

## IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2015-CA-660

DENHAM LAW FIRM, PLLC

APPELLANT

v.

KIMBERLY ANN SIMMONS

APPELLEE

APPELLANT'S BRIEF  
ORAL ARGUMENT REQUESTED

Alexander Ignatiev, Esq.  
MSB No. 100431  
PO Box 2076  
Hattiesburg, MS 39403-2076  
(601) 914-5660  
(601) 583-2641 facsimile  
ignatievlaw@gmail.com

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2015-CA-660

DENHAM LAW FIRM, PLLC

APPELLANT

v.

KIMBERLY ANN SIMMONS

APPELLEE

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. Hon. Hollis McGehee, Special Chancellor
2. Kristopher Carter, Esq., attorney for Kimberly Ann Simmons
3. Albert Jordan, IV, Esq., attorney for Kimberly Ann Simmons
4. Earl Denham, Esq., attorney for Denham Law Firm, PLLC
5. Alexander Ignatiev, Esq., attorney for Denham Law Firm, PLLC

---

Alexander Ignatiev, Esq.  
Attorney for Appellant Denham Law Firm, PLLC

## TABLE OF CONTENTS

Certificate of Interested Persons	2
Contents	3
Table of Authorities	4
STATEMENT OF THE ISSUES	6
STATEMENT OF THE CASE	7
COURSE OF PROCEEDINGS	8
STATEMENT OF FACTS	9
SUMMARY OF THE ARGUMENT	11
ARGUMENT	14
1. The Chancellor erred as a matter of law when he rewrote the contract between Denham Law and the Beneficiaries without legal justification.	16
2. The Chancellor erred as a matter of law by not finding that Carter and Jordan owed Denham Law a fiduciary duty and that they had breached it.	20
3. The Chancellor erred as a matter of law in failing to disqualify Carter and Jordan from representing the Beneficiaries in this case.	23
4. The Chancellor erred as a matter of law in not finding that the Beneficiaries had no cause of action against Denham Law.	25
CONCLUSION	27

## TABLE OF AUTHORITIES

### CASES

<i>A&amp;F Properties, LLV v. Madison County Bd. Of Sup'rs,</i> 933 So. 2d 296 (Miss. 2006)	25
<i>Beezley v. Beezley,</i> 917 So. 2d 803 (Miss. Ct. App. 2005)	23
<i>Bott v. Wood,</i> 56 Miss. 136, 140 (1878)	25
<i>Boyles v. Schlumberger Tech. Corp.,</i> 832 So. 2d 503 (Miss. 2002)	15
<i>City of Starkville v. 4-County Elec. Power Ass'n.,</i> 819 So. 2D 1216 (2002)	17
<i>DeLaughter v. Lawrence County Hospital,</i> 601 So. 2d 818 (Miss. 1992)	25
<i>Dixie South Ind. Coating, Inc. V. Miss. Power Co.,</i> 872 So. 2d 769 (Miss. Ct. App. 2004)	16
<i>Graves v. Dudley Maples, L.P.,</i> 950 So. 2d 1017 (Miss. 2007)	23-4
<i>Home Base Litter Control, LLC v. Claiborne County,</i> 2014-CA-00068 (Miss. Ct. App. 2015)	16
<i>Meinhard v. Salmon,</i> 249 N.Y. 458 (NY Ct. App. 1928)	21-2
<i>Pittman v. Currie,</i> 414 So. 2d 423 (Miss. 1982)	23

### COURT RULES

Miss. R. Civ. Pro. 56	14
-----------------------	----

## **OTHER AUTHORITIES**

<i>Ethics Opinion No. 76</i>	23
<i>Ethics Opinion No. 144</i>	20
Shelson, James W. <i>Mississippi Chancery Practice</i> , 2.24 (2014)	17

## **STATEMENT OF THE ISSUES**

- 1. The Chancellor erred as a matter of law when he refused to award Denham Law the contingency fee it was entitled to under the contracts.**
- 2. The Chancellor erred as a matter of law by not finding that Carter and Jordan owed Denham Law a fiduciary duty and that they had breached it.**
- 3. The Chancellor erred as a matter of law in failing to disqualify Carter and Jordan from representing the Beneficiaries in this case.**
- 4. The Chancellor erred as a matter of law in not finding that the Beneficiaries had no cause of action against Denham Law.**

