IN THE SUPREME COURT OF MISSISSIPPI
CASE NUMBER 2007-CP-00501

H. L. MERIDETH, JR. — APPELLANT

VS.

PHILIP T. MERIDETH, M.D. — APPELLEE

APPEAL FROM THE
CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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October 4, 2007

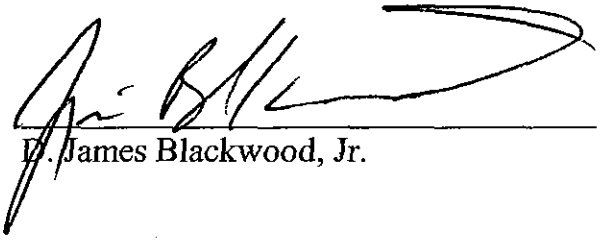
CERTIFICATE OF INTERESTED PERSONS

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 judges of this Court may evaluate possible disqualification or recusal.

1. H.L. Merideth, Jr., Plaintiff below.

2. Philip T. Merideth, M.D., Defendant below.

3. Robert L. Goza, D. James Blackwood, Jr., and Lindsey M. Turk, Copeland, Cook, Taylor & Bush, P.A., attorneys for Philip T. Merideth, M.D., Defendant below.



D. James Blackwood, Jr.

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully submits that given the straightforward nature of the issues in appeal, oral argument is not necessary and will not be helpful to the Court.

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STATEMENT OF THE ISSUES

The following issues are presented for review on appeal:

1. Whether the lower court abused its discretion when it denied Appellant's Motion to Amend Complaint on the grounds that the proposed amendment was futile.

2. Whether the lower court abused its discretion when it imposed sanctions on Appellant and awarded attorney's fees and costs to Appellee pursuant to the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-5-5, and Rule 11 of the Mississippi Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Court Below

On July 24, 2006, Plaintiff below and Appellant herein, H.L. Merideth, Jr. ("Mr. Merideth") filed suit against his son, Defendant below and Appellee herein, Philip T. Merideth, M.D. ("Philip") for allegedly failing to pay a promissory note, dated May 7, 1997, in the amount of twenty-one thousand dollars ($21,000.00). R. 1-2.[1] Specifically, Mr. Merideth alleged that Philip failed to repay Mr. Merideth a loan in installments of one thousand, five hundred dollars ($1,500.00) per month, from September 1, 1998, until October 1, 1999. *Id.*

Because the suit was clearly filed after the expiration of the statute of limitations, counsel for Philip wrote Mr. Merideth a letter advising him that the claim was time-barred and requesting that he voluntarily dismiss the case. R.E. 1, R. 16-17 (Letter, D. James Blackwood to Mr. Merideth, dated 8/7/06). Counsel for Philip further warned that in light of recent filings by Mr. Merideth against his son (discussed *infra.*), failure to dismiss the suit would be met with a motion to dismiss and the pursuit of sanctions pursuant to Rule 11 of the Mississippi Rules of Civil Procedure ("Rule 11") and the Mississippi Litigation Accountability Act, Miss. Code Ann. §11-5-5 (the "Act"). *Id.*

Mr. Merideth refused to dismiss the suit. Thereafter, Philip filed a Motion to Dismiss and Motion for Sanctions. R.E. 2, R. 3-49 (Defendant's Motion to Dismiss and Motion for

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[1] References to "R." are to the record. References to "R.E." are to the Appellee's record excerpts. References to "TR." are to the hearing transcript.

Sanctions). Mr. Merideth responded to Philip's Motion by filling a Motion to Amend Complaint. R. 52-54. Philip opposed Mr. Merideth's Motion to Amend on the grounds that the proposed amendment would be futile. R.E. 3, R. 55-60 (Defendant's Response to Plaintiff's Motion to Amend Complaint). Philip, thereafter, amended his motion to also enjoin Mr. Merideth from filing any more lawsuits against Philip or his family unless Mr. Merideth first obtained leave of court to do so. R. 61-113.

Finding that Mr. Merideth failed to state a claim for which relief could be granted under his original Complaint, and finding that Mr. Merideth's proposed amendment would be futile, the Court granted Philip's Motion to Dismiss and denied Mr. Merideth's Motion to Amend Complaint. R.E. 4, R. 118-122 (Order dated 11/16/06). On February 12, 2007, Philip brought on for hearing his request for attorney's fees pursuant to Rule 11 and the Act. The Court granted Philip's Motion for Sanctions, but denied Philip's request for injunctive relief. The Court awarded Philip his reasonable attorney's fees in the amount of eight thousand, two hundred ninety-eight dollars and nine cents ($8, 298.09). TR. 54-55, R.E. 5, R. 123-126 (Final Judgment for the Recovery of Fees and Expenses). Mr. Merideth appealed.

