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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument would be immensely beneficial in assisting this Court to obtain a grasp and complete understanding of the environment and atmosphere within which the events described herein unfolded and will provide the Court with additional insight into the extent to which Appellee attempts to rely upon unsupported facts to justify suing only five of the seven members of the city council. Further, Appellants believe that oral argument will be immensely beneficial to the Court in demonstrating how the lower court erred in denying their motion for sanctions, fees and expenses. This is a case where a lawsuit was filed against certain parties when Appellee and her attorney both knew that the claim had no hope of success. The lawsuit was filed not to seek justice but for reasons prohibited by Rule 11 and the Litigation Accountability Act. If there were ever a classic case for the awarding of sanctions, then this is the case. Oral argument will aid this Court in making this finding.

The decision of the lower court, if not corrected, will have vital ramification for parties defending frivolous lawsuits because it conveys the illusion that fees and expenses may rarely be imposed against a sanctioned party.

Further, this Court is encouraged to find that the lower court's findings of facts regarding Appellants' refusal to be dismissed from the lawsuit are clearly erroneous and a manifest error.

Finally, this Court is requested to reverse the decision of the lower court and enter its order granting an award for the total amount of fees, cost and expenses requested by Appellants since these matter are uncontested on this appeal.

I. LEGAL ARGUMENT AND AUTHORITIES

Appellants contend that the sole issue before this court is whether the lower court erred in its decision denying their motion for sanctions and fees. They answer this issue in the affirmative. Appellant hereby reply to these fourteen issues of appellee.

A. ISSUE ONE

Appellee contends that Appellants' Motion for Sanctions, Fees and Cost was untimely and should have been dismissed. This contention which is now being advanced by Appellee was raised for the first time on direct appeal. The record is devoid of any objection ever raised to the Motion for Sanctions on the basis of timeliness. The record reveals in their Answer and Affirmative Defenses, Appellants placed Appellee and her attorneys on notice that the lawsuit against them was "patent frivolous, meritless, and without any sound foundation in law or fact and brought vexatiously for the sole purpose of intimidation, harassment, humiliation, embarrassment and to multiply fees, costs and expenses in this proceeding." (R. 55)

Also, during the discussion on Appellee's proposal to dismiss the Appellants without prejudice on the date of the August 17, 2009, hearing, Appellants again placed Appellee and her attorneys on notice that they will pursue sanctions against them.

The Opinion and Order of the court dated August 26, 2009, was not a final order. The court stated in its Opinion and Order as follows:

> "[t]here are two issues before the court for determination.

> First, whether or not the termination letter to Attorney Littleton of July 6, 2009 Permanently terminated his his tenure as City Attorney and thus negated any hold over provisions as provided for in the Miss Code Annotated, Section 25-1-7 (1972), and secondly, whether or not the council members are entitled to cost and expenses if the complaint against them, is dismissed." (R.E.2-3; R.80-81) (My Emphasis Added)

After the lower court dismissed Appellee's Complaint against all defendant city council members, the lower court stated in the Opinion and Order entered on August 26, 2009 that it "reserve[d] for subsequent hearing any award to them as to costs, expenses and attorneys fees." (R.E. 2-4). This Order did not state any deadline for the filing of any request for fees, costs and expenses.

Finally, in the Opinion and Order denying sanctions entered by the lower court on July 14, 2010, there is no finding that the motion for sanction was untimely filed. (R.E. 5 & 6).

Appellee cites *Russell v. Lewis Grocer Co.*, 552 Sol2d 113 (Miss. 1989) for the proposition that the Motion for Sanctions was treated as Rule 59(e) motion to alter or amend a judgment and had to be filed within ten (10) days after entry of the judgment.

Also, she cites *Telford v. Aloway,* 530 So.2d 1179 (Miss. 1988) stating a trial court has no jurisdiction to consider an untimely Rule 59(e) Motion. These authorities are not applicable to the facts in the principal case because the Opinion and Order entered by the lower court on August 26, 2009, was not a final order. The court specifically identified the two issues to be addressed and reserved the right for subsequent hearing for appellant on any award to them as to cost, expenses and

attorney's fees.

