2010-CA-00072-SCT-RT

REPLY BRIEF OF APPELLANT

REQUEST FOR ORAL ARGUMENT

Albert Kea respectfully requests oral argument which he believes would be helpful to the Court as the legal issues and facts are complicated.

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STATEMENT OF THE CASE

Albert Kea strongly disagrees with Lisa's claims that he did not claim ownership of the disputed items in the criminal trial. According to Lisa, "[o]f significance, there was no issue as to the ownership at the time of the perjury trial." Appellee's Brief, p. 3, 42 Lisa cites to page 118 of the trial transcript in the instant case to support this claim. Page 118 does not even remotely support the notion that Albert did not claim ownership at his criminal trial.

Significantly, Lisa has filed a motion seeking to preclude Albert from referring to testimony in the criminal trial. Notwithstanding, she now seeks to take advantage of the absence of the criminal trial record by making misrepresentations about what happened at the trial. This Court should ignore her misrepresentations, particularly this one which is in no way supported

by the criminal trial record. In fact, at that trial, Albert claimed that Robert stole the items from Albert's house while Albert was in the hospital. He also produced numerous witnesses who testified that they saw Robert taking items from Albert's house while Albert was hospitalized. Albert's house burned the day after he was released from the hospital. *See, Kea v. State,* 986 So.2d 358 (Miss. App. 2007) [transcript of the testimony of Albert Kea and defense witnesses].

Albert Kea will discuss additional disagreements he has with Appellee's statement of facts in the applicable arguments.

SUMMARY OF THE ARGUMENT

Although Lisa originally brought her action as one in replevin, she now claims that the property was *in custodial legis* and that she did not need to file anything to obtain the property from the sheriff's department. According to her, she did not need to comply with the requirements of a replevin action that she list the property in order to confer jurisdiction. Lisa is incorrect. The trial judge "revived" her replevin action; therefore, she was required to comply with the requirements of the statute. Failing that, the trial judge had no jurisdiction to hear the case.

Next Lisa claims that the trial judge could revive her replevin action even though it had been dismissed. Again, Lisa is mistaken. The trial judge has no authority to revive an action once it has been dismissed.

Lisa claims that she should not be estopped from claiming ownership of the items when she failed to list the items on her bankruptcy petition because she was not required to individually list the items. Whether or not Lisa was required to individually list the items, the law plainly required her to correctly give their value. She did not do so.

Lisa claims that Albert waived any claim about whether the court had the authority to determine that he had an equitable interest in the property. Albert plainly asserted that the fact

that Robert had purchased the property meant he was the lawful owner. He did not waive the claim that the court erroneously concluded that it could not determine this issue because Albert's interest was equitable not legal.

Finally, Lisa claims that the evidence supports the judge's decision to award her the property because the judge determined her to be the more credible witness. It is clear that the judge's determination to award the property to Lisa was based on his belief that Robert would not be entitled to the property merely on a showing that Robert bought it for him where Lisa had receipts. This finding does not necessarily mean that the judge found Albert's testimony was unreliable.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR OF LAW IN OVERRULING ALBERT'S MOTION TO DISMISS BECAUSE THE DEFECTS IN LISA'S PETITION WERE INSUFFICIENT TO CONFER JURISDICTION ON THE COURT.

Lisa is correct that Albert did not raise the issue of her failure to comply with the requirements of §11-37-101, Miss. Code Ann. in his formal Motion to Dismiss. She concedes, however, that he did raise the issue in his Answer and that, in any event, jurisdiction can be raised for the first time on appeal. Consequently, whether Albert raised the issue in his motion to dismiss is irrelevant to the issue of whether or not the trial court had jurisdiction in this case. This issue, therefore, is not procedurally barred.

Lisa concedes that her initial petition did not comply with the requirement that it itemize the items and value of the subject property as required by §11-37-101, Miss. Code Ann. She contends instead that because the property was being held by the Sheriff for use in evidence in Albert's criminal trial, it was under the jurisdiction of the court and that Lisa had no need to file a replevin action in order to secure the return of the property. Lisa's argument is flawed in several respects.

First of all, it was Robert, Lisa's husband, who turned the property over to the Sheriff's Department. Therefore, in order to establish rightful ownership of the property, Lisa in fact did have to file an action in order to secure the release of the property. As Lisa's own authority points out, the Court has jurisdiction to turn over any evidence only where there is no conflict as to its ownership. *See, Newman v. Stewart,* 597 So.2d 609, 614 (Miss. 1992), cited at Appellee's brief, p. 26 for the proposition that "[i]f there is no conflict as to ownership, the court having custody of the property ordinarily directs its release to the owner."

