2010-CA-01154-COA

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
No. 2010-CA-01154-COA

DONALD GREENWOOD AND CAROL GREENWOOD — APPELLANTS

v.

GERALD ALLEN YOUNG, SR. AND MELODY ANN YOUNG — APPELLEES

GREENWOOD APPELLANTS' REPLY BRIEF
(ORAL ARGUMENT NOT REQUESTED)

APPEAL FROM THE CHANCERY COURT FOR THE
SIXTH JUDICIAL DISTRICT OF WINSTON COUNTY, MISSISSIPPI

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GREENWOOD APPELLANTS' REPLY BRIEF

I. THE YOUNGS' ASSERTION THAT THE GREENWOODS ARE REQUESTING A *DE NOVO* REVIEW AND REWEIGHING OF ALL EVIDENCE, UNDER BOTH ISSUES RAISED ON THIS APPEAL, MISSES THE POINT ENTIRELY

The Appellees' (Gerald Allen Young, Sr. and Melody Ann Young, hereinafter referred to as "Plaintiffs," "Mr. Young," "Ms. Young" or "the Youngs") argue that the Appellants'/Defendants' (Donald and Carol Greenwood, hereinafter referred to as "Defendants," "Don Greenwood" or "Carol Greenwood") argument on appeal is simply a request for this Court to conduct a *de novo* review and reweigh the evidence, is simply inaccurate and misses the point. Specifically, this case involves an appeal from the Trial Court's (1) overruling the Defendants' *Motion in Limine* and standing objection regarding the introduction of testimony and evidence sought to be excluded under specific questions of law and (2) finding that the Plaintiffs' proof was sufficient to sustain a claim of adverse possession. The following two issues are being raised in this appeal:

1. Whether the Trial Court erred in overruling Defendants/Appellants *Motion in Limine* and standing objection seeking to exclude any evidence or testimony of adverse possession allegedly occurring prior to the date the Trial Court voided the *Warranty Deed* from

Don Greenwood to the Plaintiffs/Appellees, as any acts of possession would not have been adverse to Don Greenwood, the Grantor of the *Warranty Deed*, during that period?

2. Whether the Trial Court erred in holding that the Plaintiffs/Appellees proved by clear and convincing evidence that, by their specific actions, they maintained the exclusive, complete, actual, notorious, hostile, adverse, continuous, undisputed and peaceful possession, ownership and control of the disputed property, for 10 years, entitling them to title of the disputed property through the theory of adverse possession, pursuant to Miss. Code Ann. § 15-1-13(1)?

Issue One above is a clear question of law, which is not seeking any re-determination of facts. Issue One asserts that the Trial Court erred in applying the law in overruling the Defendants' *Motion in Limine* and standing objection seeking to exclude certain evidence. Appellate courts will review questions of law under a *de novo* standard. *Carroll v. Carroll*, 976 So. 2d 880, 885 (Miss. Ct. App. 2007) (Citing *Isom v. Jernigan*, 840 So. 2d 104, 106 (Miss. 2003)). Even under a limited review of the decisions of a Chancellor, this Court has authority to reverse when a Chancellor applies an incorrect legal standard. *Nichols v. Funderburk*, 883 So. 2d 554, 556 (Miss. 2004). As shown in Section II of the *Greenwood Appellants' Principal Brief* and Section II *supra*, the Trial Court applied an incorrect legal standard and wrongly decided a pure question of law under Issue One by relying on the case of *Avera v. Williams,* 81 Miss. 714, 33 So. 501 (Miss. 1903) in overruling the Defendants' *Motion in Limine* and standing objection seeking to exclude any evidence or testimony of adverse possession

allegedly occurring prior to the voiding of the *Warranty Deed*, as any acts of possession during that time would not have been adverse to Don Greenwood, the Grantor of the *Warranty Deed*. (Tr. pp. 36-37).

