

2007-CA-01870

SCT-Appellee

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1. **CERTIFICATE OF INTERESTED PERSONS:**

The undersigned counsel of record for the Appellee, Joe S. Lewis, 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. The Appellant, Will D. Massey, individually and as co-trustee of the Massey Family Trust, P. O. Box 155, Bailey, Lauderdale County, Mississippi 39320.
2. The Appellant, Jackie M. Massey, individually and as co-trustee of the Massey Family Trust, P. O. Box 155, Bailey, Lauderdale County, Mississippi, 39320.
3. The Appellee, Joe S. Lewis, 8622 Highway 493, Bailey, Lauderdale County, Mississippi, 39320.
4. Don O. Rogers, counsel for the Appellants, P. O. Drawer 1389, Meridian, lauderdale County, Mississippi, 39302.
5. Mark A. Scarborough, counsel for the Appellee, P. O. Box 3662, Meridian, Lauderdale County, Mississippi, 39303.

This the _____ day of March, 2008.



MARK A. SCARBOROUGH, ATTORNEY FOR THE
APPELLEE

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3. STATEMENT OF THE ISSUES:

Lewis accepts the Masseys' statement of issues for the purpose of argument only, as permitted by rule 28(b) of the Mississippi Rules of Appellate Procedure, but does not in any way agree with said issues as written or expressed by the Masseys.

4. STATEMENT OF THE FACTS:

The Lewis family and the Massey family have known each other for years. The legal descriptions that describe their respective properties do not overlap, but instead share a common dividing line.

The Washingtons (Lewis' sister and brother-in-law and also predecessors in title) lost record title to their land by virtue of a 1992 tax sale for non-payment of 1991 taxes. A tax deed (trial exhibit 9) was issued on October 12, 1994, by the Chancery Clerk of Lauderdale County, Mississippi, to Hot Properties, Inc. It was recorded in the land records in the office of the Chancery Clerk of Lauderdale County, Mississippi, in Book 1361 at page 29.

The Masseys, who own real property both north and south of the Washington parcel, (record, 127) saw the Washington property advertised for sale. (record, 120). Mr. Massey negotiated with Hot Properties, and a Quitclaim Deed (trial exhibit 11) was executed in favor of the Masseys on December 26, 1994. It was recorded in the land records in the office of the Chancery Clerk of Lauderdale County, Mississippi, in Book 1385 at page 411. The legal description contained therein was

#9-B; N 1/2 S 1/2 SW NW 1/4 LESS 1 A IN NWC &
LESS THAT PT S & W RD SECTION 1 TOWNSHIP 7
RANGE 15, LAUDERDALE COUNTY, MISSISSIPPI.
PARCEL 3 121010000000015

The property described therein was not surveyed by Mr. Massey prior to its purchase. (record, 98).

The Masseys filed their Complaint to Confirm Tax Deed (trial exhibit 12) approximately three weeks after the delivery of the deed to them. This cause was assigned Civil Action No. 95-492-M in the Chancery Court of Lauderdale County, Mississippi. In their sworn Complaint the Masseys sought to confirm in themselves the same record title as that contained in the quitclaim deed to them.

The Washingtons were located and served with process. They entered their appearance, and opposed the Masseys' confirmation suit. The Washingtons agreed to and did pay the Masseys the sum of \$7,600.00 (record, 121, Appellee's Record Excerpts 18), and the Masseys executed a Quitclaim Deed (trial exhibit 10, ARE 18) in favor of the Washingtons on December 10, 1996. This instrument was recorded in the land records in the office of the Chancery Clerk of Lauderdale County, Mississippi, in Book 1450 at page 559. The legal description of the property so conveyed was as follows:

#9-B; N 1/2 S 1/2 SW NW 1/4 LESS 1 A IN NWC &
LESS THAT PT S & W RD SECTION 1 TOWNSHIP 7
RANGE 15, LAUDERDALE COUNTY, MISSISSIPPI.
PARCEL # 121010000000015

An Agreed Order of Dismissal (part of trial exhibit 12, ARE 24) was signed by Jerry G. Mason, Chancellor, in No. 95-492-M on January 27, 1997, after the parties advised the Court by motion ore tenus that the matter had been settled. The second paragraph of the Order read as follows:

"IT IS, THEREFORE, ORDERED AND ADJUDGED
that the above styled and numbered cause be and is hereby is
dismissed *with prejudice*. (The *with prejudice* notation was
written in and initialed by the attorneys for the parties.)

The validity of the Tax Deed was not submitted to the Court for adjudication,

and the tax sale was not declared void. The 1991 real property taxes assessed for the real property described within the Tax Deed (trial exhibit 9) were not paid by the Washingtons and they were not paid by the Masseys. (ARE 6).