It should be noted that there are authorities which consider requests for fees and costs to be outside Rule 59(e).

In *Bruce v. Bruce*, 587 So.2d 898 (1991), this Court determined that " . . . motions for reassessment of costs or for attorneys fees lie outside Rule 59(e), because they are "collateral" and do not seek a change in the judgment but "merely what is due because of the judgment." Citing *Buchanan v. Stanships, Inc.*, 485 U.S. at 267-68, 108 S.Ct. at 1131, 99 L.Ed.2d at 293-94; *White v. New Hampshire Dept. of Employment Security*, 455 U.S. at 451, 102 S.Ct. At 1166, 71 L.Ed.2d at 331.

587 So.2d at 903.

As previously stated, Appellee raised this matter for the first time on appeal. She voiced no objection as to timeliness in the court below. Generally, matters raised on appeal for the first time is barred from consideration. See *Regan v. South Central Regional Medical Center*, 47 So.2d 651 (MS S.Ct. 2010). This Court held the Appellant's argument that the lower court erred in failing to grant her relief under Rule 60(b)(4) was raised for the first time on appeal and is therefore barred from consideration. This argument of Appellee is without merits. Since, Appellee failed to raise any objection as to the timeliness of the Motion for Sanctions in the lower court, she is barred from raising this issue for the first time on appeal.

B. ISSUE TWO

Appellee has been for some time grappling with straws trying to justify why she sued the five African American City Councilmen, despite the fact she made no

allegations against them in her Complaint nor did she seek any relief against them. At pages 10-15 of her Brief, she contends they were sued because of her interpretation of Appellants' Answer to the Complaint and statements of their attorney made during the hearing on August 17, 2009. Based upon these two factors, Appellee concluded that these Appellants took the position that James Littleton had a right personal to him to hold over and the mayor had no lawful right to fire him. There are two major and serious problems with this unreasonable and illogical conclusion reached by Appellee.

First and quite obvious, Appellee had sued Appellants prior to their Answer being filed and prior to argument of their counsel. Appellee filed her lawsuit on July 20, 2009. Appellants filed their Answer & Affirmative Defense to the Complaint on August 3, 2009. The hearing in which their counsel made certain remarks did not occur until August 17, 2009. Even if Appellee had foresight to tell the future, the reasons offered as basis for suing Appellants will not hold. The cows were already out of the barn.

Despite the fact that the quotes from pleadings and oral argument of attorneys are after the fact, still Appellee misinterpreted them. The clear reading of Appellants statement was Section 25-1-7, MCA (1972), as amended, granted a city attorney the right to holdover <u>but the City Council Defendants do not play any role whatsoever in the hold-over city attorney position.</u> (Emphasis Added). See page 13 of Brief of Appellee.

Second, Appellee is unable to produce any official minutes of the Greenwood City Council to support any allegations taken by Appellants to justify her reasons for suing them. They were sued inter alia by Appellee because on July 6, 2009, they rejected Appellee's nomination of the Law Firm of Abraham & Rideout as city attorney by a 5 - 2

vote. This is the same law firm which sued Appellants and is representing Appellee on appeal before this Court.

Appellee's attempt to justify suing Appellants based upon allegations which had not even taken place at the time of the filing of her complaint, clearly proves the meritless and frivolous nature of her lawsuit. An award of sanctions, fees, and costs was appropriate and should have been granted by the lower court.

C. ISSUE THREE

At page 15 of her brief, Appellee contends that two council members who were not sued took the position that the mayor had the right to fire Littleton and Littleton had no right to hold over after he had been fired.[1] Appellee merely quoted their identical affidavit as an attempt to prove that they were against Littleton as a holdover city attorney. The Affidavit of Lisa Cookston is dated January 6, 2010, (R. 209-210) and the Affidavit of Johnny Jennings is dated January 6, 2010, (R. 212-213). Each affidavit was given in support of Appellee's Response and Memorandum of Law in Support of her opposition to motion for sanctions which was filed on January 7, 2010.

