

ARKANSAS REAL ESTATE REVIEW

ARKANSAS BAR ASSOCIATION REAL ESTATE LAW SECTION

Editorial Board: Lynn Foster, Editor in Chief, lfoster@ualr.edu
J. Cliff McKinney, cmckinney@qgtb.com
Christopher Barrier, cbarrier@mwsqw.com
Stephen Giles, sgiles@gileslaw.net
Tim Grooms, tgrooms@qgtb.com
Lindsey Gustafson, lpgustafson@ualr.edu
Mark Hodge, MHodge@cnjlaw.com
Wesley Lasseigne, wlasseigne@lenderstitle.com

VOL. 1
NO. 2
FALL 2008

With this issue, three new editors have joined us, generously volunteering their time reviewing cases and working with our student abstractors. Our plan is to publish the newsletter twice a year. Each issue will contain digests of Arkansas appellate real property cases of note, as well as short articles on some aspect of Arkansas real property law. We welcome your suggestions for future articles. This issue covers Arkansas, and a few federal, cases from January through June of 2008. Cases are abstracted by law students and reviewed by the editors, who have also added selective comments.

Table of Contents

Articles and Commentary

[COMMENTS FROM THE CHAIR](#)

[2006 ALTA TITLE POLICY FORM:
BEWARE OF TITLE COMPANIES BEARING
GIFTS?](#)

[THE ARKANSAS TITLE INSURANCE ACT](#)

Case Topics

[Adverse Possession](#)
[Attorneys' Fees](#)
[Bankruptcy](#)
[Boundary by Acquiescence](#)
[Breach of Contract](#)
[Contracts for Sale](#)
[Damages](#)
[Divorce](#)
[Dower & Curtesy](#)
[Eminent Domain](#)
[Foreclosures](#)
[Insurance](#)
[Leases](#)
[Lis Pendens](#)
[Materialmen's Liens](#)
[Municipal Corporations](#)
[Nuisance](#)

[Planning & Zoning](#)

[Restrictive Covenants](#)

[Settlement Agreements](#)

[Sovereign Immunity](#)

[Tax Sales](#)

[Taxes, Statute of Limitations](#)

[Trespass](#)

[Water Law](#)

Case Names

[Arkansas State Hwy. Comm'n v. Wood](#)
[Aviation Cadet Museum, Inc. v. Hammer](#)
[Belk v. Teague](#)
[Bevans v. Deutsche Bank National Trust Co.](#)
[Bilo v. El Dorado Broadcasting Co.](#)
[Born v. Hodges](#)
[Boyster v. Shoemake](#)
[Citifinancial Mortgage Co., Inc. v. Matthews](#)
[City of Alexander v. Doss](#)
[City of Dardanelle v. City of Russellville](#)
[City of Fort Smith v. Carter](#)
[City of Fort Smith v. McCutchen](#)
[England v. Eaton](#)
[Essex Ins. Co. v. Holder](#)
[Farr v. Farr](#)
[GMAC v. Farmer](#)
[Hanners v. Giant Oil Co. of Ark](#)
[Jones v. Flowers](#)
[K.C. Properties v. Lowell Investment Partners](#)
[Miller v. Cothran](#)

[Moran v. C & A/GFSP Joint Venture](#)
[Myers v. Yingling](#)
[Nash v. Landmark Storage, LLC](#)
[National Home Centers v. Coleman](#)
[Prendergast v. Craft](#)
[Roberts v. Green Bay Packaging Co.](#)
[Royal Oaks Vista, LLC v. Maddox](#)
[RWR Properties, Inc. v. Mid-State Trust VIII](#)
[Seidenstricker Farms v. Doss](#) (leases)
[Seidenstricker Farms v. Doss](#) (attorneys fees)
[Shamlin v. Quadrangle Enterprises, Inc.](#)
[United States v. Davis](#)
[United States v. Jewell](#)
[Vimy Ridge Municipal Water Imp. Dist. v. Ryles](#)
[Wilkins & Assocs., Inc. v. Vimy Ridge Municipal](#)
[Water Imp. Dist.](#)
[Young v. Young](#)

COMMENTS FROM THE CHAIR
By J. Cliff McKinney

As 2008 wraps up, I am pleased to look back on another successful year for the Real Estate Law Section. This year saw the release of the first edition of the *Arkansas Real Estate Review*, of which this is the second edition. It is the hope of the editors that this publication will provide practitioners with a valuable resource to keep up with changes in the law and recent trends. As chair, I would like to extend a very special thank you to everyone involved in the process of creating this publication, including the student writers and the volunteer editors.

The Real Estate Law Section leadership is always looking for ways to provide more benefit to members. The Section is hosting more frequent meetings, and we hope that everyone will have the opportunity to participate in a meeting. We are also open to suggestions for other ways to benefit members.

The upcoming year will offer many opportunities for members to get involved with Section activities. During the legislative session, members are encouraged to alert the Section to proposed bills that may need to be reviewed for their possible impact on real estate law. Everyone's input is welcome and needed.

I wish everyone a very happy and successful 2009.

**2006 ALTA TITLE POLICY FORM:
BEWARE OF TITLE COMPANIES BEARING
GIFTS?
By J. Cliff McKinney**

1. Introduction

By now, you have probably seen the new 2006 American Land Title Association ("ALTA") form of title insurance policy. The form was officially introduced in 2006, but only started appearing at title agencies last year. Since the new form's introduction, there has been some skepticism and misunderstanding about what the changes mean.

2. History

ALTA is an organization made up of representatives from the title industry and others in the real estate world. ALTA promulgates forms, including title insurance policy forms, for use by the title insurance industry. ALTA forms are used exclusively in Arkansas, so all title insurance in the state is written on ALTA forms.

ALTA forms have been around for many years and have been updated periodically. There was a major update in 1970 that led to the so-called 1970 ALTA form. This form remained the norm (with some updates) until the next major overhaul in 1992. The so-called 1992 ALTA form was the standard until the new 2006 ALTA form appeared.

When the 1992 ALTA form was first introduced, many people viewed it as a pro-title company document. The 1992 ALTA form contained several changes including the addition of coinsurance, arbitration provisions and creditors' rights limitations that made the 1992 ALTA form less friendly to policy holders. Some developers and banks tried to reject the 1992 ALTA form and insist on the 1970 ALTA form. Other developers and banks purchased expensive endorsements to effectively convert the 1992 ALTA form into the 1970 ALTA form.

3. The Debut of the 2006 ALTA Form

Given this history, when word first started emerging about the 2006 ALTA form, many title insurance consumers feared the 2006 ALTA form would go even further down the road of protecting title

insurance companies. I remember first hearing about the form during a seminar in Orlando in 2006. The room full of lawyers was almost hostile at the thought of a new form. However, when the speaker began, he told a tale of a new form that would be beloved by policy holders. He told us that the new form would be simplified and eliminate unpopular elements of the 1992 ALTA form. He said that the new form would have free gifts such as automatic gap coverage and coverage for wholly-owned subsidiaries that become successor entities. The audience was stunned for a few moments. When a question finally came, it was, "What's the catch?" Everyone seemed very skeptical that the industry would voluntarily make the policy more consumer-friendly.

Based on this skepticism, many in the industry were reluctant to start using the 2006 ALTA form when it was first introduced. However, the form has been out for over a year now at most title companies, so consumers are having to use it. The good news is that the skepticism seems to be waning, and it really does appear that the new 2006 ALTA form is about as good as promised.

The 2006 ALTA form gives consumers numerous advantages over the 1992 ALTA form. Detailing all of the changes is beyond the scope of this article, but here are the highlights:

- a. The policy now insures a legal right of access to the property. This does not insure any particular access point—that type of insurance still requires an access endorsement;
- b. The policy reins in the creditor rights exclusion somewhat. For instance, if the transaction is undone in bankruptcy court and it was somehow the fault of the title company (delay in recording, etc...), the consumer has coverage;
- c. The policy automatically includes gap coverage. The gap is the difference in time between the effective date of the policy and the actual time of recording (which could be several days, or even weeks, depending on the recording delays at the local courthouse). Prior to the 2006 ALTA form, there was no coverage for this gap unless

specifically requested by the consumer.

- d. The policy eliminates the coinsurance provisions. Coinsurance is the idea that a policy holder might have to share liability with the title insurance company for a loss if the policy was written for substantially less than the fair market value of the property. For instance, if the policy is written for \$600,000 but the property has a fair market value of \$1,000,000, the policy holder could be deemed a coinsurer for 40% of the risk (i.e., the policy was purchased for only 60% of the value, so the policy holder is responsible for the other 40%). Under this doctrine, if there is a \$100,000 title failure, the title company would only pay \$60,000 (i.e., 60% of the loss).
- e. The policy automatically provides coverage for wholly-owned subsidiaries who take title without consideration.
- f. The threshold for opting out of arbitration has been raised from \$1,000,000 to \$2,000,000.

There is one major caveat to the new form. While the standard base form now provides considerably more coverage, title insurance agencies are supposed to make underwriting decisions that could involve modifying the form to take away or limit some of the coverage. In other words, the new policy makes a philosophical switch that transfers the burden to the title agency to impose special limitations on coverage rather than imposing the limitations on all policies.

Despite the fears originally associated with the 2006 ALTA form, it appears that the industry really has done something good for consumers. In most instances, the 2006 ALTA form is the best choice for the policy holder.

THE ARKANSAS TITLE INSURANCE ACT By Lynn Foster and Wesley Lasseigne

Through Act 684 of 2007 (codified at Ark. Code Ann. §§ 23-103-401 *et seq.*), the legislature moved title insurance under the jurisdiction of the Arkansas Insurance Department ("Department") and abolished the Arkansas Title Insurance Licensing

Board. The Act is intended to improve the protection of the consumer of title insurance by requiring, among other things, minimum title search requirements, disclosure of matters affecting title to the property, certain notices and annual audits of local title insurance agents.

The Act requires a written contract between the title insurers (e.g., Chicago Title Insurance) and local title insurance agents (e.g., Lenders Title Company). Ark. Code Ann. § 23-103-407. At least once a year, title insurers must conduct an on-site audit of the escrow and closing practices, escrow accounts, security arrangements, files, underwriting and claims practices, and policy inventory of the title insurance agencies that sell their policies. While audits are normally confidential, an insurer may be compelled to provide a copy of its audit reports to the Department which may ultimately be introduced as evidence in hearings or trials. Ark. Code Ann. § 23-103-411.

No title insurance policy may be issued until the title insurer or agent performs a search of the title "from the evidence prepared" from either a title plant or county records, for *at least* the immediately preceding 30 years. Ark. Code Ann. § 23-103-408. Note that this is a *minimum* search requirement and there are instances where additional research must be performed (for example, if the searcher is unable to locate a deed vesting title in current owner within the last 30 years; if there is an issue with the title which a searcher is tracing back to its origin for resolution; if the agency agreement with insurer requires a longer search period; etc.).

When an agent issues a title insurance "report," commonly known as a "commitment," for the benefit of a prospective buyer of an owner-occupied residence, the report must include boilerplate language advising the proposed insured of the existence of exceptions to coverage. Ark. Code Ann. § 23-103-413.

The report or commitment must list "all liens, defects, and encumbrances affecting title to the land that are filed of record." Ark. Code Ann. § 23-103-413. The Department has interpreted the disclosure requirement as being limited to those matters which are filed of record within the 30 year search period. (See link to FAQs issued by the Department below.)

Even if an underwriting decision is made to insure over a lien, defect or encumbrance, it must still be

disclosed. Typically, such a defect will be shown as an exception with affirmative coverage being provided over it. Also note that the Act only requires that the disclosure of matters affecting title and the boilerplate language must be shown on the commitment and not in the final policy. Ark. Code Ann. § 23-103-413. However, the Department in Directive 1-2008 appears to have taken the position that the disclosure requirements apply to the policy as well despite the fact that such is not a requirement of the Act.

If no title insurance policy will be issued for the benefit of the buyer, but a lender is receiving a Loan Policy of title insurance, the buyer must be provided with notice at closing advising them that their lender will be covered under a title insurance policy, but that the buyer is not. The notice must also advise the buyer of the cost to obtain his or her own policy. Ark. Code Ann. § 23-103-413.

The agent, on behalf of the insurer, must offer settlement or closing protection coverage to the parties if it is contemplated that title insurance may be issued. Settlement or closing protection coverage provides indemnification against the loss of closing funds as a result of a closing agent, title insurance agent, or title insurer's named employee stealing or misappropriating closing funds or failing to comply with written closing instructions, but only as it relates to the status of title to the interest in land or validity, enforceability and priority of the lien of a mortgage or deed of trust. Ark. Code Ann § 23-103-405.

Keep in mind that these are only selected highlights of the Act. The Act also sets out penalties for insurers and agents who violate it. Of particular interest to those on the distribution list for this article is a provision which provides that attorneys are no longer exempt from taking the test to be licensed as title insurance agents.

The Insurance Commissioner has issued regulations (Rules 87 and 88) implementing the statute. They are available at <http://www.insurance.arkansas.gov/Legal%20Data%20services/rnrpage.htm>. FAQs posted about the new act at <http://www.insurance.arkansas.gov/License/TitleFAQs.htm> answer some questions and provide links to more information.

The Attorney General issued an opinion on the new statute and regulations on April 15th (Opinion 2008-041) which focused on the origin of the title evidence used on performing the title search and clarified that it need not be conducted in a title plant. The Attorney General's opinion also stated that only liens, defects and encumbrances during the past 30 years are required to be disclosed.

What effects will the new act have? It establishes minimum standards for insurers and agents to comply with if they want to transact business in AR; increases the value of the product to the consumer based on compliance with the minimum standards; promotes consumer protection; and provides all parties with an opportunity to obtain closing protection coverage.

ADVERSE POSSESSION

England v. Eaton
No. CA 07-700
April 16, 2008

102 Ark. App. 154, ___ S.W.3d ___
WL 1734935, 2008 Ark. App. LEXIS 322

D.P. Marshall Jr., Judge.

FACTS: This case concerned a boundary dispute between adjoining landowners, Linda Eaton (the defendant-appellee) and Don England (the plaintiff-appellant).

The disputed strip of land is located at the north end of England's land and the south end of Eaton's land. Eaton held title to the strip since 1986. England thought the land was his and thus he had maintained and improved it since he had bought his property in 1990. England had the land surveyed in 2006. Only then did he discover that he did not own the disputed strip. Accordingly, he brought an adverse possession suit. Eaton counterclaimed, seeking ejectment and damages. There is an old shop on the eastern portion of the disputed property. England cleaned out the building and after 1990 used it in conjunction with his trucking business until 2001 or 2002. He continued using the shop and completed an addition to the structure in 2000 or 2001. He also added fill dirt to the area behind the shop building.

On the western portion of the property, there is a road that runs through all of it, to the shop. England improved and maintained the road. England also

fenced off some of the western property in 1992 and ran cattle there for 2 or 3 years. The fence, which at one time crossed the road, was removed in 1999 although remnants of it are still present along a part of the north line of the disputed area. Eaton and her tenants constantly used the first 30 feet of the road to access the rental house, warehouse and the club on her property. However, she never went any further down the road. She did not know there was a shop at the end of it. She visited her land twice during the 20 years that she owned it. Even though she hired people to mow all her land, she never told them where to mow and she never went to see where they had mowed.

England built and maintained a gravel parking lot located almost entirely in the western part of the disputed parcel, between his house and the shop. For several years he gave Eaton's tenants permission to park on that lot. There was also evidence that after he had his land surveyed in 2006, when giving England's tenants permission to park on the lot, he said "Linda owns it anyway."

The circuit court determined that England had adversely possessed the eastern but not the western portion of the strip. He appealed.

RULES AND ANALYSIS: The sole issue on appeal was whether England's use of the western part of the disputed property was exclusive.

To prove the common law elements of adverse possession, one has to show that he possessed the disputed property continuously for more than 7 years and that his possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *White River Levee Dist. v. Reidhar*, 76 Ark. App. 225, 61 S.W.3d 235 (2001). England conceded Eaton's use of the 30 foot strip. Therefore, the circuit court correctly excluded it from the portion of the land England thought to acquire through adverse possession. However, the circuit court erred with respect to the rest of the western portion of the property.

The only other use of the western portion by Eaton was her renters' use of the parking lot with England's permission. However, permissive use by others does not destroy the exclusiveness of adverse claimant's possession. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). The *Anderson* case involved permissive use by public. But other states have recognized that this principle applies to record

owners as well. *Almond v. Anderegg*, 557 P.2d 220 (Ore. 1976); *Hinds v. Slack*, 299 So.2d 717 (Ala. 1974). The universe of “other persons” includes the title holder because that person’s use with permission supports the claimant’s assertion of exclusive dominion over the property. There was no evidence that Eaton or her tenants intended to oust England by parking on the disputed property or thereby asserted any right in this property. If Eaton or her tenants had used the western part of the disputed tract without England’s permission and because they thought they were entitled to do so because of Eaton’s title, this would be a different case.

Also, England’s statement about Eaton’s ownership after he found out that he does not actually own the property did not conclusively establish that England did not assert exclusive dominion over the property for the preceding sixteen years. On the record as a whole this statement standing alone did not undermine England’s claim. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005).

Finally the majority determined that the line at which the circuit court divided the eastern and western portions of the property was arbitrary. The trial court drew the north/south line, essentially dividing the disputed property in half. That new property line did not reflect the parties’ actual use.

HOLDING AND DISPOSITION: England adversely possessed the entire disputed tract, except for the first 30 feet of the western portion. The circuit court clearly erred by splitting the disputed property with an arbitrary line not rooted in the evidence. The case is remanded for a survey and for the circuit court to enter an order accurately describing the line at which Eaton’s 30 foot strip ends and England’s property begins. Affirmed as modified and remanded.

Baker and Griffen, JJ. Dissenting.

The evidence supports the trial court’s decision on appellant’s adverse possession claim regarding the western portion of the disputed area. England’s use of the western part of the disputed property was not exclusive because: (1) England acknowledged that the use was not exclusive and (2) Eaton, her renters, her visitors, and the club used the area.

The majority misinterpreted *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). In *Anderson*, the customers were merely using the access to the store, not asserting a right to possess the disputed

access area. In no way could this use by customers to access a business be analogous to assert possession against the true owner by permitting the true owner to use her own property. Neither *Anderson* nor any other case supports the premise that an adverse possessor has any legal or equitable authority to grant permission to a record owner to use her property. England’s use of her property was not permissive, but possessory. The authority of her renters and visitors to use the property flowed through her right of ownership. Their permissive use of property, therefore, could only legally come from her. Accordingly, the trial court should be affirmed because it did not err in finding that England had failed to prove his exclusive use of the western part of the disputed tract.

Abstractor: Tatiana Popacondria, 2L.

ATTORNEYS’ FEES

Hanners v. Giant Oil Company of Arkansas, Inc.
No. 07-1314
May 15, 2008
373 Ark. 418, __ S.W.3d __
2008 WL 2055189, 2008 Ark. LEXIS 332

Jim Hannah, Chief Justice

FACTS: Appellant Hanners leased real property to appellee Giant Oil on August 12, 1981 for use as a gasoline station and convenience store. The lease provided for five lease periods, each having a 5-year term. The primary term began on January 1, 1982. Each subsequent term began at the end of the preceding term unless Giant Oil provided notice of its desire to terminate the lease at least 60 days prior to the end of the current term. The lease also contained the following purchase option provision: “Lessor hereby grants unto Lessee the right to purchase the premises for \$150,000.00 at the end of the primary term and the first option period. Thereafter, for the three 5-year terms, the option price shall increase to \$200,000.00.”

Giant Oil exercised its renewal option four times, and on June 1, 2004, during the fifth and final term, gave notice to Hanners that it intended to exercise its purchase option and acquire the property for \$200,000. Hanners refused to sell. On September 23, 2004, Giant Oil filed a complaint for declaratory judgment that Hanners was contractually obligated to sell it the property. Hanners answered that the language of the lease should be construed to mean

that Giant had to buy the property by the end of the third term and that it was too late. Giant Oil filed a motion for summary judgment claiming the language of the lease to be unambiguous with respect to the purchase option. On March 27, 2006, the Circuit Court entered a judgment granting Giant Oil's motion and agreeing that it had the right to purchase the real property for \$200,000. Subsequently, Giant Oil filed a motion for attorney's fees and costs; the Circuit Court awarded Giant Oil \$7,500.00 in attorney's fees and costs on July 18, 2006.

Hanners sought to reverse the holding of the lower court granting Appellee's motion for summary judgment in the declaratory judgment action and awarding it attorney's fees and costs.

RULES AND ANALYSIS: Summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact to be litigated. *Windsong Enters., Inc. v. Upton*, 366 Ark. 23, 233 S.W.3d 145 (2006) In interpreting a contract, the words in the contract must be taken and understood in the "plain and ordinary" meaning. *Alexander v. McEwen*, 367 Ark. 241, 239 S.W.3d 519 (2006). If the contract language is ambiguous, then parol evidence may be considered to determine the contract's meaning. It may not be admitted to alter, vary, or contradict the written contract. Here, the court found that the contract language read reasonably would allow Giant Oil to exercise its purchase option during any of the five lease terms; Hanner's interpretation of the lease language was not a reasonable interpretation. Regarding the award of attorney's fees and costs, the Court, in a *de novo* review turned to Ark. Code Ann. §16-22-308, which does not allow for the award of attorney's fees in a declaratory judgment action without a claim for breach of contract. Under Ark. Code Ann. §16-111-111, there is a provision for the awarding of costs for declaratory judgment actions.

HOLDING AND DISPOSITION: Because the Court found that the contract language is unambiguous, and that the contract gave Giant Oil the option to purchase during any of the five lease terms, the lower court's ruling granting summary judgment is affirmed. Based on §16-22-308, the Supreme Court finds that the Circuit Court erred in awarding Giant Oil attorney's fees. However, based on §16-111-111, the award of costs is permitted if the court believes the award to be equitable and just. The case is remanded to the Circuit Court for a

determination of what costs may be awarded pursuant to §16-111-111.

Abstractor: Thomas W. Smith, Jr. 3L

COMMENT (TG): It is surprising that the plaintiff failed to include a count for breach of contract which may have entitled Giant Oil to recovery of attorneys fees.

Jones v. Flowers

No. 07-409

April 17, 2008

373 Ark. 213, --- S.W.3d ----

2008 WL 1746754, 2008 Ark. LEXIS 267

Tom Glaze, Justice.

FACTS: The United States Supreme Court, in *Jones v. Flowers*, 547 U.S. 220 (2006), held that a state must take additional reasonable steps to notify a property owner before a tax sale of his property when the initial mailed notice of the tax sale is returned unclaimed, reversing the decision of the Arkansas Supreme Court in *Jones v. Flowers*, 359 Ark. 443, 198 S.W.3d 520 (2004). The case was remanded to the Arkansas Supreme Court, and the Arkansas Supreme Court in turn remanded the case on September 21, 2006, to the Pulaski County Circuit Court.

