the next county".

See also *Paxton v. First National Bank of Greenvile*, 155 So.185, 185 (Miss. 1934) in which the Court held that a *lis pendens* was improper because it:

> could not operate to establish any lien on the property for the reason that the bill was not to enforce any lien, right to, or interest in, any real estate. . . The bill in this case shows beyond cavil that the First National Bank of Greenville had no interest whatsoever in the Greenville property of Mrs. Paxton. It merely sought to impound it for the payment of its debt, *id.*

Once again, the proof here showed "beyond cavil" that United and the Subcontractors had no interest in, had not claimed an interest in and had no right to an interest in Mr. Russum's Rankin County property. They did not have a contract with Mr. Russum, they had never done any work for Mr. Russum, and, they misrepresented the facts relative to the property and the lawsuit; yet, the Chancellor ate the forbidden fruit and engaged in fact finding and in so doing, completely disregarded those uncontested facts and reached conclusions based upon its findings which shouldn't have been made in the first instance.

The *lis pendens* is no more the "truth" than the construction lien was the truth; yet, a court of equity erroneously decided that United and the Subcontractors occupied some

previously unknown high road as protectors of the bankruptcy fisc, (itself another misrepresentation) and were thereby the "good guys". They are released, although wearing a cloak of lies and misrepresentations, and Mr. Russum, who did nothing except own property, is denied recourse and, being denied, is punished.

With the utmost deference for the learned Chancellor, it is clear that he became embroiled in activities unavailable under the rules and became enthralled by high and lofty ideals allegedly contained in the bankruptcy proceeding and, in so doing, improperly addressed the dispute before him.

2. <u>The Trial Court and "malice"</u>

As we begin the discussion of the "malice" evident in filing a knowingly false notice of construction lien and a knowingly false *lis pendens*, we remind the Court and ourselves that the question is whether or not the Trial Court should have granted summary judgment.

Here, the evidence of maliciousness, that is of bad purpose, is clear; however, it was not Mr. Russum's burden to prove same, but only to demonstrate malice sufficiently to require the burden of going forward to shift to the other side. He clearly did so. When Mr. Russum satisfied the initial burden, the 'fact finding' exercise should have ceased.

Maliciousness is a state of mind, and is a "question of fact, ... to be determined by the jury unless only one conclusion may reasonably be drawn from the evidence", *Owen v. Kroger Co.*, 430 So.2d 843, 848 (Miss. 1983). Yet, and in spite of that well known instruction which brooks of no misunderstanding, the learned Chancellor engaged in that very exercise. The Chancellor had to disregard legitimate testimony and inferences, arising from it, and in so doing found:

> The fact that these defendants here were claimants in the bankruptcy court, that they pursued alongside the examiner a claim that this may have been a fraudulent conveyance I think totally eliminates any notion that the filing of the *lis pendens* on September the 5th, 2006, was malicious (Tr. 117; R.E. 3) (Emphasis added).

Not only should this finding never have been made in the summary judgment environment, but it disregards direct testimony to the contrary. The underlying finding that United and the Subcontractors were pursuing a claim"... alongside the examiner ..."(supra) was itself contested by the direct testimony of Mr. Brand. This expert flat out testified that the course taken by United and the Subcontractors was never authorized by the Bankruptcy Court (Emphasis added) and how the Chancellor got from that testimony to a legitimate pursuit of an interest expressed in an improper and false construction lien and lies expressed in a *lis pendens* is unclear. It was wrong in any event.

a. United and the Subcontractors were not authorized to do anything by the Bankruptcy Court.

These Wee Care creditors couldn't go off on their own pursuing the claim that years earlier Wee Care had fraudulently transferred the Rankin County property to Mr. Russum. They knew full well that the Examiner was the proper and only party authorized to proceed against Mr. Russum, if at all, and then, having done so, plead innocence (Emphasis Added). Yet, United and the Subcontractors acted nonetheless, and then claimed good faith when they were caught at it. Such vigilante style justice epitomizes the presence of malice: "Malice in its legal sense, means a wrongful act done intentionally without just cause or excuse... and may be inferred from the fact that a defendant may have acted with reckless disregard for a plaintiff's rights, *Harmon v. Regions Bank*, 961 So.2d 693, 699 (Miss. 2007)(internal citations omitted).

