IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2017-CA-00129

R. ARNOLD SMITH, JR., M.D.;
NORTH CENTRAL MISSISSIPPI
REGIONALCANCER CENTER; AND
WILLIAM C. BELL **DEFENDANTS/APPELLANTS**

V.

ALBERT LEE ABRAHAM, JR.;
HICKMAN, GOZA & SPRAGINS, PLLC;
AND CHAPMAN, LEWIS & SWAN, PLLC **PLAINTIFFS/APPELLEES**

On Appeal from the Circuit Court of Leflore County
The Honorable L. Breland Hilburn, Special Judge
Case No.: 2012-0053

APPELLEES' BRIEF

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. R. Arnold Smith, Jr., M.D., Defendant/Appellant;
2. North Central Mississippi Regional Cancer Center, Defendant/Appellant;
3. William C. Bell of Bell Law Firm, PLLC, Appellant (and counsel of record in the trial court for Defendants and counsel of record herein for Appellants);
4. Albert Lee Abraham, Jr., Plaintiff/Appellee;
5. Hickman, Goza & Spragins, PLLC, Appellee;
6. Chapman, Lewis & Swan, PLLC; Appellee;
7. Jeffery J. Turnage of Mitchell, McNutt & Sams, P.A. (counsel of record in the trial court for Defendants);
8. Lawrence J. Tucker, Jr. of Hickman, Goza & Spragins, PLLC (counsel of record in the trial court for Plaintiffs and counsel of record herein for Appellees);

9. H. Scot Spragins of Hickman, Goza & Spragins, PLLC (counsel of record in the trial court for Plaintiffs and counsel of record herein for Appellees);

10. Ralph E. Chapman of Chapman, Lewis & Swan, PLLC (counsel of record in the trial court for Plaintiffs and counsel of record herein for Appellees);

11. Dana J. Swan of Chapman, Lewis & Swan, PLLC (counsel of record in the trial court for Plaintiffs and counsel of record herein for Appellees);

12. Honorable L. Breland Hilburn, Former Special Judge for the Circuit Court; and

13. Honorable Barry W. Ford, Current Special Judge for the Circuit Court.

/s/ Lawrence J. Tucker, Jr.
LAWRENCE J. TUCKER, JR., MSB #100869
Counsel for Plaintiffs/Appellees

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STATEMENT OF ISSUES

Appellees offer this Statement of Issues pursuant to Miss. R. App. P. 28(c). Although identified as an issue by Appellants, Appellees believe the trial court's sealing of portions of the file is irrelevant. This appeal concerns the propriety of an order imposing sanctions, not actions the trial court took to prevent dissemination of scandalous and indecent allegations. The Court need not reach this issue to decide this appeal; however, out of an abundance of caution, Appellees will address it briefly.

1. The first relevant issue for purposes of this appeal is whether the trial court was presented with credible evidence supporting the imposition of sanctions.

2. The second relevant issue for purposes of this appeal is whether the trial court had authority to impose sanctions pursuant to Miss. R. Civ. P. 37.

3. The third relevant issue for purposes of this appeal is whether Plaintiff presented sufficient proof of reasonable attorneys' fees and expenses to support the sanctions award.

4. The fourth issue, although irrelevant, is whether the trial court had authority to seal portions of the record.

STATEMENT OF THE CASE

Appellees offer this Statement of the Case pursuant to Miss. R. App. P. 28(c).

I. The Nature of the Case

Plaintiff Albert Lee Abraham, Jr. filed a civil action for damages against Defendants R. Arnold Smith, Jr., M.D. and North Central Mississippi Regional Cancer Center in the Circuit Court of Leflore County. Mr. Abraham's claims arise out of the fact that he was the victim of an attempted murder-for-hire allegedly orchestrated by Defendants and thwarted by investigators for the Office of the Attorney General for the state of Mississippi. Criminal charges including, capital murder and conspiracy to commit murder, have been brought against Dr. Smith.

Mr. Abraham is represented by Hickman, Goza & Spragins, PLLC and Chapman, Lewis & Swan, PLLC. Dr. Smith and the Cancer Center are represented by Bell Law Firm, PLLC and Mitchell, McNutt & Sams, P.A. in defense of the civil claims. Bell Law Firm, PLLC also represents Dr. Smith in defense of the criminal charges and with respect to related proceedings including, the civil commitment proceeding discussed in this brief.

The civil case is before this Court as the result of a Notice of Appeal filed by Attorney William C. Bell of Bell Law Firm, PLLC. Mr. Bell is appealing an Order imposing sanctions on him for publishing sealed evidence without the advice or consent of the trial court. Mr. Bell has filed numerous actions and appeals on behalf of Dr. Smith which are related to the civil and/or criminal cases, and his unauthorized filings in those other matters form the basis for the trial court's imposition of sanctions.

II. The Course of the Proceedings

Mr. Abraham's civil complaint for damages was filed in the Circuit Court of Leflore County on July 7, 2012. Each of the Leflore County Circuit Judges recused themselves (Mr.

Abraham is a practicing attorney in Leflore County and Dr. Smith was a practicing physician in Leflore County prior to his arrest on April 29, 2012). This Court appointed The Honorable L. Breland Hilburn as Special Judge by Order entered on the trial court docket on March 28, 2013.

