IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01283-SCT

LAMAR HOOKER — APPELLANT

VS.

STEPHEN C. GREER — APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF
THE SECOND JUDICIAL DISTRICT OF
CARROLL COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

JAMES L. ROBERTSON, MSB N[redacted]
LINDA F. COOPER, MSB No.[redacted]
WISE CARTER CHILD & CARAWAY, P.A.
Post Office Box 651
Jackson, Mississippi 39205-0651
Telephone: (601) 968-968-5500
Facsimile: (601) 968-5593

ATTORNEYS FOR LAMAR HOOKER

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

This appeal involves a heretofore undecided question of law whether a lis pendens notice never filed in any general civil docket is an "action" within the scope and coverage of the Litigation Accountability Act. In this regard, Appellee Greer has raised subsidiary questions that were never considered or decided in the Chancery Court.

The second question on appeal is whether there are genuine issues of material fact which should have precluded the Chancery Court from summarily dismissing Mr. Hooker's Counterclaim. Because the merits of the Counterclaim are intertwined with the question what statute of limitations applies, the Court may find it helpful to have counsel outline the material facts which are in genuine dispute.

For these reasons, Appellant Hooker respectfully requests oral argument.

I. OVERVIEW OF REPLY TO BRIEF OF APPELLEE

In his Brief of Appellee, Stephen Greer never confronts the indisputable legal premise that a lis pendens notice — with no legal effect unless and until a judgment is entered, and then functioning only as a rule of priority among competing lien creditors – is not an "action" within the Litigation Accountability Act ["LAA"], Miss. Code § 11-55-3(c). This first and foremost **error of law** below is a function of the Chancery Court's having treated a lis pendens notice as an "action," and awarding sanctions for its wrongful filing, not in the general civil docket of a chancery court, but in the lis pendens records kept in the clerk's office. See Miss. Code §§ 11-47-1, -3. With respect, the Court should now vacate the Chancery Court's sanctions order and, *en route*, hold as a matter of law that a lis pendens notice is not an "action" within either the LAA and/or Miss. R. Civ. P. 11.

In addition and/or in the alternative, and by reason of Greer's argument on appeal[1] differing considerably from the Chancery Court's ruling and on a point not precisely decided below, this Court should reverse the sanctions order under the LAA's "safe harbor" clause that "[n]o attorney's fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim or defense **within a reasonable time** after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense." Miss. Code § 11-55-5(2). Once Steve Greer filed suit, and thus commenced an

---

[1] Greer gives no hint, in his Statement of Issues or otherwise in his Brief of Appellee, that he believes there is error in the Chancery Court's exercise of its discretion in declining to impose sanctions on Hooker's counsel. See R. 398-99. Nor has Greer filed a notice of cross-appeal. See Miss. R. App. P. 4(c). By reason of Miss. R. App. P. 28(a)(3), the part of the Chancery Court's ruling set out in R. 398-99 is not before the Court on this appeal.

"action," Miss. R. Civ. P. 3, Hooker timely handled the matter. Hooker (a) gave reasonable advance notice that the lis pendens would not be defended and (b) formally canceled the notice of record *before* the hearing. Given the totality of the circumstances, the Chancery Court cannot be said to have abused its discretion in denying sanctions for any real or imagined impropriety in Hooker's Answer denying, at R. 41, the compound allegations in Greer's Complaint, ¶ 10, and Miss. R. Civ. P. 8(a)(2) claim for relief. R. 11.

Greer's attempt to defend the summary judgment below on Hooker's Counterclaim shows nothing more than that at trial Greer may well have defenses he could offer. The Counterclaim pleads "an equitable partnership" between Hooker and Greer, Counterclaim, ¶¶ 3, 4, R.42; "fiduciary duties of trust, loyalty, good faith and fair dealing" among the partners, and in this context, owing from Greer to Hooker, Counterclaim, ¶ 4, R.42; Greer's "breach[], abrogat[ion] and ren[unciation] of his duties," "without legal or equitable justification," Counterclaim, ¶ 6; Greer's unjust enrichment at Hooker's expense, Counterclaim, ¶ 8, R. 43; and a demand for "a constructive trust or equitable lien on all funds or properties held by [Greer], Counterclaim, ¶ 9, R. 43.

The facts in the record add flesh to what Hooker alleged in his Counterclaim, sufficient to meet Hooker's burden of production under Miss. R. Civ. P. 56(c) and (e). Construed as they must be in this combined Rule 56/statute of limitations context, the facts before the Court are more than sufficient that the summary judgment entered on June 29, 2010, must be vacated and set aside. The case must be remanded for trial on the merits of Hooker's Counterclaim where he must be given full opportunity to prove a claim within the ten year statute, Miss. Code § 15-1-39.

