12-9

IN THE SUPREME COURT OF FLORIDA

CASE NO: ~~65,537~~ 69,371

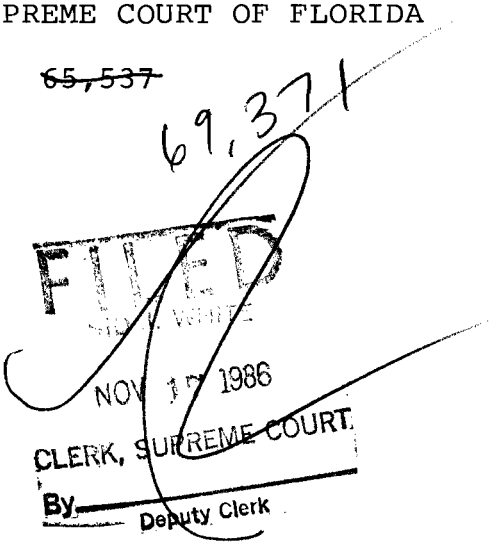
EVELYN M. BROWN,

Appellant,

-vs-

SHELIA DAVIS, ROBERT B. PRUETT AND WIFE, SHARON PRUETT, CARROLL DEMMON AND WIFE, SARA DEMMON, BUDDY WILKINSON, WEST FLORIDA TITLE AND LAND COMPANY, AND UNITED STATES OF AMERICA ACTING BY AND THROUGH FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE.

Appellees.



APPEAL ON
DISCRETIONARY REVIEW FROM THE
COURT OF APPEAL OF THE FIRST DISTRICT

ANSWER BRIEF OF APPELLEE, BUDDY WILKINSON

Respectfully submitted,

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The question certified in this case to be of great public importance involves the framing by the trial court of an equitable decree designed to protect to the greatest possible extent the conflicting interest of two innocent property owners. The First District Court of Appeal stated the question as:

> "Can a court in equity, order exchange of deeds of two lots when the owner of one lot mistakenly constructs on the adjacent lot of the other owner?"

An examination of the relevant facts and an explanation of the proceedings below, especially as they relate to the two principle litigants, is essential to an understanding of the argument that follows.

In 1974, an investment opportunity was presented to the plaintiff, Evelyn M. Brown. Although she is a registered nurse, she was employed at the time as a real estate salesperson for Realty III in Pensacola. A co-salesman at the agency agreed for her to assume his obligations under a contract for deed for the purchase of a certain Tract 17 of Karen Acres (Tr. 33-35).

The adjoining parcel, Tract 16, was purchased by Carroll and Sara Demmon in 1977. They decided to divide their lot into two parcels. One portion, measuring 126 feet by 461.86 feet was sold to Robert and Sharon Pruett. The other, with dimensions of 100 feet by 461.86 feet was later sold to the defendant, Shelia

Davis (R. 277, 253).[1]

The Farmers Home Administration approved the Pruetts' application for a loan to construct a brick home on their land. As it happened, the dwelling was mistakenly erected on the parcel belonging to Ms. Brown. After the home was completed, but before it was occupied, the Pruetts were transferred from the area. Application was made and approved for Shelia Davis to assume the Pruetts' loan, and in October of 1980, the property was conveyed to her (Tr. 69).

Shelia was living in the home when she was informed by Mr. Demmon that her driveway and pump had been constructed on that portion of Tract 16 still owned by him. On purchasing that parcel from the Demmons, title to all of Tract 16 was owned by Shelia Davis (Tr. 57).

By April of 1981, Shelia suspected that the Pruetts had constructed the home on the wrong parcel. She called Evelyn Brown and told her that she thought her house had been built on Ms. Brown's lot (Tr. 37). The following year, a complaint seeking to eject Shelia from the property was filed (R. 1).

Responding to the complaint, Shelia filed an answer and counter-claim which requested, among other things, an equitable exchange of the lots. A third party complaint was filed by her

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[1]The original dimensions of the Demmon lot, Tract 16, Karen Acres, were identical to the Brown lot, Tract 17. Both measured 226 feet by 494.86 feet, less the East 33 feet which was subject to a road easement (R. 270, 271, 248-250).

against the other parties named in this action (R. 16-19, 8-15).

