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

BRIEF OF APPELLANT, W. WARREN CALLICUTT

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CERTIFICATE OF INTERESTED PERSONS

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

1. W. Warren Callicutt – Plaintiff/Appellant
2. Thomas A. Wicker – Attorney for Plaintiff/Appellant
3. Holland, Ray, Upchurch & Hillen, P.A., Attorney for Plaintiff/Appellant
4. Laura C. Nettles – Attorney for Defendant/Appellee – Professional Services of Potts Camp., Inc., and Diane G. Taylor
5. Peggy A. Jones – Attorney for
6. Professional Services of Potts Camp, Inc. – Defendant/Appellee
7. Diane G. Taylor – Defendant/Appellee
8. Union Planters Bank, N.A. – Defendant/Appellee
9. Honorable Henry L. Lackey – Circuit Court Judge

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STATEMENT OF THE ISSUES

I. **Whether the lower Court erred in granting summary judgment in favor of the Defendants, Diane G. Taylor and Professional Services of Potts Camp, Inc.**

II. **Whether the Court erred in finding that no issue of fact existed with regard to the duty owed by Diane Taylor and Professional Services of Potts Camp, Inc., in connection with their preparation of the Exchange Agreement between Warren Callicutt and Union Planters Bank, N.A., for which they charged an attorney's fee in the amount of $1,000.00.**

III. **Whether the Court erred in finding, as a matter of law, that Warren Callicutt suffered no damages.**

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STATEMENT OF THE CASE

This is an appeal from a summary judgment entered in favor of the Defendants, Diane G. Taylor and Professional Services of Potts Camp, Inc., by the Plaintiff, Warren Callicutt. Warren Callicutt had also sued Union Planters Bank, N.A., and initially noticed an appeal from the grant of summary judgment in favor of Union Planters Bank, N.A., but the parties, in the interim, stipulated to the dismissal of all claims pertaining to Union Planters Bank, N.A.

As will be addressed below, the issues presented in this appeal relate to Warren Callicutt's claim that Diane Taylor undertook to provide him with professional services of a legal nature, representing to him that she was competent to provide those services, and either negligently or intentionally breached the duties undertaken by her and her company, resulting in damage to the Plaintiff.

I. Nature of the Case

As stated above, this is an appeal from a grant of summary judgment. The lower Court found no genuine issues of material fact existed with regard to the claims made by the Plaintiff against Diane G. Taylor and her company, Professional Services of Potts Camp, Inc. (Hereinafter, Diane Taylor and her wholly owned company, Professional Services of Potts Camp, Inc., will be referred to collectively as "Taylor").

Warren Callicutt alleged that Diane Taylor provided him with advice and services in connection with a real estate transaction that involved a Like-Kind Exchange of real property for tax deferred treatment under regulations of the Internal Service. In his Complaint, Callicutt alleged that Diane Taylor misrepresented her qualifications and expertise in handling Like-Kind Exchanges, and further misrepresented the role of Union Planters Bank, N.A. as the "qualified intermediary" required for Like-Kind Exchange Agreements.

As a consequence of the negligent and/or intentional wrong doing of Taylor, Callicutt claimed that he was damaged because the exchange, as structured by Taylor, was fatally flawed, resulting in the loss of the benefit of tax deferment, and the imposition of taxes and penalties in excess of $500,000.00 by the Internal Revenue Service.

The question presented to this Court is whether the lower Court erred in finding that there was no dispute as to certain material facts, which formed the basis for the Court's holding, as a matter of law, that Taylor owed no duty to Callicutt and that Callicutt suffered no damages.

II. Procedural History

On January 12, 2005, Warren Callicutt filed his Complaint against Taylor and Union Planters Bank, N.A. (R.E. 21-36, R-1) The Complaint alleged claims against Taylor and the Bank in connection with an attempted Like-Kind Exchange of real property for tax deferred treatment under Section 1031 of the Internal Revenue Code.

