

**IN THE COURT OF APPEALS 10/15/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00930 COA**

**MATTIE SMITH AND NORTH MISSISSIPPI RURAL LEGAL SERVICES**

**APPELLANTS**

**v.**

**OXFORD SCHOOL DISTRICT**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANTHONY T. FARESE

COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANTS:

AVA N. JACKSON, MARY A. BROWN, A. SPENCER GILBERT, J. WILLIAM MANUEL

ATTORNEYS FOR APPELLEE:

GUY T. GILLESPIE, JANET G. ARNOLD, NANCY M. MADDOX

NATURE OF THE CASE: FRAUD, UNJUST ENRICHMENT, AND BREACH OF WARRANTY  
IN THE SALE OF REAL PROPERTY

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF THE PLAINTIFF OF  
INJUNCTIVE RELIEF, AN EQUITABLE LEIN ON THE PERSONAL PROPERTY OF  
DEFENDANT SMITH AND ATTORNEYS' FEES ASSESSED AGAINST BOTH  
DEFENDANTS

MANDATE ISSUED: 5/29/97

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

#### SUMMARY

In 1993, the Oxford School District ("the District") decided to try to acquire a parcel of land adjacent to one of its school buildings. Terry Mood, Assistant Superintendent for the District, was advised by the chancery clerk's office that the property in question was owned by Mattie Smith. Mood contacted the only "Mattie Smith" listed in the telephone directory, who told Mood that she did own the property. Smith told Mood that she would be willing to sell the property, and they agreed upon a price of \$25,000.00. On June 22, 1993, Nancy Maddox, an attorney for the District, ran a title search on the property. The property, which was in the name of "Mattie L. Smith," was unencumbered, and the closing went forward that day. Smith executed a warranty deed to the property in exchange for a check for \$25,000.00. Smith then proceeded to an accountant, paid estimated income taxes on the sale in the amounts of \$3,000.00 to the Internal Revenue Service ("IRS") and \$700.00 to the Mississippi State Tax Commission, and opened a bank account for the money received from the District.

Smith also began spending the money and paying off certain personal debts. Approximately two weeks after the closing, Mood discovered that Mattie Smith was not the owner of the property but that the property really belonged to Mattie L. Smith of Chicago. Mood contacted Smith on July 12, 1993, to inform her of the problem and met with Smith and Dorothy Jones, the woman managing Mattie L. Smith's property, on July 13, 1993. After this meeting, Smith withdrew \$4,000 from the account, paid off, in advance, two personal loans and obtained a \$100 money order payable to herself. Other than paying off the loans Smith has refused to account for what purpose she used the remainder of the \$4,000.00.

Later in the day of July 13, 1993, Maddox telephoned Smith and demanded that she return the District's money. Smith took a cashier's check made payable to herself in the amount of \$15,033.09 to a meeting with the District's attorneys. The District's attorneys took the cashier's check, but Smith did not endorse it over to the District. The next day Smith turned over the \$100 money order she had obtained payable to herself to the District.

On July 14, 1993, the District filed a complaint, amended on July 22, charging Smith with fraud and breach of warranty of title, requesting a money judgment, injunctive relief, and the placement of an equitable lien and a constructive trust on the balance of the funds paid to Smith. On July 28, the District filed a motion for summary judgment. On August 13, 1993, the parties entered into an agreed order in which Smith agreed to pay \$5,000.00 by August 31, 1993, and the balance by September 13, 1993. The agreed order further provided that "should trial be necessary", it would be held on September 13, 1993.

On August 31, 1993, Bela Chain, Smith's attorney filed a motion to withdraw as counsel for Smith. On September 10, 1993, the District filed a motion to hold Smith in contempt of the August 13, 1993, agreed order since she had failed to comply with the repayment terms. On September 16, 1993,

Lawrence Young of North Mississippi Rural Legal Services ("NMRLS") was substituted as counsel for Smith.

Young filed an answer on September 21 admitting that Smith did not own the property but maintaining that Mood and the District's attorney, Maddox, had purposely misled her into believing that she did own the property and then induced her to take the money for land which she did not own. The answer also asserted that Smith did not have to return the rest of the District's money. Smith also sought leave of court to assert a compulsory counterclaim against the District, Mood, and the District's attorneys for alleged fraud and misrepresentation. The trial court ruled that Smith could assert such a claim if she submitted a bond or other form of security, such as a contingent promissory note payable to the District in the event of an unfavorable judgment, to the court. Smith declined to do so, and filed another motion for leave to file a counterclaim and for a continuance on the morning trial was scheduled to commence, September 29, 1993. In this motion, Smith admitted that she paid estimated taxes from the proceeds and further alleged that she did not have any of the District's money in her possession. The chancellor overruled the motion.

On September 28, 1993, the trial court took the District's motion for contempt under advisement, ordering Smith to repay part of the money by 9:00 A.M. the next morning. The trial commenced the next morning after Smith declined to make any further payments.

The case was tried on September 29, November 1, and November 8, 1993. During trial, Smith's counsel argued that the conveyance and payment were based on Smith's reliance on the representations of the District and its attorneys and was not a product of fraud. Young also argued that Smith did not have any money to repay the District and therefore, in equity, she should not be subjected to any additional remedies.

