

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**BRENDA S. LOTT AND
FRANCES H. SAULTERS**

APPELLANTS

VS.

NO. 2012-IA-01401-SCT

T

RALPH D. SAULTERS

APPELLEE

BRIEF OF THE APPELLANTS

**INTERLOCUTORY APPEAL FROM THE
CHANCERY COURT OF COVINGTON COUNTY, MISSISSIPPI**

ORAL ARGUMENT IS NOT REQUESTED

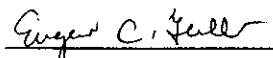
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable David Shoemake, Chancellor.
2. Ralph D. Saulters, Appellee.
3. A. Regnal Blackledge, Esq., Attorney for Ralph D. Saulters
4. Brenda S. Lott, Appellant.
5. Frances H. Saulters, Appellant.
6. Eugene C. Tullos, Attorney for the Appellants, Brenda S. Lott and Frances H. Saulters.

Respectfully submitted,



Eugene C. Tullos
Attorney for the Appellants

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VS.

NO. 2012-IA-01401-SCT

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APPELLEE

BRIEF OF THE APPELLANTS

ISSUE: The Chancery Court of Covington County erred in not finding that the applicable statute of limitations had expired, and therefore erred in denying the motion to dismiss.

STATEMENT OF THE CASE

This is an Interlocutory Appeal from the Chancery Court of Covington County, Mississippi. On or about January 3, 2012, the Appellant Ralph D. Saulters, (hereinafter Ralph) filed his lawsuit to set aside a deed, recover rights to certain real property and/or to remove cloud from property in which he alleges he holds a remainder interest. [R.E. 4] The Appellants Brenda S. Lott (hereinafter Brenda) and Frances H. Saulters (hereinafter Frances) filed a Motion to Dismiss Ralph's Complaint due to the statute of limitations having expired.[R.E. 15] The Chancellor found in his ruling denying the Motion to Dismiss that,

1. On June 11, 2001, Frances H. Saulters Executed a Warranty Deed to Ralph D. Saulters, which reserved a life estate in Frances H. Saulters.
2. Several months later, Frances H. Saulters executed a Warranty Deed on the exact same parcel of real property to Brenda S. Lott, which also reserved a life estate in Frances H. Saulters.
3. Both instruments were recorded on October 24, 2001. The instrument to Brenda S.

Lott has a time of 10:25 a.m., and the instrument to Ralph D. Saulters has a time of 11:10 a.m.

4. Both instruments reserved a Life Estate in Frances H. Saulters, who is still alive and she has control over the property as the holder of the life estate.
5. Since no adverse entry has been made due to Frances H. Saulters' Life Estate, the statute of limitations has not expired. [R.E.27]

Brenda and Frances timely filed their Petition for Interlocutory Appeal and this Court granted said petition.

STATEMENT OF FACTS

On or about January 3, 2012, Ralph filed his suit to cancel, set aside, remove cloud/quite title, and/or to recover an alleged remainder interest in and to certain real property located in Covington County, Mississippi based on allegations of fraud. [R.E.4] Frances is the mother of both Brenda and Ralph. On or about June 11, 2001, Frances executed a Warranty Deed to Ralph conveying certain real property in Covington County, Mississippi to Ralph, but reserving a life estate unto herself. On or about October 24, 2001, Frances executed a Warranty Deed to Brenda conveying the same property which was described in the Warranty Deed to Ralph several months before. However, Ralph had never previously filed and/or recorded his deed with the Chancery Clerk's Office of Covington County, Mississippi. Brenda took her deed to the Chancery Clerk's Office of Covington County, Mississippi and it reflects that it was recorded at 10:25 a.m. on October 24, 2001, in Land Deed Book 241 at page 106. [R.E. 29] Ralph then took his deed to the Chancery Clerk's Office and recorded it at 11:10 a.m. on October 24, 2001, in Land Deed Book 241 at page 109. [R.E.32] Ralph's deed was recorded some forty-five (45) minutes after Brenda filed her deed. At 10:25 a.m. on October 24, 2001, Brenda had a remainder interest in and to the subject property. Brenda's deed

was public record at 10:25 a.m. on October 24, 2001. Ralph, by filing his deed at 11:10 a.m., on October 24, 2001 was on notice of the deed to Brenda. Any alleged right to assert any claim for any cloud on his title, to recover the land, to set aside Brenda's deed vested at 10:25 a.m. on October 24, 2001. However, Ralph failed to file any action or seek any relief until January 3, 2012, when he filed his lawsuit.

