IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO: 2008-TS-02156

IN THE MATTER OF THE ESTATE OF HELEN G. VICKERY, DECEASED

GLENDY BURKE "VICK" VICKERY, APPELLANT

VERSUS

GEORGE W. VICKERY, JR., APPELLEE

****

BRIEF OF THE APPELLEE

****

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case, a will contest. 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.

Parties:

Glendy Burke "Vick" Vickery ..... Appellant above and Proponent below

George W. Vickery, Jr. ..... Appellee above and Objector below

Counsel for the Parties:

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Other Interested Parties:

Respectfully submitted, this the 11 day of August, 2009.

GEORGE W. VICKERY, JR., Appellee

BY: _____
CHESTER D. NICHOLSON
MSB # [redacted]

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STATEMENT OF THE ISSUES

This is a will contest between two brothers, Glendy Burke "Vick" Vickery, the Proponent of the defeated will and the Appellant before this Court; and Vick's older brother George W. Vickery, Jr., the Objector, and the Appellee here. The October 22, 2004 will at issue was that of the brothers' stepmother, Helen G. Vickery. Throughout this brief in order to distinguish between the two brothers, the Proponent/Appellant will be referred to as Vick Vickery; and the Objector/Appellee will be referred to as George Vickery.

George Vickery frames the issues before the Court to be these:

1. What is appealed is the denial of summary judgments, two of them, one based upon accord and satisfaction and the other based upon estoppel. These are both interlocutory in nature; thus the first issue is whether Vick Vickery is entitled to be here at all in the Appellate Court, since the summary judgments were merged in the jury verdict.

2. Next, even if the interlocutory summary judgments were not merged in the jury verdict, both are based upon affirmative defenses, accord and satisfaction and estoppel; because the affirmative defenses were not promptly asserted and argued, even as the case was extensively litigated, the case law is clear that they are waived, as was found by the Chancellor.

3. Third, even if not procedurally barred by waiver, the defense of accord and satisfaction does not apply to a will contest. Accord and satisfaction applies to debtor/creditor relationships, and Vick's lawyer is asking this Court to make some new law, as there is no support for the accord and satisfaction defense.

4. Next, even if not procedurally barred, the defense of estoppel has no application under the facts of this case, where the payment relied upon was not made out of an estate account; was not presented for approval to the Court under any sort of accounting; does not otherwise meet the test for estoppel.

5. And finally, Vick Vickery failed to preserve for appeal *any* issue regarding estoppel and/or accord and satisfaction, because the only post trial motion he argued was an *ore tenus* Motion for Judgment Notwithstanding the Verdict under Rule 59, alleging that the jury verdict setting aside the will (both on grounds of no testamentary capacity and undue influence) was against the weight of the evidence. Because the requisite post trial motion was not filed, the Appellant Vick Vickery is procedurally barred from trying to argue the matter before this Court.

STATEMENT OF THE CASE

A. Nature of the case; course of proceeding and disposition below.

This is a will contest. Helen G. Vickery was Dr. George Vickery, Sr.'s second wife, his first marriage having ended in divorce. Dr. Vickery's first marriage resulted in two children, the parties to this will contest, George Vickery, Jr., and his younger brother Vick Vickery. The Vickery brothers were thus Helen Vickery's stepsons.

Dr. Vickery predeceased Helen, leaving the bulk of the estate to her. She had a series of wills over the years, the most recent being one dated October 22, 2004,(ARE-5) which replaced an earlier will dated August 16, 2000. (ARE-4)

Helen Vickery died November 22, 2005 (R-1), at age 86.

On December 11, 2005, Vick Vickery filed his Petition to Probate the putative will of October 22, 2004 (incorrectly identified in the petition at page 1 of the record as

dated October 22, 2005: the parties are in agreement that the correct date is October 22, 2004. The 2004 will departed from previous wills which more less divided the substantial estate equally between the brothers in that it left almost everything to Vick Vickery, who had his mother's power of attorney for several years, except for a $30,000.00 bequest to George, Jr.

George Vickery did not know about the October 22, 2004 will until the day of Helen's funeral, when his brother took him aside, showed him a copy of the will (did not give him a copy) and handed him a check for $30,000.00 written on an account in which Vick was a joint signator, an account which was not on its face a part of the estate.

Letters Testamentary issued on December 13, 2005, and George filed his Objection to the Petition for Probate on January 6, 2006. No answer or affirmative defense was filed for more than eight months, until September 20, 2006. (ARE-6) The Answer raised only the affirmative defense of accord and satisfaction.

The initial objection to the petition raised only a question of testamentary capacity; however, an amended objection to the petition was filed with leave of the Court December 3, 2007, adding undue influence as an objection. The previous will of August 16, 2000, had been attached to the original objection, and was reattached to the amended objection.

In the initial answer and affirmative defenses filed by Vick Vickery on September 20, 2006, the only affirmative defense raised which was ever asserted was accord and satisfaction. Extensive litigation took place after the issue divisivit vel non was joined on January 6, 2006. For over two years, the parties steadily litigated the case,

conducting significant discovery by all means, gathering voluminous medical records (subpoena duces tecum for Valerie Lenox, MD or her records custodian on February 20, 2006, page 12 of the certified docket; insurance records, bank records, casino records, police reports, see page 10 of the certified docket; the depositions of the parties, witness interviews, out of town depositions of relatives of the family, conventional interrogatories, request for production of documents. Indeed, for over two years the parties conducted voluminous discovery to get the case ready for trial.

The first Motion for Summary Judgment on accord and satisfaction defense was not filed until June 9, 2008, a delay of approximately two and one-half years as pointed out by the trial court in its order denying the motion. R-92. The second motion for summary judgment, R - 101, this one based upon estoppel and relating back to the payment from a non-estate account to George Vickery on the day of the funeral on November 26, 2005, was not filed until November 6, 2008. In its Order denying that Motion for Summary Judgment at page 153 of the record, the Court noted that Vick Vickery did not raise the affirmative defense of estoppel until November 6, 2008, "a delay of almost three years from the beginning of this action."

The case was set for trial by Notice of Court Setting dated January 23, 2008 for February 13, 2008. It was continued from that date to June 25, 2008, but because insufficient jurors were summons to make up the jury, was again continued. The case finally came on for trial before a twelve person jury on Monday, December 8, 2008, and ended on Friday, December 12, 2008.

