IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-TS-00057

RICHARD REEVES, &
REGA, INC. *Appellant*

v.

MERIDIAN SOUTHERN RAILWAY, LLC *Appellee*

BRIEF OF THE APPELLANT

ATTORNEY FOR APPELLANT

ERIC TIEBAUER, MSB# [redacted]
4363 HIGHWAY 145 NORTH
WAYNESBORO, MS 39367
601-735-5222 - PHONE
601-735-5008 - FAX

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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 the case. These representations are made in order that the justices of the Supreme Court and/or the justices of the Court of Appeals may evaluate possible disqualifications or recusal.

Hon. Robert W. Bailey
Clarke County Circuit Court Judge
P.O. Box 86
Meridian, MS 39302

Hon. Robert M. Dreyfus, Jr.
Attorney of Record for Appellee
P.O. Box 5847
Meridian, MS 39302
601.553.8315 - Phone
601.553.5008 - Fax

Hon. Eric Tiebauer
Attorney of Record for Appellant
4363 Highway 145 North
Waynesboro, MS 39367
601.735.5222 - Phone
601.735.5008 - Fax

Mr. Richard Reeves
Appellant
1132 Hwy 145 South
Quitman, MS 39355

SO CERTIFIED, this the 20th day of July, 2010.

Eric Trebauer

ERIC TIEBAUER, MSB#[redacted]

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II. WHETHER THE TRIAL COURT ERRED IN GRANTING MERIDIAN SOUTHERN RAILROAD'S MOTION FOR SUMMARY JUDGMENT IN REGARDS TO COUNT NUMBER EIGHT (TRESPASS).

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STATEMENT OF THE CASE

Procedural History

On September 22, 2008, Plaintiff/Appellee Meridian Southern Railroad (herein after referred to as "MSR") filed a *Complaint for Replevin* (R.E.1) in the Circuit Court of Clarke County, Mississippi, against Defendants/Counter-Plaintiffs/Appellants Richard Reeves and Rega, Incorporated (herein after referred to collectively as "Rega"). The replevin action has been resolved. Rega served its *Answer to Complaint and Counterclaims* (R.E. 4) on September 29th, 2008, asserting ten distinct counts against MSR. The above referenced matter was assigned as *Civil Cause No.* 2008-269-B.

MSR filed its *Answer and Responses to Defendant's Counterclaim* (R.E.15) on November 25, 2008, denying all counts claimed by Rega. On October 7th, 2009, Appellee filed *Plaintiff's Motion for Summary Judgment; or in the alternative, For Partial Summary Judgment* (hereinafter "Motion for Summary Judgment") (R.E. 22) and *Plaintiff's Memorandum Brief In Support of its Motion for Summary Judgment* (hereinafter "Plaintiff's Memorandum Brief") (R.E. 26), pursuant to M.R.C.P. Rule 56. Plaintiff's Memorandum Brief included certain exhibits including its *Affidavit In Support of Motion for Summary Judgment*, submitted by MSR General Manager Rickey Jacobs (hereinafter referred to as "Jacobs Affidavit"). (R.E.41).

Rega did not respond to MSR's Motion for Summary Judgment. On November 18th, 2009, the Circuit Court of Clarke County, Mississippi, heard the parties in regard to Appellee's Motion for Summary Judgment. After hearing oral arguments, the Circuit Court filed its *Judgment Granting Plaintiff's Motion for Summary Judgment*, on December 10th, 2009. (R.E. 44). The Circuit Court granted MSR's Motion for Summary Judgment, finding Rega's Counter-claim failed on all ten counts. The Circuit Court held the jurisdictional issue raised by MSR, and

Rega's claim for attorney fees and punitive damages, respectively, as moot. The Circuit Court of Clarke County dismissed Rega's Counter-claim with prejudice.

Rega timely filed its *Notice of Appeal* and *Designation of Record* with the Circuit Court of Clarke County, Mississippi, on January 11, 2010. The present action before this Court was assigned as *Case No. 2010-TS-0057*. Rega requested an additional thirty day extension under M.R.A.P. Rule 26 to file its Brief of Appellant and Record Excerpts from the original due date. The Court granted Appellant's extension and set the new deadline of Appellant's Brief and Record Excerpts for July 21st, 2010.