When the trial commenced, it was announced by counsel for Ms. Brown that she expected Shelia Davis to be ejected from the property and the home awarded to her (Tr. 8). Incredulously, the trial judge remarked, "...are you asking this Court to give Mrs. Brown, your client, a $39,000.00 house for nothing, a windfall of $39,000.00?" (Tr. 12). Lawyers representing two of the third party defendants, Demmon and Wilkinson, countered by urging the equitable swap of the lots as had been advocated by Shelia's former attorney (Tr. 9, 10, 17).[2]

With these issues before the court, the testimony of the parties and their witnesses was taken. Evelyn Brown acknowledged that she became interested in the property as an investment. Faced with a choice between Tract 16 and 17, she selected Lot 17 because it had a slightly higher elevation than the other lot (Tr. 34, 35). She admitted that she had made no improvements to her land since acquiring it, and the water, electricity and septic tank serving the property were placed there by the contractor who originally built the home for the Pruetts (Tr. 45). Questioned by the court, she stated at the time of her purchase, the selling price of Tracts 16 and 17 were very similar (Tr. 50).

While expressing some sentiment toward the property or

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[2]Charles Wade had originally been retained to represent Shelia Davis. When a conflict developed, he was allowed to withdraw. Mrs. Davis was not represented by legal counsel at trial nor during the appeal to the First District Court. It is not known whether she has retained an attorney to represent her at this time.

possibly retiring there, Ms. Brown admitted she attempted to sell it in 1977. Asking $5,000.00 for the parcel she had purchased for only $2,114.32, Ms. Brown's effort to sell was unsuccessful (Tr. 35, 40-41).

The only other witness called by Ms. Brown was her surveyor, Marvin Cox. Although no one had disagreed that the house was constructed on the wrong lot, he performed a boundary survey. His fee of $300.00 for the survey was taxed as cost by the trial court. A topographic survey which he performed the month before the trial revealed another undisputed fact. The two lots were located on a hill with a gradual, but uniform slope. Tract 17 had a slightly higher elevation than Tract 16 (Tr. 23, 29, 30). The lower court refused to tax his fee of $792.50 for the topographical survey as cost.

The court then provided Shelia Davis and her husband with an opportunity to testify. Shelia explained that construction of the home was completed when she purchased it from the Pruetts. Improvements which she and her husband made to the property after acquiring it included enclosing and converting the garage into a bedroom and clearing the land on two occasions. Although there was a small mortgage of some $600.00 owed on the portion of Lot 16 purchased from the Demmons, Mr. Davis assured the court that it could be satisfied if an exchange or swap of

lots was ordered (Tr. 56, 59, 61-62).[3]

No attempt was made by Evelyn Brown to discredit the testimony that Shelia was without knowledge of the house being constructed on the wrong lot until after she purchased it and was living there. In fact, there is nothing in the record which would suggest or even hint that Shelia was anything other than a totally innocent purchaser.

Following the Davis' testimony, the county supervisor for the Farmers Home Administration, Jack Drasko, was called. While he was aware that Karen Acres was an unrecorded subdivision, his only knowledge of how long it had been in existence was supplied by Ms. Brown's earlier testimony that it began in 1974. Although the 25 or 30 lots in the subdivision had been for sale during that time, only three homes had been built there, and he had observed no appreciable growth in the area (Tr. 68).

Without objection, Mr. Drasko qualified as an expert real estate appraiser. On December 3, 1984, a week prior to the trial, he had made an appraisal of Lot 17 and the South 126 feet of Lot 16. He had observed the remaining 100 foot portion of Lot 16 and opined that the total value of Lot 16 was $5,900.00 and Lot 17 was $6,000.00 (Tr. 78-79). The difference of $100.00 in

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[3]A check of the Public Records of Okaloosa County, revealed that Shelia Davis had mortgaged the 100' X 461.86' portion of Tract 16 acquired from the Demmons to the First National Bank of Crestview on October 16, 1981. The promissory note secured by the mortgage required monthly payments of $118.65 each. At the time of the final hearing there should have been five payments or $593.25 owed on the note. The mortgage was satisfied on May 23, 1985. (See Appendix 1-4).

the value of the lots was attributable not to a difference in elevation, but rather to the unmaintained condition of the road beyond Lot 17 (Tr. 84).