That United and the Subcontractors acted without justification is beyond cavil. A Bankruptcy Judge has written that he could not "conceive of a situation in which a creditor has independent standing which would allow it to pursue the recovery of property transferred or concealed by the debtor...", *In re Blount*, 276 B.R.753,762 (Bankr. M.D.La., 2002).

In his affidavit, Mr. Brand testified that:

1. Judge Ellington did not authorize United and the Subcontractors to take any action or right them the right to protect the assets of the bankruptcy estate in any court. (Vol. 3, R. 355; R.E. 8);

2. Ceditors of a bankruptcy estate, such as United and the Subcontractors unless specl delegated such power by the Bankruptcy Court and they were not delegated that authority here (Vol. 3 R. 356; R.E. 8);

3. United or the Subcontractors were ever appointed Examiner, did not become a Creditors Committee and were not appointed the Trustee of the estate (Vol. 3, R. 356; R.E. 8);

4. On July 11, 2006, the Bankruptcy Court granted the Examiner 'expanded powers to file any motions and/or complaints that are deemed necessary regarding any pre-petition or post-petition claims on behalf of the bankrupt estate'; from that point forward, United and the Subcontractors knew or should have known that the Examiner was authorized to do whatever it thought necessary, and that they United and the Subcontractors were not; that they did not have the authority to act and knew it (Vol. 3, R. 356; R.E. 8); and,

5. He could find no authority in United or the Subcontractors to file a construction lien and/or any *lis pendens* 'in anticipation of the later action of an Examiner and/or Trustee' (Vol. 3, R. 356-357; R.E. 8).

Yet, as noted, the Chancellor found that a parallel track existed somewhere and somehow the obvious falsehoods and misrepresentations were excused.

Malice is not an element which is frequently proven with direct proof. Rarely does a party admit that it wished to do harm to another or that it knew it was progressing without

legal justification, and rarely is there a document available which spells out a sinister plan to do another party harm. In *Phelps v. Clinkscales*, 247 So.2d 819, 821 (Miss. 1971), the supreme court held: "Malice exists in the mind and usually is not susceptible of direct proof. The law determine malice by external standards: a process of drawing inferences by applying common knowledge and human experience to a person's statements, acts, and the surrounding circumstances."

There is no question that "malice" is an element when considering a claim for slander of title. The filing must be false and malicious, *Welford v. Dickerson*, 524 So.2d 331, 334 (Miss. 1988).

The announced reason for filing the 'clouds', finally reached after every other trail had been tried and United and the Subcontractors had been cornered, was disclosed by counsel during the hearing in February, 2007 hearing:

> We just needed it (*the lis pendens)* in place until we could get the bankruptcy examiner actually appointed by the Court...We couldn't get an examiner appointed immediately, so we took a step of getting a lis pendens filed and
>
> then pursued getting the examiner appointed to pursue this property. So the *lis pendens* was necessary at the time. Given that the bankruptcy's examiner's in place now, we don't have a problem with ours being lifted (Tr. 24-25).

Mr. Fulgham reiterated that intent during the hearing on the Motions for Summary Judgment regarding its reasoning for acting on behalf of the examiner for the bankruptcy estate:

The Court:	"Why didn't you wait and let the examiner move...?" (Tr. 83).
Mr. Fulgham:	"We didn't know when the examiner would be appointed; and as the record shows, even after the examiner was appointed and even after he filed suit, he still didn't file his *lis pendens*

until September 13th. I'm not disparaging Derek [attorney for examiner], I mean, but the fact of the matter is it didn't get filed until September 13th." (Tr. 83).

The Court: "What was your concern?" (Tr. 83).

Mr. Fulgham: "Our concern was that the very thing, ...this very thing would happen... he produced what purports to be a land contract that he purports he had–claims he had an offer for sale." (Tr. 84).

