

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01159

RUSSELL PUCKETT

APPELLANT

V.

**ROBERT N. GORDON, III D/B/A
TREY GORDON ROOFING CONTRACTOR**

APPELLEE

**APPEAL FROM COUNTY AND CIRCUIT COURTS OF WARREN COUNTY,
MISSISSIPPI**

BRIEF OF APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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RUSSELL PUCKETT

APPELLANT

V.

**ROBERT N. GORDON, III D/B/A
TREY GORDON ROOFING CONTRACTOR**

APPELLEE

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 to allow the Judge of the Circuit Court of Warren County, Mississippi may evaluate disqualification or recusal.

Parties:

Russell Puckett

Robert "Trey" Gordon

Attorneys:

Thomas P. Setser, Attorney of Record for Appellant

William M. Bost, Attorney of Record for Appellee

Attorney of record for Russell Puckett

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STATEMENT OF THE ISSUES

- I. Whether the County Court Judge erred in denying the Defendant/Counter-Plaintiff's request for a directed verdict?
- II. Whether the County Court Judge erred in finding that Trey Gordon, Plaintiff/Counter-Defendant, acted as an agent and construction manager for Russell Puckett, Defendant/Counter-Plaintiff, rather than a Remodeler, Contractor or Sub-Contractor?
- III. Whether the County Court Judge erred in finding that Russell Puckett committed an assault against Trey Gordon?
- IV. Whether the County Court Judge erred in awarding punitive damages?
- V. Whether the County Court Judge erred in awarding attorney fees to Trey Gordon?
- VI. Whether the County Court Judge erred in dismissing Russell Puckett's assault claim?

STATEMENT OF THE CASE

A compliant was filed by Trey N. Gordon, III, D/B/A Trey Gordon Roofing Contractor in the Warren County Court, Warren County, Mississippi, on or about September 27, 2006, alleging that Russell Puckett owed him money for work performed by him on Russell Puckett's Katrina damaged home in Vicksburg, Mississippi. The complaint also alleged assault by Russell Puckett against Trey Gordon. Trey Gordon requested compensation for unpaid work performed on Russell Puckett's home, damages for the alleged assault, punitive damages, attorney's fee and prejudgment interest from the date of a demand letter sent to Russell Puckett.¹

After an extension of time to file an answer was granted, an answer and a counter-complaint were filed by Russell Puckett on or about November 8, 2006. The counter-complaint alleged that Trey Gordon fraudulently misrepresented himself as licensed and bonded contractor, when in fact he was not, that Trey Gordon did not complete the job as the roof still leaked and Russell Puckett was then forced to hire another contractor to finish the job, that Trey Gordon broke a valuable statute located at Russell Puckett's home and that he also stole two valuable carpets belonging to Russell Puckett. Russell Puckett further alleged that Trey Gordon assaulted him in his bedroom and continued to threaten him via the telephone. Russell Puckett requested compensation for the subsequent roof repairs, stolen rugs, and broken statute, damages for the assault, fraud and misrepresentation, punitive damages, attorney fees, pre-judgment interest and post judgment interest.

A subsequent answer to the counter-complaint was filed on or about December 18, 2006, and discovery was propounded by the Plaintiff. A Motion to Docket was made by the Plaintiff on or about April 6, 2007 and at a subsequent hearing the case was set for trial on July 25, 2007.

¹ Trey Gordon alleges that he extended credit to Russell Puckett to perform the work and therefore was entitled to attorney's fee and pretrial interest pursuant to Miss. Code Ann. § 11-53-81

A Motion to Withdraw was filed by Lisa Counts, Esquire, counsel for the Defendant/Counter-Plaintiff, on or about July 23, 2007. A Response to Motion to Withdraw was filed by William M. Bost, Jr., Esquire, objecting to withdrawal of counsel and further delay in a trial on the merits in this case. An Order Resetting Case was entered on or about July 24, 2007, relieving Lisa Counts, Esquire, as counsel for Defendant/Counter-Plaintiff, and reset the cause to be heard on August 13, 2007, and further ordered Defendant/Counter-Plaintiff to be present in Court on said date or to have his new retained counsel in Court on said date and to be ready for trial within ten (10) days from that date, so as not to further prejudice the Plaintiff/Counter-defendant.

A Notice of Entry of Appearance was filed by Thomas P. Setser, Esquire, the newly retained counsel for the Defendant/Counter-Plaintiff, on or about August 2, 2007.

A Motion for Continuance was filed on behalf of the Defendant/Counter-Plaintiff on or about August 10, 2007, to permit him to perform discovery in this matter.² On or about August 10, 2007, the Defendant/Counter-plaintiff propounded discovery on the Plaintiff/Counter-defendant. That on or about August 13, 2007, a hearing was held in open Court on the Motion for Continuance and said Motion was denied.³ A bench trial was set for August 22, 2007, in Warren County Court-Courtroom.

