IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-00368

MORGAN DIGNOWITY AND REGINA DIGNOWITY

PLAINTIFFS-APPELLANTS

VS.

KONRAD DIGNOWITY, AS CONSERVATOR FOR THE ESTATE OF IDA DIGNOWITY

DEFENDANT-APPELLEE

APPEAL FROM THE CHANCERY COURT OF MARSHALL COUNTY, MISSISSIPPI

BRIEF OF APPELLEE KONRAD DIGNOWITY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Konrad Dignowity, conservator for the Estate of Ida Dignowity, defendant/appellee;

Ida Dignowity, ward of Konrad Dignowity;

Morgan and Regina Dignowity, plaintiffs/appellants;

Collier Carlton, Holly Springs, Mississippi, attorney for plaintiffs/appellants;

Rachel M. Pierce, Phelps Dunbar LLP, Tupelo, Mississippi, attorney for defendant/appellee;

W. Brett Harvey, Phelps Dunbar LLP, Jackson, Mississippi, attorney for defendant/appellee.

Chancellor Glenn Alderson, Chancellor presiding below

So certified, this the 18th day of September, 2009.

W. BRETT HARVEY, attorney of record for Appellee Konrad Dignowity, as Conservator for the Estate of Ida Dignowity

STATEMENT REGARDING ORAL ARGUMENT

The Appellee, Konrad Dignowity, agrees with the Appellants' statement that the issues in this appeal are adequately presented in the parties' briefs and that oral argument is not necessary to the proper disposition of this matter.

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INTRODUCTION

Appellant Morgan Dignowity brought this lawsuit seeking an order requiring Konrad Dignowity to sell certain real property for less than its appraised value of $159,000. Throughout his brief to this Court, Morgan carefully ignores the principal basis for the Chancellor's grant of summary judgment against him. The Chancellor held that the issue raised in this lawsuit—that is, the lawful ownership of the real property, and whether Morgan had any right to buy it for less than the $159,000 appraised value—had been decided in a prior conservatorship proceeding in 2004.

Indeed, these issues were resolved via an ***agreed order*** signed by Morgan's counsel on his behalf. That Agreed Order specifically states (1) that Ida Dignowity, the mother of appellant Morgan and appellee Konrad, is the owner of a parcel of real property on Wingo Road in Marshall County, Mississippi; (2) that Morgan Dignowity was a "month-to-month tenant," not a purchaser of said property; and (3) that the property was to be sold for not less than its $159,000 appraised value. The Chancellor held that the Agreed Order barred Morgan's claims in this lawsuit, based on the doctrine of collateral estoppel. In addition, the Chancellor correctly held that Morgan's claim to ownership of the property is barred by Mississippi's statute of frauds.

Morgan does not seriously dispute these holdings, nor could he. Instead, Morgan's brief simply rehashes testimony from the summary judgment hearing

intended to attack Ida Dignowity's ownership of the property. These arguments are too little, too late. The Chancellor correctly found that this testimony was a thinly-veiled attempt to re-litigate matters conclusively decided by the Agreed Order in the 2004 conservatorship proceeding. He therefore granted summary judgment and awarded attorneys' fees under the Litigation Accountability Act.

In sum, this appeal is meritless and—like the underlying lawsuit—borders on being frivolous. This Court should affirm the judgment of the Chancery Court.

STATEMENT OF THE ISSUES

1. Did the Chancery Court err in granting summary judgment where the dispositive issues in a plaintiff's complaint already had been adjudicated via an agreed order, to which the plaintiff and his counsel had consented?

2. Did the Chancery Court err in holding that the statute of frauds barred a claim of ownership to real property, where the party to be bound had not signed the deed contract, but instead had written her name by two proposed handwritten changes?

3. Did the Chancery Court commit reversible error in requiring a plaintiff whose claim to ownership of real property had previously been adjudicated by an agreed order to post a bond intended to cover the defendants' attorneys' fees and expenses in re-litigating the issue?

4. Did the Chancery Court abuse its discretion in excluding the testimony of Ida Dignowity during the summary judgment hearing?

STATEMENT OF FACTS

The Chancellor based his grant of summary judgment principally upon a procedural determination—that is, that Morgan's claims are barred by collateral estoppel. Consequently, most of the material facts are found below in the Statement of the Case.

Briefly, by way of general background, Mrs. Ida Dignowity is an elderly widow residing in Marshall County, Mississippi. Her husband, Konrad Dignowity, Sr., passed away in 2000. The Plaintiffs-Appellants in this matter are her son, Morgan Dignowity and his wife Regina Dignowity, and are referred to for convenience simply as "Morgan." Morgan seeks an order compelling Ida to convey to him title to a home she owns on Wingo Road in Byhalia, Mississippi (the "Wingo Road Property"). R. 1:19-22.[1] The Defendant-Appellee is her son Konrad Dignowity, in his capacity as conservator of her estate. R. 1:19. For convenience, he is referred to as "Konrad."

In 1993, Ida and her late husband Konrad, Sr. entered into an oral agreement with Morgan and Regina, by which the latter would occupy the Wingo Road Property in exchange for a monthly payment of five hundred dollars. R. 1:19-20. Morgan characterizes this arrangement as one to "purchase the property," R. 1:19, but concedes that the agreement was purely oral, and thus unenforceable as a

[1] References to the Record will follow the following format: R. [volume number]:[page number].

contract for the sale of land. R.1:125 ("The Plaintiffs must concede that an oral contract for the sale of land is unenforceable under the Mississippi Statute of Frauds.").

In 1999, Morgan took over operation of liquor store that had been run by Ida and Konrad, Sr. R. 1:20. Morgan alleges that at this time, he and his parents entered into a "new oral agreement . . . lowering the price of the house to one hundred thousand dollars" from a previous price of two hundred thousand dollars. *Id.* Here again, Morgan has affirmatively conceded this alteration in the arrangement cannot convert an oral agreement into an enforceable conveyance of land. R. 1:125.

In January 2004, the Marshall County Chancery Court determined that Ida was not capable of managing her affairs, and appointed Konrad Dignowity as conservator of her estate. R. 1:60-61. Konrad determined, over Morgan's objections, that Ida needed to sell the Wingo Road Property to meet her living expenses. As discussed more fully below, in November 2004, Chancellor Alderson entered an Agreed Order declaring Ida Dignowity the owner of the Wingo Road Property and granting Konrad authority to sell it for not less than its appraised value of $159,000. R. Vol. 2, unnumbered Exhibit D. Morgan's attorney signed the Agreed Order on his behalf. *Id.* Two months after the Agreed Order was entered, however, Morgan filed this lawsuit in an attempt to re-litigate ownership of the property.

STATEMENT OF THE CASE

Summary judgment in this case was based primarily on the fact that the sole, dispositive issue—ownership of the Wingo Road Property—had been adjudicated via the Agreed Order in the prior conservatorship proceeding. Accordingly, it may be helpful first (1) to summarize the nature of the complaint of this lawsuit, then (2) to summarize precisely what was adjudicated in the prior conservatorship proceeding, and finally (3) to describe the proceedings leading to summary judgment in this suit.

