IN THE SUPREME COURT OF MISSISSIPPI

W. WARREN CALLICUTT	**PLAINTIFF/APPELLANT**
VS.	**CASE NO. 2006-CA-00706**
PROFESSIONAL SERVICES OF POTTS CAMP, INC., DIANE G. TAYLOR AND UNION PLANTERS BANK, N.A.	**DEFENDANTS/APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT, W. WARREN CALLICUTT

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant submits that the technical and counter-intuitive nature of the issues pertaining to damages in this case, particularly with regard to the Internal Revenue Codes distinctions between property "held for investment" versus property "held for sale", are such that oral argument may be of assistance to the Court.

THOMAS A. WICKER

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The Appellees engage in a kind of "shell game" with both the facts and the law presented on this appeal.

Factual Disputes Preclude Summary Judgment

With regard to the facts, the Appellees ignore two significant and decisive issues. First, the Appellees ignore the fact that Diane Taylor, both individually and as the agent for her company, Professional Services of Potts Camp, Inc., prepared a Like-Kind Exchange Agreement intended to govern a Section 1031 Exchange of property under the Internal Revenue Code and charged Warren Callicutt One Thousand and No/100's ($1,000.00) Dollars to do so. (R-87-88, 787). This is not a fact which is in dispute, and demonstrates beyond peradventure that the Appellees engaged in the unauthorized practice of law and received a valuable consideration for doing so. Yet the Appellees fail to even make mention of this undisputed fact in arguing that there is no liability on their part to Warren Callicutt.

Instead, the Appellees enumerate a list of disputed facts concerning the relationship between Warren Callicutt and Diane Taylor as if these had been established and determined at a trial. The Appellees conveniently ignore Warren Callicutt's testimony that Diane Taylor told him that he could avoid tax in connection with the transaction in question by virtue of a Like-Kind Exchange (R 51-52); that she told him that she had handled such exchanges in the past (id.); that she had worked with

Union Planters Bank in facilitating such exchanges in the past (id.); and that she advised him - - prior to the closing - - that the essential element from his standpoint was that he could not receive or handle the money, but that this would have to be handled by the Qualified Intermediary, Union Planters Bank. (R-53).

The Appellees also ignore disputed issues of fact relative to who made the determination as to the amount of money to be escrowed for purposes of purchasing the exchange property, who determined what amounts would be used to pay off existing loans, and who determined whether or not the pay off of existing loans would need to be replaced with like-kind indebtedness. Someone made those decisions. Someone wrote down the amount of money to be escrowed in the Exchange Agreement. Union Planters Bank claims that they did not. Warren Callicutt claims that he did not. Diane Taylor claims that she did not. It is for a jury to determine who is more likely to be telling the truth in this regard.

The second area in which the Appellees deal less than forthrightly with the underlying facts in this case involves Warren Callicutt's intent to hold the property in question for investment rather than for sale. As will be explained more fully below, it is: (a) possible for a person to hold property for investment yet intend to ultimately sell it; and (b) possible for a person to initially purchase property with the intent to hold it in connection with the ordinary course of his business "for sale", but change his intent and hold the property for investment instead.

In this case, the evidence shows that, at the time he agreed to purchase the undeveloped acreage from Dudley Moore, Warren Callicutt intended to subdivide, develop and sell residential lots in connection with his business of developing, subdividing and selling residential lots. However, as even the Appellees concede, Warren Callicutt changed that intent prior to even closing on the purchase from Dudley Moore. (R 629-630) Instead, Warren Callicutt purchased the property with

no intent to do anything to improve the property before he sold it. In short, he relied upon fortuitous circumstance and the inherent nature of the property itself, as an investment, to realize a gain.

Perhaps suspecting that their legal arguments in this regard might be pierced, the Appellees make an attempt to further confuse the facts relating to this issue by asserting that Warren Callicutt closed the sale to Ms. Hurdle under terms in which "he would develop the acres, selling it off in lots." (Appellees Brief at Page 3) This is simply not true. Warren Callicutt did enter into a Management Contract with the purchaser, Ms. Hurdle, but he is not developing the acreage or selling it off in lots for himself as implied by the Appellees. Rather, he is, for a fee, facilitating the purchaser's development of the acreage and the purchaser's sale of residential lots. With regard to the fees earned by Warren Callicutt under that Management Contract, he is paying income tax on ordinary income. Ms. Hurdle is paying tax on the net gains realized by her in connection with the sale of the lots. In other words, the development and sale of lots on the acreage in question has nothing to do with Warren Callicutt's intent to hold the property for investment or for sale other than to demonstrate that any activity relating to Warren Callicutt's ordinary course of business was to take place *after* he had divested himself of title to the property.

