

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-01851-COA

consolidated with

NO. 2011-CA-01469-COA

**CATERPILLAR FINANCIAL SERVICES
CORPORATION**

APPELLANT

V.

BURROUGHS DIESEL, INC.

APPELLEE

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

Ken R. Adcock, MSB [REDACTED]
ADCOCK & MORRISON, PLLC
199 Charmant, Suite 1
Post Office Box 3308
Ridgeland, Mississippi 39158
Telephone: (601) 898-9887
Facsimile: (601) 898-9860

ATTORNEY FOR BURROUGHS DIESEL, INC.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Burroughs Diesel, Inc., Appellee;
2. Ken R. Adcock, Adcock & Morrison, PLLC, Counsel for Appellee;
3. Caterpillar Financial Services Corporation, Appellant;
4. Robert B. Ireland, Watkins & Eager, PLLC, Counsel for Appellant; and
5. Honorable Billy Joe Landrum, Circuit Court Judge for Jones County,
Mississippi

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	I
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
STATEMENT OF ISSUES	1
RESPONSE IN OPPOSITION TO NEED FOR ORAL ARGUMENT	2
STATEMENT OF THE CASE	2
A. Underlying Proceedings	2
B. Statement of Facts	4
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. The Circuit Court Committed no Error in Asserting Jurisdiction over Appellee's Complaint	7
II. The Record is Void of Any Willful Discovery Violations on the Part of Appellee	9
III. The Circuit Court Committed no Error in Granting Appellee's Motion for Summary Judgment	11
A. The doctrines of laches, waiver, and estoppel are inapplicable to this case as Appellee timely asserted its Mechanic's Lien	12
B. The Trial Court committed no error in entering a findings of fact and conclusions of law	13
C. The issue of "caveat emptor" was never raised by Appellant at the Trial Court and as such may not raise this issue on appeal.	

However, the Trial Court applied the proper standard in determining that Appellee maintained an enforceable mechanic's lien	14
D. Appellant provided no genuine issues of material fact that would have precluded the granting of Appellee's Motion for Summary Judgment	15
IV. The Trial Court Committed no Error in Awarding Appellee with Storage Fees and Attorney's Fees	17
A. Appellee was entitled to an award of storage fees.	18
B. Appellee was entitled to reasonable attorneys' fees.	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Allen v. National R.R. Passenger Corp.</i> , 934 So.2d 1006, 1012-13 (Miss. 2006)	11
<i>Batson v. Neal Spelce Assocs, Inc.</i> , 765 F.2d 511, 514 (5th Cir. 1985)	10
<i>Chambers v. Brown</i> , No. 2010-CA-00845-COA (Miss. App. July 26, 2011)	11
<i>Funchess v. Pennington</i> , 39 So.2d 1, 1 (Miss. 1949)	15, 16
<i>Huntley v. Drummond</i> , 85 So.2d 188, 189 (Miss. 1956)	14
<i>J.A. Broom & Son v. S.S. Dale & Sons</i> , 67 So. 659, 661 (Miss. 1915)	14
<i>Jones v. Ballard</i> , 573 So.2d 783, 786 (Miss. 1990)	13
<i>Martin v. Broadhead</i> , 32 So.2d 433, 434 (Miss. 1947)	15
<i>Merchants & Farmers Bank of Kosciusko v. State</i> , 651 So.2d 1060, 1063 (Miss. 1995)	12
<i>Miss. Motor Finance Inc. v. Thomas</i> , 149 So.2d 20,24 (Miss. 1963)	15
<i>Moorhead Motor Company v. H.D. Walker Auto Co.</i> , 97 So. 486 (Miss. 1923)	16
<i>Pierce v. Heritage Props, Inc.</i> , 688 So.2d 1385, 1388 (Miss. 1997)	10
<i>Scoggins v. Ellzey Beverages, Inc.</i> , 743 So.2d 990, 991 (Miss. 1999)	11
<i>Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.</i> , 804 So.2d 1000, 1006 (Miss. 2001)	11
<i>Smith v. Homes</i> , 921 So.2d 283, 286 (Miss. 2005)	8
<i>White v. White</i> , 509 So.2d 205, 208 (Miss. 1987)	10

STATUTES

Miss. Code Ann. § 63-3-103	16
Miss. Code Ann. § 63-15-3	16

Miss. Code Ann. § 63-21-5	16
Miss. Code Ann. §§ 85-7-101, et seq.	6, 13, 19
Miss. Code Ann. § 85-7-107	13
Miss. Code Ann. § 85-7-141 (1972)	7
Miss. Code Ann. § 85-7-251	7, 18, 121

RULES

Miss. R. Civ. P. 26	13
Miss. R. Civ. P. 37	7, 19, 21
Miss. R. Civ. P. 52	13
Miss. R. Civ. P. 56.	19