On March 10, 2005, the Taylor Defendants filed their Answer denying the allegations of the Complaint. (R.E. 21-36, R-17) Depositions of the primary parties and witnesses were scheduled in April, 2005, and Taylor served her Answers to written interrogatories on April 14, 2005, immediately prior to those depositions. (R-17) In Answer to Interrogatory No. 22, Taylor

identified herself as the person who prepared the Exchange Agreement between Callicutt and Union Planters Trust Department. (R-904)

Although Taylor indicated that she neither referred to or utilized any other documents in connection with the preparation of the Exchange Agreement in Answer to Interrogatory No. 3, she clarified this position at her deposition, when she testified that she prepared the Exchange Agreement (R-728) based upon an e-mail attachment that she had on her computer from a previous closing. (R-79-80)

Following the initial round of depositions in April, 2005, Taylor moved for summary judgment. (R-165) Union Planters Bank also moved for summary judgment. (R-72)

Warren Callicut filed responses in opposition to both motions for summary judgment.(R-249, 264)

Following additional discovery which related to the duties of a Qualified Intermediary as they would relate to the claims against Union Planters Bank, N.A., the matter was scheduled for hearing on the motions for summary judgment on February 27, 2006. (See, Transcript of Proceedings, Volume 8 of 8 of the Record on Appeal, Transcript Pages 1-49). All parties had filed Briefs and Supplemental Briefs, as well as Affidavits in connection with the Motions for Summary Judgment and Responses in Opposition thereto. At the hearing, the parties, through counsel, presented oral argument concerning the issues, and then were invited by the Court to submit Proposed Findings of Fact and Conclusions of Law for the lower Court's consideration. (Hearing Transcript at Page 42).

On March 28, 2006, the lower Court signed, unedited, the Findings of Fact, Conclusions of Law and Order granting Taylor's Motion for Summary Judgment. (R- 657-669) On April 25,

2006, Warren Callicutt served his Notice of Appeal of the Order Granting Summary Judgment, which Notice of Appeal was filed April 26, 2006. (R-816).

III. Statement of the Facts

Warren Callicutt is an owner in a farming enterprise, growing row crops such as soy beans, etc. He is also a Partner in an L.L.C., Callicutt Properties, which buys tracts of land and then improves the property, subdividing it and selling it off in residential lots. (R-36)

In January, 2003, Warren Callicutt contracted with Dudley Moore[1] to purchase approximately 954 acres for a purchase price of 2.6 million dollars. (R-40, R-448) Callicutt's initial intent when contracting to purchase this property was to develop and subdivide it and sell off lots. (R-42) However, before he closed on the sale, Callicutt learned that his neighbor was interested in purchasing the property and having it developed for residential lots, and was willing to pay 3.8 million dollars. (R-42, R-53)

In addition, Callicutt's neighbor, Mrs. Hurdle, was willing to enter into an agreement with Callicutt under which she would pay him to do the work necessary to develop the property (subdividing the tracts, putting in roads, etc.). (R-43, R-465) In short, Callicutt was presented with an opportunity to sell the 954 acres at a substantial profit, but would still be able to make money in his business of developing property. (R-43, R-53)

On February 21, 2003, Callicutt memorialized his agreement with Mary Ann Hurdle in a contract prepared by Callicutt (R-450), and on February 28, 2003, he closed on the purchase of the 954 acre tract. (R-453)

Subsequently, on March 5, 2003, Callicutt and Hurdle executed a second document reconfirming the agreement to resell the tract to Ms. Hurdle. (R-452)

Because of the large amount of profit that would be involved (1.2 million dollars) in the

1 The actual seller was Moore's company, DMR Farms, LP.

sale to Mary Ann Hurdle, Warren Callicutt wanted to explore the possibility of deferring the income tax. He was not familiar with Section 1031 of the Internal Revenue Code – indeed, he'd never heard of the term "1031 Exchange). (R-44, R-49) However, he knew that people sold property and took the money from the sale and bought other properties. (Id.)

Warren Callicutt was familiar with Diane Taylor and her company from previous transactions. (R-50-51) Taylor's company, Professional Services of Potts Camp, Inc., is in the business of closing real estate transactions. Prior to the closing with Ms. Hurdle, Callicutt went to Diane Taylor and met with her in her conference room and asked her how he could reinvest money from the sale of property to avoid income tax. (R-51) Diane Taylor told him that this could be accomplished with a "1031 Exchange", and began printing off information from her computer, and making copies from a book that she had on a shelf in her office, while at the same time explaining to Callicutt how the process worked. (R-51-52)

She told him that he would have to use a Qualified Intermediary and that she had done similar exchanges in the past with Union Planters Bank, and that she would call and check on it with the Bank and get back with him and let him know how much they'd charge. (R-51-52) Warren Callicutt made the mistake of believing Diane Taylor when she said that she was familiar "1031 Exchanges" and had worked before with Union Planters Bank to handle such transactions. Believing that the transaction could be handled by Taylor and the Bank, Warren Callicutt never sought any additional legal or accounting advice. (R-52, R-629-630)

