2018 Mississippi Valley/Old Republic Agents Seminar

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REL: March 2, 2018



# ALABAMA COURT OF CIVIL APPEALS

**OCTOBER TERM, 2017-2018**

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**2160649**

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**Dawn Kelly Strong**

**v.**

**Clay Slate, Jr.**

**Appeal from Clay Circuit Court**
**(CV-11-11)**

PITTMAN, Judge.

This appeal arises from efforts by one landowner, Clay Slate, Jr., to obtain access to his "landlocked" parcel of land in Clay County across a nearby parcel owned by Dawn Kelly Strong.

The abbreviated record in this case does not reflect it, but the parties agree in their appellate briefs that, in 2006, Slate brought a civil action in the Clay Circuit Court seeking a prescriptive easement across Strong's property. They further agree that Slate later amended his complaint to assert an additional claim pursuant to statutes providing for a landowner's acquisition of a right-of-way "over the lands intervening and lying between" the owner's property and "the public road nearest or most convenient thereto" via a proceeding in the nature of an action seeking "condemnation of lands for public uses." Ala. Code 1975, §§ 18-3-1 & 18-3-3. The circuit court dismissed Slate's action to the extent that it sought a prescriptive easement but transferred the action to the Clay Probate Court to the extent that a right-of-way was sought under § 18-3-1 et seq.[1] The probate court subsequently entered a judgment awarding Slate a right-of-way,

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[1]As we stated in Williams v. Minor, 202 So. 3d 676, 678-79 (Ala. Civ. App. 2016), under Ala. Code 1975, § 12-11-11, as construed in Ex parte E.S., 205 So. 3d 1245 (Ala. 2015), a court, such as the Clay Circuit Court, "has an obligation to transfer a case outside its subject-matter jurisdiction to an appropriate court within the same county should such a court exist." In Alabama, the court having original jurisdiction over right-of-way condemnation claims is the probate court. See Ala. Code 1975, § 18-3-3.

but in April 2011 Strong appealed from that judgment to the Clay Circuit Court, pursuant to Ala. Code 1975, § 18-1A-283 (a portion of the Alabama Eminent Domain Code, Ala. Code 1975, § 18-1A-1 et seq.), for a trial de novo. The record reflects that the circuit court, in response to dispositive motions filed after the presentation of evidence, entered the following judgment on February 2, 2017:

> "This Court finding [Strong's] Response to [Slate's] 'Memorandum of Law' to be well taken, [Slate's] complaint is dismissed."

On February 7, 2017, Strong filed a motion seeking an award of litigation expenses, including surveyor fees and attorney fees, in the amount of $52,020.85; as authority therefor, she cited Ala. Code 1975, § 18A-1A-232, another portion of the Alabama Eminent Domain Code, which provides that "[t]he court shall award the defendant ... litigation expenses, in addition to any other amounts authorized by law, if the action is wholly or partly dismissed for any reason" and that "[c]osts and litigation expenses authorized by this section may be claimed, taxed, and awarded under the same procedures that apply to costs in other civil actions." § 18A-1A-232(a) and (c). On March 2, 2017, Slate filed a

motion, pursuant to Rule 59, Ala. R. Civ. P., challenging the correctness of the circuit court's judgment of dismissal; he also filed a written objection to Strong's attorney-fee request contained in her motion for an award of litigation expenses on the basis that the fees sought were, he said, "excessive and unreasonable." The record does not reflect any order of the circuit court acting on either party's motion.

On May 18, 2017, Strong filed a notice of appeal and a docketing statement in which she listed her motion for an award of litigation expenses as having been filed on February 7, 2017, and as having been disposed of on May 8, 2017; however, she listed Slate's Rule 59 motion as not having been disposed of. This court held Strong's appeal in abeyance pursuant to Rule 4(a)(5), Ala. R. App. P., so that the Rule 59 motion could be ruled on by the circuit court or be deemed denied pursuant to Rule 59.1, Ala. R. Civ. P., which provides for the automatic denial of postjudgment motions pursuant to Rules 50, 52, 55, and 59, Ala. R. Civ. P., following the passage of 90 days after the filing of such motions (absent a written agreement of all parties or an extension by the appropriate appellate court). Counsel for Strong notified

this court of the denial of Slate's Rule 59 motion by operation of law, after which the record in this appeal was initially prepared. The appeal was transferred to our supreme court because of lack of appellate jurisdiction, after which that court retransferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).[2]

On appeal, Strong challenges what she believes is the denial of her request for the award of litigation expenses. In this case, the record, even as supplemented by the circuit court in July 2017, reflects no ruling by the circuit court on Strong's motion seeking an award of litigation expenses, and, in the absence of such a ruling, we have nothing to review. However, in her appellate brief, Strong asserts that her motion seeking litigation expenses was "denied by operation of law," apparently adhering to the position she took in her docketing statement that the motion was impliedly denied by

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[2]Slate attempted to appeal from the circuit court's judgment of dismissal via electronic filing, but he did not properly file a notice of appeal in a timely manner; on August 3, 2017, Slate's appeal was dismissed by this court on the authority of Alabama Department of Revenue v. Frederick, 166 So. 3d 123 (Ala. Civ. App. 2014). Slate v. Strong, (No. 2160805, Aug. 3, 2017), ___ So. 3d ___ (Ala. Civ. App. 2017) (table).

the lapse of 90 days following its having been filed without intervening affirmative action thereon by the circuit court.

Strong's contention that her motion has been denied by operation of law is refuted by our supreme court's reasoning in Russell v. State, 51 So. 3d 1026 (Ala. 2010). In Russell, an appeal by landowner E. Wayne Russell, Jr., to the Lee Circuit Court from the Lee Probate Court's condemnation judgment was dismissed on grounds that were favorable to the landowner, i.e., that the Lee Probate Court's judgment had been entered in the absence of indispensable parties and, therefore, was void. The landowner then filed a motion seeking an award of litigation expenses; however, the Lee Circuit Court entered an order on October 31, 2008, denying, among other things, the landowner's motion. The landowner then filed a motion to alter or amend that ruling, alleging that the denial of litigation expenses had been erroneous; the Lee Circuit Court denied that motion, and the landowner appealed to our supreme court.

Before reaching the merits of the landowner's appeal, our supreme court, in assessing its own appellate jurisdiction, considered whether the motion to alter or amend the October

31, 2008, ruling on the motion to award litigation expenses constituted a "successive postjudgment motion" that would not have tolled the time for taking an appeal. That court answered that question in the negative, using reasoning that applies directly to this case:

> "Russell's motion for litigation expenses and attorney fees was not a motion to alter or amend a judgment pursuant to Rule 59(e), Ala. R. Civ. P. See Ford v. Jefferson County, 989 So. 2d 542, 545 (Ala. Civ. App. 2008) (concluding that petition for assessment of attorney fees and costs was not subject to the 30-day time limitation of Rule 59(e), Ala. R. Civ. P., and observing that 'the United States Supreme Court has held that a request for an award of attorney fees ... is not a "motion to alter or amend a judgment"' (citing White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 452, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982))). See also Buchanan v. Stanships, Inc., 485 U.S. 265, 267-68, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988) (reasoning that because the statute at issue 'provides for fees independently of the underlying cause of action and only for a "prevailing party," a motion for fees required an inquiry "separate from the decision on the merits -- an inquiry that cannot even commence until one party has 'prevailed'"' and that '[s]uch a motion therefore "'does not imply a change in the judgment, but merely seeks what is due because of the judgment'"' (citations omitted)). Therefore, Russell's motion to 'reconsider' the denial of that request was not a successive postjudgment motion, and it tolled the 42-day period for filing an appeal. See, e.g., Ex parte Keith, 771 So. 2d 1018, 1022 (Ala. 1998) (noting that 'a successive postjudgment motion does not suspend the running of the time for filing a notice of appeal')."

51 So. 3d at 1028-29 n.4 (first emphasis added). Similarly, in this case, Strong's motion for an award of litigation expenses was not a postjudgment motion pursuant to Rules 50, 52, 55, or 59, Ala. R. Civ. P., so as to be susceptible to the operation of the 90-day automatic-denial provisions of Rule 59.1, Ala. R. Civ. P., but, rather, was in the nature of a motion under Rule 54(d), Ala. R. Civ. P., that "'required an inquiry "separate from the decision on the merits"'" of Slate's right-of-way claim. Williams, 51 So. 3d at 1028 n.4.

"Generally an appeal can be brought only by a party or his personal representative from an adverse ruling contained in a final judgment." Home Indem. Co. v. Anders, 459 So. 2d 836, 842 (Ala. 1984) (citations omitted). Although the circuit court has ruled on Slate's right-of-way claim in a final judgment, that court has not explicitly or (in light of Williams) implicitly acted in any substantive manner upon Strong's motion for an award of litigation expenses, including her requests for awards of attorney fees and surveyor fees. Thus, Strong has not appealed from a final judgment that is adverse to her. We therefore dismiss the appeal, albeit without prejudice to the circuit court's plenary

consideration, after this court's certificate of judgment has been issued, of the parties' respective positions on Strong's request for an award of litigation expenses.

APPEAL DISMISSED.

Thompson, P.J., and Thomas, Moore, and Donaldson, JJ., concur.

2017 WL 2610508
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

**ROCHESTER**–MOBILE, LLC, and Salzman–Mobile, LLC
v.
C & S WHOLESALE GROCERS, INC., and Southern Family Markets of Mobile South University BLVD, LLC

1160185
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June 16, 2017

**Synopsis**
**Background:** Commercial landlord brought action against lessee, seeking a declaration as to whether lessee had timely exercised the option to renew a lease. Sublessee's guarantor was added as a defendant. Lessee filed a cross-claim against guarantor and a third-party claim against sublessee alleging violations of the sublease. Guarantor and sublessee filed a cross-claim and counterclaim against lessee, alleging that, because the sublease was not recorded, it was due to terminate on expiration of 20 years. Guarantor and sublessee moved for judgment on the pleadings. The Circuit Court, Mobile County, No. CV–15–902061, granted the motion. Lessee appealed.

**|Holding:|** The Supreme Court, Main, J., held that the term "lease" as used in statute requiring recording of leases with terms longer than 20 years does not include a sublease.

Reversed and remanded.

Murdock and Bryan, JJ., concurred in the result.

**Appeal from Mobile Circuit Court (CV–15–902061)**

**Opinion**

MAIN, Justice.

***1** Rochester–Mobile, LLC, and Salzman–Mobile, LLC (hereinafter referred to as "Rochester–Salzman"), appeal from a judgment entered against them in a declaratory-judgment action relating to the validity of a 25–year sublease between Rochester–Salzman and Southern Family Markets of Mobile South University BLVD, LLC ("SFM"), and C & S Wholesale Grocers, Inc. ("C & S"). The trial court concluded that because the sublease was not recorded pursuant to § 35–4–6, Ala. Code 1975, the sublease was void for the remainder of the term extending beyond 20 years. We reverse and remand.

## I. Facts and Procedural History

In July 1974, Multiple Properties, Ltd., entered into a ground lease with Casto Developers, a general partnership, related to a parcel of property located in Mobile County. The lease was for an initial term of 31 years with 5 successive 10–year renewal options. The lease agreement was duly recorded in the Probate Office for Mobile County on August 21, 1974. The land was developed as a shopping center, and Bruno's, Inc. ("Bruno's"), then obtained Casto Developers' leasehold interest.

On June 27, 1997, Bruno's entered into a sale-leaseback financing arrangement with Rochester–Salzman. In exchange for $7,000,000, Bruno's assigned its interest under the ground lease to Rochester–Salzman. On that same day, Rochester–Salzman, now the lessee by virtue of the assignment, subleased the premises back to Bruno's in a document titled "Lease and Agreement" ("the sublease"). The sublease was for a term of 25 years with 5 additional, successive 5–year renewal options. Bruno's agreed to make monthly basic rent payments of $55,500. The sublease was not recorded in the office of the judge of probate.

In 2009, Bruno's filed for bankruptcy. As a part of the bankruptcy proceedings, SFM was assigned the rights and assumed the obligations of Bruno's under the sublease. C & S guaranteed SFM's obligations under the sublease.

In 2015, Multiple Properties, LLC, the successor to Multiple Properties, Ltd., initiated this lawsuit, seeking a declaration as to whether Rochester–Salzman or Rochester–Salzman's mortgagees had timely exercised the option to renew the ground lease. C & S was added as a defendant at some time following the original complaint. Rochester–Salzman then filed a cross-claim

against C & S and a third-party claim against SFM alleging violations of the sublease. In response, C & S and SFM filed a cross-claim and counterclaim, respectively, against Rochester–Salzman. Their claims sought a judgment declaring that, because the sublease was not recorded, it was due to terminate on the expiration of 20 years pursuant to § 35–4–6. Rochester–Salzman answered the cross-claim/counterclaim, admitting that the sublease had not been recorded within one year of its execution but denying that any such recordation was necessary under § 35–4–6. It further alleged that the sublease contained separate and independent agreements, promises, and covenants that continued in force notwithstanding the termination of the sublease. Rochester–Salzman then filed an additional counterclaim, requesting a judgment declaring that C & S and SFM continued to be obligated to Rochester–Salzman for the full 25–year term of the sublease.

*2 C & S and SFM moved for judgment on the pleadings on the cross-claim/counterclaim, contending that the pleadings established that the sublease was not recorded within 1 year of its execution and that, therefore, the sublease was due to terminate on June 25, 2017, 20 years after it was executed, pursuant to § 35–4–6. Rochester–Salzman opposed the motion and moved for a summary judgment on its declaratory-judgment counterclaim. Rochester–Salzman argued that the recording of the ground lease satisfied the recording requirement of § 35–4–6. Rochester–Salzman also contended that the payment obligations contained in the sublease were part of a financing transaction and that those obligations were independent and enforceable regardless of the termination of the sublease agreement.

On October 3, 2016, the trial court entered an order granting C & S and SFM's motion for a judgment on the pleadings and denying Rochester–Salzman's motion for a summary judgment. The trial court held as follows:

> "(1) The Lease and Agreement among [Rochester–Salzman] as Landlord and [Bruno's] as Tenant [d]ated June 27, 1997 ('the Lease') which is the subject of the parties' respective motions is a lease covered by Alabama Code [1975,] § 35–4–6.
>
> "(2) It is undisputed that the Lease was not recorded within one year of its execution.
>
> "(3) The Lease is unambiguous.
>
> "(4) Although the Lease provides for a principal term greater than twenty years, the Lease's term is twenty years pursuant to Alabama Code [1975,] § 35–4–6[,] because it was not recorded within one year of execution. The Lease expires on June 26, 2017.
>
> "(5) To the extent the Lease by its terms extends beyond June 26, 2017, the Lease is void and unenforceable pursuant to Alabama Code [1975,] § 35–4–6. As a result, any rights or obligations (monetary or non-monetary) of C & S, SFM Mobile, or Rochester–Salzman which would otherwise accrue under the Lease or the Guaranty of Lease after June 26, 2017, including without limitation any obligation of C & S or SFM Mobile to pay Rent or Additional Rent (as defined in the Lease), are likewise void and unenforceable pursuant to Alabama Code [1975,] § 35–4–6."

On January 24, 2017, the trial court certified its October 3, 2016, order as final pursuant to Rule 54(b), Ala. R. Civ. P. Rochester–Salzman appealed.

## II. Standard of Review

[1] [2] [3]Our review of a judgment on the pleadings is de novo:

> "When a motion for a judgment on the pleadings is made by a party, 'the trial court reviews the pleadings filed in the case and, if the pleadings show that no genuine issue of material fact is presented, the trial court will enter a judgment for the party entitled to a judgment according to the law.' B.K.W. Enters., Inc. v. Tractor & Equip. Co., 603 So.2d 989, 991 (Ala. 1992). See also Deaton, Inc. v. Monroe, 762 So.2d 840 (Ala. 2000). A judgment on the pleadings is subject to a de novo review. Harden v. Ritter, 710 So.2d 1254, 1255 (Ala. Civ. App. 1997).... [I]n deciding a motion for a judgment on the pleadings, the trial court is bound by the pleadings. See Stockman v. Echlin, Inc., 604 So.2d 393, 394 (Ala. 1992)."

Universal Underwriters Ins. Co. v. Thompson, 776 So.2d 81, 82–83 (Ala. 2000).

## III. Analysis

The key inquiry in this case is whether § 35–4–6 applies to a sublease. Section 35–4–6 provides:

> "No leasehold estate can be created for a longer term than 99 years. Leases for more than 20 years shall

> be void for the excess over said period unless the lease or a memorandum thereof is acknowledged or approved as required by law in conveyances of real estate and recorded within one year after execution in the office of the judge of probate in the county in which the property leased is situated."

Rochester–Salzman argues that § 35–4–6 should not be read to include a sublease. First, it notes that the statute, which imposes restrictions on the freedom to contract in the conveyance of property interests, is in derogation of the common law and, therefore, must be strictly construed. See Foster v. Martin, 286 Ala. 709, 712, 246 So.2d 435, 438 (1971) (noting that a statute in derogation of the common law must be strictly construed and that such a statute "will not be extended further than is required by the letter of the statute"). Next, Rochester–Salzman contends that the terms "lease" and "sublease" are not synonymous:

> *3 "A lease and a sublease involve different parties and different relationships of the parties to the real property involved. In a lease, an owner of land conveys a possessory interest in that land to a lessee for some period of time. A sublease involves not the landowner, but the lessee and a third party to whom the lessee conveys some portion of its leasehold interest."

(Rochester–Salzman's brief, at 30–31.) Rochester–Salzman further notes that the legislature knows how to include subleases in the express language of statutes, and it cites a multitude of examples from the Alabama Code in which the terms "lease" and "sublease," or derivatives of those terms, are used in the same section. Finally, it contends that the legislative purpose of § 35–4–6—preventing landowners from tying up property by lease for long terms—is not served by requiring recording of a sublease, which, by definition, cannot add to the term of a master lease. For these reasons, Rochester–Salzman argues, § 35–4–6 does not apply to subleases.

SFM and C & S, on the other hand, contend simply that a sublease is, in fact, a lease. They argue that the language of § 35–4–6 unambiguously applies to all leases, including subleases.

[4] [5] [6] [7] [8] [9]In interpreting a statutory provision, "a court is required to ascertain the intent of the legislature as expressed and to effectuate that intent." Tuscaloosa Cty. Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa Cty., 589 So.2d 687, 689 (Ala. 1991).

> "Words used in the statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So.2d 344, 346 (Ala. 1992)). " 'In the absence of a manifested legislative intent to the contrary, or other overriding evidence of a different meaning, legal terms in a statute are presumed to have been used in their legal sense.' " Crowley v. Bass, 445 So.2d 902, 904 (Ala. 1984) (quoting 2A D. Sands, Sutherland Statutory Construction § 47.30 (4th ed. 1973)).

> "Our review of an issue concerning the intent of the legislature is confined to the terms of the legislative act itself, unaided by the views of observers of or participants in the legislative process. City of Daphne v. City of Spanish Fort, 853 So.2d 933, 945 (Ala. 2003). We can look to " 'the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption.' " City of Birmingham v. Hendrix, 257 Ala. 300, 307, 58 So.2d 626, 633 (1952) (quoting In re Upshaw, 247 Ala. 221, 223, 23 So.2d 861, 863 (1945)). We can also look to an act's ' "relation to other statutory and constitutional provisions, view its history and the purposes sought to be accomplished and look to the previous state of law and to the defects intended to be remedied." ' Hendrix, 257 Ala. at 307, 58 So.2d at 633 (quoting Birmingham Paper Co. v. Curry, 238 Ala. 138, 140, 190 So. 86, 88 (1939)).

King v. Campbell, 988 So.2d 969, 984 (Ala. 2007).

[10]After careful consideration of the parties' arguments, and in light of the applicable canons of statutory interpretation, we conclude that the term "lease" as used

in § 35–4–6 does not include a sublease.

*4 First, the terms "lease" and "sublease" are not altogether synonymous. A lease is a contract by which the "possessor of real property conveys the right to use and occupy the property in exchange for consideration." Black's Law Dictionary 1024 (10th ed. 2014). Although a sublease is a species of lease, it has a distinct, refined legal meaning. A "sublease" is defined as "[a] lease by a lessee to a third party, conveying some or all of the leased property for a term shorter than that of the lessee, who retains a right of reversion." Black's, supra, at 1652. Indeed, a body of case-law exists regarding the determination of whether an instrument is a sublease or an assignment and the resulting ramifications. See, e.g., Pantry, Inc. v. Mosley, 126 So.3d 152, 159 n.2 (Ala. 2013); Johnson v. Moxley, 216 Ala. 466, 468, 113 So. 656, 657 (1927); and Johnson v. Thompson, 185 Ala. 666, 668–89, 64 So. 554, 555 (1914).

