

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2008-CA-00826

K.R. DAUGHTREY and PAUL UPTON

APPELLANTS

VERSUS

WILLIAM W. ALLRED

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
JONES COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF ISSUES

- I. THE CHANCERY COURT ERRED IN FINDING THAT WILLIAM ALLRED HAD STANDING TO BRING SUIT PURSUANT TO THE CONTRACT AT ISSUE.
 - A. AFFIRMATIVE DEFENSES.
 - B. ASSIGNMENT OF THE CONTRACT FROM ESTATE OF C.T. CARDEN TO WILLIAM ALLRED WAS VOID.
 - C. THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934.
- II. THE CHANCERY COURT ERRED IN FINDING THAT THE 10 YEAR STATUTE OF LIMITATIONS APPLIED TO THE CLAIMS MADE IN THE COMPLAINT.

STATEMENT OF THE FACTS

In the Appellee's Brief, the Appellee's Statement of Facts is replete with alleged facts not in evidence, misinformation and facts not germane to the issues before the Court. As a result, Appellants request this Court to disregard, in its entirety, the Statement of Facts contained in Appellee's Brief. The following are a few examples of such facts not in evidence and of the misinformation contained in the Appellee's Statement of Facts.

Facts not in evidence/Misinformation

"He [Carden] was a friend and long-time business associate of William Wallace Allred, a retired attorney..." [A^e Brief at 4]. Appellee claims that he is a "retired attorney" and testified to such at trial. However, at all times relevant to the facts in this case and to this day, Appellee was and remains listed as an active member with the Mississippi Bar. "Carden contacted Allred and several other "oil men" with whom he had done business in the past, including.... offering each the opportunity to participate." [A^e Brief at 4]. There is no testimony or evidence of this in the transcript nor record of the trial court proceedings.

"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." [A^e Brief at 5]. While Mr. Daughtrey was a former engineer for an oil company, he has never worked "in the production side of the oil business" and has never worked in Africa. There is no testimony or evidence to the contrary in the transcript nor record of the trial court

proceedings. These alleged “facts” are simply not true.

“Prior to 1995, C.T. Carden and Allred decided that the commissions for the Covington County investors would be taken by Allred...” [A^e Brief at 8]. There is no testimony or evidence of this in the transcript nor record of the trial court proceedings. As with much of the “facts” asserted in Appellee’s Brief, these are facts not in evidence and are assertions which are purely self serving to Appellee and not subject to cross examination. As with most of Appellee’s trial testimony, these assertions are also based upon conversation with a deceased C.T. Carden.

The examples provided above are not a complete list of facts not in evidence at trial and misinformation contained in Appellee’s Statement of Facts. Nonetheless, these examples show inaccuracies contained in Appellee’s Statement of Facts for which Appellants ask this Court to disregard in its entirety.

Facts Relevant to this Appeal

The following is a brief recitation of the facts germane to this appeal. William Wallace Allred (“Mr. Allred”), at all time relevant and to this day was and is an active member of the Mississippi Bar. At all times relevant, Mr. Upton and Mr. Daughtrey believed Mr. Allred to be their lawyer in the underlying transactions [Tr. at 278-279].

In 1992, Paul Upton (“Mr. Upton”) and Kenneth R. Daughtrey (“Mr. Daughtrey”), relying upon the advice and persuasion of Mr. Allred entered into an Agreement (“Contract”) wherein each would convey 15% of his original 1.89% share to a C.T.

Carden, a resident of Louisiana, within thirty days of payout. [Tr. 265-266; Trial Exhibits 9 & 10].

It is undisputed that on September 12, 1995, C.T. Carden died and L.J. Cuccia was appointed as Administrator of the Succession (Estate) of C.T. Carden in the 22nd Judicial District, St. Tammany Parish, Louisiana. It is undisputed that at the request of Mr. Allred, on February 27, 2000, Jay Cuccia executed an Assignment [RE-9] of the contracts from the Succession of C.T. Carden to Mr. Allred. This was done without prior approval of the Louisiana Succession Court.

