IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WALTER F. GANDY and
CHARLES H. GANDY — APPELLANTS

VERSUS — CASE NO. 2008-CA-00077

GEORGE FORD
DAVID EISWORTH, CHRIS HITT,
FIRST FEDERAL BANK FOR SAVINGS
SOUTH PARK — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

1. Walter F. Gandy and Charles H. Gandy, Appellants
2. George E. Ford, David Eisworth, Chris Hitt, and First Federal Bank for Savings, south Park, Appellees
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5. Honorable Judge James H. C. Thomas
   P.O.Box 807
   Hattiesburg, MS 39403

Respectfully submitted, on this the 19th day of December, 2008.

Renee McBride Porter
MSB[redacted]

Respectfully submitted, on this the 19 day of December, 2008.

Renee M. Porter

Renee McBride Porter

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STATEMENT OF THE ISSUES

1. Whether the Court committed manifest error and abused its discretion in setting aside a Bill of Sale that is clear and unambiguous?

STATEMENT OF CASE

On September 8, 2000, a Complaint to Equitable lien and Waste was filed by Walter F. and Charles H. Gandy against David Eisworth and George H. Ford. Summons was issued and returned. That on October 17, 2000, an Answer to the Complaint and Motion for Dismissal as to David Eisworth and for Guardian Ad Litem as to George E. Ford was filed. That on May 3, 2001, an Amended Complaint was filed by the Plaintiffs, after a court appearance, wherein First Federal Bank For Savings and Chris Hitt were joined. That First Federal Bank for Savings filed an Answer and subsequently a Default Judgement was entered against the Plaintiffs and in favor of First Federal Bank for Savings. That First Federal Bank For Savings was awarded their attorney's fees against Plaintiff, and they ultimately collected the same through garnishment proceedings. That finally on October 13, 2001, a summons was issued to Chris Hitt. That on February 11, 2002, Chris Hitt and David Eisworth entered their Answer. That this Court ordered for George E. Ford to have a psychiatric evaluation. That on October 21, 2003, Barbara Eisworth, the duly appointed conservator for George E. Ford moved to set aside that certain deed filed for record in Book1105 at Page 558 of the Chancery Court records of Marion County, Mississippi. That this matter was ultimately tried on May 13,2004. That the Court rendered a Judgement herein on December 6, 2007.

This Court found that George E. Ford was related by marriage to Walter F. Gandy an, d his son. Charles H. Gandy, (the Plaintiffs and Appellants herein) and that he sold by Warranty Deed approximately 26 acres of real property situated in Marion County, Mississippi, in 1992 for $14,000.00, retaining a life estate, as recorded in land deed book 1105 at page 558 in the office of the Chancery Clerk of Marion County, Mississippi (Exhibit 1 at the trial level). That further at the same

time George Ford executed a Bill Of Sale for numerous items of personal property including, *inter alia*, a Ford tractor, bush hog, and disc (Exhibit 2 at the trial level). Ford signed a receipt for $14.000.00 that he received (Exhibit 3 at the trial level). The Court further found that on March 31, 1993 George Ford executed a Bill Of Sale to Walter F. Gandy and Charles H. Gandy selling 1 Ford tractor (3930) CA 554C BD 32549 and 1 Tufline disc Model TH 92020BP Serial # A219. Ford reserved a life estate in the items (Exhibit 4 a the trial level).

The Court found that there was testimony that Ford took the $14,000.00 received for the land and purchased the Ford tractor conveyed by Exhibit 4. The tractor and other personal items remained in Ford's possession and he used them for various purposes.

Sometime later Chris Hitt obtained a Bill Of Sale for the tractor and disc from Ford (Exhibit 8 at the trial level) for which he paid $8,500.00 as evidenced by financing documents with First Federal Savings and Loan (Exhibits 7 and 9 at the trial level). The Court found that Hitt testified he did not know of Ford's 1993 Bill Of Sale to the Gandys, and took possession of the tractor at the time of that sale.

The Court found specifically that "Of the eleven witnesses who testified at trial, eight told of Ford having a drinking problem with beer over the years and that he was eccentric in his personality in that he hollered a lot at times." The Court found that Ford also had health problems which incapacitated him at times. The Court also found that Ford was single and basically a spartan life, living by himself in a camp atmosphere with held at time from family and friends. The Court found from Ford's testimony at trial that the Court found him to be rambling with some comprehension problems but, of the questions asked, he was responsive.

