IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01247 COA

ELSIE GLADNEY AND L.C. GLADNEY APPELLANTS

v.

CONTINENTAL GRAIN COMPANY APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS: JIMMY D. SHELTON

ATTORNEY FOR APPELLEE: DAVID R. SPARKS

NATURE OF THE CASE: CIVIL-BREACH OF CONTRACT

TRIAL COURT DISPOSITION: JUDGMENT OF COUNTY COURT IN FAVOR OF APPELLANT REVERSED BY CIRCUIT COURT; COUNTY COURT JUDGMENT OF $2017.91

IN FAVOR OF APPELLEE AFFIRMED BY CIRCUIT COURT

MANDATE ISSUED: 8/19/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The Lee County Court entered a judgment in favor of Elsie Gladney (Mrs. Gladney) against Continental Grain Company (Continental) for $2,385, and entered a judgment in favor of Continental against L.C. Gladney (Mr. Gladney) for $2,017.91. All three parties appealed to the Circuit Court, which reversed the judgment in favor of Mrs. Gladney against Continental and affirmed the judgment in favor of Continental against Mr. Gladney.

Mr. and Mrs. Gladney argue eleven issues in their brief appealing the Circuit Court's decision. The issues fall into two broad categories: the Circuit Court's reversal of the award against Continental based on a finding of a partnership between the Gladneys, and the County Court's joining of Mr. Gladney as a party to the action upon motion by Continental.

We find no error and affirm.

## FACTS

On October 17, 1991, Mrs. Gladney delivered soybeans to Continental. When they arrived, Mrs. Gladney noticed that Continental had the delivery in Mr. Gladney's name. Mrs. Gladney took the position that the soybeans were her property, and convinced Continental to substitute her name for her husband's.

In 1983, eight years prior to this transaction, Mr. Gladney canceled a contract to deliver grain to Continental. The cancellation agreement provided that Mr. Gladney was to pay a cancellation price, and if he did not pay within a certain time, then interest was to begin accruing. Mr. Gladney never paid the cancellation price.

When Continental paid for the delivery of the 1991 shipment of soybeans, it withheld the cancellation price owed to them by Mr. Gladney. Mrs. Gladney sued Continental to recover the amount withheld by Continental. Continental filed a counterclaim for the cost of the cancellation agreement and the interest. Upon Continental's motion, the County Court joined Mr. Gladney as a party. The Court rendered judgment in favor of Mrs. Gladney against Continental for $2,385.00, the amount withheld from the check, plus interest. The Court found that no partnership existed between Mr. and Mrs. Gladney, and rendered a judgment in favor of Continental against Mr. Gladney for $2,017.91 (the interest which accrued on the price of the cancellation agreement), plus interest.

Continental and the Gladneys appealed to Circuit Court. On appeal, the Circuit Court affirmed the judgment against Mr. Gladney because none of the issues he raised on appeal were raised at trial. The Circuit Court reversed the judgment in favor of Mrs. Gladney against Continental based on a finding

that the Gladneys did operate as a partnership. Therefore, Continental's withholding of the cancellation price was proper.

## DISCUSSION

### *I. P artnership of Mr. and Mrs. Gladney*

The Gladneys argue that the Circuit Court erred in reversing the finding of the County Court that a partnership did not exist between them. Mrs. Gladney's testified that she alone rented the land from which the soybeans came that were sold to Continental. She also testified that she and her husband kept profits separate, that each signed separate contracts regarding his/her respective operations, that they did not always file joint tax returns, and that they did not always maintain joint bank accounts.

The evidence that supports a finding of a partnership is that each farms land owned in the other's name, that there is no written lease to show that Mrs. Gladney rented the land exclusively, and that all the farm equipment used to farm the Gladneys' land is in Mr. Gladney's name and used by both partners. Mrs. Gladney admitted that the soybeans used in the shipment delivered to Continental were harvested by her husband and her son, and that they have maintained joint bank accounts since 1991.

The term "partnership" is defined by the Mississippi Code as "an association of two or more persons to carry on as co-owners a business for a profit." *Century 21 Deep South Properties v. Keys*, 652 So. 2d 707, 714 (Miss. 1995), citing M.C.A. § 79-12-11(1). The three main questions that are considered in partnership determination are: (1) the intent of the parties, (2) the control question, and (3) profit sharing. *Id.*, citing, *Smith v. Redd*, 593 So.2d 989, 994 (Miss. 1991).

