

MISSISSIPPI COURT OF APPEALS

DOCKET NO. 2008-CA-02156-COA

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

GLENDY BURKE "VICK" VICKERY

Appellant


v.

GEORGE W. VICKERY, JR.

Appellee

ON APPEAL FROM A FINAL JUDGMENT OF
THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI
IN CAUSE NO. 05-02526(3)

REPLY BRIEF OF APPELLANT,
GLENDY BURKE "VICK" VICKERY

PAUL M. NEWTON, JR. (MBN 
NEWTON AND HOFF, L.L.P.
P. O. Box 910
Gulfport, MS 39502-0910
Tel: (228) 863-8827

Attorneys for Appellant
Glendy Burke "Vick" Vickery

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	2
TABLE OF CASES AND STATUTES	3
I. STATEMENT OF ISSUES	4
II. SUMMARY OF REPLY BRIEF	4
III. LEGAL ARGUMENT	5
A. PROCEDURAL ISSUES	5
1. Affirmative Defenses Not Merged By Trial	5
2. Affirmative Defenses Properly Pled	7
3. Record on Appeal Properly Designated	8
B. LEGAL ISSUES	9
1. Applicability of Affirmative Defenses	9
2. No Waiver of Affirmative Defenses	10
C. CONCLUSION	13

TABLE OF CASES AND STATUTES

1. CASES

<i>Britton v. American Legion Post 058</i> , No. 2007-CA-01293-COA (2008)	5
<i>Britton v. American Legion Post 58, et al.</i> , Cause No. C2301-05-821 (1) Chancery Court of Hancock County, MS (2007)	5
<i>East Mississippi State Hospital v. Adams</i> , 947 So.2d 887, 891 (Miss. 2007)	10, 11, 13
<i>Gibson v. Wright</i> , 870 So.2d 1250 (Miss. Ct. App. 2004)	5
<i>Kuhne v. Miller</i> , 387 So.2d 729 (Miss. 1980)	9
<i>Lovorn v. Iron Woods Products Corp.</i> , 362 So.2d 196 (Miss. 1978)	10
<i>Mississippi Credit Center, Inc. v. Horton</i> , 926 So.2d 167 (Miss. 2006)	10, 11, 13
<i>United States Fidelity & Guaranty Co. of Mississippi v. Martin</i> , 998 So. 2d 956 (Miss. 2008)	5, 6
<i>Utermehle v. Norment</i> , 197 U. S. 40, 57 (1905)	9
<i>West v. West</i> , 131 Miss. 880, 95 So. 739 (1923)	9, 10
<i>Whitten v. Whitten</i> , 956 So.2d 1093 (Miss. Ct. App. 2007)	4, 10, 11, 13

2. STATUTES

Miss. R. App. P. 10	8
Miss. R. App. P. 10 (b) (4)	8
Miss. R. Civ. P. 8 (c)	7
Miss. R. Civ. P. 15 (a)	

I. STATEMENT OF ISSUES

The following issues are before this Court:

1. Whether appellee George W. Vickery, Jr. ["George Vickery"] was barred under the doctrine of "estoppel" and/or "accord and satisfaction" from maintaining a will contest due to his acceptance of his \$30,000 inheritance under the Will which he thereafter challenged;
2. If George Vickery's will contest were barred under estoppel and/or accord and satisfaction, whether appellant Glendy Burke "Vick" Vickery ["Vick Vickery"] waived his right to assert such affirmative defenses.

II. SUMMARY OF REPLY BRIEF

Appellee George W. Vickery, Jr. accepted \$30,000--his complete inheritance under decedent Helen G. Vickery's October 22, 2004 Last Will and Testament--with the admitted understanding that such was in satisfaction of his inheritance under the contested Will. Thereafter, George Vickery initiated litigation contesting the validity of such Will, and refused the subsequent written demand of estate executor Vick Vickery to return such \$30,000 to the estate during the pendency of such litigation. [Rec. Doc. 117-119; Exhibits "3" & "4" to Brief of Appellant, Glendy Burke "Vick" Vickery, previously filed herein]. Appellee George Vickery, by accepting his inheritance under Helen G. Vickery's October 22, 2004 Last Will and Testament, was barred under the doctrines of "estoppel" and of "accord and satisfaction" from thereafter contesting the validity of such Will.

