

IN THE SUPREME COURT OF MISSISSIPPI

2010-CA-00547

GERALD HAMMOND

APPELLANT

V.

**CATERPILLAR FINANCIAL SERVICES
CORPORATION**

APPELLEE

Appeal from Circuit Court of Alcorn County

**BRIEF OF APPELLEE CATERPILLAR
FINANCIAL SERVICES CORPORATION**

ORAL ARGUMENT NOT REQUESTED

Robert B. Ireland, III (MSB
[REDACTED])

Watkins & Eager PLLC
400 East Capitol Street (39201)
Post Office Box 650
Jackson, Mississippi 39205
Telephone: 601-965-1900
Facsimile: 601-965-1901

IN THE SUPREME COURT OF MISSISSIPPI

2010-CA-00547

GERALD HAMMOND APPELLANT

V.

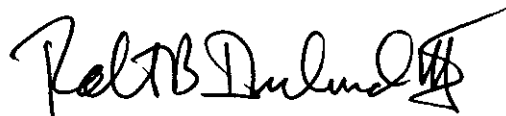
**CATERPILLAR FINANCIAL SERVICES
CORPORATION APPELLEE**

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. Gerald Hammond, Appellant;
2. Gregory D. Keenum, Counsel for Appellant, Gerald Hammond;
3. Caterpillar Financial Services Corporation, Appellee;
4. Watkins & Eager PLLC, Jackson, MS, Counsel for Appellee, Caterpillar Financial Services Corporation;
5. Renasant Bank, Additional Defendant in Trial Court Proceedings; and
6. Stephen Corbin, Counsel for Renasant Bank.

Respectfully submitted,



Robert B. Ireland, III

TABLE OF CONTENTS

Certificate of Interested Persons	ii
Table of Authorities	iv
Statement of Issue	1
Statement Regarding Oral Argument	1
Statement of the Case	1
Summary Argument	4
Argument	6
Conclusion	10
Certificate of Service	12

TABLE OF AUTHORITIES

CASES

<i>Allstate Ins. Co. v. Estes</i> , 345 So.2d 245 (Miss. 1977)	9
<i>Memphis Bank & Trust Co. v. Pate</i> , 362 So. 2d 1245 (Miss. 1978)	8
<i>Patrick v. Mich. Nat. Bank</i> , 220 So. 2d 273 (Miss. 1969)	8
<i>Robinson v. Friendly Finance Co. of Biloxi, Inc.</i> , 130 So. 2d 256 (Miss. 1961)	6

STATUTES

Explanatory Materials Preceding Miss. Code Ann. Title 75, Chapter 9	8
Miss. Code Ann. § 11-37-101	7
Miss. Code Ann. § 11-37-131	7
Miss. Code Ann. § 75-2-403	9
Miss. Code Ann. § 75-9-301	7
Miss. Code Ann. § 75-9-310	7
Miss. Code Ann. § 75-9-317(b)	5, 9
Miss. Code Ann. § 75-9-320(b), (b)(4)	5, 8
Miss. Code Ann. § 75-9-322(a), (a)(1)	4, 7
Former Miss. Code Ann. § 75-9-307(2)	8
Texas Business and Commercial Code, § 9-310	7

OTHER

Uniform Commercial Series, Volume 9B, Revised Article 9, Secured Transactions, § 9-320, cmt. 5	9
---	---

STATEMENT OF ISSUE

Whether the trial court correctly determined that Caterpillar Financial was entitled to possession of the equipment in view of Gerald Hammond's admission that Caterpillar Financial held a prior, perfected security interest?

STATEMENT REGARDING ORAL ARGUMENT

Appellee believes the simple issue presented on appeal may be resolved on the current briefing, without the need for oral argument.