[11]That the drafters of § 35–4–6 did not intend the term "lease" to include a sublease finds ample support among the other provisions of the Alabama Code in which the legislature has used both "lease" and "sublease," or derivatives of those terms, in the same provision.[1] " ' "There is a presumption that every word, sentence, or provision [of a statute] was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used." ' " Richardson v. Stanford Props., LLC, 897 So.2d 1052, 1058 (Ala. 2004)(quoting Sheffield v. State, 708 So.2d 899, 909 (Ala. Crim. App. 1997), quoting in turn 82 C.J.S. Statutes § 316, at 551–52 (1953)). Thus, to hold that the term "lease" includes a sublease would render the term "sublease" superfluous in those numerous other statutes in which both terms, or derivatives of those terms, were used. Moreover, when the legislature has intended that the term "lease" include a "sublease," it has demonstrated the ability to expressly indicate its intent. See § 7–2A–103(1)(j), Ala. Code 1975 (defining "lease" and providing that, "[u]nless the context clearly indicates otherwise, the term [lease] includes a sublease").

1 See § 8–15–31(5), Ala. Code 1975 (defining "owner" of self-service storage facility as "owner, operator, lessor or sublessor of a self-service storage facility"); § 11–47–14.1(b), Ala. Code 1975 (providing that municipalities "may authorize the lessees in ... leases and their subleasees to construct or maintain buildings and other improvements upon the properties so leased and collect wharfage dues thereon and to sublet all or any part of said wharfs, buildings and other improvements"); § 11–88–7.1(f), Ala. Code 1975 (providing that county may "acquire by lease or sublease" property comprising a water system, sewer system, or fire-protection facility); § 11–89A–2(18), Ala. Code 1975 (defining "revenues" as all income or other charges received from, among other sources, a "lease [or] sublease"); § 11–97–2(21), Ala. Code 1975 (defining "revenues" as all rentals or other income received by utility-services facility from sale, "lease, [or] sublease"); § 24–8–3(10), Ala. Code 1975 (defining for purpose of Alabama Fair Housing law, "to rent" as "to lease, to sublease"); § 26–1A–204(2), Ala. Code 1975 (providing that power of attorney granting general authority with respect to real property authorizes agent to both "lease" and "sublease" property); § 26–1A–205(2), Ala. Code 1975 (providing that power of attorney granting general authority with respect to tangible personal property authorizes agent to "lease" and "sublease" personal property); § 33–10–19, Ala. Code 1975 (providing that commission created in that chapter "may lease or sublease lands leased from the State of Alabama"); § 35–8–4, Ala. Code 1975 (deeming each condominium unit real property, the ownership of which may be by "lease or sublease"); § 35–8A–412(a), Ala. Code 1975 (requiring declarant of condominium containing conversion buildings to give notice of conversion to "each of the residential tenants, and any residential subtenant in possession"); § 35–9–60, Ala. Code 1975 (providing that landlord of any storehouse or other building shall have a lien on the goods, furniture, and effects "belonging to the tenant, and subtenant, for rent"); § 35–9A–141(7), Ala. Code 1975 (defining, for purpose of Residential Landlord and Tenant Act, "landlord" to mean "the owner, lessor or sublessor of the dwelling unit"); and § 41–9–44(a)(6), Ala. Code 1975 (providing that Council on the Arts is authorized to "lease or sublease" real property).

*5 Furthermore, the history and legislative purpose of § 35–4–6 support the proposition that § 35–4–6 was not intended to apply to subleases. The initial version of § 35–4–6, adopted in 1852, prohibited the creation of a leasehold estate for a longer term than 20 years.[2] The policy underlying the statute was to prevent landowners from tying up property by leasing for long terms.[3] Harco Drug, Inc. v. Notsla, Inc., 382 So.2d 1, 3 (Ala. 1980) ("The policy expressed by the statute is that a person should not be permitted to tie up his property by a lease for a period greater than twenty years."); Tennessee Coal, Iron & R.R. Co. v. Pratt Consol. Coal Co., 156 Ala. 446, 448, 47 So. 337, 337 (1908) ("The policy of the law is clearly expressed in the statute that a person shall not be allowed to tie his property up by lease for a longer period than 20 years ...."). Necessarily, the original version of the statute would have had no application to a sublease because, given that the original lessee could never have possessed a leasehold interest for a term greater than 20 years, the lessee could not have transferred a leasehold

interest for a greater term. Thus, the original version of the statute placed no restrictions on a lessee's right to sublet a leasehold estate.

2 "No leasehold estate can be created for a longer term than twenty years."

3 An early version of a statute or constitutional provision prohibiting long-term leases appeared in New York's constitution of 1846 and prohibited leases of agricultural land for terms longer than 12 years. The framers of that particular provision deemed long-term leases undesirable because, it was believed, tenants were unwilling to make improvements to land as to which they had no independent ownership. Stephens v. Reynolds, 6 N.Y. (2 Seld.) 454, 457 (1852).

The statute was amended in 1911 to create what is, essentially, the current § 35–4–6.[4] The 1911 amendment increased the maximum term of a lease to 99 years, but retained a vestige of the prior 20–year limit, providing that the term of any lease that extended beyond 20 years was void unless it had been recorded within 1 year of the execution of the lease. We have stated that the "plain purpose" of the recording requirement of § 35–4–6 "is to provide notice to innocent purchasers of property who otherwise might purchase property and then discover an unrecorded lease on the property that deprives them of the benefits of ownership for up to 99 years." Eastwood Mall Assocs., Ltd. v. All American Bowling Corp., 518 So.2d 44, 46 (Ala. 1987).

4 The statute was amended in 1989 to permit recording a memorandum in lieu of the actual lease.

The recognized legislative purpose of § 35–4–6 is not furthered by applying the recording requirement to subleases. First, a sublease by its nature cannot extend the lease term and thus cannot tie up property for any term longer than that held by the lessee under the master lease. Likewise, the recording of the master lease gives notice of the maximum length for which the property at issue is encumbered by lease. Thus, the legislative purpose of the statute is satisfied upon the recording of the master lease.

[12]Moreover, once a leasehold estate of longer than 20 years—fully valid under § 35–4–6—is established, there is no readily apparent basis for further restricting the alienability of that leasehold interest. In support of this point, we recognize that § 35–4–6 does not, by its terms, apply to assignments.[5] Thus, a lessee who holds a leasehold for a term of more than 20 years can freely assign the entirety of his leasehold estate without the necessity of recording the assignment under § 35–4–6. Applying the statute to subleases, however, restricts a lessee's ability to transfer the estate for a lesser term. It seems to us that, if a leasehold estate is valid in its sum, it must also be valid—and alienable—in its parts.

5 We have explained the differences between an assignment and a sublease as follows:

> " 'In general terms, the difference between an assignment and a sublease is that an assignment transfers the lessee's entire interest in the property, whereas a sublease transfers only a portion of that interest, with the original lessee retaining a right of reentry at some point during the unexpired term of the lease.' "

Pantry, Inc. v. Mosley, 126 So.3d at 159 n.2 (quoting 69 Am. Jur. Proof of Fact 3d 191, Circumstances Establishing Landlord's Unreasonable Withholding of Consent to Assignment or Sublease § 4 (2002) (footnotes omitted)).

***6** [13] [14] [15] [16]Finally, in addition to the above-referenced canons of statutory construction, Alabama law has long provided that "[s]tatutes in derogation or modification of the common law are strictly construed." Arnold v. State, 353 So.2d 524, 526 (Ala. 1977). Statutes are presumed to not alter the common law in any way not expressly declared. Arnold, supra. Likewise, "[s]tatutes or ordinances which impose restrictions on the use of private property are strictly construed and their scope cannot be extended to include limitations not therein included or prescribed." Smith v. City of Mobile, 374 So.2d 305, 307 (Ala. 1979). We agree that § 35–4–6, which restrains the ability to transfer a leasehold interest, is in derogation of the common law, mandating the narrowest reasonable construction.

For the above-stated reasons, therefore, we hold that the sublease in this case is not void under the provisions of § 35–4–6. Accordingly, the trial court erred in entering a judgment on the pleadings in favor of SFM and C & S and against Rochester–Salzman. Given our holding, we pretermit discussion of the issue whether the sublease contained separate agreements that are independently enforceable, regardless of the validity of the sublease.

## IV. Conclusion

The judgment of the trial court is reversed and the case remanded for further proceedings consistent with this

opinion.

REVERSED AND REMANDED.

Stuart, C.J., and Bolin, J., concur.

Murdock and Bryan, JJ., concur in the result.

**All Citations**

--- So.3d ----, 2017 WL 2610508

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2017 WL 1101401
Supreme Court of Alabama.

**SIMMONS** GROUP, LTD
v.
Caine O'REAR, Jr. Family Trust et al.

1150475
|
March 24, 2017

Synopsis
**Background:** Methane well operator brought interpleader action to determine who owned mineral interest in land, with holder of unbroken chain of conveyances and successors to adverse possessor each claiming ownership. After a bench trial without oral testimony, the Circuit Court, Walker County, No. CV-11-900396, Hugh D. Farris, Jr., J., found in favor of successors. Holder appealed.

**Holdings:** The Supreme Court, Bryan, J., held that:

[1] the first conveyance recorded after destruction of records became new beginning point of chain of title, and

[2] holder owned mineral interest in property.

Reversed and remanded.

Shaw, J., concurred specially and filed opinion.

Murdock, J., concurred in the result.

Parker, J., concurred in the result in part, dissented in part, and filed opinion in which Stuart, J., joined.

**Appeal from Walker Circuit Court (CV–11–900396), Hugh D. Farris, Jr., J.**

**Attorneys and Law Firms**

S. Allen Baker, Jr., James A. Bradford, Ed R. Haden, and Susan N. Han of Balch & Bingham LLP, Birmingham, for appellant.

Gordon Griffith O'Rear of O'Rear & O'Rear, LLC, Jasper.

Joseph E. Powell, Birmingham, for amicus curiae Alabama Land Title Association, Birmingham, in support of the appellant.

**Opinion**

BRYAN, Justice.

*1 [1] [2]This case began as an interpleader action filed by El Paso E & P Production, L.P. ("El Paso"), to determine who owns the mineral interest in a piece of property located in Walker County, Alabama ("the Landon parcel"), on which El Paso operates a methane well.[1] The competing claimants for the mineral interest are Simmons Group, LTD ("Simmons Group"), on the one hand, and the Caine O'Rear, Jr. Family Trust, Mary Lou Foy, Susan Foy Spratling, Paula Robertson Rose, Stacy Baker Carson, and Warren Dane Baker (hereafter referred to collectively as "O'Rear"), on the other hand. Simmons Group claims ownership by an unbroken chain of conveyances starting with an 1883 quitclaim deed from one Elizer Taylor to Musgrove Bros. purporting to convey the mineral interest ("the 1883 deed"). O'Rear claims ownership by a separate chain of conveyances originating in the adverse possession of the Landon parcel by one J.K.P. Chilton and allegedly ripening into ownership sometime before 1921. O'Rear does not argue that Chilton adversely possessed the mineral interest separate from the surface estate.[2] Rather, O'Rear argues that the 1883 deed did not validly convey the mineral interest and that the mineral interest was not severed from the surface estate until after Chilton adversely possessed the Landon parcel.[3] O'Rear does not dispute Simmons Group's chain of title subsequent to the 1883 deed. Thus, it is undisputed that, if the 1883 deed validly conveyed the mineral interest to Musgrove Bros., Simmons Group is the rightful owner. Ownership of the mineral interest is the dispositive issue in this case.

1 The original owner of the disputed interest was John W. Landon, who acquired the property by patent from the United States government in 1858.

2 When the mineral interest in a property is severed from the surface estate, adverse possession of the surface does not constitute adverse possession of the mineral interest. Sanford v. Alabama Power Co., 256 Ala. 280, 288, 54 So.2d 562, 569 (1951) ("To acquire by adverse possession the title to the mineral interests so severed, there must be an actual taking or use under claim of

right of the minerals from the land for the period necessary to affect the bar.").

3 When the mineral interest has not been severed from the surface estate, adverse possession of the surface is sufficient for adverse possession of the mineral interest. Black Warrior Coal Co. v. West, 170 Ala. 346, 351, 54 So. 200, 201 (1910) ("Had [the adverse possessor not attempted to sever] the coal and mineral interest in said lands ... there could be no question but that his adverse possession would have ripened into a perfect title to the entire interest in the land several years before his death." (emphasis added)).

The case was tried before the circuit court upon stipulations, admissions of fact, and briefs. The court did not hear oral testimony. The circuit court determined that Chilton had adversely possessed the Landon parcel with the mineral interest still attached and that O'Rear therefore owns the mineral interest.

## Standard of Review

*2 Because the circuit court did not hear oral testimony, our standard of review is de novo. § 12–2–7, Ala. Code 1975 ("[I]n deciding appeals, no weight shall be given the decision of the trial judge upon the facts where the evidence is not taken orally before the judge, but in such cases the Supreme Court shall weigh the evidence and give judgment as it deems just."). See also Eubanks v. Hale, 752 So.2d 1113, 1122 (Ala. 1999) (stating that "where no testimony is presented ore tenus, a reviewing court will not apply the presumption of correctness to a trial court's findings of fact and ... the reviewing court will review the evidence de novo").

## Discussion

Neither Simmons Group nor O'Rear can trace its chain of title to Landon, the original owner. Indeed, there is a break in the chain of title to the Landon parcel because in 1877 a fire destroyed the Walker County courthouse along with the Walker County land records. Consequently, Simmons Group argues that its chain of title, which begins with the 1883 deed, is superior to O'Rear's under Whitehead v. Hester, 512 So.2d 1297 (Ala. 1987). In Whitehead, this Court held that when all land records have been destroyed, the first conveyance recorded thereafter becomes the new beginning point of the chain of title. In this case, the first recorded conveyance subsequent to the total destruction of the land records in Walker County is the 1883 deed.

O'Rear argues that Whitehead is distinguishable from the present case for two reasons. First, O'Rear argues that Simmons Group failed to establish that all land records in Walker County were destroyed in the 1877 fire and that, therefore, Whitehead does not apply. Second, O'Rear argues that the evidence shows that Elizer Taylor did not own the mineral interest when she executed the 1883 deed and that the deed was therefore ineffective to sever the mineral interest from the surface estate.

### I. Destruction of the Walker County Land Records

[3]This Court based its decision in Whitehead on the fact that "neither side in th[at] case [could] trace its title back to the sovereign or to a common grantor because of the total destruction of all the land records by the 1890 fire that also destroyed the Franklin County Courthouse." Whitehead, 512 So.2d at 1301. O'Rear argues that Simmons Group failed to establish that all the land records were destroyed in the 1877 fire and that, therefore, Whitehead is inapplicable. We disagree. It is undisputed that the Walker County courthouse burned to the ground in 1877. Furthermore, the record on appeal contains no evidence of any land records having survived that fire. The total destruction of the building housing the county records, along with the absence in the record of any surviving records, is substantial evidence that the Walker County land records were totally destroyed in the 1877 fire. O'Rear has offered no evidence to suggest that any records survived. Accordingly, the rule from Whitehead applies to reestablish the beginning point of the chain of title to the disputed mineral interest.

### II. Evidence That Elizer Taylor Did Not Own the Mineral Interest in 1883

[4] [5] [6]Under Whitehead, this Court presumes that the first recorded conveyance after the total destruction of land records to a property is the beginning point of a disputed chain of title. The Court looks to instruments that actually purport to convey an interest, rather than instruments merely concerning ownership of the land.[4] This is because the purpose of the Whitehead rule is to

bring clarity to title disputes where the best evidence of ownership—i.e., the intact chain of title—is lost.[5] Only instruments that actually purport to convey an interest can serve the purpose of Whitehead; instruments that, by their terms, cannot convey an interest also cannot form part of the chain of title. Furthermore, by pinning the new beginning point of the chain of title to the first conveyance recorded after the destruction of the land records, the Whitehead rule protects parties from undertaking the onerous task of showing who owned certain property more than a century after the best evidence of ownership has been lost. As the Court stated in Whitehead:

> *3 "To require [the parties] to somehow locate the originals of the instruments that were destroyed in the fire and, thus, establish their chain of title from the present date completely back to a government patent or to a common grantor, would place an unreasonable burden on them, or on others similarly situated."

512 So.2d at 1302.

4 We say "purports to convey" because in lost-chain-of-title cases it is not possible to unequivocally determine the true owner of the disputed property at the time of the first-recorded conveyance. Indeed, this is the problem the Whitehead rule is intended to remedy.

5 "While the legal title to real property can be shown by a valid deed, the record title is the highest evidence of ownership of real property and is not easily defeated." 63C Am. Jur. 2d Property § 39 (2009) (emphasis added).

[7] [8]Of course, the Whitehead rule does nothing to disturb the basic property rule that a grantor cannot convey more than the grantor actually owns. See, e.g., Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So.3d 287, 297 (Ala. Civ. App. 2010)(stating that "[a] landowner cannot convey a greater interest in property than he possesses"). Thus, proof that the grantor of the first-recorded deed did not actually own the property at the time of the purported conveyance will defeat the presumption underpinning the Whitehead rule. O'Rear, however, presents no such proof.

[9]In this case, the only post-fire evidence concerning ownership of the mineral interest before the 1883 deed is an 1871 agreement, recorded in 1879, between one Nancy Landon and one Luiza Taylor ("the 1871 agreement"), and three 1920 affidavits sworn to by G.W. Kilgore, E.S. Hutto, and W.R. Brown ("the 1920 affidavits"). The 1871 agreement states, in pertinent part:

> "Contract made and executed the 28th day of November one thousand eight hundred and seventy one by and between Nancy Landon of the first part and Luiza Taylor of the second part both of the County of Walker and the State of Alabama [.] [T]he said Nancy Landon agrees to give to her daughter Luiza Taylor her property to take care of her her life time and the said Luiza Taylor agrees to take care of her mother Nancy Landon her life time for the property of her mother all the following described Land ... [describing the Landon parcel] ... and if either of the above named parties fails to comply with the above named duty this obligation is void and set aside."

O'Rear argues that this agreement shows that the mineral interest had not been severed from the surface estate of the Landon parcel and that, therefore, Elizer Taylor did not own the mineral interest when she purported to convey it to Musgrove Bros. in 1883. This argument is unpersuasive. At most, the 1871 agreement is evidence that someone besides Elizer Taylor owned the mineral interest in 1871. Evidence that Elizer Taylor did not own the mineral interest in 1871 is not inconsistent with her ownership of the interest 12 years later in 1883. Thus, the 1871 agreement cannot defeat the presumption that the 1883 deed is the beginning point of the chain of title.[6]

6 Furthermore, the 1871 agreement cannot itself serve as the presumed beginning point of the chain of title under Whitehead. The agreement is executory in nature and does not purport to convey an interest in the Landon parcel.

*4 The 1920 affidavits, which are each identical in substance, allege that, when the 1883 deed was executed, Elizer Taylor had been in adverse possession of both the mineral interest and surface of the Landon parcel for "more than one year." O'Rear argues that, because those affidavits establish that Taylor had been in adverse

possession of the as-yet-unsevered mineral interest for less than the prescriptive period when she executed the 1883 deed, that deed could not convey title. This argument is also unpersuasive. The assertion in the 1920 affidavits that Taylor was in adverse possession of the mineral interest is a legal conclusion, not a factual allegation.[7] Furthermore, the nonspecific assertion that Taylor had been in adverse possession for longer than a year does not support O'Rear's argument that Taylor had been in adverse possession for less than the prescriptive period. That assertion is, in fact, fully consistent with Taylor's possession for the prescriptive period. The 1920 affidavits contain no factual allegations inconsistent with Taylor's actual ownership of the mineral interest and therefore cannot defeat the presumption that the 1883 deed is the beginning point of the chain of title to the mineral interest.

[7] Section 35-4-70, Ala. Code 1975, governs the admissibility of affidavits as evidence in litigation over title to land and states that affidavits "shall be admissible as evidence of the facts therein recited and shall be sufficient to prima facie establish such facts." (Emphasis added.)

