IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2006-CA-00706

W. WARREN CALLICUTT — **PLAINTIFF/APPELLANT**

V.

PROFESSIONAL SERVICES OF POTTS CAMP, INC. AND DIANE G. TAYLOR — **DEFENDANTS/APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI

BRIEF OF APPELLEES PROFESSIONAL SERVICES OF POTTS CAMP, INC. AND DIANE G. TAYLOR

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NO ORAL ARGUMENT REQUESTED

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1. Whether the trial court correctly held "As a matter of tax law, the burden of proof is on the taxpayer to prove that he did not hold the property with the intent of reselling it. (citations omitted). Given the Plaintiff's own testimony concerning his intent to resell, and his execution of agreements to resell the property even before acquiring it, the court concludes that U.S. taxing authorities would hold that the Plaintiff could not carry the burden of proving that he was entitled to the benefits of §1031." (R.E. 14, R-663) (Page 7, Honorable Henry Lackey's Order granting Defendants' Motion for Summary Judgment, dated March 28, 2006.)

2. Whether the trial court correctly held that W. Warren Callicutt failed to prove that any action or inaction taken by Diane G. Taylor or Professional Services of Potts Camp, Inc. was the proximate cause of his damages.

STATEMENT OF THE CASE

I. Nature of Case

The Appellant, W. Warren Callicutt ("Callicutt"), alleges that he attempted to structure a sale and subsequent purchase of real estate so as to qualify for a like-kind exchange under Internal Revenue Code of 1954, 26 U.S.C. §1031 ("§1031") for the purpose of avoiding significant tax consequences in the sale of property in which he realized more than $1.2 million profit. The transaction failed to qualify as a "like-kind" exchange under §1031 ("§1031 exchange") because the replacement property Callicutt purchased was not purchased for an amount equal to the amount of the proceeds of the original sale. Callicutt alleges, among other things, that Diane G. Taylor and Professional Services of Potts Camp, Inc. (hereinafter referred to collectively as "Taylor") were negligent and made misrepresentations to him concerning the §1031 exchange.

II. Course of the Proceedings

On January 12, 2005, Callicutt filed his Complaint against Taylor and Union Planters Bank, N.A. (R.E. 21-36, R-1). On March 10, 2005, Taylor filed an Answer denying the allegations of the Complaint. (R.E. 21-25, R-17). After written discovery, depositions were taken of the Parties in April, 2005.

Taylor moved for summary judgment. (R-165). Union Planters Bank, N.A. also moved for summary judgment. (R-72). Callicutt opposed both Motions for Summary Judgment. (R-249-264). All parties subsequently filed supplemental briefs, as well as affidavits in connection with their Motion for Summary Judgment and oppositions thereto. Oral argument was held on February 27, 2006 before the Honorable Henry L. Lackey.

III. Disposition by Trial Court

On March 20, 2006, Judge Lackey granted Taylor's Motion for Summary Judgment. (R-657-659). On April 25, 2006, Callicutt served his Notice of Appeal of Order granting Summary Judgment, which his Notice of Appeal was filed April 26, 2006. (R-816).

IV. Statement of Material Facts

On **January 21, 2003**, Callicutt entered into a written contract with Dudley Moore under the terms of which he, Callicutt, agreed to buy Dudley Moore's 954 acres ("Moore Property") for $2.6 million dollars. (R-448-449). Callicutt bought the property from Mr. Moore with the intention of subdividing and selling the property. (R-42-43 (pp. 31, 33-34)).[1]

On **February 21, 2003**, Callicutt entered into a written contract with his next-door neighbor, Marianne Hurdle, under the terms of which Callicutt agreed to sell the Moore Property to Ms. Hurdle for $3.8 million dollars. (R-450-451).

On **February 28, 2003**, Callicutt closed the deal with Mr. Moore and acquired the Moore Property, financing 100% of the purchase price. (R-453-458). Although Taylor "just drew up the legal papers and the settlement statement," there was no discussion at the closing on the Moore Property of a §1031 exchange. (R-44(p.41)).

On **March 5, 2003**, Callicutt entered into another contract with Mrs. Hurdle, which contract contained additional terms but still called for the sale of the Moore Property to Ms. Hurdle at $3.8 million. (R-452).

On **April 10, 2003**, Callicutt closed the sale of the Moore Property to Ms. Hurdle, earning himself a profit of $1.2 million dollars, together with a management contract, under the terms of which he would develop the acres, selling it off in lots. (R-459-464)

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[1] For the convenience of the Court, because some of the deposition transcripts that are part of the Record have four deposition pages on one Record page, the pages of the deposition transcript referred to are also identified.