The question posed in Issue One is whether a grantee's occupation of property by virtue of a deed is adverse to the grantor of that deed? This is a pure question of law answered in the negative by the Mississippi Supreme Court in the case of *Washington v. Crowson,* 222 So. 2d 137, 139 (Miss. 1969), and is factually distinguishable from the *Avera* case relied upon by the Trial Court, which deals with a grantee's claim of adverse possession as against third persons or strangers, as opposed to the grantor of the deed. Plaintiffs agree that *Avera* only applies to claims against third persons and not the grantor. (Appellees' Br. pp. 7-8).

Under Issue Two, the Defendants acknowledge that a finding that the proof was sufficient to sustain a claim of adverse possession is a fact finding that requires this Court's application of the substantial evidence/manifest error test. *Walker v. Murphree,* 722 So. 2d 1277, 1280 (Miss. Ct. App. 1998). As the Defendants argue in Section III of the *Greenwood Appellants' Principal Brief* and Section III *supra*, the Trial Court's holding, that the Plaintiffs proved, by clear and convincing evidence, that their actions entitled them to title of the disputed property through the theory of adverse possession, is not supported by substantial evidence and should be reversed on that basis.

II. REPLY TO ARGUMENTS RELATING TO ISSUE ONE

As previously set forth, on July 12, 1996, Defendant, Don Greenwood, signed a *Warranty Deed* conveying the disputed two (2) acre property to the Plaintiffs. (R. p. 55). Then, on December 5, 2007, the Trial Court entered an *Agreed Judgment Voiding*

Warranty Deed and Other Relief, which declared the July 12, 1996 *Warranty Deed* void for lack of spousal signature on the homestead property of the Grantor pursuant to Miss. Code Ann. § 89-1-29. (R. p. 58). The Defendants each filed a pre-trial *Motion in Limine* and made a standing objection during the trial of this matter seeking to exclude any evidence or testimony from the Plaintiffs regarding any possessory acts to prove their adverse possession claim for the time period of July 12, 1996 through December 5, 2007, which would be the entire relevant time period herein, as any actions by the Plaintiffs during this time period would not be adverse to the grantor of the Deed, Don Greenwood (R. pp. 42-44, 60 and Tr. pp. 20-27, 60-61).

A claim of adverse possession cannot begin unless the land owner has actual or constructive knowledge that there is an adverse claim against his property. *Scrivener v. Johnson*, 861 So. 2d 1057, 1059 (Miss. Ct. App. 2003) (Emphasis added). Furthermore, the Mississippi Supreme Court has held that, so long as the grantee occupies property by virtue of a covenant in a deed, its possession is not adverse to the grantor. *Washington v. Crowson,* 222 So. 2d 137, 139 (Miss. 1969) (Emphasis added). Simply put, the possession of the property in this event would not be adverse to the grantor. *Id.* As the Mississippi Supreme Court stated, "until the grantee in the deed brought to the attention of the land owner notice that the grantee claimed the land in some method hostile and adverse to the covenant to the deed, adverse possession cannot be established." *Id.* at 139-140. (Citing *Smith v. Cunningham*, 79 Miss. 425, 30 So. 652 (1901); *Barron v. Federal Land Bank*, 182 Miss. 50, 180 So. 74 (1938); *Morgan v. Collins School House*, 160 Miss. 321, 133 So. 675 (1931); and, *Day v. Cochran*, 24 Miss. 261 (1852)).

Essentially, based on the Youngs' "illusory position" as the record title holder of the disputed property, as the Grantee under the *Warranty Deed*, none of their actions would have given Don Greenwood notice that they were attempting to adversely possess the disputed property. There is simply no antagonistic purpose to the Youngs' occupation of the disputed property, during this time period, and any possessory acts performed on the disputed property, during this time period, would not be hostile or adverse to Don Greenwood, the Grantor of the *Warranty Deed.*

A. The *Young Appellees' Principal Brief* Agrees and Unequivocally Confirms that the *Avera v. Williams* Case is Factually Distinguishable and Wholly Inapplicable to the Case *Sub Judice*