B. Statement Of The Facts

1. *Merideth I*

This appeal arises from the ***third*** lawsuit filed by Mr. Merideth against his son, Philip, since April 2005. The first lawsuit ("*Merideth I*") was filed by Mr. Merideth on April 21,

2005, in the Madison County Chancery Court, requesting a declaratory judgment that Mr. Merideth was mentally competent to modify his Last Will & Testament. R. 80-81. Philip did not respond to that lawsuit and was willing to allow a default judgment to be entered against him on Mr. Merideth's unique request for relief. R.E. 6, R. 34 (Philip affidavit). Nonetheless, Mr. Merideth subpoenaed Philip and his wife to appear at Mr. Merideth's competency trial in Yazoo City on four business days notice when Mr. Merideth knew that Philip's wife was eight and a half months pregnant with a high-risk pregnancy and under doctor's orders not to leave the Jackson area. *Id.* After a letter from Philip to the Chancery Clerk explaining why he could not appear, Mr. Merideth requested that the lower court hold Philip and his wife in contempt, and asked that sanctions be levied against them based on their failure to appear at the hearing. R. 20-21, R. 82-86. Thereafter, Mr. Merideth again subpoenaed Philip and his wife to appear at the continuation of his competency trial and to defend Mr. Merideth's motion for contempt, which came at a time when Mr. Merideth knew that Philip's wife was still under a physician's care for the Caesarian section delivery of her high-risk pregnancy that had occurred only a few days earlier. R.E. 6, R. 34 (Philip affidavit). Philip ultimately resolved *Merideth I* by filing a *pro se* motion for entry of a default judgment. R. 26.

2. *Merideth II*

Four months after the conclusion of *Merideth I*, Mr. Merideth filed a second lawsuit against Philip ("*Merideth II*") in the Madison County Chancery Court. In *Merideth II*, Mr.

Merideth purportedly attempted to cancel a quitclaim deed from Mr. Merideth to Philip conveying an undivided half-interest in 20 acres of land. R. 38-42. Philip's brother, David, owned the other undivided one-half interest in that property. R. 39.

The impetus for *Merideth II* was a real estate deal between Mr. Merideth and a local real estate developer. The terms of that deal were that Mr. Merideth agreed to sell 40 acres of land to the developer, subject however, to Philip and David also agreeing to sell their contiguous 20 acres. R. 39-40. Philip was initially reluctant to sell his interest in the 20 acres, in hopes that he would have the benefit of quiet use and enjoyment of the land with his wife and three young sons. R.E. 6, R. 35 (Philip affidavit). However, Philip did not want to stand in the way of Mr. Merideth's (and David's) desire to sell the 20 acres, and, therefore, agreed to the sale. *Id.* Thereafter, David sent Philip a proposed sales contract. However, on January 17, 2006, soon after David sent Philip the contract, Philip received a cryptic, handwritten letter from Mr. Merideth that concluded with instructions to "tear up the contract David sent U [you]." R. 43. To add further confusion to an already confusing scenario, Mr. Merideth subsequently sent a letter to Philip, dated February 17, 2006, chastising Philip for not agreeing to the sale (to which Philip had, in fact, agreed). R. 44. Philip requested clarification on these contradictory positions by a handwritten note to David, dated February 19, 2006; however, no explanation was provided. R. 45.

On February 21, 2006, despite having told Philip to "tear up the contract," Mr. Merideth filed *Merideth II* against Philip. R. 38-42. In support of *Merideth II*, Mr. Merideth

alleged that he had conveyed Philip his interest in the 20 acre parcel on the express condition that Philip build a house on the land. R. 38-42. However, the deed clearly contained no such condition, and in truth, no such condition, oral or otherwise, was ever imposed on the transfer. Although under no obligation to do so, and although Mr. Merideth clearly had no standing or legal basis for filing suit against him, Philip nonetheless agreed to sell his interest in the 20 acres in an effort to avoid unnecessary litigation and further embarrassment by the conduct of his father. R.E. 6, R. 36 (Philip affidavit).

The substance of *Merideth II* was resolved by an Escrow Agreement, dated June 1, 2006. R. 46. Pursuant to that Escrow Agreement, one of two things would occur: either (1) Philip would deliver the warranty deed conveying his interest in the land to the Escrow Agent to be held until such time as Philip's monies for the sale of the land were tendered to the Escrow Agent, at which time the Escrow Agent would deliver the warranty deed to the purchaser of the land; or (2) if Philip failed to deliver the deed to the Escrow Agent, the Escrow Agent would present a Consent Judgment signed by both Philip and Mr. Merideth for entry by the court. *Id.* Because Philip tendered the warranty deed to the Escrow Agent for delivery to the purchaser, the Consent Judgment was never entered by the Court. R. 47-48. The sale of the 20 acres closed on July 18, 2006. *Id.*

3. The Filing of the Case Below: *Merideth III*

Six days after the closing on the twenty (20) acres that were the subject of *Merideth*

II, Mr. Merideth filed this case, *Merideth III*.[2] R. 1-2. In *Merideth III*, Mr. Merideth claimed that Philip was in breach of a $21,000 promissory note, dated May 7, 1997, pursuant to which Philip had borrowed money from his father while completing his medical school residency. R. 2. Mr. Merideth subsequently forgave the loan; however, after *Merideth I* and *Merideth II*, Mr. Merideth took the position that the note had not been forgiven and filed suit against his son in an attempt to collect on the promissory note. R.E. 6, R. 36 (Philip affidavit).

