IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-00826

K.R. DAUGHTREY and PAUL UPTON — APPELLANTS

VERUS

WILLIAM W. ALLRED — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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:

1. Kenneth R. Daughtrey and Paul Upton, Appellants
2. John D. Smallwood, Esq. and Larry O. Norris, Esq., Attorneys for Appellants
3. William Wallace Allred, Appellee
4. James L. Quinn, Esq., Attorney for Appellee
5. Honorable Franklin C. McKenzie, Jr. Chancellor, 19th Chancery District

This the 6 day of March, 2009.

James L. Quinn
Attorney for Appellee

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STATEMENT REGARDING ORAL ARGUMENT

The Appellee William Wallace Allred requests oral argument. Oral argument will allow clearer presentation of the issues on appeal. Allred contends that some of the issues stated by the Appellants were not raised at trial or were waived before trial. Oral argument will facilitate focus on the issues on appeal and will be beneficial to the Parties and the Court.

STATEMENT OF ISSUES

1. Whether a defense of lack of standing is waived.

2. Whether the order of the District Court for the 22nd Judicial Court, Parish of St. Tammany, State of Louisiana in the Succession of Charles Thomas Carden should be afforded full faith and credit.

3. Whether defenses under the Securities Act of 1933 and the Securities Exchange Act of 1934 are waived.

4. Whether a ten year period of limitations applies to the Plaintiff's claims for recovery of an interest in minerals in place.

STATEMENT OF THE CASE
NATURE OF CASE AND COURSE OF PROCEEDINGS

This is an action commenced by the Appellee William Wallace Allred ("Allred") against Appellants Paul Upton ("Upton") and Ken Daughtrey, also known as K. R. Daughtrey ("Daughtrey") to recover a percentage of a mineral interest and proceeds therefrom acquired by Upton and Daughtrey by mineral deed from Amoco Production Company. Upton and Daughtrey executed agreements with C.T. Carden to convey to Carden 15% of the mineral interest Upton and Daughtrey acquired from Amoco after "payout". Allred is assignee of C.T. Carden's rights under the agreements from the succession representative of C.T. Carden following Carden's death. Upton and Daughtrey each admit execution of the agreement with Carden but deny that the agreement is enforceable by Allred. Upton and Daughtrey each assert counterclaims against Allred.

The separate actions filed by Allred were consolidated for discovery and trial. Following a two-day trial, the court entered judgment in favor of Allred finding that he was the legal and equitable owner of the contested mineral interest. The Chancellor ordered Upton and Daughtrey to convey the contested interest to Allred, requiring Upton and Daughtrey to account for income attributable to the mineral interest at issue. The counterclaims of Upton and Daughtrey were dismissed with prejudice.[1] Separate money judgments were subsequently entered against Upton and Daughtrey for amounts equal to income attributable to production from 15% of 1.89% of the Amoco minerals from February 27, 2000 to March 31, 2008.

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Upton and Daughtrey appealed the chancellor's judgment dated March 13, 2007. The appeal was dismissed because the judgment was not final. On April 10, 2008 the Defendants presented their accountings and the court entered separate money judgments against Daughtrey and Upton in the amount of $26,807.00. Upton and Daughtrey now appeal these judgments entered April 15, 2008 as well as the judgment entered March 13, 2007.

STATEMENT OF FACTS[2]

In 1992 C. T. "Tom" Carden was an active and successful businessman and oil and gas properties investor based in New Orleans, Louisiana. He was a friend and long-time business associate of William Wallace Allred, a retired attorney and active and successful investor in oil and gas properties based in Collins, Mississippi. (R.E. Tab 1;Tr. 57-60) That year Carden's company C.T.C Minerals, Inc. acquired an option to purchase certain mineral interests in Mississippi owned by Amoco Production Company. The option was presented to Carden by Jim White who had secured a commitment from Amoco Production Company. Acquisition of the option and ultimately the Amoco minerals would not have been possible without Jim White's efforts and connections with Amoco. (R.E. Tab 1; Tr. 71) The option covered all of Amoco's non-producing and unleased minerals in place consisting of approximately 53,000 mineral acres over various counties in Mississippi, including the Second Judicial District of Jones County.(Trial Exh.1) Carden contacted Allred and several other "oil men" with whom he had done business in the past, including Dayton F. Hayle (principal in Hawkeye Oil and Gas, Inc., Tuscaloosa, Alabama), Leonard Limes (principal in Limes Corporation of Madisonville, Louisiana) and Tom Reidy, (principal in Reidy International, Inc. of Houston, Texas) offering each the opportunity to participate.[3]