II. ARGUMENT IN REPLY

A. The Sanctions Award Against Hooker Must Be Reversed.

1. A Lis Pendens Notice is Not an Action Within the Litigation Accountability Act

a. That the LAA Augments, Not Expands, the Provisions of Rule 11, Supports the Indisputable Legal Premise that the Filing of a Lis Pendens Notice is Not an Action Within the LAA.

In his Brief of Appellee, Greer provides no rationale or authority for the proposition that a lis pendens notice comes within the ambit of the LAA. Nor can he. A look at Miss. R. Civ. P. 11 in relation to the LAA makes this clear. This Court has held that the LAA does not conflict with but merely augments Rule 11 "by stating that the court shall specifically set forth the reasons for awarding attorney fees and costs and enumerates factors which shall be considered by the court." *Stevens v. Lake*, 615 So. 2d 1177, 1184 (Miss. 1993) (LAA authorizes assessment of sanctions for delay or harassment "in litigation."). *See also Rose v. Tullos*, 994 So. 2d 734, 738 (Miss. 2008) (holding as a matter of first impression that the LAA creates no independent right of action, but complements Rule 11); *Mississippi Dept. of Human Services v. Shelby*, 802 So. 2d 89, 96 (Miss. 2001) ("Rule 11 of the Mississippi Rules of Civil Procedure **and** the Litigation Accountability Act of 1988 . . . deal with the filing of frivolous lawsuits.") (Emphasis added.).

Rule 11 sanctions – and by extension, LAA sanctions – are relevant only in the context of a civil action. The Comment to Rule 11 articulates the purpose of the rule "to ensure that the trial court has sufficient power to deal forcefully and effectively with parties or attorneys who may misuse the liberal, notice pleadings system effectuated by these rules." Miss. R. Civ. P. 11 comment. *See also In re Spencer*, 985 So. 2d 330, 339 (Miss. 2008) ("As the rule suggests,

sanctions are appropriate under this rule **only when a motion or pleading has been filed**.") (Emphasis added.)

At no time did Hooker's August 11, 2005 filing of the Lis Pendens implicate the Mississippi Rules of Civil Procedure, including Rule 11. This is readily seen as neither this nor any other related action was commenced until May 28, 2009. See R. 9. Because Hooker never commenced an action following up his Lis Pendens Notice – and never obtained a favorable judgment relating thereto – the Notice was without legal force or effect. See Brief of Appellant at 16-18. Hooker's filing of the Lis Pendens was **not** a motion or pleading within the ambit of Rule 11 or the Litigation Accountability Act – a point Greer never refutes.

b. Greer's Argument that Hooker "Misrepresented" that his Claim Against Greer Was Related to Property in Carroll and Holmes Counties Is Well Wide of the Mark.

Greer makes much ado about "material misrepresentations" Hooker is said to have made "to the public" in filing his Lis Pendens and implies that such "misrepresentations" warrant LAA sanctions. Brief of Appellee at 11, 15. According to Greer, "Hooker knowingly and intentionally misrepresented to the public through the land records of Carroll County that his '$141,000 claim' was related to Greer's property in Carroll and Holmes Counties." Brief of Appellee at 12. Conspicuously absent is any suggestion that anyone was in fact misled, much less that anyone lost the first penny or suffered other legally cognizable harm by reason of the suppositious "misrepresentation." And, of course, the so called misrepresentations were not made in the context of a civil action.

Greer tries to compares Hooker to the *litigant* in *In re Estate of Ladner*, 909 So. 2d 1051, 1056 (Miss. 2004). The attempt only reinforces the legal fact that LAA sanctions are **not**

available here. *Ladner* involved the administration of an estate. This Court upheld the chancery court's award of LAA sanctions against a litigant and his attorney who, *in the course of litigation*, had "misrepresented pertinent facts which were within their knowledge to the chancellor, who entered an order based on the misrepresentations." 909 So.2d at 1056. Nothing like that took place here.

Greer mixes apples and oranges when he suggests that Hooker's filing of a pre-civil action Lis Pendens Notice, without more, makes sanctionable "misrepresentations." The Litigation Accountability Act addresses and makes sanctionable conduct, such as material representations made *to the court*, in the context of *litigation*. The LAA does not reach a lis pendens notice, which, un-acted upon, is a nullity. See discussion in Brief of Appellant at16-18. Had Hooker proceeded *pro se* **in litigation**, he may well have been held to the same standard as if he had proceeded with the benefit of counsel. See *Wheeler v. Stewart*, 798 So. 2d 386 (Miss. 2001) (The Litigation Accountability Act enables a party to recover attorney fees against a*pro se* **litigant.**). But such is not the situation here. Hooker's Lis Pendens commenced no action.