The jury unanimously found, as documented by the Final Judgment at page 155 of the record, that on October 22, 2004, Helen Vickery lacked testamentary capacity to

make a will; and the jury also found unanimously that Helen was in a confidential relationship with and subject to the undue influence of Vick Vickery at the time she executed the will. Consequently, the Court entered its Order striking down the October 22, 2004 will, holding it for naught, withdrawing all Letters Testamentary from Vick Vickery, and vacating the Judgment admitting the will to probate. R-157.

There were no written post trial motions filed by Vick Vickery. Immediately upon the receipt of the jury verdict, counsel for Vick Vickery made an ore tenus Motion for Judgment Notwithstanding the Verdict based upon insufficiency of the evidence. That motion was denied from the bench. Thereafter, the Appellant noticed his appeal on December 23, 2008, filing an Amended Notice of Appeal on December 29, 2008. R-160. The Amended Notice of Appeal reflects that "the matters encompassed in this appeal specifically includes (but are not limited to) appeal of the Order Denying Motion for Summary Judgment and Motion for Continuance entered by the Chancery Court of Harrison County, Mississippi, First Judicial District, on June 25, 2008, and appeal of the Order denying Motion for Summary Judgment and Motion for Continuance entered by the Chancery Court of Harrison County, Mississippi, First Judicial District, on December 1, 2008." R-160. On January 6, 2009, Vick Vickery designated the record on appeal, designating only selected items from the Clerk's papers in the way of various motions, orders, and briefs. Although there had been a full trial before a jury, and although Rule 10(a) of the Mississippi Rules of Appellate procedures specifically requires that all transcripts be designated as part of the record, the Appellant failed to designate any part of the transcript. The Appellant's Statement of the Issues, R-166, specifies that he

is appealing the Court's denial of his summary judgments (on accord and satisfaction and estoppel) by orders of June 9, 2008 and November 6, 2008 respectively.

On January 13, 2009, George Vickery objected to the designation of the record on appeal, and pursuant to Rule 10(a) of the Mississippi Rules of Appellate Procedure designated the trial transcript, pointing out that Rule 10 (a) is clear that "...the record ***shall*** (emphasis supplied) consist of designated papers and exhibits filed in the trial court; ***the transcript of proceedings***, if any (emphasis supplied), and in every case a certified copy of the docket entries prepared by the Clerk of the trial court." ARE-11, R-172.

Notwithstanding the clear objection and the further designation of the trial transcript, the Appellee's January 13th objection and designation of the transcript was followed by a Certificate of Compliance from Vick Vickery dated January 16, 2009, which certified under Rule 11 that he had complied with Rule 10. The Certificate of Compliance was made in the face of the specific objection pointing out that no transcript had been designated, even though Rule 10(a) makes the transcript mandatory, and Rule 10 (4) requires that the transcript be prepared and at Appellant's expense if designated by the Appellee.

The objection and further designation having been filed by the Appellee, the record was nonetheless forwarded to this Court without a transcript having been prepared. Upon realizing that no transcript had been made in spite of the designation, the Appellee filed a further objection in this Court as to the failure of the trial transcript to be prepared for review.

The case continues in the trial court, moreover, with the probate of the August 2000 will, and with issues of accounting, there having been none filed during the several years of Vick Vickery's stewardship as a fiduciary for the estate, and serious issues having been raised and documented by the jury findings of no testamentary capacity and undue influence.

B. Statement of the facts.

Dr. George Vickery, Sr., was married twice in his life. He married first to the mother of the litigants here, brothers George Vickery, Jr. and Glendy Burke Vickery, usually called Vick. Dr. Vickery married his second wife, Helen Vickery, and Helen regarded the two boys as her natural sons.

Dr. Vickery predeceased Helen, dying in the late 1970's, and Helen had a series of wills which left the estate more or less equally to her stepsons.

The two wills which are in question are the most recent will, executed October 22, 2004, ARE-5, and offered for probate by Vick Vickery upon Helen's death in November 2005; and an earlier will which is before the Court, executed on August 16, 2000, ARE-4, which more or less divided things equally between the two brothers.

George never had a copy of the October 2004 will, seeing it for the first time on November 26, 2006, after Helen was buried and he met his brother at his brother's house in Gulfport surrounded by his brother's wife's relatives. At that time, Vick showed George the October 2004 will, which had only a bequest to George for $30,000.00 in it. Vick would not give George a copy of the will; instead, he wrote him out a check from a personal checking account that he had maintained with his stepmother, contrary to the representation by Vick's lawyer that the check was written from an estate account.

The true ownership of the funds which had been in that checking account is presently in dispute in the Trial Court below.

In any event, George accepted the $30,000.00, but he crossed out the notation on the check which said "per HGV will." As his lawyer explained, the $30,000.00 would be due to him regardless of which will were accepted ultimately, and from the start he intended to contest the 2004 will. R-119.

Helen Vickery died November 22, 2005. A little over two weeks later, on December 11, 2005, Vick Vickery filed a Petition to Probate the October 22, 2004 will. George filed his objection to the Petition to Probate on January 6, 2006. No Answer or other responsive pleading was filed for more than eight months, until September 20, 2006, when Vick filed an Answer and raised as an Affirmative Defense "Accord and Satisfaction." ARE-6, R-30.

The initial objection to the Petition raised only a question of testamentary capacity. However, leave of Court to amend was obtained, and on December 3, 2007, an Amended Objection to the Probate was filed, adding undue influence. R-35.

On June 9, 2008, approximately two and one-half years after the will was initially challenged, a Motion for Summary Judgment on the accord and satisfaction defense was filed. R-68. The Trial Judge dispatched that motion, denying it on the basis that it had been waived because it was not brought up timely, and because there had been extensive litigation, following the dictates of settled law under ***Whitten v. Whitten.*** ***ARE-3,R-92.***

A second Motion for Summary Judgment, this one based on estoppel, was filed on November 6, 2008. R-101. That same day, the Answer to the Amend Objection was filed, almost a year after it had been filed. R-97.

No leave of Court was obtained prior to filing the Answer to the Amended Complaint, and a Motion to Strike the out of time Answer with the estoppel defense was filed by George Vickery.

The Trial Court denied the estoppel affirmative defense, again citing the ***Whitten v. Whitten*** line of cases, noting that the Proponent of the October will had waited almost three years before bringing it up and trying to argue it. ARE-2, R-153.