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A description and explanation of the transaction sometimes referred to at trial as the "Amoco Mineral Deal" is found in the testimony of Allred reproduced in the Appellee's Record Excerpts.(R.E. Tab 1; Tr.57-76, 79-96, 154-155, 170-172)

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The opportunity to acquire an interest in non-producing and unleased all minerals in Mississippi owned by Amoco Production Company was a rare and exciting prospect. (Tr. 157-158) Unlike mineral spreads owned by timber companies or land companies the Amoco minerals were select minerals evaluated by Amoco personnel with experience and expertise and who see thousands of mineral spreads and submittals. (R.E. Tab 1; Tr. p.61)

The cost of the mineral acquisition included a $50,000.00 finder's fee to Jim White who first brought the deal to Tom Carden, (R.E. Tab 1;Tr. 71) option costs of $140,600.00 and purchase price for the 53,000 net mineral acres of $1,325,000.00.(Trial Exh.1) This was exclusive of costs and expenses associated with evaluating the mineral interests included, determining which interest were under lease (and thereby excluded from the sale of Amoco minerals) and "spot" checking titles in active oil and gas areas where the minerals were located. (R.E. Tab 1;Tr. 79- 82) In short, there was a considerable amount of work and due diligence to be done prior to exercising the option on the Amoco minerals requiring experience and expertise in the oil business generally. While Allred, Carden, Limes, Hayle and Reidy had the experience, knowledge and resources to undertake this evaluation, Paul Upton and K.R. Daughtrey did not. (R.E. Tab 1;Tr. 72-74)

Paul Upton is a lifelong friend of Wallace Allred.(R.E. Tab 1;Tr.63) Daughtrey is a former oil company employee who had worked in the production side of the oil business offshore in Africa and other foreign countries. He saved his money and when he retired he returned to Covington County and approached Allred about learning and investing in the oil business. Allred knew Daughtrey because he was the former son-in-law of a close friend of Allred.(R.E. Tab 1;Tr.66) Allred worked with Daughtrey, taught him the basics of title examination, differences between mineral interests and royalty interests, and instructed him in basic petroleum landman skills and ethics.(R.E. Tab 1;Tr.66-69) He introduced Daughtrey to other oil properties investors and promoters and from time to time notified Daughtrey of drilling prospects that were presented to Allred by others. From time to time Daughtrey made attempts on behalf of Allred to buy term royalty interest under prospects in and around Covington County.(R.E. Tab 1;Tr. 67)

Upton's home is directly across the street from Allred's office. Upton was frequently in Allred's office for social visits and often made inquires about oil activity in the area. He became

aware of the Amoco mineral option while Allred was in the process of evaluating the proposal.(R.E. Tab 1;Tr.64) Daughtrey also became aware of the Amoco deal as he had access to Allred's office and regularly availed himself of Allred's time and expertise in the business.(R.E. Tab 1;Tr.68) Bobby Joe Dykes and Stuart Leggett were also friends of Allred and were co-owners of D & L Inc., owner and operator of a wood veneer mill. These two men were also long-time friends of Allred. (R.E. Tab 1;Tr.87)

