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IN THE SUPREME COURT OF MISSISSIPPI

PATRICK DEJEAN

APPELLANT

VERSUS

CAUSE NO. <sup>CP</sup>2005-~~TS~~-00409

HAYWOOD DEJEAN, KRISTINE DEJEAN  
AND HANCOCK BANK

APPELLEES

**REPLY BRIEF OF APPELLANT**

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## **STATEMENT OF THE CASE**

The Appellant will strive not to be repetitive of those points raised in its original Brief and will restrict his argument accordingly. In so far as the Statement of the Case proposed by the Appellees, the Appellant would point out the following provision of the Amended Complaint for Declaratory Judgment:

“The Plaintiff would show that Hancock Bank breached their contract by issuing An other Certificate of Deposit in the name of JULIA DAY DEJEAN, CHRISTINE DEJEAN, or HAYWOOD DEJEAN in violation of the terms of said Contract.”

Therefore the breach of contract issue was properly raised.

## **SUMMARY OF THE APPELLANT’S RESPONSE TO THE APPELLEE’S BRIEF**

It should be noted that although the Appellees’ Brief is filed jointly, the Appellant could not find any arguments made on behalf of the two individual Appellee’s, namely, CHRISTINE DEJEAN and HAYWOOD DEJEAN. The arguments center around Hancock Bank’s position only.

The weakness of the Appellee’s position is clearly underscored by their Brief. Instead of taking the Appellant’s arguments head-on, they propose that the Appellant did not raise factual or legal issues during the trial and that certain objections were not made at trial. The reason is because they cannot refute the actual grounds for the Appeal.

not raise factual or legal issues during the trial and that certain objections were not made at trial. The reason is because they cannot refute the actual grounds for the Appeal.

The focal point of a litigation is whether or not CD No. 16314 had been negotiated or redeemed before or after JULIA MAY DEJEAN's death. If said CD had not been redeemed prior to her death, then the CD and by Miss. Code Ann. Section 81-5-63 requires Hancock Bank to remit the proceeds to the survivor, to-wit the Appellant. Hancock Bank's only witness testified that JULIA MAY DEJEAN agreed to have the redemption take effect on January 23, 2001. Therefore, at the time of JULIA MAY DEJEAN'S death, PATRICK DEJEAN and JULIA MAY DEJEAN were the owner's of said CD as joint tenants with rights of survivorship. The issue of who owned the CD in question as of JULIA MAY DEJEAN'S death is the alpha and omega of this case. The evidence presented by the Appellant at the trial level consisted of the issue date of CD No. 17178 dated January 23, 2001, the hand-written notations on the CD in issue reflecting a redemption occurring days after JULIA MAY DEJEAN'S death and the plain and customary language contained in the CD itself which established beyond a reasonable doubt that PATRICK DEJEAN and JULIA MAY DEJEAN entered into contract with Hancock Bank that was not honored according to its terms. Specifically, the CD requires payment upon the death of one of the owner's.

A. **Appellees Timing Issue.**

Hancock has no substantive response to the first three arguments of the Appellant so they claim the issue was never raised at trial. (App Br 7). " ... Patrick pursues various methods in attacking this same issue – that being the timing of the redemption" This is a transparent distortion of the Appellant's brief. Appellant respectfully submits that the

Chancellor was wrong in finding that the Bank's affirmative defense contained in its pleadings was correct. "Fourth Defense: Hancock Bank states that all conditions precedent to the redemption of the subject certificate of deposit and to the issuance of the replacement certificate of deposit were met" (Hancock Bank's Answer pg 1).

Appellees claim that Patrick failed to assert that CD 16314 was redeemed January 23, 2001 – after Julia Mae's death. Nothing could be further than the truth. Patrick has always contended CD 16314 was never redeemed by either owner. At best Julia Mae have expressed or even planned to redeem the CD but that is not relevant. The Court should only look at the language of the CDs. Appellant's first argument is that contract should be enforced according to its terms. Even if the Bank's testimony is admissible, Julia Mae wanted the redemption to occur on January 23<sup>rd</sup> – days after her death and therefore meaningless.