I. The 2005 Complaint for Specific Performance

This lawsuit began in January 2005, when Morgan Dignowity and his wife Regina filed a Complaint for Specific Performance. R.1:19. The Complaint sought an order requiring Konrad Dignowity, as conservator of Ida Dignowity, to convey Ida's Wingo Road Property to Morgan for a price below the $159,000 appraised value set forth in the Agreed Order. R.1:19-22. The sole basis for Morgan's request was an un-executed "Land Contract—Contract for Deed" attached as Exhibit A to the Complaint. R. 1:23-29. A cursory examination of the Land Contract shows it was never executed. R. 1:29. The signature block is blank. *Id.*

Despite this fact, Morgan falsely alleged that Ida Dignowity "signed" the Land Contract in October 2003. R. 1:21. That is demonstrably wrong. Ida made two handwritten counterproposals to the terms of the proposed Land Contract, and wrote her name and the date beside those changes. R.1:23, 24. She never executed

the document. R. 1:29. If that were not enough, the final clause of the Land Contract explicitly states that, pursuant to a Power of Attorney dated December 12, 2002, Ida's signature alone is legally insufficient. R. 1:28. Instead, the Land Contract requires the signature of Konrad Dignowity or Ida's daughter Gretchen McAlexander—each of whom held a power of attorney on Ida's behalf—"in addition to or in place of Ida J. Dignowity." *Id.* The signature line for "Power of Attorney" is blank, as neither Konrad nor Gretchen signed the Contract. R. 1:29.

II. The 2004 Conservatorship Proceeding

Even if the Land Contract had been executed, any claim under it is barred by a prior adjudication. On October 22, 2004, Chancellor Alderson held a hearing in the conservatorship proceeding for Ida Dignowity. *See* R. Vol. 2., unnumbered Exhibit D. The Land Contract attached as Exhibit A to the Complaint in this lawsuit was already in existence on that date. R. 1:23-29. Indeed, Ida Dignowity had made her proposed changes to the Contract in October 2003. R. 1:23-24.

On November 23, 2004, the Chancellor entered an "Agreed Order Granting Amended Petition to Sell Real Property of Ida J. Dignowity." R. Vol. 2, unnumbered Exhibit D. The Agreed Order was signed by attorney Collier Carlton on behalf of his client, Morgan Dignowity. *See id.* The Order expressly stated that "Ida Dignowity is the owner" of the Wingo Road Property, and that Morgan was living on the property—not as an owner—but as a "month-to-month tenant." *See*

id. The Agreed Order instructs Konrad, as conservator, to sell the property "for not less than the appraised value of $159,000." *Id.*

The objective of Morgan's Complaint for Specific Performance in this lawsuit is to compel Ida's estate to sell him the property for less than the appraised value of $159,000, based on (1) an unsigned Land Contract and/or (2) an alleged prior oral understanding that Morgan's monthly payments were made to purchase the property, not as rent. R. 1:19-22. The Agreed Order explicitly rejects these arguments, holding that Ida was the owner, Morgan was a "month-to-month tenant," and the property must be sold for "not less than" the appraised value of $159,000. R. Vol. 2, unnumbered Exhibit D.

To be clear, Morgan and his attorney had every opportunity to argue that the Land Contract conferred ownership of the Wingo Road Property—or the right to purchase the property at a price lower than $159,000—at the October 2004 hearing in the conservatorship proceeding. They chose not to, and instead executed the Agreed Order described above.

III. The Course Of Proceedings In This Lawsuit

Two months after the Agreed Order was entered, Morgan filed the Complaint in this matter. R. 1:19-22. Konrad filed an answer and also asserted various counterclaims against Morgan, including a claim for fees and expenses resulting from this litigation under both the Litigation Accountability Act and Rule 11 of the Mississippi Rules of Civil Procedure. R. 1:31-44. Morgan filed an

answer to these counterclaims. R. 1:47-55. Konrad subsequently moved for summary judgment. R. 1:56-59.

In his motion for summary judgment, Konrad noted that the ownership of the Wingo Road Property had been adjudicated via the Agreed Order in the 2004 conservatorship proceeding. R. 1:56-57. He further explained that, even if collateral estoppel did not apply, Morgan's claim to ownership of the property was barred by the statute of frauds because there was no signed, written conveyance. R. 1:57. In his response to the summary judgment motion, Morgan did not mention the Agreed Order and offered no coherent explanation of how the statute of frauds could be avoided. R. 1:123-25.

Chancellor Alderson had presided over the conservatorship proceeding, and was therefore aware that Morgan's complaint was a frivolous attempt to re-litigate the ownership of the Wingo Road Property. Consequently, after the summary judgment briefs had been filed, on July 8, 2005, the Chancellor entered an order stating that Morgan was to post a $15,000 bond to "satisfy they attorneys fees and expenses that the Defendant has incurred," or alternatively, summary judgment would be granted without a hearing R.1:129.

Morgan apparently posted the bond, although the record does not specifically reflect as much. At the hearing on summary judgment, Konrad's attorney reiterated that Morgan's claim to the Wingo Road Property was barred by (1) collateral estoppel, based on the Agreed Order in the 2004 conservatorship

proceeding; and (2) the statute of frauds, based on the lack of any signed, written conveyance. R. 3:2-12. Morgan's attorney made no attempt to deny the collateral estoppel effect of the Agreed Order. Instead, he called various witnesses in an attempt to rehash questions about the ownership issue. R. 3:13-37. For his part, Morgan was asked point blank "Do you have a contract for the sale of the house that you have signed?" His answer: "No, I have no contract from my mama and my daddy. I have a verbal agreement is what I had . . .." R. 3:31.

Chancellor Alderson granted the motion for summary judgment and awarded attorneys' fees to Konrad. R. 3:43. A written order to that effect was entered on September 23, 2005. R. 1:131-32. Pursuant to that order, Konrad submitted a statement of attorneys' fees and costs. R. 1:133-142. Ultimately, however, Konrad declined to bring the request for fees on for hearing. The matter remained on the court's calendar until an order of dismissal was entered on January 8, 2009. R. 2:151. The dismissal order became effective February 11, 2009, and notice of appeal was filed on March 2, 2009. R. 2:152.

SUMMARY OF THE ARGUMENT

This lawsuit is a thinly-disguised attempt to re-litigate matters adjudicated by the Agreed Order in the 2004 conservatorship proceeding. Chancellor Alderson—who had presided over the conservatorship proceeding—recognized that fact and granted summary judgment. That result is indisputably correct. The Agreed Order explicitly holds that Ida Dignowity is the owner of the Wingo Road

Property, that Morgan Dignowity was a "month-to-month tenant" with no ownership interest, and that the property was to be sold for not less than its $159,000 appraised value. Consequently, Morgan's claims to ownership—or the right to purchase below the appraised value—are barred by collateral estoppel.

