

IN THE SUPREME COURT OF MISSISSIPPI

ALL AMERICAN PROCESSING, INC.

PLAINTIFF/APPELLANT

v.

CAUSE NO. 2010-CA-00522

LAWRENCE M. RUCKDESCHEL,
KATHERINE R. RUCKDESCHEL, and
TERRY MILLER, in his capacity of
Jackson County Chancery Clerk

DEFENDANTS/APPELLEES

BRIEF OF APPELLANT

APPEAL FROM THE CHANCERY COURT
OF JACKSON COUNTY, MISSISSIPPI,

SITTING AS APPELLATE COURT ON
APPEAL FROM COUNTY COURT
OF JACKSON COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Lawrence M. Ruckdeschel, Appellee
2. Katherine R. Ruckdeschel, Appellee
3. James H. Colmer, Jr., Esq., Attorney for Appellees
4. Heidelberg, Steinberger, Colmer & Burrow, P.A., Attorneys for Appellees
5. All American Processing, Inc., Appellant
6. Bruce Garceau, stockholder in All American Processing, Inc.
7. Darlene Garceau, stockholder in All American Processing, Inc.
8. Billy Parlin, Esq., former Attorney for Appellants
9. David C. Hicks, current owner of property purchased from Appellant on which lis pendens is placed
10. Warren Paving, Inc., purchased property from Appellant

10. Honorable T. Larry Wilson, County Court Judge

11. Honorable Jaye A. Bradley, Chancellor

This, the 27th day of September, 2010.

A handwritten signature in black ink, appearing to read 'JBP', is written over a horizontal line.

JASON B. PURVIS, ESQ

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STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument is not necessary, in that the issues before the Court are purely legal.

STATEMENT OF THE ISSUES

- I. The County Court of Jackson County, Mississippi appropriately cancelled the underlying Lis Pendens as the claim upon which it was based had no relation to the property made subject thereof.
- II. The Chancery Court decision was unsupported by law or by the overwhelming weight of credible evidence, and therefore, reversal of the County Court decision was manifest error.
- III. The Chancery Court lacked a sufficient evidentiary basis to reverse the decision of the County Court and render a contrary decision.

STATEMENT OF THE CASE

A. Nature of the Case.

This matter involves the inappropriate use of a lis pendens. Lawrence and Katherine Ruckdeschel (herein the "Ruckdeschels"), whose particular roles are more particularly identified herein, recorded a lis pendens which attached to property then owned by All American Processing, Inc., a Nevada corporation owned by Bruce and Darlene Garceau ("All American Processing"). The purported basis for the lis pendens was a suit filed in the Circuit Court of Jackson County, Mississippi which included allegations of breach of contract, fraud, and misrepresentation stemming from an alleged contract to construct a modular home to be placed upon property owned by the Ruckdeschels. The County Court, the trier of fact hereunder, cancelled the lis pendens and ruled that there was "no substantial evidence that the claims set forth by the Defendants are tied to the property in such a way that the lis pendens statutes would apply...." (County CP, 102).

B. Course of Proceedings.

On February 22, 2008, the Ruckdeschels filed suit in the Circuit Court Action against eleven (11) defendants, of which All American Processing was not named. (County Court Clerk's Papers, herein "County CP," 49). Purportedly in connection with the Circuit Court Action, on June 10, 2008, the Ruckdeschels caused to be filed a lis pendens (herein the "Lis Pendens") on property in Pascagoula, Mississippi which was owned by All American Processing (the "Subject Property"). (County CP, 49). In said Lis Pendens, the Ruckdeschels asserted that "All American Processing, Inc. *is being added* as a Defendant in the instant litigation." (County CP, 50; emphasis added).

All American Processing was under contract to sell the Subject Property to Warren Paving, Inc. Prior to closing on the sale, the Lis Pendens was discovered. Billy Parlin, then counsel for All American Processing, filed suit on June 20, 2008, in the County Court of Jackson County, Mississippi, Equity Side, in Cause Number CO2008-20766, seeking cancellation of a UCC-1 Financing Statement, the subject of which is not before this Court. (County CP, 4). On June 23, 2008, All American Processing amended its Complaint to seek the release and cancellation of the Lis Pendens. (County CP, 27). Two days later, on June 25, 2008, the Ruckdeschels filed an Amended Complaint in the Circuit Court Action, at which time All American Processing was named as a defendant in that action. (County CP, 77).

