IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS

LAMBERT COMMUNITY HOUSING GROUP, L.P.

APPELLANT

VS. **CAUSE NO. 2006-[redacted]-02127**

WENZEL & ASSOCIATES, P.A., ET AL. **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF
QUITMAN COUNTY, MISSISSIPPI

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

1. Lambert Community Housing Group, L.P., Appellant;
2. David Shafer, Principal/Officer of Lambert Community Group, L.P.;
3. William Wenzel, Appellee;
4. Wenzel & Associates, P.A.; Defendant in proceedings below
5. Mark D. Herbert, Attorney for Appellant;
6. Adam Stone, Attorney for Appellant;
7. W.O. Luckett, Jr., Attorney for Appellee;
8. Robert M. Tyner, Jr., Attorney for Appellee;
9. Honorable Albert B. Smith, III, Trial Court Judge

So certified this the 26th day of July, 2007.

By: _____
ROBERT M. TYNER, JR.

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STATEMENT OF THE ISSUES

Whether the trial court was correct in not entering judgment against William H. Wenzel and dismissing him from the case with prejudice.

STATEMENT OF THE CASE[1]

Appellee William H. Wenzel, (hereinafter "Mr. Wenzel"), was a defendant in a case styled Lambert Community Housing Group, L.P. vs. Wenzel & Associates, P.A., et al. Mr. Wenzel entered into a contract for architectural services with Mid South Development Group, Inc. for the James Taper Estates in Lambert, MS. (Tr. Exh P-1). Lambert alleged in its Complaint, that neither Mr. Wenzel nor Wenzel and Associates, P.A. had a contract with Lambert Community Housing Group, L. P. (Rec. 14). Throughout this case, Mr. Wenzel has denied that he was liable for any alleged damages suffered by Lambert. (Rec. 36).

On March 23, 2006, a jury awarded a judgment in favor Lambert against Wenzel and Associates, P.A. in the amount of $1,949,932.85. (Rec. Ex. Tab 5 at 186). Instruction P-100 instructed the jury that there were multiple actors in the case. (Rec. Ex. Tab 5 at 186-87). The jury was further instructed that if it found more that one of the actors to the case was responsible for the alleged damages then it was to apportion fault. (Rec. Ex. Tab 5 at 186-87). The jury was then instructed to ". . .apportion the award among the following actors by percentage of their respective fault if any:

1. Wenzel and Associates, P.A. _____%
2. Quality Construction, Inc. _____%
3. Ellis Adams _____%

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[1] Citations to the record on appeal are denoted as follows and consistent with Appellant's Brief: "Rec." indicates a citation to the clerk's papers by page number; "Rec. Ex. Tab" indicates a citation to the Mandatory and Appellant's Record Excerpts by tab, and where applicable page number; "Tr" indicates a citation to that portion of the transcript of the trial commencing on March 20, 2006 and hearing commencing on May 23, 2006 designated for inclusion in the record on appeal for this matter and "Tr. Exh" indicates a citation to an exhibit offered at the trial commencing on March 20, 2006, by exhibit number and, where applicable, by page number; "App. Br." indicates a citation to Appellant's Brief and, where applicable, by page number.

4. Sammy Thompon _____%

5. Air Electric, Inc. _____%

6. Mid South Development, Inc. _____%"

(Rec. Ex. Tab 5 at 187). The jury instruction did not instruct the jury to apportion fault to William H. Wenzel. (Rec. Ex. Tab 5 at 186-87). William H. Wenzel's individual name was intentionally left off the verdict form by Lambert. (Rec. 224-225). The trial court entered a Final Judgment against Wenzel & Associates, P.A. and dismissed all claims against Wenzel with prejudice (Rec. Ex. Tab 2 at 296).

STATEMENT OF FACTS

Mid South Development Group, Inc. (hereinafter "Mid South") entered into a Standard Form of Agreement between Owner and Architect with Wenzel and Associates, P.A. on March 29, 1994. (Tr. Ex. P-1). The agreement was signed by Derrick Neal as president of Mid South and William Wenzel as president of Wenzel and Associates, P.A. (Tr. Exh. P-1).