On November 14, 2006, Jones filed a status report requesting the circuit court to enter final judgment for him and to set the case for proceedings to determine relief. His status report stated that he was entitled to recover attorney's fees from the state under 42 U.S.C. § 1988(b), because he had made a federal constitutional challenge to state action and won. After a status conference on November 15, 2006, the circuit court issued an order denying Jones's request for attorney's fees because he had not made any mention of 42 U.S.C. § 1983 before his status report on November 14, 2006. Jones appealed. Jones filed a motion to dismiss Flowers from the appeal. Accordingly, the sole appellee was the Arkansas Commissioner of State Lands.

RULES AND ANALYSIS: The means for a plaintiff to redress violations of federally protected rights is provided by 42 U.S.C. § 1983. Under § 1983, plaintiffs may obtain relief in federal courts if they can show (1) the deprivation of a right secured by the Constitution or laws of the United States, and (2) that a person acting under color of state law caused the deprivation. Courts have discretion, under 42 U.S.C. § 1988(b), to award reasonable attorney's fees

for a successful § 1983 action. The issue here is whether Jones may recover attorneys fees even though he did not cite either statute in his pleadings.

Regardless of whether a plaintiff specifically cites § 1983 or § 1988 in his or her original pleadings, a successful constitutional challenge is a proceeding to enforce § 1983 within the meaning of § 1988. The substance of the action, rather than the form of the pleading, should determine the applicability of attorney's fees under § 1988(b). An award of attorney's fees under § 1988(b) functions as encouragement for the bringing of meritorious civil rights claims which might otherwise be abandoned because of the expense of hiring competent counsel. *Goss v. City of Little Rock*, 151 F.3d 361 (8th Cir. 1998).

The United States Supreme Court held that the State of Arkansas violated Jones's due process rights under the United States Constitution by failing to take additional reasonable steps to notify him before a tax sale of his property when the initial notice was returned undelivered; thus Jones's action was a meritorious civil rights claim.

The majority addressed the State's Ark. R. Civ. P. 54(e) argument even though it was only raised for the first time on this appeal. Rule 54(e) is applicable only upon entry of judgment that finally concludes the controversy for which attorney's fees are sought. Ark. R. Civ. P. 54(e); *Looney v. Looney*, 336 Ark. 542, 986 S.W.2d 858 (1991).

In this case, the court's mandate issued on September 21, 2006 simply remanded the case for further proceedings. A final judgment did not occur until the circuit court issued its order on December 21, 2006 that denied the Commissioner's request to reopen the question of liability, ordered that Jones be given his house back, denied Jones his requested attorney's fees, and ordered the clerk to close the case.

HOLDING AND DISPOSITION: In a meritorious civil rights claim under 42 U.S.C. § 1983, reasonable attorney's fees may be awarded at a court's discretion within the meaning of 42 U.S.C. § 1988, regardless of whether the plaintiff specifically cited § 1983 or § 1988 in his or her original pleadings. Ark. R. Civ. P. 54(e) only applies upon entry of a final judgment. Reversed and remanded.

Brown & Danielson, JJ., Dissenting in Part.
The issue involving Arkansas Rule of Civil

Procedure 54(e) raised by the State for the first time on appeal should have been raised to the trial court before the Arkansas Supreme Court addressed it. The majority is wrong to address the issue as it is not the task of an appellate court to address an undeveloped issue raised for the first time on appeal, even if that issue is likely to recur in a new trial after the case has been reversed and remanded. *Simmons First Nat'l Bank v. Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983).

Abstractor: Cory L. Biggs, 2L

COMMENT (LF): I saw the oral argument of this case last spring with some of my Property students. The court raised the issue of sovereign immunity—i.e., whether the trial court ever had jurisdiction in this suit. Neither side was prepared at the time to address it. It is here in a footnote: Arkansas courts have concurrent jurisdiction over § 1983 claims. However, it is unsettled as to whether state court must exercise such jurisdiction. The court has left this question unanswered for now.

Seidenstricker Farms v. Doss

No. 08-273

June 26, 2008

374 Ark. 123, ___ S.W.3d ___

2008 WL 2522607, 2008 Ark. LEXIS 430

Annabelle Clinton Imber, Justice.

FACTS: Seidenstricker Farms and Warren and Etta Doss were parties to a leasehold agreement for a term of several years. When the Dosses terminated the lease, Seidenstricker Farms sued on the grounds that the lease was wrongfully terminated. Initially, the circuit court found for the Dosses that the lease had been properly terminated. Seidenstricker Farms filed an appeal, but while it was pending, the Dosses filed a motion seeking attorney's fees. In response, Seidenstricker Farms argued that the amount was unreasonable, but on November 7, 2007, the circuit court granted the Dosses' motion. On December 3, 2007, Seidenstricker Farms appealed this decision as well. A month later, on January 10, 2008, the Arkansas Supreme Court reversed the initial ruling of the circuit court by holding that the Dosses wrongfully terminated the lease. *Seidenstricker Farms v. Doss*, 372 Ark. 72 (2008). The case was remanded to the circuit court for the issue of damages.

After the January ruling, Seidenstricker Farms promptly filed a motion to vacate the award of attorney's fees because the Dosses were no longer the "prevailing party" and thus were prohibited

from recovering attorney's fees. The circuit court failed to rule on the motion. Seidenstricker Farms continued their appeal of the award of attorney's fees.

RULES AND ANALYSIS: On appeal, the court was asked to decide whether the circuit court's award of attorney's fees to the Dosses was reasonable. However, as a threshold issue the court had to decide whether it could consider arguments raised by Seidenstricker Farms in its motion to vacate the award of attorney's fees. It is this threshold issue that the opinion discusses in detail.

Arkansas law allows the prevailing party in a contract action to recover attorney's fees. Ark. Code Ann. § 16-22-203. In order to claim attorney's fees, a party must file within 14 days after the entry of judgment. Ark. R. Civ. P. 54(e). The comments to the rule provide that this deadline shall not be extended due to a pending appeal. Ark. R. Civ. P. 54(e), Rpt. Notes. The Dosses – as the prevailing party after the Circuit court decision – appropriately filed their motion for attorney's fees after the circuit court's judgment even though the appeal on the merits had not yet been decided. It is up to the circuit court, at its discretion, to defer the determination of attorney's fees until after an appeal on the merits has been decided. *Id.* The circuit court chose not to defer and ruled on the motion for attorney's fees before the appeal was decided. Instead, it should have extended the time for filing fee claims until after the pending appeal on the merits.

A circuit court may vacate an order within 90 days of its entry, but after that time it loses jurisdiction to vacate. Ark. R. Civ. P. 60(a). Because the Circuit court did not rule on Seidenstricker Farms' motion to vacate within 90 days, it lost jurisdiction to do so. As a result, the Arkansas Supreme Court also lost jurisdiction over the issue and thus could not address any arguments used by Seidenstricker Farms in the motion to vacate, namely its argument that the Dosses were no longer the prevailing party. The court also suggests in its opinion that Seidenstricker Farms could have filed an additional notice of appeal citing the motion to vacate. The only arguments that the Arkansas Supreme Court could consider in ruling on the appeal of attorney's fees were those raised in Seidenstricker Farms' response to the Dosses' motion and those in Seidenstricker Farms' appeal on the circuit court's award.

In a footnote, the court noted that the original case was on remand, and this affirming decision would have no bearing on any attorneys-fees order the circuit court might issue on remand.

HOLDING AND DISPOSITION: Even when an appeal is already pending on a judgment, if a motion to vacate the order is made and not ruled upon within the 90 days allotted by the rule, the circuit court loses jurisdiction to rule on the motion, and any arguments made in the motion are not preserved for appeal. Furthermore, the circuit court's initial award of attorney's fees was reasonable. Affirmed.

Hannah and Corbin, JJ., dissenting.

The resolution of this case is contrary to the law and produces an absurd result. The majority's reliance on Ark. R. Civ. P. 60(a) is misguided because this issue was never raised by the parties. Removing rule 60(a) from the majority's analysis has the effect of eliminating their reasoning on why the "prevailing party" argument may not be considered. It is appropriate to consider this argument, not because it was raised by Seidenstricker Farms in its motion to vacate, but because it prevents the court from coming to an absurd interpretation and application of current law. The Dosses' award is clearly contrary to the law that a losing party is not entitled to attorney's fees. Ark. Code Ann. § 16-22-308. It is an absurd result for the Dosses' award to be upheld, and it is well established that the court will not adopt an interpretation of a law that leads to an absurd result. *Fountain v. State*, 348 Ark. 359, 72 S.W.3d 511 (2002). The circuit court order granting the Dosses' motion for attorney's fees should be reversed and remanded.

Glaze, J., Dissenting.

The majority's analysis centers on the issue of whether the arguments used by Seidenstricker Farms in its motion to vacate may be considered in this appeal. However, the parties should be allowed to consider and address the relationship of Ark. R. Civ. P. 60(a), which removes the circuit court's power to vacate an order if it has not ruled on the motion within 90 days, and Ark. R. App. P.-Civ. 4(b), which states that if a motion is not ruled on within 30 days it is deemed denied by operation of law.

Abstractor: Tara Kpere-Daibo, 2L

BANKRUPTCY

United States v. Davis

5:08CV00021 JMM

April 28, 2008

2008 WL 1930546, 2008 U.S. Dist. LEXIS 35546

U.S. District Court for the Eastern District of
Arkansas

James M. Moody, District Judge

FACTS: On April 22, 1983, Davis signed a promissory note and a subsidy repayment agreement in favor of the United States Rural Housing Service (RHS), secured by a mortgage filed with the Arkansas County Circuit Clerk. The property described, Davis's residence, was security for repayment of any subsidy received. On May 3, 2002, Davis filed a petition for Chapter 13 bankruptcy. The Plan of Reorganization indicated that the debt secured by the mortgage was \$16,475. RHS filed a Proof of Claim showing that Davis owed \$59,929, and Davis objected. In September 2002, Davis's plan was confirmed. RHS never responded to Davis's objection, and on October 22, 2002, her objection was sustained; the bankruptcy court entered an order stating that RHS's proof of claim should reflect a \$16,457 secured status and no unsecured status. Near the end of 2006, Davis completed her plan and was discharged with the Trustee indicating that RHS had received \$16,475 with interest of \$3,503.

In December 2007, RHS filed a complaint in state court seeking foreclosure on the property that was secured by the mortgage, contending that Davis owed a total of \$50,816 with a daily interest accrual of \$3.68. Davis answered and filed a counterclaim contending that her debt was paid in full based upon the bankruptcy court's order that RHS had a secured claim of \$16,475. RHS removed to federal court and filed a motion for summary judgment seeking an *in rem* judgment against the property. Davis filed a motion for summary judgment seeking a release and an order that the debt due was paid in full.

RULES AND ANALYSIS: The issue on appeal was whether RHS's lien survived the Chapter 13 bankruptcy discharge and the order that modified the amount of its secured claim. One of the most basic concepts of bankruptcy law is that a lien is unaffected as it passes through bankruptcy. Davis concedes that this is true, but argues that the amount of the lien changed when her objection to the proof

of claim was sustained. However, in a Chapter 13 bankruptcy, 11 U.S.C. § 1322(b)(2) protects the holder of a secured claim by stating that a Plan of Reorganization cannot modify rights that are secured by a mortgage on a debtor's principal residence.

HOLDING AND DISPOSITION: In a Chapter 13 bankruptcy, a debtor cannot change the value of a claim secured by a mortgage on a principal residence, so a bankruptcy court's order modifying the amount of a secured claim is *res judicata* with respect to the amount of the claim allowance, and not the debt liability. RHS can continue foreclosing on the property.

Abstractor: Leila A. Awwad, 2L

BOUNDARY BY ACQUIESCENCE

Boyster v. Shoemaker

No. CA 07-593

January 23, 2008

101 Ark. App. 148, --- S.W.3d ---

2008 WL 186197, 2008 Ark. App. LEXIS 47

Wendell L. Griffin, Judge.

FACTS: The parties, Teresa Shoemaker and James Boyster, are adjacent landowners. Shoemaker's property is located south of Boyster's, and there is a fence which divides their property, and encloses Shoemaker's property on the north, west, and east sides. In 2005, Shoemaker lost several hunting dogs on her property and upon going to the north side of her property, discovered that the fence dividing her and Boyster's property had been cut, rocks had been picked up, and trees had been cut down. Shoemaker asked Boyster's wife what they were doing, and learned that Boyster had surveyed the property and discovered that the fence line was not on the boundary, thus giving rise to a boundary line dispute between Shoemaker and Boyster. Several persons presented testimony relating to the fence and boundary line of the property. Shoemaker's grandmother acquired the property in 1942 and the property passed to her grandfather in 1945 when her grandmother died. Shoemaker, who was born in 1959, testified that the fence had been on the property her entire life. The property north of the fence was used as pasture land in the 1960's, and Shoemaker never saw anyone other than her family use the property south of the fence, which was wooded. Jackie Paxton, who had hunted on the property with Shoemaker's father, Bob

Higgenbotham, testified that Higgenbotham told him that the property ended at the fence line. Paxton, along with several others, testified that the property north of the fence line was used as a pasture and that they never saw anyone north of the fence line use the property south of the fence line. Robert Shockley was one of Boyster's predecessors in interest. Pamela Sullivan, Shockley's former wife, testified that she had no recollection of the fence line. Shoemake stated that the Shockleys sold the property north of the fence to Bryan Tatum, who was Boyster's immediate predecessor in interest. Shoemake testified that she had once had a conversation with Tatum in which he acknowledged the fence line as the boundary line between the two properties. Tatum testified that he did not recall discussing the fence line or any other boundary with the Shoemake. Boyster testified that he never saw anyone use the property south of the fence line and never discussed the property line until the instant dispute.

On March 17, 2006, the Sebastian County Circuit Court entered an order finding that Boyster had established a boundary line by acquiescence and quieted title to the disputed tract in Shoemake's name. Boyster appealed, but the appeal was dismissed for lack of a final order because the circuit court had failed to address a conversion claim. On April 24, 2007, the circuit court addressed the claim in its final judgment, to which Boyster filed a timely notice of appeal.

RULES AND ANALYSIS: The sole point on appeal is whether the circuit court erred in finding that the fence line was established as the boundary line by acquiescence. For a party to prove that a boundary line by acquiescence has been established, that party must show that both parties at least tacitly accepted the non-surveyed line as the true boundary line. *Webb v. Curtis*, 235 Ark. 599, 361 S.W.2d 87 (1962). The mere existence of a fence or some other line, without evidence of mutual recognition, cannot sustain a finding of boundary by acquiescence. However, silent acquiescence may be sufficient, as the boundary line is usually inferred from the parties' conduct over so many years. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978). A boundary by acquiescence may be established without the necessity of a prior dispute or adverse use up to the line. Here, the trial court did not err in finding that Shoemake established that the fence line between the two properties was a boundary line by acquiescence. Shoemake testified that Tatum,

Boyster's predecessor in interest, acknowledged the fence as the boundary line. Shoemake's witnesses further testified that no one north of the fence used the property south of the fence and that the property north of the fence was used as a pasture, while the property south of the fence was wooded. Shoemake presented sufficient evidence to show that Boyster and his predecessors in interest recognized the fence line as the boundary line of the property. Because the trial court order contained no description of the boundary line, the appellate court granted leave to the circuit court to amend the decree by adding a more specific description of the boundary line.

HOLDING AND DISPOSITION: Silent acquiescence to a fence or other line as the true boundary line of a property may be inferred from the parties' conduct over many years, including conduct by a predecessor in interest, and is sufficient to meet the mutual recognition requirement for a finding of a boundary line by acquiescence. Affirmed.

Hart, J., Dissenting.

The judge began her dissent with a Latin maxim, "res est misera ubi jus est vagum et incertum" (things are miserable where the law is vague and uncertain). She criticized the majority's opinion as containing mistakes of both fact and law. She mentioned additional facts and concluded that the disputed area lay at the far southwest corner of the dairy farm, and was too rugged to be used as pasture land. No one disagreed that the fence was constructed to hold cattle. The only evidence of mutual recognition was that Tatum "knew" that the disputed tract was her property. Even accepting this testimony as true, it only establishes acquiescence for less than seven years, which is much less than the "many years" that the parties must treat the fence line to establish a boundary by acquiescence. The testimony presented by Shoemake and her supporters was insufficient to evidence of mutual recognition. The majority overruled clear precedent to hold that the mere existence of an old fence, without any proof of mutual recognition, is sufficient evidence to establish a boundary by acquiescence.

Abstractor: Lori A. Plant, 3L

COMMENT (LF): The dissent made the point that using the fence as the boundary line would be a "Pyrrhic victory" for the plaintiff, since on the east side of Shoemake's property the fence dipped significantly into the survey description. It can be

difficult to prove, or disprove, boundary by acquiescence where the property is wild and rugged and the tract quite large.

Myers v. Yingling
No. 07-790
March 6, 2008
372 Ark. 523, ___ S.W.3d ___
2008 WL 518192, 2008 Ark. LEXIS 147

Tom Glaze, Justice.

FACTS: On May 6, 2004, appellees David and Venice Yingling filed suit against appellant Frank Myers, alleging that Myers had blocked the only means of entry to the Yinglings' property. The Yinglings alleged that a roadway, "Yingling Lane," separated their property from Myers's and that "Overstreet Lane" (Overstreet) was a privately maintained road that the Yinglings used to get to their land. They contended that Myers had built a gate blocking Overstreet and denying them access to their property. Initially, the Yinglings sought a declaration that Overstreet was a private roadway over which they had acquired a prescriptive easement. They later amended their complaint to allege that they had acquired title to the property through adverse possession. The White County Circuit Court entered an order on October 10, 2005, finding that insufficient evidence existed to prove adverse possession, but raising the issue of whether there had been acquiescence to a boundary by the parties and their predecessors in title. The court concluded that the parties and their predecessors in title had agreed that the fence running beside the west side of Overstreet was the boundary line of the property, and therefore this boundary by acquiescence had overcome a survey showing that the actual line was east of Overstreet. However, the court noted that the Yinglings had failed to provide a legal description of the property and gave them forty-five days to provide the court with a description. On November 7, 2005, Myers filed a notice of appeal from the trial court's October 10 decision and filed the record with the Supreme Court on February 2, 2006. On February 16, the trial court entered a second order reiterating its conclusion that the Yinglings had acquired title to the property by acquiescence and including a legal description. Myers filed a second notice of appeal from this order. The Supreme Court dismissed Myers's appeal without prejudice and held that once Myers filed his original notice and lodged the record with the Supreme Court, the circuit court had lost jurisdiction to act further in the matter, and the

order of February 16, 2006, was void. Following this ruling, the circuit court held a hearing on May 15, 2007. The court entered another order finding that there was insufficient proof of adverse possession, but that there was sufficient proof to establish that a boundary line had been established by acquiescence. Accordingly, the court concluded that the Yinglings were the rightful owners of the property. The next day, Myers filed a timely notice of appeal.

RULES AND ANALYSIS: On appeal, there were three issues. The first was a procedural argument in which Myers argued that the trial court should not have allowed the Yinglings to introduce a survey at the May 15, 2007, hearing after they had already rested their case. This argument was rejected because it was Myers's decision to take an appeal from a nonappealable order and he should not have been allowed to benefit from his own improper or untimely conduct. In boundary-line disputes, a legal description is necessary before any order rendered by the trial court is final and appealable. The permanent record in a boundary-line decision should describe the line with sufficient specificity that it may be identified solely by reference to the order. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997). In this case, while the October 10, 2005, order did not contain a legal description it also did not purport to be a final order for the parties to appeal. The trial court demonstrated its contemplation of further action when it directed the Yinglings to submit a legal description within forty-five days; Myers thwarted any such action when he filed his inappropriate notice of appeal.

The second issue was that the trial court erred in finding that the Yinglings had proven boundary by acquiescence by a preponderance of the evidence. Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line, and in such circumstances, the adjoining owners and their grantees are precluded from claiming that the boundary so recognized and acquiesced in is not the true one, although it may not be. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138; *Clark v. Casebier*, 92 Ark.App. 472, 215 S.W.3d 684 (2005). A boundary line by acquiescence may exist without the necessity of a prior dispute. *Harris v. Robertson*, 306 Ark. 258, 813 S.W.2d 252 (1991); *Clark*,

supra. Nor is there any requirement of adverse usage up to a boundary fence to establish a boundary by acquiescence. *Morton v. Hall*, 239 Ark. 1094, 396 S.W.2d 830 (1965); *Clark, supra*. The question presented to the trial court was the placement or location of the western boundary of the Yinglings' property and the eastern boundary of Myers's property. In its findings of fact and conclusions of law, the trial court found that there was sufficient proof that the parties and their predecessors in title had agreed that the fence running along the west side of Overstreet was the north-south boundary between the properties, even though a survey showed the boundary being on the east side.

Yingling testified at trial that his property ran from Paradise Road, which runs east to west, and Overstreet, which runs north from Paradise Road with a fence along the west side of the road. When Yingling purchased the property in 1997, he did not have it surveyed, but thought that Overstreet Lane was the property line. He placed a gate with a lock at the end of Overstreet Lane sometime in 1998 or 1999. He gave keys to several people, including Myers. Yingling later changed the lock and refused to give a key to Myers, at which point Myers tore the gate down and built his own. Yingling also noted that his property to the north abutted land belonging to William "Billy Don" Martin, and there was a fence that ran north to south in a straight path all the way up between the Yingling and Martin property to Paradise Road. Yingling was unsure whether there was a fence along the east side of the road when he moved in, but could not deny that there was probably one there when he purchased the property. The Yinglings called Eddie Smith, the previous owner of Myers's property, as a witness. Smith had run cattle on his forty acres from 1969 until he sold it to Myers 1997. He also leased 320 acres that would later become the Yinglings' property. Smith testified that he was familiar with Overstreet Lane and the fence on the west side, which he had always considered to be his boundary line. On cross-examination, Smith reiterated that he thought the fence to be his line and added that he thought the road was everybody's. Smith also said that there had been a fence on the east side he used to keep his cattle from roaming, but that he still considered his boundary to be the west fence. Myers testified that he and Ms. Love, the Yinglings' predecessor in title, had never had any boundary disputes. Mr. Martin testified that there was a fence, which he considered to run straight up and down the property from Overstreet Lane to the north to Paradise Road to the

south. Martin testified that his grandfather had owned the property and built the fence, with Martin's father, where they understood the line to be between the Martin and Love property.

Myers contended that there was no evidence of acquiescence and argued that there was no evidence that the Yinglings or their predecessors ever possessed or occupied the land. Here, the testimony of Smith and Martin provided enough proof for the trial court to conclude that the parties' predecessors in interest had acquiesced the fence as the boundary line and Myers, as Smith's grantee, was precluded from disputing that line.

