IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JULIA POWELL — APPELLANT

VERSUS — NO. 2011-CA-00516

BENNIE JAKE EVANS AND
MARY MARGARET GREGORY — APPELLEES

APPEAL FROM THE CHANCERY COURT OF THE
SECOND JUDICIAL DISTRICT OF JASPER COUNTY, MISSISSIPPI
CAUSE NO. 2008-2003

THE HONORABLE H. DAVID CLARK, II CHANCELLOR, PRESIDING

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF FACTS

This case commenced when Julia Powell and Mary Margaret Gregory filed their Complaint for Partition of Property that was inherited by Julia, Mary Margaret and Bennie Jake Evans. The parties subsequently entered into a contract that was embodied in an **Order Settling Cause and Partitioning Real Property**. (R. 29 – 34)

A surveyor was appointed to survey the property according to the parties' contract and order. The surveyor determined without question that he could not survey the property and therefore, the Court could not partition the property according to the parties' contract. (T. 12 -13) The reason the surveyor could not survey the property is because the parties had excluded the parcel identified as a "less and except" property in the Complaint filed by Julia and Mary Margaret and in the contract and Order Settling Cause and Partitioning Real Property. (R. 6, 29 – 34) Julia Powell's house was not located on the "less and except" parcel, but was located on part of the NE ¼ of the SE ¼, Section 5, Township 10 North, Range 12 West, Second Judicial District of Jasper County, Mississippi.

These facts are undisputed. Because Julia's house was not located on the "less and except" parcel, the contract entered into by the parties could not be performed so the parties either had to voluntarily modify the contract and order and resign a new order and contract or the pleadings would need to be amended and all necessary parties joined in the proceeding for the Court to conduct a partition hearing. It is undisputed that the parties did not and would not agree to sign a contract modifying the description of the property to be partited.

A hearing was held before the Chancellor on January 13, 2011 solely on Julia Powell's Amended Motion for Relief from Judgment and Mary Margaret's Petition for Contempt against Julia Powell. (T. 1) Before this hearing was conducted, Julia Powell conveyed the property identified as the "less and except" to her daughter, Belissa Powell

(Appellant's R. E. 21) The Amended Motion succinctly identified the property that was included in the parties contract and order and informed the Court and the parties that the judgment was unenforceable and ambiguous because her house was not located on the "less and except" parcel. (R. 79 -80)

It is undisputed that the pleadings in this case do not request a reformation of Julia Powell's deed dated April 24, 1989. (Ex. 4) The pleadings also do not request a modification of the contract and order that was signed by all the parties.

Instead of granting the Motion for Relief from Judgment and starting over with new pleadings and a trial on all the issues, the Chancellor reformed the deed to Julia Powell by finding that it was the clear intent of the parties to include 2.02 acres of real property that she already owned and give Julia Powell land east of her land which is designated as Tract 2 on Exhibit B. (R. 106) There was no testimony in the record nor was there any relief sought by any other parties requesting that the Court modify the contract or reform the deed to Julia Powell.

Mary Gregory and Bennie Jake Evans both admit in their Brief that the description was in error, but they claim it was a mutual mistake that was not contemplated by any party. Of course, there is no testimony in the record to support a mutual mistake to justify a reformation of a deed. Again, there is no dispute that no one asked for reformation or a modification of the contract. There was no testimony as to the intent of the parties with regard to the contract and order. There is no question that the order was ambiguous and could not be enforced.

The reformation by the Court raises the question as to the location of Julia Powell's property lines as reformed by the Court. There was no evidence as to Powell's intent when she purchased the property from the Corleys. (Ex. 4) There was no testimony as to what the

Corleys intended when they conveyed the property to Julia Powell on April 24, 1989. (Ex. 4) Notwithstanding that no one asked for reformation of the deed, there was no evidence to support a reformation of Julia Powell's deed nor was there any evidence to support a modification of the contract.