The respective affidavits of Cookston and Jennings were obtained as a last minute effort by Appellee to coverup her true motivation for suing Appellants. Appellee brought forth no official minutes of the Greenwood City Council to substantiate the position Cookston and Jennings contends they shared about Littleton as holdover city

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[1]The two council members referred to by Appellee are Lisa Cookston and Johnny Jennings. They are the only two whites and republicans serving on the Greenwood City Council. Also, they voted in favor of Appellee's nomination to hire the Law Firm of Abraham & Rideout as city attorney. They were not made a party to the lawsuit.

attorney.

In reply to their affidavits, Appellants gave their individual affidavits refuting allegations of Cookston and Jennings. See Affidavit of David Jordan, (R. 260-261); Affidavit of Ronnie Stevenson, (R. 262-263); Affidavit of Carl Palmer, (R. 264-265); Affidavit of Charles McCoy, Sr., (R. 266-267); and Affidavit of Tennill Cannon, (R. 268-269). Appellant Ronnie Stevenson is president of the Greenwood City Council and his affidavit clearly disputes and refutes the position stated by Cookston and Jennings in their affidavits.

Appellant Stevenson stated as follows:

> I am the duly elected and qualified councilman for Ward Three of the City of Greenwood, Mississippi. Also, I serve as president of the Greenwood City Council.
>
> At no time after July 6, 2009, has the Greenwood City Council taken a vote or position on Defendant James Littleton right vel non to hold over as City Attorney.
>
> At no time after July 6, 2009, did Councilpersons Johnny Jennings or Lisa Cookston object to or sought recognition to move that James Littleton is not the City Attorney for the City of Greenwood.
>
> At no time since July 6, 2009, did Councilpersons Johnny Jennings or Lisa Cookston inform me as president of the Council that it was their position that once Carolyn McAdams sent her July 6, 2009 letter to Littleton that Littleton had no right to hold over as City Attorney.
>
> The plaintiff McAdams through her attorney, Lee Abraham and his law firm, brought this lawsuit only against the five (5) council members who are African American and Democrats. She did not sue the two (2) white Republican council members. McAdams' choice for City Attorney, Lee Abraham was rejected by the City Council by a 5 - 2 vote, with the five African-American council-person defendants in this lawsuit voting against the nomination.

(R. 262-263)

D. ISSUE FOUR

The contention advanced by Appellee at pages 15 - 16 under a purported Issue Four warrants no discussion.

E. ISSUES FIVE & SIX

There are no issues stated under Five & Six of Brief of Appellee. She merely cites certain cases and quotes from certain cases involving the law of declaratory judgments. These cases are from the States of New Jersey, Alabama, Virginia, Iowa, New York and the District of Columbia (D.C.). Appellee cites no Mississippi case or authorities on this so-call issue that declaratory judgments are routinely used to resolve disputes surrounding appointment and discharge of public officers. In addition, these cases are not applicable to this case because Appellee has failed to point to any fact to support a declaratory judgment against Appellants. A review of her pleadings reveals that no allegations were made to seek either injunctive relief or declaratory relief against Appellants. (R. 2 -29). It is crystal clear that Appellee only had a problem with Appellants because they rejected her nomination for city attorney.

