



IN THE SUPREME COURT OF MISSISSIPPI

HARRY STUDDARD and  
JEAN STUDDARD

APPELLANTS

VS.

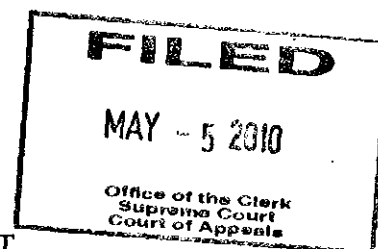
NO. 2009-<sup>CA</sup>1436

WILLIAM ROBERT "BOB" PITTS  
and TOWER LOAN OF MISSISSIPPI, INC.  
d/b/a TOWER LOAN OF VICKSBURG

APPELLEES

APPELLANTS' BRIEF

CIVIL APPEAL FROM THE CHANCERY COURT  
OF WARREN COUNTY, MISSISSIPPI  
HON. MARIE WILSON, CHANCERY JUDGE



ORAL ARGUMENT IS REQUESTED

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**IN THE SUPREME COURT OF MISSISSIPPI**

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VS.

NO. 2009-TS-01436

WILLIAM ROBERT "BOB" PITTS  
and TOWER LOAN OF MISSISSIPPI, INC.  
d/b/a TOWER LOAN OF VICKSBURG

APPELLEES

**CERTIFICATE OF INTERESTED PARTIES OR ENTITY**

The following parties and entity have an interest in the outcome of the above styled and numbered case. These representations are made so that the Justices of the Supreme Court and/or Court of Appeals may evaluate any possible disqualification or recusal.

1. HARRY STUDDARD and  
JEAN STUDDARD

APPELLANTS

2. WILLIAM ROBERT "BOB" PITTS

APPELLEE

3. TOWER LOAN OF MISSISSIPPI, INC.,  
d/b/a TOWER LOAN OF VICKSBURG

APPELLEE

WITNESS MY SIGNATURE, this the 5<sup>th</sup> day of May, 2010

  
CEOLA JAMES  
ATTORNEY FOR APPELLANT

### **STATEMENT OF THE ISSUES**

1. Whether the foreclosure in the present case was proper to defeat the Appellants' homestead exemption?
- 2, Whether the doctrine of res judicata is applicable in this case?

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE:**

This matter comes before this court on an appeal from the Chancery Court of Warren County, Mississippi, from an Order Denying the Appellants' Petition for a Rehearing. This case draws into question the validity of a sheriff's sale and sheriff's deed that was executed after the purported sale of the Appellants' homestead. The subject of the sale was a judgment lien against the Appellant, Harry Studdard. The Appellant, Jean Studdard, was never a part of the judgment lien or any of the business transactions surrounding the judgment lien. The Appellant, Jean Studdard, is an innocent spouse.

### **B. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURTS BELOW:**

The Appellants in this case first learned of the purported sale of their home and sheriff's deed when they were served with an eviction notice in the justice court of Warren County, Mississippi. The Appellee, William Robert "Bob" Pitts, was granted a judgment of eviction. It was stated that notice was put on the Appellants' door. Appellant, Harry Studdard, filed a Motion to Vacate the Judgment in Justice Court and later filed for relief in a Chapter 7 bankruptcy proceeding and was granted a stay from the eviction. The Appellant, Jean Studdard, was not involved in the Justice Court proceeding or the Chapter 7 Bankruptcy proceeding. Appellant, Jean Studdard, first entered her appearance in The Chancery Court of

Warren County, Mississippi in a Complaint to Remove Cloud on Title and to Confirm Title. The Appellant, Jean Studdard was a Joint Petitioner with her husband, Harry Studdard, and both parties are joined in this appeal before this court. Appellants maintain that they have always claimed their homestead exemption and have never waived or abandoned their homestead rights. Appellant, Jean Studdard, maintains that she is an innocent spouse. The Appellant, Harry Studdard, filed a Petition to Partially avoid the lien on his homestead. The bankruptcy judge entered an order partially avoiding the judicial lien on the Appellants' homestead. The lower court denied the relief requested by the Appellants based on the doctrine of res judicata.

Prior to the sheriff's sale, the circuit Judge, Frank Vollar, entered an order dismissing the judgment, and giving the parties the option to reinstate the judgment. The judgment was never reinstated prior to the foreclosure and sheriff's sale. At the time of the purported sheriff's sale, there was no judgment because the judgment had been dismissed and it was never reinstated.