The Court specifically stated that Ford testified and stated, "...some of that stuff I didn't sign" and that "I sold them the land in good faith, There was supposed to be nothing but land." He recalled receiving the $14,000.00 for the land but stated it was not enough."

The Court specifically found that " There was no showing of lack of incapacity by Ford at the time of the 1992 deed execution, the 1993 tractor transfer, or, for that matter, at the time of the transfer of the tractor to Hill. Although there may have been times due to his drinking or medical problems he was not of a capacity to enter into a legal transaction for him when the actions in question are taken." The Court therefore found that Ford had capacity to execute the 1992 Warranty Deed for which he received $14,000.00 in consideration and that instrument conveyed good title. The Court further found that there was no showing of consideration for the 1993 tractor transfer and that, coupled with the testimony of Ford that he only intended to transfer the land, leaves the Court with a finding that the 1993 Bill Of Sale of the tractor to Plaintiffs is void. The Court specifically found " It would not seem logical nor the action of a competent man to take the money from the sale of land, purchase another tractor and intend for the tractor to be part of the same value for the purchase of the land. The Court finds that was not Ford's intent nor did the 1993 Bill of Sale have adequate consideration based on the evidence presented."

Appellants have now appealed.

STATEMENT OF THE FACTS

George Ford was an older man (84 at the time of the trial) and testified that on October 2, 1992, he signed a Warranty Deed conveying 26 acres in rural Marion County to Walter F. Gandy and Charles H. Gandy. Mr. Ford was paid $14,000.00., for the land. Mr. Ford took the $14,000.00., and put $3,000.00., of his money with the same and purchased a Ford tractor. Then Plaintiffs allege that on March 31, 1993, Defendant George Ford sold to Plaintiffs the Ford Tractor (3930) CA554C BD 32549 and reserved a life estate to the above property with no additional compensation.

George Ford had to be cared for by numerous individuals including Barbara Eisworth. George expressed to Barbara that he would like to sell his tractor. George Ford sold to Chris Hitt the tractor. Chris borrowed the funds from First Federal Bank for Savings. Possession of the tractor was transferred to Chris.

George Ford was unable to handle his affairs, and the Court appointed Barbara Eisworth as his conservator. Barbara, on behalf of George, filed a motion to set aside that certain Deed filed for record in the land records of Marion County in Book 1105 at page 558.

The Court appointed a guardian ad litem, Forrest Dantin, for George Ford. Mr. Dantin stated that he was not able to determine whether or not George Ford had capacity or not to execute that certain Warranty Deed and Bill of Sale. There was testimony including introduction of certain medical records from the Veteran's Administration which stated that Mr. Ford did not have capacity to execute that certain Deed and Bill of Sale.

This matter proceeded to trial wherein the Appellants attempted to prove that George Ford sold his 26 acres of land to them and used the money from the sale putting $3,000.00., more of his

money with the same and then sold to Appellants the tractor and other various and as sundry personal property.

ARGUMENT

I. The Chancellor will not be overturned unless he made a decision that was in manifest error.

This Court heard this matter, observed witnesses, and viewed exhibits. The Appellants feeling aggrieved have now appealed. The law has long been that " This Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard" See Johnson v. Johnson, 650 So. 2d 357 (Miss. 1994). See also McEwen v. McEwem, 631 So. 2d 821, 823 (Miss. 1994).The only way an appellate court can reverse a chancellor's ruling of fact is when there is not "substantial, credible evidence" to justify his findings. The Court referenced Parsons v. Parsons, 678 So. 2d 701,703 (Miss. 1996), saying the award on appeal will not be disturbed unless it is found to be against the overwhelming weight of the evidence or manifestly in error. The court in Carr v. Carr, 480 So. 2d 1120 (Miss. 1985) stated that " Findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong; this is not whether the finding relates to evidentiary fact questions, or to ultimate fact questions" Tucker v. Tucker, 453 So. 2d 1294 (Miss. 1984). The Court went on to conclude that if there is evidence in the record that support the chancellor's finding of fact, then the finding should not be disturbed. "The Court is bound by the findings unless it can be said with a reasonable certainty that those findings were manifestly wrong and against the overwhelming weight of the evidence." Torrence v. Moore, 455 So. 2d 778 (Miss. 1984). "An appellate court is not at liberty to overturn decisions of the chancellor unless they are manifestly in error." Devereaux v. Devereaux, 493 So. 2d. 1310 (Miss. 1986). The Devereaux court stated again

