IN THE SUPREME COURT IN AND FOR THE STATE OF FLORIDA

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, DEPARTMENT OF AGRICULTURE and their agent JACK DRASKO,

Appellees.

----------CASE NO. 69,371
DCA CASE NO. BF-112

APPEAL FROM THE DISTRICT COURT OF APPEAL

FIRST DISTRICT OF FLORIDA

APPELLANT'S INITIAL BRIEF

Submitted By:

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ISSUES PRESENTED

The minority opinion (Justice Mills and Justice Shivers) certified the following question as one of great public importance:

> "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?"

The majority opinion (Justice Zehmer) restated the question to be certified as follows:

> "CAN A COURT EXERCISING ITS EQUITABLE POWERS ORDER EXCHANGE OF DEEDS TO TWO LOTS, DESPITE THE AVAILABILITY OF ALTERNATE STATUTORY AND COMMON LAW REMEDIES, WHERE THE OWNER OF ONE LOT MISTAKENLY CONSTRUCTS A BUILDING ON THE ADJACENT LOT OF THE OTHER OWNER AND THE LATER OWNER OBJECTS TO SUCH EXCHANGE BECAUSE THERE ARE INTRINSIC DIFFERENCES BETWEEN LOTS THAT MAKE THE FORMER UNACCEPTABLE TO HER?"

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STATEMENT OF THE CASE

The Appellant, Evelyn Brown, was the Plaintiff in the Circuit Court and Appellant in the District Court. The Appellee, Shelia Davis (Miller) was the Defendant in the Circuit Court and Appellee in the District Court. The other Appellees were Defendants brought in by Mrs. Davis (Miller).

On August 13, 1982, Evelyn Brown, a resident of Escambia County, Florida, filed suit at law in ejectment against Shelia Davis (Miller) alleging she was the lawful owner and entitled to possession of the following described two and one-half acre parcel of unimproved property in Okaloosa County, Florida, to-wit:

> Tract No. 17: Karen Acres: Commencing at the Southwest corner of the NW 1/4 of the SE 1/4 of said section 36 and run North 0 Degrees 33' West, a distance of 692.5 feet to the point of beginning; thence continue North 0 Degrees 33' West, a distance of 226 feet, thence run North 89 Degrees 27' East a distance of 494.86 feet; thence run South 0 Degrees 33' East, a distance of 226 feet; thence run South 89 Degrees 27' West, a distance of 494.86 feet to the point of beginning; being subject to a road easement over and across the East 33 feet of the above described tract. All tracts lying and being in Section 36 Township 3 North, Range 25 West, Okaloosa County, Florida.

In her Answer Shelia Davis (Miller) denied the material portions of the Complaint and filed the following Counter-claims against Mrs. Brown, in separate counts (A-24), to-wit:

FIRST COUNT: An action in equity to require Mrs. Brown to swap lots with her.

SECOND COUNT: An action for damages against Mrs. Brown under the portion of the ejectment statute which provides for payment for Betterment.

THIRD COUNT: An action in equity to establish an equitable lien against Mrs. Brown's property.

FOURTH COUNT: An action in equity allowing her to remove the improvements from Mrs. Brown's property.

Additionally, Mrs. Davis (Miller) filed Third Party Complaints (A-24) as follows:

1. Against the Pruetts who were her predecessors in title for damages for breach of warranty.

2. Against the Demmons who were also her predecessors in title as to another portion of Tract 16, for damages for breach of warranty.

3. Against Buddy Wilkinson, the surveyor for damages as a result as of negligence in surveying the property.

4. Against West Florida Title Company as agent for the issuance of a title insurance policy.

5. Against the United States Government requesting that its mortgage be cancelled.

Each of the above parties answered (except West Florida Abstract and Title Company which was not served) and interposed various defenses and Cross Complaints against others.

Subsequently, the Court entered an Order on the Plaintiff's Motion for Summary Judgment establishing the following facts (A-22):

A. That Evelyn Brown was the lawful owner of the property described as Tract number 17 of Karen Acres.

B. That the Defendant, Shelia Davis (Miller) presently occupied a one-story brick residence located upon the property and is in possession of the said property.

