In the Supreme Court of Mississippi

NO. 2007-CA-00849

ANN TIMOTHY GEORGIAN,
PETER TIMOTHY GEORGIAN AND
GUS TIMOTHY GEORGIAN, *APPELLANTS*

VERSUS

GEORGIA BELDEKAS HARRINGTON, *APPELLEE*

APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

ANN TIMOTHY GEORGIAN,
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GUS TIMOTHY GEORGIAN — APPELLANTS

VERSUS — CASE NO. 2007-CA-00849

GEORGIA BELDEKAS HARRINGTON — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee, Georgia Beldekas Harrington, certifies that the following 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.

1. Ann Timothy Georgian, Appellant;
2. Peter Timothy Georgian, Appellant;
3. Gus Timothy Georgian, Appellant;
4. Georgia Beldekas Harrington, Appellee;
5. Moran M. Pope, III, attorney of record for the Appellants;
6. Kimberly L. Guthrie, attorney of record for the Appellee; and
7. Matthew W. O'Quain, attorney of record for the Appellee.

Respectfully submitted this the 20th day of December, 2007.

Kimberly L. Guthrie,
Attorney for Appellee

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STATEMENT OF THE CASE

Ms. Harrington, Appellee, hereby substantially adopts and incorporates herein the Statement of the Case, as provided by Appellants. In addition and for clarity of the record, Ms. Harrington also filed a separate Complaint for Partition against the Georgians. These cases were consolidated, pursuant to Order of the Forrest County Chancery Court on June 16, 2005. Record (hereinafter "R"), p. 9.

STATEMENT OF THE FACTS

As stated in the Appellant's Brief, the material facts in this case are not in dispute. The parties are co-owners of six (6) parcels of property. All parties wish for these properties to be partitioned. Doug Davis, court-appointed appraiser, inspected and appraised five of the six parcels.[1] Trial Exhibit (hereinafter "T.E.") 1.

Parcel 1, known as Scovill Shopping Center, is a commercial property located at 821-831 Hardy Street, Hattiesburg, Mississippi. Trial Transcript (hereinafter "Transcript"), p. 10; T.E. 1. It appraised for $310,000.00, and has an effective gross income of $62,083.00. T.E. 1.

Parcel 2, "which is a service station," is a commercial property located at 902 Hardy Street, Hattiesburg, Mississippi. Transcript, p. 17; T.E. 1. It appraised for $39,500.00 and has an effective gross income of $5,700.00. T.E. 1.

Parcel 3 is a commercial property located at 100-102 Pinehurst Street, Hattiesburg, Mississippi. T.E. 1. It appraised for $55,000.00 and has an effective gross income of $11,400.00. T.E. 1.

Parcel 4 is comprised of a three-unit office complex (103 Broad Street, Hattiesburg, Mississippi) and a residential duplex (105 Broad Street, Hattiesburg, Mississippi). T.E. 1. It appraised for $150,000.00 and has an effective gross income of $22,680.00. T.E. 1.

Parcel 5 is comprised of a mix of commercial and residential properties located in Purvis, Mississippi on Highway 11 and Logaras Circle in Logaras Subdivision. T.E. 1. Parcel 5 appraised for $158,000.00 and has no effective gross income. T.E. 1.

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[1] Although Mr. Davis did not appraise the sixth parcel of property, which is located in Harrison County, Mississippi, the parties have agreed to its value and therefore, this fact is undisputed. See Record, p. 20. As stated in Agreed Order, dated April 14, 2006, the Harrison County property is comprised of two residential

Parcel 6 was not appraised by Doug Davis. However, it contains two residential lots in Harrison County, Mississippi and the parties have stipulated that its value at $6,000.00. R., p. 20.

The location of these properties is also undisputed. Appellant Brief (hereinafter "Brief"), p. 7. Parcels 1, 2, 3 and 4, "the commercial property and the duplex are located in very close proximity to one another." Transcript, pp.8-9; See also T.E. 1. In addition, the commercial properties designated as Parcel 2 and Parcel 3 adjoin, where Parcel 3 is "directly behind Parcel 2." Transcript, p 17. As shown from the maps included in Mr. Davis' appraisal, Parcel 1 and Parcel 4 also adjoin. See T.E. 1.

The values and groupings of the properties, as assigned by court-appointed appraiser Doug Davis, as well as the location of the various properties are not in dispute and have been accepted by the parties hereto. Brief, p. 7.