Myers's final point was that the trial court should have granted his oral motion to amend his pleadings so that he could include a prescriptive easement counterclaim. Here, there was no abuse of discretion in the trial because the burden of proof was not met. To meet the burden, there must be a showing, by a preponderance of the evidence, that one's use was adverse to the true owner and under a claim of right for the statutory period. The statutory period of seven years for adverse possession applies to prescriptive easements. *Bobo v. Jones*, 364 Ark. 564, 222 S.W.3d 197 (2006); Ark. Code Ann. § 18-61-101. The Yinglings had not been on the property for seven years at the time they filed suit and there was no proof presented that either side's use of the road was adverse for the entire period of time.

HOLDING AND DISPOSITION: Because boundary-line disputes require a legal description of the land before a final order may be granted, Myers's appeal was improper and the trial court was not in error when it allowed a survey to be entered at the May 15, 2007, hearing. The trial court also did not err in its ruling that the Yinglings had proven acquiescence by a preponderance of the evidence because the Yinglings introduced sufficient evidence to show that predecessors in interest had accepted the fence as the boundary of the properties. Because there was no evidence of overt, adverse use for the statutory period, the trial court did not abuse its discretion when it refused to allow Myers to amend his pleadings to add a counterclaim for a prescriptive easement. Affirmed.

Danielson, J., Dissenting.

The mere existence of a fence between adjoining landowners is not alone sufficient to establish a boundary by acquiescence; there must be mutual recognition of the fence as a dividing line. *See Carney*

v. Barnes, 235 Ark. 887, 363 S.W.2d 417 (1963). Here, the Yinglings failed to establish a mutual recognition that the fence on the west side of Overstreet Lane was considered to be the boundary line between adjoining lands. Smith's testimony did not support a finding of a boundary by acquiescence because he considered the road to be the dividing line of the two properties. Martin's testimony revealed that there was never a prior dispute over where the fence lines were among neighbors and that he never heard anyone comment about where the boundary lines were located. The court should consider the ruling in *Ball v. Messmore* where it was determined that the testimony of several witnesses showed, at most, the existence of a general belief about a property line but could not have the effect of vesting or divesting the title of real property. 226 Ark. 256, 289 S.W.2d 183 (1956). Martin's personal opinion only shows the existence of a general belief as to where a boundary line may be. The rule of acquiescence is based on the intent and agreement between adjoining landowners. *Fish v. Bush*, 253 Ark. 27, 484 S.W.2d 525 (1972). Myers's conduct when destroying the gate and erecting his own shows that he was not acquiescing to the Yinglings. The Yinglings failed to meet the burden of proof of showing that the parties agreed on a boundary other than that described.

Abstractor: Jeremy Yarbrough, 2L

BREACH OF CONTRACT

**K.C. Properties of N.W. Arkansas, Inc. v. Lowell
Investment Partners, LLC**

No. 07-471

March 13, 2008

373 Ark. 14, ___ S.W.3d ___

2008 WL 695825, 2008 Ark. LEXIS 178

Jim Gunter, Justice.

FACTS: On August 5, 2004, K.C. Properties ("KC") and Lowell Investment Partners ("LIP") entered into an operating agreement to form a business venture called Ozark. LIP owned fifty-one percent of the shares, with KC owning forty-nine percent. Pinnacle Mountain Services ("PMS") would become the manager of Ozark. The purpose of the venture was to create a water park near the intersection of Interstate 540 and Highway 264. The water park was to occupy 16.58 acres of the thirty-four acre parcel of land. The parcel of land was to be sold to Ozark for \$3,000,000 from Pinnacle Hills Realty ("PHR").

[Editor's note: this agreement was part of the operating agreement, and not a separate contract for

sale.] On that same day, Buildings, Inc. entered into a contract with Ozark to construct the future water park with a cost-plus-six-percent basis. On September 10, 2004, PHR entered into a real estate contract with Parker Northwest Properties to sell the entire thirty-four acre tract. KC filed suit against LIP for breach of contract and fiduciary duties. KC alleges that Ozark lost the opportunity to own the thirty-four acres, which was worth more than what the venture paid for it. KC claimed it lost at least \$501,313.24 in damages. Moreover, Buildings, Inc. filed suit for breach of contract claiming it had lost the agreed upon six-percent profit, amounting to \$410,760. On January 23, 2007, the Washington County Circuit Court granted summary judgment to LIP. The Appellants, KC and Buildings, Inc. appealed the grant of summary judgment.

RULES AND ANALYSIS: The appellants' first point on appeal was whether the circuit court erred in holding that Ark. Code Ann. § 4-32-304 precludes partners of a limited liability company from suing other partners for breach of contract and fiduciary duty. A plain reading of § 4-32-304 would limit a partner of a limited liability company from suing another partner; however, the language of § 4-32-402 allows partners to file suit against another partner if their acts or omissions constitute gross negligence or willful misconduct. Statutes relating to one another should be read together. The circuit court did not err in granting summary judgment to LIP because neither PMS, nor LIP committed an act that could be defined as gross negligence or willful misconduct.

For the second point on appeal, the appellants claimed that the circuit court erred in finding that KC was not in privity of contract with several of LIP's partners. Specifically, the Appellants argue that the circuit court erred in not finding Hunt, Graham, Schwyhart and their LLCs to be agents of the venture's manager, PMS. According to § 4-32-301 (b)(2), every manager is an agent of the limited liability company, meaning that the separate LLCs were acting in furtherance of their own benefit and not of their partners. The actions of one corporation can not be imputed to another corporation merely because they both have the same management. The circuit court did not err in granting a summary judgment to LIP because the LLCs were operating for their own benefit when they sold the property to another party, and were not acting for PMS or LIP.

For the third point on appeal, the appellants argued that circuit court erred in considering lost profits as

equal to consequential damages. Lost damages are a type of consequential damages. To recover consequential damages from a breach of contract case a plaintiff must provide evidence more than the defendant's ordinary knowledge that the breach would cause unique damages to the plaintiff.

Dawson v. Temps Plus, Inc., 337 Ark. 247, 987 S.W.2d 722 (1999). The contract between Buildings and Ozark required the parties to attempt to settle a dispute, as here over the possible breach of contract, through mediation before a lawsuit could be filed. Appellants argued that they requested mediation, and appellees never responded, thus waiving any requirement. On this sole issue, the court held that the circuit court did err in granting summary judgment to LIP because there remained an issue of fact in dispute as to whether the appellees waived the mediation requirement.

For the fourth point on appeal, the appellants asserted that the circuit court erred in holding that there was not adequate evidence to sustain Building's claim for interference with contractual relationships. In determining whether the conduct of the defendants was improper, the court examined § 767 of the Restatement (Second) of Torts. An actor's conduct in intentionally interfering with a contract may be improper depending on the following factors: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor conducts interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference and the relations between the parties. *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998). The circuit court did not err in ruling for the appellees because the appellants did not furnish adequate evidence to prove improper conduct.

For the fifth point on appeal, the appellants asserted that the circuit court erred in ruling that Buildings, Inc. was not entitled to restitution for expenses incurred. Restitution is a goal to prevent the unjust enrichment of the defendant by disgorging the benefit obtained from the plaintiff. *Smith v. Walt Bennet Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993). A party may only seek restitution in Arkansas if there is a contract implied either in fact or in law. The circuit court did not err in denying consequential damages because there was no evidence to prove an implied contract.

For the sixth point on appeal, the appellants argued that the circuit court erred in finding there was no evidence of justified reliance. A party asserting promissory estoppel must prove it with certainty and not by inference or argument. *Ward v. Worthen Bank & Trust Co.*, 284 Ark. 355, 681 S.W.2d 365 (1985). Moreover, a party asserting promissory estoppel must prove reliance on the act or the failure to act by the other party and a detriment suffered. *Worth v. Civil Serv. Comm'n*, 294 Ark. 643, 746 S.W.2d 364 (1988). The trial court did not err in denying the claim of promissory estoppel because the Appellants did not offer adequate evidence.

For the seventh point on appeal, the appellants argued that the circuit court erred in finding that there was no evidence to support that the corporate veil of the limited liability companies should be pierced. Under special circumstances, a court will overlook the corporate appearance when the corporate form has been illegally abused and injured a third party. *EnviroClean, Inc. v. Arkansas Pollution Control & Ecology Comm'n*, 314 Ark. 98, 858 S.W.2d 116 (1993). Evidence that the officers of one company are also the officers of another company does not mean these companies are the same. *Fort Smith Light & Traction Co. v. Kelley*, 94 Ark. 461, 127 S.W. 975 (1910). The Supreme Court affirmed the ruling of the circuit court because the individual LLCs, PMS, and LIP are individual companies irrespective of whether their officers are comprised of the same people.

HOLDING AND DISPOSITION: The Supreme Court reversed and remanded the circuit court's ruling on the third point of appeal because there remained an issue of fact in dispute as to whether the appellees waived the mediation requirement.

Abstractor: Tony Fam, 2L

CONTRACTS FOR SALE

Belk v. Teague

No. CA 07-1336

June 4, 2008

**2008 WL 2308911, 2008 Ark. App. LEXIS 475
(NOT DESIGNATED FOR PUBLICATION)**

Josephine Linker Hart, Judge

FACTS: In July 2006, Teague entered into an oral agreement with the Belks under which he promised to convey forty acres of his property to them in exchange for their payment of the purchase price of

\$40,000. Additionally, this agreement called for Teague to carry a promissory note for \$18,000 of the Belks' total amount due. Although the Belks drafted a written contract detailing the terms of this alleged agreement, it was never executed by either party. In August 2006, Teague and the Belks reached a second oral agreement for the sale of Teague's forty acres, under which the Belks would obtain alternative financing for the full purchase price of \$40,000. The Belks drafted a second written contract detailing the terms of this agreement, but they again failed to obtain Teague's signature on this document. The Belks claimed they obtained a \$5,000 cashier's check to be used as earnest money pursuant to their agreement, but that Teague later "called off" the agreement and entered into another agreement for sale of the same property with other buyers, Holland and Griffin (financed by Bodcaw Bank).

On September 29, 2006, the Belks filed suit against Teague seeking specific performance of their alleged agreement and against Holland and Griffin seeking an unspecified amount of compensatory and punitive damages for tortious interference with a business expectancy. Later, the Belks amended their complaint to add Bodcaw Bank as a defendant, claiming they simply wanted to allow the bank the opportunity to protect its interest as a holder of a mortgage on the property. The Belks claimed they had relied to their detriment upon their contracts with Teague, by drafting two contracts, and arranging for financing and the cashier's check. The Belks also alleged that Holland and Griffin told the Belks that (1) they were aware of the Belks' agreement with Teague, and (2) in spite of that knowledge, they planned to continue pursuing their own purchase from Teague because they could complete their purchase before the Belks.

The defendants filed answers denying the material allegations of the complaint, asserting the statute of frauds and lack of consideration as affirmative defenses, and included counterclaims seeking declaratory relief, contending the Belks had clouded the title to the property by filing the *lis pendens*. In response, the Belks reasserted that their reliance upon their alleged agreement with Teague induced them to draft the two unexecuted written contracts and obtain financing from their bank. Holland, Griffin, and the bank filed a motion to dismiss and for judgment on the pleadings (as did Teague in a separate motion). Each defendant raised the statute of frauds as a defense and asserted the Belks failed to state facts upon which relief could be granted.

Without explanation, the trial court issued a final order granting the defendants' motions, dismissing the complaint without prejudice, denying all other relief granted but awarding the defendants attorneys' fees. The Belks appealed.

RULES AND ANALYSIS: The first issue on appeal was whether the actions of the Belks satisfied the part performance exception to the statute of frauds. A contract for the sale of land comes within the statute of frauds and must be in writing to be enforceable. Ark. Code Ann. § 4-5-101. However, Arkansas courts have previously recognized that an oral agreement may be removed from the statute of frauds when there is proof of the payment of at least a part of the purchase price and possession of the property. *Smith v. Malone*, 83 Ark. App. 99, 117 S.W.3d 643 (2003). In this case, the Belks do not assert either circumstance. Instead, they only allege that they obtained financing, drafted two unexecuted agreements, and procured (but failed to deliver) a cashier's check.

The second issue is whether the Belks' actions stated above place them in a position to recover against the subsequent buyers for tortious interference with a business expectancy. The elements of tortious interference with a business expectancy has been well developed by the Arkansas Supreme Court and include (1) the existence of a valid contractual relationship or business expectancy; (2) the defendant's knowledge of the relationship or expectancy; (3) intentional interference by the defendant that induces or causes a breach or termination of the relationship or expectancy; (4) resultant damage to the party whose relationship or expectancy has been disrupted; and (5) improper conduct on the part of the defendant. *Vowell v. Fairfield Bay Cmty. Club, Inc.*, 346 Ark. 270, 58 S.W.3d 324, 329 (2001). It is clear that the Belks failed to prove the first element: the existence of a valid contract. The inability of the Belks to prove the existence of a written contract or part performance leaves them simply with a business expectancy subject to a contingency (entering a valid contract). Without an enforceable contract, Holland and Griffin's purchase of the real estate is not tortious interference with a business expectancy. See *Deck House, Inc. v. Link*, 98 Ark. App. 17, 249 S.W.3d 817 (2007).

Finally, the circuit court did not err in awarding attorneys' fees to the defendant because Ark. Code Ann. § 16-22-308 authorizes an award of attorneys'

fees to a party who successfully defends against a contract claim on the ground that no contract existed. *Cumberland Fin. Group, Ltd. v. Brown Chem. Co.*, 34 Ark. App. 269, 810 S.W.2d 49 (1991).

HOLDING AND DISPOSITION: This Court found that the Belks' arguments failed to distinguish between actions undertaken in contemplation of eventual performance of a contract and actions which truly constituted part performance of a contract. This distinction is very important. The Belks could not merely plead the existence of their expectancy to purchase real property and then claim they stated a cause of action for tortious interference with that expectancy in an effort to not subject themselves to the statute of frauds. Without a written contract or the part performance exception taking the oral agreement out of the statute of frauds, the Belks had only a business expectancy subject to the contingency that they would, in fact, enter into a valid contract with Teague. Because the Belks' expectancy was subject to their procurement of a valid contractual agreement with Teague, Holland and Griffin's purchase of the real estate was not a tortious interference with a business expectancy. Affirmed.

Abstractor: Claudia Elizabeth Taylor, 2L

COMMENT (LF): Typically two of three elements are needed to take a contract out of the Statute of Frauds requirement under the doctrine of part performance: 1) payment of a significant amount of consideration; 2) possession; or 3) improvements made to the property.

DAMAGES

Prendergast v. Craft

No. CA 06-1282

May 14, 2008

102 Ark. App. 237, __ S.W.3d __

2008 WL 2042957, 2008 Ark. App. LEXIS 402

John B. Robbins, Judge

FACTS: Allen Prendergast contracted with Wyatt Williams d/b/a Long Valley Timber to cut and sell timber from land belonging to his sisters, Kathleen Craft and Gayle Rutledge, without permission to do so. Williams contracted to sell the harvested logs to Missouri Walnut, LLC. Prendergast signed a timber deed to Williams on January 21, 2005. On January 26, 2005, Williams entered into a contract for sale with Missouri Walnut for the 808 cut logs. Missouri Walnut tendered payment in the amount of \$43,276

on the same day. One check was made payable to Williams for \$18,311 and another was made to Prendergast in the amount of \$24,966. All of the business was conducted through Williams; Missouri Walnut had no contact with Prendergast. Neither Williams nor Missouri Walnut researched the Benton County real estate records to determine ownership. The Crafts informed Missouri Walnut that Prendergast had no ownership interest in the property and that they intended to sell the logs to another timber company for approximately \$40,000.

On March 2, 2005 Missouri Walnut filed a complaint in replevin against the Crafts asserting it was a "good faith purchaser" of the logs. The Crafts filed a cross-claim, seeking treble damages for the injury to their land, and denying the allegations. On March 11, Missouri Walnut sued Williams and Prendergast, asserting breach of contract against both and a fraud claim against Prendergast, seeking damages of \$43,276 and also claiming punitive damages. Williams and Prendergast denied the allegations. Williams filed a cross-claim against Prendergast, seeking judgment for any amounts Williams might be ordered to pay Missouri Walnut, as well as punitive damages. On July 8, 2005 the Crafts filed a cross-claim against Williams and Prendergast alleging trespass and that they had destroyed timber without permission. The Crafts sought \$43,277 in damages for the value of the timber and \$5,000 for the cost of restoring the land. On May 8, 2006, Prendergast filed a cross-complaint against Williams, alleging that Williams was negligent by not waiting for him to secure his sisters' permission.

A Benton county jury found Prendergast liable for damages to all of the parties, resulting in \$43,276 in compensatory damages and \$85,000 in punitive damages to Missouri Walnut, LLC; \$48,276 to the Crafts; and \$15,000 in compensatory damages and \$35,000 in punitive damages to Williams. The damages awarded to the Crafts were trebled pursuant to Ark. Code Ann. § 18-60-102. On appeal, Prendergast raised three issues. He challenged the jury instructions on the measurement of the Crafts' damages, the punitive damages awarded to both Missouri Walnut and Williams and the compensatory damages award to Williams.

RULES AND ANALYSIS: Prendergast's first argument relies on the court's decision in *King v. Powell*, 85 Ark.App. 212, 148 S.W.3d 792 (2004). In *King*, specific jury instructions were given which

were not the same jury instructions given to the jury in Prendergast's case. The jury instructions in *King* lacked an assessment for damages based on the fair market value of the timber cut. He argued that the *King* instructions were the proper instructions and that the instructions given, because they included "fair market value" of the logs in the assessment, were improper. The court disagreed. First, the court noted that there can be other measurements of damages besides those articulated in *King*. Under Ark. Code Ann. 18-60-102, the plaintiff can recover either the value of the timber or the damage to the market value of the land. *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979). The court determined that the instructions of the circuit court to the jury that the fair market value of the timber was a measure of damages was a correct statement of the law and that it could not say that the circuit court had abused its discretion in not giving the *King* instructions.

Prendergast's second argument was that the punitive damage awards to Missouri Walnut and Wyatt Williams should be reversed due to insufficient evidence to support them and because they were the result of passion or prejudice of the jury. The court determined that Prendergast was procedurally barred from raising the insufficiency of evidence argument because he made no directed verdict motion to dismiss either Missouri Walnut's or Williams's claim for punitive damages, nor did he object to the jury being instructed on punitive damages. Failure to preserve the issue bars the court from taking it up.

However, there is no obstacle to Prendergast's second punitive damages argument, that the punitive damages were excessive as a matter of state law. In determining the excessiveness of punitive damages the court reviews the proof and inferences in the light most favorable to the appellees and then determines whether the damages awarded shock the conscience of the court. Considering Prendergast's actions, the court did not find the damage awards to be shocking. The court noted that Prendergast lied to Williams about ownership of timber, knowing that Williams would be passing the timber on to Missouri Walnut. Prendergast also refused to return the money that Missouri Walnut paid to him when it was discovered he did not own the logs. Prendergast also failed to provide any evidence that the punitive damages were a result of passion or prejudice. Absent evidence, the court may not substitute its judgment for the jury's.

The third argument Prendergast raises is that the circuit court erred in failing to direct a verdict on William's claim against him. A directed-verdict motion is a challenge to the sufficiency of the evidence. When making this determination, the court assesses whether the jury's verdict is supported by substantial evidence. Substantial evidence is evidence that is of a sufficient force and character that it will compel a conclusion one way or another with reasonable certainty, without speculation or conjecture. In considering the sufficiency of the evidence, the court views the evidence in the light most favorable to the party on whose behalf judgment was entered.

In this case, Williams brought a claim of deceit against Prendergast. Prendergast never objected when Williams presented evidence of lost business related to Prendergast's actions. Williams testified that he normally had about \$300,000 in sales of walnut logs but since this transaction, only had about \$150,000 in sales, attributing the decline to Prendergast. Absent an objection by Prendergast, he consented to the issue being tried. While Williams had no tax returns or other evidence to corroborate his testimony, the weight of his testimony is an issue that is the sole province of the jury.

HOLDING AND DISPOSITION: The circuit court is affirmed. Prendergast's arguments do not rise to the requirements necessary to find an abuse of discretion on the part of the circuit court. In addition, his failure to raise issues during the trial now prevents those issues from being taken up by the Court on appeal.

Griffen, J., Concurring.

The award of punitive damages to Williams and Missouri Walnut should be affirmed, but only because were not challenged properly at trial. Williams and Missouri Walnut were more enablers than victims.

Hart, and Baker, JJ., Dissenting

In a vehement dissent, the dissenting judges noted that Prendergast did make a directed verdict motion. His argument was that no damages should be awarded and, therefore, he should have no reason to have to argue further that punitive damages should not be awarded. Assuming the directed-verdict motion was insufficient, the motion for a new trial sufficiently preserved his argument concerning the excessiveness of the punitive damages award.

Prendergast argues that in determining the appropriateness of a punitive damages award, the five-factor test from *Superior Federal Bank v. Jones and Mackey Construction*, 93 Ark.App. 317, 219 S.W.3d 643 (2005) should be applied. Those factors are: (1) whether the harm causes was physical as opposed to economic; (2) whether the tortious conduct evinces an indifference to or reckless disregard of the health or safety of others; (3) whether the target of the conduct has financial vulnerability; (4) whether the conduct involved repeated actions or was an isolated incident; (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. These five criteria are not met regarding either Missouri Walnut or Williams.

In addition, both Williams and Missouri Walnut have committed wrongdoings in this case. Williams procured Prendergrast's signature on a timber deed that Williams drafted. This makes him an accomplice as well as someone who is practicing law without a license. As for Missouri Walnut, it is not licensed to do business in Arkansas. In addition, it chose to do business with Williams instead of Prendergast and chose to remain ignorant of the true owner by neglecting to check the plat book which it had in its possession. The conscience of the court should be shocked when a jury awards a substantial amount of damages to any business when the only reason they suffered damages was the result of flouting the laws of Arkansas.

Abstractor: Brien Saputo, 2L

DIVORCE

Farr v. Farr

No. CA 07-369

February 20, 2008

101 Ark. App. 315, __ S.W.3d __

2008 WL 442531, 2008 Ark. App. LEXIS 143

Josephine Linker Hart, Judge.

FACTS: On January 19, 2005, the Arkansas Court of Appeals remanded the property division in the divorce of John M. Farr, Jr., and Jackye R. Farr, holding that the Polk County Circuit Court erred in not dividing a \$92,000 "receivable," which was created by a loan of marital funds to John's sons from a previous marriage and remained from the sons' failed business venture. The trial court had concluded this debt was uncollectible. On November 30, 2005, the trial court entered an "Order on Mandate" to divide the marital property in

accordance with the January 15, 2005 opinion. The order divided the \$92,000 between the parties and ordered that Jackye would receive her portion from the proceeds of the sale of the marital residence. John waited until September 1, 2006, to petition to set the order aside. Jackye answered the petition and moved to dismiss, asserting that because ninety days had passed since the entry of the order, the trial court did not have the jurisdiction to modify or set aside the order. In the meantime, on August 2, 2006, the marital residence went to a Commissioner's sale. John made the highest bid of \$231,000, and, on August 30, 2006, he requested the trial court to confirm the sale. John was given fifteen days to tender the purchase price. Jackye had been occupying the marital residence and was given fifteen days to vacate. When John failed to complete the sale, Jackye petitioned to have him held in contempt, asserting that John had failed to complete the purchase of the marital residence, had made duplicate keys to the home and other buildings on the property, and had placed furniture in the residence "without knowledge and consent of the Clerk of the Court."