After discussing the possibility with C.T. Carden, Allred offered Upton, Daughtrey, Leggett and Dykes ("Covington County investors") the opportunity to participate in the Amoco mineral purchase. Allred explained the terms of the deal to the Covington County investors in at least two meetings in his office when all were present. Allred explained the option price, the proposed purchase price and the finder's fee to Jim White. He explained that additional expenses and additional work would be involved in completing an evaluation of the Amoco minerals, consummating the trade of record, and the issues involved in managing a mineral spread of approximately 53,000 acres in over 40 counties. He explained to the Covington County investors that their interest, if they decided to participate, would be subject to a commission since none of the Covington County investors were experienced in the oil and gas business, could not be expected to assist in confirming title to the mineral spread in Amoco, evaluating the areas where the minerals were situated, or closing the deal. Allred explained that a commission would be charged against the interest they acquired after the point when each recouped his investment. (R.E. Tab 1;Tr.65)

The option from Amoco was held by Carden's company C.T.C. Minerals, Inc. It was Carden's deal (R.E. Tab 1;Tr.170) and Allred secured his permission before offering anything to the Covington County investors. Allred and Carden discussed that the Covington County investors' interests would be subject to a commission because they were not professional oil men and they

could not assist in evaluating and closing this sizable purchase.(R.E. Tab 1;Tr.86) Because the Covington County investors were Allred's friends or associates, Carden agreed that the commission would be 15% of the interest each acquired payable only after the investors recouped their investment.[4]

All of the Covington County investors eagerly accepted the deal presented to them by Allred. Upton and Daughtrey each committed to purchase 1.89% of the Amoco mineral spread at a cost of $25,000.00, plus their proportionate part of the finder's fee paid to Jim White. Dykes and Leggett each committed to purchase 3.75% of the Amoco minerals at a cost of $50,000.00, plus a proportionate share of the finder's fee paid to Jim White. The interests of Upton, Daughtrey, Dykes and Leggett were subject to the 15% in-kind commission to Carden. (R.E. Tab 3, 4;Trial Exh.7, 8, 9, 10) The remaining interest in the Amoco minerals were to be acquired and paid for by Leonard Limes, Tom Carden, Tom Reidy, Wallace Allred, Dayton Hayle, and others. (Trial Exh. 2)

C.T.C. Minerals, Inc. exercised the option and upon receipt of the purchase price balance, Amoco conveyed the mineral interest directly to the purchasers, including Upton and Daughtrey, according to the undivided interest of each. (R.E. Tab 2;Trial Exh.6) Afterwards, all of the purchasers executed letters of attorney and a management agreement to vest executive rights of the minerals and management authority in Investment Management Income, Inc. ("IMI"). IMI was operated by some of the purchasers of the Amoco minerals, including Allred. (Trial Exh.4, 5) Since IMI held executive rights to the Amoco minerals, mineral leases were executed by IMI which received lease bonus payments and made periodic distributions to owners according to their interest

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4 Customarily, there is a 25% commission on transactions such as the one at issue. That is, an investor pays for a 100% and gets 75%. Such commissions are often paid "up front" not conditioned on the purchaser first recouping all of his investment. (R.E. Tab 1;Tr. 74)

after deducting certain expenses. The expenses deducted were "hard" cost such as accounting fees, attorney's fees and clerical costs. No fees for management of the Amoco minerals were charged as expenses by IMI. Royalty payments for production from the Amoco minerals were paid by the producers and gatherers directly to each owner according to his interest.(Tr. 11-12, 27-28)

After execution of the mineral deed from Amoco and the management agreement and power of attorney in favor of IMI, Allred presented written agreements to the Covington County investors which memorialized the earlier agreement of each to "notify C.T. Carden at such time as payout occurs and within thirty (30) days of payout assign in writing by recordable assignment 15% of the interest acquired....." (R.E. Tab 3, 4;Trial Exh 7, 8, 9 and 10) Upton and Daughtrey each signed the agreements. From that time and until called on to perform in April of 2000, neither Upton nor Daughtrey complained of any unfair dealings by Allred nor suggested to anyone that the 15% commissions were not a part of the deal originally offered. (Tr.86, 279-280)