that they would not reverse the chancellor's finding of facts on contradictory testimony unless it is manifestly wrong. The law is specifically that "[this Court will not disturb the factual findings of a chancellor when supported by substantial evidence unless it can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." Morgan v. West, 812 so.2d 987, 990 (Miss. 2002); Cummings v. Benderman, 681 So.2d 97, 100 (Miss. 1996). Further, in order to disturb the findings of a chancellor this court must find that the chancellor has abused his discretion, was manifestly wrong or has made a finding which was clearly erroneous. See Bank of Miss. V. Hollingsworth, 609 So.2d 422 (Miss. 1992). The chancellor's determination regarding the weight and credibility of witnesses is given deference when there is conflicting testimony. See. Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys., 789 So.2d 771 (Miss. 2001); Murphy v. Murphy, 631 so.2d 812 (Miss. 1994); Culbreath v. Johnson, 427 so.2d. 705 (Miss. 1983).

The record supports this decision. Please find the following excerpts from the record:

1. The testimony revealed George did holler at times (Record, page19 Line 13-21) "

"Q. And in '92 you would admit that he would have these hollering matches?

A. Yeah."

2. That the Appellants state that they built the home for George Ford, however the record reveals (Page 22 Line 25-27)

"Q. And did you pay for the materials?

A. Some of it. He paid for a lot of it himself."

(Page 23 Line 9-11)

"Q. So you didn't build him the house, you just assisted him in building this house?

A. You could say that."

3. The record on (Page 24 Line 12-19) reveals that the Appellants received

"Q. Fourteen thousand dollars for 26 acres of land and the property described on the Bill of Sale. Let's go to Exhibit – I'm going to direct your attention to Exhibit 4 first. Exhibit 4 is the second Bill of Sale where he conveyed to you the Ford tractor bearing Serial No. CA554CBD32549; is that correct?

A. That's it. "

(Page 29 Line 3-14)

Q. There is no receipt. All right. So you got this tractor that's listed on this Bill of Sale marked in Exhibit 2.

A. Right.

Q. And you initiated this lawsuit about this other tractor, the one that's on Exhibit No.3 - -

A. That's right.

Q. - - That cost seventeen or eighteen thousand dollars, right?"

4. When questioned "Q. It doesn't sound fishy to you that an old man sells his 26 acres of land and everything he's got on that property for $14,000and takes that $14,000 and goes and buys a tractor and then gives the tractor to the man who gave him the $14,000? That doesn't sound fishy?

A. No, it doesn't. You know, if I make a deal with you, if I want to sell you something and I say this is what I want for it, do you sit there and argue with me that your not asking enough for it? I

mean, in the business world you pay what the guy ask for it, and that's what he asked for it." (Record Page 30, lines 18-29)

5. It was brought out that Mr. Ford did not prepare the documents and was not an educated man (Record Page 31 Line 16-23)

"Q. But you agree that Mr. Ford didn't have anything to do with the preparation of the deed to the bills of sale?

A. No, he didn't.

Q. And you would agree with me - - what is Mr. Ford's level of education?

A. I suppose he's probably maybe - - maybe he went to high school. I don't know."

6. George Ford himself testified (Record Page 105 Line 17-27) that "I sold them the land, yes. I sold them the land in good faith." When questioned if he sold the Gandys his personal property, his truck, his tools and feed spreader? He replied" "Ain't supposed to be nothing but land."

7. Chris Hitt testified (Record Page 135 Lines 3-15) that he purchased the tractor and borrowed funds to purchase the tractor. He further testified that he paid notes on the tractor. He stated " I did. I had it taken out of my checking account."

The record is complete to support the decision of the Chancellor that George Ford never intended to sell the tractor and it would be unequibable to enforce that decision. .