The chancellor ruled in favor of the District and against Smith on the claims of fraud, unjust enrichment and breach of warranty. He granted a money judgment against Smith in the amount of \$10,346.42 plus interest, the balance of the proceeds of the sale which she had not yet returned, as well as \$9,000.00 in attorneys' fees for the District. The chancellor ordered that Smith apply for a refund of the taxes previously paid and return the refund to the District. The chancellor also imposed equitable liens on the tax refund and Smith's 1985 Blazer. Because Smith refused to account for all of the proceeds from the sale, the chancellor imposed a constructive trust and equitable lien over all of Smith's other property. Smith was held in contempt of the August 13, 1993, agreed order, but the punishment was held in abeyance. Although the chancellor noted during trial that there was no legitimate basis for the legal positions taken by Smith and her counsel and that Smith and her counsel were protracting the proceedings, the chancellor refrained from sanctioning NMRLS at that time.

On November 22, 1993, Smith filed a motion for new trial and amendment of judgment. In December of 1993, Young died and Ava Jackson and Mary Brown, attorneys for NMRLS, entered an appearance as counsel for Smith. On December 21, 1993, Jackson requested a copy of the transcript of the trial. The court delayed ruling on Smith's post-trial motion until Smith's attorneys could review the transcript. Jackson did not receive the transcript until September 8, 1994.

In the interim, the District learned that the IRS had mailed a tax refund to Smith on September 1, 1993, and that the refund check had not been cashed. On August 4, 1994, the District filed a motion to determine the status of the IRS refund. Smith responded on August 10, 1994, by admitting that the

IRS had mailed her the refund check in August 1993 and that she testified in November 1993, that she did not have any funds from any source to repay the District.

On September 15, 1994, after Jackson and Brown had an opportunity to review the transcript, the chancellor held a hearing on both pending motions--Smith's motion for new trial and the District's motion on the status of the IRS refund. After denying the motion for new trial, the chancellor heard the District's motion. In response to direct questions from the court about the IRS refund, Smith's attorneys refused to answer on the grounds of attorney-client privilege. Smith was then called to the stand where she invoked her Fifth Amendment privilege against self-incrimination and refused to disclose whether she had received the refund check. She also, on advice of counsel, refused to respond when asked whether she had understood the court's November 1993 judgment requiring her to obtain refunds and return them to the District.

The court then stated that he believed that Smith had committed perjury during the trial when she testified that she did not have any money to repay the District. The court also stated that Smith and her attorneys had not acted in good faith regarding the positions they asserted, without any legal authority, before the court. The court further stated that if it found out that Smith's attorneys knew that Smith had the money, "the Court will deal with them too."

At that point in the proceedings, Jackson and Brown announced to the court that Smith had received a \$3,000.00 refund from the IRS and that they had learned this after receiving the District's August 4, 1994, motion to determine the status of the refund.

Prior to recessing for lunch, the court ruled that he would impose sanctions on Smith and reserved ruling on whether he would impose sanctions on NMRLS. After reconvening, the chancellor stated that he had incorrectly ruled before lunch and his ruling was vacated. The court also stated that he had heard during lunch that Smith and her NMRLS' attorneys had sued the District and its attorneys in Circuit Court. Smith's attorneys then acknowledged this on the record.

The court proceeded to enter a new ruling which included imposing sanctions against Smith and NMRLS in the amount of \$11,000.00 for attorneys' fees and costs incurred by the District. The chancellor found that Smith and her attorneys had asserted meritless and frivolous defenses. Smith was held in contempt and sentenced to thirty days in jail for her conduct, which included perjury and violation of the August 13, 1993 agreed order. The punishment for contempt was deferred pending appeal. The sanctions against NMRLS were based upon a finding of a violation of Rule 11 of the Mississippi Rules of Civil Procedure and a violation of the Litigation Accountability Act since, among other things, the NMRLS' attorneys "knew or should have known" about the tax refund.

## ISSUES

Feeling aggrieved, both Smith and NMRLS appealed. Smith raises the following issues as error: (I.) whether the trial court erred in denying Smith leave to file a counterclaim against the District; (II. A.) whether the trial court erred in holding Smith in contempt for failing to make payments under the terms of the agreed order of August 13, 1993 and (II. B.) whether the trial court erred in finding Smith in contempt of court in its September 15, 1994, decree; (III.) whether the trial court erred in finding Smith committed fraud; (IV.) whether the trial court erred in imposing an equitable lien and constructive trust on Smith's property; (V.) whether the trial court erred in granting attorneys' fees

against Smith in the November 12, 1993, decree; (VI.) whether the trial court erred in denying Smith's motion for new trial; (VII.) whether the trial court improperly allowed the court reporter to excessively tax Smith for the cost of the transcript; and (VIII. A. and B.) whether the trial court erred in granting attorneys' fees and sanctions against NMRLS, and (VIII. C.) whether the trial court improperly considered evidence not in the record in rendering its September 15, 1994, order.

NMRLS raises the following issues as error: (VIII. A.) whether the trial court properly imposed sanctions against NMRLS under Rule 11, and (VIII. B.) whether the trial court properly imposed sanctions under the Litigation Accountability Act ("the Act").