## STATEMENT OF THE CASE

Four of the wrongful death beneficiaries and heirs-at-law of Kimberly Ann Simmons retained Denham Law Firm PLLC to represent them, signing a standard 40% contingency fee contract that included a clause for an additional attorneys' lien for fees and costs. Record p. 8-12. After the contract was signed, but before the case was resolved, Earl Denham, the principal of Denham Law Firm, PLLC fired Kristopher Carter and Albert Jordan, his former associates. Record p. 83. Unbeknownst to Denham, Carter and Jordan took the Simmons case with them, and after settlement filed a declaratory judgment action on behalf of the Simmons plaintiffs against Denham Law Firm, PLLC, to apportion attorney's fees. *Id.* The special Chancellor granted summary judgment and held that Denham Law Firm, PLLC, was only entitled to recover a lien for hours spent on the case and costs expended, instead of the contingency fee for the case. Record p. 94-5. Denham Law Firm, PLLC, appealed. Record p. 116.

## **COURSE OF PROCEEDINGS**

The Wrongful Death Beneficiaries and Heirs-at-Law of Kimberly Ann Simmons ("Beneficiaries") filed their Complaint for a Declaratory Judgment on July 23, 2014 in the Chancery Court of Jackson County, Mississippi. Record, p.1. The Judges of the Chancery Court of Jackson County recused themselves on July 28, 2014. Record p. 15. Denham Law Firm, PLLC,("Denham Law") filed a Motion to Dismiss on July 31, 2014. Record p. 19. This Court appointed Hon. Hollis McGehee special Chancellor for this cause on August 8, 2014. Record p. 19. Denham Law filed a Motion for Disqualification of Beneficiaries' counsel on September 19, 2014. After brief discovery, the special Chancellor heard oral argument on October 3, 2014 on the Motion for Summary Judgment and related motions, and ruled on the Motion for Disqualification on October 17, 2014. Record, p. 93. The Chancellor granted summary judgment for the Beneficiaries on January 22, 2015. Record p. 94. Denham Law filed its Motion to Reconsider under Rule 59 on February 2, 2015. Record p. 96. The Court heard argument on March 10, 2015, and entered a Final Judgment on March 20, 2015. Record p. 114. Denham Law timely appealed on April 17, 2015. Record p. 116

## STATEMENT OF FACTS

Earl Denham, Esq. ("Earl") is the President and partner of Denham Law Firm, PLLC, ("Denham Law") located in Ocean Springs, Jackson County, Mississippi. Record P. 81. He hired Kristopher W. Carter, Esq. ("Carter") on or about July 2, 2007, and Albert R. Jordan, IV, Esq., ("Jordan") on or about April 8, 2010, to work for Denham Law. Id. Carter and Jordan were employees of Denham Law, and never bore any costs of operation nor were ever made partners. Record p. 82. They were paid substantial salaries over their employment with Denham Law, which included the time that Simmons and her Beneficiaries hired Denham Law to represent them. Id. They did receive a 5% profit share in all fees generated by the firm, and a 10% fee paid on cases they brought to the firm. Id.

Earl's law partners passed away after Hurricane Katrina, and Earl tried to arrange a buyout option so that Carter and Jordan could take over Denham Law. Id. Earl, Carter, and Jordan were unable to come to terms, and because of this, Earl terminated Carter and Jordan's employment on September 12, 2013. Record p. 83. Immediately after Earl let Carter and Jordan go, he underwent heart surgery at the Cleveland Clinic in Cleveland, Ohio. Id. While Earl was in surgery and recovery, Carter and Jordan obtained confidential firm information, including case files and other intellectual property of Denham Law from two Denham Law employees. Id. Denham Law immediately notified their clients of Carter and Jordan's departure in writing, while simultaneously Carter and Jordan were soliciting clients from Denham Law. Id.

Kimberly Ann Simmons ("Simmons") originally executed her contingency fee

agreement with Denham Law in 2010 for a personal injury case, agreeing to pay Denham Law 40% of the award in her case, and granting Denham Law a lien for fees and costs. Id. Carter was the attorney at Denham Law who met with Simmons. Record pp. 60, 84. Simmons later passed away, and her wrongful death beneficiaries Savannah Simmons, David M. Nelson, Jr., Misty Loper, and Anthony Nelson, all signed similar contingent fee contracts with Denham Law through Carter, who at all times was an employee of Denham Law. Record pp. 8-12, 84. Denham Law filed suit on behalf of Simmons's Beneficiaries in the Circuit Court of Harrison County on August 22, 2012, which suit later was removed to the United States District Court for the Southern District of Mississippi on January 7, 2013. Id.