The trial Court's subsequent determination that Vick Vickery waived his defenses of accord and satisfaction and of estoppel, due to alleged "delay" in bringing these defenses before the Court for consideration, is incorrect as a matter of law. Unlike *Whitten v. Whitten*, 956 So.2d 1093 (Miss. Ct. App. 2007), upon which the lower Court relied, appellant Vick Vickery was

unable to establish his affirmative defenses until obtaining critical deposition admissions from appellee George Vickery. Appellant Vick Vickery's Motions for Summary Judgment were filed promptly after receipt of this critical deposition transcript; in fact, the first Motion for Summary Judgment was filed only five days (including weekends) after such receipt.

III. LEGAL ARGUMENT

A. PROCEDURAL ISSUES

1. Affirmative Defenses Not Merged by Trial

George Vickery's argument that this Court, under *Gibson v. Wright*, 870 So.2d 1250 (Miss. Ct. App. 2004) and *Britton v. American Legion Post 058*, No. 2007-CA-01293-COA (2008), is procedurally barred after a jury verdict from reviewing the applicability of the affirmative defenses of estoppel and of accord and satisfaction ignores the recent decision in *United States Fidelity & Guaranty Co. of Mississippi v. Martin*, 998 So. 2d 956 (Miss. 2008). Although this Court in *Gibson* (appeal from jury verdict) and *Britton* (appeal from Court decision) declined to review the lower Court's denial of a Motion for Summary Judgment, the lower Court's summary judgment denials in both cases were premised on the existence of *disputed questions of fact* requiring trial. See *Britton v. American Legion Post 58, et al.*, Cause No. C2301-05-821 (1), Chancery Court of Hancock County, MS; Findings of Fact, Conclusions of Law and Final Judgment, Book 252, Pages 427-30 (June 27, 2007) (Exhibit "1" hereto) (denial of summary judgment due to contested issue of material fact). Moreover, the trials in *Gibson* and *Britton* resulted in decisions adverse to the unsuccessful movant for summary judgment; thus, the disputed facts were resolved in the lower Court in favor of the non-movant, and any issues regarding the denial of summary judgment necessarily were merged into and extinguished by the final judgment.

United States Fidelity & Guaranty Co. of Mississippi v. Martin, 998 So. 2d 956 (Miss. 2008) similarly involved the appeal of the denial of a Motion for Summary Judgment after a jury verdict rendered against the unsuccessful movant. However, our Supreme Court in *Martin* specifically reviewed the propriety of the lower Court's denial of the Motion for Summary Judgment; thus, the denial of summary judgment was **not** merged into the subsequent jury verdict. Significantly, the issue before both the lower Court on the Motion for Summary Judgment, and before the appellate *Martin* Court, was whether the undisputed terms of an insurance contract were ambiguous--an issue involving **no disputed issues of fact**.

The present case is procedurally identical to *Martin*, in the following respects: (1) an adverse jury verdict was rendered against the unsuccessful movant, Vick Vickery; (2) Vick Vickery seeks appellate review of those matters giving rise to his unsuccessful motions for summary judgment.; and (3) Vick Vickery appeals issues which were the subject of denials of Motions for Summary Judgment and which involve no contested material facts. Vick Vickery emphasizes that George W. Vickery, Jr. in his May 29, 2008 sworn deposition, *admitted* his understanding that the \$30,000 check was in full satisfaction of his inheritance in the following exchange:

NEWTON: Did you think that it [check number 683] was for the \$30,000 that was left under the October 22, 2004, will?

GEORGE W. VICKERY, JR.: Yeah. That's what Vick said. He said, You've been left \$30,000, and I'm going to give this to you, and he wrote out the check.

Deposition of George W. Vickery, Jr., May 29, 2008, at 54 [Rec. Doc. 62; pages 53-55 attached as Exhibit "5" to Brief of Appellant, Glendy Burke "Vick" Vickery, previously filed herein].

In accordance with *Martin*, this Court should review, under a *de novo* standard, the lower Court's denial of Vick Vickery's Motions for Summary Judgment which were based on uncontested material facts.

2. Affirmative Defenses Properly Pled

Appellee George Vickery's incongruous assertion that the affirmative defense of estoppel was not properly pled is simply incorrect.¹ Miss. R. Civ. P. 8 (c) provides in pertinent part as follows:

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.

George Vickery filed an Amended Objection to Petition to Probate Will on December 3, 2007. Appellant Vick Vickery filed an Answer and Affirmative Defenses to Amended Objection to Petition to Probate Will [hereinafter, "Answer to Amended Petition"], in which he raised the affirmative defense of estoppel. Vick Vickery agrees that such filing occurred after the response period set forth in Miss. R. Civ. P. 15 (a). George Vickery's argument that Vick Vickery was required to obtain Court authority before filing his Answer to Amended Petition after the Rule 15 (a) response period, and that a party is barred from filing an untimely Answer without prior Court approval, is unprecedented and unmeritorious.

