

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2011 TS-01484

T

KIM WADE

APPELLANT

V

MISSISSIPPI REAL STATE COMMISSION

APPELLEE

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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. These representations are made in order that Justices of this Court may evaluate possible disqualifications or recusal:

Mississippi Real Estate Commission

John Maxey , attorney for Appellee

William Hussey, attorney for Appellee

Kim Wade, Defendant and Appellant

Christy Sievert, Court Reporter

Honorable Judge Tommie Green

RESPECTFULLY SUBMITTED

KIM WADE
APPELLANT, pro se

BY:

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Aponaugh Mfg. Co. v. Collins, 42 SO.2d 431,479 (Miss. 1949)

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Ms Real Estate License Law And Rules and Regulations 2006

Transcript of Hearing

Judge Yerger's Dec 16th 2010 Order

Transcript - Page 156-161

143 lines 5-8

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Title 01 Part III Secretary of State of Mississippi Chapter 14 Notaries Public 205 False
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STATEMENT OF THE ISSUES

The issues in this appeal revolve around whether Kim Wade's status as a Realtor is separate from his status as a participant member in the Multiple Listing Service (MLS). Wade sought to change his status from that of an associate broker to broker. Since 1954 other similarly situated brokers transitioned from associate broker to broker by simply filling out a status change form and giving it to their broker who would transmit it to the Jackson Association of Realtors.

After Wade entered into an exclusive listing agreement with John Eubanks (Eubanks) during the 30 day grace period allowed for transition, Eubanks became disgruntled and contacted JAR/MLS and subsequently submitted a complaint. Eubanks claimed that a misstatement in the information about the appliances in the listing and his house caused him injury in that it would diminish his opportunity to sell his house. At the time of Eubanks' complaint to the JAR/MLS, Eubanks had accepted a sales contract for the full asking price for his house and the transaction was scheduled to close. JAR/MLS advised Eubanks to contact the Mississippi Real Estate Commission (MREC) to lodge a complaint. An investigation was conducted and Wade and Eubanks filed responsive pleadings, letters and emails with Commission.

A hearing was held on July 13, 2010. Prior to the hearing date the sales transaction of Eubanks house closed to his satisfaction with Eubanks receiving the full asking price for his house. Prior to the hearing date and the closing Eubanks rescinded (rescission #1) any and all charges and complaints he had against Wade, and Eubanks ratified the sales and listing contract along with the rescission of his complaint when he accepted the money proceeds from the sales transaction.

For purposes of vindiction Eubanks signed and submitted a putative rescission of his initial withdrawal of his complaint, which I will call (rescission #2) to the MREC in some sort of attempt to resurrect his initial complaint against Wade. This (rescission #2) was submitted to the MREC after Eubanks initially dropped his complaint (rescission #1) just prior to receiving his money from the sale of his house. Apparently, Eubanks dropped his charges against me solely for the purpose of receiving money at the closing while he secretly intended to retract his signed agreement after he had money in hand. Wade believes that Eubanks set out to commit fraud, while MREC and their attorney's conspired with him to maliciously prosecute Wade and breach their ethical duties.

To further their scheme, Wade believes that MREC and their attorneys selectively destroyed stenographic notes and removed or kept certain documents out of the file and away from Wade in this matter so that they could not be used by Wade to defend himself at trial or on appeal.

STATEMENT OF THE CASE

Wade appeals the suspension of his license to practice as a real estate broker in Mississippi.

Also, Wade further challenges Circuit Court Judge Green's dismissal of his appeal from the MREC's suspension of his real estate broker's license for failure to prosecute.

Wade challenges the Circuit Clerks failure to issue a writ of certiorari commanding the MREC to submit not only "its" entire remaining record but the MREC's duty to submit its entire record of the matter.

Wade contends that MREC and its attorneys have reprehensibly sought to conceal pertinent documents from the record and this Court so that they could gain an unfair advantage over Wade in his hearing before the MREC Hearing Panel and in this appeal.

Wade contends that MREC has sought to foster an unfair and selectively relaxed working environment with the clerk of the court whereby the clerk would issue the required writ of certiorari only in certain cases while neglecting to do so in other cases in violation of Mississippi law.

MREC wrongfully destroyed stenographic notes from the hearing in this matter.

Further, Wade will show from the transcript of the hearing before the MREC Hearing Panel that MREC and its attorney's conspired with John Eubanks to knowingly use Eubanks' perjured testimony against Wade before the MREC hearing panel and in this appeal. Wade contends that these acts should not be allowed inasmuch as they constitute a gross miscarriage of justice.

ARGUMENT

1. The issue of the accuracy and validity of Judge Yerger's Dec 16th 2010 Order; stated:

“This Cause came before the Court on Ore Tenus Motion of Appellant Kim Wade styled Motion to Compel Correction of the Written Transcript of the Hearing before...” Despite the language quoted from the Order signed by Judge Yerger, there was no Ore Tenus hearing heard before Judge Yerger. As proof, the docket sheet does not reflect such a hearing being held.

The Order goes on to state:

“And being otherwise fully advised in the premises, finds as follows:” In order for the court to be “fully advised” requires the “entire record” be submitted to the court and that requires Appellee to comply with Ms Real Estate Law Section 73-35-25 (2) Notice of appeals shall be filed in the office of the of the court who shall have a writ of certiorari directed to the Commission commanding it within thirty (30) days after service thereof, to certify to such court “it’s entire record” in the matter in which the appeal has been taken.