## ANALYSIS

### SMITH'S APPEAL

#### I. DID THE TRIAL COURT ERR IN DENYING SMITH LEAVE TO FILE A COUNTERCLAIM AGAINST THE DISTRICT ?

Smith asserts that the trial court erred in failing to allow her to file a counterclaim against the District on allegations of gross negligence and fraud. The chancellor ruled that Smith was not entitled to such relief since she did not come into court with clean hands--she had previously admitted, through her attorney, that she did not own the land for which she took the money and that she has not repaid the District. The chancellor provided a method by which Smith could have avoided the consequences of the clean hands doctrine--he stated that if Smith tendered some type of security or promissory note into the registry of the court, then the court would allow her to proceed on her counterclaim. Smith refused to tender any type of security or note, and the chancellor subsequently denied the motion under the clean hands doctrine.

The clean hands doctrine provides that one who comes into a court of equity must do so with "clean hands." *Brennan v. Brennan*, 605 So. 2d 749, 752 (Miss. 1992). No person "can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by willful inequity . . ." George D. Warner Jr., *Warner's Griffith Mississippi Chancery Practice* § 42 (1991); see also *Calcote v. Calcote*, 583 So. 2d 197, 200 (Miss. 1991). This doctrine should be applied by the court sua sponte where applicable. *Brennan*, 605 So. 2d at 752. Clearly the trial court was acting within its discretion in requiring Smith to provide some type of security prior to allowing her to assert a counterclaim against the District. Further, even if the court erred in denying her leave to file a counterclaim, the issues which would have been asserted in her counterclaim, that of gross negligence or fraud on the part of the District, were implicitly tried, and the court ruled that Smith, rather than the District, committed the fraudulent acts and was unjustly enriched. This issue is without merit.

#### II. (A.) DID THE TRIAL COURT ERR IN HOLDING SMITH IN CONTEMPT FOR FAILING

TO MAKE PAYMENTS UNDER THE TERMS OF THE AGREED ORDER OF AUGUST 13, 1993 ?

#### (B.) DID THE TRIAL COURT ERR IN HOLDING SMITH IN CONTEMPT FOR VIOLATION

OF ITS SEPTEMBER 15, 1994, DECREE ?

A. THE AUGUST 13, 1993 AGREED ORDER

The District filed a motion for summary judgment and set it for hearing on August 13, 1993. On that day, the parties and their attorneys met with the chancellor in chambers and executed the following agreed order :

THIS CAUSE came on for hearing on plaintiff's Motions for Injunctive Relief and for Summary Judgment in the above-styled and numbered cause on August 13, 1993, in Oxford, Mississippi. After hearing argument from counsel for both parties, and after conferring with counsel for both parties and the Defendant Mattie Smith, the parties have agreed to the following order: 1.The Plaintiff Oxford School District will furnish the Defendant, through counsel, an itemized list of the exact amount allegedly due to the Plaintiff Oxford School District from the Defendant Mattie Smith as soon as possible. 2.The Defendant Mattie Smith will pay five thousand dollars (\$5,000.00) to the Plaintiff Oxford School District on or before August 31, 1993. 3.The balance remaining will be paid to Plaintiff Oxford School District on or before September 13, 1993. 4.Counsel for Defendant's motion to withdraw from this matter is hereby denied. Jay Chain, Esq., will remain counsel for Defendant Mattie Smith throughout the remaining litigation of this matter. 5. Should trial of this matter be necessary, it is hereby set for Wednesday, September 29, 1993, at the Lafayette County Courthouse in Oxford, Mississippi, at 9:30 a.m. 6. All pleadings and discovery in this matter are to be completed by September 20, 1993.

Under the terms of the agreed order, Smith was required to pay five thousand dollars to the District by August 31, 1993, and the remainder of the balance, pending receipt of an itemized list of the amount due from the District, was due by September 13, 1993. Smith refused to pay any amount whatsoever, and the District filed a motion to hold Smith in contempt for failure to comply with the repayment terms. On September 28, 1993, the day before the scheduled trial, the trial court took the District's motion for contempt under advisement, ordering Smith to repay at least part of the money by 9:00 A.M. the next morning. Smith again refused to make any payments, and trial commenced on September 29, 1993. After a trial on the merits, the chancellor ruled that Smith was in contempt of the August 13, 1993, order, but it held in abeyance any ruling regarding Smith's punishment for contempt.

B. THE SEPTEMBER 15, 1994 ORDER

Smith also asserts that the chancellor erred in finding her in contempt of court in response to the District's motion to determine the status of the IRS refund in September 1994. After a full hearing on the merits of Smith's motion for new trial and the District's motion, the court entered the following order:

Shortly after the closing of the real estate transaction at issue in this suit, Defendant used some of the proceeds to make advance payment of estimated income taxes arising from the sale. These payments were in the amounts of \$3,000.00 to the Internal Revenue Service (IRS), and \$750.00 to the