The party who does not file a timely Answer faces hazards such as the entry of a default judgment; however, neither our Rules of Civil Procedure nor case law prohibit the filing of an untimely responsive pleading or require prior Court approval for such filing. The critical fact in the present case is that Vick Vickery, in his initial Answer to Amended Petition, specifically raised the affirmative defense of estoppel. George Vickery's unprecedented assertion that Court authority was required prior to a delinquent filing, and that Vick Vickery therefore did not properly plead estoppel, must be rejected.

¹ George Vickery concedes that Vick Vickery properly pled accord and satisfaction in his initial Answer to George Vickery's Objection to Probate and Petition to Probate Lost Will. See Brief of Appellee at 14.

3. Record on Appeal Properly Designated

In his final (and equally meritless) procedural argument, appellee George Vickery contends that appellant Vick Vickery was required to provide a full transcript of the trial to this Court, in a transparent effort to increase appellant's appeal costs. The Comments to Miss. R. App. P. 10 provide as follows:

The purpose of the Rule is to permit and encourage parties to include in the record on appeal *only* those matters material to the issues on appeal. (emphasis added).

Notwithstanding George Vickery's gratuitous allegation that appellant Vick Vickery is "attempting to avoid letting this Court see the trial transcript" [Brief of the Appellee at 11], Vick Vickery strongly disagrees with the jury's verdict, denies that he "hid" the contested Will, and firmly believes that Helen Vickery had testamentary capacity and was not unduly influenced at the time she executed the contested Will.² Nonetheless, Vick Vickery recognizes that appeal of such disputed factual issues would be unsuccessful, and has limited his appeal to issues of law; specifically, the applicability of the affirmative defenses of estoppel and of accord and satisfaction. Since these are the *only* issues before this appellate Court, no legitimate purpose would be served by submission of a trial transcript. The Mississippi Supreme Court's denial of appellee's Motion to Remand to have a transcript prepared was proper and should not be disturbed.

² Appellant Vick Vickery would welcome this Court's review of any trial transcript prepared at the cost of appellee George Vickery. See Miss. R. App. P.10 (b) (4) (trial court may require appellee to bear cost of preparing unnecessary documents).

B. LEGAL ISSUES

1. Applicability of Affirmative Defenses

The sole legal issues for this Court are whether the litigation in the lower Court was barred by estoppel or accord and satisfaction, and if so, whether such affirmative defenses were waived. Notwithstanding appellee George Vickery's bombastic rhetoric in his Response Memorandum, he raises no additional substantive arguments; accordingly, the facts giving rise to the application of the doctrines of estoppel and of accord and satisfaction, as set forth in the previously filed Brief of Appellant, Glendy Burke "Vick" Vickery, require little further discussion. Appellant Vick Vickery emphasizes that this Court, in *West v. West*, 131 Miss. 880, 95 So. 739 (1923), espoused the universal principal that a party who takes an inheritance under a Will, as in the present case, may not thereafter challenge such Will, stating:

As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from, at the same time, attacking the validity of the very instrument under which he receive the benefit.

95 So. at 741, *quoting Utermehle v. Norment*, 197 U. S. 40, 57 (1905) (emphasis added), *accord*, *Kuhne v. Miller*, 387 So.2d 729 (Miss. 1980). The *West* Court further noted that the party taking an inheritance under a Will provision is *estopped* from thereafter challenging the validity of the Will. 95 So. at 741. Moreover, the fact that the \$30,000 check was written from a joint account prior to Vick Vickery's appointment as estate executor has no legal significance in view of George Vickery's admission in deposition that he knew the check represented his inheritance under the contested Will. *Cf.* Brief of Appellant at 22-24 (allegation that such somehow precludes application of estoppel).

As detailed in the previously filed Brief of Appellant, Glendy Burke "Vick" Vickery, at 7-11, George Vickery's acceptance of his inheritance under the contested Will also constitutes

accord and satisfaction under the four factors set forth in *Lovorn v. Iron Woods Products Corp.*, 362 So.2d 196, 197 (Miss. 1978).

Furthermore, despite George Vickery's contrary arguments, the jury's ruling that the contested Will was invalid (a factual determination which Vick Vickery disputes but does not appeal) is irrelevant to the issue of whether the litigation itself was barred due to estoppel and/or accord and satisfaction. Cf. Brief of Appellant at 26 (allegation that jury's verdict somehow prevents application of estoppel).