C. That possession of Shelia Davis (Miller) is without the consent of Evelyn Brown and that Shelia Davis (Miller) has refused to relinquish possession and turn the same over to Evelyn Brown.

On September 28, 1984 the Court entered a Pre-Trial Order stating that the principal issue involved was the remedy of the Plaintiff and the issue of damages (A-21).

On January 31, 1985 the Court entered Final Judgment and the pertinent provisions of which are as follows (A-13):

> "1. That the Plaintiff, EVELYN BROWN, and the Defendant, SHELIA DAVIS, shall exchange lots so that Mrs. Brown will become the owner of the property referred to as Tract Number 16 (as hereinafter described) and Shelia Davis shall become the owner of the property referred to as Tract Number 17 (as hereinafter described)."

On appeal to the District Court of Appeal, First District, affirmed in part and reserved in part and certified to the Court the following question:

"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?" (A-1)

This question is presently before the Court.

In this Brief the following symbols will be used:

"A" Appendix to Appellant's Brief

"T" Transcript of Testimony

"R" Record on Appeal

STATEMENT OF THE FACTS

This case involves the general situation where a house was constructed on the wrong piece of property. The property involved is in Karen Acres which was originally owned by Raymond Jesse and Alice Jesse who subdivided the same into twenty-five (25) separate tracts each containing an approximate two and one-half acres. The principal parties, Evelyn Brown and Shelia Davis (Miller) derived their title from the common source of James Roth and wife who purchased Tracts 16 and 17 of the property from the Jesses. In 1974 Evelyn Brown received a Deed and assignment of Contract from the Roths. She made a down payment on the property of $400.00 and assumed Mr. and Mrs. Roth's obligation to the original owners, the Jesses (T-35). She continued the required payments of principal and interest to the Jesses for a period of some ten (10) and then received a Warranty Deed to the property. (A-41)

She had last viewed the property in the spring of 1980 shortly before the house was constructed upon it and was totally unaware of the existance of the house until 1982 when she was contacted by Mrs. Davis (Miller) (T-37-38) (A-7).

The property owned by Mrs. Davis (Miller) is tract 16 of Karen Acres which is identical in size and in acreage to Tract 17. However, Tract 16 was subdivided by the Demmons so that the frontage on one portion of the property is 126 feet and the frontage on the other portion is 100 feet. Mrs. Davis (Miller)

purchased the 126 foot portion of tract 16 from the Pruetts who had constructed the house in question in the summer of 1980 (T-101). The Pruetts had obtained their financing from the Farmer's Home Administration, Division of the United States Government. Mrs. Davis (Miller) paid approximately $2,000.00 for the Pruett's equity in the property and assumed the loan. (A-1)

The division of Tract 16 had been made by the Demmons who owned all of Tract 16 and had previously acquired the same from James Roth and wife. The Demmons had employed the Surveyor, Buddy Wilkinson, an appellee in this case to make a division of Tract 16. For reasons that are not entirely clear from the record, the surveyor made a division of Tract 17 instead of Tract 16. Mrs. Davis (Miller) acquired the 100 foot portion of Tract 16 directly from the Demmons in a separate transaction paying $2,500.00 cash (T-58-60; A-8) (Plaintiff's Exhibit 4) (A-1).

It should be noted that in all of the pleadings filed by Mrs. Davis (Miller) the description of the 126 portion of Tract 16 and there is no reference to the 100 foot portion (A-10). However, at the trial, she testified that she owned the said 100 foot portion, on which she has placed a mortgage to the First National Bank of Crestview, which bank was not a party to this suit.

Additional facts will be set forth in the Argument hereafter.

SUMMARY OF ARGUMENT

This is an ejectment action under Chapter 66, Florida Statutes in which the Appellant, Evelyn Brown, is totally innocent and blameless. The legislature has provided the remedy of compensation (not exchange of property) for Defendants (Betterment) for improvements placed upon the property.

In 1974, Mrs. Brown had the opportunity to purchase either Lot 16 or Lot 17. She chose Lot 17 because of its higher elevation and proximity to the road. She has now been forced to take Lot 16 which she did not want then and which she does not want now.

The ordering of an exchange of Lots has resulted in the successful party being required to take property owned by the trespassing party as damages. The awarding of damages of specific property of another as damages for trespass is totally foreign to our jurisprudence and sets a dangerous precedent.

