

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00589

EARNEST RAY MAGEE

APPELLANT

VS.

COVINGTON COUNTY BANK

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF COVINGTON COUNTY, MISSISSIPPI**

BRIEF OF EARNEST RAY MAGEE, APPELLANT

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

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Appellant**

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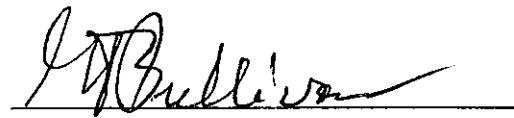
**Covington County Bank
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Appellee**

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**Hon. Eddie H. Bowen
Circuit Court Judge
Thirteenth Judicial District
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Respectfully Submitted.



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STATEMENT OF ISSUES

ISSUE 1

THE COURT BELOW ERRED IN OVERRULING EARNEST RAY MAGEE'S MOTION FOR CONSIDERATION OF IT ORDER SUSTAINING COVINGTON COUNTY BANKS MOTION FOR RELIEF FROM ORDER AND OTHER FOR OTHER RELIEF, OR ALTERNATIVELY, MOTION FOR RECONSIDERATION MADE ON THE 5TH DAY OF JANUARY, 2011.

ISSUE 2

IF THE DECISION OF THE CIRCUIT COURT IS NOT REVERSED, EARNEST RAY MAGEE WILL SUFFER MANIFEST INJUSTICE.

STATEMENT OF CASE

This appeal arises from an Order of the Circuit Court of Covington County, Mississippi, made on the 25th day of March, 2011 (RE 128) which overruled a motion of Appellant, Earnest Ray Magee, for Reconsideration of an Order made January 5, 2011 (RE 93-94) sustaining a Motion of Appellee, Covington County Bank, for relief from an agreed order made the 24th of September, 2010 (RE 63-64) granting a writing of inquiry to assess the value of the property and ascertain the damages suffered by the Earnest Ray Magee for the wrongful taking and detention of said property and setting it for a trial on the issue of damages on the 19th day of January, 2011.

STATEMENT OF FACTS

On the 7th day of July, 2008, Covington County Bank filed a Complaint in Replevin seeking possession of the property therein described.(RE 4-10)

On the 27th day of August 2008 Covington County Bank filed an ORDER GRANTING REPLEVIN (RE 11-12)

On February 24, 2009, Earnest Ray Magee file a MOTION TO SET ASIDE ORDER GRANTING REPLEVIN (RE 13-14)

There appears in the record that on July 11, 2008 a fiat ordering a summons to issue to Earnest Ray Magee to appear on the 1st day of August , 2008 in Mendenhall, MS and it is marked "Exhibit 1".(RE 15).

On the 11th day of July, 2008 a SUMMONS IN WRIT OF REPLEVIN was issued by the Clerk of the Court to Earnest Ray Magee to Covington County Banks declaration in replevin with a copy of order granting replevin as an attachment. (RE 16-17-18)

There appears in the record what appears to be a return on the summons issued ordered Earnest Ray Magee to be in Mendenhall, Ms. On the 8th day of July, 2008 to answer the Complaint in Replevin. Said return indicates that same was served on Fabian Magee on 7-19-2008 by James Morehead.. (RE 19-20-21)

On May 8, 2009, Covington County Bank filed it REPLYTOMOTION TO SET ASIDE ORDER GRANTING REPLEVIN AND MOTION FOR CONTEMPT FOR CONCEALING PROPERTY (RE 34-57)

On May 14, 2009, Earnest Ray Magee filed his RESPONSE TO MOTION FOR CONTEMPT AND CONCEALING PROPERTY.(RE 58-59)

On June 17, 2009 and ORDER was entered which stated that the case on the courts on motion was remanded to the Justice Court of Covington County, Mississippi for disposition. (RE 60).