After their initial conversation concerning the tax free exchange, Taylor called Callicutt and told him that she had talked with Union Planters and that they could handle the whole thing for a fee of $2,000.00 and that she would have everything ready at the closing. (R-53) From that point forward, through the closing on April 10, 2003, Callicutt relied upon Diane Taylor and the

Bank to structure the transaction as a Section 1031 Exchange. (R-53-54) At the closing, Callicutt was presented with an Exchange Agreement that appointed Union Planters Bank, N.A., to act as the Qualified Intermediary and that called for him to escrow the 1.2 million dollar profit for reinvestment in Like-Kind property. (R-54- R-728)

The problem, which was not discovered until much later, was that 2.6 million dollars of the proceeds were used to pay off the indebtedness incurred when Callicutt first purchased the property from Dudley Moore. This was a problem because under the Internal Revenue Regulations payment of indebtedness is treated as income for purposes of determining whether or not the transaction qualifies as a Like-Kind Exchange. In other words, the payment of the indebtedness disqualified the transaction for tax deferred treatment under Section 1031, resulting in Callicutt having to come up with more than $500,000.00 to pay taxes when he filed his return in 2004. (R-61-62)

For the transaction to have been properly structured so as to qualify for tax deferred treatment under Section 1031, the Exchange Agreement should have called for any indebtedness which was being paid off to be replaced with "Like-Kind" indebtedness. (R-59, R-736) Had this been done, no tax would have been due in 2004. (Indeed, as Warren and Andy Callicutt testified, the tax could have essentially been deferred indefinitely so long as the proceeds from the sale were invested in Like-Kind property and debt.)

The Exchange Agreement which called for reinvestment of only the 1.2 million dollar profit, and the HUD-1 closing statement that called for the 1.2 million dollars to be escrowed and the 2.6 million dollars in indebtedness to be paid off, were all prepared by Diane Taylor. Indeed, Diane Taylor charged $1,000.00 as "attorney's fees" for preparing the Exchange Agreement.(R-787, Line 808)

To summarize Warren Callicutt's version of events, he knew nothing of 1031 Exchanges, but did know that it was possible to reinvest money following the sale of property so as to avoid taxes. He went to Diane Taylor, who he understood to have expertise in real estate transactions, and she told him about Section 1031 Exchanges, and explained that she had handled such exchanges before utilizing Union Planters Banks, N.A. as the escrow agent, or Qualified Intermediary. She told Warren Callicutt that Union Planters would serve as Qualified Intermediary for a fee of $2,000.00, and that everything would be prepared and ready for him to sign at the closing. He relied on her expertise and the reputation of Union Planters Bank, N.A., in proceeding with the transaction. He was never advised by either Union Planters Bank or Diane Taylor to seek any additional legal or accounting advice.

It was not until 2004, when Callicutt was preparing to file his tax return that he learned that there was a problem with the exchange. (R-45) His tax preparer had questions about how to report the transaction, which caused Callicutt to check with an employee of Poplar Exchange, a company that specializes in Section 1031 Exchanges. The employee of Poplar Exchange alerted Callicutt to the problem with paying off indebtedness that was not replaced by Like-Kind indebtedness. (Id.) Ultimately, this led to a demand by Callicutt on both Union Planters Banks, N.A., and Taylor and the instant litigation.

Diane Taylor's version of events differs from that of Warren Callicutt. According to Taylor, Callicutt came to her and expressed some vague, undefined interest in Like-Kind Exchanges, and she simply printed off some information from the internet and copied some pages from a book that she had obtained at a seminar on the subject.(R-82, R-85) According to her version of events, the subject of actually pursuing a Section 1031 Exchange did not come up again until the date of the closing between Callicutt and Mary Ann Hurdle, on April 10, 2003.

(R-86)

Taylor maintained in her deposition testimony that after she had closed the transaction, and the parties had executed a HUD-1 closing statement without any reference to an escrow agent, Exchange Agreement, or the like, Warren Callicutt told her that he wanted to pursue a Section 1031 Exchange. (R-86) According to her testimony, that same morning of the closing, she collected the executed closing statements from the parties for destruction, prepared new closing statements, an Exchange Agreement, and contacted several banks to see whether or not they would serve as Qualified Intermediaries. In Taylor's version of events, the first time that her office ever had any communication with Union Planters Bank was following the closing of the transaction, when she was essentially restructuring the deal. (R-87-88) She testified that she had never dealt with Union Planters before, but that it was simply one of the area banks that agreed to serve as Qualified Intermediary, and that was acceptable to Callicutt. (Id.)

