

IN THE COURT OF APPEALS 03/26/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00103 COA

WAYNE C. GANDY, BOBBY J. GANDY AND TERRY WAYNE GANDY

APPELLANTS

v.

RHEBA JOY GANDY, COPIAH BANK, N.A. AND JOHN ARMSTRONG, TRUSTEE

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DONALD B. PATTERSON

COURT FROM WHICH APPEALED: COPIAH COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

LEMAN D. GANDY

ATTORNEYS FOR APPELLEES:

PATSY BUSH, POWELL G. OGLETREE, JR. KENNA L. MANSFIELD, JR.

NATURE OF THE CASE: REAL PROPERTY- WARRANTY DEED FOR TENANTS IN THE
ENTIRETY

TRIAL COURT DISPOSITION: JUDGMENT FOR APPELLEES

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

Wayne and Bobby Gandy are husband and wife. Terry and Rheba Joy Gandy are Wayne and Bobby's son and daughter-in-law. Wayne and Bobby granted twenty (20) acres of land to Terry and Rheba Joy (Joy) by warranty deed vesting title in them as tenants by the entirety.

Terry and Joy financed a \$7,077.16 construction loan in 1984. This loan was secured by a deed of trust on one acre of the property. On February 10, 1986, they renewed and extended the loan to \$14,410.80, securing it with a second deed of trust on the remaining nineteen (19) acres. Both deeds of trust included dragnet clauses which provided the bank security for additional advances as well as any indebtedness incurred before and/or after each deed of trust was executed.

Terry and Joy had a joint checking account; however, Joy handled all of the family's financial affairs. On June 29, 1990, Joy deposited \$518.45 into the account, but the bank erroneously coded the deposit as \$5,184.50. Joy discovered the error when she received the July bank statement. She circled the error and made a notation on the statement, "should have been \$518.45, \$4,666.05 difference". Joy took advantage of the error and wrote overdraft checks totaling over \$4,500.00. In early October 1990, the bank contacted Joy concerning the overdrafts. Joy reached an agreement with the bank where Joy would sign a note due on April 1, 1991 to cover the overdrafts as long as the bank would not tell Terry about the incident. The note stated on its face that it was unsecured. That note was renewed on May 14, 1991. The renewed note was due on May 30, 1992, and it provided on its face that a security interest was given in:

1. collateral securing other loans with you may also secure this loan;
2. deposit accounts and other rights to the payment of money from you.

The back of the agreement stated:

This agreement will not secure another debt:

A. If you fail to make any disclosure of the existence of this security interest required by law for such other debt;

B. If this security interest is in my principal dwelling and you fail to provide persons entitled to any notice of right of rescission required by law for such other debt.

No truth-in-lending right of rescission statement was ever given to Joy at the time of the execution of this note. Again, Terry was not told of the renewal note.

On July 9, 1991, the bank received the final payment on the February 10, 1986 note, (secured by the deed of trust on their home and the twenty acres). Initially a bank employee stamped "paid" on the note, but subsequently "stamped paid in error" was written on the note and the deed of trust was not canceled. Meanwhile, Joy defaulted on the May 14, 1991 note. The bank brought suit and judgment was entered in the amount of \$5,347.08 for the amount owed, attorney's fees plus prejudgment and post-judgment interest. Joy did not tell Terry about the suit or the judgment. The bank's attorney in the default action advised the bank that the dragnet clause in the deed of trust would allow the bank to collect any other debt Terry and Joy had outstanding with the bank. In a letter addressed only to

Joy, the bank's attorney stated that the bank could use the security interest in the deed of trust to collect the default judgment, and that the bank intended to foreclose on the February 10, 1986 deed of trust.

On April 1, 1992, foreclosure proceedings began on the deed of trust by notice of a trustee's sale which set the sale date on May 1, 1992. On April 23, 1992, Bobby was advised of the sale by another daughter-in-law, who saw the notice in the newspaper. Wayne and Bobby confronted Joy who assured them that she would take care of the problem, and asked them not to mention anything to Terry. On April 27, 1992, Terry, a truck driver, was on the road when a fellow driver told him about the foreclosure. Terry immediately contacted Wayne and Bobby who told him what they knew. Terry asked Wayne and Bobby not to tell Joy about their conversation. When Terry returned home on the evening of April 27, he did not mention the foreclosure thinking that Joy would bring it up, but she never did. When Terry awoke the next morning, he found Joy had packed some clothes and left, taking their three children with her.

