# COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-00-138-CV

RONALD L. ANDERSON, CAROL J. ANDERSON, KENNETH R. CASEY, LINDA K. CASEY, JOHN P. FIALA, MARY T. FIALA, JOHNNY FOSTER, DOROTHY M. FOSTER, KIMBERLY SUE GROSS, SAMUEL R. KERR, III, SHARON A. KERR, GARY M. MCCLURE, BRENDA MCCLURE, JACK A. SPRAGUE, SUSAN G. SPRAGUE, VIRGINIA F. WHALEY, DON E. WHITLOCK, AND LINDA G. WHITLOCK — APPELLANTS

V.

MARY R. ELDREDGE — APPELLEE

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FROM THE 362ND DISTRICT COURT OF DENTON COUNTY

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## OPINION

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This appeal arises from a summary judgment in Mary Eldredge's favor declaring that her property is not subject to certain deed restrictions. We will affirm.

## BACKGROUND

F.O. Ellard owned an eighty-acre tract of land in the Town of Hickory Creek, Denton County, Texas. The property was called Hickory Park Estates (the "subdivision"). On June 20, 1968, Mr. Ellard obtained a survey of the property and subdivided it. On August 9, 1968, Mr. Ellard signed a document entitled "DEDICATION OF HICKORY PARK ESTATES SUBDIVISION, AN ADDITION TO THE TOWN OF HICKORY CREEK, TEXAS" (the "dedication"). The dedication contained deed restrictions for the subdivision, including a restriction that allowed only one house to be built on each five-acre lot.

On October 26, 1968, Clayton and Mary Eldredge entered into a contract to purchase a twenty-acre tract of land from Mr. Ellard. The tract was described as "S. Linthicum Survey Abst. 1600 Tract 1, being 20 acres, Hickory Park Estate[s]." On November 12, 1968, the Eldredges and Mr. Ellard executed a promissory note, a deed of trust, and a warranty deed with a vendor's lien for the property.

On November 14, 1968, the dedication for the subdivision was filed in the public records for Denton County. The Denton County clerk recorded the dedication on November 19, 1968.

On November 20, 1968, Mr. Ellard notarized the warranty deed for the property he had sold to the Eldredges the week before. The deed of trust and

the warranty deed were filed in Denton County on November 22, 1968. The warranty deed was then recorded with the Denton County clerk on December 4. A copy of the recorded deed was delivered to the Eldredges sometime after December 4, 1968.

Some thirty years later, in 1998, Mrs. Eldredge entered into a contract to sell her twenty-acre tract to a developer.[1] A title search revealed that the property was encumbered with deed restrictions that allowed only one house for each five-acre lot. The developer refused to buy the property with these restrictions. Mrs. Eldredge asked her neighbors to release her from the deed restrictions, but they refused.

On September 17, 1998, Mrs. Eldredge filed a declaratory judgment suit seeking a declaration that her property is "free and clear of the Dedication and that such Dedication has no force and effect with respect to the Property." Mrs. Eldredge then filed a motion for summary judgment alleging that the deed restrictions were not filed until after she and her husband had closed on the sale of the property. In their response, appellants contended that the Eldredges had constructive notice of the deed restrictions prior to closing and Mrs. Eldredge's

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[1]When Mr. Eldredge died, all of his interest in the property passed to Mrs. Eldredge.

suit is barred by limitations and laches because she received actual notice of the deed restrictions in February 1987.

The trial court granted Mrs. Eldredge's motion for summary judgment in its entirety and stated that the property at issue "is not subject to any of the restrictions contained in the Dedication of Hickory Park Estates Subdivision An Addition to Town of Hickory Creek, Texas or any other restrictions filed of record after November 12, 1968." This appeal followed.

## STANDARD OF REVIEW

In a summary judgment case, the issue on appeal is whether the movant met her summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Rhone-Poulenc, Inc. v. Steel,* 997 S.W.2d 217, 223 (Tex. 1999); *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex. 1996); *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the

evidence and its reasonable inferences in the light most favorable to the nonmovant. *Great Am.*, 391 S.W.2d at 47.