IMI managed the Amoco mineral spread in accordance with the power of attorney and management agreement executed by all of the purchasers. Allred stayed in contact with the Covington County investors, keeping them advised of activity in areas where the Amoco minerals were located and keeping them informed about mineral leases executed by IMI on their behalf from 1992 through 2000. (Trial Exh.11 a-11v)

Prior to 1995, C.T. Carden and Allred decided that the commissions for the Covington County investors would be taken by Allred, primarily because he was the one dealing directly with these Covington County residents expending considerable time keeping them advised of management by IMI and of all matters relating to their interest in the Amoco minerals. Because the Amoco mineral purchase was originated by C.T. Carden, the commissions were originally taken in Carden's name and were under his control. Before that time Allred assumed Carden would want

Allred to share in the commissions, but Allred did not expect to be assigned all commissions from the Covington County investors. (Tr.170-172)[5]

Limes Corporation, the single largest investor in the Amoco mineral spread, determined to reduce its position in the Amoco minerals. Allred informed Upton and Daughtrey that they, along with the other Amoco mineral purchasers, would be allowed to purchase additional interests from Limes Corporation unburdened by any commission. (R.E. Tab 1;Tr. 92-93) Upton acquired an additional 2.11% and Daughtrey acquired an additional 1.11% in the Amoco minerals by instrument executed July 25, 1995. (Trial Exh.12)

In September, 1995, C.T. Carden died. His estate was opened in St. Tammany Parish, Louisiana and his stepson Jay Cuccia was appointed and confirmed as administrator. (R.E. Tab 7;Trial Exh. 20 and 21) By instrument dated February 28, 2000, Jay Cuccia, as administrator of the estate or succession of C.T. Carden, assigned to Allred all right title and interest to the agreements signed by the Covington County investors. (R.E. Tab 6;Trial Exh.19)

By letter dated May 15, 2000, Leonard Limes, an officer of IMI, stated in a letter to all investors that payout for the Amoco minerals had been reached and that "April 1, 2000 is designated as the date that the interests to be reduced for payment of commission should take place." (R.E. Tab 8;Trial Exh.23)[6] By separate letters to Daughtrey and Upton dated April 3, 2000 Allred sent copies

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The assignment from Carden's Succession representative to Allred recites that the commission agreements were taken in Carden's name for "convenience only and were held in the name of Carden on behalf of William Wallace Allred..." (R.E. Tab 6;Trial Exh. 19) This recitation is not accurate because there was no agreement about how the commissions would be divided when the commission agreements were executed by the Covington County investors in 1992. (Tr. 111, 170)

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Upton and Daughtrey each introduced ledgers reflecting payout dates for 1.89% interest in the Amoco minerals in September 1999.(Trial Ex.38,39) However, before this lawsuit neither had given notice of payout to anyone and neither had calculated a payout date.(Tr.260, 281-282)

of the agreements for the commission, the assignment to Allred and a Mineral Deed for 15% of the interest Upton and Daughtrey each original acquired in the Amoco minerals.(Trial Ex.17, 18) Similar letters and documents were sent to Stuart Leggett and to Betty Dykes, widow and sole heir and beneficiary of Bobby Joe Dykes, deceased. Leggett and Ms. Dykes promptly honored their agreements and signed and delivered the mineral deeds to Allred representing the commission.(Trial Exh.31, 34) Upton and Daughtrey each refused to execute the conveyance of the interest representing the commission to Allred. Allred gave Upton and Daughtrey several opportunities subsequently to honor their agreements and execute the mineral deeds. (Trial Exh.24, 25, 29, 30) Each refused. On February 27, 2003 Allred filed separate actions against Upton and Daughtrey for breach of contract, for imposition of a constructive trust and other equitable relief, and for damages. (R. 18-31, R.84-96)

SUMMARY OF THE ARGUMENT

The Appellants' statement of issues include matters that are waived because they were not set forth affirmatively and were not tried by consent. Upton and Daughtrey contend that Allred is without standing to pursue the claims stated in his complaint. They argue that the assignment to Allred by the appointed representative of C.T. Carden's estate was not first authorized by the Louisiana court where the estate proceedings were pending. The answers and counterclaims filed by Upton and Daughtrey do not set forth lack of standing or failure to prosecute by the real party in interest as an affirmative defense or claim. The issue is therefor waived and not before this court.