II. The Court was correct in finding that there was no intention to transfer title to the tractor.

Appellant argues that this Court must look at the contract signed by the parties and enforce the same. First of all, the competency of George E. Ford is at question. Secondly, the

Contract is on it's face unconsiciable. The Plaintiffs chose their equitable forum. The Appellees asked for the lower court to not only set aside the tractor sale but also the sale on the real property. The record reveals that the Appellants paid Appellee $14,000.00., for twenty-six acres and numerous listed personal property. The Appellants would also have the Court believe that it was the intent of George Ford to take the $14,000.00., and put $3,000.00., of his money with the same and buy a tractor and then sale the tractor to Appellants. The Court found that this was not the intent of George Ford.

This Court has upheld the application of equity to contract situations. The case of Alliance Tr. Co., Ltd. v. Armstong, 185 Miss. 148 (1939) 186 So. 633, provides " It is plainly upon the principle that a man cannot profit by his own conscious wrong that equity will reform at the instance of one taken advantage of while in error of a material fact. Generally it may be said that equitable relief by way of rescission will be given from a unilateral mistake relating to a material feature of the contract of such grave consequence that enforcement of the contract would be unconscionable, if the party making the mistake was in the exercise of ordinary diligence, and relief can be given without serious prejudice to the other party, aside from the loss of his bargain. 9 Am. Jur., sec. 33, page 378; 59 A.L.R. 809; Hurst v. National Bond & Investment Co., 117 So. 792, 59 A.L.R. 807.

" A unilateral mistake accompanied by other facts may be sufficient, however. It is said that mistake may be a good defense where hardship amounting to injustice would be inflicted on a party by holding him to his apparent bargain and where it is unreasonable to hold him to it. 12 Am. Jur., sec. 133.

In the case at hand, George Ford did not intend to sale the tractor. He made a mistake. The lower Court recognized the mistake and reformed the Contract to reflect the same.

Clinton Service Co. v. Thornton, 233 Miss 1 (1958), quoted 5 Williston on Contracts, Section 1425, p. 3990: and stated ". . . it maybe said that wherever a contract though legally valid is grossly unfair, or its enforcement opposed to good policy for any reason, equity will refuse to enforce it, and though certain kinds of unfairness may be classified, equity declines to make an exact inventory of what amounts to such unfairness or impropriety as will preclude relief, but leaves a border land where the court can consider the particular facts of each case and deal with it on its merits. So, if the contract is unconscionable in its terms, equity will not enforce it." 2 A.L.I., Rest. Contracts, Section 367; 81 C.J.S., Specific Performance, Section 18.

In this case it is unconsiciounable to allow someone to sell their land for $14,000.00., and put $3,000.00., of their own money with the $14,000.00., and then sale the item bought with the $17,000.00., for no additional consideration.

In this case there was no clear meeting of the minds. Everett v. Hubbard, 199 Miss 857 (1946) "There can be no contract without the mutual meeting of the minds of the parties thereto. 6 R.C.L. 620, Sec. 41.

The chancery courts of Mississippi decree reformation where a written instrument does not express the intention of the parties at the time the contract was made. Courts will not make a new agreement for the parties, but will reform their written instrument so it will express their true bargain. Brimm v. McGee, 119 Miss. 52, 80 So. 379; Smith et al. v. Federal Land Bank of New Orleans, 178 Miss. 600, 173 So. 673; Dead River Fishing & Hunting Club v. Stovall, supra; Merchants' and Manufacturers' Bank v. Hammer, 166 Miss. 383, 148 So. 641; McDaniel v. Inzer (Miss.), 52 So. 359; McAllister v. Richardson, 103 Miss. 418, 60 So. 570.

This Court has authority to not enforce the Bill of Sale and the Court's decision should be affirmed.

III. Chris Hitt was a bona fide purchaser for value.

Chris Hitt bought the tractor from George Ford, who had possession, and borrowed funds to buy said tractor. Chris had no idea that any one had a claim to the tractor. A conveyance, which acknowledges payment or receipt of valuable consideration is prima facie evidence that the grantee therein (Chris Hitt in the instant case) was a bona fide purchaser for a valuable consideration without notice. *Robertson v. Dombroski,* 678 So.2d 637 (Miss.1996), citing *Rollings v. Rosenbaum,* 166 Miss. 499, 148 So 384 (1933), *Burks v. Moody,* 141 Miss. 370, 107 So. 528.