Prior to January 21, 2003, Callicutt had developed at least four other different subdivision projects, in which he bought land, subdivided it and sold residential lots. (R-38-40 (pp. 16-22)). Diane Taylor is the owner of Professional Services of Potts Camp, Inc., which is a title company. Taylor has an office in Potts Camp, Mississippi and a second office in Byhalia, Mississippi. (R-77 (pp. 10, 13)). Callicutt testified Taylor may have been involved with the closing of one of his previous land sales before the closing on the Moore Property. (R-54 (pp. 64-65)).

Taylor was contacted by the Bank of Holly Springs who requested she and Professional Services of Potts Camp, Inc. perform title work for the closing of the purchase of the property by Ms. Hurdle and on behalf of Ms. Hurdle. (R-80-81 (pp. 25-26)). Callicutt testified he did not know who hired Taylor for the closing on the sale of the property to Ms. Hurdle. (R-50 (p. 65)).

At some point prior to the closing Callicutt asked Taylor how to take the money from the sale of the real estate and reinvest it to avoid tax. (R-51 (p. 68)). Taylor advised Callicutt that the process was called a §1031 exchange and she provided him with some materials that she had concerning the process. Callicutt read those materials. (R-51 (p. 69), R-63 (p. 117)). Callicutt does not recall specifically what Taylor told him about the process. (R-51 (p. 69)). Taylor did not tell Callicutt the amount of money he would need to invest in exchange property. (R-52 (pp.71-72)).

Callicutt and his brother, Andy Callicutt, discussed the exchange and the information that Taylor had provided to Callicutt. (R-52-53 (pp.72-75)).

The information which was provided to Callicutt by Taylor was marked as Ex. 6 to the deposition of Callicutt. (R-217-242)

Page 13 (R-227) of the materials provided to Callicutt states as follows:

> The non-recognition of gain or loss is available only if the exchange of properties satisfies all of the requirements of Section 1031. In addition to the extent a taxpayer (1) receives money, (2) receives other property not qualifying for Section 1031 treatment, or (3) is relieved of liabilities either through the

> assumption of liabilities by another party to the transaction or through transferring property subject to liabilities (the items in (1)-(3) being known as "Boot"), *then* gain, but not loss, will be recognized by the taxpayer to the extent of the money received, the fair market value of all property received, and the amount of liabilities the taxpayer is relieved of.
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> Page 14 (R-228) of the material provided to Callicutt states as follows:
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> In addition, if the tax payer will receive cash in the transaction for the purpose of paying off a debt on the transferred property then the transfer agreement should specifically require that the cash received will be used to pay-off debt on the transferred property. If this is done then the cash so received with a specific purpose of paying off debt on the transferred property will not be taxable boot.

Callicutt was aware at the closing that mortgages he had with the Bank of Holly Springs and the First State Bank from the purchase of the Moore Property were being paid-off with the proceeds of the sale to Ms. Hurdle. (R-54 (p. 80)).

Callicutt was not present at the meeting with Union Planters when the Exchange Agreement was finalized the day after the closing. (R-54 (p. 81-82)).

Callicutt purchased other real property using the escrowed funds within the one-hundred eighty (180) days of the closing on the property sold to Ms. Hurdle. (R-47 (p.50)). The total cost of the replacement property purchased by Callicutt was $1.2 million dollars. (R-45-46 (pp.44-47)). This property was purchased at least three to four months after the closing. (R-56 (pp. 88-89)). Callicutt never consulted with Taylor regarding the replacement property he purchased subsequent to the sale to Ms. Hurdle. (R-55 (pp. 82-83)).

SUMMARY OF THE ARGUMENT

Callicutt's intention at the time he entered into the contract with Mr. Moore to purchase the property was to sell it. Callicutt entered into a contract with Ms. Hurdle to sell her the property before he had even closed on the purchase of the property from Mr. Moore. Those two transactions took place prior to any contract with Taylor concerning a §1031 exchange. Therefore, because of Callicutt's intent to sell the property at the time he purchased it, his sale of the property to Ms. Hurdle failed to qualify as a §1031 exchange before any action or inaction on the part of Taylor. Further, no damages complained of by Callicutt in the Complaint were proximately caused by Taylor.