Early in the litigation, Mr. Bell filed a Notice of Experts with the Circuit Clerk. A report signed by Michael Levine, a purported expert witness, was attached to the Notice. The Levine report contained unfounded and salacious allegations against Mr. Abraham. When Mr. Abraham's counsel alerted the trial court to the filing, the trial court issued a bench order directing the parties to refrain from filing unsealed discovery materials with the clerk then issued a written order sealing Paragraph B.7 of the Levine report (the paragraph containing the salacious allegations). Despite these orders, and a subsequent admonition from the trial court, Mr. Bell filed the sealed allegations in numerous other forums.

As proof of the improper filings made its way to Plaintiff's counsel, they filed a motion, supplemental motion, and second supplemental motion for contempt and other sanctions. Two motion hearings were held and, following the second motion hearing, the trial court entered an Order imposing sanctions on Mr. Bell as provided by Miss. R. Civ. P. 37. The Order awarded attorneys' fees and expenses to Plaintiff's counsel for the time spent in responding to Mr. Bell's actions. The amount of the award was supported by itemized statements Plaintiff's counsel submitted *in camera* to the trial court. The propriety of the decision to award sanctions and the sufficiency of the fee and expense itemizations are now before this Court on appeal.

III. Disposition in the Court Below

The Order imposing sanctions was entered by the trial court on January 9, 2017. On February 21, 2017, at the request of Judge Hilburn, this Court appointed Honorable Barry W.

Ford as Substitute Special Judge. The case is still pending. The parties have completed discovery and it is anticipated that a trial date will be set in the near future.

IV. Statement of the Relevant Facts

On March 24, 2014, Defendants filed a Notice of Experts with the Circuit Clerk of Leflore County to which they attached a written report signed by Michael Levine, a purported expert. R. 41-90.[1] Four days later, Defendants filed an Answer and Counterclaim with the Circuit Clerk to which they attached their Notice of Experts and the Levine report. R. 2-90. Plaintiff objected to these filings on grounds that prejudice and injustice would result if certain false and salacious allegations contained in the Levine report were disseminated to the public. R. 51.

On April 8, 2014, the trial court issued the following bench order: "Any discovery to be filed with the Court will be done only by court order. There will not be any discovery filed with the clerk of the Court unless it is authorized by the Court. [The] Court is also going to enter an order sealing all discovery documents that have been filed in the court record." R. 107. On July 29, 2014, without withdrawing its bench order, the trial court entered a written order holding that Paragraph B.7 of the Levine report was sealed. R. 116. The order was approved and signed by Mr. Bell and no appeal was taken. R. 116.

On August 28, 2014, Defendants propounded (but did not file) a Designation and Supplementation of Expert Witnesses including a supplemental report signed by Mr. Levine. Although the paragraphs were re-numbered (the allegations previously in paragraph B.7 were now in paragraphs 9 and 56), the supplemental report restated and even expounded upon the sealed allegations.

[1] "R. [ ]" refers to the Record and corresponding center bottom page number, "R.E. [ ]" refers to Appellants' Record Excerpts and corresponding page number, "Tr. [ ]" refers to the Transcript and corresponding top right page number as contained in the Record at Volume 6 of 6.

On December 5, 2014, Mr. Bell, one of Defendants' attorneys, filed a Motion to Exclude Attorney General in a civil commitment proceeding against Dr. Smith. R. 117-21. An un-redacted copy of the supplemental Levine report was attached as Exhibit A. R. 118. After learning of the filing, Plaintiff filed a Motion for Contempt alleging that, because the supplemental Levine report was generated for and in connection with discovery in the civil suit and contained sealed allegations, the filing was a violation of the trial court's orders, the Litigation Accountability Act, Rule 11 and/or Rule 37 of the Mississippi Rules of Civil Procedure, or constituted contempt. R. 92-101.

On January 14, 2015, the trial court advised the parties it would hear Plaintiff's Motion for Contempt 12 days later, on January 26, 2015. Ten days before the hearing, Mr. Bell filed a complaint against Mr. Abraham with The Mississippi Bar, attaching an un-redacted copy of the supplemental Levine report. R. 139.

On January 26, 2015, Mr. Bell took the witness stand in his own defense. Tr. 16. He admitted to filing an un-redacted copy of the supplemental Levine report in the civil commitment proceeding but claimed he did not violate the April 8, 2014 bench order because the "particular report" he filed was issued "both for the criminal case and the civil case." Tr. 19. Mr. Bell also claimed he did not violate the July 29, 2014 order because the supplemental report was not signed until August 27, 2014: "[T]his particular report by Mr. Levine was not sealed by this Court … if for no other reason that that document didn't even exist" on July 29, 2014, "… it's a different document." Tr. 19-20.

During the hearing, the trial court advised "filing a different document that says the same thing as the document that this Court sealed would still be a violation … of the order ..." Tr. 21. Mr. Bell disagreed: "this document was not sealed, it didn't even exist …" Tr. 22-23. When

asked whether he believed the trial court's order had any bearing on a filing in the civil commitment proceeding, Mr. Bell replied: "It did not and does not." Tr. 27. The trial court was unconvinced: "If Mr. Levine went and rewrote the same document, just put another date on it and it was filed in another proceeding, then that still circumvents the order of this Court." Tr. 32.

