

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

ERVIN FUNDERBURG, et al

APPELLANTS

vs

NO. 2008-CA-00235


PONTOTOC ELECTRIC POWER ASSN.

APPELLEE

BRIEF OF APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

RESPECTFULLY SUBMITTED,



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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 and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal:

David Sanders, Esq.
Mitchell, McNutt & Sams
P.O. Box 1366
Columbus, MS 39703-1366

Honorable Andrew K. Howorth
Circuit Court Judge
1 Courthouse Square
Suite 201
Oxford, MS 38655

Honorable Robert W. Elliott
Circuit Court Judge
105 E. Spring Street
Ripley, MS 38663

THIS, the 9 day of June, 2008.

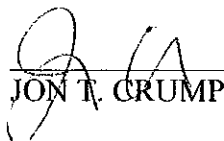

JON T. CRUMP

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STATEMENT REGARDING ORAL ARGUMENT

ORAL ARGUMENT IS NOT REQUESTED

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WAS THE STATUTE OF LIMITATIONS FOR THE SECOND SUIT
TOLLED BY THE TIMELY FILING OF THE FIRST SUIT?
- II. SHOULD A DISSOLVED, CLOSELY HELD CORPORATION BE
TREATED AS A PARTNERSHIP IN A FILING WHEN THE
CORPORATION WAS OPERATING AS A PARTNERSHIP AT THE TIME
OF THE FILING?

PROCEDURAL HISTORY

ACTION C2002-082

Defendant/Appellee, Pontotoc Electric Power Association (hereinafter referred to as PEPA), was sued in the Circuit Court of Calhoun County, Mississippi, Cause No. C2002-082, by Ervin Funderburg, one of the Plaintiff/Appellants, in this case on June 14, 2002, from an incident occurring on March 3, 2002. PEPA was served with process within the prescribed time of 120 days. On August 26, 2002, PEPA served its *Answer and Affirmative Defenses* together with discovery. That case was dismissed as stale on January 24, 2004. It was reinstated on February 3, 2004.

After the deposition of the Plaintiff, an amendment was sought changing the named Plaintiff from Ervin Funderburg to Corner Closet, Inc. This request for amendment was filed April 16, 2004. This amendment was granted April 17, 2004. This amendment is the first time the entity Corner Closet, Inc. was brought into a lawsuit against PEPA. The *Amended Complaint* itself was filed on June 24, 2004, to be re-served with the already substituted Plaintiff's name of Corner Closet, Inc.

After several unsuccessful attempts to set a trial date, the matter was set for trial on August 11, 2005. Unfortunately, the trial date was continued by Order of the Court on August 11, 2005. Defendant filed a *Motion to Dismiss* on the basis that Corner Closet, Inc. had been dissolved since 1993 on August 18, 2005. A hearing on Defendant's motion was set for the 26th of October, 2005. This hearing date was changed to October 23, 2005, at the Defendant's convenience. After the hearing on Defendant's motion,

Cause No. 2002-082 naming Corner Closet, Inc. as a corporation was dismissed by *Order* of the Court on October 26, 2005.

ACTION C2005-178

A separate suit on the same action was sent to be filed with the Court on November 29, 2005 and was filed with the Court on December 2, 2005. This new suit named Ervin Funderburg, Nancy Funderburg, and Pam Burt, individually, as well as doing business as Corner Closet, Inc. and CC Blouses. The cause number of this case was C2005-178. It is the dismissal of this action that is the basis of the appeal before the Court.

On January 20, 2006, Appellee PEPA filed a *Motion to Dismiss and Alternatively, for Summary Judgment*. A hearing on this motion of Defendant was held on October 23, 2006. The Judge rendered his opinion by signing an *Order of Final Judgment* on November 3, 2006, presumptively prepared by Defendant/Appellee PEPA. However, this Judgment was not filed until December 18, 2007, nor was the decision communicated to Plaintiff/Appellant until shortly before that period. Plaintiff/Appellant brought a *Motion to Extend Appeal Deadline* on December 19, 2007, which was filed with the Court on December 21, 2007. This motion was granted on January 14, 2008. *Notice of Appeal* was filed within the prescribed time.