Julia brought this matter to the Court's attention for a second time when she filed her Motion for a New Trial, Pursuant to Rule 59(A), Alter or Amend Judgment, Rule 59(E) or Relief from Judgment Under Rule 60. (R. 112) The Court denied Julia Powell's Motion on March 29, 2011 without any analysis or Findings of Fact and Conclusions of Law. (R. 127)

LEGAL ARGUMENT

1. Julia Powell was never put on notice that the "less and except" parcel was subject to partition as required by Rule 8(a)(1) of Mississippi Rules of Civil Procedure.

Gregory and Evans contend that because Julia Powell was a Plaintiff , that no notice was required before the Court conducted a reformation hearing and a modification of a contract. Gregory and Evans miss the point. The point is that a hearing was conducted without any pleading requesting a reformation of Julia Powell's deed or a modification of the contract and order that was entered into by the parties. The pleadings frame the issues that will be heard by the Court. The only issue before the Court at the hearing was whether or not the Court should relieve Julia Powell from the order and contract because it was admittedly ambiguous and unenforceable. Julia Powell was not given notice that a hearing would be conducted on the reformation of her deed and contract or a modification of the parties' contract and order.

The relief granted by the Chancellor was never requested in the pleadings by any party. The Chancellor cannot venture outside of the pleadings and grant relief that was not

ever requested such as a reformation of Julia Powell's deed and modification of the contract and order in this case. *Shipley v. Ferguson*, 638 So. 2d 1295 (Miss. 1994), *Duncan v. Duncan*, 417 So. 2d 908 (Miss. 1982) In *Seymore v. Greater Mississippi Life Ins. Co.*, 362 So. 2d 611 (Miss. 1978) this Court stated:

> "The issues are framed, formed and bounded by the pleadings of the litigants. The Court is limited to the issues raised in the pleadings and the proof contained in the record. Judge Griffith, in his monumental work on Mississippi Chancery Practice, gave these sound reasons why it must be so:
>
> "Courts do not instigate or initiate civil litigation. They act only when called on for aid, and only in respect to that which is within the call. The potentiality of a court to consider and determine a given class of cases over which it has jurisdiction is made actual, in a particular case within that class, only when a party entitled to relief with respect thereto has applied to the court by his written pleading and even then his written application must state the facts upon which it is based or else it will still be ineffectual to actuate the court to grant any relief. *The power of the court, will be exerted only upon, and will not be moved beyond, the scope of the cause as presented by the pleadings, for the pleadings are the means that the law has provided by which the parties may state to the court what it is they ask of the court and the facts upon which they ask it; and proof is received and is considered only as to those matters of fact that are put in issue by the pleadings, and never beyond or outside of them.* If the rule were otherwise courts could become the originators instead of the settlers of litigious disputes, and parties would never know definitely what they will be required to meet or how to meet it." Griffith, Mississippi Chancery Practice (Second Edition 1950), § 564, pp. 587-87. (Emphasis added). In 89 C.J.S. Trial § 633b, at page 464 (1955), we find this language:
>
> "The findings when compared with the pleadings must be within the issues and be responsive thereto, and must cover the material issues raised by the pleadings, and this is required whether or not evidence is introduced on such issues. *It is improper to make findings outside the scope of the issues made by the pleadings; and where such findings are made, they are nugatory and cannot support conclusions of law or the judgment;* they must be disregarded or treated as immaterial."
>
> 76 Am.Jur.2d, *Trial,* § 1264, at page 215 (1975), says:
>
> "The findings of fact made by the court should respond to and be within the issues, and a finding outside the issues cannot be considered in determining whether the judgment is supported by the findings." (362 So. 2d at 614-15) (emphasis ours.)."

Powell acknowledges that *Duncan* and *Seymore* are pre-rules cases, however, before a Court can grant relief on an independent cause of action such as reformation of a deed or modification of a contract, all parties must be notified in advance before the hearing so that they can prepare their proof in support of their position at trial. This notice clearly was not provided to Powell or any of the litigants in this case.