Statement of the Facts

MSR is a Delaware LLC that owns and operates a railroad line from Meridian, Mississippi, to Waynesboro, Mississippi, with part of the line running through Quitman, Mississippi. MSR has continuously owned the railroad line since March 2000. Rega, a Mississippi corporation, is the owner of land located in the city of Quitman, Clarke County, Mississippi, adjacent to the MSR main line. Included on Rega's property is a private side track spur. Rega purchased said property from Clarke County in December 2006. (*Plaintiff's Memorandum Brief*, p.1.) (R.E. 26).

Between March 2000 and September 2008, MSR utilized the side track for switching operations and occasional storage of rail cars. At no time did MSR own the side track in question. (*Id.* at 2.) (R.E. 27). On December 28, 2006, the Clarke County Board of Supervisors approved and executed a special warranty deed conveying the property in question to Rega. (*Special Warranty Deed* p. 1) (R.E. 56). Upon discovering six rail cars on its privately-owned side track sometime during or before September 2008, Appellant installed and locked a derail device. On or about September 24, 2008, MSR employees attempted to retrieve the six rail cards

using self-help remedies with the assistance of the Quitman Police Department. (*Plantiff's Memorandum Brief* p. 2) (R.E. 27).

At that time, Richard Reeves appeared and objected to MSR's presence on his property leading MSR to terminate its self-help efforts. MSR then filed the original complaint for replevin in this civil action. Rega subsequently released the six railroad cars, which ended the replevin action, but not before filing a counter-claim containing ten separate causes of action against MSR. (*Plaintiff's Memorandum Brief* p. 3) (R.E. 28). Included in the ten separate causes of action are count 7, conversion[1], count 8, trespass[2], and count 10, unjust enrichment[3]

MSR entered into a verbal license with the two previous owners of the property, Griffico Plastics and Clarke County, respectively. MSR received no notice that the ownership of the track had changed by either Clarke County or Rega. (plaintiff's memo brief, p. 9) (R.E.)

Sometime during or before September 2008 Appellant posted no trespassing signs on its privately owned side track. (Jacobs Affidavit, p. 2.)(R.E. 42). It is unquestioned that MSR uses a number of privately owned side tracks, including the one in question, for occasional storage of rail cars when its main storage facility in Meridian, MS, is full. (Jacobs Affidavit, p.3.)(R.E. 43). The records containing the details of these storage practices, including duration of storage and number of rail cars stored on privately owned side tracks, are not maintained in a permanent form by MSR. *Id.* These records used by MSR employees are purposefully discarded when the respective cars are moved from the private side tracks. *Id.*

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[1] *Plaintiff's Memorandum Brief* p. 8 (R.E. 33)
[2] *Plaintiff's Memorandum Brief* p. 9 (R.E. 34)
[3] *Plaintiff's Memorandum Brief* p. 10 (R.E. 35).

SUMMARY OF THE ARGUMENT

This case comes on appeal from an order granting MSR's motion for summary judgment. Appellant asks this Court to reverse the trial court's grant of such on the grounds that MSR has failed to meet their burden of showing that there exist no genuine issues of material fact as to Counts 7, 8, and 10 of Rega's counter-claim.

As to Count 7, conversion, Appellant argues that MSR is incorrect in asserting that it cannot be held liable because Appellant did not make demand on MSR and MSR did not have notice of the change in title or that it was no longer authorized to use the spur. Appellant argues (1) that demand is not necessary to hold one liable for conversion, (2) MSR had, at a minimum, constructive notice of the change in ownership from Clarke County to Appellant, and (3) MSR's misguided belief of who owned the land or that they had authorization to use it are not defenses to a claim for conversion under the distinct context of this case.

As to Count 8, trespass, Appellant argues that MSR's belief that it maintained a verbal license after possession of the land changed is incorrect. Nor is MSR's assertion correct that it had no notice of the change in ownership of the property, thereby creating a waiver of Rega's claim for trespass. The facts in the record clearly support that a trespass did indeed occur and, at a minimum, MSR is liable to Appellant for nominal damages.

As to Count 10, unjust enrichment, Appellant argues that the facts in the record show that MSR used Appellant's property without authorization and that MSR has benefited from such use at Appellant's expense. As such, MSR has been unjustly enriched and, under equitable principles, should return to Appellant the use value of the property.