F. ISSUE SEVEN

Appellee contends that she needs only to demonstrate the "ripening seeds of a controversy" to establish grounds for declaratory judgment. She cites five (5) State Court cases from Texas to support this contention. She provides no analysis of either case. Also, Appellee provides no facts relevant to any principle of these cases. She

cites no case from Mississippi accepting any principle ruling of any of the Texas cases. Appellee argues at page 13 of her brief that Littleton could not be "rehire[d] . . . by council election without mayoral appointment (as the council had attempted in 1991 and which the Supreme Court held illegal in *Jordan v. Smith*) . . ." There is nothing in the record to support any effort of the Greenwood City Council to rehire Littleton as city attorney or in any position. Further, her pleadings lack any allegation that the city was trying to rehire Littleton without the mayoral nomination. Appellants know that Appellee is not relying upon a non-issue in *Jordan v. Smith* which occurred in 1991 (some 20 years ago) as her basis to say that she has demonstrated the "ripening seeds of a controversy" to establish grounds for declaratory judgment. Appellee just took the office of mayor on July 6, 2009, and fourteen (14) days later she sued Appellants. There is no such demonstration by Appellee of any "ripening seeds of controversy" to establish grounds for declaratory judgment against these Appellants. The Texas cases cited by her, assuming this Court would even recognize them, lend no support to any facts in the record of this appeal. The Texas cases relied upon by Appellee are a solution looking for a problem.

G. ISSUE EIGHT

Appellee contends that she sought six (6) declarations of declaratory relief against the five council members (Appellants) and all six (6) declarations had both a legal and a factual basis. A review of Appellee's pleadings (complaint and application for injunctive relief) reveals that her allegations and request for relief were solely against James Littleton. On this appeal, Appellee now contends she sought declaratory relief

against Appellant.

The premises of her complaint states as follows:

> WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays that this her Verified Complaint would be received and filed and that after consideration thereof the Court would:
>
> (A). Enter a declaratory judgment declaring: . . .

(R. 8).

There is no reference in this premises to indicate this relief was sought against Appellants, especially since the complaint lacked any affirmative allegation of wrongdoing by Appellants, other than they voted down the nomination of the law firm of Abraham & Rideout as city attorney. (R. 4)

Again, without specifying which defendant she was seeking relief against, Appellee requested the Court to enter a declaratory judgment declaring:

1. That Carolyn McAdams has terminated James Littleton as the City Attorney for the City of Greenwood and that when she did so, she was acting within her lawful authority as the Mayor of the City of Greenwood;

2. That James Littleton no longer holds the office of Greenwood City Attorney;

3. That the office of Greenwood City Attorney is now vacant;

4. That, in the absence of a nomination by Mayor Carolyn McAdams of James Littleton to serve as the Greenwood City Attorney, the Greenwood City Council has no authority, statutory or otherwise, to hire James Littleton to act as City Attorney for the city of Greenwood;

5. That the Greenwood City Council has no authority, statutory or otherwise, to hire James Littleton as an attorney to represent and/or advise the Greenwood

City Council or members of the Greenwood City Council acting in their official capacities as member(s) of the Council; and,

6. That the Greenwood City Council has no authority, statutory or otherwise, to hire James Littleton to represent or advise the city council under the guise of hiring him as a Clerk or Assistant Clerk for the Council.

(R. 8 - 9).

At pages 21 and 22 of her brief, Appellee changed the wording of two of these declarations[2] as follows:

. . .

2. That, after Mayor McAdams letter of termination, James Littleton no longer held the office of Greenwood City Attorney.

3. That the office of Greenwood City Attorney, after Mayor McAdams fired James Littleton, was then vacant.

. . .

As to declaration numbered 3, both Appellants and James Littleton agreed through pleadings and at the August 17, 2009-hearing, that there was a vacancy in the office of the Greenwood City Attorney. (R. 55, 60, 62, 69, 110, 112, 114-115). Appellants were waiting on Appellee to make a nomination. She eventually did so, only after she brought this frivolous lawsuit against them. The council approved her nomination of Donnie Brock as the city attorney. *Littleton v. McAdams*, 2009-CA-01197-SCT (April 28, 2011).

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[2]Appellants hereby underline the changes in the Brief of Appellee so they can be compared with the actual stated declarations in the Complaint.

