

**COPY**

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-02098

PAUL G. SMITH

APPELLANT

VS.

**FILED**

CAMPUS EDGE OF HATTIESBURG, LLC and  
HATTIESBURG ASSOCIATES OWNERS, LLC

MAY 07 2009

APPELLEES

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

APPEAL FROM THE CIRCUIT COURT OF

LAMAR COUNTY, MISSISSIPPI

CAUSE NO. 04-0335-EH

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REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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### **Reply to Appellee's Proposition I.**

Denial of Summary Judgment is not final. The case goes to a *trial de novo* – however, the granting of Summary Judgment is final. How many times does a Plaintiff have to put a case on hold while he defends against another Summary Judgment Motion? (RE 21–22, 33-67) When the Plaintiff makes an amendment to the pleadings the door is certainly open for a new Summary Judgment Motion. But on a straight transfer back to the Circuit where Defendant, HAO, was already overruled on Summary Judgment, that party should not be allowed a third Motion or a fourth, or a fifth, etc. Appellant, Smith fears a bad precedent could be established by this case, which will do exactly the opposite of what the Honorable Court of Appeals and the Supreme Court of Mississippi have attempted to do – speed up the judicial process. Appellee cites Anderson v. LaVere, 895 So2d 828 (Miss. 2004) for authority that the matter is not *res judicata*. However, the distinction between Anderson and the case at bar is easily drawn because in Anderson the four (4) identities required for *res judicata* were not met. Here they are. Farmer v. Richardson, 970 So2d 261 (Miss. App. 2007) citing Little v. V.G. Welding Supply, Inc., 704 So2d 1336 (Miss. 1997) This matter is over except for a trial on the merits. Plaintiff's position is that the issue of Defendant's continuing motions for Summary Judgment is *res judicata*, not the case itself.

“The instant Court stated: [the first Motion for Summary Judgment was filed and denied], however, Plaintiffs have filed a Fourth Amended Complaint and further discovery has been completed. Thus, the Court considers Wall's Second Motion for Summary Judgment in light of these new facts.”

Exactly our situation Plaintiff amended his pleadings when the case was transferred to Chancery Court and the Defendant filed a 2<sup>nd</sup> Summary Judgment Motion (R.E. 21-22),

which was again overruled. However there were no changes to the pleadings when the case went back to Circuit Court. The Defendant has no new opening upon which to base another Summary Judgment Motion. Enlaw v. Tishmingo County, Miss., 962 F.2d 501 C.A. 5 (Miss. 1992) HAO is collaterally estopped from further Summary Judgment pleadings Harrison v. Chandler-Sampson, Inc., 2005 WL 107139 (Miss. 2005) .

The Defendant, Hattiesburg Associates Owner's 3<sup>rd</sup> Motion for Summary Judgment should be rejected and overruled.

### **Reply to Appellee's Proposition II.**

When Defendant, HAO, disputed Plaintiff's claim in his conclusion that Paul G. Smith only has to prove his claim by a scintilla of evidence, counsel for Appellees left out the inverse that HAO must be able to prove there is no set of facts under which Appellant could prevail. The deposition of Paul Smith and the affidavit of Raymond Dearman, P.E. (R.E. 88-89) satisfy that requirement in favor of the Plaintiff. McClinton v. Delta Pride Catfish, Inc., 792 So2d 968 (Miss. 2001) "Even when the Trial Court finds there is nothing before it that indicates a genuine dispute of material fact and finds that the Movant is otherwise entitled to Summary Judgment, the Trial Court may nevertheless be justified in denying Summary Judgment when, in it's view, a full exposition of the facts may result in a triable issue or is warranted in the interest of justice." Great Southern Nat'l Bank v. Minter, 590 So2d 129 (Miss. 1991).

### **Reply to Appellee's Proposition III.**

This is not a contract dispute. Plaintiff recognizes the Judgment of the Lamar County Circuit Court dated March 1, 2006, (R.E. 12-15) and is appealing this case based solely on the negligence claim set out in the Amended Complaint. (R.E. 16-20) A genuine issue of material fact is set up by the disagreement of the expert witnesses. In addition to that, Plaintiff, Smith in his deposition, testified the berm or dam-like structure placed on the boundary line by Defendants, Campus Edge and maintained by Defendant, HAO, has diverted the natural flow of water to flood his property worse than when the problem started with Terra Firma, who is not and was not a party in the Amended Complaint. (R.E. 16-20) Excerpt from Affidavit of Raymond Dearman, P.E., dated May 9, 2007, ...” I viewed the site wherein Paul Smith’s lot is continually flooded by heavy rains coming off the berm between himself and the adjacent apartment complex formally known as Campus Edge and now owned by Hattiesburg Associates Owner, LLC. The work that was previously done did not correct the problem and the embankment, which the apartment complex has placed on the property line between Hattiesburg Associates Owners, LLC, and Paul Smith, only serves to worsen the flooding problem, which already existed.” That statement creates a genuine factual issue that should have survived Summary Judgment against both Defendants. Summary Judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. Adcock v. International Paper, 809 F.Supp. 457 (S.D. Miss. 1992)

#### **Reply to Appellee's Proposition IV.**

While Appellant, Paul G. Smith, continues to assert his argument that damages are not significant part of a ruling in a Motion for Summary Judgment, Rodeway Inns International, Inc. v. American Enterprises, Inc., 742 F.Supp 365 (S.D. Miss. 1990), Smith has presented his affidavit concerning his damages accrued previously demanding \$35,994.80. (R.E. 84-85). In discovery Smith offered receipts for dozier work done on his lot and estimates for future necessary drainage work.



### **Conclusion**

Appellant, Smith, respectfully requests this cause be reversed and remanded for a trial on the merits. Mr. Smith has not had his day in Court and there is most certainly a genuine issue of material facts existing between the parties.

**CERTIFICATE**

I, William L. Ducker, do hereby certify that I have mailed the original and three (3) copies plus the 3 x 5 floppy disc of the above Response to Brief of Appellee, Hattiesburg Associates Owner, LLC to:

Hon. Betty Septon  
Supreme Court Clerk  
P. O. Box 117  
Jackson, MS 39205

and I have also mailed a true copy, postage pre-paid to:

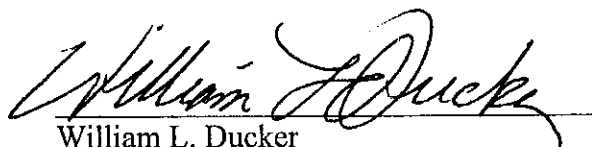
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This the 7<sup>th</sup> day of May, 2009.

  
William L. Ducker