

**NEWSLETTER OF THE REAL PROPERTY SECTION
OF THE MISSISSIPPI BAR**

APRIL 2017

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CHAIR'S COLUMN

From all accounts 2017 has started off in a positive note for both new construction and existing home sales for the entire State. It also appears commercial construction and sales have again seen an uptick. There is however concern that the mortgage financing requirements have eased somewhat and some residential lenders are qualify borrowers for larger loan amounts than available in the past few years. I would caution everyone to be on the lookout for any change of lending requirements in your area.

New homes builders in North Mississippi are still dealing with sf price issues due to the past depressed sales of lots over the last few years. This has been a result of the housing crisis that provided the builders with low lot prices. As a result any new lots that are being constructed and sold do not allow the builder to reap a reasonable rate of return because they cannot get an appraisal that takes the lot price difference into account. The appraisers in our area have been unable to adjust for these lot price discrepancies.

For those of you that will attend the Mississippi Bar Convention this summer Mississippi Valley Title Insurance will be providing a 2 hour seminar. I anticipate that they will provide you valuable information as it relates to your real property practice.

LEGISLATION

Bills that have become law

A large number of bills were introduced in the 2017 Legislature that would have affected real estate. Only a few bills have passed, including these three:

HB 1601 authorizes taxpayers to set up first-time homebuyer savings accounts. Interest earned on these accounts that are used to pay eligible costs related to the purchase of a single-family home is excluded from taxable income.

SB 2425 deletes the two-year automatic repealer on the Commercial Real Estate Brokers Lien Act.

SB 2769 authorizes flood districts to impose special assessments.

Bills that have died

The following bills were introduced but most either did not make it out of committee or died for lack of action at the first deadline.

HB 13 and HB 15 would have required lenders to meet with borrowers about modification of loans, provide the borrower with a list of approved housing counselors, required written notice of foreclosure and imposed other conditions on non-judicial foreclosures.

HB 141 would have required owners of severed minerals to pay part of the ad valorem taxes assessed to the land.

HB 364 would have authorized title insurance companies to file affidavits confirming that deeds of trust had been paid off and were released.

HB 596 would have given owners of mobile homes one-year to redeem the mobile home after a tax sale. [Note: no redemption period currently exists for personal property sold for ad valorem taxes.]

HB 793 and SB 2630 would have required a developer of a residential subdivision to turn over control of a homeowners association to the homeowners as lots are sold off; allowed the association to void certain long-term contracts entered into by the developer; set standards for boards and record-keeping; and imposed a lien to secure assessments on lots.

HB 806 would have allowed transfers effective on death. This bill is broader than the transfer on death deeds act that was introduced years ago because it allows transfer at death of assets other than real estate.

HB 807 would have permitted a court to hire a real estate broker to sell property that is being partitioned by sale, rather than appointing three commissioners.

HB 843 would have amended the Residential Landlord-Tenant Act, among other things, to address late payment fees and allow quicker evictions. [Note: the RLTA is long overdue for an

update to address, among other current issues, crime, guns and pets, and to better conform to HUD regulations. See the discussion of the *Mitchell* case below.]

HB 855 would have repealed the doctrine of adverse possession. [Note: this bill and the bill regarding ad valorem taxes on severed minerals have been introduced every year for many years, and always die a quick ignominious death.]

HB 1004 would have enacted the Mississippi Residential Mortgage Foreclosure Program, which would have required mediation between lender and borrowers before the lender initiates foreclosure.

HB 1185 would have created the Mississippi Public-Private Partnership Act, which was intended to facilitate joint ventures between government and private developers for improvement of infrastructure. This bill passed the House but died in the Senate.

HB 1406 was the Marketable Title Act that was discussed in the December 2016 Newsletter. It was supported by the title insurance industry and the Real Property Section. The bill made it out of the Judiciary A Committee but died at the February 9 deadline.