## Conclusion

In this case, the first conveyance of the mineral interest recorded after the total destruction of the Walker County land records is the 1883 deed. As such, the 1883 deed is the presumed beginning point of the chain of title under the Whitehead rule. O'Rear has offered no evidence sufficient to rebut this presumption. Therefore, we hold that title to the mineral interest in the Landon parcel vests in Simmons Group. Accordingly, we reverse the circuit court's judgment and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Main, Wise, and Bryan, JJ., concur.

Shaw, J., concurs specially.

Murdock, J., concurs in the result.

Stuart and Parker, JJ., concur in the result in part and dissent in part.

SHAW, Justice (concurring specially).

I concur. I write specially to note the following, which I discuss not as an independent theory on which to decide this case, but simply as a broader discussion of the facts presented here.

There are two chains of title to two different estates. One chain shows a transfer of a mineral estate only. This is the chain claimed by the appellant, Simmons Group, LTD ("Simmons"). The other, with some aberrations, shows a transfer of a surface estate. This is the chain claimed by the appellees. The evidence before us tends to explain how these two chains came into being.

We have evidence indicating that John Landon received the property from the United States. We have an agreement dated 1871 indicating that a later Landon, Nancy, agreed to transfer the property to her daughter, Luiza Taylor. In 1883, another Taylor, Elizer, transferred the mineral estate to Simmons's predecessor in title. Then, there is the 1887 deed by R.A. Baker and J.A. Baker conveying the property to A.H. Johnston; the nature of the interest they owned is not clear. However, in 1898, Johnston conveyed the surface rights of the property to William M. Wallace. Thus, we see Taylors receiving the property from Landons, and then Taylors selling the mineral estate. Subsequent history shows that the mineral estate and the surface estate were being separately transferred.

All of this appears to help explain what happened: The Landons transferred the property to the Taylors, and the surface estate and mineral estates where subsequently transferred separately by the Taylors. We have some evidence confirming or tending to confirm those transfers, but records showing other transfers were lost in the 1877 fire that destroyed the Walker County courthouse. Nevertheless, we do have some explanation as to how the two chains of title exist, and it tends to confirm the holding that results in this case by the application of the rule in Whitehead v. Hester, 512 So.2d 1297 (Ala. 1987).

PARKER, Justice (concurring in the result in part and dissenting in part).

*5 I concur in the result insofar as the majority reverses the circuit court's judgment in favor of the O'Rear defendants.

I dissent in part because I believe that the main opinion unnecessarily limits a trial court's discretion in considering relevant evidence in a property dispute when

it is presented with the situation, as in this case, where competing chains of title cannot be traced to a common grantor or to a patent deed from the United States as a result of the destruction of the relevant land records. I agree that the rule from Whitehead v. Hester, 512 So.2d 1297 (Ala. 1987), applies in this case; I disagree, however, with the majority's interpretation and application of this rule.

Initially, I note that the Whitehead rule was created by this Court in 1987 to resolve a very specific factual situation before it and that it has not been applied since.[8] The Whitehead Court made very clear that its decision announcing this novel, judicially created rule was to be limited to the facts before it. See Whitehead, 512 So.2d at 1301–02 (using language like "under the facts of this case" and "[i]n such circumstances"). The Whitehead Court did not have before it any evidence of recorded instruments other than deeds. The question now before this Court was not decided by the Whitehead Court. I do not think it would be wise to try to make the rule created by the Whitehead Court—intended to resolve a specific factual situation before it—into a "one-size-fits-all" rule with rigid application. With this in mind, I turn to a discussion of Whitehead.

[8] Not surprisingly, given that the Whitehead rule has been applied only once, Jesse Evans's Alabama Property Rights and Remedies, the preeminent property treatise in the state, does not cite Whitehead or provide any discussion of the Whitehead rule. I have researched cases from other jurisdictions and have not discovered any uniform rule concerning disposition of property given the situation raised in this case. Rather, in such a situation the various states have appeared to develop differing rules based on the specific facts before the respective courts.

In Whitehead, the parties disputed the ownership of a mineral interest. This Court stated that "[t]he parties derive their respective claims of title to the minerals under two separate chains of title which do not emanate from a common grantor and which are not traced back to a patent from the United States." 512 So.2d at 1298. This Court noted that the parties were unable to trace their claims of title back to the patent title from the United States "because in 1890, a fire destroyed the courthouse in which land records were maintained." Id. Accordingly, there was a "break in each party's chain of title." Id.

The appellees in Whitehead claimed ownership of the mineral interest "by virtue of a direct and unbroken chain of conveyances commencing in 1892." 512 So.2d at 1298. The original conveyance in the appellees' chain of title was a quitclaim deed dated October 7, 1892. It was undisputed that the October 7, 1892, deed was "the first documentary evidence," 512 So.2d at 1298–99, concerning the ownership of the at-issue mineral interest following the 1890 fire that had destroyed the relevant land records. The appellants in Whitehead "trace[d] their surface ownership through a chain of conveyances commencing with a warranty deed ... dated October 27, 1906, which was 14 years after the initial quitclaim deed conveying the mineral interest to [the appellees'] predecessor." 512 So.2d at 1299.

***6** The trial court in Whitehead had held that the quitclaim deed dated October 7, 1892, severed the mineral interest from the surface estate of the at-issue property. The appellants argued that the October 7, 1892, deed was "ineffective to transfer title, because there [was] no evidence which trace[d] title back to the United States or to a common grantor." 512 So.2d at 1301. This Court noted that, "[o]f course, neither side in this case can trace its title back to the sovereign or to a common grantor because of the total destruction of all the land records by the 1890 fire." Id. This Court then stated:

> "We cannot accept the assertion that [the grantor of the October 7, 1892, deed] was not the holder of legal title to the land and was not legally empowered to sever the mineral interest, under the facts of this case. The first conveyance covering the disputed mineral interest which was filed for record after the destruction of county records by fire was the conveyance in 1892 from [the grantor of the October 7, 1892, deed] to [the grantee]. This conveyance was competent and relevant evidence of a separate mineral estate, in which [the grantor of the October 7, 1892, deed] claimed an interest. Since the conveyance from [the grantor of the October 7, 1892, deed] to [the grantee] in 1892, the mineral interest has passed through a clear and unbroken chain of title directly to [the appellees]. If the argument of the [appellants] were sustained, then one who acquired a mineral interest created in Franklin County prior to 1890 might have difficulty in establishing the validity of his title. To require [the appellees] to somehow locate the originals of the instruments that were destroyed in the fire and, thus, establish their chain of title from the present date completely back to a government patent or to a common grantor, would place an unreasonable burden on them, or on others similarly situated.
>
> "The initial conveyance in the [appellants'] chain of title was from W.H. Tipton to J.A. Thorn in 1906. Again, because of the destruction of the courthouse records by fire, there is nothing in the records to indicate that W.H. Tipton had any title whatsoever to

> convey in 1906. After the patent in 1844, the next conveyance concerning the subject property filed for record—so far as the present records indicate—was the 1892 quitclaim deed from [the grantor of the October 7, 1892, deed] to [the grantee]. Some 14 years later, the [appellants'] chain of title begins with a deed from one W.H. Tipton to J.A. Thorn. In such circumstances, when dealing with two separate and distinct titles to the same property, as here, the Court should acknowledge the superiority of the title of those obtaining interests by the earliest recorded instruments. Pollard v. Simpson, 240 Ala. 401, 199 So. 560 (1941)."

512 So.2d at 1301–02. Thus, this Court concluded that the appellees had established "paramount legal title" to the mineral interest. 512 So.2d at 1304.

In summary, this Court determined in Whitehead that, in that it was impossible for the claimants of the property to trace their chains of title to the original grantor because the land records needed to do so had been destroyed by fire, the Court presumed that the grantor of the earliest recorded instrument subsequent to the destruction of the land records owned a fee-simple interest in the land the grantor was conveying. Accordingly, this Court determined that the party able to trace his chain of title to the earliest recorded instrument indicating ownership of the land had paramount legal title.

*7 The Whitehead rule is one of practicality; it operates to establish a new starting point when there is a break in the chain of ownership concerning a disputed property as the result of the destruction of the relevant land records. The purpose of the Whitehead rule is to establish this new starting point as close in time as possible to the destruction of the relevant land records. Unlike the majority, I believe that the trial court should be permitted to consider any admissible evidence in applying the Whitehead rule in order to be as certain as possible that the new starting point begins with the actual owner of the property.

The majority decision, however, interprets Whitehead to hold that the earliest recorded instrument purporting to convey title is the only evidence that can establish a new starting point under the Whitehead rule. I disagree with this interpretation of the Whitehead rule because it deprives the trial court of the discretion to consider admissible evidence, other than a recorded deed, for purposes of establishing a new starting point.[9] Whitehead did not establish such a rigid precedent, and I see no reason to make the judicially created, fact-specific Whitehead rule rigid at this time.

[9] I note that the majority decision includes the following statement:

> "Of course, the Whitehead rule does nothing to disturb the basic property rule that a grantor cannot convey more than the grantor actually owns. See, e.g., Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So.3d 287, 297 (Ala. Civ. App. 2010)(stating that '[a] landowner cannot convey a greater interest in property than he possesses'). Thus, proof that the grantor of the first-recorded deed did not actually own the property at the time of the purported conveyance will defeat the presumption underpinning the Whitehead rule. O'Rear, however, presents no such proof."

233 So.3d at 339. However, based on its interpretation of the Whitehead rule, the only evidence contemplated by the majority that may be considered by the trial court concerning ownership of the property is a recorded deed.

In Whitehead, this Court noted that the first recorded documentary evidence concerning ownership of the at-issue property following the destruction of the land records was the October 7, 1892, deed. However, nothing in Whitehead indicates that the first documentary evidence must be a deed. It just so happened that in Whitehead a recorded deed was the first documentary evidence; deeds were the only evidence presented concerning ownership of the property in Whitehead. It is within this context that the Whitehead Court stated: "In such circumstances, when dealing with two separate and distinct titles to the same property, as here, the Court should acknowledge the superiority of the title of those obtaining interests by the earliest recorded instruments." 512 So.2d at 1302 (emphasis added). Black's Law Dictionary defines "instrument" as "[a] written document; a formal or legal document in writing, such as a contract, deed, will, bond, or lease." Black's Law Dictionary 719 (5th ed. 1979).

In the present case, the earliest recorded instrument concerning ownership of the property following the alleged destruction of all the land records is the November 28, 1871, agreement between Nancy Landon and Luiza Taylor, a legal instrument recorded in the Walker County Probate Court on March 21, 1879. The agreement does not convey an interest in the property; however, I do not find this fact to be dispositive. The agreement is reliable evidence. It even has all the formalities of a deed: It is signed by both parties, witnessed by two parties, contains a metes-and-bounds description of the property, and is recorded in the deed book of the probate court. Why is this agreement, which clearly identifies the owner of the property as Nancy Landon, any less reliable than a quitclaim deed in

determining the actual owner of the property after the destruction of all the relevant land records?[10]

10 The earliest recorded instrument in Whitehead was a quitclaim deed, which does not always convey an interest in property. Of course, "if a grantor in a quitclaim deed has a good legal title, the quitclaim is as effectual to pass the title as a warranty deed." Jesse P. Evans III, Alabama Property Rights and Remedies § 4.5 (5th ed. 2012). However, "[a] quitclaim conveys nothing more than the interest owned by the grantor at the time of this execution and no more." Id. Further,

> "[a] quitclaim deed purports to convey only the grantor's present interest in the land, if any, rather than the land itself. Since such a deed purports to convey whatever interest the grantor has at the time, its use excludes any implication that he has good title, or any title at all. Such a deed in no way obligates the grantor. If he has no interest, none will be conveyed."

Robert Kratovil and Raymond J. Werner, Real Estate Law 60 (8th ed. 1983) (final emphasis added).

***8** I also present the following hypothetical to demonstrate the danger of adopting the majority's position of divesting the trial court of discretion to consider admissible evidence for the purpose of establishing a new starting point under the Whitehead rule in cases such as the present one. Suppose in the present case that, instead of the recorded agreement, Nancy Landon had recorded an affidavit concerning the ownership of the property. Assume that Nancy Landon had, at some time before the courthouse was destroyed and with it all of the land records, obtained an easement over her neighbor's property. Also assume that Nancy Landon recorded the instrument conveying to her the easement before the land records were destroyed. The land records are then destroyed by fire. Suppose that Nancy Landon and the subservient property owner did not have a copy of the instrument conveying to Nancy Landon the easement to re-record. However, after the land records were destroyed, wanting to protect their respective interests, assume that Nancy Landon and the subservient property owner recorded a joint affidavit in the probate court stating that Nancy Landon owned her property and had obtained an easement over the property of the subservient property owner sometime prior to the destruction of the courthouse and the land records.

Adopting the majority's strict application of the Whitehead rule, the trial court would not be allowed to consider this admissible evidence concerning the actual ownership of the property for purposes of establishing a new starting point. I do not see the wisdom in adopting such a strict application of the Whitehead rule. I suggest that allowing courts to consider evidence beyond recorded deeds in order to determine the owner of the property following the destruction of all records is consistent with the spirit of the Whitehead rule.

Under the actual facts of the present case, the November 28, 1871, agreement precedes the May 14, 1883, deed, which was not recorded until March 8, 1884; it is the first documentary evidence concerning the ownership of the property following the alleged destruction of all the records concerning the conveyances of property in Walker County.[11] Accordingly, as did the circuit court, I would apply the Whitehead rule in the present case to presume that Nancy Landon, not Elizer Taylor, owned a fee-simple interest in the property.

11 Nancy Landon's agreement with Luiza Taylor was recorded on March 21, 1879, more than four years before Elizer Taylor executed the May 14, 1883, deed in favor of Musgrove Bros. This Court has stated that "[t]he purpose of recording is to affect purchasers subsequent to the recording ... with notice." Williams v. White, 165 Ala. 336, 337, 51 So. 559, 559 (1910); see also Jesse P. Evans III, Alabama Property Rights and Remedies § 5.3[a] (5th ed. 2012) ("[T]he recording of an instrument under the recording statutes is conclusive notice to any third person of everything that appears on the face of an instrument so recorded."(footnote omitted)). As the earliest recorded instrument, the agreement put Elizer Taylor, Musgrove Bros., and all other third parties on notice of the fact that Nancy Landon claimed fee-simple ownership of the property.

The practical result of my approach would be that Elizer Taylor's deed to Musgrove Bros. did not severe the mineral interest from the property because, at that time, Elizer Taylor had no interest in the property to convey. Therefore, I would affirm the circuit court's judgment against Simmons Group. However, I do not agree with the circuit court's judgment in favor of the O'Rear defendants because I believe that Simmons Group has demonstrated that the trial court erred in determining that "Chilton was the owner of the property in fee by adverse possession as of 1921." The evidence in the record does not support the trial court's conclusion. Therefore, having concluded that the mineral interest had never been severed from the property, I would send the matter back to the circuit court and allow it to conduct further fact-finding in light of this holding. The property remaining one entire "bundle of

sticks," either party could then establish ownership of the property through the principle of adverse possession of the surface.

**All Citations**

--- So.3d ----, 2017 WL 1101401

Stuart, J., concurs.

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Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Civil Appeals of Alabama.

Kenneth L. MCGEE d/b/a FMC Mobile
v.
David G. DILLARD and Teresa Murray Dillard

**2160581**

Jan. 12, 2018

**Synopsis**

**Background:** Homeowners brought action against general contractor for a judgment determining that they did not owe contractor, who had filed a materialman's lien against the house, any further money, that the lien was void, and that the lien be released, and homeowners asserted claims for slander of title, breach of contract, breach of the warranty to perform in a workmanlike manner, and negligence and/or wantonness. After consolidation with contractor's small-claims action against homeowners, the Circuit Court, Mobile County, No. CV–16–900506, entered partial summary judgment for homeowners, declared the lien invalid, released the lien, but also stated that the partial summary judgment did not affect contractor's claim for money damages based on work and labor performed. Contractor appealed.

**Holdings:** On rehearing ex mero motu, the Court of Civil Appeals, Thompson, P.J., held that:

[1] contractor's small-claims action was not an action seeking to enforce his materialman's lien, and

[2] contractor's contention that he did not have to be deposed before homeowners were deposed did not involve any of the grounds for mandamus review of a discovery matter.

Appeal dismissed in part; affirmed.

Thomas, J., concurred in the rationale in part, concurred in the result, and filed opinion in which Thomas, J., joined.

Donaldson, J., concurred in the result.

**Appeal from Mobile Circuit Court (CV–16–900506)**

**Opinion**

On Rehearing Ex Mero Motu

THOMPSON, Presiding Judge.

*1 This court's opinion of December 1, 2017, is withdrawn, and the following is substituted therefor.

Kenneth L. McGee, a general contractor doing business as FMC Mobile ("McGee"), appeals from a partial summary judgment entered by the Mobile Circuit Court ("the circuit court"). Specifically, the partial summary judgment released a materialman's lien ("the lien") McGee had filed against David G. Dillard and Teresa Murray Dillard. The circuit court determined there was no just reason for delay of an appeal of the release of the lien and certified the partial summary judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. McGee also purports to appeal from interlocutory orders entered as to the Dillards' pending claims against McGee.

The record indicates the following. McGee is a general contractor who preserves and improves structures. In June 2015, he entered into two separate agreements with the Dillards for the preservation and repair of a house ("the house") owned by the Dillards. McGee completed the work to be performed as provided by one of the agreements, and the Dillards paid for that work in full. The second agreement ("the agreement") is the subject of this litigation. Pursuant to the agreement, McGee was to paint certain portions of the exterior of the house and to make certain repairs to the interior of the house, including repairing three windows. The agreement was later revised, calling for the replacement of five windows rather than the repair of three windows.

On March 10, 2016, the Dillards filed a complaint in the circuit court alleging that they had terminated McGee's services on or about September 4, 2015, and had paid him in full for all the work that had been performed, the materials provided, and the costs incurred through that date. According to the complaint, despite having been paid in full, McGee filed in the Mobile Probate Court the lien against the house. The Dillards sought a judgment determining that they did not owe McGee any further

money, declaring the lien void, and releasing the lien. The Dillards also sought money damages for slander of title. The Dillards twice amended their complaint, adding counts of breach of contract, breach of the warranty to perform in a workmanlike manner, and negligence and/or wantonness.

On March 11, 2016, the day after the Dillards filed their complaint in the circuit court, McGee, who has appeared pro se throughout these proceedings, filed an action in the Mobile small-claims court. The Dillards filed a motion in the circuit court requesting that the two actions be consolidated. The circuit court granted the motion on March 24, 2016.[1] After the actions were consolidated, McGee's action was treated as a counterclaim to the Dillards' action.

[1] The record submitted on appeal did not indicate that McGee's small-claims action, over which the district court had jurisdiction, see § 12–12–31(a), Ala. Code 1975, had been transferred to the circuit court. Accordingly, in our opinion on original submission this court determined that the circuit court had not obtained jurisdiction over the small-claims action when it entered an order consolidating that action with the Dillards' circuit-court action. Therefore, we stated, the consolidation order was void. After this court's opinion on original submission was released on December 1, 2017, the circuit court entered an order directing the Dillards to supplement the record on appeal to include the March 24, 2016, order that the district court entered in the small-claims action transferring that action to the circuit court. Time stamps indicate that, later that same day, the circuit court entered the consolidation order. Thus, the circuit court had jurisdiction over the small-claims action at the time it entered the consolidation order.

*2 On March 31, 2016, McGee filed an objection to the consolidation, saying, among other things, that it was "a rush to judgment." He claimed that he was owed $2,953.13 and, therefore, that his action should be tried in the small-claims court. McGee attached to the objection his affidavit and the final invoice he had submitted to the Dillards on September 9, 2015. A copy of the lien was not attached to McGee's objection. The circuit court denied McGee's objection, and the litigation proceeded. The record shows that McGee has consistently refused to comply with discovery requests or to be deposed. In fact, in an e-mail message to the Dillards' attorney, McGee stated: "As you know, I'm not required to give you any of that material [requested in discovery]. I will have copies available for you at trial." Eventually, the Dillards filed a motion for sanctions against McGee. On September 9, 2016, the circuit court entered an order directing McGee to sit for a deposition no later than October 21, 2016. McGee filed various papers with the circuit court claiming that his constitutional rights would somehow be violated if his deposition was taken before the Dillards' depositions. We note that McGee has not attempted to notice depositions for the Dillards or to propound discovery requests on them. The record indicates that McGee is under the impression that, because the Dillards are the plaintiffs and bear the burden of proof, he is not required to submit requested discovery or to sit for a deposition until the Dillards have been deposed. Despite McGee's specious argument and the fact that McGee had not noticed depositions for the Dillards, the circuit court amended its September 9, 2016, order to require the Dillards to be deposed on the same day as McGee and allowing McGee's deposition to be held after the Dillards' depositions. Nonetheless, McGee failed to comply with the order, and the Dillards again filed a motion for sanctions.

