E-Filed Document Apr 13 2017 13:52:28 2016-CA-01532 Pages: 40

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SAMUEL ANDREW JOHNSON
AND WIFE, KATHY JOHNSON **APPELLANTS**

VS. **NO.: 2016-TS-01532**

WYTHE RHETT, IN HIS INDIVIDUAL CAPACITY **APPELLEE**

BRIEF OF APPELLANTS

Oral Arguments requested.

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IN THE SUPREME COURT OF MISSISSIPPI
MISSISSIPPI COURT OF APPEALS

SAMUEL ANDREW JOHNSON AND WIFE, KATHY JOHNSON **APPELLANTS**

VS. **CAUSE NO.: 2016-CA-01532**

WYTHE RHETT, in his individual capacity **RESPONDENT**

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 Supreme Court of Mississippi or the Court of Appeals for the State of Mississippi may evaluate possible disqualification or recusal.

1. Cam Auerswald, Cam Auerswald Attorney at Law, Attorney for the Appellee

2. Jack Hayes, Stone and Hayes, Attorney for the Appellee

3. Jeffrey C. "Jeff" Smith, Sims & Sims, Attorney for the Appellant

4. Courtney B. "Corky" Smith, Sims & Sims, Attorney for the Appellant

5. The Honorable Lee Howard, Trial Court Judge

6. Wythe Rhett, Appellee

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1. Did the Trial Court err in granting summary judgment before completion of discovery?

2. Did the Trial Court err, as a matter of law, in finding the SOL had run when the record points to the contrary?

3. Did the Trial Court err in not allowing a claim under the Mississippi Litigation Accountability Act of 1988?

4. Did the Trial Court err in not correctly reviewing the Record before entering both appealed orders?

5. Did the Trial Court err by denying the Constitutional Right to a Jury Trial to the Appellants?

6. Did the Appellee toll the statute of limitations by fraudulent concealment?

SUMMARY OF THE ARGUMENT

The trial Court failed to consider the outstanding discovery and motion before erroneously granting Summary Judgment. Such omission should be found as reversible error. The Trial Court only used an SOL argument as the basis for its incorrect rulings.

The SOL for all the torts was satisfied through a number of filings, Court orders, and various Motions before the Courts. Through Rhett I and Rhett II, the Appellants fully complied with and operated under the laws of the State of Mississippi for tolling the appropriate SOL.

As indicated in numerous events, it is clear the trial Court did not appropriately review the record, and actually contradicts itself through the record. It disregards facts and/or just manifests them as an exercise in will. Such willful disregard to the record violates the Constitutional rights of the Appellants.

Finally, the Appellee tolled any SOL through fraudulent concealment of necessary evidence. This fact alone should warrant reversal and the disregard of such actions should disqualify the trial Judge if this action is remanded.

There is no basis in law for the trial Court's rulings, and it exemplifies will over law. The Appellee's arguments are without merit. This Court should reverse and remand this action, specifically calling for a ruling on the outstanding discovery, the request for leave, and have a trial date set within thirty (30) days of remand.

STANDARD OF REVIEW

The Standard of Review for the erroneous grant of Summary Judgment and the lack of Motion rulings by the Lower Court is DE NOVO, because all issues involve a question of law for the court to decide.

Most recently, and in line with previous decades of precedence, this court has decided that issue of law are to be decided with little deference to the Lower Court under the standard of *de novo*. *Sherwin-Williams Co. v. Gaines ex rel. Pollard*, 75 So. 3d 41, (Miss. 2011); *Hyundai Motor America v. Applewhite*, 53 So. 3d 749, (Miss. 2011); *Leitch v. Mississippi Ins. Guar. Ass'n*, 27 So. 3d 396 (Miss. 2010). This case involves multiple questions of law including but not limited to a grant of Summary Judgment. Under the above cases, the courts have consistently stated those questions of law are to be reviewed, *de novo*.

I. STATEMENT OF THE CASE

A. Nature of the Case

This matter involves a lengthy piece of litigation beginning with a case herein referred to as *Rhett I*. *Rhett I* was filed in 2009 and contained a complaint, answer and counterclaim, and answer and counterclaim to the counterclaim. It originally had Appellee as an LLC *and* an individual. During the course of that litigation, it was determined the individual should not be part of *that* action. As a result, a separate lawsuit, *Rhett II*, was instituted in 2013. It is that current matter from which this appeal is before the Court.

Rhett II pertains to the individual and contains causes of action in tort. Appellee maintains all these actions are barred by the SOL, but fails to recognize any tolling of a statute of limitations. The Court made its ruling solely on the SOL issue. In making such a ruling, the Court disregards the actual filings, its own orders, and categorically fails to apply the law in any reasonable fashion.

Appellant presents this Court with a full record of facts, full filings and orders, and the proper precedent to allow this matter to go to trial. Appellee can present no evidence to contradict such; its approach is simply one to "muddy the waters" and provide distraction to the Court from the core issues. Appellee simply does not want this matter to go before a jury. Appellee seeks to depart from having two parties meet on the level, keep the parties from acting in a plum-line fashion, and fails to square its actions with any authority.

In sum, this matter should be one presented to the jury. It is a case where the only the jury can provide justice. The Appellee will dance around facts and evidence, but

cannot escape the authority and record before this Court. The Court is finally presented with the question of whether Constitutional Principles have been preserved, or whether the Trial Court egregiously denied such to the Appellants.

B. Facts and Disposition of Previous Proceedings.

1. M&W Builders was created as the predecessor to Rhett Construction on or about January 6, 1995. On or about October 1, 2004, Appellee filed to change the name to Rhett Construction, LLC. ROA.397.

2. Appellee and his father, Munford Rhett, were the only members ever to be part of the M&W Builders and its successor, Rhett Construction, LLC. These two individuals signed an operating agreement as the governing law of both organizations on or about April 3, 1998. ROA.397 (Originally attached as Exhibit "A" to Plaintiff's Response to Defendant's Motion for Summary Judgment).