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lots, valued at $6,000.00. Record, p. 20.

SUMMARY OF THE ARGUMENT

Although partition in kind is favored in Mississippi, it is not always appropriate. In this case, the Chancellor ruled that a partition in kind is not appropriate. He relied on evidence provided by court-appointed appraiser Doug Davis whose professional, expert opinion stated that an equal division of the property could not be made in kind, and that a partition by sale would "better promote the interest of all parties..." Transcript, p. 6-9; T.E. 1; Miss. Code Ann. §11-21-11.

The Georgians – Appellants – complain that the Chancellor should have provided that the property be partly partitioned in kind, using the principle of owelty. However, this argument is completely unsupported by the record. It is also unsupported by the court-appointed appraiser's expert opinion and testimony, which stated that the properties should be sold. Transcript, p. 6-9; T.E. 1.

The record **actually** supports a finding entirely opposite to Appellant's suggestion. The record provides evidence that a partition in kind would result in inequities between the parties due to the varying types of properties to be divided (i.e. income producing v. non-income producing; commercial v. residential, etc.). Transcript, p. 6-9, 42-43; T.E. 1; R. 22, 23, 26, 27. The record further supports a finding that the interest of the parties would be better promoted through a partition by sale based on the fact that certain properties at issue adjoin one another, and a partition in kind would require that opposing parties become adjoining landowners. Transcript, p. 6-9, 42-43; T.E. 1. Finally, the record supports that all the parties would receive the best value for the properties by a partition by sale.

Accordingly, this case should be affirmed and remanded for the trial court to proceed with a partition by sale immediately.

ARGUMENT

I. STANDARD OF REVIEW

The Mississippi Supreme Court has long held that it "will not disturb a chancellor's findings of fact unless those findings are ***manifestly wrong or clearly erroneous.***" *Fuller v. Chimento*, 824 So. 2d 599 (Miss. 2002)(emphasis added) (citing *Consolidated Pipe & Supply Co. v. Colter*, 735 So.2d 958, 961 (Miss.1999)) However, the proper standard of review regarding questions of law is *de novo*. *Id.* (citing *Rawls v. Parker*, 602 So.2d 1164, 1167-68 (Miss.1992)). The standard of review for property partition cases is whether the Court finds ***manifest error*** in the decision of the chancellor, and only then will the appellate Court reverse the findings of the chancellor. *Robberson v. Burton*, 790 So.2d 226 (Miss.Ct.App.2001)(emphasis added) (citing *Dunn v. BL Dev. Corp.*, 747 So.2d 284, 285 (Miss.Ct.App.1999)).

II. THE CHANCELLOR DID NOT ERR IN RULING THAT THE SUBJECT REAL PROPERTY OWNED BY FOUR (4) CO-TENANTS SHOULD BE PARTITIONED BY SALE.

A. GEORGIA BELDEKAS HARRINGTON MET THE STATUTORY REQUIREMENTS FOR PARTITION BY SALE AND THEREFORE, THE CHANCELLOR'S RULING WAS NOT MANIFESTLY WRONG OR CLEARLY ERRONEOUS.

Miss. Code Ann. § 11-21-11 provides that a Court ***shall*** Order the sale of property where the Court finds that a sale of property "will better promote the interest of all the parties than a partition in kind, or if the court be satisfied that an equal division cannot be made." Miss. Code. Ann. §11-21-11, as supplemented (emphasis added). It is undisputed that "a partition in kind is the preferred method of partition of property under Mississippi law." *Fuller v. Chimento*, 824 So.2d. 599, 601

(Miss. 2002) (internal citations omitted). However, the appropriateness of a partition by sale or a partition in kind is determined on a case-by-case basis. *Id.* A partition sale is appropriate if it will (1) "better promote the interest of all parties than a partition in kind" **or** (2) "if the court be satisfied that an equal division [of the land] cannot be made." Miss. Code Ann. §11-21-11 *(*emphasis added). It is important to note that just **one** of the statutory requirements must be met in order for a Court to order a partition by sale. *Fuller v. Chimento*, 824 So.2d. 599, 602 (Miss. 2002).

