Serial: 166997

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2010-CA-00072-COA

ALBERT KEA — *Appellant*

v.

LISA KEYS AND STATE FARM INSURANCE COMPANIES — *Appellees*

ORDER

This matter came before the Court on Motion to Strike References in Brief of Appellant to Matters Which Are Not Part of This Record, filed by appellee Lisa Keys, and Response of Albert Kea to Lisa Keys' Motion to Strike References in Brief of Appellant to Matters Which Are Not Part of This Record, filed by the appellant.

The Court finds that the motion to strike is well taken and should be granted.

THEREFORE IT IS ORDERED that the Motion to Strike References in Brief of Appellant to Matters Which Are Not Part of This Record be, and hereby is, granted.

SO ORDERED, this the 12th day of January, 2011.

JAMES D. MAXWELL II, JUDGE

2010-CA-00072-SCT

BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or refusal:

1. Albert J. Kea, Defendant-Appellant;
2. Lisa Keys/Kea/Key; Plaintiff-Appellee;
3. E. Michael Marks and Julie Ann Epps, counsel for Appellant on appeal;
4. E. Michael Marks, counsel for Appellant at trial;
5. James F. Noble, III, counsel for State Farm;
6. Robert Kea/Keys/Key/Beverly, *etc.* [deceased];
7. Kimberly N. Howland and Charles Ross, attorneys for Lisa Keys/Kea/Key at trial and on appeal;
8. Martin R. Jeliffe, attorney for Lisa on appeal;
9. Robert G. Evans, Circuit Court Judge.

This, the 12th day of August, 2010.

E. Michael Marks
COUNSEL FOR APPELLANT

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BRIEF OF APPELLANT

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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.

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.

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

STATEMENT OF THE CASE

Because the course of the proceedings and the facts are so inextricably intertwined, Kea will discuss them together rather than separately.

The perjury charge:[1]

stricken per order 1-13-11

[1] Kea will cite the record in the Supreme Court in **No. 2006-KA-01383-COA,** the criminal case against Albert for perjury as C.P followed by the page number. He will cite that transcript as T. followed by the page number. As for the record and transcript in the replevin case, he will cite the record as R. followed by the volume and page number. This Court can take judicial notice of the records before the Court in a related case. *Euclid-Mississippi v. Western Cas. & Sur. Co.*, 249 Miss. 547, 571, 163 So.2d 676, 682 (1964). In any event, the facts as related herein are consistent with the facts in the Court of Appeals' opinion reversing Albert's perjury conviction. *Kea v. State,* 986 So.2d 358 (Miss. 2008).

Stricken per Order of 1-13-11

Albert J. Kea was indicted in October 2005 on one count of perjury in the Circuit Court of Simpson County. ~~CP. 1~~. The charges arose out of a lawsuit he filed against Entergy after his home burned to the ground. Kea's Magee, Mississippi home burned to the ground on May 23, 1998. ~~T. 13.~~ Kea had been in an automobile accident in May 1998. He was in the hospital for a week or ten days. ~~T. 217~~. He was released from the hospital on a Friday afternoon. ~~T. 217~~. The fire happened the next day.

Kea's house was insured, and he settled with his insurance company. However, Kea sued Entergy Mississippi claiming that the fire was caused by a blown transformer. ~~T. 16~~. At issue in that case was a list of items Kea provided to Entergy as having been burned in the fire and about which he testified in the trial against Entergy. ~~T. 18.~~ These items consisted of various antiques and collectibles of substantial value. ~~T. 22-23~~.

Prior to the trial against Entergy, Kea's son Bob contacted the Entergy lawyers claiming that the items his father was claiming had burned in the fire belonged to him (Bob) and that the items were not burned in the fire but were in Bob's home in Colorado. Entergy did not disclose this information to Albert prior to trial but, instead, called Bob to testify consistent with what he told Entergy's lawyers. The civil case was dismissed.

The perjury charges concerned Albert's testimony at the Entergy trial about the collectibles. In this trial, Bob, as he did in the civil trial, testified against his father and told the jury that the collectibles belonged to him and his wife Lisa. Lisa also testified that the collectibles did not belong to Albert. Albert, on the other hand, testified that the items belonged to him and that, as far as he knew, the collectibles were in the house when it burned down the day after he got out of the hospital. According to him, he had given money to Robert who had purchased them for Albert on various trips both here and abroad. Albert called several witnesses

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who testified that they saw Bob at his father's house while Albert was in the hospital and that Bob was seen removing items from the house.