STATEMENT OF THE CASE

Plaintiff Caterpillar Financial Services Corporation ("Caterpillar Financial") properly commenced this replevin suit in the Circuit Court of Alcorn County pursuant to Miss. Code Ann. § 11-37-131 to obtain possession of a large piece of equipment – a Caterpillar 257B Multi Terrain Loader valued at approximately \$19,000. Compl. (R. at 4-18).¹ Caterpillar Financial filed the complaint under oath, as required, and set forth the necessary elements to show it was entitled to possession of the equipment. *Id.*

Namely, as set forth in the verified complaint, Caterpillar Financial obtained a security interest in the equipment via an assignment contract executed on January 9, 2006. Compl. ¶ 5 (R. at 5). On July 26, 2006, the owner of the equipment transferred the property with the approval of Caterpillar Financial to Double D Services, Inc. ("Double D"), a Texas Corporation, through a Transfer and Assumption Agreement. *Id.* ¶ 6 &

¹ All cites are to documents contained in the short, 79-page record, or to Hammond's Record Excerpts.

Exhibit C thereto (R. at 5, 13-15). Following the transfer, Caterpillar Financial again promptly perfected its security interest in this property by filing a UCC financing statement with the Texas Secretary of State. *Id.* ¶ 7 & Exhibit D thereto (the UCC financing statement) (R. at 5, 16). Double D defaulted under the terms of the contract by failing to make payments to Caterpillar Financial as they came due. *Id.* ¶ 10 (R. at 10). Caterpillar Financial was unable to collect from Double D.

Later, Caterpillar Financial learned that an individual named David Timbes executed a bill of sale in 2008 for the equipment to Gerald Hammond, who obtained a loan from Renasant Bank (“the Bank”) in connection with this transaction. Compl. ¶¶ 7-9 & Exhibits E and F thereto (R. at 9, 17-18).² By virtue of its prior perfected security interest, Caterpillar Financial has a superior (or senior) security interest in the equipment as compared to all other parties. Caterpillar Financial filed this replevin suit against Hammond and the Bank in order to obtain possession of the equipment.

On March 4, 2010, the court conducted a hearing in this matter. Hrg. Tr. at 1 (R.E. II).³ At the beginning of the hearing, the Court verified that Defendants were not contesting whether Caterpillar Financial had obtained and perfected a security interest in the equipment:

² Double D also defaulted on the contract by purportedly conveying the equipment to Timbes or allowing Timbes to convey the equipment to a third party (here, Hammond) without the consent of Caterpillar Financial.

³ At the time of the hearing, Caterpillar Financial served a trial brief. (R. at 47-53). However, Hammond never filed an answer (though none appears to be required) and did not file anything (of substance) of record in this action before, during or after the hearing. *See* Court Docket (R.E. I).

Mr. Ireland: May it please the Court, I have a trial brief I'd like to give you, Your Honor.

The Court: I have some understanding of where we are. It might be that I can short circuit this somewhat by a few questions. Is there any issue at all that Cat Financial, or Caterpillar Financial, obtained and perfected a security interest in the property that is the subject of this proceeding in Texas?

Mr. Keenum: As to Gerald Hammond, there is no issue as to the perfection by Caterpillar.

The Court: All right.

Mr. Corban: Same for Renasant Bank, Your Honor.

The Court: All right.

Hr'g Tr. at 2 (R.E. II).

The Court then gave Defendants an opportunity to explain how they believed their interests in the equipment were superior to the prior perfected security interest held by Caterpillar Financial:

The Court: All right. Now, that being the case [that Caterpillar Financial has a perfected security interest in the equipment], I'm going to give you an opportunity to tell me why that does not carry the day for Caterpillar Finance.

Hr'g Tr. at 2 (R.E. II).

Hammond's counsel argued to the court that "Hammond is a buyer of consumer goods pursuant to the UCC" and that this exception made the Defendants' interests in the property superior to Caterpillar Financial's. Hrg. Tr. at 2, 2-10 (R.E. II). As explained in detail below, however, this exception could not possibly apply because it is undisputed (and even admitted by Hammond) that Caterpillar Financial held a prior perfected security interest by virtue of its filing a UCC financing statement in 2006.