Even if these issues had not been decided by the Agreed Order, Morgan cannot establish any claim of ownership to the property. He relies on a 2003 Land Contract, which was not executed by Ida Dignowity, by either of the individuals holding power of attorney on her behalf, or by anyone else. The only writings by Ida Dignowity on the Land Contract are proposed handwritten changes, signifying ongoing negotiations, not acceptance. The signature block is blank. Consequently, Morgan's reliance on the Land Contract is barred by the statute of frauds.

Morgan's objections to the posting of a bond pending summary judgment are similarly meritless. Upon reviewing the parties' summary judgment briefs, the Chancellor recognized Morgan's complaint was an attempt to re-litigate matters adjudicated by the Agreed Order. He therefore gave Morgan a choice whether to accept dismissal on the briefs or post a bond to cover attorneys' fees and proceed to a hearing. In doing so, the Chancellor acted well within his inherent power to dismiss frivolous claims and/or impose sanctions for abuse of the legal process. Even if he had not, Morgan failed to object to the bond requirement in the trial court, and thereby waived any objection on appeal.

Finally, the Chancellor did not abuse his discretion in excluding Ida Dignowity's testimony during the summary judgment hearing. As shown below, Morgan's claims of ownership fail as a matter of law, under both the doctrine of collateral estoppel and the statute of frauds. Nothing Ida Dignowity might have said could have cured either of these purely legal, fatal defects in Morgan's claim. Consequently, Ida's testimony was irrelevant and therefore inadmissible under Rule 402 of the Mississippi Rules of Evidence.

ARGUMENT

I. The Claim For Specific Performance Is Barred By Collateral Estoppel.

Morgan's Complaint for Specific Performance sought an order compelling Konrad, as conservator of Ida Dignowity's estate, to sell Morgan the Wingo Road Property for less than its appraised value. R. 1:19-22. That request was based on an argument that, while Morgan occupied the property, he was a "purchaser"—not a month-to-month tenant—and therefore certain monthly payments should be credited to him, allowing him to buy the property for $101,357.44 R. 1:20-21. These issues were adjudicated via the Agreed Order, which explicitly held that Ida Dignowity owned the property, that Morgan was a "month-to-month tenant" rather than a purchaser, and that the property was to be sold for not less than the appraised value of $159,000. Consequently, Morgan's claim to the Wingo Road Property is barred by collateral estoppel.

The doctrine of collateral estoppel precludes parties from re-litigating specific issues that were (1) actually litigated; (2) determined by; and (3) essential to the judgment in a prior action. *Hollis v. Hollis*, 650 So.2d 1371, 1377 (Miss. 1995), citing *Dunaway v. W.H. Hopper & Associates, Inc.*, 422 So.2d 749, 751 (Miss. 1982). Under settled Mississippi law, issues adjudicated by an agreed order meet all three of these requirements and therefore have the same preclusive effect as any other judgment on the merits. *See, e.g., Smith v. Malouf*, 826 So.2d 1256, 1259 (Miss. 2002) (determinations of fact in an agreed order have full collateral estoppel effect).

Indeed, the Mississippi Supreme Court explained in *Guthrie v. Guthrie* that a "consent judgment acquires the incidents of, and will be given the same force and effect as, judgments rendered after litigation. It is binding and conclusive, operating as res judicata and an estoppel to the same extent as judgments after contest." 102 So.2d 381, 383 (Miss. 1958); *see also Davis v. Davis*, 983 So.2d 358, 362-63 (Miss. Ct. App. 2008) (determinations of fact in agreed child support order were "the equivalent of res judicata"); *Richardson v. Audubon Ins. Co.*, 948 So.2d 445, 449-50 (Miss. Ct. App. 2006) (determination in agreed order as to rightful recipient of insurance proceeds collaterally estopped any challenge).

Here, Morgan and his attorney consented to the November 2004 Agreed Order in the conservatorship proceeding. The Order made the following determinations:

(1) "Ida J. Dignowity is the owner of a parcel of real property located in Marshall County, Mississippi"—that is, the Wingo Road Property. R. Vol. 2, unnumbered Exhibit D at ¶ 2.

(2) "Morgan Dignowity is currently living on the premises" of the Wingo Road Property "as a month-to-month tenant, as defined by Miss. Code Ann. § 89-8-19 and the Residential Lease Agreement between the parties." *Id.* at ¶ 5.

(3) "The Court . . . grants Konrad E. Dignowity, III as Conservator of the person and property of Ida J. Dignowity, authority to sell the [Wingo Road Property] for not less than the appraised value of $159,000." *Id.* at ¶ 8.

Under settled law, these determinations are as final and binding as if they had been made by a jury after a full trial on the merits. *See, e.g., Smith*, 826 So.2d at 1259. They prohibit Morgan from re-litigating (1) the ownership of the Wingo Road Property; (2) whether he was a purchaser or a "month-to-month tenant" during his occupancy of the property; and (3) whether he is entitled to purchase the property for less than the $159,000 appraised value.

In sum, the Agreed Order bars this backdoor attempt by Morgan to obtain the Wingo Road Property for less than the full appraised value. Consequently, this Court need go no further: the Chancellor was correct to dismiss this action based on collateral estoppel, and summary judgment should be affirmed.

II. Morgan's Claim To Ownership Of The Wingo Road Property Is Barred By The Statute Of Frauds.

Even if it were not barred by collateral estoppel, Morgan's underlying claim to ownership of the Wingo Road Property fails on its merits. Mississippi's statute of frauds requires that all contracts involving the transfer of land be (1) in writing; and (2) signed by the party to be bound. MISS. CODE ANN. § 15-3-1(c); *Allred v. Fairchild*, 785 So.2d 1064, 1069 (Miss. 2001). Morgan has conceded that these two requirements are absolute, and that the alleged oral agreements under which he occupied the Wingo Road Property cannot satisfy the statute of frauds. R. 1:125 ("The Plaintiffs must concede that an oral contract for the sale of land is unenforceable.").

Instead of pointing to a purported oral contract, Morgan relies on the un-executed 2003 Land Contract, which he attaches as Exhibit A to his complaint. R. 1:23-29. The Land Contract was not executed by anyone. The signature block is entirely blank. R. 1:29. In his appellate brief, Morgan states that he "sincerely believes" the Land Contract was signed by Ida. *See* Appellant's Br. at 8. This strange belief apparently is based solely on a pair of handwritten proposed changes to the Land Contract made by Ida Dignowity. R. 1:23-24. Ida wrote her name beside these proposed changes to indicate they were hers and dated them. *Id.* Morgan's implicit assertion that these handwritten changes constitute Ida's "signature" of the Land Contract is disingenuous and wrong as a matter of law.

