

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

JANUARY 2011

2010 – 2011 REAL PROPERTY SECTION OFFICERS

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MESSAGE FROM THE CHAIRMAN

It has been a busy six months. The Section has several active initiatives for the year.

The Special Committee tasked two years ago by the Section Leadership to draft and submit an updated Condominium Law to the Legislature has been diligent in its efforts. The end result was a modified draft of the Uniform Common Interest Ownership Act (“UCIOA”) that is now before the Mississippi Bar Commissioners. The Committee believes that the Bar will support some form of the proposal for submission to the Legislature next year. This Special Committee spent many hours working on this project and they have done a yeoman’s job. Hopefully the legislation will be presented and passed in the near future.

The Section has submitted to the Mississippi Legislature a bill to amend our acknowledgment statute. The bill will assist real property practitioners by making it less cumbersome to draft a multiple party execution acknowledgment and will also clear up the confusion when there is a conflict between the date of the acknowledgement and date of the instrument. This bill is before the Legislature through the leadership of Jim Tohill, with the assistance of Martin Hegwood of the Secretary of State’s office and Caryn Quilter, counsel in the Office of the Mississippi Senate. They have been diligent in their work on our behalf.

Rene’ Garner has brought our Section into the 21st Century with the new ‘listserve’ program. It is apparent from the e mails generated that this program is helpful to all of us. Thank you Rene’.

The Section also sponsored our first of three (and free) ‘Lunch and Learn’ CLE seminars (1 hour) in November. The seminar, on the details of the new LLC Law for 2010, was very well presented and received. Thanks to Assistant Secretaries of State Cheryn Baker and Tom Riley for presenting on this important topic. The Section plans to bring two additional relevant free CLE ‘Lunch and Learn’ Seminars soon.

Rod Clement continues to do his excellent job with the Newsletter. The Section wants to assist Rod in this effort and is seeking volunteers to brief certain cases for future Newsletters. If you are interested in taking on such a task for the Section please let us know.

It is an honor to serve as Chair of our Real Property Section; thank you for the opportunity. Please let us know if there is an issue that needs to be addressed.

Quiz No. 1

Can the owner of an apartment building require tenants to use a particular cable TV or internet provider?

RECENT CASES

Fifth Circuit certifies *BankPlus v. Kinwood* to Mississippi Supreme Court

Kinwood Capital Group L.L.C. v. BankPlus (In re Northlake Development), 614 F.3d 140 (5th Cir. 2010). In 1998 Kinialocts and Earwood (an attorney) formed a Mississippi member-managed limited liability company, Kinwood Capital Group, L.L.C. Kinialocts owned 80% of the membership interest and Earwood owned 20%. The operating agreement provided that the vote of at least 75% of the membership interest was required to approve a sale of all of the company's assets, so that Kinialocts had to approve any such sales. The company owned one asset, a 520-acre tract of land in Panola County. In 2000 Earwood formed another Mississippi limited liability company, Northlake Development, L.L.C. Without approval or knowledge of Kinialocts, Earwood signed a warranty deed that purported to convey title to the entire 520-acre tract of land from Kinwood to Northlake. Northlake then granted a deed of trust on the land to BankPlus to secure a loan. Earwood used the proceeds of the loan for his personal use. Northlake defaulted on its loan to the bank and the bank began foreclosure proceedings. In 2005 Northlake filed Chapter 11 bankruptcy. The case was converted to Chapter 7. Kinwood asked the bankruptcy court to set aside the deed of trust to the bank. The bankruptcy court held that the deed from Kinwood to Northlake and the deed of trust from Northlake to the bank were void. The United States District Court for the Southern District of Mississippi affirmed the bankruptcy court's holding in a decision reported at 430 B.R. 758 (S.D. Miss 2009). The bankruptcy court and the District Court relied on Sections 79-29-303(1) and 79-29-303(4) of the Mississippi Code, which provide that the act of a member of a limited liability company who does not have authority to act for the company is not binding on a person who had knowledge of the fact that the member was not authorized to act on behalf of the company. The District Court reasoned that since Northlake (the limited liability company formed by Earwood) knew that Earwood (Northlake's sole member) was not authorized to act for Kinwood, the deed signed by Earwood that purported to convey the land from Kinwood to Northlake was void. Since the deed from Kinwood to Northlake was void, the deed of trust from Northlake to the bank was void. The District Court noted that the effect of a lack of authority on a subsequent bona fide purchaser (in this case, the bank) of real property has not been addressed by the courts, and that the Mississippi limited liability company statutes showed that the Mississippi legislature intended to protect limited liability companies from unauthorized acts of their members. The bank appealed to the Fifth Circuit and argued that Earwood's lack of authority to act on behalf of Kinwood made the

deed voidable, not void, and that Kinwood could not assert Earwood's lack of authority as a defense against an intervening bona fide purchaser like the bank. The Fifth Circuit found that the issue of whether the deed from Kinwood to Northlake was void or voidable has not been addressed by the Mississippi courts, and certified the following question to the Mississippi Supreme Court:

