INDEX

SELECTED CASES

--- So.3d ----, 2013 WL 3607468 (Miss.App.)
(Cite as: 2013 WL 3607468 (Miss.App.))

Court of Appeals of Mississippi.
Jerry P. **MIZE**, Appellant
v.
WESTBROOK CONSTRUCTION COMPANY OF **OXFORD**, LLC, Jimmy Alvis Lewis, Jr., Kay W. Lewis and Jimmie Waller, Appellees.

No. 2012–CA–00610–COA.
July 16, 2013.

Lafayette County Chancery Court, Glenn Alderson, J.
Elbert Earl Haley Jr., Erik Gregory Faries, attorneys for appellant.

William Troy Sloan, Bela J. Chain III, attorneys for appellees.

Before GRIFFIS, P.J., BARNES and JAMES, JJ.

BARNES, J., for the Court:

*1 ¶ 1. Jerry Mize filed suit to quiet and confirm the title to his property, which he argues extends slightly south of County Road 206 in Lafayette County, Mississippi. His neighbors to the south counterclaimed, asserting that according to their deeds, they own the property to the centerline of County Road 206, and, even if their deeds are incorrect, they own the land by adverse possession. The chancellor agreed with the neighbors and confirmed their titles. The chancellor also found that **Mize** acted maliciously in pursuing his claim and awarded attorney's fees and damages. **Mize** now appeals, arguing the chancellor was biased and lacked support for his findings. Finding no error, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶ 2. **Mize** owns fifty-six acres in Lafayette County north of County Road 206. **Westbrook Construction** Company of **Oxford** LLC owns fifty-two acres directly south of **Mize's** property. Kay and Jimmy Lewis Jr. (the Lewises), Jimmie Waller (Kay's mother), and Craig Merrell also own land to the south of **Mize's**. The disputed property is a somewhat triangle-shaped piece of land that runs along the south side of County Road 206 for approximately a quarter of a mile and extends approximately four feet to the south on the west side and thirty-five feet to the south on the east side.[FN1]

FN1. The land is located within the West Half of the Northwest Quarter of Section 6, Township 8 South, Range 2 West. County Road 206 runs generally east and west within this quarter. The tax assessor's plat depicting the properties in question is attached to this opinion as "Appendix A," with Mize's property being referred to as tract 22, Westbrook's property as tract 38, the Lewises' property as tract 23, and Waller's property as tract 24.

¶ 3. The crux of this matter began in the summer of 2007, when Westbrook requested site approval with the Lafayette County Planning Commission for development of a subdivision. Westbrook had purchased the land south of Mize's property in 2005 with intentions of future development. Mize and several neighbors protested the subdivision.

¶ 4. According to Mize, when he purchased his property in August 2000, he was told by the previous property owner, Estelle Kiger, that his property line extended slightly south of County Road 206. Mize's ownership of the property south of County

Road 206 would cut off access for the proposed subdivision. In October 2007, Mize hired Melvin James Cannatella, a surveyor with W.L. Burle, Engineers P.A., to survey his property. Upon reviewing Mize's 2000 deed, Cannatella discovered that the property description "did not close" on the south side, meaning there was a gap in the property's border. Cannatella determined that the only way to close the description was to include County Road 206 and a portion of the land extending south of it. In October 2007, Cannatella rewrote the property description, and Kiger executed a correction deed to Mize.

¶ 5. On September 18, 2008, Mize filed suit in the Lafayette County Chancery Court against Westbrook, the Lewises, Waller, and Merrell to quiet and confirm his title and to bar the defendants from using his property. Westbrook, the Lewises, and Waller answered the complaint and filed counter-complaints. [FN2] The defendants/counter-claimants alleged that Mize had slandered their titles; they sought to quiet and confirm their own titles.

> FN2. Merrell did not answer the complaint. It appears from the record that Mize and Merrell had a side agreement whereby Mize would concede his claim against Merrell if the claims against the other defendants failed. Likewise, if Mize succeeded on his claim against the other defendants, he would succeed on his claim against Merrell. The property claimed by Merrell was approximately thirty feet by ten feet.

¶ 6. A hearing was held at which Mize introduced Cannatella's survey as evidence, and the defendants introduced a survey that they had commissioned by Robert Sealy. Sealy's survey stated that Mize's property line stopped at County Road 206. The chancellor found that Sealy's survey was correct, and, alternatively, that the defendants had proven all the elements of adverse possession. And because the chancellor found Mize acted with malice in pursuing his claim, Mize was ordered to pay $5,687.50 in attorney's fees and $32,530.05 in damages.

*2 ¶ 7. On appeal, Mize asserts the following issues: (1) the chancellor should have recused himself because he had personal knowledge of disputed facts; (2) the chancellor erroneously excluded three deeds from evidence; (3) the defendants did not prove adverse possession; (4) the chancellor erred in awarding attorney's fees for slander of title; (5) the chancellor erred in awarding Westbrook damages for the lost sale of property; and (6) the chancellor erred in finding Sealy's testimony more credible than Cannatella's.

ANALYSIS OF THE ISSUES

1. Chancellor's Personal Knowledge of the Facts

¶ 8. Mize argues the chancellor should have recused himself because he was familiar with the properties in controversy and had prepared one of the deeds in evidence. Alternatively, Mize argues the chancellor should have disclosed his possible disqualifications on the record and given the parties an opportunity to waive the conflict.

¶ 9. Canon 3E(1)(a)-(b) of the Mississippi Code of Judicial Conduct states:

> (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as lawyer in the matter in controversy....

¶ 10. Mize's first issue arises from the following statement made by the chancellor when giving the opinion of the court: "And I believe Exhibit No.

24, it was a number of lots that were surveyed by Mr. Edward Overall, a surveyor over in Marshall County. And there was a survey made of a—two surveys made for property for a black church. *This judge did one of the deeds.*" (Emphasis added). The deed, dated May 1996, is signed by the chancellor and describes 2.2 acres in the Northwest Quarter of Section 6.[FN3] The deed clearly bears the chancellor's name and signature. No objection or motion for recusal was made when the deed was offered into evidence or when the chancellor stated he prepared the deed. The failure to object waived this issue for appeal. *See Tubwell v. Grant,* 760 So.2d 687, 689(¶ 8) (Miss.2000) ("Where the party knew of the grounds for the motion [for recusal] or with the exercise of reasonable diligence may have discovered those grounds and where that party does not move timely prior to trial, the point will be deemed waived.").

FN3. The church's property is contained within tract 27. *See* Appendix A.

¶ 11. Regardless, the deed prepared by the chancellor does not involve the parties or properties in this action, and the contents of the deed are not in controversy. The deed references a stone in a church lot that was recognized as marking the northwest corner of Section 6. There is no dispute as to the location of the northwest corner of Section 6. In fact, Mize's surveyor, Cannatella, stated in his testimony he used the stone to establish the northwest corner of his survey. Finally, we have carefully reviewed the deeds in evidence, and their descriptions relevant to this case have a point of beginning at the *southwest corner* of the Northwest Quarter of Section 6. Also, we note that a seventeen-acre tract, labeled tract 26 in Appendix A, lies between the church's property and Mize's property; thus, the borders of the church's property as established in the deed drafted by the chancellor could not possibly encroach Mize's property. Therefore, the deed prepared by the chancellor is not a matter in controversy. Also, no bias has been shown to have resulted from the chancellor's work on the deed. Thus, we cannot find that the chancellor should have sua sponte recused himself.

*3 ¶ 12. Next, Mize argues the chancellor made two statements that revealed he had personal knowledge of hay being baled on the land in question. The first statement was made during closing arguments, when the following exchange occurred:

> [MIZE'S COUNSEL]: I don't think that the Court needs me to run through the elements of adverse possession. I believe the Court is well aware of those, but the Court should consider the fact that the use of the property that now belongs to Mr. Westbrook doesn't go back but about 2005—2005. His claim must extend in a time frame in which the—Mr. Coleman's own property—Mr. Coleman states he had individuals on the property mow there more than just—more than a month out of a year, and I don't think that meets—
>
> THE COURT:—No, sir, what Mr. Coleman testified to is that, and I think this Court and the appella[te] court realizes when you are not keep[ing] a log book, he said he was on it monthly. He knew at least monthly, other times more than that. He convinced the Court that he used it quite often. You cannot—I'm an old cow man, and when you bale hay, and *I noticed that it's ironic that I'm hearing this case. I can remember when Mr. Coleman had it, and I can remember going out to Bay Springs [Road] and passing by there and noticing each time I would go, there would be less and less round bales of hay out in that open field.* Of course, Mr. Coleman's across the ditch in that big white house and had cows running in front. His testimony was he was there quite a bit. And I think that adverse possession would run back through him. He held it out as being his.

(Emphasis added). The second statement occurred during Coleman's testimony. When Coleman was describing his property, the chancellor stopped him and said: "I'm familiar with your property, I

guess I passed it maybe a hundred times."

¶ 13. Mize argues this personal knowledge required recusal under Canon 3E(1)(a). Again, no request for recusal was made, and no bias is alleged because of what the chancellor witnessed on Coleman's land. It is undisputed that Coleman used the property as a hayfield. Mize confirmed this in his testimony. Thus, we cannot find that the chancellor should have sua sponte recused himself for having knowledge of the area where he lived.

2. Deraignment of Title

¶ 14. At trial, Mize sought to introduce into evidence the deeds of the three prior owners of his property. The defendants objected, arguing the deeds were inadmissible because Mize had not deraigned his title as required by Mississippi Code Annotated section 11–17–35 (Rev.2004). The chancellor agreed, stating: "I don't know how you [(Mize)] are going to get around 11–17–35." The objection was then sustained. Mize argues the exclusion of the deeds was error.

¶ 15. Section 11–17–35 states:

> In bills to confirm title to real estate, and to cancel and remove clouds therefrom, the complainant must set forth in plain and concise language the deraignment of his title. If title has passed out of the sovereign more than seventy-five (75) years prior to the filing of the bill, then the deraignment shall be sufficient if it show title out of the sovereign and a deraignment of title for not less than sixty (60) years prior to the filing of the bill. A mere statement therein that complainant is the real owner of the land shall be insufficient, unless good and valid reason be given why he does not deraign his title. In all such cases, final decrees in the complainant's favor shall be recorded in the record of deeds, and shall be indexed as if a conveyance of the land from the defendant or each of them, if more than one, to the complainant or complainants, if more than one.

*4 ¶ 16. Mize argues the defendants' objection was improperly granted because it did not go to whether the deeds were admissible as evidence, but, rather, whether Mize's complaint should be dismissed for failure to state a claim upon which relief could be granted. Mize argues that the failure to state a claim under Mississippi Rule of Civil Procedure 12(b)(6) is an affirmative defense, which the defendants did not pursue and, consequently, waived.

¶ 17. Regardless of the basis of the objection, the prior deeds were not relevant. Mize's claim did not arise until 2007, when he commissioned the survey by Cannatella and had the correction deed issued. Mize had owned his property since 2000. He did not make a proffer as to what he intended to show in the three deeds, and it does not appear he relied on the deeds to support his argument. When asked by the chancellor if the three deeds contained the same description as the 2000 deed, Mize's attorney responded: "One of them does—the other two have descriptions that are more general of the western half itself, but it is indeed his chain of title and differing description...."

¶ 18. Even if one of the prior deeds gave Mize a claim to the property south of County Road 206, the chancellor ultimately relied on Sealy's survey, which excluded the land south of this road. Thus, even if it were true that the chancellor erred in excluding the deeds, the error was harmless. This issue is without merit.

3. Adverse Possession

¶ 19. After finding Westbrook's, the Lewises', and Waller's deeds included the land up to the centerline of County Road 206, the chancellor alternatively found the defendants had adversely possessed the property. This finding was important because it supported the chancellor's award of damages for slander of title—that is, even though Mize had a survey to support his claim, he nonetheless frivolously pursued his claim because the defendants clearly owned the property by adverse possession. Mize argues the chancellor's finding was in error because the defendants failed to prove adverse

possession.

¶ 20. Mississippi Code Annotated section 15–1–13(1) (Rev.2012) states:

> Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title....

For possession to be adverse under the statute, it must be "(1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful." *Blackburn v. Wong,* 904 So.2d 134, 136(¶ 15) (Miss.2004) (citing *Thornhill v. Caroline Hunt Trust Estate,* 594 So.2d 1150, 1152–53 (Miss.1992)). The claimant bears the burden of proof to show adverse possession by clear and convincing evidence. *Id.* The chancellor is the fact-finder, but his findings must be supported by substantial evidence, and are reviewed for manifest error. *Walker v. Murphree,* 722 So.2d 1277, 1280(¶ 15) (Miss.Ct.App.1998) (citation omitted).

***5** ¶ 21. Waller and the Lewises have each owned their respective properties continuously for more than the statutorily required ten years—the Lewises since 1989 and Waller since 1974. Westbrook purchased his land in January 2005 from Kenny Coleman, who had owned the property since December 1994. The tacking of years is allowed as long as there is privity of possession between the predecessor and the claimant. *Walters v. Rogers,* 222 Miss. 182, 186, 75 So.2d 461, 462 (1954). Privity of possession was created when Coleman conveyed title to Westbrook; thus, Westbrook is allowed to combine his term of ownership with Coleman's to meet the statutory time period.

¶ 22. Coleman, Westbrook, the Lewises, and Waller testified that they had used and maintained their properties up to County Road 206 during their ownership. The testimony showed that they mowed grass up to the road, trimmed thorn bushes near the road, treated the land for weeds up to the road, planted flowers along the road and ditch, and cut and baled hay up to the road. Two other witnesses confirmed this regarding the Lewises' and Waller's properties. When Kiger was shown a picture of the land south of County Road 206, she recognized it as the Lewises' and Waller's yards. Kiger denied that she or her family had ever claimed ownership of the land south of County Road 206, and her only recollection of using the south side of the road was when she picked blackberries there as a child "at the top of the hill." However, the property she referenced at the top of the hill was not part of the disputed property. Further, a nearby property owner, Drayton Barnes, who drove past the properties daily, was shown photographs of the properties south of County Road 206 and asked if he recognized to whom the properties belonged. He identified the properties as the Lewises' and Waller's.

¶ 23. Waller's, the Lewises', and Westbrook/Coleman's possession of their respective properties was actual, exclusive, peaceful, open, notorious, visible, and continuous for ten years. The testimony showed that they came and went from their properties without contest from anyone. Mize argues that this is untrue and counters that he took steps after purchasing his property to show ownership of the land south of County Road 206. Specifically, he testified that he graded and graveled an abandoned access way and placed no-trespassing signs along it. In 2007, prior to commissioning the survey, he built a fence. Admittedly, the fence was outside the boundary of the survey, and was removed by Westbrook. We cannot find these actions were sufficient to defeat the neighbors' claims of adverse possession.

¶ 24. "[A]n adverse possessor 'must unfurl his flag on the land, and keep it flying, so that the (actual) owner may see....' " *Blankinship v. Payton,*

605 So.2d 817, 820 (Miss.1992) (quoting Walter G. Robillard & Lane J. Bouman, *A Treatise on the Law of Surveying and Boundaries,* § 22.08 (5th ed.1987)). Mize's neighbors have met this burden through the use and maintenance of their properties. We find the chancellor had substantial evidence to support a finding of adverse possession. Thus, this issue is without merit.

4. Slander of Title and Attorney's Fees

***6** ¶ 25. Mize asserts he brought this claim only after contacting a surveyor and having a correction deed issued, and since he had support for his claim, there was no basis for the chancellor's finding of slander of title or award of attorney's fees.

¶ 26. "Slander of title 'may consist of conduct which brings or tends to bring in question the right or title of another to particular property.' " *Ellison v. Meek,* 820 So.2d 730, 738(¶ 32) (Miss.Ct.App.2002) (quoting *Walley v. Hunt,* 212 Miss. 294, 304, 54 So.2d 393, 396 (1951)). "One who falsely and maliciously publishes [a] matter which brings in question or disparages the title to property, thereby causing special damage to the owner, may be held liable in a civil action for damages." *Walley,* 212 Miss. at 304, 54 So.2d at 396 (citation omitted). Malice may be inferred "by applying common knowledge and human experience to a person's statements, acts, and the surrounding circumstances." *Phelps v. Clinkscales,* 247 So.2d 819, 821 (Miss.1971).

¶ 27. It is undisputed that Mize called into question his neighbors' titles. Therefore, the only issue to be resolved was whether he did so with malice. The chancellor found that malice could be inferred from Mize's actions and the circumstances of this case. The chancellor "solely determines the credibility of witnesses and the weight to give to the evidence," and we give great deference to the chancellor's findings of fact. *Webb v. Drewrey,* 4 So.3d 1078, 1081(¶ 11) (Miss.Ct.App.2009) (citation omitted); *see also Bell v. Parker,* 563 So.2d 594, 597 (Miss.1990).

¶ 28. First, the chancellor found that because an abundantly clear case for adverse possession existed, Mize was on notice that he had no claim to the land south of County Road 206, regardless of what Cannatella's survey or the correction deed said. Rather, as the chancellor stated, Mize "blindly" pursued the claim despite the evidence. Mize has continually argued that he pursued the claim because Kiger led him to believe that he owned the land. However, even if Kiger represented to Mize in 2000 that the land was his, her June 2010 deposition testimony was clearly to the contrary:

> Q. Okay. And it's your testimony that [Waller] always maintained ... the property up to the road?
>
> A. Why, yes, she maintains it up to the road. Somebody does.
>
> Q. But you don't?
>
> ....
>
> A. No. I don't maintain her yard at all.
>
> ....
>
> Q. Well, let me just cut to the chase. Are you saying you own part of [Waller's] yard?
>
> A. No, I don't own any part of her yard, as far as I know.
>
> Q. Did your father ever own part of her yard?
>
> A. Not that we know of.
>
> Q. You never intended to convey Ms. Waller's property to anyone, then, did you?
>
> A. To convey her property to anyone?
>
> Q. Yeah, you didn't mean to sell her property to somebody or give her property to somebody.
>
> A. Didn't mean to, no.
>
> Q. I mean, if you never claimed it and you never

meant to convey it, did you ever consider it yours or your father's?

*7 A. No. I never considered it mine.

....

Q. [H]ave you ever claimed [the Lewises'] property?

A. No. I never claimed their property.

Q. Did you tell anybody that you owned any of their property?

A. No.

Q. So that was never your intent to sell their property to anyone?

A. No.

¶ 29. Kiger gave consistent testimony as to Walker Downs, the owner of Westbrook's property prior to Coleman, stating that Downs crossed and accessed his property through County Road 206 "all the time." Further, in relating the account of when she convinced Clark Littlejohn, a since-deceased county supervisor, that the road should be upgraded and taken over by the county, Kiger testified that she insisted to Littlejohn that she wanted any land that had to be taken to be from "my side" of the road—referring to the north side of County Road 206. Kiger later learned that Littlejohn had told the Lewises and Waller that Kiger wanted the land south of the road to be taken. Kiger became very upset over this, emphasizing that she had never claimed that land as hers.

¶ 30. Next, during the pendency of this litigation, Mize removed a culvert from the ditch alongside County Road 206, blocking Westbrook's access to his property. When county personnel attempted to replace the culvert, Mize objected, arguing that he did not want anyone crossing the ditch. Westbrook filed for an injunction, to which Mize responded that he was the owner of the property surrounding the culvert, and he removed the culvert out of necessity because it was "rusted and had collapsed and was blocking that ditch[,] forcing water onto the road and onto the remainder of Mize's property." Even if Mize removed the culvert out of necessity, this does not explain why, when the county was attempting to replace the culvert, Mize called Lafayette County Road Manager Jerry Haynie and told him to stop.

¶ 31. We find the chancellor correctly inferred malice, as there is no other explanation for Mize's actions. Having found malice, the chancellor was correct in awarding the Lewises and Waller $5,687.50 in attorney's fees.[FN4] This issue is without merit.

FN4. Waller and the Lewises were represented by the same attorney, who put on proof that his fees totaled $5,687.50. Westbrook was represented by another attorney, and no evidence was entered of his fees. Thus, no attorney's fees were awarded to Westbrook.

5. Damages for Lost Sale of Property

¶ 32. Westbrook testified that he entered into a contract on April 14, 2009, for the sale of approximately thirty acres of his property to Michael Mitchell. Westbrook contacted Mize and asked him to withdraw his suit so the sale could proceed without a cloud on the title; alternatively, Westbrook offered Mize the option of purchasing the property. Mize denies knowledge of this, but testified that even if he had known of a pending sale, he would not have withdrawn his claim or purchased the property. Mitchell testified that he was ready, willing, and able to purchase Westbrook's property, but after six months passed without a resolution of Mize's claim, he chose to purchase property elsewhere. Westbrook testified that in addition to Mitchell, several others had been interested in purchasing the property, but had chosen not to because of the dispute with Mize.

*8 ¶ 33. An action for slander of title lies

where a person claims ownership of another's property, "thereby preventing its lease or sale to another...." *Walley,* 212 Miss. at 304, 54 So.2d at 396. "The malicious filing for record of an instrument which is known to be inoperative, and which disparages the title to land, is a false and malicious statement, for which the damages suffered may be recovered." *Id.* at 305, 54 So.2d at 396 (citations omitted).

¶ 34. The chancellor found **Mize** maliciously slandered **Westbrook's** title, and this prevented the sale to Mitchell, thus entitling **Westbrook** to damages. **Mize** argues that **Westbrook's** assertion that he could not sell his land was disingenuous. In support of his argument, **Mize** cites to a sale that occurred on April 30, 2009, wherein **Westbrook** sold a portion of his property to Steven M. Shipman, who resold a portion to Merrell. Regardless of that sale, Mitchell's testimony established that he was willing and able to purchase the property from **Westbrook**, attempted to do so for six months, and did not complete the purchase because of **Mize's** suit. **Westbrook** testified that he would have netted $176,500 from the sale of the property to Mitchell, and he would have used the proceeds to pay down his loan. The interest he had paid on $176,500 since the date of the planned closing, May 15, 2009, was $32,530.05. The chancellor awarded this amount as damages.

¶ 35. We cannot find that the chancellor abused his discretion in awarding damages due to the lost sale. While the contract with Mitchell predated Kiger's deposition, which was found to have put Mize on notice he had no claim to the land, we still find that the damages award was justified. The testimony showed a clear case of adverse possession, regardless of what Mize believed Kiger had told him. Damages are appropriate for slander of title where malice lies, and we have found the chancellor did not err in concluding that Mize acted with malice. This issue is without merit.

6. Conflicting Surveys

¶ 36. Finally, Mize argues the chancellor erred in finding Sealy's survey more credible than Cannatella's. The chancellor's finding focused on the landmarks used by the surveyors, and Sealy's testimony that if Cannatella's survey was accepted, it would render all other property descriptions in the area incorrect.

¶ 37. The deeds of Waller, the Lewises, and Westbrook (and their predecessors in title) describe their property borders as running "to a point in" County Road 206. Sealy agreed that the border between their and Mize's properties was County Road 206. However, Cannatella found Mize's property line ran south of the road. According to Sealy, Cannatella's finding resulted from the use of incorrect landmarks. Unlike other property descriptions in the area, Cannatella found that a wooden post marked the northeast corner of the Northwest Quarter of Section 6. Sealy and previous surveyors found the northeast-corner marker was a cotton-picker spindle. Sealy testified that the wooden post was not on the north section line, as Cannatella believed, but, rather, twenty-five feet below it. Sealy explained that if one drew a straight line from the northwest corner of the Northwest Quarter, which undisputedly is a stone near a church, to the wooden post on the east corner, it would slope down twenty-five feet, skewing all property descriptions in the area. Sealy testified Cannatella made "all of the ties going to the south," which explains why Cannatella found Mize's property line was below County Road 206, while other surveyors found it was in the right-of-way.

*9 ¶ 38. Adding to the discrepancy in the two surveys are the measurements of Section 6 from the Government Land Office (GLO). Exhibit 30, which is attached to this opinion as "Appendix B," is a sketch drawn by Sealy, whereby Sealy converted the GLO's chain measurements to feet. The sketch shows that Section 6 is an irregular section. A section is normally 5,280 feet wide by 5,280 feet long, making each half section 2,640 feet and each quarter section 1,320 feet. However, Sealy's sketch shows varying measurements in which the Western

Halves of the Northwest and Southwest Quarters are narrower than a true section half. Sealy testified that he reviewed Cannatella's survey and compared it to the GLO's survey, and the two did not match.

¶ 39. Cannatella testified that while he reviewed the GLO's survey, he did not rely on it. Rather, Cannatella measured the section himself, which resulted in several discrepancies. For example, in establishing the southwest corner of the Northwest Quarter of Section 6, Cannatella took the distance from northwest corner of Section 6 to the southwest corner of Section 6 and divided it in half; the result was a distance of 2,662 feet. However, according to Sealy's sketch, the distance between the northwest and southwest corners of the Northwest Quarter is 2,640 feet. When asked to explain the twenty-two-foot discrepancy, Cannatella stated that he used monuments rather than the survey to measure the distance because, "[i]n the principles of surveying[,] the monument supercedes distance."

¶ 40. Not only was Cannatella's survey inconsistent with the GLO's survey and neighboring property descriptions, it was also inconsistent with a decree by the Lafayette County Chancery Court in *Avent v. Coleman,* Cause No.2001–258–G (Sept. 13, 2002), in which the center point of Section 6, i.e., the southeast corner of the Northwest Quarter, was established. Sealy relied on the point in his survey, while Cannatella did not establish a center point. Cannatella testified that he had not seen the order. When asked about Cannatella's findings, Sealy again testified that Cannatella's entire section line across the southern border of the Northwest Quarter was twenty-five feet too far south.

¶ 41. Since this was a bench trial, it was the chancellor's duty to weigh the evidence and determine the credibility of the witnesses. *See Webb,* 4 So.3d at 1081(¶ 11); *Bell,* 563 So.2d at 597. Giving deference to the chancellor's conclusions, we can find no error in the acceptance of Sealy's testimony. It was consistent with prior land surveys, the surrounding deeds, and the GLO's survey. This issue is without merit.

¶ 42. THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS, CARLTON, FAIR AND JAMES, JJ., CONCUR. MAXWELL, J., NOT PARTICIPATING.

Appendix A

Tabular or graphic material set at this point is not displayable.

Appendix B

Tabular or graphic material set at this point is not displayable.

Miss.App.,2013.
Mize v. Westbrook Const. Co. of Oxford, LLC
--- So.3d ----, 2013 WL 3607468 (Miss.App.)

END OF DOCUMENT

80 So.3d 878
(Cite as: 80 So.3d 878)

C

Court of Appeals of Mississippi.
Arthur Lee **BROWN** and Linda Jackson **Brown**, Appellants
v.
James **ANDERSON** Jr. and Laura **Anderson**, Appellees.

No. 2010–CA–01827–COA.
Feb. 21, 2012.

Background: Purchaser brought suit against vendors for breach of contract and tortious breach of contract stemming from purchase of residence. The Hinds County Circuit Court, S. Malcolm O. Harrison, J., granted vendors directed verdict. Purchaser appealed.

Holding: The Court of Appeals, Maxwell, J., held that purchaser was bound by release accepting house as is.

Affirmed.

Barnes, J., concurred in part and in result.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
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30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k. Effect of evidence and inferences therefrom on direction of verdict. Most Cited Cases

The Court of Appeals reviews the grant of a directed verdict de novo, considering the evidence in the light most favorable to the non-moving party and giving that party all reasonable favorable inferences from the evidence presented at trial.

[2] Trial 388 ⚿139.1(14)

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388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k139.1 Evidence
388k139.1(5) Submission to or Withdrawal from Jury
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Trial 388 ⚿142

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k142 k. Inferences from evidence. Most Cited Cases

If the facts and inferences create a question of fact from which reasonable minds could differ, a trial court should not grant a directed verdict but instead submit the matter to the jury.

[3] Contracts 95 ⚿93(2)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k93 Mistake
95k93(2) k. Signing in ignorance of contents in general. Most Cited Cases

Parties to a contract have an inherent duty to

read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it.

[4] Contracts 95 ⚿189.5

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k189.5 k. Exculpatory contracts. Most Cited Cases

Release signed by purchaser stating that he had inspected the home and found all systems to be in good working order prevented purchaser from bringing breach of contract case against sellers based on faulty systems in the home, even though release expressly relieved only real estate agent from liability; purchaser was bound by representations made in release at closing.

[5] Contracts 95 ⚿189.5

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k189.5 k. Exculpatory contracts. Most Cited Cases

Estoppel 156 ⚿89.1

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k89 Acquiescence
156k89.1 k. In general. Most Cited Cases

Purchaser of residence was bound by signed release stating the house's systems were in good working order at closing and that he was accepting the property as is, and thus could not prove that vendors breached the sales contract by conveying the house without electrical, plumbing, and hot water; having acquiesced to the working order of the home in order to go through with the closing, purchaser was estopped from denying the veracity of his representations made at closing.

[6] Contracts 95 ⚿187(1)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In general. Most Cited Cases

Vendor and Purchaser 400 ⚿9.1

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k9 Parties
400k9.1 k. In general. Most Cited Cases

Wife of purchaser could not maintain action against vendors based on faulty systems in home purchased by husband, because wife was not a party to the contract between husband and vendors and wife was not mentioned in contract; contract did not create any contractual duties of vendors to wife, either as a party or third-party beneficiary.

***879** David Neil McCarty, Brandi Denton Gatewood, Ocean Springs, attorneys for appellants.

Pieter John Teeuwissen, Lara E. Gill, Ridgeland, attorneys for appellees.

Before IRVING, P.J., CARLTON and MAXWELL, JJ.

MAXWELL, J., for the Court:

¶ 1. Arthur and Linda **Brown** sued James and Laura **Anderson** for breach of contract and tortious breach of contract stemming from the **Browns'** purchase of * the **Andersons'** house. After the **Browns** presented their case to a jury, the Hinds County Circuit Court granted the **Andersons'** motion for a

directed verdict. The circuit judge held, because Arthur signed a release stating the house's systems were in good working order at closing, Arthur could not prove the **Andersons** breached the sales contract by conveying the house without working electrical, plumbing, HVAC, and hot water. On appeal, the **Browns** argue the circuit court erroneously applied the release. We find Arthur was bound by the release. And based on the language of the contract and release, we find the **Browns** failed to present a claim for breach of contract and tortious breach of contract. Thus, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2. Linda contacted her realtor about showing her the **Andersons'** home in Byram, Mississippi. After visiting the home several times, Linda and Arthur decided to make an offer on the house. On June 22, 2002, Linda signed the contract using Arthur's name. Although warranting that the plumbing, electric, heating and air-conditioning systems would be in working order on the closing date, the contract encouraged Arthur to perform a pre-closing inspection because the contract stated Arthur had inspected the property and, subject to the inspection allowed in the contract, "accepts property 'as is.' " [FN1] The contract also contained a handwritten contingency that stated "all plumbing, electrical, hot water heater, appliances, central heat and central air [would be] in good working order at closing."

