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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. Chase Home Finance, LLC, Petitioner/Defendant;

2. Priority Trustee Services of Mississippi, LLC, Petitioner/Defendant;

3. C. Lee Lott, III and Alicia S. Hall of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel of record for Chase Home Finance, LLC and Priority Trustee Services of Mississippi, LLC;

4. Mark H. Tyson of McGlinchey Stafford, PLLC, counsel of record for Chase Home Finance, LLC;

5. James D. Hobson, Jr., Respondent/Plaintiff;

6. Allison M. Brewer and Kenneth B. Rector of Wheeless, Shappley, Bailess & Rector, LLP, counsel of record for Respondent/Plaintiff;

7. Honorable Isadore W. Patrick, presiding Circuit Court Judge; and

8. Honorable John S. Price, Jr., presiding County Court Judge.

KENNETH B. RECTOR

TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

James D. Hobson raises the following issue on his Cross-Appeal:

1. Did the Circuit Court, upon its affirmance of the County Court's judgment as to liability, err in remanding this case for a trial on damages?

STATEMENT OF THE CASE

Chase Home Finance, L.L.C. and Priority Trustee Services of Mississippi, L.L.C. (hereinafter collectively referred to as "Chase") appeal the grant of summary judgment by the County Court of Warren County, Mississippi, in favor of James D. Hobson (hereinafter "Hobson"). The county court held that, based on the undisputed material facts, Hobson was entitled to judgment as a matter of law, and awarded damages to Hobson to compensate him for the loss of his bargain, including pre-judgment and post-judgment interest. (R.108). The court further held that Chase's breach was grossly negligent, which entitled Hobson to his reasonable attorneys' fees and expenses. On appeal, the Warren County Circuit Court affirmed the county court's judgment as to liability, but remanded the case for a trial on damages. (R.199).

COURSE OF PROCEEDINGS

Hobson filed this case on April 24, 2008. (R.5). Hobson asserted in his complaint that Chase breached a contract formed between the parties at a foreclosure sale conducted on March 20, 2008, by refusing to convey the subject property subsequent to said sale.

On September 12, 2008, Hobson filed a motion for summary judgment, supporting brief, and itemization of undisputed facts. (R.25, 54, and 58). Thereafter, on September 24, 2008, Chase filed a notice of removal to the United States District Court for the Southern District of Mississippi.(R.68). Hobson moved to remand the case to state court and on September 1, 2009, the District Court remanded the case to the County Court due to a procedural defect in the notice of removal. (R.72).

On September 9, 2009, Chase filed a response to Hobson's motion for summary judgment and also filed a cross motion for summary judgment. (R.73). Thereafter, on September 25, 2009, Hobson filed a rebuttal to Chase's response to Hobson's motion for summary judgment combined

with a response to Chase's cross-motion for summary judgment. (R. 91). A hearing was held in the county court on both parties' motions for summary judgment on November 9, 2009. (R.101,102 and 103). At the November 9, 2009 hearing, ruling from the bench, the court granted Hobson's motion, and denied Chase's motion. (T. 14-15). In a supplemental opinion dated November 10, 2009, the County Court further found that "as a matter of fact by clear and convincing evidence from the undisputed facts that the Defendants were grossly negligent and therefore attorneys fees are allowable under Sec. 11-1-65 M.C.A." (R. 105). The county court entered its final judgment on December 1, 2009. (R. 108). Chase filed its appeal to the Warren County Circuit Court on December 30, 2009. (R.112). Oral argument was heard on July 22, 2010 and the circuit court entered its Order affirming in part and reversing and remanding in part the judgment of the county court on February 18, 2011. (R.178, 186, 199).

STATEMENT OF THE FACTS

The material facts in this matter are not genuinely in dispute. On April 11, 1996, Deborah Hood Quimby a/k/a Deborah Hood Weatherford, (hereinafter "Quimby") executed a deed of trust to Magnolia Federal Bank for Savings, which deed of trust is recorded in Book 1051 at Page 189 of the Land Records of Warren County, Mississippi. (R. 29). The deed of trust secured indebtedness therein described and conveyed a security interest in the following described property situated in Warren County, Mississippi:

> All of Lot 30 of Lakeland Village Subdivision, a plat of which is duly recorded in Plat Book 2 at Page 76 and further shown by revised plat of record in Plat Book 2 at Page 88 of the Warren County, Mississippi land records (hereinafter the "subject property").

On May 1, 2001, said deed of trust was assigned to Chase Home Finance, LLC by instrument recorded in Book 1260 at Page 754 of the aforesaid land records. (R. 36). Quimby defaulted in

payment of the indebtedness secured by the deed of trust. Subsequent to said default, by Substitution of Trustee dated October 2, 2006, recorded in Book 1426 at Page 290 of said land records, Priority Trustee Services of Mississippi, L.L.C. was appointed and substituted as Trustee in the aforesaid deed of trust. (R.37). Further, Priority was authorized to exercise the power of sale contained in the deed of trust by conducting a public foreclosure sale of the subject property.

