IN THE SUPREME COURT OF MISSISSIPPI

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 APPELLANTS MICHAEL T. HENDON, SHERRY HENDON AND CHARLES HENDON

ORAL ARGUMENT REQUESTED

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BRIEF FOR APPELLANTS

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 representatives 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.

Appellants:

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The Honorable Isadore W. Patrick
Circuit Court Judge Warren County
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SO CERTIFIED this the 22nd day of May, 2009.

MICHAEL J. BROWN,
Attorney of record for Appellants

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1.

DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR; FIRST FOR HIS DECISION TO SET ASIDE HIS ORDER TO CONFIRM "REQUESTS FOR ADMISSION", AND SECOND FOR HIS DECISION TO ALLOW THE DEFENDANTS, BEVERLY AND ROBERT LANG, TO ANSWER THE "REQUESTS FOR ADMISSION", THAT THEY HAD EITHER REFUSED OR IGNORED TO ANSWER, THAT WERE OVER 90 DAYS PAST THE DEADLINE DATE AS PRESCRIBED UNDER RULE 36 OF MISSISSIPPI RULES FOR CIVIL PROCEDURE?

2.

DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN HIS DECISION NOT TO GRANT THE PLAINTIFFS' ATTORNEY'S "MOTION FOR A MIS-TRIAL" AFTER THE DEFENDANTS' ATTORNEY HAD VIOLATED RULE 403 AND RULE 408 MISSISSIPPI RULES OF EVIDENCE WHEN HE STATED TO THE JURY THAT FORMER DEFENDANTS GLENDA AND BILLY PALMER HAD BEEN DISMISSED FROM THIS LAWSUIT AFTER THEY HAD SETTLED WITH THE PLAINTIFFS AND HAD RECEIVED A SETTLEMENT OF ZERO DOLLARS?

3.

DID THE TRIAL JUDGE ERROR WHEN HE ISSUED AN ORDER THAT STATED THAT HE NO LONGER HAD JURISDICTION TO ENFORCE A PREVIOUS ORDER OF HIS COURT, PENDING THE OUTCOME OF THE APPEAL, ALTHOUGH THE ENFORCEMENT OF HIS PREVIOUS ORDER HAD NO ISSUE ON APPEAL?

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I STATEMENT OF ISSUE

The issue to be presented for review is:

1.

DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR; FIRST FOR HIS DECISION TO SET ASIDE HIS ORDER TO CONFIRM "REQUESTS FOR ADMISSION", AND SECOND FOR HIS DECISION TO ALLOW THE DEFENDANTS, BEVERLY AND ROBERT LANG, TO ANSWER THE "REQUESTS FOR ADMISSION", THAT THEY HAD EITHER REFUSED OR IGNORED TO ANSWER, THAT WERE OVER 90 DAYS PAST THE DEADLINE DATE AS PRESCRIBED UNDER RULE 36 OF MISSISSIPPI RULES FOR CIVIL PROCEDURE?

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DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN HIS DECISION NOT TO GRANT THE PLAINTIFFS' ATTORNEY'S "MOTION FOR A MIS-TRIAL" AFTER THE DEFENDANTS' ATTORNEY HAD VIOLATED RULE 403 AND RULE 408 MISSISSIPPI RULES OF EVIDENCE WHEN HE STATED TO THE JURY THAT FORMER DEFENDANTS GLENDA AND BILLY PALMER HAD BEEN DISMISSED FROM THIS LAWSUIT AFTER THEY HAD SETTLED WITH THE PLAINTIFFS AND HAD RECEIVED A SETTLEMENT OF ZERO DOLLARS?

3.

DID THE TRIAL JUDGE ERROR WHEN HE ISSUED AN ORDER THAT STATED THAT HE NO LONGER HAD JURISDICTION TO ENFORCE A PREVIOUS ORDER OF HIS COURT, PENDING THE OUTCOME OF THE APPEAL, ALTHOUGH THE ENFORCEMENT OF HIS PREVIOUS ORDER HAD NO ISSUE ON APPEAL?