ARGUMENT

I. Standard of Review

The standard of reviewing the granting or denying of summary judgment is the same standard as employed by the trial court under Rule 56(c). This Court conducts de novo reviews of orders granting or denying summary judgment and looks at all evidentiary matters before it – admissions and pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. The burden of showing that no genuine issue of fact exist lies with the moving party and the Court gives the benefit of every reasonable doubt against whom summary judgment is sought. The Court does not try issues. Rather, the Court only decides whether there are issues to be tried. Dailey v. Methodist Medical Center, 790 So. 2d 903, 906 (Miss.Ct.Civ.App. 2001), citing Cossitt v. Alfa Insurance Corp., 726 So. 2d 132, 136 (Miss. 1998).

II. Callicutt Held Moore Property for Sale, Disqualifying it for §1031 Tax Deferment

Callicutt claims his attempted §1031 exchange of properties failed to qualify for tax deferment because Taylor did not advise him that he had to buy $3.8 million dollars worth of new property - - not the $1.2 million dollars worth that he actually bought for the exchange. He further claims damages resulting from the failure of the exchange because he was subsequently required to pay income taxes on his $1.2 million profit. As a matter of fact and law, Callicutt is mistaken. The Moore Property which he sought to use in the exchange did not qualify for a §1031 exchange and could never qualify for a §1031 exchange because Callicutt, as the evidence shows, held the Moore Property for sale. Property held "primarily for sale" is specifically excluded from the benefits of §1031 tax deferment. Accordingly, Callicutt has suffered no injury or damage attributable to any action or inaction of Taylor. The pertinent dates and transactions are as follows:

On **January 21, 2003,** Callicutt entered into a written contract with Dudley Moore to buy the Moore Property for $2.6 million dollars. (R-448-449). Callicutt bought the property from Mr. Moore with the intention of subdividing and selling the property. (R-42-43 (pp. 31, 33-34)). On **February 21, 2003,** Callicutt entered into a written contract with Ms. Hurdle to sell the Moore Property to her for $3.8 million dollars. (R-450-451).

On **February 28, 2003,** Callicutt closed the purchase of the Moore Property. (R-453-458). On **March 5, 2003,** Callicutt entered into another contract with Ms. Hurdle for the sale of the Moore Property for $3.8 million. (R-452). On **April 10, 2003,** Callicutt closed the sale of the Moore Property to Ms. Hurdle, earning himself a profit of $1.2 million dollars. (R-459-464)

Taylor was contacted by the Bank of Holly Springs who requested she and Professional Services of Potts Camp, Inc. perform title work for the closing of the purchase of the property by Ms. Hurdle and on behalf of Ms. Hurdle. (R-80-81 (pp. 25-26)).

Prior to April 10, 2003, Callicutt asked Taylor how to take the money from the sale of the real estate and reinvest it to avoid tax. (R-51 (p. 68)). Taylor advised Callicutt that the process was called a §1031 exchange and she provided him with some materials that she had concerning the process. Callicutt read those materials. (R-51 (p. 69), R-63 (p. 117)). Taylor did not tell Callicutt the amount of money he would need to invest in exchange property. (R-52 (pp.71-72)).

Shortly after April 10, 2003, Callicutt attempted a §1031 exchange, hoping to defer paying income taxes on the $1.2 million dollars of profit he had just made. He went out and purchased two (2) lots which cost a total of $1.2 million dollars. (R-45-46 (pp. 44-47)). This property was purchased at least three to four months after the April 10, 2003 closing. (R-56 (pp. 88-89)). Callicutt never consulted with Taylor regarding the replacement property he purchased subsequent to the sale to Ms. Hurdle. (R-55 (pp. 82-83)). He was later told by a third party that he had to purchase property worth $3.8 million (the entire sales price of the

Moore Property) and NOT just the $1.2 million in profit he had made in order to avoid taxes on the $1.2 million of profit. (R-45 (pp. 42-43)). Since the "exchange" had to be accomplished within a certain time frame, it was too late to purchase additional property to qualify. Callicutt claims that he had to pay income taxes on the $1.2 million and that this is all the fault of Taylor because Taylor failed to tell him that he had to expend $3.8 million on the replacement property in order to qualify for a §1031 exchange.

The problem with Callicutt's claims is that even if he had purchased $ 3.8 million dollars worth of replacement property, he still would not have qualified for a §1031 exchange tax deferment and still would have owed income taxes on his profit. This is so because the law requires that both the "relinquished" property and the "acquired" property in a § 1031 exchange must qualify. Neither parcel can be "held for sale".