In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence are disregarded and the evidence favorable to the nonmovant is accepted as true. *Rhone-Poulenc,* 997 S.W.2d at 223; *Harwell v. State Farm Mut. Auto Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am.*, 391 S.W.2d at 47. The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of the movant's cause of action as a matter of law. *Clear Creek Basin*, 589 S.W.2d at 678.

**DEED RESTRICTIONS**

In issue one, appellants assert that there is a fact issue on whether the Eldredges had actual and constructive notice of the deed restrictions before they purchased the property. The appellants rely on the following evidence to show the Eldredges had actual and constructive notice of the deed restrictions:

> • Mr. Ellard had completed the platting and approval process for the subdivision with the Town of Hickory Creek before the Eldredges purchased their property. The Eldredges were experienced land purchasers and had owned at least one home in a restricted subdivision before looking at the land in question.

- Mrs. Eldredge's denial of having notice. According to appellants, a reasonable jury could disbelieve Mrs. Eldredge.

- In 1982 and 1991, Mr. Eldredge had conversations with at least two other landowners in the subdivision about the deed restrictions.

- In the fall of 1984, a prospective buyer for the lot adjacent to the Eldredges' property spoke with Mr. Eldredge, and Mr. Eldredge allegedly demonstrated that he knew his land was part of the subdivision.

- In 1987, Mr. Eldredge was confronted directly by his neighbor and admitted that he knew the deed restrictions applied to his property.

- In February 1987, one of the appellants presented a plat of the subdivision at a Planning and Zoning Commission meeting in which public comment was heard concerning a proposed master plan to change the subdivision's zoning. The plat showed that the Eldredges' property was part of the subdivision. Mr. Eldredge addressed the Commission at that meeting and referred to his property as the "20 acres on [the] west end of [the] Hickory Creek Estates." Mrs. Eldredge also recorded the minutes for that February 1987 meeting and personally proposed language that would have allowed the Eldredges' property to be rezoned, while retaining the existing zoning requirements for the rest of the subdivision.

A purchaser is bound only by those restrictive covenants attaching to the property of which he has actual or constructive notice. *Davis v. Huey*, 620 S.W.2d 561, 565-66 (Tex. 1981); *Sharpstown Civic Ass'n v. Pickett*, 679 S.W.2d 956, 958-59 (Tex. 1984). One who purchases property for value and without notice takes the land free from restrictions. *Davis*, 620 S.W.2d at 566.

A purchaser has actual notice of deed restrictions when he has express knowledge that restrictions encumber the property, or when the purchaser should have known of the restrictions if he had made a reasonably diligent inquiry. *Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 388-89 (Tex. 1965); *Hicks v. Loveless*, 714 S.W.2d 30, 33 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). Constructive notice of deed restrictions is imputed to a purchaser when the restrictions are on file in the public record at the time of the sale. *Stanford v. Brooks*, 298 S.W.2d 268, 270-71 (Tex. Civ. App.—Fort Worth 1957, no writ) (holding that purchaser bound by restrictions in dedication when she closed sale after dedication entered); *see also Musgrave v. Brookhaven Lake Prop. Owners Ass'n*, 990 S.W.2d 386, 396 (Tex. App.—Texarkana 1999, pet. denied) (holding that purchaser has constructive knowledge when instrument has been recorded).

The Eldredges purchased the property in question on November 12, 1968. Neither the warranty deed, the deed of trust, nor any of the documents related to the transaction contain any language indicating that there were deed restrictions on the property. The only summary judgment evidence on which appellants rely to show that the Eldredges had actual or constructive notice of the deed restrictions on or before November 12, 1968 is the fact that Mr. Ellard had completed the platting and approval process for the subdivision before

November 12, 1968. The dedication containing the deed restrictions, however, was not filed in the Denton County deed records until November 14, two days after the Eldredges purchased their property. All of the other evidence on which appellants rely relates to events that occurred after November 12, 1968. These events do not raise a fact issue as to whether the Eldredges had actual or constructive notice before they purchased the property on November 12, 1968. We, therefore, conclude that there were no deed restrictions on the Eldredges' property as a matter of law, and that the trial court did not err in rendering summary judgment on the ground that the Eldredges did not have actual or constructive notice of the deed restrictions when they purchased the property.