By an order entered January 9, 2007, the trial court denied John's petition to set the order aside, found John in contempt, and awarded Jackye \$1,000 in damages for having to move from the residence and \$2,933.33 in attorney's fees. John appealed both of these rulings.

RULES AND ANALYSIS: On appeal, John first argued that the trial court erred in entering the order on mandate because it deviated from the directions given in the opinion of the court of appeals and did not resolve disputed questions of law and fact. However, the court held that, under settled law and pursuant to Rule 60(a) of the Arkansas Rules of Civil Procedure, a trial court loses jurisdiction to modify a judgment or order after ninety days. For this reason, the trial court lacked the jurisdiction to modify or vacate the order and did not err in refusing to set aside its order. John also argued that the trial court erred in finding him in contempt and in awarding Jackye damages and attorney's fees. The court found that John did not violate an order of the trial court, but merely failed to fulfill a sales contract. The court acknowledged the inherent power of the courts to punish for contempt but stressed that the power should only be exercised when it is necessary to ensure that the authority of the court is continued. *Nutt v. Delta Trust & Bank*, 79 Ark. App. 257, 85 S.W.3d 927 (2002). Ultimately, John's conduct was

covered by a contractual remedy and, for this reason, was outside the scope of the trial court's contempt power. Jackye's petition alleged that John's conduct was contemptuous because it was undertaken without her knowledge and consent or that of the Clerk of the Court. However, the court stated that before a person may be held in contempt for a violation of a judge's order, the order alleged to be violated must be definite in its terms as to the duties imposed and the command must be express rather than implied. *Sims v. First State Bank of Plainview*, 73 Ark. App. 325, 43 S.W.3d 175 (2001). Because there was not an express court order prohibiting John's conduct, it was held that the trial court erred in finding John in contempt.

HOLDING AND DISPOSITION: The court of appeals held that the trial court lacked jurisdiction to modify or vacate its order on mandate and, thus, did not err in refusing to set aside the order. Additionally, because there was not an express court order prohibiting John's conduct, the court held that it was error for the trial court to find John in contempt. Affirmed in part; reversed and dismissed in part.

Wendell L. Griffen, Dissenting.

The Polk County Circuit Court did not err in finding John in contempt. The contempt finding was supported by substantial evidence, and the majority opinion omitted this evidence presented at the trial court hearing on the contempt petition. There was more to the issue than John's failing to close on the sale of the marital residence. The contemptuous behavior included John's increasing bids on the property to prevent Jackye from obtaining the home, then failing to follow through with the purchase despite the ability to do so, which was evidenced by the purchase of other residences in the same time period. An act is deemed contemptuous if it interferes with the order of the court's business or proceedings or reflects upon the court's integrity. *Ward v. Switzer*, 73 Ark. App. 81, 40 S.W.3d 325 (2001). John's actions frustrated the purpose of resolving the property issues in the divorce. Jackye should have been awarded \$1,000 in damages as a result of John's actions, and not necessarily for moving expenses, and attorney's fees from the time of the report of the sale of the home through this decision.

Abstractor: Amber N. Elbert, 2L

Young v. Young

No. CA 07-540

March 5, 2008

101 Ark. App. 454, __ S.W.3d __

2008 WL 588601, 2008 Ark. App. LEXIS 210

Sarah J. Heffley, Judge.

FACTS: Larry Dean Young and Debra Loraine Young had been married for seventeen years until they separated and Ms. Young filed for divorce in April 2006. They had both been married once before, and each had two children from their previous marriages. In June 2003, Ms. Young's father conveyed sixty acres of land to her, titled solely in her name. In August 2003, Ms. Young executed a quitclaim deed adding Mr. Young's name to the deed. Ms. Young's father, who had suffered from Alzheimer's disease, died in November 2003.

At trial, Ms. Young's personal physician Dr. Bingham testified that in 2003, Ms. Young was experiencing multiple health problems, including depression, which compromised her ability to conduct the affairs of daily life; Dr. Bingham also testified that Ms. Young told her that Mr. Young had threatened to leave her if she didn't add his name to the deed. Based on numerous conversations with Ms. Young, Dr. Bingham testified that Mr. Young was the dominant figure in the marriage. Ms. Young's friend and coworker testified that the summer of 2003 had been a difficult time for Ms. Young due to her son's death and her father's declining health, and that Mr. Young dominated Ms. Young. In addition, she showed photographs of extensive bruising on Ms. Young's arms that Ms. Young said had been inflicted by Mr. Young. Ms. Young testified that her son Cody's death devastated her, that Mr. Young had forced her into placing his name on the deed by making her "life a living hell"; she further testified that Mr. Young had been mentally and physically abusive. Mr. Young testified that he had not been abusive, and denied having conversation about having his name placed on the deed. Mr. Young's sister and his daughter also testified that they had never witnessed any physical abuse.

The trial judge set aside the quitclaim deed because he found that Ms. Young's testimonies and witnesses were credible, and that Mr. Young was the dominating force in the marriage, and that he overcame Ms. Young's free will at a time when she was vulnerable. The trial judge also made an unequal division of the marital property by

awarding Ms. Young the marital home that was built on the land. Mr. Young appealed.

RULES AND ANALYSIS: The first issue on appeal was whether the quitclaim deed adding the defendant's name to the original deed of the property was valid. In a confidential relationship, the transfer of property from the dominated party to the dominant party is presumed to be invalid due to coercion and undue influence. *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999). The transferring party must not only claim that the receiving party was the dominant one, but also establish that this party occupied such a superior position of dominance or advantage as would imply a dominating influence. The burden of rebutting the presumption is shifted to the donee to prove that the transfer was voluntary. Here, trial court found sufficient evidence that the transfer was not voluntary.

The second issue on appeal was whether the unequal division of the marital home was error. Ark. Code Ann. § 9-12-315(a)(1)(A) contains a non-exclusive list of factors for a trial court to take into account when deciding whether to make an unequal division of marital property; and Ark. Code Ann. § 9-12-315(a)(1)(B) requires that the trial court "must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reason should be recited in the order entered in the matter." Although simply reciting the statutory factors does not satisfy the requirement of the statute, the trial court covered the issue in detail in its oral ruling from the bench.

HOLDING AND DISPOSITION: The trial court found that appellant occupied a position of trust and dominance over appellee and he exercised undue influence over her when she executed a deed creating a tenancy by the entirety in property she received from her father. Therefore the trial court did not err in setting aside the deed and making an unequal division by awarding appellee the marital home built on the land. Affirmed.

Robbins, J., Concurring.

Because proof showed that virtually everything each party had acquired was commingled throughout the seventeen-year marriage, the trial court erred in finding that the appellant occupied such a superior position of dominance as would raise the presumption of an invalid transfer. However, because in finding an unequal division of marital assets to be equitable, the trial court covered

extensively the proof as it related to the factors in its oral ruling, it was sufficient. *Jones v. Jones*, 17 Ark. App. 144, 705 S.W.2d 447 (1986). The trial court provided specific reasons supporting unequal distribution, and that decision was not clearly erroneous.

Abstractor: Ai Schein, 2L

DOWER AND CURTESY

GMAC Mortgage Corporation v. Farmer
No. CA 07-438

Jan. 9, 2008

101 Ark. App. 113, ___ S.W.3d ___
2008 WL 81501, 2008 Ark. App. LEXIS 18

David M. Glover, Judge.

FACTS: Title to the property at issue was originally obtained by Millridge Dedrick, Sr., (Millridge Sr.) and Vera Dedrick, his wife, in October 1950 by warranty deed. Millridge Sr., and Vera had one child, Millridge Jr. (Millridge Jr.) Appellees are the children of Millridge Jr. and the grandchildren of Millridge, Sr., and Vera. Vera predeceased both her husband and her son, and Millridge Sr., subsequently married a woman by the name of Lorraine. Millridge Jr., died in 1997 and Millridge Sr. died shortly thereafter. Millridge Sr. was survived by his second wife, Lorraine, and his grandchildren by Millridge Jr. Title to the property was never conveyed to Lorraine. However, in 1999, Lorraine conveyed her dower interest in fee simple absolute to Vedelle Dickson by warranty deed. Dickson encumbered her interest by various means, to various respondents in the underlying action. GMAC was the only one of those parties that appealed the decision.

In 2005, the grandchildren and their spouses petitioned the court to partition the real property at issue in this case by sale and to distribute the proceeds according to the interests of the parties. On December 13, the grandchildren moved for summary judgment on their petition, asking the trial court to confirm their title to the property, subject to Dickson's one-third interest in the property for the life of Lorraine Dedrick (a life estate pur autre vie) under Ark. Code Ann. § 28-11-301.

On February 6, GMAC filed a cross-motion for summary judgment and contended that Lorraine had conveyed a one-half interest in fee simple to Dickson under § 28-11-307 because Millridge Sr.

died leaving no surviving children – just grandchildren. However, on February 24, in a reply to its own motion, GMAC produced a copy of an unrecorded land sale contract from Milledge Sr. and Lorraine to Dickson, GMAC contended that there was a check from Dickson and a deed from Lorraine (although apparently these were not produced). Noe GMAC filed an entirely new motion for summary judgment. The grandchildren responded that the contract was untimely and improperly raised.

In 2006, the trial court entered its summary judgment in favor of the grandchildren by applying § 28-11-301, rather than § 28-11-307. It made no finding with respect to the contract. GMAC filed a post-judgment motion, requesting that the trial court make findings as to why the contract did not create a genuine issue of fact. The trial court did not rule on this motion. GMAC appealed.

RULES AND ANALYSIS: On appeal, there were three issues. The first was whether the grandchildren made a prima facie showing of entitlement to partition as a matter of law. The grandchildren had attached a redemption deed for payment of delinquent taxes to their summary judgment affidavits. GMAC on appeal argued that the redemption deed showed that the grandchildren did not have sufficient title to support a partition action. However, GMAC did not raise this argument at trial and so could not on appeal.

The second issue was whether GMAC raised a genuine issue of material fact regarding whether the grandchildren had title to the property they sought to partition. GMAC raised the issue of the contract after it had already cross-moved for summary judgment. In addition, no supporting affidavit was filed with the contract to establish its authenticity. GMAC submitted the contract too late, and in an improper fashion.

The third and primary issue was whether the trial court erred in holding that Ark. Code Ann. § 28-11-301 controls this case, as opposed to § 28-11-307. The fundamental factor here is whether the word “children” includes “grandchildren.”

The opening clause of § 28-11-307 provides: “If a person dies leaving a surviving spouse and no children. . . .” The opening clause of § 28-11-301 provides: “If a person dies leaving a surviving spouse and a child or children” Thus, the

meaning of the terms “child” and “children” in the statutes is important in deciding this case because we have the interplay between the dower rights of Lorraine Dedrick and descent and distribution rights of Millridge Sr.’s grandchildren.

In 1909, the AR Supreme Court was faced with determining whether the word “children” included “grandchildren” in a predecessor dower statute. *Starrett v. McKim*, 90 Ark. 520, 119 S.W. 824 (1909). The court concluded that it did. In all significant respects, the predecessor statute was the same as our current § 28-11-307. In deciding that the word “children” did include “grandchildren,” the Supreme Court explained that the word “children” must be construed to mean only descendants of the first degree unless it is apparent from the context that a broader meaning was intended.

When analyzing the language of the entire section, the statute shows clearly that the word was used in the broad sense to include descendants of any degree, in the contradistinction to collateral heirs. The purpose of the statute is to prescribe the dower interest of a widow as against collateral heirs, when there are no descendants. If any other construction be given to the word “children,” then the use of the words “as against collateral heirs” would be entirely superfluous, for under our statute of descents, collateral heirs take nothing in any event when direct descendants of the decedent in any degree are left.

HOLDING AND DISPOSITION: The court concluded that *Starrett, supra*, remains good law and controls the instant case. Therefore, § 28-11-301 was correctly applied as grandchildren were included under the broad use of the word “children.” Affirmed.

Abstractor: David W. Parker, 3L

COMMENT (LF): It is not uncommon in a decedents’ estates contexts for courts to rule that “children” may also include other descendants. This case is an illustration of that tendency. Interestingly, for you history enthusiasts, in the *Starrett* case the winning side was argued by J.H. Carmichael, the dean for many years of the Arkansas Law School, UALR’s predecessor. GMAC argued that *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994) should control. In *McCoy*, the Supreme Court ruled that the homestead exemption statutes do not cover minor grandchildren, noting the probate code’s definition of “child.” However, in the instant case, the Supreme

Court noted that dower is not included in the probate code, and declined to apply the definition to the dower statute. No prior case like *Starrett* was argued in McCoy, and in fact the court noted a 1912 case that also excluded minor grandchildren from the homestead exemption.

EMINENT DOMAIN

Arkansas State Highway Commn. v. Wood
No. CA 07-1118
May 28, 2008
102 Ark. App. 348, __ S.W.3d __
2008 WL 2191144, 2008 Ark. App. Lexis 421

Sarah J. Heffley, Judge

FACTS: The Arkansas State Highway Commission appeals from the trial court's order to grant a new trial on the issue of just compensation for Wallace Wood and Evelyn Wood, cotrustees of the Wood Revocable Trust. The cotrustees own a triangular-shaped, 16-acre tract of land north of Highway 63, as well as a 528-acre tract of land south of Highway 63 in Poinsett County. In 2004, the Commission made plans to convert Highway 63 into a non-access highway in connection with the Highway 118 project, preparing for Interstate 554. The Commission commenced an action to condemn the access rights of the 16-acre tract to Highway 63 but did not bring an action to condemn the 528-acre tract's access. The cotrustees commenced a separate action to be granted an injunction to stop the Commission from taking the 528-acre tract's access without instituting a condemnation action. The cases were consolidated.

Testimony at the trial by the Commission's appraiser indicated that the project left the 16-acre tract landlocked. The appraiser testified that the best use for the land would be commercial and that prior to the taking the land had a value of \$3,200 per acre. The post-taking value was assessed at \$250 per acre. The just compensation value was calculated to be \$46,250.

The Commission's appraiser further testified that the best use for the 528-acre tract was agricultural, and he assigned a value of \$1,800 per acre. The appraiser also testified that there was no loss of value to the 528-acre tract because access was still available on the south side, from Highway 322. An estimate of \$5,000.00 was given as a "cost to cure" for replacing a culvert in the middle of the tract to allow access to Highway 322.

Mr. Wood testified that the pre-taking value of the 16-acre tract was \$4,000 an acre and that, after the taking, it was worth only \$100 per acre, giving a cost of just compensation of \$61,200. He also testified that the northern 378 acres of the 528-acre tract had been damaged by the loss of access to Highway 63 because that portion did not have access to Highway 322 due to fact that the culvert spanning a slough on the property was broken. Mr. Wood placed the pre-taking value of the northern 378 acres at \$2,750 per acre, and the post-taking value at \$1,500 per acre, resulting in a total of \$472,500 for just compensation for the loss of access to the larger track.

The cotrustees' appraisers offered no opinion on the value of the smaller tract, but agreed with Mr. Wood that the northern 378 acres of the 528-acre tract had been damaged by the loss of access to Highway 63 for the same reasons explained by Mr. Wood. They placed a pre-taking value of \$1,750 per acre and a post-taking value of \$1,159 per acre on the land, an estimated \$224,000 in damages to the land.

The jury returned a verdict for \$51,520 in damages for loss of access to both tracts. The cotrustees filed a motion for a new trial. In the motion, the cotrustees argued that (1) the results from the jury were clearly the result of passion or prejudice resulting from inflammatory statements made by the Commission during closing arguments; (2) the jury's assessment of damages was erroneous because it was outside the values contained in the testimony; and (3) the jury's verdict was clearly contrary to a preponderance of the evidence. The court granted the new trial, finding the jury's verdict to be contrary to a preponderance of the evidence, and the Commission appealed.

RULES AND ANALYSIS: The issue on appeal was whether the trial court properly granted the motion for a new trial pursuant to Rule 59 of the Arkansas Rules of Civil Procedure. Rule 59 provides grounds for the granting of motion for a new trial including "error in the assessment of the amount of recovery, whether too large or too small" and when "the verdict or decision is clearly contrary to a preponderance of the evidence." When determining whether to grant a new trial, the trial court has limited discretion because it may not substitute its own view of the evidence for the jury's view except when the verdict is clearly against the preponderance of the evidence. The test in

reviewing the trial court's decision is whether or not it has abused its discretion.

Here, the jury clearly used the numbers provided by the Commissioner's appraiser: the amount of its verdict was the sum of \$46,250, the appraiser's estimate of the loss in value to the smaller tract, and of \$5,000, which was the appraiser's estimate of the cost to cure the broken culvert in the larger tract. However, the court found that the Commission's appraiser failed to provide substantial explanation for his assessment of the damages to the 528-acre tract. In *Arkansas State Hwy. Comm'n v. Ptak*, 236 Ark. 105, 365 S.W.2d. 794 (1963) the court ruled as a matter of law that a witness must have physical familiarity with the property involved. In this case, the Commission's appraiser had only a cursory familiarity with the land, being unaware of the lay of the land and also unaware of a slough that cut through the 528-acre tract, making full access to the tract from the south highway impossible. As a result, he reached a faulty conclusion that the loss of access would not diminish the value of the land.

HOLDING AND DISPOSITION: The trial court's order is affirmed. The record reflects that the Commission's appraiser had no fair and reasonable basis for concluding that the value of the 528-acre tract of land had not been diminished by the loss of access to Highway 63. The jury obviously relied on the testimony of the Commission's appraiser, which is contrary to the physical facts of the case. The trial court has not abused its discretion in this case by granting a new trial.

Abstractor: Brien Saputo, 2L

City of Fort Smith v. Carter
No. 07-220
January 10, 2008
372 Ark. 93, ___ S.W.3d___
2008 WL 90442, 2008 Ark. LEXIS 5

Annabelle C. Imber, Justice.

FACTS: The City of Fort Smith acquired specific land surrounding its Lake Fort Smith water accumulation facility by eminent domain pursuant to Ark. Code Ann. § 18-15-409. J.D. and Mary Lois Carter, the owners in possession of the condemned property, purchased the Lake Fort Smith land from Lee and Patricia Hackler, the mortgagees for the unpaid balance. In using the eminent domain statute, the City of Fort Smith undervalued the land. A trial ensued and a jury adjusted the valuation. As owners in possession, the Carters sought attorney

fees pursuant to Ark. Code Ann. § 18-15-605(b). The Hacklers, as mortgagees, also sought attorney fees pursuant to Ark. Code Ann. § 18-15-605(b). Ark. Code Ann. § 18-15-605(b) permits "landowners" to recover attorney's fees where a "corporation or water association" has used an order of immediate possession to acquire land by eminent domain and a jury determines that the amount offered by the "corporation or water association" is "less than the reasonable value for the land." The trial court denied attorney's fees under Ark. Code Ann. § 18-15-605(b) but granted them under ARCP 11. The City of Fort Smith appealed. On appeal, the Arkansas Supreme Court found no reason to grant attorney's fees under ARCP 11, but the court did find that municipal corporations, such as the City of Fort Smith, fell within the coverage of the statute. The court remanded the case back to the circuit court with instructions for it to determine (1) the fees owed to the Carters, the owners in possession, and (2) if the Hacklers, the mortgagees, were "landowners" under the statute. The circuit court conducted a hearing to determine whether the Hacklers, as mortgagees, were classified as "landowners." The circuit agreed with the Hacklers and awarded attorney's fees pursuant to the statute. The City of Fort Smith appealed claiming the term "landowner" in Ark. Code Ann. § 18-15-605(b) applied only to owners in possession and not to mortgagees.

RULES AND ANALYSIS: The sole issue is whether a mortgagee of condemned property taken by eminent domain is classified as a "landowner" under Ark. Code Ann. § 18-15-605(b) and is permitted to obtain attorney's fees. The court examined the *Black's Law Dictionary* (8th ed. 2004) definition of "landowner" but found the definition lacking. The court settled on using the term "owner," meaning one with the "right to possess, use, and convey something." Additionally, the court consulted the *Oxford American Dictionary* (2d ed. 2001) and found that "owner" is one "who possesses property." The court concluded that a landowner is "one who is entitled to possess and convey the land." Additionally, the court reiterated that a mortgagee is only entitled to possess the land at the time of default by the owner(s) in possession. A mortgage is viewed as a security for the unpaid balance on the land. *Moore v. Tillman*, 170 Ark. 895, 282 S.W. 9 (1926). At the time of the eminent domain action, the Carters were not in default on the mortgage. Therefore, the Hacklers had no "right to possess and convey" the Lake Fort Smith property,

and they could not recover attorney's fees under Ark. Code Ann. 18-15-605(b).

HOLDING AND DISPOSITION: A mortgagee of condemned property in an eminent domain action is not classified as a "landowner" under Ark. Code Ann. 18-15-605(b) and cannot obtain attorney's fees. The circuit court's order granting attorney's fees to the Hacklers is reversed and their cross appeal is rendered moot.

Abstractor: Oliver Walker, MPA, MSW, 3L

Comment (JCM): Arkansas probably ascribes to the "title theory" of mortgages. In other words, a mortgagee is viewed to hold legal title to the mortgaged property. However, Arkansas courts have a long history of qualifying mortgagee's rights. So, even though the mortgagee has legal title, the mortgagee's interest in the property is essentially limited to a security interest. The right of possession only arises when the mortgagor defaults and the equity of redemption is foreclosed. Even though the Court in this case recognized that the Hacklers, as mortgagees, held legal title, the Court determined that holding legal title is not the same as being a "landowner." This case could have gone either way. On the one hand, a mortgagee does not have any of the rights one typically thinks of as pertaining to "ownership." On the other hand, a mortgagee is the legal title holder, which seems to be just another way of saying "landowner."

Comment (LF): The opposite of the title theory is the "lien theory." Theoretically in a title theory state, if a joint tenant mortgaged property, it would sever the joint tenancy, whereas in a lien theory, it would not. Arkansas seems to have no cases on this particular point. Although the court cites *Bank of Oak Grove v. Wilmot State Bank*, 279 Ark. 107, 648 S.W.2d 802 (1983), which stated that "our decisions suggest that legal title does, indeed, pass from the mortgagor to the mortgagee," in the instant case, the court more cautiously states that in *Bank of Oak Grove* it "declined to decide whether Arkansas is a lien theory or a title theory state." A leading hornbook cites Arkansas as a "probable" title theory state. Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* (4th ed. 2001) 132 n. 11.

FORECLOSURES

Bevans v. Deutsche Bank Nat'l Trust Co.
No. 07-340
April 3, 2008
373 Ark. 105, ___ S.W.3d ___
2008 WL 886147, 2008 Ark. LEXIS 209

Annabelle Clinton Imber, Associate Justice.