Payout occurred for both Mr. Upton and Mr. Daughtrey in September 1999. As Mr. Carden was deceased, neither Mr. Upton nor Mr. Daughtrey conveyed the 15% interest outlined in the Contract. On February 27, 2003, Mr. Allred filed suit in this matter against Mr. Upton and Mr. Daughtrey based upon the original Contracts signed in 1992 and the Assignment executed in 2000 [RE-9]. On September 19 & 20, 2006, the Chancery Court of Jones County tried to conclusion the issues of liability raised in the Complaint and Counter-Complaints.

On January 8, 2007, after this matter was tried to it conclusion, Jay Cuccia filed a Petition for Authority to Execute Assignment and Conveyance of Mineral Leases to William Wallace Allred in the Louisiana Succession Court. A Judgment was entered [RE-10] which authorized L.J. Cuccia to execute the Assignment date February 27, 2000.

REPLY ARGUMENT

I. THE CHANCERY COURT ERRED IN FINDING THAT WILLIAM ALLRED HAD STANDING TO BRING SUIT PURSUANT TO THE CONTRACT AT ISSUE.

A. AFFIRMATIVE DEFENSES.

Mr. Allred argument here is twofold, first he argues that no affirmative defense of standing was raised in the pleadings and second that it was not raised at trial. The pleadings and the transcript show otherwise. The Affirmative Defenses raised by both Mr. Upton and Mr. Daughtrey in their Answers read as follows:

AFFIRMATIVE DEFENSES

1. Your Defendant would show that the statute of limitations has run **and** (*emphasis added*) that the plaintiff is not entitled to bring this action.
2. Your Defendant would show that the plaintiff and the defendant has an attorney-client relationship concerning the matters contained in the Complaint, **and** (*emphasis added*) the plaintiff is not a proper party to file the pending action.
3. Your Defendant would show that the plaintiff is a licenses 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 Attorney practicing in the State of Mississippi and is precluded from bringing this action.

[RE-7].

Juxtaposed to Mr. Allred's contention otherwise, Mr. Upton and Mr. Daughtrey, though not using the term "standing", clearly assert in Affirmative Defense 1 and 2 that Mr. Allred was not "entitled to bring the action" and was not "the proper party" to file the Complaint. In *Heard v. Remy*, 937 So.2d 939 (Miss.2006), this court found that even

though the defendant did not specifically use the phrases "insufficiency of process" or "insufficiency of service of process," his Rule 4(h) defense was sufficiently set forth and preserved in the initial responsive pleadings.

In addition, Mr. Allred's standing was raised before the trial court at length during the testimony of Mr. Jay Cuccia, the administrator of the estate of C.T. Carden [Tr. at 37-45; 273]. As is clear from the transcript, trial counsel for Mr. Upton and Mr. Daughtrey clearly revisited the affirmative defenses and laid before the trial court the issue of Mr. Allred's lack of standing. [Tr. at 39-45]. Mr. Upton and Mr. Daughtrey defend the Complaint based upon Mr. Allred not being entitled to bring the action and not being the proper party to bring the action. MRCP Rule 12(h)(2) provides

A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted order ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Mr. Upton and Mr. Daughtrey raised these defenses in their Answer and at trial thus they were not waived.

It should also be noted that as with affirmative defenses 1 and 2, Mr. Upton and Mr. Daughtrey testified to their belief that Mr. Allred was acting as their attorney at all times in the transactions at issue. Though the trial court dismissed their contentions, it was plead and remains their belief that Mr. Allred was acting as their attorney during all transactions at issue.

B. ASSIGNMENT OF THE CONTRACT FROM ESTATE OF C.T. CARDEN TO WILLIAM ALLRED WAS VOID.

It is undisputed that on February 27, 2000, L.J. Cuccia executed the Assignment [RE-9] of the two contracts from the Succession of C.T. Carden to Mr. Allred. This was done **without** prior approval of the Louisiana Succession Court. [Tr. at 37-45]. Based upon the unauthorized Assignments, on February 27, 2003, Mr. Allred filed suit in this matter against Mr. Upton and Mr. Daughtrey [RE-6]. As seen from the discussions between the trial court and counsel [Tr. 39-45], the validity of the Assignment was at issue early in the trial. In fact, during the discussion between the attorneys and the trial Court, counsel for Mr. Allred even suggested that the Estate of C.T. Carden was the proper party which should be substituted in for Mr. Allred. [Tr. at 43]. Mr. Allred maintains in his brief, that the assignment of the fractional shares is a transfer of real property. For sake of argument here, if this be the case, then Mississippi law is clear that an Administrator of an estate must petition a the estate court before the transfer of real property. Miss. Code Ann. §91-7-187.