II STATEMENT OF THE CASE

(a). Course of Proceedings and Disposition in Court below

This civil action was tried before a jury from March 31 to April 2, 2008 with the Honorable Isadore W. Patrick presiding as Special Circuit Court Judge. The Plaintiffs, in their case in chief, presented to the Court the testimony of eight witnesses including the testimony of two experts (Attorney William Smith as to liability and contract law, and Robert Cunningham in support of the damage issue) in support of their claim against the Defendants.

The evidence was overwhelmingly in favor of the Plaintiffs until the Defendants' Attorney stated to the jury while questioning Plaintiff Sherry Hendon (TT., p. 398) that the Co-Defendants Billy and Glenda Palmer had been dismissed from the lawsuit and that the Palmers had paid no money to the Plaintiffs. The jury returned a verdict in favor of the Defendants on April 2, 2008. A Final Judgment Order by the Court was signed on April 7, 2008, and entered on April 9, 2008 (R., pp. 216-217). The Plaintiffs, through their Attorney, filed a Motion for Judgment Notwithstanding the Verdict (J.N.O.V) and/or Alternatively, Motion For A New Trial on April 19, 2008 (R., pp. 219-226). The Attorney for the Defendants filed his response to Plaintiffs' Motions on April 30, 2008 (R., 227-229). An Order denying the Plaintiffs' Motions was signed on May 7, 2008 and entered on May 8, 2008 (R., p. 230). The Plaintiffs filed their notice of appeal on June 6, 2008 (R., pp. 231-232). The Plaintiffs' Attorney sent to Judge Patrick on June 2, 2008 an itemized Bill Statement for Attorney Fees, Expenses and Costs as per the Order that the Court had entered on April 24, 2007 (R., pp. 253-255). Without any objections to the amount or dispute of the statement sent to Judge Patrick,

Defendants' Attorney filed a Motion to Dismiss on June 20, 2008 (R., pp. 241-242). Without any time for a response by Plaintiffs' Attorney to the Defendants' Motion, the Trial Judge entered an Order on June 20, 2008 (R., p.243) to Dismiss Plaintiffs' request for Fees and Expenses stating that the Court no longer had Jurisdiction over the matter. The Plaintiffs' Attorney filed a Motion to Set Aside a Court Order and Award Attorney Fees on July 3, 2008 (R., pp. 244-256). The Trial Court entered an Order denying Plaintiffs' Motion on July 11, 2008 filed July 14, 2008 (R., p. 257).

(b). Statement of Facts

The following facts are presented by Plaintiffs:

i. That Plaintiffs, Michael T. Hendon and William Miller had entered into a lease agreement with Glenda and Billy Palmer on April 9, 2002, to lease a commercial property located at 308 East Railroad Avenue, Crystal Springs, Mississippi 3059, undisputed by Defendants;

ii. That this lease was to run for a period of twelve (12) months at a rate of $700.00 per month, ending on the 1st day of April, 2003, undisputed by Defendants;

iii. That the lease had, in paragraph 18, a clause that allowed the Lessee the option to purchase the leased premises, undisputed by the Defendants;

iv. That the Plaintiff, Michael Hendon had contacted both the Plamers and Langs and stated to them that he was ready to exercise his option to purchase the leased premises, undisputed by the Defendants;

v. That the Plaintiff, Michael T. Hendon, by his own testimony and that of the testimony of Beverly Hendon, showed unto the Court that he was able to fulfil the purchase price requirement of the option to purchase clause. This evidence was uncontradicted by the Defendants;

vi. That the Plaintiffs, Michael T. Hendon, Sherry M. Hendon and Charles T. Hendon, signed a new lease with the Defendants Glenda and Billy Palmer on August 5, 2002, including paragraph 18 which gave the Plaintiffs the option to purchase the leased premises, this evidence was uncontradicted by the Defendants by any credible testimony;

vii. That the new lease dated August 5, 2002, had the same terms and clauses as the lease dated April 9, 2002, including paragraph 18 which gave the Plaintiffs the option to purchase the leased premises, this evidence was uncontradicted by the Defendants by any credible testimony;

