

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

April 2023

2022-2023 Officers

Chair	Robert Bass, Tupelo
Vice-Chair	Lisa Reppeto, Jackson
Secretary	Alan Windham, Jackson
Past Chair	Barry Bridgforth, Southaven
Members at Large	Ryan Byrne, Cordova, Tennessee Kimberly S. Jones, Southaven Sean Peter Doran, Jackson

LEGISLATION

The following bills affecting real property were passed by the Legislature and signed into law by the Governor. All of these bills become effective on July 1, 2023.

HB 280 creates a committee to study the purchase of agricultural lands in Mississippi by foreign governments and requires the committee to submit a report to the Legislature by December 1, 2023.

HB 894 amends Section 17-1-27 of the Mississippi Code to permit local governments to impose administrative and civil penalties (*i.e.*, fines) for violation of zoning ordinances. Section 17-1-27 currently permits only criminal fines of \$100 per day.

SB 2164 amends Section 37-7-473 to allow school districts to sell land for residential and mixed-use development. Section 37-7-473 currently allows school districts to sell land only for industrial development.

SB 2392 amends Section 19-5-22 to provide that garbage liens will be recorded in the chancery clerk's office and shall include all information needed for recording and filing.

SB 2647 amends Section 73-35-4.1 and Section 89-1-505 to provide that brokers are not liable to any party for information provided by the seller in a Property Condition Disclosure Statement. SB 2647 also amends Section 89-1-505 to provide that a seller would not have any liability for an error in a Property Condition Disclosure Statement if the error was not within the personal knowledge of the seller, was based on information provided by public agencies, and the seller exercised ordinary care in providing the information. Finally, SB 2647 amends Section 89-1-503 to provide that if the seller fails to complete a part of the Property Condition Disclosure Statement, the purchaser is on notice to make inquiry of the seller about the failure to disclose.

SB 2751 amends Miss. Code Ann. § 29-3-132 to provide that city and county zoning and land use laws do not prohibit the use by school districts of sixteenth-section lands for education or extracurricular facilities.

The following bills made it most of the way through the legislative process, but fell just short of the goal line:

HB 246 would have enacted a new statute providing that a right of first refusal (“ROFR”) in real property is extinguished upon the death of the grantee of the ROFR unless the ROFR or a memo of the ROFR (i) is filed in the land records, and (ii) provides that the ROFR inures to the benefit of the heirs and assigns of the grantee.

HB 685 would have amended Section 89-1-7 to provide that a conveyance to a married couple of property used as their primary residence would create a rebuttable presumption that the property interest is a joint tenancy with right of survivorship unless the deed provided otherwise. Section 89-1-7 currently provides that a conveyance to two or more persons creates a tenancy in common.

HB 821 would have amended Section 25-34-9 to permit persons who are not residents of Mississippi to be notary publics in Mississippi if their place of employment is in this state.

HB 1155 would have changed the law to make it easier to adopt and amend restrictive covenants in residential subdivisions by requiring less than all of the owners to consent.

CASES

Prescriptive Easement over Water

Franco v. Ferrill, 342 So. 3d 1176 (Miss. 2022). In a case of first impression, the Mississippi Court of Appeals has held that the test for establishing a prescriptive easement over a body of water is the same as the test for establishing a prescription easement over land. In this case the Ferrills purchased eleven unimproved lots in a subdivision in Waveland between 1994 and 2006. The descriptions in the deed only referred to lot numbers in the subdivision “per the official plat or map found in the chancery clerk’s office.” The recorded plat showed the easterly boundary of the lots running to the edge of the lake. The Ferrills presumed that the lots extended into the lake. The Ferrills cleared the lots to the edge of the lake and used the lake for fishing and canoeing.

They built a floating dock in the lake and later obtained a permit from the Mississippi Department of Marine Resources to construct a pier and dock extending into the lake and to dredge the lake. They installed a double-wide trailer on the lots and later constructed a home on the lots. They also constructed a pavilion next to the lake and then converted the pavilion into an office for their business. Record title to the lake was owned by Bourgeois. Neither Bourgeois nor anyone else said anything to the Ferrills about the Ferrills' use of the lake and the shore of the lake until 2019. In 2017 Bourgeois sold the lake to Vanacor. Vanacor had a survey performed in 2018 that showed that Vanacor owned not only the lake but also a twelve-foot strip separating the Ferrills' lots from the lake. Vanacor conveyed his lots and the lake to Franco, but Vanacor in 2019 obtained a permit from the City of Waveland to construct a fence along the boundary line between the lots and the lake. Vanacor, over the objection of the Ferrills, constructed a fence along the boundary line shown on his survey, which had the effect of separating the Ferrills' lots from the lake. Vanacor also dismantled the pier and dock into the lake that the Ferrills had built. [Editor's note: Mr. Vanacor and Ms. Franco were acquaintances and Mr. Vanacor continued to exhibit a personal interest in the land after he conveyed legal title to Ms. Franco.]

The Ferrills filed an action in Hancock County Chancery Court against Franco and Vanacor asserting title by adverse possession to the strip of land between the Ferrills' lots and the lake, for a prescriptive easement over the lake, and for trespass. Franco and Vanacor counterclaimed for trespass. Following the trial, the chancery court found in favor of the Ferrills on their claims of adverse possession of the strip of land along the shore of the lake and a prescriptive easement to use the lake. The chancery court found that Franco and Vanacor had trespassed on the Ferrills' property and that the Ferrills were entitled to damages if the fence was not removed within sixty days. Finally, the chancery court ordered Vanacor to pay the Ferrills \$5,000 for dismantling the pier.