2. No Waiver of Affirmative Defenses

Appellant Vick Vickery respectfully submits that the affirmative defense of estoppel is clearly applicable to this case, *see West v. West*, 95 So. at 741, and that the affirmative defense of accord and satisfaction also applies *unless* this Court determines (for whatever reason) that accord and satisfaction must be limited to debtor/creditor relationships and contractual relationships.³ Thus, this Court must determine whether Vick Vickery in some manner waived his right to assert these defenses.

As previously detailed in the Brief of Appellant, Glendy Burke "Vick" Vickery, at 13-14, a waiver of affirmative defenses occurs *only* upon a party's prolonged failure, while actively participating in litigation, to bring the affirmative defense before the Court for consideration *when the facts necessary to maintain such defense successfully are established*. *Whitten v. Whitten*, 956 So.2d 1093 (Miss. Ct. App. 2007) (waiver of defenses of insufficiency of service and insufficiency of process, due to prolonged failure during litigation to present such then-established defense for Court's consideration), *accord*, *East Mississippi State Hospital v. Adams*, 947 So.2d 887, 891 (Miss. 2007) (same); *Mississippi Credit Center, Inc. v. Horton*, 926 So.2d

³ In view of the clear application of the doctrine of estoppel to the admitted facts, the legal issue of whether accord and satisfaction is applicable to a Will contest is somewhat immaterial.

167 (Miss. 2006) (waiver of right to require arbitration, due to prolonged failure during litigation to present then-established right for adjudication). Significantly, this Court has stressed that the mere passage of time is *not* determinative as to whether waiver occurred, *Mississippi Credit Center, Inc. v. Horton*, 926 So.2d at 180 (neither delay nor participation in the judicial process **standing alone** will ordinarily constitute a waiver).

Unlike *Whitten*, *East Mississippi*, and *Horton*, the facts necessary for appellant Vick Vickery to file a meritorious Motion for Summary Judgment based on either estoppel or accord and satisfaction were not conclusively established until the May 29, 2008 deposition of appellee George Vickery, in which George Vickery admitted his understanding that the \$30,000 check represented his inheritance under the contested Will. See Section III (A) (1) hereof, *supra* at 6. This timing of this admission, and Vick Vickery's prompt actions thereafter, are *critical* in determining whether appellant Vick Vickery waived his rights in the present case.

Undersigned counsel drafted a Motion for Summary Judgment and supporting Memorandum based on accord and satisfaction in 2007, but concluded that additional proof might be necessary to prevail on such motion--specifically, proof establishing appellee George Vickery's understanding that the \$30,000 check represented his inheritance under the subsequently challenged Will. Without such proof, appellant Vick Vickery reasonably anticipated that George Vickery would counter any Motion for Summary Judgment by asserting that he did not understand the purpose of the \$30,000 check.

In February 2008, undersigned counsel requested deposition dates for from opposing counsel for George W. Vickery, Jr., and was informed that such deposition could not be taken until May 29, 2008 due to George Vickery's personal commitments. After obtaining George Vickery's critical admissions in depositions, undersigned counsel requested expedited transcripts, and completed his first Motion for Summary Judgment and Memorandum in Support on June 9,

2008—eleven days after completion of the depositions and only *five days* (including weekends) after receipt of the deposition transcripts.

Shortly after the lower Court's denial of his Motion for Summary Judgment, appellant Vick Vickery filed a Second Motion for Summary Judgment, based on the application of "estoppel" to the same admitted facts. Once again, the Second Motion for Summary Judgment could not be successfully brought forward until appellee George Vickery confessed in deposition his understanding that the \$30,000 check constituted his inheritance under the Will that he subsequently challenged. Further, appellant Vick Vickery's Second Motion for Summary Judgment was filed within a reasonable period after receipt of the critical deposition transcripts.

George Vickery's repeated assertion that, after the outset of the case, "no new facts emerged," Brief of Appellee at 13, and that "no new information [was] developed," Brief of Appellee at 19, with regard to these affirmative defenses is simply incorrect. Appellant Vick Vickery reasonably anticipated the admissions necessary to assert his affirmative defenses successfully, obtained such admissions through deposition, and promptly brought such affirmative defenses before the Court after obtaining the critical deposition admissions.