viii. That Defendant Billy Palmer had a release document prepared to have the Hendons release their rights to exercise the option to purchase the lease premises, this document was not executed, this evidence was uncontradicted by the Defendants by any credible testimony;

ix. That William C. Miller had executed a document which gave Charles and Sherry Hendon any rights he had in the lease on the property located at 308 East Railroad Avenue, Crystal Springs, this evidence was uncontradicted by the Defendants;

x. Plaintiff Michael Hendon testified that the contacted both the Palmers and Langs and informed them that he was ready, willing and able to execute his option to purchase the property located at 308 East Railroad Avenue, Crystal Springs, Mississippi, this evidence was uncontradicted by the Defendants;

xi. That Attorney William Smith, Jr. testified that he contacted both the Palmers and Langs and informed them that the Hendons were ready, willing and able to execute their option to purchase the leased premises, this testimony was undisputed;

xii. That Attorney William Smith, Jr. testified as an expert in the fields of leases and contracts and that in his expert opinion, the option to purchase said lease premises was binding to

both the Palmers and Langs, this testimony was uncontradicted by the Defendants;

xiii. That Attorney William Smith, Jr. testified that the Langs had breached the option to purchase agreement of the lease between the parties, and that the Langs were therefore liable to the Hendons for all damages associated to their loss, this testimony was uncontradicted by the Defendants;

xiv. That Attorney Robert Lawrence testified that Defendant Robert Lang had brought to him a letter from Attorney William Smith, Jr. stating that the Hendons were ready, willing and able to exercise their option to purchase clause of their lease between the parties, this testimony was uncontradicted by the Defendants;

xv. That Attorney Robert Lawrence testified in his opinion as an expert in the fields of leases and contracts, that the Plaintiffs could seek damages for breach of contract, not just to seek for specific performance, this testimony was uncontradicted by the Defendants;

xvi. That Defendant Beverly Lang testified that neither she nor her husband ever attempted to contact the Hendons before they purchased the property located at 308 East Railroad Avenue to find out what type of lease they had with the Palmers, this testimony was undisputed by the Defendants;

xvii. That Defendant Beverly Lang testified that neither she nor her husband attempted to contact the Hendons until a month after she and her husband had purchased the property located at 308 East Railroad Avenue, this testimony was undisputed by the Defendants;

xviii. That Defendant Billy Palmer testified that Defendant Robert Lang owned a business that was only two doors down from the business being operated by the Hendons at 308 East Railroad Avenue, this testimony was undisputed by the Defendants;

xix. That the Plaintiffs, in their case in chief, presented several witnesses who testified that Defendant Robert Lang used force and intimidation against the Hendons in forcing the Hendons to leave the property located at 308 East Railroad Avenue, this testimony was uncontradicted by the Defendants;

xx. That the Plaintiffs, in their case in chief, presented the expert testimony of Robert Cunningham on economic damages the Plaintiffs suffered by not being able to exercise their option to purchase the property located at 308 East Railroad Avenue. His testimony stated that these damages exceeded over $350,000.00 in present day value calculation, and that the actual dollar loss exceeded over $900,000.00, this testimony was uncontradicted by the Defendants;

xxi. Plaintiffs Michael and Sherry Hendon testified that they had planned to rent out the two upstairs apartments of the property located at 308 East Railroad Avenue which would be additional loss of revenue, this testimony was uncontradicted by the Defendants;

SUMMARY OF THE ARGUMENT

The Appellants contend that the Trial Court erred when he allowed the Defendants to have the Order which confirmed as admitted the Requests for Admissions set aside based on the fact that Rule 36 is specific that an answer is deemed admitted unless answered to the otherwise within 30 days of filing of the request. The Defendants stated under oath that they knew they had to answer the Requests for Admissions within 30 days and in fact they answered 6 of the 20 Requests. However the fact that they did not answer the other 14 Requests does not allow them to not answer them. In fact, because they did not answer them within 30 days makes them deemed admitted. If this Court allows the Defendants in this case not answer the Requests within the 30 day time limit, then Rule 36 no longer exists as it was intended.