Substituted Trustee's Notice of Sale was advertised in The Vicksburg Post beginning February 28, 2008. (R. 55). Said notice stated that Priority would offer the subject property for sale on March 20, 2008 between the legal hours of 11:00 a.m. and 4:00 p.m. at the front door of the Warren County Courthouse located at Vicksburg, Mississippi. (R. 39, 55). The notice further indicated that the property would be sold for cash to the highest bidder. (R. 39, 55). In response to said notice, Hobson personally appeared at said foreclosure sale at which time Priority, through its agent, did offer the subject property for sale to the highest bidder for cash. (R. 39, 55). In response to said offer, Hobson bid the sum $60,948.82, which bid was the highest and best bid made. (R. 39, 55). Priority's agent, acting pursuant to the provisions of the deed of trust, duly accepted Hobson's bid and announced that the subject property was sold to Hobson for the amount bid. (R. 40, 55). Hobson paid the agreed purchase price by delivering to Priority's agent a Regions Bank cashier's check in the amount of $60,948.82, which check was received and accepted by Priority's agent. (R. 40, 55).

Notwithstanding the offer of said property for sale by Chase and the acceptance of said offer by Hobson, and further notwithstanding the payment of the agreed purchase price to Chase, Chase failed and refused to tender to Hobson a trustee's deed to the subject property and further failed and refused to deliver possession of the subject property to Hobson. (R. 40, 55). Rather, Chase, by and through their agents, returned the Regions check to Hobson by letter dated March 31, 2008, which

was received by Hobson on April 3, 2008. (R. 40, 55). Said letter indicated that Quimby had cured her default prior to the foreclosure sale and that the foreclosure sale was not cancelled due to the negligence of Chase. (R. 40, 55).

On the date of the foreclosure sale, the subject property had an appraised value of $156,000.00. (R. 40, 44, 55).

STATEMENT REGARDING ORAL ARGUMENT

Hobson respectfully states that oral argument would not be beneficial to the Court in this case. Application of the law to the facts of this case is relatively straightforward, and Hobson asserts that, as such, oral argument is unnecessary.

SUMMARY OF THE ARGUMENT

Chase contends that (a) the "receipt" delivered after the foreclosure sale is factual evidence that the parties intended the foreclosure sale to be conditional and (b) Hobson had constructive notice that the completed foreclosure sale could be nullified in the event that Quimby cured her default. In order for the "receipt" to be evidence of the parties' intent, it is elementary that both parties must have notice of the terms of the "receipt" prior to or at the time the sale was made.

Chase has presented no evidence that even remotely suggests that the "receipt" was given to Hobson before he placed his bid or before the Trustee accepted Hobson's bid on the courthouse steps. In fact, Chase's affidavit specifically states that the "receipt" was issued to someone after the foreclosure sale. (R 81-83). Furthermore, the receipt itself is evidence that it could not have been prepared until after the foreclosure sale since it identifies the successful purchaser and the bid amount that was paid and accepted by Chase. Chase also failed to present any evidence that the published notice of sale contained notice that the sale would be conditional in any respect or that the individual who called the sale on behalf of the trustee indicated that the offer to sell the property was conditional or that the trustee was reserving any right to later rescind the sale. Chase provided no evidence to contradict that an unconditional offer to sell to the highest bidder for cash was made, which offer was accepted by Hobson.

not what Chase is saying

Secondly, Chase points to no language in the recorded Quimby deed of trust that supports Chases's contention that Hobson had constructive notice that a completed foreclosure sale was contingent or conditional. Furthermore, Chase cites no authority for the proposition that the reinstatement provisions in the Quimby deed of trust provided constructive notice that the foreclosure sale was intended to be conditional. Contrarily, the reinstatement provision of the deed of trust simply reiterates the mortgagor's right to stop a foreclosure sale by curing the default prior

to the sale. The fact that Chase's agent appeared on the courthouse steps and actually conducted the foreclosure sale, clearly induced Hobson to believe that the borrower **had not exercised her right to reinstate her loan** at the time of the foreclosure sale and that Chase had full authority to sell the property.

Chase has cited no law suggesting that a mortgagee should not be liable in damages if it conducts a foreclosure sale despite knowledge that the mortgagor had cured the default. Chase argues that Quimby's "eleventh hour" reinstatement left it insufficient time to notify the auctioneer of the reinstatement. Without any citation of authority, Chase argues that this is a "procedural irregularity" that relieves it of liability for breach of its obligations to Hobson. However, Chase presented no evidence to prove when the reinstatement occurred. In fact, it is clear from the record that Chase ***does not know*** when Quimby reinstated.

Chase should not be allowed to complain about any lack of opportunity to conduct discovery in the trial court. At no time in the course of proceedings before the county court did Chase propound any discovery requests or seek to take any depositions. Nor did they, after receiving notice of hearing on Hobson's motion for summary judgment, file a motion under Miss.R.Civ.P. 56(f) seeking additional time so that they could conduct discovery.