Patrick's second argument is the inherent inconsistency in the Chancellor's decision – a CD can be cashed in for purposes of severing a property interest but not cashed in to the extent interest is lost.

Appellant's third argument is the Four Corners Doctrine.

The Appellant's introduced CD 16314 and 17178 into evidence for obviously for more reasons than the Appellees will admit. These documents established what the terms of the CD in effect at Julia Mae's death. Nothing else counts. Therefore, the Appellee's remarks that the Appellant is raising a redemption issue for the "first time" at the Appellant level are simply an effort to obfuscate the lack of merit in their position. Simply stated, all the Appellant had to do at the trial level was to introduce a valid contract, to-wit the CD and evidence of its breach to-wit the subsequent CD issued days

after JULIA MAY DEJEAN'S death to Christine and Heywood DeJean. The issue of redemption was raised by the Bank at trial and is the basis of the Chancellor's decision for which review is sought.

PATRICK DEJEAN also testified that he was not paid the CD 16314 upon JULIA MAY DEJEAN'S death or granted access to the funds. The subsequent CD No. 17178 clearly established the breach of the terms of CD No. 16314. It was and it remains the Appellee's responsibility to show that the contract had been satisfied or redeemed prior to JULIA MAY DEJEAN'S death.

The Appellee's propose that the Appellant must assert an allegation or cause of action regarding the timing of the redemption of CD No. 16314 (Appellee's Brief, Page 8). The issue of whether or not CD No. 16314 was in fact cancelled or negotiated prior to JULIA MAY DEJEAN'S death constitutes a potential defense of the Appellees. Why would the Appellant plead a fact fatal to his cause of action. As previously stated, *redemption it is the fourth affirmative defense of the Bank's* stated in its Answer,

The Appellees argument is just a distraction. In so far as the Appellees representation that PATRICK DEJEAN "never challenged the timing of the redemption of CD No. 16314 at trial", the Appellant in fact introduced CD No. 16314 and CD No. 17178. These written documents contained the best, most clear, concise and credible evidence as to what in fact transpired between the parties. CD No. 17178 was clearly issued January 23, 2001—three days after JULIA MAY DEJEAN'S death. The handwritten notation on CD No. 16314 indicates that it was transferred unto CD No. 17178 without any date reflecting when the transfer was to take place.

Curiously, the Appellees agree that Peggy Walker and JULIA MAY DEJEAN agreed to “postpone the effective date of the negotiation of CD No. 16314 until January 23, 2001”. (App Br. 3-5). Even more startling is the Appellees representation that Walker testified that she “post dated” the new CD which is clearly not reflected in Appellant’s copy of the transcript. The Chancellor did not find there was any post dating of a CD. The clear and unequivocal testimony of Peggy Walker establishes the *effective date of the transfer*—January 23<sup>rd</sup>, 2001. Therefore, the Chancellor was manifestly wrong in making this factual conclusion. The Chancellor was without evidence to support the conclusion that CD 16314 was transferred prior to death when HANCOCK BANK’S sole witness admits that said transfer was not to take effect until three days after her death.

As mentioned in the Appellant’s Brief, the Chancellor is without authority to rewrite the effective date of this transfer and allow this ruling to stand. The Court would be in fact giving the Chancellor authority to rewrite this transaction.

**B. Endorsement Issue**

Contrary to the Appellees’ position, the endorsement issue is a very simple one. The lack of any endorsement or other documentation on CD No. 16314 reflecting what date if any said CD 16314 was cashed in allows the Court to use the subsequent CD 17178 and its unambiguous language to ascertain and give effect to the intent of the parties. The contract between JULIA MAY DEJEAN, HANCOCK BANK and PATRICK DEJEAN consists of the CDs and any hand-written notations or endorsement contained on the back thereof. According to the Parole Evidence Rule, no evidence can be introduced which contradicts this evidence unless there is some ambiguity in the terms

of this contract. Therefore, the point made by the Appellees as to how the endorsement were made is a misstatement of the argument. Specifically, the Appellant argues that the lack of an endorsement on CD No. 16314 reflecting *a negotiation prior to JULIA MAY DEJEAN'S death is in fact the point of the endorsement issue*. Contrary to the Appellees' contention, the point of the endorsement is not how the endorsement was done but whether it reflects a redemption during Julia Mae's life. It most certainly does not.