An exchange of Lots is not a proper remedy where the purchase by the trespassing party is a viable option.

The Appellee is not entitled to equitable considerations because she dealt with both lots as her own and to her advantage with full knowledge that she did not own both.

There are significant differences from the case of Voss v. Fogue, FL 84 So.2d 583 (1956) including the following:

1. It was not an ejectment case.
2. The true owner would not sell.

3. Mrs. Davis (Miller) has recourse against the responsible party.

4. The Lots are not substantially identical.

Additionally, and perhaps most important, in the Voss case there was no contention that either lot had peculiar or intrinsic value; whereas, both the majority and minority opinions recognized at least five (5) differences in the two (2) lots.

The weight of authority in this country supports the rule that equity will not help one who has made improvements on the land of another by mistake, where the true owner has been guilty of no fraud, acquiescense with knowledge or other inequitable conduct. 104 ALR 580

The weight of authority also supports the view that an innocent owner should be given the option of paying for the improvements or acceptance of the value of the land without improvements. 57 ALR 2d 267

This Court should adhere to the cases of Hedges vs. Lysek, 84 So. 2d 28 (Fla. 1955) which was decided by a different division of the Supreme Court some 2 1/2 weeks prior to the Voss case; and Brown v. Johns, 312 So. 2d 526 decided by the First District Court of Appeal in 1975. In both cases the Court held that the proper remedy was to allow the improvements to be removed if possible; and, in Brown v. Johns, 312 So.2d 526 there was inequitable conduct on the part of the true owners. To the extent that these cases differ, we allege that this Court also has "conflict jurisdiction".

ARGUMENT

The majority opinion has certified to this Court the following question of great public importance:

> "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?"

The majority opinion was written by Judge Shivers and concurred with by Justice Mills.

Justice Zehmer in his descinding written opinion restated the question as follows:

> "CAN A COURT EXERCISING ITS EQUITABLE POWERS ORDER EXCHANGE OF DEEDS TO TWO LOTS, DESPITE THE AVAILABILITY OF ALTERNATE STATUTORY AND COMMON LAW REMEDIES, WHERE THE OWNER OF ONE LOT MISTAKENLY CONSTRUCTS A BUILDING ON THE ADJACENT LOT OF THE OTHER OWNER AND THE LATER OWNER OBJECTS TO SUCH EXCHANGE BECAUSE THERE ARE INTRINSIC DIFFERENCES BETWEEN LOTS THAT MAKE THE FORMER UNACCEPTABLE TO HER?"

It is our position that the exchanging of Lots is not a proper remedy to a Plaintiff in an ejectment action in a situation where the Plaintiff is totally innocent. We include the fact that the Plaintiff has <u>not</u> refused to sell her Lot at current market value. Additionally, this is a situation where there was a bona fide contention that there were intrinsic and peculiar differences between the Lots. Indeed, such differences are recognized by both the majority and minority opinions.

The question resolved as to the proper remedy of Plaintiff in an ejectment action. Under the circumstances of this case, this remedy was not adequate nor appropriate. As a "successful" Plaintiff in an ejectment action, Mrs. Brown has not been able to

recover the lot to which she held legal title or the value thereof. On the contrary, she has been awarded the remedy of a lot she did not want in 1974 and one which she considers inferior. Aside from legal arguments, an exchange of lots has the additional disadvantage of forcing individuals to live next to each other who have been engaged in this type of litigation against each other. If this were an Earl Stanley Gardner novel, it would no doubt be entitled THE CASE OF THE EJECTED PLAINTIFF.

Under the common law, improvements placed on real estate without the consent of the owner becomes part of the realty and vest in the owner, McCreary v. Lake Boulevard Sponge Exchange Company, Inc., 133 Fla 740, 183 So. 7.

In Florida, Common Law ejectment is abolished by Chapter 66, Florida Statutes entitled "Ejectment". This statute, for the most part, deals with the remedy of the Defendant under the title of "Betterment". An elaborate procedure is set up to compenstate the Defendant for improvements which the true owner must pay the Defendant for improvements. This statute makes no provision for the Plaintiff and the Defendant to exchange lots as a remedy.

