

IN THE SUPREME COURT OF MISSISSIPPI

AND

THE MISSISSIPPI COURT OF APPEALS

No. 2008-CA-00997

**MICHAEL T. HENDON, SHERRY HENDON
AND CHARLES HENDON**

APPELLANTS

VS.

BEVERLY LANG AND ROBERT C. LANG

APPELLEES

**APPEAL FROM THE CIRCUIT COURT
OF COPIAH COUNTY, MISSISSIPPI**

**BRIEF FOR APPELLEES
BEVERLY LANG AND ROBERT C. LANG**

ORAL ARGUMENT NOT REQUESTED

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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 disqualification or recusal.

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Trial Court Judge:

The Honorable Isadore W. Patrick
Circuit Court Judge of Warren County, Mississippi
Post Office Box 351
Vicksburg, Mississippi 39180

SO CERTIFIED this the 29th day of September, 2009.



EDUARDO A. FLECHAS,
Attorney for Appellees

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I. STATEMENT OF THE ISSUES

The issues presented for review are:

1. Did the Trial Court abuse its discretion in deciding to set aside its prior Order confirming certain “Requests for Admission” admitted as a matter of law against the Langs and to allow the Langs an opportunity to properly respond to such “Requests for Admission” by and through legal counsel?
2. Did the Trial Court abuse its discretion in denying the Hendons’ motion for a mistrial based upon allegedly prejudicial remarks made by the Langs’ counsel during the course of the trial?
3. Did the Trial Court abuse its discretion when it determined that it no longer possessed jurisdiction in this civil action to enter an order awarding attorneys’ fees, pending this appeal?

II. STATEMENT OF THE CASE

(A) Course of Proceedings and Disposition in the Court Below

On or about August 14, 2003, Plaintiffs Michael T. Hendon, Sherry M. Hendon, and Charles T. Hendon (the “Hendons”) filed this civil action in the Circuit Court of Copiah County, Mississippi alleging (a) breach of contract and (b) bad faith against Defendants Billy Palmer and Glenda Palmer (the “Palmers”) and Defendants Beverly Lang and Robert C. Lang (the “Langs”).¹ Before this action went to trial, the Hendons entered into an agreed order of dismissal with prejudice as to the Palmers, thereby dismissing Billy and Glenda Palmer from the lawsuit and leaving the Langs as the only remaining defendants.²

This civil action was tried before a jury on March 31 through April 2, 2008, wherein a jury verdict was returned in favor of Defendants Beverly Lang and Robert C. Lang. The Trial Court entered its final judgment upholding the jury’s verdict, which was filed on April 9, 2008.³ The Hendons filed a motion for judgment notwithstanding the verdict and/or alternatively, motion for a new trial on April 21, 2008.⁴ An Order of the Trial Court denying the Hendons’ J.N.O.V. motion was entered on May 8, 2008.⁵ The Hendons’ notice of appeal is dated June 9, 2008, thirty-one (31) days after a final judgment was entered in this cause; however, the notice of appeal was somehow filed on June 6, 2008.⁶

Prior to the filing of the Hendons’ notice of appeal, however, the Hendons’ attorney had presented to the Trial Court an itemized statement for attorneys’ fees, expenses and costs. This was done pursuant to a previous Trial Court Order dated April 24, 2007.⁷ The April 24, 2007 Order was prompted by the Langs’ earlier motion to set aside an October 19, 2006 Order of the Trial Court, which had confirmed, as admitted, certain requests for admissions previously propounded by the Hendons upon the Langs.⁸ The Trial Court’s April 24, 2007 Order did, in fact, set aside the Court’s October 19, 2006 Order, thus relieving the Langs from having certain

¹ The Honorable Lamar Pickard originally presided as Circuit Court Judge over this action but recused himself on or about March 21, 2005 and on June 17, 2005 the Mississippi Supreme Court entered its Order appointing the Honorable Isadore Patrick as Special Circuit Court Judge.

² See Record, Vol. 1, Pg. 59-60.

³ See Record, Vol. 2, Pg. 216-217; Record Excerpts, Tab 3.

⁴ See Record, Vol. 2, Pg. 219-226; Record Excerpts, Tab 4.

⁵ See Record, Vol. 2, Pg. 230; Record Excerpts, Tab 5.

⁶ See Record, Vol. 2, Pg. 231-232; Record Excerpts, Tab 2.

⁷ See Record, Vol. 2, Pg. 253-255; Record Excerpts, Tab 16.