> FN1. Section 14 of the contract for sale provided:
>
> > **PRE–CLOSING INSPECTION:** Seller warrants that all plumbing, electric, heating and air conditioning systems, all equipment and appliances which convey with the property will be in working order on closing date or upon possession, whichever occurs first, unless specifically excluded herein. Purchaser has the right and is encouraged to make a pre-closing inspection to determine their working order. The Purchaser acknowledges that he has not relied upon any statements or representations by the undersigned Seller, Listing Firm or Selling Firm which are not herein expressed. *Purchaser represents that Purchaser has inspected Property as of the date of this Purchase Agreement, and subject to the inspections allowed herein, accepts property "as is."* ...
>
> (Emphasis added).

¶ 3. Though the Browns claim their realtor and mortgage broker told them the inspection would be taken care of, the Browns admit they did not have the house inspected before closing. On the day of the closing, July 23, 2002, Arthur signed a "walk-thru inspection release." This release states that Arthur had inspected the property and "found the following items, evidenced by a check mark to be in good working ORDER and or normal condition...." The release contained check marks next to "heating unit," "air conditioner," "electrical," "water heater," and "plumbing," as well as other items. Arthur went through with the closing, and the Browns took possession of the home.

¶ 4. The Browns claim that they discovered, within a few weeks of closing, they had bought a "hell house" with faulty electrical, plumbing, HVAC, and hot water. Several weeks after the closing they paid for a home inspection. The inspection revealed problems with each of these systems. On December 31, 2002, Linda and Arthur sued their mortgage company, their realtor, the **Andersons'** realtor, and the **Andersons** based on eighteen different theories of liability. During the ensuing eight years of litigation, most parties and claims were dismissed. But the breach of ***881** contract and tortious breach of contract claim against the **Andersons** survived and were finally tried in August 2010.

¶ 5. On their breach-of-contract claim, the **Browns** had the burden to prove by a preponderance of the evidence that: (1) a valid and binding

contract existed; (2) the **Andersons** breached the contract; and (3) the **Browns** were damaged monetarily. *Warwick v. Matheney,* 603 So.2d 330, 336 (Miss.1992). To establish tortious breach of contract, the **Browns** had to prove breach of contract "coupled with 'some intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort.' " *Robinson v. S. Farm Bureau Cas. Co.,* 915 So.2d 516, 520 (¶ 14) (Miss.Ct.App.2005) (quoting *Wilson v. Gen. Motors Acceptance Corp.,* 883 So.2d 56, 66 (¶ 40) (Miss.2004)).

¶ 6. After the Browns presented their case in chief to the jury, the circuit judge granted the Andersons' motion for a directed verdict. The circuit judge found there had been no evidence presented that the Andersons committed an intentional wrong, insult, abuse, or gross negligence to support its tortious breach claim. Though the evidence showed Arthur had entered a binding contract with the Andersons, Arthur was likewise bound by the release he had signed, which stated he had inspected the property and accepted the electrical, plumbing, HVAC, and hot water as being in "good working order." Therefore, the circuit judge found there was no evidence the Andersons breached the contract by not providing these systems in good working order.

STANDARD OF REVIEW

[1][2] ¶ 7. We review the grant of a directed verdict de novo, considering the evidence in the light most favorable to the non-moving party and giving that party all reasonable favorable inferences from the evidence presented at trial. *Houston v. York,* 755 So.2d 495, 499 (¶ 12) (Miss.Ct.App.1999) (citation omitted). If the facts and inferences "create a question of fact from which reasonable minds could differ," a trial court should not grant a directed verdict but instead submit the matter to the jury. *Ducksworth v. Wal–Mart Stores, Inc.,* 832 So.2d 1260, 1262 (¶ 2) (Miss.Ct.App.2002).

DISCUSSION

¶ 8. The Browns argue the circuit judge erroneously relied on the release to hold that they failed to create a jury question on whether the Andersons had breached the contract. But we find the circuit judge was correct that Arthur was bound both by the contract, wherein he agreed he "accepts property 'as is,' " and by the release, which stated he had inspected the home's systems and found them in "good working order." Because Arthur acquiesced to the fulfillment of the contract's contingencies that the house would be in good working order at closing, he could not later assert an inconsistent position that the Andersons had breached the contract by failing to convey the house in working order.

I. Arthur's Representations in the Contract and Release

[3] ¶ 9. Both home buyers and home sellers are responsible for knowing the terms of sales contracts. "Under Mississippi law, ... parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it." ***882***MS Credit Ctr., Inc. v. Horton,* 926 So.2d 167, 177 (¶ 31) (Miss.2006).

¶ 10. This contract gave Arthur the opportunity to have the home inspected before closing to ensure it was in good working order. The specific contract provision states: "Purchaser represents that Purchaser has inspected Property as of the date of this Purchase Agreement, and subject to the inspections allowed herein, accepts property 'as is.' "

¶ 11. In *Crase v. Hahn,* 754 So.2d 471, 475–76 (¶¶ 11–13) (Miss.Ct.App.1999), this court affirmed a directed verdict in favor of a home seller based on a binding "as is" clause in a sales contract. Like Arthur, Patricia Crase was given the opportunity to inspect a home prior to closing and to refuse to close if the home was not in satisfactory condition. *Id.* at 475 (¶ 9). At closing, Crase learned the house had been previously cut in half, transported, and reassembled in its current location. But Crase still de-

cided to close on the house. *Id.* Only *after* closing did Crase perform a closer inspection and discover problems. In affirming the directed verdict, this court held that Crase "fail[ed] to appreciate the effect that the 'as is' clause has on the entire transaction." *Id.* at 475 (¶ 8). Here, as clearly evidence by the "as is" clause, the contract stated the time for inspection was prior to closing—not several weeks after.

¶ 12. Arthur's contract also included as a contingency to closing that "all plumbing, electrical, hot water heater, appliances, central heat and central air [be] in good working order at closing." As the undisputed trial evidence showed, Arthur completed the closing without complaining any of these contingencies had not been met. He also represented in the release that he had inspected all of these systems and found them to be "in good working order."

¶ 13. But the Browns argue: (1) the release only applied to the Andersons' realtor, Ruth Epps Realty Inc., and not the Andersons; and (2) Arthur created a jury issue by testifying that, even though he signed the release, he did not inspect the items on the checklist.

[4] ¶ 14. While the release expressly relieved only Ruth Epps Realty Inc. from any further liability and responsibility,[FN2] Arthur represented in the release that he had personally inspected the house and found all of these systems to be in good working order. Thus, it was not specifically the relief-from-liability clause that the circuit court enforced against Arthur but instead his representations just prior to closing about the "working order" of the home's various systems.

> FN2. The release stated Arthur "relieve[d] RUTH EPPS REALTY, INC. from any further liability and responsibility now or in the future in regards to this property."

[5] ¶ 15. Further, we find no jury issue surrounding the effect of Arthur's representations in the contract and release. Arthur did not deny he authorized Linda to sign the contract on his behalf. And it is undisputed that Arthur signed the release and went through with the closing without a single complaint that the contingencies to closing—the good working order of "all plumbing, electrical, hot water heater, appliances, central heat and central air"—had not been met. The circuit court correctly rejected Arthur's trial testimony that was inconsistent with his representations in the release. Having acquiesced to the working order of the home in order to go through with the closing, Arthur was estopped from denying the veracity of his representations made at closing. *Bailey v. Estate of Kemp,* 955 So.2d 777, 782 (¶ 21) (Miss.2007).

***883 II. Linda's Claim**

[6] ¶ 16. The Browns further argue the release could not have been used against *Linda*'s claim for breach of contract because *Linda* did not sign the release. But this argument overlooks the crucial fact that Linda did not enter the contract with the Andersons. The contract solely listed "Arthur Lee Brown" as the purchaser. No where does it mention "Linda Jackson Brown." While Linda testified she was the one who physically signed the contract, she admitted she signed "Arthur L. Brown," on Arthur's behalf. Thus, the contract did not create any contractual duties of the Andersons to Linda, either as a party or third-party beneficiary. *Burns v. Washington Sav.,* 251 Miss. 789, 796, 171 So.2d 322, 325 (1965) (holding that in order to maintain an action for breach of contract as a third-party beneficiary to the contract, "the right of the third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself"). And because Linda was not a party or third-party beneficiary to the contract, she had no right to maintain a cause of action based on the contract. *Id.* at 798–99, 171 So.2d at 326. The circuit judge properly granted a directed verdict dismissing Linda's claim against the **Andersons**.

CONCLUSION

¶ 17. Viewing the facts in the **Browns**' favor,

we find they failed to create a factual issue as to why the **Andersons** should be liable for the **Browns**' dissatisfaction with the home they purchased. The **Andersons** gave Arthur the opportunity to forego closing on the house if an inspection revealed the house's systems were not in working order. The **Andersons** also completed the closing based on Arthur's representation that the house's systems were in working order.

¶ 18. Arthur accepted the home "as is" without a home inspection. And he presented no evidence that the **Andersons** contributed in any way to his failure to obtain a home inspection prior to closing. Thus, the circuit court correctly held the **Browns** failed to provide any evidence the **Andersons** had breached the sales contract.

¶ 19. **THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS, CARLTON, RUSSELL AND FAIR, JJ., CONCUR. BARNES, J., CONCURS IN PART AND IN THE RESULT.

Miss.App.,2012.
Brown v. Anderson
80 So.3d 878

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96 So.3d 49
(Cite as: 96 So.3d 49)

H

Court of Appeals of Mississippi.
QUARTER DEVELOPMENT, LLC, Appellant
v.
Sherry **HOLLOWELL** and Bonnie Urbanek Scott and The Estate of James E. Urbanek, Appellees.

No. 2010–CA–02076–COA.
April 24, 2012.
Rehearing Denied Aug. 28, 2012.

Background: Vendor sued prospective purchasers for specific performance of purchase agreement. The Circuit Court, Lafayette County, Robert William Elliott, J., entered summary judgment in purchasers' favor, and vendor appealed.

Holding: The Court of Appeals, Russell, J., held that vendor who did not hold title to property was unable to perform its obligation to convey title to purchaser by closing date, as required to demand specific performance.

Affirmed.

Barnes, J., concurred in part and in result.

West Headnotes

[1] Specific Performance 358 95

358 Specific Performance
358III Good Faith and Diligence
358k95 k. Sufficiency of title of vendor. Most Cited Cases

Vendor did not hold marketable title to real property that was subject of purchase agreement during any period of purchase agreement and therefore, was not able to perform its obligation to convey title to purchasers by closing date, as required to demand specific performance.

[2] Specific Performance 358 87

358 Specific Performance
358III Good Faith and Diligence
358k87 k. Nature and grounds of duty of plaintiff. Most Cited Cases

Mississippi law prohibits an award of specific performance unless the party seeking that relief performs his or her part of the contract within the time allotted for his or her performance.

[3] Specific Performance 358 3

358 Specific Performance
358I Nature and Grounds of Remedy in General
358k3 k. Grounds of relief in general. Most Cited Cases

Specific Performance 358 87

358 Specific Performance
358III Good Faith and Diligence
358k87 k. Nature and grounds of duty of plaintiff. Most Cited Cases

Specific performance is not an appropriate remedy when neither party is ready, willing, and able to perform under the terms of a contract at the time performance is due.

[4] Contracts 95 312(1)

95 Contracts
95V Performance or Breach
95k312 Acts or Omissions Constituting Breach in General
95k312(1) k. In general. Most Cited Cases

When both parties cannot or do not perform under a contract, neither party is in breach of the agreement.

[5] Vendor and Purchaser 400 130(2)

400 Vendor and Purchaser
400IV Performance of Contract
400IV(A) Title and Estate of Vendor
400k130 Marketable Title
400k130(2) k. Requisites and suffi-

ciency in general. Most Cited Cases

Good title is not merely a title valid in fact, but a marketable title, which may be sold or mortgaged.

[6] Covenants 108 ⇐46

108 Covenants
108II Construction and Operation
108II(B) Covenants of Title
108k45 Covenant of Warranty
108k46 k. In general. Most Cited Cases

"Warranty deeds" warrant that the title conveyed is without defect, i.e., clear and marketable.

***50** David Earl Rozier Jr., Jackson, Jenessa Jo Carter Hicks, attorneys for appellant.

Timothy Michael Peeples, Oxford, attorney for appellees.

Before LEE, C.J., ROBERTS and RUSSELL, JJ.

RUSSELL, J., for the Court:

¶ 1. **Quarter Development**, LLC appeals the circuit court's order granting summary judgment in favor of Sherry **Hollowell**, Bonnie Urbanek Scott, and James "Jim" Urbanek [FN1] (Appellees). **Quarter Development** argues that summary judgment was improper because there are genuine issues of material fact as to whether **Quarter Development** possessed marketable title at the time set for closing. Upon review, we find no error and affirm.

FN1. James Urbanek passed away on August 24, 2009, and his estate was substituted as the appellee.

FACTS AND PROCEDURAL HISTORY

¶ 2. On February 5, 2009, **Quarter Development** and the Appellees entered into a contract for the sale of real estate in Lafayette County, Mississippi. The contract was signed by Mike Harris on behalf of **Quarter Development**, the seller, and by Jim Urbanek, the buyer. Urbanek deposited a check for $1,000 as "earnest money" with **Quarter Development's** real-estate agent, Cherie Matthews.

¶ 3. The contract provided that **Quarter Development** would convey a warranty deed to the Appellees for the property on or before April 30, 2009, with an extension period of forty-five days if the purchaser so requested.

¶ 4. The contract further provided that a reasonable time be given for the examination of title, and that should this examination reveal defects that could be cured, Quarter Development would be obligated to cure such defects as expeditiously as ***51** possible and to execute and tender a warranty deed. The parties did not close on the loan on April 30, 2009 or June 14, 2009, the last date for closing under the contract.

¶ 5. On July 28, 2009, Quarter Development filed a lawsuit against the Appellees seeking specific performance of the contract, alleging breach of contract due to the Appellees' failure to seek financing prior to the June 14, 2009 closing date; their bad faith in failing to seek financing; and their negligent representation of their intentions to seek financing prior to the June 14, 2009 closing date to Quarter Development's detriment.

¶ 6. On January 22, 2010, the Appellees filed a motion for summary judgment arguing Quarter Development was not entitled to specific performance of the contract because it did not own the property at any time during the term of the contract; and therefore, Quarter Development was not ready, willing, and able to perform on or before June 14, 2009.

¶ 7. Real property tax records for Lafayette County, Mississippi indicate that Northpointe Development, LLC, owned the property until September 4, 2009. On September 4, 2009, the property was sold to Avatar, LLC, and Intrepid Group, LLC, due to unpaid taxes by Northpointe. On September 9, 2009, Avatar sold the property to Quarter Devel-

opment.

¶ 8. On February 8, 2010, Quarter Development filed a counter-motion for summary judgment arguing they were in fact entitled to specific performance because the Appellees were bound by the terms of the contract, and that they did in fact hold marketable title at the time of closing and were therefore able to convey a warranty deed as contemplated by the contract. Quarter Development further argued that any defect found in the title to the property could and would have been cured on or prior to the June 14, 2009 closing date.

¶ 9. On July 7, 2010, the circuit court entered an order granting Appellees' motion for summary judgment and denying **Quarter Development's** counter-motion for summary judgment. Later on December 1, 2010, the circuit court denied **Quarter Development's** motion for reconsideration or, in the alternative, for amendment to the opinion and order. **Quarter Development** timely appealed.

DISCUSSION

¶ 10. This Court conducts a de novo review of a circuit court's grant or denial of a motion for summary judgment. *Holmes v. Campbell Props., Inc.,* 47 So.3d 721, 723 (¶ 6) (Miss.Ct.App.2010) (citing *Lewallen v. Slawson,* 822 So.2d 236, 237 (¶ 6) (Miss.2002)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). The facts are viewed in light most favorable to the non-moving party. *City of Jackson v. Annie Mae Sutton,* 797 So.2d 977, 979 (¶ 7) (Miss.2001).

¶ 11. The circuit court focused its ruling on whether **Quarter Development** was ready, willing, and able to perform its contractual duties at or prior to the June 14, 2009 closing date. More specifically, the circuit court looked to whether **Quarter Development** held marketable title at or prior to that date. The circuit court concluded that **Quarter Development** did not hold marketable title at or prior to the time of closing and therefore was not entitled to specific performance.

***52 I. Breach of Contract and Specific Performance Remedy**

[1] ¶ 12. **Quarter Development** argues it is entitled to specific performance of the contract because the Appellees breached their contractual duty to purchase the property. The Appellees argue that **Quarter Development** could not have performed its duty to convey a warranty deed because it did not hold merchantable title to the property at the time of closing; therefore, **Quarter Development** was not entitled to specific performance. We agree with the Appellees.

[2] ¶ 13. Mississippi law prohibits an award of specific performance unless the party seeking that relief performs his or her part of the contract within the time allotted for his or her performance. *Gunn v. Heggins,* 964 So.2d 586, 591–92 (¶¶ 9–10) (Miss.Ct.App.2007). In this case, the contract period ended on April 30, 2009, with an option to extend for a 45–day period. Quarter Development and the Appellees did not close on the contract on April 30, 2009, June 14, 2009, or any other date. During the contractual period, Quarter Development did not own the property. In fact, Quarter Development did not own the property until September 9, 2009, well after the June 14, 2009 closing date, and therefore could not perform its contractual duty. A party cannot obtain a decree for specific performance without showing compliance or readiness to comply with his part of the contract. *Id.* at 590 (¶ 7). Quarter Development could not show readiness because, as indicated by LaFayette County property-tax records, it did not own the property at the time of closing.

[3] ¶ 14. Quarter Development argues that the Appellees did not fulfill their contractual obligation because they did not obtain financing or come to the closing table. Specific performance is not an appropriate remedy when neither party is ready, willing, and able to perform under the terms of a con-

tract at the time performance is due. *Point S. Land Trust v. Gutierrez,* 997 So.2d 967, 979 (¶ 33) (Miss.Ct.App.2008).

[4] ¶ 15. Even if the circuit court found that the Appellees did not obtain financing to close on the contract after June 14, 2009, both parties would be discharged from performing their contractual duties because it was "too late for either party to make an offer to perform." *Id.* When both parties cannot or do not perform under a contract, neither party is in breach of the agreement. *Id.* Thus, Quarter Development is not entitled to specific performance of the contract.

II. Marketable Title

[5] ¶ 16. In *Gunn,* the Court explained that:

> A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple title which is free and clear of all liens and encumbrances, unless restricted by other provisions of the contract. When a seller agrees to convey property by warranty deed, he warrants that the title conveyed is without defect, i.e. the title is clear and marketable.

Gunn, 964 So.2d at 591 (¶ 8) (quoting and citing *Ferrara v. Walters,* 919 So.2d 876, 883 (¶¶ 17–18) (Miss.2005)) (internal citation omitted). Quarter Development did not own the property at the time of closing and therefore was not in a position to sell. "Good title is not merely a title valid in fact, but a marketable title, which may be sold or mortgaged." *Id.* at 592 (¶ 9). Because Quarter Development did not own the property until September 9, 2009, long after the June 14, 2009 closing date, it could not have sold what it did not possess. ***53** Thus, Quarter Development could not have conveyed clear and marketable title.

[6] ¶ 17. Quarter Development argues that the very essence of a warranty deed is that defects may be cured even after the sale of the property, citing *Ferrara,* which provides that warranty deeds warrant "that the title conveyed is without defect, i.e., clear and marketable." *Ferrara,* 919 So.2d at 883 (¶ 18). Quarter Development further argues that it could have conveyed a warranty deed at the time of closing because the defect in title could have easily been cured had the opportunity been afforded. The Court observed in *Gunn* that "although it may have been a simple judicial procedure to probate and cure title to the property, the fact remains the [the party] never did so during the contractual period. This failure constituted a defect in the title." *Gunn,* 964 So.2d 586 at 592 (¶ 9). Similarly, regardless of whether Quarter Development could have cured the title defect by purchasing the property, the argument is null and void. Quarter Development had only until June 14, 2009, to cure any and all defects. Because Quarter Development had not even purchased the property at this time, it did not have marketable title such that a warranty deed could have been conveyed.

III. Summary Judgment

¶ 18. This Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Palmer v. Anderson Infirmary Benevolent Ass'n,* 656 So.2d 790, 794 (Miss.1995). This Court will consider all of the evidence before the circuit court in the light most favorable to the non-moving party. *Id.* Quarter Development contends that whether or not it held marketable title at the time of closing is a genuine issue of material fact. It argues that it did in fact hold marketable title prior to and at the time of closing. However, this argument is without merit. Other than claiming to have marketable title, Quarter Development has provided no evidence proving that it owned the property prior to September 9, 2009, well after the closing date. In fact, LaFayette County property-tax records show that Quarter Development did not own the property during the contract period. Thus, there is no genuine issue of material fact as to whether Quarter Development had marketable title to the property at the time for clos-

ing stated in the contract. To simply argue that it held marketable title to property that it did not even own does not raise an issue of material fact as to make the grant of summary judgment improper.

¶ 19. For the foregoing reasons, we affirm the judgment of the Circuit Court of LaFayette County, Mississippi.

¶ 20. **THE JUDGMENT OF THE LAFAYETTE COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS, CARLTON AND FAIR, JJ., CONCUR. BARNES, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. MAXWELL, J., NOT PARTICIPATING.

Miss.App.,2012.
Quarter Development, LLC v. Hollowell
96 So.3d 49

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89 So.3d 573
(Cite as: 89 So.3d 573)

H

Supreme Court of Mississippi.

LONG MEADOW HOMEOWNERS' ASSOCIATION, INC., William H. Arnold, Carol K. Arnold, Kenneth G. Barron, Sylvia D. Barron, Alan B. Cameron, Mary D. Cameron, Joseph B. Christman, Leah M. Christman, Clyde H. Coltharp, Mary Frances Coltharp, Rebecca Ann Culver, Tristan Denley, Kimberly Denley, Robert Byron Ellis, Suzete M. Ellis, Aubrey O'Neal Farrar, Cynthia Leigh Farrar, Charles D. Hufford, Alice C. Hufford, E. Jeff Justis, Sally V. Justis, Scott B. Lennard, Elaine A. Lennard, Timothy J. Mays, Carla Janene Mays, Glenn R. Parsons, Cheryl B. Parsons, James C. Propes, Charlotte C. Propes, Rick N. Rafinson, Bonnie S. Rafinson, Roderick N. Rafinson, Diana G. Rafinson, Jimmy Earl Shankle, Margaret Shankle, Robert C. Speth, Janet F. Speth, Allen Spurgeon, Debra Spurgeon, Julien Tatum and Christine B. Tatum

v.

Ernest C. HARLAND and Bonnie S. Harland.

No. 2009–CT–01775–SCT.
June 7, 2012.

Background: Prospective purchasers of real property located within plat three phase of subdivision filed suit against homeowners' association to have set aside "corrected" warranty deed that had added restrictive covenants limiting use of property to one single-family dwelling for each four acres, similar to restrictive covenants in first- and second-phase plats. The Chancery Court, Lafayette County, Percy L. Lynchard, Jr., J., set aside deed, and validated original covenants that permitted purchasers to construct church on property. Association appealed. On remand from the Supreme Court, the Court of Appeals, 89 So.3d 591, affirmed. Certiorari review was granted.

Holding: The Supreme Court, Waller, C.J., held that purchasers were not equitably estopped from building church on lots purchased within phase three plat of subdivision that contained no restrictive covenants on use.

Affirmed.

Carlson, P.J., filed dissenting opinion.

West Headnotes

[1] Appeal and Error 30 ⚿1008.1(7)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(7) k. Manifest or obvious error. Most Cited Cases

Appeal and Error 30 ⚿1010.1(6)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(6) k. Substantial evidence. Most Cited Cases

The Supreme Court reviews the trial court's findings of fact under the manifest-error/substantial-evidence standard.

[2] Appeal and Error 30 ⚿847(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General

30k844 Review Dependent on Mode of Trial in Lower Court
30k847 Trial in Equitable Actions
30k847(1) k. In general. Most Cited Cases

Appeal and Error 30 ⚖1009(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(1) k. In general. Most Cited Cases

An appellate court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.

[3] Appeal and Error 30 ⚖893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Issues presenting questions of law are reviewed de novo.

[4] Estoppel 156 ⚖52(5)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(5) k. Application in general. Most Cited Cases

Estoppel 156 ⚖52(6)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(6) k. Doctrine not favored. Most Cited Cases

The law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate.

[5] Estoppel 156 ⚖52(5)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(5) k. Application in general. Most Cited Cases

Equitable estoppel is an extraordinary remedy that should be applied cautiously and only when equity clearly requires it to prevent unconscionable results.

[6] Estoppel 156 ⚖52(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(2) k. Basis of estoppel. Most Cited Cases

Estoppel 156 ⚖52(5)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(5) k. Application in general. Most Cited Cases

Equitable estoppel is to be applied only in exceptional circumstances and must be based on pub-

lic policy, fair dealing, good faith, and reasonableness.

[7] Estoppel 156 ⚷52(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(2) k. Basis of estoppel. Most Cited Cases

The principle giving rise to the remedy of equitable estoppel is that a wrongdoer is not entitled to enjoy the fruits of his fraud.

[8] Covenants 108 ⚷84

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k84 k. Persons liable on real covenants. Most Cited Cases

Estoppel 156 ⚷63

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k63 k. Inconsistency of conduct and claims in general. Most Cited Cases

Owners of real property located within phase three plat of subdivision were on notice that restrictive covenants in first- and second-plat phases, which restricted use of property to one single-family dwelling structure for each four acres of land, did not extend to property lying within phase three plat, and thus, prospective purchasers were not equitably estopped from building church on lots purchased within phase three plat, where land records for phase three plat subdivision contained no restrictive covenant prohibiting construction of church, purchasers made no representations to owners upon which they relied and that they subsequently sought to deny, and purchasers did not induce owners to take any action.

*574 Kenneth A. Rutherford, Oxford, attorney for appellants.

Tara B. Scruggs, Oxford, Lawrence L. Little, attorneys for appellees.

EN BANC.

ON WRIT OF CERTIORARI

WALLER, Chief Justice, for the Court:

¶ 1. Ernest and Bonnie **Harland** filed suit in the Chancery Court of Lafayette County seeking to have a "corrected" warranty deed set aside; to vacate three lots from the official plat of **Long Meadow** subdivision; or to validate the protective covenants included with their original deed. The chancellor set aside the "corrected" warranty deed and validated the **Harlands'** original covenants. The **Long Meadow Homeowners' Association** appealed the chancellor's judgment, and we assigned the case to the Court of Appeals. The Court of Appeals, finding no error, affirmed the judgment of the chancery court. ***Long Meadow Homeowners' Ass'n, Inc., et al. v. Harland,*** 89 So.3d 591 (Miss.Ct.App.2011). This Court granted **Long Meadow's** Petition for Writ of Certiorari. ***Long Meadow,*** 78 So.3d 906 (Table) (Miss.2012). Having reviewed the briefs and record in this appeal, we now affirm the Court of Appeals and the chancery court. We provide this opinion to discuss our precedent as it relates to the defendants' equitable-estoppel claim.

FACTS AND PROCEDURAL HISTORY

¶ 2. Long Meadow subdivision is located outside of the City of Oxford in Lafayette County. Because Long Meadow is in the county, it is not subject to any zoning regulations. Long Meadow was developed by Robert and Carroll Leavell and their daughters. The subdivision is composed *575 of forty-eight [FN1] lots, and each lot is approximately four acres. The subdivision was developed in three distinct phases. The original plat for Phase I and Phase II, showing Lots 14–46, was recorded in the land records in 1990. In 1991, restrictive covenants

for Phase II were filed in the land records and recorded in deed book 412 at page 366, with the title "Protective Covenants of Long Meadow Subdivision Phase II." The Phase II covenants provided, in pertinent part:

> FN1. The lots are numbered 1–46, with Lot 13 deleted. Lots 25, 27, and 28 were each divided into two lots, being Lots 25A, 25B, 27A, 27B, 28A, and 28B, resulting in a total of forty-eight lots.

> We, the owners of the land described in the Long Meadow Subdivision Plat filed for record and recorded in the office of the Chancery Court Clerk of Lafayette County, Mississippi, and which comprises a subdivision in Lafayette County, Mississippi, do hereby establish, charge, and place upon said land the hereinafter described protective covenants.
>
> 1. No structure shall be erected, placed or permitted to remain on any lot other than one single family residential structure for each four (4) acres of land....
>
> These covenants were adopted by Phase I in 1993 when the plat for Phases I and II, showing Lots 14–46, was refiled, incorporating the restrictive covenants recorded in book 412 at page 366. The plat for Phase III was recorded in the land records in 1994. Unlike the plat for Phases I and II, the plat for Phase III did not incorporate any restrictive covenants.

¶ 3. Phase III includes Lots 1–12. Rather than filing restrictive covenants applicable to all of Phase III, as they did with Phases I and II, the Leavells included various restrictive covenants with each individual deed on Phase III lots that they sold. Several of the deeds contained the same restrictive covenants applicable to all of Phases I and II. All of the deeds for Phase III contained covenants that restricted use of the property to "residential" use, but at least six of these deeds originally had covenants that defined residential use to include churches and schools.

¶ 4. In 2006, the Harlands began looking for land on which a church could be built, and they approached the Leavells about purchasing three adjacent lots in Phase III of Long Meadow. They intended to purchase the land and transfer it to their church, Oxford Church of Christ. The Leavells were aware of the Harlands' intention to have a church built on the property. This was reflected in their option contract dated November 2006, which included the following contingency:

> The purchase of this property is contingent upon approval being obtained to build a church and a parking lot. The parties will mutually agree to cooperate in obtaining a release of the property from the subdivision restrictions which prohibit the building of a church. If a church cannot be built on the property, that is to say if this permission to build a church has not been obtained by May 15, 2007, this contract is voidable at the option of the Purchasers and the $5,000.00 earnest money will be returned.

¶ 5. In early 2007, residents of **Long Meadow** learned of the **Harlands**' plan to build a church on the property. The **Long Meadow Homeowners' Association** informed the Leavells, the **Harlands**, and the elders of the Oxford Church of Christ that they objected to a church being built in the subdivision, claiming that the covenants did not allow for such. In spite of the landowners' objection, the Leavells and the ***576** Harlands proceeded with the transaction, and the Leavells conveyed Lots 2, 3, and 4 in Phase III to the Harlands on March 13, 2007. The Harlands' deed for Lots 2, 3, and 4 included covenants that restricted the use of the property to "residential," but defined residential use to include churches and structures used for church purposes. The deed was recorded in the land records on May 22, 2007.

¶ 6. More than a year later, in May 2008, counsel for the **Long Meadow Homeowners' Association** prepared a "corrected" warranty deed for the

Harlands' property. This deed included the same restrictive covenants applicable to Phases I and II, which allowed only one single-family, residential structure for each four acres. Without obtaining the **Harlands**' consent or approval, the **Homeowners' Association** filed their "corrected" warranty deed in the land records on July 15, 2008.

