

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FRANK L. MCWILLIAMS

FILED

APPELLANT

VS.

MAY 24 2007

NO. 2007-CA-00170

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

JOHN H. MCWILLIAMS, AS TRUSTEE OF
THE D. RIALS MCWILLIAMS TRUST, AND
INDIVIDUALLY; AND, D. RIALS
MCWILLIAMS, A MINOR

APPELLEES

**APPEAL FROM THE JUDGMENT OF THE CHANCERY COURT OF
SUNFLOWER COUNTY, MISSISSIPPI**

Brief On The Merits By The Appellant

Appellant Respectfully Requests Oral Argument

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CERTIFICATE OF INTERESTED PARTIES

Frank L. McWilliams v. John H. McWilliams, et al

NO. 2007-CA-00170

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

Honorable Percy Lynchard, Jr.
Chancellor of Sunflower County
P. O. Box 340
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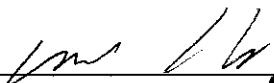
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So certified, this the 24 day of May, 2007.

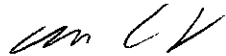


MICHAEL L. KNAPP, MSB # [REDACTED]
CERTIFYING ATTORNEY

REQUEST FOR ORAL ARGUMENT

Mr. Frank McWilliams, the Appellant herein, respectfully requests oral argument before this Honorable Court. Counsel for Mr. McWilliams contends oral argument would assist the Court in deciding the issues regarding the applicability of statutes of limitations and the tolling of these statutes.

Respectfully submitted,



MICHAEL L. KNAPP, MSB # 4203
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STATEMENT OF THE ISSUES

- I. THE CHANCELLOR ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE DEFENDANTS AND IN APPLYING THE THREE YEAR STATUTE OF LIMITATIONS UNDER MISSISSIPPI CODE §15-1-49 RATHER THAN MISSISSIPPI CODE §15-1-7, SETTING FORTH THE TEN YEAR STATUTE OF LIMITATIONS.**
- II. THE CHANCELLOR ERRED, REGARDLESS WHICH STATUTE OF LIMITATIONS APPLIED, IN HOLDING THE STATUTE OF LIMITATIONS HAD NOT BEEN TOLLED BY FRAUD.**
- III. THE CHANCELLOR ERRED IN SPECIFICALLY HOLDING THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED BECAUSE THERE WAS A PUBLIC RECORD OF THE DEED AND TRUST AGREEMENT IN QUESTION.**

STATEMENT OF THE FACTS

This action was commenced by a the filing of a Complaint to Rescind Trust Agreement and Deed, filed July 25,2005. The Complaint alleges that a Trust Agreement signed by Frank McWilliams to his son, Riles McWilliams, as Beneficiary, and a Deed signed by Mr. McWilliams to Riles McWilliams should be set aside, because of fraud and lack of mental capacity and other reasons. (R.E. 20, T. 5) The Chancellor granted a Summary Judgment Motion filed by Defendant, Riles McWilliams, based on the application of Mississippi's three year statute of limitations. (R.E. 4, T. 375)

The evidence shows that on April 23,1999, Frank McWilliams was incarcerated in the Sunflower County Jail on Burglary charges. Frank McWilliams' brother, John McWilliams, during this time, took it upon himself, to prepare a Deed and Trust Agreement without the request or knowledge of Frank McWilliams. Frank McWilliams was induced to sign the documents, without reading them, thinking they were release papers the would allow him to get out of jail and into a drug rehab treatment center. At the time of the execution of the documents in question, Frank McWilliams was under the influence of narcotics and under the duress and undue influence of his brother John McWilliams. (R.E. 11, 41, 44, 46-47, T. 315, 189, 192, 199-200)

After the execution of the aforesaid documents, Frank McWilliams was indeed released from jail and placed in a treatment center for 77 days (R.E. 51, T. 209). At the time of the execution of the documents, Frank McWilliams owned nothing that was purported to be transferred, but rather what Frank McWilliams hoped to receive from their mother's Estate when she died. (R.E. 58, 60, T. 268, 272) The McWilliams' mother

died on November 23,2002 and Frank McWilliams did inherit the property, the land and money in question. (R.E. 16-19, T. 347-350).