3. The Operating Agreement for both organizations contained a paragraph which reads, ""Upon death, retirement, resignation, expulsion, bankruptcy or dissolution of a member or upon the occurrence of any other event which terminates the continued membership of a member, the business may, within 90 days thereafter, be continued by the remaining members ***provided that there are at least two remaining members***." (Operating Agreement at paragraph 14.) Since Munford Rhett and Appellee were the only two members, when one died, the business ceased as an operation of law and its own operating agreement. In short, when Munford died, Rhett Construction, LLC died with him. In addition, the LLC was administratively dissolved on December 20, 2014. ROA.397 (Originally attached as Exhibit "B" to Plaintiff's Response to Defendant's Motion for Summary Judgment).

4. Appellants contracted with Appellee to build a house from the "studs up," in hopes of having a home place to grow a family and live out their lives in peace and serenity. Appellants' contract was signed by Wythe Rhett on a signature line as Wythe Rhett. Underneath the signature was "Rhett Construction, LLC." There is no "for," "by," or "on behalf of" linking Wythe Rhett's name to Rhett Construction, LLC. ROA.397.

5. Appellants quickly learned they made a mistake in hiring Appellee after bearing the "fruits" of his "work." These "fruits," or simply put as catastrophic failures of a builder, were not realized until after the Appellants took full possession of the home. ROA.398.

6. Appellants took possession of the home sometime toward the end of the year in 2007, around the time of Thanksgiving. Appellants have claimed since that time Appellee never substantially performed under the Contract. ROA.398.

7. After Appellee failed to substantially perform under the Contract and making no effort to correct or refund money, the Appellants made contact with the Mississippi Board of Contractors, initially during 2008. Sometime afterwards, Wallace Pogue, an investigator for the Mississippi Board of Contractors came and investigated the Appellants' complaint. His came to find, much to his absolute disgust and horror, the gross negligence performed by the Appellee. An official complaint was later filed in 2009. ROA.398.

8. An initial hearing was scheduled and held to consider the findings and claims against the Appellee during January of 2010, but was postponed until January of

2011 to allow the Defendant more time to prepare, cure anything outstanding, and/or settle the matter. Defendant made no attempt to settle the matter. ROA.398.

9. On August 26, 2010 Plaintiffs filed a lawsuit (Rhett I) against Defendant. (Exhibit "C"). Shortly thereafter, on November 4, 2010, Appellee filed a counterclaim, individually, against the Appellants. (Exhibit "D"). Counsels for Appellant and Appellee had an agreement to hold off on the answer until after a decision was reached by the Mississippi Board of Contractors. At all times, the Counterclaim, including the Breach of Contract claim, was entered on behalf of Wythe Rhett, and not Rhett Construction, LLC. ROA.398

10. On or about January 12, 2011, the Mississippi Board of Contractors issued an order against Wythe Rhett d/b/a Rhett Construction, LLC for a finding of ***GROSS NEGLIGENCE***. Appellee's State issued Contractors license was suspended for six (6) months and a $2,500.00 fine was levied against him. (Exhibit "H"). Appellee appealed this decision, which was subsequently dismissed in or about September of 2011. ROA.398-399.

11. Appellee should have immediately and voluntarily dismissed the tort counterclaims after the Mississippi Board of Contractors' ruling became final after the Appellee's appeal dismissal, but Appellee did not do so. ROA.399

12. On or about December 14, 2011, Appellants filed a Motion to Grant Leave to File First Amended Complaint. (Exhibit "G"). This Amended Complaint sought to cover the Appellee's misdeeds and nefarious activities. Appellee answered the Motion, and Appellants filed a timely reply on or about January 6, 2012. ROA.399.

13. On or about January 17, 2012 Appellants filed a motion for Summary

Judgment against the Appellee to dismiss the Appellee's counterclaims. A hearing was held on this issue on August 14, 2012 and an ordered was issued shortly thereafter, dismissing all six of the Defendant's tort counterclaims. During the hearing, the Court stated from the Bench the Appellants "**ABSOLUTELY**" had the right to amend their Complaint. (Exhibit "I") The Appellants took the position the Court was ruling from the Bench on its previously filed Motion to Grant Leave to Amend. ROA.399.

14. Subsequently, Appellants filed their First Amended Complaint (Still in *Rhett I*) on August 30, 2012, and Appellee timely answered. Another hearing was held on August 30, 2013 to have a Discovery conference due to the Appellee's large number of late filings and excessive discovery. This was due, in part, because Appellee brought in several third parties to bear the brunt of his negligence. At said hearing, Appellee brought up the First Amended Complaint. It was discussed at length. During the Discussion, the Court found Wythe Rhett was not proper in *that* action (*Rhett I*), but should be brought in another, new action (*Rhett II*). When asked about the implications involving Statute of Limitations questions, the Court ruled the filing of the current action (*Rhett I*) suspended the running of any Statute of Limitations. The Court in *Rhett I*, with great emphasis, stated the Law in this Court is very clear the filing of an action tolls the running of a Statute of Limitations. In following the Court's ruling on the matter, the Appellants filed this current action (*Rhett II*). ROA.399-400.

15. During the course of this action, Appellee failed to act in good faith, filed numerous late responses, and refused to properly comply with Discovery. At the time of the Summary Judgment filings, the the following Motions were outstanding: 1. *Plaintiffs' Motion to Grant Leave to File First Amended Complaint*; (Exhibit "J") and 2.

Plaintiffs' Motion to Compel. (Exhibit "K"). Appellee's nearly ten month late response[1] to the first Motion and its steadfast refusal to participate in discovery created a manifest injustice and substantially prejudiced the Appellants. Appellants were unable to proceed with even the basics of discovery. Appellants were unable to finish their written discovery, perform a substantial deposition of the Appellee, were given no chance to move their case forward due to the designed refusal of the Apellee. ROA.400. The trial Court did not even consider this in its ruling.

16. Summary Judgment should never be awarded while there is pending discovery, pending motions, and a lack of good faith on the part of the Defendant. Defendant's "legal stances" are incorrect and should be dismissed as a matter of law. ROA.400. Such arguments were presented to the trial Court, but there was no consideration of such.