To complete his analysis, the trial judge asked Plaintiff's counsel to mail him copies of the original and supplemental Levine reports, "outlining … where you feel like the order of this Court has been violated." Tr. 32-33, 34-35. "If it turns out that that has not happened then this will be done, it will be over. If not, then the Court is going to award fees and expenses to the attorneys for the effort they've had to go through today and whatever other expenses they may have." Tr. 33. Per the direction of the trial court, Plaintiff submitted *in camera* copies of the original and supplemental Levine reports.

On February 2, 2015, Plaintiff's counsel filed a Supplemental Motion for Contempt and Other Sanctions on grounds that Mr. Bell published an un-redacted copy of the supplemental Levine report to The Mississippi Bar. R. 134-38. Defendants responded, echoing arguments made on January 26, 2015, e.g. "[t]his court has no authority or jurisdiction to require that Dr. Smith, through counsel, seek this court's blessings about filings by Dr. Smith" and Mr. Bell "did not technically violate" the trial court's order when he filed a different document containing the same allegations in a confidential proceeding such as The Bar complaint process. R. 140-49.

Without waiting to learn whether the trial court would accept his argument, Mr. Bell proceeded to file the un-redacted supplemental Levine report five times in *unsealed* proceedings: (1) on March 24, 2016 in Smith v. McMichael et al., in the USDC for the Southern District of Mississippi, Cause No.: 3:16-cv-00212-HTW-LRA, as Ex. 4 to Plaintiff's Complaint [Doc. 1] (R. 341-81); (2) on March 29, 2016 in Smith v. McMichael et al., in the USDC for the Southern

District of Mississippi, Cause No.: 3:16cv00212-HTW-LRA, as Ex. 4 to Plaintiff's Amended Complaint [Doc. 3] (R. 382-421); (3) on March 31, 2016, in Smith v. Hood et al., in the USDC for the Southern District of Mississippi, Cause No.: 3:16-cv-00129 CWR-FKB, as Ex. 1 to Plaintiff's Response to Motion to Dismiss and/or Stay Case [Doc. 34] (R. 422-65); (4) on August 11, 2016, in Smith v. Abraham, in the Mississippi Supreme Court, Cause No.: 2014-M-00976, as Attachment 1 to Plaintiff's Second Petition for Writ of Prohibition, Mandamus, for Other Extraordinary Relief (R. 466-506); and (5) on September 3, 2016, in Smith v. Abraham, in the Mississippi Supreme Court, Cause No.: 2014-M-00976, as Attachment 1 to Plaintiff's Amended Second Petition For Writ of Prohibition, Mandamus, Extraordinary Relief (R. 507-47).[1]

A hearing on Plaintiff's Supplemental Motion was noticed for March 31, 2015. R.E. 10. One day before the hearing, Defendants filed a Notice of Removal to the United States District Court for the Northern District of Mississippi. R.E. 10. A copy of the Order remanding the action was not filed with the Circuit Clerk of Leflore County until more than one year later, on July 18, 2016. R.E. 11. By that date, Mr. Bell had already filed un-redacted copies of the supplemental Levine report three times in the United States District Court for the Southern District of Mississippi. R. 341-81, 382-421, 422-65. Mr. Bell thereafter filed un-redacted copies of the supplemental Levine report twice with this Court. R. 466-506, 507-47.

On October 17, 2016, Plaintiff's counsel filed a Second Supplemental Motion for Contempt and Other Sanctions to bring the new filings to the trial court's attention. R. 292-300.

On October 25, 2016, Mr. Bell took the witness stand again and presented the trial court with a redacted version of the supplemental Levine report, removing paragraph 9 on page 19 and

[1]Mississippi is, of course, a notice pleading state where attachment of a purported expert's report to an initial or amended petition or complaint would neither be required nor typical.

paragraph 56 on pages 41 and 42, as those were the paragraphs where the B.7 allegations were now contained. Tr. 74-75. Regarding the five new filings identified in the Second Supplemental Motion, Mr. Bell testified, "because this Court had only limited its order to that paragraph [B.7] and that pleading from 2014, there is no rule or law that I'm aware of that would require me to come back and ask this Court's blessings on how I can and cannot go forward with my defense of Dr. Smith or asserting claims for Dr. Smith." Tr. 78.

On December 1, 2016, the trial court alerted the parties that Plaintiff's Second Supplemental Motion would be granted and directed Plaintiff's counsel to submit documentation supporting the amount of attorneys' fees and expenses incurred in responding to Mr. Bell's improper filings. R. 648.

On December 19, 2016, Plaintiff's counsel instructed a paralegal employed by Hickman, Goza & Spragins, PLLC to transmit itemized statements of attorney's fees and expenses to the trial court. R. 653. One day later, the trial court acknowledged its receipt of the statements and allowed Defendants an opportunity to file any specific objections. R. 660.

On December 30, 2016, Defendants filed their response to the accounting. R. 619-34. As later noted by the trial court, "[t]he defendant's response to the statements of time and expenses presented by the two firms fails to establish any inaccuracy in either statement. The response seems to raise issues relative to [the] court's ruling on plaintiff's motion for contempt and other sanctions rather than the validity of the accounting." R.E. 39-40.