ARGUMENT

STANDARD OF REVIEW FOR A M.R.C.P. RULE 56 MOTION FOR SUMMARY JUDGMENT

The trial court's order granting MSR's motion for summary judgment should be reversed because MSR failed to carry its burden of showing there existed no genuine issues of material fact as to Appellant's claims for conversion, trespass, and unjust enrichment. The standard of review in regard to a M.R.C.P. Rule 56 Motion for Summary Judgment is as follows:

> "The movant bears the burden of demonstrating to the court that no genuine issue of material fact exists and that he is entitled to a judgment as a matter of law. *Johnson v. Burns-Tutor*, 925 So.2d 155, 157 (Miss. Ct. App.2006) (citing *McMillan v. Rodriquez*, 823 So.2d 1173, 1176(P9) (Miss.2002); *Hartford Cas. Ins. Co. v. Haliburton Co.*, 826 So.2d 1206, 1215 (Miss.2001)). When considering a summary judgment motion, the court must review all evidentiary matters in the record in the light most favorable to the non-movant. *Saucier ex rel v. Biloxi Reg'l Med. Ctr.*, 708 So.2d 1351, 1354(P10)(Miss.1998).... The non-movant should be given the benefit of the doubt. *Burns-Tutor* at 157."

Appellant argues that the facts obtained during discovery make it clear that the above-mentioned standard of review was not adhered to by the lower court. As the comments to M.R.C.P. 56 point out: "summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed facts issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried."[4]

I. THE TRIAL COURT ERRED IN GRANTING MSR'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT 7, CONVERSION, BECAUSE THE ABSENCE OF A DEMAND DOES NOT CONSTITUTE AN ABSOLUTE BAR TO RECOVERY FOR CONVERSION AND MSR HAS FAILED TO MEET THEIR BURDEN OF SHOWING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS.

[4] M.R.C.P. Rule 56, Comment 4.

"Conversion requires an intent to exercise dominion or control over goods which is inconsistent with the true owner's right." *First Investors Corp. v. Rayner*, 738 So.2d 228, 234 (Miss. 1999). "To make out a conversion, there must be proof of a wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand." *Id.*

MSR argued, and the court below agreed, that MSR could not be held liable for conversion because MSR did not know that Rega was the lawful owner of the property until the derail device was installed in September 2008. In support of this contention, MSR relied on *Mississippi Motor Finance, Inc. v. Thomas* wherein the Court stated:

> The mere purchase of personal property in good faith from a person who has no right to sell it is not a conversion; there is no conversion until the title of the lawful owner is made known and resisted or the purchaser exercises dominion over the property by use, sale, or otherwise. 89 C.J.S. Trover and Conversion § 45b, p. 552, and cases cited.

149 So.2d 20, 23 (Miss. 1963).

This rule, however, has no application to the instant case. *Stribling Brothers Corp. v. Euclid Memphis Sales*, 235 So.2d 239, 242 (Miss. 1970) ("[a] reading of this section in its entirely reveals that this section applies only in cases where the ***purchaser*** acquires the property without any notice, actual or constructive, of the title of the lawful owner") (emphasis added). MSR was not a purchaser of the spur in question. Rather, MSR wrongfully possessed and exercised dominion of Rega's spur without authorization or permission and such use was thereby inconsistent with Rega's right in the property. (Jacobs Affidavit, ¶ 6.) (R.E. 42).

Neither is MSR correct in stating that they cannot be held liable for conversion because MSR did not have notice of the change in title or that it was no longer authorized to use the spur. Rega never authorized MSR to use the spur, nor did MSR ever seek authorization. Moreover,

MSR's good faith belief, or ignorance, of who owned the title is no defense to a claim for conversion because the intent required for such a claim need not be that of a wrongdoer:

> The intent required is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights. A purchaser of stolen goods or an auctioneer who sells them in the utmost good faith becomes a converter, since the auctioneer's acts are an interference with the control of the property. A mistake of law or fact is no defense. "Persons deal with the property in chattels or exercise acts of ownership over them at their peril," and must take the risk that there is no lawful justification for their acts. The essential problem is whether the interference is of so serious a character as to require the defendant to buy the goods.