When a minority member of a Mississippi limited liability company prepares and executes, on behalf of the LLC, a deed to substantially all of the LLC's real estate, in favor of another LLC of which the same individual is the sole owner, without authority to do so under the first LLC's operating agreement, is the transfer of real property pursuant to the deed (i) voidable, such that it is subject to the intervening rights of a subsequent bona fide purchaser for value and without notice, or (ii) void *ab initio*, i.e., a legal nullity?

The Mississippi Supreme Court has not yet acted on this question.

Note 1: The District Court's decision was discussed extensively in the May 2010 issue of the Newsletter. One of two innocent parties is going to suffer a loss here, either the majority member of Kinwood who thought he had protected himself by limiting the other member's authority to execute deeds, or the bank that loaned the money in reliance on the title records. The underlying problem is that the restriction on Earwood's authority is in Kinwood's operating agreement, which is not a public record.

Note 2: According to the Fifth Circuit's opinion, the bank relied on a certificate of title from Earwood's law partner.

Quiz 2

Does an insurer have to give notice to a mortgagee before cancelling a policy of property insurance?

Subsequent owners not liable for breach of obligation to provide lateral support

Pecanty v. Mississippi Southern Bank, 49 So.3d 114 (Miss. Ct. App. 2010). Pecanty owned a home in Vicksburg. In 2000 VFW Post 1034, Inc. purchased land adjacent to and downhill from Pecanty's property and began excavation. The excavation caused significant erosion of Pecanty's property. In 2001 Pecanty and VFW entered into an agreement in which VFW agreed that it had caused the erosion and promised that VFW would restore Pecanty's property and erect a retaining wall to prevent any further erosion. VFW further promised to repair the wall if necessary and that if it failed to do so, VFW would be responsible for all of Pecanty's damages. VFW did erect a retaining wall, but the wall did not work well and Pecanty continued to suffer erosion. In 2001 a bank subsequently obtained title to the property owned by VFW. The bank sold the land to the Tarvers. In 2006 Pecanty brought an action in the Chancery Court of Warren County seeking an injunction and damages from VFW and the bank. The Tarvers were subsequently joined as defendants. The chancery court found the general three-year statute of limitation against the bank and the Tarvers began to run in 2001 when VFW failed to honor its obligations under its contract with Pecanty and granted their motions for summary judgment

based on the running of the statute of limitations. The chancery court found that VFW had breached its agreement with Pecanty by not fixing the retaining wall and awarded Pecanty damages against VFW. VFW did not appeal the judgment against it, but Pecanty appealed the grant of summary judgment for the bank and the Tarvers, on the basis that the erosion was a continuing tort which tolled the statute of limitations. On appeal, the Mississippi Court of Appeals, in a decision by Justice Myers, affirmed the chancellor's holding, but on a different basis from the chancellor. The Court of Appeal, relying on general authorities, the Restatement of Torts and cases from other states, found that subsequent purchasers are not liable for a former owner's failure to provide lateral support. The court stated that while the subsequent owners may have a duty to maintain a properly built retaining wall, they had no duty as subsequent landowners to repair the defective wall constructed by VFW. The Court of Appeals therefore affirmed the chancellor's grant of summary judgment to the bank and the Tarvers on the basis that the bank and the Tarvers had no duty to Pecanty to stop the erosion, and did not address the continuing tort or statute of limitations issue.

Note 1: What is the nature of the right of lateral support? The *Pecanty* court stated that "under common law traditions, "adjoining [land]owners have a natural right to the lateral support of each other's ground;]...[t]he duty to provide lateral support is ongoing, and one of continued support running against the servient land..." (quoting from Am. Jur. 2d *Adjoining Landowners*). Some of the literature refers to the right as an easement or other servitude that burdens the adjoining land. A similar common-law doctrine is that an adjoining landowner cannot block light and air.

Note 2: Mississippi courts have addressed lateral support in one previous case, *Lerner Jewelers, Inc. v. Glascock*, 199 So.2d 66 (Miss. 1967). In this case, however, the adjoining owner's liability was negligent because the adjoining owner failed to give a notice of excavation required by a municipal ordinance. Also, the *Lerner* case involved land that was improved and not in its natural state, and under the common law, as cited in the *Lerner* case and in general references, "the right to lateral support applies to land in its natural state only and not to additional weight of buildings and other structures placed on the land."