The Masseys executed a Certificate of Trust Agreement (trial exhibit 4, ARE 26) on September 7, 1999. It was recorded in the land records in the office of the Chancery Clerk of Lauderdale County, Mississippi, in Book 1626 at page 550. The Massey property that lies adjacent to the Washington (and now Lewis) property was described in the Exhibit A (ARE 27) attached to the Certificate as follows:

"Parcel No. 4:
... and the S 1/4 of the SW 1/4 of the NW 1/4 ...
located in Section 1, Township 7 North, Range 15
East, Lauderdale County, Mississippi."

The Masseys as individuals also executed a Quitclaim Deed (trial exhibit 5, ARE 28) to themselves as "Trustees of The Massey Family Trust" on September 7, 1999. It was recorded in the land records in the office of the Chancery Clerk of Lauderdale County, Mississippi, in Book 1626 at page 553. The property that lies adjacent to the Washington (and now Lewis) property was described in said Quitclaim Deed using the same words:

"Parcel No. 4:
... and the S 1/4 of the SW 1/4 of the NW 1/4 ...
located in Section 1, Township 7 North, Range 15
East, Lauderdale County, Mississippi."

The Washingtons filed their "Complaint to Confirm Title to Real Property" (trial exhibit 13, ARE 30) in the Chancery Court of Lauderdale County, Mississippi, on November 2, 1999. The cause number was 99-1096-M, and named as Defendants

“The unknown heirs at law and devisees of Virginia Hendricks, deceased; Marvella Hendricks Colvin, if she be living, the unknown heirs at law and devisees of Marvella Hendricks Colvin, if she be deceased;

“Any and all persons having or claiming any interest, legal or equitable, to the following described property, viz:

The first parcel described therein used the same legal description as the one in the Tax Deed (trial exhibit 9, ARE 20), the quitclaim deed from Hot Properties to the Masseys (trial exhibit 11, ARE 21), and the quitclaim deed from the Masseys to the Washingtons (trial exhibit 10, RE 22).

The Masseys were not named as Defendants because they no longer had an interest of record in the property sought to be confirmed in the Washingtons; the Masseys conveyance to the Washingtons was a part of the Washingtons’ deraignment of title. (ARE 35).

A Summons (trial exhibit 13, ARE 50) was published in The Meridian Star, a newspaper of general circulation in Lauderdale County, Mississippi, for three consecutive weeks. It was addressed to the Defendants named in the caption, their heirs or devisees if they be deceased, and to

“Any and all persons having or claiming any interest, legal or equitable, to the following described property, viz:

Parcel 1: The north 1/2 of the south 1/2 of the southwest 1/4 of the northwest 1/4; less and except one acre in the northwest corner, and all that part south and west of the public road; Section 1, Township 7 North, Range 15 East, Lauderdale County, Mississippi.”

Title to the property described above was confirmed in William M. Washington and Mildred L. Washington on May 4, 2000. A Judgment By Default was signed on that date by Jerry G. Mason, Chancellor, and was entered that same date in cause no. 99-1096-M. (Trial exhibit 13, ARE 51).

The property described above was conveyed on August 13, 2002, by William M. Washington and Mildred L. Washington to Joe S. Lewis. Said deed (Trial exhibit 6, ARE 54) was recorded in the land records in the office of the Chancery Clerk of Lauderdale County, Mississippi, in Book 1840 at page 237.

Joe S. Lewis had the property surveyed by Greg Carmichael in 2004. Mr. Lewis learned that the fence was not located on the dividing line described in his deed but instead encroached upon his property. (record, 57). This was the first time that the property had been surveyed. (Testimony of Mildred Washington, record, 36 and testimony of Will Massey, record, 98). Mr. Lewis attempted to resolve this matter with Mr. Massey, and the two reached an agreement: Mr. Lewis was going to hire a surveyor to mark the property line as described in the deeds, and Mr. Massey was going to move the fence. (Testimony of Joe S. Lewis, record, 59, ARE 11, record, 79, ARE 12 and testimony of Will Massey, record, 118, ARE 17). The parties also agreed that Mr. Massey would have an easement so that he could drive around the barn. (record, 80, ARE 13).

The surveyor, Greg Carmichael, staked off the property line (record, 81, ARE 14). Mr. Lewis, Mr. Massey, and Mr. Massey's two sons were present while the surveyor staked off the line. (record, 81, ARE 14). Mr. Lewis finally met with Mr. Massey a couple of weeks thereafter, and Mr. Massey advised that he "had changed his mind and he

wasn't going to move the fence". (record, 81, ARE 14). The stakes came a great deal further over into (the Massey) property than (Massey) had anticipated (record 118, RE 14), and the agreement fell apart; Massey decided that it was giving up more property than he wanted to give up. (record124, ARE 19).