The Louisiana court subsequently entered an order authorizing the assignment by the succession representative of C.T. Carden to Allred. The Louisiana order specifically ratified the assignment on behalf of the estate adjudicating that it was the authorized act of the estate representative and that the assignment was valid and supported by consideration. Pursuant to provisions of the Untied States Constitution, the order of the Louisiana court is entitled to full faith and credit by courts of this state.

The Appellants contend that the fractional mineral interests conveyed to Upton and Daughtrey and described in their agreements with Allred constitute "securities" governed by the Securities Act of 1933 and the Securities Exchange Act of 1934. The Appellants contend that because the transaction runs afoul of the Acts' provisions, the agreements executed by the Appellants and later assigned to Allred are illegal and void.

Illegality is an affirmative defense which appears nowhere in the answers and counterclaims of Upton or Daughtrey. The issue was raised for the first time by Upton and Daughtrey in a post-trial motion. No evidence on this claim or defense was presented by Upton or Daughtrey at trial and the chancellor properly denied the motion finding that defenses under federal securities law were

waived.

The Securities Act of 1933 and the Securities Exchange Act of 1934 fail as an affirmative defense in any event. The Appellants received title to their mineral interests from Amoco not Allred. These federal statutes are remedial in nature and provide for rescission as well as damages in the proper case. The statutes would not render the transaction void even if they applied. The Appellants do not seek to rescind the transaction. They certainly are not entitled to damages since each profited handsomely from the transaction.

The agreements of Upton and Daughtrey to convey a percentage of their undivided interest in the Amoco minerals are unambiguous, supported by consideration and are enforceable. These agreements were assigned by the personal representative of C. T. Carden's estate to Allred. Upton and Daughtrey refuse to honor these agreements although each testified he would have honored the contracts with Carden. Allred holds an equitable interest by virtue of the assignments. Legal title is wrongfully retained by Upton and Daughtrey.

Minerals in place, including a fractional interest, constitute real property in Mississippi. Allred's claim for recovery of the mineral interest is governed by the ten year periods of limitations provided in the statutes of limitations applicable to actions to recover land (Miss. Code Ann § 15-1-7), applicable to suits in equity to recover land (Miss. Code Ann § 15-1-9) and applicable to actions involving certain trusts (Miss. Code Ann § 15-1-39). Allred's claims to recover mineral interests along with proceeds therefrom were filed well within applicable periods of limitation. The Chancellor's judgments should be affirmed.

ARGUMENT

I. DEFENSES OF LACK OF STANDING AND FAILURE TO PROSECUTE BY THE REAL PARTY IN INTEREST HAVE BEEN WAIVED.

Upton and Daughtrey urge on appeal that Allred is without standing to seek enforcement of the agreements of Upton and Daughtrey providing for a reconveyance of a percentage of minerals after payout. They now contend that the assignment was void because at the time it was executed by Carden's personal representative it had not been approved by the Louisiana court where the succession of C.T. Carden was pending. In fact, neither Upton nor Daughtrey raised affirmatively the issue of standing in their answer to the complaint. Upton and Daughtrey each set forth the following three affirmative matters in his answer:

> **AFFIRMATIVE DEFENSES**
>
> 1. Your Defendant would show that the statute of limitations has run and that the plaintiff is not entitled to bring this action.
>
> 2. Your Defendant would show that the plaintiff and the defendant had an attorney-client relationship concerning the matters contained in the Complaint, and the plaintiff is not a proper party to file the pending action.[7]
>
> 3. Your Defendant would show that the plaintiff is a licensed practicing attorney at law in the State of Mississippi. The attorney dealt with the defendant concerning legal matters. The attorney did not obtain a disclosure agreement with the defendant. The plaintiff is in violation of the Standards of the Code of Ethics of Attorneys practicing in the State of Mississippi and is precluded from bringing this action. (R.35, 100)