STATEMENT OF ISSUES

The Circuit Court was correct in determining that Appellee, Burroughs Diesel, Inc., maintained a valid and enforceable mechanic's lien and in ordering that the subject equipment be sold in order to satisfy this lien. As such, this Court should resolve the issues raised on appeal by the Appellant as follows:

1. The Circuit Court committed no error in asserting jurisdiction over Appellee's mechanic's lien claim;
2. Appellee committed no willful discovery violations and any alleged discovery violations do not warrant an outright dismissal of Appellee's claim;
3. The Trial Court committed no error in granting Appellee's Motion for Summary Judgment in finding that Appellee maintained a valid and enforceable mechanic's lien; and
4. The Trial Court committed no error in finding that Appellee was entitled to the recovery of storage fees and attorneys fees.

RESPONSE IN OPPOSITION TO NEED FOR ORAL ARGUMENT

Just as in the consolidated matter before this Court, oral argument is unnecessary in this appeal. The record and pleadings in both cases speak for themselves as to the rights of the parties in the subject equipment, the validity of Appellee's mechanic's lien for the repairs on said equipment, and the recovery for storage and attorney's fees. Further, the record in both cases clearly show that Appellee made no such "wrongful" discovery violations as alleged by the Appellant and dismissal or any other sanctions would be inappropriate given that no order was ever entered by any court requiring such an inspection.

STATEMENT OF THE CASE

A. Underlying Proceedings

This appeal pertains only to the issues arising out of the Appellee's complaint seeking enforcement of its valid mechanic's lien on a Caterpillar 312CL Excavator (hereinafter "Excavator") and an order from the trial courts allowing it to sell the Excavator to satisfy this lien. This appeal has been consolidated with Appellant's appeal on its separately filed replevin action, which has already been briefed.

On July 27, 2010, Appellant filed its Complaint to Enforce Mechanic's Lien and for Order to Sell Equipment in the Chancery Court of Jones County whereby it sought to enforce its mechanic's lien on the Excavator and approval of the Court to sell the equipment. (R. at 6). Appellee filed its Answers and Defenses on August 30, 2010 (R. at 16) and later moved to dismiss or transfer the case to the County Court. (R. at 20). On September 27, 2010, the Chancery Court determined that it did not have subject matter jurisdiction over the enforcement of a mechanic's lien and properly transferred the case to

Circuit Court. (R. at 5).

On April 7, 2011, Appellee filed its Motion for Summary Judgment on the grounds that it was entitled to its mechanic's lien and that the Circuit Court should enter an order permitting the sale of the Excavator. (R. at 44). In support of its Motion, Appellee attached as exhibits the sworn affidavits of Robert Burroughs, owner of Appellee, who performed the repairs, and Randall Walters, the lessee of the Excavator and who requested the Excavator be towed to BDI and that the repair be performed. (R. at 47-56). Both of these sworn affidavits stated that the repairs performed on the Excavator were performed at the request of the lessee, Walters, and were reasonable and necessary in bringing the Excavator to working condition. *Id.* Appellant responded on April 21, 2011 asserting simply that Appellee had not met its burden showing that the repairs were reasonable and necessary while also alleging that Appellee was not entitled to an award of storage fees. (R. at 59). On July 14, 2011, Appellee filed its Supplemental Motion for Summary Judgment wherein it alerted the Circuit Court to the County Court's order¹ finding that it had a valid mechanic's lien and further requested that it be granted attorney's fees for having been required to defend itself in the replevin action in County Court and bring suit in order to enforce its statutory lien. (R. at 111).

While the parties awaited a hearing on Appellee's Motion for Summary Judgment, Appellant filed its Rule 37 Motion to Dismiss and/or Compel on May 31, 2011 whereby it sought to either have Appellee's case dismissed for an alleged discovery violation (not being

¹ Appellant appealed the County Court Order denying its replevin action against BDI to the Circuit Court and the Circuit Court denied the appeal. That order is the subject of the appeal in the consolidated action.

permitted to inspect the Excavator) involving the Excavator or for the Court to compel an inspection of the same. (R. at 77). Appellee responded on July 14, 2011 denying any alleged “wrongful” discovery violations and noting that there was no order from the Circuit Court or any other court that it could have violated to warrant a dismissal of its case. (R. at 114). On October 6, 2011, the Circuit Court entered its Order properly denying the Appellant’s Motion. (R. at 143).

On November 7, 2011, the Circuit Court conducted its full hearing on Appellee’s Motion for Summary Judgment.² (Tr. at 9). On December 5, 2011, the Circuit Court granted Appellee’s Motion, and in doing so, found that Appellee was entitled to a total lien in the amount of \$54,040.20, and ordered the sale of the Excavator. (R. at 237, 240). Due to this appeal, Appellee has not sold the Excavator.