In December, 2008, a lengthy, five day jury trial was had, at the end of which the jury answered Special Interrogatories finding that Helen Vickery lacked testamentary capacity at the time of the making of the October 22, 2004 will, and also finding that a confidential relationship existed between Vick Vickery and Helen, and that Vick had used undue influence to procure the October 22, 2004 will which largely disinherited his brother and enriched himself. ARE-1, R-155.

No post trial motions were filed by Vick Vickery except one ore tenus motion immediately upon reception in the courtroom of the jury verdict, in which counsel made an ore tenus motion under Rule 59 for Judgment Notwithstanding the Verdict based upon the verdict being against the weight of the evidence. That motion was not briefed for the Court here.

When the Notice of Appeal was filed, counsel for the Appellant indicated that he was appealing the denial of the two Summary Judgments, R-166 and he designated only a small portion of the record, completely omitting the trial transcript. R-162.

Counsel for the Objector, George Vickery, Jr., objected under Rule 10 of the Rules of Appellate Procedure, and under Rule 10(b)(4), designated the trial transcript. ARE-11, R-172. In spite of that objection and designation, the record was forwarded to this Court without a trial transcript having been prepared. Once the case was before this Court, a Motion to Remand with instructions to prepare a trial transcript was filed and denied.

This Appeal then followed.

SUMMARY OF THE ARGUMENT

The Appellant seeks to appeal two Motions for Summary Judgment which were denied by the Trial Court. First, the Trial Court found that the claimed accord and satisfaction affirmative defense had not been timely raised and argued, which, coupled with participation in litigation, resulted in the defense being waived. The Court also noted that accord and satisfaction did not apply to a will contest but was reserved for debtor/creditor relationships. Similarly, the estoppel affirmative defense was not timely raised and was not timely brought before the Court, inasmuch as the Appellate waited nearly three years after the start of the litigation to attempt to bring it forward. The Trial Judge found that defense was waived as well. Both Motions for Summary Judgment, moreover, were merged in the jury trial, which took place over a five day period of time in December 2008.

Even if the Motions for Summary Judgment were not merged in the jury trial, and even if the Trial Judge's finding of waiver were not sustained, neither motion factually applies to the circumstances before the Court. Moreover, there was no post trial motion filed by the Appellant to attempt to preserve either exception, accord and satisfaction or estoppel.

Finally, the Appellant designated only a small portion of the record, attempting to avoid letting this Court see the trial transcript. The Appellee properly designated the transcript in the Court below, but the Court Reporter and the Clerk permitted the record to come up to this Court without the transcript being prepared. The Appellee respectfully submits to this Court that the motion filed in this Court to remand the case to have the transcript prepared was improperly denied.

ARGUMENT

1. The motions for summary judgment, one based upon accord and satisfaction and the other upon estoppel, were merged in the jury verdict and can not now be appealed.

The jurisprudence of this State is clear that the denial of a Motion for Summary Judgment is an interlocutory matter which is subsumed by a subsequent trial and therefore mooted. Because this case was tried to a jury and a verdict rendered against Vick Vickery, the proponent of the October 24, 2004 Will, and because the Appellant Vick Vickery made no effort under Rule 5 to appeal the interlocutory orders of the Court denying the two Motions for Summary Judgment seasonably as the orders were entered, as a matter of law the Appellant cannot proceed on these assignments of error.

The Appellee cites as primary authority for the dismissal of the appeal ***Gibson v. Wright***, 870 So.2d 1250 (Miss. Ct. App. 2004). In ***Gibson v. Wright***, the Court declined to review the issues of the denial of summary judgment after a subsequent trial. The ***Gibson v. Wright*** Court stated that "as to the issue of whether the trial court erred in denying Gibson's Motion for Summary Judgment, we hold that the ruling on summary judgment was interlocutory in nature and was subsequently rendered moot by

the trial on the merits...in other words, once trial begins, summary judgment motions effectively become moot". ***Gibson v. Wright***, 870 So.2d 1250, 1254 (Miss. Ct. App. 2004). *accord*, ***Black v. J.I. Case Company, Inc.,*** 22 F.3d 568, 569-70 (5th Cir. 1994); ***Daigle v. Liberty Life Insurance Co.,*** 70 F.3d 394, 397 (5th Cir. 1995).

In a more recent case, ***Britton v. American Legion Post 058,*** 2007-CA-01293-COA, decided November 18, 2008, the Court of Appeals, in following ***Gibson v. Wright***, stated:

> . . . on appeal, Britton raises only the issue of whether the Chancellor erred in denying his Motion for Summary Judgment. Because Britton did not seek an interlocutory appeal under Rule 5 of the Mississippi Rules of Appellate Procedure, and because the Chancellor ruled against him after trial, the issue of Britton's Motion for Summary Judgment is moot. This Court has held that appeals from the denial of a Motion for Summary Judgment are interlocutory in nature and are rendered moot by a trial on the merits. . . once trial begins, summary judgment motions effectively become moot. . . accordingly, this Court declines to review this issue. . .Britton has raised no other issues for our review in this matter. Therefore, we dismiss Britton's appeal as moot.

Britton v. American Legion Post 058, 2007-CA-01293-COA, decided November 18, 2008.

The law seems clear that this Court will not entertain appeals from the denial of Motions for Summary Judgment once the case has been tried and the motions thus mooted. This appeal should be dismissed with prejudice, with all costs assessed to the Appellant.

2. Even if not merged in the jury verdict, the affirmative defenses of accord and satisfaction and estoppel were waived because they were not promptly asserted and argued.

a. Waiver of affirmative defenses in general

The law is well settled here, and none of it is favorable to the Appellant.

Rule 8 (c) provides in pertinent part that:

> ...**Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction...estoppel... and any other matter constituting an avoidance or affirmative defense...

Rule 8 (c), Mississippi Rules of Civil Procedure.