When the case concluded, the trial court, guided by this Court's decision in Voss v. Forgue, 84 So.2d 563 (Fla. 1956), ordered an equitable exchange of deeds between the parties. Additionally, the Farmers Home Administration and the First National Bank of Crestview were required to transfer their liens from Lot 16 to Lot 17, and Ms. Brown was awarded damages of $500.00 and a portion of her cost.

The District Court of Appeals, First District, upheld the equitable exchange of properties. Finding, however, that Ms. Brown "...could be made more whole,..." remanded the case for consideration of four matters. These were: (1) Resolution of the lack of oil, gas and mineral rights to Tract 16; (2) A conveyance to Ms. Brown of an undivided 1/25th interest in Recreational Tract 14 or compensation to her for the loss of that interest; (3) Satisfaction of the mortgage held by the First National Bank of Crestview on Tract 16; and (4) An award to Ms. Brown of $792.50 for cost of the topographic survey, Brown v. Davis, 493 So.2d 523, 525 (Fla. 1st DCA 1986).

The District Court also certified the question now before this Court.

SUMMARY OF ARGUMENT

The question certified by the District Court, First District of Florida, was previously answered by this Court in the case of Voss v. Forgue, 84 So.2d 563 (Fla. 1956), and Chavis v. Citizens Federal Savings and Loan Ass'n., 95 So.2d 581 (Fla. 1957). In both cases, the decision of the trial courts requiring a swap or exchange of lots between property owners was affirmed. In each instance, one of the parties had mistakenly constructed a home on the wrong lot.

In this case, both parties are innocent of any wrong-doing. The lots involved are the same size, essentially the same in price, and neither has any peculiar or intrinsic value. Any differences that may have existed have either been cured, rendered moot, or compensated for by an award of damages in the amount of $500.00.

With this factual situation, the trial court sitting as a court of equity - a court of conscience, invoked the principle that equity will in a proper case grant relief from a unilateral mistake. Here the court knew that the brick home occupied by Shelia Davis could not be removed from the property without doing substantial damage. Similarly, an award to Evelyn Brown of the $39,000.00 home mistakenly constructed on her lot would have constituted an unjust enrichment. Therefore, the court, in an effort to protect to the greatest extent possible the conflicting

interest of the parties, required them to exchange lots.

Finally, the trial court did not abuse its discretion by denying the demand that the $792.50 topographic survey be taxed as cost.

STATEMENT OF QUESTION FOR REVIEW

CAN A COURT IN EQUITY, ORDER EXCHANGE OF DEEDS OF TWO LOTS WHEN THE OWNER OF ONE LOT MISTAKENLY CONSTRUCTS ON THE ADJACENT LOT OF THE OTHER OWNER?

Equity will, in justifiable situations, grant relief to one from the adverse effects of a unilateral mistake, even though the other party is innocent of any inequitable conduct or fraud. Florida Courts have upheld this principle in a variety of cases. Wicker v. Board of Public Instruction of Dade County, 106 So.2d 550 (Fla. 1958); Maryland Casualty Company v. Krasnek, 174 So.2d 541 (Fla. 1965); Pa. Nat. Mut. Cas. Ins. Co. v. Anderson, 445 So.2d 612 (Fla. 3rd DCA 1984).

Employing this principle in Voss v. Forgue, 84 So.2d 563 (Fla. 1956), this Court affirmed a chancellor's decree requiring the parties to exchange lots. The Voss case is essentially indistinguishable from the one at bar. There Forgue secured a building permit to construct a dwelling on Lot 15 of F. J. Burn's Realty Company Replat. He commenced construction on Lot 16, under the mistaken belief that he was on Lot 15. After more than a month, he was notified by Voss that he was building on Lot 16 which belonged to Voss. At that point, Forgue had a considerable amount of money invested in material, and the building was near completion.

