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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190775

Anthony Gates

v.

Thomas Ellis and Diana Ellis

**Appeal from Clarke Circuit Court
(CV-17-900151)**

HANSON, Judge.

Anthony Gates appeals from a judgment of the Clarke Circuit Court ("the trial court") adjudging Thomas Ellis and Diana Ellis to be the owners

2190775

of a four-acre tract of property located in Clarke County. We reverse and remand.

Facts and Procedural History

In 1997, Donnie Ray Baswell sold Gates a two-acre tract of land located off Rural Road near Thomasville. Baswell thereafter continued to own a 10.6-acre tract of land ("the property"), which was adjacent to the tract sold to Gates. On October 16, 2013, Baswell and Gates reached an agreement for Gates to purchase four acres of the property, and, on that date, they executed a "bill of sale" document ("the bill of sale"), signed by three witnesses, stating:

"I Donnie Ray Baswell sell four acres of my property in Thomasville, Alabama located on Rural Rd. to Anthony Gates for the sum of \$4000.00 which has been paid in full on this date of October 16, 2013. The property will connect to Anthony Gates' currently owned property with exact location to be determined at the time of surveying."

Notwithstanding the execution of the bill of sale, on April 28, 2014, Baswell executed a warranty deed that, "in consideration of the sum of ten dollars and other valuable consideration," purported to convey the property, including the four acres purchased by Gates, to Baswell's son-in-

2190775

law, Thomas Ellis, and Baswell's daughter, Diana Ellis. The deed was recorded in the Clarke County probate office on May 22, 2014.

On November 19, 2014, Gates recorded the bill of sale in the Clarke County probate office. In March 2015, Baswell executed a "Correction Warranty Deed" purporting to correct the description of the four-acre tract referenced in the bill of sale and, likewise, purporting to convey the four acres to Gates. That correction deed, recorded on November 10, 2016, contained a legal description of the four acres purportedly conveyed to Gates and referenced a survey conducted by a professional surveyor dated August 7, 2014.

On September 20, 2017, the Ellises initiated an action against Gates to quiet title to the property. The Ellises alleged that they were the true owners of the property by virtue of the April 28, 2014, warranty deed. The Ellises requested that the trial court enter a judgment declaring them to be the owners of the property.

A bench trial was conducted on June 16, 2020. At trial, Thomas Ellis testified that, in 2014, he and his wife, Diana Ellis, had been living in a house located on the property and that, one day, Baswell had asked

2190775

Thomas and Diana to come with Baswell to a lawyer's office, where he had informed them that he intended to convey the property to them. Thomas testified that, at the lawyer's office, a warranty deed purporting to convey the property to the Ellises had been prepared. Thomas stated that he had paid \$10 for the property, but that he had understood that the conveyance was essentially a gift from Baswell, and he acknowledged that the value of the property was \$43,700. Thomas stated that a title search conducted contemporaneously with the preparation of the deed had indicated that Baswell had held clear title to the property. Thomas claimed that he had had no knowledge that Baswell had already sold Gates four acres of the property or that Gates claimed any interest in any part of the property.

Similarly, Diana testified that Baswell had taken her and Thomas to Baswell's lawyer's office and had asked the lawyer to prepare a deed conveying the property to the Ellises. Diana testified that she had paid for the title search, which had indicated that Baswell had held clear title to the property. Diana stated that she had not had any knowledge that Gates claimed any interest in any portion of the property. Diana testified that the first time she had realized there was potentially another claim to

2190775

the property was when a surveyor had appeared on the property in July 2014.

Gates stated that, in 2013, Baswell had asked him if he had wanted to buy some additional land and that they had agreed that Baswell would sell him the four-acre tract for \$4,000. Gates stated that, on October 16, 2013, he had met Baswell on the four-acre tract, that they and the witnesses had signed the bill of sale, and that he had paid Baswell \$3,800, and he stated that he had paid the remaining \$200 the next day. Gates stated that the transaction had taken place on the hood of Baswell's truck.

Moreover, Gates testified regarding his belief that Thomas had been aware of the sale. He stated that Thomas had been seated inside Baswell's truck at the time the transaction occurred. Gates also claimed that he had talked about his purchase of the four-acre tract with Thomas and that, after Gates had purchased the four-acre tract, Thomas had helped him cut firewood from that tract and clear land for a garden on

2190775

that tract.¹ Gates further testified that Baswell had told him that he had given the remainder of the property to the Ellises.

Gates testified that he had delayed in recording the bill of sale because he had not perceived any rush in recording it and that he had delayed getting the four-acre tract surveyed until he had had the money to pay for a survey; he noted his inexperience in purchasing real estate and stated that he had simply followed the same procedure he had followed with regard to his 1997 purchase of the two-acre tract.

Baswell testified that he and Gates had indeed agreed for Gates to purchase four acres of the property for \$4,000. He further stated that, notwithstanding the lack of a legal description of that tract in the bill of sale, he and Gates had had an understanding as to which four acres Gates was purchasing. Baswell stated that it had been his intention, following the sale of the four acres to Gates, to convey the remaining 6.6 acres of the

¹Gates testified that the land for the garden had been cleared within a year of his purchasing the four-acre tract. Thomas admitted that he had permitted Gates to plant a garden and cut firewood on the property, but he indicated that those acts had occurred after the Ellises had purchased the property.

2190775

property to the Ellises as a gift and that, when he had signed the deed to the Ellises, he had believed that that deed conveyed only the remaining 6.6 acres.

