IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NUMBER 2006-CA-00758

RICKEY W. ELLZEY — APPELLANT

VERSUS

SHERRY L. JAMES — APPELLEE

I. 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 and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

a. Rickey W. Ellzey, Appellant;

b. Thomas L. Casey, Attorney for Appellant;

c. Pamela L. Huddleston, Attorney for Appellant;

d. Sherry L. Waller James, Appellee;

e. Henry S. Davis, Jr., Attorney for Appellee;

f. John L. Jeffries, Attorney for Appellee.

g. Edge Petroleum Corporation, Lessee for mineral interests.

Appellee Brief

JOHN L. JEFFRIES MSB #[redacted]
Of Counsel for Appellee
Post Office Box 6
Laurel, Mississippi 39441-0006

II. TABLES

A. TABLE OF CONTENTS

B. TABLE OF CASES

III. STATEMENT OF ISSUES

Issue 1 Whether the decision of the Chancellor was correct that the Mineral Deed from Waller to Ellzey was lost and never delivered to Ellzey.

Issue 2 Whether the decision of the Chancellor was correct in finding that Ellzey did not come before the Court with clean hands and therefore, was not entitled to equitable relief.

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves a lost Mineral Deed and the Chancellor's decision to deny equitable relief because of fraudulent conduct of the appellant.

B. COURSE OF THE PROCEEDING

Rickey Ellzey filed a complaint against Sherry Waller now Sherry James to recover mineral interests, answer thereto was filed by Sherry James as well as a cross-complaint. The Chancellor entered Judgment in favor of Sherry James dismissing Rickey Ellzey's complaint and holding that Sherry James was the owner of the mineral interest in question.

C. STATEMENT OF FACTS

Appellee is satisfied with the Statement of Facts as presented by Appellant with the exception that there was no finding of delivery of the mineral deed in question by the Chancellor. (Appellant's record excerpts, unnumbered page 20).

V. SUMMARY OF ARGUMENT

A. The incomplete copy of the mineral deed from James to Ellzey was not sufficient to pass title to the mineral interest. Additionally, the Chancellor found the original mineral deed was lost and its whereabouts was unexplained and there was no evidence of delivery.

B. Ellzey transferred minerals to James in order to receive medicaid benefits and a fraud was perpetuated by Ellzey against the State of Mississippi. Since Ellzey does not come before the Court with clean hands, the law does not allow a Court of Equity to help him recover what he lost by defrauding the State of Mississippi.

VI. ARGUMENT

A. THE INCOMPLETE COPY OF THE MINERAL DEED TO APPELLANT IS NOT SUFFICIENT TO PASS TITLE TO THE MINERAL INTEREST.

Rickey Ellzey has based his appeal upon the conclusion that the presumed mineral deed from Sherry James to Rickey Ellzey was valid between the parties. Ellzey cited *Kelly* v. *Wilson,* 36 So.2d 817 (Miss. 1948); *Campbell v. State Highway Commission,* 54 So.2d 654 (Miss. 1951); and *Cotton v. McConnell,* 435 So.2d 683 (Miss. 1983) in support of his proposition that a deed with no acknowledgment or a defective acknowledgment is valid between the parties. However, other cases cited by Ellzey emphasize that there must be a complete and unequivocal delivery of a deed in order for it to vest title in the purported grantee. See *Odom v. Forbes,* 500 So.2d 997 (Miss. 1897); *Salmon v. Thompson,* 391 So.2d 984 (Miss. 1980); *McMillan v. Gibson,* 76 So.2d 239 (Miss. 1954). It should be noted that the instrument produced by Ellzey was an incomplete copy of a mineral deed from James to Ellzey which had no acknowledgment. The original was never produced.

