

IN THE SUPREME COURT OF MISSISSIPPI

LOUIS HOWARD

APPELLANT

V.

No: 2009-TS-01587

**JOHNNY JOE GUNNELL, D/B/A
4-S COMPANY**

APPELLEE

**Appeal from the Chancery Court
of Lincoln County, Mississippi**

APPELLEE'S BRIEF

Oral Argument Not Requested

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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 or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Edward E. Patten, Jr., Chancellor, Fifteenth District Chancery Court
2. Louis Howard, Appellant
3. Johnny Joe Gunnell, d/b/a 4-S Company, Appellee
4. Mark R. Holmes, Esquire, Counsel for Appellee
5. Wayne Dowdy, Esquire, Trial Counsel for Appellant
6. Drew M. Martin, Esquire, Appellate Counsel for Appellant
7. Melissa Selman Martin, Esquire, Appellate Counsel for Appellant



MARK R. HOLMES
COUNSEL FOR APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether failure to assert “notice” procedurally bars the Appellant from raising it on appeal
- II. Whether participation in litigation and/or entry of Agreed Order on the merits bars Appellant’s claims
- III. Whether failure to move to set aside or appeal the December 10, 2007 Agreed Order bars Appellant’s claims

STATEMENT OF THE CASE

This case is a last ditch effort by the Appellant (hereinafter “Howard”) to have this Court endorse his failure to pay the amount of damages the Appellee (hereinafter “Gunnell”) is entitled under Mississippi state law, or honor the terms of his agreement. Whether or not the tax sale *could* have successfully been enforced became moot on December 10, 2007, (hereinafter “Agreed Order”) when Howard entered into an Agreed Order with Gunnell to settle a disputed claim.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In his brief, Howard makes reference to facts and documents that are not in the *record* in the instant case, in violation of Mississippi Rules of Appellate Procedure Rule 10(f)¹. The relevant facts and procedural history are: as a result of various sales for the ad valorem taxes on Howard’s property Gunnell was entitled to the total amount of \$8,075.26, inclusive of sums paid and interest accruing²; Gunnell filed suit against Howard on March 31, 2005³, beginning litigation Howard fully participated in, through counsel without objection to the validity of the tax sale⁴; Howard entered into an Agreed Order to settle a disputed claim⁵; and lastly, Howard failed to appeal the Agreed

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Appellant’s Brief at p.1, ¶ “Procedural History and Relevant Facts,” lines 6-8; page 2 lines 3-4, lines 13-14; ¶ “December 10, 2007 Agreed Order Runs Afoul of Mississippi Law Regarding Tax Sales and is Therefore Void,” in its entirety; Mississippi Rules of Appellate Procedure Rule 10(f).

2

Appellant’s Record Excerpts Page 8, line 5-6.

3

Appellant’s Record Excerpts Page 1.

4

Id.

5

Id.

Order, move to have it set aside or abide by the terms of the Agreed Order⁶.

ARGUMENT

STANDARD OF REVIEW

Questions of law are reviewed *de novo*⁷.

NOTICE ISSUE NOT RAISED IN LOWER COURT

Since Howard filed his original Answer to Gunnell's Complaint, along with his Counter-claim, in April of 2005, he and/or counsel acting on his behalf made multiple general appearances before the Chancery Court of Lincoln County, Mississippi⁸. At no time since his initial, general appearance has Howard raised the issue of defective notice, either verbally or in his pleadings. In fact, Howard fully participated in the instant litigation, even voluntarily entering into several agreed orders regarding the setting and continuance of a trial on the merits, without objection or reservation. By his actions (e.g., filing general appearance pleadings, agreeing to trial settings, agreeing to continuances, and agreeing to the terms of the December 10, 2007 Agreed Order), Howard fully participated in the litigation and waived any claim or defense he *may* have asserted regarding the tax sale notice. Likewise, by his inactions (e.g., failure to plead defective notice, failure to timely move the trial court to set aside the entry of the December 10, 2007 Agreed Order, failure to abide by the terms of the December 10, 2007 Agreed Order), Howard has either deliberately or negligently made

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Id.

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Barrett v. Ballard, 483 So.2d 304 (Miss. 1985).

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Id.

choices that admittedly may adversely affect him, but do not constitute grounds for appeal⁹. Relief from one's own poor choices is not grounds for appeal. In fact, only upon proper motion may a court relieve a party from a final judgment or order, and only in specific, limited circumstances, not present here¹⁰.