Note 3: Suppose that Pecanty had required that the 2001 agreement between Pecanty and VFW provided that VFW's obligations ran with the land, and the agreement was recorded in the land records so that purchasers of the VFW property had constructive notice of the agreement. Would the result be any different? At this point VFW's obligation to Pecanty was a contract right not a common-law right. The Court of Appeals wrote that the bank "obtained title" to VFW's land, which probably is a euphemism for foreclosure. Even if the agreement had been recorded, a foreclosure of a previously filed deed of trust would have extinguished the agreement in this case.

Note 4: Why did the three-year statute of limitations did not bar VFW's liability under its agreement with Pecanty? Since, based on the facts in the case, it appears that VFW breached its agreement with Pecanty in 2001 by not building a retaining wall that worked, and not fixing the defective wall, why did the statute of limitations on this breach not run in 2004 and bar the complaint filed by Pecanty in 2006? Since VFW did not appeal from the chancellor's judgment, the Court of Appeals did not address this question. The facts that VFW did not appeal the judgment against it, and that Pecanty appealed the judgments dismissing the bank and the

Tarvers, suggest that Pecanty did not have confidence that she would be able to satisfy her judgment against VFW.

Note 5: The Court of Appeals did not cite any authority for the proposition that the subsequent owners might have a duty to maintain an existing wall. An alternative line of reasoning could have been that the subsequent owners did have a duty to maintain and repair the existing wall, that this duty included the duty to repair the defects in the existing wall, and that the subsequent owners breached their duty to Pecanty by not making this repair. Pecanty's expert testified that (what sounds to the editor like) a relative simple repair to the wall would have stopped the erosion.

Note 6: Pecanty alleged that the continued erosion constituted a "continuing tort." The Mississippi Court of Appeals recently described a continuing tort as "one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Humphries v. Pearlwood Apartments Partnership*, No. 2009-CA-01586-COA, 2011 WL 208330 (Miss. Ct. App., Jan. 25, 2011) (not yet released for publication). In the *Humphries* case, Pearlwood cut trees to build an apartment complex. Humphries subsequently bought a house downhill from the apartment complex in 2002. Humphries' property flooded repeatedly. In 2006 Humphries brought an action against Pearlwood, alleging that Pearlwood had a duty to Humphries and others to construct the apartments in a manner so as not to disrupt the natural flow of the water, that Pearlwood breached this duty by clearing the land, that the clearing was the cause of the flooding of Humphries' property, and that Humphries therefore was entitled to damages. Pearlwood filed a motion for summary judgment and argued that Humphries' complaint was barred by the three-year statute of limitations. Humphries argued that the repeated flooding was a continuing tort that tolled the statute of limitations. The Mississippi Court of Appeals held that the clearing of the uphill land and the construction of the apartments was the tort and not the flooding, and that since the flooding began in 2002 and Humphries did not file her complaint until 2006, Humphries' claim therefore was barred by the statute of limitations.

Note 7: A sibling to the doctrine of lateral support is the right of subjacent support, which is support of the surface by the earth beneath the surface. The Mississippi Supreme Court recognized the right to subjacent support in *Moss v. Jourdan*, 92 So. 689 (Miss. 1922). In this case the court held that the owner of the surface was entitled to an injunction to prevent the removal of gravel beneath her land when the removal of the gravel would remove the subjacent support of the surface.

Subdividing lot requires compliance with Section 17-1-23(4)

City of Gulfport v. McHugh, 38 So.3d 674 (Miss. Ct. App. 2010). The Hubbards owned one lot in a platted subdivision. In 2007 they applied to the Gulfport Planning Commission to subdivide the lot into two lots and insert an interior lot line to make the land more marketable. Section 17-1-23(4) of the Mississippi Code provides that the governing authorities of a municipality may alter or vacate a subdivision plat, but only if "the persons to be adversely affected thereby or directly interested therein" "are made aware of the action" and agree in writing to the alteration.

The Hubbards did not obtain the agreement of any of the adjacent landowners or give notice of the hearing. The Planning Commission recommended approval of the Hubbards' application and the City subsequently approved the request to make the lot into two lots. Adjacent property owners appealed to the Circuit Court of Harrison County and argued that they did not approve the change and were not given proper notice of the meeting. The City argued that Section 17-1-23(4) did not apply because inserting an interior lot line does not "alter or vacate" the subdivision. The Circuit Court found that the Hubbards did not comply with Section 17-1-23(4) and thus vacated the decision of the City. The City appealed. On appeal, the Court of Appeals, in a decision by Justice Lee, affirmed the Circuit Court's decision. The court found the Hubbards had not complied with the statutory procedure in Section 17-1-23(4) because they had not given notice to the interested parties and had not obtained their consent, and that the City therefore was not authorized to grant their application.