¶ 7. After learning of this, the **Harlands** filed suit in the Chancery Court of Lafayette County against the Leavells,[FN2] the **Long Meadow Homeowners' Association**, and certain landowners in the subdivision (collectively the "**Long Meadow** Defendants"). The **Harlands** sought to vacate Lots 2, 3, and 4 from the official plat of **Long Meadow** subdivision and requested a determination that those lots would not be subject to any restrictive covenants otherwise pertaining to the subdivision. In the alternative, the **Harlands** requested a declaratory judgment validating the original protective covenants included in their deed, which allowed a church to be constructed on the subject property. The **Harlands** also requested that the "corrected" warranty deed be set aside.

FN2. The Leavells did not respond to the Complaint or to any subsequent pleadings.

¶ 8. The **Long Meadow** Defendants asserted the defense of equitable estoppel, *inter alia,* against the **Harlands**. They also asserted a counterclaim against the **Harlands** and a cross-claim against the Leavells, requesting a declaratory judgment that the protective covenants recorded for Phase I, Phase II, and certain lots in Phase III were valid and binding as to all lots in Phase III, such that only one single-family dwelling could be constructed on any lot in all phases of Long Meadow. The chancellor ruled in favor of the Harlands, holding valid the covenants included within the original conveyance and setting aside the "corrected" warranty deed. The Long Meadow Defendants appealed, and we assigned the case to the Court of Appeals.

¶ 9. The Long Meadow Defendants asserted the following issues before the Court of Appeals: (1) whether protective covenants imposed on Phase I and Phase II of the subdivision were applicable also to Phase III; (2) whether the court erred in refusing to estop the Harlands from building a church on the property; (3) whether the court erred in granting the Harlands' motion to set aside the corrected warranty deed; and (4) whether the court erred in holding that the covenants filed with the original deed were valid. *Long Meadow,* 89 So.3d at 593–94 (¶ 2). The Court of Appeals affirmed the chancery court's judgment. *Id.* The Long Meadow Defendants filed a petition for writ of certiorari, which this Court granted.

ISSUE

¶ 10. The Long Meadow Defendants raise only one issue in their petition for certiorari. They claim that the chancery court and the Court of Appeals failed to consider the testimony of certain landowners in light of this Court's precedent in *PMZ Oil Co. v. Lucroy,* 449 So.2d 201 (Miss.1984), and *577 *White Cypress Lakes Development Corp. v. Hertz,* 541 So.2d 1031 (Miss.1989).

STANDARD OF REVIEW

[1][2][3] ¶ 11. The Supreme Court reviews the trial court's findings of fact under the manifest-error/substantial-evidence standard. *Russell v. Performance Toyota, Inc.,* 826 So.2d 719, 721 (Miss.2002). "This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Sanderson v. Sanderson,* 824 So.2d 623, 625–26 (Miss.2002) (quoting *Kilpatrick v. Kilpatrick,* 732 So.2d 876, 880 (Miss.1999)). This standard does not apply to questions of law, which are reviewed de novo. *Russell,* 826 So.2d at 721 (internal citations omitted).

DISCUSSION

[4][5][6][7] ¶ 12. "The law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate." *PMZ Oil Co. v. Lucroy,* 449 So.2d 201, 206 (Miss.1984) (quoting *McLearn v. Hill,* 276 Mass.

519, 177 N.E. 617, 619 (1931)). Equitable estoppel has been described as a "shield and not a sword." *First Investors Corp. v. Rayner,* 738 So.2d 228, 233 (Miss.1999). It is an extraordinary remedy and should be applied cautiously and only when equity clearly requires it to prevent unconscionable results. *B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So.2d 483, 491 (Miss.2005). It is to be applied only in "exceptional circumstances and must be based on public policy, fair dealing, good faith, and reasonableness." *Powell v. Campbell,* 912 So.2d 978, 982 (Miss.2005); *Windham v. Latco of Miss., Inc.,* 972 So.2d 608, 612 (Miss.2008). "[T]he principle giving rise to the remedy of equitable estoppel is that a wrongdoer is not entitled to enjoy the fruits of his fraud." *Windham,* 972 So.2d at 611.

¶ 13. The Long Meadow Defendants claim that they relied on the representations of the Leavells that all of Long Meadow Subdivision would be single-family residential. They claim that these representations induced them to buy property in Long Meadow and that they would not have purchased property but for these representations. Furthermore, the Long Meadow Defendants claim that they will suffer harm if the Harlands are allowed to build a church in the subdivision.

[8] ¶ 14. To support their claim, the Long Meadow Defendants rely principally on the testimony of landowners James Propes and Alan Cameron, who purchased property from the Leavells in 1995 and 2001, respectively. Each of these landowners testified at trial that he was given assurances that the entirety of the Long Meadow subdivision would be residential. However, the plat for Phase III was filed in 1994, before either Propes or Cameron bought land in Long Meadow. The Phase III plat contained no restrictive covenants, unlike the plats for Phases I and II. Propes and Cameron, then, were on notice that the entirety of the Long Meadow subdivision was not restricted to single-family residential use. *See Hathorn v. Ill. Cent. Gulf R. Co.,* 374 So.2d 813, 817 (Miss.1979) (individuals are held to constructive notice of land records) (citing *Staton v. Bryant,* 55 Miss. 261 (1877)). While the landowners reasonably could have expected that Phases I and II would be restricted to single-family dwellings, they were on notice that such restriction did not extend to Phase III.

¶ 15. The Long Meadow Defendants and the dissent cite this Court's decisions in *PMZ* and *White Cypress Lakes* to support their argument. The Court of Appeals***578** did not address these cases in its opinion. While the cases are significantly distinguishable from the facts before us today, we feel compelled to discuss these holdings and their applicability, *vel non,* to the Long Meadow Defendants' claim of equitable estoppel.

¶ 16. In *White Cypress Lakes,* subdivision homeowners brought an action against a development company to prevent the construction of a campground for recreational vehicles in the White Cypress Lakes subdivision. *White Cypress Lakes,* 541 So.2d at 1033. The developer intended to build the campground in Phases V and VI of the subdivision. *Id.* The plats for these phases and every phase in the subdivision prohibited any use of the property other than single-family residential. *Id.* Further, the covenants applicable to Phases V and VI specifically prohibited the use of any camping vehicles on the property. *Id.* at 1034. This Court held that the covenants prevented the type of use the developer intended and estopped the developer from building the campground. *Id.* at 1035–36. The Court held that the complaining landowners were merely "insist[ing] upon adherence to a covenant which is now as valid and binding as at the hour of its making." *Id.*

¶ 17. *White Cypress Lakes* is clearly distinguishable from the present case. The plat for Phase III of Long Meadow subdivision and the deed by which the Harlands received title did not prohibit the use intended by the Harlands. As such, *White Cypress Lakes* is inapplicable to the facts before us today.

¶ 18. *PMZ* is more factually analogous, but it

also is distinguishable. In *PMZ,* home builders sought to prevent a developer from building six townhouse condominiums, claiming that the developer had assured all homeowners that the subdivision would be restricted to single-family dwellings. *PMZ,* 449 So.2d at 202. The plat for the land at issue in *PMZ* was not recorded. *Id.* at 203. However, the developer had included the same restrictive covenants in *every* deed issued to a third party, before attempting to deviate from these covenants. *Id.* at 207–08. Based on these facts, the Court affirmed the chancellor's enforcement of estoppel against the developer. *Id.* at 208.

¶ 19. While every deed issued by the developer in *PMZ* contained the same restrictive covenants, in today's case, as early as 1988, a deed for a lot in Long Meadow subdivision Phase III was issued without the "single-family only" restriction, contrary to the subsequent representations upon which the defendants allegedly relied.[FN3] Then, from 2004 to 2007, several deeds were issued that allowed for construction of buildings other than single-family dwellings in Phase III.

FN3. David Pryor purchased Lot 1 in 1988, and the recorded deed permitted a single- or double-family residence.

¶ 20. Finally, in both *PMZ* and *White Cypress Lakes,* equitable estoppel was being asserted against the developers of the property at issue. In the present case, the Long Meadow Defendants are attempting to estop the Harlands, the grantees of a deed, from building a church—a use which the Harlands' deed allows. The Harlands made no representations upon which the Long Meadow Defendants allegedly relied. *See Minard v. ITC Deltacom Commc'ns, Inc.,* 447 F.3d 352, 358 (5th Cir.2006) ("[T]he party claiming the estoppel must have relied on *its adversary's* conduct ....") (emphasis added) (citing ***579***Heckler v. Cmty. Health Services of Crawford County, Inc.,* 467 U.S. 51, 59 n. 9, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984)). This Court has stated that equitable estoppel is appropriate where it would be "substantially unfair to allow a party to deny what he has previously induced another to believe and take action on." *PMZ,* 449 So.2d at 207. The unfairness that courts have sought to prevent through equitable estoppel is simply not present here, where the Harlands have made no representations to the Long Meadow Defendants that they now seek to deny, nor have they induced the Long Meadow Defendants to take any action.

¶ 21. The dissent mistakenly suggests that the effect of our decision today "is that covenants have no validity." Carlson, P.J., dissenting, ¶ 58. In fact, our decision achieves the opposite. Our decision holds valid the covenants applicable to the Harlands' land. What we refuse to do is place restrictions on property *in addition* to those that the applicable covenants provide. The effect of the dissent's approach would be to allow one landowner to impose the covenants on his lot to all other lots in a subdivision, regardless of what the land records applicable to those lots contained. We simply cannot endorse such an approach. *See Goode v. Village of Woodgreen Homeowners' Ass'n,* 662 So.2d 1064, 1074 (Miss.1995) ("The law in Mississippi favors the free and unobstructed use of real property.").

¶ 22. The Harlands relied not only on oral representations but also on the land records for Long Meadow. These land records did not prohibit the construction of a church in Phase III. Furthermore, the Harlands negotiated for and received a deed that specifically allowed for the construction of a church on the lots purchased. Confirming the Harlands' purchase will not work "unconscionable results," as the Long Meadow Defendants' argument necessarily indicates. *See Wedgeworth,* 911 So.2d at 491 (equitable estoppel should be used only to prevent unconscionable results). While the Long Meadow Defendants may have "relied" upon the representations made by the Leavells or their agents, this case does not present an "exceptional circumstance" where estoppel is the "most fair and reasonable remedy" and is necessary to "prevent unconscionable results." *See Wedgeworth,* 911 So.2d at 491; *Powell,* 912 So.2d at 982.

CONCLUSION

¶ 23. For the above reasons, the chancellor did not abuse his discretion in denying the Long Meadow Defendants' equitable-estoppel claim. Accordingly, we affirm the judgments of the chancery court and the Court of Appeals.

¶ 24. **AFFIRMED.**

DICKINSON, P.J., RANDOLPH, KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR. CARLSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION. LAMAR AND KING, JJ., NOT PARTICIPATING.

CARLSON, Presiding Justice, dissenting:

¶ 25. Because I disagree with the majority's application of equitable estoppel in this matter, I respectfully dissent. The one issue raised in the petition for writ of certiorari is whether the chancery court and the Court of Appeals erred in applying the doctrine of equitable estoppel. Specifically, the Long Meadow Defendants contend that the chancery court and Court of Appeals failed to consider the testimony of landowners who relied on representations made by the Leavells that all lots in Long Meadow would be subject to the same restrictive covenants and that only single-family, residential structures would be permitted in the subdivision. I agree that the ***580** chancery court and Court of Appeals erred in this regard.

I. Doctrine of Equitable Estoppel

¶ 26. I agree with the principles cited by the majority regarding equitable estoppel,[FN4] and I will add the following. Equitable estoppel is "the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed." *B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So.2d 483, 492 (Miss.2005) (quoting *Dubard v. Biloxi H.M.A., Inc.,* 778 So.2d 113, 114 (Miss.2000) (quoting *Koval v. Koval,* 576 So.2d 134, 137 (Miss.1991))). This Court has said that the doctrine of equitable estoppel is rooted "in the morals and ethics of our society." *PMZ Oil Co. v. Lucroy,* 449 So.2d 201, 206 (Miss.1984). "Whenever in equity and good conscience persons ought to behave ethically toward one another the seeds for a successful employment of equitable estoppel have been sown." *Id.*

> FN4. Regarding the majority's statement that equitable estoppel is to be used as a shield and not a sword, I will point out that the Long Meadow Defendants are not using equitable estoppel as a sword. The Harlands filed suit in this matter, and the Long Meadow Defendants asserted equitable estoppel as a defense, or a shield, against the Harlands' allegations.

¶ 27. A party asserting equitable estoppel must prove the following by a preponderance of the evidence: "(1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." *B.C. Rogers Poultry,* 911 So.2d at 492. *See also McCrary v. City of Biloxi,* 757 So.2d 978, 981 (Miss.2000). Intentional misrepresentation is not required. *Staton v. Bryant,* 55 Miss. 261, 265 (1877) ("It is not necessary to an equitable estoppel that the party should willfully intend to mislead...."). "[T]he test is whether it would be substantially unfair to allow a person to deny what he has previously induced another to believe and take action on." *First Investors Corp. v. Rayner,* 738 So.2d 228, 233–34 (Miss.1999) (internal citations omitted). A person will be subject to estoppel "if his acts, admissions, or representations were intended or calculated, or might be reasonably expected, to influence the conduct of another, and does so influence his conduct, and he would be prejudiced if the acts and admissions were allowed to be retracted." *Staton,* 55 Miss. at 267.

¶ 28. Although this Court has pronounced the general principles of equitable estoppel, as reiterated here, the application of this doctrine will not be uniform in every case. "So varied are the rela-

tions and transactions of men, that equity ... has done no more in reference to estoppel by conduct than to announce the general principles by which it will be guided in applying it-leaving each case in which it may be invoked to be determined by its own peculiar circumstances." *Staton,* 55 Miss. at 275. Under this framework, I will review the decisions of the chancery court and Court of Appeals and discuss the primary cases that have applied equitable estoppel in similar contexts.

II. Decisions of the Chancery Court and Court of Appeals and Discussion of Precedent Cases

¶ 29. The chancellor's order included the following in regard to the Long Meadow Defendants' equitable-estoppel defense:

> There appears nothing in the public records of Lafayette County, Mississippi, upon which the Respondents [the Long Meadow Defendants] could rely for assurances***581** as to the restrictions of phase 3. The one exception to this would be the individual restrictive covenants attached to the deeds sold by the Leavells. As such, the Petitioners [the Harlands] herein when researching the public records of Lafayette County, Mississippi, were reasonable in determining that as no specific covenants in connection with phase 3 were recorded and other deeds conveyed by the Leavells allowed the construction of churches in phase 3, to rely thereon.

Long Meadow, 89 So.3d at 597 (¶ 21). I disagree with the chancellor's analysis for several reasons. First, the chancellor cut short his analysis of reliance by the Long Meadow Defendants and switched to reliance by the Harlands. It is the Long Meadow Defendants' reliance, as the party asserting equitable estoppel, that is relevant. Second, the chancellor noted that the Harlands were allowed to rely on deeds that allowed for construction of churches, but he did not address whether the Long Meadow Defendants were likewise allowed to rely on the deeds that prohibited anything other than strictly residential structures. Third, his conclusion that the Harlands were reasonable in determining that a church could be built because no specific covenants pertaining to Phase III had been recorded directly contradicts the language in the option contract, which evidences that the Harlands knew that building a church was prohibited under the restrictive covenants. Finally, the order does not include any indication that the chancellor considered the Long Meadow Defendants' testimony regarding representations made by the Leavells.

¶ 30. Like the chancery court, the Court of Appeals failed to consider the Leavells' representations to the landowners. The Court of Appeals found that the chancellor did not err in finding that equitable estoppel did not apply, because no covenants were recorded with respect to Phase III and because, prior to the Harlands' purchase, several individual deeds within Phase III had allowed for construction of a church. *Id.* at 596–97 (¶ 22). The emphasis by the Court of Appeals, and by the majority here, on the other deeds that at one time permitted a church is misplaced. When the Harlands purchased Lots 2, 3, and 4, in March 2007, the covenants for all of Phases I and II, and half of the lots in Phase III (Lots 1, 7, 8, 9, and 10) permitted only one single-family, residential structure on each lot. At that time, only four lots in Phase III (Lots 5, 6, 11, and 12) allowed a church or school to be built on the lots. However, single-family residences had been built on three of those four lots, and the fourth lot was vacant. Thus, there was no indication that those landowners intended to construct schools or churches on their land.

¶ 31. The Long Meadow Defendants contend that the chancery court's judgment and the Court of Appeals' opinion are contrary to this Court's holdings in *PMZ Oil Company v. Lucroy,* 449 So.2d 201 (Miss.1984), and *White Cypress Lakes Development Corporation v. Hertz,* 541 So.2d 1031 (Miss.1989), in which this Court considered the developers' representations to buyers. I agree. With all due respect to the majority, I fail to see how the facts of those cases are "significantly distinguishable" from the facts in the case at hand.

¶ 32. In *PMZ,* the developer of Raintree subdivision told all of the purchasers and prospective homebuilders that the subdivision would consist of quality, single-family homes. *PMZ,* 449 So.2d at 202. The developer then attempted to build six townhouses on one lot, and the homeowners sought to have the developer enjoined***582** from doing so. *Id.* The chancery court granted the injunction, and this Court affirmed. *Id.* Like Phase III of Long Meadow, the Raintree covenants were not recorded with the neighborhood plat. *Id.* at 203. In fact, the Raintree plat itself was never recorded in the land records. *Id.* This Court held that filing the plat was not determinative, rather, it was "the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon ... the filing or recording of the plat." *Id.* at 208 (quoting *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.,* 77 N.M. 730, 427 P.2d 249, 251 (1967)).

¶ 33. This Court placed great weight on whether the developer reasonably could have anticipated that representations that the neighborhood would be "an exclusive residential subdivision" and that the covenants would apply to all of the lots would induce buyers to purchase lots in the subdivision. *Id.* at 207–08. This Court held, "PMZ and its officers should reasonably have anticipated that these representations would induce persons ... first to buy lots and then to build their homes." *Id.* at 207. PMZ's president admitted that he originally had planned for Raintree to be single-family residential only, but he claimed "that he never considered any of his plans to be final." *Id.* at 208. The president's unspoken intent about the finality of his plans for the subdivision did not change the fact that he repeatedly and consistently represented to all purchasers that the subdivision would be single-family, residential only. *Id.*

¶ 34. Applying the doctrine of equitable estoppel, this Court explained, "if PMZ's conduct was substantially likely to cause the Lucroys, acting reasonably in their own right, to make the substantial investment of constructing their home on Lot 11 of the Raintree Subdivision, PMZ is estopped to deny or abrogate the covenants." *Id.* at 206. This Court held that, because the developer had represented to the purchasers that the subdivision would include only single-family homes, he could not later permit multifamily dwellings, even though the plat and covenants for the subdivision were not filed in the land records. *Id.* at 207–08.

¶ 35. In the *White Cypress Lakes* case, the subdivision consisted of thirteen phases, with a separate plat and restrictive covenants recorded in the land records for each phase. *White Cypress Lakes,* 541 So.2d at 1032. The ownership changed hands after the first eleven phases had been developed, and the new development company planned to develop the last two phases as a recreational campground. *Id.* at 1033. Homeowners in the subdivision filed suit to enjoin development of the campground. *Id.* The chancery court held for the homeowners, and this Court affirmed. *Id.* at 1034.

¶ 36. The original developer had marketed the neighborhood with promotional literature stating "quality will surround" the homes, and the covenants indicated that only single-family homes would be allowed. *Id.* at 1033. This Court found no significance in the fact that separate covenants were recorded for each phase or that the covenants were not identical. *Id.* at 1033. The covenants were "distinctly similar," and they all included the relevant restrictions that only single-family dwellings could be built and that temporary structures were not allowed. *Id.* at 1033–34.

¶ 37. This Court considered the representations that the developers had made to the home buyers and found that the developers had "substantially induced purchasers" to believe that the entire subdivision would consist only of quality, single-family ***583** homes. *Id.* at 1035. The new developers were equitably estopped from using any of the land "in a manner inconsistent with the general representations *it and its predecessors made* in marketing the

lots *in the other phases* of the White Cypress Lakes development." *Id.* (emphasis added). The majority of the "representations" at issue were made by the original developers, yet equitable estoppel was enforced against the new developers. *Id.* It was irrelevant that the nonconforming use was in separate phases, in which none of the homeowners owned land, and this Court held that representations made to purchasers in other phases were binding on all phases. *Id.*

III. Application of Equitable Estoppel

¶ 38. The party asserting equitable estoppel must show "(1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." *B.C. Rogers Poultry,* 911 So.2d at 492.

A. Belief and Reliance on Representation

¶ 39. In their petition for certiorari, the Long Meadow Defendants cited the testimony of homeowners Alan Cameron and James Propes, who testified that they had relied on assurances from the Leavells and/or their representatives that only single-family, residential homes would be permitted in Long Meadow.

¶ 40. Propes and his wife purchased Lot 23 in Phase II of Long Meadow in 1995. Propes testified that, prior to selecting and purchasing Lot 23, he and his wife toured the subdivision with Dick Marchbanks, the Leavells' real estate agent. Propes explained to Marchbanks the importance of the neighborhood being entirely residential due to problems he had experienced in other neighborhoods in the past. Propes testified that Marchbanks assured him that all lots in Long Meadow would be residential. Propes said that they looked at multiple lots in Long Meadow, including some in Phase III, and specifically, the lots later purchased by the Harlands. At each lot, Propes asked Marchbanks if the property would be strictly for residential use, and each time Marchbanks assured him that all lots were for residential use only. Propes stated that he had relied on Marchbanks's representations when he decided to purchase a lot in Long Meadow. Marchbanks also directed Propes to the chancery clerk's office to look at the protective covenants. Propes located and read the protective covenants, which permitted only single-family, residential use.

¶ 41. Cameron and his wife purchased Lot 46 in Phase II of the subdivision in 2001. Prior to purchasing that lot, the Camerons inquired about protective covenants and learned that covenants were in place that limited development in the subdivision to single-family, residential homes. Cameron testified that if those covenants had not been in place, they would not have purchased in Long Meadow.

¶ 42. Lot 46 backs up to Lots 2, 3, 4, and 8 in Phase III. In 2004, a school attempted to purchase Lots 2, 3, 4, 6, and 8. The homeowners objected to the school's purchase of the land and advised the school that the property was subject to protective covenants. The school withdrew its interest in the lots. Following that incident, Cameron decided to purchase Lot 8 in Phase III, and he testified that his intent in purchasing Lot 8 was to "clarify the public record and standardize the covenants ... by insuring that it was clear that the residential only protective covenants related to all Long Meadow Subdivision lots, and most particularly ***584** phase three since those were the ones that remained to be developed." Cameron testified that the Leavells agreed that, upon the sale to him, the deed and neighborhood plat would contain the same covenants as Phase II and would prohibit nonresidential use of the lots. The covenants filed with the deed to Lot 8 did, in fact, comply with this agreement. Those covenants were titled "Protective Covenants of Long Meadow Subdivision Phase III" and appeared to apply to all of Phase III. The first paragraph stated that there could be only "one single-family[,] residential structure for each lot described on the plat of Long Meadow Subdivision, Phase III."

¶ 43. In addition to the Camerons' deed, two other sets of covenants filed with Phase III lots purported to apply to all of the lots in Phase III. In 2002, the protective covenants filed with David

Pryor's deed for an additional portion of Lot 1 and Joe and Ellen Harris's deed to Lot 10 were titled "Protective Covenants of Leavell Property Bordering Industrial Boulevard." The property bordering Industrial Boulevard (County Road 1032) is all of Phase III, as that road runs down the middle of Phase III. Those covenants provided that only "one family residential structure" could be placed on *any* lot in Phase III. Thus, it was reasonable for at least the Camerons, the Harrises, and Pryor to believe that the entire phase was subject to the same restrictions as those set forth in their covenants, because those covenants appeared to apply to all lots in Phase III.[FN5] These were the first three lots sold in Phase III; thus, anyone else who purchased in Phase III reasonably could have relied upon these covenants as well.

FN5. The majority asserts that, as early as 1988 a deed was issued without the "single-family residence" restriction, and it points to the 1988 deed of David Pryor. Pryor's first deed restricted use of the lot to "one double or single family residential structure." Although those covenants allowed for a double-family residence, the use was still strictly residential. Further, when Pryor was deeded the additional portion to Lot 1 in 2002, the covenants restricted use of the lot to "one family residential structure."

¶ 44. Cameron testified that, during his negotiations with the Leavells regarding Lot 8, he was shown a revised plat for Phase III by Charles Walker and Dick Marchbanks, the Leavells' attorney and real estate agent, respectively. Those individuals represented to Cameron that anything other than single-family residences would be prohibited in Phase III. It appears that the amended plat and covenants were never filed in the land records, because they could not be found when this litigation ensued. Cameron testified that he would not have purchased Lot 8 if he had thought the residential-only protective covenants would not apply to all of the lots.

¶ 45. Mr. Leavell died in July 2004, one month after the Camerons purchased Lot 8. The remaining Leavells then sold lots in Phase III and filed deeds that did not include the restrictive covenants mentioned in the Camerons' deed, but instead defined "residential" to include churches and schools.[FN6] All of the covenants allowing schools and churches were filed after the Camerons, Propeses, and other landowners purchased land based on the Leavells' representations that only single-family residences ***585** would be permitted in the subdivision.

FN6. This version of covenants was filed originally with six lots (Lots 5, 6, 7, 9, 11, and 12) between 2004 and 2007. Lots 7 and 9 were resold in September 2006, and the new deeds referenced the Phase II covenants, which permitted one single-family residence for each four acres of land. Therefore, when the Harlands purchased Lots 2, 3, and 4, only four lots still had covenants that permitted a school or church.

¶ 46. The chancery court and Court of Appeals found that equitable estoppel did not apply because no covenants were recorded with respect to Phase III and because several individual deeds for Phase III allowed for the construction of a church. Notably, all of the deeds for Phase III lots recorded *prior* to the Camerons' purchase of Lot 8 permitted only single-family residences. The fact that later deeds allowed churches is of no consequence, because the Camerons could rely only on the Leavells' representations and the deeds in the land records at the time of their purchase. The Long Meadow Defendants claim that they relied on the representations from the Leavells and their representatives that the entire subdivision would be subject to the same restrictive covenants and that only single-family homes would be permitted.

¶ 47. Ryland Sneed, an engineer who assisted the Leavells with development of Long Meadow, testified that Mrs. Leavell always thought "it would be good to have a church" in the subdivision.

However, there is no indication that Mrs. Leavell ever expressed that desire to any of the purchasers. In fact, she went directly against that desire by prohibiting anything other than family, residential structures in all of the restrictive covenants filed from 1988 until 2004. Like the president in *PMZ* who did not consider his plans to be final, Mrs. Leavell's subjective intent is of no moment. *PMZ,* 449 So.2d at 208. *See also Wesley M. Breland, Realtor, Inc. v. Amanatidis,* 996 So.2d 176 (Miss.Ct.App.2008) (equitable estoppel used to enforce "residential only" covenants against developer who sought to use one lot in a subdivision for commercial purposes; the Court of Appeals affirmed the chancellor, who held that the intent of the investors "should be determined by what they said, and not by what they thought").

¶ 48. The residents objected when a school attempted to purchase land in the subdivision, and they made it known that they expected only single-family, residential homes to be built in the neighborhood. The Leavells certainly knew this, as evidenced by the option contract with the Harlands, which stated, "The parties will mutually agree to cooperate in obtaining a release of the property from the subdivision restrictions which prohibit the building of a church." The Leavells knew that the other deeds contained restrictive covenants prohibiting a church because they had signed all of the deeds and covenants. Yet they proceeded to contract with the Harlands, sell the land, and file covenants that directly contradicted what was permitted in the rest of the subdivision. And they did so in the face of expressed objection by the other landowners.

¶ 49. I respectfully opine that, while the majority asserts that the Harlands relied on oral representations and land records and that they "negotiated for and received a deed that specifically allowed for the construction of a church on the lots purchased," the majority fails to recognize that all of the Long Meadow Defendants also relied on oral representations and the land records and that they negotiated for and received deeds that specifically *prohibited* any structures that were not residential. Unlike the Harlands, the Long Meadow Defendants reasonably relied on the Leavells' representations and had no indication at the time of their purchases that churches might be allowed. The deeds with covenants allowing churches were not filed until 2004, after the other owners had purchased their lots with covenants indicating otherwise. The homeowners relied on representations by the Leavells as well as the written and recorded***586** restrictive covenants, which indicated that the entirety of Long Meadow would be single-family, residential only. There was no evidence to alert them otherwise.

¶ 50. The majority concludes that Propes and Cameron "were on notice" that Phase III of Long Meadow did not have the same covenants as Phases I and II, because the plat for Phase III did not reference covenants like the plats for Phases I and II. When Propes and Cameron purchased their lots in Phase II in 1995 and 2001 respectively, there was no reason for them to look at the plat for Phase III. They had been assured repeatedly that the entirety of the subdivision would be single-family, residential, and they did their due diligence by looking at the land records for the area in which they were purchasing, Phase II.

¶ 51. Purchasers have a duty to examine the proper land records before acquiring property. *Hathorn v. Illinois Cent. Gulf R. Co.,* 374 So.2d 813, 817 (Miss.1979) (quoting *Staton,* 55 Miss. at 275). Failure to inspect the land records prior to purchase constitutes negligence. *Buchanan v. Stinson,* 335 So.2d 912, 914 (Miss.1976); *Quates v. Griffin,* 239 So.2d 803, 808–09 (Miss.1970). However, landowners are required to know of, and have "constructive knowledge" of, only deeds recorded *prior* to their purchase. *Journeay v. Berry,* 953 So.2d 1145, 1156 (Miss.Ct.App.2007) (citing *Hearn v. Autumn Woods Office Park Property Owners Ass'n,* 757 So.2d 155, 158 (Miss.1999)). The laws of this state do not require landowners to examine the deed to every piece of land purchased

in their subdivision after their purchase. Rather, the subsequent purchasers should adequately investigate the land records for their property as well as any surrounding properties, if necessary.

¶ 52. As soon as the Long Meadow Defendants became aware that covenants were not filed that covered all of Phase III, they sought to remedy the problem. Cameron testified that he purchased his Phase III lot in 2004 with the intention of clarifying the land records. He was shown a revised plat and covenants for Phase III and he was told that they would be filed in the land records. Although the Phase III covenants shown to Cameron apparently were not filed, Cameron testified that he saw them and that he was assured that they would be filed. Regardless, this Court has held that "equitable estoppel may be used to enforce an oral contract." *Powell v. Campbell,* 912 So.2d 978, 981 (Miss.2005) (citing *Koval,* 576 So.2d at 137; *Sanders v. Dantzler,* 375 So.2d 774, 776 (Miss.1979)). For equitable estoppel, the "conduct" on which a party relies to his detriment can include actual conduct, actions, language, or silence. *McCrary,* 757 So.2d at 981 (quoting *Chapman v. Chapman,* 473 So.2d 467, 470 (Miss.1985)). Further, "[i]t is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon ... the filing or recording of the plat." *PMZ,* 449 So.2d at 208 (quoting *Ute Park,* 427 P.2d at 251).