On June 24, 2009 an ORDER SUSTAINING MOTION TO SET ASIDE ORDER GRANTING REPLEVIN . It set aside and held for naught the ORDER GRANTING REPLEVIN entered on the 22nd day of August, 2008. The Court further ordered on its on motion that the case be remanded to the Justice Court of Covington County, Mississippi to determine if any attorney's fees and late charges were due Covington County Bank by Earnest Ray Magee. Said judgment was mailed to the Judge for his approval and signature and was signed on the 23rd day of June, 2009 nunc pro tunc June 12, 2009 which was the date this matter was heard.(RE 61)

On July 8, 2010 Earnest Ray Magee filed his motion for a Writ of Inquiry.(RE 62)

On September 24, 2010 the ORDER GRANTING WRIT OF INQUIRY was filed. On the face thereof it was an agreed order. (RE 63-64)

On September 27, 2010 the RESPONSE TO MOTION FOR WRIT OF INQUIRY was

filed by Covington County Bank. (RE 65 -76)

On January 5, 2011 Covington County Bank filed a MOTION FOR RELIEF FROM ORDER AND FOR OTHER RELIEF, OR ALTERNATIVELY MOTION FOR RECONSIDERATION.(RE 81-91)

On January 5, 2011 the Court entered it order which was filed on January 6,2011 SUSTAINING COVINGTON COUNTY BANK'S MOTION FOR RELIEF FROM ORDER AND FOR OTHER RELIEF, OR ALTERNATIVELY, MOTION FOR RECONSIDERATION.(RE 93-94)

On January, 19, 2011 Earnest Ray Magee filed a MOTION FOR RECONSIDERATION of the Court order of January, 5, 2011. (RE 95-127).

Composite Exhibit a to Earnest Ray Magee's Motion for Recconsideration is a Complete copy of the record of a Suit filed in the Justice Court of Covington County, Mississippi by Covington County Bank against Earnest Ray Magee on Oct 26, 2009 .(RE 106-127)

Summons served by posting 28th Oct. 2009 (RE107)

Complaint filed with one page marked Exhibit B and another page not marked on Oct 26, 2009. (RE 108, 109,110)

ANSWER AND DEFENSES AND COUNTER CLAIM FILED BY Earnest Ray Magee on 28th of December 2009. (RE 111-115)

ORDER OF DISMMISAL entered by the Justice Court on 24th day of March, 2009 and filed on March 24, 2009. (RE 116)

All of the proceedings in the Justice Court between Covington County Bank and Earnest Ray Magee were had because of a separate and distinct Declaration was filed and served on Earnest Ray Magee by the Covington County Bank, this being case no. 22-512, not a case

remanded from the Circuit Court of Covington County, Mississippi.

Transcript of Hearing filed June 30, 2011 -Hearing held March 18, 2011 consisting of pages 1-15 .(RE 141)

Courts finding of fact and ruling appears at Pages 12 and 13 thereof.

SUMMARY OF THE ARGUMENT

The Court is in error in its finding of fact in that a nunc pro tunc order is of no effect in that it found that the order entered on June 23, 2009 nunc pro tunc for June 12, 2009 was not effective as of June 12, 2009.

The Court is in error in its finding of fact in that On March 24, 2010, the Justice Court of Covington County issued and order of dismissal in the case remanded to it, without prejudice.

The Court is in error in finding that Earnest Ray Magee is not entitled to a Writ of Inquiry because he never received a Judgement for Possession.

The Court is in error in finding that it issued its order granting Earnest Ray Magee, a writ of inquiry because of like of jurisdiction.

ARGUMENT

ISSUE 1

THE COURT BELOW ERRED IN OVERRULING EARNEST RAY MAGEE'S MOTION FOR CONSIDERATION OF IT ORDER SUSTAINING COVINGTON COUNTY BANKS MOTION FOR RELIEF FROM ORDER AND OTHER FOR OTHER RELIEF, OR ALTERNATIVELY, MOTION FOR RECONSIDERATION MADE ON THE 5TH DAY OF JANUARY, 2011.

The Order of the Court entered on the 23rd day of June, 2009 nunc pro tunc June 12, 2009 should have been held to be effective on June 12, 2009 instead of the order entered on June 16, 2009. The Courts "may by nunc pro tunc orders supply omissions in the record of what had previously been done, and by mistake or neglect, not entered," "When a judgment is entered nunc

pro tunc, it become operative between the parties as of the date when it should have been entered.” Irving v. Irving, 67 So.3d 779 (Miss.2011).