Yet, this information passed to the Chancellor was untrue. The Examiner had been appointed by Judge Ellington months before the construction lien was filed in June of 2006 and the *lis pendens* was filed in September 2006. There is no possibility that United et al were unaware of the fact that the Examiner had been appointed and the powers he possessed as Examiner since it was upon their motion that Judge Ellington issued the Orders; United et al admitted that they knew by June of 2005 that a hearing to appoint an examiner to pursue actions had occurred, that the Bankruptcy Judge "granted our[ ]" Motion (presumably to appoint the examiner), and that by July of 2006, the examiner had filed a lawsuit to go after the Flowood property (Tr. 53-54)(Emphasis added).

No, the problem for them was that the Examiner wasn't acting fast enough and they wanted Mr. Russum to hurt. When they filed the *lis pendens*, the Examiner had been granted the authority to file whatever proceeding against Mr. Russum concerning the Rankin County property that the Examiner believed was justified (Vol. 3, R. 327, R.E.9).

That they believed that the Examiner wasn't acting fast enough and that they feared that Mr. Russum would sell his property, which in fact he was attempting to do, is of no consequence since if the Examiner's actions were wrong, United and the Subcontractors could sue the Examiner for not doing his job.

Under 11 U.S.C. § 322, a creditor can make a claim against the trustee's, and in this case, an Examiner's bond, when her neglect results in injury to the creditor, *Heyman v. M.L. Marketing Co.*, 116 F.3d 91, 96 (C.A.4 Md. 1997). United and the Subcontractors always had that protection if the Examiner's alleged "laxness" resulted in damage to the creditors.

United and the Subcontractors could have petitioned the bankruptcy court for assistance if they were unhappy with the Examiner's actions or lack thereof. Creditors may petition both the trustee and the bankruptcy court for action If the trustee [or examiner] fails to perform his duty, and may petition the court to appoint a creditor to act in the trustee's name if the trustee, and in this case the Examiner, refuses to act, *In the Matter of Abingdon Realty Corp., Bankrupt, Docter, Docter and Salus v. United States*, 21 B.R. 290, 293 (Bkrtcy. Va. 1982).

The bankruptcy court may also authorize a creditors' committee to institute suit, *In re Mortgage America Corp. v. American Fed. Savings & Loan,* 831 F.2d 97,98 (C.A.5 Tex 1987). Judge Ellington did not authorize United and/or the Subcontractors to do anything and they did not comprise a creditors committee, 11 U.S.C.§ 1102.

No one appointed United and the Subcontractors to act as private attorneys general or vigilantes. Yet, in order to justify the finding that United and the Subcontractors acted without malice (a fact finding activity which was off limits to the Chancellor), the Chancellor determined that creditors of a bankrupt, knowing that on Examiner had been appointed to see what was up and if warranted to file suit, were authorized nonetheless, to file suit against a third party and to tie up his property because the Examiner wasn't acting fast

enough! That is, with deference, absolutely improper and a right unknown to Bankruptcy and the law of creditor's rights.

Imagine the chaos which would follow if creditors actually had that right!!

b. The alleged parallel interest wasn't

The Chancellor found that United and the Subcontractors were authorised to pursue Mr. Russum even though the only proof before him was that the Bankruptcy Court had not authorized them.

The uncontested testimony and the failure of the law to support this finding and its resultant conclusion, makes the grant of summary judgment clear error.

This was error, and this Court should reverse and render on this issue.

3. Their activities weren't privileged either

The Trial Court concluded that United and the Subcontractors were privileged when they misrepresented the facts and falsely invoked the construction lien and *lis pendens* statutes. He concluded as a matter of law, based on *A.B. Dethlefs v. Beau Maison Development Corp.*, 511 So.2d 112 (Miss. 1987) that "certain communications published in the course of a judicial proceeding are absolutely privileged and will not sustain an action for slander of title" (Tr. 117: R.E. 3) and "because they [United and the Subcontractors] were proceeding judicially in the bankruptcy court, they were privileged to the extent that they filed the *lis pendens* in this county or in the records of the Chancery Clerk of Rankin County, Mississippi..."(Tr. 117-118; R.E. 3).