Bob admitted in his testimony that he had had a few run-ins with the law over the course of his life but led the jury to believe that he was a reformed man. It was not until **after** his father's criminal trial, however, that the full extent of Bob's criminality was learned. The jury, not having been privy to the full extent of Bob's extensive on-going criminal history, apparently believed Bob and found Albert guilty of perjury. ~~SP. 36.~~ The trial court (Judge Marcus Gordon) sentenced Albert Kea to serve eight years and pay a fine of $10,000. ~~SP. 41.~~ Albert, unlike his son, had never had any run-ins with the law prior to the perjury charge.

After Albert's sentencing, Bob was exposed as having a criminal career much greater than that he admitted to during the trial, the details of which are outlined below. Once Albert learned these new facts, he filed with this Court (in February 2007) a Motion For Remand for an Evidentiary Hearing in order that this new evidence could be submitted to the trial court. The Motion was denied on February 28, 2007. Copies of the documents can be found in the perjury record in this Court.

The perjury trial:

Kimberly Howland, one of the attorneys who represented Entergy in the civil case filed by Kea, testified that she saw the items in the typed list at the Colorado home of Kea's son Bob in 2004 and, thus, they could not have been destroyed in the 1998 fire. ~~T. 26.~~ She also testified that Bob Kea showed her documentation that the items were purchased and were owned by Bob and his wife Lisa. ~~T. 26.~~ Entergy did not disclose this information to Kea prior to trial. ~~T. 27.~~ According to Howland, Kea took the stand at the civil trial in December 2004 and swore to tell the truth. ~~T. 16, 28.~~ He testified that the items in the typewritten list were owned by him and

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that they were destroyed in the fire. ~~T. 29-30~~. In that same trial, Albert's son Bob Kea took the stand and testified that the items belonged to him. ~~T. 30~~.

On cross-examination, Howland admitted that she did not find Bob Kea; Bob contacted her to report his father's alleged fraud. ~~T. 32.~~

The only evidence that the collectibles did not belong to Albert was provided by Bob and Bob's wife Lisa. Bob was Albert's son from a previous marriage. When Albert and his wife divorced, their two boys were young and Albert's wife was awarded custody. Albert's ex-wife moved and Albert was unable to locate her and their two sons. ~~T. 212~~. In 1972, Bob was 18 and he stole a car. Bob testified that he stole the car to look for his father.[2] ~~T. 88.~~ Albert got a call from Bob's grandmother asking for Albert's help. ~~T. 212~~. Albert drove to Denver Colorado and got his son out of jail. ~~T. 213.~~

Bob testified that he lived in Colorado and that he did not work but has been disabled for the last six and a half years. ~~T. 41.~~ He admitted that he had been convicted of car theft in 1972 when he was seventeen. ~~T. 41-42.~~ When he was twenty-three, he was convicted of menacing and resisting arrest. ~~T. 42~~. In 1990, when he was thirty-six, he was convicted for passing bad checks and for making **a false statement on a passport** (this is important for reasons that will soon become apparent). ~~T. 42.~~ Bob also admitted that he had used various names over the years; Robert John Kea was his birth name but he had also been known as Robert John Cook, Robert John Beverly, Robert John Anderson and Robert John Keys. ~~T. 42-43~~. Bob did not list for the jury the name of Robert John Key – the name in which his passport was issued.

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[2] Bob's attempts to minimize his criminal activity at the perjury trial and to portray himself as a reformed man were belied by his continued criminal activity after the trial, specifically the theft of numerous items from the Park Service which cumulated in a warrant being issued for his arrest and his suicide once he was cornered and realized he would no longer be able to lie his way out of his crimes as he had in the past.

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Bob testified that he had worked as a nurse for twenty years. ~~T. 43.~~ He went to nursing school twice because the second time he was on the lam so he attended nursing school a second time under a different name so that he could earn a living. ~~T. 44.~~ Bob testified that the items contained in the list drawn up by his father did not burn up in the 1998 fire. ~~T. 46.~~ At that time, the items, which belonged to him and his wife Lisa, were in his (Bob's) home in Dallas. ~~T. 46.~~ Bob supplied various papers that allegedly proved where the items were brought.

The **real** story on Bob Kea, however, was not uncovered until **after** the trial. Albert's trial took place at the end of June 2006. According to a December 25, 2006, article in the *Rocky Mountain News*, sometime after that, Lisa and Bob became estranged and, in September 2006, Lisa reported Bob to the authorities. *See Article, attached to Albert's Initial Brief in the criminal case.* It seems that Bob's recounting of his criminal career left out the fact that he had long made his living by stealing objects from small museums across the country. Sometimes in order to steal these items, he hid them in a fake oxygen tank. He then sold at many of them on e-bay where he was aptly known as the "Travelling Collector." *Id.*

When Bob learned that Lisa had turned on him, he faxed letters to Lisa's mother (who lived in Mendenhall, Mississippi), claiming that Lisa had committed various criminal offenses, including but not limited to, insurance fraud. *Appendix I, Ex, B to Albert's brief in the criminal case.* Apparently the letters were an attempt by Bob to convince Lisa that it was not in her best interests to cooperate with authorities.[3]

In November of 2006, the federal government filed a criminal complaint against Bob in federal district court in Colorado. *See* Complaint attached to Albert's brief in the criminal case.