Prosser and Keeton on The Law of Torts. 92-93 (W. Page Keeton 5th ed. 1984); *Walker v Brown*, 501 So.2d 358 at 361 (Miss. 1987) (good faith reliance does not absolve liability).

Appellant argues that MSR cannot claim ignorance to the sale and transfer of land from Clarke County to Rega in December 2006. Because the sale transferred the land from the hands of the County to Rega this Court should, at a minimum, hold that MSR had at least constructive notice of the sale. *See Tally v. Board of Supervisors of Smith County*, 323 So.2d 547 (Miss. 1975).

MSR has failed to show that there is no genuine issue of material fact as to Rega's claim for conversion for the unauthorized use of Rega's property. As such, MSR have failed to carry their burden of establishing that they are entitled to judgment as a matter of law and therefore the trial court's dismissal of Count 7 of Rega's complaint should be reversed.

II. THE TRIAL COURT ERRED IN GRANTING MSR'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT 8, TRESPASS, BECAUSE THE EXISTENCE OF A VERBAL LICENSE FROM ONE WHO IS NO LONGER THE OWNER OF PROPERTY DOES NOT CONSTITUTE A DEFENSE TO A CLAIM FOR TRESPASS AND BECAUSE NOMINAL DAMAGES ARE AT LEAST APPROPRIATE. THUS MSR HAS FAILED TO MEET THEIR BURDEN OF SHOWING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS.

Common law trespass is an intrusion upon the land of another without a license or other right for one's own purpose. *Thomas v. Harrah's Vicksburg Corp.,* 734 So. 2d 312, 316 (Miss. Ct. App. 1999). (Citing: *Saucier v. Biloxi Regional Med. Ctr.*, 708 So.2d 1351, 1357 (Miss.1998); *Skelton v. Twin County Rural Elec. Ass'n*, 611 So.2d 931, 936 (Miss.1992); *Hoffman v. Planters Gin Co., Inc.*, 358 So.2d 1008, 1011 (Miss.1978); *Marlon Inv. Co. v. Conner*, 246 Miss. 343, 349, 149 So.2d 312 (1963); *Kelley v. Sportsmen's Speedway, Inc.*, 224 Miss. 632, 643, 80 So.2d 785, 790 (1955)). The tort of trespass to land:

> protects a person's interests in the exclusive possession of his land. Trespass can be committed by simply going upon the land of another, as well as by *placing objects on the land of another....* Trespass to land is an intentional tort, but the intent required is not the intent to invade the right of another to the exclusive possession of his land. All that is required is an intent to enter upon the particular piece of land in question. No negligence is required for liability, and *it is immaterial whether the defendant honestly and reasonably believed that he had the consent of the owner or some other privilege to enter the land.*

Mississippi Law of Torts, Mississippi Practice Series (2nd Edition). Weems and Weems. § 2:13, pp. 17-18. (Citing: *Thomas v. Harrah's Vicksburg Corp.,* 734 So. 2d 312 (Miss. Ct. App. 1999). (emphasis added).[5]

While the 1909 case of *Hicks v. Mississippi Lumber Co.*[6], cited by MSR and relied on by the trial court, does provide that a verbal license is a valid defense against an action for trespass, MSR cannot show a verbal license from Rega. As Professor Weems points out above with reference to the 1999 case of *Thomas v. Harrah's Vicksburg Corp.*[7], MSR's belief that it maintained a verbal license after possession of the land changed is incorrect. MSR argued in its

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[5] Furthermore, Professors Prosser and Keeton note that trespass can occur in a variety of ways, including "by placing objects on the property." *Thomas v. Harrah's Vicksburg Corp.,* 734 So. 2d 312, 315 (Miss. Ct. App. 1999). (Citing: W. Page Keeton, ET AL, Prosser and Keeton On Torts, § 13 at 72-73 (5th ed. 1984).

[6] *Hicks v. Mississippi Lumber Co.*, 48 So. 624 (Miss. 1909).

[7] *Thomas v. Harrah's Vicksburg Corp.,* 734 So. 2d 312, 315 (Miss. Ct. App. 1999).

Answer to Counter-claim, that the lack of notice to the change in ownership of the property in question from Clarke County to Rega somehow creates a waiver of Rega's claim for trespass. (R.E. 19). However, MSR does not point to any case law indicating such principle as controlling in this situation. Of particular note is that the sale of property from Clarke County to Rega must have been, and was in fact, approved by the Clarke County Board of Supervisors. This form of county business is held in a public forum and is public knowledge, filed in county records also open to the public.