Following Hammond's argument regarding the consumer goods exception, the Court ruled as follows: "It doesn't matter. Caterpillar Financial Services Corporation had a perfected security interest in [the equipment] under the law of the State of Texas, which we're going to honor here in this state. And it can't be any other way." Following the entry of the Court's March 4, 2010, judgment (R.E. III) granting possession of the equipment to Caterpillar Financial, this appeal ensued.

SUMMARY ARGUMENT

The trial court correctly determined that Caterpillar Financial was entitled to possession of the equipment. Revised Article 9 governs the rights and interests of the parties to the equipment in this case. Once Hammond conceded to the trial court that Caterpillar Financial had a prior perfected security interest in the equipment, the decision of the trial court was easy. *See* Hrg. Tr. at 2 (R.E. II).

Article 9 provides that a creditor with a prior perfected security interest such as Caterpillar Financial holds an interest in the equipment that is superior to that of other parties. *See* Miss. Code Ann. § 75-9-322(a), (a)(1) (ranking priority of conflicting security interests, including general rule that timing of perfection governs; *i.e.*, "first in time, first in right"). That is, Caterpillar Financial is entitled to possession of the equipment under Mississippi law.

Hammond's brief does not mention Revised Article 9, much less does it cite any authority that compels a different result than the one reached by the trial court. Hammond

apparently argues that evidence which he was prepared to present at the hearing would have shown that the consumer goods exception applies in this case, allowing him to take the equipment over Caterpillar Financial.⁴ This exception is found at Miss. Code Ann. § 75-9-320(b). However, that exception cannot apply where, as here, the secured creditor's interest (here Caterpillar Financial's interest) has been perfected by the prior filing of a UCC financing statement. *See* § 75-9-320(b)(4) (a buyer of consumer goods "takes free of a security interest, even if perfected, **if the buyer buys . . . (4) Before the filing of a financing statement covering the goods**").

Similarly, the exception found in Miss. Code Ann. § 75-9-317(b) does not apply because Caterpillar Financial's security interest was perfected in 2006 well before Hammond attempted to purchase the equipment in 2008. *Id.* (a buyer of goods can take free of a security interest "if the buyer gives value and receives delivery of the collateral without knowledge of the security interest . . . **and before it is perfected**").

Because Caterpillar Financial held a prior perfected security interest in the equipment, which was evidenced by the filing of a UCC financing statement, its rights and interests in the equipment were superior to Hammond's. Hammond's concession that Caterpillar Financial held this perfected security interest dictated the trial court's decision -- a correct decision -- that Caterpillar Financial was entitled to possession of the

⁴ Hammond did not make an adequate offer of proof as to many of the purported "facts" relayed in his brief. For instance, despite Hammond's claims, David Timbes, the person who sold the equipment to Hammond, was not present at the hearing. Hrg. Tr. at 4 (R.E. II). However, regardless what Hammond claims he could have proved on the day of the hearing, these purported "facts" would not change the fact that Caterpillar Financial is entitled to possession of the equipment under Mississippi law.

equipment. For this reason, Caterpillar Financial respectfully requests that the Court affirm the trial court's decision in this case.

ARGUMENT

"The statutory replevin proceeding is purely a possessory action under the laws of this state." *Robinson v. Friendly Finance Co. of Biloxi, Inc.*, 130 So. 2d 256, 257 (Miss. 1961). Caterpillar Financial agrees with Plaintiff that it has the burden of proof to show it is entitled to possession under the law. *Id.* In this case, Revised Article 9 governs the rights and interests of the parties to the equipment. The trial court correctly determined that Caterpillar Financial was entitled to possession under Mississippi law, and this decision is unaffected by the purported "facts" Hammond claims he was unable to present via testimony.⁵

It is undisputed that Caterpillar Financial had a properly perfected security interest in the equipment in 2008 when Hammond attempted to purchase it from Timbes. Hammond and the Bank both conceded there were not "any issues at all" regarding Caterpillar Financial's perfected security interest.⁶ Hr'g Tr. at 2 (R.E. II). Indeed, Caterpillar Financial perfected its security interest in the equipment in 2006 by filing a

⁵ Despite Hammond's claims, he did make arguments to the trial court consistent with the purported "facts" he did not present via testimony; the trial court considered those arguments; and the trial court determined Caterpillar Financial was entitled to possession under the law.