Moreover, it is doubtful, as Appellee concedes, that the rule that replevin does not lie in suits to regain property held *in custodia legis* is still viable law. That rule was codified in Section 2633 of the Code of 1880 and provided that "The action of replevin shall not be maintainable in **any case of the seizure of property under execution or attachment** when a remedy is given to claim the property by making claim to it in some mode prescribed by law . . . [emphasis added]." It was carried forth in various versions of the code thereafter, but was repealed by Laws 1975, Ch. 508 §30.

Plainly, in the instant case, because there was a conflict regarding the ownership of the property, the Court could not simply award the property without a properly filed action. M.R.Civ.P., Rule 3 requires that "a civil action is commenced by filing a complaint with the court." Rule 4 requires a summons to issue on that complaint.

Moreover, there is no other remedy available by law other than replevin for the return of the instant property. Furthermore, it is not clear that the law cited by Lisa precluding replevin would be applicable here even if it were still good law. The property was not seized under execution or attachment.[1] It was voluntarily delivered to the sheriff's department by Robert. Lisa herself is a stranger to the action, so that her argument that the property should be returned to the

[1] In *Newman v. Stewart,* cited by Lisa, the property was seized pursuant to a warrant.

one who took it to the sheriff without further litigation is misplaced. *Morrison v. Berry,* 170 Ark. 147, 278 S.W. 962 (1926) [person who was not the party the property was seized from may file for replevin because property not *in custodia legis* as to the stranger to the seizure]; *Ganter v. Kapiloff,* 69 Md. App. 97, 516 A.2d 611 (1986) [mere possession of property by a law enforcement agency does not mean that the agency is holding the property *in custodia legis*, as would preclude a replevin action]. Lisa's contention that replevin is not the proper remedy then is not well taken.

In this case, Lisa had no action filed at the time of the adjudication, and by law, her dismissed case could not be revived. In this case, replevin was the only action available for someone in her position to make a claim to the property. At the very least, such an action requires a properly filed complaint with service of process.

Lisa argues, however, that even if she was required to file an action, she was not required to comply with the §11-37-101, Miss. Code Ann. by giving a description of the property and the value of each separate article and the total value of all the articles. Instead, she claims that because the property was *in custodia legis,* she was not required to do so. This is so, because according to her, she was only required to file a complaintwhich conformed to Rule 8, Miss.R.Civ.P. As Albert has pointed out, however, that complaint was dismissed and could not be revived. Therefore, whether or not Lisa was only required to comply with Rule 8, Miss.R.Civ.P., Rule 8 does require the filing of a complaint. That was not done here.

Moreoever, Rule 10(d), Miss.R.Civ.P. requires that where an action is based on a written instrument, it should be attached to the complaint. Here, Lisa's action was based on the written itemizaion of the sheriff's department listing the items and their value. Consequently, Lisa's complaint not only did not comply with 11-37-101, it also did not comply with Rule 10(d).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REVIVING LISA'S PETITION FOR REPLEVIN AFTER LISA

HAD DISMISSED HER CLAIM AND WHERE SHE HERSELF ARGUED THAT THE COURT LACKED JURISDICTION TO PROCEED BECAUSE HER PETITION WAS NOT PENDING.

Lisa argues that the Court had jurisdiction to hear the case even though she had dismissed her replevin action and had not refilled any action. She makes little attempt to distinguish case law which says that once a judgment of dismissal has been entered the case was dismissed. That case law is clear: once a judgment of dismissal has been entered, a case is "dead." *Wilner v. White,* 929 So.2d 315, 321 (Miss. 2006). As the Court there held, once a suit is dismissed, the plaintiff is "preclud[ed] from maintaining an action upon any part of the original cause of action." *Id.*

Moreover, Lisa herself argued repeatedly in the trial court that the case was dead and that "the replevin action had been dismissed. There is no current action . . . ." R.III/12. According to Lisa, "[t]here is no current action. . . "there is no active proceeding." R.III/13. Lisa argued, "these parties cannot come back into a nonproceeding . . . ." R.III/15. According to Lisa, the articles simply should have been turned back over to her without the need of further action by her. R.III/13. In short, Lisa's position in the trial court was that there was no active proceeding.