FACTS: Jane Bevans financed the purchase of a residence with an adjustable rate promissory note and mortgage in favor of Argent Mortgage Company, LLC. Unsure of whether the note's high interest rate might constitute fraud, Bevans visited with D. Scott Heineman and Kurt F. Johnson of the Dorean Group, a firm purportedly engaged in the business of "debt elimination." Following this meeting, Bevans stopped making payments on the note and transferred ownership in her residence to Heineman and Johnson with a quitclaim deed.

Deutsche Bank, which was the holder of Bevans's note and mortgage via assignment from Argent, subsequently filed a complaint in foreclosure in Pulaski County circuit court against Bevans, Heineman, and Johnson. In response, Bevans filed several compulsory counterclaims against Deutsche Bank including breach of contract, wrongful foreclosure, violations of the Federal Truth-In-Lending Act, violations of the Real Estate Settlement Procedures Act, violations of the Unfair and Deceptive Trade Procedures Act, common-law fraud, and Yield-Spread-Premium fraud. Bevans later filed a motion for default judgment against Heineman and Johnson. Deutsche Bank also filed a motion for summary judgment against the two men.

Over 22 months later, Bevans filed a motion for nonsuit of her counterclaims, asking the circuit court to dismiss the claims without prejudice. At a hearing the next day, the circuit court judge orally granted Bevans' motion for a nonsuit of her claims against Deutsche Bank. The court then granted both Bevans' motion for default judgment and Deutsche Bank's motion for summary judgment against Heineman and Johnson. Title to the property was restored back into Bevans's name.

After a trial on Deutsche Bank's claims, the circuit court entered an order and decree of foreclosure. The order made only the following reference to Bevans's nonsuit motion: "On October 25, 2006, Bevans dismissed her counterclaim."

Bevans filed an appeal to the Arkansas Court of Appeals, which then certified the case to Arkansas Supreme Court on the jurisdictional question of whether the circuit court's order was final and appealable.

RULES AND ANALYSIS: Ark. R. App. P. – Civil 2(a) (1) states that a party may appeal from a final judgment or final decree of the circuit court. But Ark. R. Civ. P. 54 states that an order or judgment is not considered final and appealable unless it disposes of all the parties and all the claims.

Under Ark. R. Civ. P. 41(a) (1), a party may dismiss any of its claims without prejudice to a future action before final submission of the case to the jury, but any such dismissal is not effective until an entry of an order dismissing the claim.

The court relied heavily on its previous decision in *Linn v. Nationsbank*, 341 Ark. 57, 14 S.W.3d 500 (2000), a factually similar case. Nationsbank filed a complaint for foreclosure because the Linns had defaulted on their construction loans. The Linns filed several compulsory counterclaims which were later nonsuited under Rule 41 and the court entered a foreclosure decree in favor of Nationsbank. When the Linns tried to refile these claims along with several new claims in circuit court, Nationsbank argued that the claims were barred by the common law principles of res judicata and collateral estoppel. The court held that the right to refile nonsuited claims under Rule 41 is an absolute right and that a defendant who nonsuits all of his counterclaims is not barred from bringing those claims against the plaintiff again. The context in *Linn* was one of claim preclusion as opposed to finality because the defendants in that case chose to refile their claims rather than appeal the original decree. The court in the instant case found this distinction to be of little importance.

Bevans properly filed certain counterclaims in circuit court under Ark. R. Civ. P. 13. These counterclaims were compulsory because they arose out of the same transaction or occurrence (her financing arrangement) and therefore they must have been brought in the same action if at all. Rule 13 requires parties to present all existing claims simultaneously or forever be barred; its purpose is to prevent a multiplicity of suits arising from the same set of circumstances. When the court dismissed these counterclaims without prejudice pursuant to Rule 41, Bevans was free to refile her claims in circuit

court for one year. Thus the order from which Bevans appealed was not a final, appealable order.

HOLDING AND DISPOSITION: The circuit court's order was not a final, appealable order. Therefore, the court dismissed Bevans' appeal without prejudice.

Abstractor: Jonathan R. Shulan, 2L

Born v. Hodges

No. CA 07-526

January 16, 2008

101 Ark. App. 139, ___ S.W.3d ___

2008 WL 142312, 2008 Ark. App. LEXIS 20

John S. Patterson, Judge.

FACTS: On June 6, 2006, appellees Emmett and Sharon Hodges filed a complaint against appellant William Born which was served to him at his place of employment via a process server on June 7, 2006. The complaint alleged that Born was in default on a contract providing owner financing for the purchase price of real estate owned by the appellees as sellers. The complaint was originally incorrectly filed in Yell County, but that complaint was dismissed and a second was filed in Johnson County. According to the appellees, Born was notified of the previous dismissal when he was served.

Born failed to answer the complaint and the Hodges's motion for default judgment was granted by the trial court. The court ordered Born to vacate the premises and execute a quitclaim deed transferring the property to the Hodgeses within ten days of the court's order, and ordered the clerk of the court to issue a proper deed to the Hodgeses if Born did not execute the quitclaim deed pursuant to the court's order.

RULES AND ANALYSIS: Born argued on appeal that the trial court had no authority to grant the relief entered by the judgment. A defendant's claim that a judgment entered is in excess of the trial court's power is a matter of law and thus the trial court's judgment is reviewed de novo by the appellate court. *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995); *Ivy v. Office of Child Support Enforcement*, 99 Ark.App. 341, ---S.W.3d ---- (2007).

While there were discrepancies and inconsistencies in the mortgage, the real estate purchase money note, and the identities listed on the complaint; the appellate court declined to address them and instead focused on the fact that the Hodges's complaint was

a foreclosure proceeding and sought the execution of a warranty deed.

Upon default, Arkansas statutes provide for the sale of the property subject to the mortgage, and not the execution of a deed. "In the foreclosure of a mortgage, a sale of the mortgaged property shall be ordered in *all cases*." Ark. Code Ann. § 18-49-103 (emphasis added). Here, the court had authority to order a sale. Born also argued that the appellees had a right to sue only on the note, and not for foreclosure. The court noted that under the law, Hodges could sue either on the mortgage, the note or "both in succession, until the debt was satisfied." *Haney v. Phillips*, 72 Ark. App. 202, 35 S.W.3d 373 (2000).

HOLDING AND DISPOSITION: In remedying a foreclosure action, a court has no power or authority to seize the full interest on a defaulted mortgage by ordering the execution of a deed transferring the title of a property. Reversed and remanded.

Heffley, J., Concurring:

A defendant retains the right to contest the relief flowing from a default judgment, and a plaintiff cannot exact a remedy to which he is not entitled. *Young v. Barbera*, 366 Ark. 120, 233 S.W.3d 651 (2006). The trial court's order in this case worked a forfeiture. While forfeiture clauses in executory contracts for the sale of land are valid in the state of Arkansas, the mortgage must contain that forfeiture clause. *White v. Page*, 216 Ark. 632, 226 S.W.2d 973 (1950); *Abshire v. Hyde*, 13 Ark.App. 33, 679 S.W.2d 214 (1984). In this case, both the mortgage and the note provided for the sale of property at a public auction in the event of default, and not a return of the property, which would have resulted in Born's forfeiture of all monies paid.

Abstractor: T. Semotan, 3L

COMMENT (LF): Here there was apparently uncertainty as to whether the agreement was an installment land contract or a mortgage. Traditionally, on default, the buyer under an installment land contract forfeits her interest and all payments made, and the seller keeps payments and re-acquires the land back, by deed. However, on default of a mortgage, the property is sold. One wonders if perhaps the sellers thought they were entering into an installment land contract. If so, the instrument was incorrectly drafted.

Moran v. C & A/GFSP Joint Venture

No. CA 07-1062

May 21, 2008

2008 WL 2122821, 2008 Ark. App. LEXIS 410
(NOT DESIGNATED FOR PUBLICATION)

Karen R. Baker, Judge.

FACTS: Appellants Gary Moran and Entropy Systems, Inc. challenged an order denying their motion to vacate and set aside an order of foreclosure pursuant to Arkansas Rules of Civil Procedure 60(a) "to correct errors, or mistakes or to prevent the miscarriage of justice." The appellants assert that the trial court erred in not granting the motion. Appellants asked the trial court to set aside the commissioner's deed and to refund the purchase price because they had no knowledge of the outstanding prior liens on the property at the time of purchase, but found out about the liens through a title search after purchasing the property. The appellants relied on their review of the trial court's case file, before the sale, which did not disclose any liens or encumbrances. They claim the trial court was required to rescind the deed to correct errors or mistakes or prevent the miscarriage of justice.

RULES AND ANALYSIS: On appeal, the issue was whether the appellants had notice of the liens before or after the sale of the property. Parties are charged with knowledge of any pertinent real estate conveyances from the time such conveyances are placed in public records. *Hughes v. McCann*, 13 Ark. App. 28, 678 S.W.2d 784 (1984). The trial court did not err in denying appellants' motion. The liens were recorded and the appellants had constructive notice. The appellants would have made themselves aware of the recorded mortgages if they had examined the records prior to the sale instead of after the sale.

HOLDING AND DISPOSITION: The records could and should have been discovered by the exercise of reasonable diligence. Appellants' failure to examine such records must be attributed to their own lack of reasonable diligence. The trial court did not err in refusing to grant appellants' motion.

Abstractor: Adam Gilbert, 2L

COMMENT (LF): Purchasing real estate at a foreclosure sale is no bargain for the naive.

INSURANCE

Essex Ins. Co. v. Holder
No. AR 07-803
March 6, 2008
372 Ark. 535, 261 S.W.3d 456
2008 WL 598160, 2008 Ark. LEXIS 138

Tom Glaze, Associate Justice.

FACTS: Plaintiff's, Tom and Kara Baumgartner contracted with John Holder's J & H Enterprises to build their home. Before construction on the home was completed, plaintiffs filed suit against Holder in the Pulaski County Circuit Court seeking damages for breach of contract, breach of an express warranty, breach of implied warranties, and negligence. The plaintiffs alleged that they suffered damages resulting from Holder's delays, employment of incompetent subcontractors, and defective or incomplete construction. Following plaintiff's suit Holder demanded that Essex Insurance Company defend him in the Plaintiff's action under his commercial general liability (CGL) policies.

Essex responded by filing an action in federal court, seeking a declaratory judgment that it owed Holder neither a duty to defend him nor a duty to pay any judgment entered against Holder in the lawsuit. Essex asserted that because there was no coverage under any of the three CGL policies for the damages alleged, Holder was not entitled to a defense or indemnity under those policies.

The federal district court determined that Arkansas law applied in the declaratory judgment action filed by Essex, but certified this question to the Arkansas Supreme Court because it had not yet decided this specific issue.

In the first of three policies issued by Essex to Holder, "occurrence" was defined as an "accident." However, in the second and third policies, a "Combination Contractor Endorsement" (CCE) was added which modified the definition of "occurrence" somewhat and listed several exclusions from the definition: : "a) Actual and/or alleged defective work; and/or b) Actual and/or alleged defective workmanship; and/or c) Actual and/or alleged defective construction; and/or d) Actual and/or negligent construction."

The Baumgartners denied that the CCE excluded coverage of their claims and argued that this was an issue "not presently before the court." Their principal argument on this certified question was that the policy term "accident" is undefined within the CGL policy and is therefore ambiguous and should be interpreted liberally in favor of the insured--Holder.

RULES AND ANALYSIS: With respect to insurance policies, the rule is that, where terms of the policy are clear and unambiguous, the policy language controls, and absent statutory strictures to the contrary, exclusionary clauses are generally enforced according to their terms. *Smith v. Shelter Mut. Ins. Co.*, 327 Ark. 208, 937 S.W.2d 180 (1997).

The fact that a term is not defined in a policy does not necessarily render it ambiguous. In *Continental Ins. Co. v. Hodges*, 259 Ark. 541, 534 S.W.2d 764 (1976), the court looked at an insurance policy where the term "accident" was not defined, but found that "accident" is usually defined as "an event that takes place without one's foresight or expectation-an event that proceeds from an unknown cause, and therefore not expected." Here, since the policy defined "occurrence" and the court had previously found the definition of "accident," the remaining question to be resolved in this case before coverage can be determined is whether defective workmanship constitutes an "accident."

There is a split in authority over this issue, but the majority of states that have considered the issue have held that defective workmanship, standing alone, which results in damages only to the work product itself, is not an accidental occurrence under a CGL policy. *Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (Iowa 1999). Faulty workmanship is not an accident, but a foreseeable occurrence. The contractor's remedy here was not his insurance policies, but instead performance bonds, which exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work.

HOLDING AND DISPOSITION: Defective workmanship standing alone, resulting in damages only to the work product itself, is not an "occurrence" under a contractor's commercial general liability insurance policy. Certified question answered.

Abstractor: C. Brooke Elrod, 2L

LEASES

Miller v. Cothran

No. CA 07-869

March 19, 2008

102 Ark. App. 61, --- S.W.3d ----

2008 WL 725814, 2008 Ark. LEXIS 580

D.P. Marshall, Jr., Judge.

FACTS: In 2002, Otha Tackett leased his salvage yard for \$800 a month for ten years. The terms of the lease included "it is agreed that in the event of lessors death, the moneys due and payable hereunder shall be paid to the lessors wife, Judeane Tackett." Both having had prior marriages, Otha and Judeane made a prenuptial agreement, each renouncing any claim that the other brought into the marriage. Otha died in July 2006 and the Meadors then started paying Judean the rent. One of Otha's children disagreed about who was entitled to rent. Therefore starting in December 2006, the rent went into the registry of the circuit court. Judean died in March 2007, and her estate took her place in the litigation.

The circuit court agreed with Judean's estate that "the provision is clear. It is directing Meadors, Mr. Tackett says, if I die you pay the money to my spouse. There is not any way to interpret it other than that." Otha's estate appeals.

RULES AND ANALYSIS: On appeal, the sole issue was whether Otha conveyed any present interest to Judean such as an inter vivos gift. To avoid the opportunities for fraud the evidentiary difficulties, a gift inter vivos, must be consummated by actual delivery to the donee, with the donee releasing all dominion in the property beyond recall.

Alternatively, to give a future interest, the owner must make a valid will with all testamentary formalities, thereby conveying the interest at the owner's death. *Coley*, 235 Ark. at 217-18, 357 S.W.2d at 531. The terms of the lease clearly state that Judean was to receive nothing until the death of Otha, thus conveying a future interest. However, this was intended without complying with the solemn requirements of a will. Only by statute have certain circumstances supplanted the common law i.e. pay on death account or insurance proceeds.

Judean's estate also argues from out-of-state decisions and learned treatises that support enforcing the disputed provision of the lease. The

Restatement (Second) of Contracts § 302(1)(b) (1981) adds further support. "We recognize the wisdom of this law. But we are bound by *Coley* and like precedents." Only our supreme court can say that our common law has changed.

HOLDING AND DISPOSITION: Even though a lease was clear about the decedent's intentions for any rent due after death, the decedent neither consummated an inter vivos gift nor followed the testamentary formalities necessary to amend his will by codicil; therefore, statute-based precedent did not undermine certain case law because only the state supreme court could say whether the availability of pay-on-death designations, insurance products, and other transfers of future and contingent interest in property had so eroded the line of cases that common law had changed. Reversed and remanded.

Abstractor: Dallas Heltz, 2L

COMMENT (LF): Here, the court relies on solid Arkansas precedent for its holding. However, with all due respect to the court, in this case I believe that some overbroad wording in its statements of black-letter rules confuses the distinctions between future interests and expectancies. A future interest may be enforced in the present, even though it is not possessory. On the other hand, with only a few exceptions, an expectancy cannot be enforced: it is not an interest at all. It may become a present or future interest at some point; it may not. A POD account and property devised in a will are examples of expectancies. The owner of the account or the testator can normally change his or her mind, and change the account and will beneficiaries, up to the time of his or her death. However, if O conveys Blackacre to his wife for life, then to A, O has indeed made an inter vivos gift of a future interest, and it is completely enforceable by A, who is the holder of a vested remainder. One may not give a future gift, to take place at death; this would be invalid unless it is in the form of a valid will or trust. But one may give a present gift of a future interest.

Nash v. Landmark Storage, LLC

No. CA 07-1138

April 23, 2008

102 Ark. App. 182, ___ S.W.3d ___

2008 WL 1810287, 2008 Ark. App. Lexis 341

Karen R. Baker, Judge.

FACTS: In the fall of 2005, Nash rented a storage unit from Landmark. The rental agreement contained an exculpatory clause stating in part

"Landlord shall not be responsible to Tenant. . . for damage to person or property caused by negligence, water, fire, theft. . . or for any casualty or other cause whatever and Tenant agrees to indemnify and hold Landlord harmless. . . . ALL PROPERTY KEPT, STORED OR MAINTAINED ON THE PREMISES BY TENANT SHALL BE AT TENANT'S SOLE RISK." On Landmark's front gate there was a sign that said "Premises Monitored by Video Surveillance." In December, Nash discovered that his storage unit had been burglarized and some items had been stolen. Nash then sued Landmark for negligence, alleging that Landmark failed to maintain a secure facility and that Landmark was negligent in posting a sign stating "Premises Monitored by Video Surveillance" when no surveillance system actually existed. In his deposition, Nash testified to having previously rented from Landmark and had never had any trouble, and he also stated he relied upon the sign as an accurate representation of there being a video surveillance system on the grounds. Nash claimed to have mentioned the sign to a Landmark agent, and claimed that the agent replied "we've never had any problem." Nash asserted that this agent's silence, along with the false advertising of the sign, required the application of the doctrine of estoppel in pais to prevent Landmark from denying having assumed a legal duty.

Landmark moved for summary judgment, attaching copies of Nash's deposition and the rental agreement. Landmark argued that Nash assumed the risk of theft and under Arkansas law, a landlord owes no duty to protect a tenant from the criminal acts of a third party and no such duty was assumed by Landmark.

The circuit court found the posting of the sign was not enough to impose a duty on Landmark to have video surveillance, and granted Landmark's motion for summary judgment. Nash appeals.

RULES AND ANALYSIS: Arkansas adheres to the established rule that a landlord does not owe a duty to protect a tenant from criminal acts. *Lacey v. Flake & Kelley Mgmt., Inc.*, 366 Ark. 365, 235 S.W.3d 894 (2006). Only an express agreement or assumption of duty by conduct can release a landlord from liability. *Id.* Therefore on appeal, the first question was whether Landmark had made itself liable by assuming a duty to protect Nash's property from the criminal acts of a third party. The court found that the lease expressly disclaimed this specific

responsibility. The second question was whether the sign and the agent's silence about the sign resulted in an assumed duty of conduct by Landmark. Nash claims that the doctrine of equitable estoppel requires the court to hold that such a duty was assumed. The court applies the doctrine of equitable estoppel if the following elements are satisfied: (1) the party to be estopped must know the facts; (2) he must intend for his conduct to be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other's conduct to his detriment. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004). A party who acts or fails to act or speak where he should do so, either deliberately or with willful disregard of others, misleads another to conduct which he would not have entered upon, had it not been for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled. *Id.* The court did not decide whether the doctrine of equitable estoppel applied here, because even if Landmark's conduct had created such a duty, the exculpatory clause in the lease expressly excluded any liability on the part of Landmark. Exculpatory provisions are not favored by the law, but in Arkansas they are not invalid per se. Here, the clause was unambiguous.

HOLDING AND DISPOSITION: The court found that no one could reasonably infer that Landmark had any liability to Nash for losses resulting from theft under either a contract or tort theory. Thus, the circuit court granting summary judgment was appropriate. Affirmed.

Abstractor: Jonathan K. Bunch, 3L

**Seidenstricker Farms v. Warren N. Doss and Etta
A. Doss Family Trust
No. 07-786
Jan. 10, 2008
372 Ark. 72, – S.W.3d –
2008 WL 95773, 2008 Ark. LEXIS 10**

Donald L. Corbin, Justice

FACTS: Seidenstricker Farms, or its predecessors, have leased and farmed the land at issue in this case since 1972. In March of 1993, Seidenstricker Farms ("Seidenstricker") and John Auersperg executed a written lease for the term of January 1, 1993, through January 1, 1994 for the rental and farming of

Auersperg's land. The lease contained the following term:

"TO HAVE AND TO HOLD unto said TENANT from the date of January 1, 1993, until the first of January 1994, provided it satisfactory with both parties. After one party has given the other a 90 day notice in writing before the expiration of this lease which is accepted by the other party, the term of said lease shall be renewed or extended for another year under the same terms and conditions."

Halfway through the term contemplated by the written lease, Auersperg died and Seidenstricker was notified that ownership of the farm had transferred to Mrs. Doss and her sister, and then to the Dosses. Neither a renewal nor a new lease were executed. At the end of each harvest, the parties met to discuss crops. Seidenstricker continued to pay, and the Dosses continued to accept, annual rental payments. Seidenstricker farmed the land until September, 2001, when the Dosses informed Seidenstricker that the lease would terminate at the end of the year.

RULES AND ANALYSIS: On appeal, the issues are whether the circuit court clearly erred in finding (1) that the lease was properly terminated pursuant to Ark. Code Ann. § 18-16-105; and, (2) that the original lease contained a ninety-day termination provision because the lease did not address termination.

Agreements between landlord and tenant need not be in writing and may be implied from the conduct of the parties. If a holdover tenant continues to pay rent and the landlord continues to accept rent payment, then a tenancy from year to year may be created. The landlord's acceptance is considered a renewal of the prior lease for a like period and upon like terms. When a lease contains a notice of renewal provision, and the parties appear to renew without following the conditions of the lease, the parties waive the notice provision and the original lease terms will apply. Seidenstricker held over from the original lease. Since Seidenstricker continued to pay, and the Dosses continued to accept, rental payments from 1994 through 2001, a tenancy from year to year was created and the conditions of the original lease apply. Ark. Code Ann. § 18-16-105 governs oral lease agreements by owners of farmlands. The owner must give oral or written notice of termination before June 30 for the following year. Past interpretations of legislative intent indicated § 18-16-105 should be applied to

tenancies from year to year. *Lamew v. Townsend*, 147 Ark. 282, 227 S.W. 593 (1921), should not be applied to the present case. The present lease agreement explicitly contemplated the year for which the lease would have effect, whereas the *Lamew* lease contemplated the continuation of the lease for more than one year.

HOLDING AND DISPOSITION: The behavior of the parties resulted in a year-to-year tenancy. Since the Dosses did not give timely notice of termination on or before June 30, 2001, the lease was not properly terminated pursuant to § 18-16-105. The court reversed the circuit court decision and remanded the case for proceedings on damages, if any.

Imber and Brown, JJ., Dissenting.

The court wrongfully rejected the application of *Lamew*. The parties intended to allow for termination at any time during the lease term despite the common law requirement of six month's notice. If the majority determines that all of the original lease terms carry over to the orally renewed lease, then the provision that circumvents the common law to the satisfaction of both parties should apply as well.