During the course of this civil action Massey began the construction of a new barn on his property. This is shown as the rectangular drawing on trial exhibit 1.

Joe S. Lewis filed a Complaint for Declaratory Judgment and Other Relief in the Chancery Court of Lauderdale County, on April 19, 2005. (Trial exhibit 29). The Defendants were Will D. Massey and Jackie M. Massey as Trustees of the Massey Family Trust. (Trial exhibit 29). The case, being cause number 05-392-M, was assigned to Jerry G. Mason, Chancellor.

The Chancellor issued his Memorandum Opinion and Declaratory Judgment (ARE 1) on July 18, 2007. The Court ordered and adjudged, inter alia,

... "that the conveyance by Will D. Massey and Jackie M. Massey to William M. Washington and Mildred L. Washington pursuant to the Exhibit 10 Quitclaim Deed signed on December 10, 1996, was a valid conveyance of the described real property and that the conveyance through the aforesaid Quitclaim Deed is a bar to the defendants' claim of adverse possession to any of the real property conveyed by and described in the aforesaid Exhibit 10 Quitclaim Deed."

5. SUMMARY OF THE ARGUMENT

The Legislature for the State of Mississippi has enacted statutes to provide for the collection of unpaid ad valorem taxes on real property. The sale of real property by the tax collector pursuant to these statutes divests the landowner of record title.

The Masseys acquired record title to their neighbors' property after it was sold for non-payment of taxes. The Masseys sold the property back to their neighbors, the Washingtons, for valuable consideration.

The Chancellor was correct in finding that the deed from the Masseys to the Washingtons was unambiguous, and not subject to interpretation. The language used therein did not limit the conveyance in any way, but made it more definite. This conveyance was without limitation or reservation, and restored record title in the grantees.

The Chancellor was also correct in finding that there was no mutual mistake in the conveyance. The Washingtons purchased the property from the Masseys to restore their record title, and that was accomplished. The Masseys' claims of mutual mistake or lack of intent are inconsistent with the later actions of the Masseys themselves.

Finally, the Chancellor was correct in finding that the conveyance by the Masseys interrupted their unasserted claim of adverse possession to a portion of the property. This civil action was filed before the ten (10) year adverse possession statute could run in favor of the Masseys, and acted as a bar to the Masseys' claim of adverse possession.

The Declaratory Judgment rendered by the Chancellor should be affirmed.

6. ARGUMENT

FIRST ISSUE

It is well established, and almost goes without saying, that there is a limited standard of review applied to appeals from chancery courts. Spence v. Scott, 806 So. 2d 296, 298 (P5) (Miss. Ct. App. 2001). The Chancellor's findings will not be disturbed by the appellate court when they are supported by substantial, credible evidence, unless the Chancellor's findings are an abuse of discretion, manifestly wrong, clearly erroneous, or the result of an erroneously applied legal standard. Williams v. King, 860 So. 2d 847, 849 (P8) (Miss. Ct. App. 2003). It is not the responsibility of this Court to redetermine questions of fact that have been resolved by the Chancellor. Jackson v. Peoples Bank & Trust Co., 869 So. 2d 422, 423 (P5) (Miss. Ct. App. 2004).

The Masseys argue that no interest in the real property passed by virtue of the 1992 tax sale. An examination of the statutes adopted by the Mississippi legislature leads Lewis to conclude otherwise.

State, county and municipal ad valorem taxes are assessed upon lands and bind the same; and all such taxes assessed are a lien upon and bind the property assessed. Section 27-35-1 of the **Mississippi Code Annotated** of 1972. Real property is assessed in the county where situated. Section 27-35-7 of the **Mississippi Code Annotated** of 1972. The land roll is prepared by the tax assessor, per Section 27-35-55 of the **Mississippi Code Annotated** of 1972, and all property in the county is identified and listed according to its ownership.

State and county ad valorem taxes are due, payable and collectible by the tax

collector and shall be paid on or before the first day of February next succeeding the date of the assessment and levying of such taxes. Section 27-41-1 of the **Mississippi Code Annotated** of 1972. If the taxes remain unpaid on the date of the sale, the tax collector, pursuant to Section 27-41-59 of the **Mississippi Code Annotated** of 1972,

“ . . . shall proceed to sell, for the payment of taxes then remaining due and unpaid, together with all fees, penalties and damages provided by law, the land or so much and such parts of the land of each delinquent taxpayer to the highest and best bidder for cash as will pay the amount of taxes due by him and all costs and charges.”