With regard to the Agreement that she prepared for a fee of $1,000.00, she testified that it was merely a sample agreement that she presented to Callicutt, along with advice that he should obtain independent legal and accounting advice and have a "real contract" drawn up to substitute for the "sample" which she had prepared for $1,000.00, containing Callicutt's name and signature line and that of Union Planters Bank. (R91-93)

Callicutt, in his deposition testimony, simply does not agree with this version of events. According to his testimony, Diane Taylor did not advise to seek independent legal and tax advice, and had the agreement prepared for him to sign, including the hand written amount to be escrowed for purposes of the Section 1031 Exchange. Diane Taylor denies that she or anyone in her office filled in the 1.2 million dollar amount in the Exchange Agreement. (R-91) (While Taylor denies this, both Warren and Andy Callicutt and the Bank employee who received the

Exchange Agreement on behalf of Union Planters Bank, all testified that the amount was already filed in.)(R-54, 59, 102, 711)

Setting aside for the moment the obvious problems with the credibility of believing Taylor's version of events on the morning on April 10, 2003, there is a genuine issue of fact material to Warren Callicutt's claim that he reasonably relied on Diane Taylor's representations that she was familiar with Section 1031 Exchanges, had handled such exchanges before, had worked with Union Planters Bank in handling such exchanges before, and was a professional who knew what she was doing.

If Warren Callicutt's version of events is to be believed by a jury, then that jury could determine that he had justifiably relied upon Diane Taylor. If Diane Taylor's version is believed, then a jury might find that his reliance was not reasonable.

The only other contested issue of fact, to the extent that it is even contested, relates to the issue of damages. The IRS Regulations state that, in order to qualify for treatment under Section 1031, it cannot be held "primarily for sale". The definition of what constitutes property held "primarily for sale" versus property held "primarily for investment", is one which focuses on the Seller's intent at the time of the transaction for which Like-Kind treatment is sought. If the property is held by the Seller in connection with the Seller's ordinary course of business, then it is treated as property held primarily for sale. If, on the other hand, the Seller's intent is not to hold the property for sale in connection with his business, but to hold it as an investment on which the Seller might realize a profit based solely on the inherent value of the property, then it can qualify for Like-Kind treatment.

The Defendants seize upon Warren Callicutt's initial intent at the time that he entered into his agreement with Dudley Moore to purchase the 954 acres. Warren Callicutt testified that

when he initially agreed with Dudley Moore to purchase the property, he intended to develop and subdivide the property for sale in connection with Callicutt Properties, L.L.C. However, before he even closed on the purchase from Dudley Moore, Callicutt changed his intent, because he had a purchaser for the property. (R-629-630) In other words, he bought the property in order to realize the gain from his investment of 2.6 million dollars, not from any improvements which he might make to the property in the ordinary course of his business as a residential land developer.

The undisputed facts bear this out. Warren Callicutt did not develop the property or otherwise improve it while he held it. Warren Callicutt is not a dealer in unimproved real property. He and his brother own a business in which they purchase property and then work with surveyors, contractors, and others to subdivide the property, grade it, install utilities and build roads and then sell lots. (R-43) This was not done with regard to the 954 acres purchased from Dudley Moore and then sold to Mary Ann Hurdle.

At the time of the sale to Ms. Hurdle, Callicutt's intent was to simply hold the property as an investment on which he knew he could realize a profit. The fact that he also agreed with Ms. Hurdle to develop the property for her is immaterial, because any money he would realize from that agreement would be in the ordinary course of business, and for which he would report taxable income.

Even if a jury were to find that Warren Callicutt's intent was to hold the property primarily for sale, it would not do away with the liability of Taylor, but would simply affect the amount of damages incurred. Warren Callicutt submits that he was damaged in the amount of the tax which he could have indefinitely deferred and in the lost opportunities described in his testimony relating to the requirement that he mortgage other property in order to raise the money to pay his taxes. (R-61) Even if a jury agrees with the Defendants that the property could never

have qualified for Like-Kind treatment, Callicutt would be entitled to the damages flowing from the bad advice and services received from Taylor, beginning with the $1,000.00 fee which she charged, and extending to the interest and penalties he paid to the Government. Moreover, had he not relied on Taylor, or had she told him the transaction was not 1031 eligible, he could have delayed the sale of the property long enough to have avoided short-term capital gains taxes.