Abstractor: Thomas Nichols, 3L

COMMENT (JCM): The statute at issue (Ark. Code Ann. § 18-16-105) was repealed in the 2007 Legislative Session and replaced by part of the Arkansas Residential Landlord Tenant Act. Evidently, the termination was unintentional and efforts are currently underway to restore the statute.

LIS PENDENS

United States v. Jewell

March 6, 2008, 538 F. Supp. 2d 1087 (E.D. Ark. 2008), 2008 U.S. Dist. LEXIS 17312

June 4, 2008, 556 F. Supp. 2d 962 (E.D. Ark. 2008), 2008 U.S. Dist. LEXIS 43838

July 23, 2008, 2008 WL 2924312 (E.D. Ark. 2008), 2008 U.S. Dist. LEXIS 59659

J. Leon Holmes, District Judge.

FACTS NO. 1: These three cases are part of a longer series involving the prosecution of defendant Barry Jewell by the United States. Jewell practiced law for several years with non-party Bobby Keith Moser. In 2005, Moser was sentenced to approximately 30 years for mail and wire fraud, money laundering, and conspiracy to commit each of those crimes. On

June 12, 2006, the United States seized three accounts it believed were directly related to proceeds associated with Moser's crimes and placed them in the Treasury Suspense Fund. The accounts and amounts seized were as follows: \$38,815 from the Jewell Law Firm Pension Trust, \$44,819 from the Legal Advantage Retirement Trust, and \$74,793 from the Jewell Law Firm Retirement Trust. The government also filed a lis pendens notice against Jewell's home, which was owned by a family trust, of which Barry and Heather Jewell were cotrustees.

On April 4, 2007, Jewell was indicted on charges of conspiring with Moser to commit mail fraud, money laundering, and tax evasion. The allegation was that Jewell took proceeds from the conspiracy and transferred those funds into accounts under his control. The indictment sought forfeiture of these funds, as well as \$1,811,490, representing the proceeds from the conspiracy to commit mail fraud. In the indictment, the United States sought forfeiture of Jewell's residence as substitute property. On April 23, 2007, pursuant to 18 U.S.C. § 982(a)(1) and (b)(1), and 21 U.S.C. § 853(e), the government sought and was issued a protective order allowing the United States to maintain the money in the Treasury Suspense Fund until adjudication.

On April 26, 2007, the United States filed a civil complaint seeking civil forfeiture of the funds in the above named trusts, pursuant to 18 U.S.C. § 981(a)(1)(A). In this civil case, Jewell filed a claim as both an individual and a trustee of the three accounts.

In the criminal case, Jewell filed a motion to vacate the protective order and to strike the lis pendens filed against his residence; in the civil case he filed a motion for summary judgment. In both motions Jewell argued that the funds are protected from forfeiture by 29 U.S.C. § 1056(d)(1), and so the court dealt with both motions in one opinion and order.

RULES AND ANALYSIS NO. 1: The first issue for both the civil and criminal cases is whether the three funded accounts are protected from forfeiture by 29 U.S.C. § 1056(d)(1), which provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Discussion of that issue is not included here, but the court ruled that the protective order was vacated, and it returned the funds to Jewell. In the civil case, Jewell's motion for summary judgment was granted.

With respect to the lis pendens, Jewell argued that his house is a substitute property that may not be restrained prior to conviction under 21 U.S.C. § 853(e). But the filing of a lis pendens does not constitute a seizure and does not interfere with an owner's right to dispose of his land, even though it may affect marketability. *See Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1 (1984). Ark. Code Ann. § 16-56-101 requires filing of a lis pendens if a lawsuit is filed that affects the title to any real estate, in order to provide constructive notice of the suit to potential purchasers or mortgagees. The filing of the lis pendens does not prohibit the Jewells from selling the property, and it does not interfere with their use or enjoyment of the property. The lis pendens is not a seizure or legal restraint.

HOLDING AND DISPOSITION NO. 1:

The motion to strike the lis pendens is denied because the constructive notice it provides does not restrain the defendant's real estate under 21 U.S.C. § 853(e) (March 6, 2008).

FACTS NO. 2: After this opinion, Barry Jewell again filed a motion for the court to order the United States government to release the lis pendens notice against his residence. In the second motion, Jewell argued that the lis pendens was improper under Arkansas law because the residence is substitute property that may be forfeited to satisfy a money judgment, but Arkansas law does not permit the use of a lis pendens in actions seeking a money judgment. The first lis pendens filed by the government stated that the subject property was a substitute asset which might be forfeited to satisfy a money judgment. After Jewell filed the motion in the instant case, the government filed a second lis pendens that stated that the real property would be forfeited if the plaintiff's proceeds were not sufficient to satisfy a judgment.

RULES AND ANALYSIS NO. 2: The issue is whether the government can use the Arkansas lis pendens statute in a criminal forfeiture proceeding in which the government seeks the forfeiture of money that represents the proceeds of criminal activity and identifies real property as substitute property to be forfeited in the event that the money cannot be recovered for one of the reasons stated in 21 U.S.C. § 853(p)(1). The Tenth Circuit has answered this question in the negative as regards the New Mexico lis pendens statute, in a well reasoned opinion. The Eighth Circuit has not decided this issue. Here, the government is seeking an in

personam order directing the forfeiture of a sum of money—this can hardly be distinguished, so far as the lis pendens statute is concerned, from a money judgment. The issue of whether the residence will be forfeited as a substitute property will only arise if Jewell is convicted, a forfeiture order is entered, and he is unable to pay the amount that he is ordered to forfeit. Only then will the court consider whether to order the forfeiture of substitute properties. Substitute properties to be forfeited under § 853(p) need not be identified until that stage because their specific identity does not matter for forfeiture purposes. Here, the government argues that its interest in substitute relates back to the time of the criminal act. The only circuit to hold that is the Fourth Circuit; the Eighth Circuit has not ruled on this issue. However, the Eighth Circuit has ruled on the nearly identical issue of statutory construction. In *United States v. Field*, the Eighth Circuit ruled that the plain language of § 853(e) authorized pretrial restraint only of property described in § 853(a), and the statute gave the court no authority to authorize pretrial restraint of substitute property described in § 853(p). 62 F.3d 246 (8th Cir. 1995). Here, the government’s interest in Jewell’s residence is in substance the same interest that the plaintiff in a civil case has in real property that may be needed to satisfy a money judgment. The government’s interest in substitute property does not vest at the time the criminal act is committed.

HOLDING AND DISPOSITION NO. 2: In a criminal forfeiture case, the government cannot file a lis pendens on real property that is substitute property described under 21 U.S.C. § 853(p). The government is ordered to remove its lis pendens.

FACTS NO. 3: In response to the second opinion, the government filed a motion for stay pending appeal of the order to remove the lis pendens, citing 28 U.S.C. § 1355(c) as authority.

RULES AND ANALYSIS NO. 3: The court noted that 28 U.S.C. § 1355(c) governs only civil forfeiture actions. This is a criminal forfeiture. Also, it applies only in cases of a final order disposing of property. Here, there has been no final order. The usual standards for whether to stay an order are 1) whether the moving party may suffer irreparable harm without a stay; 2) consideration of the hard to the opposing party or other parties if the stay is granted; 3) whether the moving party has demonstrated a substantial likelihood of success on appeal; and 4) any public interests that may be

affected. *James River Flood Ass’n v. Watt*, 680 F.2d 543 (8th Cir. 1982). The court considered each of these factors briefly and concluded that a stay would not be appropriate.

HOLDING AND DISPOSITION NO. 3: Neither statute nor case law supports the stay of an order to remove a lis pendens. The motion for stay is denied.
Abstractor: Dawn Castillo, 2L

MATERIALMEN’S LIENS

National Home Centers v. Coleman
No. CA 07-977
April 17, 2008
373 Ark. 246, ___ S.W.3d ___
2008 WL 1747108, 2008 Ark. LEXIS 258

Annabelle Clinton Imber, Associate Justice
FACTS: In August, 2004, Coleman Construction, LLC granted a note and construction mortgage to Regions Bank on property in Pulaski County, Arkansas. Within a few months, Coleman defaulted on the loan by ceasing construction on the property. On January 4, 2005, Regions filed a complaint of foreclosure and subsequently filed a lis pendens against the property. On January 25, 2005, National Home Centers, Inc., who had supplied materials to Coleman, filed a materialman’s lien against the property. In March 2005, the circuit court entered a foreclosure decree in favor of Regions. Regions subsequently purchased the foreclosed property at the Commissioner’s sale in June 2005 and resold the property to Cain Construction, Inc.

Over a year later in April 2006, National Home Centers filed a complaint in foreclosure against the property. The complaint listed as defendants Coleman Homes, LLC, the Colemans individually, Cain Construction, Inc., Newoods, Inc., and Regions Bank. Regions and Cain Construction filed a joint motion for summary judgment. The motion alleged that National Home Center’s materialman’s lien was filed after the lis pendens in Regions foreclosure action and was subject to the outcome of the previous foreclosure litigation. Therefore, National Home Centers could not bring their own foreclosure action. In response, National Home Centers filed a cross-motion for summary judgment. After reviewing the motions, the circuit court entered an order granting summary judgment in favor of Regions and Cain Construction and denied National Home Center’s summary judgment motion.

National Home Centers was awarded a default judgment against Coleman. National Home Centers filed the instant appeal.

The appeal presented the issue of whether a lis pendens filed in conjunction with a creditor's foreclosure action serves to bar the future claim of a materialman when its materialman's lien is filed after the lis pendens is filed, and the foreclosure action proceeds to a final judgment without joinder of the materialman as a party to the action.

RULES AND ANALYSIS: The issue presented on appeal was two pronged. The first prong was whether the lis pendens statute applies to a materialman. The second prong was, if the lis pendens statute does apply to a materialman, at what point does the materialman obtain an interest in the property to establish priority to other creditors?

National Home Centers asserted that the lis pendens statute does not apply to a materialman. This argument is based on the plain language of Arkansas's lis pendens statute. Ark. Code Ann. § 16-59-101. National Home Centers argued that a plain reading of the statute shows that the legislature's only intention for the lis pendens was to give notice of a pending lawsuit to either bona fide purchasers of the property or mortgagees of the property in dispute. Contrary to National Home Centers' contention, the court had previously found that a lis pendens applied to creditors who obtained an interest in property that is subject to a pending lawsuit. *Mitchell v. Federal Bank of St. Louis*, 206 Ark. 253, 174 S.W.2d 671 (1943). Because a materialman is similar to a creditor, the court found a lis pendens could apply to a materialman who obtains an interest in the property subject to a pending lawsuit.

The second prong of the issue was to determine when National Home Centers obtained an interest in the property for purposes of the lis pendens statute. National Home Centers asserted that all materialman's liens "relate back" to when material was first provided to a construction site. Ark. Code Ann. § 18-44-110(a)(1). Because the liens "relate back" National Home Centers argued its interest in the property predated the lis pendens and was therefore unaffected by the outcome of Regions foreclosure action. Also, a materialman's lien can be perfected by filing within 120 days of the last day upon which supplies are delivered to the construction site. Ark. Code Ann. §18-44-117(a)(1).

Because the lien can be perfected 120 days after delivery of the materials, National Home Centers argued that Regions should have updated its title work 120 days after the complaint was filed in order to account for any possible materialman creditors. The court found that when materialmen delivered the last supplies to a construction site, they accrue an expectant interest in the property, but that interest does not vest or become enforceable until it is perfected. Here, National Home Centers may have accrued an expectant interest in the property in question when it delivered its last supplies in December 2004, but it did not perfect its lien until 21 days after Regions lis pendens was filed. Therefore, National Home Centers did not obtain an interest in the property prior to Regions filing the lis pendens and is therefore subject to the foreclosure decree.

HOLDING AND DISPOSITION: A materialman who files a lien against property that is subject to a pending foreclosure action, but does not perfect its lien prior to the filing of the lis pendens will be deemed to have been given notice by the lis pendens and will be blocked from bringing a separate foreclosure action after the pending foreclosure action has been resolved. Affirmed.

Abstractor: J. P. Sellers, 3L

MUNICIPAL CORPORATIONS

City of Dardanelle v. City of Russellville
No. 07-195

February 28, 2008

372 Ark. 486, __S.W.3d__

2008 WL 517349, 2008 Ark. LEXIS 125

Annabelle Clinton Imber, Justice.

FACTS: Prior to the mid-1990s, City Corporation (Corporation), Russellville's wastewater treatment facility operator, discharged its sewage effluent into a nearby creek. In the mid-1990s, Corporation realized that, in order to meet the discharge requirements under its permit from the Arkansas Department of Environmental Quality (ADEQ), it would have to either make extensive improvements to the treatment facility or redirect the sewage to a larger body of water. So, in 1996, Corporation, along with the City of Russellville (Russellville), applied for a permit from ADEQ to build a pipeline that would discharge effluent directly into the Arkansas River. Because the proposed pipeline would be located downstream from the Dardanelle Dam, across the river from the Dardanelle City Park, and

across a well that provides part of the water supply for the City of Dardanelle (Dardanelle), Dardanelle recommended that the pipeline be built downstream from its city limits, which would add approximately \$6 million to the project. This additional funding was not available, so Russellville did not adopt the plan. Disagreement between the cities continued until May 10, 2002, when both city councils and Corporation's board of directors signed a "Joint Resolution," which provided that the parties "agreed with each other to cooperate in the pursuit of all avenues of funding for the proposed municipal outfall sewer line . . . to a point downstream . . . [from] Dardanelle." It "urge[d] all citizens of Yell and Pope County to work together in a united effort" to obtain requisite funding for the project. Both parties tried to obtain financing, even sending representatives to Washington. However, on March 29, 2005, Russellville ceased efforts to obtain funding and applied to the ADEQ for a permit allowing a pipeline at the original location. On May 18, 2006, ADEQ issued a draft permit, showing its intent to issue the final permit. Dardanelle then filed a complaint, alleging that the Joint Resolution was a contract that Russellville breached when it reapplied for the permit in 2005. Russellville filed a motion to dismiss, arguing that the Joint Resolution was a non-binding agreement to cooperate. The circuit court dismissed the complaint, according to Ark. R. Civ. P. 12(b)(6). Dardanelle then appealed. The Supreme Court had jurisdiction as this is a matter of substantial public interest.

RULES AND ANALYSIS: Ark. R. Civ. P. 12(b)(6) allows a circuit court to dismiss a complaint that fails to state facts upon which relief can be granted. When reviewing a circuit court's dismissal, facts alleged in the complaint are construed in a manner most favorable to the plaintiff. Ark. Code Ann. § 14-54-101 states that a municipality can enter into contracts and "associate with other municipalities for the promotion of their general welfare." A resolution is acceptable to evidence a decision of administrative business made by a municipality's city council. In Arkansas, the laws governing contracts between municipalities are the same as between individuals. See *MCQUILLAN, MUNICIPAL CORPORATIONS* §§ 29.116-29.117 (3d ed. 1999). The following are the essential elements of a contract: (1) competent parties; (2) subject matter (contract cannot be so vague as to render it unenforceable); (3) legal consideration; (4) mutual agreement; and (5) mutual obligation. *Williamson v. Sanofi Winthrop Pharmaceuticals*, 347 Ark. 89, 60 S.W.3d 428 (2001).

Furthermore, a contract that "leaves it entirely optional" as to one party's performance will not be binding on the other party. To grant relief, contract terms must be "reasonably certain" in providing a basis for determining the existence of a breach and for giving an appropriate remedy. Here, there are no limitations on either city's ability to contract via resolution, but the terms of the Joint Resolution are not reasonably certain because they do not explicitly address the parties' obligations. The Joint Resolution simply states that the parties agreed to cooperate to obtain funding. The term "cooperate" indicates nothing more than an agreement to help one another. The Joint Resolution does not state the length of time or the extent to which the parties were to work together, and it does not explain when a party is considered to have breached the agreement by not cooperating.

HOLDING AND DISPOSITION: The terms of the Joint Resolution are too vague and uncertain to establish any obligations between parties. There is no obligation in the form of mutual promises to cooperate in obtaining funding for the pipeline. The circuit court's decision to dismiss Dardanelle's complaint is affirmed.

Abstractor: Alicia A. Paladino, 2L

NUISANCE

Aviation Cadet Museum Inc. v. Hammer
No. 07-830
April 17, 2008
373 Ark. 202, __S.W.3d__
2008 WL 1747086, 2008 Ark. LEXIS 263

Jim Hannah, Judge.

FACTS: Tom and Sue Hammer own 291 acres of property in Carroll County. This land was acquired through three separate purchases over the span of five years between 1995 and 2000. The Hammers reside on the property. Tom Hammer is a licensed, instrument-rated pilot who builds and flies RC planes. An RC plane generally weighs up to fifty-five pounds, with a wingspan of up to ten feet, and flies at altitudes of 50 to 400 at speeds of up to eighty miles an hour. Starting after the first purchase of property, Mr. Hammer began flying RC planes on his property with a flying club. Because of nearby County Road 207, Mr. Hammer moved the flight path of the RC planes a few hundred feet north to its current location. Mr. Hammer thought the previous flight path posed a danger to the road, and

consequently to motorists. In 2000, Mr. Hammer built two RC runways and a pavilion on his property.

Errol Severe incorporated Aviation Cadet Museum (ACM) in June 2001. ACM originally consisted of a nonprofit corporation that operated a museum commemorating military aviators. There are several buildings and aircraft on site to date. Mr. Severe knew of the RC plane activity on the Hammer property when he made the ACM purchase. Shortly after the purchase of property in 2001 to build the museum, Mr. Severe contacted the Federal Aviation Administration (FAA) to authorize the activation of a privately owned public-use airport on the property currently in contention. The FAA had no objection to the granting of the airport. The runway to the airport is approximately 1900 feet long, with a flight path directly over the Hammer RC flying area. The south edge is ten feet from County Road 207 and thirty-five feet from the Hammer property. The ACM airfield has no landing lights delineating the field and no navigation system. The airfield does not have a fixed base operator. Approximately twenty-four visiting aircraft use the runway each year. Other military aircraft fly by the property at low altitudes without landing. The landing approach at ACM requires planes to fly at extremely low altitudes over the Hammer property.

In November 2005, the Hammers filed suit to enjoin ACM from using its property as an airport. The Hammers alleged ACM operated its airfield in a manner that resulted in overflights and low-level buzzing of the Hammer property at substantially low altitudes. The Hammers argued this activity constituted a nuisance. They also contended the airport violated their surface rights to the enjoyment of their property according to Ark. Code Ann. § 27-116-102. The Hammers also sought damages.

ACM counterclaimed and alleged the Hammer's operation of RC planes was hazardous to pilots attempting to land full-scale planes at ACM's airport. AMC sought to enjoin the Hammers from flying RC planes on their property. ACM also sought damages. Amended complaints were filed on both sides that excluded damages. The Hammers also asserted in conjunction with the nuisance claim that the actions of ACM constituted a common law trespass.

The circuit court entered an order enjoining ACM from using its airport for landing and departing

planes until it could prove its operations did not constitute a nuisance to the Hammers. Also, the circuit court dismissed ACM's counterclaim.

RULES AND ANALYSIS: On appeal, the sole issue was whether the circuit court erred in granting an injunction enjoining ACM from using its airport to land and depart aircraft. The court reviews injunctive matters de novo. The decision to grant or deny an injunction is based on the discretion of the trial judge. The court will not reverse the circuit court's ruling unless there has been an abuse of discretion.

Nuisance is defined as conduct by one landowner that unreasonably interferes with the use and enjoyment of the lands of another and includes conduct on property that disturbs the peaceful, quiet and undisturbed use of nearby property. *Goforth v. Smith*, 338 Ark. 65, 991 S.W.2d 579 (1999). In order to constitute nuisance, an intrusion must result in physical harm, which must be proven to be certain, substantial and beyond speculation. *Southeast Ark. Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993). A mere fear of apprehension of danger, without more, is not sufficient to warrant injunctive relief for the abatement of a nuisance. *Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987). It is only the unreasonable use or conduct by one landowner which results in unwarranted interference with his neighbor that constitutes a nuisance. *Id.*

The findings of a trial judge as to the existence of a nuisance will not be overturned unless they are found to be a preponderance of the evidence. The circuit court court's findings are not clearly against the preponderance of the evidence. Evidence revealed ACM's operation created a risk of serious harm to persons on the Hammer property and to motorists driving on County Road 207. ACM contends it has the right to lawfully operate its airport pursuant to § 27-116-102. The statute makes flight lawful, except in situations where flights constitute a nuisance, trespass or otherwise pose a danger to the ground. Here, the planes flew at an altitude low enough to interfere with the then-existing use of the Hammers property and posed a danger to the land beneath. Therefore, the statute does not allow the airport operations as they functioned.

HOLDING AND DISPOSITION: The circuit court did not abuse its discretion in issuing an injunction

to enjoin ACM from using its airfield for the purposes of allowing airplanes to land and depart. Affirmed.

Abstractor: Patrick Kelley, 2L

PLANNING & ZONING

City of Fort Smith, Arkansas v. McCutchen

No. 07-864

March 6, 2008

372 Ark. 471, ___ S.W.3d ___

2008 WL 598157, 2008 Ark. LEXIS 140

Donald L. Corbin, Associate Justice.

FACTS: Appellant, City of Fort Smith, Arkansas, appealed an order from the Sebastian County Circuit Court granting appellee, Dan McCutchen, a variance from a setback requirement contained in the Fort Smith City ordinances. McCutchen owns real property in Fort Smith, Arkansas and his home is located on that same property. In late 1998 or early 1999 Quentin McCutchen, his son, built a carport on the property. In 2003, a Fort Smith city inspector told McCutchen that the carport was not in compliance with Fort Smith setback requirements. Specifically, the carport was constructed in violation of a 30' setback requirement. McCutchen filed a variance request with the Fort Smith Board of Zoning Adjustment (BZA) to allow the carport to remain at its current 7'11" setback. On April 12, 2005, the Fort Smith BZA denied McCutchen's request noting that no hardship was demonstrated as required by Arkansas statute and city ordinance. At this same hearing, the BZA noted that McCutchen had filed an identical application in 2004 which had been denied. McCutchen had already appealed the 2004 denial to circuit court and the circuit court dismissed the appeal. McCutchen again appealed the 2005 decision to the circuit court and requested a jury trial on the matter, pursuant to Ark. Code Ann. § 14-56-425. On March 22, 2007, Fort Smith filed a motion requesting a judicial determination that § 14-56-425 was unconstitutional or, in the alternative, a judicial determination that judicial review of this action was limited to whether the BZA abused its discretion. A hearing was held on April 13, 2007 in which Fort Smith's motion was denied and the court noted that the Arkansas Supreme Court had previously held that the section was constitutional. An order was entered on April 23, 2007, reflecting that ruling and noting that the constitutionality of the statute in question has been

upheld on multiple occasions, including a challenge that addressed the same separation of powers issue put forth by Fort Smith in the instant case. After a de novo jury trial on the matter, a jury found in McCutchen's favor and granted him a variance from the setback requirement. Fort Smith appealed this decision.