Because, as a matter of law, a lis pendens notice is not an "action," and any representations made in the notice by definition are not made within an "action," the Chancery Court erred when it imposed LAA sanctions against Hooker for the filing of the Lis Pendens.

2. In Addition and/or in the Alternative, the Fact that Hooker "Voluntarily Dismissed" the Lis Pendens Within a Reasonable Time After his Denial of its Impropriety Precludes any Ground for Imposing LAA Sanctions.

a. Hooker's "Voluntary Dismissal" of the Lis Pendens was Done Within a Reasonable Time.

Greer does not confront Hooker's argument that the Lis Pendens is not an "action" within the Litigation Accountability Act. Understandably, Greer does not try to defend the legal premise the Chancery Court acted upon in holding Hooker's Lis Pendens Notice to be sanctionable. Greer now makes a different argument, *viz.*, that Hooker's *denial* of the lis pendens' impropriety in his Answer constitutes an action sanctionable under the Litigation Accountability Act, although with that toe across the starting May 28, 2009 starting line and within an "action," Greer then struggles mightily to make that relate back and incorporate by reference Hooker's unacted upon August 11, 2005 filing of the Lis Pendens.

What Greer ignores is that the LAA's "safe harbor" clause precludes sanctions against a party who voluntarily dismisses a claim or defense within a reasonable time. Miss. Code § 11-55-5(2). As will be shown in detail below, the Chancery Court correctly held that Hooker, through counsel, acted to cancel the Lis Pendens – or, in LAA parlance, "voluntarily dismiss the claim" – within a reasonable time. Where the Chancery Court erred was in awarding sanctions against Hooker for what he did before any action was commenced and *despite* Hooker's revocation — under the totality of the circumstances — within a reasonable time of his denial of any impropriety in having filed the Lis Pendens Notice.

Miss. Code § 11-55-5(2) provides that "[n]o attorney's fees or costs shall be assessed **if a voluntary dismissal is filed** as to any action, claim or defense **within a reasonable time** after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense." (Emphasis added.) Even if the Lis Pendens were an "action," it is undisputed that Hooker "voluntarily dismissed" his "action" – and

"voluntarily dismissed" his denial of Greer's claim – prior to the open court hearing on Greer's motion for partial summary judgment. R. 399.

The only reason Hooker did not cancel the Lis Pendens a good month before the November 11 hearing is that Greer insisted on Hooker paying his attorneys' fees in any event. What is more, Greer never gave a hint that he thought he had a right to such under the Litigation Accountability Act before or after October 7, 2009, when Hooker first advised the claim for cancellation of the Lis Pendens would not be opposed. Greer's first notice that he was claiming under the LAA was made the afternoon of November 11 in open court *after* the Lis Pendens had in fact been cancelled. Greer's stubborn pursuit of an attorneys' fees sanction — never disclosing the legal basis therefor, see R. 11, 58, 149 — is the reason the lis pendens aspect of this matter was not fully resolved prior to the hearing. Contrary to his assertions, Greer was not "forced" to proceed to the hearing, Brief of Appellee at 6. He insisted on the hearing as an effort to get an attorneys fees sanction imposed on Hooker, even though 35 days earlier Hooker through counsel had told him that cancelling the Lis Pendens would not be opposed.[2] The reason for the supplemental briefing after the November 11 hearing was that Hooker understandably claimed surprise, when Greer in open court made his first mention of any thought that the Litigation Accountability Act might apply.

While the Chancery Court based its sanctions award against Hooker on the wrongful filing of the Lis Pendens, it sanctioned Hooker for attorneys fees incurred by Greer both before

---

[2] It is worth emphasizing here that a substantial portion of the sanctions awarded by the Chancery Court were for work done by counsel for Greer *after* counsel for Hooker had advised that Hooker would not contest Greer's claim that the Lis Pendens Notice be cancelled. See discussion in Brief of Appellant at 11.

and *after* Hooker retained counsel on June 24, 2009. R. 399-400. This was error, and for several reasons. For one thing, Hooker did nothing in the context of an "action" before he filed his Answer on June 30, 2009. Second, the Chancery Court exonerated counsel for any actions after June 24, 2009, and Greer has not appealed. See footnote 1, *supra*.

