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

SUPPLEMENTAL BRIEF OF APPELLANT

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I. 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:

Julia Powell - Appellant

Terry L. Caves - Attorney for Appellant

Jerry D. Sharp – Attorney for Appellant

Bennie Jake Evans - Appellee

Mary Margaret Gregory - Appellee

Honorable David M. Ratcliff - Attorney for Bennie Jake Evans, Appellee

Honorable Lillous S. Shoemaker - Attorney for Mary Margaret Gregory, Appellee

Honorable H. David Clark, II - Chancellor

This the 10th day of August, 2012.

Respectfully submitted,

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2. Does the Chancellor have "equity power" to direct entry of a "corrected deed" which changes a deed to property not specifically described (and in fact specifically excluded) as part of the "heir property" in pleadings before the court?

3. Whether Julia Powell's daughter, to whom she deeded the excepted property, is bound by any adjudication of title of her predecessor in title?

V. STATEMENT OF THE CASE

A. Statement of the 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 owned the less and except parcel at the time the Complaint was filed. (Ex. 4) 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 6. (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)

B. Summary of the Argument

The chancery court had subject matter jurisdiction over the reformation of Julia Powell's deed to the excepted property. However, the chancellor lacked the authority to enter such an order; not only was reformation outside the scope of the pleadings, but the chancellor's decision was not based on findings of fact supported by substantial evidence. Notwithstanding the impropriety of reformation, Belissa Powell, Julia Powell's daughter and successor in title, is not bound by the corrected deed due to her nonjoinder. Therefore, this Court should reverse the chancellor's decision.

C. Legal Argument

1. Reformation of Julia Powell's deed to the excepted property is within the chancery court's subject matter jurisdiction.

Not only does the chancery court have jurisdiction over "suits to try title and cancel deeds and other clouds upon title to real estate, [but] it shall have jurisdiction in such cases to decree possession, and to displace possession . . . ." Miss. Constitution art. 6 § 160. Accordingly, "no justifiable basis exists for arguing that a chancery court does not have subject matter jurisdiction over matters involving property. Such authority is conferred by our constitution, history, and precedent." *Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017, 1022

(Miss. 2007). This reformation undoubtedly involves title and possession of real property, as the corrected deed would displace Belissa Powell's property boundaries. The property is also within the court's territorial jurisdiction. Therefore, the chancery court had jurisdiction over the excepted property and the reformation of its deed. Venue was proper and the Court had personal jurisdiction over the parties in the suit.

2. **The chancellor lacked the authority to order reformation of Julia Powell's deed to the excepted property.**

a. Neither Powell nor Gregory or Evans raised the issue of reformation.

"The court is limited to the issues *raised in the pleadings* and proof contained in the record." *Martin v. Lowery*, 912 So. 2d 461, 467 (Miss. 2005) (quoting *City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So. 2d 742, 750 (Miss. 1996)) (emphasis in original). In *Martin*, the Mississippi Supreme Court noted:

> The Court has relied heavily upon Chief Justice Griffith's *Mississippi Chancery Practice* guide which states:
>
> > The power of a court, then, will be exerted only upon, and *will not move beyond, the scope of the cause as presented by the pleadings* . . . . 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.

912 So. 2d at 465 (quoting V.A. Griffith, Mississippi Chancery Practice § 564, at 587 (2d ed. 1950) (emphasis in original)). Accordingly, a chancellor lacks the authority, *sua sponte*, to rule on issues not presented by the parties. *Martin*, 912 So. 2d at 466; *City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So. 2d at 749-50; *Witt v. Mitchell*, 437 So. 2d 63, 65-66 (Miss. 1983). This rule is grounded in the due process requirement that each party receive fair notice of the issues the court will consider, giving them a reasonable opportunity to offer evidence. *Massey v. Huggins*, 799 So. 2d 902, 909-10 (Miss. Ct. App. 2001); *Purviance v. Burgess*, 980 So. 2d 308, 314 (Miss. Ct. App. 2007). And as such, a party is not subject to judgment merely

by virtue of her own prayer for relief; rather, there must be notice that the court is considering any judgment other than that which she requested. *Purviance*, 980 So. 2d at 314 (citing *Massey*, 799 So. 2d at 909-10).

Gregory and Evans contend that Powell lacks standing to raise the issue of insufficient notice because she is a co-plaintiff. Alternatively, they argue that Powell was on notice by virtue of her own Complaint. However, their position clearly contradicts this Court's holdings in *Massey* and *Purviance*.

In *Massey*, this Court reversed the chancellor's *sua sponte* award of child support to the father, who did not request such relief; rather, the mother requested child support in her own petition for modification of custody. 799 So. 2d at 905, 910-11. This Court held that a party's own prayer for relief does not create notice that she might have to defend against similar claims. *Id.* at 910. And in *Purviance*, this Court similarly found that the appellant, who filed for a modification of custody, had insufficient notice that the court would increase her child support payments since the appellee did not request such relief. 980 So. 2d at 314.