Upon hearing on All American Processing's Amended Complaint, which included the presentation of oral and documentary evidence, the Honorable Larry T. Wilson, County Court Judge, cancelled the lis pendens on July 3, 2008 (County CP, 62-63), following which the Subject Property was sold and conveyed to Warren Paving, Inc.

On July 9, 2008, the Ruckdeschels filed a Motion for New Trial in the County Court Action. (County CP, 64-67). Rather than promptly scheduling a hearing thereon, the Ruckdeschels bode their time and took a Default Judgment against All American Processing in the Circuit Court Action on September 19, 2008. (County CP, 98-99). On November 8, 2008, the Ruckdeschels filed a Supplement to Motion for New Trial, or Alternatively, Motion for Relief from Judgment Pursuant to MRCP 60(B). (County CP, 68-101). The matter was set for hearing on November 17, 2008. Judge Wilson denied the Motion for New Trial by Order dated November 19, 2008, wherein, after argument thereon, he found:

That under the facts of this case there is **no substantial evidence that the claims set forth by the Defendants are tied to the property in such a way that the lis pendens statute would apply** and therefore, the Motion for New Trial or to set aside the prior Judgment of the Court should be, and hereby is, denied. (County CP, 102; emphasis added).

On December 19, 2008, the Ruckdeschels appealed the denial of the Motion for New Trial to the Chancery Court of Jackson County, Mississippi. (County CP, 103). The transcript of the proceedings before Judge Wilson was not included in the record on appeal. (Chancery Court Clerk's Papers, herein "Chancery CP," 10-12). Following briefing on the appeal and oral argument thereon, on September 22, 2009, Judge Bradley reversed and rendered the decision of the County Court, thereby reinstating the Lis Pendens. (Chancery CP, 76-78).

On October 2, 2009, All American Processing filed a Motion for Reconsideration of the reversal. (Chancery CP, 79-83). Following oral argument, Judge Bradley denied said motion on March 11, 2010. (Chancery CP, 91). All American Processing timely filed its Notice of Appeal on March 25, 2010. (Chancery CP, 92-93).

C. Statement of Facts.

The Circuit Court Action brought by the Ruckdeschels included actions sounding in breach of contract, misrepresentation, fraud in the inducement, conversion and conspiracy. Although many defendants were named therein, those pertinent to this appeal are Hurricane Homes, Inc. ("Hurricane Homes"), All American Processing, and Bruce and Darlene Garceau (the "Garceaus"). The Ruckdeschels sought damages which included, but were not limited to, the amount of deposit paid unto a representative of Hurricane Homes, and the cost of constructing a custom slab for erection of the modular home on the Ruckdeschels' property.

Hurricane Homes manufactured modular homes on the Subject Property, which it leased from All American Processing. The Ruckdeschels claims in the Circuit Court Action arose from a contract between the Ruckdeschels and a putative representative of Hurricane Homes for the construction of a modular home by Hurricane Homes. The Ruckdeschels claim to have entered into a contract with Andy "Willie" Kirsch, a subcontractor for Hurricane Homes, and paid the sum of \$66,250.00 in furtherance of the contract. (Chancery CP, 42). According to the Amended Complaint, the Ruckdeschels never received their modular home, nor were refunded their deposit. (County CP 81-82). However, the Ruckdeschels do admit to receiving the sum of \$50,000.00 from Mr. Kirsch following his indictment by Grand Jury. (Chancery CP, 52).

As a result of Hurricane Homes' sale of its modular homes from the Subject Property, combined with Ruckdeschels' tender of the payment to Hurricane Homes on the Subject Property, the Ruckdeschels recorded the Lis Pendens notice on the Subject Property which at the time was owned by All American Processing. (County CP, 49-51). Said Lis Pendens was filed of record on June 10, 2008 and recorded in the office of the Chancery Clerk of Jackson County, Mississippi, in Lis Pendens Book 13 at Pages 265-275. (County CP, 49-51).

All American Processing then filed suit in the County Court Action to cancel and release the Lis Pendens. (County CP, 4-59). The Ruckdeschels and Terry Miller, in his capacity of Chancery Clerk of Jackson County, Mississippi, were identified as defendants in the County Court Action. (County CP, 4-59). Upon reviewing the documentary evidence and hearing testimony and arguments of counsel, on July 3, 2008, the Honorable T. Larry Wilson, County Court Judge, found that "[t]he Plaintiff has

sustained its burden of proof and is entitled to a Judgment canceling the lien of record." (County CP, 62-63).