The Trial Court overruled the Defendants' *Motion in Limine* by finding that the 1903 Mississippi Supreme Court case of *Avera v. Williams* controlled on the issue. (Tr. pp. 36-37). In their Principal Brief, the Youngs agree that the *Avera* case involves a situation wherein the adverse possessor sought such possession against third parties and not the grantor of the void homestead deed, and that case only sought to produce the law that fit the facts for that specific case. (Appellees' Br. pp. 7-8). This is precisely the Greenwoods' point. The *Avera* case is inapplicable and factually distinguishable from the issue presented by the Greenwoods in the subject case. Specifically, the *Avera* case holds that a deed for a homestead, in which a grantor's wife did not join, though void, is available as color of title to sustain a claim by adverse possession **as against third persons**. *Avera v. Williams*, 81 Miss. 714, 33 So. 501 (Miss. 1903) (Emphasis added) (Referring also to "third persons" as "strangers"). In the case *sub judice*, however, the Plaintiffs are seeking to adversely possess the disputed property against Don Greenwood, the Grantor in the voided homestead deed, and not a "third person" or "stranger" to that transaction.

What more can be said on this issue. The Trial Court overruled the Defendants' *Motion in Limine* by finding the case law of *Avera* to be controlling on the issue, and the Youngs' Principal Brief agrees and unequivocally confirms the position of the Defendants by stating that the *Avera* case is factually distinguishable from the case *sub judice* and only "sought to produce the law that fit the facts [at] for that specific case." (Appellees' Br.pp. 7-8). This is a clearly erroneous decision on a pure question of law.

B. Contrary to the Youngs' Arguments, It Is the Buyer's Responsibility to Ascertain the Facts Necessary to Make a Valid Conveyance of an Exempt Homestead

On page 8 of their Principal Brief, the Youngs assert that it was the seller/grantor, Don Greenwood's, mistake in not complying with homestead transfer procedure and that should be held against him. Nonetheless, under longstanding Mississippi case law, the Mississippi Supreme Court has held that:

> "Under law, a person purchasing an exempt homestead is affected with notice of the exemption and with the knowledge of the law that it is necessary to a valid conveyance of a homestead that both husband and wife join in such conveyance. In that respect, the purchaser acts at his peril. His good faith does not protect him. He should ascertain the facts, and if he fails to do so, must suffer the consequences."
>
> *Breland v. Parker*, 116 So. 879 (Miss. 1928).

This is the clearest possible statement of the law that the buyer, if he does not ascertain the facts, "must suffer the consequences." In fact, the July 12, 1996 *Warranty Deed* was prepared by the Youngs' trial counsel. (R. 55-56).

C. The Youngs Have Failed to Offer any Substantive Rebuttal to the Greenwoods' Position and Reliance on the Case of *Washington v. Crowson*

Defendants have asserted that the 1969 Mississippi Supreme Court case of *Washington v. Crowson*, should be used to guide its decision under Issue One. Essentially, the Court held in *Washington* that so long as the grantee occupies property by virtue of a covenant in a deed, its possession is not adverse to the grantor. *Washington v. Crowson,* 222 So. 2d 137, 139 (Miss. 1969). Plaintiffs have failed to offer any substantive rebuttal to the holding of the *Washington* case.

As set forth above, it is the grantee/buyer (Plaintiffs herein) charged with the knowledge of the law that it is necessary to a valid conveyance of a homestead that both husband and wife join in such conveyance and must ascertain the facts necessary to make a valid conveyance – not the grantor/seller (Defendants herein). Don Greenwood never knew, or even was charged with such knowledge under the law, that the July 12, 1996 *Warranty Deed* was voidable until the Trial Court entered an Order voiding it on December 5, 2007. Therefore, during this time period, if Don Greenwood were to have seen a survey flag on the property or the Youngs doing anything on the disputed property, he would not have thought they were making some claim adverse to him or going beyond the Deed in some type of antagonistic purpose. Although, as shown in Section III *supra*, there was nothing visible to show the world of the Youngs' occupation, any possession would not have been adverse to Don Greenwood, the Grantor of the *Warranty Deed.*