It would be important for Julia Powell to know that a reformation action was going to be tried because a survey of the correct legal description should be provided and Powell should be given an opportunity to testify as to where her actual property lines are located as reflected by her deed. She should be given the opportunity to testify about her intention as well as the Corleys at the time that her deed was conveyed to her in 1980. She should also be given the opportunity to testify about the intentions of the parties when they entered into the contract and agreed order settling the partition action. The parties are bound by their pleadings. The Chancellor had no authority to order a reformation of Julia Powell's deed and a modification of the contract when neither of these remedies were ever requested by the parties.

In addition, because the order and contract settling the partition action was admittedly ambiguous and unenforceable based upon the testimony of the surveyor, the Court before modifying the order and contract should have conducted a trial on the intent of the parties and conducted an analysis as outlined by this Court when interpreting contracts.

This Court has found "where terms of a contract are ambiguous, the contract will be interpreted in a reasonable manner. We held that is a question of law for the Court to determine whether the contract is ambiguous. In the event of an ambiguity, the subsequent interpretation presents a question of fact by the trier of fact which we review under a

substantial evidence/manifest error standard." *Harris v. Harris*, 988 So. 2d 376 (Miss. 2008)

The Court also employs a three tiered approach to contract interpretation:

> "First, the "four corners" test is applied, wherein the reviewing Court looks to the language that the parties used in expressing their agreement. Second, if the Court is unable to translate a clear understanding of the parties' intent, the Court should apply the discretionary cannons of contract construction. Finally, if the Court continues to evade clarity as to the parties' intent, the Court should consider extrinsic parol evidence. It is only when a review of a contract reaches this point that prior negotiations, agreements, and conversations might be considered in determining a parties' intentions in the construction of the contract." *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278, 283 (Miss. 2005)

This analysis was not performed by the Chancellor in this case. None of the parties testified as to their intent with regard to the order or where the property lines of the Powell property were supposed to be located. Julia Powell certainly had no notice other than the allegations in her Complaint and she expected that this case would be conducted according to the relief she had prayed for in her Complaint. This was not done in this case because the Court conducted a trial on the reformation of her deed and the modification of the contract without notice to any of the parties.

2. Belissa Powell is the record title owner of the "less and expect" parcel and a necessary party pursuant to Rule 19(A) of the Mississippi Rules of Civil Procedure.

Gregory and Evans refer to Rule 25 of Mississippi Rules of Civil Procedure for the proposition that the Court could enter a judgment without notice to a nonparty who has title to real property that is subject to a court hearing. Belissa Powell's deed was recorded in the Land Records in the Second Judicial District of Jasper County, Mississippi prior to the Court conducting a hearing and adjudicating title to the "less and except" parcel. A party only needs limited knowledge of title searches to understand that there is a question as to whether or not Belissa Powell had any knowledge at all of the facts and circumstances involved in

this case. Belissa Powell certainly had no notice of this case in the Land Records in Jasper County. No lis pendens had been filed and no document was filed of record placing her on notice of these proceedings or that the title to the "less and except" parcel would be affected by the Court's order.

Gregory and Evans quote the comment to Rule 25 but omit the comment that states as follows: "MRCP 25(c) applies to transfers, assignments, and corporate mergers and dissolutions. See Miss. Code Ann. § 79-3-151 (Effect of Merger or Consolidation), 79-3-183(e) (Articles and Dissolutions) and 79-3-209 (1972) (Survival or Remedy After Dissolution, Suspension or Failure). This rule deals more with *res judicata* and collateral estoppel than with an interest in real property. Real Property is transferred everyday based upon notice or lack of notice depending upon whether the document or judgment is filed in the Land Records. The record does not provide us with any information as to whether Belissa Powell had notice of the facts and circumstances involved in this case.

However, one thing is clear, the Land Records did not put her on notice.