On July 9, 2008, the Ruckdeschels filed a Motion for New Trial or Alternatively, Motion for Relief from Judgment ("Motion for New Trial"). (County CP, 64-67). The Ruckdeschels then let their Motion for New Trial sit dormant until after taking a Default Judgment against All American Processing in the Circuit Court Action on September 19, 2008 (County CP, 98-99), following which, on November 12, 2008, they filed a Supplement to their Motion for New Trial. (County CP, 68-101). Arguments on the Motion for New Trial were heard on November 17, 2009. (County CP, 68-76), followed by Judge Wilson's denial of said Motion on November 19, 2008. (County CP, 102),

The Ruckdeschels thereafter filed a Notice of Appeal to the Jackson County Chancery Court on December 19, 2008. (County CP, 103-104).

Following briefing by the parties and oral argument by the Ruckdeschels, the Honorable Jaye A. Bradley, Chancellor, reversed the decision of the County Court, finding that:

...substantial evidence existed to grant the Ruckdeschels' Motion for New Trial with the County Court as a Default Judgment had been entered against All American in Circuit Court. As such, all factual allegations filed in Circuit Court against All American were confessed as true and found to be true by a competent court. . . . [T]he County Court's denial of the Ruckdeschels' Motion for New Trial was manifestly wrong and against the overwhelming weight of the evidence." (Chancery CP, 78).

All American Processing filed a Motion for Reconsideration (Chancery CP, 79-83), with oral argument heard on February 19, 2010. Following denial of said Motion by

Judge Bradley on March 11, 2010. (Chancery CP, 92), a Notice of Appeal was timely filed on March 25, 2010. (Chancery CP, 92).

SUMMARY OF THE ARGUMENT

The County Court correctly applied the law to the facts of this case and found that the Ruckdeschels improperly availed themselves of the lis pendens statute. Although the Ruckdeschels correctly state that the "legal function of a lis pendens is simply to give notice of an alleged claim of a lien or interest in property," the lien or interest must have a specific relationship to the real property upon which such notice is placed. The lis pendens recorded by the Ruckdeschels relates to property owned by All American Processing and leased to Hurricane Homes. Hurricane Homes allegedly breached a contract to construct a modular home for the Ruckdeschels, which was to be placed upon the Ruckdeschels' property, not that of All American Processing. This breach of contract claim has no underlying relationship specific to the All American Processing parcel, and thus, the cancellation of the lis pendens was appropriate.

STANDARD OF REVIEW

All American Processing agrees with the standard of review stated by the Ruckdeschels. Pursuant to *Richardson v. Riley*, 355 So.2d 667, 668 (Miss. 1978), the standard of review for matters of equity is that:

... findings of fact on conflicting evidence cannot be disturbed by this Court on appeal unless we can say with reasonable certainty that these findings were manifestly wrong and against the overwhelming weight of the evidence. Even if this Court disagreed with the lower court on the finding of fact and might have arrived at a different conclusion, we are still bound by the chancellor's findings unless manifestly wrong.

ARGUMENT

- A. **The County Court of Jackson County, Mississippi appropriately cancelled the underlying Lis Pendens as the claim upon which it was based had no relation to the property made subject thereof.**

The Ruckdeschels claim a lien or interest in the Subject Property by virtue of the filing of a Complaint, followed by an Amended Complaint, in the Jackson County Circuit Court Action. In that action, the Ruckdeschels sought damages and other relief for an alleged breach of contract by Hurricane Homes, due to the failure of Hurricane Homes to construct a deliver a modular home for placement upon the Ruckdeschels' property. The Ruckdeschels' claims also included allegations of misrepresentation, fraud and conspiracy. (County CP, 82-87).

Pursuant to Miss. Code Ann. § 11-47-3, a *lis pendens* may be recorded as follows:

When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to **enforce a lien upon, right to, or interest in, any real estate**, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the clerk of the chancery court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the lis pendens record, and note on it, and in the record, the hour and day of filing and recording. [Emphasis added].

It is well established in Mississippi jurisprudence that in order for a lis pendens to be valid, the underlying claim by the proponent of a lis pendens must relate to the real property itself.