Ironically, George Vickery's present arguments to this Court underscore the crucial nature of the deposition testimony for Vick Vickery to successfully assert his affirmative defenses. Specifically, appellee George Vickery, in his Brief of Appellee at 20-23, argues that his acceptance of the \$30,000 check was not related to his bequest under the contested Will--arguments *directly contradicted* by his sworn deposition testimony. Vick Vickery reasonably anticipated that George Vickery would advance such self-serving arguments in opposition to a summary judgment motion; thus, George Vickery's deposition was required before bringing such affirmative defenses before the Court.

Significantly, the *only* manner in which appellant Vick Vickery could obtain the admissions necessary to establish his affirmative defenses was by actively participating in the litigation process, including the use of our discovery procedures. Appellant Vick Vickery filed his Motion for Summary Judgment based on accord and satisfaction *at the earliest time after obtaining the facts and admissions to support such Motion.*⁴ Clearly, a party litigant does not waive an affirmative defense by participating in the discovery process to obtain admissions for use in a Motion for Summary Judgment based on such affirmative defense. *Cf. Mississippi Credit Center, Inc. v. Horton*, 926 So.2d at 180 (neither delay nor participation in the judicial process **standing alone** will ordinarily constitute a waiver). Thus, the facts of the present case differ dramatically from *Whitten*, *East Mississippi*, and *Horton*, in which the affirmative defense could have been successfully brought before the Court at any time.

C. CONCLUSION

Appellee George Vickery's will contest, filed after his acceptance of his entire inheritance under the subsequently challenged Will, is barred both under estoppel and under accord and satisfaction. Further, appellant Vick Vickery filed his two Motions for Summary Judgment promptly after obtaining the necessary deposition testimony to establish such affirmative defenses. Although appellant Vick Vickery was unable to obtain the admissions necessary for such Motions until May 29, 2008, such certainly does not mandate that Vick Vickery somehow waived the very defenses which he was seeking to establish through discovery--those of estoppel and/or accord and satisfaction.

⁴ Vick Vickery's subsequent Motion for Summary Judgment based on estoppel was also timely.

For the reasons herein stated, this Court on appeal should hold that the litigation before the lower Court was barred by the affirmative defenses of estoppel and/or accord and satisfaction, and judgment should be rendered in favor of appellant Vick Vickery.

Respectfully submitted,



PAUL M. NEWTON, JR.
Attorneys for Proponent/Appellant

PAUL M. NEWTON, JR. (Bar No. [REDACTED])
NEWTON AND HOFF, L.L.P.
P. O. BOX 910
GULFPORT, MS 39502-0910
Tel: (228) 863-8827
Fax: (228) 868-6007

CERTIFICATE OF SERVICE

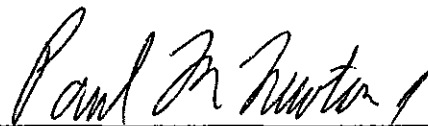
I, Paul M. Newton, Jr., Newton and Hoff, L.L.P., Attorneys at Law, attorney for Appellant Glendy Burke "Vick" Vickery, certify that I have this day filed this Reply Brief of Appellant with the Clerk of this Court, and have served a copy of this Reply Brief of Appellant by United States mail with postage prepaid on the following persons at the following address:

Honorable Sanford R. Steckler
Chancery Court of Harrison County
P. O. Box 659
Gulfport, Mississippi 39502

and

Chester D. Nicholson, Esq.
Gail D. Nicholson, Esq.
Nicholson and Nicholson
Post Office Box 162
Gulfport, Mississippi 39502

This the 24th day of September, 2009.



Paul M. Newton, Jr.

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

JAMES BRITTON

PLAINTIFF

VERSUS

CAUSE NO. C2301-05-821(1)

FILED

JUN 27 2007

TIMOTHY A. KELLAR
CHANCERY CLERK

AMERICAN LEGION POST 58, POST 58 FIRE
PROTECTION DISTRICT OF HANCOCK
COUNTY, MISSISSIPPI and
John Does 1, 2 & 3, and X,Y,Z
Corporations

BY DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

THIS matter having come on to be heard upon Complaint filed by the Plaintiff, James Britton, by his attorneys Honorable Zach Butterworth and Honorable Gary Yarborough and the Defendants, American Legion Post 58 and Post 58 Fire Protection District of Hancock County, Mississippi by their attorney, Michael D. Haas, Jr. and the court having conducted a partial trial of this matter beginning February 26, 2007 which was recessed to allow the Plaintiff to bring in an additional, necessary party that being Post 58 Fire Protection District of Hancock County, Mississippi and the court having reconvened the trial on May 14, 2007 and having heard and considered the testimony offered by the Plaintiff and Defendants and reviewed the documentary evidence finds and adjudicates as follows:

I.