Finally, the damages awarded to Hobson by the county court, and remanded for trial by the circuit court, should be reinstated. Chase only contested liability in the trial court, and never contested Hobson's evidence of damages or attorney fees. Therefore, the circuit court had no basis to remand this case for trial on the issue of damages.

ARGUMENT

1. If a borrower reinstates a Deed of Trust shortly before a foreclosure sale, is the sale absolute even though the prospective buyer is charged with constructive notice of all title issues?

2. Does a live foreclosure auction encompass a valid "offer" and "acceptance" such that an oral contract for the sale of land is formed, even if a "receipt" is provided to a bidder, evidencing the intent of the parties regarding the risk of reinstatement by a borrower?

Although Chase presents these two issues separately, Hobson will respond to them as one issue.

Chase asserts on appeal that the county court erred in granting summary judgment for Hobson because of some alleged disputed material term of the contract and because of an alleged factual dispute relating to whether the Plaintiff had notice that the foreclosure sale was conditioned upon the reinstatement of the subject loan. These assertions appear to be based in part upon a "receipt" that was issued to someone ***after*** the foreclosure sale. The "receipt" was also obviously issued after payment of the purchase price since it ***acknowledges receipt*** of the purchase price. The receipt contained the following language:

> Received from: J. Mack Varner and James D. Hobson, Jr., whose address is 1903 E-Mission 66, Vicksburg, MS 39180, whose phone numbers are 601-636-0502 and 601-638-8741, the amount of $60,948.82 which was the actual purchase price as bid, to purchase the property located at the following address: 101 Rollingwood Drive, Vicksburg MS. Which property is more particularly identified by it's (sic) legal description contained in the Notice of Sale.This receipt is issued in connection with the foreclosure sale of the above-referenced property and is subject to the terms stated, as part of the sale. The sale will not be considered final until all requirements have been met and may be withdrawn based on a timely re-instatement (sic) and/or by an order of the Bankruptcy Court. By Cashier's or Official Bank Check #310698445 Made payable to: Morris, Chneider & Prior, LLC, by: (signature illegible) Received on behalf of Morris, Schneider & Prior, LLC (R. 84)

Chase now contends that the "receipt" is evidence that both parties ***intended*** the foreclosure

sale to be conditional. In its brief Chase makes the following statement.

> No written contract exists, and the receipt is the sole piece of writing in this record, revealing the parties' intent. This intent is a question of fact for a jury, not a question of law that should have been decided in summary judgment. A reasonable fact-finder could find that the receipt's reinstatement provision evidences the intent of the parties to accept the risk of reinstatement and the contract-voiding consequences of the same. Chase Brief p. 19.

Although Chase's argument is difficult to follow, it appears that Chase is contending that Hobson placed his bid and paid the purchase price with notice of the terms of the "receipt." Stated differently, Chase is contending that the receipt is evidence of what both parties intended when they made their contract at the foreclosure sale. In order for this to be the case, it is obvious that both parties must at least have notice of the terms of the receipt at the time the sale was made. In support of this argument, Chase now belatedly claims that "the parties dispute whether the receipt was provided at the foreclosure sale." (Chase Brief, p. 7). Chase's representations and contentions in its brief regarding delivery of the receipt are obviously not supported by the trial court record.[1]

Specifically, there is nothing in Chase's affidavit filed in response to Hobson's Motion for Summary Judgment that even remotely suggests that the "receipt" was given to Hobson before Hobson placed his bid or before the Trustee accepted Hobson's bid on the courthouse steps. Rather, Chase's cryptic affidavit plainly says: "that ***after the sale***, a receipt was given that noted that a timely reinstatement could cancel the sale." (R 81-83). The affidavit does not suggest that Hobson had notice of the provisions of the receipt prior to or during the sale. In fact, the affidavit does not even state that the receipt was given ***to Hobson*** at any time.

not contended by Chase

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See specifically, Chase's Rebuttal Brief in the Circuit Court wherein Chase states, "The main point that the Plaintiff uses to distract the Court is whether the "receipt" in this case was provided before or after the foreclosure sale." "Obviously, most receipts are provided after sales, and the Defendants ***do not refute that.***" (R.161). (Emphasis added).

Furthermore, as discussed above, the receipt itself is evidence that it could not have been prepared until after the foreclosure sale was complete and the purchase price paid. Specifically, the receipt identifies the successful purchaser at the sale and the bid amount that was paid and accepted by Chase. It is elementary that this information would not have been known before or during the sale. It does not take one educated in rocket science to figure out that this receipt could not have been prepared and given to Hobson before he proffered his bid or before his bid was accepted or before the bid amount was paid. Consequently, Chase's contention that any language in the receipt reflects any intention of the parties before or at the time of the foreclosure sale is simply beyond rational comprehension.