⁸ See Record, Vol. 1, Pg. 79; Record Excerpts, Tab 13.

requests for admissions deemed admitted as a matter of law against them.⁹ However, the April 24, 2007 Order required the Langs to pay attorneys' fees to the Hendons for work done by the Hendons' attorney from October 19, 2006 through March 23, 2007.¹⁰ As stated earlier, the April 24, 2007 Order also required the Hendons' attorney to submit an itemized statement of time spent and expenses incurred as a result of opposing the Langs' request to have said admissions set aside.¹¹ This itemized statement was to be reviewed by the Langs' counsel and the Trial Court so that the Court could determine whether the amount submitted by the Hendons' attorney was reasonable.¹²

Although the record is not clear as to what date the Hendons' attorney submitted his itemized bill statement to the Trial Court, according to Appellants' Brief the bill statement was submitted for review on or about June 2, 2008.¹³ The Hendons' filed their notice of appeal four (4) days later on June 6, 2008, before the Trial Court had an opportunity to rule on the reasonableness of the submitted bill statement.¹⁴

On June 20, 2008, the Langs filed a motion to dismiss the Hendons' motion for attorneys' fees and expenses in the sum of \$39,337.50, since the Trial Court had been divested of any jurisdiction in the civil action since June 6, 2008, the date on which the Hendons had noticed this case for appeal in the Mississippi Supreme Court. The Trial Court entered an Order on June 20, 2008, which was filed on June 24, 2008, that acknowledged the Trial Court's lack of jurisdiction over this action since the filing of the Hendons' notice of appeal on June 6, 2008. A motion to set aside the June 24, 2008 Order was filed on July 8, 2008 by the Hendons, more than one (1) month after the case had been noticed for appeal.¹⁵ The Trial Court entered its Order denying the Hendons' motion to set aside the June 24, 2008 Order on July 11, 2008, which Order was filed July 14, 2008.¹⁶ No other action has taken place in the Trial Court since July 14, 2008.

⁹ See Record, Vol. 2, Pg. 253-255; Record Excerpts, Tab 16.

¹⁰ See Record, Vol. 2, Pg. 253-255; Record Excerpts, Tab 16.

¹¹ See Record, Vol. 2, Pg. 253-255; Record Excerpts, Tab 16.

¹² See Record, Vol. 2, Pg. 253-255; Record Excerpts, Tab 16.

¹³ See Brief of Appellant, Pg. 2.

¹⁴ See Record, Vol. 2, Pg. 231-232; Record Excerpts, Tab 2.

¹⁵ See Record, Vol. 2, Pg. 244 -256; Record Excerpts, Tab 8.

¹⁶ See Record, Vol. 2, Pg. 257; Record Excerpts, Tab 9.

(B) Statement of Relevant Facts

This civil action arises from an alleged breach of contract between the Hendons and the Langs as to leased, commercial property located at 308 East Railroad Avenue, Crystal Springs, Mississippi (the "Property").¹⁷ The crux of the trial was whether the Hendons (former tenants of the Property) had a valid contract with the Langs (third-party purchasers of the Property) with regard to the Property in question and, if so, whether said contract, which allegedly contained a purchase option in favor of the Hendons, was violated when the Palmers (former owners and landlords of the Property) sold the Property to the Langs, rather than allowing the Hendons an opportunity to exercise their alleged purchase option.

The case was tried before a jury on March 31 through April 2, 2008 in the Circuit Court of Copiah County, Mississippi, wherein a jury verdict was returned in favor of the Langs. The jury's verdict read:

We the jury after hearing all testimony and viewing the evidence have come to the conclusion that there was not a contract between the Hendons and the Langs and therefore, we hereby find for the Defendants.¹⁸

The facts and evidence presented at trial by both the Hendons and the Langs do not require extensive recitation here, since the issues appealed by the Hendons relate solely to the actions taken by the Trial Court Judge with regard to matters of procedure, evidence, and jurisdiction. The merits and/or validity of the jury's verdict in favor of the Langs have not been appealed. Likewise, the Trial Court's denial of the Hendons' motion for judgment notwithstanding the verdict and/or alternatively, motion for a new trial has not been appealed. Therefore, the facts, evidence, and law supportive of these ultimate findings and conclusions does not require further discussion, since they are of little importance in deciding the issues that have been presented for appeal. Only the facts, evidence, and law relating to the Hendons' three (3) stated issues for appeal warrant discussion and analysis. The set of facts relevant to each of the Hendons' three (3) stated issues presented on appeal are taken in turn.

¹⁷ See Record, Vol. 1, Pg. 11-15.

¹⁸ See Record, Vol. 2, Pg. 216.

- (i) **Facts relevant to the Trial Court's decision to set aside its prior Order confirming certain "Requests for Admission" admitted as a matter of law against the Langs and to allow the Langs an opportunity to respond to said "Requests for Admission" through legal counsel**

It wasn't until almost three (3) years after this civil action was commenced in the Trial Court, on July 3, 2006, that the Hendons propounded upon the Langs their first written discovery.¹⁹ Part of that first set of discovery was the Hendons' Requests for Admissions ("Requests for Admission"), which are at issue in this appeal.²⁰ By July 3, 2006, the Langs had learned of the Palmers' earlier dismissal from the case and believed themselves to be next in line for dismissal.²¹ Additionally, the Langs were no longer being represented by counsel at the time they received the Requests for Admission.²² Immediately upon receiving the Requests for Admission, the Langs contacted Billy Palmer, a former defendant in the action.²³ Mr. Palmer informed the Langs that answering the Hendons' Requests for Admission was a simple procedure that he could take care of for them.²⁴ The Langs forwarded to Mr. Palmer the Requests for Admission *via* facsimile,²⁵ however, the entirety of the faxed Requests for Admission was not received by Mr. Palmer due to a transmission error with the Langs' fax machine.²⁶ As a result, Mr. Palmer, on behalf of the Langs, only responded to one (1) through six (6) of the propounded Requests for Admission.²⁷