That the court has jurisdiction of the subject matter and parties, the dispute involving real property located in Hancock County, Mississippi and the parties all being residents or resident entities of Hancock County, Mississippi.

II.

That the dispute involves a lease agreement entered into February 1, 1990 (Exhibit 1 at trial) executed by the Plaintiff and his now deceased wife and now deceased brother-in-law in

BOOK 252

PAGE 427

EXHIBIT "1"

favor of American Legion Post 58. The court finds that the lease agreement provided American Legion Post 58 a fifty (50) year period to occupy the property so long as the Post maintained an auxiliary fire station on said real property.

III.

Further, the court finds that the lease required that after construction of a fire station, which is interpreted by the court by reference to paragraph one (1) of the lease to be an auxiliary fire station, should the Lessee, American Legion Post 58, fail to maintain same as a fire station for a period of more than ninety (90) days, then the lease would be null and void and the property would revert to the Lessor, James Britton, et al.

IV.

The court further finds that the American Legion Post 58 has never operated a fire department. The court finds that the American Legion sublet the property to Post 58 Volunteer Fire Department and that this fire department is an official organization and a part of a fire district. Specifically, the court finds that on March 7, 1997 and on April 28, 2006 (being Exhibits 2 and 3 at trial), American Legion Post 58 entered into an agreement with Post 58 Volunteer Fire Department in essence requiring that during the ten (10) lease year period, Post 58 Fire Department could use the building and that is the purpose of these documents.

V.

The court finds and determines that since the building was constructed on the property, said construction being completed by the American Legion Post 58, the building has been used to house a pump truck and a tanker truck. At various times issues arose as to maintenance of the property, and the use of the property and the court finds and determines that the current use of

the property and the use of the property at the time the lawsuit was filed were essentially the same as the use of the property at the time Exhibits 1, 2 and 3 were entered into.

VI.

The court finds that the Lease Agreement, Exhibit 1, does not describe an auxiliary fire station. The court finds compelling the testimony of Fire Chief Mark Manuel wherein he testified that the building was constructed as a satellite fire station. The court finds that the station is not the principal fire station of the District, that station being located on Highway 603. Further that the Highway 603 fire station is the location where meetings of the District are held and all the records are kept and additionally, the main fire fighting equipment is stored and used there.

VII.

The court finds from the exhibits entered into and made a part of the record at the trial of this matter that Engine No. 2 and Big Bertha, are used from the Highway 53 location designated as Fire Station No. 2, from time to time.

VIII.

Finally, the court finds and adjudicates that Mississippi Law requires that if an agreement is to be terminated by one party or the other, breach of that agreement, must be material, the breach must be clear and it must be evident. The remedy requested by the Plaintiff for the alleged breach of contract is that the contract be terminated. This is an extreme remedy under the laws of the State of Mississippi. The Court finds that the Plaintiff's burden of proof necessary to show that the contract was breached by the Defendants has not been met by the Plaintiff. The court enters judgment for the Defendant and dismisses the Complaint with prejudice. Further, that based upon the above findings of fact and conclusions of law, the

evidence received at the initial hearing on February 26, 2007, the pleadings, court file, allegations contained in Motion for Summary and Brief filed by the plaintiff and the Brief in Response filed by the Defendant, American Legion Post 58, and considering the evidence in the light most favorable to the Defendants the court does hereby find and adjudicate that the Motion for Summary Judgment is not well taken and is therefore denied. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by the Plaintiff be and it is hereby denied. It is further,



ORDERED, ADJUDGED AND DECREED that this cause of action be and it is hereby dismissed with prejudice. It is further,

ORDERED, ADJUDGED AND DECREED that all costs to this proceeding are assessed against the Plaintiff, for which let execution issue.

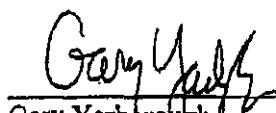

SO ORDERED, ADJUDGED AND DECREED this the 25 of June, 2007.


CHANCELLOR

Prepared by:


Michael D. Hagg, Jr.
Attorney for the Defendants, American
Legion Post 58 and Post 58 Fire Protection
District of Hancock County, Mississippi *1cc*
MS BAR NO 

Approved as to form only:


Gary Yarberough
Attorney for Plaintiff, James Britton *1cc*
MS BAR NO 

BOOK 252
PAGE 430