Note 1: The Court of Appeals never expressly states that the addition of an interior lot line "alters" a subdivision plat for purposes of Section 17-1-23(4), but this finding is a necessary predicate to the court's holding. This is the latest in a series of maddeningly inconclusive opinions about interior lot lines by the Mississippi courts. For example, in *Lake Castle Lot Owners Association, Inc. v. Litsinger*, 868 So.2d 377 (Miss. Ct. App. 2004), the Court of Appeals held that, under the subdivision covenants at issue, relocating an interior lot line was not a subdivision or resubdivision of a lot in *Cor Developments, LLC v. College Hill Heights Homeowners, LLC*, 973 So.2d 273 (Miss. Ct. App. 2008), the developer argued that constructing improvements across interior lot lines did not require an amendment of the subdivision plat. The Court of Appeals held that the developer was required to follow the statutory procedure for amending plats for other reasons and did not address the argument about interior lot lines. The Attorney General has opined more than once that the owner of a lot in a platted subdivision can convey a portion of the lot by deed and that this conveyance will not alter or amend the plat as long as the conveyed area is not given a separate lot number and the exterior boundaries of the subdivision are not altered. Opinion to Turnage, Miss. A.G. Opinion No. 2007-00327, 2007 WL 2285382 (June 29, 2007; Opinion to Gamble, Miss. A.G. Opinion No. 93-0275, 1993 WL 207344, May 12, 1993; Opinion to Lacoste, 1991 WL 577806, May 9, 1991.

Note 2: Who are "the persons to be adversely affected thereby or directly interested therein", from whom the person seeking to amend a subdivision plat must obtain consent to an alteration? The *McHugh* court stated that "it was not determined who the appropriate adversely affected or directly interested parties were. The terms "adversely affected" and "directly interested" are not defined in the statute; thus this was a factual issue that should have been determined by the Commission." This is consistent with a 2004 Mississippi Attorney General's opinion that, in an application to a county board of supervisors to amend a plat under Section 17-1-23(4), the determination of who must consent to the alteration is a question of fact that must be made by the board. Opinion to Nowak, Miss. A.G. Opinion No. 04-0208, 2004 WL 1638722, June 4, 2004. The effect of this is that a person seeking to alter a plat will not know for sure if he has gotten consent from all of the necessary parties until he gets to the hearing. The only way to make sure is to get consent from all owners of land in the subdivision.

Note 3: Does the person seeking to amend a plat have to get approval from mortgagees? The Attorney General, in the 2004 Opinion to Nowak discussed above, declined to address this question, and left this as a question of fact to be decided by the board of supervisors.

Note 4: Obtaining consent under Section 17-1-23(4) of all of “the persons to be adversely affected thereby or directly interested therein,” whoever that is, is only one method for altering a subdivision plat. An alternative method is an action in chancery court under Mississippi Code Annotated Section 19-27-31. In this case, the person filing the complaint must name as defendants ... the persons to be adversely affected or thereby or directly interested therein,” the same language used in Section 17-1-23(4). But this section does not give any guidance about how the court makes its decision. In other words, if one person wants to amend a plat and the owner of an adjacent property opposes the amendment, how does the court decide between the two? As far as the editor has been able to determine, amending plats is a statutory procedure and no body of common law exists on this subject. All of the published cases that have addressed Section 19-27-31 appear to have resulted in a default judgment or have been decided on procedural grounds. If a person seeking to amend a plat anticipates that he will not be able to obtain unanimous consent from other owners under Section 17-1-23(4), he might rather file an action under Section 19-7-23 and hope for a default judgment.

Answer to Quizzes

Answer to Quiz No. 1- The Federal Communications Commission has issued a rule that landlords of residential apartments cannot require tenant to use only one specified cable service. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-189A1.pdf.

Answer to Quiz No. 2- Miss. Code Ann. Section 83-5-28 was amended in 2006 to require notice of cancellation reduction in coverage or nonrenewal to a creditor loss payee as well as the insured. Section 83-5-28(i) states in relevant part, “A cancellation, reduction in coverage or nonrenewal of ... fire insurance coverage ... is not effective ... unless notice is mailed or delivered to the insured and to any named creditor loss payee by the insurer not less than thirty (30) days prior to the effective date of such cancellation, reduction or renewal. This section shall not apply to nonpayment of premium unless there is a named creditor loss payee, in which case at least ten (10) days notice is required.”

GENERAL

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