Peggy Walker testified that she was instructed to receive personal confirmation from JULIA MAY DEJEAN concerning the cancellation and reissuance of a new CD from JULIA MAY DEJEAN. As a result of the telephone conversation, Counsel for the Appellee's argued that Peggy Walker redeemed CD No. 16314 prior to JULIA MAY DEJEAN'S death. Unfortunately, their own witness does not agree and does not in fact make any such statement. Appellees correctly remind this Court that Peggy Walker recognized that JULIA MAY DEJEAN would lose interest if she immediately redeem the CD so therefore, "Peggy Walker had CD No. 17178 post-dated for the date of January 23, 2001, the date CD No. 16314 would realize its full interest accrual" (Appellee's Brief, Page 4). The Appellees' proposition that the CD No. 16314 was redeemed during JULIA MAY DEJEAN'S lifetime but somehow postponed until after her death is mutually inconsistent; more importantly it is in direct conflict with the contracts and therefore inadmissible under the four corner doctrine.

Notwithstanding the assertion by HANCOCK BANK that the Appellant never raised the timing issue at trial, Appellant introduced, without objection, CD No. 16314 and CD No. 17178. Together these two contracts clearly establish when CD No. 16314 was redeemed and when CD No. 17178 was issued. The Appellant asked the trial Court



to enforce the terms of CD No. 16314 according to its terms because there was no reflection on said CD that it had been redeemed at any time prior to JULIA MAY DEJEAN'S death. When the Appellees offered testimony about how CD's were renewed or redeemed by the bank, PATRICK DEJEAN objected based on the Parole Evidence Rule (Tran. Page 86). Please note that Appellees claim that PATRICK DEJEAN made no Parole Evidence objection at trial (Appellees' Brief, Page 11).

Mr. Mestayer: "Judge, we are going to object. This is obviously trying to make this as a habit evidence, which we know is clearly not admissible. We have the terms of the contract. They are trying to usurp the Parole Evidence Rule by modifying the terms of this contract and by — through habit evidence. Its— should not be—it's our other reason." (Trans. Page 86) (See objection made in Trans. Page 83, Line 22-24)

Appellant has never claimed that CD No. 16314 was redeemed during JULIA MAY DEJEAN'S lifetime. The terms on CD No. 16314 and CD No. 17178 did not support the factual conclusion by the Chancellor. Even if we assume for the sake of argument that the Court was entitled to receive parole evidence, the only relevant parole evidence offered was testimony of Peggy Walker who stated as follows:

[Question by Mr. Watt] "Q. Now, on the day, whatever that day is, the 18<sup>th</sup> or the 19<sup>th</sup> of January, 2001, whatever that day is, on that day, which is the day you have already testified you called JULIA MAY DEJEAN, if the proceeds have physically been taken that day, what effect, if any, would there have been on the interest:

A. She would have lost that interest. And she was such a good customer of ours, they said, why don't we wait and date it on the 23<sup>rd</sup>

Q. Okay. Alright which was—

A. Twenty—

Q. Several days later?

A. Uh-huh (indicating yes).

Q. Alright.

A. So she would receive the full amount of interest.

Q. Okay. And had that not been done, would their have been interest lost?

A. Yes there would have been. (Tran. Page 84-85)

Walker never testified that CD No. 16314 was cashed in during JULIA MAY DEJEAN'S lifetime. Walker was the bank employee who was responsible for handling the cashing in of the old CD and D and re-issuance of the new one. Since Walker did not testify that CD No. 16314 was cashed in during JULIA MAY DEJEAN'S lifetime, the Chancellor certainly can't find that to be true. Peggy Walker's testimony was offered to vary the terms of two unclear and ambiguous contracts. An objection was properly made by the Appellant to the introduction of said evidence on two separate occasions and the Court denied same without any finding that these contracts were unclear or ambiguous. But even considering Walker's testimony, the Court had no evidence presented indicated that the CD was cashed in on any date other than that reflected on CD No. 17178.