In his answers to Interrogatories, John McWilliams, named as a party defendant, answered that the Deed and Trust were backdated from April 23,1999 to September 14, 1998 to avoid potential Judgment creditors from seizing the aforementioned property. (R.E. 28, T. 110). In the same answers, John McWilliams said that he discussed this matter for the first time with Frank McWilliams after their mother's death on November 23, 2002. At some time after their mother's death, John McWilliams called Frank McWilliams, and John McWilliams testified, there was a long silence on the phone, indicating to him that Frank McWilliams did not know about the conveyances. (R.E. 29, T. 111).

In the deposition of Frank McWilliams, attached to the Defendant's Motion for Summary Judgment, Frank McWilliams stated that he first obtained a copy of the Trust Agreement about two years after his mothers death. (R.E. 34, T. 178) and that he did not know about the conveyances until Johnny McWilliams call (R.E. 33, 34, T. 177, 178). Frank McWilliams testified that he was still a recovering drug addict at the time of the deposition and also suffered from depression, although he was not on drugs at the deposition. Frank McWilliams detailed the particulars of his addiction. (R.E. 37-39, T. 184-186). Frank McWilliams had been an addict on painkillers, from 1985 until 1999. (R.E. 37-39, T. 184-186). Frank McWilliams had been to Jolimer Jackson Recovery Center Copec, Crossroads in Greenville, St. Dominic Medical Center, Veterans Administration, Clearview Institute in Moselle, and an outpatient at the Forrest County

Mental Health Center for his addiction. (R.E. 38-39, T. 185-186). He indicated that there may be others. During this time he had run for public office and served as Sunflower County Prosecuting Attorney for nine years.

On April 22, 1999, a day before the signing of the aforesaid documents, he received a prescription for painkillers from a dentist. He also had some pills from a prior prescription. (R.E. 41, T. 189). He had taken six hydrocodone and six to eight Darvocets, on April 22, 1999. On April 23, 1999 in jail he had taken ten to fifteen of the aforementioned painkillers. (R.E. 41-43, T. 189-191).

On the night of April 22, 1999 and morning of April 23, 1999, he wasn't unconscious but was near it. (R.E. 44, T. 192). He was told that if he did not go to treatment, there would be no bond for him to get out of jail. That is why he thought the documents he signed were an agreement to get treatment to get out of jail. (R.E. 45-48, T. 198-201). Johnny McWilliams said to him "You have to sign these papers to be released from jail" (R.E. 47, T. 200).

In the Deposition of Jane Weathersby, mother and guardian of Riles McWilliams, she stated in reference to the execution of the documents in question: "Nobody but Frank McWilliams, Johnny McWilliams and God knows what was said in that room." (R.E. 53, T. 247).

The Notary Public, Jimmy Sherman, law partner with Johnny McWilliams, back dated and notarized the signature of Frank McWilliams even though he never saw Frank McWilliams sign them. (R.E. 62, T. 277).

When John McWilliams saw Frank McWilliams at the jail, Frank McWilliams

looked “dopey” and ” confused”, He wasn’t comatose, but he was not in a good condition (R.E. 64, T.281). John McWilliams told Frank McWilliams that the Judge would not release him unless he went to a treatment center and Frank McWilliams indicated he would. “ So I asked him to sign these papers. I didn’t explain what the papers were” (R.E. 65, T. 284). Frank McWilliams did not read the documents and John McWilliams did not explain them to him (R.E. 65, T. 284). John McWilliams admitted that if a client was in Frank McWilliams’ condition he would not have drafted or allowed his client to sign them (R.E. 65, T. 284). John McWilliams told Frank McWilliams to “ Sign these papers” immediately after Frank McWilliams agreed to go into treatment (R.E. 65, T. 284). When asked if Frank McWilliams had read the documents before he signed them, would he have understood what he was reading, John McWilliams answered: “ That morning, I doubt it”. (R.E. 11, T. 315).

The Chancellor dismissed the case on Motion for Summary Judgment solely on the grounds that the three year statute of limitations had run.