On July 13, 2020, the trial court entered a final judgment in favor of the Ellises and against Gates. The trial court found that, at the time the Ellises "received their deed ..., [they] were good faith purchasers for value, without notice of any claim of ... Gates," and that the Ellises had "paid ... Baswell an actual and valuable consideration, being \$10.00." Accordingly, the trial court held that the Ellises were "the owners of [the property] in fee simple, free and clear of any claims of ... Gates," and that the bill of sale and correction deed were "null and void, and of no effect, and [to be] stricken from the records of the Probate Office of Clarke County, Alabama." Gates timely appealed from the judgment.²

Standard of Review

In this case, the trial court's judgment followed a bench trial in which ore tenus evidence was presented.

²Our supreme court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

" "When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error." ' Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).

" "The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The rule applies to "disputed issues of fact," whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d 669, 672 (Ala. 1995). The ore tenus standard of review provides:

" "[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence." "

"Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000) (quoting Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977)). However, 'that presumption [of correctness] has no application when the trial court is shown to have

2190775

improperly applied the law to the facts.' Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994)."

Yeager v. Lucy, 998 So. 2d 460, 462-63 (Ala. 2008).

Analysis

On appeal, Gates argues that the trial court erred in determining that the Ellises were bona fide purchasers for value and, thus, that they were the owners of the disputed four-acre tract. Initially, we note that no argument has been made, either in this court or below, that the bill of sale did not meet the formal requirements for a valid conveyance under Alabama law, and we therefore assume, without deciding, that that instrument contained all the elements necessary to constitute an effective conveyance. See, e.g., Smith v. Smith, 820 So. 2d 64, 70 (Ala. 2001) ("To effectuate a transfer of title to real property, Alabama statutory law requires that a deed be in writing, that the grantor sign the deed, and that it be attested to by at least one witness."), and Ala. Code 1975, § 35-4-20.

Notwithstanding our assumption that the bill of sale constituted an effective conveyance, that instrument was not recorded at the time Baswell purportedly conveyed the property to the Ellises. "A deed that is

2190775

unrecorded is good between the grantor and grantee, but is void against bona fide purchasers for value, mortgagees, and judgment creditors without notice." Smith v. Arrow Transp. Co., 571 So. 2d 1003, 1006 (Ala. 1990) (emphasis added). Specifically, § 35-4-90, Ala. Code 1975, provides protection to subsequent purchasers for value from unrecorded prior conveyances. That section provides, in pertinent part:

"(a) All conveyances of real property, deeds, mortgages, deeds of trust, or instruments in the nature of mortgages to secure any debts are inoperative and void as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees, or judgment creditors."

(Emphasis added.) Our supreme court has defined a bona fide purchaser for value as follows:

"A bona fide purchaser is one who (1) purchases legal title, (2) in good faith, (3) for adequate consideration, (4) without notice of any claim of interest in the property by any other party. First National Bank of Birmingham v. Culberson, 342 So. 2d 347, 350 (Ala. 1977). Notice sufficient to preclude a bona fide purchase may be actual or constructive or may consist of knowledge of facts which would cause a reasonable person to make an inquiry which would reveal the interest of a third party. Hill v. Taylor, 285 Ala. 612, 614, 235 So. 2d 647, 649 (1970)."

2190775

Rolling "R" Constr., Inc. v. Dodd, 477 So. 2d 330, 331-32 (Ala. 1985).

In this case, the trial court concluded that the Ellises were bona fide purchasers for value and, therefore, that the earlier conveyance to Gates was void. In attacking that judgment, Gates first argues that the Ellises were not bona fide purchasers for value because, he contends, at the time of the purported conveyance to them, they had actual or constructive knowledge that Gates had purchased the disputed four-acre tract from Baswell. On this point, however, the evidence was in dispute, and there was evidence supporting an inference that the Ellises had no notice of Gates's claim to a portion of the property. Accordingly, the trial court's finding that the Ellises lacked notice of Gates's claim cannot properly be deemed as being clearly erroneous and against the great weight of the evidence, and the fact that Gates presented evidence to the contrary does not provide a sound basis to reverse the trial court's judgment. See Yeager, supra.

Gates also argues that the Ellises were not bona fide purchasers for value because, he says, they did not give adequate consideration for the property. Indeed, the evidence is undisputed that the Ellises paid only

2190775

\$10 for the property and that they were, in essence, donees. Such a nominal consideration will not suffice to bring a purchaser under the protection of § 35-4-90. Curtis v. Riddle, 177 Ala. 128, 129, 59 So. 47, 47 (1912) (holding that a deed supported by only nominal consideration did not entitle the grantees to protection under the statutory predecessor to § 35-4-90). As one commentator has explained:

"For a purchaser to pay value, the payment must be substantial. It is sometimes said that the purchaser must pay a 'fair' value, but more commonly it is simply stated that the purchaser must pay more than merely nominal value. While the definition of this term may be easy to articulate, it can be exceptionally difficult to apply. ...

"Nevertheless, there are a few definitive positions that may be observed. On the one hand, the purchaser need not pay the fair market value of the property involved. On the other hand, the purchaser clearly may not pay a truly nominal sum such as one dollar or ten dollars. Similarly, the payment of consideration in the nature of love and affection will not suffice. While such forms of consideration may be adequate to support a contract, they are not adequate to constitute value under the recording acts."

14 Richard R. Powell, Powell on Real Property § 82.02[2][a] (Michael Allen Wolf ed., 2011) (emphasis added; footnotes omitted).

2190775

Accordingly, we conclude that the trial court erred in concluding that \$10 constituted "valuable consideration" sufficient to render the Ellises bona fide purchasers for value entitled to the protection of § 35-4-90. The judgment of the trial court is, therefore, reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Moore and Fridy, JJ., concur.

Edwards, J., concurs in the result, without writing.