HB 1416 and SB 2539 would have provided for retiring certificates of title of manufactured housing units that become part of the real estate. Currently a discrepancy exists between statutes that require the owner to surrender his certificate of title as a condition to having the manufactured housing unit treated as real estate for ad valorem tax purposes, and statutes that provide that a lender making a loan secured by manufactured housing must perfect his security interest in the manufactured housing by taking possession of the certificate of title, regardless of whether the manufactured housing unit is treated as real or personal property for ad valorem tax purposes. This bill would have addressed this problem.

SB 2321 would have adopted the Uniform Power of Attorney Act. This bill would have amended and supplemented the Uniform Durable Power of Attorney Act.

SB 2769 would have required that lenders give borrowers and the Commissioner of Banking and Consumer Finance written notice ninety days before initiating a non-judicial foreclosure.

SB 2938 would have broadened the types of single-family dwellings that are eligible for the historic property tax credit.

RECENT CASES

Lease Provisions Did Not Give Absentee Landlord Control For Premises Liability Purposes

Adams v. Hughes, 191 So. 3d 1236 (Miss. 2016). Adams leased property to a tenant that operated a nightclub on the premises. The lease included percentage rent and gave the landlord the right to check the tenant's books in order to determine whether and how much percentage rent was

due. The lease also gave the landlord the right to enter the premises to repair and maintain the premises if the tenant failed to do so. Hughes filed an action against the tenant and Adams alleging that Hughes had been attacked at the premises by third parties, and asserting that Adams and the tenant were negligent. Adams filed a motion for summary judgment based on the fact that she was an absentee landlord and had no control or supervision over the premises. Hughes argued that the percentage rent provision and the landlord's right to enter and maintain the premises made Adams a joint venturer with the tenant, and that Adams therefore contractually had an element of control over the premises. The trial court denied Adams' motion for summary judgment. On interlocutory appeal the Mississippi Supreme Court, in a decision by Justice Beam, reversed and rendered judgment in favor of Adams. Justice Beam wrote that "under Mississippi law, a landlord/lessor has no responsibility in keeping leased premises in safe condition in the absence of a contract to do so...Mississippi common law places that duty squarely on the party who possesses or controls the property." The right of entry for maintenance and repair did not give Adams sufficient control to impose the duty on her to protect the tenant's invitees from injury. The percentage rent clause did not create a joint venture between the landlord and the tenant. A joint venture is "an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge." There was no evidence of any such agreement between Adams and the tenant. Percentage rent is a "traditional commercial realty" covenant. Since Adams as an absentee landlord had no duty to protect Hughes, the court reversed the trial court's denial of Adams' motion for summary judgment and rendered judgment in favor of Adams.

Note 1: The parties agreed that Hughes was an invitee. Justice Beam quoted from a prior case that while the duty of those in control of the premises to an invitee is "to remedy most dangerous conditions on their property and to warn of those they cannot eliminate, that duty presupposes the defendant knows, or should know, of the dangerous condition." (quoting from *Kroger Co. v. Knox*, 98 So. 3d 441, 443 (Miss. 2012)). When an invitee is assaulted on the premises by a third party, an additional standard applies. "Where the alleged dangerous condition is the threat of an assault, the requisite cause to anticipate the assault may arise from (1) actual or constructive knowledge of the assailant's violent nature, or (2) actual or constructive knowledge that an atmosphere of violence exists on the premises." *Id.* In this case, there was no suggestion that the landlord had actual or constructive knowledge of the assailant's violent nature or the existence of an atmosphere of violence at the nightclub.

Note 2: This is one of those cases in which creative lawyering and a lack of real-world experience could have resulted in really bad law. The court in this case undoubtedly reached the right conclusion.