The underlying facts in *Dethlefs* are somewhat complicated but to the extent necessary to understand the principle there, we address them here. Ms. Dethlefs filed a

lawsuit against Beau Maison in the 1st district of Harrison County asserting that she and her mother had easement rights in the property involved. Unlike United and the Subcontractors the fight involved the property which was the subject of the litigation. Pro se, she also sought an injunction and damages and in due course, a summary judgment was granted against her claim. That summary judgment was reversed.

Then, Ms. Dethlefs joined Firstsouth Federal which had acquired the property from a commissioner's sale and sought damages from Firstsouth. A *lis pendens* notice had been filed by her sometime earlier. Beau Maison did not appear. After a hearing on the merits, the Chancellor concluded that she did not have an easement in the property and then awarded Firstsouth damages for filing the *lis pendens* which the Chancellor held was filed maliciously.

On appeal, the Supreme Court affirmed the decision that Ms. Dethlefs did not have an easement but reversed on the issue of the slander of title since the Chancellor had found that "...Dethlefs had a right to assert her interest in the underground pipe ...", *Dethlefs*,

p. 117. The difference between *Dethlefs* and the present case is dramatic since throughout the proceedings, the land in question was property in which Dethlefs claimed an interest and the *lis pendens* referenced the litigation in which she was asserting that interest! Here, the unchallenged proof establishes that United and the Subcontractors never had an interest in the property involved, never claimed such an interest and referred to and relied upon a lawsuit in which no such right or claim was involved. Thus, where it was true of Ms.Dethlefs, that she " had a right to assert her interest in the underground

pipe..." the same can not be honestly said of United and the Subcontractors. They had no interest in the Rankin County property, never claimed an interest in it and had not filed a lawsuit seeking to pursue their claimed interest. Their misrepresentations to the contrary are simply not privileged!

Dethlefs offers no assistance to United et al and the Court erred in applying it here. No privilege exists to misuse the lis pendens statute and none should have been created for United!

A year earlier than *Dethfels,* the Supreme Court specifically recognized that "when a *lis pendens* is filed, but no underlying suit is filed against record owners to enforce those interests supporting the *lis pendens*, then such [is] a basis for establishing slander of title in the event maliciousness [can] be proved", *Edwards v. Bridgetown Community Association*, 486 So.2d 1235, 1240 (Miss. 1986). The valid right supporting a *lis pendens* necessarily springs forth from the filing of the suit, and while United and the Subcontractors were involved in litigation, it was against another party, involving another piece of property, for work which had nothing to do with this property, and most importantly, no claims were made against the property. The only "right or interest" was wrongly discovered in bankruptcy, which actively gave them nothing.

Chancellor discovered privilege in the ongoing bankruptcy proceedings (Tr. 117; R.E. 3); however, in order for this Court to affirm the existence of that privilege, it must necessarily grant United and the Subcontractors the right to act as the unappointed Examiner in Bankruptcy!

The application of the Trial Court's reasoning cannot have an appropriate result. Safeguards, in the form of the appointment of an Examiner or a Trustee, are put in place before anyone is authorized to act on behalf of the creditors of the estate. Creditors committees must be approved and appointed by the Bankruptcy court under rigid procedures and with adequate safeguards (Emphasis added).

4. Mr. Russum suffered the right kind of damage

The learned Chancellor stated that there was no issue of material fact concerning whether or not Mr. Russum was injured and that he wasn't (Tr. 117; R.E. 3). The Chancellor disregarded sworn testimony from Mr. Russum that proved he suffered damages, the most significant being the loss of a purchaser, and the diminution of value of the property, which forced Mr. Russum to sell the property for several hundred thousand dollars less than the prospective purchaser was willing to pay for the property, and that other damages existed (Vol. 2&3, R. 294-299; R.E. 9). The Trial Court also disregarded an authenticated contract for sale of the Property (Vol. 3, R. 349-353; R.E. 9), further supporting the position that Mr. Russum was harmed. This was reversible error.