Mr. Wenzel made twelve visits to the site from July of 1996 to May of 1996. Mr. Wenzel made seven field visits from July of 1996 to May of 1996. There were three visits from September to October of 1996. An employee of Wenzel and Associates, P.A., John Lad, made two visits and would sometimes accompany Mr. Wenzel to the site. The engineer made three visits from October and November of 1996. (Tr. 132)

On March 23, 2006, the jury was instructed on the law to which the evidenced applied. Instruction P-100 which included the form of the verdict and apportionment of fault did not name Mr. Wenzel or list him as one of the actors to apportion fault. (Rec. Ex. Tab 5 at 186-87). The trial court correctly noted in a post trial hearing that ". . for the record, there was no objection. They gave me this instruction and the Court allowed it to go in." (Rec . Ex. Tab 4 at 318). Counsel for Wenzel even requested that Derrick Neal be added to the form of the verdict but counsel for Lambert advised that since no other individuals were listed that Mr. Neal should not listed. (Rec. 224-225).

SUMMARY OF THE ARGUMENT

The issue before this Court is whether the jury was instructed to impose individual liability on Mr. Wenzel. Lambert did not include Mr. Wenzel's individual name in the instructions or on the form of the verdict. (Rec. Ex. Tab 5 at 186-187). The jury was not instructed on the law as it applies to professional associations so as to properly apply the law to the facts. The trial court entered judgment against Wenzel and Associates, P.A. and properly dismissed Mr. Wenzel with prejudice. The jury's decision is clear and unambiguous. The jury was asked to return a verdict in favor of Lambert and to apportion fault among various actors in this case. Mr. Wenzel was not one of the actors for the jury to consider per the instructions. (Rec. Ex. Tab 5 at 186-187). Accordingly, the decision of the trial court should be affirmed that Mr. Wenzel be dismissed with prejudice from this action.

In the alternative, if the jury verdict was ambiguous then Lambert or the trial court should have requested that the jury be sent back to the jury room to resolve this ambiguity. The trial court could not determine the jury's intent since the jury was never instructed to consider the individual liability, if any, of Mr. Wenzel. Mr. Wenzel would be deprived of his constitutional right to a jury trial if a judgment was entered against him when clearly the jury was not instructed to consider his individual liability. Lambert waived its right to have a jury consider the individual liability of Mr. Wenzel when it did not include any instructions as to the individual liability of Mr. Wenzel. There is nothing in the record where Lambert requested that the trial court instruct the jury as to the individual liability of Mr. Wenzel; therefore, this issue is not preserved for appeal. Miss. R. Civ. Pro. 51(b)(3). Since the jury was not instructed to render a decision as to Mr. Wenzel, the trial court acted properly in dismissing Mr. Wenzel with prejudice.

STANDARD OF REVIEW

The standard of review of a trial court's grant (or denial) of a J.N.O.V., a peremptory instruction and a directed verdict is de novo. White v. Stewman, 932 So. 2d 27, 32 (Miss. 2006). "When reviewing the grant or denial of a JNOV, we consider the evidence in the light most favorable to the appellee, and give that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. Blake v. Clein, 903 So. 2d 710, 731 (Miss. 2005). If the facts considered in that light point so overwhelmingly in favor of the party requesting the JNOV that reasonable persons could not have arrived at a contrary verdict, we will reverse and render. Id." General American Life Ins. Co. v. McCraw, 2007 WL 1631053, *¶5(Miss. 2007).

ARGUMENT

The issue before this Court is whether the jury was instructed to assess liability to Mr. Wenzel, individually, in order that a verdict be entered against him. In the case, *sub judice*, the plaintiff Lambert made a conscious decision to not include Mr. Wenzel's name on the verdict. (Rec. 224-225). Accordingly, the jury apportioned fault to Wenzel and Associates, P.A., Mid South Development Group, Inc. and Quality Construction, Inc. (Rec. Ex. Tab 5 at187). Since Lambert did not submit a jury instruction to find liability against Mr. Wenzel (or object to its own instruction), Lambert cannot now assign as error instruction P-100 as being ambiguous or erroneous. Miss. R. Civ. Pro. 51(b)(3). The trial court acted correctly in dismissing all claims against Mr. Wenzel individually.

The Mississippi Constitution states that "The right to trial by jury shall remain inviolate. . ." M.S. Const. art. 3 § 31. "The right to trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate." Miss. R. Civ Pro. 38(a). If the trial court would have reworded the verdict to include a judgment against Mr. Wenzel, then this would in effect deprive Mr. Wenzel of his right to a trial by jury.

"If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall. . .direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury." URCCC 3.10. Had Lambert's counsel or the trial court thought that the verdict was ambiguous, confusing or improper then the course of action would have been to return the jury to the jury room to reword the verdict. Baham v. Sullivan, 924 So. 2d 580, 583 (Miss. App. 2005.), *citing* Saucier v. Walker, 203 So. 2d 299 (Miss. 1967).