Apartment Landlord Did Not Have Constructive Notice of Occupant's
Violent History And Did Not Have Duty to Perform Background Check

Mitchell v. Ridgewood East Apartments, 205 So. 3d 1069 (Miss. 2016). Tavaris Collins was convicted of aggravated assault and possession of cocaine. He moved into the apartment of Yashia Davis, his girlfriend and mother of his child, at Ridgewood East Apartments in West Point,

Mississippi. Collins did not become a tenant on Davis' lease, and Davis did not inform the landlord that Collins had moved in with her, contrary to the landlord's policies. Two years after Collins moved in with Davis, Devin Mitchell was visiting his cousin at the Ridgewood East Apartments. During the visit, Collins shot and killed Mitchell. Mitchell's parents filed a complaint against the landlord in the Circuit Court of Clay County. The complaint alleged that the landlord was negligent because it had actual or constructive notice of Collins' prior violent criminal conduct, and breached its duty of reasonable care to Mitchell. The plaintiffs also alleged that the landlord was liable because it failed to enforce a prohibition against weapons and long-term guests in the apartment handbook. The Circuit Court of Clay County granted the landlord's motion for summary judgment, finding that the landlord had neither actual nor constructive knowledge of Collins' presence at the apartments. On interlocutory appeal by Mitchell's parents, the Mississippi Supreme Court, in an opinion by Justice Kitchens, affirmed the Circuit Court's grant of summary judgment in favor of the landlord. The plaintiffs argued that because the apartments are federally subsidized, and applicable HUD regulations authorized the landlord to obtain criminal history records, the landlord had a duty to check Collins' background, and constructive knowledge of what it would have learned if it had conducted a background check. In prior premises liability cases involving apartments, the Mississippi Supreme Court had held that the landlord had actual knowledge of an assailant's violent tendencies. The Mississippi Supreme Court, wrote Justice Kitchens, has not yet considered whether an attack is foreseeable based on the landlord's constructive knowledge alone of an assailant's violent nature. To find that that the landlord had constructive knowledge of Collins' criminal record, the plaintiffs would have to prove that the landlord had a duty to inquire into Collins' background. The HUD regulations regarding criminal background checks were permissive, not mandatory. In order to perform a background check, the HUD regulations require a written consent from a tenant. In this case the landlord did not know of Collins' existence on the property, and did not have his consent to perform a background check. Moreover, the lease only permitted the landlord to terminate the lease under certain circumstances, and the fact that Collins had a criminal record was not among the circumstances. The plaintiffs also argued that since the rules of the apartment prohibited weapons, and Collins used a gun to kill Mitchell, the landlord had breached its duty to enforce the rules. The court wrote that by promulgating the rules against weapons and guests, the landlord did not undertake a duty to tenants and guests to prevent violations of the rules.

Note 1: As noted above in the discussion of the *Adams* case, a landlord has a duty to warn invitees about dangerous conditions of which he has knowledge. In the case of third-party assailants, the landlord is considered to have knowledge if he has actual or constructive knowledge of the assailant's violent nature. This is the first reported premises liability case in which a Mississippi court has considered whether a landlord had constructive knowledge of a potential assailant's violent nature. The *Mitchell* court only found that no constructive notice existed in this case. The court left open the possibility that a court under different facts could find that the landlord did have constructive knowledge of a potential assailant's violent nature and thus was negligent if the landlord did not warn its tenants about the danger.

Note 2: One case that the *Mitchell* court discussed at length was a recent premises liability case at an apartment, *Galanis v. CMA Management Co.*, 175 So. 3d 1213 (Miss. 2015), in which the court