The Chancellor specifically found "It is missing, and its whereabouts are unknown and have not been explained what happened to it." (Appellant's Record Excerpts unnumbered page 20) There was no finding by the court that the original deed had been delivered to Ellzey. To the contrary, the court specifically found that the original "is missing and nobody has explained where it is. It is unknown whether it was lost, destroyed or whatever." (Appellant's Record Excerpts unnumbered page 21).

In *Odom* v. *Forbes*, supra at page 1001 this court stated :

> ...The original deed was never produced. The record is silent as to what became of it...
>
> There is a presumption of delivery of a deed found in the possession of the grantee...No such presumption arises in this case because the deed was never produced.

There can be no presumption of delivery of the mineral deed to Ellzey, since the deed was never produced It is respectfully submitted that the Chancellor correctly found "that the document is missing and nobody has explained where it is." (Appellant's Record Excerpts unnumbered page 21).

B. EQUITY WILL NOT AID ONE WHO HAS COMMITTED FRAUD.

It is a well settled principal of law in the State of Mississippi that one who does fraud may not borrow the hands of the court to draw equity from a source his own hands have polluted.

In *Martin* v. *Tillman,* 13 So. 25 (Miss. 1893), a judgment debtor who wanted to defraud his numerous creditors induced a friend to purchase a judgment against him for $1,096.75 and furnished him with the money to do so. An execution was then issued and a levy was made on the land of the debtor. At the sale, the debtor's wife became the purchaser of the land, with no consideration passing, and a deed was made out to her.

In an action between the executors of the debtor and the heirs of the wife involving the title to this land, the executors of the debtor were estopped from denying the validity of the wife's title.

The court stated: (p. 252):

It is undisputed that title to the Sunflower lands was vested in Mrs. W. J. Martin by virtue of a sale under a fraudulent execution issued at the instance of B. F. Martin, as part of a fraudulent scheme by him to hinder, delay and defraud his creditors. He was the author and finisher of the fraudulent plan by which title to his lands was vested in his wife. He was the principal actor in the whole transaction, and not a mere silent looker on while a sale was made by others under an invalid or void execution. His consent brings him clearly within the terms of our statute of frauds, and neither he nor his heirs could be heard to assail the title of his wife or her heirs to land so fraudulently continued by him to bested in her.

In *Patterson* v. *Koerner*, 71 So.2d 464 (Miss. 1954), Mrs. Mittie Koerner, filed a bill against her sister, Annie Lou Patterson, seeking partition of certain real property. Mrs. Patterson responded and filed a cross-bill avering she was the sole owner of the property in question. The cross-bill sought to cancel a deed under which title was vested in Mrs. Patterson and Mrs. Koerner. The mother of the parties, Mary C. Allbrook, had executed a will in 1930, bequeathing her entire estate to Mrs. Patterson. Thereafter, in August of 1950, Mrs. Allbrook was threatened with a damage suit. In order to protect the property from the threatened lawsuit, Mrs. Allbrook conveyed the property to her granddaughter, who then conveyed the same to the parties, Mittie Koerner and Annie Lou Patterson. Mrs. Patterson's position rested on two propositions: one being that the deed was for the purpose of protecting against a damage suit and the property was to be reconveyed to her mother. Denying Mrs. Patterson' s position and holding that the property was owned equally by the parties, the court stated (p.466):

> On the second proposition, it must be remembered that the appellant's distress, for which she sought the aid of the court, arose out of her participation in an act, not in good faith and not the usual course of business, but in consummation of a scheme and plan to put her mother's property beyond the reach of an execution, in event a judgment should be obtained in the prospective

damage suit. She thereby participated in a potential fraud on the prospective judgment creditor. In *Crabb* v. *Comer*, 190 Miss. 289, 200 So. 133, 135, this Court said: "It is one of the oldest maxims of the law that no man shall, in a court of justice, take an advantage which has his own wrong as a foundation for that advantage." Moreover, one of he maxims of equity is, "He who comes into equity must come with clean hands." In other words, "It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interface on his behalf, to acknowledge his right, or to award him any remedy." Vol. 1 Pomeroy's Equity Jurisprudence, 4tH Ed., Section 397, page 738. (71 So.2d 466)