Without realizing the insufficiency of their responses to the Requests for Admission, the Langs signed the document prepared for them by Mr. Palmer and filed it with the Court as their formal response to the Hendons' Requests for Admission.²⁸ Numbers one (1) through five (5) of the Requests were denied by the Langs, through Mr. Palmer, and Number six (6) was admitted.²⁹ The Langs did not realize or understand that there were, in fact, twenty (20) requests for admission and that all twenty (20) requests had not been transmitted properly *via* facsimile to

¹⁹ See Record, Vol. 1, Pgs. 52-58.

²⁰ See Record, Vol. 3, Pg. 7, Lines 6-10; See also Record, Vol. 1, Pgs. 11-15; See also Record, Vol. 1, Pgs. 52-58; Record Excerpts, Tab 10.

²¹ See Record, Vol. 3, Pg. 17, Lines 25-29 and Pg. 18, Lines 1-7; Record Excerpts, Tab 19.

²² See Record, Vol. 1, Pgs. 50-51.

²³ See Record, Vol. 3, Pg. 17, Lines 25-29 and Pg. 18, Lines 1-7; Record Excerpts, Tab 19.

²⁴ See Record, Vol. 3, Pg. 18, Lines 9-12; Record Excerpts, Tab 19.

²⁵ See Record, Vol. 3, Pg. 18, Lines 20-21; Record Excerpts, Tab 19.

²⁶ See Record, Vol. 3, Pg. 18, Lines 27-29, Pg. 19, Lines 1-29, Pg. 20, Lines 1-15; Record Excerpts, Tab 19.

²⁷ See Record, Vol. 3, Pg. 20, Lines 2-15; Record Excerpts, Tab 19; see also Record, Vol. 1, Pg. 78.

²⁸ See Record, Vol. 3, Pg. 21, Lines 19-29; Pg. 22, Lines 1-6; Record Excerpts, Tab 19.

²⁹ See Record, Vol. 1, Pg. 78.

Mr. Palmer for answering.^{30 31} Therefore, the document responding to the Hendons' Requests for Admission, that had been prepared by Mr. Palmer, ratified by the Langs, and filed with the Trial Court on August 15, 2006, only responded to requests for admission one (1) through six (6) and not requests for admission seven (7) through (20).³²

Under Rule 36 of the Mississippi Rules of Civil Procedure, the Hendons moved the Trial Court to confirm, as admitted, the requests for admission numbered six (6) through (20).³³ An Order of the Trial Court confirming, as admitted, requests six (6) through twenty (20) was entered on October 19, 2006 and filed on October 20, 2006. Pursuant to the Court's October 19, 2006 Order, the Hendons moved for a default judgment under Rule 55 of the Mississippi Rules of Civil Procedure and a corresponding hearing was noticed.³⁴

The Langs, by and through their former attorney, filed a motion to set aside the October 19, 2006 Order of the Court, deeming requests for admissions six (6) through twenty (20) admitted by the Langs, and to allow the Langs additional time to respond to the Hendons' Requests.³⁵ The Langs' motion to set aside the October 19, 2006 Order of the Trial Court was heard on March 23, 2007.³⁶ After hearing arguments from both parties on this issue, the Trial Court entered its Order setting aside the October 19, 2006 Order. In addition to setting aside the Requests for Admission, the Trial Court granted the Langs thirty (30) additional days in which to file a response to the Hendons' Requests for Admissions seven (7) through twenty (20).³⁷ As previously noted, however, the Trial Court did require the Langs to pay reasonable attorneys' fees to the Hendons for the work done by the Hendons' attorney from October 19, 2006 through March 23, 2007.

(ii) Facts relevant to the Trial Court's decision to deny the Hendons' motion for a mistrial

At the trial of this matter, the Hendons' attorney moved the Trial Court for a mistrial due to allegedly prejudicial comments made by the Langs' attorney at trial. The Hendons' have

³⁰ See Record, Vol. 3, Pg. 21, Lines 19-29; Pg. 22, Lines 1-6; Record Excerpts, Tab 19.

³¹ The issue of whether Mr. Palmer has committed the unauthorized practice of law by his course of conduct was an issue raised at the March 23, 2007 hearing; however, whether Mr. Palmer has committed the unauthorized practice of law is an issue wholly unrelated to the Trial Court's disposition of this issue as well as this Court's disposition of this issue on appeal.

³² See Record, Vol. 3, Pg. 21, Lines 19-29; Pg. 22, Lines 1-6; Record Excerpts, Tab 19.