Under Mississippi law, a signature does not satisfy the statute of frauds unless "it conveys an intention to authenticate the writing." *Theobald v. Nosser*, 752 So.2d 1036, 1040 (Miss. 1999), quoting *Vess Beverages, Inc. v. The Paddington Corp.*, 886 F.2d 208, 213 (8th Cir. 1989). As a matter of basic logic, a party's handwritten ***changes to the substance of a contract*** cannot constitute an "authentication" or "execution" of the contract. Such changes constitute a counter-proposal, not an acceptance. *See generally Graham v. Anderson*, 397 So.2d 71, 72 (Miss. 1981) (response seeking terms different from initial offer on land contract was a counter offer, not an acceptance). This is especially true where, as here, the party to be bound signed ***only the proposed handwritten changes*** and did not sign the contract in the place clearly designated for that purpose. R. 1:23-24.

Further, even if Ida Dignowity's handwritten changes could be construed as a "signature" for purposes of the statute of frauds, the agreement would nonetheless be void under its own express terms. The "Additional Provisions" clause of the Land Contract expressly requires it be signed by one of two people—Konrad Dignowity or Ida's daughter Gretchen McAlexander—having power of attorney over Ida Dignowity. R. 1:28. Neither Konrad nor Gretchen signed the contract. R. 1:29.

In sum, any argument that the Land Contract was enforceable should have been made prior to entry of the November 2004 Agreed Order in the conservatorship proceeding, and is now barred by collateral estoppel. But even if

Morgan's belated attempt to re-litigate ownership of the property were not barred, the Land Contract was not executed by anyone and is a legal nullity.

III. The Chancery Court Did Not Err In Requiring A Bond.

Morgan contends that the Chancellor erred in requiring him to post a bond in the amount of $15,000 "to prevent summary judgment from being entered without a hearing." See Appellant's Br. at 8; R.1:129-30 (hereinafter, the "Bond Order"). There are multiple, fatal defects in this argument.

A. The Bond Order was a proper exercise of the Chancellor's inherent authority to impose sanctions to deter abuse of the judicial process.

First, the Bond Order was an entirely proper exercise of the Chancellor's inherent authority. Morgan contends that the Bond Order was improper because it required him to post bond "to prevent summary judgment from being entered without a hearing." Appellants' Br. at 8. In fact, Morgan received a full hearing on summary judgment. But even if he had not, the Chancellor acted well within his discretion by requiring a bond to cover attorneys' fees before allowing further litigation of a frivolous complaint designed to re-litigate matters adjudicated by the 2004 Agreed Order.

Put simply, there is no "right" by which a plaintiff is entitled to a summary judgment hearing, irrespective of the merits of his claim. To the contrary, the Mississippi Supreme Court consistently has held that trial courts have inherent authority to dismiss frivolous complaints *sua sponte* prior to trial or hearing, or

even before process has issued. *See, e.g., Blanks v. State*, 594 So.2d 25, 28 (Miss. 1992) ("If ... the complaint is frivolous, process need not be issued."). A trial court's inherent power to dismiss a frivolous complaint is distinct from it power to dismiss under Rule 12(b)(6), and is therefore reviewed only for abuse of discretion. *See Duncan v. Johnson*, ___ So.3d ___, 2009 WL 596661 at *1 (Miss. Ct. App. 2009) (not yet published; copy attached), citing *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *see also Huggins v. State*, 928 So.2d 981, 983 (Miss. Ct. App. 2006), citing *Dock v. State*, 802 So.2d 1051, 1056 (Miss. 2001).

Similarly, under Rule 11 of the Mississippi Rules of Civil Procedure, trial judges are afforded broad discretion in awarding attorneys' fees and expenses incurred in responding to frivolous claims. *See, e.g., Eatman v. City of Moss* Point, 809 So.2d 591, 593 (Miss. 2000). This includes the inherent authority to impose *sua sponte* whatever sanctions or restraints—at whatever stage of the proceedings—the court deems necessary to prevent or remedy abuse of the judicial process. *See, e.g., Tricon Metals & Serv's, Inc. v. Topp,* 537 So.2d 1331, 1335 (Miss. 1989).[2]

[2] Morgan contends that the imposition of attorneys' fees "would have required a finding that the Complaint for Specific Performance . . . was frivolous, was without justification, or was for the purpose of harassment or delay." Appellant's Br. at 8. Where a trial court imposes sanctions like attorneys' fees, the reviewing court will presume that such findings have been made, and reviews only to determine whether said findings would be supported by evidence. *See, e.g., Hine v. Anchor Lake Property Owners' Ass'n, Inc.*, 911 So.2d 1001, 1005 (Miss. Ct. App. 2005) (factual findings supporting sanctions, if not expressly made, are inferred), citing *Watson v. Lillard*, 493 So.2d 1277, 1279 (Miss.1986) (Supreme Court will "assume that the trial judge made all findings of fact that were necessary to support his verdict.").

The upshot is simple: the Chancellor had full authority to dismiss Morgan's complaint—***at any point in the proceedings***—based on the conclusion that it was a frivolous attempt to re-litigate matters adjudicated by the Agreed Order. Rather than take action upon the initial filing of the complaint, the Chancellor waited until both parties had submitted their summary judgment briefs before issuing the Bond Order. R. 1:129-30.

In his appellate brief, Morgan does not dispute the Chancellor's substantive conclusion that his claims had been adjudicated via the Agreed Order, nor could he. That is to say, he does not dispute that the Chancellor could have simply dismissed the complaint based on the summary judgment briefs—and imposed sanctions for a duplicative filing—without holding any hearing. Since the Chancellor could have summarily dismissed this lawsuit and imposed sanctions without any hearing, he cannot have erred in giving Morgan the option either to (1) accept early dismissal; or (2) post a bond to cover the defendant's litigation costs, and proceed to a summary judgment hearing.

B. Morgan's objection to the Bond Order has been waived.

Second, any objection to the Bond Order has been waived. Indeed, it has been waived on more than one occasion. To begin with, Morgan has appealed the grant of summary judgment, not the order requiring bond be posted. His notice of appeal does not mention the July 8, 2005 Order imposing the bond requirement. R. 1:7. Instead, it refers "particularly" to the Chancellor's "Order Granting

Defendant's Motion for Summary Judgment." *Id.* Further, Morgan never raised any objection in the Chancery Court to posting the bond.[3] Consequently, for this additional reason, any objection to the bond requirement is waived. *See, e.g., Gale v. Thomas,* 759 So.2d 1150, 1159 (Miss. 1999) ("[A]n issue not raised before the lower court is deemed waived and is procedurally barred.").

C. The Bond Order has no bearing on whether summary judgment was proper.

Third, even if the Bond Order were somehow improper and Morgan's objection to it were not waived, this issue has absolutely no bearing on the propriety of summary judgment here. Morgan does not contend that summary judgment was actually entered "without a hearing," nor could he. As the record and the parties' briefs make clear, the Bond Order was entered ***after*** Morgan's attorney submitted a summary judgment memorandum. R. 1:123-26; 1:129-30. Morgan was later permitted to conduct a full oral argument before the Chancery Court, complete with testimony from multiple witnesses. R. 3:12-41.