The Appellant, Harry Studdard, asked the bankruptcy court to void the deed as a preferential transfer that occurred within ninety days of the filing for relief in a Chapter 7 bankruptcy proceeding. The court ruled that the date of the sale was the date of the judgment and not the date of the sale of the property. Both attorneys stipulated that the date of the sale was the date the property was actually sold. The judge disagreed and dismissed the case.

The Appellee, Tower Finance Company, Inc. was not given notice of the sheriff's sale. When Tower received actual notice of the sale,

sheriff's deed, and eviction notice, Tower did not assert its first lien until the company was joined in Chancery court as a party Defendant. At that time, all parties stipulated to Tower Finance Company, Inc. having a first lien on the Appellants' homestead. See Appellants' Record Excerpts, page 23, Stipulation of Facts.

The Circuit Court judgment in question was based on the business transaction between the Appellant, Harry Studdard, and one John Barnes of Vicksburg, Mississippi, along with the Appellee, William Robert "Bob" Pitts. Harry Studdard had no assets to secure the business transaction. The only real asset the Appellant had was a house that he owned jointly with his wife which was their homestead. Mr. John Barnes had several rent houses that he lost after the judgment was entered. The amount of the Judgment against John Barnes and the Appellant, Harry Studdard was in the amount of \$54, 831.19. The Appellant had hoped that he would be able to pay his share of the business loan after the transaction failed. The Appellant states that his share of the loan was around \$15,000.00. Appellant, Harry Studdard, states that this amount was not acceptable to the Appellee, William Robert "Bob" Pitts. The Appellant, Harry Studdard, subsequently fell into bad health, and he has had some rounds with his health which includes cancer, brain surgery, and having surgery on his heart. A copy of the Judgment is listed in Appellants' Record Excerpts, page 26.

Appellant, Harry Studard, is a retired educator, having taught at Hinds Community College for many years until his retirement. Unfortunately, Mr. Studdard lost his retirement on business investments.



The Appellants, Harry Studdard and Jean Studdard are presently living on a small fixed income. The couple have two special needs children that are living with them. The Appellants hope to keep their home for themselves and their special needs children. Appellant, Jean Studdard, is an innocent spouse who has joined in this appeal.

### **C. SUMMARY OF TRIAL RELEVANT TO THE ISSUES PRESENTED FOR REVIEW**

The trial on the merits was very brief because the issues presented in this case are more involved with questions of law rather than questions of fact. The facts in this case are for the most part undisputed.

The proof during the trial showed that foreclosure was not proper to defeat the Appellant's homestead rights. The Appellants, Harry Studdard and Jean Studdard have always maintained the property in question as their homestead (Trial Record page 11, line 7: Trial Record p. 14, line 8-12) Title to the real property was properly deraigned pursuant to statute, Trial Record, p. 10, lines 1-23. See also Appellant's composite Exhibit 1 for documents deraigning title for more then sixty (60) years, and for the certificate passing title out of the United States of America. The testimony shows that an Order was entered dismissing the judgment prior to foreclosure (See Appellants Record Excerpts, page 25 which is the circuit court Order Dismissing the Judgment for Lack of Prosecution. Also, the Deed of Trust of Appellee, Tower Loan of Mississippi, Inc., was admitted into evidence by stipulation of all of the parties. (See Exhibit 1 of Appellee, Tower Loan of Mississippi, Inc.) Tower Loan of Mississippi, Inc. has a first lien. The proof shows that Tower Loan of Mississippi, Inc., was never paid after the foreclosure sale (Trial Record, p. 11, line 27). Appellee, Tower Loan of

Mississippi, Inc., never received notice of the foreclosure sale (Trial Record p. 14, line 22). The testimony is undisputed that the Bankruptcy Court Judge entered an Order partially Avoiding the judicial Lien on the homestead of Appellant, Harry Studdard (Trial Record p. 11, line 25, 26; Appellants' Record Excerpts, page 29).

The proof shows that the doctrine of res judicata is not applicable in this case. The lower court denied the relief requested by Appellants based on the doctrine or principle of res judicata. Appellant, Jean Studdard, was not a party to the Bankruptcy proceeding which is the court where the order was entered (Trial Record p.15, line 22, 23). The facts of the case were not the same because Appellant, Harry Studdard, was trying to cancel the deed as a preferential transfer of real property that occurred within 90 days of his filing bankruptcy. Canceling the deed would not mean that the title was confirmed in the Appellants. The U.S. Bankruptcy Judge ruled that the filing of the bankruptcy was outside of the ninety (90) day period based on his interpretation of when the sale took place. See Appellants' Record Excerpts, page 32 and page 41.

