IN THE SUPREME COURT OF MISSISSIPPI

JOHN R. HARRISON and
JAMES A. MIMS, JR. — APPELLANTS

VS. — CAUSE NO. 2006-CA-01663

BOBBY JOE ROBERTS — APPELLEE

Brief

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for appellee hereby 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 or the Court of Appeals may evaluate possible disqualifications or recusal.

John R. Harrison	Appellant
James A. Mims, Jr.	Appellant
Bobby Joe Roberts	Appellee
E. Scott Verhine	Attorney for Appellee
Arnold F. Gwin	Attorney for Appellants

This the 5th day of April, 2007.

Attorney for Appellee

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STATEMENT OF THE ISSUES

The issue in this case is whether a grantor in a deed of conveyance who knowingly conveys a bounded section of property to a grantee with the description "more or less" is allowed to seek equitable relief when he and the grantee later lear that more acreage was contained in the bounded section than they thought. The second issue is whether such a mistake is material so that the grantor can declare the contract/deed voidable.

STATEMENT OF THE CASE

In April of 2003, Bobby Joe Roberts paid $15,000 and received a deed of conveyance from his cousin, John R. Harrison, for a thirty acre parcel of land which was legally described as lying south of a roadway in Webster County, Mississippi. (T 21) Harrison and Roberts both thought that the parcel of land south of the roadway contained thirty (30) acres and both parties agreed to let the roadway be the northern boundary of the tract in the deed. (T 19, 53) This allowed the parties to avoid the need for a survey which would have been an additional expense in closing the transaction. (T 19,20, 53) Pete Fortner, the lawyer who prepared the legal description in the deed, testified that the parties all agreed to let the roadway be the northern boundary of the tract, and he confirmed the fact that the parties thought that the area south of the roadway contained about thirty (30) acres. (T 56,57)

Harrison also owned land north of the roadway, but he did not want to sell this tract to Roberts because it contained a family home. (T 17, 53) Roberts and Harrison both thought that the part of the tract north of the roadway contained ten (10) acres. (T 17, 46) In fact, Roberts didn't know the area contained any more acreage until this dispute arose in 2005. (T 25, 26)

In July of 2005, Harrison attempted to sell the family home and the ten acres of land that he thought he owned to James A. Mims, Jr. (T 78) This deed of conveyance was drawn up by Mr. Mims without a lawyer and presented to Harrison for signing. (T 79) Mr. Mims did not draw up the deed so as to convey all land Harrison owned north of the roadway. Instead he attempted to describe the ten acres he thought he was buying as "this 10 acres is the north part of the 40 acres" which was supposedly owned by Harrison. (RE 11). When Mims' friend went to Webster County to record the deed, someone at the clerk's office informed her that Mr. Harrison only owned about 4.5 acres of land with the family home and that Roberts owned the entire 35.5 acres of land south of the road. (T 80)

Mims and Harrison, without Roberts knowledge, signature or consent, then filed a series of correction deeds which tried to take away from Roberts 5.5 acres of land and give it to Mims. (RE 14-18) Roberts learned about Mims alleged ownership of the land only after Roberts saw Mims mowing the disputed parcel with a tractor. (T 26) Roberts then filed suit against Harrison and Mims for clouding the title to his land. (RE 1)

After a trial in Webster County, the Court ruled that Roberts was the legal owner of the entire 35.5 acre tract. (RE 40) In the opinion, the Court found that there "was no mutual mistake about what was sold and what was purchased." (RE 41) The Court further found that the testimony showed "the parties agreed that the north line was the public road." (RE 41) Finally, the Court ruled that Roberts was not required to pay Harrison additional compensation for the extra acreage because there was no evidence that the price was unconscionable or that Roberts was guilty of overreaching. (RE 41) Harrison and Mims did not file a Motion for Reconsideration nor did they ask the trial court for a new trial. Aggrieved from the judgment, Harrison and Mims filed this appeal.

LEGAL ARGUMENT

1. By not making a motion for a reconsideration or a motion for a new trial, Appellant's claims that the judgment is against the overwhelming weight of the evidence must fail.

Harrison and Mims argue that the Chancellor's findings were against the overwhelming weight of the evidence presented at trial. (App Br 17). This court has consistently held that a trial court will not be found in error on a matter not presented to the trial court for decision. Purvis v. Barnes, 791 So.2d 199,203 (Miss. 2001). Additionally, this court has held that "[t]here are certain errors that parties must bring to the attention of the trial judge in a motion for a new trial" in order to have those matters brought before this court. McClemore v. State, 669 So.2d 19,24 (Miss.1996). By not bringing the issue before the trial court prior to appeal, Harrison and Mims are barred from making them now.

