

2011-CA-01201-RT

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## ARGUMENT

ISSUE:                   The Trial Court abused its discretion, applied an erroneous legal standard and committed manifest error in sustaining Farina's Second Amended Motion to Dismiss as to JoAnn Farina and Joseph Farina.

Since May 26, 1981 and the adoption of the *Mississippi Rules of Civil Procedure*, the Mississippi Bar has adhered to "notice" pleading and the Official Comment to Rule 8, M.R.C.P. states "The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice." M.R.C.P. Rule 8.

On May 31, 2007 Welch Roofing & Construction, Inc., Plaintiff/Appellant, hereinafter "Welch", filed its Complaint to Enforce Construction Lien, alleging that on or about August 15, 2006, Welch and Joseph Farina, hereinafter "Joseph" and his wife, JoAnn, hereinafter "JoAnn", verbally agreed to the renovation and repair the roof on JoAnn's building. Welch alleged that at all times during the repair of said building, Welch performed all work and services at the direction and instructions of Joseph and JoAnn; that because of Joseph and JoAnn's refusal to pay Welch, there is a balance owed of \$57,763.55, as of February 28, 2007, together with other specified late fees, damages, interest and attorney fees. Welch demanded judgment against Joseph and JoAnn in that amount and further awarding foreclosure of the construction lien. (RE 7-9)

On August 18, 2008 Welch filed its Amended Complaint to Enforce Construction Lien, alleging the same facts but adding Defendant Railroad Investments, LP as a party

defendant. (RE 18-20)

It could not be stated any more clearly or simply that Welch was suing for breach of the verbal contract of August 15, 2006 and seeking damages for that breach.

Appellees state that the record does not show that the attorney for Joseph and JoAnn were served with a copy of the Amended Complaint. Assuming *arguendo* that the attorney was not served, he entered his appearance and waived any objection when the Amended Motion to Dismiss was filed on February 16, 2011. (RE 25-30)

#### CONCLUSION

The trial court abused its discretion, applied an erroneous legal standard and committed manifest error in sustaining Farina's Second Amended Motion to Dismiss as to JoAnn Farina and Joseph Farina. This case should be reversed and remanded for a trial on the merits as to damages for breach of contract against JoAnn and Joseph.

WELCH ROOFING & CONSTRUCTION, INC.,  
APPELLANT

BY: Conrad Mord  
ITS ATTORNEY

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CERTIFICATE OF SERVICE

I, Conrad Mord, attorney of record for Appellant, do hereby certify that I have, on April 26, 2012, mailed first class, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the following:

Honorable Wayne Smith  
Attorney at Law  
P.O. Box 525  
Liberty, MS 39645

Honorable David H. Strong, Jr.  
Circuit Court Judge  
P.O. Drawer 1387  
McComb, MS 39649-1387.

SO CERTIFIED, on the above date.

  
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CONRAD MORD