17. The trial Court awarded Summary Judgment in favor of the Appellee, specifically finding a foundation in the SOL limitation on or about November 4, 2015. ROA.437.

18. As illustrated by the actual facts of the case, this ruling was devoid of a factual or legal basis. Such void required a request for reconsideration. ROA.438-444.

19. The Court issued a one and a ***half page*** Order denying such reconsideration. ROA.451-452. In said ruling the Court stated, the "Court held a hearing and heard oral argument on the Defendant's Motion for Summary Judgment on Summary Judgment and for Other Relief on August 5, 2015" Id at Sentence 1. This is directly contrary to the Court's Signed Order of August 13, 2015 wherein the Court agreed to

[1] Throughout the course of this action, Appellee filed various motions, responses, and/or replies late, or not at all

WAIVE ORAL ARGUMENT. ROA.433.

20. It is from the Grant of Summary Judgment and Denial of Reconsideration from which the Appellant appeals.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

The courts in Mississippi are very clear about the standards for summary judgment the trial Court erred in granting such. Appellee's argument *does not* meet those standards for awarding summary judgment in its favor. Rule 56 of the *Miss. R. Civ. P.* allows for a Motion for Summary Judgment to be granted when there is "no genuine issue as to any material fact" as a standard. In *Clark v. Bertholf*, the court gave an explanation of the standard for summary judgment motions by stating, "A motion for summary judgment tests the notion of well-pled facts and requires a party to present probative evidence demonstrating triable issues of fact." 980 So. 2d 290 (Miss. 2007). *Webster v. City of D'Iberville City Council* explained that standard by stating,

> "The entry of summary judgment is mandated if the non-movant fails to make a showing sufficient to establish an essential element of the claim or defense; then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." 6 So.3d 448 (Miss. 2009)

As this court should easily see, the Mississippi Supreme Court has defined the standard for granting summary judgment. When applying the standard to the facts of this case, this Court should find no grounds to grant summary judgment in favor of Appellee. There are a number of triable, material facts for this Court to allow to be presented to a jury.

It is also important to remember Summary Judgment motions are not substitutes for trials on the merits. The trial Court did that very thing. It substituted trial by granting an untimely Motion for Summary Judgment. The *Official Comment* to *Miss. R. Civ. P.* Rule 56 states:

> "A motion for summary judgment lies only when there is no genuine issue of material fact; ***summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion***; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues." (emphasis added)

This principle, as stated in the official comment, has worked well throughout case law in Mississippi.[2]

Finally, the Courts view Summary Judgment with great caution, skepticism and should only grant them sparingly, and in the most extreme circumstances. *Simpson v. Boyd*, 880 So.2d 1047 (Miss. 2004). Motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion. *Titan Indem. Co. v. Estes* , 825 So.2d 651 (Miss. 2002); *Cole v. Methodist Medical Center,* 820 So.2d 739 (Miss. 2002); *Crum v. Johnson,* 809 So.2d 663 (Miss. 2002); *Dailey v. Methodist Medical Center,* 790 So.2d 903 (Miss. 2001). The party moving for summary judgment has the burden of demonstrating there is no genuine issue of material fact, while the non-moving party should be given the benefit of every reasonable doubt. *Buchanan v. Ameristar Casino Vicksburg, Inc.*,957 So.2d 969 (Miss. 2007), rehearing denied. Additionally, if there is even a question of doubt as to whether or not there is a genuine issue of material fact, it should always be resolved in favor of the non-moving party. *Lee v. Golden Triangle Planning & Development Dist., Inc.* (797 So.2d 845 (Miss. 2001).

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[2] See *Anderson v. LaVere* (Miss. 2004) 895 So.2d 828; *Morton v. City of Shelby*, 2007, 984 So.2d 323, rehearing denied, certiorari denied 984 So.2d 277; *Suddith v. University of Southern Mississippi,* 2007, 977 So.2d 1158, rehearing denied, certiorari denied 977 So.2d 1144; *Owens Corning v. R.J. Reynolds Tobacco Co*. (Miss. 2004) 868 So.2d 331; *Dailey v. Methodist Medical Center*, 790 So.2d 903 (Miss. 2001).

The facts have been, and always remain, in dispute in this case. As stated in the facts presented, the Court should find there are no grounds for a Judgment as a matter of law. Finally, there are ample numbers of genuine issues of material facts.

(A) Summary Judgment Should Not Be Granted Before Discovery is Completed

The Appellee never denied its discovery problems, leading this Court to find there are insufficient grounds for summary judgment. In addition to the lack of participation in discovery as noted in Plaintiffs' Motion to Compel, there was discovery to be completed with the First Amended Complaint. The trial Court erroneously disregards this fact.

The trial Court's grant of Summary Judgment fails the most basic, general rule of summary judgment, and should not be allowed before discovery is completed. While generally contained in *Miss. R. Civ. P*. Rule 56(f), the Courts of this State are adamantly clear on the issue. The rule providing that summary judgment may be denied to allow for more time for discovery is in place because the completion of discovery is, in some instances, desirable before the court can determine whether there is a genuine issue of material fact. *City of Jackson v. Shavers*, 97 So.3d 686. (Miss. 2012). The decision to order further discovery after a motion for summary judgment rests within the sound discretion of the trial judge and will not be reversed unless his decision can be characterized as an abuse of discretion. *Johnston v. Palmer*, 963 So.2d 586 (Miss. 2007). Opportunity to flesh out discovery may especially be required where the information necessary to oppose the motion for summary judgment is within the possession of the party seeking summary judgment. *Owens v. Thomae*, 759 So.2d 1117 (Miss. 1999), on subsequent appeal 904 So.2d 207. Summary judgment rule, Civil Rule 56(f), contemplates that completion of discovery in some instances is desirable and

necessary before court can determine that there are no genuine issues as to material facts *Smith v. H.C. Bailey Companies*, 477 So.2d 224 (Miss. 1985) Clearly, the Courts have established procedure for allowing discovery to be permitted before a summary judgment is proper. As Appellee has contumaciously refused to complete or fully participate in Discovery, this Court should find no other alternative than to reverse the trial Court.