Carter and Jordan took over the Simmons case while Earl was incapacitated, and settled it, and the Beneficiaries were at the time entitled to receive their monies, irrespective of the fee dispute between the attorneys. Record p. 85. Although Carter asserted at the trial of this cause that Carter and Jordan had a contract with the Beneficiaries, no evidence was ever adduced regarding its terms, or indeed its existence, beyond an assertion that Carter and Jordan had a forty per cent fee. Transcript p. 40, 48. The special Chancellor ruled that despite the fact that the Beneficiaries had a valid contract with Denham Law for a 40% contingency fee, Denham Law was only entitled to recover its actual time spent on the file and its actual expenses, awarding the balance of the fee to Carter and Jordan, without any review of their effort, costs, or time expended after their departure from Denham Law.. Record p. 94-5.

## **SUMMARY OF THE ARGUMENT**

This Court reviews grants of summary judgment de novo. In this case, Denham Law presents the Court with four issues:

- 1. The Chancellor erred as a matter of law when he refused to award Denham Law the contingency fee it was entitled to under the contracts.**
- 2. The Chancellor erred as a matter of law by awarding Denham Law only the value of its lien.**
- 3. The Chancellor erred as a matter of law in failing to disqualify Carter and Jordan from representing the Beneficiaries in this case.**
- 4. The Chancellor erred as a matter of law in not finding that the Beneficiaries had no cause of action against Denham Law.**

This case concerns contract interpretation, and under Mississippi law this Court must interpret a contract within its own four corners. But in this case there are in fact two contracts: the first, a written attorneys' fee agreement between the Beneficiaries and Denham Law, and the second, an implied attorney's fee agreement between Carter and Jordan and the Beneficiaries. This second contract itself, whether written or not, arises out of Carter and Jordan's employment by Denham Law. The two contracts are intertwined, precisely because of how Carter and Jordan came to represent the Beneficiaries. However, the contractual duties between Carter and Jordan and the Beneficiaries are apparently not reduced to writing, and involve no fees due the beneficiaries. The only written contract is the contract between Denham Law and the Beneficiaries, and it does not govern the duties existing between the two attorney firms

under such circumstances, and therefore the Summary Judgment of the Chancellor for Carter and Jordan should be reversed.

The contract between Denham Law and Simmons, and later her Beneficiaries, recited not just a lien, but also an assignment unto Denham Law an undivided 40% interest in and to all of the clients' claims and all sums recovered on their behalf. This second paragraph of the contract was separate from the third paragraph that included the lien language. The third paragraph asserting the lien included the following sentence: "This paragraph shall survive any termination of this contract for any reason." The paragraph regarding the assignment of the contingent fee had no such language. The Chancellor ruled that the contract between Denham Law and the beneficiaries only asserted a lien for the value of Denham Law's services actually performed and all costs, advances, and expenses, effectively writing out the assignment of 40% of the sums received for the beneficiaries' claims, but he failed to consider the respective contributions of each firm. This modification of the contract occurred without legal justification. Further, the ruling wholly ignores the duties certainly arising and the division of fees between the two firms arising as a result of Carter and Jordan's settling of a claim originating from and being worked at Denham Law during a time while they were paid to work on that very file, as well as others.

Because this information essential to the claims in this case could only be adduced from Carter and Jordan, making them material witnesses as well as parties in interest in the outcomes, the Chancellor should have disqualified them from representing the Beneficiaries in this case. Further, the relief granted in this case ignores the fact that

Carter and Jordan removed the file after their departure without an accounting of the value of their work to Denham Law on this case nor a showing of what they did after removal, their time, and their expenses.

Because the Chancellor selectively enforced the contract between Denham Law and the Beneficiaries; because the Chancellor failed to find that Carter and Jordan owed Denham Law a fiduciary duty and had breached it; because the Chancellor did not disqualify Carter and Jordan from representing the Beneficiaries, even though they were parties in interest as to the outcome and necessary and material witnesses as to the existence and terms of the alleged contract between Carter and Jordan and the Beneficiaries; and because the Chancellor did not find that the Beneficiaries had no claims against Denham Law, this Court should reverse and render the decision of the Chancellor and award the entire value of the contract to Denham Law. Be it recalled that the Simmonses neither personally appeared in the courtroom nor testified.