I. THE JURY'S DECISION WAS CLEAR AND UNAMBIGUOUS

If the jury was to consider rendering a verdict against Mr. Wenzel and Wenzel and Associates, P.A. then both names should have been on the jury instructions. Furthermore, Lambert never sought any sort of instruction for the jury to impose liability against Mr. Wenzel. Lambert seems to argue that the use of the word "Wenzel" somehow "clearly" imports individual liability. (App. Br. at 12). Unfortunately for Lambert, the use of the word "Wenzel" is only linked to Wenzel and Associates, P.A. since the apportionment instruction reads as follows:

> Should you find by a preponderance of the evidence that Lambert Community Housing Group was injured due to negligence you should apportion the award among the following actors by percentage of their respective fault, if any:
>
> 1. Wenzel and Associates, P.A. ___%
> 2. Quality Construction, Inc. ___%
> 3. Ellis Adams ___%
> 4. Sammy Thompon ___%
> 5. Air Electric, Inc. ___%
> 6. Mid South Development, Inc. ___%"

(Rec. Ex. Tab 5 at 187). Additionally, in paragraph 1 of instruction P-100 it states "If you find that Wenzel breached ***its*** contract with the Owner the form of your verdict shall be:. . ." (Rec. Ex. Tab 5 at 186). The use of "its" instead of "his" is indicative of a corporation rather than an individual. (Rec. Ex. Tab 5 at 186-187). None of the instructions asked the jury to consider the individual liability of Mr. Wenzel. Although, Mr. Wenzel made most of the field visits, on at least

two occasions an employee made the field visit and accompanied Mr. Wenzel on other occasions. (Tr. 132). The engineer also made three field visits (Tr. 132). Since another employee of Wenzel and Associates, P.A. had some involvement on this case, maybe Lambert did not want to confuse the jury by trying to apportion fault among employees at Wenzel and Associates, P.A. Lambert made a decision, strategic or otherwise, to not include Mr. Wenzel on the jury instructions and cannot now try to assess liability to Mr. Wenzel after the jury has left the building.

If Lambert wanted the jury to find Mr. Wenzel liable along with Wenzel and Associates, P.A., then it should have included Mr. Wenzel's name in the instructions and included his name on the apportionment instructions along with Wenzel and Associates, P.A. Accordingly, the intent of the jury was unambiguous and the court properly dismissed Mr. Wenzel. URCCC 3.10.

In the alternative, if the verdict was ambiguous, the jury should have been sent back to the jury room to reword their verdict or given a form that included Mr. Wenzel's name. Baham v. Sullivan, 924 So. 2d 580, 583 (Miss. App. 2005.), *citing* Saucier v. Walker, 203 So. 2d 299 (Miss. 1967). It is too late now to reword the verdict since the jury has been dismissed. The trial judge may reform the verdict to reflect the intent of the jury. However, the judge must first be able to ascertain the unquestionable intent of the jury. Hobbs Automotive, Inc. V. Dorsey, 914 So. 2d 148, 152 (Miss. 2005). In the case, *sub judice*, no one knows the intent of the jury since Mr. Wenzel's name was not mentioned in the jury instructions. If the court thought the verdict was ambiguous then the jury should have been sent back to the room with proper instructions. Id. As in the Hobbs case the better procedure would have been for the trial judge to send the jury back into the room to determine if Mr. Wenzel was individually liable. However, neither the court nor Lambert's counsel raised this issue. The trial court has acknowledged that the jury's verdict was ambiguous. (Tr. 309-310). Accordingly,

the jury should have been returned to the jury room. If the verdict is ambiguous, the intent of the jury cannot be determined to justify a verdict against Mr. Wenzel. To do otherwise would deprive Mr. Wenzel of his constitutional right to a jury.

A. LAMBERT DID NOT SUBMIT AN INSTRUCTION TO IMPOSE INDVIDUAL LIABILITY AGAINST MR. WENZEL.

The jury was never instructed to consider the individual liability of Mr. Wenzel. The jury was instructed as to the actors in the case by instruction P-100. (Rec. Ex. Tab at 187). The actors named were Wenzel and Associates, P.A. Quality Construction, Inc., Ellis Adams, Sammy Thompon, Air Electric, Inc., and Mid South Development, Inc. (Rec. Ex. Tab at 187). Mr. Wenzel was not named as actor; therefore, liability cannot be imposed on him.