III. REPLY TO ARGUMENTS RELATING TO ISSUE TWO

Alternatively, even if this Court affirms the Trial Court's overruling of the Defendants' *Motion in Limine* and would allow evidence and testimony regarding the

Plaintiffs' alleged use of the disputed property for the time period before the Trial Court voided the 1996 *Warranty Deed*, the Plaintiffs still failed to meet their burden of proof, by clear and convincing evidence, that, by their specific actions, they maintained the exclusive, complete, actual, notorious, hostile, adverse, continuous, undisputed and peaceful possession, ownership and control of the disputed property, for ten years, entitling them to title of the disputed property through the theory of adverse possession, pursuant to Miss. Code Ann. § 15-1-13(1).

The burden of proof is on the adverse possessor, in this case the Plaintiffs, to show by clear and convincing evidence that each element of adverse possession is met. *Double J Farm Lands, Inc. v. Paradise Baptist Church*, 999 So. 2d 826 (Miss. 2008). This includes clear proof of acts and conduct fit to put a person of ordinary prudence, and particularly the true owner, on notice that the estate in question is actually, visibly and exclusively held by a claimant in an antagonistic purpose.

A. Adverse Possession is Not as Easily Established When a Close Family Relationship is Involved

As discussed in the *Greenwood Appellants' Principal Brief*, this adverse possession case involves a dispute between family members over the ownership of land that had been in the family for decades. (Appellants' Br. pp. 5-6). The Mississippi Supreme Court has established that, when a close family relationship is involved, proof of adverse possession is not ordinarily as easily established as when the parties are strangers. *Cleveland v. Killen*, 966 So. 2d 848 (Miss. 2007). Of course, one of the obvious rationales for this rule of law is that when a landowner sees a member of his family doing something on his land, he is less likely to believe that the family member is making an adverse claim of ownership or occupying the land in some antagonistic purpose, as compared to if it was a stranger on the land.

B. At the Beginning of the Relevant Time Period, the Disputed Property Was Not "Wild" or Unimproved Land, As It Was Actually Homestead

Certainly, the character of the land determines the type of possession necessary to acquire title by adverse possession. *Holliman v. Charles L. Cherry and Associates, Inc.*, 569 So. 2d 1139, 1146 (Miss. 1990). And the Youngs attempt to argue that the disputed property should considered "wild" or unimproved land, such that adverse possession may well be established by evidence of acts that would be wholly insufficient in the case of improved or developed land. (Appellees' Br. pp. 13-14). But this is simply not the case, as the land was improved property in 1996. This argument should be seen for what it really is – an attempt to have this Court view Plaintiffs' limited, sporadic, unoccupied, non-hostile, non-continous and non-exclusive use of the disputed property as sufficient acts to establish adverse possession based on a claim that the property is now "wild" or unimproved.

Every witness at trial testified that the two acre tract of disputed property once contained the "old house," which was the home of Don Greenwood's mother and father, such that it, at one point, contained a residential structure, yard, landscape, frontage to the County access paved road, and the like. (Tr. pp. 114, 277-278). In fact, Don Greenwood testified that, even after his mother's death in 1983, the house and premises on the disputed property were kept maintained and actually rented out to various tenants over the years, prior to the execution of the *Warranty Deed* in 1996. (Tr. pp. 277-278). Essentially, at the start of the relevant time period, the disputed property was improved property containing a residential structure, yard, landscape, road frontage, a driveway and other improvements; however, based on the Plaintiffs' failure to make any improvements to the property or ever even step foot on the property personally, over the course of the next ten years, the Plaintiffs now ask this Court to consider this property to

be "wild" or unimproved, so that their extremely limited acts of possession might be sufficient on this basis where otherwise would not. This argument is simply untenable and even supports the Defendants' argument.