In summary, the facts as claimed by the Appellant, Callicutt, are that Taylor and her Company engaged in the unlicensed practice of law, misrepresented their knowledge and expertise regarding Section 1031 Exchanges and their relationship with Union Planters Bank as a Qualified Intermediary for such exchanges, substantially damaging Callicutt in the Process.

SUMMARY OF THE ARGUMENT

The lower Court erred in disregarding genuine issues of material fact concerning the duties owed by Taylor to Callicutt. If Warren Callicutt's testimony is to be believed, he justifiably relied on Diane Taylor and her representations that she had the necessary expertise and relationship with Union Planters Bank to structure a Section 1031 tax deferred exchange.

The lower Court also erred in finding that no genuine issue of material fact existed with regard to Warren Callicutt's intent to hold the property for investment at the time that he struck the deal with Mary Ann Hurdle to sell it to her for a profit, and in holding that he suffered no damages whatsoever as a consequence of Taylor's wrong-doing.

ARGUMENT

I. Standard of Review

A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Tucker v. Hines County*, 558 So.2d 869, 872 (Miss. 1990). The Court must review all evidentiary matters before it in the light most favorable to the non-moving party. *Miller v. Meeks*, 762 So.2d 302 (Miss. 2000). When there is doubt as to whether a fact issue exists, the non-moving party is the beneficiary of that doubts. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss. 1983). Where triable issues exist, summary judgment must be denied. *Wright v. Quesnel*, 876 So.2d 362, 365 (Miss. 2004).

II. Taylor Owed a Duty Which Was Breached

The lower Court, in adopting Taylor's Proposed Findings of Fact and Conclusions of Law, completely disregarded the testimony of Warren Callicutt concerning both the duties which Taylor undertook and attempted to perform (albeit negligently), and his testimony with regard to the representations she made to him (either intentionally or negligently) concerning her expertise and her working relationship with Union Planters Bank.

It is a fundamental principle of law that, when a party undertakes a duty, they are subject to liability for a breach of that duty. *Myers v. Mississippi State Bar*, 480 So2d 1080 (Miss. 1986); *Hurst v. Southwest Mississippi Legal Services,* 610 So.2d 374 (Miss. 1992). See, also, *Security Insurance Agency, Inc. v. Cox,* 299 So.2d 192, 194 (Miss. 1974); and *Peoples Bank and Trust Company v. Cermak,* 658 So.2d 1352, 1360 (Miss. 1995).

In the instant case, according to Warren Callicutt's testimony, Diane Taylor and her

Company undertook duties with regard to giving legal and accounting advice to Warren Callicutt in connection with the structuring of a Section 1031 Like-Kind Exchange. Indeed, it is uncontested that Diane Taylor charged and received a $1,000.00 fee for preparing the fatally flawed Exchange Agreement which is the subject of this litigation. Her defense that she did not fill in the amount of money to be subject of the exchange, or that the Exchange Agreement was merely a "sample" not to be relied on, are questions for the jury to determine to the extent that credibility may dictate.

If Warren Callicutt is to be believed, Diane Taylor undertook to perform these services without reservation or warning. If Diane Taylor is to be believed, she told Warren Callicutt that he should seek independent accounting and legal advice. Again, the question of who is to be believed is one for the jury, not for the Court to determine.

Similarly, questions of fact exist with regard to the representations made by Diane Taylor; the materiality of those representations, and whether or not Warren Callicutt was justified in relying on those representations.

Warren Callicutt knew who Diane Taylor was. He knew that she was experienced in handling real estate transactions and had participated in transactions which she had closed in the past. He had every reason to repose trust in her representations and, according to his testimony, he did so. A fiduciary duty or confidential relationship may arise in a legal, moral, domestic or personal context when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger. *Lowery v. Guaranty Bank and Trust Company,* 592 So.2d 79, 83 (Miss. 1991). According to Diane Taylor, Warren Callicutt should have parsed the materials which she printed for him and arrived at his own conclusions with regard to what would properly

qualify as an exchange eligible for treatment under Section 1031. This is akin to an attorney stating that the client who relied upon him for his advice and expertise should read and interpret copies of case law or statutes which that attorney might provide to the client.