Mr. Merideth's Complaint states that on May 7, 1997, he agreed to loan Philip $21,000.00, which was to be advanced in installments of $1,500.00 per month from June 1, 1997, until July 1, 1998. R. 1-2. The promissory note further provided that Philip was to re-pay Mr. Merideth the loan in installments of $1,500.00 per month from September 1, 1998, until October 1, 1999. R. 1-2. After having been sued by his father for the third time in less than fifteen months, Philip, through counsel, wrote Mr. Merideth advising him that the statute of limitations had expired on his claim. R.E. 1, R. 16-17 (Letter, D. James Blackwood to Mr. Merideth, dated 8/7/06). Counsel further warned that the failure to dismiss *Merideth III* would be met with a motion to dismiss and a motion for sanctions. *Id.* Mr. Merideth was further advised that if his harassment of Philip and his family through the

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[2] After Mr. Merideth filed suit in *Merideth III*, Philip filed a Motion for Sanctions in *Merideth II*, which case had remained open pending the closing of the underlying transaction and the resolution of the payment of Philip's attorney's fees. The court granted Philip's motion in *Merideth II*, which Mr. Merideth appealed and is now pending before this Court under Case Number 2006-CP-02135.

judicial system did not stop, Philip would pursue all legal avenues available to him to ensure its cessation. *Id.* However, Mr. Merideth refused to dismiss his complaint and indicated that instead he would seek to amend. R. 49.

On August 24, 2006, Philip filed his Motion to Dismiss and Motion for Sanctions. R.E. 2, R. 3-49 (Defendant's Motion to Dismiss and Motion for Sanctions). On September 11, 2006, Mr. Merideth responded by filing a Motion to Amend Complaint. R. 52-54. In his proposed Amended Complaint, Mr. Merideth asserted that the statute of limitations had been tolled since he believed that Philip was out of the state for a period of two years, although he did not know what years he was absent from the state. R. 53. However, Mr. Merideth had been informed through Philip's sworn testimony, two weeks prior to the filing of the motion, that Philip has lived continuously in Mississippi since June 1998. R.E. 6, R. 33 (Philip affidavit). Thus, Mr. Merideth knew, or should have known, that Philip's absence from the state had no effect on the statute of limitations, because the first installment on the note did not come due until September 1, 1998, several months ***after*** Philip had returned to the state to live. R. 2.

Thereafter, Philip filed an amended motion adding a request for an injunction prohibiting his father from filing any more lawsuits against him or his family without first obtaining leave of court to do so. R. 61-113. On November 16, 2006, the Hinds County Chancery Court, the Honorable Denise Owens presiding, entered an order granting Philip's motion to dismiss and denying Mr. Merideth's motion to amend. On the statute of

limitations issue, the court made the following verbatim findings:

- The court finds that the applicable statute of limitations is the general three year statute of limitations set forth in Miss. Code Ann. § 15-1-49; and

- Because Mr. Merideth's claim accrued, at the latest, on October 2, 1999, the day after the last installment on the note was due, the statutory period of limitation expired, at the latest, on October 2, 2002.

R.E. 4, R. 119 (Order).

On Mr. Merideth's Motion to Amend, the court held that Mr. Merideth's proposed amendment would be futile because the undisputed evidence was that Philip had lived continuously in the state since June 1998, which was several months before the first installment on the note became due on September 1, 1998. *Id.*[3] Further, the court found that "Mr. Merideth failed to come forward with any specific evidence of alleged inequitable or fraudulent conduct, which is Mr. Merideth's burden."*Id* at 121. Accordingly, the court denied Mr. Merideth's Motion to Amend finding that Mr. Merideth failed to satisfy his burden of proof, and that both of the grounds asserted by Mr. Merideth in support of his proposed amendment would be futile and would not have prevented the dismissal of his case pursuant to the applicable statute of limitations. *Id.* at 121-22.

On February 12, 2007, Philip brought on for hearing his request for attorney's fees pursuant to Rule 11 and the Act. The court granted Philip's motion and awarded attorney's

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[3] The undisputed evidence the court was referring to included Philip's affidavit, dated August 23, 2006, and his Responses to Interrogatories and Request for Production of Documents, dated November 3, 2006. R.E. 4, R. 120 (Order).

fees and expenses in the amount of eight thousand, two hundred ninety-eight dollars. TR. 54-55, R.E. 5, R. 123-126 (Final Judgment for the Recovery of Fees and Expenses).

SUMMARY OF THE ARGUMENT

The court did not abuse its discretion when it denied Mr. Merideth's Motion to Amend Complaint on the grounds of futility, and granted Philip's Motion for Sanctions awarding Philip his reasonable attorney's fees and expenses pursuant to Rule 11 of the Mississippi Rules of Civil Procedure and the Mississippi Litigation Accountability Act.

Mr. Merideth's proposed amendment to his Complaint was futile because both arguments advanced in support of the proposed amendment would not have tolled the statute of limitations or made it inapplicable. While leave to amend "shall be freely given when justice so requires," obtaining leave of court to amend is not guaranteed or absolute, and a court may disallow the amendment on the grounds of futility. In this case, Mr. Merideth advanced two arguments in support of his proposed amendment, both of which were futile.

First, Mr. Merideth claimed that the statute of limitations ***may*** have been tolled because he believed that Philip had been absent from the state for a period of two years. However, Philip presented undisputed evidence that he has lived in the state continuously since June 1998. Because the promissory note did not mature, and thereby trigger the statute of limitations, until after Philip returned to the state, Philip's absence from the state did not toll the statute of limitations.