The Trial Court made the following statement :

> I think the fact that they [Appellees' *lis pendens*] were– ... beating the examiner['s] by eight days is– its just going to be hard for me to find, number one, that that factor alone caused damage to Mr. Russum; number Two– and I read his affidavit and – I mean it's– its crafty lawyering (Tr. 103-104).[6]

[6] The Chancellor did not consider the June 9, 2006 filing date of the Statutory Notice of Construction Lien as the earliest moment Mr. Russum's title was clouded. Instead of "eight" days recognized by the Chancellor from the filing of United and the Subcontractors' *lis pendens* and the Examiner's (Tr. 73), the reality was that Mr. Russum's title had been clouded for ninety-six days from the time of the filing of the construction lien and the Examiner's!

Yet, he followed this comment with another utilizing the very affidavit which actually contradicted his findings and conclusions:

> In fact, inasmuch as Mr. Russum himself recognizes in the affidavit that he has submitted to the Court from the record that there were, in fact, other *lis pendens* notices filed-- for example, he, in his affidavit which is attached to his response to the Motions for Summary Judgment, recognizes that AmSouth had a claim to the property; that-- in fact, he says that he recognizes the existence of the *lis pendens* was of no concern to him, and he likewise says that the *lis pendens* filed by the examiner did not make the Rankin County real estate unavailable for sale, but yet the-- but somehow claims that the *lis pendens* filed before the examiner's, that is somehow created a damage for him (Tr. ; R.E. 3).

These "facts" were properly controverted by Mr. Russum in his sworn affidavit (Vol. 2&3, R.293-299 ; R.E. 9) and by the supporting contract for sale of the subject property (Vol. 3, R. 349-353). Mr. Russum testified that:

1. He had a contract to sell the land but the buyers backed out when they discovered the lis pendens filed by the appellees (Vol. 3, R. 298; R.E. 9), a copy of the contract is provided (Vol. 3, R. 349-353);

2. He and the Examiner had an understanding that if the land was to be sold, that the Examiner and appellant would agree on some figure for the sales price to place in escrow until the Examiner's argument with appellant was resolved (Vol. 3, R. 298; R.E. 9);

3. He also had an understanding with the bank that if the land sold, AmSouth would agree to a figure to put in escrow until the dispute and differences in opinion as to AmSouth's entitlement to the proceeds was determined (Vol. 3, R. 298; R.E. 9);

4. Having United' and the Subcontractors' *lis pendens* on record cost the appellant several hundred thousand dollars (Vol. 3, R. 299; R.E. 9);

5. He had to reduce his contract price for the sale of the property (Vol 3, R. 299; R.E. 9);

6. He was denied use of the sale proceeds for a long time (Vol. 3, R. 299; R.E. 9); and

7. He had to incur additional costs in the Rankin County Chancery Court and in the Bankruptcy Court (Vol. 3, R. 299; R.E. 9).

While the burden of proving damages rests upon Mr. Russum, *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 740 (Miss. 1999), Mr. Russum satisfied his burden, and for the Trial Court to disregard his uncontested proof was reversible error. This evidence, when viewed in the light most favorable to Mr. Russum, requires acceptance by the Trial Judge for Summary Judgment purposes, and recognition that at the very least, a genuine issue of this material fact existed.

Mr. Russum's affidavit is sworn to, made upon his personal knowledge, and Mr. Russum is competent to testify.[7] Mr. Russum's testimony was unchallenged.

The Chancellor was without authority to disregard material, sworn evidence based upon which version (had another been offered) seemed more credible to him, *Pollard v. Sherwin-Williams Co.*, 955 So.2d 764, 773-774 (Miss. 2007).[8] The Court's finding that Mr. Russum had not experienced damage is wrong and the summary judgment upon which it relies, must be reversed.

5. Conclusion as to "slander of title"

The Court should reverse and remand Mr. Russum's claim for slander of title, with instructions to consider the improper use of the construction lien statute by United, that the *lis pendens* was not afforded any privilege whatsoever, and that the Chancellor disregard

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[7]The Chancellor improperly assessed the credibility of Mr. Russum's affidavit, couching it as "crafty lawyering" instead of sworn testimony to be given all reasonable preference as the truth (Tr. 104).