The proof shows that the sheriff's deed should be cancelled as a cloud on the Appellants' property and title should be confirmed in the Appellants' name as joint tenants with the right of survivorship and not as tenants in common. During the trial, both Appellants made this request of the Court (Trial Record, p. 12, lines 17-19; Trial Record p. 16, lines 4-6). The proof also shows that the Appellants properly deraigned title (Trial Record p. 10, lines 13-23; Appellants' Composite Exhibit 1 - Documents deraigning title; See also Sheriff's deed, Appellants' Record Excerpts, Page 28).

### **SUMMARY OF ARGUMENT**

The foreclosure was not proper to defeat the Appellants' homestead. Appellants at all times maintained their homestead and to this date they have never abandoned their homestead.

The Appellee, Tower Loan of Mississippi, Inc., held the first lien and was never given any notice of the foreclosure. After the foreclosure, the Appellant, Tower Loan of Mississippi, Inc., was never paid from the proceeds of the sale. The Appellee, William Robert "Bob" Pitts, paid himself. In addition, a judgment was entered by the Circuit Court of Warren County, Mississippi, which dismissed the judgment without prejudice. The judgment should have been reinstated prior to the foreclosure being done.

The Appellants, Harry Studdard and his wife Jean Studdard, owned their home as joint tenants with the full right of survivorship, and not as tenants in common. The Appellant, Jean Studdard, was never given notice of the sale. The homestead could not be defeated without notice to the joint homeowner.

The elements of res judicata are not present in this case. All elements of res judicata must be present in order for a case to be dismissed based on res judicata. The lower court based its ruling on res judicata. See Appellants' Record Excerpts, page 6., Final Judgment. Appellants Filed a Motion for Rehearing, but it was denied. See Appellants' Record Excerpts, pages 14 and 22. The sheriff's deed should be

cancelled as a cloud on Appellants property and title should be confirmed in the Appellants as joint tenants with the full rights of survivorship, and not as tenants in common.

The sheriff's deed in this case was not proper because the necessary parties were not noticed. The Appellants have properly deraigned title, and title to the real property in question should be confirmed in the Appellants' name.

### A R G U M E N T

1. Whether the foreclosure in the present case was proper to defeat the Appellants' homestead?

A conveyance of a homestead without the joinder or notice to both joint owners is void. Appellant, Jean Studdard, received no notice of the sale. Appellant, Jean Studdard, was not a part of the business transaction or agreement made by her husband and the Appellee, William Robert "Bob" Pitts. The agreement or contract was made during the marriage of the parties. Section 89-1-29, MCA, 1972 uses the word "encumbrance" when referring to documents that must be signed by the spouse to be valid. An encumbrance is a legal term of art for anything that affects or limits the life of a property, such as a mortgage, lease, easement, lien, or other restriction. 'Lectric Law Library "encumbrance" Internet Law Dictionary." The encumbrance in this case is the business contract executed by the Appellant, Harry Studdard, and Appellee, William Robert "Bob" Pitts during the marriage of the Appellants while the parties were living together, which was not signed by the Appellant, Jean Studdard.

An exception to this rule is an agreement made prior to the marriage. In Harrell v. Lamar Co., 2005 So. 2d (2004) CA - 00870-COA, the court held that a lease agreement was an encumbrance. The homestead right was acquired within the meaning of Section 89-1-29, MCA, 1972, but since the husband had the lease prior to the marriage, a pre-existing agreement was held valid without the signature of the spouse.

Appellants, Harry Studdard and Jean Studdard, husband and wife, occupied their home since the date of purchase. The parties were at all times married and living together as husband and wife. the Appellants have always claimed their residence as their homestead. In the case of Patrick v. Bank of Tupelo, 152 So. 838, 169, Miss. 157 (1934), the court held that a "homestead" is an actual residence and occupied by a family and "head of the family." Exceptions are claimed for temporary absences and persons over the age of 60, but Appellants claim no exceptions.

Appellants are asserting that notice should have been given to both Appellants and to Tower Loan of Mississippi, inc., the first lienholder. The Appellants' homestead was established well in advance of the sheriff's sale, and the status of the homestead exemption was never affected or waived.