Powell's Complaint for Partition of Land did not request reformation of the deed. Likewise, "[n]o cross-claim was filed by Gregory. No counterclaim was filed by Evans. The only claim for relief filed in this case was the Complaint for Partition of Land filed by Powell and Gregory." (Appellees' Br. 8). Consistent with *Massey* and *Purviance*, neither party raised the issue of reformation; the chancellor raised the issue *sua sponte*. And although Mississippi Rule of Civil Procedure 15(b) allows for matters tried by consent of the parties, Powell objected when the chancellor raised the issue of reformation. (T. 33:7-19).

Furthermore, the only association between the prayer for relief and the 2.02 acres is that it was specifically excepted from the estate's property. (Compl. 1). But the fact that the 2.02 acres is mentioned in the Complaint does not create notice that the deed would be subject to

reformation. *See Massey*, 799 So. 2d at 910 (holding that a party's own prayer for relief does not create notice that she may have to defend against a similar claim). Powell had no notice that the court would consider reforming her deed, and she was denied the opportunity to prepare evidence. Therefore, the chancellor exceeded the court's authority by ordering relief outside the pleadings, and this Court should reverse his decision.

b. The chancellor's decision was not supported by findings of fact based on substantial evidence.

"[A]n action to reform a deed depends on the existence of a deed which on its face does not reflect what the parties intended." *Whitefoot v. Bancorpsouth Bank*, 856 So. 2d 639, 643 (Miss. Ct. App. 2003). The party asserting reformation must prove that there was either a mutual mistake, a unilateral mistake combined with fraud or inequitable conduct, or a scrivener's error; but where the parties execute a deed containing a scrivener's error, it constitutes a mistake. *In re estate of Summerlin*, 989 So. 2d 466, 480-481 (Miss. Ct. App. 2008). Accordingly, the party asserting reformation must prove mistake beyond a reasonable doubt. *Id.* at 481.

First, the chancellor failed to determine that the deed did not reflect the parties' intentions; there was no finding as to the intent of the Evanses, the Corleys, or Powell with reference to the deed. (Ex. 6) Nor did the chancellor make any finding of a mistake. In fact, the only finding that the chancellor made was that "the deed that Julia received from the Corleys and the deed that the Corleys received from Beatrice and Ben contained an error." (T. 39:21-24). But the only evidence supporting this finding, aside from the deeds themselves, was the testimony of Brandon Kirkland, the court appointed surveyor. (T. 39:20-40:10). Kirkland's testimony, however, showed only that Powell's residence is not within the calls of her deed. (T. 9:21-10:7; 30:3-18). It is entirely possible that the parties intended to convey the land described in the deed and that there was no mistake; such a possibility amounts to reasonable doubt.

Also, when certain findings of fact are not included in the record, the court may assume that the chancellor made the necessary determinations. *Martin v. Lowery*, 912 So. 2d 461, 466 (Miss. 2005) (citing *Pace v. Owens*, 511 So. 2d 489, 492 (Miss. 1987)). But,

> [t]here are limitations upon this premise. It is one thing to employ algebraic techniques to imply the numerical content of "X" in the equation 10 + 6 + X = 23. It is altogether different where, as here, we are asked to assume the content of all variables in an equation X + Y + Z = 23 . . . . We simply have not received enough help from the Chancery Court that we might derive the findings it ought to have made.

Id. (quoting *Tricon Metals & Servs., Inc. v. Topp*, 516 So. 2d 236, 238 (Miss. 1987)). Such a failure to make the necessary findings of fact constitutes an abuse of discretion and requires reversal. *Id.* at 467. Like the analogy in *Martin*, the chancellor merely concluded that reformation was proper without determining the facts necessary to support such a conclusion. As such, his failure to make such findings was an abuse of discretion.

Finally, a chancellor's decision must be based on substantial credible evidence; if it is not, the decision must be reversed. *Gulf Coast Research Laboratory v. Ameraneni*, 877 So. 2d 1250, 1252 (Miss. 2004). As noted, there was no evidence from which the chancellor could determine that the deed did not reflect the Evanses' or the Corleys' intentions; specifically, there was no evidence of either party's intentions. Rather, the chancellor relied solely upon the surveyor's testimony that Powell's residence was not located on her land. Kirkland's testimony, however, cannot establish what the Evanses or the Corleys intended to convey. And in *Sootin v. Sootin*, 737 So. 2d 1022, 1027-28 (Miss. Ct. App. 1998), this Court held, "when the record itself contains no substantial evidence to account for the ruling, as we find in the case *sub judice*, we are compelled to reverse and remand to the chancellor for findings that would justify the [decision]." The record here is likewise void of evidence that would justify reformation, and this Court should accordingly reverse the chancellor's decision.

Therefore, the chancellor exceeded the court's authority by ordering reformation *sua sponte*. Because neither party raised the issue, Powell had no notice that the court would consider reforming the deed and was denied the opportunity to prepare evidence. The chancellor also failed to make critical findings of fact regarding reformation, the absence of which warrants reversal. Furthermore, the chancellor's decision was not based on substantial evidence; there was absolutely no evidence of the parties' intent regarding the deed to the 2.02 acres. And without such evidence, mistake could not be proven beyond a reasonable doubt. The chancellor, therefore, had no authority to order the parties to execute a corrected deed, and this Court should reverse the chancellor's decision.