FACTS

On March 3, 2002, employees of Pontotoc Electric Power Association, while removing above ground gas tanks adjacent to property owned by Pam Burt, spilled a quantity of fuel on the ground. It has been alleged that this fuel irreparably damaged an inventory of used and overstock clothing to be sold by the businesses, Corner Closet, Inc. and CC Blouses. During the deposition testimony of Ervin Funderburg, who was a person claiming interest in both businesses, it was revealed that the inventory was the property of Corner Closet, Inc. Mr. Funderburg, in his deposition testimony, stated that this was a corporation currently operating in the State of Mississippi in the business of the retail sale of used and overstocked clothing. Mr. Funderburg indicated in his deposition that his daughter, Pam Burt and his wife, Nancy Funderburg, were shareholders in the corporation, Corner Closet, Inc. He further indicated that CC Blouses was a subsidiary of Corner Closet, Inc. and that the same persons listed above were shareholders in this business. Records with the Secretary of State of Mississippi show that Corner Closet, Inc. was officially dissolved in 1993. However, two locations operating under the names of Corner Closet and CC Blouses were still in operation as of 2002 when the incident in question took place although neither was incorporated through the Secretary of State's Office. Ervin Funderburg, Nancy Funderburg and Pam Burt were all shareholders in the businesses Corner Closet, Inc. and CC Blouses in 2002.

SUMMARY OF THE CASE

This case turns on one question. *Should the filing of a lawsuit in the name of a dissolved corporation toll the statute of limitations for the individual shareholders of that corporation when the shareholders continue to operate the business in fact?*

There is no question that Corner Closet, Inc. was dissolved in 1993. There is also no question that Corner Closet, Inc. was listed as the party in interest in the *Amended Complaint* in cause number C2002-082. Appellants are asking the Court to put the shareholders, Ervin Funderburg, Nancy Funderburg, and Pam Burt in the position of Corner Closet, Inc. for the purposes of that 2002 lawsuit. The effect of this would be a tolling of the statute of limitations for those shareholders, making dismissal of the 2005 action improper.

ARGUMENT

I. THE FILING OF THE FIRST COMPLAINT TOLLED THE STATUTE OF LIMITATIONS FOR CORNER CLOSET, INC.

This case appears to be one of first impression. Appellants are asking the Court to treat a dissolved corporation as a partnership for the purposes of litigation filed in the name of the corporation. The reasoning behind this is that the dissolved corporation continued to operate in fact as a partnership consisting of family members only. The effect of treating this dissolved corporation as a partnership for the filing in its name would be to toll a statute of limitations during the pendency of litigation in the corporation's name. Timely filing of a complaint acts as a tolling of a statute of limitations during the suit. Norman v. Bucklew, 684 So.2d 1246, 1256 (Miss.1996).

There are, claimed by Appellants, two possible ways to calculate the actual statute of limitations. The first way is that the statute was tolled by the filing of the suit by Ervin Funderburg. Mr. Funderburg filed his individual suit in June of 2002 with slightly over thirty-two months and two weeks remaining on the statute of limitations. The case was dismissed as stale for just over one week before being reinstated in early 2004, meaning that in 2004 there would have been thirty-two months and just under one week remaining on the statute of limitations due to the tolling period. Then, when the case was dismissed in 2005, a period of one month passed before a new suit was filed naming Ervin Funderburg as one of the Plaintiffs. As of the date of the filing of the new suit naming the proper parties by their correct names, when treating the Ervin Funderburg suit as the

beginning of the tolling period, there would have been approximately thirty-one months remaining on the statute of limitations, regardless of the fact that the actual date was more than three years past the date of the incident giving rise to the cause of action.

Another possible computation period would be that the tolling of the statute limitations only began when the Complaint was amended to name Corner Closet, Inc. as a party Plaintiff. This is because Corner Closet, Inc. was the entity which indeed owned the inventory in question, regardless of whether Corner Closet, Inc. continued to exist as a fully licensed and registered corporation. The naming of Corner Closet, Inc. occurred on April 17, 2004. At that time, there would have been ten months and two weeks remaining on the statute of limitations. The dismissal in October of 2005, would have begun the statute of limitations running again and the filing of the new suit in November of 2005 resulted in a one month subtraction from the statute of limitations, meaning that at the time of the filing of the new suit in 2005, there still remained over nine months on the statute of limitations.

