

CERTIFICATE OF INTERESTED PERSONS

2009-CA-00368

COA E

Morgan Dignowity, *et. al.*,
Plaintiffs-Appellants

vs.

Konrad Dignowity,
Defendant-Appellee

The undersigned counsel of record for the Appellants, Morgan Dignowity and Regina Dignowity, 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. Morgan Dignowity - Plaintiff-Appellant.
2. Regina Dignowity - Plaintiff-Appellant.
3. Konrad Dignowity - Defendant-Appellee.
4. Ida Dignowity - Ward of Konrad Dignowity.
5. Collier Carlton - attorney for Morgan Dignowity and Regina Dignowity.
6. Rachael Pierce of Phelps Dunbar Firm - attorney for Konrad Dignowity.
7. Chancellor Glenn Alderson - Chancellor presiding below.



COLLIER CARLTON
Attorney of record for Morgan
Dignowity and Regina Dignowity,
Plaintiffs-Appellants.

STATEMENT REGARDING ORAL ARGUMENT

The Appellants feel that the issues presented may be adequately argued in briefs and that further oral argument would not be of assistance to the members of the Court. The Appellants would, however, be happy to present oral argument if the Court finds it helpful.

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STATEMENT OF ISSUES

In this case the Chancellor granted the Defendant's Motion for Summary Judgment and awarded attorney fees for defending the suit. The issues presented for review are whether or not the Chancellor applied the proper legal standard in granting the Defendant's Motion for Summary Judgment and in awarding the defendant attorney fees and whether or not the Chancellor's findings were manifestly wrong or were not supported by credible evidence.

Another issue is whether or not the Chancellor erred in not allowing the Plaintiff/Appellants to call a witness who was present in the Courtroom at the hearing on the Motion for Summary Judgment.

STATEMENT OF THE CASE

(1) COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Morgan Dignowity and Regina Dignowity filed suit against Konrad Dignowity, Conservator of the Estate of Ida Dignowity, for specific performance of a contract for the sale of land on January 26, 2005. A copy of the contract is attached to the Complaint as an Exhibit to the Complaint. (Clerk's Papers, pages 19-29).

On February 25, 2005, the defendant, Konrad Dignowity, filed his Answer and Counter-Claim. (Clerk's Papers, pages 30-46).

On March 28, 2005, the plaintiffs, Morgan Dignowity and Regina Dignowity, filed their Response to Affirmative Defenses and Answer to Counter-Claim. (Clerk's Papers, pages 47-55).

Konrad Dignowity, defendant, filed his Motion for Summary Judgment on or about June 13, 2005. (Clerk's Papers, pages 56-122).

Morgan and Regina Dignowity filed their Response to Defendant's Motion for Summary Judgment on June 28, 2005. (Clerk's Papers, pages 123-128).

The hearing on the Motion for Summary Judgment was originally set for June 28, 2005, and on July 8, 2005, *nunc pro tunc* June 29, 2005, the Court entered an Order resetting the hearing on the Motion for Summary Judgment on July 28, 2005 and also requiring the Plaintiffs to post a cash bond in the amount of \$15,000 to prevent Summary Judgment from being granted without a hearing and further stating that the \$15,000 cash both would be used to satisfy attorney fees in the event that the Court found merit to the Motion for Summary Judgment. (Clerk's Papers, pages 129-130).

A hearing was held on the Motion for Summary Judgment on July 28, 2005. (See Reporter's Transcript. On September 23, 2005, the Court signed an Order granting the Defendant's Motion for

Summary Judgment and awarded attorneys fees and costs. (Clerk's Papers, pages 131-132).

Konrad Dignowity, through counsel, filed a Petition for Attorney Fees and Costs on or about October 28, 2005. (Clerk's Papers, pages 133-143). The Defendant never took action to bring the Petition before the Court.

On December 5, 2005, Konrad Dignowity filed a Petition for Attachment and Monetary Judgment. (Clerk's Papers, pages 144-150). The Defendant never took action to bring the Petition before the Court.

As the Defendant never brought his Counter-Claim on to be heard nor the two Petitions mentioned above, the case was eventually dismissed as a stale case on January 8, 2009 which became effect thirty (30) days from the date of entry. (Clerk's Papers, page 151).

The Plaintiffs gave timely Notice of Appeal and took all necessary further actions to perfect their appeal. (Clerks Papers, pages 152-164).

(2) STATEMENT OF THE FACTS

This hearing on the Defendant's Motion for Summary Judgment was heard by Chancellor Glenn Alderson in the Chancery Court of Marshall County, Mississippi, on July 28, 2005.