³³ See Record, Vol. 1, Pg. 69-78; Record Excerpts, Tab 12.

³⁴ See Record, Vol. 1, Pg. 80-105; Record Excerpts, Tab 14.

³⁵ See Record, Vol. 1, Pg. 109-113; see also Record Excerpts, Tab 15.

³⁶ See Record, Vol. 3, Pg. 4, Lines 1-13.

³⁷ See Record, Vol. 1, Pgs. 115-118.

appealed the Trial Court's denial of their motion for a mistrial, which was made as a result an allegedly improper reference to settlement by the Langs' counsel at trial.

(iii) Facts relevant to the Trial Court's determination that it no longer possessed jurisdiction to enter an order awarding attorneys' fees pending this appeal

Prior to the filing of the Hendons' notice of appeal, the Hendons' attorney had presented an itemized statement for attorneys' fees, expenses and costs in accordance with the Trial Court's April 24, 2007 Order. The Trial Court was to review the bill statement to determine whether the stated amount of attorneys' fees and expenses therein was reasonable. Again, the record is not clear as to what date the Hendons' attorney submitted his itemized bill statement to the Trial Court but according to Appellants' Brief the bill statement was submitted for review on June 2, 2008.³⁸ The Hendons' filed their notice of appeal four (4) days later on June 6, 2008, before the Trial Court had an opportunity to rule on the reasonableness of the submitted bill statement.³⁹

On June 20, 2008, the Langs filed a motion to dismiss the Hendons' motion for attorneys' fees and expenses, since the Trial Court had been divested of any jurisdiction over the civil action since June 6, 2008, the date on which the Hendons had noticed the case for appeal in the Mississippi Supreme Court. The Trial Court entered an Order on June 20, 2008, which was filed on June 24, 2008, that acknowledged that the Trial Court no longer had jurisdiction to enter an order awarding attorneys' fees pending this appeal. A motion to set aside the June 24, 2008 Order was filed on July 8, 2008 by the Hendons, more than one (1) month after the case had been noticed for appeal.⁴⁰ The Trial Court entered its Order denying the Hendons' motion to set aside the June 24, 2008 Order on July 11, 2008, which was subsequently filed on July 14, 2008.⁴¹

³⁸ See Brief of Appellant, Pg. 2.

³⁹ See Record, Vol. 2, Pg. 231-232; Record Excerpts, Tab 2.

⁴⁰ See Record, Vol. 2, Pg. 244 -256; Record Excerpts, Tab 8.

⁴¹ See Record, Vol. 2, Pg. 257, Record Excerpts, Tab 9.

III. SUMMARY OF THE ARGUMENT

This appeal presents three (3) issues for review. They are:

ISSUE 1: Did the Trial Court abuse its discretion in deciding to set aside its prior Order confirming certain Rule 36 requests for admission admitted as a matter of law against the Langs and to allow the Langs an opportunity to properly respond to such requests for admission by and through legal counsel?

Mississippi law affords trial courts wide latitude in deciding discovery matters. Under State law, a trial court's decision as to matters of discovery will be given great deference and reviewed only for an abuse of discretion. At issue in this appeal is Rule 36 of the Mississippi Rules of Civil Procedure. Rule 36 exists as a tool for dividing disputable facts from those that are not in dispute; however the Rule has never been allowed to be used as a means for a party to avoid proper adjudication of the facts through finesse or cunning.

In this case, the Trial Court exercised sound discretion when it decided to set aside its prior Order confirming, as admitted, certain requests for admissions against the Langs and to allow the Langs an opportunity to respond to said Requests through legal counsel. The Trial Court's decision was founded upon the good cause shown by the Langs at a hearing of this matter on March 23, 2007.

Based upon the testimony heard at the March 23, 2007 hearing, the Trial Court determined that good cause had, in fact, been shown by the Langs and justly set aside its prior Order confirming said requests admitted as a matter of law against the Langs. The Trial Court's Order should be sustained in this appeal, as the Trial Court has not abused its discretion with regard to this discovery question.

ISSUE 2: Did the Trial Court abuse its discretion in denying the Hendons' motion for a mistrial based upon allegedly prejudicial remarks made by the Langs' counsel during the course of the trial?

While it is disputed whether the remark made by the Langs' counsel can even be considered a reference to evidence excluded by Rule 408 of the Mississippi Rules of Evidence, any such reference was not of sufficient prejudice to warrant a mistrial. It is evident from the record that the Trial Court took the Hendons' motion for a mistrial under serious consideration, yet in the end the Trial Court deemed the statements made by the Langs' counsel unworthy of a mistrial.

As is usually the case, the Trial Court was in the best position to evaluate any possible prejudice caused by the statements made by the Langs' counsel, which amounted to three (3) lines of questioning during the entire trial. An abuse of discretion standard of review is to be applied when reviewing a trial court's decision as to whether a mistrial should be granted. See Coho Resources, Inc. v. McCarthy, 829 So.2d 1, 18 (Miss. 2002). Since the Trial Court has not abused its discretion in denying the Hendons' motion for a mistrial based on the allegedly prejudicial remarks made by the Langs' counsel at trial, the Trial Court's decision with regard to this issue should stand.