The first prong to a partition sale requires that a sale "better promote the interest of all the parties than a partition in kind..." *Id.* A partition sale would undoubtedly be in the parties' best interest in this case. R., p. 22, 23, 26, 27. Although the Georgians do not specifically admit this fact, they certainly provide a perfect example of the inequity that would result if the properties were partitioned in kind. The Georgians provide three examples of how they feel the properties could be partitioned in kind. Brief 10 - 11. Interestingly, each of these examples provides that Parcel 1, which is valued at $310,000.00 and has an effective gross income of $62,083.00, be awarded to the Georgians. Brief 10-11; T.E. 1. Parcel 1 is the most valuable piece of property, not only because of its location, but because of its ability to produce income, as evidenced from the Appraiser's Report. See T.E. 1.

From the appraisal provided by Doug Davis, court-appointed appraiser and stipulated expert witness, it is clear that Parcel 1, also known as 821-831 Hardy Street is the highest income producing property, with the ability to produce $62,083.00 annually. T.E. 1 (See document entitled "Income Approach"). There are three other income-producing properties: 1) Parcel 2, also known as 902 Hardy Street, which has an effective gross income of $5,700.00 annually 2) Parcel 3, also known as 100-102 Pinehurst, which has the ability to produce income of $11,400.00 annually and 3) Parcel 4,

also known as 103-105 Broad Street, which has the ability to produce income of $22,680.00 annually. T.E. 1. These three income-producing properties combined do not provide the value through income production that Parcel 1 can alone. T.E. 1. This example demonstrates that a partition in kind would result in an inequitable result – giving one party Parcel 1, which generates a substantial annual income, and leaving the other party with the less valuable properties.

In addition to the inequities found in the income production of the properties, several of the properties also adjoin one another, further complicating a partition in kind. Parcels 1 and 4, and Parcels 2 and 3 are adjoining properties. Transcript, pp. 9, 17; T.E. 1. The Georgians demonstrated this fact in their brief. Brief, pp. 10-11. As mentioned earlier, the Georgians provided examples of how they feel the property can be partitioned in kind. Brief, pp. 10-11. In these examples they did not provided a single scenario where the adjoining properties would be owned by the same person. Brief, pp. 10-11. By forcing the parties to become adjoining landowners, further inequities would clearly result and the parties' best interests would not be served as recognized by this Court in established case law. See *Fuller v. Chimento*, 824 So.2d 599 (Miss. 2002)

This is exemplified in the case of *Fuller v. Chimento*, where the Supreme Court upheld the Chancellor's ruling to sell the property at issue since a partition in kind would make the parties neighbors. *Fuller v. Chimento*, 824 So.2d 599, 602 (Miss. 2002). This Court held "[f]or these [property] rights to be meaningful, each property owner's use and enjoyment of his property must be shielded from unreasonable interference by others - these 'others' ranging from the faceless sovereign to one's next door neighbor." *Id.* (citing *Hall v. Wood*, 443 So.2d 834, 838 (Miss.1983)). The case at bar is exactly what this Court described in its opinion recognizing a landowner's right to be "shielded from unreasonable interference." *Id.*

Even though there is no testimony from any of the parties in this matter, clearly the filing of a lawsuit against family members is undisputable evidence that the parties cannot and do not get along. Given the tension and lack of cooperation between the parties, which has resulted in this litigation and appeal, it would certainly not be in the best interest of the parties to force them into ownership of adjoining properties.

Furthermore, Mr. Davis testified that a factor in his conclusion that the subject property should be partitioned by sale was "...the commercial property [Parcels 1, 2, 3 and part of 4] and the duplex [part of Parcel 4] are located in very close proximity to one another...I did notice that there's almost a neighborhood difference from the north side of Hardy Street to the south side of Hardy Street." Transcript, p. 9. Through Mr. Davis' process of inspecting and appraising each of the properties, he observed potential future problems that could result from forcing the parties to be adjoining landowners and he concluded that the best interests of the parties could only be served from a partition by sale. Transcript, pp. 6-9; T.E. 1.

The trial Court, who was presented with evidence through the appraiser's report and testimony, made a well founded conclusion based upon law and fact that a partition in kind would result in inequity among the parties. R., pp. 23, 27. The Chancery Court, after testimony was given in the March 29, 2007, stated as follows:

> It's obvious to me that these properties have got different characteristics and different values, different use values. There's an entire difference between what an unimproved lot in a residential area would be worth as opposed to a shopping center that's able to be ready now and that the value to somebody that's going to develop a residential lot is different for somebody that's going to actually develop it than somebody that's going to sell a lot to a developer. And taking all those things into consideration, I don't know how the property could be divided in kind easily...

Transcript, p. 42.