KONRAD DIGNOWITY'S CASE FOR SUMMARY JUDGMENT

Konrad Dignowity's case at the hearing on the Motion for Summary Judgment consisted of argument from his counsel. (Reporter's Transcript, pages 3-12).

MORGAN DIGNOWITY AND REGINA DIGNOWITY'S CASE AGAINST SUMMARY JUDGMENT

At the hearing on the Defendant's Motion for Summary Judgment, Morgan Dignowity and Regina Dignowity presented the following witnesses:

KONRAD DIGNOWITY

Konrad Dignowity was called as an adverse witness. Konrad testified that he was the eldest son of Konrad Dignowity, deceased, and Ida Dignowity. He further stated that he was Ida's Conservator. He stated that in 1993, his father, Konrad Dignowity, and his mother, Ida Dignowity, agreed to sell the property in question to Morgan for \$200,000.00 at 0% interest with payments of \$1,000.00 per month. Konrad Dignowity, Sr. passed away in 2000 but to his knowledge Morgan and Regina Dignowity moved into the house in 1993 and made payments to their parents as per the agreement. It was his further understanding that there was later an agreement whereby the price of the house subject to the suit was reduced to \$100,000.00 upon Morgan and Regina assuming a note on a liquor store owned by Konrad, Sr. and Ida. (Reporter's Transcript, pages 13-15).

Konrad testified that in 2002 he and his sister, Gretchen McAlexander, obtained a Power of Attorney from their mother, Ida, after they decided that the power of attorney was necessary. (Reporter's Transcript, pages 16-17).

Konrad identified the Contract that is the basis of this suit and stated that his wife prepared the contract. He also identified a letter dated February 2, 2004 where he offered to sell the property to Morgan and Regina Dignowity for \$120,000.00. (Reporter's Transcript, page 19).

On direct examination Konrad Dignowity testified that Ida Dignowity was not in good health on the October 26, 2003, the date of the contract. (Reporter's Transcript, pages 20-21).

GRETCHEN MCALEXANDER

Gretchen McAlexander also testified. She stated that she was the daughter of Konrad Dignowity and Ida Dignowity. She testified that she and her brother Konrad were granted Power of Attorney over Ida Dignowity on December 12, 2002 and that her brother Konrad was appointed Conservator of Ida Dignowity on January 26, 2004. Gretchen also was aware of the 1993 agreement

to sell the property in question to Morgan and Regina Dignowity for \$200,000.00 at 0% interest with payments of \$1,000.00 per month. (Reporter's Transcript, pages 21-23).

On cross examination Gretchen McAlexander stated that her mother, Ida, was not good in October, 2003.

IDA DIGNOWITY

The Plaintiffs attempted to call Ida Dignowity to the stand but the Court would not allow her to be called as a witness. Reporter's Transcript, pages 27-30).

MORGAN DIGNOWITY

Morgan Dignowity was the next witness at the hearing on the Defendant's Motion for Summary Judgment. Morgan testified that he and his parents, Konrad and Ida, had an agreement in 1993 for him and Regina to buy the old family home for \$200,000.00 at 0% interest which was later modified. Morgan stated that he had the necessary money to purchase the home. (Reporter's Transcript, pages 30-32).

On cross examination, Morgan testified that he wanted to buy the property in question and that he had the money to do so and further described the discussions regarding the sale of the property and that Konrad had failed to respond to his communications regarding the purchase of the property. (Reporter's Transcript, pages 32-36).

After hearing the arguments of both counsel (Reporter's Transcript, pages 37-42), the Court sustained the Defendant's Motion for Summary Judgment and awarded an undetermined amount of attorney fees. (Reporter's Transcript, page 43).

SUMMARY OF THE ARGUMENT

Rule 56 of the Mississippi Rules of Civil Procedure is not a substitute for a trial on the merits of disputed facts and should be granted only if there is no genuine issue as to any material fact. In the case before the Court there were many issues of material fact and the Court erred in granting the Defendant/Appellee's Motion for Summary Judgment.

The Chancellor erred in granting undetermined attorney fees to the Defendant/Appellee. Rule 56 of the Mississippi Rules of Civil Procedure makes no provision for attorney fees to the prevailing party when the Motion is granted. The Plaintiff's filed their Complaint for Specific Performance for the sale of land in good faith based upon a writing signed by the party to be charged and upon an oral agreement that was admitted by the Defendant/Appellee.

The Chancellor erred in not allowing the Plaintiff/Appellants to call a witness who was present at the hearing. Rule 601 of the Mississippi Rules of Evidence states that every person is competent to be a witness with some exceptions, none of which apply in the present case.