Wayne and Bobby contacted an attorney regarding the foreclosure. He advised them not to pay the debt and to allow the sale to take place with them bidding on the property. The attorney told them that this would divest Joy of her interest in the property. Subsequently, Wayne and Bobby reached an agreement with the bank where Wayne and Bobby would bid \$4,500 on the property at the foreclosure sale, and that the bank would not overbid them. The bank agreed to lend Wayne and Bobby the \$4,500.00 to finance the bid if it was the high bid. Wayne and Bobby were in fact the high bidders at the sale and were declared the purchasers. A trustee's deed conveying the twenty acres to Wayne and Bobby was executed, delivered, and recorded. It contained the statement, "The undersigned conveys only such title vested in him as trustee with no warranty of title." On the same date, Wayne and Bobby executed a note to the bank for \$4,507.50, due May 1, 1993, secured by a deed of trust on the twenty acres. Wayne and Bobby paid the accrued interest and renewed the note on April 30, 1993. Wayne and Bobby paid the 1992 taxes, interest, insurance and mortgage on the property. Meanwhile, Terry and Joy had filed for divorce on May 1, 1992. The court denied either party a divorce.

On August 2, 1992, Joy filed a petition to set aside the foreclosure, remove cloud on title, and for damages and later filed an amended petition. Wayne, Bobby, and Terry asserted a counterclaim against Joy seeking recovery for all out of pocket expenses and attorney's fees. They also asserted a cross-claim against the bank seeking all out of pocket expenses, attorney's fees, and all funds expended in purchasing the property if the foreclosure was set aside. The bank was granted a motion to leave to amend its answer. In its amended answer, the bank admitted that the foreclosure sale was void. Wayne, Bobby, and Terry then filed an amended cross-claim against the bank alleging slander of title and other damages. All parties have stipulated that the foreclosure sale was void and that the trustee's deed was void as well.

ISSUES

The following issues are now before this Court on appeal from the Copiah County Chancery Court: (1) whether the chancellor erred in finding that Wayne and Bobby Gandy were not bona fide purchasers of the property purchased at a foreclosure sale; (2) whether the chancellor erred in not awarding the Gandy's attorney's fees, punitive damages, and other out of pocket expenses; (3)

whether the chancellor erred in limiting Terry Gandy's attorney's fees; (4) whether the chancellor erred in not addressing the issue of the bank taking Terry's property to satisfy the overdrafts written by Rheba Joy; and (5) whether the chancellor erred in refusing to reconsider the verdict or to grant a new trial. Finding no merit to these issues, we affirm.

DISCUSSION

BONA FIDE PURCHASERS

On appeal, this Court is required to follow the "substantial evidence/manifest error" standard of review. *Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994); *West v. Brewer*, 579 So. 2d 1261, 1264 (Miss. 1991) (quoting *Stallings v. Bailey*, 558 So. 2d 858, 861 (Miss. 1990)). Unless the chancellor abused his discretion, committed manifest error in his decision, or applied an erroneous legal standard, we are not at liberty to disturb his decision. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992); *Johnson v. Hinds County*, 524 So. 2d 947, 956 (Miss. 1988); *Culbreath v. Johnson*, 427 So. 2d 705, 707-08 (Miss. 1983).

The Appellants state that the issue before this Court is whether they had knowledge that the foreclosure sale and the trustee deed were void prior to their purchase of the property. They argue that they only acted pursuant to advice given to them by counsel. Therefore, they contend that they were bona fide purchasers acting in good faith. We disagree.

It is well settled law in this State that ordinarily, one who acquires real property ordinarily takes it subject to whatever claims lie against it and whatever defects there may be in the title. *Hill v. Thompson*, 564 So. 2d 1, 10 (Miss. 1989). An innocent purchaser without notice and who pays fair value is a bona fide purchaser, and accordingly, takes free and clear of hidden claims or title defects. *Hill*, 564 So. 2d at 10. "Under Mississippi law, a prior deed, whether recorded or unrecorded, is good against a subsequent purchaser with actual notice of it." *Mills v. Damson Oil Corp.*, 686 F.2d 1096, 1101 (5th Cir. 1982) (citations omitted). Furthermore, a purchaser of land is not a bona fide purchaser unless he takes a conveyance and pays the purchase price before he receives actual notice of a prior deed. *Mills v. Damson Oil Corp.*, 686 F.2d at 1101. A party is charged with knowledge for "whatever is enough to excite attention, or put a party on inquiry, is notice of everything to which such attention or inquiry might reasonably lead." *Hill*, 564 So. 2d at 11 (citations omitted). Of course, caveat emptor is applicable at foreclosure sales. *Id.*