[8]See also *Mantachie Natural Gas v.* Mississippi Valley Gas Co., 594 So.2d 1170, 1172 (Miss. 1992); "issue of fact sufficient to require denial of a motion for summary judgment ... [as] one party swears to one version of the matter in issue and another says the opposite".

Wee Care's bankruptcy proceedings in determining whether any privilege or justification exists. Finally, this Court should instruct the Chancellor that Mr. Russum has suffered "actual damages" the amount to be proven at trial.

D. Penalty for False Notice

The chancellor did not acknowledge or specifically rule upon Mr. Russum's claim to statutory damages arising under Miss. Code Ann. § 85-7-201 (1972 & Supp. 2003) for the improper Statutory Notice of Construction Lien filed June 9, 2006, but instead, focused solely on the "slander of title" claim discussed in the first portion of this argument. This was error, and this Court should reverse the dismissal of Mr. Russum's statutory claim for a determination of United's liability.

The "false notice" statute provides:

"Penalty for false notice; expungement"

> Any person who shall falsely and knowingly file the notice mentioned in Section 85-7-197 without just cause shall forfeit to every party injured thereby the full amount for which such claim was filed, to be recovered in an action by any party so injured at any time within one year from such filing; and any person whose rights may be adversely affected may apply, upon two days' notice, to the chancery Court or to the chancellor in vacation, or to the county Court, if within its jurisdiction, to expunge; whereupon proceedings with reference thereto shall be forthwith had, and should it be found that the claim was improperly filed rectification shall at once be made thereof Miss. Code Ann. § 85-7-201 (1972 & Supp. 2003) (Emphasis added).

The access to and the ability to record a claim in the *lis pendens* record is granted by the *Lis Pendens* Statute, Miss. Code Ann. § 85-7-197 (1972 & Supp. 2003), and is

available to a claimant under both available construction liens,[9] and requires that certain elements must be satisfied; re:

1. Concerning the Notice itself:

    i. she must reduce his claim for a lien to writing showing the basis of his claim and the parties effected thereby;

    ii. the writing shall identify the property involved;

    iii. she shall set forth the rights claimed in the property; and,

    iv. she shall make an affidavit "to the writing."

Miss. Code Ann. § 85-7-197 (1972 & Supp. 2003).

2. Concerning the Notice itself and its subsequent use:

    i. she must notify the owner in writing or by certified mail and attach an affidavit that the notice has been given and how.

Miss. Code Ann. § 85-7-197 (1972 & Supp. 2003).

1. <u>The requirements of § 85-7-197 are unavailable</u>

While United did file its Statutory Notice of Construction Lien, that is the only portion of the statute which was satisfied. As discussed in Section C, (1),(a), pgs. 24-25 of this Brief, the construction lien did not contain the essential elements of a construction lien; a valid basis, the work was performed on the Second District property and not the Rankin County property, and no rights were available to United in the Rankin County property Miss. Code Ann. § 85-7-197 (1972 & Supp. 2003). Additionally, United has never

[9] Again, Miss. Code Ann. §85-7-131 for unpaid prime or general contractors, and another, Miss. Code Ann. § 85-7-181 (1972 & Supp. 2003), the "Stop Notice" statute for subcontractors.

produced an affidavit to the writing. And obviously, with no affidavit available, the Notice requirement that such affidavit be supplied is also lacking Miss. Code Ann. § 85-7-197 (1972 & Supp. 2003).

2. Failing § 85-7-197, United's actions are studied under § 85-7-201

Thus, with absolute proof that United's construction lien was unlawful and improper and did not meet the requirements of Miss. Code Ann. § 85-7-197 (1972 & Supp. 2003), Mr. Russum provided sufficient evidence to show that:

1. A false and knowingly false filing of [construction lien] was made;
2. It was made without just cause, which
3 required forfeiture to every party injured of the full amount of the lien asserted, only
4. that was to be recovered by the injured party within one year from such filing.

Miss. Code Ann. § 85-7-201(1972 & Supp. 2003).