## ARGUMENT

This Court should reverse the judgment of the Chancery Court of Jackson County, and render a judgment to award to Denham Law the attorneys' fees earned in the Beneficiaries' case, and grant to Carter and Jordan their quantum meruit fees; alternatively, this Court should remand this matter for a trial on the merits, to allow appropriate discovery and to bring all the evidence to bear on this case. Whichever remedy this Court elects, this Court should do so because the grant of summary judgment for the Beneficiaries was not justified as a matter of law.

Summary judgment is appropriate when there are no disputed material facts such that a neutral fact finder could not find for the non-moving party. MRCP 56(c). The Chancery Court of Jackson County granted summary judgment on an attorney's fee contract between Denham Law and the Beneficiary, ruling that Denham Law was entitled only to a lien on its actual hourly fees and costs associated with the Beneficiaries' wrongful death case. The Court did not explain why the 40% contingent fee did not persist after the Beneficiaries were not released, but were solicited by firm employees who had been discharged. The Court declined to disqualify Carter and Jordan, who were necessary witnesses to this case, as well as parties in interest, from representing the Beneficiaries; and the Court did not address the issue of Carter's and Jordan's breaches of fiduciary duty to Denham Law and the Beneficiaries. The Chancery Court of Jackson County did not interpret the contract as a whole, but rather cherry picked a single paragraph to reach its decision. The Chancery Court of Jackson County did not explain the legal justification for eliding all other provisions from the contract except the

attorney's lien paragraph. The Chancery Court of Jackson County in fact made only one finding of fact, and one conclusion of law, and on that basis deprived Denham Law of its fair day in court.

This Court reviews grants of summary judgment de novo. *Boyles v. Schlumberger Tech. Corp.*, 832 So. 2d 503, 506 (¶5) (Miss. 2002).

In this case, Denham Law presents the Court with four issues:

- 1. The Chancellor erred as a matter of law by modifying the terms of the contract between Denham Law and the Beneficiaries without legal justification.**
- 2. The Chancellor erred as a matter of law by not finding that Carter and Jordan owed Denham Law a fiduciary duty and that they had breached it.**
- 3. The Chancellor erred as a matter of law in failing to disqualify Carter and Jordan from representing the Beneficiaries in this case.**
- 4. The Chancellor erred as a matter of law in not finding that the Beneficiaries had no cause of action against Denham Law.**

**1. The Chancellor erred as a matter of law by modifying the terms of the contract between Denham Law and the Beneficiaries without legal justification.**

Questions of contract law are reviewed de novo. *Dixie South Ind. Coating, Inc. V. Miss. Power Co.*, 872 So. 2d 769, 772 (Miss. Ct. App. 2004). The contracts between Denham Law and Simmons, and later her Beneficiaries, recited not just a lien, but also assigned unto Denham Law an undivided 40% interest in and to all of their claims and all sums recovered on their behalf. *Supra*, p. X. This paragraph of the contract was separate from the paragraph that included the lien language. The paragraph asserting the lien included the following sentence: "This paragraph shall survive any termination of this contract for any reason." The paragraph regarding the contingent fee had no such language.

The complaint in this cause sought a declaratory judgment that the contract is valid and binding. R. At 83. Mississippi adheres to the four corners rule when interpreting contracts:

[W]e first look to the "four corners" of the contract to determine its meaning. We may only go beyond the four corners if the contract is ambiguous, and if we cannot harmonize its provisions with the parties' apparent intent. If the contract is unambiguous, it will be enforced as written.

*Home Base Litter Control, LLC v. Claiborne County*, 2014-CA-00068 (¶20) (Miss. Ct. App. 2015) (internal citations omitted).

The Chancellor had no justification to sever the paragraph containing the assignment of fees from the contract, and in fact found the contract unambiguous. Therefore, the Chancellor was obligated to enforce the entire contract.

The Chancellor ruled that the contract between Denham Law and the beneficiaries only asserted a lien for the value of Denham Law's services actually performed and all costs, advances, and expenses, effectively writing out the assignment of 40% of the sums received for the beneficiaries' claims. This modification of the contract occurred without legal justification and without precedent and totally ignored the totality of the circumstances under which Carter and Jordan obtained the case.