SUMMARY OF THE ARGUMENT

The Chancery Court found that because Frances was still alive, Ralph's statute of limitation had not expired because there was no adverse entry. However, there is no tolling of any statute of limitation in this matter and every relevant statute of limitations has expired. The circumstances of this case are such that if Ralph felt aggrieved, he should have taken action prior to the expiration of the relevant statute of limitations. Mississippi is a "race/notice" state and the deed to Brenda was properly recorded prior to Ralph's deed in the Chancery Clerk's Office of Covington County. Regardless of the claims, assertions, and/or causes of action plead by Ralph; he was on notice as of October 24, 2001, at 10:26 a.m. (one minute after the filing of Brenda's Deed) that his mother Frances had conveyed the subject property to Brenda and said deed was recorded. The fact that Brenda's deed was recorded first cut off any alleged remainder interest Ralph may have claimed in and to the property without an adverse ruling by the Chancery Court. Because Ralph filed his deed some forty-five (45) minutes after Brenda's deed was recorded, he was on actual and constructive notice of her deed. Therefore, any claim asserted by Ralph D. Saulters is subject to actual and/or constructive notice and the initiation of the running of the statute of limitations. The time for Ralph to take legal action to set aside Brenda's deed began to run on October 24, 2001. However, for whatever reason, Ralph took no action until January 2012, which was well after all applicable statute of limitations had expired. As such, the Chancellor erred in not dismissing this action.

STANDARD OF REVIEW

This Court has held that, “When considering a motion to dismiss, this Court's standard of review is *de novo*.” Pruitt v. Hancock Med. Ctr., 942 So. 2d 797, 800 (Miss. 2006)

ARGUMENT

This is a relatively straightforward case with regard to the statutory requirements for the recording of conveyances of land and the priority of instruments as it relates to the statute of limitations for bringing an action to set aside a deed. In a case such as this, the reviewing Court must start at the beginning, which is the filing of the deeds in this action. Mississippi Code Ann. 1972, §89-5-1 regarding the recording of conveyances of land provides,

Except as provided by Sections 89-5-113, a conveyance of land shall not be good against a purchaser for a valuable consideration without notice, or any creditor, unless it be lodged with the clerk of the chancery court of the county in which the lands are situated to be recorded; **but after filing with the clerk, the priority of time of filing shall determine the priority of all conveyance of the same land as between several holders of such conveyances.**

Mississippi Code Ann. § 89-5-5, regarding the priority of instruments provides,

Every conveyance, covenant, agreement bond, mortgage and deed of trust shall take effect as to all creditors and subsequent purchasers for a valuable consideration without notice, only from the time when delivered to the clerk to be recorded; and **no conveyance, covenant, agreement, bond, mortgage or deed of trust which is unrecorded or has not been filed for record, shall take precedence or any similar instrument affecting the same property which may be of record, to the end that with reference to all instruments which may be filed for record under this section, the priority thereof shall be governed by the priority in time of the filing of the several instruments, in the absence of actual notice.**

There is no factual dispute that the deed from Frances to Brenda was recorded before the deed to Ralph D. Saulters in the Chancery Clerk's Office of Covington County. Even though Ralph's deed predated the deed given to Brenda S. Lott, it was Brenda who filed her deed first with the chancery clerk's office. In White v. Cooke, 4 So. 3d 330, 336 (Miss. 2009), the Court held,

Mississippi has long been a “race/notice” state. Mississippi is a race/notice jurisdiction. That is, where an owner conveys conflicting claims to real property, the first to file (wins the “race” to the courthouse) has priority, unless that person takes the interest with “notice” of a prior, conflicting claim.