Wade contends that the Circuit Court Judge should have required its clerk to issue a writ of certiorari to the MREC consistent with Section 73-35-25 (2). The MREC can and did submit what they wanted to submit to the court albeit not what Section 73-35-25 (2) and 73-35-5 (1) requires. I am however, asking this court to require them to comply with the law. MREC should not be allowed to have that type of unfair advantage over me. While insisting every yot and tiddle of the law is brought to bear on me.

The Court must utilize the most accurate means of recording the trial proceedings in order to ensure that a complete record is made for purposes of a potential appeal. Without a complete record, Defendant could not exercise the right to appeal in a meaningful or effective way. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

The MREC failed to use and/or retain the most accurate method or means of recording the trial proceedings and failed to inform Wade of the likelihood of their failure to accurately and completely maintain the record of the trial proceeding or the other records filed in this matter as MREC claims was the custom and practice of their chosen court reporter.

2. The issue of the Circuit Court's finding that I failed to prosecute my appeal;

The Circuit Court was in error when it found that I failed to prosecute my appeal. Wade continuously sought to prosecute his appeal. Wade was entitled to a complete and accurate record on which he could base his appeal and Wade was not provided with one. Despite this, the docket sheet will show that hearings were scheduled before Honorable Judge Yerger, Honorable Judge Weil, and the Honorable Judge Gowan, Judges who for whatever reasons either recused themselves, rescheduled the hearings or cancelled the hearings. This hardly amounts to a failure to prosecute. The Docket sheet shows that I never sought to avoid any date established for a hearing. In fact, I was prepared to argue all outstanding motions before any Judge who would allow me to.

The case was sent back to the Chief Judge for reassignment and rather than reassigning she summarily dismissed for lack of prosecution. I cite Circuit Court Case 251-04-1315 Russell vs Jackson Public Schools presided over by the Honorable Judge Tommie Green in which Judge Green refused a Motion to Dismiss brought by the defendants

The defendants in that case cited **Cox.V.Cox,976 So.2869,877 (MISS.2008)** **The Supreme Court has indicated that long term inactivity in a case establishes a *strong* presumption of prejudice to the defendant because of fading memories and potential problems with locating witnesses.**

The Defendants in this case cited **Hill. V. Ramsey, 3 So.3d 120 (Miss.2009), the Mississippi Supreme Court in dismissing the plaintiffs case with prejudice, considered that the Plaintiff, over a course of 2 years, never noticed a deposition (until a motion to dismiss was filed), never served discovery, never issued a subpoena or otherwise initiated discovery. The court held that the two year span of inactivity, *alone*, was sufficient to sustain a dismissal with prejudice under Miss.R.Civ.P.41(b).ID**

In **Hillman V.Weatherly, 15 So.3d 721 (Miss.2009)**, the Mississippi Supreme Court found that even 19 months of inactivity, **standing alone**, were enough to warrant dismissal with prejudice.

The same Judge Green who dismissed my case, denied the defendants motion for dismissal in Russell vs Jackson Public Schools. In Russell vs JPS the Plaintiff s acknowledged not having taken any action in the case in *nearly five years*.

Our Supreme Court has consistently held that a trial court's dismissal for failure to prosecute necessarily abuses its discretion when it does not consider lesser sanctions", **Hill vs Ramsey,3 So.3d 120 (Miss.2009)**

In Russell vs JPS the Court ruled:"The Court finds excusable neglect for the slow movement of the herein case. Moreover, neither party has provided a Scheduling Order as previously required by the Court's rule since last docket call.

In my case there were pending motions before the court and there were monthly filings by me in this case. I was merely waiting for a new judge to be assigned Its been over 500 days and the Appellee has yet to certify and authenticate to the court it's entire record in this matter pursuant to Miss Ann 73-35-25(2) and 73-35-5 (3) as authenticated by the seal of Mississippi Real Estate Commission. I ask this court to refuse to allow Appellee to hopscotch around the law in search of a rule it chooses to abide by while it ignores the rules that apply to them.

3. The issue of the MREC hearing panel's jurisdiction or lack thereof;

The MREC Hearing Panel was in error and without jurisdiction in hearing the charges made by MREC against Wade without first having a verified complaint, therefore, its finding against Wade is void.

Eubanks never sought to cancel his listing agreement after discovering what he believed to be fraudulent behaviour on his Wade's part. He reaped the benefits thus ratifying the actions on March 30th 2010 when he accepted the proceeds from the loan closing.

The Commission states they were bringing the charges.

According to Miss Ann 73-35-23 (1) The Commission is hereby authorized and directed to take legal action against any violator of this chapter. Upon complaint initiated by the Commission of (sic) filed with it.

Miss Ann 73-35-21 (1) states: The Commission may, upon its own motion, and shall, upon the verified complaint in writing of any person, hold a hearing for the refusal of license or the suspension or revocation of a license previously issued, or for such actions as the Commission deems appropriate.

My file for this case does not contain a record of a motion by the board to proceed with a complaint as required by this statute. The board speaks through its minutes. No such entries have been made submitted to the court as part the documents submitted by Appellee claiming to be part of the “entire record” There is no verified complaint from the Commission submitted to the court as part of the “entire record” other than the one the MREC agrees that John Eubanks rescinded

Kim Wade was charged with misrepresentation as to his status as a Realtor and a participant in the MLS based on a preprinted listing agreement which he entered into with Eubanks in or around July 5, 2009.