Forgue filed a suit in equity against Voss. He alleged the mistake and asked that Voss be required to purchase the improvements

at a fair value or convey the lot to him at its reasonable value. Voss, who was in a posture similar to Ms. Brown in this case, asked that he be awarded the improvements without compensation to Forgue, or that Forgue be required to remove the improvements.

In ordering the exchange of lots, the chancellor found Lots 15 and 16 to be adjacent and substantially the same in value. Further the chancellor found that because Forgue was innocent of wrongdoing, he should not be required to forfeit his expenditure. Affirming that decision, this Court also noted that there was no contention that either of the lots had any peculiar or intrinsic value. Id. at 564.

This decision comports precisely with the holding of the trial court in the present case. In fact, the record significantly establishes that Shelia Davis, unlike Forgue, did not commit the mistake of constructing her home on the wrong property. The home had been constructed by the Pruetts, and Shelia had purchased it from them without any knowledge that it was built on Ms. Brown's lot. She was totally innocent of any wrongdoing, and the trial judge quite properly fashioned an equitable resolution of the conflicting interest of the parties.

In an attempt to distinguish Voss from this case, Ms. Brown asserts that there were peculiar or intrinsic distinctions between her lot and the Davis lot. These differences included three of the four matters the District Court remanded for reconsideration.

For example, Tract 16 had no oil or mineral rights, and no easement to Recreational Tract 14. Also, part of Tract 16 was mortgaged to a local bank.

After the District Court issued its mandate, Carroll and Sara Demmon executed a quit claim deed conveying to Ms. Brown their undivided 1/25th interest in Recreational Tract 14, and the oil, gas, and other mineral rights they had reserved in Tract 16. That deed, a copy of which is included on Page 5 of the Appendix, is being held in escrow pending the outcome of this suit. A check of the Public Records of Okaloosa County renders moot any concern Ms. Brown expressed with the mortgage that encumbered part of Tract 16. The lien of the First National Bank of Crestview has now been satisfied (Appendix 1-4).

The two remaining dissimilarities suggested by Ms. Brown are the slightly lower elevation of Tract 16, and the fact that it is heavily wooded and access to it is overgrown. The testimony of Ms. Brown's surveyor established that Tract 16 and 17 are on a uniform, sloping hill. Although one lot is slightly higher on the hill than the other, this, in the opinion of the appraiser, was not the reason why there was only $100.00 difference in the value of the two lots. He attributed that to the lack of maintenance of the access easement beyond Lot 17. Also, one would expect to find heavier timber growth on Tract 16 which has not been cleared for the construction of a residence as was Tract 17, and it is certainly

foreseeable that an access route that is neither used nor maintained would become overgrown. These two alleged, distinguishing characteristics, and the other factors previously mentioned, simply are not valid distinctions between the two cases.

Even if they were, which the District Court obviously found was not the case, the courts of our state have not hesitated to grant equitable relief in similar situations in order to do complete justice. The circumstances here are almost identical to those which existed in Chavis v. Citizens Federal Savings and Loan Ass'n., 95 So.2d 581 (Fla. 1957). There, Division B of the Florida Supreme Court affirmed on the authority of Voss, the chancellor's decree ordering the exchange of two lots on which homes had been constructed. The lots were the same size, and the homes were of the same value. See, Boyer, Ankus and Friedman, Survey of Real Property, XII U. Miami L. Rev. 499 (1958).

The granting of equitable relief from a unilateral mistake has not been limited to real property litigation. In both Maryland Casualty Company v. Krasnek, and Pa. Nat. Mut. Cas. Inc. Co. v. Anderson, supra, insurance companies were relieved of their obligations reached in negotiated settlements that resulted from unilateral mistakes on the part of the companies. Recognizing that this might not align with the expression of other jurisdictions, the

Krasnek Court concluded:

> "Although there is little doubt that the statement in the District Court's opinion that unilateral mistake provides no basis for recission of a contract or for other equitable relief therefrom, represents the majority view, ...we are of opinion that it does not accurately reflect Florida case law. ..." supra at 542.