Once a judgment of dismissal has been entered, a case is "dead." *Wilner v. White,* 929 So.2d 315, 321 (Miss. 2006). As the Court there held, once a suit is dismissed, the plaintiff is "preclud[ed] from maintaining an action upon any part of the original cause of action." *Id.* It cannot be revived by the trial court as it was here.

Lisa focuses her argument on Albert's additional argument against revival of the action which was that Lisa should be estopped from taking a contrary position on appeal to the one she adopted in the trial court that there was no active proceeding for the court to act on. In support of his estoppel argument Albert cited *Bailey* v. *Estate of Kemp,* 955 So.2d 777, 782 (Miss. 2007) [a party cannot assert, to another's disadvantage, a right inconsistent with a position it has

previously taken and "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit]." Lisa attempts to distinguish that case by arguing that it is a contract case and since this is not a contract case, the concept of estoppel does not apply.

She cites no authority for the notion that the concept of estoppel is limited to situations involving contracts. Indeed, the doctrine of estoppel means also that "a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." *Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003) (citing *Banes v. Thompson*, 352 So.2d 812, 815 (Miss. 1977)). *Pursue Energy Corp. v. Mississippi State Tax Com'n,* 968 So.2d 368, 377 (Miss. 2007). That is what Lisa seeks to do in this case. Moreover, that she was unsuccessful in her bid to stop the case from going forward in the lower court does not mean she is not estopped from contradicting herself on appeal.

Lisa next claims that the "issue [of estoppel] was not raised at trial"; therefore, Albert cannot raise it on appeal. Lisa is mistaken. At trial, the trial judge himself noted the inconsistency in Lisa's position. In response to Lisa's argument that the court did not have jurisdicition because her claim had been dismissed, the trial judge noted: "[a]nd that sworn cuts your way too. Ms. Keys has abandoned her claim by dismissing it." R.III/12. Thus, it is apparent that the trial judge was aware of the estoppel argument. At that point, there would have been no point in Albert belaboring the point. *See also,* Rule 12(h), Miss.R.Civ.P. [where issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings].

It should be pointed out that Lisa's procedural bar arguments are not well-taken for another reason. She never filed anything other than her "intent" notice in the "revived" action. She filed this notice on October 15, 2008, just two days before the scheduled hearing between

State Farm and Albert Kea. Therefore, Albert and State Farm had no way of knowing in advance of the hearing what grounds Lisa would be relying on. In other words, by not filing a complaint and instead filing her "notice," Lisa bypassed the normal discovery channels and now seeks to rely on her failure to do so to argue that others should be procedurally barred because of their failure to anticipate her arguments.

The bottom line is that once Lisa's replevin action was dismissed, her cause of action was over. There was no complaint for the court to act on, and the court was without authority to revive her action. *Wilner v. White,* 929 So.2d 315, 321 (Miss. 2006).

Since the trial court lacked jurisdiction in this case, the Court should reverse the judgment. Albert incorporates his arguments from Proposition I in support of his argument that the court lacked jurisdiction in this matter. Although a court may have subject matter jurisdiction generally, it has no jurisdiction in a particular case without a properly filed pleading and a properly issued summons. Miss.R.Civ.P., Rules 3 and 4.

III. THE TRIAL COURT ERRED IN FAILING TO DISMISS LISA'S CLAIM BECAUSE HER SWORN FILINGS IN A PRIOR BANKRUPTCY PROCEEDING PRECLUDED HER FROM MAKING CONTRADICTORY CLAIMS IN THIS SUIT.

There can be no doubt that at the hearing in the instant case Lisa claimed that she and Robert owned the 25 items in question at the time she and Robert filed for bankruptcy in 2002. R.III/103-113. None of the items are listed as personal property in that petition. *See,* Exhibit 14.

Lisa again argues that Albert is procedurally barred from claiming that the court erred in granting her relief where her testimony that she and/or Robert owned the property is inconsistent with her bankruptcy petition. While it is true that Marks did not specifically ask that the case be dismissed on this ground, it is clear that the testimony established that she was either lying in her bankruptcy petition or in court. R.III/99, 115. This was plainly an issue that was raised before the Court and was an issue for the Court to decide when determining if Lisa was entitled to relief.

Specifically, the inventory submitted by Robert Kea to the sheriff of the items in question show them to have a value of nearly $34,000.00. *See, Exhibit 37*. By contrast, Lisa and Robert's valuation of their personal property which would included these items is far less than that—a mere $5,000.00 *See, Exhibit 14.* Even when exempt property is taken into consideration, the value is the property is less than half the amount of the property submitted to the sheriff.