[3] Although she denied it at the trial of the instant case, it was apparently these letters and other information implicating Lisa in past criminal misconduct which led her to move to dismiss her

The complaint charged Bob with stealing an antique rifle worth $4000 to $6000 from the Estes Park Museum in Colorado and 15 antique Elgin watches taken from the Elgin Area Historical Society Museum. When officials went to arrest Bob, they discovered that he had fled to Texas. He was tracked to a motel near Amarillo. When officers observed Bob leaving his car to walk into the motel, they approached him and identified themselves. Bob got back into his car and rammed the officers' vehicle. He then drove a mile down the interstate, pulled into a parking lot near a gas station, and shot himself in the head and died. *See, Appendices to Albert's brief in the perjury trial.*

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In Albert's defense, there were several witnesses who testified to having seen the various collectibles in Albert's house over the years. Larry Blair worked for a pest control business in Brookhaven. ~~T. 145.~~ He began servicing Albert's house approximately once a month beginning in 1995. ~~T. 146.~~ On some of those occasions, Albert's wife Ann would ask Larry to sit and have coffee and cake with her. ~~T. 146~~. Several of the collectibles at issue were displayed in the kitchen. ~~T. 147.~~ Ann would often bring out an item to show Larry saying, "Look what I've got this time." ~~T. 147.~~ Larry was asked to review the photos of the collectibles and identify those he had seen in the Kea home. ~~T. 149.~~ He was able to identify several that had been in the Kea home prior to the fire. ~~T. 149.~~

Mary J. Starling testified that she used to live next door to the Keas, was a good friend to Ann and visited in the house all the time. ~~T. 151-52.~~ Starling looked through the photographs of collectibles and identified those she recognized as having been in the Kea home. ~~T. 152-167.~~ Starling was familiar with Bob Kea. She knew that Ann and Albert had given him money on numerous occasions. ~~T. 169.~~ When Albert was in the hospital just before his house burned

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replevin action in March of 2008. Unfortunately, the statute of limitations appears to have run on most, if not all, of these crimes.

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down, Starling saw that Bob was staying at his father's house. She testified that on one day, she saw Bob came out of the front door with a garbage bag filled with stuff from the house. ~~T. 169.~~

Teresa Joy Tisdale testified that Albert Kea was her husband's uncle. ~~T. 177~~. Tisdale did not really know Bob Kea but knew him enough to recognize him. ~~T. 177.~~ Tisdale's husband had proposed to her in 1994. Around Christmas that year, Tisdale's fiancé took her to meet his family. His mother lived in an apartment on the Kea property. ~~T. 178.~~ Tisdale was outside smoking when she saw Bob Kea taking a gun out of his father's window. He wrapped it in a blanket and put it in the trunk of his car. ~~T. 178.~~ Tisdale recognized some of the items pictured in the photos of the collectibles at issue in the Entergy lawsuit as items that had been in Albert's home. ~~T. 179.~~

Lisa Terry Holloway has known Albert and Ann Kea practically all of her life. ~~T. 182.~~ Albert's father was married to Holloway's aunt and he (Albert's father) practically raised her. ~~T. 182~~. Holloway would assist Ann in her housework. ~~T. 183.~~ She identified many of the collectibles as items she had seen in Ann and Albert's house. 183-186. She remembers that just prior to the fire that burned up Albert's home, Albert was in the hospital. During that time, she saw Bob taking things out of the house and putting them in the trunk of his car. ~~T. 187~~. Bob was out of breath and so Holloway asked if he needed some help. She and her sister Carol and their half-brother Buddy (now deceased) then assisted him in loading boxes into his van. ~~T. 188.~~ She did not see what was in the boxes. She spent twenty to thirty minutes assisting Bob. ~~T. 189.~~ Afterwards, Bob left with the boxes still in his van. ~~T. 189.~~

Carol McMillan, like her sister Lisa, had also known Albert and Ann Kea all of her life. ~~T. 194.~~ She doesn't remember when it was exactly (she remembers that Albert was in the

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hospital) but she recalls that she, Lisa, and Buddy helped Bob load some small boxes into his van. ~~T. 195, 198~~.

Helen Williams is Albert's sister. In the 1990s, she lived with her brother. ~~T. 200~~. She was able to identify many of the collectibles as having been in Albert and Ann's home. ~~T. 201-204~~. She had also seen the photographs themselves in their home. ~~T. 204.~~ After the fire, Helen testified, Bob offered to help his father figure out what the items were worth. He took all of the photos with him and said he would make up a list to help his dad out. ~~T. 210~~.