Mississippi State Tax Commission (MSTC). At the time of trial in November 1993, and on several occasions prior thereto, both Mattie Smith and her attorney represented to the Court that she had no money with which to repay the school district for the funds she wrongfully obtained. Based on these representations, the Court assumed that the Defendant had not yet received any refund of the taxes she had pre-paid. Accordingly, . . . the Court ordered the Defendant to take all steps necessary to obtain a refund of advance tax payments she made to the Internal Revenue Service and the Mississippi State Tax Commission. The Court further ordered Defendant to "immediately" pay these amounts over to the Plaintiff as soon as she received them. The Final Judgment further granted the Plaintiff a lien over these funds. These provisions were clearly stated in the Court's final Judgment, and were well-known to Smith and her then-attorney Lawrence Young. The provisions were easily discernable by her present counsel. Now, however, it appears that Mrs. Smith had already obtained a refund --at least from the IRS-- even before the November 1993 trial. It appears further that this refund check was not cashed

as late as June, 1994, according to an IRS record entered into the Court file. At the post-trial hearing on the Plaintiff's motion to determine the status of the IRS refund check, neither Smith nor her attorneys would initially disclose whether, or when, she received this refund. Instead, her attorneys invoked a supposed attorney-client privilege. Smith took the witness stand and initially invoked her Fifth Amendment rights against self-incrimination, rather than disclose to the Court and counsel opposite whether, or when she received the check. Later in the hearing, however, Smith finally disclosed that she had, in fact, received the refund but no longer has it at this time. She has not disclosed where these funds went, or when or how they were disposed of. Accordingly, the Court has no choice but to find that Mattie Smith has shown an intentional, blatant contempt of this Court. She misrepresented facts to this Court during the trial and previous hearings, and has blatantly ignored and violated this Court's order of November 12, 1993. The Court to this point has been as solicitous as it could be toward the Defendant and her rights; however, such a blatant contempt for

the orders of this Court can no longer be condoned, or excused. It is therefore the opinion and finding of this Court that the Defendant Mattie Smith is guilty of intentional contempt of this Court. She is hereby sentenced to serve thirty (30) days in the Lafayette County Detention Center. However, service of this sentence shall be deferred until further order of this Court. . . .

### C. THE LAW

Smith offers no real argument or authority in support of the assignment of error that the court erred in holding her in contempt for violation of its September, 1994, order, and as a result, this Court is not compelled to address this issue as to the 1994 order. *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993).

Smith asserts that the chancellor erred in holding her in contempt for violation of the September 1993, order for two reasons: (1) neither she nor her attorney understood the terms of the order and, therefore, the order is the result of mutual mistake, and (2) Smith was without the financial means to comply with the terms of the order. There is no merit to either of these arguments.

A finding that a party is in contempt of court is left to the chancellor's substantial discretion. *Shelton v. Shelton*, 653 So. 2d 283, 286 (Miss. 1995) (citation omitted). This Court will not overturn a chancellor's finding of contempt absent a showing of abuse of discretion. Smith correctly asserts that an agreed order may be set aside if it was obtained as a result of mutual mistake of the parties. *Wray v. Langston*, 380 So. 2d 1262, 1263 (Miss. 1980); *Guthrie v. Guthrie*, 84 So. 2d 158, 160-61 (Miss. 1955). However, the chancellor clearly found that there was no mistake, on behalf of either party, in agreement to and understanding of the terms of the agreed order.

Smith's assertion that she should not be held in contempt of court because she had no financial means of complying with the order is simply factually untrue. Contrary to Smith's bald untruth in her brief that the "uncontroverted proof in this case" shows that she could not repay the District, the uncontroverted proof at the hearing on the District's September 1994 motion clearly shows that both Smith and her attorneys knew that she had at least \$3,000.00 in the form of the uncashed IRS refund check with which to pay the judgment. The chancellor was extremely tolerant of Smith's blatant refusal to obey the order, and he offered her numerous opportunities to purge herself of contempt before he was finally forced, by Smith's and her attorneys' actions, to hold Smith in contempt. There is absolutely no merit whatsoever to this assignment of error, and, if this Court had been so requested by the District, we would most assuredly not hesitate to impose sanctions against Smith and her attorneys for asserting such frivolous and meritless issues on appeal.

### III. DID THE TRIAL COURT ERR IN FINDING SMITH COMMITTED FRAUD ?

The chancellor, sitting as finder of fact, found that Smith committed fraud by misrepresenting her identity and her ownership of the land. Our review of such a finding is limited. We will not disturb the factual findings of a chancellor when such findings are supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. *Malone v. Odom*, 657 So. 2d 1112, 1115 (Miss. 1995) (citations omitted); *Rawls v. Parker*, 602 So. 2d 1164, 1167 (Miss. 1992).

The elements of fraud are as follows: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the representation's truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 642 (Miss. 1996) (citations omitted). After correctly stating in his bench opinion the proper legal standard for fraud, the trial court made the following factual findings regarding the issue of whether Smith actually committed fraud:

It's the judgment of this Court that all of those listed elements [of fraud] were proved by the evidence in this case. The defendant represented herself to be the true owner of the land in question. Either she inherited it, or it was a gift, or it fell from the sky, she acquired title. We now know that was false. This is a material representation.

The School District was ignorant of the fact that the defendant was not the real Mattie L. Smith. The School District relied on this defendant's representation of herself as the true owner. Her reliance

caused the School District the loss of its funds, as well as costs incurred to recover those funds.