The end result was that the trial court permitted the trial to proceed and thereafter permitted the Estate of C.T. Carden to obtain authorization for the Assignment,

Mr. Allred's interest comes to him through C.T. Carden assigned by the C.T. Carden Estate to him. He is the rightful owner of whatever rights that C.T. Carden had against Daughtrey and Upton. And, of course, this is subject to the executor sending the Court, certified under the Acts of Congress, whatever court order is necessary to formerly approve the conveyance or assignment to Mr. Allred.

[Tr. at 286].

If the Assignment [RE-9] was valid and thus Mr. Allred was a proper party when he filed his Complaint and when the case was tried, why would any authorization from the Louisiana Succession Court be needed? It would not, thus a post trial authorization from the Louisiana Succession Court did not and could not breathe life into Mr. Allred's standing in this lawsuit. The Assignment was void which precludes Mr. Allred's complaint based upon the Assignment.

C. THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934.

The trial of this matter was bifurcated. The final phase of the trial was not concluded until April 10, 2008. Mr. Upton and Mr. Daughtrey filed and presented their Motion to Dismiss [RE-12] based upon federal law at the final day of trial.

In Appellee's Brief, Mr. Allred claims that under Mississippi law, the fractional interests in oil, gas and/or mineral rights at issue herein are exempted from being securities. This contention, whether true or not, has no place in this discussion. As outlined for the trial court and in the Appellant's Brief, Securities Act of 1933 defines a security to include the "fractional undivided interest in oil, gas or other mineral rights". This Act regulates the issuance of securities in interstate commerce.¹

It is undisputed that C.T. Carden, at the time of the Contract at issue herein, was a resident of Louisiana. Also at the time of the Contract at issue, Mr. Upton and Mr. Daughtrey were residents of Mississippi. The Securities Act of 1933 and the Securities

1. Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1) (2006).

Exchange Act of 1934 control interstate transfers.

II. THE CHANCERY COURT ERRED IN FINDING THAT THE 10 YEAR STATUTE OF LIMITATIONS APPLIED TO THE CLAIMS MADE IN THE COMPLAINT.

The Complaint filed by Allred and the ultimate finding of the court was based upon alleged breach of contract and accounting. Of course, the contracts alleged to have been breached were those "Agreements" executed in 1992 and attached to the Complaints. At trial, it was made clear that though there was a signature line for C.T. Carden to execute the Agreements, he did not [Tr. at 33-35]. Instead each Agreement was signed by **William Wallace Allred** above on the signature line for C.T. Carden.

The well-pled complaint filed by Mr. Allred, a Mississippi attorney licensed since 1955, seeks recovery for breach of contract and an accounting. Miss. Code Ann. §15-1-49 is clearly the statute of limitations applicable to a claim for breach of contract. In their Answers [RE-7], Mr. Upton and Mr. Daughtrey asserted as an affirmative defense, statute of limitations. This defense was never waived.

CONCLUSION

Based upon the foregoing, this Court should reverse and render the findings by the trial court that William Allred had a valid assignment, that the subject contract was enforceable and/or that the 10 year statute of limitations applied to the claims made in the Complaint.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "John D. Small Wood", is written over a horizontal line.

JOHN D. SMALL WOOD [REDACTED]
ATTORNEY FOR APPELLANTS

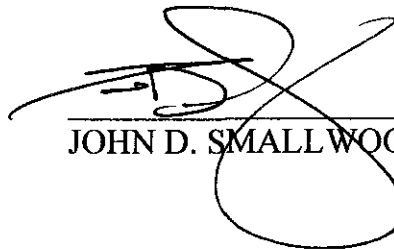
CERTIFICATION OF SERVICE

I do hereby certify that I served a copy of the foregoing Reply Brief of Appellants on all parties to this matter by first class mailing to the attorneys and on the date listed below:

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This the 15th day of May, 2009.



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