Albert testified that his wife Ann, who died in August 2003, liked collectibles. A lot of the things she wanted, she would have Bob purchase for her. Ann and Albert would give Bob cash and he would pay for items with his credit card and in this way Bob could get free airline miles. ~~T. 214.~~ Bob would travel and bring back magazines and Ann would point out the things she wanted and Bob would obtain them on his next trip and bring the receipts back to Albert. ~~T. 214-15~~.

Photographs of the collectibles had been stored in a safe and Albert was able to retrieve them after the fire. ~~T. 224.~~ Bob offered to help his father draw up a list of the lost items since he had purchased most of them for his father using Albert's money. ~~T. 224.~~

Right after Ann died, Bob approached his father and asked him for $50,000 for a down payment on a home. ~~T. 227.~~ Albert refused. His other children needed his help, and Albert was ashamed of Bob's criminal activity. T. 226. A few weeks later, Lisa approached Albert and told him that if he did not give Bob the $50,000, Bob was going to jail. ~~T. 227~~. Lisa left angry when Albert refused to give them any money. Albert had not talked to the two since then. ~~T. 227.~~[4]

[4] The timing of Bob's request for $50,000 coincides with the time that federal authorities finally caught up with Bob on the 1991 federal bank fraud charges for which he had been on the lam for 13 years. *See App. I, Ex. A to Albert's brief in the criminal case.* Coincidentally, the timing of

Albert testified that he did not know that Bob came to his house while Albert was in the hospital. ~~T. 228.~~ stricken per order of 1-13-11

On redirect, the prosecution, over the defendant's objection, introduced Bob and Lisa's passports to corroborate their testimony that they had been in Turkey the week before the fire. The passports were issued to Robert and Lisa Key. The passports were later amended to identify the bearers as Robert and Lisa Keys.

The appeal of the perjury charge:

On appeal of the perjury conviction, the Court of Appeals reversed Albert's conviction. *Kea v. State,* 986 So.2d 358 (Miss. 2008). In so doing, the Court noted that Bob's passport was obtained through fraud because he used an alias to obtain it. Furthermore, the Court held that the passports containing the visa stamps purporting to show that Bob and Lisa were in Turkey at the time the other witnesses claimed they were in Mississippi taking items from Albert's house were improperly admitted because the people who supposedly affixed the visa stamps did not authenticate them. *Id.* 362. The Court also reversed because the jury was not given a two-witness jury instruction. *Id.*

The Replevin case:

On September 11, 2006, Lisa filed a "Petition to Intervene and Declaration of Replevin" citing Robert Kea, Albert Kea and Kenneth Lewis, the Sheriff of Simpson County, as defendants. R.I/6-8. She claimed that certain property had been seized "from the home of Robert Kea" and that she, Lisa, was the legal owner of the property of "the personal property seized during the

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Bob's coming forward to the Entergy attorneys then coincided with his need for someone to put in a good word for him on his then pending criminal case in Colorado. As the article in the *Rocky Mountain News* indicates, Bob only **appeared** to have turned his life around at that point and the United States District Court Judge was deceived into giving Bob a light sentence, order only that Bob to pay back $10,000 in bad checks and serve time on probation. *See, App. I, Ex. A to Albert's initial brief in the criminal case.*

trial of State of Mississippi v. Albert Kea."[5] R.I/6. She gave no itemized list of the property; nor did she give its value. Furthermore, she did not swear to the complaint, which was sworn to by her then attorney, Daniel D. Ware. R.I/7.

On September 28, 2006, Albert filed his Answer and defense. R.I/10-13. He raised, among other defenses, that the petition failed to state a claim and that the petition did not specifically list the items requested to be replevined nor gave any values or descriptions as required by §11-31-101(b), Miss. Code Ann. R.I/11.

After failing to comply with discovery requests and a court order directing her to do so,[6] Lisa on February 20, 2007, filed a "Motion to Amend Petition to Intervene and Declaration of Replevin." R.I/29-34. No order was entered on the motion to amend.

Subsequently, without ever obtaining leave to amend her original complaint, Lisa requested that her case be dismissed. By order dated March 4, 2008, the circuit judge dismissed Lisa's case in an order entitled "Order Dismissing Case Without Prejudice." R.I/45. Specifically, that order states in pertinent part:

> THIS DAY this matter came on for hearing by motion of the Plaintiff in light of new evidence found by the Plaintiff, and the court after hearing and considering same, founds [sic] that said motion is well taken and should be granted.
>
> IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion is well taken and is hereby granted.

R.I/45.