Ralph asserts that Brenda had notice of his deed dated June 11, 2001. However, it is Ralph who has been on actual notice of Brenda’s deed filed on October 24, 2001 at 10:25 a.m. but chose to take no action and the applicable statute of limitations has expired. Ralph’s argument of Brenda’s notice of his deed is irrelevant at this point because he failed to seek relief from the Court prior to the running of the relevant statute of limitations. In the recent case of Moore v. McDonald, 47 So.3d 1186 (Miss. Ct. App. 2010) the Court of Appeals in considering a similar situation held that the record owners who first filed their deed to certain real property gave them superior title to that of the other parties, who had failed to record their contract for sale and purchase that formed the basis for their claim to title. The Court found that even though the contract for sale and purchase predated the recorded deed, because the contract was not recorded, it did not impart notice to the record owners, because the contract was not filed.

In this case, it is Ralph who is on notice of the deed conveying the property to Brenda and reserving a life estate to Frances because it was recorded prior to the time he recorded his deed. Because the deed to Brenda was recorded in the Chancery Clerk’s Office of Covington County, it was public record for the entire world to see, including Ralph. The Mississippi Supreme Court in Aultman v. Kelly, 109 So.2d 344, 347 (Miss. 1959) held,

When the cause of action arose, the heirs, whether they had any actual knowledge of the deed or not, had constructive knowledge thereof, because it had been recorded. **Constructive notice of the making of a deed begins the moment it is lodged with the proper officer for record. Besides, where the alleged fraudulent conveyance is recorded, the circumstances are public and the means of finding out the character of the transaction are available. Consequently, the running of the**

statute of limitation is not prevented. (Citations omitted).

Ralph, for whatever reason chose not to file his deed for over four months. Then he chose not to take any action for well over ten years to assert any rights to the subject property or to attack Brenda's remainder interest and ultimate ownership rights in the property. Any allegation by Ralph of fraud, deceit or the like is irrelevant because in 2001, the Court in O'Neal Steel, Inc., v. Millette, 797 So.2d 869 (Miss. 2001), held, that the rule of concealed fraud is an exception to applicable statute of limitations; however, the rule cannot apply to matters of public record. The Court in Aultman **held that ordinarily, statutes of limitation begin to run as soon as there is a cause of action.** In Rankin v. Mark, 120 So.2d 435, 437-438 (Miss. 1960) the Court held that a cause of action accrues, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. Because Brenda's deed is recorded first it has priority. It was Ralph's responsibility to file a complaint to set aside this deed in a timely manner if he wanted to contest the priority of Brenda's deed, and allege to the Court that Brenda had notice of his deed.

According to Ralph's complaint, his cause of action accrued when the deed to Brenda was filed on October 24, 2001. Ralph later argued and the Chancellor erroneously agreed that the statute of limitations had not expired because of Frances' reservation of the life estate. This is an incorrect assessment of the applicable law and Ralph's assertions are flawed. Frances is a party to this litigation and holder of a life estate interest in the property. If, as the trial court found, there is no "adverse entry" because of Frances' reservation of a life estate, then Ralph is without standing to bring this action. Because Brenda's deed was filed first, her deed has priority, and she has the remainder interest in and to the subject property. Ralph cannot even get to the point of arguing any alleged notice on the part of Brenda because he has allowed the statute of limitations to expire to

assert his claims. Therefore, any actual or constructive notice on the part of Brenda of Ralph's deed is immaterial because he did not bring his action within the applicable statute of limitations to protect his perceived interests.