There is no question but that the Moore Property was "held for sale". Callicutt had a contract to sell the property to Ms. Hurdle before he had even closed on the Moore Property himself. Even if he had not, although there is no question that he did, at the time he purchased the Moore Property, his intention was always to sell it. (R-42-43 (p. 31, 33-34)).

Section 1031, in one form or another has been in the revenue code since its inception. It permits a taxpayer to hold property which appreciates in value and then swap it for another property of equal (now higher value) without incurring income tax liability, at the time. The primary purpose of the statute has been variously described. The intent was to provide a way for taxpayers to avoid what was usually a "paper gain." In other words, typically, a taxpayer has held the property in question for some length of time, during which it appreciates in value. (Eg., he bought it for $10,000 and it is now worth $50,000 due to appreciation over time.) The taxpayer then decides that he wants another piece of property, which is of equal value to his property at $50,000. The $40,000 gain on his property would ordinarily have to be reported as a

capital gain and tax paid on the amount of the gain, if the taxpayer "sold" the property, outright. If, instead, he exchanges his property for the new property, even-steven, so to speak, no gain is recognized and no tax is paid at the time of the exchange. If and when he ever sells the "new" property, he will have to pay taxes on the gain, using the original $10,000 as his "basis." Of course, there are many variations on this theme, but the foregoing sets forth the most typical scenario. As stated by one court, §1031 was "...designed to avoid the imposition of a tax on those who do not 'cash in' their investments..." Starker v. United States, 602 F.2d 1341, 1352 (9th Cir. 1979). As others have pointed out, when such a trade is consummated, the owner of the property which has increased in value has no "cash" to pay taxes with. It is only after he eventually sells the property for cash that he has the money to pay Uncle Sam.

Section 1031 expressly provides that "property held primarily for sale" does not qualify for the benefits of § 1031. Section 1031(a)(1) states the general rule:

(a) Nonrecognition of gain or loss from exchanges solely in kind

(1) In general

> No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.

Section 1031(a)(2) states exceptions to subsection (a)(1). It lists the situations when the taxpayer will not qualify for the benefits of §1031(a)(1). It states that: "this subsection shall not apply to any exchange of – (A) stock in trade or other property held primarily for sale . . ."

The owner of property held "primarily for sale" cannot use that property in a §1031 exchange and obtain the desired postponement of taxes. Thus, developers who hold property to subdivide and sell lots can not invoke §1031. See Land Dynamics v. Commissioner of Internal Revenue, T.C. Memo. 1978-259, 1978 WL 2945 (U.S. Tax Court 1978).

To understand the distinction between holding property for "investment" versus holding it "primarily for sale", it is helpful to think of property that is held for investment as being property which is acquired by a taxpayer with the intent to hold it for "future appreciation" in value. Obviously, it is possible that a taxpayer could have both considerations in mind, but, if his primary intent is to sell the property, he can not invoke the benefits of a §1031 exchange.

Perhaps the seminal case on the issue that is currently before this court is Regals Realty Co. v. Comm., 127 F.2d 931 (2d Cir. 1942). In that case, the taxpayer (a corporation) had decided to sell a certain piece of real estate. When the stockholders were advised of the tax consequences of a sale (due to the increased value of the property over time), they decided that it would be too expensive to pay the income taxes. Later, the prospective purchaser offered to "trade" another piece of property (real estate) for the corporation's property in a tax-free exchange under what was then 26 U.S.C., §112(b) and is now §1031. The stockholders agreed to this, made the exchange and, one month later, decided to liquidate the corporation, sell the "new" property and make distribution of the proceeds to its stockholders. The Board of Tax Appeals found, as a fact, that the taxpayer did not intend for the new property "to be held...for investment." Instead, they intended to sell it. Affirming the decision of the Board of Tax Appeals, denying the taxpayer the benefits of a tax-free exchange, the Court stated, at 934: "... **the taxpayer must still acquire the property (a) for investment or productive use, rather than (b) for inventory, sale, or similar purposes.**" (emphasis added).

Under §1031, both the "relinquished" (old) property and the "acquired" (new) property must meet the test. Neither can be "held primarily for sale." (See Subsection (a) (1), §1031, quoted above.)

In a tax court decision, affirmed on other grounds by the Seventh Circuit Court of Appeals, the court found the fact that the taxpayer held certain property for a period of six years

did not negate the finding that the property was held not for investment but for sale, precluding qualification under §1031. Klarkowski v. C.I.R., T.C.Memo 1965-328, 1965 WL 1278 (Tax Ct. 1965); aff'd on other grounds, 385 F.2d 398 (7th Cir. 1967).