Appellants allege that the date the conveyance became effective was not November 12, 1968, but the date on which the Eldredges received the deed in the mail after it had been recorded in the Denton County public records on December 4, 1968. We disagree.

A conveyance becomes effective and title is transferred when the grantor executes and delivers the deed to the purchaser. *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974); *Hicks*, 714 S.W.2d at 32-33. The recording of a deed is not essential to conveyance of title. *Thornton v. Rains*, 157 Tex. 65, 299 S.W.2d 287, 288 (1957); *Bell v. Smith*, 532

S.W.2d 680, 685 (Tex. Civ. App.—Fort Worth 1976, no writ). Delivery occurs when the deed is placed within the purchaser's control for the purpose of having it become operative as a conveyance, and with the seller's intention to relinquish control of the deed to the purchaser. *Hicks*, 714 S.W.2d at 32. In the absence of evidence to the contrary, the law presumes that delivery occurred on the date the deed was executed. *Id.*; *Bell*, 532 S.W.2d at 685. Moreover, if the deed and its acknowledgment bear different dates, we presume that the deed was delivered to the purchaser on the date of the deed rather than on the date of the acknowledgment. *Bell*, 532 S.W.2d at 685.

In this case, the Eldredges executed the promissory note for the purchase of the property and Mr. Ellard signed the deed of trust over to the Eldredges on November 12, 1968. Even though the deed was not recorded in the public records until December 4, 1968, title to the property was transferred to the Eldredges on November 12, 1968 when Mr. Ellard executed and delivered the deed to them. We overrule issue one.

**AFFIRMATIVE DEFENSES**

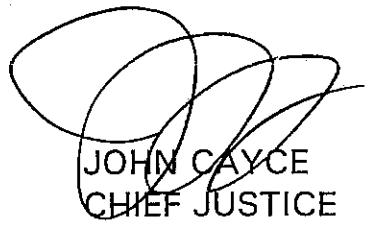
In issues two and three, appellants contend that the trial court erred in granting Mrs. Eldredge's motion for summary judgment because there are fact issues as to whether her suit is barred by the affirmative defenses of laches and limitations.

Because injury from a cloud on the title of real estate is continuing, the cause of action for its removal is continuing and never barred while the cloud exists. *Watson v. Rochmill*, 137 Tex. 565, 155 S.W.2d 783, 785 (1941); *Tex. Co. v. Davis*, 113 Tex. 321, 254 S.W. 304, 309 (1923); *Ojeda v. Ojeda*, 461 S.W.2d 487, 488 (Tex. Civ. App.—Austin 1970, writ ref'd n.r.e.). Similarly, laches will not bar a suit to quiet title unless the party asserting the defense can demonstrate that he was in possession of the contested property during the period of delay. *Teledyne Isotopes, Inc. v. Bravenec*, 640 S.W.2d 387, 391 (Tex. Civ. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

This case arises from a suit for declaratory judgment seeking to remove a cloud on the title of property Mrs. Eldredge owned and possessed during the alleged period of delay. Therefore, the doctrine of laches and the bar of the statute of limitations do not apply as a matter of law. We overrule issues two and three.

In their fourth issue, appellants contend that the trial court should have granted their motion for summary judgment. Because of our disposition of issues one, two, and three, we need not reach appellant's fourth issue.

Having overruled appellants' issues on appeal, we affirm the trial court's judgment.



JOHN CAYCE
CHIEF JUSTICE

PANEL A: CAYCE, C.J.; DAY and DAUPHINOT, JJ.

DO NOT PUBLISH
TEX. R. APP. P. 47.3(a)

JUN 14 2001