Chase's affidavit also did not claim that the published notice of sale (which offered the property for sale to the highest bidder for cash) contained notice that the sale would be conditional in any respect. Chase in its brief makes much ado about the inadvertent omission of the published notice of sale which was intended to be an attachment to Hobson's affidavit in support of this Motion for Summary Judgment (R 39)(Chase's Brief, p. 4). Chase did not complain in the lower court about the accidental omission of the published notice. More to the point, Chase never filed anything in the trial court to controvert Hobson's statement in his affidavit that the published notice indicated only "that the property would be sold for cash to the highest bidder" (R 39).

Lastly, and importantly, Chase's affidavit does not state that the individual who called the sale on behalf of the trustee indicated that the offer to sell the property was conditional or that the trustee was reserving any right to later rescind the sale. Chase provided no evidence to contradict that an unconditional offer to sell to the highest bidder for cash was made, which offer was accepted by Hobson.

Chase cites *Franklin Life Ins. Co. v. Hamilton*, 335 So.2d 119 (Miss. 1976) in support of its

argument that the receipt in this case evidenced the parties' intent for the contract to be conditional. However, *Hamilton* deals with a "conditional receipt" given ***prior to*** issuance of a life insurance contract. Hamilton applied for a life insurance policy, paid the first month's premium, and was provided with a "conditional receipt" which outlined the procedure for approval. The receipt stated that any insurance contract ***would not take effect*** until Hamilton's medical report was received and approved and the policy delivered to him. *Id.* at 120-121. In other words, Hamilton clearly had notice that there would be no contract of insurance until he underwent a physical examination and the results of said examination were approved by the insurance company.

The facts in *Hamilton* are clearly distinguishable. In *Hamilton*, the "conditional receipt" was given to Hamilton ***before*** a contract of insurance was entered into. Contrarily, in the case at bar, Chase has provided no evidence that the "receipt" was provided before the parties made the contract for purchase and sale of the property on the courthouse steps or before Hobson fully performed his part of the contract by payment of the purchase price. Rather, Chase's affidavit and the receipt itself clearly show that the receipt was given ***after the foreclosure sale***. (R 81-84).

Based on the undisputed facts, the lower courts determined that the offer and acceptance, coupled with performance on Hobson's part, created a valid and binding contract, which Chase and Priority could neither alter nor unilaterally rescind based on language in a receipt given to Hobson ***after*** the sale.[2] Common sense tells us that "only by express reservation *announced* prior to the sale can the seller reserve the right to review and reject bids after the auctioneer closes the sale" *Udall v. T.D. Escrow Services, Inc.*, 154 P.3d 882, 912 (Wash. 2007). Therefore, in order to avoid

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The fact that said receipt may have been *drafted* prior to the sale, as Chase and Priority contended on appeal to Circuit Court, is completely irrelevant. (R.142).

summary judgment on the theory that the sale was conditional, Chase necessarily was required to present some evidence that it gave Hobson notice that the sale was conditional when the offer to sell was published in the newspaper, or at the public auction ***before*** bids were solicited, ***or before*** Hobson placed his bid, ***or before*** the trustee's agent accepted Hobson's bid and announced that the property was sold to Hobson on the courthouse steps, ***or before*** the purchase price was paid and received by Chase. Obviously, the record here does not support Chase's contention that the "receipt" raises any genuine issue of material fact as to a "disputed material term" of the contract or as to the parties "intent."

Obviously, in order to survive summary judgment, Chase was obligated to present evidence by affidavit, or other means recognized by Rule 56, supporting the notion that Hobson had prior notice that the property was being offered for sale subject to some contingency. Although Chase filed an affidavit in support of its own motion for summary judgment, the affiant did not testify therein that Hobson had prior notice that the sale was conditional. Chase is not entitled to reversal solely to permit them a second bite at the apple. Having failed to demonstrate the existence of a genuine issue of material fact in the lower court and on appeal to the Circuit Court, another opportunity to attempt to do so is clearly not permissible under applicable law.

Further, Mississippi Code Ann. §13-3-187 provides in pertinent part that "the officer making the sale ***shall***, on payment of the purchase-money, execute to the purchaser a conveyance which shall vest in the purchaser all the right, title and interest which the defendant had in and to such lands." *Id.* (emphasis added). Although Chase said it intended to conduct a conditional foreclosure sale, the foregoing statute does not leave room for conditional foreclosure sales. The *Udall* case discussed above involved a very similar statute and is almost directly on point. In *Udall*, as in the instant case, Udall purchased property at a foreclosure sale and was given a receipt for his purchase by the

auctioneer. 154 P.3d at 885. When the trustee discovered that the auctioneer had opened bids One Hundred Thousand Dollars ($100,000.00) lower than authorized, it refused to deliver a deed to Udall, and instead issued Udall a refund of the purchase price. *Id.* at 886. Udall sued and the trial court granted summary judgment in favor of Udall. *Id.* The Washington Supreme Court affirmed the trial court after analysis of a state statute that reads, in pertinent part, "the trustee or its authorized agent ***shall*** sell the property at public auction to the highest bidder . . . [purchaser] shall forthwith pay the purchase price bid and on payment the trustee ***shall*** execute [the deed]" (emphasis added). *Id.* at 887. The court found that this language imposed an obligation on the trustee to sell the property to the highest bidder and to execute the deed to the highest bidder. *Id.* The court further found that the delivery of the deed to the purchaser is a ministerial act, symbolizing conveyance of property rights to the purchaser. *Id.*