The simple fact is that Morgan was afforded every opportunity to advance his arguments on summary judgment. Thus, even if this Court somehow found that the Bond Order was in error, the correct result in this appeal would nonetheless be to affirm summary judgment.

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[3] Morgan and his attorney designated those documents to be included in the appellate record, R. 3:154, and were afforded the opportunity to review the record from the Marshall County Chancery Court, R. 2:166. Nothing in the record indicates that Morgan ever objected to the July 8, 2005 Order imposing the bond requirement.

IV. The Chancery Court Did Not Abuse Its Discretion In Excluding The Testimony Of Ida Dignowity.

Finally, Morgan argues that the Chancellor erred in preventing Ida Dignowity from testifying at the summary judgment hearing. A decision to exclude testimony is reviewed only for abuse of discretion. *See, e.g., Kindred v. Columbus Country Club, Inc.*, 918 So.2d 1281 (Miss. 2005). Further, unless an abuse of discretion is prejudicial to the appellant, a reviewing court will not reverse the ruling. *See, e.g., Shaw v. State*, 915 So.2d 442, 445 (Miss. 2005). No such abuse or prejudice occurred here. To the contrary, Ida Dignowity's testimony was irrelevant as a matter of law, and therefore inadmissible.

Morgan's attorney stated that he intended to call Ida Dignowity to testify about the "written agreement"—that is, the 2003 Land Contract. R. 3:28. Upon an objection by Konrad's counsel, the Chancellor excluded Ida Dignowity's testimony based on a finding that the Land Contract was a legal nullity. R. 3:28 ("I'm going to rule there is no agreement.").

In other words, the Chancellor correctly found that any testimony from Ida about the Land Contract was irrelevant as a matter of law. As the Chancellor previously had indicated, any assertion that the Land Contract gave Morgan an ownership interest was (1) barred by collateral estoppel, based on the 2004 Agreed Order; and (2) barred by the statute of frauds, since the Contract had not been executed. Nothing Ida Dignowity might have said could have changed either legal

conclusion. Consequently, her testimony was properly excluded as irrelevant under Rule 402 of the Mississippi Rules of Evidence. *See* Miss. R. Evid. 402 ("Evidence which is not relevant is not admissible."). Further, because Morgan's claims failed as a matter of law, the exclusion of Ida's testimony could not have been prejudicial to him, and thus cannot provide a basis for reversal of the Chancery Court. *See, e.g., Shaw*, 915 So.2d at 445.

CONCLUSION

For the foregoing reasons, Appellee Konrad Dignowity, in his capacity as conservator of the Estate of Ida Dignowity, respectfully requests that this Court affirm the judgment of the Chancery Court in all respects, with all costs assessed to the Appellants.

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Appellee Konrad Dignowity, as Conservator for the Estate of Ida Dignowity, does hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following person at the address indicated:

Collier Carlton
P. O. Box 429
Holly Springs, MS 38635

Attorney for Appellants

This the 18th day of September, 2009.

W. BRETT HARVEY

APPENDIX

UNPUBLISHED CASE

Duncan v. Johnson, ___ So.3d ___, 2009 WL 596661 (Miss. Ct. App. 2009)

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Only the Westlaw citation is currently available.

Court of Appeals of Mississippi.
Wendell DUNCAN a/k/a Wendell Avery Duncan, Appellant,
v.
Donna Jill JOHNSON and Renee Covert, Appellees.
No. 2008-CP-00055-COA.

March 10, 2009.
Rehearing Denied May 5, 2009.
Certiorari Denied Aug. 6, 2009.

Background: Action was brought against circuit clerk and deputy circuit clerk, alleging violation of the constitutional right of access to the courts in circuit clerk's failure to issue summonses in a prior suit and deputy circuit clerk's failure to alter filing dates on docket sheet of the prior suit. The Circuit Court, Lauderdale County, Robert Walter Bailey, J., dismissed complaint as frivolous and barred plaintiff from filing any additional papers in the circuit court. Plaintiff appealed.

Holdings: The Court of Appeals, Myers, P.J., held that:
(1) trial court acted within its discretion in dismissing as frivolous complaint against circuit clerk;
(2) trial court acted within its discretion in dismissing as frivolous complaint against deputy circuit clerk; but
(3) trial court was not authorized to impose an absolute, permanent bar on future filings.

Affirmed in part, vacated in part, and remanded.

Barnes, J., concurred in part, dissented in part, and filed opinion, in which King, C.J., Irving and Ishee JJ., joined.

West Headnotes

[1] Courts 106 ⇐97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In General. Most Cited Cases

Courts 106 ⇐489(1)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k489 Exclusive or Concurrent Jurisdiction
106k489(1) k. In General. Most Cited Cases
State courts exercise concurrent jurisdiction with federal counterparts over § 1983 claims, but the elements of and the defenses to the cause of action are defined by federal law. 42 U.S.C.A. § 1983.

[2] Pretrial Procedure 307A ⇐674

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak674 k. Dismissal on Court's Own Motion; Automatic Dismissal. Most Cited Cases
Trial courts possess an inherent authority to dismiss frivolous complaints, sua sponte, even prior to service of process on the defendants.

[3] Pleading 302 ⇐34(3.5)

302 Pleading
302I Form and Allegations in General

302k34 Construction in General
302k34(3.5) k. Pro Se or Lay Pleadings. Most Cited Cases
Trial court is required to give a liberal construction to pro se civil rights complaints.

[4] Appeal and Error 30 ⚖960(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k960 Rulings on Motions Relating to Pleadings
30k960(1) k. In General. Most Cited Cases
Appellate court reviews a trial court's conclusion that a complaint is frivolous for abuse of discretion.

[5] Pretrial Procedure 307A ⚖622

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak622 k. Insufficiency in General. Most Cited Cases
A trial court has not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.

[6] Costs 102 ⚖132(1)

102 Costs
102VI Security for Costs; Proceedings in Forma Pauperis
102k127 Action or Defense in Forma Pauperis
102k132 Application and Proceedings Thereon
102k132(1) k. In General. Most Cited Cases
Trial court was not required to conduct *Spears* hearing prior to dismissing prisoner's complaint as frivolous.

[7] Appeal and Error 30 ⚖960(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k960 Rulings on Motions Relating to Pleadings
30k960(1) k. In General. Most Cited Cases
In reviewing for an abuse of discretion a circuit court's dismissal of a complaint as frivolous, appellate court considers: (1) whether the complaint has a realistic chance of success; (2) whether it presented an arguably sound basis in fact and law; and (3) whether the complainant could prove any set of facts that would warrant relief.