Once Hooker was served with Summons and Complaint, and retained counsel, he and his counsel became in practical effect "joined at the hip" *vis-a-vis* any assessment of sanctions. To decide whether sanctions against Hooker were within the Chancery Court's discretion, once Hooker had retained counsel, this Court must focus on whether Hooker's post-June 24 conduct was objectively reasonable under § 11-55-5(2). *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So. 2d 1041, 1046 (Miss. 2007). The timeline of relevant events makes clear that Hooker acted reasonably under the totality of the circumstances and, at the very least, the Chancery Court did not abuse its discretion in its ruling regarding the post-June 24 aspect of the lis pendens issue.

1. On May 28, 2009, Greer filed his Complaint to Remove Cloud on Title and asked "for a judgment cancelling that certain Lis Pendens dated August 11, 2005" and recorded in the Lis Pendens docket of Carroll County. R. 11.

2. On June 24, 2009, Hooker retained present counsel for the purpose of responding to Greer's Complaint. R. 398. With only a few days left in the 30-day time limit, Miss. R. Civ. P. 12(a) and with numerous pending but unrelated professional commitments, counsel for Hooker prepared a good-faith Answer and Counterclaim. A careful look at Hooker's Answer, shows that counsel for Hooker reasonably denied, at R. 41, the allegations of Complaint, ¶ 10, and claim for relief, R. 11, which alleged, "Plaintiff is entitled to have this Lis Pendens cancelled

of record by this Court and the costs of this action, together with attorney fees for its filing, assessed against Defendant Hooker." Until such time as so recently retained counsel had time to learn the full facts of the matter, counsel prudently denied this compound allegation.[3]

3. On June 30, 2009, Hooker, through counsel, filed his Answer and Counterclaim. R. 40.

4. Through the Summer months of 2009, counsel for both parties necessarily focused their efforts[4] on the Counterclaim, not to Greer's Complaint to Remove Cloud on Title, *viz.*,

On July 29, 2009, Greer filed his Answer to Defendant's Counterclaim, R. 48, and his Motion to Dismiss Counterclaim, R. 53, and

On September 10, 2009, after an agreed enlargement of time, Hooker filed his Response in Opposition to Greer's Motion to Dismiss Counterclaim, with substantial evidentiary, Miss. R. Civ. P. 56(c), and other documentary support. R. 102-137.

During this period of time, counsel for Hooker worked to present — in Miss. R. Civ. P. 56(c) and (e) sufficient form – the facts related to Hooker's partnership with Greer and Greer's actions that led to his unjust enrichment.

5. On October 1, 2009, Greer filed a Motion for Partial Summary Judgment seeking entry of an order "direct[ing] the Chancery Clerk of Carroll County to cancel the Lis Pendens Notice on the property" described therein. R. 144-150. This Motion said nothing about Greer's claim for attorneys fees, under the LAA or any other premise.

---

[3] Miss. R. Civ. P. 8(b) authorizes the use of a general denial "subject to the obligations set forth in Rule 11," of which "[g]ood faith and professional responsibility are the bases."

[4] During the Summer of 2009, defense counsel were fulfilling many professional engagements unrelated to Greer vs. Hooker, as no doubt were counsel for Steve Greer.

6. On October 7, 2009, **six days later**, counsel for Hooker advised counsel for Greer that Hooker would not contest Greer's claim that the Lis Pendens Notice should be cancelled. R. 346-347. Greer confirms this date and notice. Brief of Appellee, at 29, item 7.

7. On November 3, 2009, Hooker – again through counsel and via e-mail – reaffirmed his prior representation that he would not oppose Greer's claim that the Lis Pendens Notice should be cancelled. R. 348.

8. On November 9, 2009, Hooker – again through counsel and via email – clarified his prior representations that, while he would not oppose Greer's claim that the Lis Pendens Notice should be cancelled, he would oppose Greer's claim for attorneys fees. R. 350.

9. On the morning of November 11, 2009, Hooker formally cancelled the Lis Pendens of record in the office of the Chancery Clerk of Carroll County in Vaiden, Mississippi. A copy of the cancelled Lis Pendens notice was produced at the hearing and received into evidence without objection. R. 219.

10. On the afternoon of November 11, 2009, in open court Greer **for the first time** made mention of the notion that Hooker should be sanctioned under the LAA and assessed with Greer's attorneys fees.

In candor, once the undersigned James L. Robertson learned that the lands against which the Lis Pendens had been placed had not been partnership assets, he knew that the Lis Pendens Notice would be difficult, if not impossible, to defend. On the other hand, Greer's Complaint, ¶ 10, and claim for relief, R. 11, 58, contained compound allegations of fact and law, the attorneys fees component of which was factually without merit, was supported by no credible legal premise, and which Hooker denies to this day.