¶ 53. If anyone had "constructive notice" regarding the subdivision covenants, it was the **Harlands**. The language in the option contract, as well as Mr. **Harland's** testimony, indicate that the **Harlands** actually knew that restrictive covenants prohibited building a church in the subdivision. The **Harlands** also were aware of the objections of the other landowners. The **Long Meadow** Defendants voiced their objections by telephone and through multiple letters from the **Long Meadow Homeowners' Association**, members thereof, and their attorney. Further, the **Harlands** could see that only residential homes had been built in the subdivision. **Harland** *587 testified that he looked at only one deed from Phase III in the land records, that of Timothy Mays, whose covenants define "residential" to include churches and schools. However, Mays built a single-family residence on his lot, which was visible to Harland. Even if Harland had examined the covenants for all of the lots in Phase III and he had seen that four lots permitted schools and churches, he would have seen that three of those four lots had houses on them. The entire subdivision was made up of only single-family, residential homes.

¶ 54. The Harlands had more than constructive notice; they had actual notice that a church was not permitted in the subdivision. If the Harlands relied on the Leavells' representations, they did so in light of glaring facts that contradicted the Leavells' statements. A similar situation was presented in *Journeay v. Berry,* 953 So.2d 1145 (Miss.Ct.App.2007), and the Court of Appeals held that the parties were bound by restrictive covenants, even though the covenants had been filed improperly, because they had "actual and constructive knowledge of the restrictions" and they "acknowledged the covenants by seeking to obtain variances and other approvals." *Id.* at 1149. This is like the Harlands, who acknowledged the restrictions by indicating in the option contract that they would need to obtain "a release of the property from the subdivision restrictions which prohibit the building of a church."

B. Change of Position and Detriment Caused by Change of Position

¶ 55. As discussed above, both Propes and Cameron testified that they relied on the representations made by the Leavells and their representatives that the entirety of Long Meadow would contain only single-family, residential homes. The representations were confirmed in writing in deeds and restrictive covenants filed for Phase I, Phase II, and half of the lots in Phase III. Cameron and Propes testified that they would not have purchased their

lots without these assurances. Cameron and Propes changed their positions from not owning lots in Long Meadow, by purchasing lots and building homes in the subdivision, based on the assurance that the entire subdivision would be single-family, residential only.

¶ 56. The Long Meadow Defendants believe that they will incur detriment as a result of the Leavells' denial of their previous promises. All of the effects of building a church in the subdivision are unknown, but the Long Meadow Defendants have valid concerns about traffic, safety, noise, and drainage issues. Further, the Harlands' deed does not define "structures used for church purposes," which could result in a variety of structures being constructed on the property. Cameron testified that plans for the church indicated that there would be large parking lots, school facilities, outbuildings, and a ball field with the attendant lighting. This is not consistent with the residential character of the neighborhood. The Long Meadow Defendants wanted to live in a subdivision with only single-family, residential homes. Now they own land and houses in a neighborhood that is not equivalent to that for which they bargained. Because Long Meadow is out of the city limits, it is not subject to zoning. The landowners in Long Meadow rely entirely on the subdivision restrictive covenants to protect the value of their land.

¶ 57. Although numerous Long Meadow homeowners are involved in this suit, it is my position that either Cameron or Propes alone could enforce equitable estoppel, regardless of whether anyone else in the neighborhood joined or even cared. *See* ***588***White Cypress Lakes,* 541 So.2d at 1035–36. This Court said the following in *White Cypress Lakes:*

> It may be that only a handful of White Cypress Lakes' many homeowners object to the RV campground. No matter. The truculence of a single landowner, with or without justification, can prevail over those who propose to use realty in a prohibited manner.
>
> Here, in the case at hand, no process of balancing the equities can make the plaintiff's the greater when compared with the defendant's, or even place the two in equipoise. The defendant, the owner has done nothing but insist upon adherence to a covenant which is now as valid and binding as at the hour of its making. His neighbors are willing to modify the restriction and forego a portion of their rights. He refuses to go with them. *Rightly or wrongly he believes that the comfort of his dwelling will be imperiled by the change, and so he chooses to abide by the covenant as framed.* The choice is for him only.... Other owners may consent. One owner, the defendant, satisfied with the existing state of things, refuses to disturb it. He will be protected in his refusal by all the power of the law.
>
> *Evangelical Lutheran Church of the Ascension of Snyder v. Sahlem,* 254 N.Y. 161, 168, 172 N.E. 455, 457 (1930) (per Cardozo, C.J.). The principle holds as well where the homeowners' right to relief is grounded only in equitable estoppel.

White Cypress Lakes, 541 So.2d at 1035–36 (emphasis added).

¶ 58. I recognize that the damage that would result from a church being built in the neighborhood is not as significant as the damage that might result from a different type of structure, such as a gas station, bar, or apartment complex. However, in the future, the Harlands' land could be sold to anyone, and any type of structure or facility could be placed on the land. It is irrelevant that the covenants for those lots allow only a church and "structures used for church purposes," because I firmly believe that the effect of the majority's decision is that covenants have no validity.

¶ 59. Substantial injustice will result from the allowance of the fraud by the Leavells, and the detriment will extend far beyond the metes and bounds of Long Meadow subdivision. I fervently believe that today's majority decision gives developers per-

mission to say anything to potential purchasers to make a sale, and buyers have no assurance, regardless of whether the promises are verbal or in writing, that the developer will uphold his end of the bargain. Restrictive covenants will have little value. For rural landowners like those in Long Meadow, whose land is not subject to zoning, this will be extremely problematic.

¶ 60. The wrongdoer is not allowed to "enjoy the fruits of his fraud." *Windham v. Latco of Miss., Inc.,* 972 So.2d 608, 611–12 (Miss.2008). The testimony in this case indicates that the Leavells and their representatives repeatedly promised purchasers, verbally and in writing, that the entire subdivision would be single-family, residential only. The Leavells' real estate agent assured Propes that all lots in the subdivision would be single-family, residential only. The Leavells verbally promised Cameron that the revised covenants for Phase III would be filed and that only residential homes would be permitted in the entirety of the subdivision. The Leavells signed numerous deeds and covenants that included the single-family, residential restriction for all of Phase I and Phase II and half of Phase III (including three sets of covenants that purported to ***589** apply to the entirety of Phase III). The Leavells later decided to allow schools and churches in the subdivision, contrary to their explicit promises made for more than fifteen years. The Leavells should be bound by their promises and by the documents they signed. They are "required by common honesty to do that which [they] represented [they] would do." *PMZ,* 449 So.2d at 208 (quoting *Ute Park,* 427 P.2d at 251). The single-family residence restriction should be enforced, and the Leavells should be estopped from changing the restrictive covenants of Long Meadow subdivision to allow churches, schools, or any other type of construction other than single-family, residential structures.

¶ 61. The Leavells, as the developers and those who made the representations, are the ones who should be estopped. However, they already sold the lots at issue to the Harlands, in spite of the landowners' protest prior to completion of the sale. The Leavells' option contract with the Harlands allowed the purchase to be cancelled if permission could not be obtained to build a church. Permission was not obtained, but they proceeded with the sale anyway. Although the Harlands did not make representations to the other landowners, they are not without fault. The Harlands acted with knowledge that the other landowners believed that the entirety of Long Meadow was single-family, residential. When the Long Meadow Defendants voiced their objection to a church being built in the neighborhood, the Harlands hurried to complete the purchase. They did not exercise the option in the option contract, even though the option had not expired and in light of the fact that permission had not been obtained to build a church. The Harlands participated in the Leavells' fraud, and neither party should be allowed to "enjoy the fruits of his fraud."

¶ 62. It is proper to apply equitable estoppel to the Harlands, because equitable estoppel has been used to enforce covenants against a party who has "knowledge of the 'general plan or scheme' of a subdivision[,]" regardless of whether covenants are recorded. *PMZ,* 449 So.2d at 208 (citing *Jones v. Cook,* 271 Ark. 870, 611 S.W.2d 506 (1981); *Johnson v. Mt. Baker Park Presbyterian Church,* 113 Wash. 458, 194 P. 536 (1920); *Hagan v. Sabal Palms, Inc.,* 186 So.2d 302 (Fla.App.1966)). The Harlands certainly had "knowledge of the general plan or scheme" of Long Meadow from the plain view of the neighborhood, from the notice given by the other homeowners, and from the language in the option contract.

¶ 63. In this case, equitable estoppel is "the most fair and reasonable remedy," and substantial injustice could be avoided by enforcing the Leavells' numerous promises to the landowners. *See Powell,* 912 So.2d at 981 (citing *PMZ,* 449 So.2d at 206; *Sanders,* 375 So.2d at 776). This Court has held that "[w]here one of two innocent parties will suffer a loss from the default or fraud of a third

party, the party in the best position to protect himself should bear the loss." *Christian Methodist Episcopal Church v. S & S Const. Co., Inc.,* 615 So.2d 568, 571–72 (Miss.1993) (citing *W. Cas. & Sur. Co. v. Honeywell, Inc.,* 380 So.2d 1385, 1389 (Miss.1980); *XYOQUIP, Inc. v. Mims,* 413 F.Supp. 962, 967 (N.D.Miss.1976)). Although I do not take the position that the Harlands are innocent, they are in the best position to protect themselves in this case. They could sell the land back to the Leavells, keep it as an investment, build a house on it, or let the Oxford Church of Christ use it as an investment. They are in the best position to protect themselves and would incur the least detriment. The numerous Long Meadow Defendants have built homes on their land, and they are not in a position ***590** otherwise to protect themselves. The only protection the Long Meadow Defendants have is enforcement of their covenants.

IV. Enforcing Restrictive Covenants as Equitable Servitudes

¶ 64. Whether created via legislative or judicial enactment, it may be time for Mississippi to allow a cause of action recognized in other jurisdictions for enforcement of restrictive covenants, which treats restrictive covenants as equitable servitudes, often referred to as a reciprocal negative easement or an implied equitable servitude. *See Forster v. Hall,* 265 Va. 293, 576 S.E.2d 746, 749–50 (2003); *Chase v. Burrell,* 474 A.2d 180, 181 (Me.1984); *Gauthier v. Robinson,* 122 N.H. 365, 444 A.2d 564, 566 (1982). These "equitable servitude" doctrines were "developed in order to provide protection for purchasers buying lots in what they reasonably expected was a general development in which all of the lots would be equally burdened and benefitted." *Roper v. Camuso,* 376 Md. 240, 829 A.2d 589, 602 (2003).

¶ 65. Although the precise requirements may vary in different jurisdictions, generally, these doctrines are employed when a common landowner subdivides property into multiple lots, develops the property as a whole pursuant to a common plan or scheme, and attaches restrictive covenants reflecting the common plan to a majority of the lots. *See Forster,* 576 S.E.2d at 749–50; *Chase,* 474 A.2d at 181; *Gauthier,* 444 A.2d at 566; *Sanborn v. McLean,* 233 Mich. 227, 206 N.W. 496, 497 (1925) . The party seeking to enforce a restrictive covenant must prove that there is an express or implied covenant applicable to the property at issue. *See Buffington v. T.O.E. Enter.,* 383 S.C. 388, 680 S.E.2d 289, 291 (2009). Obviously, an express covenant would be stated in the deed or in recorded covenants. *Wheeler v. Sweezer,* 65 S.W.3d 565, 569 (Mo.Ct.App.2002). However, covenants may be "implied" where the developer of residential property has developed and sold land "pursuant to a common plan or scheme of improvement." *Id. See also Forster,* 576 S.E.2d at 749–50; *Arthur v. Lake Tansi Vill., Inc.,* 590 S.W.2d 923, 928 (Tenn.1979). To enforce the doctrine, the property at issue must be part of the common plan or scheme, and the purchaser of the property at issue must have actual or constructive notice of the restriction. *See Forster,* 576 S.E.2d at 749–50; *Chase,* 474 A.2d at 181; *Gauthier,* 444 A.2d at 566; *Sanborn,* 206 N.W. at 497.

¶ 66. Generally, an action to enforce restrictive covenants can be brought by anyone for whose benefit the covenant was made. *Anderson v. Bommer,* 926 P.2d 959, 962 (Wyo.1996) (power to enforce the covenants is granted to every record property owner); *Eakman v. Robb,* 237 N.W.2d 423 (N.D.1975) (purchasers brought action to enforce restrictive covenants against owner and developer); *Anderson v. New Prop. Owners' Ass'n of Newport, Inc.,* 122 S.W.3d 378, 384–85 (Tex.App.2003) (property owners' association had standing to bring suit); *Wheeler,* 65 S.W.3d at 569 ("covenants can be enforced by any benefited landowner"); *Save the Prairie Soc. v. Greene Dev. Group, Inc.,* 323 Ill.App.3d 862, 256 Ill.Dec. 643, 752 N.E.2d 523, 528 (2001) ("Owners of all similarly encumbered lots subject to the same general plan have the right to enforce such covenants.").

¶ 67. "[W]hen a common grantor imposes restrictive covenants on a tract of land as part of a common plan or general scheme of development, an owner of a lot in the tract may enforce the covenants against the owner of any other lot in the tract." *Kohl v. Legoullon,* 936 P.2d 514, 516 (Alaska 1997). *See also* ***591***Forster,* 576 S.E.2d at 750; *Karner v. Roy White Flowers,* Inc., 351 N.C. 433, 527 S.E.2d 40, 42–43 (2000); *Jubb v. Letterle,* 185 W.Va. 239, 406 S.E.2d 465, 468 (1991); *Marion Rd. Ass'n v. Harlow,* 1 Conn.App. 329, 472 A.2d 785, 788 (1984); *Ruffinengo v. Miller,* 579 P.2d 342, 343 (Utah 1978). Courts also have held that, where a property owner or developer intended to establish a common plan or scheme in a subdivision, the "fact that some lots in a subdivision are sold without restrictions does not invalidate restrictions placed on the remaining lots." *McIntyre v. Baker,* 660 N.E.2d 348, 352 (Ind.Ct.App.1996). "If such a scheme of development is proved, 'the grantees acquire by implication an equitable right ... to enforce similar restrictions against that part of the tract retained by the grantor or subsequently *sold without the restrictions* to a purchaser with actual or constructive notice of the restrictions and covenants.' " *Forster,* 576 S.E.2d at 750 (emphasis in original) (internal citations omitted). *See also Kuhn v. Saum,* 316 Mo. 805, 291 S.W. 104, 106 (1926); *Allen v. City of Detroit,* 167 Mich. 464, 133 N.W. 317, 319 (1911); *Hagan,* 186 So.2d at 307.

¶ 68. But, notwithstanding this brief discussion on the doctrines of equitable servitude, the Long Meadow Defendants are entitled to relief under our well-entrenched doctrine of equitable estoppel.

V. Summary of Argument

¶ 69. It is my opinion that the Long Meadow Defendants have proven the existence of the elements required for equitable estoppel: "(1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." *B.C. Rogers Poultry,* 911 So.2d at 492. Testimony indicates that the Leavells and their representatives made numerous representations to the Camerons, the Propeses, and the other Long Meadow Defendants for more than fifteen years regarding the development of Long Meadow, repeatedly assuring them verbally and in writing that the entirety of the subdivision would be single-family, residential. Propes and Cameron both testified that they had changed their positions in response to these representations, and that they would not have purchased their lots without these assurances. The Long Meadow Defendants now believe that they will incur detriment as a result of the Leavells' denial of their promises.

¶ 70. In light of the foregoing, I find that the chancery court and the Court of Appeals erred by failing to find that the Long Meadow Defendants relied on representations by the Leavells and/or their representatives when they purchased lots in Long Meadow. In my opinion, this case should be reversed and rendered on that basis. At a minimum, the case should be remanded for the chancery court to consider the representations made to, and relied upon by, the Long Meadow Defendants in the court's application of equitable estoppel. Because the majority finds otherwise, I respectfully dissent.

Miss.,2012.
Long Meadow Homeowners' Ass'n, Inc. v. Harland
89 So.3d 573

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--- So.3d ----, 2013 WL 3605341 (Miss.App.)
(Cite as: 2013 WL 3605341 (Miss.App.))

Only the Westlaw citation is currently available.

Court of Appeals of Mississippi.
Randolph MAY and Martha Gene May, Appellants
v.
ADIRONDACK TIMBER I, LLC, Appellee.

No. 2012–CA–00748–COA.
July 16, 2013.

Background: **Timber** company that owned landlocked parcel filed petition for establishment of a private road over neighbors' land. The Special Court of Eminent Domain, Pike County, awarded **timber** company a 50-foot-wide easement for a private road over neighboring land. Neighbors filed post-judgment motion for new trial, or to alter or amend the judgment, and **timber** company filed motion for sanctions. The Special Court of Eminent Domain, John P. Price, J., denied neighbors' motion and granted **timber** company's request for sanctions. Neighbors appealed.

Holdings: The Court of Appeals, Maxwell, J., held that:
(1) **timber** company was entitled to easement by necessity over neighbors' land, and
(2) trial court abused its discretion in imposing sanctions against neighbors.

Affirmed in part, and reversed and rendered in part.

West Headnotes

[1] Private Roads 311 0

311 Private Roads

Timber company that owned landlocked parcel met statutory burden of proof to show that it was entitled to easement by necessity over neighbors' land; private road over neighbors' land was only reasonably way to access landlocked parcel, as parcel was bordered on three sides by creeks, a river, and a railroad, and, although railroad company was willing to grant timber company a temporary easement across its tracks, such option would not have provided timber company long-term access to landlocked parcel. West's A.M.C. § 65–7–201.

[2] Costs 102 0

102 Costs

Trial court abused its discretion in imposing sanctions against neighboring landowners who filed motion to alter or amend a judgment awarding timber company an easement by necessity over neighbors' land; neighbors had objective hope of succeeding on motion to alter or amend the judgment, as motion identified an alleged "clear error of law" by the trial court. Rules Civ.Proc., Rules 11(b), 59(e).

[3] Costs 102 0

102 Costs

Under rule prohibiting frivolous, harassing, or delaying motions, a motion is "frivolous," and thus sanctionable, only when, objectively speaking, the movant has no hope of success. Rules Civ.Proc., Rule 11(b).

[4] Judgment 228 0

228 Judgment

To succeed on a motion to alter or amend a judgment, a movant must show an intervening change in controlling law, the availability of new evidence not previously available, or the need to correct a clear error of law or to prevent manifest injustice.

Pike County Special Court of Eminent Domain, John P. Price, J.Alfred L. Felder, attorney for appellants.

Michael Scott Jones, Powell G. Ogletree, Jr., attorneys for appellee.

Before GRIFFIS, P.J., MAXWELL and FAIR, JJ.

MAXWELL, J., for the Court:

*1 ¶ 1. Mississippi statutory law permits a person to petition for a private road across someone else's property "when necessary for ingress and egress." FN1 Following statutory procedures, **Adirondack Timber I, LLC**, obtained an easement for a private road across Randolph May and Martha Gene May's property. Because we find **Adirondack** met its burden to show the private road across the Mays' property was necessary to gain permanent access to its landlocked property, we affirm the judgment granting **Adirondack** the easement.

¶ 2. We cannot, however, affirm the grant of **Adirondack's** request for Rule 11 sanctions. FN2 The Mays' post-judgment motion, which challenged the legal correctness of the judgment that condemned a portion of their property, while unsuccessful, was not frivolous. Because it was an abuse of discretion to impose sanctions on the Mays for filing this motion, we reverse and render the judgment awarding **Adirondack** $200 as sanctions.

Background

¶ 3. **Adirondack** owns real property in Lincoln County, Mississippi, with mature **timber** that it plans to harvest. But the property is landlocked. To the immediate west of **Adirondack's** property is the Canadian National Railroad, which refused to permit **Adirondack** a permanent crossing. And to the north are creeks. The eastern boundary is the Bogue Chitto River. Determining the only reasonable access to its property was from the south, **Adirondack** attempted to obtain an easement from the landowners to the south for a private road immediately east of the railroad that would run parallel to the railroad till it reached Carruth Drive, an existing public road with a permanent railroad crossing.

¶ 4. Adirondack's immediate southern neighbors in Lincoln County were amenable to this plan and deeded an easement across their property, down to the Pike County line. But the Mays, who own the property from the county line to Carruth Drive, refused to grant an easement. So Adirondack utilized the procedures of Mississippi Code Annotated section 65–7–201 (Rev.2012) and petitioned the Pike County Special Court of Eminent Domain for a private road across the Mays' property. The county court judge, sitting as special eminent domain judge, found Adirondack met the statutory requirements and granted a 50–foot–wide easement for a private road, for which Adirondack would pay the Mays $4,000. FN3

¶ 5. The Mays then filed a Rule 59 motion for a new trial or, alternatively, to alter or amend the judgment. *See* M.R.C.P. 59(a), (e). Adirondack responded by asking for Rule 11 sanctions, arguing the Mays' post-trial motion was frivolous. *See* M.R.C.P. 11. The judge denied the Mays' post-trial motion and granted Adirondack's request for sanctions, requiring the Mays to pay Adirondack $200 in attorney's fees.

¶ 6. The Mays appeal both the grant of the easement for the private road and the sanctions imposed.

Discussion

¶ 7. We affirm the special eminent domain judge's grant of an easement for a private road. While, on one hand, the statute required Adirondack to show more than the mere convenience of having a private road across the Mays' property to Carruth Drive, on the other hand, Adirondack did not have to show there was no other possible way to get to its property. We find the judge properly found that Adirondack met its statutory burden to show the private road was reasonably necessary to enter and leave its landlocked property.

*2 ¶ 8. But we reverse the award of sanctions. While Rule 11 sanctions are within the sound discretion of the trial court, we find the judge abused this discretion when he held the Mays' post-trial motion was frivolous and, thus, sanctionable.

I. Grant of Private–Road Easement

[1] ¶ 9. As the petitioner, Adirondack had the burden to show the private road across the Mays' property is "necessary for ingress and egress" to its property.[FN4] Miss.Code Ann. § 65–7–201; *see also Alpaugh v. Moore,* 568 So.2d 291, 295 (Miss.1990) (finding petitioners had met their statutory burden to show necessity). The Mays argue the judge erred in finding Adirondack met this burden.

¶ 10. Because "the right to control and use of one's property is a sacred right not to be lightly invaded or disturbed," in order to invade this right and be granted a private road over the Mays' property, Adirondack had to show "real necessity[,] not just mere convenience." *Hooks v. George Cnty.,* 748 So.2d 678, 681–82 (15, 21) (Miss.1999). For example, in *Hooks,* the Mississippi Supreme Court held that the petitioners failed to show a private road across their neighbors' property was reasonably necessary because the petitioners had already obtained two other easements to their property. *Id.* at 682–83 (21–27). And the only reason they petitioned under the statute for a private road was because, unlike their other easements, the road had already been cleared. Because "the private way across [their neighbor's] property [was] not a necessity but [instead] a mere convenience," the supreme court held that the petitioners failed to meet their statutory burden. *Id.* at 682(21).

¶ 11. Here, Adirondack has shown that it sought the private road for more than mere convenience. An easement to the south of its property was not merely the most convenient way to enter and exit its property, it was the only feasible way to get to a public road. To the north and east are creeks and a river, and to the west is a railroad, which would not grant Adirondack a permanent crossing.

¶ 12. The Mays assert Adirondack failed to meet its burden because there was evidence the railroad was willing to grant a *temporary* easement across its tracks, and the Browns, property owners to the west of the railroad, were willing to grant an easement for a road parallel to the railroad to the west that would connect to Carruth Drive. According to the Mays, Adirondack could not show "necessity" because it failed to pursue an easement from willing property owners west of the railroad tracks. But Adirondack did explore this option—and was refused a permanent railroad crossing by Canadian National Railroad to get to the Browns' property to the west. Thus, it was unreasonable for Adirondack to pursue this option for long-term access to its property.

¶ 13. The supreme court has interpreted the statute's use of the word "necessary" to mean what is "reasonably necessary and practical" and not what is "absolutely necessary." *Id.* (quoting *Quinn v. Holly,* 244 Miss. 808, 813, 146 So.2d 357, 359 (1962)). In *Alpaugh,* the supreme court held that the petitioners had met their burden of showing the reasonable necessity of a private way across their neighbors' property because the petitioners' property was bound by water on three sides. *Alpaugh,* 568 So.2d at 295. The petitioners' neighbors had argued that an absolute necessity standard should apply—asserting that the petitioners "failed to explore the option of building a bridge to their land." *Id.* The supreme court rejected this argument, finding such an exploration was "not ... required due to the unreasonableness inherent in such an undertaking." *Id.* The court held the petitioners had met their burden by "showing that they ha[d] no other dry access to their land. *Id.*

*3 ¶ 14. As in *Alpaugh,* the Mays essentially argue that because the judge did not find the private road was "absolute necessity," the judge failed to make the required finding under the statute. However, Adirondack's burden was to show there was no other *reasonable* access to the property other than going through the Mays' property. The

judge found that, because of the creeks to the north, the Bogue Chitto River to the east, and the railroad to the west, the only reasonable option for Adirondack was to enter and leave its property from the south, by building a private road from Adirondack's property to the established railroad crossing at Carruth Drive. Because we find the special eminent domain judge properly applied section 65–7–201 and supported his finding of reasonable necessity with substantial evidence from the record, we affirm the judgment granting Adirondack an easement for a private road across the Mays' property.

II. Award of Sanctions

[2] ¶ 15. Since we find the judgment granting an easement was proper, we find the denial of the Mays' motion for a new trial or to alter or amend that judgment was also proper. But we find that to impose sanctions for filing this motion was an abuse of discretion. *See Leaf River Forest Prods., Inc. v. Deakle,* 661 So.2d 188, 196 (Miss.1995) (holding that the imposition of sanctions will only be reversed if the judge abused his discretion).

[3] ¶ 16. Rule 11(b) grants a judge the authority to order a party, his attorney, or both to pay the reasonable expenses incurred by the opposite party to defend a motion that, "in the opinion of the [judge], is frivolous or is filed for the purpose of harassment or delay." M.R.C.P. 11(b). However, a motion is "frivolous," and thus sanctionable, "only when, objectively speaking, the ... movant has no hope of success." *Leaf River,* 661 So.2d at 196–97 (quoting *Smith v. Malouf,* 597 So.2d 1299, 1303 (Miss.1992)).

¶ 17. The judge found the Mays' motion had no hope of success because it "presented no new facts or law" but instead "restate[d] the exact same argument made at trial," which the judge "ha[d] already heard and considered [.]" FN5 But the standard is an objective one, not a subjective one. Though subjectively the judge obviously found the Mays had no hope he would change his mind based on the same argument, objectively, we cannot say it is hopeless to ask a judge to change his mind based on the argument he misapplied the law the parties had already presented.

[4] ¶ 18. While showing "an intervening change in controlling law" or "the availability of new evidence not previously available" are two ways to succeed on a motion to alter or amend, another way to prevail on a Rule 59(e) motion is to show "the need to correct a clear error of law or to prevent manifest injustice." *Journey v. Berry,* 953 So.2d 1145, 1160(51) (Miss.Ct.App.2007) (citing *Brooks v. Roberts,* 882 So.2d 229, 233(¶ 15) (Miss.2004)). So simply pointing out the need to correct clear legal error based on the law and evidence already presented is a non-frivolous use of Rule 59(e). And arguably the Mays thought they were giving the judge an opportunity to correct a misapplication of section 65–7–201's "necessity" standard, before raising this issue on appeal.

*4 ¶ 19. While there may be circumstances where a post-judgment motion raises solely frivolous arguments or is filed only to delay the effect of the judgment, those circumstances are not present here, particularly where the moving party has lost property rights.

¶ 20. We find the judge abused his discretion when he held the Mays' post-trial motion was frivolous and imposed the $200 sanction. Thus, we reverse and render the award of $200 in sanctions to Adirondack.

¶ 21. **THE JUDGMENT OF THE PIKE COUNTY SPECIAL COURT OF EMINENT DOMAIN IS AFFIRMED IN PART AND REVERSED AND RENDERED IN PART. ALL COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN THE APPELLANTS AND THE APPELLEE.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, CARLTON, FAIR AND JAMES, JJ., CONCUR.

FN1. Miss.Code Ann. § 65–7–201

(Rev.2012).

FN2. *See* M.R.C.P. 11(b).

FN3. Adirondack and the Mays stipulated to this amount, which is not at issue on appeal.

FN4. Under section 65–7–201:

> When any person shall desire to have a private road laid out through the land of another, *when necessary for ingress and egress,* he shall apply by petition, stating the facts and reasons, to the special court of eminent domain created under Section 11–27–3 of the county where the land or part of it is located, and the case shall proceed as nearly as possible as provided in Title 11, Chapter 27 for the condemnation of private property for public use. The court sitting without a jury shall determine the reasonableness of the application. The owner of the property shall be a necessary party to the proceedings. If the court finds in favor of the petitioner, all damages that the jury determines the landowner should be compensated for shall be assessed against and shall be paid by the person applying for the private road, and he shall pay all the costs and expenses incurred in the proceedings.
>
> (Emphasis added).

FN5. This case involved a bench trial, not a jury trial, so this is not a case where a post-trial motion was necessary to preserve challenges to the sufficiency and weight of the evidence.

Miss.App.,2013.
May v. Adirondack Timber I, LLC
--- So.3d ----, 2013 WL 3605341 (Miss.App.)

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--- So.3d ----, 2013 WL 3610594 (Miss.App.)
(Cite as: 2013 WL 3610594 (Miss.App.))

Court of Appeals of Mississippi.
Robert **HOBGOOD**, Appellant
v.
MISSISSIPPI **POWER** COMPANY, INC., Appellee.

No. 2012–CP–00546–COA.
July 16, 2013.

Background: **Power** company brought condemnation action against property owner seeking to acquire an easement across property. The Special Court of Eminent Domain, Lauderdale County, Franklin M. Coleman, J., entered judgment on a jury verdict awarding owner $6,821.75. Owner appealed.

Holding: The Court of Appeals, Lee, C.J., held that evidence was sufficient to support jury's award of compensation.

Affirmed.

West Headnotes

[1] Evidence 157 ⚿0

157 Evidence
To challenge the sufficiency of the evidence, a party moves for a directed verdict or a judgment notwithstanding the verdict (JNOV).

[2] Appeal and Error 30 ⚿0

30 Appeal and Error
By failing to raise the issue of the sufficiency of the evidence in condemnation action before the trial court by either moving for a directed verdict or for a judgment notwithstanding the verdict (JNOV), property owner did not preserve the issue for appeal.

[3] Eminent Domain 148 ⚿0

148 Eminent Domain
Evidence was sufficient to support jury's award of $6,821.75 to property owner in condemnation action; property appraiser who was admitted as an expert without objection from property owner testified that fair compensation for the easement on the property was $27,287 and considering the one-fourth interest that owner held, his portion of the compensation was $6,821.75.

Lauderdale County Special Court of Eminent Domain, Franklin M. Coleman, J.Robert Hobgood (Pro Se), attorney for appellant.