Each element will now be addressed.

a. The filing was false and knowingly false

In Section C, (1),(a), pgs. 24-25 of this Brief, Mr. Russum identified the proof that satisfied this requirement and In Sections C, (2),(a),(b) pgs. 30-35 of the Brief, of United's malicious conduct. Mr. Russum refers to those sections to save space and time. The standard defining 'malice' as it is used in slander of title claims, is different from the closely related "knowing" element in the statute creating a penalty for false notice of a construction lien. Judge Biggers has found that such a "knowing" false filing consists of one "done with an evil or bad purpose", *Manderson v. Ceco Corp.*, 587 F.Supp. 445, (N.D. Miss. 1984).

Having filed a false document with the knowledge that it was unlawful and improper, and with such "technical irregularities" admitted by United, for the sole purpose of blighting Mr. Russum's title in order to prevent any sale or transfer, is the requisite mal purpose required by the statute.

b. United's actions were not justifiable

No Mississippi Court has defined the phrase "without just cause" as it is used in this statute, although in *Manderson v. Ceco Corp.*, 587 F. Supp. 445 at 447, Judge Biggers held that because the Defendants had filed an improper construction lien on advice of counsel "such filing was done on an attorney's advice, and was therefore 'with just cause'". Mr. Fulgham, United and the Subcontractors' counsel, openly admitted that United acted on its own when it filed the Statutory Notice of Construction Lien: "Defendant/Counter-Plaintiff United had, without the assistance of counsel, filed a Statutory Notice of Construction Lien on June 9, 2006, to protect the Flowood property from being sold by Mr. Russum out from underneath the protection of the Bankruptcy Court" (Vol. 1, R. 100; R.E. 6).

Thus, a "just cause" defense is unavailable here!

c. Mr. Russum was injured

In Section C (4), pgs. 38-40 of this Brief, Mr. Russum identified the proof related to the "actual damages" caused by the intentionally false filing of the construction lien, and we adopt and incorporate that argument in here. With that said, however, Mr. Russum does not abandon his argument that the filing of an improper lien, which diminishes his

property right, is not in of itself enough for a finding of "injury" under the statute, Miss. Code Ann. § 85-7-201 (1972 & Supp. 2003).

Property rights are strictly protected, and disparagement of such rights have a very low threshhold; "matter which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another's property in land..." is sufficient. *Black's Law Dictionary*, p. 470 (6th Ed., 1991).

At the moment that United clouded Mr. Russum's title, he was injured, disparaged by those actions, and having not had the opportunity to define injury as it is used in the "penal" statute, Mr. Russum asks this Court to follow the intent of the statute and rule so as to deter any more malicious conduct.

i § 85-7-201 sets the amount of damages

The statute states plainly that a knowingly false filing of a construction lien without just cause invites a "forfeiture" of the full amount for which such claim was filed.[10]

The statute, § 85-7-201 (1972 & Supp. 2003), is penal in nature and must be strictly construed,[11] *Evans v. City of Aberdeen*, 926 So.2d 181, 183 (Miss. 2006) and it is at this juncture that United might argue, what we did didn't hurt Mr Russum, much. Yet, § 85-7-

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[10]Mississippi Courts have defined "Forfeiture" as it is used in the statutes as "a divestiture of specific property without compensation, as the consequence of some default or act forbidden by law." *Mississippi Bureau of Narcotics v. Lincoln County, Mississippi*, 605 So.2d 802, 804 (Miss. 1992); see also *Malouf v. Gully*, 192 So. 2, 4 (Miss 1939)("forfeiture has a comprehensive meaning, and expresses the result which flows from an inability to comply with the law").

[11]Such construction gives credence to the intent of the Legislature in passing such law. *Clark v. State ex. Rel Mississippi State Med. Ass'n*, 381 So.2d 1046, 1048 (Miss. 1980)(holding that the "Court's primary objective is to employ that interpretation which best suits the legislature's true intent or meaning"). "'The only credible source of legislative intent available' is the wording of the statutes." *Mississippi Department of Public Safety v. Prine*, 687 So.2d 1116, 1118 (Miss. 1997)(citing *Mississippi State Highway Com'n v. Herban*, 522 So.2d 210, 213 (Miss. 1988)). The statute leaves no bones about it; forfeit the full amount of the claim.