If there were an affirmative defense available based upon accord and satisfaction or upon estoppel, the defenses were waived, as the trial court correctly found. Affirmative defenses that are neither pled nor tried by consent are deemed waived. ***Goode v. Village of Woodgreen Homeowners***, 662 So.2d 1064, 1077 (Miss. 1995). It is undisputed that the Proponent did not plead estoppel in the answer he filed in September 2006. No new facts emerged which would have given the Proponent another run at it two years later. And while accord and satisfaction was pled, it wasn't pursued for over two and one-half years from the time the complaint was served, and twenty-one months after the answer was filed. Even if a defense is properly pled, it must be asserted timely or it is waived. ***Whitten v. Whitten*** , 956 So.2d 1093 (Miss. Ct.App. 2007). The ***Whitten*** court held:

> . . . ordinarily, neither delay nor participation in the judicial process, standing alone, will constitute a waiver, but when there is substantial and unreasonable delay in pursuing the right along with active participation in the litigation process, the court will not hesitate to find a waiver (of a listed affirmative defense under Rule 8(c) . . .

Miss. Credit Center, Inc. v. Horton, 926 So.2d 167 (Miss. 2006) held that absent unusual circumstances, an eight month delay in pursuing any affirmative

defense (which was properly raised) or other right which could serve to terminate the litigation, along with participation in the litigation, constitutes waiver as a matter of law. ***Miss. Credit Center, Inc. v. Horton,*** 926 So.2d 167 (Miss. 2006); ***Whitten v. Whitten***, 956 So.2d 1093, 1098 (Miss. Ct. App. 2007).

b. The Accord and Satisfaction defense was waived.

The Proponent of the October 2004 will moved for summary judgment based upon the affirmative defense of accord and satisfaction on June 9, 2008, two and one-half years after the will was challenged, R-68, and the Trial Court properly denied that motion on June 25, 2008. ARE-3, R-92.

Rule 8(c) controls. That is, "in (a responsive pleading), a party shall set forth ***affirmatively*** (emphasis supplied) accord and satisfaction..." Hence, accord and satisfaction is an affirmative defense which must be pled or else is waived. ***Red Enterprises, Inc. v. Peashooter, Inc.,*** 455 So.2d 793 (Miss. 1984).

A review of the pleadings reveals that Vick Vickery did in fact file the affirmative defense of Accord and Satisfaction on September 20, 2006 in answer to the Objection to Probate and Petition to Probate Lost Will filed by the Objector nearly nine months earlier on January 6, 2006.

Before urging the affirmative defense in a pleading, nearly two years - - twenty-one months - - passed before Vick Vickery brought the motion forward for argument. During that period of time, the case was extensively litigated. Complete discovery took place in the form of interrogatories and request for production. The depositions of expert witnesses were taken. Various depositions of lay witnesses were taken. Discovery disputes were filed and resolved by the Court in the form of Motions to

Compel. See Case Docket Sheet. The case came on for trial at one point, but because insufficient jurors had been summonsed, the matter had to be reset. And now the case has been tried, five days worth of it, in December 2008. See Court Docket generally.

The rule is clear. If the defense is properly pled, it must be asserted timely or it is waived. In ***Whitten v. Whitten,*** 956 So.2d 1093 (Miss. Ct. App. 2007), the Court held:

> ...ordinarily, neither delay or participation in the judicial process, standing alone, will constitute a waiver, but when there is substantial and unreasonable delay in pursuing the right along with the active participation in the litigation process, the Court will not hesitate to find a waiver to the right to compel arbitration (one of the affirmative defenses listed, along with accord and satisfaction and estoppel), in Rule 8 (c).

Whitten v. Whitten, citing ***Miss. Credit Center, Inc. v. Horton***, 926 So.2d 167 (Miss. 2006) and ***East Miss. State Hospital v. Adams***, 947 So.2d 887 (Miss. 2007).

In the ***Whitten*** case and the cases which are seminal here, the Court offered helpful guidance:

> ...a defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, would ordinarily serve as a waiver.

Miss. Credit Center, Inc. v. Horton, 926 So.2d at 180 (Miss. 2006).

The ***Whitten*** court addressed the very situation before this Court now when it noted:

> (The ***Miss. Credit Center*** court) declined to set a number of days that would constitute unreasonable delay in every

> case, but did hold, absent unusual circumstances, an eight month unjustified delay in the pursuit of any affirmative defense or other right which could serve to terminate the litigation, along with participation, constitutes a waiver as a matter of law.

Whitten v. Whitten at page 1098.

Thus, the twenty-one month delay in pursuing the affirmative defense of accord and satisfaction from the time it was first raised, coupled with extensive litigation clearly waived the defense even if it had merit, which clearly it does not.

In the Trial Court's Order denying the Motion for Summary Judgment (on accord and satisfaction) and the Motion for Continuance filed on the eve of trial (that had to be reset because not enough jurors were summonsed), Judge Steckler correctly noted that:

> ...Glendy Burke Vickery raised the affirmative defense of accord and satisfaction on January 6, 2006. For twenty-one months thereafter the case continued through discovery and one attempt at seating a jury for trial. Glendy Burke Vickery did not bring the affirmative defense of accord and satisfaction for consideration until the filing of the Motion for Summary Judgment filed June 9, 2008, a delay of approximately two and one-half years. The Court finds that pursuant to the case of ***Whitten v. Whitten***, 956 So.2d 1093 (Miss. Ct. App. 2007), the affirmative defense has been waived...
>
> R-92.

The Trial Judge correctly applied the law to the facts and found a waiver, a finding which must stand.

c. The Estoppel Defense was not timely raised; was filed without leave of court; and it was waived regardless.

Vick Vickery filed an Answer and Affirmative Defenses on September 20, 2006,

to the initial filing of the Objector; however, that initial Answer, filed nine months after the objection was lodged, did not include the affirmative defense of estoppel. An amended objection was filed with leave of Court and served on December 3, 2007 (see certified copy of the docket, page 7 [Order Granting Motion to Amend dated November 30, 2007; Amended Objection to the Petition to Probate Will filed December 3, 2007]. R-35. Under Rule 3 of the Mississippi Rules of Civil Procedure, the Objection to Probate is essentially a complaint within the contemplation of Rule 3; indeed, the Proponent treats it as a complaint and denominates his response as an "Answer." However, that Answer, along with its affirmative defenses, was not timely filed.

Pursuant to Rule 15(a) of the Mississippi Rules of Civil Procedure, "...a party shall plead in response to an amended pleading within the time remaining for a response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the Court otherwise orders." Thus, the Answer and Affirmative Defenses to the Amended Objection were due on or before December 13, 2007.