Roderick Mark Alexander Jr., Hampton Wingfield Glover Jr., Ben Harry Stone, attorneys for appellee.

Before LEE, C.J., FAIR and JAMES, JJ.

LEE, C.J., for the Court:

FACTS AND PROCEDURAL HISTORY

***1** ¶ 1. Mississippi **Power** Company (MPC) sought to acquire an easement across a piece of property owned partially by Robert **Hobgood**. MPC was granted a Certificate of Public Convenience and Necessity under Mississippi Code Annotated section 77–3–1 (Rev.2009) by the Mississippi Public Service Commission. The certificate authorized MPC to acquire the necessary land to construct an electric-generating plant, along with the necessary transmission facilities and pipelines in Kemper, Lauderdale, Clarke, and Jasper Counties, Mississippi.

¶ 2. MPC filed a complaint on August 18, 2011, in the Lauderdale County Special Court of Eminent Domain, seeking to acquire a seventy-five-foot-wide easement to construct a pipeline. The suit was filed against Robert Hobgood, Richard Hobgood, David Hobgood, and Stephen McRea, who each owned a one-fourth interest in the land in question. Prior to trial, MPC settled with all of the record title owners except Robert Hobgood.

¶ 3. On February 27, 2012, a trial was held to determine the amount of compensation Hobgood was owed for the easement. Immediately prior to trial, MPC moved in limine to exclude the testimony of Hobgood, including any testimony as to the fair market value of the property, the highest and best use of the property, and any damages to the remainder. In support, MPC argued that Hobgood had failed to comply with Mississippi Code Annotated section 11–27–7 (Rev.2004) and that Hobgood had admitted in discovery: he had not made an independent assessment of the comparable properties; he did not intend to call an expert witness; and he did not intend to call any other witnesses. The trial court granted MPC's motion. While Hobgood represented himself at the trial level, as he does at the appellate level, the trial court noted that he was an attorney and had practiced law in the state of Texas.

¶ 4. After the trial, the jury awarded Hobgood $6,821.75 in damages. This appeal followed.

DISCUSSION

¶ 5. Hobgood raises seven issues on appeal: (1) "whether a condemnor can acquire a general easement"; (2) "whether a condemnor owes no duty to accommodate reasonable subservient use of right of way tract as a matter of law"; (3) "whether the issue of remainder damages to a landowner is wholly a question of law in [right-of-way] cases"; (4) "whether [Hobgood] was afforded due process before the cause was sent for trial"; (5) "whether the expert's evidence of land values sufficed to support the judgment"; (6) "whether [Hobgood] could [counterclaim] against the condemnor for a tortious abuse of judicial process"; and (7) "whether the Plea to General Authority got to the point of the controversy."

¶ 6. The only issue before the jury was the amount of damages **Hobgood** should receive for the easement. As this Court has stated numerous times, "[a] party cannot raise an issue for the first time on appeal." *Ellison v. Meek,* 820 So.2d 730, 736 (¶ 22) (**Miss** .Ct.App.2002). Therefore, the only issue raised that is appropriate for appeal is whether the jury's award was supported by sufficient evidence.

***2** [1][2] ¶ 7. To challenge the sufficiency of the evidence, a party moves for a directed verdict or a judgment notwithstanding the verdict (JNOV). *Milburn v. Vinson,* 850 So.2d 1219, 1222 (¶ 6) (Miss.Ct.App.2002). Hobgood failed to move for a directed verdict or file a motion for a JNOV. By failing to raise the issue of the sufficiency of the evidence before the trial court, Hobgood did not preserve the issue for appeal. And as stated above, he cannot raise an issue for the first time on appeal. *Ellison,* 820 So.2d at 736 (¶ 22).

[3] ¶ 8. Even excluding this bar, sufficient evidence was presented to support the jury's award of $6,821.75. When reviewing the denial of a motion for a JNOV or a motion for a directed verdict, we use the same standard. *Wal–Mart Stores, Inc. v. Littleton,* 822 So.2d 1056, 1058 (¶ 4) (Miss.Ct.App.2002). "This Court will reverse the denial of a directed verdict only where reasonable and fair-minded jurors could only find for the moving party." *Id.* at (¶ 7).

¶ 9. MPC called George William Null, a property appraiser who was admitted as an expert without objection from Hobgood. Null testified that fair compensation for the easement on the property would be $27,287. He further testified that considering the one-fourth interest that Hobgood owned, his portion of the compensation would be $6,821.75. Hobgood offered no evidence that this amount was improper or that another amount should be considered. With the evidence offered, it

cannot be said that fair-minded jurors could only find for Hobgood. Therefore, we affirm.

¶ 10. **THE JUDGMENT OF THE LAUDERDALE COUNTY SPECIAL COURT OF EMINENT DOMAIN IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, CARLTON, MAXWELL, FAIR AND JAMES, JJ., CONCUR.

Miss.App.,2013.
Hobgood v. Mississippi Power Co., Inc.
--- So.3d ----, 2013 WL 3610594 (Miss.App.)

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Mississippi Div. of Medicaid v. Stinson
69 So.3d 767 (Table)
Miss. 2011.
September 01, 2011 (Approx. 1 page)

69 So.3d 767 (Table)

Briefs and Other Related Documents
(The Court's decision is referenced in a Southern Reporter table captioned "Supreme Court of Mississippi Petitions for Writ of Certiorari." See MS R RAP RULE 35-A for rules regarding the publication and citation of unpublished opinions.)

Supreme Court of Mississippi
Mississippi Division of Medicaid
v.
Linda **Darby Stinson**

NO. 2010-CT-00335-COA
September 01, 2011

Disposition: Denied.

Miss. 2011.
Mississippi Div. of Medicaid v. **Stinson**
69 So.3d 767 (Table)

Briefs and Other Related Documents (Back to top)

- 2010-TS-00335 (Docket) (Feb. 19, 2010)

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--- So.3d ----, 2013 WL 791850 (Miss.App.)
(Cite as: 2013 WL 791850 (Miss.App.))

H

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Mississippi.
Guy E. EVANS, Appellant
v.
Joel W. HOWELL, III, Appellee.

No. 2011–CA–01414–COA.
March 5, 2013.
Rehearing Denied June 25, 2013.

Background: Client sued attorney for legal malpractice, alleging that attorney negligently failed to prepare a buyout agreement to cover all corporate entities client jointly owned with business partner. The Circuit Court, Hinds County, Winston L. Kidd, J., found that the statute of limitations for client's claim had expired and granted summary judgment in favor of attorney. Client appealed.

Holding: The Court of Appeals, en banc, Griffis, P.J., held that client's claim accrued on the date client signed the agreement, and his action was barred because it was filed after the three-year limitations period had expired.

Affirmed.

Irving, P.J., filed a dissenting opinion, in which Lee, C.J., Roberts, and Maxwell, JJ., joined.

West Headnotes

[1] Limitation of Actions 241 ⚿95(11)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(10) Professional Negligence or Malpractice
241k95(11) k. Attorneys. Most Cited Cases

Client knew or should have known of his legal-malpractice claim alleging that attorney negligently failed to prepare a buyout agreement to cover all corporate entities client jointly owned with business partner, triggering the statute of limitations, on the date client signed the agreement, not on the date business partner's estate sued client to limit the application of the buyout agreement to only one of the jointly owned corporations pursuant to the buyout agreement's reference to a previous buyout agreement; client signed both agreements, admitted that he had read both agreements and that the business valuation under the prior agreement was the only business valuation that existed, and prior agreement required buyout of only one corporation, even though client and business partner jointly owned other corporations. West's A.M.C. § 15–1–49.

[2] Limitation of Actions 241 ⚿199(1)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k199 Questions for Jury
241k199(1) k. In general. Most Cited Cases

The issue of whether the statute of limitations has run is a question of law. West's A.M.C. § 15–1–49.

[3] Limitation of Actions 241 ⚿95(11)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action

241k95(10) Professional Negligence or Malpractice

241k95(11) k. Attorneys. Most Cited Cases

Under the "discovery rule" for legal-malpractice actions, the statute of limitations on a legal malpractice claim begins to run on the date that the client learns or, through the exercise of reasonable diligence, should learn of his lawyer's negligence. West's A.M.C. § 15–1–49.

[4] Limitation of Actions 241 ⚖95(11)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(10) Professional Negligence or Malpractice
241k95(11) k. Attorneys. Most Cited Cases

The discovery rule for determining when the statute of limitations for a legal malpractice case begins to run applies when it would be impractical to require a layperson to have discovered the malpractice at the time it happened. West's A.M.C. § 15–1–49.

[5] Contracts 95 ⚖93(2)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k93 Mistake
95k93(2) k. Signing in ignorance of contents in general. Most Cited Cases

A person is charged with knowing the contents of any document that he executes.

James D. Shannon, Hazlehurst, Jamie Nicole Hardison–Edwards, Kathryn Lindsey White, Hazlehurst, attorneys for appellant.

Clifford B. Ammons, Paul Stephenson, attorneys for appellee.

EN BANC.

GRIFFIS, P.J., for the Court:

*1 ¶ 1. Guy E. **Evans** appeals the grant of summary judgment in favor of Joel **Howell**. The trial court determined that the statute of limitations for a legal-malpractice claim had expired before the complaint was filed. **Evans** argues that the grant of summary judgment was not proper. We find no error and affirm.

FACTS

¶ 2. Robert J. Giordano and **Evans** owned and operated several businesses. They formed **Evans**/Giordano Inc. ("EGI") to sell insurance and related products. Giordano and **Evans** each owned fifty percent of the stock in EGI. Joel **Howell** performed legal services for EGI and advised Giordano and **Evans** about various corporate and other legal issues.

¶ 3. In 1996, Giordano and **Evans** had incorporated two other businesses: Safety Risk Services Inc. ("SRS"), and Insurance Premium Services Inc. ("IPS"). Thus, Giordano and **Evans** were the sole stockholders of three corporations, EGI, SRS, and IPS. EGI was a profitable entity, while SRS and IPS were new companies with little or no assets.

¶ 4. Giordano and **Evans** wanted to enter a buyout agreement. In the event of the death of either Giordano or **Evans**, this agreement would allow the surviving stockholder to purchase all stock owned by the deceased stockholder. Likewise, the estate of the deceased stockholder would be required to sell the stock to the surviving stockholder. The agreement would be funded by the purchase of life insurance policies on the stockholders. Giordano and Evans asked Howell to prepare this agreement.

¶ 5. On August 16, 1996, Giordano and Evans signed a "Purchase and Sale Agreement" (the "1996 agreement"). This agreement was prepared by Howell. It provided:

Guy E. Evans and Robert J. Giordano are sole stockholders of Evans/Giordano, Inc., a Mississippi corporation (hereinafter referred to as the Corporation, each owning fifty percent (50%) of the stock of the Corporation.

The purpose of this Agreement is twofold: (a) to provide for the purchase by the survivor of the decedent's stock interest in the Corporation; and (b) to provide the funds necessary to carry out such purchase.

It is, therefore, mutually agreed by Guy E. Evans and Robert J. Giordano as follows:

1. If either stockholder should desire to dispose of any of his stock in the Corporation during his lifetime, he shall first offer in writing to sell his stock to the other stockholder. The offer shall be based on a price determined in accordance with the provisions of paragraph 5 hereof....

2. The parties hereto are insured by several policies, a schedule of which is attached hereto and incorporated by reference herein as Exhibit "A." ...

3. This Agreement shall extend to and shall include all additional policies issued pursuant hereto; such additional policies shall be added to the list in Schedule "A," attached hereto.

4. Upon the death of either stockholder, the survivor shall purchase and the estate of the decedent shall sell the stock interest now owned or hereafter acquired by the stockholder who is the first to die. The purchase price of such interest shall be computed in accordance with the provisions of paragraph 5 of this Agreement.

*2 5. The outstanding capital stock of the Corporation consists of 1,000 shares which are owned and held by the stockholders as follows:

Guy E. Evans..... 500 shares

Robert J. Giordano..... 500 shares

Unless and until changed as hereinafter provided, the value of each share of stock of the Corporation held by each stockholder shall be $1,500.00. Said value includes an amount mutually agreed upon as representing the goodwill of the Corporation as a going concern. Within thirty days following the end of each fiscal year, Guy E. Evans and Robert J. Giordano shall redetermine the value of each share of stock. Such value shall be endorsed on Schedule B, attached hereto....

6. Each stockholder agrees that the proceeds of the policies subject to this Agreement shall be applied toward the purchase price set forth above....

9. This Agreement may be altered, amended or terminated by a writing signed by both stockholders....

¶ 6. Although Giordano and **Evans** jointly owned two other companies at the time, SRS and IPS, the 1996 agreement only applied to the purchase and sale of EGI stock.

¶ 7. Between 1996 and 2004, **Evans** and Giordano formed two new corporations: Insurance Network Services Inc. ("INS"), and **Evans**/Giordano of Florida Inc. ("EGF"). Giordano and **Evans** operated INS, EGF, SRS, and IPS as "sister companies" of EGI.

¶ 8. By 2004, the sister companies were gaining success and bringing in significant income and profits. In September 2004, Giordano asked **Howell** to draft a new buyout agreement. **Howell** drafted a new "Purchase and Sale Agreement" (the "2004 agreement") and provided it to Giordano and **Evans** . This agreement was to provide that the surviving stockholder purchase, using insurance proceeds, the deceased stockholder's interest in all five companies for $3,000,000. The proposed 2004 agreement was never signed by Giordano and **Evans**.

¶ 9. In March 2005, Giordano and **Evans** asked **Howell** to draft another agreement (the "2005

agreement"),[FN1] which read in its entirety:

> The parties to the buy/sell agreement of 1996 agree that, pending completion of a new agreement, the prior business valuation is hereby increased to three million dollars, with life insurance policies currently in place in that amount.

Evans and Giordano signed the 2005 agreement.

¶ 10. Giordano died on May 25, 2006. Thereafter, Evans filed a claim for the life insurance death benefits payable as a result of Giordano's death. On August 8, EGI received two checks from Guardian Life Insurance Company of America in the amounts of $2,013,541.60 and $1,006,770.80.

¶ 11. On November 1, 2006, Giordano's estate filed suit against **Evans** in the Madison County Circuit Court. Giordano's estate claimed that the $3,000,000 from Giordano's life insurance policy was for the purchase of Giordano's EGI stock only, not Giordano's interest in the sister companies. **Evans** claimed that the insurance proceeds covered not only Giordano's interest in EGI, but also Giordano's interest in the sister companies because these companies were identified in the 2004 agreement and included in the most recent valuation. **Evans** settled with Giordano's estate and paid more than the $3,000,000 that he received in life insurance proceeds for the stock in all of the corporations jointly owned by Giordano and **Evans**.

* ¶ 12. On May 13, 2009, **Evans** filed his complaint for legal-malpractice against **Howell**. **Evans** alleged that **Howell** negligently failed to prepare the 2005 agreement to cover all corporate entities formed by Giordano and **Evans**. Further, **Evans** argued that the problems arising from **Howell's** negligence in drafting the "referenced documents" surfaced after the death of Giordano. He claimed **Howell** knew or should have known that the sister companies would be involved in the purchase and sale agreement, and he was specifically so instructed. As a result of **Howell's** failure to amend the purchase and sale agreement, **Evans** was forced to pay money in excess of the purchased life insurance for the stock of the deceased Giordano. But for **Howell's** negligence, **Evans** claimed, the life insurance purchased on Giordano would have covered the entire cost of **Evans** acquiring Giordano's stockholder's interest.

¶ 13. On October 4, 2012, **Howell** filed a motion for summary judgment. **Howell** claimed the statute of limitations had expired before **Evans** commenced this action. After a hearing, the Honorable Winston Kidd, Hinds County Circuit Judge, found the limitations period had expired and **Evans's** claim was time-barred. The court entered an order granting summary judgment on November 12, 2010. **Evans** filed a motion for reconsideration, which was denied by order dated August 19, 2011. **Evans** then perfected this appeal.

STANDARD OF REVIEW

¶ 14. Appellate courts review de novo a trial court's grant of summary judgment. *Williamson ex rel. Williamson v. Keith,* 786 So.2d 390, 393 (¶ 10) (Miss.2001). An appellate court examines all evidentiary matters before it "in the light most favorable to the party against whom the motion has been made." *Id.* "If ... there is no genuine issue of material fact[, and] the moving party is entitled to judgment as a matter of law, summary judgment should ... be entered in his favor." *Id.* "[T]he burden of demonstrating that no genuine issue of fact exists is on the moving party." *Id.*

ANALYSIS

[1] ¶ 15. Pursuant to Mississippi Code Annotated section 15–1–49 (Rev.2003), a legal-malpractice claim must be brought within three years after the claim accrued. *Channel v. Loyacono,* 954 So.2d 415, 420 (¶ 13) (Miss.2007). When **Evans's** legal-malpractice claim accrued, he had three years from that date to file his lawsuit. **Evans's** complaint was originally filed on May 13, 2009. Therefore, if **Evans** learned or by reasonable diligence should have learned of his claim before May 13, 2006, his claim is barred by the statute of

limitations.

¶ 16. **Howell** argues that the statute of limitations began to run when the 2005 agreement was signed, on March 10, 2005. **Howell** contends that the limitations period on **Evans's** claim had expired before the complaint was filed. The trial court agreed and granted summary judgment.

¶ 17. **Evans** argues that his claim accrued, at the earliest, when the complaint was filed by Giordano's estate against him, which was on November 1, 2006. Thus, since his claim was filed on May 13, 2009, **Evans** argues that his claim was timely because his complaint was filed before the statute of limitations expired. **Evans** also argues that March 10, 2005, could not be the accrual date because he was incapable of determining **Howell's** negligence before Giordano's estate filed a lawsuit and raised the issue.

***4** [2] ¶ 18. The issue of whether the statute of limitations has run is a question of law. *Wayne Gen. Hosp. v. Hayes,* 868 So.2d 997, 1000 (¶ 11) (Miss.2004). Evans does not argue that the trial court was incorrect to decide when the claim began to accrue or that this issue was a mixed question of fact and law that would be appropriate for the jury to decide.

[3][4] ¶ 19. The Mississippi Supreme Court has adopted the discovery rule for legal-malpractice actions. *Smith v. Sneed,* 638 So.2d 1252, 1258 (Miss.1994). As a result, the statute of limitations begins to run on the date that the client learns or, through the exercise of reasonable diligence, should learn of his lawyer's negligence. *Id.* at 1256. Recently, the supreme court followed *Sneed* and reasoned:

> The discovery rule is applied when the facts indicate that "it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." In *Sneed,* the Court found that the discovery rule applies when it would be impractical to require a layperson to have discovered the malpractice at the time it happened. This is because requiring a layperson to ascertain legal malpractice at the time it occurs would necessitate the retention of a second attorney to review the work of the first.

Bennett v. Hill–Boren, P.C., 52 So.3d 364, 369 (¶ 15) (Miss.2011) (internal citations omitted).

¶ 20. Both parties cite *Channel v. Loyacono,* 954 So.2d 415, 420 (¶ 13) (Miss.2007), as authority for the question of when a legal-malpractice claim would "accrue." In *Channel,* the plaintiffs were represented by attorneys Paul Loyacono and Scott Verhine in mass tort litigation (Fen-phen). *Id.* at 418 (¶ 2). The engagement contract authorized Loyacono and Verhine to associate other lawyers to assist them. *Id.* Loyacono and Verhine began settlement discussions with the defendant in "late November and early December 2000." *Id.* at (¶ 4). They presented settlement offers to their clients, some of whom settled and some of whom did not. *Id.* at 418–19 (¶¶ 4–5). They negotiated further and ultimately settled all of their clients' cases. *Id.* at 419 (¶ 5). All of their clients received their settlement funds on January 26, 2001. *Id.*

¶ 21. Two of the lawyers Loyacono and Verhine associated began to call the clients and challenge the validity of the settlements. *Id.* at (¶¶ 6–7). In several of the cases, the associated lawyers filed a motion that "accused Loyacono and Verhine of acting dishonestly, negligently, and fraudulently in negotiating the settlements." *Id.* at (¶ 7). At the hearing, "all of the clients testified that Loyacono and Verhine had acted dishonestly, negligently, and fraudulently in negotiating their settlements[;] each of them testified that they had signed their settlement agreements, received the proceeds, and considered their cases settled." *Id.* at (¶ 8). In April 2004, the court determined that the cases were knowingly and voluntarily agreed to and were settled. *Id.* at (¶ 9).

***5** ¶ 22. On January 5, 2004, the clients filed a legal-malpractice action against Loyacono and Ver-

limitations.

¶ 16. **Howell** argues that the statute of limitations began to run when the 2005 agreement was signed, on March 10, 2005. **Howell** contends that the limitations period on **Evans's** claim had expired before the complaint was filed. The trial court agreed and granted summary judgment.

¶ 17. **Evans** argues that his claim accrued, at the earliest, when the complaint was filed by Giordano's estate against him, which was on November 1, 2006. Thus, since his claim was filed on May 13, 2009, **Evans** argues that his claim was timely because his complaint was filed before the statute of limitations expired. **Evans** also argues that March 10, 2005, could not be the accrual date because he was incapable of determining **Howell's** negligence before Giordano's estate filed a lawsuit and raised the issue.

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> The discovery rule is applied when the facts indicate that "it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." In *Sneed,* the Court found that the discovery rule applies when it would be impractical to require a layperson to have discovered the malpractice at the time it happened. This is because requiring a layperson to ascertain legal malpractice at the time it occurs would necessitate the retention of a second attorney to review the work of the first.

Bennett v. Hill–Boren, P.C., 52 So.3d 364, 369 (¶ 15) (Miss.2011) (internal citations omitted).

¶ 20. Both parties cite *Channel v. Loyacono,* 954 So.2d 415, 420 (¶ 13) (Miss.2007), as authority for the question of when a legal-malpractice claim would "accrue." In *Channel,* the plaintiffs were represented by attorneys Paul Loyacono and Scott Verhine in mass tort litigation (Fen-phen). *Id.* at 418 (¶ 2). The engagement contract authorized Loyacono and Verhine to associate other lawyers to assist them. *Id.* Loyacono and Verhine began settlement discussions with the defendant in "late November and early December 2000." *Id.* at (¶ 4). They presented settlement offers to their clients, some of whom settled and some of whom did not. *Id.* at 418–19 (¶¶ 4–5). They negotiated further and ultimately settled all of their clients' cases. *Id.* at 419 (¶ 5). All of their clients received their settlement funds on January 26, 2001. *Id.*

¶ 21. Two of the lawyers Loyacono and Verhine associated began to call the clients and challenge the validity of the settlements. *Id.* at (¶¶ 6–7). In several of the cases, the associated lawyers filed a motion that "accused Loyacono and Verhine of acting dishonestly, negligently, and fraudulently in negotiating the settlements." *Id.* at (¶ 7). At the hearing, "all of the clients testified that Loyacono and Verhine had acted dishonestly, negligently, and fraudulently in negotiating their settlements[;] each of them testified that they had signed their settlement agreements, received the proceeds, and considered their cases settled." *Id.* at (¶ 8). In April 2004, the court determined that the cases were knowingly and voluntarily agreed to and were settled. *Id.* at (¶ 9).

*5 ¶ 22. On January 5, 2004, the clients filed a legal-malpractice action against Loyacono and Ver-

hine. *Id.* at 419–20 (¶ 10). Loyacono and Verhine field a motion for summary judgment and argued that their claims were barred by the statute of limitations. *Id.* The trial court determined that the claims of malpractice "would have occurred in November and December 2000 when Loyacono and Verhine negotiated and obtained settlement offers and presented them to the clients for acceptance or rejection." *Id.* at 420 (¶ 11). The court found:

> [T]his Court [has] held that "the statute of limitations in a legal malpractice action properly begins to run on the date the client learns or through the exercise of reasonable diligence should learn of the negligence of his lawyer." This Court has said that the discovery rule is to be applied when "the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question," or it may be applied "when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." Given this precedent, it must be determined whether the alleged injury in this case was secretive or inherently undiscoverable, or in the alternative, whether the plaintiffs, as laymen, could not have reasonably been expected to perceive the injury at the time of the alleged wrongful act.
>
> The "secretive or inherently undiscoverable" standard is applicable where there is some piece of physical evidence that is the subject of the test. There is no allegation in this case that there was any physical evidence that was undiscoverable. Therefore, we will focus on the layman standard.

Channel, 954 So.2d at 421 (¶¶ 19–20) (internal citations omitted). The court reversed the summary judgment on the ground that it could not determine when all the plaintiffs had notice of malpractice. *Id.* at 423 (¶ 26).

¶ 23. Here, there was nothing "secretive or inherently undiscoverable" about Howell's preparation of and the execution of the 2005 agreement. Further, we can determine whether Evans, "as [a] laym[a]n, could not have reasonably been expected to perceive the injury at the time of the alleged wrongful act." *Id.* at 421 (¶ 19). With these legal principles in mind, we examine the facts of this case. There are only three documents that are relevant. There are only two documents where Giordano and Evans actually entered a contract.

¶ 24. The 1996 and 2005 agreements were signed by Giordano and Evans. They both considered only the purchase and sale of EGI stock. The 2004 agreement was not signed, and it considered Evans's and Giordano's stock interests in EGI *and* four other corporations they had formed since 1996 (e.g., the sister companies).

[5] ¶ 25. Howell claims that Evans knew or should have known, simply by reading the 2005 agreement, that the 2005 agreement only provided for the purchase of Giordano's EGI stock. Evans admitted that he read the 1996 and the 2005 agreements. "In Mississippi, a person is charged with knowing the contents of any document that he executes." *Russell v. Performance Toyota, Inc.,* 826 So.2d 719, 726 (¶ 28) (Miss.2002) (citation omitted).

***6** ¶ 26. The 2005 agreement reads:

> The parties to the buy/sell agreement of 1996 agree that, pending completion of a new agreement, the prior business valuation is hereby increased to three million dollars ($3,000,000) with life insurance policies currently in place in that amount.

"The parties" were Giordano and Evans. The "buy/sell agreement of 1996" was what we have termed the 1996 agreement. The "prior business valuation" could only mean the $1,500,000 in the 1996 agreement. Evans admitted in his deposition that the business valuation under the 1996 agreement was the only business valuation that existed.

¶ 27. It is not in dispute that the 1996 agreement only required the purchase and sale of EGI

stock. Even though Giordano and Evans owned stock in two additional companies, the purchase and sale of the stock of those other companies was not part of the 1996 agreement.

¶ 28. It was not unrealistic that Evans, or "an intelligent layman familiar only with the basics of English language," understood that the one-sentence 2005 agreement covered only EGI stock because it was specifically tied to the 1996 agreement, which only covered EGI stock and did not mention any of the sister companies. *Warren v. Derivaux,* 996 So.2d 729, 735 (¶ 12) (Miss.2008). Evans cites *Willis v. Maverick,* 760 S.W.2d 642, 645 (Tex.1988), for the proposition that a "corollary to [an attorney's] expertise is the inability of the layman to detect its misapplication; the client may not recognize the negligence of the professional when he sees it." This principle does not assist Evans. There were only two contracts, and the contract in issue here was only one sentence and thirty-eight words long. There is nothing about the 2005 agreement that would have required Evans to retain a second attorney to review the work of Howell.

¶ 29. Other cases also provide legal principles that we must consider. In *Stephens v. Equitable Life Assurance Society of the United States,* 850 So.2d 78, 83 (¶ 16) (Miss.2003), the supreme court held that the statute of limitations began to run when the plaintiffs signed insurance contracts. In both *Channel* and *Stephens,* "the plaintiffs were on notice of their claims because proof of the alleged misrepresentation was apparent from the face of the contract." *Archer v. Nissan Motor Acceptance Corp.,* 633 F.Supp.2d 259, 268 (S.D.Miss.2007). In *Archer,* because the terms were apparent on the face of the documents and, with due diligence, each plaintiff could have easily determined that he or she had not been offered what had been bargained for, the discovery rule did not toll the statute of limitations there. *Id.* at 269.

¶ 30. The trial court determined that Evans knew or should have known of Howell's alleged legal malpractice on March 10, 2005, when he signed the 2005 agreement. Thus, the three-year limitations period had expired before Evans's complaint was filed on May 13, 2009. The circuit court correctly found that the action was time-barred and correctly granted Howell's motion for summary judgment. Therefore, the summary judgment is affirmed.

*7 ¶ 31. **THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

BARNES, ISHEE AND CARLTON, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY LEE, C.J., ROBERTS AND MAXWELL, JJ. FAIR AND JAMES, JJ., NOT PARTICIPATING.

IRVING, P.J., dissenting:

¶ 32. The majority, finding that the trial court was correct that the statute of limitations had run on Evans's legal-negligence claim, affirms the trial court's grant of summary judgment to Howell. With due respect, I believe that the majority errs, as, based on the evidence presented for and against summary judgment, there is a genuine issue of fact as to when Evans knew or should have known of Howell's negligence. Therefore, I dissent. I would reverse and remand this case for further proceedings. Although the majority has set forth most of the essential facts, I find it helpful to an easy read of this dissent to recite them in a slightly different order.

¶ 33. Evans and Giordano were the sole stockholders of EGI, a Mississippi corporation. Each owned a fifty percent interest of stock in EGI. Howell performed a variety of legal services for Evans and Giordano regarding EGI, which included setting up the corporation, drafting corporate documents, and advising Evans and Giordano on various corporate and other legal issues.

¶ 34. On August 16, 1996, Howell drafted a

"Purchase and Sale Agreement" (the 1996 agreement) for Evans and Giordano, which both Evans and Giordano signed. The purpose of this agreement was to allow the surviving stockholder to purchase the deceased stockholder's interest in EGI and to provide for the purchase of life insurance to fund the purchase of the deceased stockholder's interest. Although Evans and Giordano owned two additional companies in 1996, SRS and IPS, the 1996 agreement only applied to EGI. Each share of EGI was worth $1,500. The 1996 agreement valued all EGI stock at $1,500,000.

¶ 35. Between 1996 and 2004, Evans and Giordano formed two additional corporations, INS and EGF. INS, EGF, SRS, and IPS operated as EGI's sister companies. By 2004, the sister companies were gaining success and bringing in significant income and profits. ***As a result, in September 2004, Giordano requested that Howell draft a new agreement (the 2004 agreement) which would allow the surviving stockholder to purchase the deceased stockholder's interest in all five companies for $3,000,000. The 2004 agreement stipulated that the surviving stockholder would purchase the deceased stockholder's interest in all five companies using the life insurance proceeds.***

¶ 36. ***Evans and Giordano never executed the 2004 agreement due to ongoing negotiations unrelated to the valuation of the corporations set forth in the 2004 agreement.*** According to Evans, the negotiations involved Giordano's prospective purchase of Evans's interest in all of their companies. Evans and Giordano asked Howell to draft a third agreement in March 2005 (the 2005 agreement) because they would not execute the 2004 agreement until they resolved the prospective buyout. The 2005 agreement reads: "The parties to the buy/sell agreement of 1996 agree that, pending completion of a new agreement, the prior business valuation is hereby increased to three million dollars, with life insurance policies currently in place in that amount." Evans and Giordano executed the 2005 agreement.