The matter of *W.H. Hopper and Associates, Inc. v. Dunaway*, 396 So.2d 43 (Miss. 1981)(herein "*Dunaway I*"), is of particular significance to the case sub judice. The Dunaways purchased a house and lot from an owner/builder, W.H. Hopper and Associates, Inc. ("Hopper"), and brought suit against Hopper on warranty claims and claims for failure to complete work which was included in the purchase price. *Id.* At the time of filing suit, Hopper owned real property adjacent to that purchased by the Dunaways. At the time of filing suit by the Dunaways, they also filed a lis pendens upon Hopper's adjacent property. *Id.* at 44. Hopper then filed a cross-complaint for expungement of the lis pendens on the adjacent property, which the corporation had thereafter transferred to W.V. Hopper, the father of Hopper's sole corporate stockholder. *Id.* The claim for expungement of the lis pendens was denied by the lower court, resulting in an appeal to the Mississippi Supreme Court.

Although the suit was filed and lis pendens recorded prior to the conveyance of the adjacent property to W.V. Hopper, the Mississippi Supreme Court stated "[it] is obvious that the relief requested in the bill of complaint filed by the [Dunaways] was not to enforce a lien upon, right to, or interest in the next-door property of corporate defendant." *Id.* As a result, the Supreme Court was "forced to hold that the lower court was in error by failing to expunge the lis pendens notice on the property next door to the property involved in the suit." *Id.* at 45.

In reaching its decision, the *Dunaway I* Court relied, in part, on the case of *Paxton v. First National Bank of Greenville*, 155 So. 185 (Miss. 1934), which was factually similar to *Dunaway*. In *Paxton*, the Mississippi Supreme Court held that:

The lis pendens could not operate to establish any lien on the property for the reason that the bill was not to enforce any lien, right to, or interest in, any real estate. The bill in this case shows beyond cavil that the First National Bank of Greenville had no interest whatsoever in the Greenville property of Mrs. Paxton. It merely sought to impound it for the payment of its debt. *Id.* at 44.

The *Dunaway I* Court also looked to 51 Am.Jur. 2d, *Lis Pendens*, § 17, which stated:

Although the extent to which particular property must be "involved in", or "affected by", litigation in order to render the doctrine of lis pendens applicable may, of course, be governed by statute, it is clear that some form of identifiable "property" must be directly involved in the litigation, and, further, that the litigation to which the doctrine is sought to be applied must "involve" the particular property to which the doctrine is sought to be applied.

The Dunaways filed a second suit seeking to set aside the conveyance to Hopper's father on the grounds that said conveyance was fraudulent. The Chancery Court dismissed the action seeking to set aside the deed as res judicata based upon the cancellation of the lis pendens in *Dunaway I*. *Dunaway v. W.H. Hopper & Associates, Inc.*, 422 So.2d 749 (Miss. 1982)(herein "*Dunaway II*"). The *Dunaway II* Court reversed the dismissal, stating:

Not only are these two causes of action grounded in different statutes, they also involve entirely different classes of litigants. **The lis pendens statute was enacted for those who claimed to rightfully own an interest in the property.** *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, 37 So. 502 (1904). But, the statute permitting an attack on fraudulent conveyances was devised for the protection of creditors who had no specific interest in the land. *Dunaway II, supra*, 422 So.2d at 751 (emphasis added).

Under the law as set forth in Miss. Code Ann. § 11-47-3, and as explained in *Dunaway I*, *Dunaway II*, and *Paxton*, there is simply no evidence that the property

made subject of the lis pendens filed by the Ruckdeschels is “involved in” or “affected by” the litigation pertaining to the breach of contract and damages sought by the Ruckdeschels in the Circuit Court Action.

The Ruckdeschels submitted the following arguments in support of their claims that the allegations in the Circuit Court Action “touch” the Subject Property.

1. They entered into a contract with Hurricane Homes to construct their modular home.

The contract between the Ruckdeschels and Hurricane Homes was signed by Mr. Kirsch, a subcontractor of Hurricane Homes. (County CP, 90-94). Even if said contract was signed by the president of Hurricane Homes, the relationship to the Subject Property remains simply that the modules of the home would be constructed by Hurricane Homes on the Subject Property which it leased from All American Property. The modules were intended to be relocated to the Ruckdeschels’ property. Thus, the modules were never intended to become part of the Subject Property owned by All American Processing. The Ruckdeschels do not and cannot assert that they entered into contract for any purpose whatsoever with All American Processing.