The bottom line is that Warren Callicutt was led to believe by Diane Taylor that the Appellees could handle his transaction as a "Like-Kind Exchange" so as to defer or avoid ordinary income tax. It is for a jury to determine whether or not his reliance on these representations was justified under the circumstances. It would be a terrible injustice to permit the Appellees to profit in this case where it is clear that they charged and received a professional fee from Warren Callicutt and prepared a defective Agreement which ultimately cost him more than Five Hundred Thousand and No/100's ($500,000.00) Dollars.

Property Held for "Investment"

The Appellees contend, however, that Warren Callicutt sustained no damages, because the transaction would never have qualified for favorable treatment under Section 1031. This is where the Appellees misperceive the difference between property "held for investment" and property "held for sale".

Before analyzing and demonstrating the existence of issues of fact relative to Warren Callicutt's holding the property for investment, it should be noted that even if his intent were to disqualify this transaction for Like-Kind Exchange treatment, the Appellees would not necessarily escape liability. If a jury were to find, based upon the disputed issues of fact set forth above and in the Appellant's original Brief, that Diane Taylor undertook to advise Warren Callicutt in this regard, the jury could conclude that the advice was bad, and that Warren Callicutt was thereby prevented from avoiding the adverse tax consequences by considering an alternative means of holding and/or developing the property. It is undisputed that Warren Callicutt desired to minimize the tax burden associated with the transaction, and a jury could therefore find that it would have been probable that he would have of availed himself of such alternative means of minimizing this burden by either holding the property for longer period of time or by developing the property himself, in the ordinary course of his business.

However, the reason why the Appellees' argument must fail in this regard is that it is ultimately a question of fact for the jury to decide, not a question to be determined on summary judgment, as to Warren Callicutt's intent at the time of the transaction in April, when he closed on the sale of the property to Ms. Hurdle and executed the Exchange Agreement.

The essential element which the Appellees misunderstand, or would have this Court misunderstand, with regard to Warren Callicutt's intent to hold the property for investment or sale is

not whether he intended to sell the property. If the Appellees' contention were true, then if a taxpayer purchased property intending to ever sell it in the future, he could never establish that he had purchased the property "for investment".

The cases demonstrate that the key determining factors in resolving this question revolve around the manner in which a sale is to be achieved, not the fact of the sale itself.

If a taxpayer purchases property intending to do so in the ordinary course of the taxpayer's business, so as to add to that property's value by the goods and services rendered in the course of that business, then a fact finder may determine that he has "held the property for sale". If, on the other hand, the taxpayer purchases the property to hold it and to do nothing to enhance the value of the property other than to allow the property to appreciate over time or through fortuitous circumstance, then the gain which he realizes will be the consequence of holding the property "for investment".

That is what Warren Callicutt decided to do before he closed on the sale with Mr. Moore. Even if Warren Callicutt had changed his intent after acquiring the property, so long as he did nothing to improve or enhance the value of the property through any effort on his part, the property would be deemed as being held for investment. That is the difference between the business of selling versus the business of investing. The Courts recognize this distinction. Even the cases cited by the Appellees recognize this distinction. In *Starker v. United States,* 602 F. 2d 1341 (9th Cir. 1979) the Appellees stopped short in quoting the Court's opinion at Page 1352. The entire quote is as follows:

> "The legislative history [of Section 1031] reveals that the provision was designed to avoid the imposition of a tax on those who do not 'cash in' on their investments **in trade or business property**."

602 F.2d 1352 (Emphasis Added).

The Appellees' reliance on *Klarkowski v. Commissioner,* T. C. Memo. 1965-328, 1965 WL 1278 (Tax Ct. 1965) is also misplaced. In that case, the Tax Court stated:

> "An 'investor' or speculator in real estate is usually anticipating a gradual appreciation in value of the real estate, **or a rather sudden increase in value in the event of fortuitous circumstances,** without his doing must to cause that increase in value; whereas the dealer in real estate is typically looking for a rapid increase in price over a relatively short time, most frequently as a **result of some efforts on his part to cause the increase.**"

T.C. Memo. 1965-328, Page 16 (Emphasis Added).

The Tax Court in *Klarkowski* also emphasized, as has been emphasized heretofore in the Appellant's original Brief, that this question of intent is essentially factual in nature, with each case turning upon its own peculiar facts. *Supra,* at Page 15.

Warren Callicutt is not a real estate broker or a dealer in real estate. He is a farmer who also develops and sells residential lots. However, he did not develop the property in question. It is undisputed that Warren Callicutt did not do the first thing to enhance the value of this property, to market the property, to promote the property, or anything else which, through his efforts, would have resulted in a profit. The sole reason for the realization of gain in this instance was the fortuitous circumstance that his neighbor desired to purchase it for a price substantially higher than that for which Warren Callicutt was able to acquire it.