The first three so-called declarations sought by Appellee did not in any remote manner involve Appellants. Certainly, the seeking of declaratory relief on these three declarations should have never been a basis for a lawsuit against them. As to the remaining declarations (4 - 6), no facts are alleged in the complaint to seek any such declaratory relief against Appellants. Appellee did not allege nor present any evidence that Appellants voted to hire James Littleton to act as city attorney (Declaration #4); or voted to hire James Littleton as an attorney to represent and/or advise the Greenwood City Council or member of the Greenwood City Council acting in their official capacities as members of the council (Declaration #5); or voted to hire James Littleton to represent of advise the City Council under the guise of hiring him as a Clerk or Assistant Clerk for the Council (Declaration #6).

At pages 22 and 23, Appellee cites *Jordan v. Smith*, 669 So.2d 752 (1996), *MCA* Section 21-8-13 and several Attorney General Opinions as her basis in law for the declaratory judgment against Appellants. These authorities and Attorney General Opinions lend no support to Appellee because she lacks a factual basis for suing Appellants. Appellee failed to produce any Minutes of the Greenwood City Council to prove facts she is alleging on appeal. The City of Greenwood, a public body speaks and speaks only through its Minutes. See *Miss. Code Ann.* 1972 (as amended) Section 21-15-17.

It has been held many times that Minutes are the only evidence of official actions by a municipality. See *City of Moss Point v. Talmadge L. Miller, et al.*, 608 So.2d 1332 (1992) and *Thompson v. Jones County Community Hospital*, 352 So.2d (Miss. 1977).

At pages 23 - 25 of Brief of Appellee, she states her basis in fact for the declaratory judgment this Court's recent Opinion in *Littleton v. McAdams*, this Court's Opinion in 1991 in *Jordan v. Smith, supra* and several Attorney General Opinions sought by prior Greenwood City Attorneys in 1991, 1996, and 2001. Appellee contends that these authorities and opinions constitute her factual basis to seek declaratory relief against Appellants. *Littleton v. McAdams* was just decided by this Court on August 28, 2011. It is not conceivable how this Opinion served as a factual basis for Appellee's claim for declaratory relief sought against Appellants in her complaint filed on July 20, 2009.

Appellee was not the mayor in 1991 and there is nothing stated in *Jordan v. Smith, supra* which is applicable to any facts alleged or argued by her in the lower court. Appellee failed to produce any Minutes or Board Resolutions where Appellants or the council attempted to appoint a city attorney.

Also, Appellee alleges a long stormy history between the Mayor and the Greenwood City Council over the appointment and confirmation of a city attorney. However, she failed to demonstrate how whatever occurred in 1991, some twenty years ago, support a factual basis for declaratory judgment against Appellants. Appellee forgot to tell this Court that this stormy relationship, if any, was initiated by her when she sued only the African American and Democrat council members because they rejected her attorneys representing her on this appeal, as her nomination for city attorney. Also, she forgot to tell this Court that her next nomination for city attorney, which was acted upon by the council, was overwhelmingly approved.

H. ISSUE NINE

Again, Appellee contends that declaratory judgment was appropriate in this case because when this action was filed, there was present the ripening seeds of a controversy.[3] Again, she relies upon alleged facts which have not been proven in this record to support their so-called "ripening seeds of controversy" argument. Appellee erroneously argues that Appellants support a personal right of Littleton to holdover even though she had fired him in writing on July 6, 2009. She contends these Appellants continued to allow him to attend council meetings and act as the city attorney. However, Appellee forgot to tell the Court that she was present at these meetings attended by Littleton and she presented no minutes to reveal any protest by her. Appellee forgot to tell the Court about how Littleton since July 6, 2009, kept the city from missing grant deadlines, auditing deadlines and prepared resolutions so the city could function at meetings. (Tr. 29, 32-33 and 38). Also, Appellee forgot to tell this Court, that after her letter of termination to Littleton, she continued to use his service as city attorney. On August 19, 2009, Appellee forwarded a letter dated July 14, 2009, to Littleton as city attorney, requesting him to prepare an Attorney Opinion Letter for the City's Auditors, Killebrew & Moss. (R. 67-68, 69, 72-73).