Section 27-45-3 of the **Mississippi Code Annotated** grants the owner of the property a period of two (2) years in which to redeem the tax sale. When the period of redemption has expired, the chancery clerk shall, on demand, execute deeds of conveyance to individuals purchasing lands at tax sales. Section 27-45-23 of the **Mississippi Code Annotated** states that

“When the period of redemption has expired, the chancery clerk shall, on demand, execute deeds of conveyance to individuals purchasing lands at tax sales. . . .Such conveyance shall be attested by the seal of the office of the chancery clerk, and shall be recordable when acknowledged as land deeds are recorded, and *such conveyance shall vest in the purchaser a perfect title with immediate right of possession to the land sold for taxes.*”
(emphasis added.)

These statutes make it clear that title to property can be divested from the owner by the non-payment of property taxes. The execution and delivery of the Quitclaim Deed from the Lauderdale County Tax Collector to Hot Properties (Trial Exhibit 9, ARE 20) on October 12, 1994, and its subsequent recording on November 8, 1994, had that very effect: record title was removed from the Washingtons and vested in Hot Properties. That

document became part of the chain of title; any conclusion otherwise is contrary to the purposes of the statutes quoted above.

The Masseys now argue that no interest in real property was conveyed to them by their purchase from Hot Properties (Trial exhibit 11, ARE 21). The Masseys past actions, however, are contrary to their present assertions. The Washington property lies between the Masseys' home to the north and the Massey farm to the south (record, 127), and Mr. Massey called Hot Properties as soon as he saw the Washington property advertised for sale. (record, 120). Negotiations to purchase the property were begun, and Massey testified that he paid Hot Properties \$10,000.00 for a deed to the property (record, 121, ARE 18). This deed (Trial Exhibit 11, ARE 21) was given to Mr. Massey and his wife, Jackie M. Massey, on December 26, 1994. The real property conveyed was described as

"#9-B; N1/2 S1/2 SW NW 1/4 LESS 1A IN NWC & LESS
THAT PT S & W RD SECTION 1 TOWNSHIP 7 RANGE 15,
LAUDERDALE COUNTY, MISSISSIPPI. PARCEL
#121010000000015

The deed also referenced the fact that the Grantor's interest was acquired by a conveyance through the Chancery Clerk of Lauderdale County, Mississippi. Mr. Massey had been familiar with the property for years (record, 97), and obviously knew that he was getting a deed from someone outside the Lewis and Washington families.

At this point in time the Masseys had expressed no concern about the effectiveness of the conveyance to them from Hot Properties. Instead, they hired an attorney and sought to confirm the record title they received from Hot Properties. The attorney they employed, George Culpepper, thought enough of the case to accept the

representation and file a "Complaint to Confirm Tax Deed" (Trial exhibit 12) on behalf of the Masseys. This action was filed about one month after the Masseys acquired their deed from Hot Properties, and named William M. Washington and Mildred L. Washington as Defendants. The cause was number 95-492-M in the Chancery Court of Lauderdale County, Mississippi. Paragraphs 3. and 4. of the Masseys' sworn Complaint are as follows:

"3. That the subject property is described as:
#9; North 1/2 South 1/2 Southwest Northwest 1/4 Less 1 Acre in Northwest corner and Less that part South and West Road Section 1, Township 7, Range 15, Lauderdale County, Mississippi. Parcel #121010000000015.

"4. Hot Properties, Inc. d/b/a Hot Properties obtained the title to the subject property by tax deed executed by the Chancery Clerk of Lauderdale County, Mississippi on October 12, 1994 and filed and record (sic) in Deed Book 1361 at page 29 among the land records in the office of the Chancery Clerk of said County. A true and correct copy of said tax deed is attached hereto as Exhibit "A" and incorporated herein by reference. Said Hot Properties, Inc., conveyed the subject property by quitclaim deed to the plaintiffs herein by instrument dated December 26, 1994 and recorded in Deed Book 1365 at page 411, a true and correct copy of said quitclaim is attached hereto as Exhibit "B" and incorporated herein by reference."

It appears that the Masseys and their attorney still were not worried about the effectiveness of the conveyance from the Chancery Clerk to Hot Properties, and that they had not yet doubted the effectiveness of the conveyance to them from Hot Properties.

The Washingtons were located, entered their appearance and opposed the Masseys' attempted confirmation suit. The Chancellor noted on pages 6 and 7 of his Memorandum Opinion in this civil action that:

"Attorney Culpepper *subsequently concluded* (emphasis added) that the notice to the Washingtons was insufficient . . .