The Supreme Court is in favor of discovery being completed before summary judgment can be considered. In determining the purpose and spirit of the Rule governing Summary Judgment, the Supreme Court stated,

> ""[t]he rule itself contemplates that the completion of discovery is, in some instances, desirable before the court can determine whether there is a genuine issue of material fact." *Marx v. Truck Renting & Leasing Ass'n, Inc.,* 520 So.2d 1333, 1343 (Miss.1987) (citing *Smith v. H.C. Bailey Cos.,* 477 So.2d 224, 232 (Miss.1985)). "Justice is served," the Court stated in *Cunningham v. Lanier,* 555 So.2d 685, 686 (Miss.1989), "when a fair opportunity to oppose a motion is provided—*because consideration of a motion for* ***summary judgment*** *requires a careful review by the trial court of all pertinent evidence in a light most favorable to the nonmovant."* (emphasis in original)." *Owens v. Thomae* (Miss. 1999) 759 So.2d 1117, ¶11, on subsequent appeal 904 So.2d 207.

The *Owens* Court considered a case where a Defendant moved for Summary Judgment without complying Discovery. The Court found discovery should be permitted and Summary Judgment denied because the Plaintiff had tried to obtain discovery before the Summary Judgment Motion. The Court ruled, "Contested status issues invariably require discovery. The party seeking summary judgment on the grounds that he was not responsible for another's actions typically will be the party in possession of the information necessary to determining whether he is indeed responsible. While summary judgment may be appropriate where the status issue has been fully fleshed out and there are no material issues of fact, *Webster v. Mississippi Publishers Corp.,* 571 So.2d 946

(Miss.1990); *Fruchter v. Lynch Oil Co.,* 522 So.2d 195, 199–201 (Miss.1988), it cannot be said that the status issue in this case has been fully fleshed out." Id at ¶18. This Court should follow the *Owens* Court and find further discovery is required. Such a following would allow the litgants to flesh out a number of issues concerning the claims in the original and amended complaint.

When applied to the facts of this case, the Court should find the *Owens* case guides this Court's course of action. As in the *Owens* case, this Appellant sought discovery, only to be denied such access to discovery. As in *Owens*, the Appellee moved for Summary Judgment before allowing information in his possession to be discovered. In following *Owens*, this Court should find the trial Court erred, Appellee is not entitled to Summary Judgment consideration until discovery is completed. As a result, this Court should reverse and remand this matter.

(B) Abuse of Process and Intentional Infliction of Emotional Distress are allowed as a Matter of Law

The Court made an egregious error in not allowing these claims to be brought before a jury. Instead of providing any sort of cogent analysis, the trial Court seemed predisposed to rid itself of this matter at all costs, in spite of law. In doing so, the Court simply "rubber stamped" the Appellee's flawed argument regarding the statute of limitations. To quote the Holy Book of *Daniel,*[3] the argument of the Court and Appellee "art weighed in the balances, and art found wanting." *Daniel 5:27, King James Version*.

[3] The instance when Daniel was charged with interpreting the signs on the wall by Bellshazzar when it appeared on the wall by a mysterious hand at a feast. This analogy is particularly instructive in the circumstances because Bellshazzar learns nothing from the interpretation of his dream and, in turn, has his kingdom destroyed. He dies that very night, and Darius the Mede takes over. Nebuchadnezzar, his father, on the other hand, has a vision which Daniel interprets. Unlike Belshazzar, Nebuchadnezzar heads this warning, recognizes God and receives a blessing through restoration of his kingdom.

This Court is presented with an argument similar to "MENE, MENE, TEKEL, and PARSIN." Instead of following the trial Court and eroding the foundation of the judiciary, Appellant would suggest the Court look to the words of *Job* when he stated: "let me be weighed in an even balance, that God may know mine integrity." *Job 31:6, King James Version*. All Appellant seeks is a true and correct analysis, finding, and application of the law.

These two claims are allowed under the applicable statute of limitations. While it is true the statute of limitations is one year for intentional torts, the Appellants complied with the Statute of Limitations for such. The general rule regarding tolling of statute of limitations was presented to the Appellee in a letter response to his letter of threat to dismiss this action. Appellee conveniently does not include it in his list of exhibits or mention it in any of his arguments for Summary Judgment. Appellant attached it for the Court's review as Exhibit "L" in its response to Summary Judgment. Appellee's position on this was simply to ignore it. Unfortunately, this is a fatal position to his argument.

The General Rules in Mississippi parallel the actions of the Appellants in both cases. The general rule in Mississippi states, "Ordinarily, when a complaint is filed and properly served, that complaint tolls the running of the statute of limitations." *Owens v. Mai,* 891 So.2d 220, 223 (Miss.2005). This is a bright line rule for the filing of complaints and tolling of statute of limitations. As stated in the facts above, the Appellants filed a counterclaim to the Appellee's Counterclaim on or about February 11, 2011. (Exhibit "E"). The Appellee answered this counterclaim as Wythe Rhett d/b/a Rhett Construction, LLC. (Exhibit "F"). The Appellant's counterclaim to Appellee's counterclaim contained claims individual liability, intentional infliction of emotional

distresss ("IIED"), and abuse of process claims. This filing of the suit tolled the running of any statute of limitations. Appellee and the trial Court produced no law or argument for rebuttal.

Appellee's, and unfortunately the trial Court's, incorrect position is simple: the Filing of his Motion to Strike the Amended Complaint, and its subsequent grant, made the statute of limitations automatically run. This argument has no basis in law. In fact, the laws of Mississippi are directly contrary to the Defendant's position. A Motion to Strike does not keep the statute of limitations from running. A Grant of a Motion to Strike does not keep a statute of limitations running. A Grant of a Motion to Strike operates as a Dismissal without Prejudice. *Dinet v. Gavagnie*, 948 So.2d 1281, (Miss. 2007). In Mississippi, a dismissal of a complaint always tolls the running of a statute of limitations unless it is voluntarily dismissed by the Plaintiff. *Price v. Clark*, 21 So. 3d 509 (Miss. 2009); *Koestler v. Mississippi Baptist Health Systems, Inc*., 45 So. 3d 280 (Miss. 2010).