On January 6, 2017, the circuit court held a hearing on the motion for sanctions. In its order of January 9, 2017, the circuit court noted that, at the hearing, McGee continued "to argue the fairness of this Court's order requiring him to sit for a deposition before the [Dillards] were deposed." The circuit court then stated:

> "This Court finds [McGee's] tactics to date to be dilatory. No good cause has been shown for ignoring the Court's order to sit for a deposition, nonetheless, the Court will give [McGee] one more opportunity to comply with its order of September 9, 2016. Accordingly, defendant, Kenneth McGee, shall make himself available for his deposition within 21 days from the date of the January 6, 2017, hearing, i.e., no later than January 27, 2017. Failing the same, the Court will enter appropriate sanctions which may include an award of attorney's fees, dismissal of [McGee's] counterclaim, and/or granting of a default judgment."

We note that the record contains a motion for sanctions that the Dillards filed on January 31, 2017, alleging that McGee still refused to sit for a deposition. The record does not indicate that the circuit court has acted on that motion.

Meanwhile, on December 16, 2016, the Dillards filed a motion for a summary judgment as to the declaratory-judgment count of their complaint, which sought the release of the lien. The Dillards argued that McGee had failed to commence an action to perfect or enforce the lien within six months, as required by § 35–11–221, Ala. Code 1975. That statute provides that "[a]ny action for the enforcement of the lien declared in this division [i.e., Title 35, Chapter 11, Division 8, §§ 35–11–210 through 35–11–234, Ala. Code 1975] must be commenced within six months after the maturity of the entire indebtedness secured thereby, except as otherwise provided in this division." In support of the motion for a partial summary judgment, the Dillards submitted a copy of the lien, purporting to secure an indebtedness of $3,887.62, which was filed in the Mobile Probate Court on September 14, 2015. The lien stated that the work was completed on September 11, 2015. McGee filed an opposition to the motion.

On March 6, 2017, the circuit court entered a partial summary judgment, finding that McGee had never sought to enforce his lien in the circuit court. Instead, the circuit court stated, McGee had filed an action in the small-claims court seeking monetary damages for work, labor, and materials furnished, which did not comply with statutory requirements for perfecting or enforcing the lien. The circuit court noted that McGee's action for monetary damages, which had been consolidated with the Dillards' action, could proceed.

That same day, March 6, 2017, the circuit court entered an order declaring the lien invalid and releasing the lien. On March 14, 2017, the circuit court certified the March 6, 2017, partial summary judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. In doing so, the circuit court found that there was no just reason for delay in entering a final judgment on the issue of the release of the lien, explaining that the Dillards were scheduled to close on the property that was the subject of the lien, and ordered the closing agent to hold $5,831.43, 150% of the amount of the lien, in escrow until the time for an appeal had run. The circuit court also explained:

> ***3** "Discovery is ongoing in this matter, and [McGee] continues his defiant, dilatory conduct in refusing to sit for a deposition despite this court's orders. Therefore, [McGee's] conduct could require the [Dillards'] money to be held in escrow indefinitely even though the court has ordered the lien at issue to be released."

The circuit court also stated that the entry of the partial summary judgment did not affect McGee's counterclaim for money damages based on work and labor performed. McGee filed a timely notice of appeal to this court on April 25, 2017.

[1] [2]On appeal, McGee first argues that the circuit court erred in releasing the lien. Although in his appellate brief McGee states that the circuit court's judgment was "based on plainly and palpably wrong findings," the propriety of the judgment releasing the lien is a question of law, not of fact. Therefore, we review the judgment de novo. "[W]hen the material facts are undisputed and the only issue presented involves a pure question of law, the appellate court's review is de novo. Christian v. Murray, 915 So.2d 23, 25 (Ala. 2005); Alabama Republican Party v. McGinley, 893 So.2d 337, 342 (Ala. 2004)." Magrinat v. Maddox, 220 So.3d 1081, 1084 (Ala. Civ. App. 2016).

[3] [4] [5]The law regarding perfection and enforcement of materialman's liens is well settled.

> "Materialman's liens, being statutory creations, can be perfected and enforced only by complying with the requirements found in Ala. Code 1975, § 35–11–210 et seq. The liens are inchoate and will be lost if the lienors fail to perfect them according to the requirements of the statute. Bailey Mortgage Co. v. Gobble–Fite Lumber Co., 565 So.2d 138 (Ala. 1990)."

Ex parte Grubbs, 571 So.2d 1119, 1120 (Ala. 1990).

> "A materialman's lien comes into existence immediately when one provides any materials or performs labor upon the property, but it remains inchoate unless the statement of lien is timely filed pursuant to § 35–11–213 and unless an action is timely filed to perfect the materialman's lien, pursuant to § 35–11–221. Metro Bank v. Henderson's Builders Supply Co., 613 So.2d 339 (Ala. 1993)."

Hill v. Hill, 757 So.2d 468, 471 (Ala. Civ. App. 2000)(emphasis added).

[6]To perfect a mechanic's or materialman's lien, one must complete three required steps: (1) provide statutory notice to the owner; (2) file a verified statement of lien in the probate office of the county where the improvement is

located; and (3) file suit to enforce the lien. § 35–11–210 et seq., Ala. Code 1975; Bailey Mortg. Co. v. Gobble–Fite Lumber Co., 565 So.2d 138, 141–43 (Ala. 1990). In this case, notice is not an issue, nor is the filing of a verified statement of lien. In Gobble–Fite, our supreme court discussed the last step required to perfect a lien, i.e, filing an action to enforce the lien.

> "The final step for perfection is to file suit in the circuit court of the county where the property is located (in the district court if the amount is less than $50). Ala. Code 1975, § 35–11–220. Suit must be commenced within six months 'after ... maturity of the entire indebtedness.' Ala. Code 1975, § 35–11–221. More than likely, this will be the date of the last labor performed or the date materials were last furnished. Yeager v. Coastal Mill Work, Inc., 510 So.2d 188 (Ala. 1987)."

565 So.2d at 143.

[7]The lien McGee filed indicates that the last work, labor, and/or materials provided to improve the house was on September 11, 2015. The lien was for $3,887.62. On March 11, 2016, McGee filed an action in small-claims court seeking $2,953.13 in damages from the Dillards. McGee's complaint did not seek the enforcement of the lien; in fact, it did not mention the lien. To date, McGee has not filed an action seeking to enforce the lien, which is required for the lien to be perfected. § 35–11–220, Ala. Code 1975; see also Gobble–Fite, 565 So.2d at 143. Because no action for the enforcement of the lien was commenced within six months after the maturity of the debt the lien secured, the limitations period for the enforcement of the lien expired. § 35–11–221, Ala. Code 1975. Therefore, the circuit court correctly determined that the lien was invalid and due to be released.

*4 [8] [9] [10] [11] [12] [13]McGee also contends that the circuit court deprived him of his constitutional rights when it ordered him to sit for his deposition before the Dillards had been deposed. The discovery orders that McGee challenges, entered on September 9, 2016, and January 9, 2017, are interlocutory. The proper means of seeking appellate review of an interlocutory order is to petition for a writ of mandamus. Norman v. Norman, 984 So.2d 427, 429 (Ala. Civ. App. 2007); see also Ex parte C.L.J., 946 So.2d 880, 887 (Ala. Civ. App. 2006) ("A petition for a writ of mandamus is the appropriate method for reviewing an interlocutory order."). "Upon a determination that a judgment is not final, this court has discretion to treat an appeal as a petition for a writ of mandamus." Ex parte Landry, 117 So.3d 714, 718 (Ala. Civ. App. 2013). However,

> "[m]andamus is an extraordinary remedy and will be granted only where there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex parte Alfab, Inc., 586 So.2d 889, 891 (Ala. 1991). This Court will not issue the writ of mandamus where the petitioner has " 'full and adequate relief' " by appeal. State v. Cobb, 288 Ala. 675, 678, 264 So.2d 523, 526 (1972) (quoting State v. Williams, 69 Ala. 311, 316 (1881))."

Ex parte Ocwen Fed. Bank, FSB, 872 So.2d 810, 813 (Ala. 2003). Appellate courts

> " 'will review by mandamus only those discovery matters involving (a) the disregard of a privilege, (b) the ordered production of "patently irrelevant or duplicative documents," (c) orders effectively eviscerating "a party's entire action or defense," and (d) orders denying a party the opportunity to make a record sufficient for appellate review of the discovery issue. [Ex parte Ocwen Fed. Bank, FSB,] 872 So.2d [810] at 813–14 [ (Ala. 2003) ]....'
>
> "Ex parte Meadowbrook Ins. Group, Inc., 987 So.2d 540, 547 (Ala. 2007)."

Ex parte Mobile Gas Serv. Corp., 123 So.3d 499, 504 (Ala. 2013). McGee's contention that he does not have to be deposed until after the Dillards are deposed does not involve any of the grounds for mandamus review of a discovery matter. Accordingly, we decline to treat the issue as though it were before us on a petition for a writ of mandamus. Because no judgment has been entered as to the Dillards' claims for damages, there is no final judgment from which McGee can appeal as to this issue. Therefore, the appeal is dismissed as to the issue of whether the circuit court erred in ordering McGee to sit for a deposition. See Ex parte Vanderwall, 201 So.3d 525, 532 (Ala. 2015)(holding that, when an order appealed from is not a final judgment, it is the duty of the court to dismiss the appeal ex mero motu).

For the reasons set forth, the circuit court's judgment releasing the lien is affirmed. The remainder of McGee's appeal is dismissed.

ON REHEARING EX MERO MOTU: OPINION OF DECEMBER 1, 2017, WITHDRAWN; OPINION SUBSTITUTED; APPEAL DISMISSED IN PART; AFFIRMED.

Moore, J., concurs.

Thomas, J., concurs in the rationale in part and concurs in the result, with writing, which Pittman, J., joins.

Donaldson, J., concurs in the result, without writing.

THOMAS, Judge, concurring in the rationale in part and concurring in the result.

I agree with the main opinion's conclusion that the Mobile Circuit Court ("the trial court") correctly determined that the materialman's lien filed by Kenneth L. McGee was invalid. However, although I would also not treat any portion of McGee's appeal as a petition for the writ of mandamus, I would decline to do so because McGee's appeal was filed more than 42 days after the entry of the interlocutory orders of the trial court of which he complains. See Rule 21(a)(3), Ala. R. App. P. (requiring that a petition for the writ of mandamus be filed within a reasonable time, which is presumed to be equivalent to the time for taking an appeal). Thus, even if we were to have treated McGee's notice of appeal as a petition for the writ of mandamus, we could not have considered McGee's arguments because they were untimely asserted.

Pittman, J., concurs.

**All Citations**

--- So.3d ----, 2018 WL 387846

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NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

EVABANK
v.
TRADITIONS BANK et al.

**1160495**
|
Feb. 9, 2018

**Synopsis**
**Background:** After mortgagee under mortgage of prior owner refused to release its mortgages encumbering property, purchase-money mortgagee brought action against prior mortgagee, asserting a claim of slander of title and seeking a judgment declaring it was the first lienholder on the property. Prior mortgagee counterclaimed, seeking a declaratory judgment concerning priority. Prior owner and title company were added as parties. All parties moved for summary judgment or partial summary judgment. The Circuit Court, Cullman County, No. CV–13–900480, entered judgment in favor of purchase-money mortgagee and title company. Prior mortgagee appealed.

**[Holding:]** The Supreme Court, Sellers, J., held that purchase-money mortgagee and title company could not rely on equitable estoppel as basis to claim priority interest.

Reversed and remanded.

Shaw, J., filed an opinion concurring in part and concurring in the result in which Bolin, J., concurred.

Parker, Wise, and Bryan, JJ., concurred in the result.

**Appeal from Cullman Circuit Court (CV–13–900480)**

**Opinion**

SELLERS, Justice.

***1** EvaBank, an Alabama banking corporation, appeals from a summary judgment in favor of Traditions Bank, TBX Title, Inc., and Terry Williams. We reverse the judgment and remand the case.

Facts

The following facts are undisputed: On August 14, 2013, William Michael Robertson and Connie Robertson, customers of EvaBank, entered into a purchase agreement with Terry Williams, pursuant to which Williams agreed to purchase the Robertsons' property located on County Road 35 in Hanceville ("the property").[1] The agreed-upon purchase price for the property was $50,000. EvaBank held two mortgages on the property, securing a loan totaling approximately $41,000 (hereinafter referred to as "the EvaBank mortgages"). Williams engaged Traditions Bank to finance his purchase of the property. Traditions Bank agreed to provide Williams with a loan secured by a first mortgage on the property. TBX Title, a subsidiary of Traditions Bank, acted as the closing agent for the real-estate transaction. In preparation for the closing, Traditions Bank requested that the Robertsons obtain a payoff statement for the EvaBank mortgages. William Michael Robertson contacted EvaBank via telephone and requested that EvaBank fax to Traditions Bank a payoff statement for the mortgages. On September 10, 2013, EvaBank faxed to Traditions Bank the payoff statement for loan no. 80210981, indicating a balance due of $22,111.30. That payoff statement, however, was actually for anther EvaBank customer, Michael S. Roberson, with an address in Moulton, Alabama.

[1] The property was also owned by William Heath Robertson and Heather Rose Robertson; however, they were not signatories to the purchase agreement and are not parties to this appeal.

On September 13, 2013, TBX Title closed the real-estate transaction between the Robertsons and Williams. Traditions Bank thereafter delivered a check to EvaBank for "Loan Payoff # 1—80210981," in the amount of $22,123.25. EvaBank accepted and negotiated the check and applied the proceeds to the loan of Michael S. Roberson. On September 16, 2013, TBX Title wired to the Robertsons, who were living in Texas, the net sales proceeds from the closing—$24,672.19.

On September 17, 2013, TBX Title recorded the warranty deed and mortgage and mailed the deed to Williams. On September 18, 2013, EvaBank contacted William Michael Robertson about his loan being past due; Robertson responded that the loan should have been paid off at the closing with the proceeds from the sale. EvaBank learned at this point that there was a problem with the payoff statement it had provided, i.e., the payoff statement was for a loan in the name of Michael S. Roberson, not William Michael Robertson. EvaBank thereafter subtracted the payoff proceeds from the Michael S. Roberson loan and applied them to the William Michael Robertson loan. EvaBank ultimately sent Traditions Bank an e-mail, explaining its mistake and noting that it had made a demand upon William Michael Robertson to pay the remaining balance due on the EvaBank mortgages but that Robertson had refused. Accordingly, EvaBank informed Traditions Bank that it would not release it mortgages encumbering the Robertsons' property until the balance on the loan they were securing had been fully satisfied.

***2** On December 12, 2013, Traditions Bank sued EvaBank, asserting a claim of slander of title and seeking a judgment declaring that it was the first lienholder on the property. EvaBank counterclaimed, seeking a declaratory judgment concerning the priority of the EvaBank mortgages and its right to full payment for the loan secured by the mortgages. EvaBank added Williams as a necessary party to its declaratory-judgment action. EvaBank also added TBX Title as a defendant in its counterclaim action, alleging third-party breach of contract, negligence, wantonness, and slander of title. Williams filed a counterclaim against EvaBank, joining Tradition Bank's demand for a judgment declaring Traditions Bank the first lienholder on the property; Williams demanded, in the alternative, monetary damages against EvaBank for alleged fraud, negligence, and wantonness. All parties moved for a summary judgment or a partial summary judgment pursuant to Rule 56(c), Ala. R. Civ. P.

On February 7, 2017, after conducting a hearing, the trial court entered a summary judgment in favor of Traditions Bank and TBX Title, on the basis of equitable estoppel, on the claims involving those parties and dismissed all other claims. The trial court concluded that, as between the two banks, EvaBank had the opportunity to prevent the injuries suffered. Accordingly, the trial court ordered EvaBank to release its mortgages on the property. EvaBank filed a postjudgment motion, which the trial court denied. This appeal followed.

Standard of Review

[1]"Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review." Continental Nat'l Indem. Co. v. Fields, 926 So.2d 1033, 1035 (Ala. 2005).

Discussion

[2]EvaBank raises several issues on appeal, one of which is dispositive. Specifically, EvaBank contends that the trial court erred in entering a summary judgment in favor of Traditions Bank, TBX Title, and Williams[2] on the basis of equitable estoppel because, it says, the elements of estoppel are not present in this case. We agree.

[2] Although Williams is a nominal party to this appeal, our discussion references only Traditions Bank and TBX Title, the parties who jointly undertook to close the real-estate transaction. As noted, Williams, in his counterclaim against EvaBank, joined Traditions Bank's demand for a judgment declaring Traditions Bank the first lienholder on the property. Although it appears Williams did not file a separate summary-judgment motion as to EvaBank, he filed an appellee's brief in support of the summary judgment.

[3] [4]We begin our discussion by noting that Alabama classifies itself as a "title" state with regard to mortgages. "Execution of a mortgage passes legal title to the mortgagee." Trauner v. Lowrey, 369 So.2d 531, 534 (Ala. 1979). Section § 35–10–26, Ala. Code 1975, states both that "[t]he payment or satisfaction of the real property mortgage debt divests the title passing by the mortgage" and that " '[p]ayment or satisfaction of the real property mortgage debt' shall not occur until there is no outstanding indebtedness or other obligation secured by the mortgage." (Emphasis added.) In this case, EvaBank held legal title to the property by virtue of its mortgages on the property securing the Robertsons' loan. Traditions Bank and TBX Title sought to divest EvaBank of legal title to the property by satisfying the EvaBank mortgages encumbering the property. In preparation for the closing, Traditions Bank requested from the Robertsons a payoff statement for the EvaBank mortgages. William Michael Robertson contacted EvaBank via telephone and requested that it fax a payoff statement to Traditions Bank. Jane Smith, the EvaBank employee who received the telephone call, confused Robertson with another EvaBank customer, Michael Roberson. She testified in

her deposition:

> "I got a call from a Michael Roberson, Roberson, saying I need you to fax a payoff to Traditions [Bank]. I recognized the voice, I pulled up [the account of] Michael Roberson, and I faxed the payoff to [Traditions Bank]."

*3 [5]EvaBank asserts that, in undertaking to satisfy the EvaBank mortgages, Traditions Bank and TBX Title had a duty to inquire and to verify that the payoff statement was, in fact, the correct mortgage-payoff statement for the EvaBank mortgages encumbering the property. Traditions Bank and TBX Title, on the other hand, assert that EvaBank is estopped from claiming a priority interest in the property because, they say, the payoff statement was a misleading communication upon which they detrimentally relied.[3]

[3] Traditions Bank and TBX Title also assert that EvaBank is estopped from asserting a priority interest in the property by virtue of § 35–10–91(f), Ala. Code 1975, a section of the Alabama Residential Mortgage Satisfaction Act ("the Act") concerning erroneous payoff statements for mortgages securing residential property. Section 35–10–91(f) provides, in relevant part:

> "If a secured creditor determines that the payoff statement it provided was erroneous, the creditor may send a corrected payoff statement. If the entitled person or the person's authorized agent receives and has a reasonable opportunity to act upon a correct payoff statement before making payment, the corrected statement supersedes an earlier statement."

Traditions Bank and TBX Title assert that, because EvaBank never provided a corrected payoff statement before the payoff proceeds were applied to the Michael S. Roberson loan, EvaBank is estopped from asserting a priority interest over the property. The Act, however, is inapplicable in this case because the payoff statement was requested by telephone. Section 35–10–91(g), Ala. Code 1975, specifically states that "[t]his section does not preclude, nor does it apply to, other methods of obtaining payoff information such as telephone calls, electronically, or other methods." (Emphasis added.) Moreover, it does not appear that the trial court relied on the Act in entering the summary judgment.