On April 11, 2008, State Farm Insurance Company wrote to Judge Evans claiming an interest in seven items being held by the sheriff. State Farm had learned from Robert's brother

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[5] The evidence at trial subsequently established that Robert had delivered twenty-five items to the Sheriff on 6/27/06. They were not seized from Robert's house as Lisa's petition claimed.

[6] After Lisa refused to comply with Albert's request for discovery by refusing to submit for a deposition, Albert moved to compel which was granted. R.I/17-19, 23. Thereafter, Lisa

that Robert had fraudulently claimed some of the items which were being held by the sheriff by claiming they were stolen in a burglary in 1994. As a result of that fraudulent claim, State Farm had paid Robert for the allegedly stolen items.R.I/52-54. State Farm eventually claimed only four of the items.

Judge Evans responded to the letter explaining that the case had been dismissed in March of 2008 and that he could not simply release the property based on State Farm's letter request. R.I/54. On September 9, 2008, Judge Evans wrote to State Farm, to counsel for Albert and Lisa and to Lisa and her mother, Dean McCrory, stating that because of documents and communications he had received about the case in the past few months, he was setting the case for trial where "I intend to fully and finally dispose of this matter and release the subject property to someone . . . ." He directed everyone to communicate with the court only in writing and only if shared among the parties. R.I/62.

On October 6, 2008, as a result of Judge Evan's letter, State Farm entered an appearance and filed a Petition for Intervention by State Farm Insurance Companies and for Replevin of Certain Items of Personal Property" which it had paid Robert for as a result of his 1994 insurance claim for burglary. R.I/63-99.

On October 15, 2008, Kimberly N. Howland and Charles E. Ross, who had been Entergy's lawyers, filed an "Entry of Appearance and Notice of Intent to Pursue Claim." R.I/100. The notice stated simply that Lisa "gives notice of her intent to assert her claim of ownership, and thus possession, of those items listed on the Simpson County Sheriff's Department property release form attached hereto." R.I/100. The record does not reflect that any such form was attached. R.I/100-101.

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continued to refuse to comply with discovery, and Albert moved to cite her for contempt for failing to abide by the court's order. R.I/25-28.

At this point, Albert filed a motion to dismiss or request for continuance alleging, among other things, lack of timely notice that Lisa intended to pursue her claim. R.I/102. Both State Farm and Albert objected to the court's decision to hear Lisa's claim because she had not filed any new complaint or petition. R.I/106.

The trial court then conducted the first of two hearings on the issues involved in the replevin case on October 17, 2008.[7] At that hearing, Judge Evans gave his reasons for in effect *sua sponte* putting the case back on the docket without any motion from Lisa to do so. According to the judge, after the case was dismissed in March of 2008, his office was bombarded by repeated requests from Lisa Key's mother for him to take action on the case. Despite repeated admonitions, she would not stop communicating with the court, and he had to order her to stop. Then according to him, Albert continued to contact the clerk's office, and the judge ordered him to quit. Then he had the letter from State Farm requesting the property. "In a nutshell, I got fed up with everybody wanting this stuff. So I set this matter for hearing today to dispose of it once and for all, and that's where we are." R.III/2-3.

At the initial hearing on October 17th on the issues now before this Court, Lisa, instead of agreeing with the judge's attempt to revive her action, sought to take advantage of the fact that the case had been dismissed by arguing that the Court lacked jurisdiction to hear the matter because she had dismissed her action for replevin![8] Albert, on the other hand, had agreed that

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[7] The Court's letter went out in September; however, Howland only noticed counsel for Kea that she was entering the case as counsel for Lisa 48 hours prior to the hearing on October 17, 2008.

[8] Specifically, Ms. Howland argued that because the replevin action had been dismissed, "[t]here is no current action . . . . So, State Farm certainly had every opportunity to file a complaint for replevin, to issue a summons, to issue a fiat and to go forward with a replevin action. They simply cannot come here into a cause that has been dismissed and assert claims that they are – or that they have been barred from asserting in other places that actually do have competent jurisdiction of this question." R.III/13. The Court noted that "that sword cuts your way too. Ms. Keys has abandoned her claim by dismissing it. . . . Except for my twisting your arms and getting this back on my docket so I could make y'all all go away." R.III/12-13. Howland, on behalf of Lisa, responded in part, "There is no current action. It should simply go back to the person that

State Farm should take position of the items[9] by virtue of having paid for them as a result of Robert's fraudulent insurance claim even though Albert also had paid Robert for the items. R.III/9-10. Lisa, however, asserted that because she had not been a party to that particular fraud, having not been married to Robert at the time, she was nevertheless entitled to the items.[10] R.III/16. The judge allowed the case to proceed without ruling on whether Lisa's case should be dismissed because of flaws in the petition and the failure to properly revive her replevin action by filing a new suit. He heard arguments on some motions, including the motions to dismiss, but did not rule on them, and then continued the hearing to an indefinite date.