Lambert chose for whatever reason not to include Mr. Wenzel's name in the instructions. Lambert never objected that the instructions did not include Mr. Wenzel's name and in particular to P-100. "[A] party has no right to raise on appeal the failure to give an instruction unless the party properly requested the instruction from the court." 2 Jeffrey Jackson and Mary Miller, Encyclopedia of Mississippi Law §13:220 (2001). "No party may assign as error the granting or denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury. . ." Miss. R. Civ. Pro. 51(b)(3). Since Lambert did not submit an instruction to impose individual liability against Mr. Wenzel, that issue was not before the jury and the case against Mr. Wenzel was properly dismissed against him.

B. LAMBERT FAILED TO SUBMIT AN INSTRUCTION REGARDING PROFESSIONAL ASSOCIATIONS

Instruction C-1 states "The Court will presently instruct you as to the rules of law which you will use and apply to this evidence in reaching your verdict." (Rec. 309). Lambert argues that Miss.

Code Ann. 79-10-67 makes Mr. Wenzel personally liable in this case. (App. Br. at 23). Lambert overlooks the fact that it did not submit an instruction on the law regarding professional associations, Miss. Code. Ann. §§ 79-10-1 *et seq.*; therefore, the jury was not instructed on this rule of law to use and apply to the evidence. Lambert cannot complain now that liability should be imposed on Mr. Wenzel when it did submit the proper instructions. Miss. R. Civ. Pro. 51(b)(3). A jury cannot impose individual liability if it is not instructed on the rules of law to apply in reaching its verdict.

C. THE DOCTRINE OF EJUSDEM GENERIS DOES NOT APPLY

Lambert argues that doctrine of *ejusdem generis* should apply in the case. Lambert looks to Yazoo Properties v. Katz & Besthoff Number 284, Inc., 644 So. 2d 429 (Miss. 1994) in support of its argument that specific provisions control over general provisions. (App. Br. at 18). Lambert is trying to apply contract law to a jury instruction issue. These two concepts are incongruent. The bottom line is that the jury was not asked to consider the individual liability of Mr. Wenzel. The jury was never instructed on the law as to professional associations so it could apply the facts of the case to determine individual liability, if any, of Mr. Wenzel. Therefore, no verdict was rendered against Mr. Wenzel and the trial court properly dismissed the case against Mr. Wenzel. In the alternative, if the verdict or instruction was ambiguous then the jury should have been returned to the jury room with proper instructions. Baham v. Sullivan, 924 So. 2d 580, 583 (Miss. Ct. App. 2005.), citing Saucier v. Walker, 203 So. 2d 299 (Miss. 1967). This was not done and the verdict cannot be reworded now. Contract law should not be applied to a jury instruction issue. The intent of the jury cannot be determined on an issue or issues for which it was never instructed to consider.

II. THE TRIAL COURT PROPERLY DENIED LAMBERT'S MOTION FOR DIRECTED VERDICT AGAINST WILLIAM WENZEL

The record of Lambert's motion for directed verdict after the close of the Defendant's case in chief is not a part of the record on appeal and cannot be properly heard by this Court. The court has stated many times that it is the duty of the appellant to designate the record on appeal and the court will not consider anything on appeal that is not in the record. Willenbrock v. Brown, 239 So. 2d 922, 925 (Miss. 1970). Accordingly, we do not even know if Lambert properly moved for a directed verdict against Mr. Wenzel so that it is properly preserved for appeal.

Notwithstanding the foregoing, this Court considers the evidence in the light most favorable to the appellee, Mr. Wenzel, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. General Motors Acceptance Corp. v. Baymon, 732 So. 2d 262, 268 (Miss. 1999). In the present situation, the jury was not instructed to consider the individual liability of Mr. Wenzel. Lambert now seeks to remedy its own jury instruction to impose liability upon Mr. Wenzel after the verdict has been handed down. Lambert never sought a determination as a matter of law that Mr. Wenzel would be held individually liable in the event Wenzel and Associates, P.A. was found liable. Lambert cites a Texas case in support of its position that the negligence of Mr. Wenzel follows the negligence of Wenzel and Associates, P.A. as a matter of law. Carl J. Battaglia, M.D., P.A. v. Alexander, 177 S.W. 3d 893, 903 (Tex. 2005). However, Battaglia does not stand for the position that individual liability follows the liability of a professional association. Battaglia states that ". . .the jury should have been asked only whether the physicians were negligent; the consequences of the professional associations follow as a matter of law." Id. The reverse of Battaglia is not necessarily true as asserted by Lambert. To hold otherwise, could impose a disproportionate share of liability to an employee of a professional association if that

employee only had a small share of the alleged negligence involved. The statute does not allow joint and several liability among the shareholders or employees of a professional association. If the Court were to follow Lambert's position, then it would create joint and several liability among shareholders.