[6] [7]To establish the essential elements of estoppel, Traditions Bank and TBX Title had the burden of demonstrating that

> "(1) [t]he person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on; (2) the person seeking to assert estoppel, who lacks knowledge of the facts, relies upon that communication; and (3) the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct."

General Elec. Credit Corp. v. Strickland Div. of Rebel Lumber Co., 437 So.2d 1240, 1243 (Ala. 1983). It is undisputed that EvaBank mistakenly faxed to Traditions Bank the payoff statement for Michael S. Roberson, and not the payoff statement for William Michael Robertson. It is further undisputed that EvaBank did not become aware of its mistake until after the closing had occurred. Therefore, given EvaBank's lack of knowledge as to its mistake, it could not have intended to induce reliance. In other words, there is no evidence indicating that EvaBank intended to induce either Traditions Bank or TBX Title to rely on the payoff statement for Michael S. Roberson to close the real-estate transaction between the Robertsons and Williams. Moreover, the testimony on behalf of Traditions Bank and TBX Title, as described below, establishes that neither was ignorant of the discrepancies in the payoff statement. Thus, the only question left for our review is whether it can be held, as a matter of law, that Traditions Bank and TBX Title's reliance on the payoff statement provided them by EvaBank was reasonable under the undisputed facts of this case. It is well settled that the "party invoking estoppel must have in good faith been ignorant of the true facts at the time a representation is made to him, and must have acted with diligence to learn the truth." Ivey v. Dixon Inv. Co., 283 Ala. 590, 594, 219 So.2d 639, 643 (1969). See also Webb v. Pioneer Ins. Co., 56 Ala. App. 484, 488, 323 So.2d 373, 376 (Ala. Civ. App. 1975) (noting that "[t]he party seeking to claim the benefit of an estoppel must show detrimental reliance of a substantial character on his part").

*4 Traditions Bank and TBX Title had before them numerous documents that, among other things, set forth each of the Robertsons' full names, the address of the property, the dates of the two EvaBank mortgages, and the amount of the loan secured by the mortgages. For example, the purchase agreement contained the signatures of William M. Robertson and Connie Robertson. The payoff statement, on the other hand, reflected the name of Michael S. Roberson. The EvaBank mortgages contained the signatures of four Robertsons, including the signature of William Michael Robertson. The payoff statement, on the other hand, contained only the single name of Michael S. Roberson. The warranty deed recorded by TBX Title contained the full names of each of the Robertsons, including William Michael Robertson. Again, the payoff statement reflected the name Michael S. Roberson.

Tabitha White, a loan officer with Traditions Bank, stated in her deposition that she had requested most of the documents required for the closing and that she forwarded them to Debra Butler, the sole employee of TBX Title. White stated that, when she received the payoff statement, she noticed that the name, Michael S. Roberson, was different from any of the names on the closing documents. White stated, however, that she did not check the name on the payoff statement against the names of the sellers, i.e., the Robertsons, because, according to her, EvaBank had provided the payoff statement at the request of its customer. Butler also admitted in her deposition that there was a discrepancy between the name on the payoff statement and the name on the closing documents. When questioned by the attorney for EvaBank, Butler responded:

"A. ... I checked the name. I do not have [a] loan number, and Social Security numbers are usually not on payoffs. I did check the name.

"Q. All right. Well, did you see that the name was different?

"A. I—yes.

"Q. All right. And did you do anything else to find out whether there was a problem?

"....

"A. I questioned Tabitha and asked where the payoff came from, who got the payoff, because the name was different. And she said that the seller ordered the payoff directly from EvaBank. My response to her was then it's not for us to question—if the seller ordered their payoff and it came directly from EvaBank, it's not for us to question....

"....

"Q. All right. You did not do anything to check to see if it was the wrong payoff for the wrong person?

"....

"A. I did nothing further.

"Q. Okay. All right. You could have checked, couldn't you have?

"[Objection.]

"A. Sure.

"Q. And obviously, it raised a question, didn't it?

"[Objection.]

"A. Yes.

"Q. Whose call was it to determine or decide whether or not to do anything further to check it, [yours] or [White's]?

"A. Mine.

"Q. Whose responsibility was it to obtain the payoff ...?

"[Objection.]

"A. I think [White and I] both shared responsibility in it.

"Q. Okay. And was it both your responsibilities to get an accurate payoff?

"[Objection.]

"A. Yes.

"Q. All right. Since it was your responsibility, did you at the same time accept the responsibility for deciding that you weren't going to double-check [the accuracy of the payoff statement] despite the question arising?

"[Objection.]

"A. Yes.

"....

"Q. All right. And [in hindsight] did you think [you] should have checked [the discrepancy with the name in the payoff]?

"[Objection.]

"A. Yes."

The testimony reflects that Traditions Bank and TBX Title shared the responsibility for obtaining an accurate payoff statement. Yet White candidly admitted that she assumed, without checking, that the payoff was accurate because EvaBank had provided it at the request of its customer. Butler also admitted that there was a discrepancy with the name in the payoff statement and that she should have investigated the discrepancy. Further, Traditions Bank and TBX Title had before them numerous documents, including the purchase agreement, the "property appraisal link," the "as is agreement" signed by Williams, and the "property tax agreement" signed by Williams, reflecting the location of the property being sold by the Robertsons as being in "Hanceville, AL," which is in Cullman County. The record also contains e-mails between White and Butler indicating that they knew, before the closing, that all the Robertsons had moved to Texas and that they no longer lived on the property located in Hanceville. Yet, the payoff statement upon which Traditions Bank and TBX Title claim they relied reflects an address for property located in Moulton, a city located in an entirely different county. When questioned by EvaBank's attorney regarding this discrepancy, Butler noted that she always looked at the seller's address in a payoff statement and that it was not unusual for the address to be different from the address in other documents related to the closing. When questioned further, however, Butler testified:

***5** "Q. And when [the address is] different ... [w]hat do you do to determine whether or not that is a problem, whether or not it indicates that there's a problem, a mistake? What do you do?

"A. Well, in the past, I have caught—I have called—if it was a problem, I've called to verify that it was the right [address]."

Based on the foregoing, it is clear that both Traditions Bank and TBX Title were on notice of one or more discrepancies between the payoff statement and the closing documents, which, through the exercise of due diligence, would have revealed the fact that the payoff statement was not for the loan secured by the EvaBank mortgages encumbering the property being sold by the Robertsons. We therefore conclude, as a matter of law, that Traditions Bank and TBX Title's reliance on the payoff statement, without further inquiry, was not reasonable. Accordingly, they may not rely on estoppel as a basis on which to claim a priority interest in the property.

## Conclusion

The doctrine of equitable estoppel did not provide a basis for the trial court's summary judgment in favor of Traditions Bank and TBX Title. Accordingly, the summary judgment is reversed, and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, C.J., and Main, J., concur.

Bolin and Shaw, JJ., concur in part and concur in the result.

Parker, Wise, and Bryan, JJ., concur in the result.

SHAW, Justice (concurring in part and concurring in the result).

I concur with the main opinion that any reliance upon the payoff statement in this case was not reasonable. As to the portion of the analysis in the main opinion regarding whether EvaBank "intended to induce reliance," I concur in the result.

Bolin, J., concurs.

**All Citations**

--- So.3d ----, 2018 WL 797542

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NOT YET RELEASED FOR PUBLICATION.

Court of Civil Appeals of Alabama.

**ASSET PRESERVATION**, LLC
v.
OAK ROAD WEST, LLC

2150939
|
01/20/2017

**Synopsis**
**Background:** Purported second assignee of right of redemption in foreclosed property sought to redeem disputed property. The Baldwin Circuit Court, No. CV–16–900322, Jody W. Bishop, J., granted summary judgment to first assignee. Purported second assignee appealed.

**[Holding:]** The Court of Civil Appeals, Thomas, J., held that once mortgagors assigned their statutory right of redemption to first assignee, mortgagors no longer possessed any enforceable right of redemption that they could exercise or convey to another assignee.

Affirmed.

**Appeal from Baldwin Circuit Court (CV–16–900322, Jody W. Bishop, J.)**

**Attorneys and Law Firms**

Franklin H. Eaton, Jr., Northport, for appellant.

Richard E. Davis, Jr., of David & Fields, P.C., Daphne, for appellee.

**Opinion**

THOMAS, Judge.

*1 [1]Asset Preservation, LLC ("Asset"), appeals from a summary judgment entered by the Baldwin Circuit Court in favor of Oak Road West, LLC ("Oak Road"). We affirm.

Background

In 2014, Humphrey Investments, LLC, executed a mortgage in favor of Quality First Financial, Inc., which was secured by certain property that is located in Gulf Shores ("the disputed property"). On March 26, 2015, Quality First Financial, Inc., foreclosed upon the mortgage and purchased the disputed property at a foreclosure sale. On August 19, 2015, Steven G. Humphrey, an "authorized member" of Humphrey Investments, LLC, executed two documents in favor of Oak Road, each entitled "Assignment of Statutory Right of Redemption"; Steven Humphrey executed one of those documents on his own behalf and the other on behalf of Humphrey Investments, LLC (Steven Humphrey and Humphrey Investments, LLC, are hereinafter referred to collectively as "the assignors").[1] On August 24, 2015, Quality First Financial, Inc., executed a warranty deed conveying its interest in the disputed property to Oak Road.

[1] The record is not clear as to what interest, if any, Steven Humphrey had in the disputed property; however, because the parties do not contend that resolution of the issues on appeal are impacted by any disparity of interest the assignors might have had in the disputed property and because both assignors executed the relevant documents purporting to transfer their redemption rights in the disputed property, we, like the parties, will treat the assignors as if each possessed the statutory right to redeem the property. See Ex parte Professional Bus. Owners Ass'n Workers' Comp. Fund, 867 So.2d 1099, 1101 (Ala. 2003)("Generally, an appellate court is limited to considering only those issues raised on appeal.").

On March 23, 2016, Steven Humphrey executed a quitclaim deed, individually and on behalf of Humphrey Investments, LLC, conveying their interests, "including the right of redemption," in the disputed property to Asset. Two days later, Asset initiated an action in the circuit court seeking to redeem the disputed property pursuant to § 6–5–248, Ala. Code 1975, and alleging, among other things, that Oak Road had committed waste by making unnecessary permanent improvements on the disputed property and that Asset was therefore unable to ascertain the lawful charges it was required to pay to redeem the property. Thus, Asset requested, among other

things, that the circuit court determine the correct amount of lawful charges that it was required to pay to redeem the property.

Oak Road responded to Asset's claims by submitting a motion for a summary judgment on "two completely independent bas[e]s." (Emphasis in original.) First, Oak Road asserted that, because the assignors had already assigned their statutory redemption rights to Oak Road when it acquired the disputed property in August 2015, Asset could not have acquired a statutory right to redeem the disputed property via the subsequently executed quitclaim deed referenced in its complaint. Second, Oak Road argued that, even assuming that Asset had acquired a statutory right of redemption, Oak Road was nevertheless entitled to a judgment as a matter of law because Asset had failed to tender the redemption price or, alternatively, had failed to request a statement of lawful charges before the expiration of the redemption period.

*2 Asset submitted a response to Oak Road's motion in which it asserted, among other things, that Oak Road could not rely upon the assignors' assignments of their statutory redemption rights because Oak Road had not recorded the assignments, as Asset contended was required under Alabama law. Asset also admitted that it had not tendered the redemption price or requested a statement of lawful charges but argued that it was not "statutorily required" to do so because there was a "bona fide disagreement as to what are permanent improvements and the value therein."

Oak Road thereafter submitted a "supplemental brief in support of its motion for [a] summary judgment" in which it argued that Asset could not avail itself of the protection afforded by Alabama's recording statutes because, it asserted, those statutes protected only bona fide purchasers, Asset was merely a quitclaim grantee, and quitclaim grantees are not bona fide purchasers as a matter of law. Asset submitted a response to Oak Road's supplemental brief in which it argued that it was permitted to redeem the disputed property notwithstanding the assignors' prior assignments of their statutory rights of redemption to Oak Road because, Asset contended, "[t]he statutory right of redemption, like a license[,] can be assigned as many times as the assignor desires, unless otherwise limited, until one of the assignees exercises the right, as required by statute."

On May 19, 2016, the circuit court entered an order granting Oak Road's summary-judgment motion without specifying the reason for its decision. Asset filed a postjudgment motion on June 18, 2016, and the circuit court entered an order on August 9, 2016, denying Asset's postjudgment motion. Asset filed a timely notice of appeal to the Alabama Supreme Court. The appeal was transferred to this court by the supreme court, pursuant to § 12–2–7(6), Ala. Code 1975.

## Standard of Review

> "The pertinent facts are not in dispute, and, therefore, this action must be resolved by applying the applicable law to the undisputed facts. 'Where only a question of law is presented, a case is appropriate for a summary judgment.' Finch v. Auburn Nat'l Bank of Auburn, 646 So.2d 64, 65 (Ala. Civ. App. 1994); see also Bice v. Indurall Chem. Coating Sys., Inc., 544 So.2d 948, 952 (Ala. 1989) ('The uncontroverted facts offered below in support of and in opposition to the motion for summary judgment present a question of law appropriate for resolution by summary judgment.'). " '[O]n appeal, the ruling on a question of law carries no presumption of correctness, and this Court's review is de novo.' " Rogers Found. Repair, Inc. v. Powell, 748 So.2d 869, 871 (Ala. 1999)(quoting Ex parte Graham, 702 So.2d 1215, 1221 (Ala. 1997)).
> Hardin v. Metlife Auto & Home Ins. Co., 982 So.2d 522, 524 (Ala. Civ. App. 2007). Furthermore, when the summary-judgment movant has presented the trial court with multiple alternative bases for a favorable judgment and "the trial court [has] not specif[ied] the ground upon which it based its summary judgment in favor of [the movant], the law in Alabama is clear that this Court is bound to sustain a trial court's judgment if there is a valid basis for it." Hughes v. Allenstein, 514 So.2d 858, 860 (Ala. 1987).

## Analysis

[2] [3] [4]On appeal, Asset argues that the circuit court's judgment should be reversed because, it contends, it acquired the assignors' statutory rights of redemption via the March 23, 2016, quitclaim deed and properly exercised that right by filing its complaint in the circuit court. Oak Road argues that the circuit court's judgment should be affirmed, either because it had already acquired the assignors' statutory rights of redemption before they executed the quitclaim deed to Asset or because Asset did not properly assert its statutory right of redemption by failing to timely request a statement of lawful charges. Notably, Asset does not argue on appeal that the

assignors' assignments of their statutory rights of redemption to Oak Road were somehow invalid; rather, it insists that the assignors' conveyance of their statutory rights of redemption via the quitclaim deed to Asset was also valid. Thus, the dispositive issue regarding Oak Road's first argument is whether the assignors' execution of the quitclaim deed effectively assigned to Asset their statutory rights to redeem the disputed property.

> *3 "When real property in Alabama is mortgaged, the legal title passes to the mortgagee and the mortgagor retains the equity of redemption, which he may convey. First National Bank of Mobile[ ] v. Gilbert Imported Hardwoods, Inc., 398 So.2d 258 (Ala. 1981).... Unlike the equity of redemption, which exists prior to foreclosure and is deemed an interest in the property, the statutory right of redemption arises after foreclosure and is a mere personal privilege conferred by statute; it is not property or a property right."

Dominex, Inc. v. Key, 456 So.2d 1047, 1052–53 (Ala. 1984). Section 6–5–248 provides, in relevant part:

> "(a) Where real estate, or any interest therein, is sold the same may be redeemed by:
>
> "....
>
> "(5) Any transferee of the interests of the debtor or mortgagor, either before or after the sale. A transfer of any kind made by the debtor or mortgagor will accomplish a transfer of the interests of that party."

Citing Dominex, supra; Garvich v. Associates Financial Services Co. of Alabama, Inc., 435 So.2d 30 (Ala. 1983); First Colbert National Bank v. Security Federal Savings and Loan Association, 411 So.2d 786 (Ala. 1982); Flirt v. Kirkpatrick, 278 Ala. 61, 175 So.2d 755 (1965); Stevenson v. King, 243 Ala. 551, 10 So.2d 825 (1942); Upchurch v. West, 234 Ala. 604, 176 So. 186 (Ala. 1937)(overruled on another ground by Dominex, supra); Chess v. Burt, 87 So.3d 1201 (Ala. Civ. App. 2011); and Deutsche Bank National Trust Co. v. Citibank, N.A., 806 F.Supp.2d 1212 (M.D. Ala. 2011), Asset argues that

> "[t]he statutory right of redemption is a mere personal privilege, clearly assignable, that can be exercised by 'any vendee or assignee of the right of redemption under this Code.' Dominex, Inc. v. Key, 456 So.2d 1047[, 1053] (Ala. 1984) [ (quoting former § 6–5–230, Ala. Code 1975) ] .... The statutory language and case law does not restrict or otherwise limit the number of times the personal privilege can be assigned but does limit the statutory right to only those identified parties, the hierarchy of redemption rights [,] and exactly how the right must be exercised by the prescribed mode, manner, and time provisions."

(Emphasis in original.)

Oak Road responds by noting that none of the cases upon which Asset relies stand for the proposition that a particular mortgagor can effectively convey its statutory right of redemption to multiple sequential assignees. In support of its position, Oak Road relies upon Warren v. Gallagher, 252 Ala. 621, 42 So.2d 261 (1949), in which our supreme court considered whether a trial court had properly allowed a third party to intervene in a pending action. In so doing, the supreme court summarized the action at issue by stating:

> "[The action] was a suit in equity by [Ellison] against [Warren], seeking the enforcement of a statutory right of redemption of real estate after foreclosure of a mortgage. The petition to intervene was filed after Warren had acquired all the right which Ellison sought to enforce by deeds of conveyance. The effect of such conveyance was to cancel Ellison's claim of right to redeem, if he had a right to enforce it. The result of the conveyance to Warren by Ellison, if valid, was by the complainant to the principal respondent and served to place Ellison where he could no longer prosecute the suit, and justified an abatement of it. So that Ellison has destroyed his right to prosecute the suit by his conveyance, and no one is asserting the right to do so by an assignment from him."

*4 252 Ala. at 622, 42 So.2d at 262. Thus, Oak Road contends, "once the [assignors] assigned their statutory right of redemption to Oak Road on August 19, 2015, the [assignors] no longer possessed any enforceable right of redemption, neither to exercise it themselves nor to assign it to Asset."

Oak Road also points to the much more recent case of

Richardson v. Stanford Properties, LLC, 897 So.2d 1052 (Ala. 2004), in which our supreme court affirmed the trial court's denial of a petition to redeem real property after a foreclosure sale because the original mortgagor, from whom the purported redemptioner had acquired a statutory right of redemption, had failed to vacate the disputed property within 10 days of receiving a demand from the purchaser that she do so, as required by § 6–5–251, Ala. Code 1975, to avoid forfeiture of her statutory right of redemption. In so doing, the supreme court concluded that the purported redemptioner's statutory right to redeem the property was contingent upon the original mortgagor's compliance with § 6–5–251, and stated:

> "If [the purported redemptioner] had 'a totally new and separate right to redeem, unaffected by the notice given to his predecessor,' [the purchaser] argues, then, theoretically, following a demand upon [the purported redemptioner] to vacate, [the purported redemptioner] 'could assign his right to redeem to Jane Doe; who, upon being served notice to vacate could assign to someone else; and on and on.' ... Such a rule would, [the purchaser] insists, 'pervert[ ] the law and obstruct[ ] the rights of the foreclosing mortgage company and the foreclosure purchaser in the property.' ... We agree."

897 So.2d at 1058–59.

[5]As mentioned above, we also note that "the equity of redemption, being a property right which exists before foreclosure, is terminated by a conveyance of that right." Huie v. Smith, 236 Ala. 516, 519, 183 So. 661, 663 (1938)(emphasis added); see also Dominex, 456 So.2d at 1053 ("[B]ecause only those with an interest in the property can redeem, a mortgagor who has conveyed his equity of redemption cannot seek to redeem the property, before or after foreclosure." (Emphasis added)). However, "[t]he statutory rights of redemption ... are mere personal privileges and not property or property rights." § 6–5–250, Ala. Code 1975 (emphasis added). Our research has revealed no caselaw explicitly discussing whether a mortgagor can effectively convey the "personal privilege" of statutory redemption to different sequential assignees under § 6–5–248(a)(5).