Wade was in an agency relationship with Eubanks. In fact as exclusive agent for Eubanks, Wade had more right to sell and negotiate the sale of Eubanks’ than Eubanks had. Ms Real Estate

License Law And Rules and Regulations 2006: DEFINITIONS: From Agency Disclosures page 53

Mississippi Real Estate License Law and Rules Regulation states on page 53 regarding

Agency Definitions: (a) Agency shall mean the relationship created when one person, the Principal (client), delegates to another, the agent, the right to act on his behalf in a real transaction and to exercise some degree of discretion while so acting. Agency may be entered into by expressed agreement, implied through the actions of the agent and or ratified after by the principal accepting the benefits of an agent's previously unauthorized act.

Eubanks ratified the agreement he had with his agent Wade on 3 different times. **First** when he leased purchased the house to the buyer. The listing agreement states if the property was leased, rented , sold on terms acceptable to the seller, I fulfilled the agreement . Eubanks took full advantage of my services and admits under oath he got his full asking price. The **second** time he ratified it was at the closing when he accepted the proceeds from the sale. The **third** time is when he signed the release (rescission #1) on March 30th 2010. MREC knew that it could only offer perjured testimony from Eubanks at any hearing to be held at a later date.

John Eubanks complaint against Wade with the MREC claimed that Wade misrepresented his status as a Realtor and as a member of the Jackson Association of Realtors That issue is also dealt with elsewhere in this brief.

On or about March 28th or 29th 2010 Eubanks served notice to the MREC of his request to withdraw his complaint. This is important to note that MREC had to have received the rescission notice prior to the closing. Because Eubanks drafted a letter on March 29th which was later signed and notarized on March 30th 2010 rescinding his previous rescission letter.

This paper trail is pertinent because it demonstrates that MREC knew that Eubanks was and would be willing to offer perjured testimony. MREC knew Eubanks had committed fraud before they put him on the stand. And Eubanks admitted the same in sworn testimony at the hearing. He implicated his attorneys as having endorsed his criminal behavior.

Prior to the hearing before the MREC Hearing Panel, Eubanks signed a notarized release, relieving Kim Wade et al from any and all claims made by Eubanks and thus, Eubanks fully released Wade and rescinded his complaint against Wade which he made to the MREC.

The language of the release signed by John Eubanks is as follows:

“Kim Wade acknowledges that upon payment of all sales commissions due, related to the sale of John Eubanks’ home, Kim Wade and/or Kim Wade Real Estate, and/or his agents or assigns releases John Eubanks from any and all responsibility or obligation(s) related to the real estate sales transaction closing today.

I, John Eubanks acknowledges that he is fully satisfied and hereby releases Kim Wade and/or Kim Wade Real Estate, and/or Melissa Reese, and/or Prestige Realty and Investment Co, from any and all claims and complaints made by him, against them, related in any way, to the real estate listing and sales transaction of my real property located at 1268 Lewis Drive in Terry, MS

39170. This includes, but is not limited to, any and all complaints made to The Mississippi Real Estate Commission, Jackson Association of Realtors / Multiple Listing Service.

This Agreement constitutes the entire agreement between John Eubanks and Kim Wade concerning or related in any way to the listing and sale of John Eubanks' home located at 128 Lewis Drive in Terry, MS 39170. This Agreement cannot be modified except upon mutual agreement, in writing, signed by both John Eubanks and Kim Wade.”

The mutual release above was notarized and signed by Wade and Eubanks to affirm their agreement with the terms of the release agreement. It was signed at Eubanks' lawyer's office at the closing of the sales transaction. After Eubanks submitted this release (rescission #1) to the MREC he ratified his rescission #1 of his complaint and confirmed Wade's status as procuring cause of the sale when he closed the sale of his home, wherein he received the full asking price from the sale and paid Wade's commission.

Wade challenged the authority of MREC to continue prosecuting him when there was no complaint or complainant or any valid cause to believe that Eubanks was not satisfied with the transaction. When subject matter jurisdiction is challenged, as it was and is herein, the party asserting that the court has subject matter jurisdiction has the burden of showing that it exists on the record. Once the court has knowledge that subject matter is lacking, the court (meaning the judge) has no discretion but to dismiss the action. Failure to dismiss means that the court (Hearing Panel) is proceeding in clear absence of all jurisdiction.

Wade contends that MREC lost subject matter jurisdiction to continue prosecuting him when Eubanks rescinded any and all of his charges against Wade and ratified his agreement by accepting the money from the sale. Wade further contends that for MREC or its lawyers to continue any prosecution of Wade, after receipt of Eubanks' letter of rescission #1, by or with the use of evidence or testimony supplied by Eubanks which contradicts the terms of Eubanks' rescission, would be an act of suborning perjury and would also violate ethical duties.

It is important to note that Eubanks signed a rescission with Wade which provided that any changes to that entire agreement would have to be signed and agreed to by both parties. This never happened.

Although MREC nor its attorney's should in good faith place John Eubanks on the witness stand to testify against Wade at any subsequent hearing, they did just that while having full knowledge of Eubanks notarized rescission and false statements. T - Page 156-161

Additionally, MREC and its attorneys are in error for concealing rescission documents from the record, from Wade and the file.