Hooker's answer was due six days after he retained counsel. In this setting, counsel was entitled to protect his client and deny the compound allegation of Complaint, pending exploration of all possible defenses, including, *inter alia*, laches. After all, a party such as Greer was charged in law with knowledge of that which had been of public record in the Chancery Clerk's office since August 12, 2005 — some **three years, nine and a half months** before Greer filed suit. *See e.g. McCuiston v. Blaylock*, 61 So. 2d 332, 334 (Miss. 1952) (third party charged with notice of all the terms of the deed which had been placed of record); *Howard v. Wactor*, 41 So. 2d 259, 261 (Miss. 1949) (party charged with constructive notice of real property-related issues that had been made a matter of public record). Greer has never claimed he lost any sales or suffered any other legally cognizable harm as a result of the Lis Pendens Notice being of record in the Chancery Clerk's office in Carroll County from and after August 12, 2005.

The net effect of Greer's position is that a sanction should be imposed for filing an answer with a denial that counsel knows might be difficult to defend, in a context where the complaint disclosed no credible factual or legal basis upon which attorneys fees might be awarded, and then not advising counsel opposite for a little over three months that the point would be conceded. With respect, if Greer's position is the correct reading of the LAA, even handed justice demands that sanctions be imposed consistently to all similar claims and defenses, and in all cases across the board.[5] [As explained below, Greer made and persisted in an allegation in his Complaint which, with all due deference, may be more specious than Hooker's denial of Complaint, ¶ 10.] For present purposes, at no point did Greer, via interrogatory or request for

---

[5] See generally Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 Miss. College L. Rev. 111 (1988).

admission, seek clarification of the factual basis for Hooker's denial. It is incumbent upon a party who would move for attorneys' fees to mitigate his own damages.

Leave aside Greer's 11th hour, 59th minute assertion of the Litigation Accountability Act. To support an LAA award of attorneys fees against counsel for Hooker, the Chancery Court had to find that counsel for Hooker asserted a defense 1) "without substantial justification," i.e. "Frivolous, groundless in fact or in law, or vexatious," 2) for the purpose of "delay or harassment," or 3) "to unnecessarily expand the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures." Miss. Code § 11-55-5(1). The Record reflects no such conduct. *See Illinois Central Railroad Co. v. Broussard*, 19 So.3d 821, 823-24 (¶13) (Miss.Ct.App. 2009) (Court was within its discretion to deny sanction of attorneys fees against employee's attorneys even though employee was deceased at time of filing claim because plaintiff's attorneys were "not guilty of the type of egregious conduct required by the [Litigation Accountability] Act and Rule 11 so as to warrant the assessment of attorney[s'] fees and expenses." Greer has not – and in good faith cannot – argue that counsel for Hooker acted in bad faith or in dereliction of their professional responsibilities. The sanctions award must be reversed.

b. The Chancery Court's Ruling that Hooker, Acting Through Counsel, Undertook a "Timely Defense" of Greer's Claim May Only be Reviewed for Abuse of Discretion.

The Chancery Court agreed that counsel for Hooker acted reasonably in defending Greer's claim. When awarding LAA sanctions, the trial court is required by statute to set forth the factual basis for the awarding of attorneys' fees, using the factors set forth therein. Miss. Code § 11-55-7. *See also Miss. Dept. of Human Services v. Shelby*, 802 So. 2d 89, 97 (Miss.

2001) (reversing award of sanctions on basis that chancellor failed to support LAA sanctions award with specific findings). Here, the Chancery Court applied the relevant factors, R. 398-400, and made clear that it was awarding sanctions for Hooker's "frivolous claim through the filing of the lis pendens in Carroll County, Mississippi," R. 398, ***not*** for any denial of the lis pendens' impropriety.

The Chancery Court expressly rejected any notion that LAA sanctions should be assessed for Hooker's denial in his Answer of the impropriety of the lis pendens. "[T]he chancellor possesses the best position to evaluate frivolity and determine the facts." *In Re Guardianship of Buckalew*, 2011 WL 590361, *4, ¶ 19 (Miss.Ct.App. 2011). Here, the Chancery Court reasoned that counsel for Hooker undertook a "timely response and inquiry, including Requests for Production of Documents, in an attempt to establish a factual basis for the defense of their client." R. 399. The Chancery Court also properly noted that "[t]he offer [by counsel for Hooker] to confess the motion for Partial Summary Judgment without attorney fees was made prior to the hearing in Carroll County Chancery Court, Vaiden, Mississippi on November 11, 2009." *Id.* Specifically, the Court found that counsel for Hooker "exercised due diligence in determining the facts upon which to base a defense of their client and acted appropriately under a severe time constraint and no attorneys fees will be assessed against the attorneys individually and/or the firm." *Id.; see again, Guardianship of Buckalew*, 2011 WL 590361, *4, ¶ 19 (Miss.Ct.App. 2011).