The *Udall* court further stated that, acceptance at auction is "commonly signified by the fall of the hammer or by the auctioneer's announcement 'Sold,'" after which the "sale is consummated and neither party can withdraw." *Id.* at 912. Only by express reservation announced prior to the sale can the seller reserve the right to review and reject bids after the auctioneer closes the sale. *Id.* "T.D. made no such reservation." *Id.* "When auctioneer Hayes announced "sold," Hayes accepted Udall's bid on T.D.'s behalf and a contract was formed." *Id.* "T.D. could not re-exercise its power of acceptance to reject Udall's bid when it later discovered the erroneous opening bid amount." *Id.* Similarly, neither Chase nor Hobson had the privilege of withdrawing from the sale after the sale was complete.

Alternatively, Chase says Hobson placed his bid with "constructive notice" that the foreclosure sale could be invalid. (Chase Brief, p. 12-14). To support this theory, Chase states in its brief that Hobson "has been a licensed appraiser, real estate broker, and real estate developer in

Warren County for 'many years' and he 'regularly' follows foreclosure sales, so he is familiar not only with the meaning of the reinstatement provision in the Deed of Trust, but also with the possibility that borrowers may reinstate their loan prior to foreclosure sale." (Chase Brief, p. 14). As a result of Hobson's experience with real estate, Chase claims that Hobson had notice that foreclosure sales in Mississippi are conducted subject to the owner's right to reinstate his mortgage.

Contrary to Chase's contentions, whether the recorded Quimby Deed of Trust provided constructive notice of Quimby's right to cure her default is irrelevant to anything in this case. Rather, the issue arguably is whether Hobson had constructive notice from the terms of the Deed of Trust that the foreclosure sale was conditional or subject to unilateral recision by the mortgagee. Chase does not point to any language in its recorded Deed of Trust from which Hobson or any other potential bidder could have been actually or constructively notified that a foreclosure sale conducted pursuant thereto could be nullified at the discretion of Chase.

At most, the language of the Deed of Trust conceivably provides constructive notice that a mortgagor, after default, has the right under applicable law to prevent a foreclosure sale by curing his or her default. However, the fact that Chase's agent appeared on the courthouse steps and actually conducted the foreclosure sale would clearly induce someone "familiar with the meaning of the reinstatement provision in the Deed of Trust" to believe that the borrower **had not reinstated their loan** at the time of the foreclosure sale and that Chase had full authority to sell the property.

Udall again states the general law on the issue of the Trustee's apparent authority:

> An agent has apparent authority when a third party reasonably believes the agent has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations. Restatement (Third) of Agency § 2.03, at 1113 (2006). Apparent authority may exist in agents who act beyond the scope of their actual authority. *Id.* cmt. A at 113. Apparent authority is present where the principal's objective manifestations (1) "cause the one claiming apparent

> authority to actually, or subjectively, believe that the agent has authority to act for the principal," and (2) "the claimant's actual, subjective belief is objectively reasonable." *King v. Riveland*, 125 Wash.2d 500, 507, 886 P.2d 160(1994). *Id.* at 913.

Mississippi law is consistent with *Udall.* In *Mladineo v. Schmidt*, 52 So.3d 1154, 1167 (Miss. 2010) this Court held:

> Apparent authority exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1180 (Miss. 1990) (quoting *Ford v. Lamar Life Ins. Co.*, 513 So.2d 880,888 (Miss. 1987). To recover under the theory of apparent authority, the following three factors must be present: (1) acts or conduct on the part of the principal indicating the agent's authority, (2) reasonable reliance on those acts, and (3) a detrimental change in position as a result of such reliance. *Id.*

See also, Langham v. Behnen, 39 So.3d 970 (Miss. App.2010).

Chase also now argues that Hobson cannot recover his damages because Quimby's reinstatement was a "procedural irregularity that defeated Chase/Priority's authority to sell the subject property." (Chase Brief, p. 16). We are having considerable difficulty following this circuitous argument. Chase contends that Quimby cured her default and that, as a result, Chase did not have the right to sell the property to Hobson. More specifically, Chase says that the foreclosure sale to Hobson is invalid because Quimby had cured her default. However, from this point, Chase's logic becomes murky. Based on *Udall*, Chase tries to analogize the case at bar to cases where the mortgagee conducts a foreclosure sale without knowledge that the sale has been stayed under the federal bankruptcy code. Chase is apparently attempting to equate the facts in this case with cases wherein the mortgagor has filed bankruptcy "shortly before a foreclosure sale, ***but without sufficient time to notify creditors***." (Chase Brief p. 16). (emphasis added).