ISSUE 3: Did the Trial Court abuse its discretion when it determined that it no longer possessed jurisdiction in this civil action to enter an order awarding attorneys' fees, pending this appeal?

It is the rule in this State that once an appeal from the trial court is perfected, the case is *ipso facto* removed to the appellate court. Dunavant Enterprises, Inc. v. Ford, 294 So.2d 788, 792 (Miss.1974); Crocker v. Farmers & Merchants Bank, et al, 293 So.2d 444 (Miss.1974). While Miss. R. Civ. P. 60 confers "limited concurrent jurisdiction on the trial court to grant relief from a judgment even though an appeal has been perfected", it does not grant concurrent jurisdiction in the trial court to enter entirely new orders while the case is on appeal. See In re Estate of Moreland v. Riley, 537 So.2d 1345, 1347 n. 1 (Miss.1989) (stating exception to the general rule).

Here, the Trial Court never entered an order with regard to the reasonableness of the bill for attorneys' fees submitted by the Hendons' counsel. Inasmuch, the Trial Court has been divested of any jurisdiction to enter such an order, pending this appeal.

IV. ARGUMENT

ISSUE 1: Did the Trial Court abuse its discretion in deciding to set aside its prior Order confirming certain Rule 36 requests for admission admitted as a matter of law against the Langs and to allow the Langs an opportunity to properly respond to such requests for admission by and through legal counsel?

Rule 36 of the Mississippi Rules of Civil Procedure is straightforward in its terms. The Rule provides, in pertinent part, that a “matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter” Deblanc v. Stancil, 814 So.2d 796, 798 (Miss. 2002). Rule 36 exists as a means for dividing disputable facts from those that are not in dispute; however, the Rule does not exist as a means for a party to avoid proper adjudication of the facts through finesse or cunning. Id. at 802.

A court may allow the withdrawal or amendment of an admitted matter when presentation of the merits of an action will be subverted by its continued confession and the party who obtained the admission will not be prejudiced by the change. Id. at 799. Rule 36 was never meant to be applied in an unusually severe or harsh manner. Id. at 802.

It is well settled law in Mississippi that the decision to grant relief from a prior order of the Court, under Rule 60 of the Mississippi Rules of Civil Procedure, is left to the sound discretion of the trial court. Langley v. Miles, 956 So.2d 970, 973 (Miss. Ct. App. 2006). Moreover, the decisions of a trial court as to matters of discovery must be reviewed under an abuse of discretion standard. Earwood v. Reeves, 798 So.2d 508, 514 (Miss. 2001) ([t]he decision of a trial court with regard to matters of discovery is subject to review for abuse of discretion). Therefore, unless the Trial Court in this case abused its discretion by setting aside its prior Order confirming the Requests for Admission admitted as a matter of law against the Langs, the Trial Court’s decision must stand. This is true even if this Court would have reached a different outcome if presented with the question in the first instance.

In the case at bar, the Trial Court’s decision to set aside its prior Order was clearly justified and in no way an abuse of the Trial Court’s discretion. Good cause was amply demonstrated by the Langs at the hearing of this matter on March 23, 2007. At that hearing, Ms. Beverly Lang testified as to the reasons why the Langs had failed to properly respond to the

Hendons' request for admissions seven (7) through twenty (20).⁴³ As supported by the record, the Langs thought that they had properly responded to all of the Hendons' Requests for Admission.⁴⁴ The testimony offered by the Langs at the March 23, 2007 hearing confirmed that the Langs had entrusted former co-defendant Billy Palmer with answering the Hendons' Requests for Admissions on their behalf.^{45 46}

Mr. Palmer, however, only responded to one (1) through six (6) of the Hendons' propounded Requests.⁴⁷ Without realizing the insufficiency of their responses, the Langs signed the document prepared for them by Mr. Palmer and filed it with the Court as their formal response to the Hendons' Requests for Admission.⁴⁸ Numbers one (1) through five (5) of the Requests were denied by the Langs, through Mr. Palmer, and Number six (6) was admitted.⁴⁹

As set forth in the Statement of the Case above, the Langs did not realize or understand that there were, in fact, twenty (20) Requests for Admission and that all twenty (20) Requests had not been transmitted properly *via* facsimile to Mr. Palmer for answering.⁵⁰ Therefore, the document filed in response to the Hendons' Requests for Admission, that had been prepared by Mr. Palmer, ratified by the Langs, and filed with the Trial Court on August 15, 2006, only responded to Requests one (1) through six (6) and not requests seven (7) through (20).⁵¹

As this Court can see from the Requests for Admissions denied by the Langs (i.e. numbers one through five), the Langs effectively denied their liability to the Hendons.⁵² However, the Requests that had been confirmed as admitted by the Trial Court initially went to the damages that had been suffered by the Hendons.⁵³ This was an obvious inconsistency and anomaly and the Trial Court recognized that it would be absurd to think that the Langs would deny liability in certain Requests for Admission and then admit liability in others. It was an obvious mistake on the part of the Langs not to answer Requests for Admission seven (7) through twenty (20).