Ralph argued that because Frances is still alive and holder of the life estate, he did not have a right to enter the property and therefore the statute of limitations had not started to run. However, his deed was filed after the remainder interest was titled to Brenda. Furthermore, Ralph's complaint is essentially claiming the right to recover land and/or set aside Brenda's deed to remove cloud from his title based on assertions of fraud. Ralph's cause(s) of action to recover land would appear to be controlled by §15-1-7 which provides,

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

In considering the recovery of land and §15-1-7, the Court in Rankin v. Mark considered a similar situation and found,

According to the complainants' theory, Sol was to get a deed to the forty acres of land and one-half of the minerals thereunder. That deed was to be delivered to him on November 7, 1945. He did not get it. Consequently a cause of action to obtain the

deed arose to him the next day, November 8, 1945. Statutes of limitation begin to run as soon as there is a cause of action. **A cause of action 'accrues' when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested nothing to enforce delivery to him of a deed, of the tenor and effect as now claimed, until he filed this suit on January 28, 1958, more than ten years after his cause of action accrued or came into existence.** The applicable part of Section 709, Code of 1942, Recompiled, is as follows: 'A person may not make an entry or commence an action to recover land but within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims; or, if the right shall not have accrued to any person through whom he claims, then within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same... In the remaining part of the section the right is extended to a person under the disability of infancy or unsoundness of mind to bring the action within ten years from the removal or cessation of such disability. While Sol was very adept at telling the court how ignorant he was and how little he knew, there was of course no claim or suggestion that he was under the disability either of infancy or unsoundness of mind. Obviously his right to bring this action was barred. By Section 710, Code of 1942, Recompiled, the same limitations, as provided for in Section 709, supra, apply against a person claiming land in equity, except as to cases of concealed fraud. **But even then the cause of action accrues at the time at which 'the fraud shall, or, with reasonable diligence might, have been first known or discovered.'** **There was no substantial basis upon which it could be said that fraud, if in fact there was such, was concealed. In the first place, Rankin's deed from Albert Buck Mark and wife was promptly recorded, and of course constituted constructive notice. On account of the recordation, the circumstances were public and the means of finding out the character of the transaction were available.** In the second place, Sol knew that J. P. McRaney was reserving one-half of the minerals. In the deed from Albert Buck Mark and wife to Sol, minerals were not mentioned. In such circumstances, a person of ordinary sense ought to make inquiry as to the state of his title. In the third place, Sol, in his deed of trust to the Federal Land Bank, made it subject to McRaney's recorded reservation of one-half of the minerals and to Rankin's recorded deed to one-half of the minerals. Mr. McCloud, the representative of the Bank, handled this transaction; and when Sol was asked if he denied that he told Mr. McCloud that he did not own any of the minerals, he replied, 'No, sir.' Manifestly the plea of the statutes of limitation in bar of the suit ought to have been sustained, and the cause should have been dismissed with prejudice at the cost of the complainants.

Id., at 437-438.

As previously referenced, the Aultman Court in 1959 held,

When the cause of action arose, the heirs, whether they had any actual knowledge of the deed or not, had constructive knowledge thereof, because it had been recorded. 'Constructive notice of the making of a deed begins the moment it is lodged with the proper officer for record. **Where the alleged fraudulent conveyance is recorded, the circumstances are public and the means of finding out the character of the transaction are available. Consequently, the running of the statute of limitation is not prevented.**

Id., at 347.

Ralph did nothing to assert any claim to protect any alleged rights he may have had for over ten years. Therefore, his claims are barred by the statute of limitations set forth in §15-1-7. As stated earlier, Ralph argued to the trial court that the ten year statute of limitations did not bar his claims because his mother Frances (whom he made a defendant) was still alive and held a life estate. Essentially, Ralph is asserting that because the life tenant is still living, his claim lives on as well until such time as his mother Frances dies. This is the argument with which he used to confuse the issue before the Chancery Court. This argument is however in complete contradiction with relevant case law in Mississippi. While it is true that Ralph has no right to immediate position, it is incorrect to find that no adverse entry was made so as to toll the statute of limitations. The filing of Brenda's deed would be considered adverse to Ralph's interests. However, taking Ralph's argument at face value, we see that he is asserting that he has no right to possession until the death of his mother Frances. In part, Ralph's argument is correct that he has no right to possession at this time, and that is because of at least three reasons. (1) His deed was not filed first, and therefore does not have a claim to a right of future possession; (2) Brenda holds the remainder interest in the property not Ralph; and (3) Even if he held the remainder interest, he does not hold the right of possession over the life tenant. However, his complaint is to protect his alleged remainder interest and that is what he is seeking to protect and/or establish. It is this claim to his alleged remainder interest that he

failed to protect. A life tenant has the right of possession to real property while they are alive. The Court in Twin States Land & Timber Co., Inc., v. Chapman, 750 So.2d 567, 570 (Miss. Ct. App. 1999) held,