On January 9, 2017, the trial court entered an Order awarding sanctions against Mr. Bell but finding he was not in contempt. R.E. 38-40. "Although contempt, litigation responsibility, and sanctions were considered by the court," the sanctions imposed on Mr. Bell were pursuant to Rule 37. R.E. 38, 39. The trial court noted, "[t]he finding that sanctions should be imposed on

defense counsel does not reach the level of contempt as authorized by Rule 37 (b)(2)(D) MRCP. Contempt is not a part of this sanction." R.E. 40. In support of its Order, the trial court found:

> This Court's sanction of defense counsel is for his publication of sealed evidence without the advice or consent of the Circuit Court of Leflore County, Mississippi. Counsel for the defendant has stated of record his reasoning as to why he felt no obligation to comply with the order of the Circuit Court of Leflore County sealing certain evidence. His reasoning is totally unacceptable.

R.E. 39. In light of these findings, and Defendants' failure to "establish any inaccuracy" in the statements of time and expenses, the trial court entered a "judgment" for sanctions against Mr. Bell and in favor of Hickman, Goza & Spragins, PLLC and Chapman, Lewis & Swan, PLLC. It is from this Order that Mr. Bell and his clients have taken their appeal.

SUMMARY OF THE ARGUMENT

The trial court was presented with credible evidence supporting the imposition of sanctions. Mr. Bell intentionally published sealed allegations *seven* times. The last five filings were made after the trial court admonished Mr. Bell not to file any document containing sealed allegations in any court. Mr. Bell's rationale for disregarding the trial court's order (e.g. the original and supplemental reports were not the same documents, the "blessing" of the trial court was not required to file sealed allegations in other forums, etc.) was not acceptable to Judge Hilburn and should not be accepted by this Court.

After carefully considering whether Mr. Bell's actions should be viewed as a violation of the Litigation Accountability Act, Rule 11 and/or Rule 37 of the Mississippi Rules of Civil Procedure, or as a matter of contempt, the trial court properly imposed sanctions pursuant to Rule 37. Mr. Levine's reports are discovery documents and the order sealing portions of his original report is a discovery order. Rule 37 empowers a trial court to impose sanctions, including an award of reasonable attorney's fees and expenses, for discovery violations. As such, the trial court acted within its discretion and authority.

Plaintiff's counsel presented sufficient proof of reasonable attorneys' fees and expenses to support the sanctions award by submitting two itemized statements for *in camera* review by the trial court. The information included in the statements, coupled with the trial judge's familiarity with the case and counsel, was sufficient to meet the requirements set forth in precedent and the Rules of Professional Conduct. Furthermore, transmittal of the statements to the trial court by a paralegal does not constitute the illegal practice of law as the transmittal was neither a pleading nor an application to the court for an order.

Although irrelevant for purposes of this appeal, the trial court had authority to seal portions of the record. The trial court issued a bench order regarding the filing of discovery documents and an order sealing portions of the Levine report. When there was a risk that a pleading or exhibit would violate the trial court's orders, Plaintiff's counsel wrote "Subject to Court Order- to be Held Under Seal" on the top of the pleading. If Defendants believed a document had been improperly designated, they could have filed a motion to unseal it. They did not and, as a result, are procedurally barred from raising this issue on appeal.

ARGUMENT

I. THE TRIAL COURT WAS PRESENTED WITH CREDIBLE EVIDENCE SUPPORTING THE IMPOSITION OF SANCTIONS

On January 9, 2017, the trial court ruled "a sanction of counsel for the defense is appropriate." R.E. 39. Defendants complain on appeal there is no "credible evidence" to support an imposition of sanctions. Appellants' Brief at p. 19. In support, they argue that Plaintiff "did not introduce any document into evidence, did not call one single witness, and elected at both hearings not to cross-examine William Bell. Lee Abraham and his attorneys rested their entire presentation on their hundreds of pages of pleadings, and on Mr. Tucker's arguments from the podium." Id. These allegations in no way support Defendants' contention that there is a lack of "credible evidence" in support of the sanctions. It appears Defendants have confused the evidentiary burden at trial with the evidentiary burden at a motion hearing.

A. Exhibits are evidence when filed in support of a motion

In support of their argument that there is no "credible evidence" to support the imposition of sanctions, Defendants direct this Court to Terry v. Jones, 44 Miss. 540 (Miss.1871). Defendants cite this 147-year-old decision, without analysis, for the proposition that "[p]leading is one thing and evidence is another." Id. at 542. Yet Defendants fail to quote the very next sentence of the decision which states: "A bill in equity is pleading, and exhibits are evidence." Id. Defendants also fail to note that the appeal in Terry arose from a chancellor's decision to overrule the demurrer of the defendants to a bill of complaint. Id. at 541. In other words, Terry concerns antiquated procedures related to the legal sufficiency of a plaintiff's claim, not his evidentiary burden. Terry does not support Defendants' position and, if anything, supports Plaintiff's contention that "exhibits are evidence" when filed in support of a motion.

Defendants also direct this Court to Wackenhut Corp. v. Fortune, 87 So.3d 1083 (Miss.Ct.App.2012), in which the Mississippi Court of Appeals held a statement made by an attorney during the course of a jury trial was not evidence. Id. at 1092 (¶ 27). "Although Fortune's attorney stated Fortune had been sober for one year, statements by attorneys are not evidence. As it stands, there is no evidence Fortune qualified for future shoulder surgery." Id. Plaintiff agrees the statements of counsel, whether in a hearing or a trial, are not evidence but maintains that "exhibits are evidence" when filed in support of a motion. Terry, 44 Miss. at 541.