*8 ¶ 37. Giordano died on May 25, 2006. Evans received the $3,000,000 life insurance death benefits. Giordano's estate filed suit against Evans in the Madison County Circuit Court, taking the position that the $3,000,000 from Giordano's life insurance policy was for the purchase of Giordano's EGI stock only, not Giordano's interest in the sister companies. Evans, on the other hand, contended that the insurance proceeds covered not only Giordano's interest in EGI, but also Giordano's interest in the other four corporations identified in the 2004 agreement. Nevertheless, Evans settled with the estate, paying more than the $3,000,000 that he received in life insurance proceeds. On May 13, 2009, Evans filed his complaint for legal malpractice, alleging that Howell negligently failed to prepare the 2005 agreement to cover all corporate entities formed by Evans and Giordano.

¶ 38. The linchpin of the majority's decision to affirm is its view that Evans, as well as any layman of average intelligence, would understand that the 2005 agreement refers to EGI and that Evans should have understood that the agreement references the valuation of EGI only, changing it from $1,500,00 to $3,000,000. As a consequence, the majority finds that the statute of limitations began to run on March 10, 2005, the day Evans executed the 2005 agreement. I will attempt to explain later in this dissent why I disagree with the majority's position. But I should note at this point that the commencement of the running of a statute of limitations imposes upon an injured party the obligation to commence suit for the redress of the injury suffered or risk being forever barred from doing so. The majority does not explain any injury that Evans suffered in March 2005 immediately upon his signing the agreement that would have allowed him to sue Howell for damages.

¶ 39. Next, I should point out that what Evans knew or should have known about the 2005 agreement cannot be viewed in a vacuum by a simple reading of the words in the agreement. Rather, knowledge imputed to him must be considered in

light of the history between him and Giordano in valuating their businesses and providing capital for the survivor to utilize in the purchase of the other's interest in case of death. Their first venture in this direction involved one corporation—EGI—and then in 2004, all five corporations. When considered against the backdrop of this historical perspective, I believe the 2005 agreement, despite its brevity, is clearly ambiguous.

¶ 40. What must not be lost in the analysis is that, prior to the drafting of the 2005 agreement, Howell had drafted not only a 1996 agreement, admittedly involving only EGI, which was valued at $1,500,000, with each partner owning a one-half interest, but he also had drafted a 2004 agreement involving all five corporations, valued in the aggregate at $6,000,000, with each partner owning a one-half interest. Evans and Giordano's objective in making the initial purchase of $1,500,000 in insurance in 1996 was to provide capital for the surviving partner to purchase the deceased partner's interest in EGI, the only profitable corporation at that time. Later, after two other corporations had been formed, making a total of five with the three that were in existence when the 1996 agreement was executed, Evans and Giordano increased their life insurance policies to $3,000,000 each and provided in the 2004 agreement that the surviving partner could purchase the deceased partner's interest in all five corporations for $3,000,000. It is clear to me that the objective that Evans and Giordano were attempting to accomplish in both the 1996 and 2004 agreements was to establish a fair value of the deceased partner's interest in their jointly owned corporations and to provide a funding mechanism that the surviving partner could use to purchase the deceased partner's interest. In 1996, Evans and Giordano had one profitable corporation, EGI. By 2004, they had five. Therefore, in furtherance of their objective that began in 1996, they purchased additional insurance, valued all five corporations at $6,000,000, and provided that the surviving partner could purchase the deceased partner's interest in all five for $3,000,000.

*9 ¶ 41. It is of no moment that the 2004 agreement was not signed, as there is no disagreement that the valuation of all five corporations provided for in the 2004 agreement was what the parties intended. Its value to the resolution of the issue before us lies in the fact that Evans and Giordano had agreed upon a value of all five corporations prior to the execution of the 2005 agreement. Further, there is no dispute that the only reason Evans and Giordano did not sign the 2004 agreement is that Giordano was attempting a buyout of Evans's interest in all five corporations. It is also not disputed that the buyout negotiations were not stalled over the aggregate value of the corporations. Additionally, there is no evidence or suggestion that Giordano was negotiating the purchase of EGI only. Therefore, when the parties asked Howell to draft the temporary agreement in 2005, it is entirely reasonable that their intention was to make sure that the surviving partner would be able to acquire the deceased partner's interest in all five corporations for $3,000,000 if either of the partners died before the buyout of Evans's interest was completed. It is also reasonable for Evans to believe that execution of the 2005 agreement had accomplished that objective.

¶ 42. Mississippi Code Annotated section 15–1–49 (Rev.2003) requires that a legal malpractice action be brought within three years after the cause of action has accrued. The statute of limitations begins to run on the date that the client learns or, through the exercise of reasonable diligence, should learn of his lawyer's negligence. *Smith v. Sneed,* 638 So.2d 1252, 1256 (Miss.1994). The Mississippi Supreme Court has held that the client learns of the negligence "as soon as an injury is sustained as a result of a defendant's alleged culpable conduct." *Id.* at 1254–55. Therefore, it follows that if no injury has occurred, the client cannot be charged with knowledge of the lawyer's negligence.

¶ 43. I agree with Evans that a genuine issue of material fact exists as to whether Evans knew or should have known of Howell's negligence prior to

Giordano's estate raising the issue with the agreement. Prior to that time, Evans had not suffered any injury, nor had he been placed on notice of any potential negligence on the part of Howell. Evans was first placed on notice when Giordano's estate balked at accepting $3,000,000 for Giordano's interest in all five corporations. It is not debatable that the injury occurred in March 2007, when Evans was forced to pay more than $3,000,000 to acquire all of Giordano's interest in all five of the corporations.

¶ 44. Our supreme court has held that when "it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act[,]" the discovery rule applies, tolling the statute of limitations for legal malpractice. *Channel,* 954 So.2d at 421 (¶ 19) (citations omitted). Although **Howell** may have committed legal malpractice in March 2005 when he drafted the 2005 agreement, the statute of limitations did not begin to run until **Evans** had knowledge or, through the exercise of reasonable diligence, should have known of **Howell's** negligence. As a layman, **Evans** could not be charged in March 2005 with knowing, without hiring another attorney to review **Howell's** work product, that the 2005 agreement that **Howell** had drafted was inadequate to accomplish **Evans** and Giordano's intended objective. In *Channel,* our supreme court, while discussing its holding in *Sneed,* explained why reasonable diligence does not require such a course of action:

> ***10** [I]f the discovery rule were not followed, the client could protect himself fully only by ascertaining malpractice at the moment of its incidence. To do so, he would have to hire a second attorney to observe the work of the first. This costly and impractical solution would but serve to undermine the confidential relationship between attorney and client.

Channel, 954 So.2d at 422 (¶ 21).

¶ 45. "An ambiguity is defined as a susceptibility to two reasonable interpretations." *Dalton v. Cellular S., Inc.,* 20 So.3d 1227, 1232 (¶ 10) (Miss.2009) (citing *Amer. Guar. & Liab. Ins. Co. v. 1906 Co.,* 129 F.3d 802, 811–12 (5th Cir.1997)). As stated, the majority agrees with the trial judge that the 2005 agreement is clear and unambiguous in that the alleged misrepresentation is apparent on the face of the 2005 agreement. In my judgment, one could reach this conclusion only by reading the 2005 agreement in a vacuum. The "prior business valuation" language in the 2005 agreement does not specifically refer to either the 1996 valuation of EGI or the 2004 valuation, which included the total valuation of all of the corporations. The reference in the 2005 agreement to the 1996 agreement is a reference to the parties, not to the 1996 valuation. Even though the 2004 agreement was not executed, it is not unreasonable for a layperson to interpret the "prior business valuation" language in the 2005 agreement to be a reference to the $3,000,000 valuation contained in the 2004 agreement, which covered all of the businesses that Evans and Giordano owned in 2004. This is especially true since the 2004 agreement stipulated that the surviving stockholder would purchase the deceased stockholder's interest in all five companies using the life-insurance proceeds, which at that time were $3,000,000. Therefore, the agreement could be read as Giordano's estate read it—to cover only the purchase of Giordano's interest in EGI—or it could be read to cover the purchase of Giordano's interest in all five companies, as stipulated in the 2004 agreement.

¶ 46. For the reasons presented, I dissent.

LEE, C.J., ROBERTS AND MAXWELL, JJ., JOIN THIS OPINION.

> FN1. Evans's brief refers to this as the "2005 *temporary* agreement." (Emphasis added).

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81 So.3d 1193
(Cite as: 81 So.3d 1193)

C

Court of Appeals of Mississippi.
Mark **LAMPKIN** and Jennifer **Lampkin**, Appellants
v.
Tommy **THRASH**, Tommy **Thrash** Construction Co., Inc. and **Thrash** Commercial, Inc., Appellees.

No. 2010–CA–01897–COA.
Feb. 28, 2012.

Background: Homeowners brought action against construction company and contractor personally for negligence and breach of warranty in the construction of personal residence. The Circuit Court, Rankin County, William E. Chapman III, J., granted defendants' motion to dismiss complaint as time-barred, and homeowners appealed.

Holdings: The Court of Appeals, Carlton, J., held that:
(1) work done by contractor to repair problems to home related to its original construction did not constitute an improvement to real property, as required to toll six-year statute of repose for an action to recover damages for injury to property;
(2) six-year statute of limitations to recover damages for injury to property began to run on the date homeowners occupied their newly constructed residence;
(3) contractor could not be held personally liable for damages to homeowners' new residence; and
(4) Circuit Court's denial of homeowners' motion for reconsideration and motion to amend their complaint did not constitute an abuse of discretion.

Affirmed.

Roberts, J., concurred in part and in the result.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

The Court of Appeals employs a de novo standard of review of a motion to dismiss.

[2] Pretrial Procedure 307A ⚿624

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak623 Clear and Certain Nature of Insufficiency
307Ak624 k. Availability of relief under any state of facts provable. Most Cited Cases

Pretrial Procedure 307A ⚿679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of pleadings. Most Cited Cases

When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim.

[3] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited Cases

Appeal and Error 30 ⚿1024.3

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)6 Questions of Fact on Motions or Other Interlocutory or Special Proceedings
30k1024.3 k. Proceedings preliminary to trial. Most Cited Cases

Upon review of a grant or denial of a motion to dismiss, the Court of Appeals will not disturb the findings of the trial court unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied.

[4] Limitation of Actions 241 ⚿55(5)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k55 Torts
241k55(5) k. Injuries to property in general. Most Cited Cases

Work done by contractor to repair problems to home related to its original construction did not constitute an improvement to real property, as required to toll six-year statute of repose for an action to recover damages for injury to property, regardless of the time of the accrual of homeowner's cause of action for negligence or breach of warranty, or the notice of the invasion of a legal right. West's A.M.C. § 15–1–41.

[5] Limitation of Actions 241 ⚿55(5)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k55 Torts
241k55(5) k. Injuries to property in general. Most Cited Cases

Six-year statute of limitations to recover damages for injury to property began to run on the date homeowners occupied their newly constructed residence. West's A.M.C. § 15–1–41.

[6] Corporations and Business Organizations 101 ⚿1644

101 Corporations and Business Organizations
101VI Shareholders and Members
101VI(D) Liability for Corporate Debts and Acts
101k1643 Nature and Grounds in General
101k1644 k. In general. Most Cited Cases

Corporations and Business Organizations 101 ⚿1957

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1956 Nature and Grounds in General
101k1957 k. In general. Most Cited Cases

Contractor who served as an agent of construction company could not be held personally liable for damages to homeowners' new residence on the basis of negligence or breach of warranty, even if contractor was a principal of construction company as an officer or shareholder of corporation, absent a claim of any veil-piercing theory in homeowners' complaint, and where contractor was not a party to the construction agreement.

[7] Limitation of Actions 241 ⚿189

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k186 Pleading in Avoidance of Defense
241k189 k. Amendment of original pleading. Most Cited Cases

Trial court's denial of homeowners' motion for reconsideration and motion to amend their com-

plaint to allow them to establish a claim for fraudulent concealment against contractor did not constitute an abuse of discretion, where homeowners failed to direct the Circuit Court's attention to any new evidence not previously available in two prior complaints, provide any errors of law, or show manifest injustice. Rules Civ.Proc., Rule 59(e).

[8] Judgment 228 ⚿303

228 Judgment
228VIII Amendment, Correction, and Review in Same Court
228k302 Nature of Errors or Defects
228k303 k. In general. Most Cited Cases

Judgment 228 ⚿324

228 Judgment
228VIII Amendment, Correction, and Review in Same Court
228k324 k. Affidavits and other evidence. Most Cited Cases

To succeed on a motion to alter or amend a judgment, the movant must show: (1) an intervening change in controlling law, (2) availability of new evidence not previously available, or (3) need to correct a clear error of law or to prevent manifest injustice. Rules Civ.Proc., Rule 59(e).

[9] Appeal and Error 30 ⚿983(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k983 Proceedings After Judgment
30k983(2) k. Amendment, modification, or review in same court. Most Cited Cases

On appeal, the Court of Appeals reviews a circuit court's denial of a motion to alter or amend a judgment under an abuse-of-discretion standard. Rules Civ.Proc., Rule 59(e).

***1194** Tracy Stidham Steen, attorney for appellants.

Clyde X. Copeland, Samuel E.L. Anderson, Matthew William Vanderloo, attorneys for appellees.

Before IRVING, P.J., CARLTON and MAXWELL, JJ.

CARLTON, J., for the Court:

¶ 1. Mark and Jennifer **Lampkin** (the **Lampkins**) filed suit against Tommy **Thrash** Construction Co., Inc. and Tommy **Thrash**, individually, (collectively **Thrash**), seeking damages for negligence and breach of warranty in the construction of ***1195** their personal residence. The Rankin County Circuit Court granted **Thrash's** motion to dismiss the **Lampkins'** complaint as time-barred pursuant to Mississippi Code Annotated section 15–1–41 (Rev.2003). The **Lampkins** now appeal, claiming the circuit court erred in granting **Thrash's** motion to dismiss because an issue of material fact existed which should have been submitted to the jury. The **Lampkins** also claim that the circuit court erred in denying the **Lampkins'** subsequent motion for reconsideration and motion to amend, stating that such a denial constituted an injustice in contradiction of Mississippi Rule of Civil Procedure 15(a). Finding no error, we affirm the judgment of the circuit court.

FACTS

¶ 2. On June 30, 1999, the Lampkins and Thrash entered into a construction agreement to build the Lampkins' personal residence in Rankin County, Mississippi. Upon moving into their new home in February 2000, the Lampkins began noticing problems with the residence, including, but not limited to, extensive cracking inside and outside of the home, shifting, and separating of the flooring and door jams, as well as improper drainage.

¶ 3. In July 2002, Thrash retained engineers from Ewing and Ray to determine the cause of the damage to the Lampkins' home. After performing tests on soil samples, the engineers discovered significant problems existed with the soil beneath the home. To improve the condition of the property, the

engineers recommended the installation of French drains.[FN1]

FN1. The **Lampkins** did not install the recommended French drains until 2008.

¶ 4. In July and September 2003, **Thrash** again retained Ewing and Ray to install elevations and to repair the foundation on the property. In late 2007, major issues resurfaced with the home. John Ray of Ewing and Ray advised Jennifer that **Thrash** failed to build the home "according to code." Ray recommended that the **Lampkins** install two French drains with gutters and downspout extensions and gutter screens to improve the condition. In June 2008, the **Lampkins** installed the drains. However, additional damage to the property occurred after the installation of the drains.

¶ 5. The **Lampkins** filed suit against **Thrash** on January 15, 2010, for negligence and breach of implied and express warranties. The **Lampkins** assert that they delayed filing suit until 2010 because **Thrash** continued to represent to the **Lampkins** that he would improve the property's condition. The **Lampkins** claim that they detrimentally relied on **Thrash's** representations.

¶ 6. **Thrash** filed a motion to dismiss the **Lampkins'** claims based on the six-year statute of repose set forth in section 15–1–41, maintaining that the **Lampkins'** claims were time-barred. The circuit court granted the motion to dismiss. The **Lampkins** filed a motion for reconsideration and a motion to amend, which the circuit court subsequently denied. The **Lampkins** now appeal.

STANDARD OF REVIEW

[1][2][3] ¶ 7. This Court employs a de novo standard of review of a motion to dismiss. *Scaggs v. GPCH–GP, Inc.*, 931 So.2d 1274, 1275 (¶ 6) (Miss.2006). "When considering a motion to dismiss, the allegations in the complaint must be taken as true[,] and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." ***1196***Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234, 1236 (¶ 7) (Miss.1999) (citation omitted). This Court will not disturb the findings of the trial court unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Sanderson v. Sanderson,* 824 So.2d 623, 625–26 (¶ 8) (Miss.2002).

DISCUSSION

I. Motion to Dismiss

[4][5] ¶ 8. On appeal, the Lampkins argue that the circuit court erred in granting Thrash's motion to dismiss. The Lampkins submit that issues of fact exist concerning the improvements made to the property at issue, and they claim that these issues of fact should be submitted to a jury. Although the Lampkins concede that they did not file suit until January 15, 2010, they claim that Thrash continually represented to them that he would improve the property's condition.

¶ 9. Thrash maintains that the Lampkins' claims are barred by the six-year statute of repose set forth in section 15–1–41, which states in pertinent part:

> No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mis-

sissippi or any agency, department, institution or political subdivision thereof as well as for any private or nongovernmental entity.

¶ 10. Thrash asserts that this statute invalidated the Lampkins' claims arising out of the construction of their home. The Lampkins state that the improvements that Thrash made to the home over the years, and as recently as June 2008, fall squarely within the plain meaning of the statute. However, the Lampkins submit that the repeated performance of such improvements tolled the running of the statute of repose.

¶ 11. The Lampkins cite to *Ferrell v. River City Roofing, Inc.,* 912 So.2d 448, 454 (¶ 15) (Miss.2005), wherein the Mississippi Supreme Court defined an "improvement" as "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes." The Lampkins submit that the work performed on their property constituted improvements, and they contend that the work was intended to enhance the value of the property. The Lampkins claim that the last known improvement to their property was performed as recently as June 2008. The Lampkins argue that each improvement tolled the running of the statute of repose; thus, they maintain that the statute began to run no earlier than June 2008. Although the Lampkins admit that they are uncertain as to each date of performance of the improvements, they submit***1197** they should be allowed to engage in discovery and pursue their claims against Thrash.

¶ 12. Thrash claims that the work performed on the Lampkins' home does not constitute an improvement according to the definition provided in *Ferrell.* Thrash instead maintains that all work performed on the Lampkins' property was performed with the purpose of repairing problems allegedly caused by the initial site preparation and construction of the home, and the performance of such repairs failed to establish a new statute of repose under the language of section 15–1–41. Thrash points out the Lampkins stated in their amended complaint: "Due to the defects in the preparation of the construction of the home and the actual construction of the residence by [Thrash], the Lampkins' home has been damaged and is in need of significant repairs," not "improvements" as defined by *Ferrell,* 912 So.2d at 454 (¶ 15).

¶ 13. This Court finds that the facts in *Ferrell* are distinguishable from the case before us. The lawsuit in *Ferrell* arose from problems stemming from the re-roofing of an existing building—Ferrell claimed that in August 1993, River City Roofing, Inc. (River City) installed a roofing structure over two previously existing roofing structures, instead of replacing the roof. *Id.* at 451 (¶ 5). Ferrell alleged that he first learned of River City's actions, which he claims were a violation of the City of Jackson's building standards and fire code, in December 2001. *Id.* The circuit judge granted summary judgment in favor of River City after determining that Ferrell's lawsuit was time-barred by the statute of limitations under section 15–1–41. *Id.* at 450 (¶ 2). On appeal, the supreme court in *Ferrell* established: "The installation of a new roof is clearly an 'improvement to real property' " for purposes of section 15–1–41, thus tolling the statute of limitations. *Id.* at 454 (¶ 17). The supreme court affirmed the circuit court's grant of summary judgment based on the determination that Ferrell's claim was barred under the statute of repose, section 15–1–41. *Id.* at 458 (¶ 30). In the present case, however, Thrash performed work on the Lampkins' property to repair problems relating to the original construction. The record shows that the Lampkins were placed on notice of these problems upon moving into the residence, yet they failed to file suit until approximately ten years later. The record supports Thrash's assertions that all work performed on the Lampkins' property was performed to repair problems arising from the original construction of the residence; thus, we find such work did not constitute an "improvement." Accordingly, we hold

that the statute of limitations in the present case began to run upon the Lampkins' occupancy of the residence in February 2000.

¶ 14. The Mississippi Supreme Court has explained that a statute of repose "cuts off the right of action after a specified period of time measured from the delivery of a product or the completion of work. Statutes of repose do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." *Windham v. Latco of Miss., Inc.,* 972 So.2d 608, 611 (¶ 5) (Miss.2008). Additionally, the supreme court has stated: " Section 15–1–41 was intended by the [L]egislature to protect architects, builders[,] and the like who have completed their jobs and who have relinquished access and control of the improvements." *W. End Corp. v. Royals,* 450 So.2d 420, 424 (Miss.1984). Thrash argues that in the present case, the date of occupancy, February 2000, is the date that commenced the running of the six-year time period established by section 15–1–41.

***1198** ¶ 15. The Lampkins assert that in *Windham,* 972 So.2d at 612 (¶ 7), the supreme court carved out a narrow exception to the six-year time limit set forth in section 15–1–41, explaining that, if proven, an act of fraudulent concealment tolls the statute of repose. In discussing the applicability of equitable estoppel to statutes of repose, the supreme court in *Windham* further opined: "The logic supporting the availability of common-law equitable estoppel as a remedy to bar application of a statute of repose is compelling. Equity mandates that wrongdoers should be estopped from enjoying the fruits of their fraud." *Id.* The **Lampkins** submit that they were unaware that their home was not built according to code until late 2007. The **Lampkins** claim that they should be allowed to engage in discovery in order to demonstrate the requirements of equitable estoppel, thus preventing **Thrash** from benefitting from his alleged wrongdoings.

¶ 16. However, **Thrash** submits that the **Lampkins** failed to raise the argument of fraudulent concealment or equitable estoppel in their response to **Thrash's** motion to dismiss. The record shows that the **Lampkins** first raised the argument of fraudulent concealment in their motion for reconsideration and motion to amend the complaint. **Thrash** further states that although the **Lampkins**, in their amended complaint, claim fraudulent concealment by **Thrash**, the **Lampkins** failed to provide any factual claims in support of this claim in their pleadings, as required by Rule 9(b).[FN2] To prove fraud, the plaintiff is required to show by clear and convincing evidence: (1) a representation, (2) that is false, (3) that is material, (4) that the speaker knew was false or was ignorant of the truth, (5) the speaker's intent that the listener act on the representation in the manner reasonably contemplated, (6) the listener's ignorance of the statement's falsity, (7) the listener's reliance on the statement as true, (8) the listener's right to rely on the statement, and (9) the listener's consequent and proximate injury. *In re Estate of Law,* 869 So.2d 1027, 1029 (¶ 4) (Miss.2004). Thrash claims that the Lampkins had full knowledge of the foundation problems, and he asserts that he performed the repairs to the property while the Lampkins lived there. Thrash claims that even if the Lampkins had asserted their equitable estoppel argument in the circuit court pleadings, this case does not present the extraordinary circumstance where the Lampkins lacked the ability to protect themselves.

FN2. Mississippi Rule of Civil Procedure 9(b): "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."

¶ 17. After reviewing the record, we find the work performed on the Lampkins' property by Thrash after the date the Lampkins moved into their home were repairs to the property. *See Smith v. Fluor Corp.,* 514 So.2d 1227, 1230–31 (Miss.1987) . As a result, section 15–1–41 began to run the on date of occupancy of the property in February 2000,

ten years before the filing of the present suit. We thus find that the Lampkins' claim against Thrash is barred by section 15–1–41. Furthermore, our supreme court has held: "Although factual considerations may be involved in determining whether an article of property is an 'improvement to real property,' on the basis of the undisputed facts, they do not constitute a genuine issue of material fact which would preclude summary judgment." *Id.* Therefore, we find no error in the circuit judge's grant of the motion to dismiss in favor of **Thrash** after finding that no genuine issue of material fact existed.

* [6] ¶ 18. The **Lampkins** further argue that the circuit court erred in granting **Thrash's** motion to dismiss because the determination of whether Tommy **Thrash** constituted an agent or the principal of **Thrash** Construction for purposes of liability serves as a question of fact for the jury. The **Lampkins** maintain that under *Fonte v. Audubon Ins. Co.,* 8 So.3d 161 (Miss.2009), Tommy is **Thrash's** principal because he possessed control and the rights of control in the construction as well as in the improvements made to the property at issue.

¶ 19. However, **Thrash** argues that the construction agreement referenced in the complaint was entered into by **Thrash** Construction; Tommy was not an individual party to the contract. Further, **Thrash** cites to *Buchanan v. Ameristar Casino Vicksburg, Inc.,* 957 So.2d 969, 977–78 (¶¶ 27–28) (Miss.2007), in support of its argument that even if Tommy was a principal of **Thrash**, he would not be liable in the present case because a corporation possesses a legal existence separate and apart from that of its officers and shareholders. **Thrash** maintains that the **Lampkins** failed to present "facts sufficient to justify piercing" the corporate veil in order to hold Tommy individually liable to the **Lampkins** . *Id.* at 976 (¶ 23). We agree and find the record reflects that Tommy serves as an agent of **Thrash**, and not a principal. We also note that the **Lampkins** failed to raise a veil-piercing theory in their complaint. This issue is without merit.

II. Motion for Reconsideration and Motion to Amend

[7] ¶ 20. The **Lampkins** next argue that the circuit court erred in denying their motion for reconsideration and motion to amend their complaint. Specifically, the **Lampkins** claim that pursuant to Rule 15(a), they should have been permitted to amend their complaint and their first amended complaint to plead thoroughly the fraud allegations that fall within the statutory provisions. The **Lampkins** submit that amending their complaint would not have delayed or prejudiced **Thrash**; instead, it would merely have allowed the **Lampkins** to establish their claims of fraudulent concealment.

[8][9] ¶ 21. A motion for reconsideration is treated as a motion to amend the judgment pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure, and this motion must be filed within ten days from the entry of the judgment sought to be amended. To succeed on a Rule 59(e) motion, "the movant must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice." *Brooks v. Roberts,* 882 So.2d 229, 233 (¶ 15) (Miss.2004). On appeal, we review a circuit court's denial of a Rule 59 motion under an abuse-of-discretion standard. *Id.*

¶ 22. Thrash first argues that the circuit judge dismissed the Lampkins' complaint with prejudice; therefore, nothing remains for the Lampkins to amend. Thrash further contends the Lampkins failed to provide the circuit court with any intervening change in controlling law, new evidence, or the need to correct any clear error that could warrant reconsideration under Rule 59(e). The Lampkins counter that they seek to amend their complaint "to achieve justice." However, Thrash alleges that the Lampkins requested to amend their complaint to include the fraudulent-concealment claim only after the circuit court dismissed their complaint with prejudice due to the expiration of the six-year statute of repose set forth in section 15–1–41.

***1200** ¶ 23. The record reflects that the Lamp-

kins previously alleged in their complaint and first amended complaint that Ray with Ewing and Ray advised Jennifer that Thrash failed to build the home "according to code." In their subsequent motion for reconsideration and motion to amend, the Lampkins again cited the statement by Ray, and they also claimed they sought to amend their complaint "to allege fraud." After reviewing the record, we find that the Lampkins' motion for reconsideration and motion to amend failed to direct the circuit court's attention to any new evidence not previously available in the two prior complaints, and the motions also failed to provide any errors of law or show manifest injustice. *Bell,* 467 So.2d at 661. We therefore find no abuse of discretion in the circuit judge's denial of the Lampkins' motion for reconsideration and motion to amend.

¶ 24. **THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, MAXWELL, RUSSELL AND FAIR, JJ., CONCUR. ROBERTS, J., CONCURS IN PART AND IN THE RESULT.

Miss.App.,2012.
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81 So.3d 1103
(Cite as: 81 So.3d 1103)

C

Supreme Court of Mississippi.
Lamar HOOKER
v.
Stephen C. GREER.

No. 2010–CA–01283–SCT.
March 8, 2012.

Background: Landowner brought action against his business partner to remove cloud on title, seeking to have lis pendens cancelled. Partner, who had filed the lis pendens, brought counterclaim alleging an equitable partnership and a constructive trust on non-specific funds or property held by landowner and a monetary judgment for unjust enrichment. The Chancery Court, Carroll County, J. Max Kilpatrick, J., entered summary judgment in favor of landowner and awarded landowner attorney fees. Partner appealed.

Holdings: The Supreme Court, Waller, C.J., held that:
(1) filing by partner of lis pendens was without basis in fact or law or substantial justification as required for award of attorney fees;
(2) a defense to an action to remove a lis pendens, filed without substantial justification, could be an "action" under the Litigation Accountability Act (LAA) and, thus, form the basis of an award; and
(3) counterclaim was not purely and exclusively equitable as required for application of ten-year statute of limitations for constructive trusts.

Affirmed in part, reversed and vacated in part, and remanded.

Kitchens, J., concurred in part, dissented in part, and filed opinion in which Dickinson, P.J., and Randolph, J., joined.

West Headnotes

[1] Appeal and Error 30 ⚿78(1)

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k78 Nature and Scope of Decision
30k78(1) k. In general. Most Cited Cases

Appeal and Error 30 ⚿80(6)

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k75 Final Judgments or Decrees
30k80 Determination of Controversy
30k80(6) k. Determination of part of controversy. Most Cited Cases

Appeal and Error 30 ⚿366

30 Appeal and Error
30VII Transfer of Cause
30VII(B) Petition or Prayer, Allowance, and Certificate or Affidavit
30k366 k. Certificate as to grounds. Most Cited Cases

Appeal, in part, from a grant of partial summary judgment was proper for appellate review, although counterclaim by landowner's business partner was still pending and court's judgment did not contain certification that there was no just reason for delay, where court's orders taken together disposed of all claims against all parties. Rules Civ.Proc., Rule 54(b).

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court

30k893(1) k. In general. Most Cited Cases

Supreme Court reviews trial court's grant or denial of summary judgment and partial summary judgment de novo.

[3] Judgment 228 ⚿185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and burden of proof. Most Cited Cases

The party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists, whereas the non-moving party is given the benefit of the doubt as to the existence of a material fact. Rules Civ.Proc., Rule 56(c).

[4] Judgment 228 ⚿185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and burden of proof. Most Cited Cases

When considering a motion for summary judgment, evidence must be viewed in the light most favorable to the non-moving party. Rules Civ.Proc., Rule 56(c).

[5] Appeal and Error 30 ⚿984(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(5) k. Attorney fees. Most Cited Cases

Supreme Court reviews an award of attorney fees for abuse of discretion.

[6] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Supreme Court conducts a de novo review of questions of law.