SUMMARY OF THE ARGUMENT

The Plaintiff, Frank McWilliams, seeks to set aside a Deed and Trust Agreement signed by him while he was in a drug induced state. (R.E. 41-44, T. 189-192) The evidence, through testimony of the depositions of John McWilliams and Frank McWilliams, indicated that Frank McWilliams believed he was signing papers to be released to a drug rehab center. (R.E. 11, 46, 47, T. 315, 199, 200) The purpose of John McWilliams in drawing up the Deed and Trust Agreement was to set up a fraudulent conveyance to avoid creditors of Frank McWilliams. (R.E. 28, T. 110)

Jane Weathersby, mother and natural guardian of the minor Grantee and Beneficiary, Riles McWilliams, indicated that only Frank McWilliams and John McWilliams (and God) knew what happened at the jail where the documents were executed. (R.E. 53, T. 247)

Frank McWilliams, relying on the case law and statutes cited herein, argues that the ten year statute of limitations involving actions to recover land applies, at least to the Deed, and that any statute of limitations would be tolled because it would not begin to run until Frank McWilliams, acting as a reasonable man, would have discovered it. Frank McWilliams was not put on notice of the Deed and Trust with invalid recordings nor were there circumstances which would have put him on notice of the transactions. Frank McWilliams acted timely and prudently when filing his Complaint.

The Plaintiff, Frank McWilliams, would show that the acknowledgment on the Deed and Trust were defective since the Notary Public never saw Frank McWilliams sign the document, and it was backdated several months.

ARGUMENT

THE CHANCELLOR ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE DEFENDANTS AND IN APPLYING THE THREE YEAR STATUTE OF LIMITATIONS UNDER MISSISSIPPI CODE §15-1-49 RATHER THAN MISSISSIPPI CODE §15-1-7, SETTING FORTH THE TEN YEAR STATUTE OF LIMITATIONS

In granting the Defendant's Motion for Summary Judgment the Chancellor specifically held that Mississippi Code §15-1-49 (Three Year Statute) was the applicable Statute. Said Section provides:

(1) all actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) The actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

The Plaintiff asserts that the Chancellor should have instead applied Mississippi Code §15-1-7, said Section provides:

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within then years next after the time at which the right to make entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first

accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

In the case of Altman v. Kelly, 236 Miss. 109 So. 2d. 344, (1959) the issue involved a suit filed by the sole heirs of a Grantor to cancel his Mineral Deed to a Grantee. They alleged fraud and the Grantor's incompetence. The Court in Altman held that the Mineral Deed in question was recorded and the Grantor's heirs were required under the predecessor of §15-1-7, to institute of suit within ten years from the accrued of their claim. However, in that case more than ten years elapsed before they filed suit, so the heirs were not successful.

The Court in Altman noted however, that if the Grantor was under a legal disability until his death, then the cause of action would not arise until his death, citing 9 Am. Jur, Cancellation of Instruments, §45 at Page 389; "A right to cancel a deed for fraudulent practiced on the grantor arrives at the time when he discovers the fraud, and the statute applicable thereto runs against him and his heirs from that date." 1D at 389. The Court held because of constructive notice of a filed deed that there was no tolling of the ten years statute of limitations. However, it should be noted that Altman in a suit for cancellation of a recorded Mineral Deed the Court applied the ten year statute of limitations.

In Greenlee v. Mitchell, 607 So. 2d. 97, No. 89-CA-0464 (Supreme Court Mississippi 1992) involved suits to set aside Deeds, with one party a contending the 1949 Deed was valid and the other party claiming a 1953 Deed to another person was valid

(both dealt with same property).

Mitchell, one of the parties, claimed that the Grantor lacked the mental capacity to execute the 1949 Deed and that further the 1949 Deed was invalid because it was not notarized.

After extensive discussion about the procedures followed in the executions of the Deeds in question the Court held that in 1949 Deed was not valid because of undue influence and possibly confidential relationship. The Court also noted that the 1949 Deed had no acknowledgment and therefore should not have been recorded. “An unacknowledged Deed is not constructive notice to anyone.” (ID at 103). The Court applied Mississippi Code §15-1-7 and applied the ten year statute of limitations and held that statute did not begin to run until timber was harvested in 1985 and 1986 as this did indeed provide them (the supporters of the 1949 Deed) with notice of the cause of action. The Court also noted that there was no evidence of possession of Defendants to even start the statute running on behalf of the Defendants.

Accordingly, in the present case, which is a suit set aside a trust and a deed, the Chancellor should have applied the ten year statute of limitations.

In Cupit v. Pluskat, 825 So. 2d 1, 02000-CA-00663-SCT (Miss. 2002), the issue involved a suit by Mr. Reid’s heirs to set aside a Warranty Deed and a Will executed by Mrs. Reid alleging that they were a result of Cupit’s fraud and undue influence upon Reid.