A Motion to Dismiss under Rule 12(b)(6) or in the Alternative for Summary Judgment was filed on behalf of the Defendant/Counter-Plaintiff, alleging that Trey Gordon was an unlicensed Mississippi Contractor and in compliance with Miss. Code Ann. § 73-59-9(3) does not have a remedy either at law or in equity to bring any action and therefore his complaint concerning the unpaid invoice should be dismissed. By written Order dated August 20, 2007, the

² The Defendant/Counter-plaintiff had not filed any type of discovery in preparation of his defense and prosecution of his complaint.

³ No written Order denying the Motion for Continuance exists.

Motion was denied. A Petition for an Interlocutory Appeal was filed with the Mississippi Supreme Court the same day. On August 21, 2007, said Petition was denied by the Mississippi Supreme Court and the case proceeded to trial on Wednesday, August 22, 2007.

A one day bench trial was held on August 22, 2007, whereby the County Court Judge for Warren County, Mississippi, found for the Plaintiff and Counter-Defendant. Prior to the Plaintiff beginning his case, the Defendant/Counter-Plaintiff renewed his Motion for Summary Judgment based on newly attained evidence.⁴ The County Court Judge again denied the Defendant/Counter-Plaintiff's Motion for Summary Judgment. Upon the Plaintiff resting, the Defendant/Counter-Plaintiff made a Motion for a Directed Verdict on all issues raised by the Plaintiff/Counter-Defendant, and the Defendant/Counter-Plaintiff's motion was denied.

At the close of the case and after the County Court Judge announcing his ruling, the Defendant/Counter-Plaintiff made Motion for Specific Findings of Facts. Said Motion was granted and on or about September 4, 2007, the County Court Judge adopted, with the exception to the additional language added by the County Court Judge, the proposed finding of facts offered by the Plaintiff/Counter-Defendant.

Prior to the Court making specific findings of fact, the Defendant/Counter-Plaintiff made a Motion to Re-consider filed on or about August 31, 2007. The Motion to Re-consider was denied on or about September 4, 2007.

A subsequent Notice of Appeal by the Defendant/Counter-Plaintiff was filed on or about September 26, 2007, and on or about June 3, 2008, the Circuit Court of Warren County, Mississippi denied Defendant/Counter-Plaintiff's appeal. A notice of appeal was filed on or about July 3, 2008.

⁴ Trey Gordon had filed a Construction Lien with Warren County Chancery Clerk's office in compliance pursuant to Miss Code Ann § 85-7-181 after filing his lawsuit

RELEVANT STATEMENT OF FACTS

The Appellee, hereinafter referred to as "Trey Gordon" or "Trey", is an individual that approached the Appellant, hereinafter "Russell Puckett" or "Russell", a disabled, bedridden individual, to fix the damage to Russell's roof and home caused by Hurricane Katrina.⁵ R. at 188. Trey Gordon submitted a written estimate for \$119,300.00 to completely repair the residence. R. at 18-19, 71.

To accomplish this house repair project, Trey Gordon formed a "joint venture" with Ricky Antoine. C.P. at 32, R. at 61. It was agreed between Ricky Antoine and Trey Gordon that Ricky Antoine would repair the wood-work and that Trey Gordon would repair the roof. R. at 61, 106. Further, Ricky Antoine attained the permit from the city for the remodeling project because he was a licensed contractor. R. at 61, 94. Trey Gordon could not attain the permit because the work exceeded \$10,000.00 and he did not have a contractor's license issued by the Mississippi Board of Contractors. R. at 60. Ricky Antoine was paid by Harvey Smith every two weeks upon presentation of an invoice for his work and the work of the subcontractors that he hired performed. R. at 95-97.

During the time that Ricky Antoine was working on Russell's residence, Trey Gordon would periodically come and check on the progress while he continued to work on other customers' projects. R. at 77-78. Prior to Ricky Antoine beginning his work, Trey hired a subcontractor to remove the tree that had caused the damage to the home, which was part of his original estimate for repair to the Feld House. R. at 56-57. Over the entire project, Trey only consulted with Russell Puckett twice on subcontractors that he was going to use to repair the damage to Russell's residence. R. at 184. On those two occasions, after consultation with

⁵ The Feld House is the name given to Russell Puckett's dwelling. He also sold antiques and other valuable collectables from the home. The House still contains valuable items although the Feld House has closed its doors for business.

Russell, Trey chose not to use the first two subcontractors he had initially chosen to replace the wallpaper and plaster work, but instead hired two other subcontractors to perform the wallpaper work and the plaster work. R. at 184-185. Upon Ricky Antoine completing the wood-work, Trey began repairing the roof to the Feld House. R. at 78-79. Trey utilized Ricky's son to assist him with the work to the Feld House roof. R. at 70. Trey also cleaned windows and assisted with debris removal at the Feld House. R. at 53-4, 78.

About halfway through the project, Trey Gordon submitted an invoice for a sum of \$9,128.81, reflecting work Trey had performed on the project as well as other sub-contractors had performed and was paid by Russell Puckett via Harvey Smith. R. at 29, 143. Trey presented a final bill to Harvey Smith, Russell Puckett's personal assistant and one time employee, just prior to completion of the project for \$17,603.65. R. at 34-40, 143. However, Russell Puckett refused to pay Trey until Russell was satisfied that there were no leaks and that the previous repairs made by Trey Gordon to the Feld House were complete. R. at 74. Ricky Antoine had also prepared a final bill for his work to be paid by Russell Puckett. R. at 34-40, 65.