Howard seeks to have this Court set aside the lower court's order, an *agreed* order no less, on the basis of defective/deficient notice in an underlying tax sale. However, Howard neither raised the issue before the trial court nor did he ever move to have the order set aside, prior to "appealing" it here. The Mississippi appellate courts routinely hold that where an issue is not raised in the trial court it is deemed waived and procedurally barred."¹¹ The record is completely devoid of any evidence whatsoever of compliance or non-compliance with statutes regarding tax sales because the issue was never before the trial court. Moreover, even if the issue had been raised, the terms of the Agreed Order provided that Gunnell would receive the amount of delinquent taxes he paid, plus interest¹². Even where a tax sale is deemed invalid, a party is entitled to those exact damages as a lien on the subject property¹³. Here, while represented by competent counsel, Howard voluntarily agreed that in the event he failed to pay Gunnell that amount, he would surrender ownership of the property, without further proceedings. Whether this Court determines that the terms of the Agreed

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Jenkins v. Jenkins, 757 So.2d 339, 343 (Miss. Ct. App. 2000) (citing *Stringfellow v. Stringfellow*, 451 So.2d 219, 220 (Miss. 1984).

10

Estate of Davis v. O'Neill, 2009-CA-01025-SCT (August 19, 2010), ¶16.

11

Gale v. Thomas, 759 So.2d 1150, 1157-59 (Miss. 1999).

12

Appellant's Record Excerpts pages 5-6.

13

Miss. Code Ann. §27-45-27

Order were a “good deal” for both parties is not the issue. Whether the parties freely agreed to the terms in the Order and whether the parties complied with the terms of the Agreed Order are the determinative factors.

REQUEST FOR RELIEF FROM DECEMBER 10, 2007, AGREED ORDER NOT TIMELY

Howard has presented no evidence found in the record to refute that the Agreed Order was voluntarily entered into or that the terms were breached by Howard and more than thirty (30) days passed from the Agreed Order before he sought relief from this Court. As discussed, *supra*, only upon proper motion may a court relieve a party from a final judgment or order, and only in specific, limited circumstances¹⁴. Howard contends that the Agreed Order is void on the basis that Gunnell could not have obtained title at trial; however, what *may or may not* have happened at trial does not render an Agreed Order compromising the claim void. A tax sale that may later be determined to be void is different than a void judgment¹⁵.

CONCLUSION

Howard voluntarily compromised a disputed claim on December 10, 2007, by entering into an Agreed Order with Johnny Joe Gunnell d/b/a 4-S Company. Each party had the opportunity to try this case and perhaps receive more, perhaps receive less, perhaps receive nothing. Such is the nature of litigation and all Agreed Orders. Allowing litigants to “settle” claims then decide that their case may have been better than they originally thought or they had a defense available they did not raise and ask this Court to “unsettle” claims, allows parties to circumvent years of established common law as well as undo the finality of every Agreed Order.

¹⁴

Estate of Davis v. O'Neill, 2009-CA-01025-SCT (August 19, 2010), ¶16.

¹⁵

Price v. McBeath, 989 So.2d 444, 451 (Miss. Ct. App. 2008).

Gunnell respectfully requests this Court to affirm the lower court's ruling, *in toto* and assess all costs related to this appeal, including attorney's fees, to the Appellant.

Respectfully submitted,

JOHNNY JOE GUNNELL, D/B/A 4-S
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CERTIFICATE OF SERVICE

I, Mark R. Holmes, do hereby certify that I have this day mailed postage prepaid by U.S.

Mail, a true and correct copy of the above and foregoing document to the following:

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Honorable Edward E. Patten, Jr.
Chancellor, Fifteenth District Chancery Court
Post Office Box 707
Hazelhurst, Mississippi 39083

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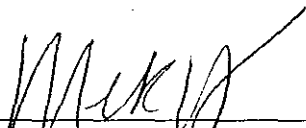
This the 4th day of October, 2010.



MARK R. HOLMES

CERTIFICATE OF COMPLIANCE

I, Mark R. Holmes, attorney for Johnny Joe Gunnell d/b/a 4-S Company, Appellee, certify that I have complied with Mississippi Rules of Appellate Procedure.



MARK R. HOLMES