Though a life tenant occupies a different ownership interest than a tenant in common, such a tenancy is a form of ownership of real property. A life tenant holds the exclusive right to use, possession, and enjoyment of the property during the term of the tenancy. (Citations omitted.)

While not having possessory rights, however, a holder of a remainder interest in the property has rights to which they must act to protect. For instance, the holder of a remainder interest in real property has a right to expect that the life tenant will not commit waste on the property. Nevertheless, a person who holds or claims to hold a remainder interest in land cannot sit idly by for more than ten (10) years and do nothing to protect a perceived remainder interest in and/or to real property. In making the argument that because the life tenant is still alive and the holder of the remainder interest has no right of possession, Ralph reveals a fatal flaw in his case. **He has never had the right of possession of the real property which is the subject of this litigation.** If the Court were to believe Ralph's argument, then a holder of a remainder interest could not protect property against an adverse possessor who meets all ten of the elements of adverse possession, if the life tenant chose not to assert a claim of trespass or ejectment, for whatever reason, prior to the ten year period to establish adverse possession by a third party. Nevertheless, §15-1-7 does provide in part,

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry **or bring the action shall have first accrued to the person making or bringing the same.**

Ralph claims that he has no rights until his mother dies to possess the land. However, his right to bring the action first accrued when the remainder interest was given to Brenda and her deed was filed prior to his deed in October 2001. Ralph was on notice for more than ten (10) years because his deed was filed after Brenda's, and he therefore has no right to ever possess or make entry or to recover the land without court intervention and/or a court order setting aside Brenda's deed or vesting title to Ralph. Therefore, Ralph was required to act to preserve his claim, if any, to the property. The simple fact of the matter is that one cannot recover that which they never held or possessed.

If Ralph has no right to possession, then one of two situations should then exist. (1) Either he has no standing to bring this action, or (2) his action should be governed by the three-year statute of limitations under the alleged fraud claim in his complaint, not the ten-year statute of limitations to recover land which he has never possessed. This issue was addressed by the Court in McWilliams v. McWilliams, 970 So.2d 200, 202-204 (Miss. Ct. App. 2007). In McWilliams, Frank McWilliams, who was an attorney, was incarcerated in the Sunflower County Jail after being arrested for burglary. While in jail, Frank executed an irrevocable trust and warranty deed naming his minor son, D. Rials McWilliams as beneficiary. Both of these instruments were prepared by Frank's brother, John H. McWilliams, also an attorney. The irrevocable trust and warranty deed were filed on the same day they were executed, as public records in the Chancery Clerk's Office of Sunflower County. Six years later, Frank sought to set aside the Warranty Deed and trust, claiming fraud, undue influence, overreaching, and lack of mental capacity due to his drug addiction. In his motion to set aside the deed and irrevocable trust, Frank alleged that his brother fraudulently presented the deed transfer and trust documents for execution under the guise that the documents were actually intended to facilitate his release from jail and admittance into a drug rehabilitation center. The Chancery Court found that

the statute of limitations had run on Frank's claim. Frank argued on appeal that the chancery court erred in applying the wrong statute of limitations. The chancery court held that the fraudulent conveyance claim was time-barred pursuant to the three-year statute of limitations found in Mississippi Code Annotated §15-1-49. Frank asserted that his claim to set aside the warranty deed and trust should have been afforded the ten-year statute of limitations, found in Mississippi Code Annotated §15-1-7, because this statute speaks directly to the recovery of real property. The chancery court found Frank's claim to be predicated upon a claim of fraudulent conveyance, a claim which must be brought within three years of the transferred property. In affirming the chancellor's ruling in McWilliams, the Court held,