Civil action number 95-492-M was subsequently settled and compromised by the litigants and an Agreed Order of Dismissal was approved and rendered by the Chancery Court of Lauderdale County, Mississippi, on January 27, 1997. The aforesaid Agreed Order of Dismissal *adjudicates* (emphasis added) as follows:

‘IT IS, THEREFORE, ORDERED AND ADJUDGED that the above styled and numbered cause be and hereby is dismissed with prejudice.’”

The wording of the Agreed Judgment was critical to the findings of the Chancellor in this civil action. No other terms or documents were referenced. The Agreed Judgment made no mention of the execution and delivery of a Quitclaim Deed from the Masseys to the Washingtons, and it did not recite the payment of \$7,600.00 by the Washingtons to the Masseys. The cause was dismissed with prejudice. Most importantly, the Agreed Judgment was totally silent as to the validity of the Tax Deed. As the Chancellor stated in his Opinion in this civil action,

“The validity of the Tax Deed was not submitted to this Court and this Court cannot find, as did the Chancery Court in Alexander v. Womack 857 So. 2d 59 (Miss. 2003), that the tax sale was void.” (ARE 7).

The Chancellor went on to state that:

“This Court finds that the Exhibit 10 Quitclaim Deed is not ambiguous. This Court further finds that Will D. Massey and Jackie M. Massey conveyed to William M. Washington and Mildred L. Washington the real property described within the Exhibit 10 Quitclaim Deed without any limitation or reservation by the Exhibit 9 Tax Deed or the Exhibit 11 Quitclaim Deed.” (ARE 7).

The Chancellor was correct in finding that these deeds became a part of the Washington (and Lewis) chain of title. Lewis further submits that he became a bona fide purchaser for

value and without notice when he purchased the property from the Washingtons, and as such he took free and clear of hidden claims or title defects. Hill v. Thompson, 564 So.2d 1, page 10 (Miss. 1989)

The Masseys also now argue that it was not their intent to convey the record title they received from Hot Properties. The Chancellor found the deed to the Washingtons to be unambiguous, and found no need to address the issue of intent. As stated by the Court of Appeals in Crawford v. Butler, 924 So. 2d 569, page 574, (Miss. App. 2005), "An instrument that is clear, definite, explicit, harmonious in all its provisions and free from ambiguity must be given effect."

Lewis submits that the "intent" of the Masseys does not matter. The tax sale pursuant to Section 27-41-59 of the **Mississippi Code Annotated** of 1972 divested the Washingtons of record title; the property that was assessed by the tax assessor was the same as that sold by the tax collector. The language that the Masseys now claim limited their conveyance to the Washingtons is really more for identification. The Washingtons record title, including that portion shown as the hatched area on Trial Exhibit 1, was conveyed to Hot Properties by the tax deed (Trial exhibit 9, ARE 20) and to the Masseys by the deed from Hot Properties (Trial exhibit 11, ARE 21). The Court was correct in finding that there was no ambiguity in the deed that followed from the Masseys to the Washingtons, (Trial exhibit 10), and no need to look for intent when none was expressed to the contrary.

Our Supreme Court spoke eloquently about the dangers inherent in the construction of an instrument in Gaston v. Mitchell, 192 Miss. 452, 4 So. 2d 892 (Miss.

1941). In that case the Court said

“Nor may appellees invoke the language of the instrument next following the quoted clause to vary its meaning. . . .

“Such construction aids are available only to interpret ambiguity. We may not follow counsel into fields of speculation as to what the grantor intended or should have intended, for we are compelled to identify his intent with his plain language.

“Ambiguity may not be created in order to make available rules of construction. Nor may courts seek out an intent in order to judge what was said, but rather must they judge what was meant by what was said.

“Construction may give force to language, but may not contradict it. We are not at liberty to support an assumed intent by striking out language inconsistent therewith. On the contrary, we must take the words and reject any intent inconsistent with their obvious and accepted import.”
Id. at page 893.

Even if “intent” is to be considered, the evidence seems clear. The intent of the Washingtons was plainly to restore record title to their property. Mildred Washington was asked on direct examination to identify Exhibit number 8:

- Q. What is that document?
- A. This is an agreement, a deed of conveyance signed by my dad and mother.
- Q. To whom does that convey property?
- A. It conveys it to William Washington and his wife, Mildred Washington.
- Q. So the short answer would be that it conveys it to you?
- A. Yes. (record, 19, ARE 9)

Mildred Washington was later asked to identify Exhibit number 10:

- Q. Who executed the quitclaim deed?
- A. Will D. Massey and Jackie M. Massey.
- Q. Who are the recipients of the property or the grantees?
- A. It went back to me.