B. Statement of Facts

Because the facts of this appeal are identical to those of the consolidated case, Appellee would refer the Court to its Statement of Facts section of its Appellee’s Brief filed in the consolidated Case No. 2011-CA-01469-COA. Nonetheless, Appellee will provided a brief recitation of these facts in order to rebut certain details found in Appellant’s principal brief.

Prior to July 1, 2008, the lessee of the Excavator, Randall Walters, requested that the Excavator be towed to Appellee’s business in order to be repaired on account of the Excavator no longer being operational. (R. at 6-7). Burroughs Diesel made the reasonable

² On July 25, 2011, the Court heard arguments on Appellee’s Motion but held it in abeyance until the appeal of replevin action was resolved by the Court before continuing the hearing. (Tr. at 1).

and necessary repairs to the subject Excavator at the request of Walters, and in doing so, returned the Excavator to its proper working condition. *Id.* The charges for these repairs were \$12,307.02 and on July 1, 2008, Appellant began charging storage fees of \$25.00 per day. (R. at 10-12). After failing to recover any payments from Walters for these repairs over the course of the next year, Appellee learned that Appellant was the true owner of the Excavator and made immediate demand for payment of these repair costs and storage fees pursuant to its storage lien. (R. at 37).

Following the institution of both lawsuits, Appellant sought to inspect the Excavator and both parties initially agreed to hold this inspection following an agreed upon October 7, 2010 hearing date in the County Court action. (R. at 88). Unfortunately, this hearing never came to be and the parties were never able to agree upon a date to inspect the Excavator. On April 20, 2011, Appellant filed a Rule 34 request to inspect the Excavator. (R. at 57). Appellant made no attempt following this filing to schedule any such inspection until its May 23, 2011 correspondence threatening a motion to compel. (R. at 108). On May 31, 2011, Appellant filed its Motion to Dismiss and/or Compel a week later seeking to have the Circuit Court dismiss Appellee's claim without ever making a ruling on the merits of its motion. (R. at 77). The Circuit Court properly denied this Motion on October 14, 2011. (R. at 143). The Circuit Court then entered its Order granting Appellee's Motion for Summary Judgment on December 5, 2011 and establishes the amount of the Appellant's Mechanic's Lien by including repair charge, accumulated storage fees and attorney's fees in the amount of \$54,040.02. (R. at 237).

SUMMARY OF THE ARGUMENT

Appellee brought this action to enforce its mechanic's lien pursuant to Mississippi's mechanic's lien statutes, Miss. Code Ann. § 85-7-101, et seq. Under these statutes, the Circuit Court was tasked with determining the validity of Appellee's mechanic's lien and whether Appellee maintained a right to possession of the subject equipment until the lien was satisfied. Pursuant to these statutes, the Circuit Court was proper in exercising its jurisdiction over this matter pursuant to these statutes.

The record is clear that there is absolutely no evidence of any willful or bad faith discovery violations regarding any inspections of the subject equipment. If anything, the record indicates that the parties simply could not come to an agreeable time and date to conduct this inspection. Further, the record is clear that the Appellant only pursued intervention from the Circuit Court once regarding the inspection issue and that the Circuit Court denied Appellant's Motion to Compel. Accordingly, there is no Order from the Circuit Court that the Appellee could have been in contempt of to warrant ultimate sanctions requested by Appellant.

The Circuit Court committed no error in allegedly failing to address Appellant's arguments that Appellee's lien was barred by the doctrines of laches, waiver, or estoppel. Appellee asserted its lien claim against Appellant immediately upon learning that Appellant was the owner of the subject equipment.

The Circuit Court committed no error in finding that Appellee was entitled to enforcement of its mechanic's lien on the subject equipment. The evidence in the record, including the repair invoices and sworn and uncontested affidavits of Robert Burroughs and Randall Walters, make it clear that the repairs to the subject equipment were reasonable

and did bring the equipment back to working condition.

Finally, the Circuit Court was proper in awarding Appellee reasonable storage fees accrued as well as reasonable attorneys' fees incurred in pursuing the enforcement of its mechanic's lien. Miss. Code Ann. § 85-7-251 permits for reasonable fees for towing and storage of motor vehicles, and it cannot be disputed that the subject equipment qualifies as a motor vehicle under one or more motor vehicle statutes. Further, Rule 37 of the M.R.C.P. permits the recovery of attorneys' fees for successfully defending against a motion to compel. The record is clear that the Circuit Court found Appellant's Motion to Dismiss and/or Compel not well taken and denied it thereby allowing the recovery of attorneys' fees to Appellee for defending the motion.