The Court in Cupit after determining that undue influence had been established turned to the issue of the applicability of Mississippi Code §15-1-9 (1995) (a statute that

it is to be read with §15-1-7). A Court noted that citing Greenlee, supra that Mississippi Code, §15-1-7 (1995) has been construed to require possession by the Defendant's claiming its protection. Again, in Greenlee the Court held the ten year statute of limitations did not begin to run as soon as the cause of action existed, but only when the Grantors heirs had notice of the existence of the attempted Deed. Here, Cupit did not gain possession, with the recording of a 1982 Deed, since a Life Estate was retained by Reid. The only person who could have contested the Deed during this period was Reid herself, who was in possession (please note that in the instant case when the Deed and Trust were executed, Frank McWilliams was not in possession, nor were the Defendant's in possession of the real or personal property, and the only person who was in possession was Ms. McWilliams before her demise). The Court held that although the ten year statute of limitation would be applicable it provided no protection to the Defendant.

The Court in O'Neil Steel, Inc. v. Millette, 797 So. 2d 869, 1999-CA-01213-SCT, (Miss. 2001), a judgment creditor, O'Neil, attempted to set aside a fraudulent conveyance to avoid creditors. In a Motion for Summary Judgment, O'Neil's claim was held to be time barred by Mississippi Code §15-1-49 (1995) the three year statute of limitations. The Court in O'Neil Steel citing Kennedy v. Sanders, 90 Miss 527, 43 So. 916 (1907) indicated that the ten year statute of limitations of Mississippi Code §15-1-7 concerns ownership or possession of property. The Court noted in an instant case O'Neil Steel was simply a judgment creditor seeking to enforce a judgment lien. A judgment lien would not create a possessory interest in the property. The Court, citing First National Bank of Commerce v. Donald, 112 Miss. 681, 73 So. 723 (1917) "a judgment lien is not property

in a thing itself, nor does it constitute a right of action for the thing; rather it constitute a charge upon the thing,” ID at 724. The Court cited several cases, distinguishing them from the instance of a judgment debtor.

The O’Neil Steel case seems to show when to apply the three year statute of limitations, ie: when no possessory or ownership of land is involved.

See also case of Talbert v. Henderson, 688 F Supp 250, which indicates that a Summary Judgment would not lie on the state, stating, that the applicable statute of limitations was Mississippi Code §15-1-7 which bars actions in recovery of land not brought within ten years after the case accrued. The issue in Talbert was whether or not Mr. Tolbert was mentally competent when he executed the Deed of Trust or when the Foreclosure took place. Talbert, involved a suit to set aside these transactions.

The Supreme Court of Mississippi has repeatedly applied the ten year statute of limitations on actions to set aside Deeds and other instruments.

ARGUMENT

THE CHANCELLOR ERRED, REGARDLESS WHICH STATUTE OF LIMITATIONS APPLIED, IN HOLDING THE STATUTE OF LIMITATION HAD NOT BEEN TOLLED BY FRAUD

In Smith v. Orman, 822 So. 2d 975, 2001-CA-00252-COA, (Miss. 2002), the issue involved was an attempt by a subsequent Executor to set aside a transfer by Warranty Deed of 500 acres of land deed by the prior Executrix to her daughter alleging the Deed was invalid and executed with intent to defraud the Estate.

The Court found that the statute of limitations had expired, then turned to the issue on whether it was tolled by concealment of fraud. The Court held that in order for the creditor of the Estate must “show that he or she has made a diligent search in such matters”, 1D. At 982, quoting O’Neil Steel, *supra*, and noted that the heirs of the Estate of Fred McDonald had no reason to know in 1995 that Rebecca Smith executed a Deed on the land and that she was misappropriating Estate assets.

Bullard v. Guardian Life Insurance Company of America, 2006 So. 2d (2005- CA-00849-SCT) (2005), involved a cause of action based on fraud by Guardian Life Insurance Company of America. The Court found “it is well established that prescription does not run against one who has neither actual or constructive knowledge of the facts that would entitle him to an bring action”, 1D. at 1P 12. The Court in Bullard did not involve a dispute as to which statute of limitations applied, nor did it involve an action to set aside a conveyance, instead it is presented for the proposition of when the statute of limitations begins to run in the event of fraud.