Eubanks apparently concocted some sort of notion whereby, in his mind, he could do nothing more than unilaterally rescind his initial rescission of his charges against me thereby automatically resurrecting his initial charges against me without mutual consent. MREC apparently agreed with Eubanks' incredible imagination because they used the testimony of a

person (Eubanks) who admitted to deliberately signing a document known to be false. (rescission #2).

The timeline is as follows: The hearing before the MREC Hearing Panel was scheduled for March 30th 2010. On or before March 28th 2010 Eubanks signed a release of any and all claims he had against Wade. Wade was entitled to rely on Eubanks' promises. Eubanks drafted a document dated March 29th 2010 to the MREC wherein he re-states his charges and claims against Wade which contradicted his letter of rescission #1. On March 30th 2010 Eubanks attends the previously scheduled real estate closing so that he can receive his monetary proceeds from the sale of his home. At this real estate closing Eubanks relied on the initial release of his charges as the basis for closing the sale of his home. After the closing, and after receiving his money, Eubanks submits to the MREC a notarized re-statement of his previously rescinded charges against Wade.

As shown in the transcript on page 143 lines 5-8, attorney John Maxey asks John Eubanks if he understands that the Commission had decided to proceed on its own based on Eubanks' complaint? Eubanks said, yes. Wade contends that the MREC cannot proceed on its own based on Eubanks' complaint because (1) Eubanks' complaint no longer exists after her rescinded it and (2) Eubanks is giving testimony before the Commission wherein he admits to lying.

This is important because during the reading of the charges against me at the beginning of the hearing, Jim King read into the record that John Eubanks was the complaining party. During the

hearing, Attorney John Maxey asks his witness John Eubanks whether he understands that the Commission had decided to proceed on its own based on Eubanks' complaint?

The official charges read at the beginning of the hearing state that John Eubanks is the complainant. John Maxey attempts to enter evidence that the MREC is the complainant. I am confused at that point and that is the reason why I stated on the record that I do not understand the charges against me. T – Page 192 lines 1-8. The fact that the reading of the charges at the beginning of the hearing are not contained in the transcript as it currently exists, will prove my assertion that record evidence has been redacted from the transcript. This is corrupt. Further proof is the fact that the existing transcript does not show the reading of any charges against me. Therefore, MREC should have to show cause why that record of events has been removed from the transcript. And if they fail to show just cause, they and their attorney's should be reprimanded accordingly.

Further, MREC cited no provision in statute or case law which would authorize them to (1) maintain jurisdiction to proceed under such circumstances or (2) to somehow revive a rescinded complaint as the basis for their charges against me or to (3) use at a hearing, the testimony of someone who previously disavowed any and all charges against me or to (4) selectively ignore Eubanks' rescission #1 while assigning credibility to Eubanks perjured and void rescission #2.

MREC never filed new charges against me and MREC would not answer my questions to them regarding my failure to understand these charges. My failure to understand the charges made by MREC was the reason and basis for my statement at the hearing found on page 192 lines 1-8 of

the transcript wherein I state that "I do not understand". This too brings MREC's and/or the hearing panel's jurisdiction into question.

When I questioned MREC's chief investigator, Jim King, about the reason for continued prosecution, I was told via email that the MREC spent too much time on this to stop.

I asked "Jim under what reasons is this complaint still being pursued?" On April 1, 2010 at 3:45 PM Jim King responded: "I am instructed by the Administrator that regardless of the fact that Mr. Eubanks has rescinded his complaint the Commission has invested time and effort in this case and is obligated to continue the investigation because of the circumstances involved.

Commission Attorney, John Maxey, e-mailed me and asked me to fax him the statement from Eubanks alleging "extortion" as the reason he was forced to rescind his complaint. He advised he would get back with me tomorrow or Monday with an opinion."

Apparently, the MREC's attorney believes that a person clearly guilty of fraudulent conduct would make the perfect witness. Additionally, despite this acknowledgment of receipt of Eubanks' rescission, that document is not in the file nor was a copy of the signed statement made available to Wade. As relevant and material as that document is, Wade contends that the MREC and its attorney set a very bad example by concealing that document and possibly others. Surely, they should have to show cause why they would engage in such reprehensible conduct. I Move that this court require them, MREC and their attorney's to show cause why they should not be found in contempt and sanctioned.

MREC should have to state the legal basis it used for revalidating Eubanks' void charges against Wade after the initial charges were rescinded. MREC should have to state their reasons for using Eubanks to provide testimony against Wade in light of the knowledge MREC had available to them at the time that Eubanks perjured himself. MREC should have to state their reasons for failing to file new charges against Wade since the first charges and the basis for those charges had been rescinded.

Although Wade objected to MREC's conduct, MREC never explained (1) their reasons for ignoring Eubanks' rescission of his charges and (2) their reasons for accepting Eubanks second statement wherein he attempted to revoke his initial rescission after receiving his money at the closing of the sale of his home. MREC never explained its reason for using the testimony of a complainant or witness at the hearing who has previously perjured himself. MREC never explained their reasons for concealing these details from Wade or the hearing panel. Wade urges this Honorable Court to require that MREC show lawful justification for its actions described above and show cause why they should not be sanctioned for their misconduct.

Thus, MREC lost any jurisdiction it may have had and this Court should dismiss the charges against Wade and this Court should also discipline MREC and its attorney's accordingly.

