IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00402

MICHAEL S. HENRY, JAMES N. HENRY, WILLIAM S. HENRY, LARRY H. HENRY, AND DAVID HENRY **APPELLANTS**

VS.

JOHN STUART MOORE AND KAREN J. MOORE **APPELLEES**

APPEAL FROM THE CHANCERY COURT
OF OKTIBBEHA COUNTY, MISSISSIPPI

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT IN REPLY

I. The trial court inverted the normal rules of contract construction by first hearing all manner of extrinsic evidence and then deciding that the lease was ambiguous.

This case is about a lease that required Moore, as lessee, to assume the responsibility for three structures on an eighty acre parcel during the ten year term of the lease. Without citing any contract law, Moore's argument assumes that there are relevant factual disputes relating to the contract that opened the door for evidence of the parties' intentions that is extrinsic to the lease. For example, Moore argues that there was a material dispute at trial about the condition of the law office at the time Moore and George Henry entered into the lease. (Red brief at 7-8)

Dr. Terry Amburgey, the William Giles Distinguished Professor of Forest Products at Mississippi State University, testified that he had examined the structures on Moore's behalf in March of 2002. (V. 4: T. 9) He noted that the law office's roof had decayed to the point of having partly caved in. (V. 4: T. 11) Amburgey[1] said that the rate wood decays does not have an exact measure because of the large number of variables involved. He would have expected the roof to have been leaking in 1989 when the lease was executed. (V. 4: T. 14) Amburgey said he would have been "very surprised" if the contents of the law office had not had mold damage in 1995, but qualified the assertion by saying that his trained eye

[1]Professor Amburgey became known to the undersigned a number of years ago in *Hodges v. Allstate Ins. Co.*, No. 2:00cv75 (S.D.Miss.), where his testimony was crucial to the settlement of the case. He is a prominent mycologist with an extensive *curriculum vita*.

often detected mold problems lay persons might not yet see. (V. 4: T. 22)

The Henry brothers objected not to Amburgey's expertise, but to the relevance of the testimony when the question is whether the contract is ambiguous. (V. 4: T. 9) It does not matter what condition the structures were in at the time of the contracting. The only question is whether Moore's promise to take responsibility for the structures meant something other than that he was to maintain them.

As argued previously, both appellate courts of Mississippi have had occasion to interpret what the word "responsible" means when used in contracts. Both courts have held that the word is unambiguous and that being responsible for something means to undertake an obligation or duty with regard to the subject matter of the promise. *Owen v. Gerrity*, 422 So.2d 284, 288 (Miss. 1982); *Benchmark Health Care Center, Inc. v. Cain*, 912 So.2d 175, 182 (Miss.App. 2005).

By contrast, the special chancellor ruled that "[t]he drafter of this lease/option was trying to free himself and his wife of the responsibility of providing for the structures without placing any further affirmative obligations on the Moores." (V. 1: C.P. 91) As applied to George, then, the chancellor used the term "responsibility" in the sense of George's obligation for the structures' upkeep. But when the same word is applied to Moore, the special chancellor ruled that "[Moore was] to have the responsibility for the buildings. If [he] chose to repair them, [he] could. If [he] chose not to repair they (sic), [he] did not have to."

(V. 1: C.P. 93)

The chancellor accomplished no more than to decide that the same word had different meanings when applied to different parties. It is impossible to take the yoke of duty from one man's shoulders and, in the act of placing it on another's, take away all the burden. Whatever motivated the special chancellor's ruling, there is nothing in the contract suggesting that the same word meant different things depending on whose ox is being gored.

Moore seems to argue that the phrase "assume the responsibility" for the structures is ambiguous because other words, such as "maintenance," were not used. (Red Brief at 9) Again, this gets the cart before the horse: the question is whether "responsibility" is ambiguous with respect to the subject matter of the promise. If that word has alternate and mutually exclusive meanings within the four corners of the agreement, then the contract provision is ambiguous. "Maintain," "repair," and "preserve," are all synonyms and do not express any concepts that are different from the basic idea of taking on a duty with respect to three small buildings.