Our supreme court has directly addressed the issue we are presented with in this appeal in *O'Neal Steel, Inc. v. Millette*, 797 So.2d 869 (Miss.2001). In *O'Neal Steel, Inc.*, the Supreme Court affirmed a grant of summary judgment because suit to set aside an alleged fraudulent conveyance was brought outside of the applicable three-year limitations period of Mississippi Code Annotated section 15-1-49. *Id.* at 875(¶ 25). **The ten-year limitations period set out in Mississippi Code Annotated section 15-1-7 did not apply, as the court found that no action to recover land was involved. Rather, the three-year "catch-all" limitations period of Mississippi Code Annotated section 15-1-49 applied and started running when the deed was filed and recorded. *Id.* at 875(¶ 20).** Although the plaintiffs argued that the statute of limitations should have been tolled due to concealed fraud, the court found that the plaintiffs failed to exercise reasonable diligence to discover the property transfer, a matter of which was public record. *Id.* at 876(¶ 27). Based on this finding, the court dismissed the argument. Here, Frank did not bring suit to set aside the land deed transfer or resulting trust on the basis of fraud until approximately six years after the warranty deed and trust were recorded in the chancery clerk's office. He seeks a finding that the chancery court should have applied the ten-year statute of limitations of Mississippi Code Annotated section 15-1-7, and, thus, his complaint would not be time-barred. **However, when a complaint is brought to set aside a land transfer based upon an alleged fraudulent conveyance, the three-year statute of limitations, found in Mississippi Code Annotated section 15-1-49, begins running once the complainant either discovers, or should have discovered with due diligence, the property transfer. *O'Neal Steel, Inc.*, 797 So.2d at 875-76 (¶¶ 24-26).** Therefore, Frank's complaint, predicated upon fraud, was to be filed within three years of the transfer, or within three years of the time he would have discovered the transfer using due diligence. The ten-year statute of limitations

set out in Mississippi Code Annotated section 15-1-7 cannot be applied to Frank's suit, as this statute only governs actions to recover land and presupposes the complainant is asserting a possessory interest in the land in question. Frank alternatively argues that his complaint to set aside the warranty deed and trust is not time-barred due to the tolling of the statute of limitations under the doctrine of concealed fraud. While Frank is correct in asserting that concealed fraud may toll the statute of limitations, the doctrine of concealed fraud will not toll the statute of limitations where the instrument is recorded as a matter of public record. *Carder v. BASF Corp.*, 919 So.2d 258, 262(¶ 14) (Miss.Ct.App.2005) (holding that “[w]hen the information is placed in the public domain, the doctrine of fraudulent concealment ceases to be applicable.”) **Specifically, “where an alleged fraudulent conveyance of real property is recorded and available to the public, there can be no concealed fraud preventing the running of statute of limitations.”** *O’Neal Steel, Inc.*, 797 So.2d at 876(¶ 26). Frank cannot claim that concealed fraud tolled the applicable statute of limitations because the warranty deed transfer and irrevocable trust were filed as public records in the office of the clerk of Sunflower County. The chancellor found that the recording of the deed in the chancery clerk's office obviates the defense of concealed fraud which would toll the statute of limitations, and we agree. The three-year statute of limitations in Mississippi applies to an action to set aside a deed on the basis of fraud. Concealed fraud may toll the statute of limitations; however, concealed fraud will not toll the statute of limitations where the instrument is recorded as a matter of public record. Thus, when Frank filed his motion to set aside the irrevocable trust and warranty deed, the statute of limitations had already run. Therefore, the chancellor was correct in granting summary judgment in favor of the Trust, because there were no genuine issues of material fact left to discern. Accordingly, we affirm the grant of summary judgment.

Id., at 203-04 (¶8-10).