2. Their modular home was to be constructed on the Subject Property.

In oral argument, the analogy was presented that one could substitute “cabinets” for “modular home.” (Chancery RT, 34). The mere fact that an item, be it a cabinet or modules for a home, was to be constructed on a particular parcel of property under the

control of a lessee is insufficient to give rise to an "interest in" the land or to warrant or support a claim against the ownership of the lessor, in this case being All American Processing.

3. They physically tendered payment to Hurricane Homes on the Subject Property.

The place of payment is completely irrelevant in determining if the Ruckdeschels possess an interest in the Subject Property. Using their argument, if the Ruckdeschels owned residential rental property and their renters contracted for repairs to a washing machine located on the premises, but failed to pay, the repairman would have grounds to file a lis pendens notice against the rental property. Indeed, such an absurd result does not and cannot lie, as a lis pendens notice is not meant to impound a debt, irrespective of where a transfer of funds may take place.

4. Upon information and belief, All American Processing was the conduit through which their funds were funneled in an effort to defraud them. (Chancery CP, 27).

The Ruckdeschels offered bare accusations that the money paid to Hurricane Homes was utilized to pay rent to All American Processing. *Id.* No such evidence exists. In fact, to the contrary, one party (Mr. Kirsch) to the Circuit Action agreed to and did pay unto the Ruckdeschels the sum of \$50,000.00 after being indicted. (Chancery RT, 51). It is clear that *he* was the recipient of funds, not the lessee, Hurricane Homes, and certainly not the landlord, All American Processing. Of particular note is that in spite of the

accusations that all of the defendants were in collusion and acted in conspiracy with one another, only one person was indicted: Mr. Kirsch. There is no evidence, other than bald assertions, that any other party was even investigated. The Ruckdeschels have not a shred of evidence that any funds were "funneled" from Hurricane Homes to All American, or even that Hurricane Homes received any of the funds from Mr. Kirsch.

5. Bruce Garceau allegedly held an interest in Hurricane Homes and an interest in All American Processing.

Hurricane Homes and All American are two distinct corporate entities. While any community of stockholders is appropriate fodder for the Circuit Court Action, it is not relevant to the integrity of the lis pendens, as the Subject Property is owned by All American Processing and leased to Hurricane Homes. There is no privity between the Ruckdeschels and All American Processing, and the Ruckdeschels have not stated, much less proven, an "interest in" the Subject Property. The Circuit Court Action is nothing more than an action for damages. They seek to impound the Subject Property to pay a debt. Mississippi law cannot be any clearer that such an impound is impermissible. To affirm such conduct by the Ruckdeschels would have catastrophic effects upon the marketability of title to real property located in the State of Mississippi.

To sum up several of their arguments, the Ruckdeschels asserted the following during the initial hearing on appeal to the Chancery Court:

There are cases also in Mississippi that say that interest has to touch the property, Mr. Parlin argued that, that there has to be a relationship to the real property. It has to touch the property in some form or fashion. What we have argued is that, yea, it touches the property all right. Mr. Ruckdeschel here was standing on the property when he gave them the money. We have alleged [in the Circuit Court Action] that the money that he gave them was converted into that property into that asset, which has now been sold and the money is gone out of town, so, we have alleged that the lis pendens does touch the property, does involve the property, does concern the property. (Chancery Reporter's Transcript, 14; herein "Chancery RT").

Contrary to the foregoing assertions, the Ruckdeschels' suit does not "involve" the property. Instead, the Ruckdeschels merely filed the lis pendens so that in the event they obtained a judgment, they would have property on which to levy. In fact, at the time the lis pendens was filed, All American Processing, the owner of the Subject Property, was not even named as a party in the Circuit Court Action. The lis pendens itself identifies 11 defendants, none of which is All American Processing, and states that "All American Processing, Inc. is being added as a Defendant in the instant litigation." (County CP, 49-50). An even which, curiously, did not occur until after All American Processing filed its Complaint in County Court to cancel the Lis Pendens.

The facts set forth by the Ruckdeschels describe no lien upon, right to, or interest in, the real estate made subject of the lis pendens. They did, however, persuade the Chancery Court to reverse the decision of the County Court by claiming that the Default Judgment in the Circuit Court Action for damages could relate back to the improperly filed Lis Pendens. The end result, then, is a pre-judgment impound of

property to pay a debt. The law is clear that this is improper, and a lis pendens filed under such circumstances should be cancelled. *Dunaway I, supra*, at 44.