The case law (cases cited on p. 14) concerning §1031 holds that the question of whether property is held primarily for sale is a question of the taxpayer's intent. Because a question of intent is normally a question for the trier of fact, Callicutt argues that this question should be submitted to the jury in this case. However, Callicutt has the burden of proof of every element of his claim including damages, and the undisputed facts, including Callicutt's own testimony, make it clear he cannot carry that burden. The evidence shows that Callicutt had entered into a contract to sell the Moore Property even before he acquired it. Also, Callicutt testified in his deposition that he intended to sell the property at the time he acquired it. His testimony is as follows:

> Q. When did you -- let me ask it this way: When you purchased Moore Farms, was it your intention to resell that property at the time that you purchased it?
>
> A. It -- it was not my intentions to resell it as a whole. It was my intention to resell it one piece at a time.
>
> (R-42 (p.31)).
>
> .....
>
> Q. And at the time that -- just so I'm clear -- at the time that you bought it from Mr. Moore, it was your intention to subdivide it and develop it yourself?
>
> A. Yes, ma'am.
>
> Q. How did you arrive at the purchase price? Well, first of all, let me ask you this: What did you sell it to Ms. Hurdle for? How much money?
>
> A. 3.8.
>
> Q. How did you arrive at that purchase price?
>
> A. I don't recall.

Q. Well you bought it in February from Mr. Moore for 2.6?

A. Yes, ma'am.

Q. And you sold it to Ms. Hurdle or started talking to her about it in March. You don't recall what calculations or figures or anything you looked at to make that decision to offer it to her at 3.8?

A. Not specifically. I mean, I knew what the place would generate in lot sales. And I knew what land values were and that's how I arrived at that number.

(R-42-43 (pp.33-34)).

Callicutt sought to create an issue of fact by filing an Affidavit on February 26, 2006 (R-629-630) asserting that it was not his intention to sell the property after Taylor filed a Supplemental Brief in Further Support of Summary Judgment on February 8, 2006 (R-436-443). However, one cannot create an issue of fact by contradicting one's own sworn testimony. The recent case of Coleman v. Smith, 914 So. 2d 807 (Miss. Ct. Civ. App. 2005), the Mississippi Court of Civil Appeals set forth the law in a similar situation:

> "Although the Court must resolve all factual inferences in favor of the movant, the movant cannot manufacture a disputed material fact where none exists. Thus, the non-movant cannot defeat a motion for summary by submitting an affidavit which directly contradicts without explanation, his previous testimony." Foldes v. Hancock Bank, 554 So.2d 319, 321 (Miss. 1989), citing Russell v. Harrison, 736 F.2d, 283, 287 (5th Cir. 1989); Kennett-Murray Corp. v. Bone, 622 F.2d 887, 894 (5th Cir. 1980)). "We simply cannot rely upon unsupported, conclusory allegation to defeat a motion for summary judgment where there is no issue of material fact." Jacox v. Circus-Circus Mississippi, Inc., 908 So.2d 181, 184 (¶.6) (Miss. Ct. Civ. App. 2005).
>
> Id. at 813.

Thus Callicutt's Affidavit cannot be considered to create a fact issue.

Furthermore, Callicutt has not presented an issue for resolution by a jury in this civil action between private parties. The decision of a jury in this case between private parties would not affect whether the transaction would be accepted by U.S taxing authorities as qualifying for §1031 tax deferment. The precise issue before this Court is not what a jury might believe

Callicutt's intent was, it is whether or not U.S. taxing authorities would, on these facts, rule that the property qualified for §1031 tax deferment.

As a matter of tax law, the burden of proof is on the taxpayer to prove that he did not hold the property with the intent of selling it. (See cases cited below.) Given Callicutt's own testimony concerning his intent to sell, and his execution of agreements to sell the property even before acquiring it, it is clear that U.S. taxing authorities would hold that Callicutt could not carry the burden of proving that he was entitled to the benefits of §1031. See Land Dynamics v. Commissioner of Internal Revenue, T.C. Memo 1978-259, 1978 WL 2945 (U.S. Tax Court 1978); Black v. Commissioner of Internal Revenue, 35 T.C. 90 (Tax Ct. 1960); Griffin v. Commissioner of Internal Revenue, 49 T.C. 253 (Tax. Ct. 1967); Wood v. Commissioner of Internal Revenue, 276 F.2d 586 (5th Cir. 1960); Klarkowski v. Commissioner of Internal Revenue, T.C. Memo 1965-328, 1965 W.L. 1278 (Tax Ct. 1965); Regals Realty Co. v. Commission of Internal Revenue, 127 F.2d 931 (2nd Cir. 1942).