In *Thigpen v. Kennedy*, 238 So.2d 744 (Miss. 1970), Plaintiff had purchased property in the name of a girlfriend in order to conceal the same from his wife in an impending divorce suit. Plaintiff later filed an action against the girlfriend to recover the property. In disallowing the Plaintiff's complaint, the Supreme Court stated (p. 746):

> The maxim is often stated in the following language, "he who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." The maxim is not to be lightly considered and brushed aside. It is the duty of the Court to apply it of its own motion when it becomes evident that the facts are such that they call for the application of the maxim. Griffith, Miss. Chancery Practice Sec. 42 (1950).
>
> The fact that the parties in this case are in pari delicto does not aid appellee. The maxim is not invoked for the benefit of the parties to a fraudulent transaction, but rests upon the proposition that society must be protected. Furthermore, in order for the court to invoke the maxim, it is not necessary for the conduct to be of such a nature as to be punishable as a crime or even to justify legal proceedings of any character. Any wilful act concerning the cause of action which can be said to transgress equitable standards of conduct is sufficient to invoke the maxim.
>
> It is clear from the allegations in the bill of complaint and from appellee's own testimony that he did not come into court with clean hands and that the chancellor was manifestly in error in granting him any relief under the circumstances of this case. For this reason this case is reversed and the judgment will be entered here dismissing appellee's bill of complaint with prejudice.

In *Willenbrock v. Brown,* 239 So.2d 922 (Miss. 1970), appellant Wight opened a bank account in the name of Willenbrock in order to conceal funds from his wife. At the time the bank account was opened, Wight and his wife were estranged and at her instance a receiver had been appointed to take possession of all of his assets. Brown recovered a default judgment against Willenbrock and executed upon the bank account. The bank interpled the funds into court. Holding that Wight was not entitled to these funds, the court stated: (p. 925):

> As to the appeal of Wight, his sworn answer and his testimony shows that he conspired with Willenbrock to set up the trust account in the name of Willenbrock and placed therein his funds so that funds in this account could not be reached by attachment or garnishment proceedings by his wife in pending litigation. We are of the opinion that the trial court was correct in holding that he was not entitled to recover these funds. In *Crabb v. Comer,* 190 Miss. 289,200 So. 133(1941),we said: "It is one of the oldest maxim of the law that no man shall, in a court of justice, take an advantage which has his own wrong as a foundation for that advantage" (190 Miss. at 296,200 So. at 135).
>
> *See also: Patterson v. Koerner,* 220 Miss. 590, 71So.2d 464 (1954). Wight placed himself in this unfortunate position by an act, not in the usual course of business, but in furtherance of a plan to place his assets beyond the reach of his wife in pending litigation. We are of the opinion that the trial court was correct in refusing to interfere on his behalf and to acknowledge his right, if any, to the funds.

In *Cain v. Thomas,*. 373 So.2d 812 (Miss. 1979), Complainant filed a complaint against her mother seeking to establish a constructive trust in her favor to a one-half interest in certain lands which Complainant and her deceased husband had deeded to her mother. The property was placed in her mother's name to protect it from her second husband. In disallowing Complainant's claim the court stated: (p. 814):

> The maxim is often stated in the following language, "he who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." The maxim is not to be lightly considered and brushed aside. It is the duty of the Court to apply it of its own motion when it becomes

evident that the facts are such that they call for the application of the maxim. Griffith, Miss. Chancery Practice, Sec. 42 (1950).

The fact that the parties in this case are in pari delicto does not aid appellee. The maxim is not invoked for the benefit of the parties to a fraudulent transaction, but rests upon the proposition that society must be protected.

The chancellor properly dismissed the bill of complaint at the conclusion of complainant's testimony because complainant had participated in placing title to the land in her parents by fraudulent transfers against public policy, thus creating the situation for which she sought the aid of a court of equity. She did no come into court with clean hands.