[7] Lis Pendens 242 ⚿22(1)

242 Lis Pendens
242k22 Operation and Effect in General
242k22(1) k. In general. Most Cited Cases

A lis pendens is intended to serve as notice to the world of an alleged claim of a lien or interest in the property. West's A.M.C. § 11–47–3 et seq.

[8] Lis Pendens 242 ⚿22(1)

242 Lis Pendens
242k22 Operation and Effect in General
242k22(1) k. In general. Most Cited Cases

The lis pendens filing provides notice to the public of an alleged claim on land. West's A.M.C. § 11–47–3.

[9] Lis Pendens 242 ⚿20

242 Lis Pendens
242k12 Notice of Pendency of Action
242k20 k. Cancellation, discharge, or modification. Most Cited Cases

Filing by landowner's business partner of lis pendens was without basis in fact or law or substantial justification, as required for award of attorney fees under Litigation Accountability Act (LAA) to party acting pro se, where it was filed without any legal or arguable basis, since partner had no alleged claim on the land on which the lis pendens was filed, and partner took no action to remove it until after landowner filed his suit to remove the cloud on title. West's A.M.C. § 11–47–3 et seq., 11–55–5.

[10] Lis Pendens 242 ⚿20

242 Lis Pendens
242k12 Notice of Pendency of Action
242k20 k. Cancellation, discharge, or modification. Most Cited Cases

A defense to an action to remove a lis pendens, filed without substantial justification, may be an "action" under the Litigation Accountability Act (LAA) and, thus, form the basis of an award of attorney fees, although the filing of a lis pendens notice itself is not an action subject to the LAA. West's A.M.C. § 11–55–3.

[11] Costs 102 ⚿208

102 Costs
102IX Taxation
102k208 k. Duties and proceedings of taxing officer. Most Cited Cases

Litigation Accountability Act (LAA) 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. West's A.M.C. § 11–55–3; Rules Civ.Proc., Rule 11.

[12] Costs 102 ⚿2

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In general. Most Cited Cases

Costs 102 ⚿194.44

102 Costs
102VIII Attorney Fees
102k194.44 k. Bad faith or meritless litigation. Most Cited Cases

Litigation Accountability Act's (LAA) definition of "action," in which it also discusses "claims" and "defenses," is designed similarly to Rule 11 to restrict the LAA's applicability to filings within the confines of civil actions. West's A.M.C. § 11–55–3; Rules Civ.Proc., Rule 11.

[13] Trusts 390 ⚿365(5)

390 Trusts
390VII Establishment and Enforcement of Trust
390VII(C) Actions
390k365 Time to Sue, Limitations, and Laches
390k365(5) k. Constructive trusts. Most Cited Cases

The ten-year statute of limitations, applicable to constructive trusts, applies only to claims which are purely and exclusively equitable; on the other hand, claims which seek a legal remedy are subject to the general three-year statute of limitations, unless otherwise provided. West's A.M.C. § 15–1–39.

[14] Trusts 390 ⚿365(5)

390 Trusts
390VII Establishment and Enforcement of Trust
390VII(C) Actions
390k365 Time to Sue, Limitations, and Laches
390k365(5) k. Constructive trusts. Most Cited Cases

Counterclaim by landowner's business partner, which alleged that landowner had been unjustly enriched and request that the court impose a constructive trust or equitable lien on all funds or properties held by landowner, was not purely and exclusively equitable as required for application of ten-year statute of limitations for constructive trusts in landowner's action against partner to remove cloud on title from lis pendens that partner filed, although counterclaim alleged that landowner had been unjustly enriched and that the court should impose a constructive trust or equitable lien on all funds or properties held by landowner, where partner sought only a monetary judgment to compensate him for his alleged losses, and he did not seek a partnership accounting, interest in the land, or other alleged partnership property. West's A.M.C. § 15–1–39.

[15] Action 13 ⚿22

13 Action
13II Nature and Form

13k21 Legal or Equitable
13k22 k. Nature of action. Most Cited Cases

A compensatory money damage award is a remedy at law.

*1104 Linda F. Cooper, James L. Robertson, Jackson, attorneys for appellant.

Ed L. Brunini, Jr., Lane W. Staines, Jackson, attorneys for appellee.

Before WALLER, C.J., LAMAR and PIERCE, JJ.

*1105 WALLER, Chief Justice, for the Court:

¶ 1. Lamar Hooker appeals from the Carroll County Chancery Court's grant of Stephen C. Greer's Motion for Partial Summary Judgment, in which the court awarded attorney's fees to Greer based on Hooker's improper filing of a *lis pendens,* and Greer's Motion for Summary Judgment on Hooker's counterclaim. We affirm the trial court's finding that the *lis pendens* was improperly filed. However, because the trial court based the attorney's fees award on an improper interpretation of the Litigation Accountability Act, we reverse the judgment, vacate the award, and remand for further consideration. Finally, we affirm the trial court's grant of summary judgment for Greer on Hooker's counterclaim, holding that his claim is subject to the three-year statute of limitations and, thus, is time-barred.

FACTS AND PROCEDURAL HISTORY

¶ 2. Greer and Hooker knew each other for more than thirty years, having worked together in multiple business ventures. In early 2002, Greer and Hooker entered into an agreement for the purchase, development, and sale of two tracts of land—Prairie Point Towhead, located in Arkansas, and Lee Towhead Island, in Missouri. Each party made monetary contributions and participated in certain decisions regarding the development and marketing of the properties. In November 2002, **Greer** and **Hooker** executed agreements with T. Eugene Moss, a forester, and Gary Davidson, a logger, for the removal of timber from Lee Towhead Island. In the agreements, **Hooker** and **Greer** were referred to as "H/G," and each signed the agreements as the "Owner" of Lee Towhead Island.

¶ 3. In September 2003, **Greer** sent a letter to **Hooker** in which he cancelled their business arrangement. In this letter, he characterized the relationship as a "proposed joint venture" and declared such proposed venture "null and void." **Greer** claimed the "proposed joint venture" was predicated on **Hooker's** ability to put up one half of the initial capital investment to purchase the properties, and that **Hooker** had failed to do so. In the letter, **Greer** acknowledged that **Hooker** had contributed approximately $100,000, and **Greer** said he would "render a final accounting" on those funds to **Hooker** as soon as possible. **Greer** requested that **Hooker** send him calculations of his unreimbursed expenses and documentation in support thereof.

¶ 4. **Hooker** alleges that, after receiving this letter, he attempted to contact **Greer** both by phone and in person to seek repayment of his contributions. **Hooker** alleges that **Greer** stated he would not pay **Hooker** any money. **Greer** acknowledges that **Hooker** showed up at his house in May 2007 demanding repayment.

¶ 5. In August 2005, **Hooker**, without counsel, filed a *lis pendens* notice [FN1] with the Chancery Clerk of Carroll County, Mississippi. The notice said that **Hooker** was instituting a lawsuit [FN2] against **Greer** in Madison County, Mississippi, for $141,000. The *lis pendens* designated land that **Greer** owned in Carroll and Holmes [FN3] Counties as the "subject property" of the suit.

FN1. Miss.Code Ann. § 11–47–3 (Rev.2002). The purpose of a *lis pendens* is "to give notice to the world of an alleged claim of a lien or interest in the property." *Aldridge v. Aldridge,* 527 So.2d 96, 99 (Miss.1988).

FN2. **Hooker** never filed such a lawsuit.

FN3. **Hooker** did not file a *lis pendens* with the Holmes County Chancery Clerk.

***1106** ¶ 6. **Greer** became aware of the *lis pendens* while marketing his property in Carroll County. **Greer** claims he sent a letter to **Hooker** in January 2009 requesting that **Hooker** cancel the *lis pendens.* **Hooker** alleges that he never received such a letter, and the record does not contain a signed copy.[FN4]

FN4. **Greer** did produce a copy of this letter, however the copy is not signed, and **Hooker** denies receiving it.

¶ 7. On May 28, 2009, **Greer** filed a Complaint to Remove Cloud on Title, seeking to have the *lis pendens* cancelled. In the complaint, **Greer** also sought recovery of his attorney's fees. On June 30, 2009, **Hooker** filed an Answer and Counter–Claim, admitting the *lis pendens,* but denying that it was improperly filed. In his counterclaim, **Hooker** alleged he and **Greer** had entered into an "equitable partnership." **Hooker** alleged **Greer** had breached his fiduciary duties to **Hooker** by terminating the partnership. **Hooker** claimed **Greer** had been unjustly enriched at his expense by at least $141,000, and that he (**Hooker**) had suffered a $141,000 loss. **Hooker** asked the court to impose a constructive trust on nonspecific "funds or properties" held by **Greer**. In his request for relief, **Hooker** demanded a monetary judgment "in the amount of $141,000, together with interest and costs."

The Lis Pendens and Attorney's Fees Award

¶ 8. On October 1, 2009, **Greer** filed a Motion for Partial Summary Judgment, arguing that he was entitled to cancellation of the *lis pendens* and an award of attorney's fees. Prior to the hearing on **Greer's** motion, **Hooker's** counsel advised **Greer's** counsel that **Hooker** would not contest the cancellation of the *lis pendens,* but would oppose **Greer's** request for attorney's fees. On November 11, 2009, the day scheduled for hearing on **Greer's** motion for summary judgment, **Hooker** formally cancelled the *lis pendens* in the docket of the Carroll County Chancery Clerk.

¶ 9. At the summary judgment hearing, counsel for **Greer** argued that **Greer** was entitled to attorney's fees under the Litigation Accountability Act of 1988 ("the LAA").[FN5] **Greer's** counsel argued that **Hooker's** improper filing of the *lis pendens,* as well as his denial of the *lis pendens* ' impropriety, formed the basis for an award of attorney's fees under the LAA. At the conclusion of the plaintiff's argument, **Hooker's** attorneys announced that they were not prepared to argue the issue of attorney's fees as arising under the LAA, and they requested additional time to respond. The court granted the request, and, on December 29, 2009, **Hooker** submitted a supplemental brief, along with supporting exhibits and affidavits, addressing the applicability of the LAA.

FN5. Miss.Code Ann. § 11–55–5 (Rev.2002).

¶ 10. **Hooker** argued that the filing of a *lis pendens* was not an "action," as that term is defined under the LAA. **Hooker** also argued that there was no evidence that he knew or reasonably should have known that his filing of the *lis pendens* was without substantial justification, as required by the LAA for awarding attorney's fees against a party acting *pro se.*[FN6] That said, counsel for **Hooker**, in the Answer to **Greer's** Complaint to Remove Cloud on Title, denied the impropriety of the *lis pendens.* **Hooker's** attorneys argued that they acted in a reasonable manner in contesting the complaint because they had not yet had time to fully investigate the facts surrounding the claim. **Hooker's** attorneys also argued they had timely notified * **Greer's** counsel that the impropriety of the *lis pendens* would not be contested. Notwithstanding this concession, no actions were taken to dismiss the *lis pendens* until the day of the hearing on **Greer's** motion for summary judgment.

FN6. It is undisputed that **Hooker** was act-

ing without counsel when he filed the *lis pendens*.

¶ 11. On March 22, 2010, the court issued a judgment granting **Greer's** motion and awarding **Greer** attorney's fees in the amount of $12, 794.88.[FN7] The court held that **Hooker's** filing of the *lis pendens* constituted a frivolous claim that was without substantial justification. As such, the court held that **Hooker**, individually, should be assessed attorney's fees. The court awarded **Greer** the attorney's fees he had incurred related to the *lis pendens,* through November 12, 2009. The court did not assess attorney's fees against **Hooker's** counsel.

FN7. Even though **Hooker** already had cancelled the *lis pendens,* the court, in its judgment, ordered the *lis pendens* to be cancelled. **Hooker's** appeal concerns only the portion of the judgment awarding attorney's fees.

The Counterclaim

¶ 12. On April 21, 2010, **Greer** filed a Motion for Summary Judgment[FN8] on **Hooker's** counterclaim, arguing that the claim was barred by the three-year statute of limitations. **Greer** also argued that **Hooker** was not entitled to a constructive trust, which would give rise to a ten-year statute of limitations, since the parties never formed a partnership, but rather had a "proposed joint venture" which never materialized, due to **Hooker's** alleged failure to provide his half of the funding. **Greer** further argued that, even assuming a partnership did exist and that a constructive trust arose, **Hooker** would be responsible for a portion of the financial loss incurred by the partnership, which **Greer** alleged totaled more than $1 million.

FN8. **Greer** initially filed a Motion to Dismiss on **Hooker's** counterclaim. **Hooker's** response to this motion referenced certain matters outside the pleadings. Because the court determined these matters went to the heart of the issue of **Hooker's** counterclaim and **Greer's** motion, and in accordance with Mississippi Rule of Civil Procedure 12(b), the court ordered that **Greer's** motion be amended to a Motion for Summary Judgment.

¶ 13. In his response, **Hooker** asserted that he and **Greer** were, in fact, partners.[FN9] **Hooker** alleged that **Greer's** admission, in his September 2003 letter, that he owed **Hooker** an "accounting" was evidence that **Greer** and **Hooker** had formed a partnership. As additional evidence of the alleged partnership, **Hooker** referenced the agreements that he and **Greer** had entered into with Moss and Davidson regarding the removal of timber from Lee Towhead Island. **Hooker** argued that **Greer** had breached his fiduciary duties to **Hooker**, had failed to provide a partnership accounting, and wrongfully had retained partnership property. As such, **Hooker** argued a constructive trust should be imposed on the partnership property, as it existed on September 9, 2003, for **Hooker's** benefit. **Hooker** argued that his claim was not barred, as claims for a constructive trust are subject to the ten-year statute of limitations found in Mississippi Code Section 15–1–39 (Rev.2003).

FN9. **Hooker** asserted that he was "entitled to partial summary judgment that there was indeed a partnership...." The court interpreted this as a motion for partial summary judgment, and denied as much. This issue is not before the Court on appeal.

¶ 14. On June 29, 2010, the court granted **Greer's** Motion for Summary Judgment. The court characterized the parties' relationship as an unwritten joint venture or "single-shot partnership" in relation to the Lee Towhead Island and the Prairie Point Towhead properties. The court found that **Hooker** had contributed approximately***1108** $120,000 to the business venture. The court held that **Greer's** 2003 termination letter to **Hooker** put the roughly $120,000 owed to **Hooker** at issue. The court said the record was devoid of fraud, abuse of confidence, wrongful conduct, or any other uncon-

scionable conduct on the part of **Greer**. The court noted that **Greer's** letter acknowledged that **Hooker** had contributed money and that an accounting should be made between the parties. The court found that **Hooker** had not pursued an accounting in a timely fashion. As such, the court found that a constructive trust was not applicable in this case, and it held that **Hooker's** counterclaim was barred by the three-year statute of limitations. **Hooker** timely appealed from the court's final judgment and its prior interlocutory judgments.

ISSUES

[1] ¶ 15. **Hooker** brings two issues on appeal: FN10

> FN10. **Hooker** appeals, in part, from a grant of partial summary judgment. Despite this, the case is proper for appellate review. **Greer's** motion on the *lis pendens* issue was for "partial" summary judgment because **Hooker's** counterclaim was still pending. **Greer** requested the court enter a Rule 54(b) final judgment, but the court's judgment on **Greer's** motion did not contain a Rule 54(b) certification. However, when the court granted **Greer's** Motion for Summary Judgment on **Hooker's** counterclaim, the court disposed of the remaining claims in the action. When taken together, the court's orders dispose of all claims against all parties, making the case proper for appeal. *See Calvert v. Griggs,* 992 So.2d 627, 631 (Miss.2008) ("An appeal to this Court may be taken as a matter of right only after the trial court disposes of all the claims against all defendants.").

1) Whether the trial court erred in awarding Greer attorney's fees under the LAA, and

2) Whether the trial court erred in granting Greer's motion for summary judgment on Hooker's counterclaim.

STANDARD OF REVIEW

[2][3][4] ¶ 16. This Court reviews a trial court's grant or denial of summary judgment *de novo. Waggoner v. Williamson,* 8 So.3d 147, 152 (Miss.2009). This Court also reviews grants or denials of partial summary judgment *de novo. Id.* at 153. Summary judgment shall be rendered when "the pleadings, depositions, answers to interrogatories and admissions on file ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The moving party bears the burden of showing that no genuine issue of material fact exists, whereas the nonmoving party is given the benefit of the doubt as to the existence of a material fact. *Waggoner,* 8 So.3d at 152–53. When considering a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 152.

[5][6] ¶ 17. This Court reviews an award of attorney's fees for abuse of discretion. *Miss. Power & Light Co. v. Cook,* 832 So.2d 474, 478 (Miss.2002). However, this Court conducts a *de novo* review of questions of law—including whether the LAA applies to Hooker's filing of the *lis pendens. See Bank of Miss. v. Southern Mem'l Park, Inc.,* 677 So.2d 186, 191 (Miss.1996).

DISCUSSION

I. Whether the trial court erred in awarding attorney's fees based on Hooker's improper filing of the *lis pendens.*

A. The lis pendens

[7][8] ¶ 18. Hooker filed a *lis pendens* in Carroll County but took no other action ***1109** to pursue a claim against Greer. A *lis pendens* is intended to serve as "notice to the world of an alleged claim of a lien or interest in the property." *Aldridge v. Aldridge,* 527 So.2d 96, 99 (Miss.1988). Filing a *lis pendens* is a preliminary action necessary to file a civil action to enforce an interest in property. *See* Miss.Code Ann. §§ 11–47–3, 11–47–9 (Rev.2002). The *lis pendens* filing provides notice to the public of an alleged claim on land. *Aldridge,* 527 So.2d at

99.

[9] ¶ 19. It is undisputed that Hooker took no action with respect to the *lis pendens* from August 2005, when he filed the *lis pendens,* until after Greer filed his suit in May of 2009 to remove the cloud on title. There is further no issue that the *lis pendens* filing was without any legal or arguable basis, as Hooker had no alleged claim on Greer's land in Carroll and Holmes Counties. We therefore affirm the trial court's finding that the filing of the *lis pendens* was without basis in fact or law, and was without substantial justification.

B. The Litigation Accountability Act ("LAA")

[10] ¶ 20. Hooker argues that the LAA does not authorize awarding attorney's fees based on the filing of a *lis pendens.* While the filing of the *lis pendens* notice itself does not constitute an "action" subject to the LAA, a *defense* to an action to remove a *lis pendens,* filed without substantial justification, may form the basis of an award under the LAA.

¶ 21. The LAA allows costs and expenses for claims or defenses asserted without substantial justification:

> [I]n any civil action commenced or appealed in any court of record in this state, the court shall award ... reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim *or defense,* that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment.

Miss.Code Ann. § 11–55–5(1) (Rev.2002) (emphasis added). The LAA defines an "action" as involving not only a *claim,* but also a *defense:*

> "Action" means a civil action that contains one or more claims for relief, *defense* or an appeal of such civil action. For purposes of this chapter only, an "action" also means any separate count, claim, *defense* or request for relief contained in any such civil action.

Miss.Code Ann. § 11–55–3 (Rev.2002) (emphasis added).

[11][12] ¶ 22. The LAA provides for the award of attorney's fees for actions taken by parties or their attorneys within the confines of a civil action. The provisions of the LAA are in harmony with those of Mississippi Rule of Civil Procedure 11, which allows for the awarding of attorney's fees as a sanction. *Rose v. Tullos,* 994 So.2d 734, 738 (Miss.2008). The LAA 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." *Rose,* 994 So.2d at 738 (quoting *Stevens v. Lake,* 615 So.2d 1177, 1184 (Miss.1993)). The LAA's definition of "action," in which it also discusses "claims" and "*defenses,*" is similarly designed to restrict the LAA's applicability to filings within the confines of a civil action. *See* Miss.Code Ann. § 11–55–3; *see also Randolph v. Lambert,* 926 So.2d 941, 944 (Miss.Ct.App.2006) ("The court will only award fees when a party brings ***1110** frivolous or bad faith *litigation.*") (emphasis added).

C. The defense of the complaint to remove cloud on title

¶ 23. Greer asserts that, even if the filing of a *lis pendens* is not considered an action, Hooker's *defense* of the *lis pendens* in his Answer provided the basis for an award of attorney's fees under the LAA. We agree with Greer that the LAA provides for attorney's fees awards based on a frivolous or bad-faith defense. However, the trial court's judgment is clear that the award was based on Hooker's *filing* of the *lis pendens.*[FN11] Since the LAA does not support a sanction based on Hooker's filing of the *lis pendens,* we vacate the trial court's award. On remand, the court should, consistent with today's opinion, consider whether to award attorney's fees for the defense to Greer's action to remove the *lis pendens. See* Miss.Code Ann. §

11–55–5(1) ("the court shall award ... reasonable attorney's fees and costs against any party or attorney if the court ... finds that an attorney or party ... asserted any claim or *defense,* that is without substantial justification.") (emphasis added).

> FN11. The trial court's judgment includes the following language:
>
> > ... the lis pendens *filing* had no basis in law or fact and was clearly intended to harass.... His frivolous claim *through the filing* of the lis pendens in Carroll County, Mississippi, was without substantial justification.... As a result of Mr. **Hooker's** frivolous lis pendens *filing* ....
> >
> > (Emphasis added.)

II. Whether the trial court erred in granting Greer's motion for summary judgment on Hooker's counterclaim.

¶ 24. In his second issue on appeal, **Hooker** claims the trial court erred in finding his counterclaim time-barred by the three-year statute of limitations and granting **Greer's** motion for summary judgment. **Hooker** argues that his claim is one for a constructive trust and that such claims are subject to the ten-year statute of limitations found in Mississippi Code Section 15–1–39 (Rev.2003).[FN12] We hold that **Hooker** has not made out a claim for a constructive trust, and we therefore affirm the trial court.

> FN12. **Hooker** does not dispute that, if his claim is subject to the three-year statute of limitations, his claim is time-barred. Similarly, **Greer** does not dispute that **Hooker's** claim would not be time-barred, if it is subject to the ten-year statute of limitations.

[13] ¶ 25. Mississippi Code Section 15–1–39 provides that "[b]ills for relief, in case of the existence of a trust not cognizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue...." Miss.Code Ann. § 15–1–39 (Rev.2003). The ten-year statute of limitations, applicable to constructive trusts, applies only to claims which are "purely and exclusively equitable." *Winters v. AmSouth Bank,* 964 So.2d 595, 599 (Miss.2007) (quoting *Alvarez v. Coleman,* 642 So.2d 361, 373 (Miss.1994)). Claims which seek a legal remedy, on the other hand, are subject to the general three-year statute of limitations, unless otherwise provided. *Winters,* 964 So.2d at 599.

¶ 26. In *Wholey v. Cal–Maine Foods, Inc.,* 530 So.2d 136, 137 (Miss.1988), two limited partners sued general partners, alleging the general partners had been misappropriating funds from the partnership through self-dealing and had been making and concealing profits. The plaintiffs alleged the general partners had breached their fiduciary duties to the partnership, ***1111** and the plaintiffs requested a partnership accounting and the imposition of a constructive trust. *Id.* at 139–140. The Court noted that fiduciaries can be held as constructive trustees with respect to "secret profits or commissions obtained by the violation of a confidence or duty...." *Id.* at 140 (quoting 76 Am.Jur.2d *Trusts* § 232, 455 (1975)). Finding that the claim was one for a constructive trust based on the defendants' breach of fiduciary duties and retention of secret or hidden profits, the Court applied the ten-year statute of limitations. *Id.* at 140.

¶ 27. In *Winters v. AmSouth Bank,* 964 So.2d 595, 596 (Miss.App.2007), income beneficiaries of testamentary trusts sued a bank, alleging breach of fiduciary duty for actions taken with respect to the trust property. After the trial court held the plaintiffs' claims barred by the general six-year statute of limitations,[FN13] the plaintiffs appealed, arguing that their claim should be subject to the ten-year statute of limitations found in Section 15–1–39 . *Id.* at 598. In affirming the trial court, the Court found the plaintiffs' claims to be of a legal, rather than equitable, nature. *Id.* at 599. The Court held, "the [plaintiffs] do not seek to impose a construct-

ive trust. Instead, they seek purely legal relief, namely, compensatory and punitive money damages in the amount of $180,000,000." *Id.*

> FN13. Mississippi Code Section 15–1–49 provided for a six-year period of limitations for claims arising before July 1, 1989. The statute provides for a three-year period of limitations for claims arising on or after this date.

[14][15] ¶ 28. Unlike the plaintiffs' claim in *Wholey,* Hooker's claim is not "purely and exclusively equitable." In his counterclaim, Hooker alleged that Greer had been unjustly enriched and that "[t]he Court should impose a constructive trust or equitable lien on all funds or properties held by Counterdefendant." However, these assertions notwithstanding, it is clear that Hooker seeks only a monetary judgment to compensate him for his alleged losses. In his counterclaim, he alleges to have suffered "financial losses in the sum of $141,000." Furthermore, in his request for relief, Hooker asserts that he is demanding judgment "in the amount of $141,000, together with interest and costs." Hooker did not request a partnership accounting, nor does he claim a one-half interest in the Prairie Point Towhead and Lee Towhead Island properties, or any other partnership property. Rather, he seeks only a return of his money. It is plain that, while he couches his claim in terms of a constructive trust, Hooker seeks only compensation for his alleged losses in the parties' failed business venture. A compensatory money damage award is a remedy at law. *See Winters,* 964 So.2d at 599 (holding compensatory money damages to be "purely legal relief"). As such, Hooker's claim is not "purely and exclusively equitable." *See id.* The trial court correctly found that Hooker's claim was subject to the general three-year statute of limitations and, thus, time-barred.

CONCLUSION

¶ 29. We affirm the trial court's finding that the filing of the *lis pendens* was without substantial justification. However, the trial court based its award of attorney's fees on the baseless filing of the *lis pendens,* which is an improper reading of the LAA. Accordingly, we vacate the trial court's award and remand for further proceedings to determine, under the Litigation Accountability Act, the propriety of the *defense* to the complaint to remove cloud on title.

*1112 ¶ 30. Finally, we hold that Hooker's counterclaim is subject to the three-year statute of limitations and, thus, is time-barred. Accordingly, we affirm the trial court's grant of summary judgment to Greer on Hooker's counterclaim.

¶ 31. **AFFIRMED IN PART; REVERSED AND VACATED IN PART; AND REMANDED.**

CARLSON, P.J., LAMAR, CHANDLER, PIERCE AND KING, JJ., CONCUR. KITCHENS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., AND RANDOLPH, J.

KITCHENS, Justice, concurring in part and dissenting in part:

¶ 32. I agree that the trial court correctly dismissed Hooker's counterclaim, but I disagree that the Litigation Accountability Act (LAA), specifically Mississippi Code Section 11–55–5(1), prevented the trial court's imposition of sanctions against Hooker for his filing of the *lis pendens* notice. While the Legislature limited the scope of the statute to "actions" or "defenses," Rule 11 of the Mississippi Rules of Civil Procedure contains no such limitation. Rule 11(b) provides:

> **(b) Sanctions.** If a *pleading or motion* is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a *motion or pleading* which, in the opinion of the court, is frivolous or is filed for the purpose of harassment

> or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

(Emphasis added.) Thus, notwithstanding the language of Section 11–55–5(1), the chancellor had authority to sanction Hooker for filing a frivolous *lis pendens* notice. Accordingly, I would affirm the judgment *in toto,* and for this reason, respectfully concur in part and dissent in part.

DICKINSON, P.J., AND RANDOLPH, J., JOIN THIS OPINION.

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(Cite as: 81 So.3d 1050)

H

Supreme Court of Mississippi.
Betty LOCKHART
v.
Richard COLLINS, Peggy Collins, Bolin Hamilton and Orene Hamilton on Motion for Rehearing.

No. 2010–CA–01705–SCT.
Feb. 16, 2012.

Background: Cotenant that was owner of life estate brought partition action against owners of adjoining life estate who maintained property as their homestead and against the remaindermen. The Chancery Court, Monroe County, Jacqueline Estes Mask, J., denied petition. Cotenant appealed.

Holdings: The Supreme Court, Pierce, J., held that:
(1) cotenant had standing to seek a partition against owners of adjoining life estate but not against the fee of the estate owned by remaindermen;
(2) statute providing that partition of homestead property owned by spouses was subject to partition only by written agreement did not apply; but
(3) partition of property by public sale was not warranted.

Affirmed; rehearing denied.

West Headnotes

[1] Appeal and Error 30 ⚿1009(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(1) k. In general. Most Cited Cases

Supreme Court will not disturb a chancellor's findings of fact unless such findings are manifestly wrong or clearly erroneous.

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Supreme Court reviews all questions of law de novo.

[3] Partition 288 ⚿12(3)

288 Partition
288II Actions for Partition
288II(A) Right of Action and Defenses
288k12 Property and Estates Therein Subject to Partition
288k12(3) k. Homestead. Most Cited Cases

Partition 288 ⚿14

288 Partition
288II Actions for Partition
288II(A) Right of Action and Defenses
288k14 k. Right to and grounds for partition in general. Most Cited Cases

Partition 288 ⚿23

288 Partition
288II Actions for Partition
288II(A) Right of Action and Defenses
288k23 k. Probable injury to property, inconvenience, or hardship. Most Cited Cases

Right to partition property is absolute, however inconvenient it may be, with the exception of limitation placed on homestead property. West's A.M.C. § 93–1–23.

[4] Partition 288 ⚿13

288 Partition
288II Actions for Partition
288II(A) Right of Action and Defenses
288k13 k. Cotenancy or other common interest of parties. Most Cited Cases

Partition 288 ⚿14

288 Partition
288II Actions for Partition
288II(A) Right of Action and Defenses
288k14 k. Right to and grounds for partition in general. Most Cited Cases

Cotenant that was owner of life estate had standing to seek a partition against owners of the adjoining life estate but not against the fee of the estate owned by the remaindermen; partition was a possessory proceeding only. West's A.M.C. § 11–21–3.

[5] Tenancy in Common 373 ⚿1

373 Tenancy in Common
373I Creation and Existence
373k1 k. Nature and incidents of cotenancy. Most Cited Cases

A "tenancy in common" occurs when two or more persons, in equal or unequal undivided shares, have an equal right to possess the property.

[6] Partition 288 ⚿77(1)

288 Partition
288II Actions for Partition
288II(B) Proceedings and Relief
288k76 Determination as to Mode of Partition
288k77 Actual Partition or Sale
288k77(1) k. In general. Most Cited Cases

Statute providing that partition of homestead property owned by spouses was subject to partition only by written agreement did not apply to cotenant's petition to partition property by public sale, where cotenants were not spouses. Miss.Code Ann. § 11–21–1(2).

[7] Statutes 361 ⚿1108

361 Statutes
361III Construction
361III(C) Clarity and Ambiguity; Multiple Meanings
361k1107 Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1108 k. In general. Most Cited Cases
(Formerly 361k190)

When a statute is plain on its face, there is no room for statutory construction.

[8] Partition 288 ⚿77(1)

288 Partition
288II Actions for Partition
288II(B) Proceedings and Relief
288k76 Determination as to Mode of Partition
288k77 Actual Partition or Sale
288k77(1) k. In general. Most Cited Cases

Partition by public sale of property in which cotenant had an interest was not warranted, where cotenant did not show that any statutory requirements for partition by public sale were met. West's A.M.C. § 11–21–11.