At the completion of the repairs, Trey Gordon and Ricky Antoine went to the Feld home on or about April 11, 2006, to demand payment for their unpaid invoices. R. at 34-40. Trey and Ricky were escorted to Russell's private quarters by Harvey Smith. R. at 43. Russell was in his bed, the same place he remained for the majority of the remodeling project. R. at 45. Trey, a physically larger and stronger individual than Russell, came into Russell's private bed chamber and loudly demanded his money from Russell. R. at 72-3. Russell refused to tender payment until he was ensured that the roof didn't leak and that the other portion of the roof had been properly repaired.⁶ R. at 74, 188. Trey Gordon got louder and was hovering over Russell as he

⁶ Trey, prior to Hurricane Katrina, had been employed by Russell Puckett to repair leaks in the roof of the Feld House. Russell Puckett had paid Trey in full for that job. Russell had been dissatisfied with the work as the roof

lay in bed. R. at 188, 191. Trey lowered his voice and took step toward Russell threatened him with bodily harm. R. at 191. Russell helpless and trapped pulled a gun and threatened to shoot Trey Gordon if he did not leave. R. at 191. Trey immediately left the bed chamber and eventually left the premises later that day after gathering all his tools. R. at 46. Ricky Antoine, who admitted to having a hearing problem and was in the bedroom during this incident, stayed and spoke with Russell before leaving the Feld House. R. at 101-2. Subsequent to Trey Gordon leaving, Russell and Harvey reported to having received threatening phone calls from Trey Gordon. R. at 199.

After Trey Gordon left the premises, Harvey Smith discovered two valuable Oriental rugs were missing and that an outside cement statute had been damaged. R. at 195. Harvey Smith acknowledged that the carpets or rugs had been initially damaged by the storm and had been sent off to be cleaned and restored. R. at 213. Harvey further recalls receiving them back after being cleaned and that he had stored them in the same room that had been damaged by Hurricane Katrina. R. at 214. Harvey verified that no customers of the Feld House had had access to this room, only those persons that had worked on the repairs.⁷ R. at 213.

Upon completion of a the remodeling project, Ricky Antoine notified in writing the City of Vicksburg's Permit Department expressing his completion of the job and that Trey and Russell had a dispute over Trey's fee. R. at 115-17. In the letter, that he said Trey Gordon assisted him in writing, he refers to Trey Gordon as a sub-contractor. R. at 117. Further, after filing a complaint against Russell Puckett, Trey Gordon filed a construction lien with the Warren County Chancery Clerk's Land Records pursuant to Miss. Code Ann. § 85-7-131. R. at 81. Trey

had still leaked. Trey had offered to reduce the amount owed to him for the Katrina repairs by the amount he had been previously paid on the unrelated roofing repair.

⁷ The Dining Room was the room the tree had damaged. But, only a third of the room was being worked on with the other two thirds protected by a large piece of plastic. Further, the doors to the dining room on the interior of the home had been shut and blocked.

Gordon was not an architect, engineer, surveyor, or materialmen. To claim the relief under Miss. Code Ann. § 85-7-131, he was either a laborer or a contractor.

After Trey Gordon did not receive his money from Russell and after the gun incident, Trey was reported to be more agitated than usual. R. at 131. However, it was also testified to that Trey's business was not steady after completion of the repairs to the Feld House. R. at 132. Trey Gordon did not suffer physically or monetarily because of the gun incident. R. at 80.

SUMMARY OF ARGUMENT

Trey Gordon's complaint, as it pertains to the money owed him for his work performed on the Feld House and his participation in the Joint Venture, is directly dependent on his classification or characterization and involvement with the Feld House repairs.

Trey Gordon approached and represented himself to Russell Puckett as a licensed and bonded Contractor. He solicited Russell Puckett to repair the Feld House. Trey Gordon further solicited the assistance of Ricky Antoine, a licensed Contractor, so that Trey Gordon could ascertain a work permit through the City of Vicksburg's Permit Department. Trey referred to Ricky Antoine's involvement as a Joint Venture. A Joint Venture is exactly what it was. Ricky Antoine repaired the wood-work damaged by the large oak tree that fell on the Feld House and Trey repaired the roof. Both parties, hired sub-contractors to complete specialized areas for the repairs.

Russell Puckett took no part in hiring and/or firing of sub-contractors, except on two occasions that Trey Gordon consulted with Russell. On both occasions, Trey indicated that he thought both subcontractors price for their work was too high. Russell took no part in directed clean-up, tree-removal and subsequent repairs. His only involvement was a cursory inspection of the Dining room once it was near completion. He exercised no control of any of the subcontractors' work and/or Trey and Ricky's work.

He did not tell Trey how to put the roof on the home or how to lay the tile on the roof. He did not instruct Ricky Antoine on how to repair the wood structure or how to drive a nail, etc. In fact he spent most of his time in his bedroom. The only control Russell had over the project was through the purse strings just like any other owner of home or project. The only demand Russell made on Trey for final payment was to ensure the roof did not leak after two wind blown rains.