Second, an amendment may be deemed futile and disallowed if the amendment itself

fails to state a cause of action for which relief can be granted. Mr. Merideth argues his proposed amendment should have been granted because Philip may have been equitably estopped from asserting a statute of limitations defense. Yet, Mr. Merideth did not allege any facts to provide the court with a basis to conclude that Philip has engaged in any inequitable conduct, as was his burden.

Mr. Merideth also relies on federal procedural law that (1) is not binding on the Court, and (2) has since been abrogated by the United States Supreme Court. Mr. Merideth cites *Stribling* for the principle that his proposed amendment should have been permitted if there were some set of hypothetical facts that would support his theory of relief. However, in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Supreme Court concluded that a plaintiff may no longer avoid dismissal of his complaint by a "wholly conclusory statement," but must base his complaint on facts that nudge the claim beyond the conceivable to the plausible. Mr. Merideth made no effort to point the court to any facts which support an equitable estoppel argument, nor did he allege any facts that would have had tolled the statute of limitations.

Mr. Merideth further argues that the court incorrectly applied a summary judgment standard by referring to evidence beyond the pleadings when it concluded that Mr. Merideth's proposed amendment was futile. However, this practice is acceptable under Mississippi law, so long as adequate notice is given of an intention to do so. In this case, Mr. Merideth was apprised of Philip's request, if necessary, to convert his Motion to Dismiss into

one for summary judgment approximately 32 days before it was heard by the court. Therefore, Mr. Merideth had ample notice that it was possible the court would look to extrinsic evidence and convert Philip's motion to summary judgment.

The court, likewise, did not abuse its discretion in awarding Philip his reasonable attorney's fees pursuant to Rule 11 and the Act. Mr. Merideth's claim in *Merideth III* was frivolous and without substantial justification, because it was clearly barred by the applicable statute of limitations. Moreover, Mr. Merideth was placed on notice by a letter from Philip's counsel that Philip would assert a statute of limitations defense; yet, Mr. Merideth refused to dismiss the lawsuit, thereby intentionally maintaining a meritless action.

Philip was also entitled to an award of attorney's fees because *Merideth III* was filed for purposes of harassment. Mr. Merideth has filed three lawsuits against his son in a fifteen month period, all of which were of questionable legal merit. Mr. Merideth need not have filed *Merideth I* simply to modify his will, and *Merideth II* was filed as a pressure play to force Philip to sell his interest in the land which was the subject of that suit. To add insult to injury, this case, which was clearly barred by the statute of limitations, was filed a mere six days after the closing on the land which was the subject of *Merideth II*. Therefore, the court correctly held that *Merideth III* was frivolous and without substantial justification and filed for purposes of harassment, thereby justifying the imposition of sanctions.

Finally, Mr. Merideth is entitled to an award of his reasonable attorney's fees incurred in the defense of this appeal pursuant to the Mississippi Litigation Accountability Act and

Rule 38 of the Mississippi Rules of Appellate Procedure. This appeal is frivolous and was filed without substantial justification, just as was the case below.

For the foregoing reasons, and those set forth in detail in the "Argument" section below, the court did not abuse its discretion in denying Mr. Merideth's Motion to Amend Complaint and awarding Philip his reasonable costs and attorney's fees. The court's decision should, therefore, be affirmed.

ARGUMENT

A. Standard of Review

There are two issues on appeal to this Court. The first issue is whether the lower court correctly denied Mr. Merideth's Motion to Amend Complaint on the grounds of futility. The standard of reviewing a decision denying a motion for leave to amend is for an abuse of discretion. *Poindexter v. Southern United Fire Ins. Co.*, 838 So. 2d 964, ¶ 22 (Miss. 2003). Unless an appellate court is convinced that the trial judge abused its discretion in the denial of the motion, it is without authority to reverse. *Id.*

The second issue is whether the lower court correctly granted Philip's Motion for Sanctions. Again, the standard of review for a decision imposing sanctions pursuant to the Act and Rule 11 is abuse of discretion. *Jackson County Sch. Bd. v. Osborn*, 605 So. 2d 731, 735 (Miss. 1992). *See also Foster v. Ross*, 804 So. 2d 1018, 1022 (Miss. 2002) ("when reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, this Court is limited to a consideration of whether the trial court abused

its discretion"); *Scruggs v. Saterfiel*, 693 So. 2d 924, 927 (Miss. 1997) (the Court may ***only*** reverse a chancellor's decision regarding the imposition of sanctions pursuant to the Mississippi Litigation Accountability Act when the chancellor abused her discretion).

Mr. Merideth contends that there is a conflict in the case law regarding the appropriate standard of review of a decision regarding the imposition of sanctions pursuant to Rule 11 and the Act, and that the proper standard is *de novo*. *See e.g., Estate of Ladner v. Ladner*, 909 So. 2d 1051 (Miss. 2004) (citing *Amiker v. Drugs for Less, Inc.*, 796 So. 2d 942, 945-46 (Miss. 2001)). Mr. Merideth is in error. The "conflict," to the extent one exists, arises only where the trial court employs the wrong legal standard in imposing sanctions. *See Leaf River Forest Products, Inc. v. Deakle*, 661 So. 2d 188, 196 (Miss. 1995) (stating, "this Court will reverse only where the trial court abused its discretion in imposing sanctions, ***so long as the correct legal standards were employed.***").