This Court should review *de novo* the Chancery Court's determination of law that the improper filing of a lis pendens notice, without more, is sanctionable. When reviewing the imposition *vel non* of LAA sanctions, however, this Court is limited to considering whether the

Chancery Court abused its discretion. *Wyssbrod v. Wittjen*, 798 So.2d 352, 357 (¶17) (Miss. 2001) (abuse of discretion standard of review); *Scruggs v. Saterfiel*, 693 So. 2d 924, 927 (Miss. 1997) (reviewing the prior case law stating that the imposition of sanctions raises a question of law but concluding that the abuse of discretion standard applies as to an award of LAA sanctions); *Leaf River Forest Prods., Inc., v. Deakle*, 661 So. 2d 188, 197 (Miss. 1995) (same); *In Re Guardianship of Buckalew*, 2011 WL 590361, *3, ¶ 16 (Miss.Ct.App. 2011) (same). Abuse of discretion occurs where a chancery judge was manifestly wrong, clearly erroneous, or applied an erroneous legal standard to the facts at hand. *In re Estate of Johnson*, 735 So. 2d 231, 236 (Miss. 1999). The Chancery Court's decision that Hooker through counsel acted reasonably in defending Greer's claim and ultimately "dismissing" the Lis Pendens was an appropriate exercise of that Court's discretion. There being no grounds for suggesting that discretion was abused, this Court should reject so much of Greer's effort to get the sanctions order affirmed as rests on Hooker's post-June 24 conduct. Rather, this part of the Chancery Court's ruling must be upheld on appeal, and not just for the reasons set out in footnote 1, *supra*.

c. A Broader Policy Point: The Shoe is Sometimes on the Other Foot

Greer predicated much of his lawsuit against Hooker, and the substantial attorneys' fees he subsequently incurred, on Hooker's failure to respond to a purported January 6, 2009 letter demanding that Hooker cancel the Lis Pendens.[6] R. 11. In his Complaint, Greer alleges that, "through his attorney, [he] notified Defendant Hooker of the impropriety of this Lis Pendens by

---

[6] Greer maintains that he filed his Complaint after sending pre-suit letter [asking Hooker to cancel the lis pendens]. R. at 398. However, the Chancery Court correctly found that "[a] copy of the signed noticed letter was never produced even though a Request for Production of documents was timely filed by Wise Carter." R. 398.

letter dated January 6, 2009, and asked that it be promptly removed before it adversely affected a potential sale of the property." Complaint, ¶ 9, R. 11. We accept that at the time they filed the Complaint, counsel for Greer believed that such a demand letter had been sent. See Miss. R. Civ. P. 11(a) ("The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it . . . .") But Hooker never received any such letter. R. 258. That is why Hooker asked for a copy of "the letter" in his request for production of documents served June 30, 2009. R. 253-254. In response, Greer produced only what is obviously an unsigned draft of a letter that included notes to Greer from his lawyer. R. 256-257.

We accept that Plaintiff's Response to Defendant's Requests for Production produced all Greer had. It has the practical effect of establishing that no such letter was sent, much less received by Hooker. Greer should have either produced a copy of the actual document he claims was sent, or he should have admitted right then and there that no such letter was ever sent. In the alternative, Greer could have filed an affidavit clarifying the circumstances surrounding the purported letter. After all, counsel are under a continuing duty to supplement discovery responses as appropriate. See Miss. R. Civ. P. 26(f).

Greer's continued refusal to admit that no pre-suit letter was sent calls to mind the familiar parable of people in glass houses when we get to Greer's insistence that Hooker unreasonably failed for three months to cancel the Lis Pendens. The term "frivolous" seems more appropriately applied, not to Hooker's Answer, but to Greer's transparent maneuver to tax Hooker with litigation costs that could have been avoided by inexpensive pre-suit measures. The Litigation Accountability Act provides no remedy for Greer's self-inflicted injury.