⁴³ See Record, Vol. 3, Pgs. 15 et seq.

⁴⁴ See Record, Vol. 3, Pg. 21, Lines 19-29; Pg. 22, Lines 1-6.

⁴⁵ See Record, Vol. 3, Pg. 18, Lines 20-21.

⁴⁶ See Record, Vol. 3, Pg. 18, Lines 27-29, Pg. 19, Lines 1-29, Pg. 20, Lines 1-15.

⁴⁷ See Record, Vol. 3, Pg. 20, Lines 2-15; see also Record, Vol. 1, Pg. 78

⁴⁸ See Record, Vol. 3, Pg. 21, Lines 19-29; Pg. 22, Lines 1-6.

⁴⁹ See Record, Vol. 1, Pg. 78.

⁵⁰ See Record, Vol. 3, Pg. 21, Lines 19-29; Pg. 22, Lines 1-6.

⁵¹ See Record, Vol. 3, Pg. 21, Lines 19-29; Pg. 22, Lines 1-6.

⁵² See Record, Vol. 1, Pgs. 61-65.

⁵³ See Record, Vol. 1, Pg. 69-78.

In deciding to set aside its prior Order confirming, as admitted, Requests for Admission seven (7) through twenty (20) against the Langs and to allow the Langs an opportunity to properly respond to these requests through legal counsel, the Trial Court clearly served the interests of justice.

The ability of a Trial Court to set aside previously confirmed requests for admissions has been discussed at length in Skipworth v. Rabun I and Skipworth v. Rabun II. See Skipworth v. Rabun I, 568 So.2d 289, 291 (Miss. 1990); see also Skipworth v. Rabun II, 704 So.2d 1008, 1009 (Miss. 1996).

In Skipworth I, certain requests for admission were deemed admitted when the defendant therein failed to answer certain requests within the thirty (30) days allowed by Rule 36. Skipworth II, 704 So.2d at 1009. At an unrecorded hearing, the lower court therein granted the defendant leave to withdraw his admissions. Id. The ability of the defendant to withdraw such admissions prompted the denial of the Skipworth plaintiff's partial motion for summary judgment. Id. The plaintiff subsequently commenced an appeal in the Mississippi Supreme Court regarding the trial court's decision to allow the withdrawal of said admissions.

The issue for the Supreme Court in Skipworth I was whether the trial judge followed Rule 36 or whether he abused his discretion in allowing the withdrawal of the admissions and the subsequent filing of a response thereto out of time. Skipworth v. Rabun I, 568 So.2d 289, 291 (Miss. 1990). The Skipworth I Court held that since there was "no record of a good and sufficient reason offered by [the defendant] to the trial judge for allowing the withdrawal of the admission and the filing of a response, we conclude that it was an abuse of discretion for the trial court to allow the defendant on oral motion to withdraw the admissions and file responses out of time." Id.

The case returned to the Mississippi Supreme Court six years later to decide a more complex Rule 36 issue than that presented initially. In sum, the Skipworth II Court was asked to decide whether or not the previously admitted requests in Skipworth I had been conclusively established and thus had become incapable of being rebutted by other evidence. The question was prime for appellate adjudication since the inception of Martin v. Simmons, a Mississippi Supreme Court case that had been handed down shortly after the Skipworth I decision. See Martin, 571 So.2d 254 (Miss. 1990).

The Skipworth II Court acknowledged that Skipworth I had been remanded solely for a trial court explanation as to why good cause was shown in setting aside the confirmed requests

for admission and for a determination of whether the trial court abused its discretion in doing so. Skipworth II, 704 So.2d at 1012. While the Skipworth II Court acknowledged that a *pro se* party's lack of financial means was not a legally sufficient reason for a trial court to set aside previously confirmed admissions made by an unrepresented party, the Court expressly declared that it was not interpreting Skipworth I as a final determination that the lower court therein had erred and abused its discretion in allowing the defendant to withdraw his admissions.

What the reader can discern from a conjunctive reading of Skipworth I and Skipworth II is that a trial court commits reversible error only when it allows the withdrawal of previously confirmed admissions based upon an insufficient reason or no reason at all. A trial court does not, however, abuse its discretion when it sets aside previously confirmed admissions for good cause. This is undoubtedly a fact specific inquiry to be entrusted to the good and capable hands of the Trial Court.

Here, after conducting an extensive hearing on this issue, the Trial Court properly acknowledged the good cause shown by the Langs' for their failure to adequately respond to the Hendons' Requests for Admission one (1) through twenty (20). For this reason, the Trial Court did not abuse its discretion in setting aside the admissions it had previously confirmed as admitted against the Langs and allowing the Langs an opportunity to properly respond to such Requests for Admission through legal counsel. Inasmuch, the judgment of the Trial Court setting aside its prior Order must stand.