In the case of McMilliam vs. Aru, 773 So 2d 253 (2000) No. 1999-CA-00018-COA, the court held that after a sheriff's sale, the debtor's homestead remained exempt. the court further held that in order for property not to be subject to a judgment lien, it must be homestead at

the time of the sale. In the McMilliam case, *ibid*, the parties sold the property and did not pay the judgment lien. The court noticed that the parties had a judgment lien subordinate to their debts. The court also held that the homestead property was exempt from seizure and sale, not the lien. The court further stated that a lien on a homestead was of no value, and that the judgment debtors maintained their homestead until they made a bona fide conveyance to a new owner.

Prior to the foreclosure, an order was signed by circuit Judge Frank Vollar dismissing the judgment without prejudice. The judge cited Rule 41, MRCP. Rule 41 MRCP deals with dismissal of cases. Rule 60, MRCP deals with vacating and dismissing judgments after they are entered. The judgment should have been reinstated prior to the foreclosure sale. Appellant, Harry Studdard, was also granted an Order Partially Avoiding the Judicial Lien on his homestead. See Appellants' Record Excerpts, page 29. It appears that the vacating and dismissal of a judgment would be under Rule 60, MRCP as opposed to Rule 41, MRCP. It appears that an order that is signed by the judge without prejudice would have to be reinstated prior to executing on the judgment.

1. Whether the doctrine of res judicata is applicable in this case?

The lower court denied the Appellants' relief based on the doctrine of res judicata. In order for res judicata to be applicable, the elements of res judicata must be present. *State of Mississippi vs. John Ellis, Jr.*, No 2000 CA-00110-COA. In the case before the U.S. Bankruptcy Judge, the court ruled that the date of transfer was the date the lien attached and not the date of the actual sale. The transfer date is not a well settled issue in some courts. Some will say the date of sale is the

transfer date. Others may say the day that the deed is prepared or executed is the transfer date. The day the deed is filed may be recognized in some instances, giving the distressed debtor a few more days to save his property.

An action by Appellant Harry Studdard in U.S. Bankruptcy court could not defeat the homestead rights of Appellant, Jean Studdard. Also, the subject matter in the two actions was not the same. In the U.S. Bankruptcy Court, the subject was voiding the deed as a preferential transfer made within 90 days of filing bankruptcy. In Chancery Court, the subject matter was canceling a deed as a cloud on the title and confirming title. The statute of limitations is generally ten years for suits on real property, otherwise title will generally accrue by adverse possession. The parties in the two cases were not the same. Appellant, Jean Studdard, was not a party to the circuit court action, justice court action, or U.S. Bankruptcy court action. Appellant, Jean Studdard's first appearance in this matter was to join the Petition filed in the Chancery court of Warren County, Mississippi to cancel the sheriff's deed and to confirm title in the real property in question. The cause of action was not the same as set forth in Williams Vintage Petroleum, Inc., 825 So. 2d 685 (2002).

### **C O N C L U S I O N**

For the reasons set out above, the Appellants' request for relief should be granted, and the sheriff's deed should be cancelled as a cloud on the Appellants' property. Title in the real property should be confirmed in the name of Jean Studdard and Harry Studdard as joint

tenants with full rights of survivorship, and not as tenants in common. The real property is more particularly described as following:

That part of the Northeast Quarter (NE ¼) of Section Fourteen (14), Township Fifteen (15) North, Range Four (4) East, Warren County, Mississippi.

Beginning at the Southwest corner of the Northeast Quarter (NE ¼) of Section Fourteen (14), Township Fifteen (15) North, Range Four (4) East, and running thence North One (1) Degree, No (00) Minutes West, 252.7 feet, said point being on the West right-of-way of the present Mississippi State Highway No. 27, thence along said right-of-way South Thirty-three (33) Degrees, Sixteen (16) Minutes East, 299.7 feet, thence leaving said right-of-way and running South Eighty-nine (89) Degrees Fifteen (15) Minutes West, 160.0 feet, said point being the point of beginning.

Appellants also request such general relief that the court deems proper.

Respectfully submitted,

  
**CEOLA JAMES**  
**ATTORNEY FOR APPELLANTS**



**CERTIFICATE OF SERVICE**

I, **Ceola James**, do hereby certify that I have this day mailed a copy of the **Appellants' Brief** to:

Hon. David Sessums  
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Hon. Marie Wilson  
Chancery Judge  
P.O. Box 1762  
Greenville, MS 38702-1762

**WITNESS MY SIGNATURE,** this the 5<sup>th</sup> day of

May, 2010.

  
**CEOLA JAMES**  
**ATTORNEY AT LAW**

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