"No sanctions can be imposed absent proof of jurisdiction." Standard v. Olsen, 74 S. Ct. 768; Title 5 U.S.C., Sec. 556 and 558 (b).

This means that there can be no penalty or punishment, if there is no proof of the plaintiff's jurisdiction in the class of case involved. Regarding jurisdictional challenges, The United States Supreme Court held as follows:

(a). Once jurisdiction has been challenged, it is presumed that the court lacks jurisdiction unless or until the evidentiary sufficiency is provided and submitted to the record. (b). The presumption is that a court lacks jurisdiction on a particular issue until it has been demonstrated that jurisdiction over the subject matter exists. (c). The facts showing the existence of jurisdiction must be affirmatively in the record. (d). If jurisdiction is challenged, the burden is on the party claiming jurisdiction to demonstrate that the court has jurisdiction over the subject matter. (e). The limits upon jurisdiction must be neither disregarded nor evaded. (f). The requirement to submit admissible evidence upon the record proving jurisdiction once jurisdiction is challenged is mandatory. (g). The Supreme Court of the United States as well as lower courts have consistently reaffirmed the requirement that once jurisdiction is challenged those who claim jurisdiction must submit the evidence to prove the validity of the claim. MREC has failed to prove jurisdiction after Eubanks rescinded his complaint against Wade. For these reasons, the charges against Wade should be dismissed and MREC should be cautioned about this kind of impropriety and its attorney's should be sanctioned for their part in this scheme.

4. The issue of the Circuit Court's jurisdiction or lack thereof;

Wade believes that the Circuit Court has failed to have and maintain jurisdiction over this matter because the court's clerk failed to follow the requirements of Section 73-35-25 (2) "Notice of appeals shall be filed in the office of the of the court who shall have a writ of certiorari directed

to the Commission commanding it within thirty (30) days after service thereof, to certify to such court "it's entire record" in the matter in which the appeal has been taken."

Although in the past, the clerk has issued the required writ in cases like Curtis Cora Green, Broker vs Mississippi Real Estate Commission (Case # 1999-477) Docket Sheet, (Exhibit # 1), it failed to do so in my case. This failure causes me to be treated in a less than equal manner and this failure is at the root of the problems that I am having in getting MREC to be forthcoming with the records and documents I need to better prove my case on appeal. Since the MREC is not directly and officially under a command, based on a writ of certiorari from the clerk, MREC is doing things in a manner to suit themselves without regard for my right to fundamental fairness, adherence to the law and due process.

Thus, MREC has provided less than the entire record and has submitted a transcript which is incomplete and inaccurate. Appellant Moves that this Court either dismiss this matter in favor of Appellant, Kim Wade or issue its Order requiring the Clerk to issue a writ of Certiorari pursuant to law.

5. The issue of the MREC's willful spoliation of parts of the record in the matter or their authorization of same by their court reporter.

73-35-23 (1) state:

At such hearings, all witnesses shall be properly sworn and stenographic notes of the proceeding shall be taken and filed as a part of the record in the case. Any party to the proceedings shall be

furnished with a copy of such stenographic notes upon payment to the Commission of such fees as it shall prescribe.

At the hearing, notes were taken of the proceeding. Some allegedly destroyed and some retained or partially retained. The law cited above allows me the right to receive a copy of the stenographic notes. I Move this court to declare (1) what are stenographic notes and (2) what are the rights of the parties regarding the stenographic notes a party is entitled to receive upon payment of costs.

6. The issue of Christy Sievert's authority or lack thereof to notarize her own signature on documents submitted for use at trial or appeal;

MREC is in possession of an official seal to authenticate and certify its documents. Instead of certifying its record in this matter, MREC sought to pass their duty, obligation and responsibility onto Christy Sievert, (Sievert) their chosen court reporter. Wade contends that MREC should not be allowed to certify its record with a notary public seal instead of their official seal. Wade Moves that this Court declare the duties and obligations regarding the clerk's and MREC's compliance with 73-35-25 (2).

The record certified to the Circuit Court is a record which has been notarized by Sievert. In Sievert's certificate, she essentially states that she is not an employee of MREC. Wade contends that as such, Sievert cannot "certify" any record to the Circuit Court pursuant to Section 73-35-25 (2) on behalf of the MREC nor can Sievert notarize her own signature as a notary Public

based on Title 01 Part III Secretary of State of Mississippi Chapter 14 Notaries Public 205 False Certificate.(1) “A notary shall not execute a certificate containing information known or believed by the notary to be false.” Christy R. Sievert knew that by submitting a certificate (See Exhibit “B”) which is required by law, that she knows to be invalid because of her act of notarizing her own signature, she is thereby executing “a certificate containing information known or believed by the notary to be false.” This is especially so when the self notarized certificate proclaims its truthfulness on line #6.

7: The issue of Christy Sievert’s authority or lack thereof to certify a transcript or record on behalf of the MREC.

MREC is in possession of an official seal to authenticate and certify its documents. Instead of doing so in this matter, MREC seeks to pass their duty and responsibility onto Christy Sievert, (Sievert) their chosen court reporter.