Attached to Allred's complaint against Upton (R.18-31), and to his complaint against Daughtrey (R.84-96) are copies of the agreements providing for the commission, a copy of Letters of Administration, and a copy of the assignment from the Administrator to Allred. Allred's

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[7] The Chancellor found that no attorney-client relationship existed between Allred and Upton, or between Allred and Daughtrey. (Tr. 279; R. 201-207)

complaints are explicit that his claim to the commissions is through authorized acts of the representative of Carden's Estate. Nowhere in the pleadings of Upton or Daughtrey can it be discerned that either seeks to avoid the obligation based on a argument that Allred is without standing or is not a proper party to bring an action on the agreements because the assignments to him were not first approved by the Louisiana court where the Succession was pending.

Miss. R. Civ. P. 8(c) provides in pertinent part:

> ... a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, *and any other matter constituting and avoidance or affirmative defense.*

(emphasis supplied). The first defense of Upton and Daughtrey sets forth the statute of limitations. The second affirmative defense sets forth the attorney-client relationship as a matter constituting an avoidance. The third affirmative defense sets forth that Allred's claim is barred because he is a licensed attorney and did not secure disclosure agreements. Each of the three separate defenses concludes with an allegation that the plaintiff is not entitled to or is precluded from bringing the action. Nowhere is it alleged that Allred lacks standing or is not the real party in interest.

Miss. R. Civ. P. 10(b) provides in pertinent part:

> All averments of claim or defense shall be made in numbered paragraphs, the contents of each which shall be limited as far as practicable to a statement of a *single set of circumstances*;... each claim founded on separate transaction or occurrence and *each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matter set forth.*

(emphasis supplied). Rule 10(b) regulates pleadings rather than admissibility of evidence. *Sims v. Collins*, 762 So. 2d 785 (Miss. Ct. App. 2000). Yet a party must plead an affirmative defense or it

is waived. *Hertz Commercial Leasing Div. v. Morrison*, 567 So. 2d 832 (Miss. 1990); *Harris v. Tom Griffith Water Well and Conductor Serv., Inc.*, ___ So. 2d ___, 2009 WL 176121 (Miss. App. 2009) Notice pleading is the rule and there is nothing in the affirmative defenses set forth by Upton and Daughtrey, nor elsewhere in their answers or counterclaims, to put Allred on notice that the appointment or authority of C.T. Carden's personal representative is challenged. This was initially raised at trial and only after copies of letters of administration to Cuccia (R.E. Tab 7;Trial Exh.20), copies of the assignment to Allred (R.E. Tab 6;Trial Exh.19) and copies of the agreements (R.E. Tab 3, 4;Trial Exh.9, 10) were admitted into evidence by stipulation.(Tr. 1)

A failure to actively and specifically pursue an affirmative defense while participating in the litigation serves as a waiver of the defense. *Estate of Grimes v. Warrington*, 982 So. 2d 365, 370 (Miss. 2008). There, the physician defendant set forth in his answer a defense of immunity under the Mississippi Tort Claims Act. After extensive discovery and three trial settings the physician moved for summary judgment on the defense of immunity. The court held that the defense was waived and remanded for trial on the merits.

The defense of lack of standing or failure to prosecute by the real party in interest was not tried by consent. Timely objection was interposed during cross examination of Cuccia about his authority to execute the assignment:

> Mr. Walker. Did you get authority from the court to do that?
> A. I don't recall.
> Q. Okay. Do you have any authority that authorizes you to do that whatsoever?
> Mr. Quinn: Your Honor, excuse me I'm gonna object to this line of questioning. Nobody - - there's no challenges, no affirmative defense, there is nothing - - no - - any indication in the pleadings that there's any challenge to this agreement based on the - - any power in the will, based on any court because of the lack of power in the will, because of the lack of any court order. The only thing they've challenged this thing about is on the basis of fraud and

> on the basis of overreaching what they say was an attorney- client relationship between Wallace and these two men, Upton and Daughtrey. (Tr.39)

Affirmative defenses that are neither plead nor tried by consent are deemed waived. *Goode v. Village of Woodgreen Homeowners Assn.*, 662 So. 2d 1064, 1077 (Miss. 1995).