In this case there is no dispute that Chris Hitt paid $7,000.00, to George Ford for the tractor.

Lacking evidence that attacks the consideration given by Chris Hitt to George Ford, and lacking evidence showing that Chris Hitt, and/or David Eisworth, had actual knowledge of the claim of the Plaintiffs against the property, it must be concluded that Chris Hitt was a bona fide purchaser for value without notice. No such evidence exists, and Chris Hitt was a bona fide purchaser for value without notice.

A bona fide purchaser is "one who has in good faith paid a valuable consideration without notice of the adverse rights in another." *Harrell v. Lamar Co.,* WL 2277310 (Miss. App. 2005). Thus, there are three requirements/elements for a bona fide purchaser: (1) valuable consideration, (2) good faith, (3) absence of notice. *Memphis Hardwood Flooring Co. v. Daniel,* 771 So.2d 924, 933 (Miss. 2000). Valuable consideration is defined as being "paid by one who, at the

time of his purchase, advances a new consideration, surrenders some security, or does some other act which, if his purchase were set aside, would leave him in a worse position than that which he occupied before the purchase." *Buckley v. Garner*, 2004-CA-00158-COA (Miss. App. Ct. 2005).

The most important of these three appears to be notice. In *Credit Lyonnais v. Koval*, 745 So.2d 837 (Miss. 1999), the State Supreme Court held, "Our statutory and case law indicates that a purchaser is charged with actual notice of facts of which he has actual knowledge; and, where the purchaser has knowledge of facts which would cause a reasonable person to inquire, he is charged with inquiry notice of those facts which could be uncovered by diligent investigation."

Furthermore, notice can be either actual or constructive. As stated in *Sun Oil Co. v. Broadhead*, 323 So.2d 95 (Miss. 1975),

> "So, it has been held that, under the particular facts and circumstances, a party is not an innocent purchaser if he had notice of a prior conveyance, or if he knew of the mistake or of the other's claim before he paid the purchase price; neither is he, if he was conscious of having the means of such knowledge and did not use them as an ordinarily prudent and diligent person would have done, or if there were circumstances sufficient to put him on inquiry. If there were circumstances which, in the exercise of common reason and prudence, ought to put him on particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would have given him."

> Moreover, Miss. Code Ann. § 75-1-201(25), provides in pertinent part,
> "A person has 'notice' of a fact when:
>
> 5. He has actual knowledge of it; or
> (B) He has received a notice or notification of it; or
> (C) From all the facts and circumstances known to him at the time in question he has reason to know that it exists. A person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it. 'Discover' or 'learn' or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not

determined by this code."

In the case at hand, Chris Hitt did not know, or have reason to know, that the tractor had been previously conveyed to the Gandys. George E. Ford had possession of the tractor. George E. Ford sold the tractor to Chris Hitt. Also, it is clear Chris Hitt gave valuable consideration for the tractor by financing it with First Federal Bank. Lastly, there is no evidence indicating Chris Hitt acted in bad faith. Therefore, Chris Hitt is a bona fide purchaser as defined by law.

CONCLUSION

The Chancellor was correct in his Judgement setting aside the sale of the tractor and his decision is supported by the law and evidence in this case and must be affirmed with all costs being assessed to Appellants.

CERTIFICATES OF SERVICE

I, RENEE MCBRIDE PORTER, do hereby certify that I have caused this day a true and correct copy of the above and foregoing Appellee Brief to be forwarded via U.S. Mail postage prepaid to the following at their usual and last known mailing address:

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Dated this the 19th day of December, 2008.

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CERTIFICATE OF SERVICE

I, RENEE MCBRIDE PORTER, do hereby certify that I have caused this day a true and correct copy of the Appellee Brief to be forwarded via U.S. Mail postage prepaid to Dreher Law Firm, Hon. William W. Dreher, Jr, P. O. Box 968 Gulfport, MS 39502.

Dated this the 6th day of January, 2009.

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