ISSUE 2: Did the Trial Court abuse its discretion in denying the Hendons' motion for a mistrial based upon allegedly prejudicial remarks made by the Langs' counsel during the course of the trial?

Rule 408 of the Mississippi Rules of Evidence, which is entitled "Compromise and offers to compromise," states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . .

M.R.E. 408.

The comment to Rule 408 states that it "only excludes offers when the purpose is proving the validity or invalidity of the claim or amount" Id.

In this case, the Hendons contend that the Trial Court committed reversible error when it declined to accept the Hendons' invitation for a mistrial, due to allegedly improper comments made by the Langs' counsel at trial. See Brief of Appellant, Page 10. The Hendons argue that the Langs' counsel made improper references to settlement when he brought up the earlier dismissal of the Palmers from the lawsuit and that, as a result, a mistrial should have been declared by the Trial Court. After considering the arguments of both parties' counsel, outside the presence of the jury, the Trial Court denied the Hendons' motion for a mistrial.⁵⁴

As this Court well knows, the standard of review of a trial court's decision whether to grant a mistrial is abuse of discretion. Coho Resources, Inc. v. McCarthy, 829 So.2d 1, 18 (Miss. 2002). However, the Mississippi Supreme Court has also unequivocally held that a trial judge is the person best capable of determining the prejudicial effect of an objectionable remark. Id. In Coho Resources, the Court stated that "[t]he judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared." Id. Where there is an absence of serious and irreparable damage, the judge should instruct the jury to disregard the improper remark. Id.

Here, the allegedly improper remark was made by the Langs' counsel's during the cross-examination of Ms. Sherry Hendon, one of the Plaintiffs in this action. While it is not at all clear whether the Langs' counsel's line of questioning even touched on "settlements" as regarded by Rule 408, the Trial Court Judge ensured a clean record for appeal by instructing the jury that:

Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement, or remark has no basis in the evidence, *then you should disregard the argument, statement or remark. . . You are to disregard all evidence which was excluded by the Court from consideration during the trial*⁵⁵

While it is clearly disputed whether the remark by the Langs' counsel can even be considered a reference to evidence excluded by Rule 408, any such reference was not of sufficient prejudice to the Hendons as to warrant a mistrial. It is evident from the record that the Trial Court took the Hendons' motion for a mistrial under serious consideration, yet in the end the Trial Court deemed the Hendons' objection to the statements at issue unworthy of a mistrial.⁵⁶ Presumably, the Trial Court believed that it had limited any prejudice by immediately

⁵⁴ See Record, Vol. 5, Pages 396 – 398; Record Excerpts, Tab 21.

⁵⁵ See Record, Vol. 2, Page 195 (emphasis added); Record Excerpts, Tab 17.

⁵⁶ See Record, Vol. 5, Pages 396 – 398; Record Excerpts, Tab 21.

sustaining the Hendons' counsel's objection to the line of questioning being pursued by the Langs' counsel and issuing a curative instruction to the jury.⁵⁷

Here, the Trial Court was in the best position to evaluate any possible prejudice caused by the statements made by the Langs' counsel.⁵⁸ See Coho Resources, Inc., 829 So.2d at 18. Further, it is the Trial Court who can best evaluate whether Rules 403 and 408 of the Mississippi Rules of Evidence have been violated in such a way as to warrant a mistrial. Id. In this case, the voluntary dismissal of the Palmers had nothing whatsoever to do with whether the Langs breached a contract with the Hendons.

The primary issue at trial was whether either, or both, the Palmer defendants and the Lang defendants had an enforceable contract with the Hendons as to the Property at issue. The fact that the jury learned that the Palmers had been dismissed from the action and had no such contract with the Hendons could not lead a reasonable jury to the same conclusion with regard to the Langs. The Langs and the Palmers were in completely different degrees of privity with the Hendons regarding the alleged contract at issue. The Trial Court's role in resolving this issue was to determine whether three (3) lines of questioning made by the Langs' counsel at trial were of sufficient detriment and prejudice to the Hendons as to warrant a mistrial. As correctly determined by the Trial Court, they were not.

ISSUE 3: Did the Trial Court abuse its discretion when it determined that it no longer possessed jurisdiction in this civil action to enter an order awarding attorneys' fees, pending this appeal?

The facts of this case, and law in Mississippi, make this issue easy for disposition. Prior to the filing of the Hendons' notice of appeal, the Hendons' attorney had presented an itemized statement for attorneys' fees, expenses, and costs in accordance with the Trial Court's April 24, 2007 Order. The Trial Court was to review the bill statement to determine whether the stated amount of attorneys' fees and expenses therein was reasonable. The Hendons' filed their notice of appeal four (4) days later on June 6, 2008 before the Trial Court had an opportunity to rule on the reasonableness of the submitted bill statement.⁵⁹ As the Hendons' filed their notice of appeal before the Trial Court had an opportunity to enter an order as to the reasonableness of the attorneys' fees, the Trial Court lacked jurisdiction to decide the question of reasonableness until this appeal has been decided.