Trey Gordon was not Russell Puckett's agent but his Contractor. Trey Gordon was not licensed by the Mississippi Board of Contractors. The entire project far exceeded \$10,000.00. Trey's portion of the project far exceeded \$10,000.00. Under Mississippi law, one must have a contractor's license to work on projects in excess of \$10,000.00. If one does not have a license, the unlicensed individual works on the project in violation of Mississippi law and is deprived recovery for work performed, at law or in equity. Trey Gordon was an unlicensed contractor that worked on a project, either as a laborer and/or a contractor, in excess of \$10,000.00. Trey is in violation of Mississippi law and is without a remedy at law or in equity and therefore not entitled to recovery of the unpaid \$17,603.65.

If Trey is not a Contractor, then he was a sub-contractor of Ricky Antoine. Ricky Antoine never directed or controlled Trey Gordon's actions and/or work on the Feld House. Trey Gordon's work on the residential repairs was one of a roofer. Upon completion of the roof, he presented Russell Puckett for final payment. Again this payment exceeded \$10,000.00. A sub-contractor is not entitled to relief against an owner unless he has first presented the owner with a stop-payment notice. Trey Gordon did not present Russell Puckett with a stop-payment notice. Trey Gordon contends that Ricky Antoine was the contractor on job, because he had a license. Assuming that as true, Trey Gordon's action is against Ricky Antoine not Russell Puckett.

Under Mississippi jurisprudence, an individual can be an agent and a contractor simultaneously. Assuming Trey Gordon acted as an agent of Russell Puckett, Trey was still a laborer or contractor for purposes of repairs to the roof. As such, Trey Gordon never produced any invoices distinguishing the work Trey performed as an agent vice work he performed as an independent contractor or roofer, and since no one is contesting he worked as a roofer, then one

must assume that the invoice was for his labor on the roof. Since his roof work exceeded \$10,000.00, he is barred from recovery under Mississippi law.

Russell Puckett is a disabled, bedridden 68 year old gentleman, who appeared in Court in a wheel chair and pajamas. Trey Gordon is a 43 year old man, that has been performing physical labor most of his adult life. On the day the assault took place, Trey came into Russell's private bed-chamber blocking the only means to escape and began demanding, very loudly, payment for his work. When Russell refused, Trey took a step toward Russell, who was still lying in his bed, and threatened him with physical violence. Russell used the only means available to him to protect himself from this perceived threat and that was his personal hand-gun that he keeps near him in his own home. Subsequent to this incident, Trey Gordon called numerous times and threatened Russell Puckett with physical violence. Russell Puckett's actions were in self-defense. Russell Puckett is entitled to verdict in his favor for assault.

As Russell was defending himself and was himself assaulted by Trey Gordon, punitive damages were not warranted against Russell. Further, punitive damages are awarded to deter future misconduct. Under current Mississippi law, a man is permitted to use any means, including use of deadly force to protect himself and his home. Since deterrence is moot issue by legislative action, punitive damages would not be warranted against Russell Puckett, if his actions were deemed to be an assault and not self-defense.

Because Trey Gordon is not entitled to punitive damages, he is not entitled to Attorney's Fees. Trey Gordon claimed Attorney's Fees under two theories: open account and punitive damages. Trey Gordon claims that since he did not request full payment for his services as a contractor up front, which is not the industry standard for repair to homes, that he was acting as a creditor, and Russell had an open account or a line of credit with Trey Gordon, but no evidence other than this bare assertion was ever produced. The type of project that was performed, a

garden variety repair for storm damage, and Trey Gordon's relationship to Russell Puckett directly contradict this assertion that Russell had an open account with Trey Gordon for the work performed on the Feld House. Further, the County Court Judge made no specific findings of fact to rely upon for awarding attorney fees on this theory. The County Court Judge relied solely upon his award of punitive damages to award attorney fees. As punitive damages were not warranted in this case neither were attorney fees.

Trey Gordon is not entitled to recover his unpaid invoices as he was an unlicensed contractor and barred from recovery under Mississippi law. Further, his actions in Russell Puckett's bed chamber and subsequent threatening phone calls constitute assault and Russell Puckett's action constituted self-defense not an assault. Russell Puckett is entitled to a judgment against Trey Gordon for assault and punitive damages to deter such heinous and despicable acts. Russell Puckett is entitled to attorney fees upon the award of punitive damages.

Trey Gordon is not entitled to punitive damages or attorney fees.

ARGUMENT

I. Whether the County Court Judge erred in denying the Defendant/Counter-Plaintiff's request for a directed verdict?

At the end of a Plaintiff's case, a defendant(s) may make a motion for a directed verdict. See Miss. R. Civ. Pr. 50(a). Upon Trey Gordon resting, Russell Puckett moved for a directed verdict on all claims in the complaint made by Trey Gordon. R. at 168-181. After much discussion the Motion for a Directed Verdict was overruled. R. at 181. The standard for granting a motion for a directed verdict is the judge should view the evidence in light most favorable to the party opposing the directed verdict motion. Another way to say that is the courts should direct a verdict only if reasonable minds could not arrive at a verdict contrary to the position of the movant. *See Ishee v. Peoples Bank*, 737 So. 2d 1011 (Miss. Ct. App. 1998). "The decision to grant a directed verdict is one of law". *Fox v. Smith*, 594 So. 2d 596 (Miss. 1992).