The record certified to the Circuit Court is a record which has been notarized by Sievert and not certified by the Mississippi Real Estate Commission as required by law. In Sievert’s certificate, she essentially states that she is not an employee of MREC. Wade contends that as such, Sievert cannot “certify” any record to the Circuit Court pursuant to Section 73-35-25 (2) on behalf of the MREC nor can Sievert notarize her own signature as a notary Public based on Part 3 of Secretary of State chapter 14 on NOTARIES

Rule 202 Disqualifications for Notaries:

A notary is disqualified for performing one of the following acts:

1. Is a party to or is named in the document to be notarized.

In Judge Yerger's ruling of Dec 16th 2010 the court found that the issues raised with respect to the content of the record are not supported by the record transcript submitted by Christy Sievert.

Wade contends that if the Court found that the seal of a notary public equates with the official of the MREC that ruling is in error. Notary Christy Sievert's submission under her notary seal is not the certified "entire record" in the matter from the Commission as required by law. My real estate broker's license seal does not contain a notary public's seal. It contains the official seal of the MREC and so should the record which is to be submitted on appeal.

Section 73-35-5 (3) clearly states:

The Commission shall adopt a seal by which to authenticate its proceedings. Copies of all records and papers in the office of the Commission, duly certified and authenticated by the seal of said commission, shall be received in evidence in all courts equally and with like effects as the original.

If the section is to be understood to apply based on the plain language contained therein, this statute does not allow or authorize the Court to substitute a notary seal for the seal of the Commission. Absent a seal from the Commission or some proof that the Commission has adopted a notary seal as their official or alternate seal, MREC has violated the plain language of the law and thus, no record has been certified to this date.

Because the record submitted by MREC was submitted under a notary public's seal instead of the seal of the Mississippi Real Estate Commission, it has been 500 plus days that the MREC has failed to certify "its" entire record in the matter as required by Section 73-35-23 (2). Thus, this Court should dismiss the charges against Wade or order MREC to fully comply with Section 73-35-5 (3) or order the MREC to certify and submit the entire record in this matter.

The Commission does or should fully understand the purpose of the seal. It has placed its seal properly on the Order, subpoenas, licenses, etc. (See Exhibit 2a, 2b and 2c)

The court cited no controlling legal authority to support its deviation from the clear instructions in Section 73-35-25 (2) which requires "the Commission" to certify its "entire record" in the matter not Christy Sievert. Wade requests and Moves this Court to stand by the decision made by the lawmakers of Mississippi that requires the Commission to certify its own record instead of allowing the MREC to attempt to delegate this duty to their court reporter.

8. The issue of the Circuit Clerk's failure to issue a writ of certiorari to the Commission.

In order for the court to be "fully advised" requires the "entire record" be submitted to the court and that requires Appellee to comply with Ms Real Estate Law 73-35-25 (2)

Ms Real Estate Law 73-35-25 (2) states:

Notice of appeals shall be filed in the office of the clerk of the court who shall have a writ of certiorari directed to the Commission commanding it, within thirty (30) days after service thereof, to certify to such court its “entire” record in the matter in which the appeal has been taken. The appeal shall thereupon be heard in due course by said court, without a jury, which shall review the record and make its determination of the cause between the parties.

Accordingly, the issuing of the Writ of Certiorari is not optional. What the Appellee submits on its own volition does not remove their duty to submit the “entire record or the clerks duty to follow the law. In fact, the docket sheet will show that Wade filed a request directly to the clerk to issue a writ of certiorari in this matter. Wades request was completely ignored by the clerk.

The Appellee asserts that the Commission certified the record. Yet the Court’s Order of Dec 16th 2010 clearly states that Christy Sievert certified the record. But, even if her notary seal does substitute for the seal of the Mississippi Real Estate Commission. Thus said document is not authenticated per Section 73-35-5 (3) as original. Surely pursuant to the law, only one of these two has the authority. To certify the record

The Appellee has not responded to Appellants Motions to Compel or its request that the Appellee show any alleged authority to delegate certification of its record to Christy Sievert or anyone else. This failure to respond is MREC’s admission that no such authority exists. The Order does not address this failure. Hence, over 500 days have elapsed and Appellee has yet to submit a certified, authenticated record, transcript, exhibit of any kind to the court. This failure renders the Appellant unable to make all of its arguments on appeal. Therefore Appellant Moves

this Court to dismiss this matter with prejudice in favor of Appellant or in the alternative, issue its Order commanding the clerk to follow the law and the MREC to follow the law as it relates to the issues raised herein.

9. The issue of John Eubanks being allowed to offer testimony known in advance to be perjury.

As shown in the transcript on page 143 lines 5-8, attorney John Maxey asks John Eubanks if he understands that the Commission had decided to proceed on its own based on Eubanks' complaint? Eubanks said, yes.

Despite this effort to sidestep its requirement to issue a verified complaint, MREC had a duty to properly file a verified complaint and they did not do so. Thus, the MREC's Hearing Panel had no jurisdiction to hold a hearing on this matter or to hear charges against me. In addition, Miss Law requires the Commission by motion to go forward with a complaint. No such motion is part of the file in this case 73-35-21 (1). Thus, there is no verified complaint or motion from the Commission Board or evidence of minutes from their meetings authorizing the filing of charges as a part of the file submitted. Consequently, there is no jurisdiction.

10. The issue of whether the MREC must strictly comply with MRCP Rules.

In this matter it is uncontroverted that MREC has not submitted the entire record as required by law. Wade believes MREC has selectively secreted it, willfully destroyed it and/or for some

unknown reason it no longer has said record in its possession. The MREC attempts stealth and artful ways to sidestep this issue and diminish the importance of the need to live up to its obligation to certify and submit its entire record. Instead the MREC submits only the self serving remainder of the record which it chooses to submit. To allow MREC to selectively pick and choose which portions of the record to submit would be like placing the chicken in charge of the chicken feed or the fox in charge of the hen house.