It is also clear, it is a taxpayer's burden to establish his intent at the time he acquired the property. See Regals, 127 F.2d at 933-934, Bolker v. Commissioner of Internal Revenue, 760 F.2d 1039, 1043 (9th Cir. 1985). In this case, prior to purchasing the Moore Property on February 28, 2003, Callicutt had entered into a contract on February 21, 2003 to sell the same property to Ms. Hurdle. Callicutt's intent prior to February 28, 2003 is meaningless. His intent on February 28, 2003 is all that matters.

III. No Action or Inaction by Taylor Was the Proximate Cause of Callicutt's Damages

In order to maintain the allegations contained in Callicutt's Complaint against Taylor, Callicutt must establish, at least, a preponderance of evidence that Taylor's actions or inactions caused his damages. Howell v. Methodist Health Care Jackson Hospital, 556 So.2d 353 (Ms.Ct.Civ.App.2003); Murrand v. Fairly, 908 So. 2d 508, 509-512 (Ms.Ct.Civ.App.2005).

Further, as set forth above, all of the damages Callicutt claims are the result of the failure of the sale of the property to Ms. Hurdle to qualify as a §1031 exchange for tax deferment. Callicutt attempts to insinuate under the circumstances Taylor could have and should have warned Callicutt that his sale of the Moore Property to Ms. Hurdle would not qualify as a §1031 exchange. Callicutt has not produced one scintilla of proof Taylor knew Callicutt's intent on February 28, 2003 at the time that the purchased the Moore Property was to sell the property to Ms. Hurdle. Further, Callicutt's alleged "reliance" on Taylor is not substantiated by the facts of the case. All of the damages claimed by Callicutt in this matter are the result of his having to pay income taxes on his $1.2 million in profit from the sale to Ms. Hurdle. (R. E. -21-25, R-1-5). Callicutt's claim for damages is without merit because Callicutt owed the taxes, regardless of anything Taylor did or failed to do.

While we believe the Court does not have to look further then the first issue presented above to find as a matter of law the trial court correctly granted summary judgment in favor of Taylor, we will briefly address other issues raised in Callicutt's Appellant's Brief.

Callicutt's arguments concerning the "duties" which Taylor undertook and attempted to perform are exceedingly strained. Callicutt testified that Taylor "drew up the legal papers and the settlement statements" for the purchase of the Moore Property. (R-40 (pp. 24-26)). He testified there was no discussion of a §1031 exchange during that closing. (R-44 (p. 41)). Callicutt testified prior to speaking to Taylor he "knew people sold property and took the money from the sale and bought other properties. I didn't know how it was done or what it was called but I knew people did that and that is when I asked Ms. Diane about doing that on this sale too when we sold to Marianne." (R-49-50 (pp. 61-62)). Prior to the closing when Callicutt purchased the Moore Property he said Professional Services handled "part" of the sale of Early Creek Farms, one of the properties which he owned and sold. (R-50 (pp. 64-65)).

Callicutt testified he did not know who contacted Taylor to prepare the title work and handle the closing the sale of the Moore Property to Ms. Hurdle. (R-50-51 (pp. 65-66)). When Callicutt talked to Diane Taylor about the §1031 exchange he had already closed the purchase of the Moore Property. (R-51 (pp. 66-67)). Callicutt testified he asked Taylor how to take "the money from the sale of real estate, and invest it to avoid - - to avoid tax." Taylor "said they're called 1031 exchanges" and she got a book off a shelf and started explaining the process to him. (R-51 (pp. 68-69)). Callicutt testified Taylor said she would call Union Planters and get back with him about "how much they charged." (R-51-52 (pp. 69-70)).

Callicutt has testified that Taylor did not advise him as to the amount of money which he would need to escrow in order for the transaction to qualify as a §1031 exchange in the event that Callicutt purchased replacement property. In his deposition, Callicutt was specifically asked as follows:

> Q. What, specifically, do you recall Ms. Taylor telling you with respect to the amount of money that you would have to invest in exchange property?
>
> A. She never did say.
>
> Q. She didn't tell you one way or the other?
>
> A. No, ma'am.
>
> (R-52 (pp. 71-72)).