RULES AND ANALYSIS: On appeal, the issue was whether a de novo trial on appeal of a BZA determination is constitutional. An administrative agency's action on zoning regulation is properly reviewed de novo where the action was not an enactment but an application of regulations or existing ordinances. Fort Smith argued that § 14-56-425 is unconstitutional because it permits a de novo trial on appeal of a legislative determination by the BZA. Fort Smith proposed that the court follow *Goodall v. Williams*, 271 Ark. 354, 609 S.W.2d 25 (1980), and determine that de novo review of a BZA determination violates the separation of powers doctrine because it permits a jury review of a variance application with no deference to the BZA decision. Fort Smith asserted that a BZA exercises legislative discretion when it grants or denies a variance.

McCutchen argued that the city waived any right to claim that de novo review is unconstitutional in this situation and was estopped from asserting such a claim. His argument was premised on the fact that Fort Smith's ordinance provides for a de novo review in the trial court so its attempt to suggest that its own ordinance was invalid is inconsistent with its earlier position taken by enacting the ordinance and is thus precluded under the doctrine of judicial estoppel.

The court first found that McCutchen's claim as to waiver was without merit. Waiver is the voluntary abandonment or surrender by a capable person of a right known to him to exist, with the intent of forever depriving him of the benefits of the right, and it may occur when one, with full knowledge of the material facts, does something which is inconsistent with the right or his intention to rely upon it. *Cochran v. Bentley*, 369 Ark. 159, --- S.W.3d --- (2007). The court ruled that waiver was simply not applicable in this case and that it could not address the judicial estoppel argument because it was not preserved for appeal.

The court then addressed the constitutionality of the Ark. Code Ann. §14-56-425. Statutes are always

presumed to be constitutional and the burden of proving otherwise is upon the party challenging the statute. *Parker v. BancorpSouth Bank*, 369 Ark. 300, --- S.W.3d --- (2007). A statute will be construed as constitutional if it is possible to do so. *Id.* The court then affirmed that de novo review of a legislative act is unconstitutional, see *City of Lowell v. M&N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996), but stated that it is proper to conduct a de novo review of a final action by an agency acting in an administrative or quasi-judicial mode. *City of Jonesboro v. Vuncannon*, 310 Ark. 366, 837 S.W.2d 286 (1992). Appeals to the circuit court from a BZA determination are properly reviewed de novo because a BZA is an administrative agency and a BZA does not have the power to legislate.

This holding is still consistent with *Goodall* because the court's determination in that case concerning instances where de novo review is appropriate turned on the character and legal status of the interests affected by administrative action. [NOTE: In *Goodall*, the court held unconstitutional a statute which authorized de novo review of decisions by the Alcoholic Beverage Control Board to grant or deny liquor licenses.] If the interests affected by administrative action are constitutionally or statutorily preserved or preserved by private agreement, and enforcement is a matter of right, de novo review by the judiciary of administrative decisions altering these interests is a matter of right. Where the interests are less fixed and their existence primarily depends on executive or legislative wisdom, de novo review is inappropriate and judicial review is limited to whether these interests have been capriciously or arbitrarily affected. In *McCammon v. Boyer*, 285 Ark. 288, 686 S.W.2d 421 (1985), the court stated that a Board of Adjustment has no power to legislate and that individual property rights are secured by several provisions of our constitutions, restricted by health and welfare doctrines. The court further elaborated that if de novo review of actions by such administrative boards were not allowed, a board or commission might act arbitrarily, unreasonably, or conceal the real facts and protect its actions from review. Therefore, a de novo hearing on appeal is proper when the appeal is from actions taken by administrative boards, commissions and agencies exercising adjudicatory or quasi judicial functions.

HOLDING AND DISPOSITION: The Forth Smith BZA was acting in an adjudicatory capacity, not a legislative capacity, when it denied McCutchen's

variance request because it was enforcing an already-established ordinance. Therefore, Fort Smith's argument that Ark. Code Ann. § 14-56-425 is a violation of the separation of powers doctrine and is unconstitutional must be rejected. Affirmed.

Abstractor: Jaletta Long Smith, 2L

Comment (JCM): Without questioning the court's decision, one has to wonder if this law is entirely appropriate. Presumably, the reason that a city appoints a board of adjustments or a planning commission is to apply the city codes and make educated, consistent decisions. At least in theory, members of a board of adjustments or planning commission should have specialized knowledge, experience or expertise that helps them make good decisions. Ark. Code Ann. §14-14-56-425 essentially throws this specialized knowledge, experience and expertise out the window by subjecting the decisions to de novo review by a jury. In many instances, the jury members may not even be residents of the city where the issue arose. Why even bother with a board of adjustments or planning commission if every decision can be appealed to twelve random people?

Also, another issue not fully addressed by this case is whether a de novo jury review is appropriate when the appeal is taken from a city council's review of the board of adjustment or planning commission decision. For instance, in many cities, if you do not like the decision of the board of adjustment or planning commission, you can appeal the decision to the city council. Is the city council's decision reviewable de novo by a jury?

RESTRICTIVE COVENANTS

Royal Oaks Vista L.L.C. v. Maddox
No. 07-542

January 17, 2008

372 Ark. 119, ___ S.W.3d ___
2008 WL 151547, 2008 Ark. LEXIS 28

Jim Hannah, Chief Justice.

FACTS: In January 1972, a plat and bill of assurance were filed for Royal Oaks Vista subdivision located in Cleburne County. The plat laid out 21 lots and streets for the subdivision. The bill of assurances provided, inter alia, that all the lots were to be residential and that no lots were to be resubdivided. In 1987, Lynn Rice, appellee, acquired lot 1 of the subdivision. In April 1993, Jean and James Maddox, appellees, purchased lots 2-4 in the subdivision. Royal Oaks Vista (ROV) acquired the remaining lots

(5 through 21) by a deed dated August 12, 2004. On August 18, 2004, ROV filed a replat of the subdivision and an amended bill of assurance for the new subdivision. The replat created lots 7 through 18 and lot 56 from lots 5 through 21 of the original subdivision.

While ROV was preparing the replat and new bill of assurance for the subdivision, it continued with development. ROV sold four lots, including replatted lot 8, which was sold to David Tindall. Tindall erected a house that was later conveyed to Mary and Gary Yeager, appellees. Appellees filed a complaint seeking injunctive relief and damages against ROV on September 20, 2005, asserting that the replat and new bill of assurances were in violation of the original bill of assurances for the subdivision. ROV asserted the affirmative defenses of laches, waiver, and estoppel, and filed a counterclaim for declaratory relief, asserting that the original bill of assurance was an unreasonable restraint on alienation and violated the Rule Against Perpetuities.

The circuit court found that the replat was in violation of the original bill of assurances. Additionally, the circuit court found that the defense of laches did not apply, the original plat was not an unreasonable restraint on alienation, and the Rule Against Perpetuities was not violated. The court granted the request for an injunction and ROV was ordered to remove any structures built in violation of the restrictive covenants. The court ordered that the original bill of assurances would control the subdivision. ROV appealed the circuit court's decision to the Arkansas Court of Appeals which affirmed the lower court's decision in an unpublished decision. ROV then petitioned the Supreme Court for review.

RULES AND ANALYSIS: On appeal, the sole issue is the interpretation of a protective or restrictive covenant on the use of land. Restrictions upon the use of land are not favored in the law. A restrictive covenant will be strictly construed against limitations on the free use of land. Any restriction on the use of land must be clearly apparent in the language of the asserted covenant. If the language of the covenant is clear and unambiguous, application of the restriction will be governed by the court's general rules of interpretation – that the intent of the parties governs as disclosed by the plain language of the restriction. Here, ROV did not challenge the finding that the replat and new bill of

assurances were an “abject violation” of the original plat and bill of assurances. Instead, ROV contended that laches barred the appellees' claims. However, the circuit court found that when the appellees first learned of ROV's intent to replat and resubdivide the subdivision they vigorously protested the petition to abandon streets before the Greers Ferry Council. Additionally, much of the development was completed by the time the appellees learned of the plans. The circuit court's findings were not clearly erroneous in finding that the doctrine of laches was inapplicable to this case. The circuit also found that the temporary septic easement across lot 56 violated the restrictive covenant. On appeal, the court noted that the plain language of the restrictive covenant limited the use of each lot to a single family dwelling, and agreed with the circuit court's ruling that to use a lot for a community sewage system would violate the restrictive covenant. *Hays v. Watson*, 250 Ark. 589, 466 S.W.2d 272 (1971). Finally, the restrictive covenant did not constitute an unreasonable restraint on alienation because ROV could not show that the covenant requiring residential use only was oppressive and equitable due to any change in circumstances.

HOLDING AND DISPOSITION: A developer's replat and new bill of assurances violated an original restrictive covenant that restricted lots to residential use only and prohibited resubdivision. Affirmed. Abstractor: Amy Szczepanik Tracy, 2L

SETTLEMENT AGREEMENTS

Roberts v. Green Bay Packaging, Inc.

No. CA 07-60

January 23, 2008

101 Ark. App. 160, ___ S.W.3d ___

2008 WL 186156, 2008 Ark. App. LEXIS 43

D.P. Marshall, Jr., Judge.

FACTS: The parties to this action own adjoining tracts of land in rural Van Buren County. Global Road, which crosses the Robertses' property, is used by the parties, and the Robertses filed this suit alleging that Mr. Rhodes, Green Bay and a John Doe had destroyed trees in the process of widening the road. About a week before trial, the Robertses' attorney sent all counsel a letter, dated July 1, 2005, proposing settlement terms. The proposal offered Green Bay and Mr. Rhodes a thirty foot easement pursuant to a survey, gave the Robertses full access to Global Road with an easement across Green Bay's

property to access State Highway 16, and expressly prohibited any interference with the Robertses' petition to remove Global Road from the county-road system. The proposal also contained a provision to place gates on the road and a provision for Mrs. Rhodes, not a party to the suit, to agree to the settlement in writing. The circuit court then removed the case from the trial docket. Subsequently, the parties could not agree whether a settlement had actually been reached. After the trial date had passed, a survey was done and the lawyers exchanged letters regarding Green Bay's desire for an easement wider than thirty feet at some points along the road. A few months later, Mr. Rhodes became frustrated with the delay and moved to enforce the proposed settlement. Green Bay joined the motion to enforce. The Robertses opposed the motion, stating that some, but not all issues, had been resolved prior to trial and no final settlement had been reached. The Robertses then submitted a proposed decree containing provisions similar to those found in the July 1 letter. Counsel for Mr. Rhodes rejected the letter outright while Green Bay's counsel drafted a decree which differed in many respects from the July 1 letter. The circuit court held a hearing on the motion to enforce. The attorneys disagreed as to whether a settlement had been reached. No testimony was heard, and over the Robertses' objections, the court received the July 1 letter, correspondence between the parties, and the proposed decrees into evidence. The Robertses argued that their admission was contrary to Rule 408 which bars admission of evidence of settlement negotiations and that the other parties had refused to disclose the proposed evidence prior to the hearing. The circuit court concluded that the parties had settled the litigation and entered an "Agreed Decree," which dismissed all claims and counterclaims against all the parties.

RULES AND ANALYSIS: There are two issues on appeal. First, the court examined whether the district court abused its discretion by admitting evidence of the parties' settlement negotiations. Arkansas Rule of Evidence 408 prohibits using offers of compromise to prove liability of the invalidity of an amount or claim. *McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 749 S.W.2d 653 (1988). However, the Rule allows evidence of settlement negotiations to prove other things. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). Here, the evidence was admissible, as it was offered to clarify whether the parties had agreed to settle, not to assess liability. The appellate court found no reversible error

regarding opposing counsel's failure to inform the Robertses of the planned exhibits before the hearing.

Second, the court determined whether the parties had reached an enforceable settlement agreement. Our law favors and encourages settlement negotiations. *Williams v. Davis*, 9 Ark. App. 323, 659 S.W.2d 514 (1983). But, like any other contract, the terms of a settlement agreement must be definitely agreed upon and reasonably certain. *Key v. Coryell*, 86 Ark. App. 334, 185 S.W.3d 98 (2004). Mutual agreement, as evidenced by objective indicators, is essential. *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003). Here, the record demonstrated no objective evidence that the parties mutually assented to all material settlement terms in the "Agreed Decree." In this case, Mr. Rhodes's and Green Bay's counsel maintained that a settlement agreement had been reached, while the Robertses' counsel denied this. "Lawyers' statements that a settlement exists. . . are insufficient in the face of denials by opposing counsel and a lack of testimonial or other competent evidence." *Williams*. Although Green Bay and Mr. Rhodes argued that they accepted the July 1 letter, Mr. Rhodes unequivocally rejected the Robertses' proposed decree based on the July 1 letter. Moreover, the "Agreed Decree" more closely resembled the proposed decree written by Green Bay's counsel, which added some provisions to the Robertses' letter and left out others. In light of this evidence, the court found it clear that the element of mutual agreement was not present in the settlement agreement.

HOLDING AND DISPOSITION: The circuit court did not abuse its discretion in admitting evidence of the parties settlement negotiations, as they were offered on the issue of settlement and not liability. Mutual agreement is essential to forming an enforceable settlement agreement. Where, as here, the evidence indicates that the parties did not mutually agree to the court's settlement agreement, the agreement must be set aside. Reversed and remanded.

Abstractor: Jennifer D. Rossmeier, 2L

SOVEREIGN IMMUNITY

City of Alexander v. Doss

No. CA 07-1122

May 7, 2008

102 Ark. App. 232, ___ S.W.3d ___

2008 WL 2153691, Ark. App. LEXIS 380

Josephine L. Hart, Judge.

FACTS: Doss was the owner of a restaurant in Alexander that is bordered on two sides by storm-water drainage ditches. The City of Alexander (the City) maintained these ditches; however, Doss usually mowed them. Doss sent the City bills for his mowing services, which the City refused to pay. Additionally, after several years of failed attempts to have the City put culverts in the ditches, Doss constructed a retaining wall entirely on his property to stop the erosion of his land by the water flowing in the ditches. On May 16, 2006, Doss sued the City for \$30,000. He claimed \$6,180 of the \$30,000 for the construction of the retaining wall, another \$19,500 for "cleaning up junk piles in the alley," and the remainder for exclusively maintaining the ditch for years. The City argued that Doss was not entitled to compensation under the doctrine of unjust enrichment because the City did not receive anything of value because the wall was built on private property. Additionally, the City argues that it was immune from suit under Arkansas's sovereign immunity statute, Ark. Code Ann. § 21-9-301.

The trial court relied on *City of Crossett v. Riles*, 261 Ark. 522, 549 S.W.2d 800 (1977), to dismiss Doss's claims for the alley clean-up and the mowing services. The court did, however, award damages in the amount of \$6,180 for the construction of the retaining wall. The City then filed a notice of appeal arguing that the trial court erred in finding that the City was not entitled to immunity under § 21-9-301, that the trial court erred in not finding that Doss was a volunteer when he built a retaining wall on his property, and that there is insufficient evidence to support the \$6,190 judgment given to Doss.

RULES AND ANALYSIS: On appeal, the main issue was whether Doss's suit was in equity for unjust enrichment, against which the City is not immune, or a cause of action for a tort, against which the City is immune by statute. By following the reasoning of the California Court of Appeals in *Janis v. California State Lottery Commission*, 80 Cal. Rptr. 2d

549 (Cal. App. Ct. 1998), where the court said the that court should look to the nature of the relief sought, not merely at what the plaintiff calls the cause of action, the court held that unjust enrichment was not the cause of action. Unjust enrichment requires that one party received something of value, to which he or she is not entitled, and which he or she must restore. *El Paso Prod. Co. v. Blanchard*, 371 Ark. 634 (2007). Here the City did not receive anything of value because the wall was exclusively on Doss's property; additionally, unjust enrichment could not arise from the fact that Doss's building of the retaining wall saved the expenditure of city funds because the City had no duty to maintain the ditch or indemnify adjoining landowners for problems arising from water being carried by the ditch. Doss's suit was based on either negligent maintenance of the ditch or trespass. Because both of the potential causes of action were based in tort, Doss was barred from bringing suit under § 21-9-301. Finally, the court stated Doss's situation was not the type of emergency needed to satisfy the black letter law from the Restatement of Restitution § 115 (1936), which states that "recovery for performance of another person's duty to the public is limited to those situations where the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety."

HOLDING AND DISPOSITION: The trial court's award of damages to Doss is reversed, and the case is dismissed, because the cause of action sounded in tort and the City is immune from suit under section 21-9-301. Furthermore, the City was not unjustly enriched by Doss's building of the retaining wall because the wall was built on private property.

Abstractor: Emily Zehm, 2L

TAX SALES

Citifinancial Mortgage Co., Inc. v. Matthews

No. 07-431

January 17, 2008

372 Ark. 167, ___ S.W.3d ___

2008 WL 151608, 2008 Ark. LEXIS 26

Paul E. Danielson, Justice.

FACTS: Kenneth and Desonia Matthews owned real property in Crittenden County, Arkansas, subject to a mortgage held by Associates Home Equity Services, Inc. (Associates). The Matthews failed to pay taxes on the property for the tax years 1998 and 1999. On October 11, 2001, the Arkansas Commissioner of State Lands ("Commissioner")

notified the Matthews by certified mail of the delinquent status of the property. The notice informed the Matthews that the property would be subject to a public sale on October 15, 2003. The notice listed Associates as a lienholder on the property. In addition, notice of public sale was published in the local newspaper, *The Evening Times*. The property was offered for sale at public auction on the scheduled date. No bids were made and the property was not sold, so the property became available for private sale through the Commissioner's office. On February 1, 2004, Jack and Sue McClain made an offer to purchase the property. On March 23, 2004, the Commissioner sent notice of the forthcoming sale to the Matthews, the current resident, the Department of Housing and Urban Development, and Associates, currently known as Citifinancial, advising that "[i]f you have an interest in the property, in order to avoid its sale and additional costs, you should contact the Records Department of this office immediately for a petition to redeem. . . ." None of the parties receiving notice took any action to redeem the property or pay any of the taxes; therefore, a deed conveying the property to the McClains was executed on May 27, 2004, sixty-five days after notice had been sent. On January 3, 2005, Citifinancial commenced an action seeking to set aside the negotiated sale because it had not been provided notice by certified mail of the public sale. Citifinancial also alleged that the Matthews had defaulted on their loan, thereby entitling Citifinancial to foreclosure on the mortgage it held on the property. The Commissioner and the McClains filed timely answers. Citifinancial twice moved for summary judgment; both motions were denied by the trial court. The McClains' motion for summary judgment, however, was granted by the court on their argument that Citifinancial had received proper notice. Citifinancial timely appealed the ruling of the trial court, and the Arkansas Court of Appeals certified the case to the Arkansas Supreme Court on November 28, 2007.

RULES AND ANALYSIS: Citifinancial appealed the decision of the trial court to grant summary judgment to the McClains, first arguing that it had not received proper notice under the Arkansas statute because it had not received notice of the first sale by certified mail. Summary judgment is appropriate when evidentiary items presented by the moving party in support of its motion leave no material fact unanswered. Evidence is viewed in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences

against the moving party. Strict compliance with the requirement of notice of the tax sales themselves is required before an owner can be deprived of his or her property. *Tsann Kuen Enters. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003). The court reasoned that the Arkansas statute requiring notice prior to Commissioner's sale "does not make a distinction between a sale by a public bid and a negotiated sale," nor does the statute prescribe a "two-step process requiring two separate notices." Ark. Code Ann. § 26-37-301. Proper notice of the private, negotiated sale, which Citifinancial received more than sixty days prior to the sale, was sufficient under the statute.

Next, Citifinancial contended that it had been denied due process of law, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950). In *Mullane*, the Court held that, with regard to taking of property, notice by newspaper publication is not sufficient and fails to satisfy due process of law when the whereabouts of an interested person can with due diligence be ascertained. Citifinancial also argued for application of a case recently decided by the United States Supreme Court wherein the Court ruled that "[taking] additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered" is required to satisfy property owners' due process rights under the Fourteenth Amendment. *Flowers v. Jones*, 547 U.S. 220, 126 S. Ct. 1708 (2006). The cited cases are not analogous to the instant case. Here, no property interests were lost upon failure to provide proper notice prior to sale; rather, actual notice of the sale was given before any sale was completed.

Finally, Citifinancial asserted that it had inadequate time to act to protect its interests when it did not receive notice of the public sale. While the statute does provide a time line regarding the sale of the property, requiring that the sale date "shall be no earlier than one (1) year after the land is certified to the Commissioner of State Lands," the statute makes no provision for a time line as to the notice requirement, except as to property owners, who are guaranteed sixty days' notice prior to a sale. Ark. Code Ann. § 26-37-301.

HOLDING AND DISPOSITION: Actual notice to an interested party of a negotiated tax sale prior to completion of said sale is sufficient to satisfy the notice requirements of Arkansas's notice statute. Ark. Code Ann. § 26-37-301. The statute does not prescribe a two-part scheme requiring first a public

sale and then a private one, with notice to owners and interested parties required prior to each sale attempt, nor does it establish a time line for notice, except that property owners are guaranteed actual notice six months prior to the sale. Affirmed.

Abstractor: Susan G. ("Susie") Cross, 3L

RWR Properties, Inc. v. Mid-State Trust VIII
No. CA 07-992
April 9, 2008
102 Ark. App. 115, ___ S.W.3d ___
2008 WL 944166, 2008 Ark. App. LEXIS 282

D.P. Marshall, Jr., Judge.

FACTS: Mr. and Mrs. George Thomas borrowed money to buy a home and two lots in Jefferson County. They gave a mortgage on the realty to Jim Walter Homes, Inc. to secure their note. Their mortgage was assigned many times. The Thomases did not pay their real estate taxes on lot 2. In October 2002, that lot was certified to the Commissioner of State Lands pursuant to Ark. Code Ann. § 26-37-101 (Repl. 1997) as tax-delinquent land. At that time, First Union National Bank, Trustee, was the mortgage holder of record. The Thomases later failed to pay their note on the property. When the Thomases defaulted, Mid-State Trust VIII and Walter Mortgage Company owned the mortgage. They began foreclosure proceedings. Walter Mortgage bought the home and lots at the foreclosure sale for \$64,000.00, received a Commissioner's deed, and later sold the property. Walter Mortgage took a mortgage from the buyer, and after having been assigned several times, that mortgage is now held by the appellee, Mid-State. Almost a year after the foreclosure proceedings ended, the Commissioner of State Lands sold lot 2 to RWR for \$6,000.00, which covered back taxes, penalties, interest, and fees. Pursuant to Ark. Code Ann. § 26-37-301 (Repl. 1997), the Commissioner gave notice of the sale and the right to redeem to Mr. and Mrs. Thomas, because they owned the property when it was certified as tax delinquent. The governing statute also made First Union an interested party entitled to notice because First Union had held a recorded interest in the property at the time of certification. Ark. Code Ann. §§ 26-37-301(a)(1) & (2) and (c). The Commissioner failed to notify First Union.