B. Genuine Issues of Material Fact Preclude Affirmance of The Summary Judgment Dismissing Hooker's Counterclaim

1. Overview of Greer's Legally Erroneous Approach

The tipoff is in first clause of the title Greer gives his argument for affirming dismissal of Hooker's Counterclaim, *viz.*,

> **B. Hooker Fails to Establish By Clear and Convincing Evidence That a Constructive Trust Arose; etc.**

Brief of Appellee, at page 20. But Hooker is not required to establish any such thing at this summary judgment stage, much less by clear and convincing evidence. Hooker's burden is to show only enough that, if credited by the Chancery Court at a plenary trial on the merits, his evidence may establish his Counterclaim by the requisite burden of proof. At pages 20-32 of his Brief of Appellee, Greer shows only that, at trial, he has points to make in defense that may have merit. All Greer has established is that, if Hooker had moved for partial summary judgment on the liability phase of his Counterclaim, that motion would have had to be denied.

Lamar Hooker is not required to accept — and the Court cannot consistent with Rule 56 accept — Greer's assertion that the partnership lost "over $500,000" and that the partnership "had made no profit off the islands." Brief of Appellee, at 21. If nothing else, that is utterly inconsistent with Greer's offer in his letter of September 15, 2003, to "render a final accounting of the approximately $100,000.00 operating expense contribution you have made . . . ," subject to an odd condition, *viz.*, Hooker's providing "sufficiently detailed records for IRS tax purposes." R. 125.

Though Greer tries to spin the facts in his favor — impermissibly in this summary judgment context — he shows nothing that undermines the Chancery Court's assertion that the

parties essentially agree on the nature and extent of their business relationship, *i.e.*, that "their facts, with the exceptions of 'labeling' of the arrangement, are fairly consistent." R. 527. This is one of many points that makes the Chancery Court's denial "that there was a partnership," R. 534, so inexplicable.

2. Summary of Material Facts Hooker Has Shown Supporting His Counterclaim

On September 15, 2003, Greer "suddenly, without prior notice, and without legal or equitable justification or excuse, breached, abrogated and renounced all of his duties to [Hooker]." R. 42, Counterclaim, ¶ 6. Hooker's affidavit establishes that this happened. R. 112, 124-25. Given Greer's fiduciary duty to Hooker, see Brief of Appellant, at 40-42, Greer more than sufficiently pulled the rug from under Hooker, and took unfair advantage of his unsuspecting partner's reasonable reliance. This was a wrongful act by which Greer seized control of all partnership assets and brought his conduct within the rules of the cases cited and discussed in the briefs heretofore, e.g., *McNeil v. Hester*, 753 So.2d 1057, 1064 (Miss. 2000); *Griffin v. Armana*, 687 So.2d 1188, 1195 (Miss. 1946); *Wholey v. Cal-Marine Foods, Inc.*, 530 So.2d 136, 140 (Miss. 1988); and *Sojourner v. Sojourner*, 153 So.2d 803, 809 (Miss. 1963), albeit acknowledging a duty to Hooker to "render a final accounting of the approximately $100,000.00 operating expense contribution you have made" R. 125.

It was at the moment on September 9, 2003, when Greer seized the parties' assets, and effectively terminated the Hooker's opportunity to pursue further parties' venture, that a constructive trust arose to protect Hooker's interest. *See Allred v. Fairchild*, 785 So. 2d 1064, 1067 (Miss. 2001) (broker of oil, gas and mineral leases was entitled to imposition of

constructive trust on lessee's leasehold rights, where broker and lessee had a confidential relationship based on 20 years' business dealings). As Greer says he has long since disposed of the assets he seized, Hooker's equitable lien extends to the proceeds of those assets.

3. A Few Words Why, Having Shown The Requisite Material Facts, Hooker Is Entitled To The Opportunity To Prove At Trial A Claim Subject Only To § 15-1-39's Ten Year Statute Of Limitations

A rereading of Part III of Brief of Appellant, pages 31-46, is close to being sufficient to refute the argument Greer now offers why Hooker's Counterclaim should have been held subject to and barred by the three year statute of limitations. Miss. Code §§ 15-1-29, -49(1). We show in Part III that Greer failed to establish below that there are no genuine issues of material fact on the matter of whether Hooker has a viable claim for unjust enrichment against his former partner, such that a constructive trust should be imposed on partnership assets and, if Greer has disposed of them, the proceeds of such assets. To the point, Hooker has made a legally sufficient Rule 56(c) & (e) showing, under which his claim is governed only by the ten year statute of limitations, Miss. Code § 15-1-39.

We have explained in detail how the Chancery Court time and time again characterized the relationship between Greer and Hooker as a partnership. See Brief of Appellant, at 33-36. On those same pages we show that there is much more evidence than the Chancery Court acknowledges that Greer and Hooker were partners. After all, in this summary judgment context, on this point the Court was required to give Hooker, not Greer, the benefit of reasonable favorable readings of the facts and inferences.