[9] Partition 288 ⚿89

288 Partition
288II Actions for Partition
288II(B) Proceedings and Relief
288k80 Relief Incidental to Partition
288k89 k. Pleading and proof to authorize incidental relief. Most Cited Cases

Party seeking partition of property by public sale bears the burden to prove that the statutory requisites for a partition sale are met. West's A.M.C. § 11–21–11.

[10] Partition 288 ⚿77(1)

288 Partition
288II Actions for Partition

288II(B) Proceedings and Relief
288k76 Determination as to Mode of Partition
288k77 Actual Partition or Sale
288k77(1) k. In general. Most Cited Cases

Chancellor lacks the authority to decree a partition of property by public sale unless the statutory requisites are clearly met and a substantial reason exists for choosing partition by sale over partition in kind. West's A.M.C. § 11–21–11.

***1052** Carter Dobbs, Jr., attorney for appellant.

Martha Bost Stegall, Tupelo, attorney for appellees.

Before WALLER, C.J., LAMAR and PIERCE, JJ.

ON MOTION FOR REHEARING

PIERCE, Justice, for the Court:

¶ 1. The motion for rehearing is denied. The original opinion is withdrawn, and this opinion is substituted therefor.

¶ 2. J.C. and Betty Lockhart owned a life estate in an undivided one-fourth interest in 160 acres in Monroe County, Mississippi. After the death of J.C., Betty Lockhart filed a complaint to partition by public sale the land that she shared with her in-laws, Bolin and Orene Hamilton. The Hamiltons also own a life estate in the same property, and they maintain the property as their homestead. Additionally, Lockhart sued Richard and Peggy Collins, who have a future interest in the property as remaindermen. The trial court dismissed Lockhart's petition, and Lockhart appealed. Because Lockhart failed to meet the statutory requisites for a partition sale, we affirm the chancellor's ruling.

PERTINENT CONVEYANCES

¶ 3. The following conveyances reveal the parties' current interests in the 160 acres.

¶ 4. In 1947, R.T. Ray conveyed the property to W.E. Lockhart and Bolin Hamilton as tenants in common. W.E. was the father of Orene Hamilton and J.C. Lockhart, and the father-in-law of Bolin Hamilton. In his Last Will and Testament, W.E. devised his undivided one-half interest to his two children, J.C. and Orene. At that point in time, Bolin Hamilton held an undivided one-half fee-simple interest, and Orene and J.C. each held an undivided one-fourth fee-simple interest in the 160 acres.

¶ 5. In 2007, J.C. Lockhart and his wife Betty conveyed his fee-simple interest to his son (Betty's stepson), Joel Lockhart. This conveyance reserved a life estate in the Lockharts. Around the same time, Bolin and Orene Hamilton conveyed their combined three-fourths fee-simple interest in the property to their daughter, Peggy Collins. They also reserved a life estate in their combined three-fourths interest. In 2008, Joel Lockhart conveyed his undivided one-fourth fee-simple interest to Richard and Peggy Collins, subject to the life estate of his stepmother, Betty Lockhart. Peggy Collins then quitclaimed her remainder interest in the property to herself and her husband, Richard.

¶ 6. Accordingly, Lockhart has a life estate in an undivided one-fourth interest; Bolin and Orene Hamilton have a life estate in the remaining undivided three-fourths interest; and Richard and Peggy Collins have the remainder of the entire 160 acres.

PROCEDURAL HISTORY

¶ 7. With the death of her husband in 2007, Betty Lockhart left the property and filed a complaint against the Hamiltons and the Collinses (the "Defendants") seeking to partition by public sale the 160 acres in which she has a life estate. The Defendants opposed the complaint, and asserted that Lockhart lacked standing to seek partition by sale. Additionally, the Defendants asserted that the property was not subject to partition, since it was homesteaded by the Hamiltons. The Defendants filed a motion to dismiss Lockhart's complaint, which the chancellor granted, in part.

***1053** ¶ 8. In a very detailed order, the chancellor found that Lockhart had standing to seek par-

tition under Mississippi Code Section 11–21–3,[FN1] because both Lockhart and the Hamiltons, together as cotenants, share a present right to possess and use the property. The chancellor further found that Lockhart was not entitled to partition by sale, unless by written agreement of the parties under Section 11–21–1(2),[FN2] because the property was homesteaded by the Hamiltons. And she noted that, in the event a partition of the property should become available, a sale of the property was not warranted under Mississippi Code Section 11–21–11. [FN3]

FN1. Section 11–21–3 provides that "[p]artition of land held by joint tenants, tenants in common, or coparceners, having an estate in possession or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five (5), may be made by judgment of the chancery court of that county in which the lands or some part thereof, are situated...." Miss.Code Ann. § 11–21–3 (Rev. 2004).

FN2. Section 11–21–1(2) provides that "[h]omestead property exempted from execution that is owned by spouses shall be subject to partition pursuant to the provisions of this section only, and not otherwise." Subsection (1) of Section 11–21–1 provides that "[p]artition of land held by joint tenants, tenants in common, and coparceners, may be made by agreement, which shall be evidenced by a writing, signed by the parties...." Miss.Code Ann. § 11–21–1(2) (Rev. 2004).

FN3. Mississippi Code Section 11–21–11 (Rev. 2004) provides for a partition sale where a chancellor determines (1) "a sale of the lands, or any part thereof, will better promote the interest of all parties than a partition in kind;" or (2) "an equal division cannot be made[.]"

¶ 9. Lockhart appeals and claims that the chancellor erred in ruling that Section 11–21–1(2) acts to prevent partition, unless by written agreement, when the partition is not between spouses, but, rather, couples.

DISCUSSION

Standard of review

[1][2] ¶ 10. This Court will not disturb a chancellor's findings of fact unless such findings are manifestly wrong or clearly erroneous.[FN4] But we review all questions of law de novo.[FN5]

FN4. *Estate of Dykes v. Estate of Williams,* 864 So.2d 926, 930 (Miss.2003).

FN5. *Id.*

Whether partition by sale can occur by decree of the chancery court where more than one couple share a right to use and possess the property.

[3][4] ¶ 11. In Mississippi, the right to partition is absolute, however inconvenient it may be, with the exception of the limitation placed on homestead property.[FN6] This statutory exception, provided in Mississippi Code Section 91–1–23 (Rev. 2004), prevents a forced partition of homestead property of a surviving spouse who is using and occupying the property.[FN7] Otherwise, partition of land "held by joint tenants, *tenants in common,* or coparceners, having an estate in possession or a right of possession ... may be made by judgment of the chancery court of that county in which the lands or some part thereof, are situated." [FN8]

FN6. *Cheeks v. Herrington,* 523 So.2d 1033, 1035 (Miss.1988); *Daughtrey v. Daughtrey,* 474 So.2d 598, 601 (Miss.1985).

FN7. Miss.Code Ann. § 91–1–23 (Rev. 2004).

FN8. Miss.Code Ann. § 11–21–3 (Rev. 2004).

¶ 12. Lockhart's complaint specifically prays for the chancery court to partition the land in question by public sale and to ***1054** divide the proceeds among her, the Hamiltons, and the Collinses. As owners of a life estate, both Lockhart and the Hamiltons have a right to use and possess the property for the duration of their respective lives. On the other hand, the Collinses are remaindermen and do not have a right to use and possess the property. The statute allows for partition only as between "... tenants in common ... having an estate in possession or a right of possession...."

[5] ¶ 13. A tenancy in common occurs when "two or more persons, in equal or unequal undivided shares," [FN9] have an equal right to possess the property. Moreover, our caselaw has recognized that:

> FN9. *Black's Law Dictionary* 1506 (8th ed. 2004).

> It is not essential to the right of partition that the cotenants shall have estates that are equal. One may have a term, another an estate for life, and another an estate in fee. All that is necessary is that they shall be cotenants of what is proposed to be partitioned. A *remainder or reversion will not be partitioned,* but that does not hinder an estate in possession from being partitioned among the co-tenants, and the fact that there is a remainder or reversion is not a bar to partition among those having an interest in possession.[FN10]

> FN10. *Black v. Washington,* 65 Miss. 60, 3 So. 140 (1887).

"Cotenant" is defined as a "tenancy with two or more co-owners who have unity of possession," such as a joint tenancy or a tenancy in common. [FN11] Further, the manner in which the partition is accomplished is determined by one's right to possession.[FN12] Under the first paragraph of Section 11–21–3, partition is a possessory proceeding only. This means Lockhart has standing only to seek a partition against the Hamiltons as owners of the adjoining life estate and not against the fee of the estate owned by the Collinses as remaindermen.[FN13]

> FN11. *Black's Law Dictionary* 1505 (8th ed. 2004).

> FN12. *Cheeks,* 523 So.2d at 1036.

> FN13. "It is generally held that a life tenant or tenant for years can maintain a suit for partition as among his or her cotenants for life or for years. The holder of a life estate or an estate for years cannot sue the remaindermen or reversioners for partition in the absence of statutory authorization." 68 C.J.S. *Partition* § 69 (2011).

[6][7] ¶ 14. Next, because Lockhart had standing to proceed against the Hamiltons for partition, we address whether Section 11–21–1 is applicable. Section 11–21–1 provides that "[p]artition of land held by joint tenants, tenants in common, and coparceners, may be made by agreement, which shall be evidenced by a writing, signed by the parties...." Subsection (2) of Section 11–21–1 states that "[h]omestead property exempted from execution that is *owned by spouses* shall be subject to partition pursuant to the provisions of this section only, and not otherwise." A plain reading of these two statutes reveals that when property is owned by spouses, and those spouses maintain the property as their homestead, partition is available only by written agreement between the parties. "When a statute is plain on its face, there is no room for statutory construction." [FN14]

> FN14. *Camp v. Stokes,* 41 So.3d 685, 686 (Miss.2010).

¶ 15. We cannot agree with the chancellor's application of this statute, because the entire parcel of property was owned by the Hamiltons and Lockhart, not by spouses. ***1055** In *Solomon v. Solomon,* [FN15] this Court held that "where the wife of a tenant in common owning an undivided interest in land, occupies the land as a homestead, the occupa-

tion of the property by her does not enlarge her interest therein as against her husband's cotenants, but the land is at all times subject to partition by the cotenants." [FN16] Here, the fact that the Hamiltons occupy part of the land as a homestead does not enlarge their three-fourth interest in the land against their cotenant, Lockhart's one-fourths interest. Rather, the protections under the homestead statutes are respective to each cotenant's interest in the property.[FN17] Accordingly, the land is subject to partition by Lockhart, absent some statutory exception.

FN15. *Solomon v. Solomon,* 187 Miss. 22, 192 So. 10 (1939).

FN16. *Id.; see also Carter v. Brewton,* 396 So.2d 617, 618 (Miss.1981) (quoting *Dillon v. Hackett,* 204 Miss. 464, 37 So.2d 744, 746 (1948)).

FN17. *Id.*

[8][9][10] ¶ 16. Nevertheless, the chancellor found that, in the event a partition of the subject property should become available, a sale of the property in the first instance was not warranted under Section 11–21–11. This statute requires that, before the court may order a sale in the first instance, it must find that a sale of the lands will better promote the interests of all parties than a partition in kind, or the court must be convinced that an equal division cannot be made.[FN18] Lockhart bears the burden to prove that the statutory requisites for a partition sale are met. [FN19] The record is devoid of any proof regarding either statutory requisite. And since the chancellor lacks the "authority to decree a sale unless the statutory requisites are 'clearly' met and a 'substantial reason' exists for choosing partition by sale over partition in kind," [FN20] we cannot hold her in error.

FN18. Miss.Code Ann. § 11–21–11 (Rev. 2004).

FN19. *Overstreet v. Overstreet,* 692 So.2d 88, 90–91 (Miss.1997).

FN20. *Unknown Heirs at Law of Blair v. Blair,* 601 So.2d 848, 850 (Miss.1992).

CONCLUSION

¶ 17. Section 11–21–1(2) is inapplicable to the present facts. Nevertheless, we agree with the chancellor's alternative ruling. Accordingly, we affirm.

¶ 18. **AFFIRMED.**

WALLER, C.J., CARLSON AND DICKINSON, P.JJ., RANDOLPH, LAMAR, KITCHENS, CHANDLER AND KING, JJ., CONCUR.

Miss.,2012.
Lockhart v. Collins
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95 So.3d 751
(Cite as: 95 So.3d 751)

Court of Appeals of Mississippi.
Carolyn JONES, Appellant
v.
Anthony GRAPHIA, Appellee.

No. 2011–CA–00984–COA.
Aug. 7, 2012.

Background: Former boyfriend brought action for partition of real property owned with former girlfriend as joint tenants with right of survivorship. The Chancery Court, Hancock County, Carter O. Bise, J., denied girlfriend's motion for summary judgment and, after a bench trial, entered judgment awarding boyfriend the entire sale price of the property. Girlfriend appealed.

Holding: The Court of Appeals, Griffis, P.J., held that chancellor could award boyfriend the entirety of the sale proceeds based on the fact that he paid the entire purchase price, as well as the utilities, insurance, club dues, and taxes on the property.

Affirmed.

Carlton, J., filed dissenting opinion in which Fair, J., joined and Irving, P.J., and Maxwell, J., joined in part.

Maxwell, J., filed dissenting opinion.

West Headnotes

[1] Appeal and Error 30 ⚿847(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k847 Trial in Equitable Actions
30k847(1) k. In general. Most Cited Cases

Court of Appeals has a limited standard of review in appeals from the chancery court.

[2] Appeal and Error 30 ⚿949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

The standard of review of a chancellor's decision is abuse of discretion.

[3] Appeal and Error 30 ⚿1009(2)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1009 Effect in Equitable Actions
30k1009(2) k. Sufficiency of evidence in support. Most Cited Cases

An appellate court will not disturb the factual findings of a chancellor when supported by substantial evidence unless it can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard; however, on questions of law, appellate courts employ a de novo standard of review.

[4] Joint Tenancy 226 ⚿6

226 Joint Tenancy
226k6 k. Survivorship. Most Cited Cases

By virtue of survivorship, property held in a joint tenancy descends outside of probate from the deceased joint tenant to the surviving joint tenant.

[5] Joint Tenancy 226 ⚿6

226 Joint Tenancy
226k6 k. Survivorship. Most Cited Cases

Joint Tenancy 226 ⚿8

226 Joint Tenancy
226k7 Mutual Rights, Duties, and Liabilities of Joint Tenants
226k8 k. In general. Most Cited Cases
Ownership of the whole and then taking the whole by survivorship are the outstanding features of owning property as joint tenants; the decedent's share does not have to pass to the survivor because the survivor already owns the whole.

[6] Joint Tenancy 226 ⚿6

226 Joint Tenancy
226k6 k. Survivorship. Most Cited Cases
The usefulness of the joint tenancy is that it serves as a poor man's probate.

[7] Partition 288 ⚿83

288 Partition
288II Actions for Partition
288II(B) Proceedings and Relief
288k80 Relief Incidental to Partition
288k83 k. Adjustment of claims and equities between parties. Most Cited Cases

Partition 288 ⚿87

288 Partition
288II Actions for Partition
288II(B) Proceedings and Relief
288k80 Relief Incidental to Partition
288k87 k. Reimbursement of payments and advances. Most Cited Cases
In former boyfriend's action for partition of real property that was owned with former girlfriend as joint tenants with right of survivorship, chancellor could award boyfriend the entirety of the sale proceeds based on the fact that he paid the entire purchase price, as well as the utilities, insurance, club dues, and taxes on the property; chancellor had statutory authority to "adjust the equities" between the parties. West's A.M.C. §§ 11–21–3, 11–21–9.

***752** George W. Healy IV, Gulfport, Cassidy Lee Anderson, attorneys for appellant.

W. Stewart Robinson, attorney for appellee.

Before GRIFFIS, P.J., MAXWELL and RUSSELL, JJ.

GRIFFIS, P.J., for the Court:

¶ 1. Two unmarried, romantically involved people bought a house together as joint tenants. The man paid the purchase price for the home, and the woman paid nothing. Later when the relationship soured, he filed suit in chancery court to partite the property. The chancellor awarded him the entire amount he had paid for the house, giving his former lover and joint tenant nothing. She appeals. Finding no error in the chancellor's judgment, we affirm.

FACTS

¶ 2. Anthony Graphia and Carolyn Jones were romantically involved, but never married. Each lived in Louisiana. On March 26, 2010, they purchased a home in Diamondhead in Hancock County, Mississippi, as joint tenants with the right of survivorship, and not as tenants in common. Graphia and Jones had dated for two years prior to buying the home. It was their intention at the time to marry and live in the Mississippi home.

***753** ¶ 3. It was undisputed that the purchase price of the home, $274,000, was paid entirely by **Graphia**. He also paid all the utilities, the insurance, the taxes, and the dues for the property owners' association. **Jones** testified that she helped decorate the home, hung draperies, and used some of her furnishings in the home.[FN1]

FN1. **Graphia** testified that **Jones** wanted to be a joint owner and that she agreed to give him fifty percent ownership of her town home in Baton Rogue, Louisiana, in return for including her as a joint tenant of the Mississippi property. However, **Graphia** testified that this never happened.

¶ 4. The relationship waned, after which **Graphia** filed suit in Hancock County Chancery Court to partition the property. **Graphia** contended that the property was incapable of division in kind, and that even if it were, that he should be allowed an equitable adjustment since he alone purchased the property. **Jones** answered denying the allegations. **Jones** filed a motion for summary judgment claiming that the parol-evidence rule would not allow a court to look beyond the language of the deed, which names the parties as joint tenants with rights of survivorship.

¶ 5. In her motion for summary judgment, Jones argued that as a joint tenant she was entitled to a share of the funds from the sale of the home. She cited *Thornhill v. Chapman,* 748 So.2d 819 (Miss.Ct.App.1999), for the proposition that the chancellor should not have allowed Graphia to testify about how much he paid for the property, as that was a violation of the parol-evidence rule. The summary-judgment motion was denied, and a trial was held, after which the chancellor ruled that he could adjust the equities between the parties pursuant to Mississippi Code Annotated section 11–21–9 (Rev.2004). Further, the chancellor applied Mississippi Code Annotated section 11–21–33 (Rev.2004), which allows the chancellor to use owelty in a partition action, and awarded Graphia $274,000, the amount of the purchase price. The chancellor allowed Jones to retrieve any personal belongings remaining in the home.

STANDARD OF REVIEW

[1][2][3] ¶ 6. This Court has a limited standard of review in appeals from the chancery court. *Tucker v. Prisock,* 791 So.2d 190, 192 (¶ 10) (Miss.2001). The standard of review of a chancellor's decision is abuse of discretion. *Creely v. Hosemann,* 910 So.2d 512, 516 (¶ 11) (Miss.2005). An appellate court "will not disturb the factual findings of a chancellor when supported by substantial evidence unless we can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous[,] or applied an erroneous legal standard." *Biglane v. Under the Hill Corp.,* 949 So.2d 9, 13–14 (¶ 17) (Miss.2007) (quoting *Cummings v. Benderman,* 681 So.2d 97, 100 (Miss.1996)). However, on questions of law, appellate courts employ a de novo standard of review. *Id.; Tucker,* 791 So.2d at 192 (¶ 10).

ANALYSIS

[4][5][6] ¶ 7. Before we address the issues in this appeal, we must discuss the peculiarities of the joint tenancy. The Mississippi Supreme Court has held that "the distinguishing characteristic of a joint tenancy is the right of survivorship." *In re Admin. of Estate of Abernathy,* 778 So.2d 123, 129 (¶ 24) (Miss.2001) (citing *Vaughn v. Vaughn,* 238 Miss. 342, 349, 118 So.2d 620, 622 (1960)). By virtue of survivorship, the property descends outside of probate from the deceased joint tenant to the surviving joint tenant. John E. Cribbet, *Principles of the Law of Property* 99 *754 (1975). The requirements for the creation of a joint tenancy with right of survivorship in land are governed by statute.[FN2] Ownership of the whole and then taking the whole by survivorship are the outstanding features of owning property as joint tenants. *Id.* at 99. The decedent's share does not have to pass to the survivor because the survivor already owns the whole. The usefulness of the joint tenancy as one property-law expert explained is that it serves as a "poor man's probate." *Id.* at 102.

FN2. Mississippi Code Annotated section 89–1–7 (Rev.2011) provides:

> All conveyances or devises of land made to two (2) or more persons, including conveyances or devises to husband and wife, shall be construed to create estates in common and not in joint tenancy or entirety, *unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy or entirety with the right of survivorship. But an estate in joint tenancy or entirety with right of survivorship may be created by such conveyance from*

> *the owner or owners to himself, themselves or others, or to himself, themselves and others.*
>
> An estate in joint tenancy or entirety with right of survivorship between spouses may be terminated by deed of one spouse to the other without necessity of joinder of the grantee spouse and without regard to whether the property constitutes any part of the homestead of the spouses.
>
> (Emphasis added).

¶ 8. With the above said about joint tenancy and its feature of survivorship, one point becomes clear about this case: **Jones** owned the whole along with **Graphia** while they were joint owners. However, when **Graphia** filed to partite the property, as joint tenants are allowed to do,[FN3] then **Jones's** interest was subject to division by the chancellor. Prior to the chancery proceeding, **Jones** enjoyed the ownership of the whole. **Jones** lost this enjoyment when **Graphia**, her joint tenant, filed for partition. Had **Graphia** died, **Jones**, as the only other joint owner, would have owned the whole by herself. But since there was no death, the joint tenants had to give testimony during the partition hearing concerning their contributions to buying the house.

> FN3. *See* Miss.Code Ann. § 11–21–3 (Rev.2011). In addition to partitioning real property, a chancellor may adjust the equities between cotenants by, for example, adjusting the amount paid by one cotenant for improvements made to the property, or for taxes paid and other related expenses. Miss.Code Ann. §§ 11–21–11, 11–21–27 (Rev.2004).

[7] ¶ 9. We next turn to the decision of the chancellor to partite the property and give all of the sale proceeds to Graphia. Jones cites *Johnson v. Johnson,* 550 So.2d 416, 420 (Miss.1989), for the proposition that when a property owner agrees to own property jointly with another, the common law presumes that the owner intended to gift the one-half interest to the other property owner. First and foremost, *Johnson* was abrogated in *Pearson v. Pearson,* 761 So.2d 157, 163 (¶ 16) (Miss.2000), when the court noted that *Johnson* was pre- *Ferguson* and that the *Johnson* holding was just an equitable way for a court to divide marital property. The *Pearson* court held that consideration of the *Ferguson* factors would now serve that function. Secondly, *Pearson* involved married individuals who had collected assets together for seventeen years, rather than an unmarried couple in a short relationship as in this case.

¶ 10. Jones argues that the chancellor erred when he found that Jones would be unjustly enriched if she were awarded any part of the partition sale.

¶ 11. The chancellor, as an alternative ground to his decision, found that awarding Jones an equal share of the purchase price, to which she contributed no purchase funds and very little sweat equity in ***755** the property, would unjustly enrich her. The chancellor found that Jones contributed nothing to the acquisition of the property and that she had no equity interest in the property. The chancellor cited Mississippi Code Annotated section 11–21–9, which allows him to determine all questions concerning title. "The court may adjust the equities between and determine all claims of the several cotenants as well as the equities and claims of encumbrancers." *Id.*

¶ 12. We remain mindful of our limited standard of review with regard to a chancellor's findings. Here we find no error of law or of fact. As joint tenants, either party could have filed for partition after the relationship soured. Graphia did so. Then, the duty fell to the chancellor to adjust the equities and determine the claims of the joint tenants. Here, we have two unmarried adults who titled property as joint tenants with the right of survivorship, and not as tenants in common. It was undisputed that

Graphia paid the $274,000 purchase price for the home, plus utilities, insurance, club dues, and taxes. It was undisputed that **Jones** paid nothing. Had **Graphia** died, **Jones** would have benefitted from the joint tenancy and become the sole owner. However, as joint tenants are allowed to do, **Graphia** sought partition and allowed the chancellor to decide the issues. The chancellor found that **Graphia** should receive the total purchase price since he had paid it and that **Jones** should receive nothing since she had made no contribution. We find no error in the chancellor's decision.

¶ 13. **THE JUDGMENT OF THE CHANCERY COURT OF HANCOCK COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., BARNES, ISHEE, ROBERTS AND RUSSELL, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY FAIR, J.; IRVING, P.J., AND MAXWELL, J., JOIN IN PART. MAXWELL, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

CARLTON, J., dissenting:

¶ 14. I respectfully dissent from the majority opinion wherein the majority allows the trial court to deviate from the statutory procedure in dividing the joint interest in real property upon the filing of a petition to partition. *See Walker v. Williams,* 84 Miss. 392, 36 So. 450, 451–52 (1904); *see also Murphree v. Cook,* 822 So.2d 1092, 1098–99 (¶ 21) (Miss.Ct.App.2002) (This Court found the chancellor erred in divesting a co-tenant of his interest in property using such factors as original cost and subsequent cost of maintaining the property. The Court held that the right of partition created by statute is an absolute right of a tenant in common); *see also* Miss.Code Ann. § 11–21–11 (When considering partition in kind, the court may order a sale of the lands or any part thereof if sale would better promote the interest of all parties than a partition in kind or court may order sale when determining that equal division of the lands cannot be made.); *Cox v. Kyle,* 75 Miss. 667, 23 So. 518, 519 (1898) (Applying strict construction of partition statute).

¶ 15. The decision by this Court in *Murphree,* 822 So.2d at 1098–99 (¶¶ 21–22) is helpful to the resolution of the case before us today. In *Murphree,* this Court explained that the chancellor abused his discretion in attempting to fashion a unique remedy to sever a co-tenancy by ignoring statutes of the state defining the only lawful method available to accomplish that purpose. *Id.* In the case before ***756** us, if the chancellor determined that the lands were not subject to equal partition in kind or that the interest of the parties were served by a sale, then the chancellor should have equally divided any sale proceeds in accordance with each co-tenant's respective joint interest. *See generally* MS-PRAC–ENC § 60:100 (explaining that the equities that may be adjusted between the parties upon partition and cancellation of the joint title include adjustments such as rent, improvements to the property, payment of taxes, and other related expenses). The equities that may be adjusted upon partition of the property constitute equities that arise out of the cancellation of that joint title in the partition action. *Hudson v. Strickland,* 58 Miss. 186, 1880 WL 4849, 4–5 (1880); *see also Moorer v. Willis,* 239 Miss. 118, 129–30, 121 So.2d 127, 132 (1960) (The equities arising out of the cancellation of the title concern matters such as the collection of rents, payment of taxes, and costs of maintenance and upkeep.).

¶ 16. In this case, the chancellor considered disputes between the parties that exceeded those equities arising out of the cancellation of the title upon partition. The original purchase price related to the formation of the title, but it did not constitute an equity arising out of the cancellation of the title or partition after formation of the joint title. **Graphia's** testimony that **Jones** agreed to give him fifty percent ownership of her town home in exchange for including her as a joint tenant on the property in dispute relates to a matter arising prior to formation of the joint title. I submit that nothing in the title of joint ownership provides that Jones's

joint interest was contingent upon some other such conveyance. However, Mississippi Code Annotated § 11–21–9 and precedent all recognize the chancellor's authority to consider the equities arising out of the cancellation of the title in partition actions. The chancellor, and majority, properly recognized the chancellor's authority in making adjustments relating to the maintenance of the property, such as taxes. *Dailey v. Houston,* 246 Miss. 667, 151 So.2d 919 (Miss.1963); *see* Miss.Code Ann. § 11–21–11. I submit that the chancellor exceeded the equities of the claims between the parties arising out of the cancellation of the title; therefore, I would reverse and remand for a new partition division by the chancellor. *See Walker,* 84 Miss. at 392, 36 So. at 451–52; *Murphree,* 822 So.2d at 1098–99 (¶¶ 21–22).

FAIR, J., JOINS THIS OPINION. IRVING, P.J., AND MAXWELL, J., JOIN THIS OPINION IN PART.

MAXWELL, J., dissenting:

¶ 17. This case concerns a partition sale of a house that Jones and Graphia owned as joint tenants with the right of survivorship. But instead of partitioning the property, the chancellor essentially performed an equitable distribution of the house, justifying his decision to award one joint tenant all the proceeds of a partition sale based primarily on the "putative-spouse doctrine." Because Graphia was not a "putative spouse"—and was, thus, not entitled to an equitable distribution of the property he jointly owned with his girlfriend—I dissent.

¶ 18. The chancellor relied on *Chrismond v. Chrismond,* 211 Miss. 746, 757, 52 So.2d 624, 629 (1951), *Pickens v. Pickens,* 490 So.2d 872 (Miss.1986), and *Cotton v. Cotton,* 44 So.3d 371 (Miss.Ct.App.2010), to hold he could look beyond joint ownership and consider each owner's contribution to the accumulation of the property. But the Mississippi Supreme Court has made clear the equity power in *Chrismond* and *Pickens* does not extend to cohabitants, like *757 Jones and Graphia, who never attempted a valid marriage. *See Davis v. Davis,* 643 So.2d 931, 934–36 (Miss.1994). While Jones and Graphia had intended to marry when they purchased the home as joint tenants, they were never married or ceremonially married. Thus, equitable distribution—which authorizes a chancellor to look beyond title and consider disparity in contribution to divest a joint owner of his or her interest in *marital* property, *e.g., Ferguson v. Ferguson,* 639 So.2d 921, 927 (Miss.1994)—simply was unavailable to the unmarried Graphia in his *statutory partition action.* And it was error for the chancellor to distribute the proceeds of the partition sale based on this doctrine.

¶ 19. The majority justifies the chancellor's award on an alternative basis—the language in Mississippi Code Annotated section 11–21–9 (Rev.2004) that a chancellor "may adjust the equities between and determine all claims of the several cotenants." According to Graphia, this language authorized the chancellor to divest Jones of her right to equal ownership of the home or proceeds. I disagree. Section 11–21–9 does not, as the majority suggests, authorize chancellors to look beyond title when a joint tenant initiates a partition action. Rather, this statute concerns *jurisdiction*—allowing the chancellor to decide all ancillary issues between cotenants to the partition action. *See id.*

¶ 20. I agree with Judge Carlton that "adjust[ment] of the equities," as contemplated by section 11–21–9, authorizes chancellors to use a cotenant's otherwise equal share of proceeds to *offset* what he owes his cotenant for rent, improvement costs, taxes, or other similar debts. However, this language does not grant chancellors authority to disregard title and to divide sale proceeds based solely on equity. Thus, the chancellor in this case could not rely on section 11–21–9 to deny Jones her equal share of the partition-sale proceeds.

¶ 21. Because title showed Jones was a joint tenant with Graphia, both were entitled to an equal share of the jointly owned home upon severance, by either partition in kind or partition by sale. And the chancellor erred by denying Jones this right. I

would reverse the judgment and remand this partition case for an equal distribution of the partition-sale proceeds.

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