Thus, Lisa's argument that she should not be estopped because she was not required to list each item separately is not well-taken. Regardless of whether or not she was required to make a list of each individual item, plainly she was required to give an accurate assessment of the worth of the items. She did not do so leading to the inescapable conclusion that her failure to list valuable art items and misleading the bankruptcy court about their value was no accident and was designed to prevent the bankruptcy trustee from determining that Lisa and Robert had valuable items of value which could have been liquidated to pay their debts. *In re Mohring,* 45 B.R. 389, 395 (E.D.Cal. 1992) [cited in Lisa's brief for the proposition that the items should be itemized in sufficient detail so that the trustee can determine if further investigation is warranted].

Lisa argues that she should not be estopped from claiming the items because she did not intentionally fail to list the items on the bankruptcy petition. Her argument is that it was Robert, not she, who prepared the schedules. Nevertheless, Lisa signed the schedules and was legally obligated to make sure they were accurate. Under the circumstances in this case, Lisa's position is not believable. While exact specificity in itemizing assets may not be required, reporting less than half of the property is a bit too inexact and smacks of fraud.

Lisa again seeks to take advantage of conflicting positions. Therefore, this Court should reverse the award of property and direct it be returned to Albert because Lisa's bankruptcy petition is in effect a denial of ownership of the property which is consistent with Albert's

position that Robert bought the property on Albert's behalf and Robert and/or Lisa were not the real owners..

IV. THE CHANCELLOR ERRED AS A MATTER OF LAW IN FAILING TO AWARD THE PROPERTY TO ALBERT BECAUSE OF AN ERRONEOUS BELIEF THAT HE HAD NO AUTHORITY TO ADJUDICATE ALBERT'S EQUITABLE INTEREST IN THE PROPERTY.

Lisa argues that Albert did not raise the issue of equitable ownership in the Court below. This argument is frivolous. Albert argued that Robert and Lisa had bought the property on his behalf. His argument was and is that the trial court erred in not finding that he was the real owner. Inexplicably, in denying Albert possession of the property, the Court made the following finding:

> All right, I've heard all of your testimony and looked at your exhibits. **It may very well be that Mr. Kea, Mr. Albert Kea, has an equitable interest in this property, but this is not a Chancery Court.** The documentation reflecting ownership, upon which I must rely, which has been introduced into evidence, all reflect the name Robert Keys or Lisa Keys, even those documents introduced by Mr. Albert Kea. That all being before, [sic] me I have to find that Lisa Keys has met her burden of proof by a preponderance of the evidence and is entitled to the possession listed in the sheriff's inventory [emphasis added].

Tr.III/137, RE 9-10.

The trial court's ruling, therefore, is based on the erroneous legal assumption that even though Albert testified that Robert bought the items for him, Albert could not establish ownership because Robert and Lisa had documents showing they had purchased them. It was the court who called Albert's claim of ownership "equitable."

Whether or not Albert's interest is considered "equitable," as opposed to "legal," the Court's ruling misses the point. The Court plainly could find that Robert had ownership rights to the property even though Robert and Lisa had purchased the property. In short, it was legal error for the trial judge to find that it was precluded from finding ownership in Albert under these circumstances regardless of whether one calls the ownership "equitable" or "legal."

Lisa claims that Albert cited no authority for this proposition in his brief and has waived this issue.[2] Lisa is mistaken. Albert cited the case of *Tyson Breeders, Inc. v. Harrison,* 940 So.2d 230, 232-34 (Miss. 2006) for the notion that the circuit court could decide equitable property interests. In that case, the Court held that equitable claims are more appropriately brought before a circuit court when they are connected to a contractual relationship or other claims tied to questions of law. Thus, there can be no doubt that a circuit court can hear an equitable claim involving ownership of property. In any event, Lisa herself cites no authority at all for the notion that the circuit court could not decide the property issue in question. Again, Lisa seeks to invoke rules when they suit her, but does not feel like she has to abide by them when they do not advance her cause.

In short, in determining that Albert's interest was an "equitable" one not subject to determination in the Circuit Court, the trial judge committed legal error. Albert's testimony that Robert/Lisa bought the property on Albert's behalf is more than sufficient to warrant a finding that the property in fact belonged to Albert. Whether the trial court chose to call it an "equitable" or a "legal" interest, the issue was not whether or not Robert and/or Lisa purchased the property. The issue was whether one or both of them purchased the property on Albert's behalf, in which case, the property belonged to Albert. Thus, in limiting the issue to who had initially purchased the property, the trial court committed legal error.

V. THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S AWARD OF THE PROPERTY TO LISA.

At trial, Lisa testified that she had receipts for only the following items:

1. Dillard's receipt for the Jester-Ex. #15. R.III/103.

[2] Lisa also claims that Albert did not argue that he had an "equitable" interest in the property in the trial court. Lisa again misses the point. It was the trial court who made the distinction between "equitable" and "legal" interests in its opinion. Albert, therefore, did not deprive the trial court of the opportunity of ruling on the issue by not objecting because the trial court ruled on the issue.

2. Jiminy Cricket receipt-Ex. #16. R.III/105.

3. Prisms- Ex. #17. R.III/106.

4. Scheuner lithographs three of them-composite Ex. #18. R.III/108.

5. Receipt for mille fiore plate which she says she signed for-Ex. #19. R.III/108-09.

6. Nurse Bunnykins- Ex.#20 is a credit card receipt with no name. R.III/109-10.

7. Royal Doulton figure she says she bought for Bob for Xmas and her name is on receipt-Ex. #21. R.II/110.

8. Toucan and Polar bear purchased in England, name not on receipt-Ex. #22. R.III/111.

9. Ivory tusk and Royal Doulton piece for the balloon seller, her name not on it-Ex. #12. R.III/112.

10. Scarf from Hungary which she bought-Ex. #23. R.III/113.

Lisa concedes in her brief that she produced receipts for only 14 of the 21 remaining items on the list. Even then, it is not clear the receipts are for the items she claims because the notations for some of items have been written on to the receipts by someone other than the person who wrote the receipts—presumably either Lisa or Robert.

Conspicuously absent from Lisa's evidence is a receipt for the watch which Albert testified had once belonged to the husband of his mother's sister and its walnut stand. R.III/122.

In her brief, Lisa claims there was no issue as to who owned the subject property at the time of Albert Kea's perjury trial. Appellee's Brief, p. 3, 42. She cites to page 118 of the trial record for support of this extraordinary claim. Page 118 does not even remotely support this claim. In fact, the testimony at the perjury trial from Albert was that he owned the property and that Robert and Lisa had stolen it from his house shortly before the fire while he was in the hospital. *See, Kea v. State,* 986 So.2d 358 (Miss. App. 2007). Lisa's misstatements regarding the evidence in the criminal case is typical of her duplicity. She has filed a motion to preclude Albert from relying on the criminal case, but she not only relies on the case, but misstates the evidence

in that case. In fact, not only did Albert testify as to his ownership, numerous other witnesses swore that they had seen many of the items in Albert's house over the years.

While conceding that Albert had in his possession receipts for many of the items (Exhibit 24), Lisa contends that this fact has no significance and does not support Albert's story that the items were purchased on his behalf and that Robert gave him copies of the receipts to show his ownership. Lisa offers o explanation as to why Albert would have had in his possession receipts for these items if Robert had not in fact given them to him as Albert testified.

Lisa similarly discounts Robert's July of 2002 letter to Albert wherein Robert talks about going abroad to replace Albert's "collection" which was lost in the fire. In the letter, Robert wonders if the collection can be replaced for only $160,000.00. The letter also references a Moorcroft vase and a "mosaic from Rome," both items listed on the Sheriff's list. The letter also states that "Lisa doesn't want her mother to know we sold you the clocks and the Schnever pictures before the fire, will explain when I see you." Ex. 37.[3] Lisa claimed that Albert never had those pictures that are listed on the sheriff's list. Albert also introduced receipts that he had found in his safe after the fire which he testified were some of the receipts Robert had given him when Robert turned the purchases over to Albert. *See,* Composite Ex. 24.

Lisa says, however, the mere fact that the letter references "Schnever" pictures, a Moorcraft vase and a "mosaic from Rome" does not mean that these are the same items described in the sheriff's list. The same, however, could be said of Lisa's receipts. The description in the receipts is no more complete than that of the letter; yet, Lisa asks the Court to find that those descriptions apply to the items on the sheriff's list.

[3] The letter also references an attempt to replace a lost "Waterford 'Kennedy' bowl" which, although not the subject of the replevin, is one of the items listed on Albert's claim for lost property filed in the Entergy Suit; thereby, supporting Albert's claim that the bowl had been sold to him by Robert earlier.