A cursory view of Trey Gordon's case must be viewed in a light most favorable to him. The facts of this case are clear. Trey Gordon was hired by Russell Puckett to repair his roof and dining room damaged by an oak tree that fell on the Feld House. R. at 11 and 136. On or about February 2, 2006, Trey Gordon presented Russell Puckett with an invoice for \$9128.81, reflecting charges for time and work performed on Russell Puckett's residence from the beginning of the project until that date by Trey Gordon. R. at 26-27. Russell Puckett promptly paid him for his work on the project. R. at 27. However, in dispute is not whether Trey Gordon worked on the project, but whether his final invoice is justifiable and ultimately, whether Trey Gordon is entitled to recover at law or in equity. Russell Puckett submits he is not.

Trey Gordon's complaint alleges that he is entitled to \$17, 603.65 for work performed on Russell Puckett's House. C.P. at 4. During Trey's testimony he alleges that this was for work

performed by him personally and for work performed by sub-contractors. R. at 34-41. Trey continued to be questioned by his counsel concerning justification for the amount he charged, but could not ever come up with an explanation. R. 40-41. He was never able to establish how long he worked or at what rate. R. at 41. In fact he had to guess:

Q: Okay. How much an hour were you charging him?

A: Well, it depended. I don't remember. It depended on what job we were doing. You know, I don't guess it would really be hourly. It would just be depending on what we had done. It usually **probably** ended up to be about \$25 an hour.

R. at 41. emphasis added.

Even when questioned by the County Court Judge in regards to time and the hourly wage calculated to figure up his labor, Trey Gordon was unable to justify his time with evidence. He simply testified in general terms. R. 87-90. The \$13,000.00 plus he was claiming was for his labor was not supported by any time sheets or any other documentation or other type of evidence to support this amount. R. 66-68. In fact, the amount he submitted on his invoice was almost the exact amount he had earmarked for the end of the project. R. at 68. Although Trey Gordon testified that he performed \$13,000.00 worth of work for labor, he was never able to corroborate this figure with any credible evidence. R. at 66-68. The County Court Judge was in error to not grant a directed verdict in favor of Russell Puckett on this issue.

Trey Gordon claims that Russell Puckett assaulted him with a gun. R. at 46. Assuming that Russell Pucket did not act in self defense, Trey Gordon provided no evidence that he suffered any damages because of this assault. R. at 79-80. He provided no doctors reports or other competent evidence that he suffered mental or emotional trauma nor any physical injury caused by the such conduct. R. at 80. Further, based on all the facts and circumstances, Russell Puckett was justified in his action against Trey Gordon.

Trey Gordon is 6'3", 240 pound male that has been in construction or other manual labor for at least 20 years. Russell Puckett is a 68 year old male, who is disabled and bedridden. Trey Gordon came into the room and was being loud. R. at 114. Trey was angry because he believed he had been deceived by Russell Puckett. R. at 74. He went into the room to demand money. R. 74-75. In fact, he demanded money. R at 75. Trey blocked the only means of escape. R. at 72. Given the situation as testified to and the overall facts at the time that Trey Gordon rested his case and the fact that a larger man who was extremely agitated, very loud, and demanding money from a 67-68 year old disabled, bedridden man; Russell Puckett was justified in defending himself with whatever means he had available to him at the time. The Judge erred in not granting a directed verdict in favor of Russell Puckett as to the assault.

The statutory language of Miss. Code Ann. § 73-59-1 (2004) defines a Remodeler as:

[A]ny . . . individual who, for a fixed price, commission, fee, wage or other compensation, undertakes or offers to undertake the construction, or superintending of the construction, of improvements to an existing residence when the cost of the improvements exceeds Ten Thousand Dollars (\$10,000.00).

Miss. Code Ann. § 73-59-1 (revised 2004).

That Miss. Code Ann. § 73-59-9(2) states "Any remodeler who undertakes . . . the business of residential improvement without having a valid license as required by this chapter, . . . **shall** be deemed guilty of a misdemeanor. . . ." Miss. Code Ann. § 73-59-9(2) (revised 2004) emphasis added. It further states " A . . . remodeler who does not have the license provided by this chapter **may not bring any action, either at law or in equity**, to enforce any contract for . . . remodeling or to enforce a sales contract." Miss. Code Ann. § 73-59-9(3)(revised 2004), emphasis added. Trey Gordon testified that he was an individual that for a fee undertook the construction and the superintendent of a construction project to an existing residence and said project exceeded \$10,000.00. R at 51-58. Trey Gordon did not have a license through the Mississippi Board of Contractors at the time he performed the work on the residence. R. at 60.

Russell Puckett used Harvey Smith to communicate with Trey Gordon and others during the course of the remodeling project. R. at 67. Harvey Smith handled the money for Russell Puckett. R. at 63. Trey Gordon meets the statutory definition of a remodeler by his own admission. R. at 51-58.