The Appellants contend that the Trial Judge committed reversible error when he failed to Order a mistrial at the time the Defendants' attorney made the remarks that the other Defendants that were original in this case had been dismissed and stated to the jury that the Plaintiffs had paid the other Defendants (The Palmers') zero dollars in settlement. This statement was in complete violation of Mississippi Rule of Evidence 403 and 408 and had a great deal of impact upon the outcome of this trial in the jury in ruling in favor of the Defendants.

The Appellants contend that the Trial Judge erred when he refused to enforce his Order of May 2, 2007, and have the Defendants pay Attorney fees and all costs associated with the actions of the Defendants. The issue of the fees and costs are not part of the appeal and the Court would retain jurisdiction on this matter and therefore the Order should be followed.

ARGUMENT

ISSUE

1) DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR; FIRST FOR HIS DECISION TO SET ASIDE HIS ORDER TO CONFIRM "REQUESTS FOR ADMISSION", AND SECOND FOR HIS DECISION TO ALLOW THE DEFENDANTS, BEVERLY AND ROBERT LANG, TO ANSWER THE "REQUESTS FOR ADMISSION", THAT THEY HAD EITHER REFUSED OR IGNORED TO ANSWER, THAT WERE OVER 90 DAYS PAST THE DEADLINE DATE AS PRESCRIBED UNDER RULE 36 OF MISSISSIPPI RULES FOR CIVIL PROCEDURE?

The Mississippi Supreme Court has ruled that under Miss. Rules of Civil Procedure Rule 36 the Requests must be answered within 30 days unless relief of Court has been granted and in this case the Plaintiff testified that they had received the Requests for Admissions and had answered what she thought was all of them but in fact they answered only the first six. The first five they denied and the sixth one they admitted to. However, there was no response to the other 14 Requests and therefore by the rule, they are admitted. The Defendant in her testimony before the Court stated the following: (TT., at pages 40 - 41):

Q. You received the Request for Admissions. Did you not? They are marked---

A. The 1 through 20, yes, I did. The 1 through 20, yeah.

Q. And you knew that you had to answer, right?

A. Yes, I did.

In fact the Defendants filed them on August 15, 2006, but had stated that they had signed them on August 7, 2006. Therefore, the Defendants knew of the importance of the Requests for Admission

to have them back dated so as to show that they were filed within the 30 days as required under the rule. These Defendants were playing a game with the Court and if this Court rules that what these Defendants did was reasonable then there will be no need to have a time limit based on Rule 36, since all you have to state is that I thought I had answered the Requests.

The Defendant further testified the following at the March 23 hearing: (TT., at page 43 line 29):" - I'm not guilty of 1 through 6 but I am of 7 through 20."

Further, the Mississippi Supreme Court has ruled in **Amiker v. Drugs for Less, Inc.**, 796 So. 2d 942, 951 (Miss 2000) "While the severest of sanctions should be reserved for extreme circumstances, the district court does not abuse its discretion by imposing the sanctions of dismissal when a party demonstrates flagrant bad faith and callous disregard for its responsibilities." and when the Defendants failed to answer the 14 other Requests for Admissions and failed to answer or show up for court on the Plaintiffs Motion to Confirm as Admitted under Rule 36, then these Defendants have showed nothing but a callous disregard and flagrant bad faith towards the Court and the Legal system.

Rules of Court are meant to be followed even by those who fire their attorney and then proceed Pro Se. The Supreme Court held in **Harvey v. Stone County School District**, 862 So.2d 545, 549 (Miss 2003), that "pro se parties should be held to the same rules of procedure and substantive law as represented parties." **Dethlefs v. Beau Maison Dev. Corp.**, 511 So.2d 112, 118 (Miss 1987). The Defendants in this case did everything they could do to delay and obstruct the court process, and by not reversing the Court decision here, and reinstating the original Order of October 20, 2006, then justice will not be served.

2) DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN HIS DECISION NOT TO GRANT THE PLAINTIFFS' ATTORNEY'S "MOTION FOR A MIS-TRIAL" AFTER THE DEFENDANTS' ATTORNEY HAD VIOLATED RULE 403 AND RULE 408 MISSISSIPPI RULES OF EVIDENCE WHEN HE STATED TO THE JURY THAT FORMER DEFENDANTS GLENDA AND BILLY PALMER HAD BEEN DISMISSED FROM THIS LAWSUIT AFTER THEY HAD SETTLED WITH THE PLAINTIFFS AND HAD RECEIVED A SETTLEMENT OF ZERO DOLLARS?