Q. And your husband?

A. And my husband. I'm sorry. Yes. (record, 24, ARE 10)

Finally, Mrs. Washington was asked to compare the legal descriptions in Exhibit number 8 and Exhibit number 10:

Q. Does the legal description in the quitclaim deed from the Masseys in Exhibit 10 correspond with the legal description you have highlighted here in Exhibit 8?

A. Yes. (record, 24, ARE 10)

It is clear that the intent of the Washingtons was satisfied by the execution, delivery and recording of an instrument that contained the same legal description as the one they received from Mrs. Washingtons' parents. Anything less would have been unacceptable.

The intent of the Masseys at the time was arguably the same: the restoration of their record title. Mr. Massey did not survey the property before they conveyed it to the Washingtons; Mr. Massey even testified (record, 98) that he did not know of any survey until he was shown the plat (Trial exhibit 27), by Mr. Lewis. This was approximately eight years after the Masseys had executed the deed in favor of the Washingtons.

Mr. Lewis submits that a truer measure of the Masseys former state of mind is found in the testimony regarding the settlement negotiations between the parties. Mr. Lewis testified on direct examination that he and Mr. Massey tried to come up with a solution when they met in 2004:.

A. "... and, as I understand it, at the time, Massey was going to move the fence to that point.

Q. Had Mr. Massey made any representation of that fact?

A. That was the agreements we had at that time.

Q. What happened with the agreement?

- A. Well, after Mr. Carmichael had came out and did the field survey and I paid him for that, I contacted Mr. Massey at his home and we talked about it and basically he said he had changed his mind. (record, 59, ARE 11)

This same testimony was elicited on cross-examination of Mr. Lewis:

- A. "... I had an agreement with Massey--with Will, we had agreed to move the fence and I had hired Culpepper to come mark the lines to identify exactly where the fence needs to be and ... once Culpepper come back and staked the lines, Will was going to move the fence and the problem was solved." (record, 79, ARE 12)

Mr. Lewis was later asked on cross-examination about his part of the agreement:

- Q. What was your part of the agreement?
A. That I was going to pay for identifying the lines, which I did, seven hundred fifty dollars for Carmichael to identify exactly where the fence needs to go.
Q. And in return of you paying for where it should go, Mr. Massey was going to move his fence?
A. Yeah. I offered to pay half of the fence. Will said no. He said he would take care of it. (record, 80, ARE 13)

The substance of the agreement between Mr. Lewis and Mr. Massey was confirmed by

Mr. Massey on direct examination:

- Q. Could you relate those conversations with Mr. Lewis and what Mr. Lewis said and the nature of those please?
A. As I recall, they were exactly as Mr. Lewis said with some minor exception and that was that I said I would attempt to accomodate him however I could, and we talked about the right-of-way around the buildings and he said, well, we can take care of that, as he mentioned, and we got--it just wasn't any big thing at the time, and then Mr. Carmichael, Greg Carmichael, sent his crew back out and they set the stakes and these stakes came a great deal further over into my property than I had anticipated ... (record, 118, ARE 17)

Mr. Massey then summarized his thoughts on cross-examination:

Q. But the real reason then why the agreement fell apart is because it was just giving up more property than you wanted to?

A. Yes, sir. (record, 118, ARE 17)

This was the first time Mr. Massey had expressed his discontent with the record title. His expression of discontent came some eight (8) years after his delivery of the Quitclaim Deed (Exhibit 10) to the Lewis predecessors in title.

The Declaratory Judgment rendered by the Chancellor should be affirmed.

SECOND ISSUE

Again, there is a limited standard of review applied to appeals from Chancery Courts. Spence v. Scott, 806 So. 2d 296, 298 (Miss. App. 2001)

The Chancellor was correct in declining to reform the legal description in the December 10, 1996, Quitclaim Deed. (Trial exhibit 10, ARE 22). There was no prior adverse possession claim made by the Masseys that would disturb record title, there was no need to apply the rules of construction to the deed (Exhibit 10), and there was no mutual mistake.

The filing of this civil action interrupted the Masseys' claim of adverse possession Bounds v. Davis, 253 Miss. 849, 179 So. 2d. 566, page 568, (Miss. 1965). The Chancellor noted that "... this civil action was filed before the expiration of the required ten year period." (ARE 8). There was no assertion of an adverse possession claim by the Masseys prior to this civil action, and there was consequently no adjudication of an adverse possession claim in favor of the Masseys. Adverse possession must be pleaded and proved by the party who relies on it. White v. Turner, 197 Miss. 265, 19 So. 2d 825,

page 826 (Miss. 1945). In the absence of any adjudication of adverse possession, there is nothing for the Court to consider but record title.