Plaintiff filed 10 exhibits with the trial court in support of his original, supplemental and second supplemental motions for contempt and other sanctions.[2] These motions did not lead to a show cause hearing and certainly did not result in a trial. In fact, at the motion hearing on January 26, 2015, the trial court directed Mr. Bell's co-counsel, Jeffery Turnage, to "reserve your argument about whether the Court should or should not find counsel in contempt for a time when the court would set a show cause hearing." R. 317. A show cause hearing was never held because the trial court concluded that Mr. Bell's conduct, while deserving of sanction, did not rise to the level of contempt. R.E. 40.

In addition to the 10 exhibits Plaintiff filed on the record, Plaintiff also submitted *in camera* copies of the original and supplemental Levine reports outlining their similarities and how they violated the order sealing certain allegations. Tr. 32-33, 34-35. These documents were not introduced during the motion hearing on January 26, 2015 because it was open to the public and attended by the media (Tr. 3), and the trial judge asked Plaintiff's counsel to mail the documents to him after the hearing. Tr. 30, 32. Upon its review of Plaintiff's exhibits (both of

[2] Plaintiff attached three exhibits to his original motion, one additional exhibit to his supplemental motion and six exhibits to his second supplemental motion for contempt or other sanctions.

record and *in camera*) and its consideration of Mr. Bell's own testimony, the trial court possessed sufficient credible evidence upon which to rule. The trial court's decision was not an abuse of discretion, and this Court should affirm.

B. Plaintiff was not required to call witnesses or conduct cross-examination

Mr. Bell's testimony on January 26, 2015 and October 25, 2016 plainly established that he had knowingly and intentionally filed un-redacted copies of the supplemental Levine report *seven* times. In his defense, Mr. Bell testified that he was entitled to file the supplemental report wherever and whenever he pleased without so much as seeking the "blessing" of the trial court because (1) the trial court's order only sealed paragraph B.7 of the original report, (2) the supplemental report did not exist when the order sealing paragraph B.7 was entered, (3) the sealed allegations were now in paragraphs 9 and 56 of the supplemental report, and (4) the trial court lacked authority to constrain filings in other forums.

Plaintiff and his counsel saw no reason to delve further into Mr. Bell's motivations through cross-examination. It is clear Mr. Bell lacks respect for the trial court.[3] It is equally clear that despite having prepared a redacted version of the supplemental report in December 2014, Mr. Bell continued filing un-redacted copies at least through September 3, 2016. Mr. Bell did so at his own peril as the trial court alerted him in January 2015: "If Mr. Levine went and rewrote the same document, just put another date on it and it was filed in another proceeding, then that still circumvents the order of this Court." Tr. 32. Mr. Bell was also on notice that attorney's fees

[3] Mr. Bell has evidenced a lack of respect for the authority of the trial court through his testimony and his filings. See, e.g. Motion to Set Aside and Vacate "Order Appointing Special Judge" filed in this Court under Cause Nos. 2012-AP-1719 and 2012-AP-1720, in which the constitutionality of Judge Hilburn's appointment is challenged (R. 549-56); Petition for Recusal of Supreme Court Justice and for Review Under the Structural Error Standard filed in this Court under Cause No. 2014-M-00979, in which Judge Hilburn is repeatedly described as a "biased judge" (R. 568-580). See also, the allegations of bias made against Judge Hilburn on December 30, 2016 (R. 630) and the challenge to his appointment (R. 629) made more than 20 months after this Court rejected that argument (R. 557, 567).

and expenses would be awarded if the trial court's order was violated yet he did not change course. Tr. 33. The fees and expenses increased as a direct result of his decisions.

Plaintiff did not need to call other witnesses whose testimony might shed light on whether Mr. Bell violated the trial court's orders. Mr. Bell was the witness with the most direct knowledge and Mr. Bell testified in his own defense twice. In addition to the exhibits presented by Plaintiff, the trial court has stated that it considered the testimony of Mr. Bell when determining whether sanctions were warranted: "Counsel for the defendant has stated of record his reasoning as to why he felt no obligation to comply with the order of the Circuit Court of Leflore County sealing certain evidence. His reasoning is totally unacceptable." R.E. 39. This and other statements contained in the trial court's order amount to its findings of fact.[4] The trial court did not abuse its discretion when imposing sanctions on Mr. Bell for his publication of sealed evidence, its ruling is supported by credible evidence, and this Court should affirm.