Equitable relief therefore is available to the School District in this case. From the totality of all the facts and circumstances this Court finds that the defendant has in truth committed fraud by wrongfully and intentionally obtaining funds that she knew were not hers. Some of the most important of those facts are as follows: The defendant knew from past experiences that she had been confused with another Mattie Smith. She knew or should have known that she had never acquired title to the property in question. When she appeared at the closing and saw that the grantor of the deed was Mattie L. Smith she concealed her knowledge of the other Mattie L. Smith who she knew to exist. The defendant assured Mr. Mood that she was the owner of the property. Mr. Mood gave a detailed description in his effort to make sure that the defendant understood precisely which piece of property he was discussing. The defendant attempted to continue this deception after it was discovered by asserting that Mattie L. Smith had left or would be leaving the property to her. That the defendant affirmatively attempted to retain the benefit of the money she wrongfully held by using it to retire debts after the time that she knew that the School District had discovered or was about to discover the true state of affairs.

One of the things that bothers me in his case as I stated from the very beginning, is the station, education and the vocation of this defendant. She's not an ignorant person. She's not particularly a learned individual. But she's intelligent enough to interpret the Bible; preach to the masses; make arrangements with radio stations for radio time; solicit monies to support her ministry; borrow money from lending agencies; pay back loans -- she is not ignorant.

This Court is convinced by clear and convincing evidence that this situation arose due to the defendant's fraudulent representations and concealments.

There was more than substantial evidence that Smith committed fraud in misrepresenting her identity and her ownership of the land. There is no merit to this assignment of error.

#### IV. DID THE TRIAL COURT ERR IN IMPOSING AN EQUITABLE LIEN AND CONSTRUCTIVE TRUST ON SMITH'S PROPERTY ?

The chancellor granted the District an equitable lien and a constructive trust on the tax refunds and on Smith's vehicle which she had repaired with a portion of the District's money. The chancellor also reinstated a promissory note and security agreement to Commercial Credit Corporation which Smith had prepaid with a portion of the District's money and further granted the District an equitable lien and constructive trust over the remainder of Smith's real and personal property since Smith failed to specify on what she had spent the remainder of the District's money. Smith alleges that the trial court erred in imposing an equitable liens and a constructive trust as remedies in this matter in that (1) there was no identifiable property to serve as the *res* of the trusts, and (2) there was no evidence of fraud to justify the application of such remedies.

##### A. THE CONSTRUCTIVE TRUST

The Mississippi Supreme Court has defined a constructive trust as:

One that arises by operation of law against one who, by fraud, actual or constructive, . . . by commission of wrong, or by any other form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

*Alvarez v. Coleman*, 642 So. 2d 361, 367 (Miss. 1994) (citations omitted). "A constructive trust 'is raised by equity to satisfy the demands of justice. . . . Any transaction may provide an appropriate setting for creating a constructive trust where, for any reason, one party holds funds 'which in equity and good conscience should be possessed by' another party. Their forms and varieties 'are practically without limit.'" *Planters Bank & Trust Co. v. Sklar*, 555 So. 2d 1024, 1034 (Miss. 1990) (citations omitted).

## B. THE EQUITABLE LIEN

The Mississippi Supreme Court has discussed equitable liens as follows:

Characteristic of equitable liens is that they are not estates or property in the thing itself, nor are they rights to recover the thing, that is they are not rights which may be the basis of a possessory action. They are merely a charge on property for the purpose of security, and are ancillary to and separate from the debt. They are neither debts nor rights of property, but merely remedies for a debt. Of extreme importance is the fact that *such liens do not divest the debtor of title or possession*.

*Pittman v. Pittman*, 652 So. 2d 1105, 1110 (Miss. 1995) (citations omitted).

## C. THE LAW

Smith has cited no authority to this Court which prohibits a chancellor from imposing these equitable remedies in such a situation. A chancellor has broad equity powers that enable him to fashion a remedy for which there may be no precise precedent. *Hall v. Wood*, 443 So. 2d 834, 842 (Miss. 1983); *see also* George D. Warner Jr., *Warner's Griffith Mississippi Chancery Practice* § 35 (1991). This is particularly true in a situation where a party has refused to account for the wrongfully withheld assets. If we denied a chancellor the discretion exercised here, particularly in light of Smith's fraud and blatant refusal to account for the District's assets, then any party desiring to avoid such repayment could simply refuse to disclose what he or she did with the money.

There must be clear and convincing evidence in order to establish a constructive trust or an equitable lien. *Alvarez*, 642 So. 2d at 368; *First Nat'l Bank v. Huff*, 441 So. 2d 1317, 1321 (Miss.

1983). Since the chancellor found that there was clear and convincing evidence that Smith had committed fraud, he was entirely within his discretion in applying such equitable remedies.

## V. DID THE TRIAL COURT ERR IN GRANTING ATTORNEYS' FEES AGAINST SMITH IN THE NOVEMBER 12, 1993, DECREE ?

Smith asserts that the chancellor improperly awarded \$9,000.00 in attorneys' fees to the District in its November 1993 opinion for two reasons: (1) the District sued for breach of warranty and, therefore, could not recover attorneys' fees; and (2) there was no proof of reasonableness of the fees.