II. THE ORDER OF THE DISTRICT COURT FOR THE 22nd JUDICIAL DISTRICT COURT, PARISH OF ST. TAMMANY, STATE OF LOUISIANA IN THE SUCCESSION OF CHARLES THOMAS CARDEN SHOULD BE AFFORDED FULL FAITH AND CREDIT.

Following objection by Allred to cross examination of the succession representative about authority to act on behalf of Carden's estate, the chancellor inquired of counsel for Upton and Daughtrey:

> The Court: What is it you want from him?
> Mr. Walker: I would like to see something to show that this is an approved and authorized document based on fact that this document itself is signed by him as administrator and signed by William Wallace Allred... (Tr. 41)

At this point, and based on Cuccia's representations that in accordance with authority previously conferred by the Louisiana court an order could be secured specifically recognizing his authority to make the assignments, the Chancellor allowed time to secure such an order.(Tr. 40, 43-44) This was accomplished in due course by entry of an order of the Louisiana court which provided that L. Jay Cuccia, Administrator of the Succession of C. T. Carden is "authorized, directed and empowered to enter into the assignment and conveyance of mineral leases (sic) to William Wallace Allred dated February 28, 2000, a true copy of which is attached to the petition filed in this matter as Exhibit "B" ("Assignment") on the terms and conditions set forth in the petition..." The order further provided that the assignment is "supported by consideration and is otherwise valid and the act of L. J. Cuccia, Administrator of the Succession of C. T. Carden in executing said assignment is hereby ratified

the contract, was illegal and therefor void. Furthermore, the trial court erred in awarding damages based upon an illegal and void contract." ("Brief of Appellants" p. 13). Miss. R. Civ. P. 8(c) specifically provides that "illegality" is an affirmative defense that must be set forth affirmatively. On appeal Upton and Daughtrey argue that the agreement signed by Upton and Daughtrey as well as the assignment from Carden's estate to Allred are illegal and void because the transactions are in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934.

These defenses are not set forth affirmatively by Upton nor Daughtrey and were not argued or raised during trial. This issue was raised for the first time by Upton and Daughtrey in their post-trial "Defendants' Motion to Dismiss" filed April 4, 2008 (R.262) Allred filed his response on April 8, 2008 denying the allegations of the motion and setting forth that it constitutes affirmative matter required to have been plead in accordance with Miss. R. Civ. P. 8.(R. 267-269) The Motion to Dismiss was noticed for April 10, 2008, the day scheduled for hearing on the accountings of Upton and Daughtrey on matter of money damages to be awarded Allred. At that time, the trial court heard Upton and Daughtrey's Motion To Dismiss and denied it, ruling that it amounted to an affirmative defense that was not plead and was not otherwise raised during trial.(R.E. Tab 10; Tr. 295-296, 298, 313-314)

The Securities Act of 1933 (15 U.S.C.A. § 77(a), et seq.) and the Securities Exchange Act of 1934 (15 U.S.C.A. § 78(a), et seq.) are remedial statutes enacted for the primary purpose of protecting investors. *Associated Securities Corp. v. Securities and Exchange Commn.*, 293 F. 2d 738 (10th Cir. 1961). That a fractional mineral interest may, under certain circumstances, fit the

bookkeeping and other expenses associated with maintaining payout records[10]. Allred could not have determined Upton and Daughtrey's payout date since he did not know what expenses either attributed to the investment.(Tr. 99-101) Each wrongfully refused to perform his contract, including the obligation to notify Carden or his successors or assigns of payout. Accordingly, each should be estopped to assert that Allred's claim is barred any period statute of limitations.