201 "makes a wrongdoer liable to the person wronged for a fixed sum without reference to the damage inflicted by the commission of the wrong..." *Manderson v. Ceco Corporation*, 587 F.Supp. 445, 446 (N.D.Miss 1984). Judge Biggers recognized that the legislative purpose behind the statute was to require abusers of the statute to be held responsible.

Mr. Russum asks that this Court reverse and render, on the question of United's liability, to Mr. Russum in the amount of $690,000.00, being the amount claimed on the lien.

3. Conclusion; statutory damages are available to Mr. Russum

Mr. Russum's claim for statutory damages for the improper construction lien filed by United was disregarded by the chancellor, and dismissed without making any findings of fact or conclusions of law. The dismissal should be reversed and rendered, with instructions that the liability of United be fixed at the amount of the lien asserted against the Property, $690,000.00.

E. Attorney's fees

The Learned Chancellor noted:

> [that it only knew of] circumstances ... in which I can award attorneys' fees, and I don't know at this point and do not believe that I have any authority to award attorneys' fees unless there's either– statutory entitlement to it under the *lis pendens* statute... I do not find that the filing of the *lis pendens* was malicious, therefore I cannot award [attorneys' fees]– nor do I find that any of the pleadings filed on behalf of the defendants United and the Subcontractors have been– violated Rule 11 or the Litigation Accountability Act. (Tr. 118-119; R.E. 3).

The Chancellor erred by not finding that Mr. Russum was entiled to his "actual damages" incurred by Mr. Russum on account of the slanderous actions of United and the Subcontractors; he instead found that the slander of title claim lacked merit. If this Court determines that United and the Subcontractors were unjustified in the filings, then attorneys fees should be counted in Mr. Russum's "actual damages". Mississippi law has held that while "actual damages" cannot consist solely of attorneys fees, they may be considered part of a party's "actual damages", *Phelps v. Clinkscales,* 247 So. 2d 819,821(Miss. 1971).

F. The Court should have dismissed United's Counterclaim

The Lower Court's only express ruling pertaining to Mr. Russum's Motion to Dismiss Counterclaim was to deny the relief United and the Subcontractors sought (Vol. 3, R. 358-359, R.E. 1). The Chancellor never granted Mr. Russum's Motion to Dismiss, but ruled that "all other motions and prayers for relief not previously ruled upon" were denied (Vol. 3, R. 359, R.E. 1). The learned Chancellor made the following statement: "Now, let me go ahead and make a similar finding, and that is that I don't find any of the pleadings filed by the plaintiff [Mr. Russum] have then violated Rule 11 or the Litigation Accountability Act" (Tr. 119; R.E. 3). These were the basis for United and the Subcontractors claim for attorneys' fees and costs (Vol.1, R. 39-47; R.E. 5). It was error for the Chancellor to not grant Mr. Russum's Motion to Dismiss Counterclaim.

Conclusion

The Court should reverse the Chancellor's decision to grant United and the Subcontractors' Summary Judgment on all of Mr. Russum's claims, and instructions should

be given that actual damages resulting from the slander of title be determined, and that the issue of liability pursuant to Miss. Code Ann. § 85-7-201 (1972 & Supp. 2003) is fixed at the amount of the claim asserted by United, $690,000, that United and the Subcontractors' Counterclaim be dismissed, and further, that Mr. Russum be awarded all costs and attorneys' fees for having to pursue this matter.

THIS the 20th day of March, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS W. PREWITT, do hereby certify that I have mailed, via United States Mail, postage fully prepaid thereon, a true and correct copy of the above and foregoing ***Brief of Appellant W. D. Russum*** to:

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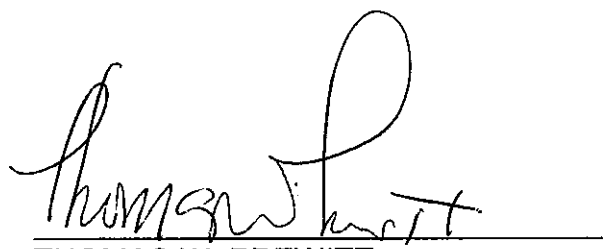
THIS, the 20th day of March, 2008.



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