3. **Belissa Powell is not bound by the corrected deed if she is a bona fide purchaser for value without notice.**

"The basis of procedural due process is simply that 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.'" *Aldridge v. Aldridge*, 527 So. 2d 96, 98 (Miss. 1988) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1864)). Thus, nonjoinder of an interested party constitutes a violation of due process and requires reversal when complete relief cannot otherwise be granted to the existing parties. *American Public Finance, Inc. v. Smith*, 45 So. 3d 307, 311 (Miss. Ct. App. 2010) (citing *Bd. of Educ. of Calhoun Cnty. v. Warner*, 853 So. 2d 1159, 1170 (Miss. 2003)). Moreover, "[i]t is well established that we will not correct a mistake in a written agreement as against a bona fide purchaser without notice affected thereby." *Miller v. Lowery*, 468 So. 2d 865, 867 (Miss. 1985).

Gregory and Evans contend that joining Belissa Powell, the record title owner of the excepted property, was not necessary pursuant to Mississippi Rule of Civil Procedure 25(c). (Appellees' Br. 11). But although Rule 25(c) does allow an action to be maintained against the original party in interest where such interest has been conveyed, the rule does not stand against

bona fide purchasers for value without notice. *Compare Aldridge v. Aldridge*, 527 So. 2d 96, 99-100 (Miss. 1988) (holding that failure to join subsequent purchaser in an action to impose lien on the property was a violation of due process because they were bona fide purchasers without notice) *with American Public Finance, Inc. v. Smith*, 45 So. 3d 307, 311-12 (Miss. Ct. App. 2010) (holding that because the appellant was *not* a bona fide purchaser without notice, Rule 25(c) rendered joinder unnecessary). This Court's rulings clearly demonstrate that application of Rule 25(c) turns on whether the party to be joined is a bona fide purchaser without notice. *See id.* Nonetheless, the Mississippi Supreme Court has specifically said that reformation of a deed will not stand against a bona fide purchaser without notice. *Miller*, 468 So. 2d at 867.

Although Gregory and Evans concede that no lis pendens was filed on the 2.02-acre tract, they contend that notice of the litigation is imputed to Belissa Powell by virtue of her relationship to Julia Powell. (Appellees' Br. 13). Unfortunately for the appellees, the law does not support their argument. Rather, Mississippi Code Annotated section 11-47-9 (1972) provides that where no lis pendens notice is filed, the adjudication "shall not affect the rights of bona fide purchasers or incumbrancers of such real estate, unless they have actual notice . . . ." And in *Robertson v. Dambroski*, 678 So. 2d 637, 640 (Miss. 1996), the court held that "[a] conveyance which acknowledges payment or receipt of valuable consideration is prima facie evidence that the grantee therein was a bona fide purchaser for a valuable consideration without notice." Without evidence proving otherwise, the court must presume that the grantee was a bona fide purchaser for value without notice. *Id.*

Because no lis pendens was filed on the 2.02-acre property, Belissa Powell cannot have been on constructive notice of the pending litigation; a proper title search would not have shown that the property was involved in the action. Additionally, there was no evidence presented to the court to prove that Belissa Powell had actual notice of the litigation. The only evidence in

the record regarding Belissa Powell is the deed she received from Julia Powell. (Ex. 5). Consistent with *Robertson*, that deed acknowledges payment of valuable consideration and is, therefore, prima facie evidence that Belissa Powell was a bona fide purchaser for value without notice. (*Id.*). And because there is no evidence in the record proving otherwise, "this Court must conclude that [Belissa Powell] was a bona fide purchaser for value without notice." *Robertson*, 678 So. 2d at 640.

Accordingly, Belissa Powell's joinder was necessary under Mississippi Rules of Civil Procedure 19(a) because complete relief could not be granted to the existing parties without her. Specifically, the partition could not be carried out according to the parties' intent due to the location of the Belissa Powell's 2.02 acres. (T. 17:4-17). And although the chancellor ordered reformation of Julia Powell's deed, such a reformation is not binding upon Belissa Powell for the reasons noted above. Therefore, Belissa Powell's joinder was necessary to accord complete relief to the parties. Consistent with this Court's previous decisions, the nonjoinder of Belissa Powell amounts to a violation of due process and requires that this matter be reversed and remanded. *Aldridge*, 527 So. 2d at 99-100; *American Public Finance*, 45 So. 3d at 311-12.

VI. CONCLUSION

Although reformation of Julia Powell's deed was within the chancery court's subject matter jurisdiction, the chancellor had no authority to order such reformation. Because neither Powell nor Gregory or Evans raised the issue of reformation, Powell had no notice that the court would consider reforming the deed; the chancellor exceeded the court's authority by, *sua sponte*, raising the issue and entering such an order. But even if the reformation was properly before the court, the chancellor's decision was not based on findings of fact supported by substantial evidence, nor is it binding upon Belissa Powell. Therefore, this Court should reverse the chancellor's order and remand the matter for proper adjudication.

Respectfully Submitted,

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VII. 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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This the 10th day of August, 2012.

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