ARGUMENT

I. The Circuit Court Committed no Error in Asserting Jurisdiction over Appellee's Complaint

At the time this action was originally filed, July 27, 2010, and ultimately transferred, September 27, 2010, the Circuit Courts were the only courts permitted by statute to adjudicate any actions regarding the enforcement of mechanic's liens. *See, e.g.*, Miss. Code Ann. § 85-7-141 (1972) (the only lien statute defining which court had jurisdiction over enforcement actions).³ As such, the only court of competent jurisdiction at the time of filing was the Circuit Court of Jones County.

The doctrine of priority jurisdiction states that "where two (2) suits between the same parties over the same controversy are brought in courts of concurrent jurisdiction, the

³ County courts were given concurrent jurisdiction with circuit courts over lien enforcement actions after this statute was amended, effective July 1, 2011.

court which first acquires jurisdiction retains jurisdiction over the whole controversy to the exclusion or abatement of the second suit.” *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 804 So.2d 1000, 1006 (Miss. 2001) (emphasis added); *see also Smith v. Holmes*, 921 So.2d 283, 286 (Miss. 2005). While the Court in *Scruggs* ultimately held that priority jurisdiction did apply, it is the emphasized language that applies herein. As stated above, at the time of initial filing (July 27, 2010) and transfer from Chancery to Circuit Court (September 27, 2010), the Circuit and County Courts did not share concurrent jurisdiction over lien enforcement matters and thus the doctrine of priority jurisdiction is inapplicable as a matter of law. As such, the only court that could have heard Appellee’s mechanic’s lien enforcement action was the Circuit Court of the Second Judicial District of Jones County.

As it pertains to Appellant’s argument that Appellee is barred from asserting any claim on the grounds that it failed to make a compulsory counterclaim in the County Court case, this arguments is factually flawed and must fail. As the record in the companion case on appeal shows, Appellee clearly asserted in its Answers and Defenses to Appellant’s replevin complaint that it was asserting its mechanic’s lien.⁴

Finally, even if Appellant’s position was to be accepted, which it should not, any assignment of error is harmless as the Circuit Court ultimately came to the same conclusion in both filed cases. In the case subject to the first appeal, the Circuit Court affirmed the County Court’s ruling that Appellee was entitled to first possession of the Excavator on

⁴ While not a part of the record of this case, Appellee refers the Court to its Answers and Defenses to Appellant’s complaint in replevin in this sister case, Case No. 2011-CA-01469-COA, at page 44 of the record.

account of its valid and enforceable mechanic's lien. In the case subject to this appeal, the Circuit Court again confirmed the validity of Appellee's mechanic's lien and established the amount of the lien and ordered the sale of the Excavator to satisfy the lien.

Accordingly, the Circuit Court was correct in asserting jurisdiction over Appellee's complaint for enforcement of its valid mechanic's lien, and thus, Appellee respectfully requests that this Court affirm the ruling of the Trial Court.

II. The Record is Void of Any Willful Discovery Violations on the Part of Appellee

As set forth in its briefing on the first appeal, the record is clear that Appellee committed no willful or bad faith discovery violations and has never refused to permit the Appellant to inspect the Excavator as suggested by the Appellant.

In this case, Appellant filed its sole discovery request, a Rule 34 request to inspect the Excavator, on April 21, 2011, nearly a year after Appellee filed its complaint and several months after Appellee filed its Motion for Summary Judgment. (R. at 57). Appellant made no attempt following the filing of this Rule 34 request to schedule an inspection of the subject Excavator until it proceeded with sending demand letter threatening a Motion to Compel on May 23, 2011 (R. at 108) and subsequently filed a Motion to Dismiss on May 31, 2011. (R. at 77). In its response to this Motion, Appellee took the position that there was no such willful discovery violation as it plainly showed to the Circuit Court that both parties had agreed to hold the inspections following hearings in the County Court replevin matter.⁵

⁵ Unfortunately, both of these inspections were unable to be completed due to Appellant's October 7, 2010 hearing on its Amended Verified Complaint for Replevin being cancelled and the County Court having ruled only three days after the April 11, 2011 hearing on the same..

(R. at 116). Further, it was, and still is, Appellee's position that the relief sought by the Appellant in its Motion to Dismiss was contrary to fact and law in that outright dismissal was an inappropriate remedy.

Under Mississippi law, outright dismissal for an alleged failure to comply with discovery is only justified "under the most extreme circumstances." *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385, 1388 (Miss. 1997); see also *White v. White*, 509 So.2d 205, 208 (Miss. 1987) (finding that cases where the imposition of ultimate sanctions are indeed rare). This Court in *Pierce* adopted the four factor inquiry from the Fifth Circuit in order to determine when a case should be dismissed for discovery violations: (1) when the failure to comply with the court's order results from willful or bad faith and not from the inability to comply; (2) when the deterrent value of Rule 37 cannot be substantially achieved with less drastic sanctions; (3) when the other party's preparation for trial was substantially prejudiced; and (4) when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders. *Id.* (quoting *Batson v. Neal Spelce Assocs, Inc.*, 762 F.2d 511, 514 (5th Cir. 1985)).