The Appellant's argument that they should be classified as bona fide purchasers flies in the face of the well established definition of a bona fide purchaser. In the present case, Wayne and Bobby, the purchasers, originally conveyed the twenty acres by warranty deed to Terry and Joy as tenants in the entirety; thus obviously, Wayne and Bobby had actual notice that the title of the land was vested in Terry and Joy. Although Wayne and Bobby acted in good faith pursuant to advice of counsel, their argument falls short on the crucial element of notice. Thus, they cannot be shielded under a bona fide purchaser defense. Therefore, we find no merit to this issue.

DAMAGES AND ATTORNEY'S FEES

WAYNE AND BOBBY GANDY

The chancellor ordered the bank to reimburse Wayne and Bobby for the amount of money they had paid plus interest towards the principal and recording fee on the trustee's deed. The bank was also ordered to cancel the notes dated May 1, 1992 and April 10, 1993, from Wayne and Bobby Gandy. Wayne and Bobby now assert that the chancellor should have awarded them attorney's fees and out of pocket expenses for defending their title in the land. Because we hold that Wayne and Bobby were not bona fide purchasers and that the title remained vested in Terry and Joy, we find no merit to this argument.

TERRY GANDY

The chancellor awarded \$2,000.00 to Terry Gandy in attorney's fees and damages for slander of title. The chancellor limited the attorney's fees only from the point the complaint was amended to include a slander of title action. The chancellor found that Terry did not suffer special damages, nor was he entitled to punitive damages. Our courts have held that "the award and quantum of attorneys' fees is a matter committed to the sound discretion of the trial judge." *Young v. Huron Smith Oil Co.*, 564 So. 2d 36, 40 (Miss. 1990). However, "[t]he court may not judicially note what is a reasonable fee and it certainly may not merely pull a figure out of thin air." *Key Constructors, Inc. v. H & M Gas Co.*, 537 So. 2d 1318, 1325 (Miss. 1989). "Rather, the party entitled to recover a reasonable fee must furnish an evidentiary predicate therefor." *Id.*; *Young*, 564 So. 2d at 40 (Miss. 1990); *Smith v. Smith*, 545 So. 2d 725, 729 (Miss. 1989). It is apparent from the record that the chancellor awarded Terry \$2,000 in attorney's fees based on the information submitted by the parties, as well as his experience and observation as allowed by section 9-1-41 of the Mississippi Code. Finding that the chancellor was well within his discretion in awarding the attorney's fees and damages at issue, we affirm the chancellor's awards.

OVERDRAFT CHECKS

Terry argues that the bank should not have foreclosed on the twenty acres of land in order to satisfy the judgment against Joy. Since it is stipulated that the foreclosure sale and the trustee's deed was void, and that Joy still remains liable for the money judgment owed to the bank, there is no merit to this issue.

JNOV/NEW TRIAL

The grant or denial of a new trial has always been within the discretion of the trial judge. Absent an abuse of discretion, we do not have the power to disturb such a determination. *Muse v. Hutchins*, 559 So. 2d 1031, 1034 (Miss. 1990). The standard of review for denial of a JNOV and a directed verdict are identical. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 252 (Miss. 1993) (citations omitted). Under this standard, the evidence is viewed in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. *Munford Inc. v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992). "If there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required." *Munford v. Fleming*, 597 So. 2d at 1284. In applying this standard, we find that there is substantial evidence to support the chancellor's decision. We find no error.

CONCLUSION

Accordingly, we fail to find that the chancellor committed any manifest error which would require us to reverse this case. Wayne and Bobby Gandy were not bona fide purchasers at the foreclosure sale. The chancellor was well within his discretion in awarding attorney's fees and damages, as well as denying the motion for a new trial. Therefore, we affirm the judgment below. **THE JUDGMENT OF THE COPIAH COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL SHALL BE TAXED TO THE APPELLANT.**

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.