However, " '[w]ords used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says.' " Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So.2d 293, 296 (Ala. 1998)(quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So.2d 344, 346 (Ala. 1992)). As noted above, the second sentence of § 6–5–248(a)(5) provides that "[a] transfer of any kind made by the debtor or mortgagor will accomplish a transfer of the interests of that party." (Emphasis added.) Black's Law Dictionary defines "transfer" as: "Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance." Black's Law Dictionary 1727 (10th ed. 2014)(emphasis added).

***5** Thus, the plain language of § 6–5–248(a)(5) indicates that, through their August 19, 2016, assignments to Oak Road, the assignors had transferred their statutory rights of redemption to Oak Road and had effectively disposed of and parted with those interests in the disputed property, such that they could not subsequently convey those dispossessed interests to Asset via the quitclaim deed that was executed on March 23, 2016. Our interpretation of § 6–5–248(a)(5) is consistent with the supreme court's discussion in Richardson:

> "Assignments are governed by § 6–5–248(a)(5), codified from Act No. 88–441, § 2(a)(5). Act No. 88–441 was enacted on the suggestion of the Alabama Law Institute to remedy perceived 'complexit[ies]' in the former statutory scheme and 'obtuseness' in the construction of the scheme found in Alabama caselaw. [Harry] Cohen, [The Statutory Right of Redemption in Alabama: A New Statute Is on the Horizon, 39 Ala. L. Rev. 131,] 157 [ (1987) ]. The language of § 6–5–248(a)(5) differs from the assignability provision of its predecessor, Ala. Code 1975, § 6–5–230, in a number of respects. ...
>
> "Section 6–5–230 and other provisions of the former scheme 'included [an order] of priorities among those entitled to redeem from foreclosure. The provisions of prior statutes relating to priority of rights of redemption were eliminated with the adoption of [Act No. 88–441].' Jesse P. Evans III, Alabama Property Rights and Remedies § 35.5, at 642 (1994) (footnotes omitted). However, for the purposes of this case, the most remarkable change in statutory language was the addition of the second sentence, which states that an assignment merely 'will accomplish a transfer of the interests of [the transferring] party.' (Emphasis added.)
>
> "... It is difficult to imagine why the Legislature, in writing § 6–5–248(a)(5), included the second sentence, other than to declare or emphasize that the mortgagor's assignee simply stands in the shoes of the mortgagor, at least as to the respective positions of the mortgagor and foreclosure-sale purchaser at the time of the assignment. See Nissan Motor Acceptance Corp. v. Ross, 703 So.2d 324, 326 (Ala. 1997) (assignee 'steps into the shoes of the assignor,' acquiring the 'same

> rights, benefits, and remedies that the assignor possesses'); Watts[ v. Rudulph Real Estate, Inc.], 675 So.2d [411,] 413 [ (Ala. 1996) ] (the right acquired by the assignee of a statutory right of redemption is 'limited to the right [the assignor] had when he executed the [assignment]')."

897 So.2d at 1058 (final emphasis added). Through the August 19, 2016, assignments, Oak Road "stepped into the shoes" of the assignors and acquired their statutory rights of redemption, and the assignors could not have thereafter conveyed those rights to Asset.

[6]Thus, although we acknowledge the legislature's expression in § 6–5–250 that "[t]he statutory rights of redemption ... are mere personal privileges and not property or property rights," we do not view that declaration as an indication that the legislature intended to prohibit judicial application of "[t]he prevailing principle in this state ... that the grantee of an estate takes no greater estate in the property than the grantor can convey" to assignments of statutory rights of redemption under § 6–5–248(a)(5). Potter v. Owens, 535 So.2d 173, 175 (Ala. Civ. App. 1988). To construe § 6–5–248(a)(5) to mean that a mortgagor can, under Alabama law, effectively assign its statutory right of redemption to a potentially unlimited number of persons would resurrect the "complexity" and "obtuseness" in our caselaw that the legislature sought to remedy by implementing Act No. 88–441, § 2(a)(5), now codified as § 6–5–248(a)(5). See Richardson, supra. We therefore decline Asset's invitation to so construe § 6–5–248(a)(5) in this case, and the circuit court's summary judgment in Oak Road's favor is due to be affirmed.

***6** Because the circuit court did not specify the reason for its decision, and because the circuit court's summary judgment in favor of Oak Road was properly entered based on Oak Road's assertion that Asset had not acquired a statutory right of redemption, we do not consider whether the alternative basis proffered by Oak Road would have also supported a summary judgment in its favor. See Hughes, supra.

AFFIRMED.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ., concur.

**All Citations**

--- So.3d ----, 2017 WL 242542

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NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Thomas W. **HINOTE**, Cindy S. **Hinote**, Rebecca L. Dowdy, and David H. Dowdy
v.
Annette Freeman OWENS et al.

1160268
|
September 8, 2017

Synopsis
**Background:** Descendants of landowner who died intestate with multiple heirs brought action against land's purported owners, seeking a judgment determining ownership and a sale of the property for a division of proceeds. The Circuit Court, Fayette County, No. CV–13–9, entered judgment for descendants, determined that descendants owned the property as cotenants with purported owners, ordered the sale of the property, and ordered that the sale proceeds be divided according to the property interest held. Purported owners appealed.

**[Holding:]** The Supreme Court, Bryan, J., held that 20-year common-law rule of repose did not apply and thus did not bar action.

Affirmed.

Murdock, J., concurred specially and filed opinion.

Sellers, J., dissented and filed opinion.

**Appeal from Fayette Circuit Court (CV–13–9)**

**Opinion**

BRYAN, Justice.

***1** This case involves two competing claims to a 40–acre tract of land ("the property") and whether the rule of repose may be applied to resolve that dispute. In 1930, Felix Jackson Freeman ("Felix") inherited the property from his father Matt Freeman through Matt's will. Felix married and had 12 children. The record on appeal contains no evidence establishing that Felix conveyed the property during his life. Thus, the record indicates that Felix owned the property when he died in 1961. Felix died intestate, and he was predeceased by his wife and three of his children, only one of whom had a surviving spouse or children. Thus, when Felix died, the property passed by intestate succession to his nine surviving children (each having a one-tenth interest) and to the heirs of one of Felix's predeceased children (who shared the predeceased child's one-tenth interest).

The complications in this case began in 1964, when one of Felix's children, James Freeman ("James"), purported to deed all the property to another child of Felix's, Joseph Freeman ("Joseph"). The 1964 deed was duly recorded. Nothing in the record establishes that, before that deed was executed, James owned more than the one-tenth interest in the property he had inherited from Felix in 1961. The 1964 deed from James to Joseph began a series of conveyances involving various parties over several years. That line of conveyances ended with two deeds in 2004, when DRL, LLC, purported to convey one-half of the surface estate of the property to Thomas W. Hinote and Cindy S. Hinote and one-half of the surface estate of the property to David H. Dowdy and Rebecca L. Dowdy. DRL also purported to convey a portion of the mineral rights in the property to the Hinotes and the Dowdys; DRL retained a portion of the mineral rights for itself. However, for the sake of simplicity, we will describe the competing claims to the property only as they relate to the surface estate, as to which, for purposes of this appeal, the mineral estate is similarly situated.

The various transactions created a situation with two sides laying claim to the property. On the one hand, Felix's descendants claim to own various fractional parts of the property as cotenants. They claim that James never owned more than the one-tenth interest in the property he inherited on Felix's death and, thus, that he could not have conveyed more than that one-tenth interest to Joseph in 1964. They contend that, after the 1964 deed, Joseph owned only a two-tenths interest in the property (the one-tenth interest he inherited on Felix's death plus the one-tenth interest he acquired from James). Under their view, the Hinotes and the Dowdys would also be cotenants, each having actually acquired a one-tenth interest instead of the one-half interest they thought they had acquired. The Hinotes and the Dowdys, on the other hand, each claim to own one-half of the property, tracing their titles back to the 1964 deed in which James

purported to deed all the property to Joseph.

*2 In 2011, four of Felix's descendants, Annette Freeman Owens, Willie Freeman, Jr., Eva N. Freeman Jones, and Nona Freeman Farrior, sued the Hinotes and the Dowdys.[1] In pertinent part, the plaintiffs sought a judgment determining the ownership of the property, and they requested a sale of the property for a division of the proceeds. The Hinotes and the Dowdys primarily argued that the plaintiffs' action is barred by the 20–year rule of repose; the plaintiffs dispute that their action is barred by the rule of repose. The Hinotes and the Dowdys alternatively argued that they had acquired the property by adverse possession, contending that they and their predecessors had been in actual, hostile, open, notorious, and exclusive possession of the property for many years.

[1] The plaintiffs also sued, as necessary parties, many Freeman relatives who allegedly held interests in the property. Concerning the issue on appeal, the interests of those additional defendants are actually aligned with the interests of the plaintiffs. Thus, the additional defendants were listed as appellees in the notice of appeal. However, the additional defendants did not file appellate briefs and have not actively participated in this appeal.

Following a trial, the trial court entered a judgment in favor of the plaintiffs. The trial court concluded that the plaintiffs owned the property as cotenants, along with the Hinotes, the Dowdys, and dozens of other descendants of Felix. That is, the court determined that the Hinotes and the Dowdys had each acquired a one-tenth interest in the property instead of the one-half interest their respective deeds indicate. The trial court further ordered that the property be sold and the proceeds divided according to the property interest held. The trial court did not discuss the rule of repose in its judgment. The Hinotes and the Dowdys appealed. We affirm.

[1] [2] [3]On appeal, the Hinotes and the Dowdys argue that Alabama's common-law rule of repose bars this action. In Ex parte Liberty National Life Insurance Co., 825 So.2d 758 (Ala. 2002), this Court clarified the law concerning the rule of repose. In that case, we explained that the rule of repose bars an action not brought within 20 years from the time the action could have been brought. 825 So.2d at 764. The rule is based solely on the passage of time. Id. This concept is distinct from the accrual of a claim for purposes of a statute of limitations: "[R]epose does not depend on 'accrual,' because the concept of accrual sometimes incorporates other factors, such as notice, knowledge, or discovery." 825 So.2d at 764 n.2. However, in some cases the start of the 20–year period of repose will coincide with the accrual of a claim. Unlike a statute of limitations, which extinguishes the remedy rather than the right, the rule of repose extinguishes both the remedy and the action itself. 825 So.2d at 765. The rule is based on the ideas that " '[i]t is necessary for the peace and security of society' " that disputes should end at some point and that " 'it is inequitable to allow those who have slept upon their rights for a period of 20 years' " to bring an action after memories have faded and parties and witnesses have passed away. 825 So.2d at 763 (quoting Snodgrass v. Snodgrass, 176 Ala. 276, 280, 58 So. 201, 202 (1912)). " '[T]he only circumstance that will stay the running of the 20 year period of repose is a recognition of the existence of the claimant's right by the party defending against the claim.' " 825 So.2d at 765 (quoting Boshell v. Keith, 418 So.2d 89, 92 (Ala. 1982) (emphasis omitted)). That recognition must be express and explicit. 825 So.2d at 765.

[4]The Hinotes and the Dowdys trace their titles to the 1964 deed by which James purported to convey all the property to Joseph. They contend that "[a] claim existed and a right could have been asserted as early as 1964 when James ... purported to convey the full interest—not just his interest—in the [property] to Joseph." The Hinotes and the Dowdys' brief, at 16. Thus, the Hinotes and the Dowdys argue that a 20–year period of repose began to run at that point in 1964. Therefore, they argue, the 20–year period expired long before the plaintiffs filed their action in 2011 and, thus, the action is barred. However, the rule of repose simply does not apply in this case.

*3 [5]Initially, we emphasize the fundamental principle that one cannot convey more property that one owns. Simmons Grp., LTD v. O'Rear, [Ms. 1150475, March 24, 2017] — So.3d ——, —— (Ala. 2017) (stating "the basic property rule that a grantor cannot convey more than the grantor actually owns"). In 1964, James purported to convey all the property to Joseph by deed. However, nothing in the record establishes that, when that deed was executed, James owned more than the one-tenth interest in the property he had inherited in 1961. The record indicates that James was a cotenant of the property with Felix's other heirs. The Hinotes and the Dowdys acknowledge as much in their brief by noting that "one cotenant[, James,] attempted to convey all of the [property]" and that, in the 1964 deed, "James ... purported to convey the full interest—not just his interest—in the [property] to Joseph." The Hinotes and the Dowdys' brief, at 14 and 16 (emphasis in original).

[6]Given that James attempted in the 1964 deed to convey more than he owned and that the Hinotes and the Dowdys

claim through that deed, it is evident that the plaintiffs, who claim through intestate succession from Felix, have superior title to the Hinotes and the Dowdys. Once superior title has been established, there is a limited manner by which another party may wrest away that title. In this case, the Hinotes and the Dowdys attempt to use the rule of repose to divest title from the other cotenants; however, the rule may not be used in that way. "The rule of repose has been described as the 'running of the period against claims' rather than a device to displace title. ... [T]he rule of repose cannot be used against one with valid record title by one who clearly does not have title." Oehmig v. Johnson, 638 So.2d 846, 850 (Ala. 1994) (quoting Boshell, 418 So.2d at 92 (emphasis in Boshell omitted)), overruled on other grounds by Ex parte Liberty National, supra. In a case like this, the method of divesting title from other cotenants would be to establish adverse possession.

Knouff v. Knouff, 485 So.2d 1155 (Ala. 1986), illustrates that point. In the proceedings below and on appeal there has been some discussion about whether and how Knouff relates to Ex parte Liberty National, which clarified the law on the rule of repose 16 years after the opinion in Knouff was issued. We take this opportunity to address that issue. Like this case, Knouff involved several heirs who inherited land intestate and thus became cotenants. After taxes were not paid on the land, one of the cotenants, S.S. Knouff, purchased the land at a tax sale. S.S. received a tax deed to the land in his own name. More than 20 years later, certain heirs, claiming they still owned the land as cotenants, sought a sale for division. S.S.'s son and heir, J.R. Knouff, then sought to quiet title to the land. J.R. argued that the rule of repose barred the heirs' attempt to have the trial court order a sale for division. This Court disagreed, concluding that the rule of repose did not bar the action.

The Court first observed that, although S.S. had bought the land at a tax sale and had acquired a tax deed in his own name, his doing so was deemed to be for the benefit of all the cotenants. Thus, the tax deed had not actually given S.S. exclusive ownership of the land. The Court then addressed J.R.'s argument that he and his father S.S. had nevertheless adversely possessed the land since the date of the tax deed. The Court used "repose" language when discussing the adverse-possession claim:

> "There is a strong presumption in the law that the possession of one co-tenant is the possession of all, and possession by one tenant in common alone does not repel the presumption. Monte v. Montalbano, 274 Ala. 6, 145 So.2d 197 (1962). Neither do the payment of taxes and lapse of time. ...
>
> "The reason for the presumption that possession by one tenant in common is for the benefit of all tenants in common is obvious. One co-tenant should not be favored over another simply because the latter makes no objection to the first co-tenant's possessing and using the land they own in common. If the one using common land intends to deprive his co-tenant of his interest, he should have the burden of bringing his evil intent to the attention of his co-tenant. It is only after actual knowledge of the fact that the possession is hostile and intended to oust the co-tenant and defeat his common interest that the rule of repose begins to run against the co-tenant. One cannot be said to have slept on his rights unless it has been brought home to him that his rights have been invaded."

***4** Knouff, 485 So.2d at 1156 (emphasis added).

Knouff concerns how one cotenant might wrest title from another cotenant. In that context, the Court used the term "rule of repose" to describe adverse possession. The "rule of repose" discussed in Knouff is not the rule of repose discussed 16 years later in Ex parte Liberty National, which clarified the rule. The rule of repose, as discussed in Ex parte Liberty National, is based solely on the passage of time. However, the "rule of repose" discussed in Knouff is actually adverse possession, which of course involves more elements than the mere passage of time. Ex parte Liberty National did not discuss Knouff, which is not surprising, given that the cases discuss distinct concepts. The rule of repose discussed in Ex parte Liberty National is "a defensive matter" and "is unlike adverse possession, which affirmatively establishes title." Boshell, 418 So.2d at 92. However, although repose and adverse possession are distinct, they are related and come from the same legal root; thus, it is not surprising that "repose" language will sometimes appear in adverse-possession cases. Both the rule of repose and adverse possession are based on the idea that unasserted rights may be extinguished under certain conditions. With the rule of repose, the only requirement is the passage of time; adverse possession requires the passage of time plus all the other requirements of adverse possession. In short, adverse possession is a rule of repose in that it puts to rest a property claim, but it is not the rule of repose discussed in Ex parte Liberty National. See, e.g., Sparks v. Byrd, 562 So.2d 211, 214 (Ala. 1990) ("In Alabama, the common-law doctrine of adverse possession by prescription acts as a rule of absolute repose ...."); Snow v. Boykin, 432 So.2d 1210, 1212 (Ala. 1983) (stating that the common-law doctrine of adverse possession by "prescription of twenty years is a rule of absolute repose"); and Fitts v. Alexander, 277 Ala. 372, 376, 170 So.2d 808, 811 (1965) (stating that the 20–year prescriptive period for adverse possession "operates as an

absolute rule of repose"); see also Herrick v. Moore, 185 Iowa 828, 169 N.W. 741, 742 (1918) ("[A]dverse possession is in the nature of a rule of repose.").

Knouff illustrates that adverse possession is the method of "repose" one cotenant may use to displace title from another cotenant. Ex parte Walker, 739 So.2d 3 (Ala. 1999), further illustrates this point. In Ex parte Walker, one cotenant, Cox, argued that he had acquired all of a tract of land from his other cotenants by adverse possession. The case was a straightforward adverse-possession case concerning cotenants. The Court, in concluding that Cox had not established adverse possession, quoted and relied on Knouff. Specifically, the Court quoted that part of Knouff, also quoted above, concluding that " '[i]t is only after actual knowledge of the fact that the possession is hostile and intended to oust the co-tenant and defeat his common interest that the rule of repose begins to run against the co-tenant.' " Ex parte Walker, 739 So.2d at 7 (quoting Knouff, 485 So.2d at 1156). It is evident that the "rule of repose" discussed in Ex parte Walker, like the "rule of repose" discussed in Knouff, is actually adverse possession.

*5 We need not discuss whether the Hinotes and the Dowdys obtained the property by adverse possession because they have not presented and argued that issue.[2] Their appeal rises or falls on their argument that the rule of repose bars the plaintiffs' action. We conclude that the rule of repose is inapplicable in this case and thus does not bar the plaintiffs' action. Accordingly, we affirm the trial court's judgment in favor of the plaintiffs.

[2] For a summary of the law concerning adverse possession as it relates to cotenants, see Horne v. Ward, 585 So.2d 877, 878 (Ala. 1991).

AFFIRMED.

Stuart, C.J., and Bolin, Parker, Shaw, Main, and Wise, JJ., concur.

Murdock, J., concurs specially.

Sellers, J., dissents.

MURDOCK, Justice (concurring specially).

I fully agree with the well considered analysis of the main opinion. I write separately to offer a few additional thoughts.

The law begins with this fundamental principle, well explained by the main opinion: One cannot convey better title than one owns. And an application of the rule of repose in the same "space" as this fundamental principle would eviscerate this principle. It would mean that, in fact, a person could be conveyed a better title by his grantor than was held by his grantor so long as no one files an action challenging that conveyance, e.g., a quiet-title action, for 20 years.

Applying a bare, 20–year rule of repose in the manner suggested by the appellants (i.e., merely because a grantee records his deed) would prevent not only the holder under an older, superior chain from defending or suing to vindicate his title once another grantee's deed had been on record for 20 years, but also would prevent the holder under the younger, inferior chain from invoking judicial assistance to defend or vindicate that holder's claim to the land because, typically, the older, superior chain of title also is of record and therefore would have been on record even longer than the challenger's chain. That is, the appellants' approach would mean that when two competing, recorded chains of title are both at least 20 years old, neither side could obtain judicial relief to clarify ownership of land. I suppose self-help would be the only remedy at that point.

Temporal limitations imposed by our law—statutes of limitations and rules of repose—are apposite in civil claims of wrong committed by one party against another. If there is no recovery in such an action because of those limitations, then there is no recovery. So be it.

But disputes over ownership of land are different. The purpose of a quiet-title action is not to allow the law to take the measure of a wrong by one party against another. There is no actionable "wrong" by either party, except for the "cloud" that both parties cast on the title of the other. Moreover, where two parties each lay claim to ownership of the same land, there must be a recovery. Unlike a civil action that measures a claimed wrong by one party against another, the action can not end without a recovery. One of the parties must come away with an award of title to the land. A rule of repose is inapposite.