The Chancellor was correct in finding that legal description used in the December 10, 1996, Quitclaim Deed was unambiguous. The Chancellor noted that the legal descriptions of the Lewis property and the Masseys' property do not overlap:

"The evidence is undisputed that (Lewis) is record title owner of the following described real property:

'The North 1/2 of the South 1/2 of the Southwest 1/4 of the Northwest 1/4, and all that part south and west of the public road; Section 1, Township 7 North, Range 15 East, Lauderdale County, Mississippi.' " (ARE 5)

"The evidence is undisputed that . . . Will D. Massey and Jackie M. Massey, as trustees, of the (Massey) Family Trust, are the record title owners of the following described real property:

'The S 1/4 of the SW 1/4 of the NW1/4 and the SE 1/4 of the NW 1/4 of Section 1, Township 7 North, Range 15 East, Lauderdale County, Mississippi.'"

The Chancellor found it unnecessary to go beyond the four corners of the December 10, 1996, Quitclaim Deed. (Trial exhibit 10, ARE 22), and cited Crawford v. Butler, 924 So. 2d 569 (Miss. App. 2005):

". . . An instrument that is clear, definite, explicit, harmonious in all its provisions and free from ambiguity must be given effect." Id. at page 574.

The language that the Masseys' claim limited their conveyance did nothing more

than identify the subject property more clearly. If anything, those words removed ambiguity rather than created it. The property was clearly the record title divested out of the Washingtons by virtue of the tax collector's sale for non-payment of taxes.

In their brief the Masseys submit that "... the Lewis claim to ownership of that 'lost' area rests on the 1996 quitclaim deed from the Masseys to the Washingtons ...". Lewis believes that statement is only partly true. The Masseys' deed is in his chain of title, but his claim does not rest solely on that instrument. The Chancellor pointed out in his Memorandum Opinion that

"The (Lewis) record title is based upon the Exhibit 8 Warranty Deed, the Exhibit 9 Tax Deed, the Exhibit 11 Quitclaim Deed, the Exhibit 10 Quitclaim Deed, the Exhibit 6 Quitclaim Deed and the Exhibit 7 Quitclaim Deed" (ARE 5).

Lewis was also aware of the confirmation suit filed by his predecessors in title before he commenced this civil action pursuant to Rule 57. (record, 53). The 1999 confirmation suit that was filed by the Washingtons after their receipt of the deed from the Masseys. These pleadings were before the Chancellor as Trial Exhibit 13 (ARE 30). The Chancellor summarized that confirmation proceeding in his Memorandum Opinion as follows:

"William M. Washington and Mildred L. Washington filed a Complaint to Confirm Title to Real Property in the Chancery Court of Lauderdale County, Mississippi, civil action number 99-1096-M, on November 2, 1999. They filed an Amended Complaint to Confirm Title to Real Property on February 10, 2000. The plaintiffs in the aforesaid civil action sought confirmation of title to three parcels of real property. The description in Parcel 1 was as follows:

'Parcel 1: The north 1/2 of the south 1/2 of the southwest 1/4 of the northwest 1/4; less and except one acre in the northwest corner, and all that part south and west of the public road; Section 1, Township 7 North, Range 15 East, Lauderdale County, Mississippi;'

"The defendants in civil action number 99-1096-M were: (1) The unknown heirs at law and devisees of Virginia Hendricks, deceased; (2) Marvella Hendricks Colvin, if she be living, the unknown heirs at law and devisees of Marvella Hendricks Colvin, if she be deceased; (3) any and all persons having or claiming any interest, legal or equitable, to the following described property, . . . Virginia Hendricks and Marvella Hendricks Colvin were relatives of Mildred Washington's grandfather.

"A Judgment by Default was rendered on May 4, 2000, and title to the three parcels of real property was confirmed in William M. Washington and Mildred L. Washington. Will D. Massey and Jackie M. Massey lived in Lauderdale County, Mississippi, in 1999 and 2000, but they were not aware of civil action number 99-1096-M. They were not defendants in civil action number 99-1096-M. Exhibit 13 includes a copy of the aforesaid pleadings and a copy of the Judgment by Default."

Title to the property conveyed by the Masseys to the Washingtons was confirmed in the Washingtons. George Culpepper, the Masseys' attorney in the their attempted confirmation suit, civil action 95-492-M, testified under cross-examination that the parcels "... appear to be the same." (record, 75, ARE 15).