Finally, Appellee cites *Johnson v. Hinds*, 524 So.2d 947 (Miss. 1988) to support her "ripening seeds of controversy" argument. A review of this case reveals that the

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[3]Under Issue Seven at pages 19 - 20 of Brief of Appellee, she cited cases from Texas regarding "ripening seeds of a controversy," all of which had no applicability to facts in this case.

court never once used the phrase "ripening seeds of controversy."

The *Johnson* case involves a real estate developer who refused to comply with Hinds County Subdivision Ordinances. After the County sought injunctive relief against Johnson, he asserted defensively his lack of authority to go on the property of the twenty-six lot owners. The County amended its complaint to join the 26 lot owners as defendants. The County sought a declaratory judgment against these lot owners asking the Court to declare that each owner had bought his lot subject to the existing subdivision ordinance and that from this it follows that Johnson may go on each lot to the extent necessary to bring the land into compliance with the subdivision ordinance.

The Court granted declaratory judgment on the basis that the owners took title to their respective lots subject to the Hinds County Subdivision Ordinance.

Appellee somehow derived a conclusion from *Johnson, supra*, that a declaratory judgment was issued against the landowners and they had done nothing. However, the fact in *Johnson, supra* does not support this conclusion. The fact is clear that each day from date of purchase the landowners' properties were in violation of the County Subdivision Ordinance.

I. ISSUE TEN

Appellee contends that a city can be liable without recording an act or omission in its Minutes. The discussion on this purported issue is a distortion of facts and a misquote of this Court's Opinion in *Littleton, supra*. It is an unsuccessful attempt to undermine authorities cited in Brief of Appellants regarding the Minutes being the official action of the City of Greenwood and that Greenwood City Council speaks and

speaks only through its Minutes. Since, Appellee is unable to produce official Minutes to justify why she made only certain city council members parties to this lawsuit, she now engages in a distortion of facts. As to Littleton's claim of holdover attorney, it is absolutely clear that Appellants took no action or failed to take any action differently than their two white counterpart members of the council. There is no question on this matter. As to Appellee's nomination for city attorney, Appellants separated from their counterparts and voted down the Law Firm of Abraham & Rideout. This led to their being named defendants.

At page 28, Appellee stated:

> " . . . they supported James Littleton's holdover as city attorney. They allowed his presence at their meetings and allowed him to continue to sit with the council at council's table and continue to advise the council.
>
> By doing so this Court found in the Littleton case that these five council members had, by acting to support Littleton in this dispute, subjected the city to the potential of irreparable harm."(My emphasis added).

A review of the Opinion in *Littleton* case failed to reveal any such finding by the Court as stated by Appellee. This is a wholesale distortion and misrepresentation by Appellee to this Court.

At pages 9 and 10 of Brief of Appellants, they cited several authorities which held minutes are the only evidence of official actions by a municipality. See *City of Moss Point, infra*; *Thompson, infra et seq.* Appellee, in her hours of desperation, attempted to limit these holdings to a contract rule. (p. 28 Brief of Appellee). Of course, Appellee cited no authority of this Court limiting the holdings in *City of Moss Point, Miss. v.*

Talmadge L. Miller, et al., 608 So.2d 1332 (1992); *Thompson v. Jones Co. Community Hospital*, 352 So.2d 795 (Miss. 1977) et seq., to a contract rule. Appellee stated at pages 28 and 29 that the purpose of the contract " . . . rule is to prevent a single member of the city council from obligating city funds by entering into a contract without a vote of the full council which is confirmed in writing by being recorded in the council's minutes."