To put it mildly, Chase is arguing apples and oranges. This lawsuit would likely not have been filed if Chase had conducted the foreclosure sale without knowledge of an eleventh hour bankruptcy filing. Contrary to the arguments made by Chase, nothing in *Udall* supports Chases's contention that a mortgagee should not be liable in damages if it conducts a foreclosure sale ***with knowledge*** of some alleged "procedural irregularity." Certainly, a lender who proceeds to conduct a foreclosure sale with knowledge that the mortgagor has filed bankruptcy would be liable to the foreclosure sale purchaser for contract damages for the same reasons that the lower court found Chase to be liable here. According to Chase's convoluted interpretation of *Udall*, any seller who contracts to convey real property that the seller knows he does not own cannot be held liable for breach because any conveyance pursuant to said contract would be a nullity. This is a nonsensical contention since, according to Chase's legal theories, the vendee in the foregoing hypothetical would never have a legal remedy for the vendor's intentional breach.

Apparently as an extension of its "procedural irregularity" defense, Chase now alleges that Quimby made an "eleventh hour reinstatement of her mortgage." (Chase Brief, p. 16). More specifically, Chase states in its brief that "a mortgage can theoretically be (***and in this case was***) reinstated by a borrower under the Deed of Trust ***shortly before foreclosure sale***, but leaving ***insufficient time*** to notify the auctioneer of the reinstatement." *Id.* (Emphasis added). Contrary to what Chase says in its brief, Chase presented no evidence to prove when the reinstatement occurred other than the affidavit of LaShun Palmer which simply states that Quimby reinstated "prior to the foreclosure sale." (R. 81-83). In fact, Chase ***does not know*** when Quimby reinstated. The following exchange took place during the argument of Chase's appeal to circuit court:

By the Court: "When was the reinstatement made?"

By Mr. Lott: "Well, I don't know the exact date and time but it was

shortly before the sale."

By the Court: "The same date?"

By Mr. Lott: "I do not know, Your Honor. I do not know."

By the Court: "Isn't that important?"

By Mr. Lott: "Well, Your Honor, the record, of course, of this appeal is what we are limited to. And in the record there is an affidavit where LaShun Palmer states under oath that they found out that she had reinstated. They made all kinds of efforts to contact the person standing on the steps and just couldn't do that. And I don't believe that the exact timing of that is important. What I think .."

By the Court: "Well, let me say this and not to cut you off."

By Mr. Lott: "Yes, You Honor."

By the Court: "The County Court granted punitive damages. You are saying that punitive damages don't lye. Its important to me in terms of determining whether or not punitive damages lyes is whether or not you had notice that the owner had reinstated her rights to the property."

By Mr. Lott: "Yes, Your Honor. Well, the evidence in the record is actually in dispute. We present that David..."

By the Court: "Are you saying that you don't know?"

By Mr. Lott: "I do not know the exact time. And it might be stated in there but in discovery we can flush that out... (T. 6-7).

Since Chase contends that Hobson should be denied benefit of his bargain based on an alleged "procedural irregularity," it is curious indeed that Chase never provided any evidence relating to a procedural snafu. As described above, Chase has never told the court whether Quimby cured her default on the day of the foreclosure sale or two weeks prior. In light of Chase's "procedural

irregularity" argument, it is strange that Chase provided no evidence explaining or justifying its inability to notify the auctioneer that the sale should be cancelled. Rather, Chase's affidavit said that its employee "took the steps necessary to cancel the crying of the sale, but the communication was unsuccessful" (R. 82). If this is true, it is strange indeed that Hobson's cashiers check was not returned immediately after the sale. To the contrary, it is undisputed in the record that Hobson's cashiers check was not returned until April 3, 2008, fourteen days after the sale. (R. 40). Therefore, there is no evidence to support any contention that Chase knowingly conducted an invalid foreclosure sale as a result of some technicality or "procedural irregularity."

This case is quite simple. Chase negligently failed to communicate to its agent that Quimby had cured her default, and apparently does not even know when the cure was made. Chase, through their agent, then conducted the foreclosure sale and struck the property off as "sold" to Hobson. Hobson paid the bid price. Chase then kept Hobson's money for two weeks before returning it. Now, to avoid liability, Chase contends that completed Mississippi foreclosure sales can be unilaterally rescinded by the mortgagee without any liability to the foreclosure purchaser. We are not surprised that Chase is unable to cite a single case to support this contention.