As this Court can plainly read, the trial Court's statute of limitations argument is categorically and grossly incorrect. The Statute of Limitations was preserved by the Appellant filing of a counterclaim to the Appellee's counterclaim, and again by the Amended Complaint. Appellee and the trial Court make no argument to counter this simple principle.

Appellee incorrectly argues "the plaintiffs have no proof which supports this claim." This is an awfully convenient argument for the Appellee since Appellee steadfastly refused to give the information concerning these claims in this suit. As stated above and in the Plaintiffs' Motion to Compel, Appellee has possession of the proof, but

refuses to allow the information to be given to the Appellant and this Court. As such, Appellee's argument fails as a matter of law. This is discussed in length above, and should be incorporated by reference. The Court never considered any of this, finds one fact (albeit an incorrect fact), and seems to confuse itself in making an order. In sum, this Court reverse the trial Court, and allow the claims of Abuse of Process and IIED to go before the jury.

The court erroneously ruled any individual claims were dismissed on August 15, 2012. This is patently incorrect. It has no basis in fact. Nothing evidences such a claim other than Rhett Construction was recognized as an entity[4] and the party in Rhett I. Having an LLC recognized as a party to an action has no effect on the individual claims. Nothing at the August 15, 2012 hearings addressed the individual claims against Wythe Rhett in the counterclaim to the counterclaim. In fact, the tort of malicious prosecution was not even completed until this ruling. The court's current finding is devoid of logic and absent a factual basis.

(C) Plaintiffs Malicious Prosecution Claim is Allowed as a Matter of Law

Appellants' malicious prosecution claim is allowed under the appropriate SOL, which Appellee and the trial Court correctly state is one year. As stated above, this Malicious prosecution claim began to run when the Appellee's counterclaim was dismissed on August 14, 2012. It was tolled when the Appellant filed its First Amended Complaint to include the claim on August 30, 2012. The SOL ran for sixteen (16) days. Appellee and the Court conveniently omit this fact.

Additionally, when the Amended Complaint was struck when the Court granted

[4] By the Operating Agreement, Rhett Construction (formerly M&W Builders) ceased to exist as an entity

the Defendant's Motion to Strike in *Rhett I*, the SOL began to run again after August 30, 2013. The Court's order was entered shortly thereafter and the Appellants filed this Complaint in *Rhett II* on September 12, 2013. The SOL ran for, at most, thirteen (13) days. All total, the SOL on this claim ran for a period of twenty-nine (29) days, or just under a month. Appellants are well within their right to bring the Complaint in *Rhett II*.

As stated above, the law supports the Appellants' contention. The General rule is , "Ordinarily, when a complaint is filed and properly served, that complaint tolls the running of the statute of limitations." *Owens v. Mai,* 891 So.2d 220, 223 (Miss.2005). This is a bright line rule for filing of complaints and tolling of statute of limitations; a fact never rebutted by the Appellee nor the Court.

A Motion to Strike, such as that filed by Appellee in *Rhett I*, does not keep the statute of limitations from running. A Grant of a Motion to Strike, such as *Rhett I*, does not keep a statute of limitations running. Conversely, a Grant of a Motion to Strike operates as a Dismissal without Prejudice. *Dinet v. Gavagnie*, 948 So.2d 1281, (Miss. 2007). In Mississippi, a dismissal of a complaint always tolls the running of a statute of limitations unless it is voluntarily dismissed by the Plaintiff. *Price v. Clark*, 21 So. 3d 509 (Miss. 2009); *Koestler v. Mississippi Baptist Health Systems, Inc*., 45 So. 3d 280 (Miss. 2010). There was never a voluntary dismissal of the claim, so the claim was tolled by each action stated above. The law concerning the SOL is explicitly clear, and warrants a reversal of the trial Court.

Additionally, the Appellee erroneously argues there is no "proof" for this claim in his Motion for Summary Judgment. It is virtually the same argument as IIED and Abuse of Process, but adds a tangential, extraneous, and digressing argument concerning

"probable cause." As Lewis Carroll would state, Appellee's additional argument is "going down a rabbit hole." Nevertheless, Appellee's arguments on this item fail as a matter of law.

Appellee has steadfastly refused to give the information concerning these claims in this suit. As stated above and in the Plaintiffs' Motion to Compel, Appellee has possession of the proof, but refuses to allow the information to be given to the Appellants and this Court. As such, Appellee's argument fails as a matter of law. This is discussed in length above, and should be incorporated by reference. Additionally, Appellee's argument is misleading as it cites cases irrelevant to the case, *sub judice*.

To prevail in a malicious prosecution claim, the Plaintiff must prove "by a preponderance of the evidence: (1) the institution or continuation of original judicial proceedings, either criminal or civil; (2) by, or at the insistence of the defendants; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceedings; and (6) the suffering of damages as a result of the action or prosecution complained of." *Van v. Grand Casinos of Mississippi, Inc.*, 767 So.2d 1014 (Miss. 2000). For some reason, Appellee focuses on the "probable cause" element in stating the Defendant cannot satisfy it. The Appellant will satisfy this element at trial, and has already satisfied this as an element for purposes of defeating Summary Judgment.

It should also be noted the Court never mentioned, considered, or provided an analysis of this claim, aside from its blanket denial under SOL grounds. While the trial Court did not, such omission of analysis should not be shrugged off so easily by this Court. Appellant begs the Court for a thorough analysis of such claim, as to leave no

room for error by the trial Court on remand.