Here, the standard employed by the lower court under Rule 11 was whether Mr. Merideth's claim was ***"frivolous or filed for the purpose of harassment."*** Under the Act, the standard employed by the court was whether the case had been filed ***"without substantial justification,"*** or ***"interposed for delay or harassment."*** Pursuant to both Rule 11 and the Act, the court applied the correct legal standards. *Foster*, 804 So. 2d at 1022. Therefore, the standard of review for this issue on appeal is whether the trial court abused its discretion in granting Philip his attorney's fees and expenses under Rule 11 and the Act.

In applying the abuse of discretion standard, the Court should affirm the trial court's decision unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached on the weighing of relevant factors." *Amiker*, 796 So. 2d at 948 (citing *Cooper v. State Farm Fire & Cas. Co.*, 568 So. 2d 687 (Miss. 1990)). The court clearly did not abuse its discretion in denying Mr. Merideth's Motion to Amend on the grounds of futility, nor did it abuse its discretion in imposing sanctions on Mr. Merideth pursuant to Rule 11 and the Act. Therefore, both of the lower court's decisions should be affirmed.

B. The Court Correctly Denied Mr. Merideth's Motion To Amend Complaint

1. Mr. Merideth's Proposed Amendment to the Complaint was Futile

The court did not abuse its discretion in denying Mr. Merideth's Motion to Amend Complaint, because the proposed amendment clearly would have been futile. Rule 15 of the Mississippi Rules of Civil Procedure provides that after a responsive pleading is filed, a plaintiff may amend his complaint only upon leave of court. Rule 15 further provides that "leave shall be freely given when justice so requires." However, obtaining leave of court is not guaranteed or absolute. An amendment will be disallowed if the amendment will unduly prejudice the opposing party, or if the amendment would be ***futile.*** *Wilner v. White*, 788 So. 2d 822, 824 (Miss. Ct. App. 2001) *See also Red Enterprises, Inc. v. Peashooter, Inc.*, 455 So. 2d 793 (Miss. 1984) (holding that in the absence of any apparent or declared reason, such as ***futility*** of an amendment, then leave should be freely given); *Jones v. Lovett*,

755 So. 2d 1243, 1247 (Miss. Ct. App. 2000) (stating that one reason specifically contemplated by the Mississippi Supreme Court as a basis for denial of a request to amend a complaint is ***futility*** of the amendment) (overruled on other grounds). Two of the most common examples of futility in the context of Rule 15 is where the amendment will not affect application of the statute of limitations, or where the amendment itself fails to state a cause of action. *Knotts ex rel. Knotts v. Hassell*, 659 So. 2d 886, 889 (Miss. 1995).

In this case, Mr. Merideth advanced two arguments in support of his proposed amendment. First, Mr. Merideth claimed that the statute of limitations ***may*** have been tolled because he believed Philip was out of the state for a period of two years, although he did not know what years he was absent from the state. R. 53. Second, Mr. Merideth alleged that Philip should be equitably estopped from asserting a statute of limitations defense due to an alleged confidential relationship between the parties and unspecified actions or inactions on Philip's part. *Id.* Both arguments are without merit.

The court found that Mr. Merideth's proposed amendment was futile because the amendment would not toll the statute of limitations and/or make it inapplicable. R.E. 4, R. 118-122 (Order). Although Mr. Merideth's proposed amendment states, ***on information and belief***, that Philip lived outside of the state for a period of two years, Philip presented undisputed evidence that he has lived in the state continuously since June 1998.[4] R.E. 7, TR.

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[4] In his motion, Philip requested that to the extent the court was required to consider extrinsic evidence, the court convert his motion to one for summary judgment pursuant to Miss. R. Civ. Pro. 56.

Ex. 4 (Exhibit 4, 11/8/2006 hearing, Defendant's Responses to Plaintiff's First Interrogatories) and R.E. 6, R. 33 (Philip affidavit). Therefore, the fact that Philip may have lived outside of the state for a period of two years prior to June 1998 would not have tolled the statute of limitations pursuant to Miss. Code Ann. § 15-1-63,[5] because the note did not mature, and thereby trigger the statute of limitations until October 1, 1999. *Id.*[6] Because the statute of limitations expired no later than October 2, 2002, and because Mr. Merideth filed *Merideth III* on July 24, 2006, the court was clearly correct in ruling that Mr. Merideth's proposed amendment was futile.

Second, the amendment itself failed to state a cause of action for which relief could be granted. Although Mr. Merideth alleged that the statute of limitations should not apply on the grounds of equitable estoppel, Mr. Merideth did not plead *any* facts to demonstrate that Philip engaged in any inequitable or fraudulent conduct. In *Southern Win-Dor, Inc. v. RLI Insurance Co.*, the court noted that "equitable estoppel should only be applied against the statute of limitations in the most egregious of cases, because the primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time . . . they are designed to suppress assertion of false and stale claims, when evidence has

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[5] Miss. Code. Ann. § 15-1-63 provides: "If, after any cause of action has accrued in this State, the person whom it has accrued be absent from and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action after he shall return."