As shown in factors one and four above, the key to the *Pierce* factors is that dismissal is only warranted when a party fails to comply with a court order. In this case, the Circuit Court never entered any order compelling Appellee to provide the Excavator for inspection, and in fact, Appellant never argued this motion before the Circuit Court. The Circuit Court denied Appellant's motion based upon the arguments present in Appellant's motion and Appellee's Response thereto. Surely Appellee cannot fail to comply with a court order that never existed.

Further, Appellant's reliance on *Chambers v. Brown*, No. 2010-CA-00845-COA (Miss. App. July 26, 2011) to circumvent the *Pierce* factors that a party be in non-compliance with a court order is inapplicable to this case. In *Chambers*, the Court of Appeals determined that dismissal was an appropriate sanction for a party who knowingly perjured herself during her deposition testimony.⁶ *Id.* at ¶ 21. This case is completely distinguishable from *Chambers*. Appellee has never offered false testimony or otherwise misrepresented any facts to the courts. In short, there is absolutely no basis to support Appellant's claim that dismissal is appropriate.

Accordingly, because there is no evidence in the record of any bad faith or willful refusal on the part of Appellee and no evidence of any failure to comply with a court order, Appellee respectfully requests that this Honorable Court deny the relief sought by the Appellant and affirm the opinion of the lower court.

III. The Circuit Court Committed no Error in Granting Appellee's Motion for Summary Judgment

In its December 5, 2011 Order, the Circuit Court properly granted Appellee's Motion for Summary Judgment and held that Appellee had a mechanic's lien on the Excavator for the labor and repairs on the subject Excavator and that the amount of the mechanic's lien would include towing charges, repair charges and accumulated storage fees and attorneys fees. For the reasons set forth below, the Circuit Court committed no error on any of the

⁶ In fact, each case cited in *Chambers* in support of dismissal without violation of court order involved the party providing false testimony in its interrogatories, deposition, or at trial. *See, e.g., Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990, 991 (Miss. 1999); *Allen v. National R.R. Passenger Corp.*, 934 So.2d 1006, 1012-13 (Miss. 2006)

four issues now raised by the Appellant.

A. The doctrines of laches, waiver, and estoppel are inapplicable to this case as Appellee timely asserted its Mechanic's Lien⁷

Laches can be invoked to bar litigation only when the following three factors are satisfied: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *Merchants & Farmers Bank of Kosciusko v. State*, 651 So.2d 1060, 1063 (Miss. 1995). Just as in the County Court appeal, the record before this Court is clear that the doctrine of laches, and therefore waiver and estoppel, are inapplicable for the following reasons.

As shown throughout the record, Appellee was never made aware that Walters was the lessee of the Excavator until after the Appellant successfully had the Excavator abandoned from Walters' bankruptcy estate in November, 2009, and notified Appellee. (R. at 37). It is undisputed that it was Walters who requested that the Excavator be repaired to good working condition and that Appellee sought payment from Walters following the completion of these repairs. (R. at 52-53). Furthermore, it is likewise undisputed that once Appellee became aware that Walters was the a lessor of the Excavator and that Appellant was the owner, it took actions to enforce the mechanic's lien and named Appellant as a Defendant in the subject suit. (R. at 37). (R. at 6). Accordingly, there is simply no evidence that Appellant was less than diligent or guilty of any delay in pursuit its lien claim.

Appellant's additional arguments that Mississippi's lien statutes prescribe a finite time period to notice and assert a claim are without merit. Likewise, Appellant's argument

⁷ This exact same issue is brief in full in Appellee's Brief, Case No. 2011-CA-01469-COA, § II.C, at pp. 15-16, in the consolidated, companion case to this appeal.

that the mechanic's lien statutes, Miss. Code Ann. § 85-7-101, requires notice to the owner of the equipment is a complete fabrication. Contrary to Appellant's representation, Miss. Code Ann. §§ 85-7-101 does not require that the owner or other interested parties be placed on notice prior to filing a suit to enforce the lien. In fact, under this statute and in accordance with Miss. Code Ann. § 85-7-107, Appellee went above and beyond its requirements by notifying Appellant in its December 11, 2009 letter that it would be then be asserting its mechanic's lien against the Appellant and provided it with notice that it would be filing suit if the lien was not satisfied. (R.. at 37). Appellant did not satisfy the lien and the subject suit was filed.