RWR and Mid-State agreed on the material facts of the case. On those facts, the circuit court entered summary judgment for Mid-State and voided RWR's tax deed due to the failure of the Commissioner of

State Lands to give notice to a prior mortgagee, First Union, that the land was about to be sold to pay the delinquent taxes and could be redeemed. RWR appealed.

RULES AND ANALYSIS: The Commissioner of State Lands must comply strictly with the statute's notice requirements. *Sanders v. Ryles*, 318 Ark. 418, 885 S.W.2d 888 (1994). Beyond the statute, the Due Process Clause protects a mortgagee's right to notice of a tax sale so that the mortgagee has the opportunity to protect its interest in the real property. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). The Commissioner acknowledged and the parties agreed that First Union received no notice of the sale, so the circuit court correctly voided the Commissioner's limited warranty deed to RWR. RWR put forth several arguments supporting the notion that the foreclosure in Mid-State's chain of title requires reversal of the circuit court. They first argued that First Union was not a necessary party under Rule of Civil Procedure 19. As a mortgage holder at the time of certification, First Union had the right to notice of the tax sale. The right was not personal, but under the statute it was a function of the interest in realty. *Price v. Williams*, 179 Ark. 12, 13 S.W.2d 822 (1929). The court held that whenever First Union assigned the mortgage of lot 2, it passed all the rights it had to the assignee. RWR's second argument, its core argument, was that Mid-State lacked the standing necessary to pursue the no-notice argument because Mid-State held title through the foreclosure and resulting deed. RWR argued that the foreclosure proceeding would have terminated the original mortgage and any successor claims. If this were true, then the deed that resulted from the foreclosure created a new and independent chain of title. The court held that the foreclosure did not create a new chain of title unrelated to the prior interest in property. Instead, the court said that the purchaser at a foreclosure sale "stepped into the shoes of the mortgagee" and was entitled to all the rights the mortgagee had under the mortgage. *Robb v. Hoffman*, 178 Ark. 1172, 14 S.W.2d 222 (1929). The principle in *Robb* was the governing legal principle whether it subjected the purchaser's interest to a prior mortgage or it vested in the purchaser a right of a predecessor mortgagee to notice prior to a tax sale. Mid-State's challenge to RWR's tax deed was essentially a suit to redeem. *McAllister v. Wright*, 197 Ark. 1156, 127 S.W.2d 645 (1939). Either the current owner, Ms. Hicks, or the current mortgagee, Mid-State, had a sufficient interest in lot 2 to pursue redemption. *Woodward v. Campbell*, 39 Ark. 580, 584

(1882). When Hicks and Mid-State acquired an interest in the property through purchase at the foreclosure sale, they gained the right that First Union would have had to challenge the tax sale based on the Commissioner of State Land's failure to give notice. RWR's third and final argument was that Mid-State was collaterally estopped from asserting the no-notice claims. According to RWR, because the Commissioner of State Lands was not party to the foreclosure action and ownership litigation had occurred at the foreclosure action without the notice issue being raised Mid-State would be barred from asserting the issue in the circuit court. The Court of Appeals said that the argument confused claim preclusion and issue preclusion; the former barring relitigation of issues that could be raised but were not and the latter barring issues actually raised and decided. *John Cheeseman Trucking, Inc. v. Pinson*, 313 Ark. 632, 635-36, 855 S.W.2d 941, 943 (1993). The elements of collateral estoppel simply were not present in the record. Under RWR's preclusion argument, if the notice issue was not argued at the foreclosure action, then there could be no collateral estoppel issue in the subsequent action.

HOLDING AND DISPOSITION: When a predecessor in title has a right to notice that he or she may redeem at a tax sale for payment of delinquent taxes, that right passes to any subsequent purchasers at the foreclosure sale. The chain of title was not destroyed by foreclosure but instead passed to the purchaser all rights that the previous mortgagee had under the mortgage. Affirmed.

Abstractor: Jeremy H. Yarbrough, 2L

NOTE: On September 4, the Supreme Court denied review of this case.

TAXES, STATUTES OF LIMITATION

**Wilkins & Associates, Inc. v. Vimy Ridge
Municipal Water Imp. Dist.**

No. 07-690

May 29, 2008

373 Ark. 580, __ S.W.3d __

2008 WL 2205279, 2008 Ark. LEXIS 376

Jim Gunter, Justice.

FACTS: Wilkins & Associates (Wilkins) did not pay improvement district assessments for the years 2001, 2002 and 2003 to the Vimy Ridge Municipal Water Improvement District (Vimy Ridge). In 2004, Vimy

Ridge filed a complaint for foreclosure against Wilkins for nonpayment.

Vimy Ridge filed a motion for summary judgment. On January 6, 2006, at the hearing held on the motion for summary judgment, Wilkins argued that the foreclosure complaint filed on October 1, 2004, was barred by the three-year statute of limitations under Ark. Code Ann § 14-86-1208. Wilkins asserted that pursuant to § 14-86-1208, special improvement taxes are due on March 1, and are considered delinquent ninety days after that date, i.e., June 1. Wilkins argued that the complaint for the 2001 taxes should be barred by the statute of limitations because it was not filed by June 1, 2004.

The circuit court ruled that Ark. Code Ann. § 26-35-501 includes special district taxes and that the 2001 taxes were not delinquent until after October 10, 2004. The circuit court ruled that the foreclosure complaint was timely and granted Vimy Ridge's motion for summary judgment. Wilkins appealed, arguing that the circuit court erred in granting Vimy Ridge summary judgment because the statute of limitations had expired with respect to the special improvement district assessment for 2001.

RULES AND ANALYSIS: The sole issue on appeal was to determine when the three-year statute of limitations began to run. Ark. Code Ann. § 26-36-201(a), which fixes October 10 as the dates all unpaid taxes become delinquent, is not applicable to the improvement district's special taxes at issue. Municipal improvement districts constitute a separate and distinct type of district than that of counties, municipal corporations, and school districts. *Vimy Ridge v. Ryles*, No. 07-1262, 2008 WL 1970920, (Ark. May 2, 2008) (citing *Quapaw Central Business Improvement Dist. v. Bond-Kilman, Inc.*, 315 Ark. 703, 706, 870 S.W.2d 390,391-92 (1994)).

[NOTE: *Vimy Ridge v. Ryles* is also abstracted in this issue.] The general tax provisions only apply to municipal improvement district taxes if the district has specifically adopted the installment scheme by ordinance pursuant to Ark. Ann. § 14-90-801(b)(2). Without this adoption, and without specifying the date the special taxes are delinquent, § 14-86-1204, the statute that applicable to delinquent special improvement taxes, applies and therefore the delinquency date is ninety days after the special taxes are due.

Little Rock ordinance 15-513 specifies that special taxes are to be collected annually with the first

installment of general taxes, but the Vimy Ridge district did not adopt the subsequent quarterly installment provisions for general taxes under Title 26, which may be adopted for improvement districts in accordance with § 14-90-801(b)(2). *Vimy Ridge*, 2008 WL 1970920. Because the Little Rock ordinance specifically states that the special district taxes are to be collected annually, with the first installment of general taxes, and § 26-35-501(a) states that the first installment of general taxes “shall be payable on and from the third Monday in February and including the third Monday in April,” the three-year statute of limitations for the taxes in question began to run ninety days after the third Monday in April, 2001. *Id.* Therefore, the statute of limitations barred Vimy Ridge’s foreclosure action for the 2001 delinquent improvement district taxes.

HOLDING AND DISPOSITION: If a municipal improvement district tax does not adopt the general tax installment scheme by ordinance pursuant to Ark. Ann. § 14-90-801(b)(2) (Repl. 1998) and does not specify the date that the special taxes are delinquent, § 14-86-1204, the statute applicable to delinquent special improvement taxes, applies. Therefore the delinquency date is ninety days after the special taxes are due. The Supreme Court reversed the decision of the circuit court.

Abstractor: Nicole Daye, 2L

Vimy Ridge Mun. Water Imp. Dist. v. Ryles
No. CA 07-1262
May 8, 2008
No. 07-1262
373 Ark. 366, ___ S.W.3d ___
2008 WL 1970920, 2008 Ark. LEXIS 314

Tom Glaze, Associate Judge

FACTS: The Appellants, Vimy Ridge Municipal Water Improvement District and The Bank of New York Trust Company (collectively “Vimy Ridge”) appeal an order of the Pulaski County Circuit Court that granted summary judgment in favor of appellees (collectively “Ryles”). Vimy Ridge filed a foreclosure action against Ryles on October 1, 2004 declaring that the district’s 2001 taxes were delinquent. Ryles asserted that the action was barred by a three-year statute of limitations.

RULES AND ANALYSIS: The primary issue on appeal dealt with the exact date the municipal improvement district’s taxes became delinquent. The date the special taxes became delinquent triggered the three-year statute of limitations. The court’s

analysis dealt primarily with the statutory construction of several tax provisions. Little Rock ordinance number 15-513 applied to Vimy Ridge and states that the tax assessment “shall be collected by the County Collector with the first installment of general taxes becoming due...until the whole of the local assessment shall be paid.” However the ordinance did not specify the date the special taxes would become delinquent. Ark. Code Ann. § 14-86-1204 states that when an improvement district fails to specify the delinquency date by ordinance, it is ninety days after they first become due and payable.

Vimy Ridge argued first that Ark. Code Ann. § 26-36-201(a) should be applied. This section is concerned with the delinquency date of general taxes. Also, under Ark. Code Ann. § 26-35-501(a), general taxes may be paid in installments that extend until October 10, when they become “delinquent” under § 26-36-201(a). The appellants’ second argument was that because the ordinance didn’t specify what is due and payable, Ark. Code Ann. § 14-90-801(a) should apply. This section states that annual special tax assessments are first collected as specified by the ordinance, and subsequent annual installments “shall be paid” with the first installments of general taxes.

The court denied both of these arguments because Vimy Ridge attempted to apply provisions apply for the payment of general taxes to the special taxes of improvement districts under Title 14. The court referred to its past decision in *Quapaw Central Business Improvement District v. Bond-Kinman*, 315 Ark. 703, 870 S.W.2d 390 (1994), which stated that municipal improvement districts are “separate and distinct species of taxing districts.” Specifically the court pointed out that the provisions for general taxes under Title 26 only apply to municipal improvement district taxes if they “specifically adopted” the installment scheme by ordinance. The ordinance at issue *did* specify that the special taxes were to be collected “annually with the first installment of general taxes,” however it *did not* adopt the installment provisions, which improvement districts “may” adopt by ordinance under § 14-90-801(b)(2). Therefore, the court reasoned that without such adoption, and without specifying the delinquency date for special taxes, Ark. Code Ann. § 14-86-1204, which explains when special taxes become delinquent, should be applied. Pursuant to § 14-86-1204, the delinquency date was ninety days after the special taxes were due and payable.

HOLDING AND DISPOSITION: The Little Rock ordinance specified that special taxes were to be collected annually, "with the first installment of general taxes." Ark. Code Ann. § 26-35-501(a) specifically states that this installment "shall be payable on and from the third Monday in February to and including the third Monday in April." Therefore, pursuant to § 14-86-1204 the three-year statute of limitations began to run ninety days after the third Monday in April, 2001. Vimy Ridge did not file its foreclosure action until October 1, 2004 and thus the action for the 2001 delinquent improvement district taxes is barred. Affirmed.
Abstractor: Brittney A. McClinton, 3L

TRESPASS

Shamlin v. Quadrangle Enterprises, Inc.
No. CA 07-308
January 23, 2008
101 Ark. App. 164, ___ S.W. 3d ___
2008 WL 186158, 2008 Ark. App. LEXIS 48

Vaught, Judge.

FACTS: Quadrangle Enterprises, Inc. (Quadrangle) owned over 1,000 acres in Saline County. Kenneth Harper (Harper) owned Real Estate Development Inc (REDI) and 47 acres that were surrounded by Quadrangle's land. Harper entered into a contract with Arkansas Timber and Logging (ATL), a sole proprietorship owned by Ron Shamlin Sr. (Shamlin Sr.). The contract included a legal description of the land that Harper wanted logged. The contract also contained language certifying that Harper owned the property and was solely responsible for marking its boundaries. Shamlin Sr.'s son, Ron Shamlin Jr. (Shamlin Jr.) managed ATL's day to day operations, and executed the contract on behalf of ATL.

Pursuant to the agreement, ATL cut and removed timber on Harper's 47 acre tract. Later, Harper represented to ATL that he had recently acquired additional property and requested ATL to remove timber from this property. After ATL spent two weeks removing timber from approximately twenty acres, Harper visited the job site and realized that ATL was logging property owned by Quadrangle. Nonetheless, Harper did not stop ATL from logging or notify ATL that it was logging the wrong property.

As a result of this logging, criminal charges (not at issue here) were filed against Shamlin Jr. He ultimately pled guilty and was sentenced to ten

years' probation and ordered to pay restitution of \$21,485. In March 2004, Quadrangle sued Harper, REDI, Shamlin Jr., and ATL for trespass to land and conversion of timber under Ark. Code Ann. § 18-60-102, and sought damages jointly and severally against the defendants, treble damages, and punitive damages. Quadrangle later added Shamlin Sr. as a defendant and alleged negligent supervision by Shamlin Sr.

In December 2005, Quadrangle filed a motion for partial summary judgment as to liability against the Shamlins, arguing that Shamlin Jr. was liable for trespass and that Shamlin Sr. was liable under the doctrines of negligent supervision and *respondeat superior*. The Shamlins responded that summary judgment was improper because the Civil Justice Reform Act of 2003 (CJRA), codified at Ark. Code Ann. §§ 16-55-201 to 16-55-220, abolished joint and several liability except upon a finding that Shamlin Jr. and Harper acted in concert. They argued that this finding was a question of fact for a jury.

The circuit court ruled in Quadrangle's favor on its motion for summary judgment against the Shamlins. The court held that Shamlin Sr. was liable to the same extent as Shamlin Jr. under *respondeat superior*. The court also found that the CJRA did not affect Quadrangle's claims of trespass, conversion, and treble and punitive damages and that the CJRA required apportionment as to Quadrangle's remediation costs for the damage to its land.

In August 2006, during a jury trial on Quadrangle's damages and apportionment of damages, the court entered judgment in Quadrangle's favor based on the jury's answers in a Special Verdict form. The court found the following: 1) Shamlin Jr., Shamlin Sr., Harper, and REDI were jointly and severally liable for conversion of timber; 2) the timber was worth \$11,500 (trebled under 18-60-102); 3) Shamlin Jr., Shamlin Sr., Harper and REDI were jointly and severally liable for litigation costs of \$1,005; 4) Shamlin Jr. and Shamlin Sr. were jointly and severally liable for \$1,800, or 15% of Quadrangle's remediation costs; 5) Harper and REDI were liable to Quadrangle for \$38,200 (\$10,200, or 85% of Quadrangle's remediation costs, \$3,000 in treble damages for additional timber conversion, and \$25,000 in punitive damages). The Shamlins appealed.

In December 2006, the Shamlins' new attorney filed a motion for an extension to file the record.

Quadrangle objected to the extension, alleging that the Shamlins violated Arkansas Rules of Appellate Procedure-Civil because they failed to order the transcript from the court reporter prior to filing their notice of appeal. Quadrangle cross-appealed from the circuit court's order granting the Shamlins' extension.

The Shamlins' appeal consisted of four points. First, the Shamlins maintained that the circuit court erred in granting summary judgment against Shamlin Jr. because Arkansas has not adopted the standard of strict liability for trespass. Second, they argued that the circuit court erred in granting summary judgment against Shamlin Sr. because his liability turned whether Shamlin Jr. was an employee or an independent contractor, which was a material issue of fact. Third, the Shamlins contended that they should not be jointly and severally liable with Harper and each other for the value of Quadrangle's timber because the CJRA abolished joint and several liability on the facts of this case. Fourth, they argued that the circuit court ruled improperly in awarding Quadrangle both punitive and statutory treble damages against the Shamlins (this issue will not be discussed below because the court ruled that the Shamlins did not have standing to raise it, as no punitive damages were awarded against them).

RULES AND ANALYSIS:

With respect to Quadrangle's cross-appeal, the Shamlins' former attorney did not order the transcript, however, the Shamlins' new attorney did all that he could to perfect the appeal by verifying with the court reporter that financial arrangements were in place and by filing an appropriate motion for an extension of time to file the record. The court reporter was satisfied that the proper arrangements were in place before Quadrangle objected, and Quadrangle could not prove any prejudice because of the extension. Therefore, the circuit court did not abuse its discretion when it granted the extension of time to file the record.

Regarding the issue of strict liability in trespass, the court upheld the trial court's grant of summary judgment against Shamlin Jr. It is true that strict liability in trespass does not exist under Arkansas's common law. *Arkansas Louisiana Gas Co. v. Central Utilities Constructors, Inc.*, 278 Ark. 101, 643 S.W.2d 566 (1982). However, this suit was brought under § 18-60-102, not the common law. Under this statute the owner of property may recover as trebled damages the value of such property against one who

willfully destroys it. *Laser v. Jones*, 116 Ark. 206, 172 S.W.1024 (1915).

On the issue of the status of Shamlin Jr., the court held that whether Shamlin Jr. was an independent contractor or an employee of ATL is irrelevant under § 18-60-102. In *Lewis v. Mays*, 208 Ark. 382, 186 S.W.2d 178 (1945), a party who hired a timber cutter became a joint tortfeasor with the cutter because the cutter acted "by the advice or direction" of the employer. The status of the cutter as an employee or independent contractor was irrelevant. Here, ATL had no separate identity apart from Shamlin Sr. because he was its sole proprietor. As a result, when Shamlin Jr. acted on behalf of ATL and trespassed on Quadrangle's lands, he and Shamlin Sr. were acting as one person, Shamlin Sr., and became liable as joint tortfeasors.

The CJRA does not affect the Shamlins' joint and several liability for conversion of timber under § 18-60-102. The circuit court ruled correctly in finding the CJRA inapplicable to the facts of this case and in apportioning damages among the defendants. The CJRA abolishes joint liability for compensatory and punitive damages for the causes of action that it lists. However, while it lists property damage, it does not list conversion. § 16-55-201. A statute does not change the common law absent an irreconcilable conflict or clear expression of the intent to do so. *Thompson v. Bank of America*, 356 Ark. 576, 157 S.W.3d 174 (2004). Because conversion does not necessarily involve property damage, liability for a conversion action brought under § 18-60-102 is not automatically affected by the CJRA. Therefore, the circuit court did not commit error in finding the Shamlins jointly and severally liable with Harper and each other for the value of Quadrangle's timber.

HOLDING AND DISPOSITION: Affirmed on the Shamlins' direct appeal; affirmed on Quadrangle's cross-appeal.

Abstractor: Mike Lauro, 3L

COMMENT (LF): In addition to common law trespass, Arkansas statutes make the following types of trespass involving real property illegal or subject to liability: trespass by animals, § 2-38-301 et seq.; criminal trespass, § 5-39-203; criminal trespass on land, § 5-39-302 et seq.; trespass on school grounds, § 6-21-606; criminal trespass on a military reservation, § 12-63-209; trespass by water impounded by a dam, § 15-22-216; trespass and unlawful cutting of trees, §§ 15-32-301 et seq.;

trespass and cutting and carrying away, §§ 18-60-102; trespass on state lands, § 22-5-601. One lesson from this case is how common law trespass differs from the statutory forms.

WATER LAW

Bilo v. El Dorado Broadcasting Co.

No. CA 07-507

February 13, 2008

101 Ark. App. 267, ___ S.W.3d ___

2008 WL 375966, 2008 Ark. App. LEXIS 188

Josephine Linker Hart, Judge.

FACTS: Eugene Bilo owned a rectangular tract of land located between Timberland Drive and Hillsborough Road in El Dorado. The El Dorado Broadcasting Company (EDB) owned a tract of land located to the west of Bilo's land. Prior to 2004, Bilo's land was a swampy lowland consisting of willow trees, mud, and beaver dams. Water from a nearby source occasionally flowed onto Bilo's land. Bilo sought and received a permit from the Army Corps of Engineers to do the fill work, although the permit expressly stated that it did not authorize work that could adversely affect adjacent property. In 2004 or 2005, Bilo placed landfill on his property, causing an increased flow of water onto EDB's property. EDB sued Bilo to restore the natural water flow, arguing that the increase in water flow endangered EDB's broadcast tower and guy anchor.

The trial court found that the water on Bilo's tract of land was part of a natural watercourse, and Bilo's diversion of it was unreasonable. The court enjoined Bilo from "further fill activities" on the west side of his property and ordered him to construct, at his own expense, "drainage facilities to prevent no more than 20% of the flow of water" onto EDB's land. If Bilo chose to construct the drainage ditch on the west side of his tract, the court ordered EDB to contribute twenty percent of the land required. Bilo appealed.

RULES AND ANALYSIS: On appeal, at issue was whether the trial court erred in finding that the water was a natural watercourse and that Bilo's conduct was unreasonable. Bilo argued that the water was diffuse surface water, and thus a variant of the "common enemy" rule should apply. This rule allows a landowner to defend against surface runoff despite damage to his or her neighbor, unless injury could be avoided by reasonable effort and

expenses. *Boyd v. Greene County*, 7 Ark. App. 110, 644 S.W.2d 615 (1983). However, the court of appeals agreed with the trial court. It again cited Boyd for a definition of "watercourse": a running stream, although it need not flow continually, in a definite channel. The trial court did not err in finding that a natural water course existed where the water was a wetland associated with a tributary of Bayou de Loutre, and its water drained into Loutre Creek. The court did not discuss the reasonableness of the diversion.

HOLDING AND DISPOSITION: The trial court was correct in finding that the water on Bilo's tract of land was part of a watercourse and his diversion of it onto EDB's land was unreasonable. Affirmed.

Gladwin and Griffen, JJ., Dissenting: The lack of a well defined bed, banks or channel classifies the water on Bilo's land as surface water, not part of a natural watercourse. Since the water in question is surface water, the relevant rule appears to be the traditional common enemy rule which Arkansas seems to apply to urban areas, that owners of land are permitted to fill in, ditch it or build on the land as necessary to protect it from the flow of surface water from neighboring properties. *Levy v. Nash*, 87 Ark. 41, 112 S.W. 173 (1908). Because Bilo's land is in a developed urban area, the dissent would allow him to fill and elevate his land to prevent the flow of surface water from neighboring property.

Abstractor: Samantha Holloway, 3L

NOTE: On September 4, the Supreme Court denied review of this case.

COMMENT (LF): The traditional "common enemy" doctrine, still followed by a significant number of states, allows one to divert and repel surface waters by any means necessary. Many Arkansas cases contain the qualifier to the effect that the owner may not cause injury if it could be avoided by reasonable effort and expenses. This qualification was not part of the original rule but has often been used when the rule is applied in urban areas. A great source for Arkansas law on this topic is J.W. Looney, *Diffuse Surface Water in Arkansas: Is It Time for a New Rule?* 18 U.A.L.R. L.J. 393 (1996).