II. THE TRIAL COURT HAD AUTHORITY TO IMPOSE SANCTIONS PURSUANT TO MISS. R. CIV. P. 37

On January 9, 2017, the trial court ruled "sanctions should be imposed on counsel as provided under Rule 37 MRCP." R.E. 38. Defendants complain on appeal "[t]here is not one iota of evidence in this record to support any discovery sanction under Rule 37." Appellants' Brief at p. 12. In support, they argue the July 29, 2014 order was not a "discovery order," the trial court lacked authority "to order sanctions for filings in other courts over which the circuit court has no jurisdiction," and the trial court erroneously awarded fees and expenses to the "law firms – not to the party in the case." Id. at pp. 12-13. Defendants are incorrect: (1) the Levine report is a discovery document and the order sealing paragraph B.7 is a discovery order; (2) it matters not

[4] Appellants' complain on appeal that the trial court failed to make sufficient findings of fact. Appellants' Brief at p. 15. Appellees believe the January 9, 2017 Order speaks for itself as to this issue.

whether the trial court had authority over the other courts where Mr. Bell made his filings, the trial court had authority over Mr. Bell; and (3) if it was error to award the sanctions directly to the law firms, the error was harmless and Mr. Abraham has not objected.[5]

It was argued in Plaintiff's original, supplemental and second supplemental motions that Mr. Bell's filing of un-redacted copies of the supplemental Levine report could be viewed as a direct violation of the trial court's orders, the Litigation Accountability Act, Rule 11 and/or Rule 37 of the Mississippi Rules of Civil Procedure, or as a matter of contempt. Plaintiff provided the trial court with an analysis of each argument and the trial court elected to proceed with sanctions under Rule 37. (A reading of the transcripts presented on appeal indicates the trial court also considered whether the proceedings had been expanded by Mr. Bell's filings in contravention of the Litigation Accountability Act.) The trial court's decision to impose sanctions pursuant to Rule 37 was neither erroneous nor an abuse of discretion, and should be affirmed.

Where a party or its representative violates a discovery order, Rule 37 provides the trial court with authority to issue such sanctions "as are just" including, requiring "the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure …" Miss. R. Civ. P. 37(b). This Court has held the authority to impose Rule 37 sanctions is quite broad: "State courts have the authority under Rule 37 to impose purely monetary, noncompensatory fines for a violation of a discovery order" pursuant to a finding of contempt, and compensatory fines in the form of reasonable attorney's

[5] "In applying the harmless error rule this Court views the whole record as to whether the verdict and judgment are supported by the weight of the evidence and whether the errors are trivial in order to determine if it affirmatively appears that the error resulted in a miscarriage of justice." Griffin v. Holliday, 233 So.2d 820, 823 (Miss.1970).

fees and expenses "caused directly by the other party's failure to comply with the court's orders." Cooper Tire & Rubber Co. v. McGill, 890 So.2d 859, 867 (¶¶ 29, 31) (Miss.2004).

As a general proposition, this Court has held, "[o]ur trial judges ... have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they do so at their own peril." Buchanan v. Ameristar Casino Vicksburg, Inc., 957 So.2d 969, 975 (¶ 18) (Miss.2007) (citing Miss. Ins. Guar. Ass'n v. Miss. Cas. Ins. Co., 947 So.2d 865, 877 (¶ 34) (Miss.2006) (quoting Bowie v. Montfort Jones Mem'l Hosp., 861 So.2d 1037, 1042 (¶ 14) (Miss.2003))); see also Collins v. Koppers, Inc., 59 So.3d 582, 590 (¶ 24) (Miss.2011) (quoting Bowie, 861 So.2d at 1042). "While the end result … may appear to be harsh, litigants must understand that there is an obligation to timely comply with the orders of our trial courts." Buckley v. Singing River Hosp., 99 So.3d 248, 255 (¶ 24) (Miss.Ct.App.2012) (quoting Bowie, 861 So.2d at 1043 (¶ 16)). This obligation exists because orders "are not advisory" and "a flagrant disregard for the orderly administration of our trial courts" will not be tolerated. Id.

In Brooks v. Roberts, 882 So.2d 229 (Miss.2004), this Court held "parties must use all good faith to comply with the order of the trial court" and "[l]itigants must understand that their cases are at risk without good faith compliance with the orders of the trial courts." Id. at 233 (¶ 14). It cannot be said that Mr. Bell used "all good faith" in this case. Mr. Bell obtained a supplemental report from Mr. Levine shortly after the trial court sealed certain allegations in his original report. The supplemental report restated and even expounded upon the sealed allegations. Mr. Bell proceeded to file an un-redacted copy of the supplemental report in a chancery proceeding then publish it to The Mississippi Bar. Even after being warned by the trial

court that filing any document containing the sealed allegations would violate its order, Mr. Bell filed an un-redacted copy of the supplemental Levine report *five* more times.

In light of Mr. Bell's failure to act in good faith and his "flagrant disregard" for the orders of the trial court, Brooks, 882 So.2d at 233 (¶ 13), the trial court had authority under Rule 37 to impose such sanctions on Mr. Bell "as are just." Miss. R. Civ. P. 37(b). The trial court did not abuse its discretion when imposing sanctions on Mr. Bell for his publication of sealed evidence, its ruling is supported by credible evidence, and this Court should affirm.

III. PLAINTIFF PRESENTED SUFFICIENT PROOF OF REASONABLE ATTORNEYS' FEES AND EXPENSES TO SUPPORT THE SANCTIONS AWARD

On January 9, 2017, the trial court found "[t]he defendant's response to the statements of time and expenses presented by the two firms fails to establish any inaccuracy in either statement. The response seems to raise issues relative to [the] court's ruling on plaintiff's motion for contempt and other sanctions rather than the validity of the accounting." R.E. 39-40. Defendants complain on appeal that the itemized statements submitted by the law firms in support of their fees and expenses are a "sham and false." Appellants' Brief at pp. 13-15. Defendants also complain that the itemized statements should not have been considered because they were transmitted by a paralegal who "illegally engaged in the unauthorized practice of law." Id. at pp. 17-19. Finally, Defendants complain that there is no proof the fees are reasonable as required by Rule 1.5 of the Rules of Professional Conduct. Id. at pp. 21-23. Defendants are incorrect. Plaintiffs will respond to each of these allegations in turn.