Instead he said she gave him the printed information and told him she would call Union Planters. (R-52 (pp. 71-72)). Callicutt testified that Taylor called him and told him that Union Planters would "handle the whole - - the whole thing for $2000 - - a fee of $2000." (R-53 (p. 77)).

Callicutt testified that he was given information Taylor had received at a seminar on §1031 exchanges which is entitled "Taxation Issues in the Real Estate Practice." (R-217-242).

Callicutt testified that he read this material. (R-63 (p.117)). Page 13 (R-227) of the materials provided to Callicutt states as follows:

> The non-recognition of gain or loss is available only if the exchange of properties satisfies all of the requirements of Section 1031. In addition to the extent a taxpayer (1) receives money, (2) receives other property not qualifying for Section 1031 treatment, or (3) is relieved of liabilities either through the assumption of liabilities by another party to the transaction or through transferring property subject to liabilities (the items in (1)-(3) being known as "Boot"), *then* gain, but not loss, will be recognized by the taxpayer to the extent of the money received, the fair market value of all property received, and the amount of liabilities the taxpayer is relieved of.

Page 14 (R-228) of the material provided to Callicutt states as follows:

> In addition, if the tax payer will receive cash in the transaction for the purpose of paying off a debt on the transferred property then the transfer agreement should specifically require that the cash received will be used to pay-off debt on the transferred property. If this is done then the cash so received with a specific purpose of paying off debt on the transferred property will not be taxable boot.

Callicutt testified he "assumed" that Union Planters had prepared "that Exchange Agreement that was between me and Union Planters." (R-54 (p. 79)). Callicutt does not recall whether he signed the Exchange Agreement at the closing and he does not recall whether Union Planters had signed the Exchange Agreement. (R-54 (pp. 79-80)). Callicutt testified that he does not recall having a conversation at the closing about the amount of money Union Planters would hold in escrow. He said that he was "pretty sure" the amount was written into the exchange agreement when he signed it. (R-54 (pp. 80-81)). Callicutt was aware during the closing that the mortgages the Bank of Holly Springs and First State Bank were holding on his purchase of the Moore Property were being paid off by the sale to Ms. Hurdle. (R-54 (p. 80)). Callicutt testified that he does not recall having any other conversations with Taylor concerning the §1031 exchange. (R-54 (p. 81)).

It is clear Callicutt had information in his possession at the time of the closing that should have alerted him to the fact that the cost of replacement property would have to be an amount

equal to the amount of the purchase price of the property sold to Ms. Hurdle if he were to attempt a §1031 exchange. However, as has been clearly shown, the sale to Ms. Hurdle still would not have qualified as a §1031 exchange because the Moore Property was purchased with the intent to sell. No representations or misrepresentations allegedly made by Taylor to Callicutt changes that fact.

Callicutt also attempts to insinuate Taylor somehow breached a fiduciary duty and failed to warn him of the tax consequences of the sale to Ms. Hurdle. Taylor was not in a fiduciary relationship with Callicutt. There is no evidence, much less clear and convincing evidence, that Taylor had dominion and control over Callicutt or that Taylor had any common interest or would have profited by the transaction between Callicutt and Ms. Hurdle or Callicutt and any subsequent purchase that he made. See Richardson v. New Century Mortgage Corp., 2005 WL 1554026 (N.D. Miss. July 1, 2005); Hopewell Enterprises, Inc. v. Trust Mark National Bank, 608 So. 2d 812, 816 (Miss. 1996). Callicutt has not established nor can he that Diane Taylor offered him advice or counsel with respect to whether he should purchase the Moore Property with the intent to sell it to Ms. Hurdle as the facts are clear and disputed that the transactions which disqualified the sale to Ms. Hurdle for §1031 tax deferment had already taken place prior to Taylor's involvement with the sale of the property to Ms. Hurdle. Clearly by the time that Callicutt approached Ms. Taylor about the possibility of a §1031 exchange, any warning would have been futile.

The testimony in the record is a far cry from the accusations by Callicutt that "Diane Taylor and her company undertook duties with regard to giving legal and accounting advise to Warren Callicutt in connection with the structuring of a §1031 like kind exchange." Further, the cases relied upon by Callicutt as authority for imposing a duty on Taylor are easily distinguishable from the case at bar. In Myers v. Mississippi State Bar, 840 So. 2d 1080 (Miss.