The Court is in error in its finding of fact in that On March 24, 2010, the Justice Court of Covington County issued and order of dismissal in the case remanded to it, without prejudice. This is not supported by the record. The record in fact show that the case which was decided by the Justice Court made no reference to said case being remanded, but was decided on the Complaint filed there in. Covington County Bank failed in its prosecution of the replevin action in that it has never brought to trial the Issue remanded to the Justice Court of Covington County, Mississippi. (RE 106-116)

The Court is in error in finding that Earnest Ray Magee is not entitled to a Writ of Inquiry because he never received a Judgement for Possession as Provided by Section 11-37-129 MCA 1972 in that said section states “In case the plaintiff make default in prosecuting the replevin action, or be nonsuited, after seizure under writ of replevin, the defendant may have a writ of inquire to assess the value of the property, or the damages sustained by the wrongful suing out of the writ, or both, as the case may be; and like judgment shall be rendered upon the finding as upon issue found for him.” In this case Covington County Bank has wholly failed in the prosecution of this case as it Order Granting Replevin has been ordered to be set aside and of no effect and they have not taken any steps to prosecute the Complaint in Replevin since.

The Court is in error in finding that it issued its order granting Earnest Ray Magee, a writ of inquiry because of like of jurisdiction. The Court has jurisdiction as the order entered nunc pro tunc is valid and the order granting the writ of inquiry and trial setting was agreed to. (RE 63-64)

ISSUE 2

IF THE DECISION OF THE CIRCUIT COURT IS NOT REVERSED, EARNEST RAY

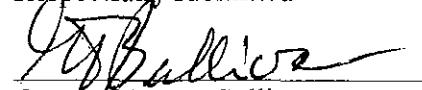
MAGEE WILL SUFFER MANIFEST INJUSTICE.

The record in this case reflects that the Covington County Bank took and retains to this day the property of Earnest Ray Magee without due process of law in that the filed a replevin action against him, took an order for possession of the property taken from him on an order that the Court found and ordered to be set aside and of no effect. (RE 61) The record sets out Covington County Bank wholly failed in its prosecution of this replevin action.

CONSLUSION

The decision of the Circuit Court denying Earnest Ray Magee the writ of inquiry to ascertain the value of the property taken and retained by Covington Bank from him and to ascertain the damages suffered as a result of the wrongful taking and detention of Earnest Ray Magees property by Covington County Bank should be reversed and a trial should ordered to grant Ernest Ray Magee a writ of inquiry to ascertain the value of the property taken and retained by Covington County Bank and damages suffered by him as result of Covington County Bank taking and retaining his property without due process of law.

Respectfully submitted


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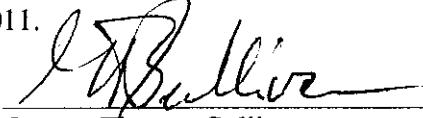
CERTIFICATE OF SERVICE

I, George Thomas Sullivan, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant, Earnest Ray Magee to the following:

Hon. Eddie H. Bowen
Circuit Court Judge
Thirteenth Judicial District
P. O. Box 545
Raleigh, MS 39153-0545

A. Regnal Blackledge, Esquire
P. O. Box 549
Collins, MS 39428

So certified, this the 2nd day of December, 2011.



George Thomas Sullivan

CERTIFICATE OF FILING

I, George Thomas Sullivan, attorney for Appellant, Earnest Ray Magee, do hereby certify that I have this day filed the Brief of Appellant, Earnest Ray Magee, by Depositing an original and three copies of Brief of Appellant, Earnest Ray Graves, with the United State Postal Service, first class postage, prepaid, address to Hon. Kathy Gillis, Clerk, Mississippi Supreme Court and Court of Appeals, P. O. Box 249, Jackson, Mississippi 39205-0205.

So certified this the 2nd day of December, 2011.



George Thomas Sullivan