But in *Thompson v. Jones Co. Community Hospital, supra*, this Court, quoting its decision in *Smith, et al. v. Bd of Supervisors*, L12 Miss. 36, 86 So. 707 (1920), stated one reason requiring the acts of public boards to be evidenced by an entry on its minutes as follows:

> We also think it was error for the court to permit individual members of the board of supervisors to testify what the board did, and what the board understood, and what the board had authorized to be done in the premises. A board of supervisors can act only as a body, and its act must be evidenced by an entry on its minutes. The minutes of the board of supervisors are the sole and exclusive evidence of what the board did. The individuals composing the board cannot act for the county, nor officially in reference to the county's business, except as authorized by law, and the minutes of the board of supervisors must be the repository and the evidence of their official acts. (Citation omitted) 352 So.2d at 796.

Finally, Appellee makes the bold statement at page 29 of her brief that "[t]his [contract] rule has no application in the case where a tort has been committed or a statute violated. Again, she cited not one authority of this Court to support this statement.

J. ISSUE ELEVEN

At pages 31 - 32 of her brief, Appellee cited authorities she contends set forth the parameters of and burden of proof for Rule 11 and the Litigation Accountability Act. These authorities are not in conflict with those cited in pages 13 -20 of Brief of Appellants on the topics Rule 11 Sanctions and Miss - "Litigation Accountability Act of 1988." Consequently, Appellants take no issue with these authorities. However, these authorities do not support Appellee's cause.

First, Appellee and her attorneys knew when they filed this suit against the Appellants that they had no chance of proving or succeeding at a trial. See *Hodges v. Lucas*, 904 So.2d 1098 (Miss. Ct. App. 2004); *Eatman v. City of Moss Point*, 809 So.2d 591 (Miss. 2000). After the hearing, the lower court agreed to grant Appellants' Motion for a dismissal.

At page 31, Appellee felt it was worth to repeat what the Seventh Circuit said about Rule 11 in *Anderson v. Kahn*, 111 F.3d 494 (7th Cir. 1997) regarding " . . . defendants are not automatically entitled to receive full reimbursement of their expenses just because the case was frivolous . . . The purpose of the rule is to deter baseless filings . . . and the sanction "shall be limited to what is sufficient to deter repetition of such conduct . . ." 111 F.3d at 502.

Appellants interpret this citation by Appellee to be a confession as to sanction but an urge to this Court not to award full expenses to Appellants. Immediately prior to this statement, the court in *Anderson, supra* stated as follows:

> **Rule 11 indicates that courts may order a sanctioned party to**

> pay the prevailing party its reasonable expenses and attorney fees incurred as a direct result of the violation, if an order to that effect is warranted for effective deterrence. *Fed.R.Civ.P.* 11(c)(1)(A) and (c)(2). That's what the district court did here, reviewing affidavits from the defendants as to the amount they spent defending the meritless amended complaint (and filing for sanctions), finding the amounts reasonable, and ordering Kahn to pay the total as a deterrent to filing future frivolous lawsuits.

111 F.3d at 501-502.

The Court in *Anderson* affirmed the lower court's order of total fees and expenses.

Appellee contends that the lower court was correct in denying sanctions because of its finding that the joinder of Appellants in the lawsuit was not frivolous and because Appellants objected to being dismissed. Appellants have discussed elsewhere in this brief that the concern raised by them was the proposed dismissal without prejudice.

Appellee placed a lot of reliance on the lower court's question, "[h]ow can a party object to being dismissed from a lawsuit and then seek reimbursement for their expenses? This Court will not allow that." (R.E. 5). But Appellee failed to address the contention that this was an abuse of discretion. She failed to address Rule 11(b), *MRCP* which focuses on the filing of the pleading. Further, she failed to address *January v. Barnes*, 621 So.2d 915 (Miss. 1992), stating that "[f]iling is what triggers the possibility of sanctions." 621 So.2d at 922.