For principles of equitable estoppel to apply against a defendant asserting limitations, the following elements must be present: 1) Plaintiff was induced by the conduct of the Defendants not to file his complaints sooner; 2) resulting in a claim being barred by a statute of limitations; and 3) the Defendants knew or had reason to know that such consequences would follow. *Harrison Enterprises, Inc. v Trilogy Commun., Inc.*, 818 So. 2d 1088 (Miss. 2002). Equitable estoppel is an extraordinary remedy and should only be invoked to prevent unconscionable results. *EB, Inc. v Smith*, 757 So. 2d 1017 (Miss. Ct. App. 2000). Fraudulent intent to mislead or deceive when relied upon, often produces inequity and an estoppel. This doesn't mean that no estoppel may be enforced absent such intent *ab initio*. There are cases, such as this one, where there has been a substantial inequity produced by a change of attitude without original fraudulent intent. Substantial inequity is the touchstone. *Izard v Mikell,* 173 Miss. 770, 163 So.498 (1935).

Allred, as successor in interest to C.T. Carden, had the right to rely on the Defendants'

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Except for their original cost basis neither Appellant assessed any expenses against income from the Amoco Minerals in ledgers offered at trial to establish a payout date. (Trial Exh. 38,39) Each set forth extensive expenses in their accountings filed on the day of the hearing to determine the amount of Allred's money damages. (Trial Exh. 50)

contractual obligation to provide notification of payout.[11] By the time payout occurred, C.T. Carden had died, his estate or succession had been opened in Louisiana, and step-son Jay Cuccia had been appointed and had qualified as Administrator. Upton or Daughtrey, by exercise of minimal effort, could have determined the proper party to notify either by inquiring of Wallace Allred or Jay Cuccia. Allred had earlier notified them of Carden's death by letter dated October 10, 1995. (R.E. Tab 5;Trial Exh.11p).

CONCLUSION

The Chancellor's judgments are supported by substantial evidence and by the law of this State. The Appellants' arguments that Allred lacks standing or is not the real party in interest are waived because they were not set forth affirmatively in the Appellants' answers and the issues were not tried by consent. This issue is resolved in any event by order of the Louisiana court where the Succession of C.T. Carden is pending which must be afforded full faith and credit by courts of this state.

Any defense of illegality or violation of federal statutes is waived since these issues were first asserted by the Appellants in a post-trial motion. Allred's claims are for recovery of his equitable interest in minerals in place and proceeds therefrom, legal title to which continues to be held by Upton and Daughtrey. Allred's complaint was filed well within the periods of limitations provided in such cases. Allred respectfully urges the Court to affirm the judgment below entered March 13, 2007, and the separate judgments against Upton and Daughtrey entered April 15, 2008.

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Allred's reliance is supported by the letter from IMI (R.E. Tab 8;Trial Exh. 23) sent by Leonard Limes stating that for purposes of commissions the payout date is deemed to be April 1, 2000. Allred filed his lawsuits against Upton and Daughtrey within three years of that date on February 27, 2003. Allred did not cross-appeal the Chancellor's ruling that his claim for production proceeds is limited to those arising after February 27, 2000, three years prior to the date he filed suit.

Respectfully submitted this the 6 day of March, 2009.

JAMES L. QUINN, Attorney
For Appellee William Wallace Allred

James L. Quinn, [redacted]
Attorney at Law
Post Office Box 271
Hattiesburg, MS 39403-0271
(601) 544-1842

CERTIFICATE OF SERVICE

I, James L. Quinn, attorney for Appellee William Wallace Allred, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, the original and three copies of the Brief of Appellee along with a diskette containing the brief to the Clerk of the Supreme Court of Mississippi and one copy to the following:

Hon. Franklin C. McKenzie, Jr.
Chancery Court Judge
P.O. Box 1961
Laurel, MS 39441

John D. Smallwood, Esq.
Tucker Buchanan P.A.
P.O. Box 4326
Laurel, MS 39441

Larry Norris, Esq.
Attorney At Law
Post Office Box 8
Hattiesburg, MS 39403

This the 6 day of March, 2009.

James L. Quinn, attorney for
Appellee William Wallace Allred