Almost ten months passed before Vick Vickery tried to file his Answer and Affirmative Defenses, to include the estoppel defense. On October 8, 2008, with the matter already set for trial in December, Vick Vickery filed a Motion for Authority to Amend his Answer and Affirmative Defenses. R-94. On November 6, 2008, George Vickery filed a lengthy opposition of the Objector to the Proponent's Motion to Amend Answer and Affirmative Defenses, which included briefing of the point. ARE-8, R-130. The Objection had actually been served the preceding day on November 5, 2008, and was faxed to counsel for the Proponent. After having received the Objection on

November 5th, Vick's lawyer hastily filed, without an order of the Court giving him leave to do so, an out-of-time Answer and Affirmative Defenses to the Amended Objection. ARE-7, R-97. At the same time, he put together his Memorandum Brief in Support of his Motion for Summary Judgment on the estoppel defense, and filed that as well.

The Proponent ignored the requirements of Rule 15(a), which required him to file his response to the amended pleading within ten days after service on him, making it due in mid-December 2007, over ten months before he filed it. A Motion to Strike the Amended Answer and Affirmative Defense was filed on November 26, 2008. ARE-9, R-137.

The Trial Court entered it's Order on December 1, 2008, denying the Motion for Summary Judgment and a concurrently filed Motion for Continuance based upon estoppel. ARE-2, R-153. The Court did not rule on the Objection or the Motion to Strike, going instead straight to the waiver issue. The Court held:

> ...Glendy Burke Vickery did not raise the affirmative defense of estoppel until, by his own admission, November 6, 2008, a delay of almost three years from the beginning of this action. During the entire time this case has been pending there has been extensive discovery and one attempt at seating a jury for trial. Glendy Burke Vickery did not bring the affirmative defense of estoppel for consideration until the filing of the most recent Motion for Summary Judgment filed November 6, 2008. The Court finds that, pursuant to the case of ***Whitten v. Whitten***, (citation omitted) the affirmative defense of estoppel has been waived.
>
> R-153-54.

The Court also denied the Motion for Continuance at the same time. R-154.

Thus, it is clear that Vick Vickery, through counsel, ignored his duty to raise the estoppel defense in a timely manner, in that the particulars that he relied upon in the

defense were well known even before the estate was opened. There was no new information developed, and no reason not to have raised it at the outset had he thought it were valid. He simply didn't do it. The Court's application of the rule on waiver after unreasonable delay plus participation in litigation was sound, and should be sustained.

Applying the law as set out above in ***Whitten*** and ***Miss. Credit Center, Inc.***, the failure to raise the affirmative defense of estoppel in September 2006, coupled with several years of litigation, is clearly a waiver; moreover, the failure to raise the affirmative defense of estoppel after the amended objection was filed in December 2007 further constitutes a waiver; and even if the Proponent had raised the affirmative defense of estoppel within ten days of the December 2007 filing of the amended objection as required by Rule 12, waiting instead for over ten months to try to assert it, falls outside the eight month bright line period specifically set out in ***Miss. Credit Center, Inc.,*** particularly given the intense litigation participation. Indeed, the estoppel, as found by the Chancellor, should have been raised three years earlier in the first answer, assuming *arguendo* that it might have some merit.

It could not be more clear that the estoppel defense was waived as a matter of law.

3. Even if not procedurally barred, the defense of accord and satisfaction does not apply to a will contest.

In his Order denying the summary judgment on accord and satisfaction, R-92, Judge Steckler found that even absent a waiver, accord and satisfaction does not lie as an affirmative defense to a will contest. Specifically, he said:

> ...The Court further finds that accord and satisfaction is an inappropriate affirmative defense in this will contest. Accord

> and satisfaction is a legal concept having to do with the satisfaction of a debt between an obligor and an obligee. A will contest examines the capacity and intent of the testator as well as an examination of the instrument purporting to express the interest of the testator. ...

Order of the Court, ARE-3, R-92

No Mississippi case could be located where accord and satisfaction was approved as a defense to a will contest. In every case cited in the digest under accord and satisfaction, at issues are monies owed in contract, on debt instruments (really a form of contracts) or as settlement for damages claimed in tort, usually under an insurance contract.

There are four elements of accord and satisfaction, which are simply inapposite to a will contest. Specifically, in order to find accord and satisfaction of a debt, there must exist these elements:

(1) *Something of value offered in full satisfaction of a demand.* Clearly there is no demand here. There was a void bequest made in a concealed will which was found to have been made without testamentary capacity and the result of undue influence.

(2) *The demand must be accompanied by acts and declarations as amount to a consideration that if the thing is accepted, it is accepted in satisfaction.* No such acts or declarations were present. Vick Vickery points to his note made on the bottom of the check that says that "per HGV Will." R-59. That notation was stricken. There had been no discussion of the will provision. Indeed, Vick Vickery hid the will for over a year after it was made, presenting it only after their stepmother had been buried, showing it to his brother at his house after the funeral, surrounded by his wife's relatives. He didn't even give George a copy of the disputed 2004 will, and George always believed

the valid will to be the August 2000 will, ARE-4..

(3) *The party offered the thing of value is bound to understand that if he takes it he takes it subject to such conditions.* Obviously that doesn't apply. There were no conditions laid out, there was no debt obligation, there was no demand. George disputed from the start that the $30,000.00 was in any way in satisfaction of any will term. As pointed out in a letter from George Vickery's counsel to Vick Vickery's, R-119, "I will not instruct Mr. Vickery to return any of the $30,000.00. If his objection to the probate of the will is not sustained, he will be entitled to the money. If the objection is sustained, he will be entitled to the money. Either way, he will receive at least that amount. Therefore I see no useful purpose to be served by returning the money." R-119.

Counsel for Vick Vickery had incorrectly observed in his February 14, 2006 letter that:

> ...On November 26, 2005, Mr. Vickery as executor caused the estate to issue a check for $30,000.00 to ...George W. Vickery, Jr. This disbursement was in accordance with Article 3 of the Last Will and Testament of Helen G. Vickery dated October 22, 2005, (sic) which will is presently being probated in the Chancery Court of Harrison County, Mississippi. ...R-90.

Vick Vickery was not the executor of the estate as of November 26, 2005. The estate had not been opened inasmuch as Helen Vickery had only died three days earlier, and the estate would not be opened for several weeks more. There was no disbursement from an estate account. The disbursement was from an account which was titled jointly with survivorship in Helen Vickery and Vick Vickery's names. According to Vick Vickery, who did not include the checking account on the Inventory,

R-150, the money was his and his alone and was not part of the estate. That assertion is the subject of an ongoing dispute in the Trial Court yet to be resolved. The third prong of accord and satisfaction test is not satisfied. Moreover, the reference to "HGV will" is vague, as George always took the position that the 2000 will was valid.