ruled for the plaintiff. In order to understand the arguments in *Mitchell*, it is helpful to know about *Galanis*. In *Galanis*, an existing tenant, Batiste, filed a complaint form with the landlord in which he complained about how messy his roommate was and suggested that Batiste may become violent with the roommate if the problem was not addressed. The landlord had a policy of performing background checks on prospective and renewal tenants and a policy of not allowing tenants with criminal histories to become new tenants or renew their leases. The landlord did a background check on Batiste when Batiste sought to renew his lease, and learned that he had a criminal history. The landlord nevertheless matched Batiste and Galanis as roommates without disclosing to Galanis Batiste's threatening statements against his former roommate or his criminal history. Batiste subsequently stole money from and killed Galanis. Galanis' family brought an action for negligence against the landlord in the Circuit Court of Oktibbeha County. They alleged that the landlord breached its duty under premises liability law to protect Galanis, whom the parties agreed was an invitee, from reasonable foreseeable injuries caused by third parties. They also alleged that the landlord had assumed a heightened duty of care to Galanis by performing a background check on Batiste and learning about Batiste's criminal background, and that the landlord had breached this duty of care by not warning Galanis about Batiste's criminal background. The circuit court granted summary judgment to the landlord on the basis that the landlord did not have actual or constructive knowledge of Batiste's violent tendencies. The Court of Appeals affirmed the circuit's court's judgment. The Mississippi Supreme Court, in a decision by Justice Dickinson, found that Batiste's complaint form threatening violence against his former roommate was sufficient to create a genuine issue of material fact about whether the landlord had actual knowledge of Batiste's potentially violent nature and a duty to warn Galanis about Batiste's threats against his former roommate, and reversed and remanded the case to the circuit court. The *Galanis* court found that doing the background check did not impose a separate duty of care on the landlord, though the plaintiffs could argue that the landlord had an obligation under its existing duty under premises liability law to warn Galanis about Batiste's criminal background. In dissent, Justice Kitchens agreed with the plaintiffs that by adopting a "zero tolerance for crime" and taking the extra step of performing the background check on Batiste, which was not required under the landlord's traditional premises liability duty to its tenants, and by undertaking a roommate matching service, the landlord assumed a separate duty to warn Galanis about Batiste's criminal background, and that the plaintiffs should be able to argue the breach of this separate duty to the jury. In *Mitchell*, the court distinguished *Mitchell* from *Galanis* by noting that, unlike the *Galanis* landlord, the *Mitchell* landlord did not assert a "zero tolerance for crime" policy.

Note 3: Reading *Galanis* and *Mitchell* together, the editor draws the following conclusions: The landlord's duty to warn tenants about reasonably foreseeable actions of third parties does not require a landlord to run background checks on potential or existing tenants; if the landlord runs a background check on a prospective or renewing tenant, finds something that indicates that the tenant may be a risk to other tenants, and the landlord does not act upon the knowledge, and another tenant is injured by the tenant with the criminal record, then the injured tenant may argue that the landlord breached its duty to warn the injured tenant about dangerous conditions; and if a landlord represents to tenants that it has a policy of "zero tolerance for crime", makes an exception to that policy, and another tenant is injured by the tenant for whom the landlord made the exception, the injured tenant may argue that the landlord created a dangerous condition by failing to warn him.

Note 4: Although the issue did not get much attention from the court, the editor thought that the finding of the *Mitchell* court that the landlord could not be sued by a tenant for not enforcing the rules was significant. It is especially significant that one of the rules at issue was a prohibition against weapons. Is a provision in a lease prohibiting a tenant to openly carry a gun enforceable? Does it matter if the prohibition is in the body of the lease, a tenant handbook, or rules separately promulgated by the landlord?

Note 5: What about the fact that the victim, Devin Mitchell, was not a tenant of the apartment, but a guest of a tenant? Does the landlord owe the same duty to a guest of a tenant as the landlord owes to a tenant? That issue isn't discussed in this case. No set rule exists in Mississippi. The landlord's duty to guests of its tenants depends on whether the guest is classified as an invitee or a trespasser. See *Handy v. Nejam*, 111 So. 3d 610, 613 (Miss. 2013). Compare *Price v. Park Management, Inc.*, 831 So. 2d 550, 551 (Miss. 2002) ("social guests" of a tenant are owed the same duty as trespassers) with *Estate of Hynes v. Ambling Management Co.*, 66 So. 3d 712, 714 (Miss. 2011) (nephew of tenant was invitee). Relatives of tenants seem to be more likely to be considered to be invitees than adult guests. It is possible for a guest to enter the premises as an invitee and then become a trespasser. See *Handy v. Nejam*, 111 So. 3d at 613 (nephew of tenant was invitee but changed to trespasser when he went to pool).