The Mississippi Supreme Court has ruled that under Miss. R. Evid. Rule 408 that it is "not admissible to prove liability for or invalidity of the claim or its amount." which is exactly what the Attorney for the Defendants did at the trial when he told the jury that the Plaintiffs had settled with the other defendants in this cause of action. In the (TT., at page 388) that is exactly what the Defendants' Attorney was doing when he stated to the jury the following:

Q. And you would agree with me that you dismissed the Palmers from this lawsuit.

A. Yes, we did.

Q. Okay. And there was no money paid by the Palmers to you.

As soon as Attorney Brand stated to the Plaintiff in front of the jury that "No money paid by the Palmers" he violated Miss. R. Evid. Rule 403 and 408 and the jury was tainted and there could be no other course, but to grant the Plaintiffs' Attorney's Motion for a Mis-trial.

Further, the Mississippi Supreme Court has ruled in **Smith v. Payne**, 839 So. 2d 482, (Miss 2002) that "to inform a jury of the amount of a settlement prior to its returning a verdict for a joint tortfeasor or co-defendant will certainly and unnecessarily influence a jury in its decision." **Whittley v. City of Merdidian**, 530 So. 2d 1341, 1346 (Miss. 1998).

3) DID THE TRIAL JUDGE ERROR WHEN HE ISSUED AN ORDER THAT STATED THAT HE NO LONGER HAD JURISDICTION TO ENFORCE A PREVIOUS ORDER OF HIS COURT, PENDING THE OUTCOME OF THE APPEAL, ALTHOUGH THE ENFORCEMENT OF HIS PREVIOUS ORDER HAD NO ISSUE ON APPEAL?

The Supreme Court ruled in **Pittman v. Commonwealth National Life Ins. Co.**, 562 So.2d 73, 74 (Miss, 1990) "The 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." that is exactly the issue here, the Trial Court had entered an Order on the Hearing of March 23, 2007 in which he ordered the defendants to pay all attorneys fees and costs of the Plaintiffs' attorney for their behavior. The Court has refused to follow its own order. The Defendants' attorney did not dispute the fee and cost presented to the Court in the amount $39,337.50, and therefore the Court should award said amount.

CONCLUSION

The decision of the Circuit Court in regards to his ruling on reversing his Order on the Requests For Admissions under Rule 36 should be reversed and rendered in favor of the Appellants or Rule 36 has no meaning in the future

This Court should find that the statement made by the Defendants' Attorney in regards to his statement about that another Defendant receiving zero dollars from the Plaintiffs in regards to them being dismissed from a case as part of a settlement should have cause the trial court to grant Plaintiffs' Motion for a Mis-trial and therefore the lower Court;s decision should be reversed and be remanded.

This Court should rule that the lower Court still has jurisdiction to enforce an order that it has ordered against the Defendants in a matter in regards to attorney's fees and costs and should be reversed and remanded or should be reversed and rendered in the amount of $39,337.50.

RESPECTFULLY SUBMITTED, this the 22nd day of May, 2009.

Michael T. Hendon, Sherry Hendon
And Charles Hendon
APPELLANTS

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CERTIFICATE OF SERVICE

I, Michael J. Brown, attorney for Appellants, do hereby certify that I have forwarded and deposited by First Class United States Mail on July 14, 2004, postage paid, an original and three (3) copies of the Brief of Appellants, an original and three (3) copies of the Record Excerpts to the Clerk of the Mississippi Supreme Court and have also forwarded and deposited by First Class United States Mail on May 22, 2009, postage prepaid, one (1) copy of the above and foregoing Brief of Appellants and one (1) copy of the Record Excerpts to the following:

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Jackson, Ms. 39201

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

This the 22nd day of May, 2009.

Respectfully Submitted,

Michael J. Brown, MSB[redacted]