"Probable Cause" is a well established element in the Mississippi Law. Generally probable cause is more lenient for civil actions, but it still requires a reasonable belief of facts to support its assertion. *Armco, Inc. v. Southern Rock, Inc*., 778 F.2d 1134, C.A. 5 (Miss.1985). It is curious why the Appellee cites *Armco* in furtherance of this matter, because the case supports the Appellants' argument. In *Armco*, the Court stated: "In a word, the initiator of private civil proceedings need not have the same degree of certainty as to the relevant facts that is required of a private prosecutor of criminal proceedings. In many cases, civil proceedings, to be effective, must be begun before all of the relevant facts can be ascertained to a reasonable degree of certainty." *Id*. This simply means the initiator of a private suit must have some degree of certainty in entertaining and prosecuting a claim. While Appellee claims he was acting on advice of counsel, he either knew or should have known no single set of facts could support his claim after his appeal of a Gross Negligence finding was dismissed. At that point Appellee should have voluntarily attempted to dismiss his counterclaim. He did not. He carried out a set of claims against the Appellants for claims he knew or should have known were not based in a single material fact. He knew or should have known it was a legal impossibility for him to prevail on those claims. He knew or should have known no reasonable person can win a case that is a legal impossibility. This is dangerous behavior, but Appellee's behavior personifies what "lack of probable cause" means. It requires no inference, but a Juror could easily and readily infer such from his actions.

(D) The Mississippi Litigation Accountability Act of 1988 Allows a Separate Tort in the Action

The trial Court erred, yet again, with another erroneous and incorrect statement of

law. The Court can find no clear reason to deny such from its unclear ruling, other the convenient argument it is not allowed. Additionally, Appellee incorrectly uses two cases to support his argument, without fully apprising the Court of the facts of each case and how such facts affect the ruling of this Court. Appellee's cases should have no bearing and this Court should allow the proceedings to move forward.

In looking at the context of the rule, it is clear the *Miss. Litigation Accountability Ac*t is to be read in conjunction with Rule 11. *Stevens v. Lake* (Miss. 1993) 615 So.2d 1177; S*cruggs v. Saterfiel* (Miss. 1997) 693 So.2d 924. It is also important to look at the ends the Act hopes to achieve. The act seeks to protect parties against frivolous suits and motions[5], malicious filings[6], harassment[7], and bad faith.[8] To put it shortly, it seeks to prevent bad faith and malice.

Bad faith and malice are claimed in this action, and are grounds for a claim against the Defendant for violating the *Mississippi Litigation Accountability Act*. Common law bad faith claims are recognized as valid in Mississippi throughout the breadth and areas of the Mississippi Code[9]. Malice is a common law tort allowed in Mississippi Courts as well[10]. Since both of these torts are allowed under Mississippi law, they should be allowed by this Court. Additionally, since the aim of the *Mississippi Litigation Accountability Act* seeks to protect against malice and bad faith, a litigant

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[5] *In re Spencer* (Miss. 2008) 985 So.2d 330, certiorari denied 129 S.Ct. 629, 555 U.S. 1046,
[6] *Ellison v. Meek*, 820 So.2d 730 (Miss. 2002).
[7] *Stevens v. Lake*, 615 So.2d 1177 (Miss. 1993).
[8] *Knight v. Covington County*, 27 So.3d 1163,(Miss. Ct. App. 2009) rehearing denied, certiorari granted 19 So.3d 82, certiorari dismissed as improvidently granted
[9] a non-exhaustive set of examples: *Gallagher Bassett Services, Inc. v. Malone,* 30 So3d 301 (Miss. 2010); *Blue Cross & Blue Shield of Mississippi, Inc. v. Campbell*, 466 So.2d 833 (Miss. 1984); K*aplan v. Harco Nat. Ins. Co*., 716 So.2d 673 (Miss. Ct. App. 1998).
[10] *Harmon v. Regions Bank*, 961 So.2d 693 (Miss. 2007); *Journal Pub. Co. v. McCullough* 743 So.2d 352 (Miss. 1999).

should be awarded the same protections as under the common law. When read together, *Miss. R. Civ. P.* Rule 11, the *Mississippi Litigations Accountability Ac*t and the Common Law torts of bad faith and malice should act in concert. A litigant should not have to choose between only one or two, he should be afforded all the protections allowed under the law.

As a result, this Court should find there is a separate course of action under the *Mississippi Litigation Accountability Act*. The Court should allow this action to proceed and reverse Summary Judgment on this claim.

(E) Denial of Reconsideration Was Improper Because the Trial Court Did Not Correctly Review the Record

The trial court committed an egregious error on its part by granting summary judgment on November 4, 2015, and again after its denial of reconsideration. The trial Court exercised its will over the overwhelming weight of the law and exhibited a callously disregard of the pertinent facts of this case.

The Court states it made a review of the record (Opinion at Page 2), but apparently just skimmed a few pieces of it. To begin, the Court seems to indicate it only made a cursory examination of the record when it states "The real issue for this Court to decide is whether the filing of Plaintiffs' amended complaint without first seeking leave to amend prevented the limitations period from running prior to that amended complaint being stricken." Such a statement by the Court ignores the obvious facts of the case.

The original action (categorized as *Rhett I* by the Court) was filed against Wythe Rhett d/b/a Rhett Construction. The counterclaim to *Rhett I* was filed by Wythe Rhett. A counterclaim to the counterclaim was filed against Wythe Rhett. This counterclaim to the counterclaim is important because the it contained claims for Intentional Infliction of

Emotional Distress, Abuse of Process, and Malicious Prosecution. It was filed on February 11, 2011. This counterclaim alone tolls any statute of limitation. A copy of the Counterclaim to the Counterclaim was attached to the Plaintiff's response to the Defendant's Motion for Summary Judgment. This means Wythe Rhett, individually was the Defendant, Counter-Plaintiff, and Counter-Defendant in *Rhett I*.

The Court's above-mentioned statement seems to ignore facts, the truth, or, at worst, blatantly and intentionally disregards what actually is contained in the record. The Appellants ***DID SEEK LEAVE TO AMEND*** when on or about December 14, 2011, Appellants filed a Motion to Grant Leave to File First Amended Complaint to contain the torts already before it in one simple complaint. The purpose of this motion was an attempt to streamline this action because the Court seemed to be having some difficulty comprehending the action thus far. Appellee answered the Motion, and Appellants filed a timely reply on or about January 6, 2012. This fact was brought to the Court's attention in Paragraph 12 of the *MEMORANDUM IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*. Additionally a copy of the Motion stamped "Filed" was attached as Exhibit "G" to the *Response in Opposition to Summary Judgment*. It is incomprehensible how the trial Court in this matter can state there was never an attempt to seek leave to amend when this information was brought before it.