2. Harrison clearly understood the legal boundaries that he was conveying to Roberts , therefore, he is precluded from seeking equitable relief just because those boundaries contained more acreage than the parties originally thought.

The trial court found that the evidence demonstrated Harrison and Roberts consented to the roadway as being the north boundary of the property. (RE 43). Clearly, this fact was undisputed at trial. (Tr. 19, 46, 58) There was no mutual mistake as to the description of the land rather only what acreage the land contained. However, the deed of conveyance clearly demonstrated that the parcel conveyed contained "thirty acres more or less." (RE 8)

Mississippi has long held that a mutual mistake does not alone make a contract unenforceable. Wall v. Wall, 177 Miss 743, 171 So. 675 (1937). This court has held that a contract may be voidable only when the mistake is a material element to the contract. Terry

Haute Cooperage v. Branscome, 203 Miss. 493, 35 So.2d. 537, 540 (1948). When looking to see if a mistake is material, contract law dictates that a party must "show that the resulting imbalance in the agreed exchange is so severe that they cannot fairly be required to carry it out." Restatement (Second) Contracts (1981), §152(c).

The facts in the instant case are similar to those in the Terry Haute Cooperage. In that case, the plaintiff mistakenly believed that a parcel of land contained 350,000 feet of timber footage when in fact it only contained 117,000 feet. Terry Haute Cooperage at 538. This court held that plaintiff was barred from revoking the contract because he had inspected the area and the mistake was his own fault. Id.

While the case *sub judice* is concerned with the acreage of land in a bounded tract, the fact still remains that Harrison was the owner of that land and should have known what lands he owned south of the roadway in question. Further, Harrison and Mims did not prove that the mistake had such an adverse consequence on the bargain that it is not fair for the contract to be carried out.

Harrison and Mims hang their hat on the theory that Roberts should get only thirty acres because he "only intended to buy thirty acres". (App Br 12). However, this fact was consistently rebuffed at trial. The trial court found that the parties both thought the area south of the roadway contained thirty acres and that Roberts and Harrison bargained to buy and sell the land south of the roadway, which they thought was thirty acres. (RE 43,44).

The cases cited by Harrison and Mims are easily distinguishable from the case at hand. In Brimm v. McGee, the grantor and grantee in question both thought that the legal description used in the deed was accurate but in fact it was not. Brimm v. McGee, 119 Miss. 52, 80 So. 379

(Miss. 1919). The court held that an erroneous legal description called for the deed to be reformed since all parties meant to buy and sell a certain parcel of land. Brimm at 381.

Again, in Webb v. Brown, 404 So.2d 1029 (1981), the grantor and grantee both intended to buy and sell a certain tract of land, however, the legal description contained a separate tract of land that was specifically excluded in their oral discussions. Webb at 1031. The court held that since the parties intended to exclude a parcel of land in their negotiations, the deed would be reformed to express the desires of the parties. Id. The facts in the case at issue vary drastically from Webb because here the parties all agreed that the tract to be conveyed was the land south of the roadway. No evidence was presented or found credible by the trial court that any such different agreement existed between the parties.

Finally, King v. Jones, 199 Miss. 666, 24 So.2d 860 (Miss. 1946) is irrelevant to the case at hand as it deals with the intention of a grantor to grant a lien in a Deed of Trust.

3. Public policy dictates that a grantor assumes the risk that land he conveys contains more acreage than he contemplated.

When a real estate transaction closes, buyers and sellers must have confidence that the sale is final. It is a basic policy of real estate law that a seller should know what he is selling and that a buyer should know what he is buying. By allowing parties to make claims years after a closing that a sale was inequitable because there was more or less land conveyed than bargained for, this destroys public confidence in Mississippi's real estate system. Harrison conveyed approximately thirty acres "more or less" to Roberts. If Harrison wanted to sell just thirty acres, he should have had a survey performed to accurately describe the exact boundaries he wanted to sell. Instead, he chose to sell everything south of the roadway which just so happened to be more than thirty acres.

CONCLUSION

The ruling of the trial court should be affirmed as all arguments made by Harrison and Mims are without merit and have no legal precedent in Mississippi law.

Respectfully submitted,

Bobby Joe Roberts, Appellee

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CERTIFICATE OF SERVICE

I, E. Scott Verhine, attorney for appellee, hereby certify that I have this day deposited in the United States mail, postage prepaid, a true and correct copy of the above and foregoing brief of appellee to Arnold F.Gwin, Post Office Box 1956, Greenwood, MS, 38935-1956 and to Judge Robert L. Lancaster, P.O. Box 884, Columbus, MS, 39703-0884.

Mailed this the 11th day of April, 2007.

E. Scott Verhine