Under such circumstances, the only one receiving a benefit would be the one with an unfair advantage. Surely this is not what lawmakers had in mind when they enacted Section 73-35-25 (2). The unjustified negligence of the MREC unfairly deprives Wade of his opportunity to attempt to prove salient points in his arguments regarding issues of importance to Wade. These issues are related to the MREC's violation of its own rules, its duty to provide Wade with a fair and impartial hearing, its violation of Wade's due process rights and its violation of Mississippi law as mentioned herein. MREC cannot rightly or reasonably determine that Wade does not need these documents and pleadings because MREC does not know all of the possible defenses and arguments which Wade has a desire to present on appeal. MREC and the clerk's indifference to the rules and laws of Mississippi work an unfair and unreasonable hardship on Wade and should not be allowed.

11. The issue of whether the MREC and its attorney's are authorized to provide simultaneous representation to the MREC and stenographer/court reporter, Christy Sievert in Sievert's affidavit in response to my Motion to compel. She affirms she is not an employee of MREC. Wade contends that counsel for the Appellant and prosecutor cannot

rightly represent a party employed by the State as a contractor or sub-contractor.

Especially is this true when the interests of Sievert and the MREC have the possibility of becoming divergent.

12. The issue of whether the findings of the MREC Hearing Panel was in error.

MREC Hearing Panel erroneously found Wade guilty of misrepresentation despite the evidence or lack thereof submitted at the hearing and despite the MREC's failure to prove by clear and convincing evidence all of the elements of the charges against Wade.

Wade was charged with misrepresentation as to his status as a Realtor and a participant in the MLS based on a preprinted listing agreement which he entered into with Eubanks in or around July 5, 2009.

Wade was associated with a real estate broker named Ann Prewitt and on or about June 17, 2009, he terminated his relationship with Ann Prewitt and sought a principal broker license with the Mississippi Real Estate Commission. The Commission issued a license to Kim Wade Real Estate on June 19, 2009. On or about July 9, 2009, the property owned by John Eubanks was entered into the Multiple Listing Service, hereinafter "*MLS*", by Melissa Reese and she was identified as a listing agent.

Complainant, *in error*, alleges that Respondent, upon terminating his relationship with Ann Prewitt, was required to reapply for membership in the Jackson Association of Realtors, hereinafter "*JAR/MLS*". The Bylaws for JAR/MLS established two relevant classes of

membership - REALTOR member and REALTOR member (non-principal). REALTOR members are sole proprietors, partners, corporate officers, or branch office managers, which are *"engaged actively in the real estate profession, including buying, selling, exchanging, renting or leasing, managing, appraising or others for compensation, counseling, building, developing or subdividing real estate, and who maintain or are associated with an established real estate office in the state of Mississippi."* JAR Bylaws, p. 2.

A REALTOR members (non-principal) are *"individuals who are engaged in the real estate profession other than as sole proprietors, partners, corporate officers, or branch office managers and are associated with a REALTOR Member and meet the qualifications set out in Article V."* Id.

According to Section 6 of the JAR Bylaws, when a REALTOR changes the conditions under which he holds membership, *"he shall be required to provide written notification to the Board within 30 days through the Licensee Status Form. A REALTOR (non-principal) who becomes a principal in the firm with which he has been licensed or, alternatively, becomes a principal in a new firm which will be comprised of REALTOR principals may be required to satisfy any previously unsatisfied membership requirements applicable to REALTOR (principal)."* Members *"shall, during the period of transition from one status of membership to another, be subject to all of the privileges and obligations of a REALTOR (principal)."* If the Realtor (non-principal) does not satisfy the requirements established in the Bylaws for the category of membership to which they have transferred within 30 days of their change in status, their membership will be terminated automatically. Id. at p. 9.

According to the JAR Bylaws, Respondent, Kim Wade, when he terminated his relationship with Ann Prewitt on June 17, 2009, he had up to and including July 17, 2009, to provide written notification to JAR of the change to his membership status via the Licensee Status Form. During this transition period, pursuant to Section 6 of the JAR Bylaws, Respondent had "*all of the privileges and obligations of a REALTOR (principal)*." Therefore, Respondent was a member of JAR/MLS on July 5, 2009, when he entered into a listing agreement with Mr. Eubanks and there was no substantial misrepresentation by Respondent of his status with JAR/MLS.

Respondent vehemently denies that he misrepresented his status with JAR/MLS to Mr. Eubanks and because the licensure statutes and regulations at issue are penal, this Commission is required to prove its case against Kim Wade by clear and convincing evidence. *Mississippi Real Estate Commission v. McCaughan*, 900 So.2d 1169, 1173 (Miss. 2004). The statutes and regulations at issue must be strictly construed in favor of Mr. Wade. *Id.* Furthermore, ambiguities in a regulation should be construed against the agency where the agency seeks to apply its interpretation retroactively. *State v. Beebe*, 687 So.2d 702 (Miss. 1996).

Clear and convincing evidence is the weight of proof that produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. It is evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, as to the truth of the asserted facts.