Following Chase's illogical arguments, a mortgagee can unilaterally rescind a foreclosure sale anytime after a foreclosure sale simply based on sloppy record keeping or ineffective communication technology. Unquestionably, the hundreds of real property lawyers as well as the title insurers doing business in Mississippi will require stress counseling if this Court rules that land titles arising out of a foreclosure can be unraveled simply because some bank employee negligently failed to communicate the reinstatement of the mortgage to the Trustee or auctioneer. If Chase's arguments are accepted by this Court, we can be certain that the number of persons interested in purchasing property at foreclosure sales will dwindle dramatically and there will be no banks willing

to finance bidders at foreclosure sales.

Chase and other gargantuan interstate banking houses may argue that they are no longer able to keep track of the thousands of foreclosures occurring annually in this country. We can certainly understand why banks might want to conduct conditional foreclosures even though not specifically authorized by Mississippi statute. Even if conditional foreclosures should be permitted by the legislature or by this Court, obviously the mortgagee must be required to give all potential bidders advance notice that the sale is subject to contingencies for some specified period of time. Certainly, banks cannot be allowed to conduct foreclosure sales subject to some secret right to rescind as Chase contends is appropriate in the case at bar.

Based upon the foregoing, Hobson asserts that the county court did not err in granting summary judgment in his favor, and that the circuit court did not err in affirming said judgment. Therefore, this Court should affirm the ruling of the lower courts as to liability.

3. Summary Judgment is Not Appropriate When Genuine Issues of Material Fact Remain, Especially When the Parties Have Not Even Been Given the Opportunity to Engage in Needed Discovery.

While this issue is not listed in the Statement of the Issues, Chase nevertheless argues in their brief that they were not afforded an opportunity for discovery. As stated above, this suit was filed on April 24, 2008. Priority filed its Answer on May 22, 2008, and Chase, after a motion for extension of time, filed its Answer on June 25, 2008. (R. 12, 18). Chase states that Hobson filed his Motion for Summary Judgment before any discovery was conducted. However, Chase fails to point out that Hobson did not file his motion until September 12, 2008, almost five months after the Complaint was served, during which time Chase could have conducted discovery. (R. 25). Chase also fails to mention that, shortly thereafter, while in the federal court on removal, it likewise filed

a motion for summary judgment on October 3, 2008. After the case was remanded by the federal court on August 31, 2009, Chase re-filed its motion for summary judgment in County Court (R. 73), and ***both parties*** noticed their motions for summary judgment for hearing to be held on November 9, 2009. (R. 102, 103). At no time before the case was removed or after the case was remanded, did Chase propound any discovery requests or seek to take any depositions. Furthermore, had Chase determined that discovery was required in order to oppose Hobson's motion at any point after receiving notice of hearing on Hobson's motion, Miss.R.Civ.P. 56(f) provides the proper procedure. Therefore, Chase should not be allowed to complain to this Court, as they complained to the Circuit Court, about any lack of opportunity to conduct discovery.

ARGUMENT ON CROSS-APPEAL

1. Did the Circuit Court, upon its affirmance of the County Court's judgment as to liability, err in remanding this cause for a trial on damages?

In the county court, Hobson presented undisputed, uncontradicted evidence, through appraisal and supporting affidavits, that the value of the subject property on the date of the foreclosure sale was $156,000.00. (R. 40, 44, 55). Hobson purchased said property at the foreclosure sale for $60,948.82. (R. 40, 55). Therefore, Hobson claimed damages in the amount of $95,051.18, being the difference in the value of the property and the price paid therefor.

The measure of damages in a breach of contract case is well established. "Contract damages are ordinarily based on the injured party's **expectation interest** and are intended to give him the **benefit of the bargain** by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." *Theobald v. Nosser*, 752 So. 2d 1036, 1042 (Miss. 1999) citing *J.O .Hooker and Sons, Inc. V. Robert's Cabinet Co.*, 683 So. 2d 396, 405 (Miss. 1996) (emphasis added). Therefore, in order for Hobson to be "in

as good a position as he would have been" but for the breach, Hobson must receive the difference between the purchase price and the value of the property. Stated another way, if Chase had performed, Hobson would have received property worth $156,000.00 for a purchase price of $60,948.82, instantly giving him equity in the property in the amount of $95,051.18. Therefore, in order to put him in the position he would have been in but for Chase's breach, Hobson was entitled to recover damages in the amount of $95,051.18, which is the amount of the award rendered by the county court.

Chase did not submit any evidence in the trial court to contest or contradict Hobson's appraisal evidence. Chase clearly could have created a genuine issue of fact on the issue of damages by submitting an appraisal showing the property to be valued at less than $156,000.00 on the date of the foreclosure. If conflicting affidavits on the issue of the property's value had been submitted in response to the motions for summary judgment, it is likely that the county court would have been compelled to conduct a trial on the issue of damages.