(4) *The party actually does accept the item.* It's true that George Vickery accepted a check for $30,000.00 from his brother, but it wasn't approved by a court, it wasn't estate money, it wasn't written out of an estate account, and the will under which Vick Vickery was traveling was shown to be a fraud, the product of undue influence and the result of no testamentary capacity.

The case law cited for accord and satisfaction does not apply, as a quick survey would show. ***Channel v. Loyacano***, 954 So.2d 415 (Miss. 2007), ***Medlin v. Hazelhurst Emergency Physicians,*** 889 So.2d 496 (Miss. 2004); and ***Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*** , 857 So.2d 748 (Miss. 2003) are all representative. They all involve debtor/creditor relationships, or contractual relationships, and they universally hold that "for a valid accord and satisfaction, there must be a meeting of the minds of the parties." ***Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.***, 857 So.2d 748 (Miss. 2003).

Thus, even absent a waiver which was found by the Trial Court and which should be affirmed by this Court, accord and satisfaction doesn't apply here.

4. Even if not procedurally barred, the defense of estoppel has no application under the facts of this case.

Even if the estoppel defense were not waived, it has no merit. The Appellant's argument is that since he gave his brother a $30,000.00 check, the amount bequeathed

under the disputed will– found by the jury to be void both on grounds of no testamentary capacity and undue influence as well– and George accepted the check, he is estopped from contesting the will.

However, George never took an inheritance under a will provision. His brother gave him a check on November 26, 2005. The estate wasn't opened until December 18, 2005, over three weeks later. The disputed will wasn't offered for probate until weeks after Vick gave George the check, and the case law cited in support of the estoppel simply is not operative.

The Court should bear in mind that the $30,000.00 check was tendered to George Vickery contemporaneously with the funeral on November 26, 2005, and it was at that same moment, more or less, that the theretofore concealed will was produced for the first time, literally before the dirt on Helen Vickery's grave had settled. George had been laboring under the notion that the August 2000 will which has now been offered for probate was the will in effect. See certified docket entry for February 11, 2009. Until that moment, George was unaware that the 2000 will had been so drastically changed, or indeed, that it had been changed at all.

Further, the $30,000.00 appears not to have been distributed from the estate at all. A review of the inventory (R-150) shows that the money could not have been from the estate as reported by Vick Vickery. The sworn inventory shows no bank accounts and reports cash on hand as of February 1, 2006, eight months prior to the actual filing of the inventory, of $1,731.50. Reference to the check itself which was tendered and which is attached as an exhibit to Vick's Motion for Summary Judgment (R-116) shows that the check was written on a joint account held by Helen Vickery and Glendy Vickery

four days after she died, immediately after the funeral, and the money, according to the inventory, has nothing to do with the estate. In addition, the handwritten words "per HCV Will" appearing at the bottom left hand corner of the check are ambiguous, and in no way make clear reference to the Will offered for probate by Glendy Vickery. Regardless of that, the note is lined out and initialed by George Vickery, who clearly indicated his intent to contest the Will which was hidden from him by the executor until the day of the funeral.

Vick Vickery has the burden of proving his estoppel defense, even if it were pled and timely raised - - neither of which obtains - - by clear and convincing evidence. See ***Wallace v. United Mississippi Bank***, 726 So.2d 578 (Miss. 1998); ***Young v. Southern Farm Bureau Life Insurance Co.***, 592 So.2d 103 (Miss. 1991); and ***Cook v. Bowie***, 448 So.2d 286 (Miss. 1984).

The elements of proof necessary to make out an equitable estoppel affirmative defense make clear that estoppel is applied to prevent one party from perpetrating a fraud on the other, who has been led to rely to his detriment on the representations or actions of the person against whom the estoppel is sought to be applied. ***Insurance Co. v. Mowry***, 96 U.S. 544 (1878); ***Windom v. Latco of Miss, Inc.***, 972 So.2d 608 (Miss. 2008); ***Dubard v. Biloxi HMA, Inc.***, 778 So.2d 113 (Miss. 2000).

Specifically, "subjective intent to mislead is unnecessary so long as the acts of the parties sought to be estopped, viewed objectively, were calculated to and did mislead the other party. ***The party asserting the equitable estoppel must show that he has changed his position to his detriment in reliance upon the conduct of another.***" (Emphasis supplied). ***McDevitt***, 755 So.2d 1125, 1129 (Miss.App.1999).

Vick Vickery never relied to his detriment on anything George did or didn't do.

Indeed, far from George trying to trick or mislead Vick, exactly the opposite obtains here. It was Vick Vickery who as found by a jury took advantage of a frail, elderly woman stricken with dementia and without capacity and caused her to make a will favorable to him; and it was Vick Vickery who as found by a jury used undue influence to obtain a will that largely cut out his brother and gave him the bulk of the estate. Where, indeed, is the "intent to mislead" which, viewed objectively, was calculated to and did mislead Vic Vickery?

Here, even if the Court does not find a waiver, which seems unlikely given the nature of the facts and the very clear law on the point, it must be said that Vick Vickery acting as the executor of the estate or as the principal heir under the contested and now voided October 2004 will, made an effort to trick his brother into taking $30,000.00 to satisfy all claims. If there is any fraud in this case, it was committed by Vick Vickery in taking advantage of his infirm step mother for personal gain; and if there is detrimental reliance it is by George Vickery relying on the good will and honorable intentions of his brother, who waited until the day of the funeral to spring the secret will on his grief-stricken brother.

Moreover, under whichever will were ultimately admitted for probate and sustained, George would receive no less than $30,000.00. George made clear from the very start that he was contesting the 2004 will. His position is clearly articulated in his lawyer's letter to counsel for the Appellant, R- 119, as cited above.

The primary modern case relied on by the Appellant, ***Kuhne v. Miller***, 387 So.2d 729 (Miss. 1980) and others are easily distinguished in at least five (5) important ways:

(1) In ***Kuhne*** and others the estoppel defense was promptly raised and brought forward. There was not a three year delay as found by the trial court here during which there had been extensive litigation.

(2) There was no jury verdict, as here, where the jury heard all the evidence and unanimously found the 2004 will to be void, both on grounds of no testamentary capacity and also on grounds of undue influence.