The jury in this case was never instructed to decide the issue of the individual liability of Mr. Wenzel. The jury was never instructed on Miss. Code Ann. § 79-10- 67 so it could apply the law to the evidence. If the jury is not instructed to decide an issue it cannot render a decision on that issue. The bottom line is that one knows or can assert how the jury would have decided the issue of individual liability since Lambert did not seek a decision from the jury on the individual liability of Mr. Wenzel. Therefore, the court was proper in dismissing the case against Mr. Wenzel.

Lambert argues that Wenzel and Associates, P.A. and William H. Wenzel were referenced as a single entity from the inception of the case and cites to pleadings in the record. (App. Br. at 21). The fact that pleadings contain single references do not translate to the issue presented before the jury. The only issue considered by the jury was the liability of Wenzel and Associates, P.A. The jury was not allowed to take the pleadings into the jury room to consider as evidence. Miss. R. Civ. Pro. 9(g). The jury was not instructed to consider the individual liability of Mr. Wenzel and could not render a verdict against Mr. Wenzel. Mr. Wenzel would be deprived of his constitutional right to a trial by jury to have verdict entered against him at this time. The trial court acted properly and in accordance with the law by dismissing Mr. Wenzel individually. "No party may assign as error the granting or denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury;. . ."Miss. R. Civ. Pro. 51(b)(3). In the case, *sub judice*, Lambert never requested an instruction as to the individual liability of Wenzel. Therefore, the jury was not

instructed to consider the individual liability of Wenzel and the trial court properly dismissed Wenzel from the lawsuit. Lambert now seeks to get around its own erroneous instruction by arguing that it is entitled to a directed verdict. Lambert made the decision, strategic or otherwise, to not include Mr. Wenzel's name on the jury instructions. Lambert submitted the case to the jury under those circumstances and did not obtain a verdict against Mr. Wenzel.

Lambert asserts that neither Wenzel and Associates, P.A. nor Mr. Wenzel have filed a cross notice of appeal challenging the jury's verdict. (App. Br. 22). It appears that Lambert is using this as some sort of admission that Wenzel and Associates, P.A. and Mr. Wenzel agree with the jury's verdict. This is simply not the case. Wenzel and Associates, P.A., filed bankruptcy. It could not appeal the decision unless it posted a bond and sought to lift the automatic stay. A simple matter of economics prevented Wenzel and Associates, P.A. from noticing an appeal. Failure to notice an appeal should not be taken that Wenzel and Associates, P.A. agreed with verdict against it. As to Mr. Wenzel, he has no reason to notice an appeal; the case against him was dismissed.

CONCLUSION

For whatever reason, Lambert chose not to place Mr. Wenzel on the form of the verdict and now must live with it. Perhaps it was a strategic decision on the part of Lambert to not include Mr. Wenzel since a jury may by sympathetic about rendering a verdict against an individual rather than a corporation or professional association. The bottom line is that Lambert chose not to include Mr. Wenzel in the form of the verdict; Lambert chose not to submit instructions regarding the law as applicable to professional associations. If the jury is not properly instructed on the law then it cannot render a decision on a particular issue. Lambert did preserve any error as to the jury instruction P-100 for appeal since it was submitted by Lambert without objection. Miss. R. Civ. Pro. 51(b)(3).

The jury verdict cannot be reworded or reformed at this late date without violating Mr. Wenzel's constitutional right to a trial by jury. Accordingly, the trial court correctly dismissed the case with prejudice against Mr. Wenzel.

This the 26th day of July, 2007.

Respectfully Submitted

WILLIAM H. WENZEL

ROBERT M. TYNER, JR. MSB[redacted]

CERTIFICATE OF SERVICE

I, Robert M. Tyner, Jr., do hereby certify that I have this day served a copy of the foregoing document by U.S. Mail on the following persons pursuant to Rule 5 of the MISSISSIPPI RULES OF CIVIL PROCEDURE:

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This the 26th day of July, 2007

ROBERT M. TYNER, JR.