However, as evidenced by the following statement in its rebuttal brief to the circuit court, it is clear that Chase never intended to contest the measure or amount of Hobson's contract damages:

> In his Response Brief, the Plaintiff argues that the correct measure of damages was used and that the Defendants did not preserve the question of attorney's fees for appeal. Yet again, the Plaintiff has ignored the actual arguments raised by the Defendants on this appeal. ***The Defendants have not appealed the measure of damages. The Defendants have appealed the Plaintiff's entitlement to damages in the first place.*** (Emphasis added). (R. 170)

Since Chase did not contest the measure of damages used by the County Court in awarding judgment for Hobson and, by its own admission, appealed only Hobson's entitlement to damages, i.e., liability, the circuit court, in affirming the county court's findings as to liability, also should have

affirmed the determination of damages.[3] By ordering this cause remanded for a trial on damages, the circuit court is allowing Chase an unfair opportunity to introduce evidence that they failed to introduce in the lower court. In the county court, Chase failed to present any evidence as to damages, failed to file any affidavits relating to damages, and wholly failed to rebut Hobson's evidence as to damages. They should not be allowed to do so now. Clearly, since Chase only contested liability in the trial court, and never contested Hobson's evidence of damages, the circuit court had no basis to remand this case for trial on the issue of damages.

Chase also argued to the circuit court that the county court erred in awarding punitive damages. (R. 144-145). However, no award for punitive damages was made. Rather, the county court awarded Hobson his attorneys fees and expenses in the amount of $10,868.60. (R. 109). The Court found that an award of attorneys fees and expenses was warranted due to Chase's gross negligence.[4]

Chase is apparently confused by the fact that the test for determining when attorneys fees and expenses may be awarded in a breach of contract case is the same test used in determining whether punitive damages are warranted. As a general rule, "in breach of contract cases, attorney fees generally are not awarded absent provision for such in the contract or a finding of conduct so outrageous as to support an award of punitive damages." *Garner v. Hickman*, 733 So.2d 191, 198 (Miss. 1999). "A trial court's decision on attorneys fees is subject to the abuse of discretion standard

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[3] The circuit court's order does not explain the basis upon which the court concluded that a trial should be conducted on the uncontested issue of damages. (R.178, 186, 199).

[4] Chase and Priority admit this gross negligence by admitting that they conducted the foreclosure sale when they "did not have the right to convey the subject property at the foreclosure sale, because Quimby reinstated under the Deed of Trust" (Chase's Brief, p. 15) and by admitting that they have no idea when this reinstatement occurred. (T. 6-7).

of review." *Sentinel Indust. Contracting Corp. v. Kimmins Indust. Serv. Corp.*, 743 So.2d 954, 970-71 (Miss. 1999).

After determining the issue of liability and actual damages at the hearing on the cross motions for summary judgment, the trial judge indicated he would hold a separate hearing on the attorney fee issue ***if Chase intended to contest the attorney fee issue.*** Specifically, the county court stated,

> Prepare your bill [for attorneys fees] and let's try to do that within three weeks. Supply counsel opposite with a copy of it. If they don't have any contest, I will award what you ask for. If they have a contest, get with Sherry and she will set up a separate hearing. Did any of the attorneys have anything further? (T. 15).

Neither Chase nor Priority objected to the submission of Hobson's attorneys fees or made any argument as to why said fees should not be allowed. Further, even after Hobson's submission of his attorneys fees, neither Chase nor Priority contacted the court administrator to ask for a hearing on same. The judgment of the county court specifically states:

> [f]urther, the Court finds that Defendants' breach was grossly negligent and therefore amounted to an independent tort entitling Plaintiff to his reasonable attorney's fees and expenses in the amount of $10,868.60, ***there being no objection by the Defendants to same during the time allotted by the Court.*** (R. 109).

Therefore, Hobson asserts that Chase did not preserve this issue for appeal. "In order to preserve an issue for appeal, it is necessary to raise the matter first with the trial court on the theory that [the appellate court] cannot normally put the trial court in error for a ruling that it was never offered the opportunity to make." *Dunaway v. Dunaway*, 749 So.2d 1112, 1120 (Miss.App. 1999). Chase had two opportunities to raise their objection to the county court's award for attorneys fees and failed to take advantage of either.

CONCLUSION

Hobson was a bona fide purchaser for value without notice at the foreclosure sale of the subject property. Furthermore, when Hobson's bid was accepted, binding contractual obligations were imposed on the parties. Hobson fully performed his obligation when he paid the purchase price. There are no genuine issues of material fact as to any alleged "disputed terms" of the contract or as to whether or not Hobson had notice prior to placing his bid that the contract was conditional. Finally, based on the undisputed, uncontradicted evidence, the county court did not err in its award of damages. Therefore, this Court should affirm the Circuit Court's Order affirming the county court's judgment as to liability. This Court should also reverse the Circuit Court's Order as to the damage portion of this suit and reinstate the judgment of the county court.

THIS 21st day of July, 2011.

Respectfully submitted,

JAMES D. HOBSON, JR.

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CERTIFICATE

I, Kenneth B. Rector, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to:

CIRCUIT COURT JUDGE:
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COUNTY COURT JUDGE:
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