Equity follows the law. Shelson, *Mississippi Chancery Practice* 2.24 (2014). "A court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous." *City of Starkville v. 4-County Elec. Power Ass'n.*, 819 So. 2d 1216, 1220 (¶10) (2002). The determination of the Chancery Court of Jackson County was that the contract between Denham Law and the Beneficiaries was unambiguous. Record, 94-5. The Chancellor then denied Denham Law its unambiguous 40% contingent fee. *Id.* Or to make any equitable appointment thereof.

The general rule is that an attorney's representation of a client may be terminated by either the client or attorney under almost any circumstances. *Ethics Opinion No. 144*. However, a terminated attorney is entitled to recover any reasonable fee for his services, and is not limited to quantum meruit recovery. *Id.* The quantum meruit rule is a safe harbor, ethically; however, any fee proven reasonable before a court may be recovered by the terminated attorney. *Id.*

Denham Law knows of no case wherein an unambiguous contract may be partially rewritten by a court in a declaratory judgment action. The contract contains no severance clause; there are no allegations or evidence that it is unconscionable or otherwise against public policy; and there are no allegations that the contract is impracticable or impossible. In fact, there is no legal basis for any court to modify this contract in any way.

What occurred in this case is simple, and the facts uncontested: Earl Denham fired two associates. While he was having heart surgery and recovering from it, those two former associates induced at least two employees of Denham Law to convert files from Denham Law to Carter and Jordan and solicited Denham's clients. Denham Law paid Carter and Jordan; these two non-members were paid handsomely for their work until Carter and Jordan rejected an opportunity to negotiate a buyout of Denham Law from Earl. Then they purloined what they would not deign to purchase. The Chancery Court of Jackson County's decision ratified the solicitation of Denham Law Firm's clients by doing away with an entire paragraph of a contingent fee contract and by ignoring the totality of the circumstances as pleaded by Denham Law when it answered the complaint.

This ruling is a result that should leave all practitioners before the bar terrified. A court of equity has rewarded two former law firm associates who literally stole the intellectual property of Denham Law along with fees that were earned based upon the reputation and character of Earl Denham. This was no arms-length transaction, and to this date, there is not a scintilla of evidence in the record that supports Carter and Jordan's receiving any fee at all for their alleged services, other than the fact that they solicited the

clients of their employer.

This Court should reverse and render, awarding the entire contingent fee to Denham Law.

**2. The Chancellor erred as a matter of law by not finding that Carter and Jordan owed Denham Law a fiduciary duty and that they had breached it.**

Carter and Jordan were employees of Denham Law when Simmons and later her Beneficiaries retained Denham Law. Carter and Jordan as employees of Denham received a salary and bonuses and extensive perks, plus 5% of fees earned in a case assigned to them that they worked but did not bring in, or 10% of fees in a case that they brought in. R. At 104. It is not disputed that the reason that Simmons and her Beneficiaries retained Denham Law because of Earl's reputation as a trial attorney, and his record and reputation in the community. Nor is it disputed that Carter and Jordan were discharged from Denham Law after refusing to negotiate a buyout of Earl's practice, and that they then started representing a number of Denham Law's former clients. *Supra*.

The duty of Carter and Jordan to Denham Law is a mixed matter of ethics and law. *Ethics Opinion No. 144*. In particular, the question of their duty to protect Denham Law's fee is dependent entirely on the nature of their contract with the Beneficiaries. *Id.* The contract between Carter and Jordan and the Beneficiaries is not part of this appeal record; however, since Carter and Jordan filed the declaratory judgment on behalf of the Beneficiaries regarding the lien of Denham Law, this Court should find that they are judicially estopped from asserting that they had no duty to protect the clients' obligations to pay Denham Law. *Id.*

Carter and Jordan owe a fiduciary duty to Denham Law to protect the fees of Denham Law. The fee earned by Denham Law is one subject to an expectation of reasonableness, not the prevention of unreasonableness, as Carter argued. T. 42-3.

Importantly, the Chancellor did not find that the contingent fee was unreasonable in any way. R. 94-5. The Chancellor simply ignored that paragraph of the contract.