(3) In ***Kuhne***, the Trial Court reviewed the estoppel matter early and communicated its position to the Objectors, giving them five days to return the deed, which they declined to do.

(4) In ***Kuhne***, the challengers to the will had long been aware of the connection between the deed and the will, and only sought to challenge the will when the widow, well after the fact, disclaimed her interest in the life estate at issue, changing her position and giving up something of value in the opinion of the Court.

(5) And finally, in ***Kuhne*** there was not a second will, as here, which George Vickery always maintained was the one valid will, and which gave him a far greater benefit then he was due under the void 2004 will. The 2000 will has now been offered for probate without objection from Vick Vickery. A review of the 2000 will, ARE - 8, shows Vick's substantial inheritance under that will.

5. The Appellant failed to preserve for appeal the issues of estoppel and accord and satisfaction because the only post-trial motion argued was an ore tenus Motion for Judgment not withstanding the verdict under Rule 59 setting aside the will based upon the verdict being against the weight of the evidence.

As pointed out under the first assignment of error, that this appeal is procedurally barred because the affirmative defenses belated raised in the trial court, accord and satisfaction and estoppel, were merged in the jury verdict. The case law clearly

requires the dissatisfied movant of a summary judgment to seek an interlocutory appeal prior to a jury listening to the entire case. ***Gibson v. Wright***, 870 So.2d 1250 (Miss. Ct. App. 2004); ***Black v. J.I. Case Co, Inc.***, 22 F.3d 568 (5th Cir. 1994); ***Daigle v. Liberty Life Insurance Company***, 70 3d 394 (5th Cir. 1995).

In addition, the Appellant's failure to re-urge his affirmative defenses after all the evidence had been heard and the jury verdict returned is a further barrier to his appeal. As noted, the only post trial motion he made was an ore tenus motion for judgment notwithstanding the verdict or in the alternative for a new trial because the jury verdicts were against the great weight of the evidence. This Court has "repeatedly held that a trial judge will not be found in error on a matter not presented to the trial court for a decision." ***Purvis v. Barnes***, 791 So.2d 199, 203 (Miss. 2001); ***Bender v. North Meridian Mobile Home Park***, 636 So.2d 385 (Miss. 1994). The factual components of the belatedly raised affirmative defenses, moreover, were throughly aired at the trial, giving the Court an opportunity, had it been asked to do so, to consider the full panoply of testimonial and documentary evidence. This the Appellant failed to do. His failure to include the affirmative defenses in any post trial motion is yet another shortfall which precludes the matter being argued now on appeal to this Court.

6. The Appellant failed to designate the trial transcript as part of his designation of the record in compliance with Miss. Rule of Appellate Procedure 10(a); the Appellee respectfully asserts that this Court erred in not sustaining his objection to the record and remanding for the trial court reporter to complete the trial transcript as designated by the Appellee.

The case finally came on for trial before a twelve person jury on Monday, December 8, 2008, and ended on Friday, December 12, 2008.

The jury unanimously found, as documented by the Final Judgment at page 155 of the record, that on October 22, 2004, Helen Vickery lacked capacity to make a will; and the jury also found unanimously that Helen was in a confidential relationship with and subject to the undue influence of Vick Vickery at the time she executed the will. Consequently, the Court entered its Order striking down the October 22, 2004 will, holding it for naught, withdrawing all Letters Testamentary from Vick Vickery, and vacating the Judgment admitting the will to probate. R-157.

There were no written post trial motions filed by Vick Vickery. Immediately upon the receipt of the jury verdict, counsel for Vick Vickery made an ore tenus Motion for Judgment Notwithstanding the Verdict based upon insufficiency of the evidence. That motion was denied from the bench. Thereafter, the Appellant noticed his appeal on December 23, 2008, filing an Amended Notice of Appeal on December 29, 2008. R-160. The Amended Notice of Appeal reflects that "the matters encompassed in this appeal specifically includes (but are not limited to) appeal of the Order Denying Motion for Summary Judgment and Motion for Continuance entered by the Chancery Court of Harrison County, Mississippi, First Judicial District, on June 25, 2008, and appeal of the Order denying Motion for Summary Judgment and Motion for Continuance entered by the Chancery Court of Harrison County, Mississippi, First Judicial District, on December 1, 2008." R-160.

On January 6, 2009, Vick Vickery designated the record on appeal, designating only selected items from the Clerk's papers in the way of various motions, orders, and briefs. R-162 Although there had been a full trial before a jury, and although Rule 10(a) of the Mississippi Rules of Appellate Procedure specifically requires that all

transcripts be designated as part of the record, the Appellant failed to designate any part of the transcript.

On January 13, 2009, George Vickery timely objected to the designation of the record on appeal, and pursuant to Rule 10(a) of the Mississippi Rules of Appellate Procedure designated the trial transcript, pointing out that Rule 10 (a) is clear that "...the record ***shall*** (emphasis supplied) consist of designated papers and exhibits filed in the trial court; ***the transcript of proceedings, if any*** (emphasis supplied), and a certified copy of the docket entries prepared by the Clerk of the trial court." R-172.

Notwithstanding the clear objection and the further designation of the trial transcript, the January 13th objection and designation of the transcript was followed by a Certificate of Compliance from Vick Vickery dated January 16, 2009, which certified under Rule 11 that he had complied with Rule 10. R-175. The Certificate of Compliance was made in the face of the specific objection pointing out that no transcript had been designated, even though Rule 10(a) makes the transcript mandatory.

The objection and further designation having been filed by the Appellee, the record was nonetheless forwarded to this Court without a transcript having been prepared. Immediately upon realizing that no transcript had been made in spite of the designation, the Appellee filed a further objection in this Court as to the failure of the trial transcript to be prepared for review.

The content of the record on appeal is governed by Rule 10 of the Mississippi Rules of Appellate Procedure. Relevant subparts of Rule 10 include Rules 10(a) and Rule 10(b)(4). For ease of reference, those subparts are reproduced here:

a. Rule 10. Content of the Record on Appeal.