ARGUMENT

The Plaintiff/Appellants, Morgan and Regina Dignowity (hereinafter "Morgan and Regina"), entered into an oral agreement with his parents in about 1993 for Morgan and Regina to purchase his parents' home in Marshall County, Mississippi, for \$200,000.00 at zero per cent interest with payments of \$500.00 per month. That agreement was later modified to \$100,000.00 with Morgan and Regina agreeing to assume a \$94,000.00 loan. All parties agree that this was the agreement between Morgan and Regina and his parents and all agree that Morgan and Regina moved into the home, maintained the home, and made payments on the home.

Morgan's father later died. On October 26, 2003, Morgan's mother, Ida Dignowity, signed a seven page written document that provided for the sale of the property to Morgan and Regina. (Clerk's Papers, pages 23-29).

§15-3-1 of the *Mississippi Code of 1972, Annotated* contains Mississippi's Statute of Frauds requiring certain types of contracts to be in writing, one being a contract for the sale of lands. Morgan and Regina concede that the oral agreement that they had with Morgan's parents did not meet the requirements of the Statute of Frauds, however, in good faith they do feel that the October 26, 2003 document signed by Ida Dignowity does meet the requirements of the Statute in that everyone agrees that there was an oral agreement and §15-3-1 only requires that the writing be signed by the party to be charged, in this case Ida Dignowity.

Based on the above, the Chancellor erred in granting the Defendant/Appellee's Motion for Summary Judgment and dismissing Morgan and Regina's Complaint for Specific Performance for the sale of the Dignowity home that they had occupied and made payments on for many years. Certainly there were many genuine issues of material fact that deserved a full trial on the merits of

the case.

Morgan and Regina also contend that the Chancellor erred in requiring them to post a bond in the amount of \$15,000.00 to prevent summary judgment from being entered without a hearing and also in awarding unspecified attorney fees to the Defendant/Appellant.

Rule 56 of the Mississippi Rules of Civil Procedure make no provision for the awarding of attorney fees to the prevailing party if the prevailing party is the moving party. Rule 56 only provides for attorney fee to the prevailing party when summary judgment is denied. In the Order Granting Summary Judgment the Chancellor ruled that attorney fees should be awarded on the Defendant's Counter-Claim which would have required a finding that the Complaint for Specific Performance filed by Morgan and Regina was frivolous, was without substantial justification, or was for the purpose of harassment or delay.

All parties agree that there was an oral agreement. While it is conceded that the oral agreement does not meet the requirements of the Statute of Frauds, it should be noted that Morgan and Regina and Morgan's parents honored that oral agreement for more than a decade with Morgan and Regina living on the property and making payments as agreed. After Morgan's father's death, a written document was prepared and signed by Ida providing for the sale of the property to Morgan and Regina.

Morgan and Regina sincerely believe that the written document signed by Ida met the requirements of the Statute of Frauds and that their actions in filing the Complaint for Specific Performance cannot be called frivolous, without substantial justification, or for the purpose of harassment or delay. Morgan and Regina feel that the Chancellor was in error in requiring them to post a bond to prevent summary judgment without a hearing and in awarding attorney fees to the Defendant/Appellee.

Ida Dignowity was present in Court the day of the hearing on the Motion for Summary Judgment. When Morgan and Regina attempted to call Ida to the stand they were prevented from doing so by the Chancellor.

Rule 601 of the Mississippi Rules of Evidence state that, "Every person is competent to be a witness....." and then goes on to state some exceptions none of which apply to Ida.

The Chancellor should have allowed Morgan and Regina to develop their record and present the testimony of Ida. The Chancellor could have completely ignored or disregarded her testimony as the finder of fact but that goes only to her credibility as a witness and not to the admissibility of her relevant testimony.

Morgan and Regina feel that the Chancellor erred in not allowing them to present the testimony of a competent witness who had specific knowledge of the facts in issue.

CONCLUSION

For the reasons stated herein, Morgan and Regina pray that this Honorable Court will reverse the decision of the Chancellor granting the Defendant/Appellee's Motion for Summary Judgment and remand the case to the Court below with directions to restore the case to the trial docket, to dispense with the requirement of posting a \$15,000 bond, to allow the testimony of Ida Dignowity, and to find that the Defendant/Appellee is not entitled to attorney fees.

Respectfully submitted this the 15th day of June, 2009.

A handwritten signature in black ink, appearing to read 'Collier Carlton', written over a horizontal line.

Collier Carlton for the Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Brief of Appellants Morgan Dignowity and Regina Dignowity to the following persons by mailing them a copy of same, postage prepaid, to the addresses shown:

Hon. Rachel Pierce
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Attorney for Appellee, Konrad Dignowity

Hon. Glenn Alderson
Chancellor
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Oxford, MS 38655

Presiding Chancellor

This the 15th day of June, 2009.



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