Note 6: In addition to being a case of first impression regarding the landlord's constructive knowledge, this case is full of good lessons and issues for those who draft leases and counsel landlords.

General Three-Year Statute of Limitations and Discovery Rule Apply to Inverse Condemnation Claims

City of Tupelo v. O'Callaghan, 208 So. 3d 556 (Miss. 2017). In 1992 the City of Tupelo installed a storm water drainage ditch on O'Callaghan's property. The city did not have an easement to construct the easement. In 1996 O'Callaghan enclosed his carport, which was adjacent to the ditch, to make an apartment and laundry room. Shortly afterwards, the walls of the apartment began cracking and the roof began leaking. Eventually the roof caved in, the walls separated and black mold grew in the structure. O'Callaghan noticed that the ditch created by the city was eroding. Thinking that the erosion of the ditch may be related to the damage to his home, O'Callaghan contacted the city about fixing the ditch to stop the erosion. The city declined to do so because the ditch was on O'Callaghan's private property. In 2008 O'Callaghan filed an action against the city in Lee County County Court alleging that the ditch caused the damage to his property. O'Callaghan's expert witness, an engineer who was going to testify that the ditch caused the damage to O'Callaghan's home, changed his opinion and said that he did not think that the ditch caused the damage to the home. O'Callaghan therefore dismissed his action without prejudice. In 2012, after additional erosion of the ditch, O'Callaghan hired another engineer. This engineer opined that the ditch caused the damage to the home, and that every time it rained, more erosion occurred. O'Callaghan then filed a second lawsuit against the city, asserting that he was entitled to damages for inverse condemnation under the Takings Clause of the Mississippi Constitution,

Article 3, Section 17, and that in addition to property damages, he claimed personal injuries from the black mold. The City of Tupelo filed a motion for summary judgment asserting that (a) the lawsuit was barred by the statute of limitations, and (b) that damages for personal injuries were not recoverable in a takings action. The county court denied the city's motion for summary judgment. The city filed an interlocutory appeal. The Mississippi Supreme Court, in decision in which the majority decision was written by Justice Beam, reversed the county court's denial of the city's motion for summary judgment and rendered judgment for the city. The Takings Clause provides in relevant part, "Private property shall not be taken *or damaged* for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; ...". Neither the issue of whether a claim under the Takings Clause is subject to a statute of limitations, nor the issue of whether damages other than damages to the property could be recovered in an action under the Takings Clause, has previously been addressed by the Mississippi Supreme Court. In *City of Vicksburg v. Herman*, 16 So. 434 (Miss. 1894), the Mississippi Supreme Court wrote that the words "or damaged" were added to the Takings Clause in 1890 to expand the protection afforded to property owners, and that these words are "without limitation or qualification." O'Callaghan argued that the words "without limitation or qualification" in the 1894 case meant that no statute of limitations applies to a claim under the Takings Clause, and that the damages for taking are not limited to the type of damages available for injuries to the property, but extend to claims for personal injuries suffered by the owner as a result of the taking, such as the damage to O'Callaghan's health due to the black mold. Justice Beam wrote that the words "without limitation or qualification" in the 1894 case only applied to the type of damages recoverable for injuries to property, and did not address whether a statute of limitations applied to inverse condemnation cases. In the absence of a specific statute of limitations for inverse condemnation cases, the default three-year statute of limitations in Section 15-1-49 of the Mississippi Code applies to inverse condemnation cases. Under Section 15-1-49, a cause of action accrues upon discovery of the injury, not upon the discovery of the injury and its cause. In this case the three-year statute of limitations began to run against O'Callaghan, at the latest, in 2008, when he contacted the city about the damage to his home. The statute of limitations therefore barred O'Callaghan's claim. O'Callaghan argued that because the ditch eroded every time it rained, the damage to his property was continuous and the statute of limitations began running again each time that it rained. Justice Beam wrote that physical takings under the Takings Clause are not continuous in nature, and therefore a new claim did not arise every time the ditch eroded. The court also found that the Takings Clause only permits compensation for the value of the property taken and damages to the remaining property, not personal injuries. So O'Callaghan's claim for personal injuries arising out of mold was not recoverable under Mississippi's inverse condemnation statute. Justice Beam summarized the court's decision as follows: "Future actions presented under Article 3, Section 17: (1) shall be subject to Section 15-1-49; (2) shall be effective from the time that the property owner knew or should have known of the taking or damage; (3) shall continue uninterrupted until the taking ceases or just compensation is paid; and (4) shall concern only injuries related to the real property affected."