> (a) Content of the Record. The parties shall designate the content of the record pursuant to this rule, and the record shall consist of designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries prepare by the Clerk of the Trial Court.
>
> (b) Determining the content of the record.
>
> (1) Within seven (7) days after filing the notice of appeal, the Appellant shall file with the Clerk of the Trial Court and serve both on the court reporters and on the appellee a written designation describing those parts of the record necessary for the appeal.
>
> (4) Statement of Issues. Unless the entire record, except for those matters identified in (b)(3) of this rule is to be included, the Appellant shall within the seven (7) days time provided in (b)(1) of this rule, file a statement of the issues the appellant intends to present on the appeal and shall serve on the Appellee a copy of the designation and of the statement. Each issue in the statement shall be separately numbered. If the Appellee deems inclusion of other parts of the proceedings to be necessary, the Appellee shall within fourteen (14) days after the service of the designation and the statement of the Appellant, file with the Clerk and serve on the Appellant and the court reporter a designation of additional parts to be included. The Clerk and reporter ***shall prepare the additional parts at the expense of the Appellant*** unless the Appellant obtains from the Trial Court an order requiring the Appellee to pay the expense. (Emphasis supplied)

Under Rule 10(a), a literal reading of the rule makes the trial transcript a mandatory part of the designation. Witness: "the parties ***shall*** designate the content of the record pursuant to this rule, and the record ***shall*** consist of...the transcript of the proceedings... (emphasis supplied)

This case features a five day jury trial. As argued vigorously by the Appellee, the summary judgments now sought to be appealed should be merged in the jury trial under the case law cited. However, both the affirmative defenses belatedly raised and presented to the Trial Court contained factual components which are fully explored in the trial transcript: hence, the relevancy of the trial transcript.

If the Court follows the line of cases cited by the Appellee and holds that the summary judgments are interlocutory in nature and are merged in the jury verdict, then this point of argument is moot. However, if this Court declines for some reason to follow that line of cases, then the lack of a transcript, in spite of one being designated, is problematic, and this Court should direct that the trial transcript be prepared as has been twice requested by the Appellee, once in the Trial Court as per the rule, and once by motion before this Court.

On it's face, Rule 10(b)(4) would seem to make it clear that the Appellee has the discretion of designating a trial transcript if the Appellant doesn't designate it, and at the expense of the Appellant unless a different order issues from the Trial Court. 10(b)(4) bears repeating:

> (4) Statement of Issues. ...if the Appellee deems inclusion of other parts of the proceedings to be necessary, the Appellee shall, within fourteen days after the service of the designation and the statement of the Appellant, file with the Clerk and serve on the Appellant and the Court Reporter a designation of additional parts to be included. ***The Clerk and Reporter shall prepare the additional parts at the expense of the Appellant unless the Appellant obtains from the Trial Court an Order requiring the Appellee to pay the expense.*** (Emphasis supplied).

The Appellee did what he was required to do under the rule to cause the entire trial transcript to be prepared so that the issues might be fully reviewed if necessary before this Court.

It is the belief of the Appellee, George W. Vickery, Jr., that the affirmative defenses which were the subject of the summary judgments were, in the first instance, waived, and properly found to be so by the trial court; and if they were not waived, they were merged in the jury verdict and therefore no longer appealable; and if they were neither waived nor merged in the jury verdict, then they simply didn't apply under the facts of this case.

If this Court upholds either the waiver of the defenses as found by the Trial Court, or applies the clearly established doctrine which holds that summary judgments which are denied in the Trial Court are merged in a jury verdict, then no transcript is necessary.

However, if this Court chooses to consider the factual components of the accord and satisfaction or estoppel defenses and declines to find waiver or merger, then the transcript is necessary, and it should be produced.

CONCLUSION

The case law is well settled that failed summary judgment motions are merged in the jury verdict and are thus mooted. The Court, in denying the first Motion for Summary Judgment in which the Proponent tried to raise the affirmative defense of accord and satisfaction, held that "for twenty-one months . . . the case continued through discovery and one attempt at seating a jury for trial. Glendy Burke Vickery did not bring the affirmative defense of accord and satisfaction for consideration until the

filing of the Motion for Summary Judgment filed June 9, 2008, a delay of approximately two and one-half years. The Court finds that, pursuant to the case of ***Whitten v. Whitten***, 956 So.2d 1093 (Miss. Ct. App. 2007), the affirmative defense has been waived." Order of the Court entered June 25, 2008. Under the ***Whitten v. Whitten*** line of cases, the failure even to raise the affirmative defense of estoppel prior to two years of expensive, exhaustive litigation and to make no effort to assert the claim to the court for three years is fatal. It is waived. Even Vick's effort to justify the delay - saying he only discovered the facts necessary to raise the defense - is fraudulent. He wrote out the check himself on his own account and gave it to George; and he took George's deposition ***twice***, the first time almost two years before belatedly attempting to raise the estoppel defenses.

The law of the case would require the Court to apply the same law to this second effort at raising a belated affirmative defense years after it should have been raised, and find a waiver.

The case continues in the trial court, moreover, with the probate of the August 2000 will and grave issues of accounting, there having been none filed during the several years of Vick Vickery's stewardship as a fiduciary for the estate. Serious issues were documented and underscored by the jury findings of no testamentary capacity and undue influence, and those are continuing to be explored in the Trial Court. This Court, moreover, should uphold the Chancellor's rulings, and not permit Vick Vickery to revive a horribly tainted will that has been denounced by a jury after a week long trial during which it heard all the evidence.

What Vick wants this Court to do, moreover, is look the other way and pretend that a lengthy jury trial never took place at the conclusion of which he was found to have breached his fiduciary duties owed to his step-mother (He had held her full power of attorney for several years) at a time when she lacked the testamentary capacity to make a will; and he was found to have used undue influence to get her to change her will to one which benefitted him almost to the exclusion altogether of his brother.

It should not be lost on the Court that Vick Vickery does not challenge the jury findings of no testamentary capacity and of undue influence in the making of the 2004 will. He doesn't make that challenge because he knows what he did, and he knows that the jury made a correct finding.

This Court should dismiss the appeal and let the jury verdict stand.

Respectfully submitted on this the 17th day of August, 2009.

BY: _____
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CERTIFICATE OF SERVICE

I, CHESTER D. NICHOLSON, do hereby certify that I have mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee to Paul M. Newton, Jr., Esquire at his mailing address of P. O. Box 910, Gulfport, Mississippi 39502 and Honorable Sanford Steckler, Harrison County Chancery Judge at his mailing address of P. O. Box 659, Gulfport, Mississippi 39502.

This the 11th day of August, 2009.

CHESTER D. NICHOLSON