The gold standard description of the role of a fiduciary is found in *Meinhard v. Salmon*, 249 N.Y. 458 (NY Ct. App. 1928). In *Meinhard*, the parties found themselves lashed to each other in an unenviable joint venture subject to the whims of third parties involving real estate development in Manhattan. *Meinhard*, 249 N.Y. at 462-4. Meinhard was the passive investor in the project, and Salmon the manager of the project. *Id.* Salmon found himself in a position to profit from his managerial position with a new property owner, and excluded Meinhard from the deal. *Id.* This is directly analogous to the factual circumstances in this case:

Carter and Jordan were the associates working on the Simmons case, and during the time that they worked for Denham Law, they were paid in full for their services. While Earl was incapacitated, after he had terminated Carter and Jordan from Denham Law, Carter and Jordan acquired the Simmons case from Denham Law, where the Beneficiaries had signed up Denham Law as their counsel upon recommendation from third parties and of their own volition, as stated in the contracts. R. 8-12.

To the extent that Carter and Jordan obligated themselves to preserve Denham Law's fees in the underlying matter, Carter, Jordan, and Denham Law were "coadventurers, subject to fiduciary duties akin to those of partners." *Meinhard*, 249 N.Y. 458 at 462. Then Chief Judge Benjamin Cardozo goes on to explain that "[m]any forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties...[n]ot honesty alone, but the punctilio of an honor the

most sensitive, is then the standard of behavior." *Id.* At 464. Through the Chancellor's ruling, a "healing benediction" is cast upon the misbehavior of Carter and Jordan, and this is an error that this Court should reverse.

The contract between Carter and Jordan and the Beneficiaries, if it exists, is not part of the record, and in fact, there is no competent evidence that such a contract exists beyond a bare representation that Carter and Jordan are authorized counsel for the Beneficiaries in this matter. Therefore, the Court should reverse and render, finding that there was no contract between Carter and Jordan and the Beneficiaries, and award the entire contingent fee to Denham Law, or at the least remand for discovery and trial.

**3. The Chancellor erred as a matter of law in failing to disqualify Carter and Jordan from representing the Beneficiaries in this case.**

Carter and Jordan here represented the Beneficiaries while being necessary witnesses and parties in interest in this matter in violation of Rule of Professional Conduct 3.7(a)(1). An attorney may not act as an advocate in a trial when he "is likely to be a necessary witness except where the testimony related to an uncontested issue." *Id.* In this cause, a major factual and legal concern is the nature of the contract between Carter and Jordan and the Beneficiaries. *See Question Presented II, supra.* Of particular interest is the matter of whether Carter and Jordan obligated themselves to preserve Denham Law's fees in their contract with the Beneficiaries, or even, if Carter and Jordan had a contract with the Beneficiaries at all. *See Ethics Opinion No. 76.*

To the extent that the contract is not in the record, and Carter appears to have testified about it, he is a necessary witness and cannot ethically represent the Beneficiaries. A written contract that is unambiguous is not subject to interpretation, and is in fact the best evidence of the intent of the contracting parties. *See Beezley v. Beezley*, 917 So. 2d 803, 807 (¶14) (Miss. Ct. App. 2005). The failure of the Plaintiffs to introduce the contract between the Plaintiffs and Carter and Jordan essentially makes it impossible for this Court to sustain the Chancellor's determination regarding fees, and equally impossible for Carter and Jordan to represent the Beneficiaries in this cause, as they are necessary witnesses to a contested fact. *Pittman v. Currie*, 414 So. 2d 423, 427 (Miss. 1982). This Court has held consistently that the preference is for the testimony of the attorney, and not for his advocacy. *Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017, 1023-

24 (¶¶24-7) (Miss. 2007). In *Graves*, Darwin Maples, who had served as the attorney for Dudley Maples, was found to be a necessary witness; accordingly, the Court barred him from serving as the advocate for Dudley Maples, favoring the testimony of an attorney over his role as advocate. *Id.* That is the decision the Chancellor should have made here, and did not, and this constitutes reversible error.

Denham Law pleaded that “The law firm of Carter and Jordan, PLLC, and its members Kristopher Carter and Albert R. Jordan, III, are by filing this action attempting to utilize clients, former and present, of both firms to sue the [Denham Law] solely in an effort to further their own interests in fee division dispute between the two law firms.” The Court could render no summary judgment without addressing the issue of whether or not 1.) The Plaintiffs were in actuality suing the Defendant, and 2.) The plaintiffs had suffered any damage on withholding of fees because of the Defendant’s actions.

