

**SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

CASE NO. 2008-TS-01669

JULIA WALLS, ET AL

APPELLANT (S)

VS

SHERMAN IVY

APPELLEE

**APPEAL FROM THE CHANCERY COURT
OF CLAY COUNTY, MISSISSIPPI**

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this 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. Julia Walls, Appellant
2. Benny L. Jones, Jr., Attorney for Appellant
3. Sherman Ivy, Appellee
4. Randolph Walker, Attorney for Appellee
5. Honorable Jim Davidson, Chancellor

This the 20 day of August, 2009.



RANDOLPH WALKER
ATTORNEY FOR APPELLEE

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BRIEF OF APPELLEE

I.

STATEMENT OF THE ISSUES

- 1. Whether Summary Judgment was proper on the Appellees' Motion For Summary Judgment where there were no genuine issues of material fact warranting a trial on the merits.**
- 2. Whether this case should be remanded for further proceedings to allow Appellants an opportunity to file a First Amended Complaint which would not include new material facts to make a triable issue.**

II.

STATEMENT OF THE CASE

i.

PROCEDURAL HISTORY

On March 11, 2003, Appellants filed a complaint in the Chancery Court of Clay County, Mississippi, requesting the court to set aside a deed filed for record January 29, 1974. Appellants alleged they discovered in 2002 that the deed was for six (6) acres and not one acre. The request before the Court was to have the deed reformed to read one acre as opposed to the six acres as stated in the instrument on record.

After the Appellant and Appellee completed discovery, both parties filed competing Motions for Summary Judgments. At the hearing on the competing Motions for Summary Judgments on August 29, 2008, the Chancery Judge of Clay County, Mississippi entered an order denying the Appellants' Motion for Summary Judgment and granting Appellee Motion for Summary Judgment. It is from this order the Appellant, Julia M. Walls, appeals.

ii.

STATEMENT OF FACTS

On March 11, 2003, Julia M. Walls, R. C. Holliday and Stella Coleman filed suit against Sherman Ivy in the Chancery Court of Clay County to have a deed reformed reducing the acreage stated in the deed of six (6) acres to one (1) acre. The land in question is part of the property belonging to the Julia Holliday Estate, which was never probated. Sherman Ivy is the widower of Christine Heard Ivy one of the heirs to the Julia

Holliday Estate. He and his late wife are the parents of two adult children who were not made parties to this litigation, although Appellee and his wife owned the property as tenants in common. The deed to Sherman Ivy and wife, Christine Heard Ivy, was duly recorded after execution by all heirs and a home constructed on the property where they claimed homestead. Appellee still resides on the property.

The late Christine Heard Ivy is an heir to the Julia Holliday Estate and her interest in the Estate exceed the amount of property covered in this six (6) acre conveyance. Appellants failed to include all parties with an interest in the Julia Holliday Estate including the two adult children of the Appellee as required under Rule 19 Mississippi Rules of Civil Procedure (joinder of persons needed for just adjudication).

Although the Appellee and his wife occupied the six (6) acres twenty nine (29) years, Appellants took no action to get the deed reformed for twenty-nine (29) years.

Appellant, Julia Walls, alleged in her affidavit that she did not sign the deed and someone forged her name. Ms. Walls lives in Illinois and the deed was notarized in Illinois. Ms. Walls further states that she intended to convey one (1) acre rather than six (6) in her pleadings requesting the trial court to reform the deed to one (1) acre.

Appellee has lived continuously on the six (6) acre tract after the deed was executed and had a house constructed in 1974 where he and his family lived. Also, Appellee has openly occupied the six (6) acre without interference from Appellants and the other heirs to Julia Holliday who lived nearby.

III.

SUMMARY OF THE ARGUMENT

The order granting Appellees' Motion for Summary Judgment should be affirmed in this cause for the following reasons:

1. Appellant's complaint is barred by the doctrine of laches and/or waiver, as it will commence more than twenty-nine (29) years after the cause of action occurred.
2. Appellant's complaint is barred by the applicable rule of the three (3) in (**§15-1-49 MCA**) and the ten (10) year (**§15-1-7 MCA**) statute of limitations.
3. Appellee has acquired the subject property by virtue of adverse possession as he has been in open and hostile possession of said property twenty-nine (29) years claimed it as homestead, paid taxes and said six (6) acre tract was deducted from the Julia Holliday Estate after the recording of the deed.
4. Appellants failed to plead fraud with particularity as required by **Rule 9(b) MRCP** although it was insinuated in the Complaint, but not plead.
5. Appellant failed to join all necessary parties as mandated by **Rule 19 MRCP**.

Although Appellant has requested this court to allow them to amend their pleadings to include the adult children of Appellee and to seek additional affidavits, neither of these actions will cure the defects in the Complaint to justify a hearing on the merits. All material facts and issues are already before the Court and they do not meet the minimum requirements for a hearing on the merits nor justify any relief whatsoever.