Accordingly, Appellee respectfully requests that this Honorable Court deny the relief sought by the Appellant and affirm the ruling of the Trial Court.

B. The Trial Court committed no error in entering a findings of fact and conclusions of law

Appellant now asserts that the Circuit Court somehow misapplied the standards for summary judgment under Rule 26 of the M.R.C.P. The basis for Appellant's argument is that by entering a findings of fact and conclusions of law that the Circuit Court erred in failing to view all evidence in a light more favorable to the Appellant. While findings of fact are only required in cases arising under Rule 52 of the M.R.C.P., the inclusion of findings of fact and conclusion of law in a motion for summary judgment is not uncommon. *See, e.g., Jones v. Ballard*, 573 So.2d 783, 786 (Miss. 1990) (suggesting that the better practice for an order granting summary judgment include an explanation of its rationale). As such, this argument has no merit, and Appellant has cited no case law in support of its assertion.

Accordingly, Appellee respectfully requests that this Honorable Court deny the relief

sought by the Appellant and affirm the ruling of the Trial Court.

C. The issue of “caveat emptor” was never raised by Appellant at the Trial Court and as such may not raise this issue on appeal. However, the Trial Court applied the proper standard in determining that Appellee maintained an enforceable mechanic’s lien⁸

Appellant now argues that the Circuit Court was erroneous in failing to apply a “caveat emptor” approach in determining whether Appellee had an enforceable mechanic’s lien. Appellant never raised this issue in any motions, pleadings, briefs, or oral arguments before the Circuit Court and has raised this issue for the first time on this appeal.⁹ As such, this Court should refuse to consider this issue for the first time on appeal.

Assuming, *arguendo*, that this Court elects to consider this issue, it is longstanding Mississippi law that under the mechanic’s and materialman’s lien statutes, a repairman is allowed to retain possession of the repaired property if he has a lien on it until this lien is satisfied provided that the owner has consented, either expressly or implicitly, to the subject repairs *Huntley v. Drummond*, 85 So.2d 188, 189-90 (Miss. 1956). This Court has gone on to state that implied consent may be inferred when an owner, by virtue of a lease agreement, is aware of or requires that the subject equipment be maintained in a reasonable and operational condition. *J.A. Broom & Sons v. S.S. Dale & Sons*, 67 So. 659, 661 (Miss.

⁸ Again, this exact same issue is brief in full in Appellee’s Brief, Case No. 2011-CA-01469-COA, § II.A, at pp. 9-10, in the consolidated, companion case to this appeal.

⁹ See Appellant’s Response to Motion for Summary Judgment (R. at 59) and Transcript from Appellee’s Motion for Summary Judgment hearing (Tr. at 9)

1915); *Martin v. Broadhead*, 32 So.2d 433, 434 (Miss. 1947).

In this case, it is undisputed that the Appellant leased the Excavator to Walters and that the subject lease required Walters to maintain the Excavator in good, working order. (R. at 28-30). As such, Walters had the implied authority of Appellant to request that Appellee make reasonable and necessary repairs to return the Excavator to operation condition. It cannot be disputed that Walters did just this when prior to June 1, 2008, it authorized Appellee to make these repairs and that these repairs did in fact return the Excavator to a working condition. (R. at 47-48, 52-53).

Accordingly, because this issue was never raised before the Circuit Court, this Court cannot consider this issue which is now being raised for the first time. Nonetheless, even if this Court elects to hear this issue, the Appellee was authorized to make the repairs and this Court should affirm the ruling of the Trial Court.

D. Appellant provided no genuine issues of material fact that would have precluded the granting of Appellee's Motion for Summary Judgment

In Mississippi, in order to maintain a mechanic's lien, the repairs must be reasonable and necessary in order to keep the equipment in proper operating condition. *See, e.g., Funchess v. Pennington*, 39 So.2d 1, 1 (Miss. 1949); *Miss. Motor Finance Inc. v. Thomas*, 149 So.2d 20,24 (Miss. 1963).

In support of its Motion for Summary Judgment and in showing that the repairs performed on the Excavator were reasonable, necessary, and performed in order to keep/return the Excavator to a proper working condition, Appellee provided the sworn affidavits of both Robert Burroughs, owner of Burroughs Diesel, Inc. where the repairs were

performed, and Randall Walters, lessee of the Excavator who authorized these repairs. (R. at 47-48, 52-53). In his sworn affidavit, Burroughs testified that all repairs, including the labor and materials, on the subject Excavator were performed in a reasonable manner, at a reasonable cost, and were necessary to bring the Excavator back into operating condition after being owed to Burroughs Diesel in a broken down and vandalized state. (R. at 47-48). Burroughs' affidavit continues by confirming the validity and accuracy of the itemized statement of repair costs that he provided to Walters. (R. at 47-48). In his sworn affidavit, Walters confirmed Burroughs' affidavit testimony and that Appellee did in fact repair and return the Excavator into working condition. Appellant provided no affidavits, evidence, or otherwise which rebutted or contradicted the sworn affidavit testimony of Burroughs and Walters and thus, it cannot be disputed that the Excavator was reasonably repaired and return to proper working condition.