What the letter and Albert's possession of the receipts, in many cases the same receipts produced by Lisa, demonstrate is that Albert was telling the truth when he said that Robert bought the items lost in the fire for him and that both Robert and Lisa were lying when they claimed otherwise. This supports an inference that it is Albert, not Lisa, who is telling the truth about the ownership of the items in this case. Ironically, two of the items which Albert claimed Robert sold him were the walnut tusk and tooth, two items which Robert had claimed were stolen and which State Farm reimbursed him for. At the very least, that Robert lied on his insurance claim about the theft of these two items supports the notion that he lied about selling them to Albert. That Albert concedes that Robert fraudulently reported these items stolen and that State Farm, therefore, has the right of possession does not in any way discredit Albert's claims to any property not fraudulently reported. Lisa's argument in this regard is not supported by law or logic.

Lisa faults Albert for not introducing evidence of bills of sale. However, it must be remembered that Albert's house was destroyed in the fire which he believed had also destroyed the items in question. Lisa also faults Albert for not claiming in the Entergy trial that Robert had stolen the items from his house suggesting that he made up his claim of theft at a latter time. Again, Lisa seeks to gain an advantage of the absence of the record in that case and the criminal trial. At the time of the Entergy trial, Albert was first confronted with Robert and Lisa's claim that the property was not at Albert's house at the time of the fire on the day of the Entergy trial. Therefore, he could not have been aware of theft until after that trial. It was not until after Albert dismissed his claim against Entergy that he learned from his neighbors that Robert had been seen

CERTIFICATE

I, the undersigned attorney for Appellant, do hereby certify that I have this date mailed by United States mail, first class, postage prepaid, a true and correct copy of the above and foregoing to Kimberly N. Howland and Martin R. Jeliffe, Wise Carter Child & Caraway, PO Box 651, Jackson, MS 39225-0651, James F. Noble III, Esq. Noble & Noble, PLLC, PO Drawer 2569, Jackson, MS 39207-2569, counsel opposite, and the original and three copies to Kathy Gillis, Clerk, PO Box 249, Jackson, Mississippi 39205-0249 and one copy to Robert G. Evans, Circuit Judge, PO Box 543, Raleigh, MS 39153.

This the 4th day of January, 2011.

E. Michael Marks
ATTORNEY FOR APPELLANT,
ALBERT J. KEA

JULIE ANN EPPS; MSB[redacted]
504 E. Peace Street
Canton, Mississippi 39046
Telephone: (601) 407-1410
Facsimile: (601) 407-1435

E. MICHAEL MARKS; MSB[redacted]
120 North Congress Street
Suite 7730, The Plaza Building
Jackson, Mississippi 39201
Telephone: (601) 969-6711

ATTORNEYS FOR APPELLANT

removing items from Albert's house while he was in the hospital.[4] *See* e.g., Transcript in *Kea v. State,* pp. 169, 178-79.

Given Lisa's bankruptcy fraud, there is no logical reason for crediting Lisa's testimony. Moreover, her repeated refusal to submit to discovery means that at he very least, her testimony should have been excluded. *Beck v. Sapet*, 937 So. 2d 945 (Miss. 2006).[5]

In assessing the credibility of the witnesses, it is not at all clear that the trial judge did not believe Albert when he said Robert gave him the property. It is certain from the judge's ruling, however, that he did not believe this was a sufficient basis for awarding the property to Albert because he believed Albert's ownership was "equitable" and therefore something which could not be adjudicated in Circuit Court. Insofar as Lisa's argument for affirmance is based on a mistaken belief that the judge's ruling necessarily meant that the judge did not believe Albert, her argument for affirmance is misplaced.

CONCLUSION

The Chancellor's decision to award the property to Lisa was based on numerous errors of both law and fact that warrant reversal. Moreover, because the evidence failed to show Lisa was entitled to the property, the court should reverse and render judgment in favor of Albert based on evidence that Albert is entitled to possession.

Respectfully submitted,
ALBERT J. KEA, APPELLANT

By: E. Michael Marks
ATTORNEY FOR APPELLANT

[4] Lisa also faults Albert for not being able to precisely describe some of the items at the instant trial. The fire took place in May of 1998. The instant trial was in December of 2009, well over 10 years later. It is not surprising that he could no longer describe the items he bought for his wife.

[5] Although not listed in a separate proposition, Albert does intend to urge that the failure to the trial court to exclude Lisa's testimony and/or dismiss her case is an independent ground for reversal.