In the meantime, on May 18, 2009, Albert served Lisa with a set of interrogatories which Lisa again did not respond to. R.I/148-49.

On June 10, 2009, Albert again moved to dismiss alleging, among other things, that Lisa had not filed a claim after her initial claim had been dismissed and that Lisa's attorneys had directed her not to respond to Albert's requests for discovery, including a request for deposition, because she had been deposed prior to the time the case was dismissed. R.II/153. Lisa did not file a written response to Albert's motion.

At the subsequent hearing in December of 2009, over objection of Albert that she had refused to participate in or provide discovery, Lisa testified that she and/or Robert had purchased some of the 25 items on the sheriff's list. Exhibit 37, RE 11. She produced receipts for some, but not all, of the items that she claimed corroborated this. Some of the receipts, however, were not

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brought it here . . . . and there is no active proceeding." R.III/13. Continuing, "[m]y argument is that these cannot come back into a nonproceeding and now assert claims" that they were barred from asserting in Colorado. R.III/15. Unfortunately for this argument, State Farm produced a copy of the Colorado transcript showing that the Mississippi items were not the subject of the Colorado litigation. *See,* R.I/107-08, 122.

[9] By this time, State Farm had limited its claim to four items.

[10] Lisa did however file a theft claim against State Farm for other property not involved in this suit later in 1994 about a month after she married Robert. R.III/20-21. Robert had also filed

made out to her or Robert. Moreover, in the case of the watch, she produced no receipt at all; nor did she explain how it had come to be in Robert's possession in 2006, at the time he delivered it to the sheriff's department.

As for the watch, Albert testified that the watch had the initial EAM on the back that were the initial of Edgar Allen Myers who was married to Albert's mother's sister. He said that at some point, the watch disappeared, presumably when Robert took items from his home prior to the fire. R.III/122.

As he had at his criminal trial, Albert again asserted that Robert had purchased the items on his (Albert's) behalf and that he (Albert) had paid Robert for them. Albert produced copies of his receipts which he claimed had been given to him by Robert at the time of these transfers. Exhibit 24. Those receipts correspond to some of those introduced by Lisa. He further produced a letter from Robert dated July 19, 2002, which he had found was still in his safe after the fire and therefore had not been destroyed by the fire. Exhibit 36 (receipts), RE 12-13 (letter).

At the conclusion of the December hearing, without objection from Albert, Judge Evans concluded that State Farm was entitled to four items: a mosaic picture, an ivory whale's tooth, an ivory walrus tusk, and a glass fish. R.II/181-83.

He allowed Lisa to pursue her claim despite the absence of any pleading and her failure to respond to discovery. He awarded her the remaining twenty-one items being held by the sheriff. Exhibit 37 (list) at RE 11. Subsequently, he entered an order reviving Lisa's petition nunc pro tunc "as if the order of dismissal dated March 4, 2008 "had never been entered." RE 6-8, R.II/191-194. He did not require her to post bond in order to obtain the property.

Albert timely filed a notice of appeal. R.II/188-90.

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another claim against State Farm for stolen property in 1992, that claim is not a subject of this litigation. R.III/20.

SUMMARY OF THE ARGUMENT

Albert Kea is still attempting to get the property he claims he purchased from his son, Robert, and which he claims was wrongfully and without his knowledge removed by Robert and Lisa prior to a fire which devastated his home. Lisa is represented by the attorney who represented Entergy during the civil suit Kea filed against Entergy for faulty wiring which he claimed caused the fire. Entergy avoided liability for that fire by coming forward with the now-discredited testimony of Robert and Lisa Keys, or whatever their names are, that Albert had perjured himself when he claimed damages for certain items of personal property, which are the subject of this litigation. Not only did Albert lose his property and any damages to which he might have been entitled as a result of the testimony of Robert and Lisa, he lost his liberty as a result of a perjury trial where they again testified. As it turned out, Robert had been a notorious art thief who, after the criminal trial, was turned in to authorities by Lisa, who had left him and was getting a divorce. As a result, Robert fled from authorities and committed suicide once it became apparent that he would be unable to escape liability for his crimes by claiming again that he was a reformed character.

The issues in this court in this appeal largely resolve around Lisa's attempts to avoid the consequences of her actions in dismissing her initial petition when confronted by allegations of her own involvement in Robert's wrong doing. If Lisa is to be believed, she is, by her own admission, guilty of bankruptcy fraud in concealing the very items she now seeks to obtain. Either that, or she is lying when she denied that Robert had sold the property to Albert prior to the time of the bankruptcy. Either way, equity requires that Lisa be denied the benefit of her lie.

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.