The absence of MSR's attempt to obtain license from the new property owner is itself suspect. At best MSR's belief was a mistake unsupported by law. Regardless, MSR, by definition, was a trespasser on Rega's property, and thus Rega is entitled to damages:

> Even if no damage was done by the trespasser, the owner may still recover nominal damages. If damage was done, either to the property itself or to activity carried out on the property, the owner can recover for such damage. Punitive damages can be recovered if the defendant's conduct was malicious, grossly negligent, or in reckless disregard to the rights of owner.

Mississippi Law of Torts, Mississippi Practice Series (2nd Edition). Weems and Weems. § 2:14, p. 18. (Citing: *Thomas v. Harrah's Vicksburg Corp.*, 734 So. 2d 312 (Miss. Ct. App. 1999).

MSR states that if there was a trespass, it was only a "technical trespass."[8] The facts clearly indicate that a trespass indeed occurred. One need only look to the facts set forth in the above referenced document as well as the accompanying *Jacobs Affidavit*. MSR avers that Rega is the owner of the track of land and side track in question, purchased from Clarke County in December 2006.[9] Furthermore, MSR states that it utilized the side track for "switching

[8] *Plaintiff's Memorandum Brief*, p. 10. (R.E. 35).
[9] *Id. at* 3. (R.E. 28).

operations" and for "storing railcars."[10] This clearly indicates MSR's use of the private side track for its own benefit.

MSR claims it was not given notice by any person associated with Rega regarding the change in ownership of the property after the approval of sale by Clarke County. However, MSR does not cite to any authority requiring the purchaser of land to make known to the world of his or her property acquisitions. Common sense and the facts show that regardless of who owned the private side spur, it is irrefutable that MSR did not own the property.

While MSR may have acquired a verbal license from Clarke County, MSR did not have a license from Rega. The mere fact that Rega did not object to MSR's trespass for any amount of time is not an extension of a verbal license. Therefore, MSR has no defense to the continued trespass on Rega's private side track as exemplified by their storage of rail cars on the property in question.

Thus, Rega is entitled to at least nominal damages for MSR's trespass. Whether additional damages should be awarded to Rega as well as the amount of damages awarded is a question of degree. These are issues of fact to be decided by the trier of fact. Therefore, this Court should reverse the trial court's error regarding the dismissal of Count 8 and remand the issue of trespass back to the lower court.

III. THE TRIAL COURT ERRED IN GRANTING MSR'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT 10, UNJUST ENRICHMENT, BECAUSE MSR RECEIVED A VALUABLE BENEFIT FROM THE UTILIZATION OF REGA'S SIDE TRACK AND ACCORDING TO THE PRINCIPLES OF EQUITY AND GOOD CONSCIENCE SHOULD NOT BE ALLOWED TO ENRICH THEMSELVES AT REGA'S EXPENSE.

[10] *Id. at* 2. (R.E. 27).

A claim for unjust enrichment is a modern denotation for the doctrine of "quasi-contract." *1704 21st Avenue, Ltd. v. City of Gulfport*, 988 So.2d 412, 416 (Miss. Ct. App. 2008). The claim is based on a promise, implied in law, that one will pay a person what he is entitled to according to "equity and good conscience." *Id.* "Thus, the action is based on the equitable principle 'that a person shall not be allowed to enrich himself unjustly at the expense of another.'" *Id.* The action is based on a contract implied in law because the obligation is created in the absence of any agreement. *Id.*

In *Hans v. Hans* the Court explained unjust enrichment as the following:

> The doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another, the courts imposing a duty to refund the money or ***the use value of the property*** to the person to whom in good conscience it ought to belong.

482 So.2d 1117, 1122 (Miss. 1986) *quoting* 66 Am.Jur.2d Restitution and Implied Contracts, § 11 (1973) (emphasis added).

During the time in which Rega has owned the spur in question, MSR has utilized the side track for switching operations and to occasionally store rail cars on the side track. (Jacobs Affidavit, ¶ 5) (R.E. 41). In September 2008, MSR utilized the side track on Rega's property to store six rail cars. (Jacob Affidavit, ¶ 6) (R.E. 42).