Clearly, the Plaintiffs are making the point that, at the time litigation was commenced in this action, the disputed property appeared to be "wild" or unimproved. But the undisputed testimony at trial was that, in July 1996, the property contained a residential structure, yard, landscape, road frontage, a driveway and other improvements. (Tr. pp. 114, 277-278). Yet, the Plaintiffs also are attempting to argue that during the interim, their actual occupation and improvement to the property was visual to the world, but the fact is, the Plaintiffs never stepped foot on the property and are attempting to use this to their benefit to lower their burden of proof. This is simply astounding!

C. Statutory Time Period

As contemplated by Miss. Code Ann. § 15-1-13(1), each of the six elements of adverse possession must operate together, continuously for an excess of ten years. Importantly, the Plaintiffs' claim to adverse possession begins on July 12, 1996, the date they first came under a claim of ownership by being the Grantees of the *Warranty Deed*; therefore, the statute of limitations on an adverse possession claim was not put into motion until that date and any actions prior to that date, including the survey and burning of the "old house" would not be considered acts of possession as they were performed prior to the statute of limitations on any adverse claim being put into operation by the execution of the *Warranty Deed*.

D. Plaintiffs Wholly Failed to Conduct Any Possessory Acts to "Visually" Notify the World of Their Antagonistic Occupation

The collective testimony of all witnesses at the trial of this matter clearly support the fact that Plaintiffs rarely, if ever at all, themselves personally, actually used the disputed property in any manner whatsoever. In fact, Don Greenwood, Carol Greenwood and Tessie Higginbotham, all residents of Winston County, Mississippi, each testified that they had never, not one single time, seen either of the Plaintiffs using the disputed property, in any manner whatsoever during the relevant time period. (Tr. pp. 212, 285, 329, 335). In fact, in looking at the totality of Ms. Young's testimony during cross-examination, she could not recall a single incident where she herself actually stepped foot on the disputed property during the relevant time period. In fact, at trial, Plaintiff testified that the location of the property lines of the disputed property was unknown to her, which even prompted the Chancellor to inquire as to how someone could adversely possess property without knowing the location of the property lines. (Tr. pp. 105, 129). Importantly, Ms. Young testified that at no point, during the relevant time period, did she ever cultivate the soil, cut timber, sell timber, lease mineral rights, lease hunting rights, hunt, plant a garden, build a house, build a fence, build a pond or make any other improvements whatsoever to the disputed property. (Tr. pp. 114-115). Certainly, Ms. Young could not detail or itemize specific acts of usage for each month, for each year, for the relevant time period, and there is virtually nothing on the property that would allow others to know of her occupation, if any. (Tr. p. 115).

In fact, the only visible indicators of the Plaintiffs' occupation of the disputed property during the relevant time period, are (1) the existence of survey flags, on the four corners of the property, although the undisputed testimony was that at least two of the corners would not have been visible from the adjacent road (R. pp. 307-308 and Tr.

pp. 99, 139-140, 165, 231); (2) the property being bush hogged four times over a period of ten years by persons other than the Plaintiffs themselves (Appellees' Br. p. 4); and, (3) an alleged bulldozing of a "pad" for a mobile home, although Don Greenwood testified that the only area cleared off was the location of Carol Greenwood's mobile home, which is located west of the disputed property on Don's separate property – not on the property. (Tr. pp. 284, 291). Importantly, Carol's mobile home is located on a cleared off area approximately 100 feet west of the disputed two acre property, so any alleged "clearing of a pad" was actually done on adjacent land and not on the disputed property, such that it could not be considered an act of possession or improvement to the disputed property to support Plaintiffs' claim to ownership by adverse possession. (Tr. p. 166).

The Youngs attempt to assert that Defendant, Carol Greenwood, should have clearly known of the Plaintiffs' adverse occupation, as she lives near the disputed property; however, what was there for her see? Over the course of ten years, there were four instances where Carol's brother-in-law, Dan Greenwood (Don's brother and Melody Young's father), or her nephew, Ray Greenwood, bush hogged the adjacent property and there were, at most, two survey flags near the road. How is that visually notifying the Defendant, Carol Greenwood, that someone has invaded her property, asserting an adverse claim and occupying the land under an antagonistic purpose? Simply put, Plaintiffs have wholly failed to conduct any possessory acts, during the relevant time period, which would have been easily discoverable by the Defendants or the general public to "visually" notify the world of their occupation, as necessary to establish an adverse possession claim. *See for example, Apperson v. White*, 950 So. 2d 1113 (Miss. Ct. App. 2007).