Even if Warren Callicutt were considered to be a real estate dealer or broker, that would not bar him from holding specific property for investment rather than for sale in the ordinary course of business. *Municipal Bond Corporation v. Commissioner of Internal Revenue,* 382 F.2d 184, 186 (8th Cir. 1967). The question of whether property is held primarily for sale to customers in the ordinary course of business or for investment sale is one for determination by a jury. As stated in *Maddux Construction Company v. Commissioner*, 54 T.C. 1278 (Tax Ct. 1970):

> "This question is purely a factual question, the burden of proof being upon petitioner. Several factors have been enumerated by the Courts for the determine of the question, some of which are: (1) the purpose for which the property was initially acquire; (2) the purpose for which the property was subsequently held; (3) the extent to which improvements, if any, were made to the property to the taxpayer; (4) the frequency, number and continuity of sales; (5) the extent and nature of the transactions involved; (6) the ordinary business of the taxpayer; (7) the extent of advertising, promotion or other active efforts used in soliciting buyers for the sale of the property; (8) the listing of property with bankers; and (9) the purpose for which the property was held at the time of sale."

54 T.C. at 1284. See, also, *Klarkowski,* supra at Page 15.

In *Maddux*, as here, the taxpayer was in the business of developing real estate for the construction of residential homes. In that case, as here, the question of the taxpayer's intent to hold the property for investment turned upon whether or not he developed the property in the ordinary course of his business as a residential real estate developer. The *Maddux* Court also stated:

> "We agree that petitioner originally acquired the property for sale to customers in the ordinary course of its business. However, while the purpose of that position is one factor to be considered, it is not conclusive, for as we stated in *Eline Realty Company,* supra at 5:
>
> 'While the purpose for the acquisition must be given consideration, intent is subject to change, and **the determining factor is the purpose for which the property is held at the time of sale'.**"

54 T.C. 1286 (emphasis added).

That is what occurred in this case. Despite the efforts of the Appellees to make it appear that Warren Callicutt is contradicting himself, the distinction between his deposition and affidavit testimony, supported by the other facts and circumstances present in this case, is that he initially intended to hold and develop the property in the ordinary course of his business, but changed his mind and, at the point at which he sold the property to Ms. Hurdle, his intent was focused on realizing a gain that was not the result of his business. As the Court determined in *Maddux,* so a jury would be justified in determining in this case: that the profit realized on this particular transaction does not represent profits arising from the every day operation of the taxpayer's business, but from

the character of the property itself. It should be noted that, in *Maddux,* the Commissioner was able to demonstrate that some improvements were even made to the property before the taxpayer altered his intent, and yet the Court still concluded that the property, ultimately, was held for investment.

The question is similar to that used in determining whether sales result in capital gains or ordinary gains. In *Bramblett v. Commissioner,* 960 F.2d 526 (5th Cir. 1992), the Court stated that there are three principle questions to be considered in determining whether sales of land are considered sales of a capital asset or sales of property held primarily for sale to customers in the ordinary course of a taxpayer's business. Those three principle questions are:

1. Was the taxpayer engaged in a trade or business, and if so, what business;

2. Was the taxpayer holding the property primarily for sale in that business; and

3. Were the sales contemplated by the taxpayer "ordinary" in the course of that business?

Bramblett v. Commissioner, supra at 530.

The Court when on to enumerate seven factors to be considered in answering those three questions, to wit:

> "Seven factors which should be considered when answering these three questions are: (1) the nature and purpose of the acquisition of the property and the duration of the ownership; (2) the extent and nature of the taxpayer's efforts to sell the property; (3) the number, extent, continuity and substantiality of the sale; (4) the extent of subdividing, developing and advertising to increase sale; (5) the ;use of a business office for the sale of the property; (6) the character and degree of supervision or control exercised by the taxpayer over any representative selling the property; and (7) the time and effort the taxpayer habitually devoted to the sales."

960 F.2d 530-531.

The *only* evidence that Warren Callicutt has realized any gain from the subject property in connection with the ordinary course of his business of developing and selling residential lots, is the

gain which he realized subsequent to the sale to Ms. Hurdle, for which he has been paid fees having nothing to do with the question presented to this Court. The fact that Warren Callicutt's investment returned a tremendous gain in an extremely short period of time does not change the circumstance that the gain resulted solely from the fortunes of investment, and not through any efforts expended in the ordinary course of his business.

Accordingly, the principle defense upon which the Appellees rely in contending that Warren Callicutt suffered no damage as a result of the gross negligence and misrepresentations of the Appellees must fail. The lynchpin of their defense having been removed, the wheels of the Appellees' case for summary judgment come off.