Russell Puckett took no part in hiring or firing of the subcontractors. R. at 51-58. Trey Gordon was operating without license and met the statutory definition of a remodeler and was in violation of Mississippi law and therefore was without a remedy at law or in equity. The County Court Judge erred in not granting a directed verdict on this issue.

II. Whether the County Court Judge erred in finding that Trey Gordon, Plaintiff/Counter-Defendant, acted as an agent and construction manager for Russell Puckett, Defendant/Counter-Plaintiff, rather than a Remodeler, Contractor or Sub-Contractor?

Upon the County Court Judge finding for Trey Gordon on Russell Puckett's claims and for Trey Gordon on his claims, Russell Puckett made a motion that the County Court Judge make specific findings of fact. R. at 229. The County Court Judge ordered that both parties submit proposed findings of fact. R. at 229. Trey Gordon's findings of fact were adopted verbatim but for a minor addition by the County Court Judge. RE. at 4-7; CP at 100-103.

"In bench trials, a [county court] judge's findings are subject to the same standard of review as those of a chancellor." *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989). The standard of review is usually the manifest error/substantial evidence rule. *Miss. State Tax Comm'n v. Med. Devices*, 624 So. 2d 987, 989 (Miss. 1993). However, heightened scrutiny is applied when a party's entire proposal is adopted verbatim. *Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500, 504 (Miss. 2007). "Heightened scrutiny also is applied when the court makes only minor alterations to a party's proposed findings." Quoting *University*

of *Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141, 145 (Miss. 2007); *Smith v. Orman*, 822 So. 2d 975, 977-78 (Miss. Ct. App. 2002).

Since the County Court Judge adopted the plaintiff's findings of fact verbatim with minor alterations, this Court views the Judge's decision with heightened scrutiny, **not** manifest error/substantial evidence rule. *Id.*; see also *City of Greenville v. Jones*, 925 So. 2d 106,116 (Miss. 2006). When the court acts as the finder of fact and does not make separate findings of fact and conclusions of law, then that court has committed error and the reviewing Court's deference to the lower courts findings is lessened and in matters of law the review of the record is *de novo*. *Brooks v. Brooks*, 652 So. 2d 1113, 1119 (Miss. 1995).

Trey Gordon's theory for recovery on his construction contract with Russell Puckett was that of agency. R. at 50. Russell Puckett contends that Trey Gordon was his general contractor, hired to reconstruct and/or repair his residence, the Feld House. R. at 183. The importance of Trey Gordon's characterization directly affects his ability to prosecute his law suit as it pertains to recovery of unpaid invoices. If Trey Gordon can not demonstrate that he acted as an agent vice a contractor or remodeler, as defined by Mississippi statute, then he has no remedy at law or in equity. See Miss. Code Ann. § 73-59-1 et. seq. (revised 2004).

"Whether an agency has in fact been created is to be determined by the relations of the parties as they exist under their agreements or acts, with the question being ultimately one of intention." *Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So. 2d 613, 617-18 (Miss. 1969). "The line between an agent and an independent contractor is not really a line but a 'twilight zone,' with the answer inevitably revolving around the idea of control." *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So. Ed 135, 1359 (Miss. 1989) (citing *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198-99 (Miss. 1988)). "The most characteristic feature of an agent's employment is that he is employed primarily to bring about business relations between his principal and third persons."

First Jackson Secs. Corp. v. B.F. Goodrich Co., 176 So. 2d 272, 278 (Miss. 1965)(quoting 2 C.J.S. *Agency* § 1c, at 1024 (1936)). Adopting Black's Law Dictionary's definition of a general contractor, the Mississippi Supreme Court has said a general contractor is "the party to a building contract who is charged with the total construction and who enters into sub-contracts for such work as electrical, plumbing and the like." *Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc.*, 589 So. 2d 1245, 1247-48 (quoting Black's Law Dictionary 349 & 621 (5th ed. 1983)). "Fundamentally, 'an [individual] which acts as agent for an owner intending **no profit** from the construction itself is *not* a contractor or master workman for the purposes of § 85-7-181'." *Aladdin Constr. Co., Inc. v. John Hancock Life Ins. Co.*, 914 So. 2d 169, 178 (Miss. 2005) (quoting *Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc.*, 589 So. 2d 1245, 1249 (Miss. 1991)).

In the *Aladdin Construction* case, the agent sought no profit from the construction, but acted as a conduit to pay for the construction. *Id.* Also, in *Aladdin Construction* the alleged general contractor did not perform any actual construction. *Id.* The *Aladdin Construction* is altogether distinguishable from the case *sub judice* in that the subcontractors were attempting to recover under § 85-7-181, and therefore had to prove that the contractor in that case acted as the owner's agent rather than as a contractor. *Id.* In this case, the general contractor is trying assume the legal description as an agent to circumvent § 73-59-9. Unlike in *Aladdin Construction*, Trey Gordon performed actual construction, hired and fired sub-contractors, and sought profit from the actual construction or remodeling of the Feld House. R. at 69-70.