⁵⁷ See Record, Vol. 5, Pages 388.

⁵⁸ See Record, Vol. 5, Pg. 388.

⁵⁹ See Record, Vol. 2, Pg. 231-232.

It is the rule in this State that once an appeal from the trial court is perfected, the case is *ipso facto* removed to the appellate court. Dunavant Enterprises, Inc. v. Ford, 294 So.2d 788, 792 (Miss.1974); Crocker v. Farmers & Merchants Bank, et al, 293 So.2d 444 (Miss.1974). While Miss. R. Civ. P. 60 confers “limited concurrent jurisdiction on the trial court to grant relief from a judgment even though an appeal has been perfected”, it does not grant concurrent jurisdiction in the trial court to enter entirely new orders while the case is on appeal. See In re Estate of Moreland v. Riley, 537 So.2d 1345, 1347 n. 1 (Miss.1989) (stating exception to the general rule).

The Hendons’ cite Pittman v. Commonwealth National Life Ins. Co. in support of their argument that the Trial Court does not lack jurisdiction to award the attorneys’ fees at issue; however, Pittman itself evidences the Trial Court’s current lack of jurisdiction over this case. Pittman, 562 So.2d 73, 74 (Miss. 1990).

The Hendons’ are correct when they quote the Pittman Court as saying: “[t]he trial court also lost jurisdiction as to the merits, Miss. R. Civ. P. 59 and 60, but still retains jurisdiction to cause its orders to be executed.” This, however, is not the issue in this case since the Trial Court never entered an Order as to the reasonableness of the proposed attorneys’ fees.⁶⁰ Had the Trial Court done so, perhaps it would have retained jurisdiction over this case to cause its previous order to be executed. However, under Mississippi law, when a trial court has yet to enter an order regarding a particular matter, the trial court does not retain jurisdiction over that matter, pending an appeal. Such is a subtle but important distinction in the law, one recognized by the Trial Court in this case.⁶¹ As the Trial Court never entered an order as to the reasonableness of the attorneys’ fees at issue, it has been divested of any jurisdiction to enter such an order pending this appeal.

⁶⁰ See Record, Vol. 2, page 243.

⁶¹ See Record, Vol. 2, page 243.

V. CONCLUSION

In sum, the Trial Court did not abuse its discretion with regard to any of the rulings from which the Hendons take their appeal.

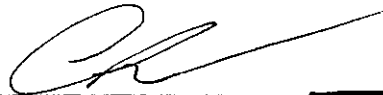
As to the first issue raised by the Hendons, good cause was amply demonstrated by the Langs at the March 23, 2007 hearing so that it cannot be said that the Trial Court committed reversible error when it set aside its prior Order confirming, as admitted, certain Requests for Admission against the Langs. Moreover, Mississippi case law demonstrates that the Trial Court was not in a posture of error when it allowed the Langs an opportunity to properly respond to said Requests through legal counsel. The ruling of the Trial Court with regard to the first issue in this appeal should therefore be affirmed.

Regarding the allegedly prejudicial remarks made the Langs counsel at trial, the Trial Court gave serious and appropriate consideration to the Hendons' motion for a mistrial and determined that the remarks by the Langs' counsel were not of sufficient prejudice to warrant a mistrial. The Trial Court also minimized any prejudice by issuing a proper curative instruction to the jury at the close of trial. The ruling of the Trial Court with regard to the second issue in this appeal should therefore be affirmed.

Finally, the Trial Court in this case was divested of jurisdiction over this civil action as soon as the Hendons filed their notice of appeal with the Mississippi Supreme Court. While the law may afford trial courts the ability to enforce orders entered prior to an appeal, it does not grant a trial court jurisdiction to enter new orders while the case is up on appeal. The ruling of the Trial Court with regard to the third issue in this appeal should therefore be affirmed.

This the 29th day of September, 2009.

Respectfully submitted,



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VI. CERTIFICATE OF SERVICE

I, Eduardo A. Flechas, attorney for Appellees, do hereby certify that I have forwarded via First Class United States Mail, postage paid, an original and three (3) copies of the Brief of Appellees, an original and three (3) copies of the Record Excerpts to the Clerk of the Mississippi Supreme Court and Mississippi Court of Appeals and have also forwarded via First Class United States Mail, postage paid, one (1) copy of the above and foregoing Brief of Appellees and one (1) copy of the Record Excerpts to the following:

Michael J. Brown, Esq.
625 Lakeland East Drive, Suite A
Jackson, Mississippi 39232

The Honorable Isadore W. Patrick
Circuit Court Judge Warren County, Mississippi
Post Office Box 351
Vicksburg, Mississippi 39180

This the 27th day of September, 2009.



Eduardo A. Flechas, MSB 