Even if Belissa Powell had read the court file, it clearly revealed that the "less and except" parcel was not subject to the litigation. Gregory and Evans make the unsupported statement that the transfer of title to Belissa was a transfer from mother to daughter and therefore by some magical inference the knowledge of the scope of the litigation should be imputed to Belissa to effectively put her on notice that her interest may be affected. This statement is grossly speculative and is not supported by the evidence in the record. If Belissa Powell is not made a party and her interest is not adjudicated, any lawyer checking title to the partitioned property is going to make an exception as to a cloud on title created by the deed to Belissa Powell. There are not many cases interpreting Rule 25 of Mississippi Rules of

Civil Procedure. The only case cited and the only case that could be found by Powell is *Mississippi Power Co. and Southern Co. Services, Inc. v. Hanson*, 905 So. 2d 547 (Miss. 2005) The Court in *Hanson* relied on the principal of *res judicata* to prevent any further litigation against Mississippi Power Company concerning its easement rights. However, the Court did not address the title issues involved for a third party grantee without notice. A person checking title for purposes of purchasing real property is not required to go through the Court files in the Chancery Clerk's Office if there is no lis pendens recorded in the Lis Pendens book.

A prospective purchaser can purchase property without notice of any litigation effecting their property if no lis pendens has been filed. Therefore, there is no evidence in the record of Belissa Powell's knowledge of the facts of the case or the effect of this case on the title to the property that she acquired from Julia Powell.

Belissa Powell is a necessary party and the Court, upon being provided with information concerning the deed, should have stopped the proceedings and had Belissa Powell joined as a necessary party. Miss.R.Civ.P. 19(a), *Johnson v. Weston Lumber and Building Supply, Co.*, 566 So. 2d 466 (Miss. 1990)

3. The Chancellor erred in making an equitable partition.

Gregory and Evans conclude that in Mississippi family settlements are much favored by the courts. Therefore, the Chancellor should be able to honor the original intent of the parties even though there is no evidence of the parties' intent in the record. There is no evidence of a mutual mistake. There is no evidence of a scrivener's error. If Gregory and Evans contend that an equitable partition means that a Chancellor can award any relief that he so chooses to award to try to fix a problem when there are no pleadings requesting that the

problem be fixed, then they are requesting the Court to adopt a new theory of pleading and practice in the State of Mississippi. The question is not does a Chancery Court have authority to fashion its decree based upon the pleadings of the parties. The question becomes how one determines in this case where Julia Powell's property lines are located without any testimony of the intent of the parties. (Ex. 6) A review of Exhibit 6 shows the property lines without any evidence to support the intent of the Corleys and Julia Powell as to the property she purchased. Was she purchasing the house property and the "less and except" tract? There was no meeting of the minds with regard to the description contained within the order and contract and the judgment is not enforceable. Compromises are favored in the law, but those compromises and agreements have to be set forth with clarity and the parties must have a meeting of the minds as to the property that is going to be divided and the location of those property lines. This was not done in this case.

Conclusion

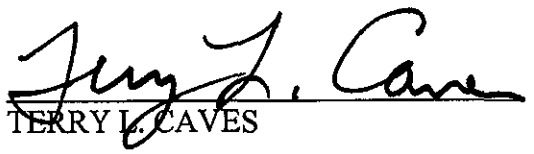
The judgment of the Court included a reformation of the deed that was never requested by any of the parties in this case. The contract and Agreed Order entered into by the parties was admittedly ambiguous and no one requested a modification of the order or contract. No hearing was conducted on the intent of the parties with regard to the Agreed Order. Powell was not given notice that the hearing was going to be one of reformation when she appeared at the hearing on her Amended Motion for Relief from Judgment.

Belissa Powell was a necessary party because there was no evidence that she had knowledge that the "less and except" parcel which she acquired from her mother was going to be effected by the partition action. The Belissa Powell deed, at a minimum, will create a cloud on the title to any of the property that was included in the Court's judgment.

Therefore, the judgment should be reversed and remanded for the parties to amend their pleadings to request the appropriate relief to resolve the issues in this case.

Respectfully Submitted,

JULIA POWELL

BY: 
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CERTIFICATE OF SERVICE

I, Terry L. Caves, Attorney for Julia Powell, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing Brief of Appellant to:

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Honorable H. David Clark, II
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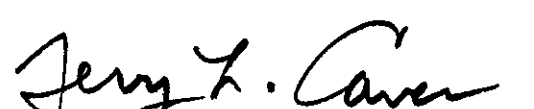
This the 2nd day of November, 2011.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