[8] Civil Rights 78 ⚖1395(7)

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading
78k1395 Particular Causes of Action
78k1395(7) k. Prisons and Jails; Probation and Parole. Most Cited Cases

Civil Rights 78 ⚖1741

78 Civil Rights
78V State and Local Remedies
78k1738 Pleading
78k1741 k. Other Particular Cases and Contexts. Most Cited Cases
Trial court acted within its discretion in dismissing as frivolous complaint against circuit clerk, alleging violation of the constitutional right of access to the courts based on clerk's "maliciously, recklessly, intentional[ly], and negligently" failing to file summonses in a prior suit; clerk could not be liable for inadvertent conduct or good faith mistake, trial court could find allegations, to the narrow extent they could be actionable, to be improbable, and any prejudice suffered by plaintiff in prior suit was not

due to any failure of the clerk, but was a result of plaintiff's failure to prosecute.

[9] Civil Rights 78 ⚿1056

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1056 k. Courts and Judicial Proceedings. Most Cited Cases
An "access to the courts" claim under § 1983 requires an allegation of intentional conduct; negligent or inadvertent conduct will not suffice. 42 U.S.C.A. § 1983.

[10] Civil Rights 78 ⚿1376(8)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(8) k. Judges, Courts, and Judicial Officers. Most Cited Cases

Civil Rights 78 ⚿1737

78 Civil Rights
78V State and Local Remedies
78k1734 Persons Protected, Persons Liable, and Parties
78k1737 k. Other Particular Cases and Contexts. Most Cited Cases

Clerks of Courts 79 ⚿72

79 Clerks of Courts
79k72 k. Liabilities for Negligence or Misconduct. Most Cited Cases
A court clerk is entitled to qualified immunity for good faith efforts in the execution of her duties, unless her conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.

[11] Civil Rights 78 ⚿1395(7)

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading
78k1395 Particular Causes of Action
78k1395(7) k. Prisons and Jails; Probation and Parole. Most Cited Cases

Civil Rights 78 ⚿1741

78 Civil Rights
78V State and Local Remedies
78k1738 Pleading
78k1741 k. Other Particular Cases and Contexts. Most Cited Cases
Trial court acted within its discretion in dismissing as frivolous complaint against deputy circuit clerk, alleging violation of the constitutional right of access to the courts based on clerk's alleged failure in a prior suit to "correct" docket to reflect the filing of summonses that were never filed; action was without legal merit, and deputy clerk could not have done anything that would have prevented plaintiff's prior complaint from being dismissed.

[12] Injunction 212 ⚿26(4)

212 Injunction
212II Subjects of Protection and Relief
212II(A) Actions and Other Legal Proceedings
212k26 Commencement and Prosecution of Civil Actions
212k26(4) k. Prevention of Multiplicity of Suits or Circuity of Action. Most Cited Cases
Circuit court, having dismissed as frivolous plaintiff's meritless claims against circuit clerk and deputy circuit clerk, was not authorized to impose an absolute, permanent bar on plaintiff's filing any additional papers in the circuit court, even considering that seven other actions had been filed by plaintiff in the circuit court but were not pursued.

[13] Constitutional Law 92 ⚿2325

92 Constitutional Law

92XIX Rights to Open Courts, Remedies, and Justice

92k2325 k. Prisoners and Pretrial Detainees. Most Cited Cases

Courts must carefully observe the fine line between legitimate restraints on the filing of meritless litigation and an impermissible restriction on a prisoner's constitutional right of access to the courts.

[14] Injunction 212 ⚖26(4)

212 Injunction

212II Subjects of Protection and Relief

212II(A) Actions and Other Legal Proceedings

212k26 Commencement and Prosecution of Civil Actions

212k26(4) k. Prevention of Multiplicity of Suits or Circuity of Action. Most Cited Cases

The circuit court's considerable discretion in crafting restrictions on abusive litigants does not extend to an absolute, permanent bar on future filings.

Wendell Duncan, Pro Se.

No Brief Filed.

EN BANC.

*1 MYERS, P.J., for the Court.

¶ 1. Wendell Duncan filed suit against Donna Jill Johnson, Circuit Clerk of Lauderdale County, and Renee Covert, a deputy circuit clerk. Duncan alleged that Johnson violated his constitutional right of access to the courts by failing to issue summonses in a prior suit. Duncan also alleged that Covert violated his right of access to the courts by refusing to subsequently alter filing dates on the docket sheet of the same action. Duncan alleged these failures resulted in that cause being dismissed, and as a result, he suffered emotional distress.

¶ 2. The circuit court dismissed Duncan's complaint as frivolous. In light of this complaint, and seven others that he had filed but not pursued, the circuit court also enjoined Duncan from filing any additional papers in the Circuit Court of Lauderdale County. Duncan appeals, arguing that the circuit court erred in dismissing his complaint as frivolous and that the circuit court's bar on his filing papers in that court violates his constitutional right of access to the courts.

DISCUSSION

1. Whether the circuit court erred in dismissing Duncan's complaint as frivolous.

[1] ¶ 3. Mississippi courts exercise concurrent jurisdiction with our federal counterparts over section 1983 [FN1] claims, but the elements of and the defenses to the cause of action are defined by federal law. *E. Miss. State Hosp. v. Callens,* 892 So.2d 800, 812(¶ 21) (Miss.2004) (citations omitted).

[2][3][4][5][6] ¶ 4. Our trial courts possess an inherent authority to dismiss frivolous complaints, sua sponte, even prior to service of process on the defendants.[FN2] *See Blanks v. State,* 594 So.2d 25, 28 (Miss.1992) ("If ... the complaint is frivolous, process need not be issued. In this event, there would be no occasion for the defendants to file an answer to the prisoner's complaint."). *See also Bilbo v. Thigpen,* 647 So.2d 678, 684 (Miss.1994). Although a trial court is required to give a liberal construction to pro se civil rights complaints, *see Moore v. McDonald,* 30 F.3d 616, 620 (5th Cir.1994), we review a trial court's conclusion that a complaint is frivolous for abuse of discretion. *Huggins v. State,* 928 So.2d 981, 983(¶ 4) (Miss.Ct.App.2006) (citing *Dock v. State,* 802 So.2d 1051, 1056(¶ 11) (Miss.2001)). The power to dismiss a frivolous complaint is distinct from a trial court's authority to dismiss for failure to state a claim under Rule 12(b)(6). *See Neitzke v. Williams,* 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). A trial court has "not only the authority

to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Id.* at 327, 109 S.Ct. 1827.

[7] ¶ 5. Accordingly, in reviewing the circuit court's dismissal for an abuse of discretion, we consider: (1) whether the complaint has a realistic chance of success; (2) whether it presented an arguably sound basis in fact and law; and (3) whether the complainant could prove any set of facts that would warrant relief. *Dock,* 802 So.2d at 1056(¶ 11). We shall address Duncan's allegations against each defendant separately.

A. Duncan's Claims Against the Circuit Clerk

***2** [8] ¶ 6. Duncan's complaint alleged that the circuit clerk denied him access to the courts by refusing on one instance to issue summonses. Duncan claims that on May 17, 2006, he mailed a summons for each defendant, along with a cover letter,[FN3] to the circuit clerk's office. Duncan alleged that the circuit clerk "maliciously, recklessly, intentional[ly], and negligently failed to file [his summonses] correctly or file them at all."