In Barnes v. Singing River Hospital Systems, 733 So. 2d 199, 197-CA-01552-SCT, (Miss. 1999), the Court adopted the “Discovery Rule”. The action in Barnes involved the one year statute of limitations for the Mississippi Tort Claims Act which is not an issue here. However, the Court did note that in the absence of any specific discovery language in the statute of limitations, the “Discovery Rule” applied. The Court applied the “Discovery Rule” to the Mississippi Tort Claims Act. The “Discovery Rule” was set out as being when a reasonable person would have had knowledge of the action commences the running of statute of limitations. The Court in Barnes cited several cases where the “Discovery Rule” was applied in negligence product liability actions, Worker’s Compensations, actions against the Mississippi Department of Agriculture and Commerce and Legal Malpractice claims. Barnes is not a suit to set aside a conveyance, however, stands for the proposition that the “Discovery Rule” was applied to many statute of limitations under Mississippi Law.

Mooney v. Harlin, 622 S 2d 83, B-9833, Supreme Court Texas (1981), involved a case of actionable fraud where the documents were recorded in public records, the Court held the statute of limitations begins to run when it “could have been discovered by the exercise of ordinary diligence. ID at 85.

In the instant case Frank McWilliams was the subject of fraud in the execution of the Deed and Trust Agreement in question.

Frank McWilliams was also heavily drugged and had no indication, until after Frank McWilliams gained sobriety, that said conveyance existed or that Frank

McWilliams even needed to check the Public Records. The statute of limitations began to run either when John McWilliams called Frank McWilliams about the conveyances or upon the death of their mother.

ARGUMENT

THE CHANCELLOR ERRED IN SPECIFICALLY HOLDING THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED BECAUSE THERE WAS A PUBLIC RECORD OF THE DEED AND TRUST AGREEMENT IN QUESTION

In Associates Financial Service Company of Mississippi, Inc. v. Bennett, 611 So. 2d 973, 90-CA-0237 (Miss. 1992) the Court in a foreclosure dispute involving allegations of fraud held that although a defective acknowledgment has no effect as between the parties, it is not entitled to be recorded in the Chancery Court Records.

The Court in Bennett held that when the acknowledgment in a Deed was defective, the recording is not valid, except between the Grantor and Grantee, and therefore not constructive notice. The “defect” in the acknowledgement was that the Notary Public did not see the Grantor sign the document and the Grantor did not tell the Notary Public they had signed the Deed. That is clearly the case here when no Notary Public was present at the time of execution of the instruments. (R.E. 62, T. 277). See Greenlee v. Mitchell, *supra*.

Consequently, as stated by the aforementioned cases, the Deed with the defective acknowledgement and Trust with the defective acknowledgment, could not be constructive notice, nor be enough notice to make the Plaintiff aware that an action should be brought. In the instant case the Plaintiff was almost drugged senseless at the time of the execution, and did not even know to look in the Land Records for any Deed or Trust and was not aware of same until it was mentioned to him by his brother. (R.E. 29, T. 111) This information is un-contradicted in the depositions.

In the instant case, the acknowledgements were not only substantially backdated

(R.E. 62, T. 277) but the signature of Frank McWilliams was made outside the presence of the Notary, nor was it shown Frank McWilliams acknowledged to the Notary Public that he signed same. The acknowledgment is therefore defective. Although the Deed was recorded April 23, 1999, it was backdated several months, and this would have been apparent on its face by reexamination of the filing date and the documents themselves.

CONCLUSION

John McWilliams obtained Frank McWilliams' signature to convey real property and personal property which Frank McWilliams did not even own at the time. There was nothing in the Trust after its execution. These documents were executed by Frank McWilliams during a drug induced state. The evidence is clearly that this was done to protect assets of Frank McWilliams from the claims of potential creditors wholly orchestrated by John McWilliams. The acknowledgment was back dated several months and the Notary Public never saw Frank McWilliams sign said documents, hence the acknowledgment is defective.

However, there was no reason for Frank McWilliams to check the land records if he was not aware of the conveyance because of drug use and representations made to him. Either the ten year statute of limitations applies or, in the event the three year statute of limitation applies, the statute did not begin to run until a reasonable person would have become aware of it. These are fact questions, even though the facts support a tolling of the statute of limitations.

The Judgment granting Summary Judgment should be reversed and the case remanded for trial.

CERTIFICATE OF SERVICE

I, Michael L. Knapp, Attorney for Appellant, Frank L. McWilliams, hereby certifies, that on this date, I delivered, or caused to be delivered a true a true and correct copy of the above and forgoing Brief on the Merits by the Appellant to the Clerk of the Supreme Court of the State of Mississippi and mailed, by United States mail, postage fully pre-paid, to the following:

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