"A general contractor is 'charged with the total construction'" *Aladdin Constr. Co. Inc.*, at 178. A contractor is defined as "[o]ne who in pursuit of independent business undertakes to perform a job or piece of work, retaining to himself control of means, method and manner of accomplishing the desired result." Blacks Law Dictionary 397 (4th ed. 1968). A construction or

project manager is a person who administers or supervises the affairs of business, office, or other organization. *Aladdin Constr. Co.Inc.*, at 178. Again, the assumption is that the agent acts in the place of the owner. *Id.* However, at all times, the owner, Russell Puckett, managed the money of the remodeling project.⁸ R. at 63. Trey Gordon sole role was to ensure the completion of the repairs to the Feld House. R. 183-184. He submitted a written estimate to complete the project. R. at 18-19. The written estimate was for \$119,300.00. P.E. 1. \$18,000.00 of the estimate was for roofing labor only. P.E. 1. Trey Gordon was the only person except Ricky Antoine's son performing the roofing work. R. at 70. However, Ricky's son was paid by Ricky Antoine and not Trey Gordon, so the \$18,000.00 in the estimate was purely Trey's profit. R. at 70. Although Trey Gordon testified that Russell was in control and that he was there to ensure everything got done the way Russell wanted, there was no evidence produced, through testimony or otherwise, that Russell Puckett controlled the means, method and manner of accomplishing the desired result. R. at 18. Russell Puckett acted as any other owner of home or business that he had invested time and money in, he told Trey Gordon what his desired result was and Trey Gordon made sure it happened. Trey Gordon meets the text book definition of a contractor.

Interestingly, Trey Gordon sought to use the protection § 85-7-131, by filing a Construction Lien with Warren County Chancery Clerk's Land Records. R. at 81. § 85-7-131 is reserved with those persons that have direct privy of contract with the owner such as laborer and/or contractor. Miss. Code Ann. § 85-7-131. By filing the lien, Trey Gordon is holding himself out as either a laborer or a contractor.⁹ *Id.* § 73-59-1 defines a remodeler¹⁰, a laborer and/or a contractor both fit this statutory definition. Miss. Code Ann. § 73-59-1. § 73-59-9 makes it a misdemeanor to be remodeler without a license. Miss. Code Ann. § 73-59-9(2).

⁸ Actually the testimony indicated that Harvey Smith was keeping up with check book and Harvey Smith at the time was Russell Puckett's only employee.

⁹ Other groups qualify to file a lien under this statute but none match or resemble the work Trey Gordon performed.

¹⁰ Remodeler has already been defined in this brief.

Under this same section of the Mississippi Code, a remodeler may not bring any action, either at law or in equity, to enforce any contract. *Id.* There are exceptions to this rule. Miss. Code Ann. § 73-59-15(1)(b). However, these exceptions live and die on the definition of agency and contractor as previously defined. Although Trey Gordon went through great pains to make himself appear to be only the conduit, like in the *Aladdin* case, his actions reveal the truth. Trey Gordon performed actually physical labor on the construction project, he paid sub-contractors with his own money, he fired sub-contractors, Russell Puckett took no part in controlling the construction project, Trey Gordon filed a construction lien, and he described his own involvement as a Joint Venture with Ricky Antoine, a licensed Mississippi contractor.

Even if some of Trey Gordon's actions slipped in to the characterization of agency, Mississippi recognizes that one can be both an agent and an independent contractor for the same employer. See *Kight*, 537 So. 2d at 1359. However, Trey Gordon could not distinguish his alleged agency work from his roofing and other construction duties, and therefore, can not recover, as his contracting duties were in violation of Mississippi law. See Miss. Code Ann. § 73-59-9.

The most telling and revealing information concerning Trey's position concerning the project came through Ricky Antwine. His testimony confirms that Trey was the independent contractor for the roof and he was the independent contractor for the wood work. R. at 106.

Trey Gordon's actions were at all times that of a contractor not an agent and therefore the Judge erred in finding for Trey Gordon on his complaint for compensation for the \$17, 603.65.

III. Whether the County Court Judge erred in finding that Russell Puckett committed an assault against Trey Gordon?

It is undisputed that Trey Gordon and Russell Puckett had a dispute in Russell Puckett's bed chambers. R. at 45-46, 151. It is undisputed that Russell Puckett eventually pointed a gun at

Robert Gordon. R. at 45-46, 151. What is in dispute, is whether Russell Puckett was justified in pointing the gun at Trey Gordon? The only other witness to the scene was Ricky Antoine. R. at 100-102. Through Ricky's testimony, Trey's Testimony and Russell's testimony, it undisputed that Trey was upset about not being paid, that Ricky had not yet received his final payment and that both men went back to Russell's private bed chambers together to confront Russell about being paid. R. at 45-6, 100-2, 189-91. Through Ricky and Russell, Trey was agitated and became loud; that Trey is physically larger and younger than Russell; that Russell was bedridden at the time of event and that at all times all parties were in Russell's residence. R. at 45-46, 151, 100-102, 188-192. Further, Ricky Antwine is hard of hearing, especially when there is background noise. R. at 113. Ricky Antwine does not recall what was said. R. at 114. There was an oscillating fan turned on and running in Russell Puckett's room at the time of the incident. R. at 189. Therefore, the circumstances surrounding this unfortunate event justified Russell Puckett pulling a gun on Trey Gordon.