The Gladneys argue that they did not intend to form a partnership, and there is no written agreement to form a partnership. However, the test for intent is whether the parties intended to do the acts that in law constitute partnership. *Smith*, 593 So. 2d at 994. A written partnership agreement is probative, but unnecessary as intent may be established from the surrounding circumstances. *Century 21*, 652 So. 2d at 715.

In one case, the supreme court reversed a trial court's decision that no partnership existed between the parties. *Allied Steel Corp. v. Cooper*, 607 So. 2d 113, 117 (Miss. 1992). There was no written partnership agreement, but the evidence showed that the parties met every day to make decisions and exercised mutual control over the development of a project. *Id.* Here, the evidence showed that the Gladneys worked land together, used the same equipment, filed joint tax returns, and maintained joint bank accounts. They admit that they both worked on all the property they farmed. Mr. Gladney testified that he would designate Mrs. Gladney acres for her source of income, then she would sell the soybeans from the property and take a share of the profits. According to statute, "the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. . ." Miss. Code Ann. § 79-12-13(4); *Century 21*, 652 So. 2d at 716. The supreme court has stressed profit sharing as a key factor. *Century*, 652 So. 2d at 715.

Continental argues that the Gladneys joined their money, goods, labor, and skill with the community interest in making a profit from their farming operation. We agree. The Circuit Court was within its discretion when it reversed the County Court's decision that the Gladneys were not in a partnership.

We affirm its finding of a partnership and its reversal of the award to Mrs. Gladney.

The Gladneys also argue that the Circuit Court's finding of the existence of a partnership allowed Continental to recover for the cancellation price twice. They argue that the decision to reverse the judgment against Continental for $2,385 and, in addition, to affirm the award of $2,017.01 allowed Continental was double recovery by Continental.

The amount owed as a cancellation charge for the 1983 contract was $2,385. That amount was recovered by withholding the amount from the check due on the soybeans. The interest which accrued over eight years was $2,017.01, which is the amount of the judgment against Mr. Gladney in favor of Continental. Continental did not receive a double recovery. Continental recovered the cancellation contract price and the accrued interest.

*II. Joinder of Mr. Gladney*

The Gladneys argue that the Circuit Court committed manifest error in three ways: (1) by executing an ex parte order joining Mr. Gladney without notice to interested parties, (2) by joining Mr. Gladney as a party without requiring that he be designated a plaintiff, an involuntary plaintiff, or a defendant, and (3) by joining Mr. Gladney as a party without establishing the jurisdictional requirement. The Gladneys also argue that the County Court, the Circuit Court, and Continental acted in an arbitrary and capricious manner. The Gladneys do not describe facts which support their argument and we are not sure what actions allegedly prove this caprice. We therefore are unable to review this allegation.

Returning to the joinder issue, we find controlling this procedural rule:

(a) A person who is subject to jurisdiction of the court shall be joined as a party in the action if:

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

M.R.C.P. 19 (a)(2). Notice of the hearing on the motion to join Mr. Gladney as a party was sent to the Gladneys' attorney before the hearing was held. The Gladneys argue that Mr. Gladney did not know he was a party to the suit until the judgment was rendered against him. However, he stated during direct examination that he knew he was a party, but his attorney told him that Continental needed to have collected their debt in less time to sue him. Because notice was given and Mr. Gladney stated that he knew he was a party, his argument that his joinder was improper because of an ex parte hearing is in error. He may not have participated in the hearing, but he had notice.

The Gladneys' argument that the court lacked personal jurisdiction over Mr. Gladney was raised for the first time on appeal to the Circuit Court. Lack of personal jurisdiction is waived unless timely raised in the trial court. M.R.C.P. 12(h). Because the Gladneys' did not present this defense until after

the trial, the Circuit Court was correct in denying this assignment of error.

The Gladneys also failed to plead the defense of statute of limitations. The statute of limitations is an affirmative defense. M.R.C.P.8(c). The Gladneys argue that because of the lack of notice to the suit, Mr. Gladney was not allowed affirmatively to plead the defense of statute of limitations. We disagree, as Mr. Gladney did receive notice.

**THE JUDGMENTS OF THE LEE COUNTY CIRCUIT COURT REVERSING THE JUDGMENT OF THE COUNTY COURT OF LEE COUNTY IN FAVOR OF THE APPELLANTS AND AFFIRMING THE JUDGMENT OF THE COUNTY COURT OF LEE COUNTY IN FAVOR OF THE APPELLEE ARE AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.**