⁶The Bank has not joined this appeal.

UCC financing statement with the Texas Secretary of State.⁷ Pursuant to Mississippi law, this prior perfected security interest is superior to that of any other party.

Section 75-9-322 ranks the priority of conflicting security interests. That section embraces the “first in time, first in right” rule. *See* § 75-9-322(a)(1) (“Conflicting perfected security interests . . . rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest . . . is first perfected.”). That is, among conflicting perfected security interests, the first person to perfect a security interest has a superior interest to those who later perfect a security interest.

Hammond concedes that Caterpillar Financial had a perfected security interest before it took any interest in the equipment. Accordingly, pursuant to § 75-9-322, Caterpillar Financial’s interest is superior to Hammond’s and the Bank’s. Caterpillar Financial is thus entitled to possession of the equipment.

This conclusion is unaffected by the erroneous suggestion that Caterpillar Financial wrongly commenced this action without filing a bond. No bond is required when the replevin is filed pursuant to Miss. Code Ann. § 11-37-131, as was done here. Since Caterpillar Financial did not seek possession of the equipment before the court hearing, this section applies, rather than § 11-37-101, which involves immediate seizure of the property, requires a bond, and was incorrectly referenced by Hammond.

⁷ The law of the location of the debtor – here, Texas where Double D was incorporated – governs perfection. Miss. Code Ann. § 75-9-301. In Texas (as in Mississippi), the filing of a financing statement perfects a non-possessory security interest. *Compare* Texas Business and Commercial Code, § 9-310, *with* Miss. Code Ann. § 75-9-310.

Hammond also argues that his interest in the equipment is nonetheless superior to Caterpillar Financial's pursuant to the "consumer goods exception". Though this is an affirmative defense on which Hammond has the burden of proof, he did not even cite any authority for this exception. *See Patrick v. Mich. Nat. Bank*, 220 So. 2d 273, 275 (Miss. 1969). It is found in Miss. Code Ann. § 75-9-320(b), and provides as follows:

(b) . . . a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

- (1) Without knowledge of the security interest;
- (2) For value
- (3) Primarily for the buyer's personal, family, or household purposes;
- and

(4) Before the filing of a financing statement covering the goods.

Miss. Code Ann. § 75-9-320(b) (emphasis added).

Plainly, this exception does not apply here because Caterpillar Financial had perfected its security interest in the equipment by filing a UCC financing statement with the Texas Secretary of State in 2006. That is, based on Plaintiff's own concessions to the trial court, sub-section (4) of the consumer goods exception is not present. *See also Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245, 1250 (Miss. 1978) (explaining similar consumer goods exception found in version of Article 9 in effect at the time, former Miss. Code Ann. § 75-9-307(2): "A buyer does not take free of a security interest under this provision [i.e., the consumer goods exception] where prior to the purchase a

financing statement has been filed with respect to the security interest.”).⁸

Mississippi’s consumer goods exception is identical to that found in Uniform Revised Article 9, § 320(b). The Official Comments to that section make it clear that (1) “the rights of a buyer under sub-section(b) turn on whether a financing statement has been filed against consumer goods”, and (2) “if the secured party does file, all buyers take subject to the security interest.” Uniform Commercial Series, Volume 9B, Revised Article 9, Secured Transactions, §9-320(b), cmt. 5.

There is another, similar exception (also not cited by Hammond) that is found at Miss. Code Ann. § 75-9-317(b): “a buyer . . . takes free of a security interest . . . if the buyer gives value and receives delivery of the collateral without knowledge of the security interest . . . **before it is perfected.**” This exception does not apply either, for the same reasons. Namely, it is undisputed Caterpillar Financial had a prior, perfected security interest in the equipment.