The Court granted leave to amend when it ruled from the Bench at an August 14, 2012 hearing. Specifically the Appellants asked the Court about amending the Complaint wherein the Court ruled the Appellants "absolutely" could amend their Complaint. This was brought to this Court's attention in Paragraph 13 of the *MEMORANDUM IN*

SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. Additionally a copy of the transcript evidencing the Court's ruling was attached as Exhibit "I" to the *Response in Opposition to Summary Judgment*. This was a bench ruling. A bench ruling should be treated as a final ruling. This Court takes the incorrect position a bench ruling has no effect.

Nearly every Court in the United States, in addition to nearly one thousand years of common law, disagree with this Court's position. A bench ruling is a final decision, appealable by a Notice of Appeal. *Firstier Mortgage Company v. Investors Mortgage Insurance Company*, 498 U.S. 268 (1991); affirmed and adopted by the Fifth Circuit in *Barrett v. Atlantic Richfield Co*., 95 F.3d 375 (Tex. 1996). Bench rulings are commonplace in criminal cases (See *Keller v. State*, 138 So.3d 817 (Miss. 2014)), as well as civil cases (See Chancery Case: *Love v. Barnett*, 611 So.2d 205 (Miss. 1992); see also Circuit Case: *Maxwell v. BMH-DeSoto, Inc.,* 15 So.3d 427 (Miss. Ct. App. 2005)). This Court should recognize it has erred in not addressing this issue correctly. This Court should find there was leave sought to amend, and the Court properly ruled upon the Motion from the Bench. Such a grant tolls any statute of limitations.

In accordance with the Court's valid bench ruling, Appellants filed the First Amended Complaint on August 30, 2012. This tolled the running of the statute of limitations again. Now, to be explicitly clear, the Appellants already had tolled the statute of limitations with its counterclaim to the counterclaim, but doubly tolled the statute of limitations with the Amended Complaint filed. The statute of limitations did not run from February 2011 through this date. These facts follow along with the erroneous case ruling of *Curry v. Turner*, 832 So.2d 508 (Miss. 2008). It should be noted

for the record on appeal the *Curry* matter made its analysis in regards to relation back amendments. This case should not be instructive because it does not involve the two part analysis of Curry. Addtionally *Curry v. Turner* has been distinguished partially on this point by *Scaggs v. GPCH-GP, Inc*., 23 So.3d 1080 (Miss. 2009), rehearing denied. Both cases have been further distinguished on this point by *D.P. Holmes Trucking, LLC v. Butler*, 94 So.3d 248 (Miss. 2012). Reliance on a case as instructive, twice distinguished on a certain point, is reversible error in and of itself.

To be clear up to this point for the Court, the statute of limitations was tolled on February 11, 2011, three months after it began to run. After a ***proper bench ruling***, the Amended Complaint doubly tolled the statue of limitations without the running of such beginning again.

In addition to answering the Amended Complaint, the Appellee filed a Motion to Strike. The Motion to Strike was not heard until August 30, 2013 and sought to dismiss Wythe Rhett individually. The Court agreed Wythe Rhett, individually, would be dismissed from the suit at this point. This was another bench ruling this trial Court seems to find valid. It was only at this point the Wythe Rhett was dismissed for his individual claims. The Court incorrectly states August 15, 2012 as the date of dismissal. As discussed in length in the Plaintiffs *MEMORANDUM IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*, A Grant of a Motion to Strike operates as a Dismissal without Prejudice. *Dinet v. Gavagnie*, 948 So.2d 1281, (Miss. 2007). In Mississippi, the filing of a complaint always tolls the running of a statute of limitations unless it is voluntarily dismissed by the Plaintiff. *Price v. Clark*, 21 So. 3d 509 (Miss. 2009); *Koestler v.*

Mississippi Baptist Health Systems, Inc., 45 So. 3d 280 (Miss. 2010). The statute of limitations was tolled for these actions until the ruling of the Court on August 30, 2013. Any running before hand has no basis in law, fact, reason, logic or sanity.

Appellants properly filed this current action only after the Court in *Rhett I* dismissed all individual claims at the hearing in August 30, 2013. The total amount of time running against the statute of limitations is November 4, 2010-February 11, 2011 (99 days) and again from August 30, 2013-September 12, 2013 (13 days). A total of 112 days have elapsed during the running of the statute of limitations, well within the 1-year SOL for intentional torts in the State of Mississippi.

Appellants urge the Court to reverse Summary Judgment because the trial Court's grant has no factual basis, and no legal authority to support it. Appellants additionally ask this Court to thoroughly review the record to find the Appellants' argument has actual basis in fact and law, controlling on the issue.

Appellants ask the Court to, again, consider the other two Motions the trial Court had before it. Appellants also asked the Court to make a ruling on these two motions so they may be reviewed on appeal. Unfortunately, this is one of many things the trial Court ignored.

(F) The Trial Courts Grant of Summary Judgment is Part of a Comprehensive Denial of the Right to Trial by Jury Guaranteed Under the Seventh Amendment to the U.S. Constitution and Article III Section 31 of the Mississippi Constitution of 1890

The Trial Court showed a predisposed nature to remove this matter from its docket in spite of the law, not in furtherance of it. Such an action is part of a larger problem is a compound problem due to the lack of access to jury by the trial Judge.

As stated above, the trial Court put facts in its order directly contradicted by the

record. The trial Court even stated a hearing was conducted on the Motion for Summary Judgment, which did not happen. That fact alone should warrant a reversal. The tiral Court imposes its will instead of a well-reasoned analysis of the law. Unfortunately, this matter is the rule of order and not the exception.