Again, regardless of whether Diane Taylor's testimony is to be credited or that of Warren Callicutt, it is for a jury to determine whether or not the representations were made and whether, under the circumstances in this particular case, Warren Callicutt was justified in relying upon Taylor rather than seeking independent accounting or legal advise.

The lower Court erred in completely disregarding Warren Callicutt's testimony relative to the representations made by Diane Taylor, and in disregarding Diane Taylor's own admission that she prepared the Exchange Agreement for a fee of $1,000.00.

III. The Issue of Damages is for the Jury

The lower Court erred in granting summary judgment based upon the Defendants' theory that no damages occurred even if there were intentional and/or negligent misrepresentations and breach of care. However, as will be more particularly discussed below, the question of damages in this case hinges not only on Warren Callicutt's intent, but would at a minimum include damages sustained regardless of whether or not this particular transaction qualified for deferred tax treatment.

Warren Callicutt's claim for damages depends on the failure of the transaction to qualify for tax deferred treatment only to the extent that it impacts the amount of his damages. Callicutt has submitted the Affidavit testimony of experts to the effect that, had the exchange been properly structured, it would have qualified for tax deferred treatment. The Defendants respond that Callicutt held the property in question for sale in the ordinary course of his business, and that the transaction could never have qualified under Section 1031.

The Defendants are wrong, and the lower Court erred in disregarding the legal principle that a tax payer's intent under the Internal Revenue Service Regulations is a question of fact.

Warren Callicutt, when he initially struck the deal with Dudley Moore, intended to take title and possession to the property in question in the ordinary course of his business as a residential real estate developer. Before he closed on that transaction with Dudley Moore, however, Warren Callicutt realized that he could purchase the property purely for purposes of investment, and realize a gain from simply holding the property until it could be resold. The facts bear out this change of intent between the time that Warren Callicutt agreed to purchase the property and the time when he sold the property. He never did a single thing to improve or develop the property, but simply held it as an investment. (R-629)

There is no question but that the intent that controls is the intent at the time of the exchange. DNA Tax Management Portfolio #567, 3rd Ed., Page A29, Section III(c) states that:

> "A tax payer's historical reasons for hold property are not controlling. It is the tax payer's intent at the time of the exchange that must be determined."

See, also, *Neal T. Banker Enterprises, Inc. v. Commissioner of Internal Revenue,* TC Memo, 1998-302 at Page 6, and *Beeler v. Commissioner of Internal Revenue,* TC Memo, 1997-73 (1997), and *Verito v. Commissioner,* 43 TC 429, 441 (1965). The authorities are clear: the question of Warren Callicutt's intent with regard to whether or not the subject property was held for investment, or held by him as property in the ordinary course of his business for sale, is one of fact. Questions of fact are for the jury to determine, not the Court. *Wright v. Quesnel,* supra.

Again, it is the position of Warren Callicutt that Taylor failed, through negligent performance, and in either negligently or intentionally misrepresenting her level of expertise, experience and relationship with Union Planters Bank, to structure the

CONCLUSION

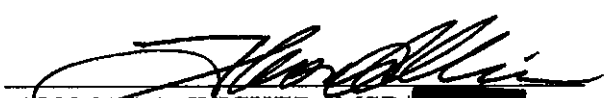
This is a case in which Warren Callicutt justifiably relied upon the representations of Diane Taylor and in which Diane Taylor was negligent in the execution of duties assumed by her and from which she profited. As a result of his reliance, Warren Callicutt lost a substantial likelihood that he could have deferred more than $500,000.00 in taxes, as well as damages which foreseeably flowed from that loss.

The lower Court is simply disregarding contested issues of material fact relative to what Diane Taylor did and said in connection with this transaction, and in failing to recognize that Warren Callicutt's intent with regard to the manner in which he held the property in question was one for the jury.

If the lower Court's entry of summary judgment in favor of these Defendants is allowed to stand, then this Court must condone the grossly negligent and unauthorized practice of law by Diane Taylor and Professional Services of Potts Camp, Inc., not only withholding punishment of the Defendants for these egregious actions, but allowing them to retain their profit from the same. Such a decision should not be allowed to stand.

Respectfully submitted,

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.



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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 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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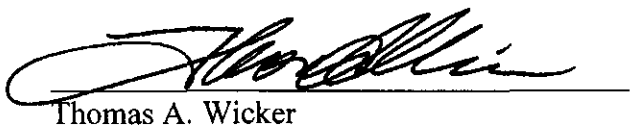
This, the 27th day of November, 2006.



Thomas A. Wicker