Nonetheless, Appellant argues that these sworn affidavits are insufficient and relies upon *Funchess and Moorhead Motor Company v. H.D. Walker Auto Co.*, 97 So. 486 (Miss. 1923) to form the basis of its argument. In these two distinguishable cases, the evidence of repairs before both the trial and appellate courts consisted solely of an unsworn itemized list of repairs performed. The repairmen in both cases provided no affidavits or any other further testimony to support these itemized repairs, and as such, this Court found that the itemized list of repairs, by themselves, were insufficient to show that the repairs were reasonably necessary and returned the equipment to working condition. This is simply not the case here. The itemized statement of repairs in this case were corroborated with the sworn affidavit testimony of both the repairman (Burroughs/Appellee) and the lessee of the Excavator who requested the repairs (Walters), and both individuals swore that the repairs

were necessary and did in fact return the Excavator to working condition. As such, Appellee clearly satisfied its burden required of it to show that the repairs were necessary and reasonable, and Appellant failed to raise any genuine issues of the Circuit Court to refute these affidavits.

Finally, Appellant's argument that Walters' affidavit is insufficient due to a lack of personal and argues that because Walters never retook possession of the Excavator after the repairs that he lacks knowledge as to whether the Excavator was actually repaired. Appellant's argument is wholly without merit as it has not provided one iota of evidence that Walters lacked the personal knowledge requisite to form the foundation for his sworn affidavit testimony. In fact, Walters' affidavit testimony is precisely to the contrary of these baseless assertions. As such, Walters' affidavit is neither insufficient nor conclusory and was properly relied upon by the Circuit Court. If all had wanted to challenge the merits of either Affidavit, it could have taken the deposition of Burroughs or Walters and chose not to do so.

Accordingly, Appellee respectfully requests that this Honorable Court find that Appellee has provided no genuine issues of material fact to rebut Appellee's affidavit testimony and affirm the ruling of the Trial Court.

IV. The Trial Court Committed no Error in Awarding Appellee with Storage Fees and Attorney's Fees

In the Circuit Court's December 5, 2011 Order Granting Appellee's Motion for Summary Judgment, it recognized that Appellee has a valid and enforceable lien and granted a lien in the amount of \$54,040.02. For the reasons set forth below, the Circuit Court committed no error in including these fees as a part of Appellee's lien.

A. Appellee was entitled to an award of storage fees.

As part of the Circuit Court's Order, Appellee was granted \$30,925.00 (calculated at \$25 per day for 1,237 days) in storage fee costs. Such costs are recoverable under Miss. Code Ann. § 85-7-251, which states that reasonable storage costs can be charged when the owner of a vehicle requests that it be towed and said owner will be liable for said towing and storage costs. In this case, it is undisputed that Walters, as lessee of the Excavator, authorized that the equipment be towed to the Appellee's place of business to be repaired and thus bound himself and the Appellant to all towing and storage costs arising out of this authorization. (See Affidavit of Burroughs and Walters (R. at 47-56)).

In order for storage fees to be awarded under this statute, the vehicle towed must be a "motor vehicle" as defined by this state. Mississippi has several definitions for motor vehicles but each such definition is applicable to the Excavator in question. *See, e.g.*, Miss. Code Ann. § 63-3-103 (defining a motor vehicle as every vehicle that is self propelled but not operated upon rails); Miss. Code Ann. § 63-21-5 (defining a motor vehicle as a vehicle which may be used on the public highway and not drawn by animal power or used exclusively on stationary rails or tracks); Miss. Code Ann. § 63-15-3 (defining a motor vehicle as any self-propelled vehicle (other than traction engines, road rollers and grader, tractor cranes, power shovels, well drillers, and implements of husbandry) which is not operated upon rails).

While being a large piece of equipment, it is clear that it still falls within these definitions. It cannot be disputed that the Excavator is in fact a vehicle self-propelled via its own engine, is not pulled by any manner of husbandry, is not to be used on railroad track and is often driven on highways and shoulders of public roads during paving operations.

Furthermore, common sense would seem to dictate that the Excavator is in fact a motor vehicle that would require towing in cases of breakdown or abandonment and is subject to the same towing statutes.

Accordingly, the Circuit Court did not err in awarding storage fees for the subject Excavator and the ruling of the Trial Court should be affirmed.