A. Standard of Review:

On appeal, findings of fact are entitled to deference when reviewed on appeal but will be reversed where they are not supported by substantial evidence. Rulings of law, however, are subject to *de novo* review. *Dorr v. Dorr,* 797 So.2d 1008 (Miss.App. 2001).

B. The Merits:

First of all, Lisa's initial petition does not even remotely comply with the requirements of 11-37-101, Miss. Code Ann. R.I/6-8. That section states in pertinent part that a person is entitled to a writ of replevin:

> If any person, his agent or attorney, shall file a complaint under oath setting forth:
>
> (a) A description of any personal property;
>
> (b) The value thereof, giving the value of each separate article and the value of the total of all articles;
>
> (c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
>
> (d) That the property is in the possession of the defendant . . . .

Lisa's petition does not describe the property, give the value of each separate article; nor does it give the total value of all of the articles, as required by the statute. Lisa filed a motion for leave to amend the original petition; however, she was never granted an order allowing her to do so. Therefore, the amended complain/petition is of no effect. *Ezell v. Helton,* 235 So.2d 247, 248 (Miss. 1970) [in the absence of an order amending a pleading, it remains as is].

Allegations regarding the value of the items have been essential to the validity of the replevin complaint without which the Circuit Court has no jurisdiction to proceed because the property must have a value of more than a certain amount. *Ezell v. Helton,* 235 So.2d at 248 and cases cited therein holding that allegation of an amount is jurisdictional.

Consequently, even if the Court could revive Lisa's defunct petition for replevin on its own motion, which Albert argues in the next proposition, he could not; the trial court lacked jurisdiction to proceed on the petition because of the failure to comply with §11-37-101, Miss. Code Ann. *Id.*

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.

A. Standard of Review:

See, Standard in Proposition I.

B. The Merits:

After hearing the evidence, the trial court denied Albert's motion to dismiss for lack of jurisdiction and allowed Lisa to "revive" her Petition for replevin "*nunc pro tunc*" as if the order of dismissal "had never been entered." RE 6-8, R.II/191-92. This was error.

At the time of the hearing, Lisa's petition had been dismissed at her request on March 4, 2008. Lisa never filed a motion to reinstate her replevin action, and, moreover, she argued at the hearing on the motion that the court lacked jurisdiction to adjudicate State Farm's claim because she had dismissed her claim and had not refiled.

Under these circumstances, the trial court erred as a matter of law in allowing Lisa to "revive" her petition and in entering a judgment in her favor. The court had no jurisdiction to proceed once the case was dismissed. 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.*

Furthermore, to allow Lisa to argue that the court lacked jurisdiction because the case had been dismissed in order to defeat State Farm's claim; then to allow her to benefit from the contrary position in the case of Albert is unconscionable. *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]."

Since the trial court lacked jurisdiction in this case, the Court should reverse the judgment.

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.

A. Standard of Review:

See, Proposition I.

B. The Merits:

The trial court erred in granting Lisa possession of the property because in a previous bankruptcy proceeding, she said she did not own the property. According to Lisa's testimony, she and/or Robert purchased the 25 items prior to the time she and Robert filed for bankruptcy in 2000. R.III/103-113 and dates on receipts attached as exhibits to her testimony, Exhibits 15-23. She denied to her knowledge Robert had ever executed any documents or given any of the items to Albert and testified that none of the items had ever been at Albert's house. R.III/113.

Moreover, at the hearing, she claimed that the items had been in their home, not Albert's from the time they were purchased in the years preceding the bankruptcy. R.III/113-14.

This testimony, if true, establishes then that at the time she and Robert filed for bankruptcy in 2000, she and Robert lied when they failed to list these items on their bankruptcy schedules. *See, Schedules attached to Bankruptcy Petition attached as Exhibit 14.* If, on the other hand, they did not lie on the bankruptcy petition, and they in fact did not own the property, then this would support Albert's claim that Robert and Lisa bought the items on his behalf, that he paid for them, and that they had indeed been in his possession before the fire at his home.[11]

Again, Lisa seeks to have her cake and eat it, too. This, of course, is not surprising given her unwillingness to submit to discovery requests by counsel opposite. Unfortunately for Lisa, the law precludes her from having it both ways. Because she swore under oath that she did not have the property which she now claims was purchased prior to that time, she is now estopped from a contrary position in this suit.