[9][10] ¶ 7. We note as a threshold issue that an "access to the courts" claim under section 1983 requires an allegation of intentional conduct; negligent or inadvertent conduct will not suffice. *Richardson v. McDonnell,* 841 F.2d 120, 122 (5th Cir.1988). Likewise, a court clerk is entitled to qualified immunity for good faith efforts in the execution of her duties, unless her conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *see also Antoine v. Byers & Anderson Inc.,* 508 U.S. 429, 432 n. 4, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993); *Rheuark v. Shaw,* 628 F.2d 297, 305 (5th Cir.1980). Clearly, the circuit court did not abuse its discretion in finding Duncan's complaint frivolous to the extent he alleged harm from inadvertent conduct or a good faith mistake. Nor can we say that the circuit court abused its discretion in finding Duncan's allegations, to the narrow extent they may be actionable, to be improbable.

¶ 8. Even if we accept the facts alleged in the complaint as true, it is not clear that Duncan has stated a cause of action under section 1983. Duncan filed suit on January 30, 2006, but he admits that he did not attempt to issue summonses prior to May 17, 2006, when less than two weeks remained of the 120 days allowed for service of process by Mississippi Rule of Civil Procedure 4(h). Even if Duncan mailed the summonses on May 17, 2006, as he claimed, and the circuit clerk had promptly issued process and delivered it to the sheriff, there is no guarantee that service would have been effected prior to the expiration of the 120-day period. Likewise, had Duncan diligently prosecuted his claim, he could have sought a writ of mandamus to order the circuit clerk to issue the summonses. Furthermore, the Mississippi Rules of Civil Procedure provided Duncan an opportunity to seek enlargement of the time allowed for service, prior to the expiration of the 120-day period under Rule 6(b)(1), but he did not. Duncan was also permitted to extend the 120-day period by motion following its expiration on a showing of excusable neglect under Rule 6(b)(2), or excuse his failure to timely serve process with a showing of good cause under Rule 4(h).

¶ 9. Instead, Duncan did not follow up on the cause until September 25, 2006, long after the end of the 120-day period for service. Under these circumstances, we find the reasoning in *Kincaid v. Vail,* 969 F.2d 594 (7th Cir.1992), to be persuasive. With similar operative facts before it, the Seventh Circuit held:

> ***3** The appellants had adequate state remedies available to them. The Indiana Constitution assures civil litigants the right of access to the courts.... Indiana law permits enforcement of those rights by providing that writs of mandate

> and prohibition may be issued to any and all inferior courts compelling the performance of any duty enjoined by law upon the inferior courts....
>
> More fundamentally, the appellants have not alleged that any prejudice resulted from the March return of their check. This action ... caused at most a *delay* in the plaintiffs' access to the court. While a delay or interruption in pending or contemplated litigation may indicate a deprivation of constitutional dimensions, we have required a showing of prejudice. Here, if the plaintiffs suffered any prejudice ... [it] is attributable to [a subsequent judicial decision].

Id. at 602-03 (citations and internal quotations omitted). Considering the lengthy 120-day period allowed for service and the multitude of remedies available to Duncan, we do not see this single, isolated failure of the circuit clerk to be an actionable interference with Duncan's right of access to the courts. Any prejudice Duncan suffered was a result of his failure to prosecute the suit.

B. Duncan's Claims Against the Deputy Clerk

[11] ¶ 10. Duncan's only allegation against the deputy clerk was that she refused to "correct" the docket to reflect the filing of the summonses he claimed to have mailed to the circuit clerk on May 17, 2006. As the circuit court explained, the docket only reflects filings; it cannot be "corrected" to include documents that were never filed. Duncan's argument is without legal merit and does not have a realistic chance of success. Furthermore, Duncan can claim no prejudice to his right of access to the courts by any actions of the deputy clerk because his request to correct the docket was not made until September 25, 2006, almost four months after the 120 days allowed to serve process had run. The deputy clerk could not have done anything in response to Duncan's letter that would have prevented his complaint from being dismissed.

2. Whether the circuit court erred in sanctioning Duncan.

[12] ¶ 11. The circuit court ordered that Duncan "may not file and is barred from filing another Complaint or any other pleading whatsoever in this Court. The Circuit Clerk is ordered and directed not to accept, receive or file any additional pleadings, documents, letters or other correspondence from the Plaintiff, Wendell Duncan."

[13][14] ¶ 12. In *Vinson v. Benson,* 805 So.2d 571, 576(¶ 18) (Miss.Ct.App.2001), this Court discussed the inherent authority of our trial courts to regulate and sanction abusive litigants:

> The Mississippi Constitution does not create an unlimited right of access to the courts. *Turrentine v. Brookhaven, Mississippi School Dist.,* 794 F.Supp. 620, 626 (S.D.Miss.1992). "No one, rich or poor, is entitled to abuse the judicial process." *Tripati v. Beaman,* 878 F.2d 351, 353 (10th Cir.1989) (citing *Hardwick v. Brinson,* 523 F.2d 798, 800 (5th Cir.1975)). "One acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." *Farguson v. MBank Houston, N.A.,* 808 F.2d 358, 359 (5th Cir.1986). We adopt the view of these federal courts that abuse of the judicial process is inappropriate....

***4** Nonetheless, "[C]ourts must carefully observe the fine line between legitimate restraints and an impermissible restriction on a prisoner's constitutional right of access to the courts." *Procup v. Strickland,* 792 F.2d 1069, 1072 (11th Cir.1986). While we recognize the circuit court's considerable discretion in crafting restrictions on abusive litigants, this authority does not extend to an absolute, permanent bar on future filings.

¶ 13. Therefore, although we affirm the circuit court's dismissal of Duncan's complaint as frivolous, the circuit court's injunction is vacated, and the cause is remanded for the circuit court to consider an appropriate alternative sanction.

¶ 14. THE JUDGMENT OF THE CIRCUIT COURT OF LAUDERDALE COUNTY IS AFFIRMED IN PART AND VACATED AND REMANDED IN PART FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAUDERDALE COUNTY.

LEE, P.J., GRIFFIS, and CARLTON, JJ., CONCUR. BARNES, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., IRVING AND ISHEE JJ. KING, C.J., CONCURS IN PART AND DISSENTS IN PART WITHOUT SEPARATE WRITTEN OPINION. IRVING, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. ROBERTS AND MAXWELL, JJ. NOT PARTICIPATING.BARNES, J., Concurring in Part, Dissenting in Part.

¶ 15. I must respectfully dissent from the majority's decision to affirm the dismissal of Duncan's lawsuit as "patently frivolous" without any notice or opportunity for Duncan to be heard in the circuit court. While Duncan's claims may indeed be found to be frivolous upon further review, he is entitled to a *Spears* hearing [FN4] prior to any dismissal of his complaint. I do, however, concur with the majority opinion that the circuit court's injunction on future filings be vacated and remanded.