A. The itemized statements are competent evidence

Defendants complain that the itemized statements submitted by the law firms in support of their fees and expenses are a "sham and false" because (1) the statements constitute an

unsigned "pleading," (2) the statements constitute "an application to the court for an order," and (3) the statements were transmitted to the trial judge via email by a paralegal for the purpose of "intentionally circumventing Rule 11." Appellants' Brief at pp. 13-15. Defendants are willfully mischaracterizing the itemized statements. The trial judge alerted the parties on December 30, 2016 that Plaintiff's Second Supplemental Motion would be granted and instructed Plaintiff's counsel to present documentation in support of the fees and expenses incurred in bringing Mr. Bell's improper filings to the court's attention. R. 648. Accordingly, the transmittal of the statement was neither a "pleading" nor "an application to the court for an order."

B. The paralegal that transmitted the statements was not practicing law

Defendants complain that the paralegal who transmitted the statements engaged in the "unlawful practice of law" by writing an email to the trial judge politely asking him to let her know if he had "any questions" or needed "anything further." Appellants' Brief at pp. 17-19. Defendants are incorrect and their reliance upon the Mississippi Code is grossly misplaced. The statutory law governing the illegal practice of law plainly relates only to the preparation of documents which are "to be filed in any cause or proceeding, or to be instituted in any court in this state …" Miss. Code Ann. § 73-3-55. The paralegal in question did no more than send a polite transmittal letter to the trial judge at the instruction of counsel. R. 653. Neither the transmittal letter itself nor any of its attachments were "to be filed in any cause or proceeding," but were submitted *in camera* to the trial court at its request.[6] R. 648. The paralegal did not

[6] Defendants claim "[t]he fee bill from the Hickman, Goza and Spragins firm even shows that any questions should be directed to 'Stacey Ainsworth', who is a paralegal." Appellants' Brief at p. 14. Ms. Ainsworth is not a paralegal; she is the firm's former bookkeeper and, as such, was the person in charge of accounting for fees and expenses and billing clients on the date when the itemization was prepared.

attempt to enter an appearance and did not sign any pleading. She acted in little more than a secretarial capacity at the direction of counsel.

C. The award of attorney's fees is supported by specific proof

Defendants complain that "Lee Abraham and his attorneys presented no evidence to support their claim for attorney fees and expenses." Appellants' Brief at pp. 21-23. Defendants are simply incorrect. Hickman, Goza & Spragins, PLLC submitted a 5-page itemized statement on which it set forth the date of each related task, a brief description of each such task, and the time each such task took to complete. R. 654-58. The itemized statement also set forth the hourly rate for each timekeeper and calculated the cost of each task based on the particular hourly rate of the person performing it. Id. Chapman, Lewis & Swan, PLLC submitted a 1-page itemized statement which was in substantially the same form and contained substantially the same information as the one submitted by their co-counsel. R. 659. The hourly rate charged by Mr. Chapman is the same as that charged by Mr. Spragins and Mr. Tucker, and can be easily ascertained by a comparison of the amounts charged for the time billed. Id.

The Mississippi Court of Appeals has examined relevant precedent related to an award of attorney's fees, finding as follows:

> While the court may find a case appropriate for the award of attorney's fees, the actual award of attorney's fees is still dependent upon specific proof. A & F Properties, LLC v. Lake Caroline, Inc., 775 So.2d 1276(¶ 22) (Miss.Ct.App.2000). When a party fails to present competent evidence to determine attorney's fees, the award may be denied. Id. The abuse of discretion standard applies regarding the award of attorney's fees, and such awards must be supported by credible evidence. Mississippi Power & Light Co. v. Cook, 832 So.2d 474(¶ 39) (Miss.2002).

Romney v. Barbetta, 881 So.2d 958, 962–63 (Miss.Ct.App.2004). The Court of Appeals further found that the proof a trial court should consider when awarding attorney's fees is set forth both in precedent and in Rule 1.5 of the Mississippi Rules of Professional Conduct:

> In determining an appropriate amount of attorneys fees, a sum sufficient to secure one competent attorney is the criterion by which we are directed. Rees v. Rees, 188 Miss. 256, 194 So. 750 (1940). The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

Romney, 881 So.2d at 962–63 (quoting McKee v. McKee, 418 So.2d 764, 767 (Miss.1982). Plaintiff believes the trial court was sufficiently familiar with the nature the case, the novelty and difficulty of the questions at issue, and the skill and standing of the attorneys practicing before it to answer these considerations. Likewise, Plaintiff believes the trial court could judge for itself the degree of responsibility each of the attorneys had over the management of the cause based on their in person appearances and their signatures on numerous pleadings. As to the time and labor involved, this question is answered by the itemized statements.