The attorneys' fees awarded to the District were entirely proper. First, Smith overlooks the fact that the chancellor found that she had committed fraud. Attorneys' fees are properly awarded under Mississippi law if there is a showing of an intentional and willful wrong such as fraud. *Defenbaugh & Co. v. Rogers*, 543 So. 2d 1164, 1167 (Miss. 1989).

Second, there was proper proof of the reasonableness of the fees. The Mississippi Supreme Court has enunciated the following factors as a basis for determining an appropriate fee:

[t]he fee depends on consideration of . . . 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.

*McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). There was ample testimony presented at trial

on which the chancellor awarded attorneys' fees. Nancy Maddox testified as to the number of hours and the reasonableness of the hourly rate charged. The District also presented a detailed exhibit documenting in detail the nature of the work performed. Although the exhibit did not include a precise breakdown for the attorneys' time incurred during the final two days of trial, the chancellor obviously was in a position to accurately assess appropriate fees for the final two days that the District's attorneys appeared before him. There is no merit to this issue.

## VI. DID THE TRIAL COURT ERR IN DENYING SMITH'S MOTION FOR NEW TRIAL ?

Smith asserts that the trial court erred in denying her motion for new trial. However Smith offers no argument or authority in support of this assignment of error. As a result, this Court is not compelled to address this issue. *Estate of Mason v. Fort*, 616 So. 2d 322, 327 (Miss. 1993).

Even if Smith had properly raised this issue for consideration by this Court, there is no merit to the issue. The granting or denial of a motion for new trial, which challenges the weight of the evidence, is within the sound discretion of the trial court. *American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1390 (Miss. 1995) (citations omitted). The trial judge has considerable discretion in making such a ruling, and we will reverse such a ruling only upon a finding of abuse of discretion. *Id.* at 1390; *Bland v. Bland*, 629 So. 2d 582, 586 (Miss. 1993). There was more than ample evidence

supporting the verdict. The trial court did not abuse its discretion in denying the motion for new trial.

VII. DID THE TRIAL COURT IMPROPERLY ALLOW THE COURT REPORTER TO EXCESSIVELY TAX SMITH FOR THE COST OF THE TRANSCRIPT ?

After Young died, NMRLS requested that the court reporter prepare a transcript of the proceedings through trial. NMRLS paid \$1,080.00 deposit to cover the cost of the transcript. After the trial court denied the motion for new trial, Smith appealed and was required to pay an additional \$2,266.00 to cover the cost of preparing the designated record. Smith filed a motion objecting to the cost estimate, asserting that the court reporter charged her twice for preparing the same record, except for the small portion of the record from the hearing on the motion for new trial which had yet to be transcribed. The chancellor denied the motion.

Smith's only support for this assignment of error is *In re Newsome*, 536 So. 2d 1, 3 (Miss. 1988), which merely provides that Rule 11(b) limits prepaid court costs to those costs essential to the processing of the appeal. The costs incurred for preparing the designated record are clearly essential to the appeal. *Id.* We are cited to no authority supporting Smith's assertion of error on this point, and we decline to address this issue further. *Estate of Mason*, 616 So. 2d at 327.

SMITH'S AND NMRLS' APPEALS

VIII. (A .) DID THE TRIAL COURT ERR IN GRANTING ATTORNEYS' FEES AND SANCTIONS AGAINST NMRLS UNDER RULE 11 ?

(B.) DID THE TRIAL COURT ERR IN GRANTING ATTORNEYS' FEES AND SANCTIONS AGAINST NMRLS UNDER THE LITIGATION ACCOUNTABILITY ACT ?

(C.) DID THE TRIAL COURT IMPROPERLY CONSIDER EX PARTE COMMUNICATIONS IN RENDERING ITS SEPTEMBER 15, 1994, ORDER ?

Smith and NMRLS assert that the trial court erred in awarding the District attorneys' fees and sanctioning Smith and NMRLS. Following the September 1994, hearing, the court made the following ruling:

Under the circumstances of this case, the Court must also consider whether or not Smith's counsel should be sanctioned under Miss. R. Civ. P. 11 and/or the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-3, *et seq.* In their written response to the Plaintiff's motion regarding status of the IRS check, defense counsel did not disclose the actual status of the check. As previously noted, defense counsel did not affirmatively disclose the status of those funds at the hearing, either. In evaluating this conduct by counsel for the Defendant, the Mississippi Rules of Professional Conduct are instructive. Rule 3.3 of the Mississippi Rules of Professional Conduct expressly imposes on attorneys a duty of candor to the Courts. It provides that lawyers shall not knowingly "fail to

disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in a criminal or fraudulent act by the client." Rule 3.3 also expressly provides that this affirmative duty of disclosure of material facts applies even if it mandates disclosure of facts that would otherwise be protected under Rule 1.6, dealing with attorney-client privilege. The Court is of the opinion that the Defendant's legal counsel had an affirmative obligation to consult with and advise Smith to comply with the Court's order of November 12, 1993, and to take reasonably appropriate steps to see that she did not dispose of the funds at issue in the meantime. At the very least, Smith's attorneys should have seen to it that these funds were deposited into the registry of the Court or otherwise preserved for safekeeping. By their own admission, they failed to make any inquiry of their own client about the status of these funds until the Plaintiff filed the present motion to determine their status. Even then, instead of candidly reporting to the Court that its order had been violated, these attorneys declined to disclose to the Court their knowledge about the status of the funds. Rather, they attempted to invoke a questionable attorney-client privilege as to a factual matter dealing with whether their client had complied with, or violated, this Court's order. This conduct by Smith's counsel violated Rule 11 (with regard to the written response to the Plaintiff's motion to determine status of the IRS check) and the Litigation Accountability Act. Smith's counsel asserted a reason for non-disclosure of the status of the check that had no reasonable or substantial justification in law or fact and, by doing so, unnecessarily expanded these proceedings through improper conduct. Clearly, if Smith's counsel instructed her to rely on the 5th Amendment, counsel knew that their own non-disclosure would assist in a criminal or fraudulent act. Moreover, the Court has carefully reviewed this file once again. Upon doing so, the Court is even more disappointed in the manner in which this matter has been handled by the attorneys for Defendant. The Court believes that attorneys should zealously represent their clients, but at the same time attorneys are officers of the Court with a duty to refrain from asserting frivolous and/or groundless arguments. Indeed, both Rule 11 and the Litigation Accountability Act specifically prohibit attorneys from participating in the practice of asserting frivolous defenses or positions, without any arguable or legitimate basis. In the Court's opinion, after careful consideration, Defendant's attorneys have done just that. This entire litigation has been lengthened, made more complicated, and has been unduly burdensome both to the parties and the Court itself, because defense counsel did not simply tell their client that her position was untenable. Her attorneys have signed an Answer, pre-trial and post-trial motions, and other papers in violation of this rule and the Act. Consequently, the attorneys' fees and expenses awarded to the Plaintiff are hereby awarded jointly against Smith and her counsel, North Mississippi Rural Legal Services. Again, the Court has reviewed the time and expense records of Plaintiff's counsel, and finds that the amount of \$11,000.00 in fees and expenses is a sanction warranted by the conduct of North Mississippi Rural Legal Services. Since the entry into this case by NMRLS, Plaintiff's counsel has incurred a total of over 100 hours of attorney time, as well as time spent by paralegals. In addition, the firm has incurred over \$200.00 in out-of-pocket expenses. The Court finds that a monetary sanction in the total amount of \$11,000.00 is warranted.

#### A. RULE 11 SANCTIONS

Smith and her attorneys assert that the trial court improperly sanctioned her attorneys under Rule 11 since the positions taken by her attorneys were not "frivolous." *See* M.R.C.P. 11. Monetary sanctions, including attorneys' fees are "warranted when the pleading or motion is 1) frivolous or 2)

is filed for the purpose of harassment or delay." *Leaf River Forest Prods., Inc. v. Deakle*, 661 So. 2d 188, 195 (Miss. 1995) (citations omitted). Under Rule 11, a frivolous pleading is one for which there is no "hope of success." *Id.* (citations omitted).

This Court will reverse the trial court's imposition of sanctions only upon a finding of abuse of discretion. *Id.* at 196. As evidenced by the trial court's ruling, the chancellor was entirely within his discretion in sanctioning Smith and NMRLS for the filing of the answer, other motions and responses to motions, specifically the response to the motion to determine status of the IRS refund check.

## B. LITIGATION ACCOUNTABILITY ACT SANCTIONS

Smith and her attorneys assert that the chancellor improperly sanctioned NMRLS under the Litigation Accountability Act. *See* Miss. Code Ann. § 11-55-1 *et. seq.* (Supp. 1994). Section 11-55-5 provides:

. . . in every civil action . . . , the court shall award . . . reasonable attorney's fees and costs against any party or attorney if the court . . . finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct . . . .

*Id.* § 11-55-5.

A claim or defense is "without substantial justification" if it is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." *Id.* § 11-55-3. A determination that a claim or defense is frivolous under the Act is made under the same standard applied for Rule 11: "only when, objectively speaking, the pleader or movant has no hope of success" is a claim or defense frivolous. *Leaf River*, 661 So. 2d at 196-97.

The Act requires that the trial court "specifically set forth the reasons for [an] award [of attorney's fees and costs] and shall consider [specific] factors, among others, in determining whether to assess [] fees and cost and the amount to be assessed." *Id.* § 11-55-7. Section 11-55-7 includes, in part, the following factors : (a) the extent to which an effort was made to determine the validity of a defense before it was asserted; (b) the extent of any effort to dismiss claims found to be invalid; (c) the availability of facts available to determine the validity of the defense; (d) whether the action was defended in bad faith or for an improper purpose; (e) whether determinative issues of fact were reasonable in conflict; and (f) the number of defenses on which the party prevailed. *Id.*

This Court will not reverse a trial court's imposition of sanction under the Act absent a finding of abuse of discretion. *Leaf River*, 661 So. 2d at 197 (citations omitted). The trial court properly set forth a number of specific reasons for its decision to impose sanctions on NMRLS. There was no abuse of discretion, and, consequently, there is no merit to this issue.

## C. DID THE CHANCELLOR CONSIDER IMPROPER EX PARTE COMMUNICATIONS IN

RENDERING HIS DECISION TO IMPOSE SANCTIONS ?