In *Walters v. Patterson*, 531 So.2d 581(Miss. 1988), Walters transferred property to Patterson for the purpose to conceal the same from the Internal Revenue. In disallowing Walters' efforts to recover said property, the Supreme Court stated (p. 485):

"Transfers of this nature and for such purposes are in violation of the statutes of fraud and contrary to public policy".

Walters' case is similar to the case before this court because in *Walters* the plaintiff was seeking to conceal property from the Internal Revenue Commission, a governmental body. In the case before this court the plaintiff sought to conceal property from the Mississippi Medicaid Commission.

The court further stated: (p. 584):

This Court notices that appellant, Reed Walters petitioned a court of equity for relief. In his petition, and in the testimony of both Walters and Mrs. Patterson, Walters' asserted purpose in transferring title to the "Town Property" was to conceal the property from the United States Internal Revenue Service. Transfers of this nature and for such purposes are in violation of the statute of frauds and contrary to public policy.

The maxim is often stated in the following language, "he who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." It is the duty of the Court to apply it of its own motion when it becomes evident that the facts are such that they call for the application of the maxim. Griffith, Mississippi Chancery Practice, Sec. 42 (1950).

In *Collins v. Collins*, 625 So 2d 786 (Miss. 1993), a former husband who conveyed property to a former wife while they were married filed a complaint seeking cancellation of deeds to the property. The purpose for the conveyance was to thwart the state's ability to seize the property in payments of fines levied against him. In denying plaintiff's claim the court quoting *Pomeroy's Equity Jurisprudence* stated (p. 789):

> The maxim is often stated in the following language, "he who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." The maxim is not to be lightly considered and brushed aside. It is the duty of the Court to apply it on its own motion when it becomes evident that the facts are such that they call for the application of the maxim. Griffith, Miss. Chancery Practice, Sec. 42 (1950).
>
> The fact that the parties in this case are in pari delicto does not aid appellee. The maxim is not invoked for the benefit of the parities of a ftaudulent transaction, but rests upon the proposition that society must be protected. Furthermore, in order for the court to invoke the maxim, it is not necessary for the conduct to be of such a nature as to be punishable as a crime or even to justify legal proceedings of any character. Any wilful act concerning the cause of action which can be said to transgress equitable standards of conduct is sufficient to invoke the maxim.

C. FINDINGS OF FACT MADE BY A CHANCELLOR MAY NOT BE DISTURBED OR SET ASIDE ON APPEAL UNLESS MANIFESTLY WRONG.

It is a well settled principle of equity jurisprudence that the findings of fact by a Chancellor may not be disturbed on appeal unless manifestly wrong. See *Cotton v. McConnell*, supra, at page 685. The Chancellor clearly found that there was no delivery of the deed in question. Even if the opposite had been true, the Chancellor also found that Ellzey "did not come before this Court with clean hands, the law does not allow a Court of equity to help him recover what he lost by defrauding the State of Mississippi." (Appellant's Record Excerpts unnumbered

page 6).

VII. CONCLUSION

For the above stated reasons, this court should affirm the decision of the lower court.

RESPECTFULLY SUBMITTED,

JOHN L. JEFFRIES MSB [redacted]
Of Counsel for Appellee
Post Office Box 6
Laurel, Mississippi 39441-0006

CERTIFICATE OF SERVICE

I, JOHN L JEFFRIES, of counsel for appellee, do hereby certify that I have this day mailed, postage prepaid, a true copy of the above and foregoing Brief of Appellee to:

Honorable Pamela L. Huddleston
Attorney for Appellant
Post Office Box 1194
Laurel, Mississippi 39441-1194

Honorable Franklin McKenzie
Chancellor
Post Office Box 1961
Laurel, Mississippi 39441-1961

This the 28th day of February, A. D., 2007.

JOHN L. JEFFRIES