There is no evidence the trial judge abused his discretion in awarding the attorney's fees and expenses, and the itemized statements submitted by the law firms constitute credible evidence in support of the award. However, in the event that this Court finds additional information should have been submitted by the law firms, or additional findings should have been made by the trial court, Plaintiff would suggest that the proper remedy is to remand the matter for further proceedings. Defendants' request that this Court "reverse and render the trial court judgments" should be denied.

IV. THE TRIAL COURT HAD AUTHORITY TO SEAL PORTIONS OF THE RECORD

On July 29, 2014, the trial court entered an order holding that Paragraph B.7 of the original Levine report was sealed. R. 116. The order was approved and signed by Mr. Bell and no appeal was taken, yet Defendants now complain that "[t]he circuit clerk sealed multiple parts of the record in this case without a court order and without a hearing." Appellants' Brief at p. 24. Defendants are incorrect. A hearing was held on April 8, 2014, at which time the trial court issued a bench order directing the parties to refrain from filing discovery materials on the record and advising it was sealing those discovery documents that had already been filed. R. 107.

The transcripts presented on appeal plainly reflect that Plaintiff's counsel took steps during oral argument to avoid violating the April 8, 2014 bench order and the July 29, 2014 order sealing certain allegations. See, e.g. Tr. 3-4, 16. Likewise, when there was a risk that a pleading or one of its exhibits would violate the trial court's orders, Plaintiff's counsel wrote "Subject to Court Order- to be Held Under Seal" on the top of the pleading.[7] Defendants could have filed a motion to unseal any document they believed had been improperly designated.

The docket reflects that the following 23 filings (most of which included exhibits and many of which deal with discovery matters) have been sealed: Defendants' expert designation (attaching the original Levine report), Defendants' answers (attaching the original Levine report), two motions to compel and an amended motion to compel, Plaintiff's response in opposition to the Cancer Center's motion to dismiss, Plaintiff's objection to a subpoena *duces tecum*, Plaintiff's responses in opposition to two motions to quash, Defendants' reply in support

[7] Mr. Bell's co-counsel, Mr. Turnage, clearly had the same understanding as he wrote "To Be Held Under Seal" on the top of pleadings that contained information which might violate the orders. See, e.g. R. 122-133, 140-149. Mr. Turnage also submitted the supplemental Levine report under seal at the hearing on January 26, 2015. Tr. 17-18.

of one motion to quash, Plaintiff's three motions for contempt[8] and Defendants' responses to those three motions, Plaintiff's motion to exclude the testimony of Levine, a motion to compel production and inspection, Plaintiff's motion for partial summary judgment and supporting itemization of fact, a motion to quash, and Plaintiff's reply in support of its motion for partial summary judgment. R.E. 1-18. The docket also reflects that Defendants never filed a contemporaneous or otherwise timely motion to unseal any of these filings. Id.

Defendants failed to file a timely motion challenging the sealing of any of the 23 documents designated as sealed on the docket; therefore, they should be procedurally barred from raising this issue on appeal. "This Court 'has held that unless substantial rights are affected, issues not presented to the trial judge are procedurally barred from being raised for the first time on appeal.' " InTown Lessee Assocs., LLC v. Howard, 67 So.3d 711, 718 (Miss.2011) (citations omitted). In the event this Court could find otherwise, Plaintiff would note that while "[c]ourt filings are considered to be public records, unless otherwise exempted by statute," "parties may file documents under seal, and the [Public Records] Act does not conflict with the court's authority to declare a public record confidential or privileged." Estate of Cole v. Ferrell, 163 So.3d 921, 925 (Miss.2012) (citing Miss.Code Ann. § 25–61–11) (additional citations omitted). Thus, "[a] court may, within its discretion, determine if nonexempt matters should be declared confidential or privileged, removing those records from public disclosure." Id.

The trial court was within its discretion to find that due to the nature of the allegations made by the parties, discovery documents were not to be filed on the record. The trial court was further authorized to find that certain allegations set forth in Defendants' discovery materials

[8] It is alleged that Plaintiff filed "unsealed" copies of the supplemental Levine report as exhibits to his Second Supplemental Motion for Contempt but this is not borne out by the record.

deserved to be sealed. Defendants approved and did not appeal the Order sealing portions of the original Levine report and did not file contemporaneous motions to unseal any of the documents which have been designated as sealed. As a result, this Court should find the fact that the trial court sealed portions of the record is irrelevant, Defendants are procedurally barred from complaining about the sealing of certain documents, and the trial court did not abuse its discretion in determining that certain maters needed to be removed from public disclosure.

CONCLUSION

For all reasons cited the foregoing Brief of Appellees, Albert Lee Abraham, Jr., Hickman, Goza & Spragins, PLLC, and Chapman, Lewis & Swan, PLLC respectfully request that this Honorable Court affirm the trial court's Order imposing sanctions on Attorney William C. Bell.

Respectfully submitted,

ALBERT LEE ABRAHAM, JR.;
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BY: */s/ Lawrence J. Tucker, Jr.*

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CERTIFICATE OF SERVICE

I, LAWRENCE J. TUCKER, JR., one of the attorneys for the Appellees, do hereby certify that I have on this date electronically filed the foregoing document with the Clerk of Court using the MEC system which sent notification of such filing to all counsel of record including the following:

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Further, I hereby certify that I have mailed by United States Postal Service the foregoing document to the following non-MEC participants:

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