Note 1: Justice Kitchens in dissent wrote that having the statute of limitations on O'Callaghan's inverse condemnation claim begin running at the time that the injury was discovered, and before the cause of the injury was known, was unworkable and unfair. Requiring owners to file lawsuits

without knowing the cause of the injury may subject owners to sanctions under Rule 11 of the Mississippi Rules of Civil Procedure and Mississippi's Litigation Accountability Act. In this case O'Callaghan dismissed his lawsuit in 2008 because his expert witness changed his opinion about the cause of the damage to the house and he did not have proof that the erosion of the ditch caused the damage to his house.

Note 2: In finding that the statute of limitations began to run against O'Callaghan when he discovered his injury, rather than when he discovered the cause of the injury, the court relied on its decision in *Angle v. Koppers, Inc.*, 42 So. 3d 1 (Miss. 2010). In *Angle* the plaintiff alleged that she had suffered personal injuries from run-off of chemicals from a wood treatment plant. Her injuries first manifested themselves from 1984 through 2001. She filed her action against the owner of the plant in 2006. The Court found that the three-year statute of limitations in Section 15-1-49 applied to Angle's cause of action. Section 15-1-49(2) provides, "In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury." This is known as the "discovery rule", i.e., the statute of limitations begins to run when the injury is discovered, not when the cause of the injury is discovered. Because the plaintiff in *Angle* had suffered her injuries more than three years before she filed her lawsuit, the Mississippi Supreme Court found that her claim was barred by the three-year statute of limitations of Section 15-1-49(2). The editor does not follow the Court's logic in applying the discovery rule to inverse condemnation claims. In *Angle*, the discovery rule applied because the claim was for injury and disease and thus fell within the express terms of Section 15-1-49(2). O'Callaghan's takings claims (separate from his claim for personal injuries from "black mold") did not fall within Section 15-1-49(2). So why did the Court find that the discovery rule applies to inverse condemnation claim? The editor does not have an opinion about how the discovery rule works in personal injury cases, but applying it to takings claims puts an owner in a dilemma if injury to his property occurs and he can't determine the cause.

Note 3: Given the recent constitutional amendment limiting the state's power of eminent domain, and recent Mississippi Supreme Court cases in favor of owners in inverse condemnation cases, see, e.g., *State v. Murphy*, 202 So. 3d 1243 (Miss. 2016); *Ward Gulfport Properties, LLC v. State Highway Commission*, 176 So. 3d 789 (Miss. 2015), the editor would have said that the trend of the law in Mississippi has been in favor of protecting private property rights. Between the three-year statute of limitations, the application of the discovery rule, and the determination that any damages for future and continuing injuries are barred if the owner does not file his action within three years after the first signs of injury to the property become visible, *City of Tupelo v. O'Callaghan* is a serious limitation on inverse condemnation claims and the rights of property owners in Mississippi.

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