The Ruckdeschels cite *Aldridge v. Aldridge*, 527 So.2d 96 (Miss. 1988) to claim that their lis pendens is proper, in that "the legal function of a Lis Pendens is to give notice to the world of an alleged claim of a lien or interest in the property." *Id.* at 99. Although that quote, in and of itself, is not disputed as being true, the Ruckdeschels have not pled a valid "lien or interest in the property." In fact, the sentences before and after the above quote provide a better perspective:

Mississippi case law clearly illustrates that a lien is not obtained by the mere filing of a Lis Pendens Notice. The legal function of a Lis Pendens is to give notice to the world of an alleged claim of a lien or interest in the property. The Lis Pendens notice itself does not constitute an independent basis for imposition of a lien. Therefore, it was necessary that the chancellor make specific findings of fact sufficient to constitute an independent basis for imposing a lien on property rather than simply relying on the presence of a lis pendens notice as grounds therefor. *Id.*

The facts alleged by the Ruckdeschels in the Circuit Court Action describe no lien upon, right to, or interest in, the Subject Property. The Circuit Court Action does not "involve" the real property owned by All American Processing, the landlord to Hurricane Homes, which allegedly breached its contract with the Ruckdeschels.

B. The Chancery Court decision was unsupported by law or by the overwhelming weight of credible evidence, and therefore, reversal of the County Court decision was manifest error.

County Court Judge Wilson was the trier of fact, being presented with oral and documentary evidence. The Chancery Court was not the court of original jurisdiction, but rather sat in review of the County Court final judgment.

Although the specific facts argued before Judge Wilson are not before this Court as the transcript of those proceedings was not designated on the appeal to Chancery Court, Judge Wilson held, in his Order of December 19, 2008, as follows:

That under the facts of this case there is no substantial evidence that the claims set forth by the Defendants are tied to the property in such a way that the lis pendens statute would apply and therefore, the Motion for New Trial or to set aside the prior Judgment of the Court should be, and hereby is, denied. (CP 102).

The Ruckdeschels assert that it was error to cancel their Lis Pendens, in that the proper method of cancelling a lis pendens based upon litigation is to dismiss the underlying litigation. While that may be true for a properly filed lis pendens when the underlying claim is sufficiently related to the land, it cannot be said that a party must refrain from seeking cancellation of a lis pendens when the claims are not related to the real property. *Dunaway* is but one of several cases to confirm this.

The facts upon which the Ruckdeschels rely to support their lis pendens are even more tenuous than the facts as set forth in *Dunaway*. As a result, the County Court's cancellation of the lis pendens was necessary, appropriate, and in fact required by law. As in *Paxton*, the Ruckdeschels seek to impound the All American Processing parcel as payment of a debt; as set forth in *Paxton*, this is not a permissible use of the lis pendens statute.

In reversing the County Court decision, the Chancery Court found that "...substantial evidence existed to grant the Ruckdeschels' Motion for New Trial with the County Court as a Default Judgment had been entered against All American in Circuit Court." (Chancery CP, 78). Upon hearing the Ruckdeschels' Motion for New Trial, the County Court was well aware that the Default Judgment had been entered. In spite

thereof, Judge Wilson remained steadfast in his opinion that there was "...no substantial evidence that the claims set forth by the Defendants are tied to the property in such a way that the lis pendens statute would apply...." The after-acquired Default Judgment was apparently, and appropriately, of no relevance to Judge Wilson in his analysis of the Lis Pendens.

Essentially, the effect of the Chancery Court's reversal is to *nunc pro tunc* the Default Judgment to the date of the Lis Pendens recordation. This entirely defeats the clear language of the lis pendens statute and Mississippi's courts' interpretation thereof. In effect, by allowing the Lis Pendens to be reinstated, the Chancery Court is conveying the message that anyone may file a lis pendens notice against any property, even if suit is not yet filed against the owner, and should the filer be so lucky as to obtain a default judgment, no matter how disconnected the facts are to the property, the lis pendens will stand based upon the after-acquired default judgment. Certainly such a scenario is not what the Legislature intended when declaring that one may utilize a lis pendens notice to "enforce a lien upon, right to, or interest in, any real estate." MCA 11-47-3.