The McWilliams Court relied on O’Neal Steel, Inc. v. Millette, 797 So.2d 869 (Miss. 2001) in reaching its ultimate findings. The Court in O’Neal held,

“An action to recover land” under both §15-1-7 and §15-1-9 presumes that the O’Neal has some ownership or possessory interest in the land. This Court has written: It would be meaningless to talk about suits to “recover the land” and “making an entry on the land,” if the contemplation of the statute were not that possession of the land is an essential feature in the very nature of things. *Kennedy v. Sanders*, 90 Miss. 524, 542, 43 So. 913, 916 (1907). Indeed, in all the cases applying § 15-1-7, the contested issue always concerns ownership or possession of the property in question, such as adverse possession, a suit to remove a cloud on title, or confirmation of mineral rights. In fact, this Court has described § 15-1-7 as “[o]ur statute on adverse possession....” *Lowi v. David*, 134 Miss. 296, 300, 98 So. 684, 685 (1924). This Court has also held that the only person who may claim the limitation

defense of § 15-1-7 is one who “has been in adverse possession of the land against the true owner.” *Continental Oil Co. v. Walker*, 238 Miss. 21, 33, 117 So.2d 333, 337 (1960).

Id., at 872-73 (¶ 11).

Because the deed to Ralph was not recorded until after the deed conveying the property to Brenda, and because the deed to Brenda reserved a life estate to Frances, Ralph has no ownership rights. Therefore he cannot allege a ten-year statute under §15-1-7 or a tolling of the statute because there was no adverse entry. Furthermore, in addition to having no ownership rights to the property because his deed was recorded after Brenda’s deed, he also has no rights to possession as of the time of the filing of either of the Warranty Deeds because Frances reserved a life estate unto herself in both deeds. Also, at the time Ralph filed his Complaint, he had no rights to possession of the property because Frances is still alive. Therefore, because Ralph has no ownership or right of possession to the subject property §15-1-7 (the ten-year statute) is not applicable but rather §15-1-49 which provides the general three-year statute of limitation.

Ralph’s Complaint clearly asserts a cause of action of fraud. [R.E. 4, 7, & 9] Paragraph 16 of the Complaint states, “The instrument to Brenda by Frances is a **fraud** in that...” Further, in paragraph 21, Ralph alleges, “Brenda engaged in **fraud and/or fraudulent inducement** regarding his dealings with Frances to procure the instrument reference above. Brenda made material representations to Frances that she would look after her best interest, which were false...”¹ Clearly Ralph’s claims rest on an assertion of fraud. As such, again §15-1-49 provides the applicable statute

¹ What is interesting in Ralph’s allegations of fraud against Brenda and that she asserted undue influence over Frances, is that he also asserted claims against his mother Frances that she breached the covenant of warranty. If there had been any fraud on the part of Brenda against Frances, it would be Frances who would have brought the suit, within the ten years following the deed. Within those ten years if there was fraud Frances would have known it, but because there was no fraud, Frances did not seek to set aside Brenda’s deed.

of limitations which is three years for bringing a fraud action. Therefore, because Ralph has no ownership or possessory rights to the subject property as stated above, he cannot assert the ten-year statute of limitations under §15-1-7. Further, because his entire claim rests on assertions of fraud, he is bound by the three-year statute of limitations as provided by §15-1-49. The Chancellor found in his ruling, "Since no adverse entry has been made due to France H. Saulters' Life Estate, the statute of limitations has not expired." However, while seeing the problem, the Chancellor improperly applied the relevant statute of limitations and/or law. While it is true that there was no adverse entry onto the land, there was a deed recorded which was adverse to Ralph's contentions and ownership interests. If because of the life estate, no adverse entry was made by Brenda, the same holds true for Ralph in that he had no rights of possession which would entitle him to a ten-year statute of limitations, which he has missed also. This key issue however is that Ralph has asserted a claim of fraud and that is clearly controlled by the three-year statute of limitations.