If the Court agrees with Appellants arguments below that the filing of a suit on behalf of a dissolved corporation which continues to operate as a family owned business tolls the statute of limitations for a suit in the name of that partnership then there could be no argument but that the 2005 suit was within the prescribed statute of limitations.

II. THE FILING OF A SUIT IN THE NAME OF A DISSOLVED CORPORATION WHICH HAS CONTINUED TO ACT AS A FAMILY RUN BUSINESS SHOULD BE TREATED AS A FILING ON BEHALF OF THE BUSINESS AS A PARTNERHSIP.

Corner Closet, Inc. in 1993 was closely held corporation. Only family members had shares in the corporation. Those family members included Ervin Funderburg, Nancy Funderburg, and Pam Burt. All of those individuals operated the business continuously from 1993 through the present. They are all still holders of interest in Corner Closet, Inc. regardless of its filed designation with the Secretary of State. We are asking the Court today as a matter of public policy to treat Corner Closet, Inc., as named in the *Amended Complaint* of April 17, 2004, as whatever entity Corner Closet, Inc. has operated as in fact rather than treating it as a dissolved corporation.

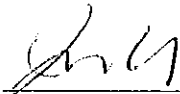
The parties in interest in Corner Closet have remained the same. The structure of Corner Closet, Inc. remains the same. The inventory was the same inventory from 1993 until the day after the dissolution. The location remained the same. The only change to the business entity were filings with the Secretary of State's Office. Since a corporation is treated as an individual, the parallel would be a person who changes their legal name through marriage or for some other reason, the person remains the same whether the name changes or not. "A rose is a rose." The business entity should not be punished for a simple change in paperwork with the Secretary of State's Office.

CONCLUSION

The closely held family business was allegedly damaged in 2002 by Pontotoc Electric Power Association. Mr. Funderburg, the patriarch of the family, took responsibility for instituting action. Mr. Funderburg is not a business school graduate and may have been confused on the exact structural name of his business when he gave his deposition in the 2002 action. He stated that Corner Closet, Inc. was a corporation because he had, at one time, with his daughter, wife and other family members filed as a corporation. He did not realize the effect of dissolution. He and his family continued to operate the business as Corner Closet, Inc. When suit was filed in the amended name of Corner Closet, Inc. in April 17, 2004, the intent of the Plaintiff was a filing for the business entity in whatever form existed at that time, whether it was called Corner Closet, Inc., Corner Closet General Partnership or any other name. A filing on behalf of that business entity should act as a tolling of the statute of limitations for the entity and any persons with financial interests in the business.

As a matter of public policy, Corner Closet, Inc. as filed in the 2002 action should be treated as a filing for Ervin Funderburg, Nancy Funderburg, and Pam Burt, individually, as well as doing business as Corner Closet, Inc. and CC Blouses so that the filing in 2005 of an action those proper names will be within the prescribed statute of limitations. This case should be sent back to the lower Court to proceed toward trial.

RESPECTFULLY SUBMITTED, this the 9 day of June, 2008.

BY: 
Jon T. Crump
Attorney for Appellants

CERTIFICATE OF SERVICE


I, Jon T. Crump, Shelton & Associates, P.A., do hereby certify that I have this date, mailed, by U.S. Mail, first class delivery, sufficient postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to the following interested persons and counsel of record:

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Honorable Andrew K. Howorth
Circuit Court Judge
1 Courthouse Square
Suite 201
Oxford, MS 38655

Honorable Robert W. Elliott
Circuit Court Judge
105 E. Spring Street
Ripley, MS 38663

DATED, this the 9 day of June, 2008.

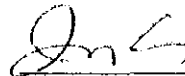

JON T. CRUMP

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have this date placed the original of the above and foregoing BRIEF OF APPELLANT together with three (3) copies of same and electronic disk containing the text of the brief in Word Format in the regular United States Mail, postage prepaid, addressed to:

Honorable Betty W. Sephton
Office of the Clerk
Mississippi Supreme Court
P.O. Box 249
Jackson, MS 39205-0249

THIS, the 9 day of June, 2008.



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