**C. Partial Cash-In**

Appellees passionately argue that the Appellant has no authority for the proposition that a CD cannot be partially cashed in. The Appellant agrees wholeheartedly with that statement. The Chancellor's findings create just that very issue and

the Appellant has been unable to find any legal authority in support of the position taken by the Chancellor or Hancock.

**D. Post-dating of Certificates of Deposit**

Appellees propose that non-negotiable instruments can be post-dated pursuant to Article of the Uniform Commercial Code. (Appellee's Brief, Page 15) Unfortunately, Article III specifically states it only applies *negotiable* instruments period. Section 75-3-101 states "this Chapter may be cited as the Uniform Commercial Code—Negotiable Instruments". Both CD's reflect that they are non-negotiable on their face in bold print. However, if Article III does apply, Section 75-3-204 (a) states the following:

- A. "Endorsement means a signature, other than that of a signor as maker, drawer or acceptor, accompanied by the words made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring the endorsed liability on the instrument..."

So if a CD can be post-dated pursuant to Article of the Uniform Commercial Code, then should we not also apply the definition of endorsement contained in the above quote and to these CD's as well.

The Appellant does not submit that Article III applies to these CD's.

**CONCLUSION**

Appellees seek to divert this Court's attention from real issue in this Cause to-wit whether CD No. 16314 was redeemed or cashed in prior to JULIA MAY DEJEAN'S death. Appellees assert that PATRICK DEJEAN should have raised or mentioned the Appellees' redemption issue in its pleadings and generally asserts that the evidence they introduced at trial somehow supports the Chancellor's findings. If the Court in fact looks

at the testimony and documents supported at trial, it is apparent why the Appellees failed to discuss their point in detail. The relevant contracts were introduced and contained clear unambiguous language. In the final analysis the Appellees cannot point to how parole evidence was admissible or how this very parole evidence supports the Chancellor's decision --failure of any witness stating that the CD was cashed in prior to JULIA MAY DEJEAN'S death.

The remainder of the Appellees' argument was confusing at best. They submit that the Appellant failed to present certain issues to the Court. It is hard to imagine that the introduction of both CD No. 16314 and CD No. 17178 did not present all relevant issues before the learned Chancellor. These documents clearly reflect the existence of an obligation by HANCOCK BANK; PATRICK DEJEAN testified that HANCOCK BANK refused to honor the terms of this contract and CD No. 17178 clearly shows that HANCOCK BANK transferred said funds to Appellees, CHRISTINE DEJEAN AND HAYWOOD DEJEAN after JULIA MAY DEJEAN'S death. It is the Bank's responsibility to prove its own defenses and clearly not the Appellant's responsibility to raise said issues in his pleadings or at trial. Appellees attempt to twist their defense into an affirmative obligation to PATRICK DEJEAN because the Appellees know that neither the documents nor their own witnesses unequivocally stated that said CD No. 16314 was in fact cashed in before JULIA MAY DEJEAN'S death. The fact of the matter is that PATRICK DEJEAN did not take the position that CD No. 16314 was redeemed at any point in time but in fact argued that CD No. 16314 was never redeemed during JULIA MAY DEJEAN'S death.

**MAILING CERTIFICATE**

I, ELLIOT G. MESTAYER, do certify that I have mailed on this day by U.S. mail, first class, postage prepaid Appellant's Reply Brief unto the Mississippi Supreme Court at P.O. Box 117, Jackson, MS 39205.

THIS THE 2<sup>nd</sup> day of March, 2007.



ELLIOT G. MESTAYER

**CERTIFICATE OF SERVICE**

I, ELLIOT G. MESTAYER, do certify that I have mailed on this day by U. S. Mail, first class, postage prepaid the Appellant's Reply Brief unto the following:

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THIS THE 2<sup>nd</sup> day of March, 2007.



ELLIOT G. MESTAYER