IV.

ARGUMENT

In this case the Appellant and the Appellee filed competing Motions for Summary Judgment pursuant to **Rule 56 MRCP**. **Rule 56 MRCP** sets forth the standard for granting Summary Judgment. It provides that where there is no issue of material fact, the moving party is entitled to judgment as the matter of the law. However, the burden rests on the moving party and the evidence is viewed in the light most favorable to the nonmoving party. **Arrechea Family Trust v. Adams, 960 So.2d 501 (Miss. Ct. App. 2006), Heigle v. Heigle, 771So.2d 341 (Miss. 2000)**. In this case, Appellants state they learned in 2002 that the deed to Appellee contained six (6) acres rather than one (1) acre as they intended. The notary sections of the deed indicated some of the heirs signed in Mississippi and some in Illinois. The deed executed by the Appellants clearly stated the acreage conveyed was six (6) acres.

Although Appellants in their affidavits attached to the Motion for Summary Judgment filed in the lower court raised issues of never appearing before a Notary or executing the deed, the only allegation in the Complaint which Appellants are bound is the conveyance was for (6) acres when they intended to convey one (1) acre.

In paragraph one of the complaint, Appellants clearly expressed their intent to execute and deliver the deed in question. The intent was to convey one (1) acre rather than six (6) according to the Complaint to reform deed. Parties are bound by their pleadings.

Mississippi has by statute imposed certain limitations, which govern the filing of claims in this state for various and sundry remedies. Appellee raised affirmative defenses

in his answer, the running of the three (3) year statute of limitations (**§15-1-49 MCA**), which applies to this case as well as the ten (10) year statute (**§15-1-7 MCA**). It must be remembered that this action was brought some twenty-nine (29) years after the filing of the deed for public record in the office of the Chancery Clerk of Clay County. The deed was filed for record January 29, 1974 in Deed Book 126, pages 383-385. The Complaint was filed March 11, 2003. Appellants alleged in their pleadings that they learned of the discrepancy in 2002, some twenty-eight (28) years after the recording of the deed. The Chancellor found the case of **McWilliams v. McWilliams, 977 So.2d 200 (Miss. 2007)** to be persuasive which involved a Motion similar to the one here to set aside a deed and a trust in Sunflower County, Mississippi. The Complaint was filed more than six (6) years after the transaction in question. The Chancellor in that case applied the three (3) year statute of limitations (**§15-1-49, MCA**), holding that the three (3) year period began to run when the deed was filed and recorded. **O'neal Steel, Inc. v. Millette, 797 So.2d 869 (Miss. 2001)**. The Supreme Court of Mississippi has upheld the ruling. The **McWilliams case** further addressed the imposition of the ten (10) year limitation period as set forth in **§15-1-7 MCA** stating that this statute did not apply since it was applicable only to the recovery of land and presupposes that the Complaint is a possessory interest in the land in question. The Appellant in this case does not meet either of the statutory barriers being the three (3) year statute or the ten (10) year statute as the event complained of occurred some twenty-nine (29) years ago.

The **McWilliams case** also addresses allegations of concealed fraud. Appellants raise the issue of concealed fraud in this case although it is not plead properly as pointed out by the Chancellor in the Order Granting Summary Judgment to Appellee.

McWilliams set forth that concealed fraud would not toll the statute of limitations where the instrument is recorded as a matter of public record. “Where an alleged fraudulent conveyance of real property is recorded and available to the public, there can be no concealed fraud preventing the running of the statute of limitations” **McWilliams, ibid.** The **McWilliams case** made it very clear where an alleged fraudulent conveyance of real property is recorded and available to the public, there can be no concealed fraud preventing the running of the statute of limitations. See also **Carder v. BASF Corporation, 919 So.2d 258 (Miss. Ct. App. 2005).**

The lower court found and rightfully so that no amount of factual testimony even if allowed, could overcome the bar of the statute of limitations as set forth herein. Summary Judgment was appropriate in this case for Appellee and this Court should affirm the findings of the Chancellor hearing this case.

CERTIFICATE OF SERVICE

I, Randolph Walker, Attorney for Appellee, Sherman Ivy, do hereby certify that I have this day mailed, by first class mail, postage prepaid, the original and three (3) copies of the above Brief of Appellee to the clerk of the Mississippi Supreme Court. I further certify that I have this day mailed a true and correct copy of same to the following:

**BENNIE L. JONES, JR., ESQ.,
B.L. JONES, JR & ASSOCIATES
P. O. BOX 357
206 COURT STREET
WEST POINT, MS 39773**

**HONORABLE JIM DAVIDSON
CHANCERY COURT JUDGE
P. O. BOX 684
COLUMBUS, MS 39703**

THIS, the 20 day of August, 2009.



RANDOLPH WALKER