The main opinion also well states a corollary to the principle that one cannot convey more than he actually owns, namely that the superior chain of title governs the question of land ownership, unless a third party is able to "wrest" that title away from the proper title holder. And to give full vitality to this principle, the law has always required something more to wrest ownership from the

rightful owner than a claim under an otherwise invalid conveyance, even if recorded, followed by a period of inaction and waiting. That "more"—that has developed over hundreds of years in our common law (and is now codified in some measure)—are the additional elements of adverse or prescriptive possession, i.e., (i) actual and exclusive possession that is (ii) open, (iii) hostile, (iii) notorious, and (iv) continuous.

*6 The "more" is not the recording of a deed. In fact, the cases where the law has required the challenger to meet the adverse-possession elements under statutory adverse possession (10 years) or common-law prescription (20 years), are not affected by whether the challenger's deed is recorded. Application of the contrary notion would mean (i) that the legal theories of adverse possession and prescription are in large measure rendered unnecessary and (ii) that everyone who receives valid title to land must go to the courthouse and check that title every 20 years for any recordation of a competing deed, else risk losing title to the land to an otherwise stealth owner who takes no other action to put the rightful owner on notice of his adverse claim to the land. That, of course, is not required. See Oehmig v. Johnson, 638 So.2d 846 (Ala. 1994).[3]

[3] Ex parte Liberty National Life Insurance Co., 825 So.2d 758 (Ala. 2002) is inapposite. It did not involve challenges to ownership of real property but, instead, involved an action against a life insurer to recover for use of race-distinct mortality rates in industrial insurance policies.

SELLERS, Justice (dissenting).

I respectfully dissent.

In Oehmig v. Johnson, 638 So.2d 846 (Ala. 1994), the purported grantee of real property in fee simple sought to quiet title as against the purported owners of the mineral rights in the property. In discussing the rule of repose, which the grantee had asserted in support of his quiet-title action, this Court said:

> "The rule of repose is 'a defensive matter' and 'is unlike adverse possession, which affirmatively establishes title.' Boshell v. Keith, 418 So.2d 89, 92 (Ala. 1982). The rule of repose has been described as the 'running of the period against claims' rather than a device to displace title. Id. (Emphasis in original.) We hold that the rule of repose cannot be used against one with valid record title by one who clearly does not have title.
>
> "... It was not the responsibility of the [purported owners of the mineral rights] to continually check the title records to see if someone had purported to convey their mineral interests. The time for the rule of repose cannot run until there is at least constructive notice of a potential claim. ..."

638 So.2d at 850–51.

Oehmig, however, was criticized in Ex parte Liberty National Life Insurance Co., 825 So.2d 758 (Ala. 2002). In that case, this Court indicated that Oehmig was incorrect in suggesting that the rule of repose cannot start to run until there has been "notice" of the claim at issue. 825 So.2d at 764 n.3. The Court, however, did not criticize Oehmig for indicating that the rule of repose cannot "be used offensively (in a manner similar to the concept of adverse possession) 'against one with valid record title by one who clearly does not have title' in order to divest the title owner of property." Id. (quoting Oehmig, 638 So.2d at 850).

In Harrison v. Alabama Forever Wild Land Trust, 4 So.3d 1114 (Ala. 2008), however, this Court held that the rule of repose applied in a quiet-title action, which was commenced by a plaintiff claiming to own a parcel of real property more than 20 years after the recording of a deed that, if valid, would defeat the plaintiff's claim to ownership. The property at issue in Harrison was originally granted to Greenberry Williams, Sr., by the United States government in 1848. In 1856, Greenberry Williams, Sr., conveyed the property to one of his sons, Ausker. In 1907, a deed was recorded by which Ausker's brother, Greenberry Williams, Jr., purported to convey the property to J.T. Crotts and P.B. Worley. There was, however, no deed whereby the property had been conveyed to Greenberry Williams, Jr. The plaintiff in Harrison disputed the validity of the 1907 deed from Greenberry Williams, Jr., to Crotts and Worley, suggesting that it was a "forgery." 4 So.3d at 1116–18. He claimed that the property actually had "passed down through the Ausker Williams family pursuant to the 1856 deed by which Greenberry Williams, Sr., conveyed the property to Ausker Williams." 4 So.3d at 1116. After the 1907 deed to Crotts and Worley was recorded, multiple additional deeds, which purported to convey the property to various grantees, were executed and recorded. In 2002, the property was conveyed to the Alabama Forever Wild Land Trust ("the Trust Fund"), which was named as a defendant in the quiet-title action.

*7 The trial court in Harrison entered a judgment in favor

of the Trust Fund. On appeal, this Court held that the rule of repose applied to the plaintiff's claim of ownership:

> "The Trust Fund claims ownership of the property by way of the 1907 deed whereby Greenberry Williams, Jr., transferred the property to Crotts and Worley. That deed was properly recorded in Colbert County, and [the plaintiff's] ancestors were accordingly on notice as of that date that another party claimed an interest in the property. See § 35–4–63, Ala. Code 1975 ('The recording in the proper office of any conveyance of property or other instrument which may be legally admitted to record operates as a notice of the contents of such conveyance or instrument without any acknowledgment or probate thereof as required by law.'). Nevertheless, none of those ancestors took any steps to contest the 1907 deed. Rather, it was not until 2005—98 years after the 1907 deed was recorded—that [the plaintiff] initiated the present action to quiet title to the property. During those 98 years in which [the plaintiff] and his ancestors 'slept upon their rights' and took no action to quiet title to the property, 'the memory of transactions ... faded and parties and witnesses passed away.' Boshell [v. Keith, 418 So.2d 89, 91 (Ala. 1982) ] (emphasis omitted). Indeed, [the plaintiff] has raised the possibility that the 1907 deed was a forgery; however, the parties that might have personal knowledge of the circumstances surrounding the execution and filing of that deed have almost certainly all passed away. These are precisely the facts for which the rule of repose was fashioned, and that rule accordingly serves as an absolute bar to [the plaintiff's] action."

4 So.3d at 1118 (footnote omitted).

Relying on the circumstances and the reasoning in Harrison, I would conclude that, in 1964 when James recorded a deed purporting to convey the entire 40–acre property to Joseph in fee simple, the 20–year rule of repose began to run. That recording put Felix's heirs on notice that "another party claimed an interest in the property." Harrison, 4 So.3d at 1118. The rule of repose creates finality by barring claims after an established period. That finality is important because memories fade and parties and witnesses pass away. Id. (citing Boshell v. Keith, 418 So.2d 89, 91 (Ala. 1982)).

I also note that the record indicates that, in 1980, other family members were involved in conveyances with persons in the relevant chain of title, who claimed to own the property at issue. Thus, it appears that the appellees had knowledge at that time of a dispute regarding ownership of the property. The appellees, however, took no action until 2011. We should not reward parties who sleep on their rights and fail to take actions to protect their interests in real property. The rule of repose prevents parties who here have some 30 years' prior notice of a possible dispute as to ownership from bringing suit to establish title. Accordingly, I would reverse the trial court's judgment.

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Court of Civil Appeals of Alabama.

BIRMINGHAM PLANNING COMMISSION
v.
Andrew LAIRD, Charles Cleveland, and Dr. Peter Hendricks
Altamont School
v.
Andrew Laird, Charles Cleveland, and Dr. Peter Hendricks

**2160898**
|
2160907
|
Feb. 23, 2018

**Appeals from Jefferson Circuit Court (CV–16–904242)**

**Opinion**

MOORE, Judge.

***1** In appeal number **2160898**, the Birmingham Planning Commission ("the planning commission") appeals from a judgment entered by the Jefferson Circuit Court ("the circuit court") issuing a writ of mandamus to the planning commission directing it "to deny the application for the [proposed development of a] subdivision ... filed by the Brook Hill School." In appeal number 2160907, the Altamont School ("Altamont"), formerly known as the Brook Hill School, appeals from the circuit court's order denying its motion to intervene in the mandamus proceedings.

Procedural History

On August 18, 2016, Altamont submitted an application to the planning commission in which it sought approval to combine two lots in the Buckingham Place subdivision with one lot in the Clairmont Addition to Forest Park Sector Two subdivision to create "Buckingham Place Plat No. 2" ("the proposed subdivision"). On September 16, 2016, the planning commission's "subdivision committee"[1] approved Altamont's application for the proposed subdivision, subject to certain conditions. On September 27, 2016, Andrew Laird, Charles Cleveland, and Dr. Peter Hendricks ("the neighboring property owners"), all of whom own property in the Clairmont Addition to Forest Park Sector Two subdivision, filed a notice of appeal to the planning commission, pursuant to Section 3.11 of the Subdivision Regulations of the City of Birmingham ("the subdivision regulations") and § 11–52–32(d), Ala. Code 1975. After a hearing on November 6, 2016, the planning commission orally granted the application for the proposed subdivision.[2]

1 The "subdivision committee" is a committee that is composed of five members of the planning commission and whose duties include, among others, "hear[ing] and decid[ing] upon applications for subdivisions of land. See Section 2.2, Subdivision Regulations of the City of Birmingham (defining "subdivision committee" as "[a] committee composed of five (5) members of the [p]lanning [c]ommission authorized to hear and decide upon applications for subdivision of land, and to advise the chief legislative body of the City [of Birmingham] on vacation of public land and new right-of-way dedications, all such actions to be taken on behalf of the [p]lanning [c]ommission"); and § 11–52–32(d), Ala. Code 1975 ("The municipal planning commission of any Class 1 city may elect no fewer than three and no more than five persons who are members of the municipal planning commission to serve while members thereof and at the pleasure of the municipal planning commission as a committee to approve or disapprove in the name of the municipal planning commission any plat presented to the municipal planning commission." (footnote omitted) ).
The Subdivision Regulations of the City of Birmingham are authorized pursuant to § 11–52–31, Ala. Code 1975. Additionally, we note that " 'Birmingham is a Class 1 municipality, as defined in § 11–40–12, Ala. Code 1975, because its population was more than 300,000 inhabitants as certified by the 1970 federal decennial census.' Biggs v. City of Birmingham, 91 So.3d 708, 711 n.2 (Ala. Civ. App. 2012)." Atlantis Entm't Grp., LLC v. City of Birmingham, 231 So.3d 332, 340 n.2 (Ala. Civ. App. 2017).

2 Although the record before this court does not contain a written order approving the proposed subdivision, § 11–52–32(a), Ala. Code 1975, provides that "the municipal planning commission shall approve or disapprove a plat within 30 days after the submission thereof to it; otherwise, the plat shall be deemed to have been approved."

*2 On November 11, 2016, the neighboring property owners filed a petition in the circuit court requesting the court to issue a writ of mandamus to the planning commission directing it to deny Altamont's application for the proposed subdivision. The neighboring property owners attached documents in support of their mandamus petition. On December 6, 2016, the circuit court set the matter for a hearing to be held on January 5, 2017. On December 30, 2016, the planning commission filed a response to the mandamus petition; it did not submit any documents in support of its response. That same day, the planning commission filed a motion to continue the January 5 hearing, asserting that it had "submitted an hour and a half long recording of [the subdivision committee's] September 14, 2016, meeting ... to be transcribed" and that a continuance was necessary in order to have the transcription completed before the hearing; the circuit court granted that motion.

On January 17, 2017, Altamont filed a motion to intervene in the action. On April 6, 2017, the neighboring property owners filed an objection to the motion to intervene. After a hearing, the circuit court entered an order on May 4, 2017, denying Altamont's motion to intervene. On May 8, 2017, the circuit court entered a judgment concluding that the planning commission had not complied with Section 3.12 of the subdivision regulations because "factual evidence provided to the Subdivision Committee or Planning Commission does not support the criteria established by the regulations." Specifically, the circuit court concluded, in pertinent part:

> "The record attached to the Petition for Writ of Mandamus is void of factual evidence presented by the subdivider confirming the suitability of lands for the proposed consolidation. The evidence presented by the [neighboring property owners] demonstrates the adverse effects to the general welfare of surrounding subdivisions. This Court has been unable to locate in the record where the Subdivision Committee or the Planning Commission considered the reclassification of land, the consistency of land use, the detriment, if any, to adjacent property owners and the public, and the character of uses of adjacent property owners."

The circuit court granted the mandamus petition and issued a writ directing the planning commission to deny Altamont's application for the proposed subdivision.

On May 12, 2017, the planning commission and Altamont filed separate postjudgment motions. On May 22, 2017, the planning commission filed a supplement to its postjudgment motion, attaching the transcript of the hearing held before the planning commission's subdivision committee on September 14, 2016; that transcript indicated that it had been transcribed on May 15, 2017. On June 8, 2017, the neighboring property owners filed a response to the postjudgment motion and supplement thereto filed by the planning commission and moved to strike the transcript attached to the supplement. On June 22, 2017, the circuit court granted the motion to strike and denied the postjudgment motions filed by the planning commission and Altamont. On August 3, 2017, the planning commission and Altamont filed separate notices of appeal; this court consolidated the appeals, ex mero motu.

## Discussion

### Appeal No. 2160898

On appeal, the planning commission argues that the circuit court erred in granting the petition for the writ of mandamus filed by the neighboring property owners because, it says, the planning commission's decision was not arbitrary and capricious.

> " 'Mandamus is an extraordinary remedy requiring a showing that there is: " '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' " Ex parte Leigeber, 623 So.2d 1068, 1071 (Ala. 1993) (quoting Ex parte Alfab, Inc., 586 So.2d 889, 891 (Ala. 1991) ). Because it is an extraordinary remedy, the standard of review is whether there has been a clear abuse of discretion by the trial court. Ex parte State Dep't of Human Resources, 674 So.2d 1274 (Ala. Civ. App. 1995).'

*3 "City of Birmingham Planning Comm'n v. Johnson Realty Co., 688 So.2d 871, 872 (Ala. Civ. App. 1997).

...

"... As this court stated in Mobile City Planning Commission v. Stanley, 775 So.2d 226 (Ala. Civ. App. 2000), this court—and the [circuit] court—are limited

in our review of the decision of a planning commission.

> " 'Judicial review of a city planning commission's action is limited. Noojin v. Mobile City Planning Comm'n, 480 So.2d 587 (Ala. Civ. App. 1985). When a planning commission exercises control over subdivision lands within a municipality it acts in an administrative capacity. Boulder Corp. v. Vann, 345 So.2d 272 (Ala. 1977).
>
> > " ' "There is no dispute that the proper standard of review in cases based on an administrative agency's decision is whether that decision was arbitrary or capricious or was not made in compliance with applicable law.
> >
> > " ' " 'Our standard of review regarding administrative actions is very limited in scope. We review the circuit court's judgment without any presumption of correctness since that court was in no better position than this court to review the agency decision. The special competence of the agency lends great weight to its decision. That decision must be affirmed unless arbitrary, capricious, or not made in compliance with applicable law. Neither the circuit court nor this court may substitute its judgment for that of the administrative agency.' "
>
> " 'Ex parte City of Fairhope, 739 So.2d 35, 38 (Ala. 1999), quoting State Dep't of Revenue v. Acker, 636 So.2d 470, 473 (Ala. Civ. App. 1994) (citations omitted). ...'

"Stanley, 775 So.2d at 228."

Chandler v. City of Vestavia Hills Planning & Zoning Comm'n, 959 So.2d 1124, 1128–29 (Ala. Civ. App. 2006).

"Once a planning commission has properly exercised its authority in drafting ordinances regulating subdivision development, it is bound by those ordinances." Smith v. City of Mobile, 374 So.2d 305, 307 (Ala. 1979). See also Boulder Corp. v. Vann, 345 So.2d 272, 275 (Ala. 1977); and Chandler v. City of Vestavia Hills Planning & Zoning Comm'n, 959 So.2d at 1127.

Section 3.12 of the subdivision regulations[3] provides, in pertinent part:

> "All decisions of the Subdivision Committee concerning proposed subdivisions must be based on factual evidence presented by the subdivider confirming the suitability of particular lands for proposed buildings, construction, access, type and intensity of development or other uses. No new lots shall be created which pose hazards to health, safety or the general welfare, or are not designed in character with existing surrounding subdivisions, or which are not developable or usable for some public purpose or private activities in accord with all applicable zoning provisions."

[3] Because Birmingham is a Class I municipality, see note 1, supra, this court may take judicial notice of its municipal regulations. See § 11–45–11, Ala. Code 1975.

Section 11–52–32(d) provides, in pertinent part, that, "[i]n the case of an appeal, the [subdivision] committee shall cause a transcript of all papers and documents filed with the committee in connection with the matter involved in the appeal to be certified to the municipal planning commission to which the appeal is taken." Additionally, subsection H of Section 3.11 of the subdivision regulations provides, in pertinent part:

> ***4** "[I]n appeal cases, [the planning commission's] review shall be limited to evaluation of the evidence submitted on the record, unless it determines by an affirmative vote of twelve (12) members that additional facts may have relevance to the decision, whereupon the case shall be tried ab initio, allowing presentation of new evidence."

In the present case, there is nothing in the record before this court to indicate that the planning commission voted to try the case ab initio. Therefore, we must determine if the planning commission had before it the record of the meeting held before the subdivision committee concerning this matter ("the subdivision committee meeting") and, if it did, whether that record contains the requisite evidence as set forth in Section 3.12 of the subdivision regulations.

As previously noted, the transcript of the subdivision committee's meeting indicates that it was transcribed

from an audio recording on May 15, 2017, months after the planning commission had affirmed the decision of the subdivision committee. The planning commission has not argued to this court, or cited to a place in the record before it showing, that it had the benefit of reviewing the transcript of, or listening to the audio recording from, the subdivision committee's meeting; indeed, the planning commission refers to the transcript as "newly acquired evidence" and "newly discovered evidence" in its brief to this court. Planning Commission's brief at pp. 16–19.

Based on the foregoing, we conclude that because the planning commission did not consider the transcript of, or the audio recording from, the subdivision committee's meeting in determining whether to approve the application for the proposed subdivision, it did not review the record from the subdivision committee's meeting as required by Section 3.11 of the subdivision regulations. Moreover, the record before this court is devoid of any showing that the evidence required in Section 3.12 of the subdivision regulations was included in the record that the planning commission was tasked with reviewing pursuant to Section 3.11. Because the planning commission did not review the record from the subdivision committee's meeting and the planning commission did not have before it the evidence required by its own regulations, we conclude that the planning commission's action in approving the proposed subdivision was done in a procedural manner inconsistent with its own regulations. As we previously recognized: "Once a planning commission has properly exercised its authority in drafting ordinances regulating subdivision development, it is bound by those ordinances." Smith, 374 So.2d at 307. Based on the foregoing, we conclude that the circuit court did not err in issuing the writ of mandamus to the planning commission.

The planning commission also argues that the circuit court erred by denying its postjudgment motion and by striking the transcript of the subdivision committee's meeting. It argues that it should have been permitted to show the existence of factual support for the planning commission's decision and to counter alleged misstatements by the neighboring property owners as to what had occurred at that meeting. In support of its argument, the planning commission cites § 12–13–11(a)(1), (2), and (7), Ala. Code 1975, which provide:

***5** "(a) On motion filed within 30 days from entry of judgment, a new trial may be granted for the following grounds:

"(1) Irregularity in the proceedings of the court, jury or prevailing party, or any order of court, or abuse of discretion, by which the party was prevented from having a fair trial.

"(2) Misconduct of the jury or prevailing party.

"....

"(7) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

"The determination of whether to grant or deny a new trial is for the trial judge, and an order granting or denying a motion for new trial on the basis of newly discovered evidence will not be disturbed on appeal, unless it appears that the trial court abused its discretion." Talley v. Kellogg Co., 546 So.2d 385, 388 (Ala. 1989). In this case, the planning commission sought a continuance to procure the transcript of the subdivision committee's meeting. Although the motion for a continuance was granted, the planning commission still failed to submit that transcript to the circuit court before the court entered its judgment. Moreover, as discussed previously, the planning commission has not shown that it considered the transcript of the subdivision committee's meeting in determining whether to approve the application for the proposed subdivision. Based on the foregoing, we cannot conclude that the circuit court exceeded its discretion in declining to accept the transcript of the subdivision committee's meeting. Accordingly, we affirm the circuit court's order denying the planning commission's postjudgment motion and granting the neighboring property owners' motion to strike the transcript.