[6] Specifically, the lower court found that "Mr. Merideth's claim accrued at the latest on October 2, 1999, the day after the last installment on the note was due, therefore, the statutory period of limitation expired at the latest on October 2, 2002." R.E. 4, R. 119 (Order). The expiration of the statute of limitations will subsequently be addressed in more detail.

been lost [and] memories have faded..." 925 So. 2d 884, 887 (Miss. Ct. App. 2005). Further, it is the burden of the party opposing dismissal on statute of limitations grounds of coming forward with evidence to show inequitable or fraudulent conduct. *See McCrary v. City of Biloxi*, 757 So. 2d 978, 981 (Miss. 2000) (stating "the burden of establishing the elements of an estoppel is on the party asserting the estoppel, and the existence of the elements of an estoppel must be established by the preponderance of the evidence"). Dismissal will not be precluded on bald conclusions alone. *Id.*

In this case, Mr. Merideth did not make any showing, nor did he allege any facts in support of his proposed amended complaint, to provide the court with a basis to conclude that Philip should be estopped from asserting a statute of limitations defense, nor has Philip engaged in any such acts. Mr. Merideth's proposed amendment merely asserted that Philip should be equitably estopped from asserting a statute of limitations defense by virtue of an alleged confidential relationship between the parties and based on Philips alleged actions or inactions. However, Mr. Merideth did not plead any facts to support that bald conclusion, nor are any facts present. Accordingly, the lower court did not abuse its discretion in denying Mr. Merideth's Motion to Amend Complaint on the grounds that the proposed amendment was futile.

2. Mr. Merideth's Reliance on *Stribling* Is Misplaced

In support of his brief, Mr. Merideth relies on *Stripling v. Jordan Prod. Co.*, 234 F.3d 863 (5th Cir. 2000), wherein the Fifth Circuit Court of Appeals addressed the question of

futility of a proposed amendment pursuant to our Federal Rules of Civil Procedure. Relying upon *Stripling*, Mr. Merideth contends that the court was required to view his complaint in terms of the theoretical, and deny his motion only if it appears beyond a reasonable doubt that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 234 F.3d at 872. Thus, argues Mr. Merideth, only if the court, in its wildest imagination, could not conceive of any set of facts that would allow Mr. Merideth to go forward on his claims, should his motion have been denied.

To the extent the Court is inclined to rely on federal jurisprudence, the United States Supreme Court recently abrogated Mr. Merideth's construction of the "no set of facts" language that appears in Rule 12(b)(6). Specifically, in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Court noted:

> This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley*[7] in some such way when formulating its understanding of the proper pleading standard.
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> * * *
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> On such a focused and literal reading of *Conley's* "no set of facts," ***a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts"*** to support recovery.

Id. at 1968 (internal citations omitted) (brackets in original) (emphasis added). Concluding

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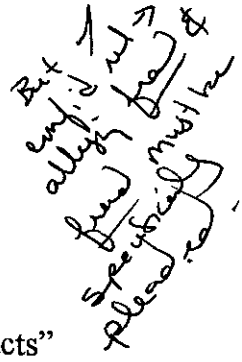
[7] The holding in *Conley vs. Gibson,* 78 S.Ct. 99 (1957) is the basis for the Fifth Circuit's opinion in *Stribling.*

that Rule 12(b) did not allow plaintiffs to avoid dismissal on what facts are merely conceivable, the Court explained:

> [W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line ***from conceivable to plausible***, their complaint must be dismissed.

Id. at 1974 (emphasis added).



In this case, it is clear that Mr. Merideth is clinging to the old *Conley* "no set of facts" construction that, when if literally construed, would defeat a motion to dismiss based on theoretically, unsubstantiated facts. That plainly is no longer the law (to the extent it ever was). In the context of Mr. Merideth's equitable estoppel argument, Mr. Merideth made no effort whatsoever to point to any facts that would lead the court to conclude Philip engaged in some inequitable conduct that would estop him from asserting a statute of limitations defense. Rather, he pled precisely what the *Twombley* court cautioned against, a "wholly conclusory statement," that should not survived a motion to dismiss.

Moreover, the Court had before it undisputed evidence that there was no merit to Mr. Merideth's "information and belief" argument that the statute of limitations had been tolled due to Philip's absence from the state while he completed his medical school residency. In his response to interrogatories, dated November 3, 2006, Philip indicated the dates in which he was out of the state completing his medical education. In his affidavit, dated August 23, 2006, Philip again states under oath that he has lived continuously in Mississippi since June 1998. Thus, there was no basis upon which to conclude that Mr. Merideth's speculative

suggestion that the statute had been tolled. In the words of the Twombley Court, Mr. Merideth failed to nudge his allegations beyond the theoretical to the plausible. Thus, the Court acted within its discretion in denying Mr. Merideth's Motion to Amend on the grounds of futility.

3. The Court Did Not Apply the Incorrect Legal Standard

Finally, Mr. Merideth argues that the Court incorrectly applied a summary judgment standard when it referred to Philip's discovery responses in concluding the proposed amendment was futile. In support of that argument, Mr. Merideth cites a case from the district court of the District of Columbia, which Mr. Merideth contends stands for the hard and fast principle that "consideration of external materials . . . cannot properly take place under a dismissal for failure to state a claim." Mr. Merideth's Brf. at 12 (quoting *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985).