This Court should not take the actions of the trial Court lightly; for in doing so, the foundations of our legal system begin to crumble. The right to trial by jury is the only place in our system where parties may meet on the level, may be judged according to objective principles, and remain just and upright at the end of the decision. The *Mississippi Constitution of 1890* states explicitly this right shall remain "inviolate." "Trial judges must be sensitive to the notion that summary judgment may never be granted in derogation of a party's constitutional right to trial by jury." *Ladnier v. Hester* (Miss. 2012) 98 So.3d 1025, rehearing denied. The actions of the trial Court specifically contradict *Ladnier* and the *Mississippi Constitution*. It seems as the Court puts in to practice the old saying from Oscar Wilde: "The only way to give in to temptation is to yield to it….I can resist anything but temptation." The trial Court has been tempted to keep matters from the Jury, imposing its own will. The Court regularly gives in to that temptation.

The Trial Court systematically denies the Constitutional right to trial by jury on a regular and consistent basis. Fortunately, this Court reverses the trial Court on a substantially large number of matter. For instance, the Circuit Clerk of Lowndes County informed counsel as of the date of filing, there have only been four (4) civil jury trials in Lowndes County, Mississippi since January 1, 2013. There are three Judges in Lowndes County, Mississippi. There are nearly 60,000 residents of Lowndes County. That is an

average of less than one per year, even though hundreds, if not thousands, of cases are filed.

Such lack of access to the guaranteed right of a jury trial harms the entire judicial system in Mississippi. It is not a matter of law for the Court to consider, as stated above. Every matter of law the Court ruled on is incorrect. The only remedy this Court should consider is reversal and remand.

On remand, Appellant would ask the Court to appoint a new Judge due to the egregious nature and sheer number of errors. An appointed Judge from Senior status would be preferred to preserve the judicial process, but that is a matter up to the discretion of this Court.

(G) Appellee's Withholding of The Operating Agreement Evidencing the Termination of The LLC Entity Amounts to Fraudulent Concealment

The crux of Appellee's argument fails for the sheer fact he failed to provide the LLC Operating Agreement for Rhett Construction, LLC. This fact alone should toll any running of statute of limitations, and provide ample evidence for malice and bad faith. At no time during *Rhett I* did Appellee provide the Operating Agreement showing Rhett Construction, LLC ceased to be an entity as a matter of law. It was not until well in to *Rhett II* when this information appeared.

Such information would be crucial to the finding of the Court in *Rhett I*, and would prove certain elements of claims in *Rhett I* and *II*. This information warranted the immediate Appellants' Motion to Seek Leave to Amend the Complaint in *Rhett II*. It is beyond the comprehension of this counsel how no duties were violated in not producing that document in *Rhett I*.

This Court gave a thorough analysis of fraudulent concealment in *Aldridge v.*

Aldridge and why it should apply to this matter:

> "Fraudulent concealment is an affirmative act to conceal the underlying tortious conduct. *Robinson v. Cobb,* 763 So.2d 883, 887 (¶ 19) (Miss.2000). To succeed on a claim of fraudulent concealment, the plaintiff must show he failed to discover the factual basis of the claims despite exercising due diligence. *Id.* Fraudulent concealment is an exception to any applicable statute of limitations. *O'Neal Steel, Inc. v. Millette,* 797 So.2d 869, 875 (¶ 22) (Miss.2001). "Due diligence **1134* ordinarily requires the plaintiff to make the best use of the facts available to him." *Anderson v. Equitable Life Assurance Soc'y of U.S.,* 248 F.Supp.2d 584, 590 (S.D.Miss.2003). When the fraudulent-concealment doctrine is applicable, the limitations period does not begin to run until the claims are discovered. *Ross v. Citifinancial, Inc.,* 344 F.3d 458, 463 (5th Cir.2003)." 168 So.3d 1127 at ¶26 (Miss. 2014).

As stated *supra*, the Court gives the standard in plain terms. The conduct of the Appellee satisfies every element of this.

The Appellee knew or should have known Rhett Construction, LLC ceased to exist, as a matter of law, when Munford Rhett died. He died (2004) well before the original contract in this action. Throughout the course of *Rhett I* and most of *Rhett II*, Appellee claimed a shield through the LLC, knowing it did not exist. This becomes intentionally egregious when he failed to provide the LLC operating agreement, the one document he knew was directly contrary to his position, to the Appellants. This is without reason and without any explanation other than fraudulently concealing facts and evidence to avoid liability.

The Appellants exercised exhaustive due diligence in trying to ascertain this matter. Discovery, depositions, and motion to compel were constant throughout both actions. When this was finally discovered, the Appellants took rightful action to preserve their rights under the law.

There is no dispute on this matter. This Court should find there is no other course but to find fraudulent concealment on behalf of the Appellee. Such actions should toll all SOL issues presented on all claims until the document was produced.

IV. CONCLUSION

The trial Court and Appellee's argument is flawed in both law in fact. The trial Court's facts are clearly mistaken, omit obvious, pertinent facts, and fail make an informed decision. Appellants' claims for Abuse of Process, IIED, Malicious Prosecution, and under the *Mississippi Litigation Accountability Act* are correct from a procedural and legal standpoint. There are no procedural bars to any claims after a cursory review of the record, as discussed *supra*. Finally, there is fraudulent concealment when the Appellee failed to reveal and produce the LLC Operating Agreement. As a result, this Court should find the Appellee's Summary Judgment Motion is without merit, the Court committed gross error in granting such, and this matter should be reversed and remanded with special instructions for appointing a new trial Judge.

Respectfully Submitted,
Samuel Andrew Johnson and Kathy Johnson
By: Sims & Sims, LLC

By: /s/Jeffrey C. Smith
Jeffrey C. "Jeff" Smith

/s/Courtney B. Smith
Courtney B. "Corky" Smith

CERTIFICATE OF SERVICE

I, JEFFREY C. "JEFF" SMITH, do hereby certify on this date I have sent a true and correct copy of the foregoing **APPELLANT'S BRIEF** to the following, via the Mississippi Electronic Court system, at their usual electronic mail addresses:

Cam Auerswald
causerwald@upshawwilliams.com

Jack Hayes
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SO CERTIFIED on this the 13th day of April, 2017

/s/Jeffrey C. Smith
Jeffrey C. "Jeff" Smith