E. Any Use of the Disputed Property by the Plaintiffs Was Not Exclusive, As Don Greenwood Used the Property During the Relevant Time Period

"Exclusive possession," as an element of adverse possession, is an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimants conduct must afford an unequivocal indication that he is exercising dominion of a sole owner. *Weyerhousing Management v. Haywood Properties, LP*, 978 So. 2d 684 (Miss. 2008). In the case *sub judice*, the Plaintiffs made no effort to attempt to build any type of boundary fence or other barriers or place any type of "posted– no trespassing" signs to keep other people off the subject property, particularly Don Greenwood, who owns all surrounding and adjoining property. (Tr. p. 115).

The undisputed testimony elicited at trial was that Don Greenwood continued using the disputed property during the relevant time period. In fact, the biggest improvement to the disputed property during the relevant time period was the reconstruction of a 150 foot long road across the disputed property and into the adjacent Greenwood property, along with a new culvert and widening of the gravel road so that heavy equipment could travel across the disputed property to remove dirt out of a pit located on Mr. Greenwood's adjoining property, west of the disputed property. (Tr. pp. 145, 285-289, 291, 297). Plaintiffs' Brief attempts to argue that Don did not actually make these improvements; however, the improvements were made by contract dirt haulers, at Mr. Greenwood's direction and instruction, and the costs were factored into the price paid for Mr. Greenwood's dirt, such that he paid for the work to be done. (Tr. pp. 287, 297). Moreover, Mr. Greenwood traveled on and across the disputed property on a weekly basis, hunted on the disputed property and bush hogged the property on multiple occasions, during the relevant time period. (Tr. pp. 285-290).

The Mississippi Supreme Court has stated that "[i]t is well settled that joint use of property is insufficient to establish adverse possession." *Gadd v. Stone*, 459 So. 2d 773, 774 (Miss. 1984) (Finding that the evidence was insufficient to support finding of hostile and exclusive possession for a period of ten years as required for adverse possession, where adverse possessors and record title holders both used road for access to their lands and adverse possessor did not direct title holders to stop using the road until less than ten years before suit).

Clearly, the Chancellor's finding that the Plaintiffs had established their adverse possession claim of this improved, family property, by clear and convincing evidence, is not supported by substantial evidence and is actually against the greater weight of the evidence, such that it should be reversed.

CONCLUSION

It defies logic and long standing Mississippi Case law to allow a Grantee to "occupy" land as a result of a *Warranty Deed* which is later declared void, to then assert a claim of adverse possession over said land against the Grantor of the *Warranty Deed*, since there is no antagonistic purpose of such "occupation" during the period of time between the signing of the Deed and the voiding of the Deed. Simply put, any acts of possession or use of the property, during that time period, would not be adverse or hostile to the Grantor. But, even if this Court disagrees with that position, the Plaintiffs herein have wholly failed to meet their burden of proof, by clear and convincing evidence, on their adverse possession claim, as any use they might offer would be limited, sporadic, unoccupied, non-hostile, non-continuous and non-exclusive. The Trial Court's finding that the Plaintiffs had established their adverse possession claim of this improved, family property, by clear and convincing evidence, is not supported by

substantial evidence and is actually against the greater weight of the evidence. Accordingly, the Defendants respectfully request that this Honorable Court enter an Opinion reversing the Trial Court's ruling under both Issues I and II on the basis asserted herein.

Respectfully Submitted, this the 20th day of May, 2011.

DONALD AND CAROL GREENWOOD

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the *Greenwood Appellants' Reply Brief* has been forwarded via regular United States Mail, postage pre-paid, to the following addresses:

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Respectfully submitted, this the 20th day of May, 2011.

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