Mr. Merideth's argument is without merit for two reasons. First, Mr. Merideth's legal argument runs headlong into the well-established case law of this state. This Court has consistently and repeatedly held that if a court refers to matters outside of the pleadings, a motion to dismiss may be converted into one for summary judgment. *See Walton v. Bourgeois*, 512 So. 2d 698 (Miss. 1987) (stating "if, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and considered by the court, the motion ***shall*** be treated as one for summary judgment...") (quoting Miss. R. Civ. Pro. 12(b)). Indeed, Philip contemplated this

possibility when he specifically stated in his response to Mr. Merideth's Motion to Amend Complaint, that "to the extent the court finds it necessary to refer to evidence beyond the pleadings, Philip respectfully requests that his Motion to Dismiss be converted to a Motion for Summary Judgment." *See Bias v. Bias*, 493 So. 2d 342, 344 n.2 (Miss. 1986) (stating that when a trial judge considers matters beyond the pleadings it ordinarily converts a motion to dismiss into a motion for summary judgment).

Second, Mr. Merideth misstates the holding of *Tele-Communications of Key West*. Unlike the facts of this case, in *Tele-Communications of Key West*, the court found that the treatment of the dismissal as a motion for summary judgment would be inappropriate because it would have been procedurally unfair, i.e., the motion to convert was served a mere four days before it was heard. 757 F.2d at 1335. Unlike that case, there was no procedural unfairness to Mr. Merideth, on notice of Philip's request to convert his motion to one for summary judgment if the court found it necessary to consider external materials. Mississippi law requires no more than ten days notice. *City of Gulfport v. Orange Grove Utilities, Inc.*, 735 So. 2d 1041, 1047 (Miss. 1999). Thus, the Court's reference to materials beyond the pleadings or application by the Court of the summary judgment standard was not an abuse of discretion.

C. *Merideth III* Was Filed Without Substantial Justification, Was Frivolous In Nature, And Filed For Purposes Of Harassment

The questions before the lower court under Rule 11 and the Act were whether the claim asserted by Mr. Merideth in *Merideth III* was frivolous, filed without substantial

justification, or interposed for the purpose of harassment or delay. Philip's arguments on these issues were two-fold. On the issue of whether the claim was frivolous and/or filed without substantial justification, Philip demonstrated that Mr. Merideth's claim was clearly barred by the statute of limitations. Moreover, Mr. Merideth was placed on notice by letter from Philip's counsel, dated August 7, 2006, that Philip's position was that the claim was barred by the statute of limitations, yet Mr. Merideth refused to voluntarily dismiss the lawsuit and maintained a meritless claim.

On the issue of harassment, Philip demonstrated that after being put on notice that *Merideth III* was frivolous and filed without substantial justification, instead of dismissing his lawsuit, Mr. Merideth sought to amend in an attempt to craft a claim where none existed, causing Philip to expend more money and time in the defense of a frivolous lawsuit, filed for the purpose of harassment. Additionally, Philip demonstrated that *Merideth III* was part of an obvious, ongoing pattern of harassment by Mr. Merideth through the legal system.

The court considered the evidence and arguments by both sides on these issues and concluded that the grounds asserted by Philip in support of his request for sanctions had been satisfied. R.E. 5, R. 121 (Final Judgment for the Recovery of Fees and Expenses). Mindful that the Court will examine these issues under a deferential standard of review, the following discussion illustrates that the lower court did not commit a "clear error in judgment" and, therefore, did not abuse its discretion.

1. Mr. Merideth's Claim Was Frivolous and Filed Without Substantial Justification

The lower court did not abuse its discretion by imposing sanctions on Mr. Merideth pursuant to Rule 11 and Mississippi Litigation Accountability Act. Claims on a promissory note are governed by Mississippi's general three-year statute of limitations, Miss. Code Ann. § 15-1-49. *See Andrus v. Ellis*, 887 So. 2d 175 (Miss. 2004); *EB, Inc. v. Smith*, 757 So. 2d 1017, 1020 (Miss. Ct. App. 2000). In cases where a note is payable in installments, the Supreme Court has held the "statute of limitations begins to run as to each installment from the time when it falls due; and the creditor can recover only those installments falling due within the statutory period before the beginning of the action." *Freeman v. Truitt*, 119 So. 2d 765, 771 (Miss. 1960).

Mr. Merideth's cause of action was clearly barred by the three-year statute of limitations. Accepting the allegations of Mr. Merideth's Complaint as true, all installments on the promissory note were due no later than ***October 1, 1999***. Accordingly, the statute of limitations on all of Mr. Merideth's claims expired, at the latest, on ***October 2, 2002.***

Neither Mr. Merideth's Complaint, nor his proposed Amended Complaint, alleged any facts that would support a tolling argument, as no such facts exist. Because Mr. Merideth filed his Complaint on ***July 24, 2006***, his claim was filed almost ***four years*** beyond the expiration of the statute of limitations. Additionally, Mr. Merideth was apprised of the fact that his claim was clearly barred by the statute of limitations and was given an opportunity to dismiss his pleading voluntarily; however, Mr. Merideth chose not to do so. R.E. 1, R. 16-

17 (Letter, D. James Blackwood, Jr. to Mr. Merideth, dated 8/7/06). While Mr. Merideth argues that he responded promptly to this letter indicating that he would assert an equitable estoppel argument, he failed to adequately plead that the doctrine should operate against the statute of limitations; therefore the continued maintenance of *Merideth III* was frivolous and without substantial justification.