Breach of Duty by Appellees

The remainder of the Appellees' defense rests upon their contention that they owed Warren Callicutt no duty. This argument is based upon their version of the facts pursuant to which they would have this Court (or a jury) believe that all Diane Taylor did was print some pages from her computer and give them to Warren Callicutt in the course of a casual conversation concerning whether or not he could structure the sale of the property so as to avoid or defer taxes. According to this version of events, Diane Taylor did nothing more and Warren Callicutt had no basis for imposing any trust or confidence in her or for relying upon any expertise which she may or may not have had.

However, the Appellees' version of events is just that: a version of the events. Another version of those events is found in the Record in this case.

According to Warren Callicutt, he knew from prior experience with Diane Taylor that she handled a large number of the real estate transactions in his geographic area. He went to her expressly for the purpose of inquiring as to whether or not she knew of a means whereby he could

structure the sale so as to obtain beneficial tax treatment. According to his testimony, she answered in the affirmative both with regard to the fact that he could structure the sale as a Like-Kind Exchange, and the fact and representation made by her that she was qualified to assist him and to handle the transaction.

The parties disagree as to both the substance and the timing of subsequent communications between them.

According to Warren Callicutt, Diane Taylor, in advance of the closing of the sale to Ms. Hurdle, contacted him and advised that she (together with Union Planters Bank) could handle the transaction and that the only requirement of him was that he not handle any of the proceeds of the sale whatsoever.

It is undisputed that Diane Taylor undertook, for a fee of One Thousand Dollars, to prepare the flawed Exchange Agreement in this case. It is undisputed that (contrary to what Warren Callicutt testified she told him) she had never worked with Union Planters Bank in connection with a Section 1031 Exchange before. It is undisputed that she did not disclose this to Warren Callicutt.

If a jury determines that the Appellees undertook to provide professional services for Warren Callicutt and were negligent in providing those services, and that negligence caused foreseeable loss to Callicutt, then they should compensate him for such loss.

Fact issues exist with regard to whether or not Diane Taylor supplied, on her own initiative, the amount of money to be escrowed in the Exchange Agreement. This is the central question upon which liability will turn.

It should be for a jury to determine whether or not Diane Taylor is being honest when she says that she closed the sale from Callicutt to Ms. Hurdle twice on the morning of April 10, 2003.

It is for a jury to determine whether Diane Taylor is telling the truth when she states that it

was not until after he had initially closed the transaction as a regular sale on the morning of April 10, 2003, that Warren Callicutt finally advised her that he wanted to proceed with the sale as a Like-Kind Exchange, and that it was at that point that she began her quest to find a Qualified Intermediary, to revives the Contract for Sale of Real Estate, and to present Warren Callicutt with the Exchange Agreement.

It is for a jury to determine whether or not Diane Taylor is being honest when she testified that she presented the Exchange Agreement to Warren Callicutt as a "sample" agreement.

The Appellant would suggest that it would take an unusual jury to credit Diane Taylor's versions of the facts, but Diane Taylor is entitled to have a jury pass on those questions.

Similarly, Warren Callicutt is entitled to have a jury pass on the question of whether or not, under the facts and circumstances in this case, he is in a position that would justify his imposition of trust and confidence in Diane Taylor. It is for a jury to determine whether or not Warren Callicutt was the recipient of the representations which he alleges were made by Diane Taylor to him prior to April 10, 2003. It is for a jury to determine whether or not those representations, if made, would justify Warren Callicutt's reliance thereon.

If a jury were to find for Warren Callicutt relative to his version of the facts, then liability may certainly be imposed upon Diane Taylor for misrepresenting her knowledge and expertise, breaching duties of ordinary care in the preparation of the Exchange Agreement in question, and breach of the fiduciary duty which she undertook under circumstances in which Warren Callicutt imposed trust and confidence in her. See, *Lane v. Oustalet,* 873 So.2d 82 (Miss. 2004); *Dabney v. Hataway,* 740 So. 2d 915 (Miss. 1999); and *Lowery v. Guaranty Bank and Trust Company,* 592 So.2d 79, 83 (Miss. 1991).

It is undisputed that Diane Taylor engaged in the unauthorized practice of law by

preparing a contract which most members of the Bar would refrain from preparing, given the specialized nature of the tax issues involved. She did so, however, and charged and received a substantial fee for doing so. She should not be permitted to do so without reckoning with the consequences of her actions.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, the undersigned counsel of record for the Appellant, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing Reply Brief of Appellant to the following by placing true and correct copies thereof in the sent via United States Mail, postage prepaid, addressed as follows:

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This, the 18th day of April, 2007.

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