¶ 16. The trial judge, upon his own motion, dismissed Duncan's complaint against the circuit clerk and her deputy clerk on the same day it was filed and, further, barred Duncan from filing any further pleadings in the court. The trial judge cited no authority for such action. Although the majority cites *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989), for the proposition that the trial court has "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless[,]" a closer review of the case reveals that such authority is only accorded under 28 U.S.C. § 1915(d). *Id.* ("To this end, the *statute* accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory ...") (emphasis added). The Supreme Court stated in *Neitzke:*

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11.

***5** *Id.* [FN5] Mississippi, however, has no comparable statute.

¶ 17. Regardless, our supreme court, fully cognizant of the concerns raised in *Neitzke,* has addressed the issue of dismissal of frivolous claims brought by a pro se in forma pauperis litigant in *Blanks v. State,* 594 So.2d 25 (Miss.1992) and in *Bilbo v. Thigpen,* 647 So.2d 678 (Miss.1994). In those cases, the supreme court stated that our rules of civil procedure adequately cover the process outlined in section 1915(d) under Mississippi Rules of Civil Procedure 3 and 11. In *Blanks,* the court explained:

> Rule 3(c) MRCP provides that the court may on its [own] motion examine an affiant alleging pauperism as to the facts and circumstances of his financial condition. If the action is to be dismissed on the basis that the affidavit is untrue that finding should be based on evidence preserved in the record. *Feazell v. Staltzfus,* 98 Miss. 886, 54 So. 444 (1911). Where the court conducts a hearing to determine the issue of poverty, it is entirely reasonable and in the interest of judicial economy that the pleading also be examined and the affiant questioned to determine whether the action is frivolous and, therefore, subject to dismissal pursuant to Rule 11 MRCP. Thus the so-called *Spears* hearing, usually employed in pro se prisoner in forma pauperis complaints, is consonant with our law.

Blanks, 594 So.2d at 28. Therefore, the purpose of a *Spears* hearing is to determine whether or not a "prisoner should be permitted to file and proceed on his complaint in forma pauperis" and whether "the inmate's complaint suffers from frivolity." *Id.* It is only if the trial judge finds that the "complainant is not a pauper" or "the complaint is frivolous, process need not be issued[,]" and there would be no need for a "defendant[ ] to file an answer to the prisoner's complaint." *Id.*

¶ 18. "Once a *Spears* evidentiary hearing is conducted, dismissal of the case because of frivolity becomes an issue." *Bilbo,* 647 So.2d at 688. The supreme court in *Bilbo* recognized that while a *Spears* hearing "is not explicitly authorized by our state statutes, it is a federal procedure consonant with our law, given approval in *Blanks* and *Rougeau* [.]" FN6 *Id.* at 693. "Therefore, we choose to give meaning and effect to *Spears* hearings, announcing our employment of the United States Supreme Court's definition of 'frivolous' and the abuse of discretion appellate standard of review for application to pro se prisoners' in forma pauperis complaints." *Id.*

¶ 19. The majority submits that, based on the Fifth Circuit Court of Appeals' ruling in *Eason v. Thaler,* 14 F.3d 8, 9 (5th Cir.1994), a *Spears* hearing is only necessary in situations where "it appear[s] that insufficient factual allegations might be remedied by more specific pleading." They contend that Duncan's claims were not actionable and, therefore, did not merit such an opportunity. However, *Eason* is distinguishable from the present case in that it is a federal court case; consequently, section 1915 would be applicable. As already noted, section 1915 is not applicable to cases brought in Mississippi courts.

*6 ¶ 20. In both *Blanks* and *Bilbo,* the prisoner was afforded a *Spears* hearing prior to the dismissal of his claim. I find no Mississippi authority for dismissing a prisoner's claim without such a hearing, and the majority has cited none. Accordingly, I find that the trial judge's failure to afford Duncan a *Spears* hearing, which our supreme court has found to be an appropriate procedure in determining a pro se prisoner's claims, to be reversible error. In my view, the case should be remanded for a *Spears* hearing in order to afford Duncan notice and an opportunity to be heard prior to any dismissal of his claim.

KING, C.J., IRVING AND ISHEE, JJ., JOIN THIS OPINION.

FN1. 42 U.S.C. § 1983 (2006).

FN2. The dissent asserts that the trial court was required to conduct a *Spears* hearing prior to dismissing Duncan's complaint. *See Spears v. McCotter,* 766 F.2d 179 (5th Cir.1985). It can cite no Mississippi authority holding a trial court in error for not conducting such a hearing. Indeed, in authorizing *Spears* hearings, our supreme court held that a trial court "*may* on its own motion" hold such a hearing when the plaintiff alleges poverty; it is not required. *See Blanks v. State,* 594 So.2d 25, 28 (Miss.1992) (emphasis added).

> In the Fifth Circuit, a prisoner-plaintiff is only entitled to a *Spears* hearing when "it appear[s] that insufficient *factual* allegations might be remedied by more specific pleading." *Eason v. Thaler,* 14 F.3d 8, 9 (5th Cir.1994) (emphasis added); *see also Rougeau v. Shepard,* 607 So.2d 1227, 1231-32 (Miss.1992) (describing a *Spears* hearing as "a limited inquiry regarding the facts of inartfully drawn pleadings"). In the Fifth Circuit, a district court's decision not to hold such a hearing is reviewed for an abuse of discretion. *Eason,* 14 F.3d at 9. Even assuming that a Mississippi circuit court could be held to error in not conducting a *Spears* hearing, the court here did not abuse its discretion in finding one unnecessary; we affirm its dismissal

because the facts, although clearly alleged, are nonetheless not actionable.

FN3. The cover letter read:

> Please find enclosed, two (2) summons for Willie Bookert and Darryl Johnson, to be served the filed complaint, thats [sic] attached to the summons. I would like you to file this action, just in case they have not been served, because I have not received an answer from either one and I have a Motion for Summary Judgment filed on the 22nd day of March, 2006. I would like you, to return me a stamped filed copy of the same....

FN4. In *Spears v. McCotter,* 766 F.2d 179 (5th Cir.1985), the court held that a prisoner proceeding in forma pauperis may be afforded an evidentiary hearing by a magistrate to determine if there is a legal basis for the claim. The court in *Spears* encouraged the trial courts to examine pro se pleadings, "using interrogatories as well as evidentiary hearings to do so, prior to deciding whether the prisoner can state a claim to satisfy Rule 12(b)(6)." *Green v. McKaskle,* 788 F.2d 1116, 1119 (5th Cir.1986).

FN5. The statute was revised in 1996, and section 1915(d) was re-designated as section 1915(e). The statute states in pertinent part that a court may dismiss an in forma pauperis case "at any time if the court determines that ... the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

FN6. *Rougeau v. Shepard,* 607 So.2d 1227 (Miss.1992).

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