Regardless of which statute of limitations applies however, Ralph cannot argue that any statute of limitation was tolled because the deed conveying the property to Brenda, reserving a life estate to Frances, was recorded in the public records and therefore he was on notice. As such, not only has the three-year statute of limitations expired, but the ten-year statute of limitations for the recovery of land has also expired. The O'Neal Court stated, "this Court has also stated that the only person who may claim the limitation defense of §15-1-7 is the one who has been in adverse possession of the land against the true owner." "When a complaint is brought to set aside a land transfer based upon an alleged fraudulent conveyance, the three-year statute of limitations, found in Mississippi Code Annotated section 15-1-49, begins running once the complainant either discovers, or should have discovered with due diligence, the property transfer." McWilliams, at 203-04 (¶8). Because the deed which Ralph seeks to have set aside was recorded, there is no tolling of the statute

of limitations, regardless of any entry onto said land. Therefore the decision of the Chancery Court of Covington County was in error and Ralph's claims should have been dismissed as time-barred.

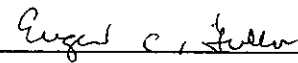
CONCLUSION

The Chancery Court erred in finding that the applicable statute of limitations had not expired in this action thereby barring Ralph's claim. While the issue may at first glance be somewhat confusing regarding Ralph's rights, the trial court applied the improper standard as to the running of the statute of limitations and/or applied an erroneous legal standard. This Court should conduct a *de novo* review of the Chancellor's ruling. Mississippi is a race/notice state. Therefore, Ralph's deed does not have priority over Brenda's deed. Ralph asserts that Brenda was on notice of his deed, but he failed to take any action to protect his claims. The simple fact is that because Ralph failed to act within the relevant statute of limitations he cannot assert that Brenda had any notice of his deed because he is barred from proceeding with this action. The question of any notice Brenda may or may not have possessed is irrelevant because the applicable statute of limitations prohibits the litigation from proceeding and therefore Ralph cannot produce any proof of this assertion. Since Ralph's claims are time-barred, he cannot present his claims and/or produce evidence to support his claims.

Furthermore, because Ralph had no possessory interest in the land, he cannot assert a ten-year statute of limitations. Nevertheless, even if he could assert a ten-year statute of limitations, that time expired prior to his bringing this action. However, because Ralph's entire case rests on his assertion of fraud, he is barred by a three-year statute of limitations set forth in §15-1-49. The Court in *McWilliams*, held, "The three-year statute of limitations in Mississippi applies to an action to set aside a deed on the basis of fraud." *Id.* At 347. Ralph was on notice of Brenda's deed because her deed was recorded prior to his deed and Brenda's was public record and has been public record since

October 24, 2001. Ralph has no claim for tolling the statute of limitations for any type of concealment. “[T]he doctrine of concealed fraud will not toll the statute of limitations where the instrument is recorded as a matter of public record. Carder v. BASF Corp., 919 So.2d 258, 262(¶ 14) (Miss.Ct.App.2005) (holding that “[w]hen the information is placed in the public domain, the doctrine of fraudulent concealment ceases to be applicable.”) Specifically, “where an alleged fraudulent conveyance of real property is recorded and available to the public, there can be no concealed fraud preventing the running of statute of limitations.” O’Neal Steel, Inc., at 876(¶ 26). Therefore, under §15-1-49 Ralph’s time for bringing a suit to set aside an alleged fraudulent conveyance started on October 24, 2001, and expired on October 24, 2004. Ralph did not file suit until January 3, 2012, well after the three-year statute of limitations of §15-1-49, and/or any ten-year statute of limitations under §15-1-7 even it applied, which it does not.

Therefore, Ralph’s complaint which is based upon assertions of fraud is time barred regardless of the absence of any adverse entry as held by the Chancery Court. As a point in fact, the adverse entry was the filing of Brenda’s deed before Ralph’s deed. Nevertheless, Ralph’s entire complaint rests upon the contention that a fraud was committed and that the conveyance to Brenda was thus a fraudulent conveyance. As such, this Court should reverse the order of the Chancery Court and render a decision dismissing Ralph’s complaint with prejudice as being time barred.


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CERTIFICATE OF SERVICE

I do hereby certify that I have this day delivered, via U.S. Postal Service, postage

prepaid, and/or hand-delivered, a true and correct copy of the Appellant's Brief to:

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