Embodied in the position taken by our courts is the rationale that a court of equity is a court of conscience which looks to the equities and circumstances shown in each particular case. This consideration aside, Ms. Brown argues that Shelia should be treated as a trespasser; that she wrongfully converted Ms. Brown's property to her own use; and the trial judge failed to apply the law of condemnation by forcing Shelia to buy Ms. Brown's property. These contentions are totally without basis in any of the pleadings, evidence or law now before this Court. Also, the reference made by Ms. Brown to a letter discussing settlement by an attorney who did not even participate in the trial or these appellate proceedings, is totally improper.

The one concluding point which we ask this Court to address is the District Court's reversal of the trial judge's decision disallowing the cost of Ms. Brown's topographic survey. In 1982, Ms. Brown's surveyor made a survey of Lot 17 showing the erroneous location of the home (Tr. 23). This was not a disputed fact. One month before the trial, the surveyor also prepared a topographical survey, which identified the lots on a gradual sloping hill, Again,

this fact was not in dispute.

When the trial court awarded Ms. Brown $300.00 for the cost of the original survey and denied the cost of the other, there was an apparent recognition that the topographical survey contributed nothing of value to the case. This was a matter within the discretion of the chancellor. For as this Court has said:

> "It has long been a fundamental rule of equity jurisprudence that in a chancery cause costs should be awarded as the justice of the case may require. ... Accordingly, a Court of equity, in the exercise of a sound judicial discretion, may decree that the cost shall follow the result of the suit; may apportion the costs between both parties; or may require that all costs shall be paid by the prevailing party. In either situation, an appellate court will not disturb the ruling of the chancellor, unless a clear abuse of discretion is made to appear."

Atkins v. Bethea, 160 Fla. 99, 33 So.2d 638, 640 (Fla. 1948).

In the present case, the decision not to allow $792.50 as cost for the topographical survey was within the discretion of the trial judge. That discretion was not violated unless no reasonable man would agree with the position taken by the chancellor.

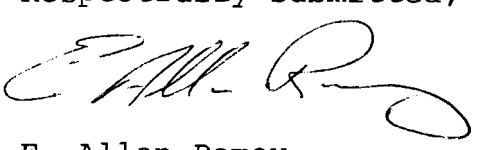
CONCLUSION

Respectfully, it is submitted that Ms. Brown's complaint with the trial court's ruling in this case has nothing to do with the requirement that she exchange lots with Mrs. Davis. It is rather obvious that when she was unsuccessful in selling her lot in 1977, she viewed this unfortunate mistake as an excellent way to unload her "investment" at a profit.

The reasonableness and logic of Voss has not been questioned. Following the policy of stare decisis, the trial judge correctly and equitably applied the principle of law announced there to the facts presented in this case. There has been no suggestion made that Shelia Davis contributed to the mistake or was guilty of any wrongdoing. Clearly, the trial court's ruling invokes justice and fairness for both parties.

Furthermore, there has been no showing that the chancellor abused his discretion by denying the cost of the topographic survey. The District Court's reversal on this point constitutes error. It is, therefore, our position that the decision of the Circuit Court of Okaloosa County was wholly correct and must be affirmed.

Respectfully submitted,



E. Allan Ramey
Attorney for Third Party
Defendant/Buddy Wilkinson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief of the Appellee, Buddy Wilkinson, was furnished to the Clerk of the Supreme Court, Tallahassee, Florida, 32304; and a copy to W. Thomas Dillard, United States Attorney and Benjamin W. Beard, Assistant United States Attorney, U.S. Courthouse Room 307, 100 North Palafox Street, Pensacola, Florida 32501; copy to Shelia Davis, Route 1, Box 127-B, Holt, Florida 32564; and a copy to W. A. Swann, Jr., Attorney for appellant, P.O. Box 17687, Pensacola, Florida 32522, by regular U.S. Mail, this 14th day of November, 1986.

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