The special chancellor and Moore also appear to reason that even if the phrase "assume responsibility" refers to the buildings' upkeep, then the phrase is ambiguous because it does not state the extent or quality of the maintenance required. (Red Brief at 9, 10; V. 1: C.P. 92) This reasoning is flawed because it finds "ambiguity" not in the meaning of the phrase – which is the legal touchstone – but in the lack of precision with respect to what Moore was to do in order to

maintain the buildings.

Where a contract is valid and enforceable, but some terms are left incomplete, Mississippi law implies a requirement of reasonableness to the provision. *Putt v. Corinth*, 579 So.2d 534, 539 (Miss. 1991)(contract details not going to validity of the contract may be supplied by implying reasonable terms); see also, *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 755 (Miss. 1987)(law implies into contracts only such terms as may be expected to fill out the parties' agreement and reasonable expectations).

Moore was required to maintain the structures in a reasonable manner. Moore has admitted that he did nothing, reasonable or otherwise, to maintain the structures. Any factual dispute requiring extrinsic evidence is pretermitted.

According to Moore and the special chancellor, the phrase is ambiguous because it could mean that George Henry was imposing an affirmative duty on Moore, or it could mean that George was trying to remove the obligation from himself without imposing the obligation elsewhere. (Red Brief at 10; V. 1: C.P. 91) Both Moore and the chancellor err in failing to apply ordinary contract law. The "four corners" of the instrument must be examined and all terms given their effect before a document is labeled "ambiguous."

If George had intended to relieve himself of further obligation for the structures upkeep and leave the decision to Moore about whether to maintain them, George would have written that he would bear no responsibility to his lessee for the structures and that any repairs would be Moore's responsibility. This is, of

course, how the chancellor re-wrote the lease to come to the result now before the Court.

There is nothing in Mississippi law empowering this special chancellor to add to or alter the express terms of the lease. Equally sure, courts have the power to relieve a party from a contract's duties and obligations only under unusual and extreme circumstances, such as mistake or unconscionability. *Martin v. Ealy*, 859 So.2d 1034, 1038 (Miss.App. 2003)(collecting cases: fundamental right to contract does not permit courts to alter contract terms absent mistake, fraud, or illegality).

Moore makes no claim of any mistake, fraud, or unconscionability in the lease or in the consideration he owed to George Henry.

The Court should reverse the trial court's ruling that the lease was ambiguous and that Moore did not breach his promised duty to be responsible for the buildings.

II. The trial court ruled that Moore did not breach the agreement and therefore never reached the issue of whether the breach was material.

In an argument the Henry nephews cannot claim to understand, Moore appears to argue that the issue of whether his breach was material was never presented to the trial court. Therefore, the argument seems to go, this Court does not have the authority to consider whether the breach was sufficiently material to justify George Henry's termination of the contract. (Red brief at 10-11)

The Parties stipulated that the issue of which party breached the lease

agreement was governed by the meaning of certain language in the lease. As pointed out previously, had the special chancellor ruled that Moore was to be responsible for the structures during the leasehold and therefore breached the lease agreement, then the trial court necessarily would have had to consider whether the breach was material – justifying termination – or nominal.

The Henry nephews agree that issues not presented to the trial court are not preserved for appeal. The issue of Moore's breach was manifestly presented to the trial court.

The Court should render judgment in the Henry nephews' favor on the issue of materiality because the breach involved a substantial part of the consideration John Moore promised to George Henry. Moore allowed the buildings to decay to the point that a roof has partly caved in. Not paying what an agreement requires is the most fundamental kind of material breach.

III. The final judgment is inconsistent with the trial court's opinion and is internally inconsistent.

Candor requires acknowledging that the issues revolving around the relief ordered by the trial court are secondary to the main point of whether the lease agreement was breached. The Henry nephews' argument is straightforward: if a contract is to be specifically enforced, it can only be enforced against a contracting party. If the contract here is specifically enforced, then the deed out from George and Geraldine Henry to their nephews must be voided and title revested in order that the contract may be specifically enforced. There is nothing in Mississippi

contract law that suggests a contract may be enforced against five strangers to it.