Appeal No. 2160907

On appeal, Altamont argues that the circuit court erred in denying its motion to intervene. It argues that, if it had been allowed to intervene, it would have submitted the transcript of the subdivision committee's meeting as well as reports of engineers. As noted previously, however, the transcript of the subdivision committee's meeting was not transcribed and made a part of the record before the planning commission on appeal, so the planning commission could not have based its decision on that transcript. Furthermore, Altamont does not argue that any of the reports from engineers were made a part of the record on appeal to the planning commission. We have already concluded that the planning commission's decision was not in compliance with its own regulations because it did not review the record from the subdivision committee's meeting and because the record before the

planning commission did not include the evidence required by its own regulations. Because Altamont does not argue that any of the evidence it sought to submit was part of the record in the appeal to the planning commission, we conclude that any error in denying Altamont's motion to intervene was harmless. Rule 45, Ala. R. App. P. Therefore, we affirm the circuit court's order denying Altamont's motion to intervene.

**2160898**—AFFIRMED.

2160907—AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur.

**All Citations**

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Court of Civil Appeals of Alabama.
**RIOPROP** HOLDINGS, LLC

v.
COMPASS BANK, et al.

2160673
|
Jan. 12, 2018

**Synopsis**
**Background:** Holder of tax deed to property brought action that sought a declaration that it held an enforceable lien on the property with priority over all other liens, the ejectment of everyone who claimed an interest in the property, the vesting of possession in tax-deed holder, the quieting of title in the tax-deed holder, and the establishment and enforcement of a tax lien if tax-deed holder was not entitled to possession. Tax-deed holder also alleged unjust enrichment based on taxes paid if tax-deed holder was not entitled to possession. The Circuit Court, Baldwin County, No. CV–16–900135, granted owner's and mortgagee's separate motions to dismiss and later, after a hearing, entered a judgment in owner's favor as to tax-deed holder's claim that it held an enforceable lien with priority over all other liens on property, denied tax-deed holder's request to establish and enforce a lien pursuant to tax-lien statutes, found in tax-deed holder's favor and against owner on tax-deed holder's unjust-enrichment claim, and vested fee-simple title to the property in owner. Tax-deed holder appealed.

**Holdings:** The Court of Civil Appeals, Thompson, P.J., held that:

[1] three-year limitations period for tax-deed holder to file an ejectment action regarding property, as required for tax-deed holder to maintain a quiet-title action regarding the property, began three years after the day when tax-deed holder was entitled to obtain the tax deed;

[2] owner was not required to pay tax-deed holder to redeem property; and

[3] tax-deed holder was not entitled to a lien for expenses that it had incurred.

Affirmed.

**Appeal from Baldwin Circuit Court (CV–16–900135).**

**Opinion**

THOMPSON, Presiding Judge.

*1 Rioprop Holdings, LLC ("Rioprop"), appeals from a judgment the Baldwin Circuit Court ("the trial court") entered in favor of Compass Bank ("Compass") and Walter K. Striplin in this action involving a dispute over title to a unit in the Dunes Condominiums in Gulf Shores ("the property").[1] In the judgment, the trial court, among other things, divested Rioprop of any interest it had in the property and determined that Striplin had fee-simple title to the property.

[1] Also named as defendants in Rioprop's civil action were Henrietta Jordan and Wesley Acee, as tenants in common with Striplin; Branch Banking & Trust, known as BB & T, as a junior mortgage holder; the United States of America; and Sage Development, LLC. The United States of America and Jordan filed disclaimers of interest. Acee, BB & T, and Sage did not file responsive pleadings and did not appear at trial.

The record indicates the following. In 2007, Striplin owned the property. Compass held a mortgage on the property. Striplin failed to pay the 2007 property taxes for the property, so on May 27, 2008, the Baldwin County revenue commissioner conducted a tax sale of the property. Plymouth Park Tax Services ("Plymouth") purchased the property for $36,826.16 at the tax sale. However, Plymouth never took action to obtain possession of the property, and it did not notify Compass of its interest in the property.

In November 2011, Plymouth obtained a tax deed on the property. It subsequently conveyed its interest in the property to Propel Financial 1, LLC ("Propel"). Joseph Lassen, the in-house counsel for Propel, testified that, in 2014 or 2015, Propel purchased Plymouth and all of its assets, including the property. Lassen said that Rioprop, "which owns our REO [real estate owned] aspect of Propel, is a separate entity that manages the REO, real estate owned properties." On February 4, 2016, Propel filed a civil action ("the action") in the trial court to

enforce its interest in the property. During the pendency of the action, Rioprop was substituted for Propel. For ease of reference, we refer to Rioprop when discussing the actions of Plymouth, the tax purchaser, or Propel throughout the remainder of this opinion.

In its complaint, Rioprop alleged five counts, including a count seeking a declaration that it held an enforceable lien on the property, with priority over all other liens; a count seeking to eject everyone who claimed an interest in the property and to vest possession in Rioprop; a count seeking to quiet title of the property in Rioprop; a count to establish and enforce a tax lien in the event the trial court determined that Rioprop was not entitled to possession; and a count alleging unjust enrichment based on the taxes that Rioprop had paid since purchasing the property in the event that the trial court determined that it was not entitled to possession of the property or to a lien on the property.

Compass and Striplin filed separate motions to dismiss the ejectment and quiet-title claims on the ground that the applicable limitations period had expired as to those claims. In separate orders dated July 15, 2016, the trial court granted the motions to dismiss those claims. Compass also filed a counterclaim seeking a declaration that Rioprop did not have an interest in the property because, it said, Rioprop was time-barred from seeking possession. Compass further claimed that any interest Rioprop might have had in the property had vested in Striplin, subject to Compass's mortgage.

*2 On April 17, 2017, an ore tenus hearing was held on the remaining issue of whether Rioprop was entitled to recover the amount it had paid for the property at the tax sale, the accumulated interest on that amount, the amount it had paid for expenses such as property taxes and insurance, and an attorney fee. At the hearing, Lassen testified that the total amount Rioprop claimed was $117,372.79. On cross-examination, however, Lassen acknowledged that he did not have a copy of the insurance policy or bills for the premiums that had been paid. Lassen also admitted that, other than a "payoff statement" that included a description of the expenses paid in connection with the property, he did not have receipts, copies of checks, or other documents to support Rioprop's claim that it was owed $117,372.79 or entitled to a lien in that amount. Lassen also testified that Rioprop had never demanded possession of the property from Striplin.

On May 1, 2017, the trial court entered a judgment in favor of Striplin as to Rioprop's contention that it held an enforceable lien with priority over all other liens on the property. The trial court also denied Rioprop's request to establish and enforce a lien pursuant to §§ 40–10–70 and –76, Ala. Code 1975. As to Rioprop's unjust-enrichment claim against Striplin, the trial court found in favor of Rioprop and ordered Striplin to pay Rioprop $5,190.36. In addition, the trial court divested Rioprop of any interest it had in the property and vested title of the property in fee simple absolute to Striplin. The trial court then explicitly stated that the judgment had disposed of all matters as to all parties. Rioprop appealed to the Alabama Supreme Court, which transferred the appeal to this court pursuant to § 12–2–7(6), Ala. Code 1975.

[1]Rioprop argues on appeal that the trial court erred in dismissing its claims for ejectment and to quiet title. In its brief on appeal, Rioprop states that the trial court's order "did not provide any clue as to what legal or factual support upon which [sic] it based it's decision." In their motions to dismiss the ejectment and quiet-title claims, both Compass and Striplin argued that those claims were time-barred.

> " '[T]he standard for granting a motion to dismiss based upon the expiration of the statute of limitations is whether the existence of the affirmative defense appears clearly on the face of the pleading. Sims v. Lewis, 374 So.2d 298 (Ala. 1979); Browning v. City of Gadsden, 359 So.2d 361 (Ala. 1978); Wright & Miller, Federal Practice and Procedure, Civil & 1357 [sic], at 605 (1969).'
>
> "Braggs v. Jim Skinner Ford, Inc., 396 So.2d 1055, 1058 (Ala. 1981)."

Treadwell v. Farrow, [Ms. 2160667, Oct. 27, 2017] —— So.3d ——, —— (Ala. Civ. App. 2017).

Compass and Striplin supported their contention that the ejectment and quiet-title claims were barred by the applicable statute of limitations by citing §§ 40–10–29 and –82, Ala. Code 1975.

Section 40–10–29, which deals with the sale of land for tax purposes, provides:

> "After the expiration of three years from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to the purchaser, other than the state, or person to whom the certificate of purchase has been assigned, upon the return of the certificate, proof that all ad valorem

> taxes have been paid, and payment of a fee of five dollars ($5) to the judge of probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest and estate of the person whose duty it was to pay the taxes on such real estate and the lien and claim of the state and county thereto, but it shall not convey the right, title or interest of any reversioner or remainderman therein."

*3 (Emphasis added.)

Section 40–10–82, part of the same chapter as § 40–10–29, provides:

> "No action for the recovery of real estate sold for the payment of taxes shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor; but if the owner of such real estate was, at the time of such sale, under the age of 19 years or insane, he or she, his or her heirs, or legal representatives shall be allowed one year after such disability is removed to bring an action for the recovery thereof; but this section shall not apply to any action brought by the state, to cases in which the owner of the real estate sold had paid the taxes, for the payment of which such real estate was sold prior to such sale, or to cases in which the real estate sold was not, at the time of the assessment or of the sale, subject to taxation. There shall be no time limit for recovery of real estate by an owner of land who has retained possession. If the owner of land seeking to redeem has retained possession, character of possession need not be actual and peaceful, but may be constructive and scrambling and, where there is no real occupancy of land, constructive possession follows title of the original owner and may only be cut off by adverse possession of the tax purchaser for three years after the purchaser is entitled to possession."

(Emphasis added.)

[2]A contention identical to Rioprop's contention—that the ejectment claim and the claim to quiet title are not time-barred—has already been considered and rejected by our supreme court. In Reese v. Robinson, 523 So.2d 398 (Ala. 1988), our supreme court discussed the application of the limitations period set forth in § 40–10–82, explaining:

> "Code 1975, § 40–10–82, states that no action for the recovery of land sold for the payment of taxes 'shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor.' [The landowner] successfully argued to the trial court that this Code section required that [the tax purchaser], in order to cut off [the landowner's] right of redemption, possess the property exclusively and adversely for a three-year period, and that, according to undisputed evidence, he had not done so. Section 40–10–82 has been construed as a 'short' statute of limitations (Williams v. Mobil Oil Exploration & Producing Southeast, Inc., 457 So.2d 962 (Ala. 1984)), and does not begin to run until the purchaser of the property at a tax sale has become entitled to demand a deed to the land; and the tax purchaser is entitled to 'quiet title' relief only after being in exclusive, adverse possession for the statutory three-year period. Gulf Land Co. v. Buzzelli, 501 So.2d 1211 (Ala. 1987).
>
> "Additionally, this limitations period has been held to bar an action by the tax purchaser to recover property sold for the payment of taxes, unless the tax purchaser brought the action within three years from the date he was entitled to demand a tax deed. Grayson v. Muckleroy, 220 Ala. 182, 124 So. 217 (1929). Also, if the taxpayer/landowner has remained in possession of the property for three years after the date when the tax purchaser became entitled to demand a tax deed, this statute would vest title in the taxpayer/landowner and protect him from any action brought by the tax purchaser to recover the property. Johnson v. Stephens, 240 Ala. 419, 199 So. 828 (1941); and Sherrill v.

Sandlin, 232 Ala. 389, 168 So. 426 (1936)."

*4 523 So.2d at 400 (footnotes omitted; emphasis added). In its brief on appeal, Rioprop contends that our supreme court's holding in Reese, supra, "is ... a misinterpretation of the law." We note, however, that even if we were to agree with Rioprop, "as an intermediate appellate court, we are bound by the holdings of our supreme court. See, e.g., Kanellis v. Pacific Indem. Co., 917 So.2d 149, 154 (Ala. Civ. App. 2005)." Frederick v. Frederick, 92 So.3d 792, 795 (Ala. Civ. App. 2012).

The federal bankruptcy court for the Middle District of Alabama, which also relied on Reese, discussed the applicable statute of limitations and related caselaw.

> "The statute of limitations in § 40–10–82 can serve not only to bar a tax purchaser's ejectment action, but also to re-vest legal title in the land owner. Reese [v. Robinson], 523 So.2d [398] at 400 [ (Ala. 1988) ]. In Johnson v. Stephens, 240 Ala. 419, 199 So. 828 (1941), a father lost legal title to property through a 1931 tax sale and 1933 tax deed delivery but retained exclusive and adverse possession until his death in 1938, at which point the tax purchaser obtained possession of the property. Johnson, [ 240 Ala. at 422,] 199 So. at 829. The court held that the suit of the father's heirs against the tax purchaser, to partition and sell the property for the heirs' benefit, was not barred because the prior version of § 40–10–82 vested the father with an absolute defense against the tax purchaser, which then vested in the father's heirs at his death. Id."

In re Washington, 551 B.R. 644, 650–51 (Bankr. M.D. Ala. 2016). The bankruptcy court then summarized the applicability of the statute of limitations, writing:

> "When land is sold under Alabama law due to non-payment of taxes, the tax debtor has three years (or more) to redeem his interest in the land without losing legal title to the property—known as administrative redemption. If the tax debtor fails to redeem his interest in the land within three years after the foreclosure, the tax purchaser may demand a tax deed (or the State may sell one) that extinguishes the tax debtor's legal interest in the land.
>
> "The tax purchaser is entitled to possession of the land when he purchases it at the tax sale (or from the State). If the tax purchaser obtains a tax deed and maintains adverse possession of the land, the tax debtor has three years to redeem the land by filing suit—known as judicial redemption. If the tax debtor has at least constructive or scrambling possession of the land (i.e., the tax purchaser does not adversely possess the land), then notwithstanding the tax deed the tax debtor has a right to redeem the land for as long as he retains possession. Finally, if the tax purchaser obtains a tax deed but the tax debtor remains in adverse possession of the land, title to the land will revert back to the tax debtor unless the tax purchaser files an ejectment action within three years."

551 B.R. at 651 (emphasis added).

[3]In this case, Rioprop purchased the property at a tax sale on May 27, 2008. Three years later, on May 27, 2011, Rioprop was entitled to obtain a tax deed for the property. See § 40–10–29, Ala. Code 1975. Three years after that date, May 27, 2014, Rioprop was entitled to seek to quiet title to the property if it had been in adverse possession of the property for three years or if it had filed an ejectment action within those three years. However, Rioprop did not file its ejectment action until February 4, 2016, nearly two years after the limitations period for such an action had expired. Furthermore, in its complaint, Rioprop did not aver that it had been in adverse possession of the property for three years. Instead, it stated in the complaint that it had been in "constructive possession by virtue of being the holder of the Tax Deed." Rioprop alleged that Striplin and/or other defendants claimed to be in possession of the property and asked the court to place it in actual possession.

*5 Moreover, in its answer to Compass's and Striplin's motions to dismiss, Rioprop did not allege that it had adversely possessed the property. Instead, it argued that it had constructive possession of the property and, therefore, had a right to the property pursuant to § 6–6–540, Ala. Code 1975, which provides for a cause of action to "settle the title" to lands. In Gulf Land Co. v. Buzzelli, 501 So.2d 1211 (Ala. 1987), however, our supreme court determined that possession and ownership of land purchased pursuant to a tax sale is governed by Title 40, Chapter 10, of the Alabama Code of 1975, and not the statutes governing quieting title of disputed property. In Buzzelli, our supreme court held that, even if the tax purchaser in that case had made out a prima facie case to quiet title pursuant to the requirements of § 6–6–540, the tax purchaser would still not have prevailed because of the

application of § 40–10–82. Our supreme court explained that, in a dispute over ownership of land involving a tax purchaser, the landowner's

> "possession may be constructive or scrambling, and, where there is no real occupancy of the land, constructive possession follows the title of the original owner and can only be cut off by the adverse possession of the tax purchaser. Stallworth v. First Nat. Bank of Mobile, 432 So.2d 1222 (Ala. 1983); Hand v. Stanard, 392 So.2d 1157 (Ala. 1980); O'Connor v. Rabren, 373 So.2d 302 (Ala. 1979).
>
> "... In order for the short period of § 40–10–82 to bar redemption under § 40–10–83, the tax purchaser must prove continuous adverse possession for three years after he is entitled to demand a tax deed. Stallworth, 432 So.2d at 1224. This statute applies to cases where the land is purchased from the State, as well as to instances where the purchase is made from the tax collector. Merchants National Bank of Mobile v. Lott, 255 Ala. 133, 50 So.2d 406 (1951)."

Gulf Land Co., 501 So.2d at 1213.

Because the face of the complaint indicates that Rioprop's claims for ejectment and to quiet title demonstrate that those claims were filed nearly two years after the applicable limitations period had expired under § 40–10–82, we conclude that the trial court properly dismissed those claims.[2]

[2] We further note that Rioprop's response to the motions to dismiss failed to create a question regarding the timeliness of those claims.

[4]On appeal, Rioprop raises two additional arguments regarding the claims for ejectment and to quiet title. Because we have already determined that those claims are time-barred, thus disposing of those claims, we need not address those arguments.

Rioprop also argues that the trial court erred in divesting it of its interest in the property without ruling on Striplin's motion for redemption and by not establishing the amount of money Striplin was required to pay to redeem the property. Before the trial, Striplin had filed a motion for a determination of the amount necessary for him to judicially redeem the property. After the trial of this matter, the trial court entered a judgment divesting Rioprop of "any and all interest" it had in the property and vesting title to the property "in absolute fee simple" to Striplin.

In its appellate brief, Rioprop states that the trial court improperly "stripped" it of its title without requiring Striplin to redeem the property pursuant to redemption statutes. However, Rioprop's argument ignores the holdings of Reese and Washington. As our supreme court explained in Reese, "if the taxpayer/landowner [here, Striplin] has remained in possession of the property for three years after the date when the tax purchaser became entitled to demand a tax deed, [§ 40–10–82] would vest title in the taxpayer/landowner and protect him from any action brought by the tax purchaser to recover the property." 523 So.2d at 400.

Because Rioprop failed to exercise its right to obtain possession of the property during the three years after May 27, 2011 (the date Rioprop was entitled to demand the tax deed for the property), and took no action to actually possess the property or to file an ejectment action, title to the property reverted to, or was "re-vested" in, Striplin. Id.; and Washington, 551 B.R. at 651. Rioprop has not cited any authority, and our research has revealed no authority, indicating that, once title to the property was "re-vested" in Striplin, he was required to pay any amount to redeem the property. Accordingly, we conclude that the trial court did not err in refusing to require Striplin to pay Rioprop to redeem the property.

***6** [5]Finally, Rioprop argues that, even if there were "some legitimate ground for denying [it] possession or title" to the property, it was still entitled to a lien for expenses it had incurred, such as the payment of property taxes, plus statutory interest. Specifically, Rioprop argues that, pursuant to § 40–10–29, when it received the tax deed to the property in November 2011, it was also given "the lien and claim of the state and county thereto." Rioprop maintains that it stepped into the shoes of the State of Alabama and enjoyed the same priority with regard to preexisting liens.

We have found no authority that would allow Rioprop to establish or maintain a lien on property in which it no longer has an interest. There is no language in § 40–10–29 that would provide a tax purchaser the ability to maintain a lien for the property tax paid when the property reverted to the landowner by virtue of the tax purchaser's failure to act within the limitations period. In support of its contention that, for purposes of establishing an ad valorem tax lien, it stepped into the shoes of the State of Alabama, Rioprop cites Langan v. Altmayer, 539 So.2d 173 (Ala. 1988). We find nothing in that opinion that supports Rioprop's position, however. The language Rioprop refers to in making its argument that it stepped into the shoes of the State is found only in Justice

Maddox's dissenting opinion. Id. at 186 (Maddox, J., dissenting).

After studying the arguments of the parties and the applicable law, we conclude that, under the circumstances of this case, there is no legal basis for allowing Rioprop to establish a lien to recover the expenses it paid in its attempt to acquire the property. Accordingly, we hold that the trial court did not err in denying Rioprop's request for a lien.

Rioprop has failed to demonstrate that the trial court erred in divesting it of any rights or interests in the property and in awarding the property to Striplin in fee simple absolute. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

Pittman, Thomas, Moore, and Donaldson, JJ., concur.

**All Citations**

--- So.3d ----, 2018 WL 387792

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