The lower court agreed with the foregoing analysis, and awarded Philip attorney's fees and costs pursuant to Rule 11 and the Act, specifically finding:

> - As reflected in the Court's Order, dated November 16, 2006, Mr. Merideth's claim was clearly barred by the statute of limitations.
>
> - Moreover, Mr. Merideth was placed on notice by letter from Philip's counsel, dated August 7, 2006, that Philip's position was that the claim was barred by the statute of limitations and was filed solely for the purpose of harassment.
>
> - Based on the foregoing, the Court finds that not only was Mr. Merideth's claim frivolous and without substantial justification, but also that the maintenance of the lawsuit after receiving notice of Philip's position was frivolous and without substantial justification.

R.E. 5, R. 125 (Final Judgment for the Recovery of Fees and Expenses). Thus, the Court clearly had well-founded grounds supporting its ruling and was not an abuse of the Court's discretion.

2. *Merideth III* was Filed for Purposes of Harassment

Additionally, against the backdrop of the facts recited above, it is clear that this

lawsuit is part and parcel of an ongoing pattern of harassment by Mr. Merideth of Philip and his family. Mr. Merideth has filed three frivolous lawsuits against his son in a fifteen month period (April, 2005 to July, 2006), and pursued them in an intentionally abusive manner. Mr. Merideth need not have filed *Merideth I* simply to modify his Will, and there was absolutely no reason Philip or his wife needed to participate in that trial when they had agreed to the default and when Philip's wife was unavailable due to her high-risk pregnancy and delivery. Similarly, Mr. Merideth had absolutely no standing or legal basis for filing *Merideth II*. Mr. Merideth interfered with Philip's right of quiet use and enjoyment of his property, and he required Philip to incur significant expenses and fees in preparing a defense to a claim that never should have been filed. To add insult to that injury, a mere six days after *Merideth II* was resolved, Mr. Merideth filed *Merideth III*, which was clearly barred by the statute of limitations. This pattern of harassment is precisely the type of conduct that Rule 11 and the Act were designed to prevent, which the Court acknowledged. Accordingly, the Court did not abuse its discretion in awarding Philip his expenses and attorneys' fees in *Merideth III*, and its decision should be affirmed.

D. This Court Should Award Philip Attorneys' Fees And Expenses Incurred In Connection To Defending This Frivolous Appeal

Miss. Code Ann. § 11-55-15 provides in pertinent part: "This chapter shall apply to any suit or claim or defense ***or appeal*** filed or perfected subsequent to the effective date of this chapter..." Additionally, Rule 38 of the Mississippi Rules of Appellate Procedure provides the following: "In a civil case if the Supreme Court or Court of Appeals shall

determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee." Courts have evaluated Rule 38 frivolity by reference to Miss. R. Civ. Pro. 11. *McCoy v. City of Florence*, 949 So. 2d 69, 85 (Miss. Ct. App. 2006) (citing *Roussel v. Hutton*, 638 So. 2d 1305, 1318 (Miss. 1994)). Since violations of the Act apply to appeals as well as the original lawsuit, and Rule 38 of the Mississippi Rules of Appellate Procedure is evaluated in terms of the Rule 11 standard, this Court should award Philip his attorneys' fees and expenses incurred in the defense of this appeal for the same grounds raised in the case below.

Awarding Philip his reasonable attorney's fees and expenses in connection with defending this appeal is consistent with the underlying policy of Rule 11 and the Act. A defendant should not be put through the burden of defending a frivolous lawsuit, be awarded his reasonable attorney's fees and expenses, and then be required to bear the expense of responding to an appeal that is just as frivolous as the underlying lawsuit.

If the Court concludes the trial court did not abuse its discretion, the Court would create an inconsistent result by requiring Philip to incur the fees and expenses associated with this appeal. The prosecution of this appeal is frivolous, was pursued without substantial justification, and is part of an ongoing pattern of harassment by Mr. Merideth of his son. Therefore, the Court should grant Philip his reasonable expenses and attorney's fees in his defense of this appeal.

Because this matter is ongoing, and Philip will incur additional fees and expenses if oral argument is granted, Philip requests that if the Court finds it appropriate to award him the attorney's fees incurred in the defense of this appeal, he be allowed thirty days from the date of the Court's Opinion to submit an affidavit delineating his attorney's fees and expenses. *See McCoy*, 949 So. 2d at 85.

CONCLUSION

For the reasons enumerated above, the Court should affirm the chancery court's denial of Mr. Merideth's Motion to Amend Complaint and grant of Philip's Motion for Sanctions and Final Judgment for the Recovery of Fees and Expenses in Philip's favor in the amount of eight thousand, two hundred ninety-eight dollars and nine cents ($8,298.09), together with interest at the legal rate from and after February 26, 2007, plus costs of court. Additionally, the Court should award Philip his attorney's fees and double the costs incurred in connection to the defense of this appeal pursuant to Miss. Code Ann. § 11-55-15 and Rule 38 of the Mississippi Rules of Appellate Procedure, plus interest at the legal rate from and after the date this appeal was filed.

This the 4th day of October, 2007.

Respectfully Submitted,

PHILIP T. MERIDETH, M.D.

By: _____

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CERTIFICATE OF SERVICE

I, D. James Blackwood, Jr., do hereby certify that I have this day served, via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

The Honorable Denise Owens
Hinds County Chancery Court Judge
Post Office Box 686
Jackson, MS 39205-0686

H. L. Merideth, Jr., Esq.
407-B West Parkway Place
Ridgeland, MS 39157

This the 4th day of October, 2007.

D. James Blackwood, Jr.