The Ruckdeschels have simply, yet improperly, availed themselves of the lis pendens statutory scheme, and thus the County Court's cancellation of the Lis Pendens was appropriate.

C. The Chancery Court lacked a sufficient evidentiary basis to reverse the decision of the County Court and render a contrary decision.

The Chancery Court heard argument on appeal that was not properly before it in the record from the County Court. All American Processing argued the following at the hearing on the Motion for Reconsideration of the Chancery Court's reversal of the expungement of the Lis Pendens:

... I know that in an appellate posture, even though you may review the rules of the trial judge de novo, this is not a trial do novo. And the Supreme Court has said: We have been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of an opportunity to first rule on the issue so that we can then review such ruling by the trial Court. That is, *Williams vs. Skeleton*, 6 So.3d 428 that's a 2009 case from the Mississippi Supreme Court. I believe that many facts were given to the Court at the original hearing on the appeal, but the Court need not consider any of those facts if it looks to this chronology and the fact that there was no lien and no underlying complaint implicating the property. (Chancery RT, 37).

By way of example, Mr. Colmer, counsel for the Ruckdeschels, advised the Chancery Court that All American Processing sold the Subject Property prior to Judge Wilson entering the order cancelling the Lis Pendens. This argument was not in the record on appeal from the County Court.¹ (Chancery Reporter's Transcript 9-10; herein "Chancery RT").

Further, Mr. Colmer advised Judge Bradley that he "designated the record and it's all before Your Honor now." (Chancery RT, 12). While it is agreed that whatever was designated was before Her Honor, the record was devoid of all of the factual and legal arguments and evidence presented at the hearing before Judge Wilson, upon which he rendered his decision. Nonetheless, the Chancery Court found that "...the County Court's denial of the Ruckdeschels' Motion for New Trial was manifestly wrong and against the overwhelming weight of the evidence." (Chancery CP, 78).

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A review of the public Deed Books on file in the office of the Jackson County Chancery Clerk would reveal that counsel was mistaken in this representation.

Although the Chancery Court apparently put little weight on the response, Judge Bradley asked of counsel for the Ruckdeschels the following question of telltale import:

THE COURT: Can I ask you this: Was the default judgment from circuit court entered before the county court action to remove the lis pendens was filed?

MR. COLMER: No.

The inquiry could have, and should have, stopped there, as “a judgment constitutes a lien on all of a defendant’s property once that judgment is enrolled.” *Gordon v. Gordon*, 929 So.2d 981, 987 (Miss. 2006). The Default Judgment in the Circuit Court Action for damages, having no relation to the *actual Subject Property itself*, cannot relate back to the date of the filing of the Lis Pendens. The County Court, therefore, was manifestly correct in releasing and cancelling the Lis Pendens.



CONCLUSION


Based upon the foregoing, All American Processing submits that the cancellation of the lis pendens by the County Court of Jackson County, Mississippi, was not only appropriate, but in fact was required by established Mississippi law. As found by the Court, the Ruckdeschels provided no substantial evidence that their claims as described in the Circuit Court Action were tied to the All American Processing parcel such that the lis pendens statute would apply. The reversal of the County Court decision by the Chancery Court on appeal was manifest error. With respect, the Chancellor’s decision on appeal was without foundation in law or fact. The Judgment of the County Court should be reinstated. To rule otherwise will create chaos in the titles to ownership of land in Mississippi.

Respectfully submitted on this, the 27th day of September, 2010.

ALL AMERICAN PROCESSING, INC.

BY: **DEUTSCH, KERRIGAN & STILES, PLLC**

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CERTIFICATE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I have caused to be delivered the original and three (3) true and correct copies of the above and foregoing Brief of Appellant, and that pursuant M.R.A.P. Rule 28(m), I further certify that I have caused to be delivered an electronic copy of the Brief of Appellant stored on an electronic disk in Adobe Portable Document Format (PDF), all being hand delivered to:

Hon. Betty W. Sephton
Clerk, Supreme Court of Mississippi
450 High Street
Jackson, Mississippi 39201

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellant *via* First Class U.S. Mail, to:

Honorable Jaye Bradley
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Jackson County, Mississippi
Post Office Box 998
Pascagoula, Mississippi 39568

Honorable T. Larry Wilson
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THIS, the 27th day of September, 2010.



JASON B. PURVIS