Lewis submits that this confirmation was one of the reasons the Chancellor declined to reform the deed. (Trial Exhibit 10, ARE 22). Even though the Masseys were not named as parties, as one might expect under Rule 19 the Mississippi Rules of Civil Procedure, an argument can be made that they were not necessary. Consider the findings of the Chancellor:

- A. The Masseys made no claim of adverse possession prior to the delivery of the December 10, 1996, Quitclaim Deed to the Washingtons; (ARE 6);
- B. The validity of the tax sale was never determined or adjudicated by the Court in civil action 95-492-M; (ARE 7).
- C. The Masseys delivered the Quitclaim Deed (Exhibit 10) to the Washingtons upon the Washingtons' payment of \$7,600.00 without any limitation or reservation; (ARE 7)
- D. The December 10, 1996 Quitclaim Deed from the Masseys to the Washingtons appears in the Washington and Lewis chain of title; (ARE 5)
- E. The legal descriptions under which Lewis and Massey claim do not overlap, and they each own record title as described in their respective deeds ; (ARE 5, 6)

The deraignment of title prepared for the Washingtons' confirmation suit (Trial exhibit 13, ARE 35) did not discover any adverse claims because none had been made. Said deraignment noted that the Masseys had conveyed away their claim to the record title and were now outside the chain of title. As the Court of Appeals said in Mahaffey v. Alexander, 800 So. 2d 1284 (Miss. App. 2001),

"Persons who no longer claim any interest in the property, having conveyed it away, and against whom no personal judgment is sought, are neither indispensable nor even proper parties, except as to the grantor's warranty." Id. at page 1286. (emphasis added.)

Finally, there simply was no mutual mistake in the conveyance from the Masseys to the Washingtons. (Trial exhibit 10). The Washingtons were seeking the restoration of their record title, and they paid the Masseys to have it restored.

The Masseys subsequent actions indicate that they continued to recognize the deed record lines. In their Certificate of Trust Agreement dated September 7, 1999, (Trial exhibit 4, ARE 26) the Masseys described the property adjacent to the Washingtons (and now Lewis) under "Parcel No. 4 as

“ . . . and the S 1/4 of the SW 1/4 of the NW 1/4 . . .
Section 1, Township 7 North, Range 15 East,
Lauderdale County, Mississippi.”

In their quitclaim deed (Trial exhibit 5, ARE 28) to the Massey Family Trust, the property adjacent to the Washingtons (and now Lewis) was described and conveyed under "Parcel No. 4 the same way:

“ . . . and the S 1/4 of the SW 1/4 of the NW 1/4 . . .
Section 1, Township 7 North, Range 15 East, Lauderdale
County, Mississippi.”

The Masseys, therefore, continued to recognize the deed record line in conveyances among themselves; they cannot now argue that the Washington deed was a “mutual mistake” any more than they can argue that the deed from themselves individually to themselves as trustees was the result of a “mutual mistake”.

The Declaratory Judgment rendered by the Chancellor should be affirmed.

7. CONCLUSION

Intent is subjective, but actions are not. The Masseys' past actions are contrary to their current assertions. Consider the claims made by the Masseys in their brief.

The Masseys now claim that no interest in the real property passed to them through the deed from Hot Properties, but at the time they were willing to pay \$10,000.00 for the deed.

The Masseys now claim that their deed to the Washingtons passed no interest in the real property, even though at the time they demanded and received the sum of \$7,600.00 from their neighbors, the Washingtons.

The Masseys now claim that they didn't intend to convey the property at issue even though they did not know where the deed record lines were at the time.

The Masseys even recognized the deed record lines in subsequent conveyances between themselves individually and themselves as trustees.

Lewis was aware of the confirmation in favor of his predecessors when he purchased the subject property. He was also aware of it when he brought this Declaratory Judgment action. Lewis was unable to resolve the issue with his neighbors, and turned to the Court for a ruling on the documents in his chain of title. The Chancellor was correct in finding that the Exhibit 10 Quitclaim Deed given by the Masseys interrupted their adverse possession claim, and served as a bar to that same claim. Perhaps the Chancellor's rulings could have been broader, but the Chancellor addressed the issue before the Court. The Declaratory Judgment rendered by the Chancellor should be affirmed.

Respectfully submitted,

Joe S. Lewis, Appellee

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8. CERTIFICATE OF SERVICE

The undersigned attorney for Joe S. Lewis, the Appellee, does hereby certify that he has this day mailed by United States Mail, postage prepaid, a true copy of the foregoing Brief of Appellee to Chancellor Jerry G. Mason at Post Office Box 5681, Meridian, MS 39302, and to the Honorable Don O. Rogers at Post Office Drawer 1389, Meridian, MS 39302.

This the 10th day of March, 2008.

Mark A. Scarborough
Mark A. Scarborough