After the Court heard testimony from Doug Davis, the Court-appointed appraiser and stipulated expert witness, the Court was clearly not satisfied that an equal division of the property could be made. The Court allowed the parties to submit proposals for a division of the property. R., p. 18. After reviewing the submission provided by the Georgians[2], the Court still was not satisfied that an equal division of the property could be made, and ruled that "the more equitable remedy to the Complaint is to sell the properties with the proceeds to be equally divided between the parties, which is felt to be the procedure to bring the best values of the properties." R., pp. 23, 27.

The Chancellor's ruling, which relied on the testimony and report of the Court-appointed appraiser and stipulated expert, was not clearly erroneous, was in accordance with established Mississippi case law and supported by Mississippi statute, and therefore, should be affirmed.

B. GEORGIA BELDEKAS HARRINGTON PRESENTED "CLEAR PROOF" TO THE TRIAL COURT THAT THE PROPERTY IN QUESTION COULD NOT BE DIVIDED IN KIND.

The Georgians argue that Mr. Davis only offered "vague generalities" in support of his recommendation that the subject property be sold. Brief, p. 6. This is simply not true and is not supported by the Record. Mr. Davis, not only provided the Court and the parties with a Complete Summary Appraisal Report, consisting of over 100 pages, but Mr. Davis was also present in Court to

[2] The Georgians' confidential proposal, which was purportedly submitted to the Chancellor, is just that – confidential. It is completely irrelevant to this appeal as it has not been provided to Appellee, or submitted to this Court in the designation of the record. Therefore, it cannot be relied upon in the Georgian's assertion that the trial court was manifestly in error, since the "confidential proposal" is not before this Court.

testify about his findings contained in his report. See T.E. 1 and Transcript. Specifically, Mr. Davis testified that he took into consideration "the values, the location, the property type, [and] property use" in concluding that the properties could not be divided in kind. Transcript, p. 8. Mr. Davis also testified that he tried "different variations" for how the properties may be divided in kind, and "it just didn't seem possible." Transcript, p. 8.

The Georgians state that "nothing in the record indicates that Mr. Davis seriously considered" whether the property could be divided partly in kind and partly by sale. Brief, p. 9. However, the following transcript excerpt between counsel for the Georgians and court-appointed appraiser, Doug Davis at the March 29, 2006 hearing indicates that Mr. Davis did consider each option requested of him by the trial Court:

> Q: Let me ask you, did you attempt in any way before concluding that the properties should be sold, all the properties should be sold - - did you attempt - - did you do any calculations using the other two possibilities? Did you attempt to figure out how it might be done in kind?
>
> A. I've looked at the numbers, and they just - - you just try different variations, and it just didn't seem possible to me.

Transcript, p. 9.

Mr. Davis testified in Court, as well as providing evidence through his March 2, 2006 report that, in his expert opinion, the properties should be sold and proceeds divided pursuant to the ownership interest of each party. See T.E. 1, Transcript, p. 7.

Mr. Davis' opinion is clearly supported by his thorough report, which was provided to the Court and admitted as Exhibit 1 at the March 29, 2007 hearing. It is clear, through his testimony and

through his report that he deemed it impossible to partition the subject properties in kind. Transcript, pp. 7-9; T.E. 1. Mr. Davis' testimony provides clear proof to the trial court that the subject property should not and cannot be divided in kind. Further, although the Georgians feel that the appraiser did not consider whether the property could be divided partly in kind and partly by sale, they have conceded that the Chancellor did, in fact, consider and reject this option because of the aforementioned circumstances. Brief, p.9. Therefore, the Chancellor's ruling, that the property should be partitioned by sale, must be upheld.

C. THE GEORGIANS DID NOT PROVIDE ANY TESTIMONY AND/OR EVIDENCE OF ANY KIND TO REBUT THE TESTIMONY OF COURT-APPOINTED APPRAISER AND STIPULATED EXPERT, DOUG DAVIS.

The Georgians admit that they offered no other testimony at the hearing to contradict Mr. Davis' report and testimony. Brief, p. 7. In fact, they state that "it would be difficult to divide these parcels of land so that each side would wind up with properties worth exactly the same in value." Brief, p. 8. This concession on their part is tantamount to an admission that the Chancellor's ruling was the most equitable decision.