One is entitled to use deadly force to repel deadly force. *Burton v. Waller*, 502 F.2d 1261, 1275 (5th Cir. 1974)(applying Mississippi law.) However, in this case, deadly force was not used but only the threat of deadly force. Trey Gordon, a much larger man, standing within feet of an older, feeble man, took a step toward Russell Puckett and threatened to do bodily harm to him. R. at 191. Russell Puckett had no choice but to use whatever means available to him to repel the perceived threat of Trey Gordon. Further, had Russell Puckett intended to maliciously pull a gun on Trey for calmly demanding money, then why did he not also point the gun at Ricky Antwine? The fact is clear, Trey Gordon came in the room in threatening manner and made an overt threat toward Russell Puckett justifying Russell's action.

IV. Whether the County Court Judge erred in awarding punitive damages?

The Plaintiff must establish by clear and convincing evidence that Russell Puckett acted with malice or with willful, wanton or reckless disregard for the safety of others. *Jordan v. McKenna*, 573 So. 2d 1371, 1378 (Miss. 1990); Miss. Code Ann. § 11-1-65. If no actual damages are awarded, then punitive damages are not recoverable. *Jenkins v. CST Timber Co.*, 761 So. 2d 177, 180 (Miss. 2001). Per Mississippi Code, the fact finder shall consider: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing: Defendants motivation, duration of the assault, etc. The primary purpose is to punish the wrongdoer and deter similar misconduct in the future by the defendant. Miss Code Ann. § 11-1-65(1)(e).

In the case *sub judice*, punitive damages were not warranted as Russell Puckett's actions were justified. Even if Russell Puckett's actions were not justified, under the circumstances in this case, punitive damages were not warranted. Further, Trey Gordon suffered no harm because of the alleged assault.

It was error for the Judge to grant an award of punitive damages.

V. Whether the County Court Judge erred in awarding attorney fees to Trey Gordon?

There were two theories by which the Plaintiff requested attorney fees and only was supported by the County Court Judge's findings of fact. RE at 5-7, C. P. at 101-103. The Judge adopted the Plaintiff's proposed almost verbatim. RE 5-7., C. P. at 100. The Judge awarded attorney fees based solely on the award of punitive damages. RE 6-7, C.P. at 101-103. The findings of fact do not support an award of attorney's fee based on an open account per § 11-53-81. RE 5-7. Further, Trey Gordon is an individual roofer not a credit card, company, banking institution, or other entity in the practice of extending credit. R. at 50-53. Trey Gordon did not extend credit as he did not have credit to extend. He entered into an agreement to repair a home,

period. R. 7-15. 50-55. Trey Gordon was paid in the normal course of business in the construction industry, paid on demand or completion of work. This was not an open account case.

As Russell Puckett was justified in his actions in regards to the alleged assault, punitive damages were not therefore warranted. Since punitive damages were not warranted, neither are attorney fees.

VI. Whether the County Court Judge erred in dismissing Russell Puckett's assault claim?

The facts already listed and arguments made concerning the bedroom incident clearly establish an assault on Russell Puckett. Further, the evidence demonstrated that Russell Puckett received threatening phone calls from Trey Gordon. R. at 199-201. The threat to do bodily harm to Russell Puckett and subsequent threatening phone calls clearly established that Russell Puckett was entitled to an award of damages for his claim of assault. He was further entitled to an award of punitive damages and attorney fees arising from the assault.

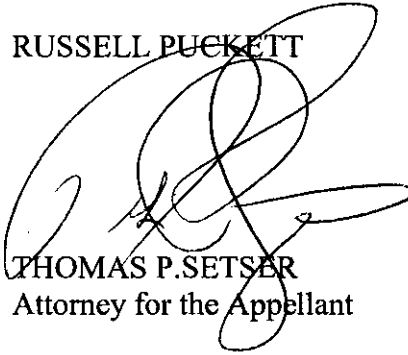
It was error to not grant the relief requested by Russell Puckett in regards to the assault.

CONCLUSION

The Appellant respectfully requests that this Honorable Court reverse and render the decision of the lower court and dismiss the appellee's claim as barred by Miss Code Ann. § 73-59-9 and further find in favor of Appellant and against the Appellee on the Assault, award punitive damages, and attorney fees.

Respectfully Submitted,

RUSSELL PUCKETT



THOMAS P. SETSER
Attorney for the Appellant

CERTIFICATE OF SERVICE

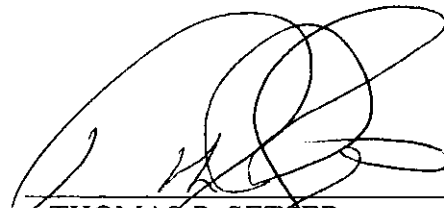
I, Thomas P. Setser, attorney for appellant, Russell Puckett, certify that I have this day filed a one original and one copy of Appellant's Brief with the Clerk of the Circuit Court of Warren County, Mississippi and have hand delivered copies to the following persons:

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This the 27th day of October, 2008.



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