As a final matter, Caterpillar Financial had also planned to argue at the hearing (*see* Trial Br. (R. at 47-53), and Hr’g Tr. (R.E. II)) that David Timbes was unable to pass title or any other interests in the equipment to Hammond because Double D, not Timbes, owned the property at the time. *See Allstate Ins. Co. v. Estes*, 345 So. 2d 265, 266 (Miss. 1977) (“The dictate of 75-2-403 is clear. . . A purchaser can take only those rights which

⁸ Revised Article 9 was enacted by Mississippi effective 2001. While a majority of the same concepts were retained between Article 9 and Revised Article 9, the statutes were renumbered as part of the revision. The prior consumer goods exception found in former § 75-9-307(2) is similar to the one found now in § 75-9-320(b). See the Table and other explanatory information preceding Title 75, Chapter 9 in Mississippi Code Annotated.

his transferor has in the subject goods”). Hammond did not make an adequate offer of proof that Timbes (who was not present for the hearing, Hr’g Tr. at 4 (R.E. II)) owned the equipment, and any suggestion Hammond could have proved otherwise is without merit. In fact, the only evidence of record regarding ownership prior to Hammond’s attempted purchase was the purchase contract executed by Double D. For this additional reason, Caterpillar Financial is entitled to possession of the equipment over Hammond.

In summary, Hammond advances one argument that he is entitled to possession of the equipment over Caterpillar Financial – the consumer goods exception. For the reasons discussed above, this exception does not apply. The trial court correctly determined that Caterpillar Financial was entitled to possession of the equipment under Mississippi law because it held a prior perfected security interest evidenced by the filing of a financing statement covering the equipment. Accordingly, Caterpillar Financial respectfully requests that the Court affirm the trial court’s judgment in its favor.

CONCLUSION

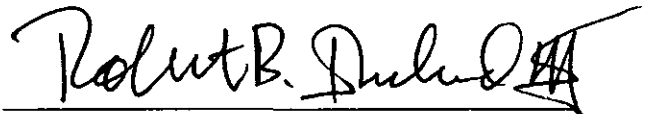
At the replevin hearing, Hammond admitted that Caterpillar Financial held a prior, perfected security interest in the equipment. The trial court correctly determined, in view of this admission, that Caterpillar Financial was entitled to possession of the equipment based on the governing provisions of Revised Article 9 as enacted in Mississippi. Even assuming Hammond could have proved the purported “facts” relayed in his brief (and that he made a sufficient offer of proof of the same), the result would have been the same. The consumer goods exception – the sole exception advanced before the Court by Hammond – does not

apply since Caterpillar Financial had perfected its security interests by filing a financing statement years before Hammond attempted to purchase this equipment from Timbes.

Accordingly, for these reasons, Caterpillar Financial respectfully requests that the Court affirm the trial court's judgment awarding possession of the equipment to Caterpillar Financial.

Dated: November 30th, 2010.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Robert B. Ireland, III", with a stylized flourish at the end.

ROBERT B. IRELAND, III (MSB NO [REDACTED])
WATKINS & EAGER PLLC

ATTORNEY FOR CATERPILLAR FINANCIAL
SERVICES CORPORATION

OF COUNSEL:

ROBERT B. IRELAND, III (MSB [REDACTED])
WATKINS & EAGER PLLC
400 EAST CAPITOL STREET (39201)
POST OFFICE BOX 650
JACKSON, MISSISSIPPI 39205
TELEPHONE: 601-965-1900
FACSIMILE: 601-965-1901

CERTIFICATE OF SERVICE

I Hereby Certify That I Have this Day Caused a True and Correct Copy of the above and Foregoing Paper to Be Delivered by United States Mail, Postage Prepaid, to the Following:

Gregory D. Keenum
Gregory D. Keenum, P.a.
219 West College Street
Booneville, Ms 38829

The Honorable Thomas J. Gardner, III
P. O. Drawer 1100
Tupelo, MS 38802-1100

Stephen M. Corban
Renasant Bank
P. O. Box 709
Tupelo, Ms 38802-0709

This, the 30th Day of November, 2010.


ROBERT B. IRELAND, III