Now, for the first time, we are told that the trial court's opinion was not that specific performance would lie, but that the final judgment imposed a constructive trust on the rights to the land and that the Henry nephews, as trustees for Moore, were merely being ordered to convey title in their capacities as trustees. (Red brief at 12) None of the pleadings mentions the equitable doctrine of constructive trust; nor does the special chancellor's opinion; nor does the final judgment.[2]

Moore is correct that Mississippi courts have the authority to use the equitable remedy of constructive trust to effect a remedy in cases where a third party, with knowledge of a prior sale agreement, takes title to real property. *C&D Investment Co. v. Gulf Transport Co.*, 526 So.2d 526, 530-31 (Miss. 1988)(one taking deed with notice of a prior agreement by the vendor to convey to another person is trustee of the latter); *Grantham v. McCaleb*, 202 Miss. 167, 30 So.2d 312 (1947)(same); *Rhoads v. Peoples Bank & Trust Co.*, 200 Miss. 606, 27 So.2d 552 (1946)(*en banc*)(third party buyer is constructive trustee for the benefit of the original purchaser).

But imposing a constructive trust is not the same thing as specifically enforcing a contract. The remedies are both equitable, but distinct in logic and operation.

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[2]The Henry nephews acknowledge that under modern rules and doctrine, a court may award any relief to a party to which the party "is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings . . .." Rule 54(c), Miss.R.Civ.P.

The problem is that the final judgment neither says it is imposing a constructive trust nor is that what it effected. To reiterate briefly, the final judgment ordered George Henry and his nephews to quitclaim their rights in the land to Moore, and for Moore to pay to George and his nephews jointly $15,000.00. If a constructive trust were being imposed, then George Henry, having conveyed legal title, would not be a trustee for Moore's benefit because he would not possess any interest to deed to Moore.

On the other hand, if the deed to the Henry nephews were being voided, title revested, and specific performance ordered, then the Henry nephews would have no interest to convey and no right to receive any compensation for interests they did not possess.

The special chancellor did sign the final judgment and that makes it an official act of a court of record. It is also true that the trial judge had no hand at all in drafting the final judgment and that the parties' then-lawyers concocted it.

Obviously, if the Court reverses and renders judgment for the Henry nephews this issue vanishes. But if the Court affirms, then it must deal with the final order which is internally inconsistent, and which is also apparently inconsistent with the special chancellor's opinion that indicated specific performance was to be had.

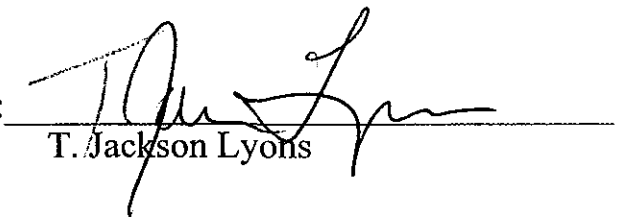
IV. Conclusion

The Court should reverse and render judgment for the Henry nephews because their predecessor in interest properly terminated an agreement Moore

materially breached. Alternatively, if the final judgment is due to be affirmed, the Court should remand for clarification of the state of title and to get the parties to the remedy right.

Respectfully submitted,

MICHAEL S. HENRY, JAMES N. HENRY, WILLIAM HENRY, LARRY HENRY AND DAVID HENRY

By: 
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CERTIFICATE OF SERVICE AND FILING

The undersigned counsel of record to the Appellants hereby certifies that the above and foregoing Appellants' Reply Brief has been filed with the Clerk of the Court by hand delivery of the undersigned and that true and correct copies have been deposited into the United States mail, first class postage prepaid, to the following addressees:

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SO CERTIFIED this the 10th day of December, 2007.

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