MSR receives a benefit for such switching operations and storing of rail cars on private spurs like Rega's. In its *Answer to First Set of Interrogatories Propounded to Meridian Southern Railway, Inc.*, MSR averred the following:

> Interrogatory 7: Please state the amount of revenue received by Meridian Southern Railway, LLC, or any of it's [*sic*] subsidiaries, for storage of railroad cars whether loaded or unloaded and/or locomotives on either private spurs or spurs leased or owned by

> Meridian Southern Railways, LLC for the following years: 2004; 2005; 2006; 2007; and year to date 2008. This interrogatory is limited to that intrastate track beginning in Lauderdale County, Mississippi and ending in Wayne County, Mississippi.
>
> Answer to Interrogatory 7: 2004 - $31, 807, 2005 - $27, 369, 2006 - $38, 696.75, 2007 - $58, 423, and January – October 2008 - $66, 484.75.

(Answer to First Set of Interrogatories Propounded to Meridian Southern Railway, LLC. ¶ 7) (R.E. 61).

MSR, however, has never paid any storage or other fees to Rega for the use of its side track. (Plaintiff's. Response to First Set of Request for Admissions ¶ 3.) (R.E. 65). In response to why MSR has never paid Rega for the use of its spur, MSR replied with the following:

> Interrogatory 14: Please explain why Meridian Southern Railway, LLC has not paid storage fees for railway cars stored on REGA, Inc.'s private spur.
>
> Answer to Interrogatory 14: MDS has not paid any storage fees to REGA for the reason that it has never been asked to pay storage fees by REGA.

(Answer to First Set of Interrogatories Propounded to Meridian Southern Railway, LLC. ¶ 14.) (R.E. 63).

The discovery completed in this case clearly shows that during the period since Rega has owned the property in question that MSR has used Rega's side track for its own purposes without Rega's consent. MSR has received a valuable benefit in the form of revenue derived from switching and storing operations on Rega's private side track and others similarly situated. Despite this, MSR has not paid Rega for such valuable use of its property. These profits represent an unjust enrichment to MSR, and, thus, according to the principles of equity and good conscience should be returned to Rega.

MSR, as the moving party, is burdened with the task of "persuading the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, that he is entitled to judgment as a matter of law." *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 198 (Miss. 1988). MSR has failed to show the lack of a genuine issue of material fact as to Rega's claim for unjust enrichment and therefore the trial court's order on Count 7 of Rega's counter-claim should be reversed.

CONCLUSION

Appellant has shown that there does indeed exist genuine issues of material fact as to Appellant's claims for conversion, trespass, and unjust enrichment. MSR's arguments do not pass the standard required by the moving party on a motion for summary judgment. Thus, MSR has failed to meet its burden of showing that there exist no genuine issues of material facts as to Counts 7, 8, and 10 of Appellant's counter-claim. Therefore, Appellant requests that this Court reverse the Circuit Court's grant of MSR's motion for summary judgment and remand the present action back to the lower court.

RESPECTFULLY SUBMITTED, this the 20th day of July, 2010.

BY: Eric Tiebauer
ERIC TIEBAUER, MSB#[redacted]

ERIC TIEBAUER
Attorney at Law, MSB#[redacted]
4363 Highway 145 North
P.O. Box 1421
Waynesboro, MS 39367
601.735.5222 - Phone
601.735.5008 - Fax

CERTIFICATE OF SERVICE

I, Eric Tiebauer, the undersigned attorney, have this day forwarded, via United States Mail, postage pre-paid, a copy of the above foregoing document to the following:

Hon. Robert W. Bailey
Clarke County Circuit Court Judge
P.O. Box 86
Meridian, MS 39302

Hon. Robert M. Dreyfus, Jr.
Attorney of Record for Appellee
P.O. Box 5847
Meridian, MS 39302
601.553.8315 - Phone
601.553.5008 - Fax

Hon. Eric Tiebauer
Attorney of Record for Appellant
4363 Highway 145 North
Waynesboro, MS 39367
601.735.5222 - Phone
601.735.5008 - Fax

Mr. Richard Reeves
Appellant
1132 Hwy 145 South
Quitman, MS 39355

SO CERTIFIED; this the 20th day of July, 2010

Eric Tiebauer
ERIC TIEBAUER