1986), Myers was an attorney who had represented the complaining party, Gary Moawad, in a three day long criminal trial in which Moawad was found guilty on three counts including murder and two counts of aggravated assault. The case hinged on whether or not Moawad had expressed to his attorney Myers, that he wanted Myers to continue as his attorney to file a motion for a new trial and an appeal, if necessary. Myers disputed that testimony and instead said he thought Moawad was going to have someone else handle his appeal.

In Hurst v. Southwest Mississippi Legal Services Corp., 610 So. 2d 374 (Miss. 1992), the Hursts sued Southwest and one of its attorneys for legal malpractice for failure to raise the affirmative defense of adverse possession in a civil proceeding. Further, the Hursts alleged that the attorney abandoned an appeal which would potentially have resulted in a reversal of the underlying case. The court, quoted Myers for the proposition that when "an attorney undertakes to represent a client in a court of record in this stated that there attaches at that moment, a legal, ethical, professional and moral obligation to continue in that representation until such time as he is properly relieved by the court of record before whom he has undertaken to represent a client." Id at 382, quoting, Myers, 480 So. 2d at 1090.

Security Insurance Agency, Inc. v. Cox, 299 So. 2d 192 (Miss. 1974) involved failure of an insurance agency to renew an insurance policy. The evidence showed that Security was a local insurance agency and had handled insurance for the Coxes, for not only the rental home which was at issue in the case, but also on their primary residence and that they had been doing business with each other for a period of six or more years. Id at 193.

Finally, Peoples Bank and Trust Co. v. Cermack, 658 So. 2d 1352, 1358 (Miss. 1995) involved a default and post-acceleration dispute between Cermack and Peoples Bank. Cermack had been a customer of Peoples Bank for 15 years prior to the time that the dispute arose. Interestingly, and contrary to the assertions of Callicutt in this matter, the Supreme Court did not

find that Peoples Bank was a fiduciary of Cermack, even though Cermack alleged that the bank told him on several occasions how to run his business, had effective control over his business and made suggestions on his billing and pricing. The court cited Carter Equipment v. John Deere Indus. Equipment, 681 F. 2d 386, 391 (5th Cir. 1982) for the proposition that a fiduciary relationship "may arise" in a commercial transaction where the circumstances establish that (1) the parties have "shared goals" in the others commercial activity, (2) one party justifiably places trust or confidence in the integrity and fidelity of the other, and (3) the trusted party has control over the other party. (emphasis supplied).

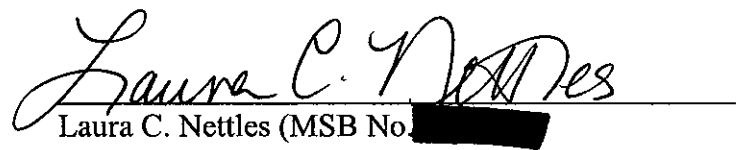
Certainly the testimony by Callicutt concerning his relationship and the conversations he had with Taylor do not rise to the level of a confidential relationship or breach of a duty owed as set forth in these cases. Callicutt acknowledges that he knew Ms. Taylor had experience in handling real estate transactions and had participated in transactions which he had closed in the past. He does not say that he thought she was an attorney, tax advisor, or an accountant. Prior to purchasing the Moore Property, Callicutt can only recall one instance in which he had any dealings with Taylor. Further, as previously explored in detail Callicut could not reasonably rely on any representations or misrepresentations allegedly made to him by Taylor at the closing when in fact he had in his possession information concerning a §1031 exchange tax deferment which he admits he read and which should have put him on notice of §1031 exchange requirements.

Ultimately and as argued above, no action or inaction by Taylor caused the damages Callicutt complains of in his Complaint. Those damages were accrued on February 28, 2003 when Callicutt purchased the Moore Property with the intent and the contractual obligation to sell it to Ms. Hurdle.

CONCLUSION

The trial court was correct finding Callicutt suffered no damages which were proximately caused by the actions or inactions of Taylor. Callicutt's attempt to show a factual issue in this matter is meaningless as his intent on February 28, 2003 was to sell the property, thus disqualifying the sale to Ms. Hurdle for §1031 exchange tax deferment. All of Callicutt's damages flow from that transaction. The trial court's decision should be affirmed.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I, the undersigned counsel of record for the Appellees, do hereby certify that I have this the 5th day of **March**, **2007**, delivered a true and correct copy(ies) of the above and foregoing Brief of Appellee to the following by placing true and correct copies thereof in the United States Mail, postage prepaid, addressed as follows:

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