The question naturally arises why should the totally innocent Plaintiff be any worse off because the Defendant was a trespasser without any color of title than where the Defendant-trespasser was with color of title. In such a case aren't there more "equities with the with the trespasser with color of title". It must be kept in mind that the negligence we are dealing with

in thise case appears to be more than simple in that there was uncontraverted testimony that the concrete markers for the lots were easily visible and that each lot had the lot number posted on it. It is certain that we are dealing with a surveyor who is essentially a professional person and whose dereliction could best be characterized as malpractice. He is a defendant in the case and is the person responsible for this situation. The nominal damages of only $500.00 assessed against him as compared to the harsh remedy awarded the Plaintiff do not seem to balance one another.

The propriety of awarding property to a successful Plaintiff as a "remedy" in this case must be analyzed in the following factual background:

Originally, Mrs. Brown had the opportunity to purchase either Tract 16 or Tract 17 from a realtor who owned both tracts. In her testimony, Mrs. Brown stated the reasons for purchasing Tract 17 as follows:

> "So I chose lot 17 because it was higher elevated, closer to the highway and I did not like Lot 16 that was slopped down toward the creek."

It is Mrs. Brown's position that she did not want Tract 16 back in 1972 when she was looking at both tracts and that she does not want it now.

Thus we have a situation where Mrs. Brown who is totally innocent and has the most "equities", in her favor has been forced to take another piece of property as a remedy and as

damages in a situation where she has clearly been the innocent victim of a trespass.

If we were dealing with a law suit involving the conversion of personal property, the normal remedies would be the return of the property itself or its value in damages. It would be absurd to suggested that one of the available remedies should be that the Defendant "exchange " substantially similar property which he may own for the property converted. Likewise, one who trespasses upon and converts the real property of another, however innocent, should either have to return the real property itself or pay the value thereof in damages. He should not have the option to substitute other real property which he might own, however similar, for the property trespassed upon and converted.

The taking of one's property without his consent is totally foreign to our form of government and to the constitutions under which we live. There are only a few instances in which such taking is legal, one such instance being the right of the sovereign to take property through condemnation proceedings which is justified solely on the basis of being necessary for the common good of all people. Even in this instance the property owner is compensated in money (not other property) through condemnation proceedings wherein a jury determines the value of his property.

There are several equities in this case which work against Mrs. Davis (Miller). First, she would not entertain the idea of

paying Mrs. Brown for her lot even though the Farmers' Home Administration agreed to advance her the money with which to do so. There is evidence in the record of this case that prior to the trial Mrs. Brown offered to accept $7,000.00 for her lot of which Mrs. Davis (Miller) was to pay the sum of $4,000.00 and other defendants were to pay the sum of $3,000.00. In other words, Mrs. Davis (Miller) could have had a $7,000.00 lot for $4,000.00 but chose not to do so. (Letter to Mrs. Davis (Miller) A-20).

In addition, Mrs. Davis (Miller) placed a mortgage on her Lot, Lot 16 after the ejectment action was filed with full knowledge that her house was not located on Lot 16. The relatively small amount of the mortgage is not the point. The fact is that Mrs. Davis (Miller) dealt with both lots as if they were her own, with full knowledge that she did not own both.

The fact that this was done after the case was commenced with full knowledge of the true facts is contemptous to the pending proceeding and shows a complete disregard for the legal process. Such selfserving conduct hardly qualifies for equitable consideration.

With respect to the case of Voss v. Forgue, FL 84 So.2d 583 (1956), there are significant differences.

First, the Voss case is not an ejectment case but rather a suit instituted by the landowner who had mistakenly constructed his dwelling upon a lot adjacent for relief from his mistake.

The provisions of the ejectment statute dealing with betterment were not available as a remedy.

Second, the trespasser tried to unsuccessully purchase the lot after the mistake was discovered.

Third, in our case Mrs. Davis (Miller) had recourse against the predessors in title and against the surveyor, all of whom are parties to this case.

Fourth, the lots in this case are not substantially similar.