On several occasions throughout their brief, the Georgians state that there is no evidence other than that presented by Mr. Davis. Brief, pp. 2, 6, 7 and 8. However, the Georgians were well aware of Mr. Davis' expert report and recommendation to the Court, which was dated March 2, 2006, prior to the March 29, 2006 hearing. If the Georgians were dissatisfied with Mr. Davis' conclusion, they certainly could have provided the court with an alternative opinion; they could have retained their own expert to rebut the testimony of Mr. Davis; and they could have provided testimony regarding their own layman's opinion of how the property should be divided. However, the Georgians did none of these. Instead, they stipulated that Mr. Davis was, in fact, an expert in the

field of real estate appraisal. Transcript, p. 20-21. As admitted in their brief, the Georgians completely failed to object to Mr. Davis' valuation and grouping of the properties. Brief, p. 8. Moreover, although the Georgians did provide the Court with a confidential proposal[3] which purportedly outlined the manner in which the Georgians felt the property could be partitioned in kind or partly in kind and partly by sale, the trial Court rejected their proposal, and ruled that a partition by sale was "the more equitable remedy." See Brief, p. 9; R., p. 27. Clearly, the Chancellor gave the Georgians every conceivable opportunity to convince him why their proposal should be granted, and they either waived opportunities to properly present evidence or make objections.

In addition, the Georgians argue that the burden of proof was incorrectly shifted to them. Brief, pp. 4, 10. Ms. Harrington does not dispute that she has the initial burden to prove that a partition by sale is necessary. Ms. Harrington met this burden, as explained earlier, by meeting not one, but both of the disjunctive statutory requirements, despite the fact that only one was required. The Georgians, as the party opposed to a partition by sale, were certainly given multiple opportunities to put forth some effort to rebut the proof presented by Ms. Harrington. They presented nothing. The Chancellor even allowed the Georgians to brief the issue, by submitting a proposal to the Court, and they failed to provide sufficient evidence or a tenable argument supporting their request.

Furthermore, the Georgians hang their hat on the idea that the property should be divided in kind, using the principle of owelty. See Brief, pp. 4, 8, 9, 10, 11, 12. Miss. Code Ann. §11-21-13 provides that the court may order a partition in kind with owelty, "if, at the hearing, it appear ...that

[3] As stated earlier, any proposal submitted by the Georgians to the trial court has not been disclosed to Appellee or this Court, and therefore, cannot be relied on. Appellee simply argues, that whatever the content, although the content of the proposal is unknown, the Chancellor was still not convinced that a partition in kind would best serve the interest of the parties.

it would promote the best interest of the parties..." Miss. Code Ann. §11-21-13. The Georgians presented no proof whatsoever that a partition in kind with owelty would promote the best interest of the parties. Therefore, this argument should be rejected, and the ruling of the Chancellor to partition the property by sale should be affirmed.

D. THE UNSOLICITED OFFER FURTHER DEMONSTRATES THAT A PARTITION IN KIND IS NOT IN THE BEST INTEREST OF THE PARTIES.

In a final desperate attempt to find an issue in this case, the Georgians attempt to "make a fuss" over the fact that the Chancellor received an unsolicited offer to purchase some of the subject property. However, there is nothing in the Record to support the Georgians' argument that "...the 'unsolicited offer' ... was a significant – perhaps *the* significant – factor in his decision..." Brief, p. 9 (fn. 4). In fact, the Record shows that at the March 26, 2006 hearing the Chancellor had already determined that a partition by sale would be the more equitable remedy in this case as he stated "...taking all those things [different characteristics and different values, different use values] into consideration, I don't know how the property could be divided in kind easily..." R., p. 42. Therefore, any unsolicited post-hearing offer is simply a "red herring" in this case since the Georgians have articulated no issues on appeal which would warrant relief by this Court.

E. CONCLUSION

The record in this case clearly supports the Chancellor's ruling that the subject property should be partitioned by sale. The Georgians' argument that the property should be partly partitioned in kind, using the principle of owelty, is wholly unsupported by any record evidence, by any statutory law or any case law. Therefore, the ruling of the Chancellor should be affirmed and remanded to proceed with a partition by sale, with all costs and attorneys fees associated with this appeal to be assessed against the Appellant for bringing this frivolous appeal.

CERTIFICATE OF SERVICE

I, undersigned counsel of record for Appellee, do hereby certify that I have this date cause to be sent via United States Mail, postage prepaid, a true and correct copy of the foregoing pleading to the following at their usual mailing address:

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Hon. James H.C. Thomas, Jr.
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So certified, this the 20th day of December, 2007.

Attorney for Appellee