On appeal the Mississippi Court of Appeals, in a decision by Justice Maxwell, affirmed. The Court considered the six elements of adverse possession: that possession must be under claim of ownership; actual or hostile; open, notorious and visible; continuous and uninterrupted for ten years; exclusive; and peaceful. The Court of Appeals found that the Ferrills proved all six elements by clear and convincing evidence, as required.

The Court of Appeals then addressed the question of whether this traditional test for adverse possession, which is the same test used for prescriptive easements over land, applied to a prescriptive easement over the lake. Determining that this was a question of first impression in Mississippi, the Court of Appeals looked to cases from other states. Some states impose a higher burden for proving the existence of a prescriptive easement over a body of water, but courts in other states do not impose a higher burden. The Court of Appeals determined that the same test should apply for determining a prescriptive easement over water in Mississippi as for a prescriptive easement over land. The Court of Appeals then considered whether the Ferrills proved all six elements of a prescriptive easement over the lake and concluded that they had.

Justice McCarty, joined in part by Justice Lawrence, concurred in part and in the result. Justice McCarty wrote that the test for a prescriptive easement has never been tied to land, and he did not join in the majority's discussion of the law of other states.

Note 1: How did the surveyor come up with a different boundary line than the boundary line shown on the recorded subdivision plat? At the trial, the surveyor testified that he considered the tax parcel lines and the tax assessor's geoportial map (presumably the same as a GIS map), and not the recorded plat. In response to a question from the chancellor, the surveyor testified that he surveyed what Vanacor told him to survey.

Note 2: If the recorded plat was right and the Ferrills had record title to the edge of the lake, why didn't the Ferrills seek to confirm their title to the land to the boundary of the lake rather than assert title by adverse possession?

Note 3: The Mississippi Supreme Court has held in prior cases that the owners of land adjacent to a man-made or artificial lake who do not have rights in the land beneath the lake do not have the right to use the lake. In *Black v. Williams*, 417 So. 2d 911 (Miss. 1982), after a public utility district established a man-made lake over the land of two landowners, one owner sought to use the portion of the lake that was over the submerged land of the other owner. The Mississippi Supreme Court held that the plaintiff was not entitled to use the portion of the lake beyond the boundary of his submerged land. 417 So. 2d at 912. In *Crenshaw v. Graybeal*, 597 So., 2d 650 (Miss. 1992), the owners of land adjacent to a man-made lake and who had made use of the lake for 27 years asserted that they had obtained rights to use the lake because they had acquired title to the lakebed by adverse possession. The trial court held that the plaintiffs were entitled to use a portion of the lake next to their property. The Mississippi Supreme Court reversed and held that the plaintiffs' use of the lake had been permissive and that the plaintiffs could not continue to use the lake once the owner of the lake had withdrawn his permission to use the lake. In *Franco v. Ferrill*, the Court of Appeals noted that the plaintiffs in *Crenshaw* were seeking rights in the lakebed, while the Ferrills were only seeking a prescriptive easement to use the surface of the lake. 342 So. 3d at 1192 n. 8.

Note 4: Lakes and ponds are parts of many residential subdivisions. In addition to providing an amenity, lakes and ponds can act as stormwater detention ponds. But the headaches that subdivision lakes provide to real estate attorneys are legion. For starters, who should own the lake—the developer, the owners of lots adjacent to the lake, or the homeowners' association? If the developer owns the lake, what happens when the development is completed and the developer walks away? The editor knows of several subdivision lakes in Madison County that are not assessed for ad valorem because the developers' corporations that owned the lakes were administratively dissolved after the subdivision was completed and the tax assessor cannot determine the current owner. If the owners of the lots adjacent to the lake own the lake, then who pays for the maintenance of the lake? Lakes have to be dredged periodically because silt builds up, and for additional reasons require regular maintenance. If the owners of the lots adjacent to the lake are responsible for the costs, then one can imagine the enmity that results if one or more owners do not pay their share. On the other hand, if the homeowners' association owns the lake, the owners of lots that are not adjacent to the lake are not going to want to pay for maintenance of a lake that primarily benefits the owners of the lots adjacent to the lake. Another problem is potential liability arising out of ownership of the lake. *See, e.g., Borne v. Carraway*, 118 So. 3d 571 (Miss 2013) (judgment against individual owners of homes adjacent to a lake when a culvert draining the lake was not maintained and as a result a sinkhole appeared on property of

neighbor); *Dedeaux v. Lake Caroline Owners Ass'n*, 146 So. 3d 1010 (Miss. Ct. App. 2014) (user of lake was business invitee of homeowners' association).

DISCLAIMER

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of the Section's members. Members are welcomed and encouraged to send their corrections, comments, news, articles or ideas for articles to the editor, Rod Clement at rclement@bradley.com. Although an earnest effort has been made to ensure the accuracy of the matters contained in this Newsletter, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases and statutes are intended only to bring current issues to the attention of the Section's members for their further study and independent review and should not be relied upon by readers for their own or their clients' legal matters. All commentary reflects only the personal opinions of the editor, which are subject to change, and does not reflect a position of The Mississippi Bar, the Real Property Section, or the editor's law firm.