Contrary to the lower court's finding, an award of sanctions in a frivolous case is not determined by any resistance to a proposal to dismiss a complaint some 28 days later. Filing is what triggers sanctions. *January v. Barnes, supra.*

K. ISSUE TWELVE

Contrary to Appellee's contention at page 33 of her Brief, Appellants never argued at page 7 of their Brief that the decision of the lower court should be overruled for failure to findings of facts under *Rule 52(a), MRCP.* This twisted contention of Appellee was taken from the Summary of Argument section of Brief of Appellants. Appellants stated then and state now that the lower court committed reversible error in its decision denying their motions for sanctions and fees against Appellee and her attorneys. Appellants contended then and now that the lower court abused its discretion when it found that the suit against them was ill advised but it did not rise to the level of frivolous or for the purpose of harassment or delay. Next, Appellants contended then and now that the findings of the lower court regarding the proposed dismissal on the date of the August 14, 2009 hearing, were clearly erroneous.

It is interesting to note that Appellee did not deny the fact that Appellants' concern about the proposed dismissal was that it was not a dismissal with prejudice. Further, Appellee does not dispute the fact that her proposed Order to Dismiss Without Prejudice was never given to Appellants' counsel. Also, Appellee failed to dispute Appellants' contention at pages 12 of their Brief that " . . . there is nothing in the transcript to support the lower court's finding 'that on Friday, August 14, 2009, around noon, plaintiff's counsel hand delivered an Order of Dismissal to defendants' attorney, Mr. Perkins.'"

This is a crucial factual finding since the lower court ultimately found "how can a party object to being dismissed from a lawsuit then seek reimbursement for their

expenses. (R.E. 5). The entire discussion on this matter at pages 11 - 13 was not addressed or refuted by Appellee and thus silent is consent.

L. ISSUE THIRTEEN

During the hearing on August 17, 2009, there is no question that one of Appellee's attorneys, Mr. Preston Rideout, made the following statement:

> **"If this Court does what I think it should do, and says that there is no city attorney, what that is going to force these two branches of government to do is both compromise toward the middle. (R. E. 16; Tr. 34).**

There is no dispute that Appellee and her attorneys had a vital interest in this compromise. The city council had just rejected her nomination of this firm. Also, there is no dispute that Appellants' attorney instantly objected to Appellee's use of the court system to settle a political dispute. (R.E. 17 - 18; Tr. 37-38).

Rather than addressing these contentions on the merits, Appellee decided to make personal attacks upon the character, integrity, reputation and good name of Appellants' counsel. Further, she decided to make indecent and scandalous statements in addressing this matter.[4]

M. ISSUE FOURTEEN

Appellants contend that this entire issue and discussion is not supported by any fact appearing in this record. It is irrelevant, immaterial, impertinent and contains sham

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[4]On July 18, 2011, Appellants filed their Motion to Strike With Authorities with this Court. The motion seeks to have stricken from the record these sham and scandalous matters stated under Issues Thirteen and Fourteen and elsewhere in Brief of Appellee. Also, the motion seeks to strike the entire Issue and Discussion under Issue Fourteen on the additional grounds of immaterial, impertinent, and irrelevant.

and scandalous matter and should be stricken from the brief. See footnote #4.

CONCLUSION

In light of the foregoing reasons, authorities and principles, Appellants respectfully request that this Honorable Court reverses the decision of the lower court and enter its order awarding sanctions, fees, costs, and expenses against Appellee and/or her attorneys. In the alternative, this court is requested to remand this matter with instructions to order an assessment of attorney's fees, costs and expenses against Appellee and/or her attorneys, and order the lower court to conduct a hearing to determine the extent and amount of fees, costs and expenses to be awarded and to order general relief.

Respectfully submitted, this the 20th day of July 2011.

BY: _____
WILLIE J. PERKINS, SR.
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I, Willie J. Perkins, Sr., attorney for Appellants David Jordan, et al., do hereby certify that I have this day caused to be mailed via U. S. Mail, postage prepaid, a true and correct paper copy and one true and correct computer readable diskette of the above and foregoing Reply Brief of Appellants unto the following persons:

Lee Abraham, Esquire
Abraham & Rideout
Post Office Box 8407
Greenwood, MS 38935-8407

Honorable Joe C. Webster
Special Judge
Post Office Box 2046
Clarksdale, MS 38614

This the 20th day of July 2011.

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