B. Appellee was entitled to reasonable attorneys' fees.

Also as part of the Circuit Court's Order establishing the amount of the mechanic's lien, the Court included \$10,808.00 in attorney's fees although the Order itself does not specify the basis for allowing these fees. Appellant argues that the mechanic's lien statutes, Miss. Code Ann. §§ 85-7-101, et seq., do not authorize an award of attorney's fees and that as the prevailing party on its own Motion for Summary Judgment that Appellee is not allowed attorney's fees pursuant to Rule 56 of the M.R.C.P. While correct in this assessment, Appellant neglects to mention that Appellee successfully defended against the Appellant's Motion to Dismiss and/or Compel. As this Court is more than aware, under Rule 37(a)(4) of the M.R.C.P., a party who successfully defends against a motion to compel may recover its expenses and costs incurred in defending against the motion unless the court finds that the motion was substantially justified. In this case, the Circuit Court reviewed Appellant's Motion to Dismiss and/or Compel and ultimately entered its Order finding that the Motion was not well-taken and should be denied. (R. at 143). As such, the record is clear that Appellee was in fact entitled to an award of reasonable attorney's fees in successfully defending against the Appellant's Motion to Dismiss and/or Compel.

Accordingly, the Circuit Court did not err in awarding storage fees or attorney's fees for the subject Excavator and must deny any relief requested by the Appellant as it pertains

to this issue.

CONCLUSION

The Circuit Court was proper in maintaining jurisdiction over Appellee's Complaint to Enforce Mechanic's Lien, in finding that Appellee maintained a valid and enforceable Mechanic's Lien on the subject Excavator, in establishing the amount of the lien and in ordering a sale of the Excavator in order to satisfy this lien. The Circuit Court committed no error in finding that the sworn affidavits of both Burroughs and Walters formed a sufficient basis of proof that the repairs performed on the Excavator were both reasonable and necessary and did in fact return the Excavator to a proper working condition. Accordingly, this Court should affirm the decision of the Circuit Court.

The Circuit Court likewise committed no error in failing to find that Appellee's claims were barred by the doctrines of laches, waiver, and estoppel or should otherwise be dismissed on account of alleged willful discovery violations. The record before the Circuit Court and this Court is clear that Appellee acted within a reasonable time in asserting its lien once it discovered that the Appellant was the owner of the Excavator. The record is also clear that the Appellee committed no bad faith or willful discovery violations. Dismissal is inappropriate as Appellee was never ordered by the Circuit Court to produce the Excavator for inspection.

Further, Appellants arguments that the Circuit Court erred by failing to adhere to the Rule 56 and "caveat emptor" standards should not be considered for the first time by this Court, without merit. There is nothing in Rule 56, and otherwise which prohibits entry of findings of fact and conclusions of law. This Court has encouraged trial courts to enter such findings in order to allow the parties to understand the rationale behind the court's

decision. As Appellant never raised nor argue the issue of "caveat emptor" prior to the appeal of this matter, this issue should not be considered by this Court.

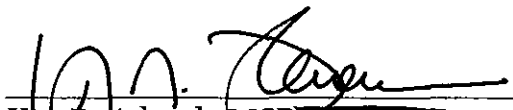

Finally, the Circuit Court committed no error in awarding storage and attorneys' fees to Appellee in its Order. The Excavator clearly matches the definition of a motor vehicle by one or more statute thereby allowing an award of storage costs under Miss. Code Ann. § 85-7-251. Further, in successfully defending against Appellant's Motion to Dismiss and/or Compel, Appellee was allowed an award of attorney's fees under Rule 37 of the M.R.C.P.

Accordingly, Appellee, Burroughs Diesel, Inc., respectfully requests that this Honorable Court affirm the decision of the Circuit Court thereby affirming that it maintains a valid and enforceable Mechanic's Lien on the Excavator and allow it to auction the Excavator for the purposes of satisfying said lien.

RESPECTFULLY SUBMITTED, this the 3rd day of July, 2012.

BURROUGHS DIESEL, INC.

By:


Ken R. Adcock, MSP 

ADCOCK & MORRISON, PLLC
199 Charmant Drive, Suite 1
Post Office Box 3308
Ridgeland, Mississippi 39158
Telephone: (601)898-9887
Facsimile: (601)898-9860

CERTIFICATE OF SERVICE

I, KEN R. ADCOCK, do hereby certify that I have this day delivered by United States mail, properly addressed and postage pre-paid, a true and correct copy of the above and foregoing pleading to:

Robert B. Ireland, III, Esq.
Watkins & Eager, PLLC
400 East Capitol Street (39201)
Post Office Box 650
Jackson, Mississippi 39205

Hon. Billy Joe Landrum
Circuit Court of Jones County
Post Office Box 685
Laurel, Mississippi 39441

SO CERTIFIED, this the 3rd day of July, 2012.



KEN R. ADCOCK