For example, in *Chandler v. Samford University*, 35 F.Supp.2d 861 (N.D.Ala.1999), an employee claimed in district court she was a victim of racial discrimination by her employer. The employee subsequently filed for bankruptcy, but never revealed the pending discrimination claim to the bankruptcy court. The bankruptcy was discharged favorably to the employee as a "no asset case." The district court dismissed the discrimination case because a debtor's assertion of a legal claim not disclosed in an earlier bankruptcy proceeding is the assumption of inconsistent positions, and is evidence of intent to manipulate the judicial system. *See also, Bailey v. Estate of*

[11] The fire occurred the day after Albert went home after an extended hospital stay. As the photographs, both before and after the fire demonstrate, it is plausible that an elderly man who had been ill might not have been able to discern that certain items were missing from his quite large house when he arrived home from the hospital. Albert has always maintained that he had no knowledge that Robert and Lisa from his house had removed the items while he was in the hospital.

Kemp, 955 So.2d 777, 782 (Miss. 2007); *Kirk v. Pope,* 973 So.2d 981, 991 (Miss. 2007) [cannot later pursue a claim which was omitted from bankruptcy schedule of assets].

The same is true here, as the Court found in *Kirk v. Pope, supra,* omission of an asset on a bankruptcy petition is tantamount to an admission that it does not exist. *Id.* Here both Lisa and Robert denied owning the property in their bankruptcy petition. Lisa cannot now pursue a claim that contradicts that judicial admission. Therefore, this Court should reverse the award of property and direct it be returned to Albert.

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.

A. Standard of Review:

See, Proposition I.

B.T he Merits:

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.

Despite a finding that Albert "may very well" have an equitable interest in the property, the Court held that it could not adjudicate that interest because it was "not a Chancery Court." RE 9-10. That the trial judge was mistaken is so clear as to require little discussion. A circuit

court can hear and decide both questions of law and equity in a case where the equitable claim is intertwined with the legal claim. *Tyson Breeders, Inc. v. Harrison,* 940 So.2d 230, 232-34 (Miss. 2006).

The trial court, therefore, erred as a matter of law in finding it could not adjudicate Kea's equitable claim to the property.

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

A. Standard of Review:

A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.,* 525 So.2d 746, 754 (Miss.1987)).

B. The Merits:

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. 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.

It appears then that Lisa only produced receipts for 14 of the remaining 21 items on the sheriff's list. Moreover, it is by no means clear that the receipts are for the items she claims they are because the notations for items have been written on to the receipts by someone other than the person who wrote the receipts—presumably either Lisa or Robert.

Furthermore, 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. R.III/122.

In contrast to Lisa's testimony, Albert testified that he had received a letter from Robert dated July 19, 2002, after the fire, in which 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.[12] 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.

Under these circumstances, Lisa's testimony has little to commend it. In the first place, Albert's motion to preclude her from testifying because she refused to submit to his discovery requests should have been sustained and her testimony excluded and her claims dismissed.

[12] 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.

Where, as here, a party's discovery violations are repeated and willful. *Beck v. Sapet*, 937 So. 2d 945 (Miss. 2006).[13]

Even if not excluded, the only rational interpretation of the evidence is that Lisa either lied in the hearing in this case about having the items in 2000 or she lied in her bankruptcy petition about not having them. She evaded discovery in this case, and she should not now be allowed to profit from her attempts to manipulate the judicial system.

Albert produced the 2002 letter from Robert which Lisa did not dispute had been written by Robert. Exhibit 24, RE 12-13. In it, Robert clearly writes about replacing a collection of objects worth at least $160,000.00 which Albert had in his home at the time of the fire and which Robert is commiserating with Albert about losing. The letter specifically references some of the items on the sheriff's list which Lisa claimed were not Albert's but hers and Robert although Robert's letter would certainly indicate otherwise. Albert had in his possession receipts for numerous items he claimed were purchased by Robert which he had no reason for having unless Robert had in fact given them to him as Albert claimed as receipts for purchases made by Robert on Albert's behalf. Included in those receipts are the three Scheuner prints, the fish vase, the toucan, the Italian mosaic (given to State Farm), the walrus tusk and tooth, a Moorcroft vase, clocks and other items of china which appear to be the ones on the Sheriff's list.

It is difficult to see why, in the face of evidence that either Lisa lied in her bankruptcy petition or lied here; the trial judge gave her the property. This is particularly true since Lisa's bankruptcy statements support Albert's claims. Moreover, Robert's letter supported Albert's claims, not Lisa's. Furthermore, Lisa never presented any receipts for several of the items; nor did she explain how she and Robert came to have Albert's watch. Therefore, the trial judge

[13] 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.

clearly erred in giving Lisa all the items despite her lack of proof of ownership of all of them and in the face of far more persuasive evidence that Robert had sold the items to Albert. Particularly egregious was the return of Albert's family pocket watch to Lisa in the absence of even any arguable proof of ownership.

Clearly, the trial court erred in awarding Lisa the property when the evidence fails to show her ownership. Rather, the evidence showed Albert was the rightful owner and should have been awarded possession.

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

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 12th day of August, 2010.

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