Greer never mentions, much less does he dispute, that whether a partnership existed between Hooker and Greer in 2002-03 is governed by Mississippi's Uniform Partnership Law,

Miss. Code §§ 79-12-1 to - 119 (prospectively repealed in 2004) (defining partnership as "an association of two or more persons to carry on as co-owners a business for profit," Miss. Code § 79-12-11). This statute codified the common law rules of partnership, *Hults v. Tillman*, 480 So. 2d 1134, 1144 (Miss. 1985), though the common law still supplemented the statute in determining when a partnership exists. *Smith v. Redd*, 593 So. 2d 989, 993 (Miss. 1991).

In pertinent part, applicable partnership law provides, "Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, **including those to partners**, are satisfied . . . ." Miss. Code § 79-12-35(1) (Emphasis added.) The statute also provides that "[t]he partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property." In our present summary judgment context, it is a reasonable inference favorable to Hooker that the "approximately $100,000" that Greer admits he probably owes Hooker includes proceeds of any partnership assets that Greer may have disposed of. R. 124-125; Tr. 28.

Because there were only two partners, Greer's dissociation of Hooker from the partnership effectively dissolved the partnership. "The dissolution of a partnership requires the settling of accounts." *Cuevas v. Kellum*, 12 So. 3d 1154, 1157 (Miss. App. 2009). Partners are accountable to each other as fiduciaries. *Wholey v. Cal-Marine Foods, Inc.*, 530 So.2d 136, 140 (Miss. 1988).

Pursuant to Miss. Code § 79-12-43(1)(a) (prospectively repealed in 2004), "any partner shall have the right to a formal account as to partnership affairs: (a) [i]f he is wrongfully

excluded from the partnership business or possession of its property by his copartners."[7] A formal account of a partnership . . . should contain, at minimum, the partnership's disbursements and receipts of money." *Cuevas*, 12 So. 3d at 1158. When Greer suddenly and without cause breached the partnership agreement, Hooker became entitled to just such an accounting. "Greer has no way around the fact that, in practical effect, he admits as much in his letter of September 15, 2003. Partnership property must be disposed of at dissolution. Partnership assets, including partnership property and **partner contributions** are subject to the liabilities of the partnership. Miss. Code § 79-12-79(a) (prospectively repealed in 2004) (emphasis added.)

Past these points, a rereading of Part III of Brief of Appellant, pages 31-46, is sufficient to show that there are sufficiently supported genuine issues of material fact, such that the Chancery Court was without authority to summarily decide that Hooker could prove no claim at trial that would have been subject only to the ten year statute of limitations of Miss. Code §§ 15-1-39.

III. CONCLUSION

For the reasons set forth in Brief of Appellant, as augmented hereinabove, the Court should reverse the Judgment On Motion For Partial Summary Judgment entered March 22, 2010, and render judgment here finally dismissing Greer's claims for attorneys fees and legal expenses, and absolving Hooker of any liability or responsibility in the premises.

For the reasons set forth in Brief of Appellant, as augmented hereinabove, the Court should reverse the Final Judgment entered on June 29, 2010,

---

[7] The repealing statute contained a savings clause that states "this chapter does not affect an action or proceeding commenced **or right accrued** before this chapter took effect," so any right created in the partnership during the life of the statute is not lost by its repeal. See Miss. Code § 79-13-1206. (Emphasis added).

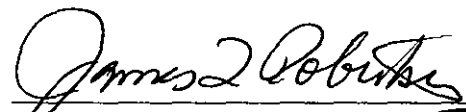
(A) On Plaintiff/Counter-Defendant's Motion For Summary Judgment, granting the same, and

(B) On Defendant/Counter-Claimant's Motion For Partial Summary Judgment, denying the same,

and remand the case for full trial on the merits of Hooker's Counterclaim, specifically holding that the only statute of limitations applicable thereto is the ten year statute, Miss Code Ann. § 15-1-39.

Respectfully submitted, this the 11th day of July, 2011.

LAMAR HOOKER

BY: 

JAMES L. ROBERTSON, MSB [redacted]
LINDA F. COOPER, MSB [redacted]
Post Office Box 651
Jackson, MS 39205-0651
Telephone: (601) 968-5500
Facsimile: (601) 968-5593

OF COUNSEL:

WISE CARTER CHILD & CARAWAY
Post Office Box 651
Jackson, MS 39205-0651
Telephone: (601) 968-5500
Facsimile: (601) 968-5593