We are all familiar with cases that "open the door" to what might be described as previously forbidden areas. The majority opinion seems to have construed the case as opening the door to the exchange of lots as a common and acceptable remedy. The Voss case, if it is to be followed at all, should be limited to the exact facts. On of these facts is that "there is no contentions that either of the lots had one peculiar or intrinsic value" (Page 564). In our case there was not only the contention but there were some five differences about which there was not contest. These differences were:

1. Part of Tract 16 is mortgaged to a local bank.
2. Tract 16 has no oil or mineral rights.
3. Tract 16 has no easement to recreational Tract 14.
4. Tract 16 is substantially lower in elevation.
5. Tract 16 is heavily wooded and access to it is overgrown.

The majority opinion seems to us that some of the differences but not all can be cured by action on the Appellee. However, those who are seeking equity should be taken such action prior to the trial of the case.

The Voss case recognizes as the weight of authority the following rule of law as set forth in 104 ALR 580:

> "In a bare majority of the jurisdictions of this county wherein the question has clearly received consideration, support has been given to the rule that, not even in equity can one who has made improvements on the land of another, believing himself to be the owner, recover therefor, as plaintiff, where the owner has been guilty of no fraud, or acquiescence with knowledge, or other inequitable conduct." (Emphasis Supplied)

We think that a case more in point with the factual situation presented is the case of Brown vs. Johns, Fla. App. 312 So.2d. 526 (1975) decided by the First District Court of Appeal. This case was an ejectment action (the Voss case was not). This case involved a house being mistakenly built upon the wrong property wherein the improver was lead to believe that the true owner would "work out" a satisfactory deal later. The house (a Jim Walter home) could easily be removed from the property. The trial court ordered ejectment and enjoined the Defendants from removing the home from the premises. The District Court of Appeal through Justice Boyer held that since the home could easily removed and there was inequitable conduct on the part of the true owner that the improver should be allowed to remove the house. Even in a situation where there was inequitable conduct

on the part of the true owner, the most that was given to the improver was the right to remove the improvements and this only because they could be easily removed.

In the annotation appearing at 57 ALR 2nd 267 it is stated that the owners ignorance or knowledge that the improvements were being made is an important and sometimes controlling factor in determining the claimant's right to relief. Specifically, it is stated;

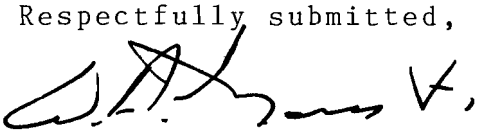
> "In some instances the owners have been given the option of paying for the improvements or accepting the value of the land without the improvements."

Additionally, initially it should be noted that the Voss case was decided by Division "A" of the Supreme Court in an opinion filed on January 4, 1956. Two and one-half weeks prior thereto on December 14, 1955, Division "B" of the Supreme Court published the opinion in Hedges vs. Lysek, 84 So.2d. 28 (1955) where the Court held that the remedy in a similar factual situation was to allow the removal of the building from the land. Such removal was allowed only because the record revealed that such could be accomplished easily and without substantial damage to the freehold. These two (2) cases reached different conclusions as to remedy on identical facts.

CONCLUSION

The relief requested is for the case to be remanded with instructions for Mrs. Brown to be awarded the value of her lot without improvements plus interest at the legal rate since the date on which the improvements were made. A date certain should be set for the payment of the foregoing the default of which she would be granted possession of the improved property. Stated another way, the Defendants would have the option of turning over to Mrs. Brown her property with improvements or of paying her the market value thereof plus damages for detention.

Respectfully submitted,



W. A. SWANN, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing Appellant's Initial Brief and Appendix was furnished to the Clerk of the Supreme Court of Florida, Tallahassee, Florida 32304, by U. S. Mail and one copy of each was furnished to ALLEN RAMEY, Esquire, P. O. Box 369, DeFuniak Springs, FL 32433, C. THOMAS HOLLAND, Esquire, 596 North Ferdon Boulevard, Crestview, FL 32536, SAMUEL ALTER, JR., Esquire, U. S. Courthouse, Room 307, 100 North Palafox St., Pensacola, FL 32536, MRS. SHELIA DAVIS, Route 1, Box 127-B, Holt, FL 32564, and MR. AND MRS. ROBERT PRUETT, Route 4, Box 251, Crestview, FL 32536, together with a copy of the transcript of the testimony by U. S. Mail this the 20th day of October, 1986.

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