**4. The Chancellor erred as a matter of law in not finding that the Beneficiaries had no cause of action against Denham Law.**

Mississippi's courts have no jurisdiction over matters not in actual controversy. *A&F Properties, LLV v. Madison County Bd. Of Sup'rs*, 933 So. 2d 296, 302 (¶15) (Miss. 2006). Although Carter testified that there was some sort of contract between Carter and Jordan and the Beneficiaries, they introduced no writing evidencing any agreement of the kind. The record is silent as to anything regarding the agreement. There are no affidavits, no emails, text messages, letters, handwritten notes, or memoranda of any kind. Under Mississippi law, this should weigh against Carter and Jordan. *See DeLaughter v. Lawrence County Hospital*, 601 So. 2d 818, 822 (Miss. 1992) (citing *Bott v. Wood*, 56 Miss. 136, 140 (1878): "The principle of the maxim *Omnia praesumuntur in odium spoliatoris*, as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises a presumption that the document would, if produced, militate against the party destroying or suppressing it, and that his conduct is attributable to this circumstance, and, therefore, slight evidence of the contents of the instrument will usually, in such a case, be sufficient.")

Nor was Carter's statement regarding the agreement alleged between Carter and Jordan and the Beneficiaries sufficiently definite to allow the Chancellor to determine how much money Carter and Jordan were entitled to, and how much money Denham Law was entitled to. The Chancellor conducted no inquiry into the nature of the agreement between Carter and Jordan and the Beneficiaries.

Had the Chancellor done so, there might have been evidence to support his

interpretation of the contracts. The fact remains that the terms of whatever contract exists between the Beneficiaries and Carter and Jordan were and are unknown. The Chancellor never even saw evidence of such a contract beyond Carter's bare assertion about it. The Chancellor erred both as a matter of law, and on the facts.

What is apparent from the record is that Plaintiffs suffered no damage and had no cause of action against Denham Law. The sole dispute over the division of fees exists exclusively between the two law firms and never was, or should be of concern to, or have any effect on the Plaintiffs in the slightest way.

## CONCLUSION

The Chancellor erred in granting Summary Judgment to the Plaintiffs on this declaratory judgment action. The Chancellor found that Denham Law's contract with the Beneficiaries was unambiguous, but only enforced a portion of it, without any findings supporting that decision. The Chancellor also failed to hold that Carter and Jordan had a fiduciary duty to preserve Denham Law's fees. The Chancellor declined to bar Carter and Jordan from representing the Beneficiaries in this cause, even though they were necessary witnesses and actual parties in interest on a contested matter. Finally, the Chancellor erred in not finding that the Beneficiaries had no actual dispute with Denham Law, no cause of action.

These manifold errors of fact and of law merit reversal of the granting of Summary Judgment. This Court should reverse and render, ordering that Denham Law is entitled to recover its entire 40% contingency fee, because there is no evidence that Carter and Jordan had a contract to represent the Beneficiaries. In the alternative, this Court should reverse and remand for further fact-finding to determine whether Carter and Jordan had a contract with the beneficiaries, and the nature of that contract, as well as ordering that Carter and Jordan are necessary witnesses and therefore cannot serve as advocates for the Beneficiaries, and to further determine the claims of the Defendant, Denham Law, for sanctions and damages as pleaded pursuant to Rule 12 and the Mississippi Litigation Accountability Act.

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2015-CA-660

DENHAM LAW FIRM, PLLC

APPELLANT

v.

KIMBERLY ANN SIMMONS

APPELLEE

CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellants, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a copy of the foregoing Brief of the Appellants to the following:

Hon. Hollis McGehee  
Special Chancellor  
P.O. Box 1587  
Ocean Springs, MS 39566

Kristopher W. Carter, Esq.  
Albert R. Jordan, IV, Esq.  
1101 Iberville Drive  
Ocean Springs, MS 39564  
[kris@carterjordanlaw.com](mailto:kris@carterjordanlaw.com)  
[al@carterjordanlaw.com](mailto:al@carterjordanlaw.com)  
(228) 202-1108

*Attorneys for Appellee*

THIS the 2d day of December, A.D. 2015.

---

ALEXANDER IGNATIEV