Smith and NMRLS briefly assert that the decision to impose sanctions on NMRLS was improperly based on the chancellor's conversation with his court reporter during the lunch recess of the September 1994, hearing during which the reporter informed the chancellor that she had heard that Smith had filed a civil case in circuit court against the District's attorneys. Although a trial judge's reliance on facts within his personal knowledge is not favored, this issue is without merit in the case sub judice. The mere fact that the chancellor may have considered facts within his personal knowledge does not necessarily mean that he let these facts impair his ability to consider the previously presented evidence. *Marshall Durbin, Inc. v. Tew*, 362 So. 2d 601, 604 (Miss. 1978). There was a more than sufficient basis in the record to support the chancellor's imposition of sanctions.

**THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE ASSESSED AGAINST THE APPELLANTS.**

**FRAISER, C.J., BARBER, COLEMAN, DIAZ MCMILLIN, PAYNE AND SOUTHWICK, JJ., CONCUR.**

**KING, J., CONCURS IN PART AND DISSENTS IN PART, WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, P.J.**

**IN THE COURT OF APPEALS 10/15/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00930 COA**

**MATTIE SMITH AND NORTH MISSISSIPPI RURAL LEGAL SERVICES.**

**APPELLANTS**

**v.**

**OXFORD SCHOOL DISTRICT**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

KING, J., CONCURRING IN PART, DISSENTING IN PART:

Although I concur in the result reached with respect to Mattie Smith, I disagree with the majority's opinion that the chancellor's imposition of sanctions against North Mississippi Rural Legal Services (NMRLS) was proper. As justification for imposing sanctions against NMRLS, the chancellor opined:

In their written response to the Plaintiff's motion regarding status of the IRS check, defense counsel did not disclose the actual status of the check. As previously noted, defense counsel did not affirmatively disclose the status of those funds at the hearing either.

In evaluating this conduct by counsel for the Defendant, the Mississippi Rules of Professional Conduct are instructive. Rule 3.3 of the Mississippi Rules of Professional Conduct expressly imposes on attorneys a duty of candor to the Courts. It provides that lawyers shall not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in a criminal or fraudulent act by the client." Rule 3.3 also expressly provides that this affirmative duty of disclosure of material facts applies even if it mandates disclosure of facts that would otherwise be protected under Rule 1.6, dealing with attorney-client privilege.

The Court is of the opinion that the Defendant's legal counsel had an affirmative obligation to consult with and advise Smith to comply with the Court's order of November 12, 1993, and to take reasonably appropriate steps to see that she did not dispose of the funds at issue in the meantime. At the very least, Smith's attorneys should have seen to it that these funds were deposited into the registry of the Court or otherwise preserved for safekeeping. By their own admission, they failed to make any inquiry of their own client about the status of these funds until the Plaintiff filed the present motion to determine their status.

Even then, instead of candidly reporting to the Court that its order had been violated, these attorneys declined to disclose to the Court their knowledge about the status of the funds. Rather, they attempted to invoke a questionable attorney-client privilege as to a factual matter dealing with whether their client had complied with, or violated this Court's order.

This conduct by Smith's counsel violated Rule 11 (with regard to the written response to the Plaintiff's motion to determine status of the IRS check) and the Litigation Accountability Act. Smith's counsel asserted a reason for non-disclosure of the status of the check that had no reasonable or substantial justification in law or fact and, by doing so, unnecessarily expanded these proceedings through improper conduct. Clearly, if Smith's counsel instructed her to rely on the 5th Amendment, counsel knew that their own non-disclosure would assist in a criminal or fraudulent act.

Rule 11 sanctions are warranted when a pleading or motion is either frivolous or filed for the purpose of harassment or delay. *Leaf River Forest Prods., Inc. v. Deakle*, 661 So. 2d 188, 195 (Miss. 1995). Comparatively, the Litigation Accountability Act authorizes the award of reasonable attorney's fees and costs when a party's claim or defense is asserted without substantial justification, or is interposed for delay or harassment, or if a party has unnecessarily expanded the proceedings by improper conduct.

The court did not impose sanctions against NMRLS on the basis of Rule 11 and/or the Litigation Accountability Act criteria. Clearly, the court predicated its imposition of sanctions against NMRLS upon the organization's perceived failure to adhere to the Mississippi Rules of Professional Conduct. Specifically, the court chided NMRLS for failing to insure Smith's compliance with the order and for failing to disclose Smith's noncompliance upon discovery.

This Court is obliged to give deference to a trial court's imposition of sanctions only when it employs the correct legal standard. *See January v. Barnes*, 621 So. 2d 915, 921 (Miss. 1992). Where the trial court misperceives the correct legal standard, the error becomes one of law, and the deference customarily afforded trial courts is pretermitted. *January*, 621 So. 2d at 921 (citing *Bean v. Broussard*, 587 So. 2d 908, 913 (Miss. 1991)). The trial court abused its discretion when it used Mississippi Rules of Professional Conduct criteria and not, Rule 11 and/or the Litigation Accountability Act criteria to impose sanctions against NMRLS. Accordingly, I would reverse that portion of the court's judgment, which imposed sanctions against NMRLS.

**BRIDGES, P.J., JOINS THIS OPINION.**