Moran v. Fairley, 919 So.2d 969 (Miss. Ct. App. 2005); Sumlerv. East Ford. Inc., 915 So.2d 1081, 1088 (Miss. Ct. App. 2005). Clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level. Id. The clear and convincing standard is where the evidence is of such real and substantial nature that impartial men of sound judgment would reasonably believe it. Aponaugh Mfg. Co. v. Collins, 42 SO.2d 431,479 (Miss. 1949).

In short, the Commission should only sanction Mr. Wade if it finds there exists clear and convincing evidence to support a violation of Mississippi Code Annotated § 73-35-21 (a) by Mr. Wade. The decision by this Commission must be (1) supported by substantial evidence, (2) not be arbitrary or capricious, or (3) beyond the power of the administrative agency to make, or (4) violate some statutory or constitutional right of the complaining party. The Commission's decision to sanction Mr. Wade would be considered arbitrary if *"it is not done according to reason and judgment, but depending on will alone."* Miss. State Dept. of Health v. Natchez Cmty. Hosp., 743 SO.2d 973 (Miss. 1999). A capricious action is defined as being *"done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles."* McGowan v. Miss. State Oil & Gas Bd., 604 SO.2d 312, 322 (Miss. 1992), defines arbitrary and capricious as follows:

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone - absolute in power,

tyrannical, despotic, non-rational- implying either a lack of understanding of or a disregard for the fundamental nature of things.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlled principles.

It is clear that *Section 6* of the JAR Bylaws gives REAL TORS a thirty day transition period to change their status and complete any additional membership qualifications. Therefore, Mr. Wade was a member of JAR/MLS at the time in question. Any other interpretation of *Section 6* is arbitrary and capricious and subject to judicial review. The plain language reading of *Section 6* provides REAL TORS with a thirty day transition period to change their status and any other reading would be irrational, fickle and arbitrary.

Membership in a Board of REAL TORS has been recognized by the courts as a valuable property right. *Mort v. North Central Mississippi Board of Realtors, Inc.*, 27 So.3d 1188 (Miss. Ct. App. 2009). As such, any action affecting the rights and privileges of a member must be justified both substantively and procedurally. *Id.* An association has a right to fix penalties and terminate membership, but penalties and termination must be determined according to some method, to which the member has agreed. *Multiple Listing Service of Jackson v. Century 21 Cantrell Real Estate, Inc.*, 390 So.2d 982 (Miss. 1980). Otherwise, the association would be allowed to arbitrarily terminate memberships and assess fines which

are clearly unjust and improper. Id. To allow an association to act in such an arbitrary and capricious manner would *"work serious loss to members and invite an abuse of authority."* Id. at 985.

In Century 21, the Mississippi Supreme Court held that private organizations, like JAR/MLS, have a right to discipline and terminate its members but a member can only be disciplined and terminated where there is written documentation regarding discipline and termination, which each member agreed to be bound by when joining the association. Id. To hold that an association might arbitrarily terminate memberships would *"invite an abuse of authority."* Id. at 986.

In the case *sub judice*, effective July 9, 2009, there existed no JAR/MLS rules or regulations which would have placed Mr. Wade or any other REALTOR on notice that their membership with JAR/MLS terminated prior to the thirty day transition period set forth in Section 6 of the bylaws when they disassociated with another REALTOR and changed their status. This premise is further supported by the December 16, 2009, email from Jo Usry of JAR/MLS to Kim Wade in which she states, *"I was wrong about your membership status. I was thinking that the mere fact that you paid REALTOR dues for 2009 your REALTOR status was still intact with your new company."* It is reasonable to presume that if Mrs. Usry, CEO of JAR/MLS, was unclear about Mr. Wade's status on July 9, 2009, that the rules and regulations do not effectively place members on notice as to when their membership terminates when they disassociated with another REALTOR and changed their status, making it arbitrary and capricious.

Because membership in JAR/MLS is a property right, JAR/MLS has a heightened duty to insure that its members are aware of the means in which their membership may be terminated. At the time in question, JAR/MLS had no rule or regulations which would support the termination of Mr. Wade's membership prior to July 19, 2009, which was thirty days after he terminated his relationship with Ann Prewitt and the Commission issued a license to Kim Wade Real Estate. As such, Mr. Wade was still a member of JAR/MLS and not in violation of Mississippi Code Annotated § 73-35-21(a) on July 9, 2009. Therefore, this Commission should immediately dismiss the charges against Mr. Wade.

CONCLUSION

The aforementioned arguments and facts constitute just cause to dismiss the charges against Wade.

The aforementioned arguments and facts constitute just cause to sanction MREC attorney's and enjoin MREC from any such similar wrongful conduct and rule violations, or in the alternative issue this Courts Order as justice deems necessary.

CERTIFICATE OF SERVICE

I, The undersigned, **Kim Wade**, pro se, hereby certify, that I have this the 28th day of December, 2011 served a copy of the foregoing **APPELLANT BRIEF** upon the following by United States Mail, First Class, prepaid and/ or hand delivery at the following addresses:

Honorable John L. Maxey II

Honorable William Hussey

MAXEY WANN, PLLC

P.O. BOX 3977

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Honorable Judge Tomie Green

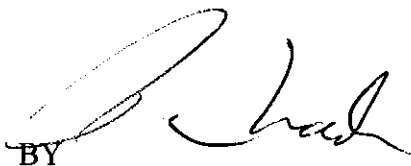
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This, the 28th day of December 2011

BY 

Kim Wade, pro se