IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00402

GEORGE F. HENRY, JR., GERALDINE P. HENRY, 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' PRINCIPAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Shortly before the complaint was filed Geraldine Henry died. (V. 1: C.P. 31) After the final judgment was entered in 2004, but prior to the notice of appeal being filed, George Henry, Jr., died. A motion to dismiss the deceased parties is being filed contemporaneously herewith.

2. The surviving Defendants-Appellants are all brothers, and nephews of the late George and Geraldine Henry: Michael, James, William, Larry, and David Henry. Michael, James, William and David are residents of Greenville, Washington County, Mississippi; Larry lives in Madison,

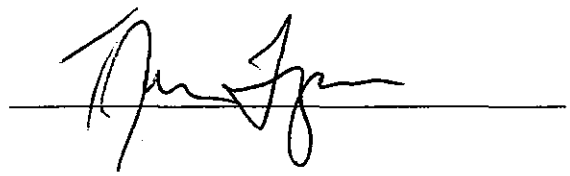
Madison County, Mississippi.

3. The Henry nephews' appellate counsel is T. Jackson Lyons, with offices in Jackson, Mississippi.

4. The Plaintiffs-Appellees are John and Karen Moore who are residents of Oktibbeha County, Mississippi.

5. The Moores are represented by Dolton McAlpin, who practices from offices in Starkville, Mississippi.

SO CERTIFIED, this the 27th ~~day~~ of September, 2007.



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ISSUE

George and Geraldine Henry sold John and Karen Moore hunting and fishing rights on land the Henrys also leased to the Moores. The lease also gave the Moores an option to buy the land in consideration of annual rent payments, a payment of $15,000.00 upon exercise of the option, and the Moores' promise to "assum[e] responsibility for (1) log cabin, one (1) law office, and one (1) barn lying on the herein described land."

The question in this contract construction case is whether the special chancellor erred as a matter of law in ruling that the Moores' promise to assume responsibility for three structures on the land was ambiguous and did not mean that they were promising to maintain the structures as part of the consideration flowing to George and Geraldine Henry.

STATEMENT OF THE CASE

A. Procedural History

John and Karen Moore (collectively, "Moore") filed suit in May of 2000 against George and Geraldine Henry, and the Henrys' nephews, Michael Henry, James Henry, William Henry, David Henry, and Larry Henry (collectively, "Henry nephews"). Moore alleged that George and Geraldine had entered into a contract with him to sell real property and, *inter alia*, requested specific performance. (V. 1: C.P. 3-4)

Instead of selling the property to Moore, the elder Henrys had conveyed the parcel to their nephews. (V. 1: C.P. 6-7) Moore's complaint alleged that the Henry

nephews had tortiously interfered with Moore's arrangement with the elder Henrys. (V. 1: C.P. 8-9) The Henry nephews responded, *inter alia*, that Moore had breached the lease which had included the responsibility for certain structures. (V. 1: C.P. 31, 35) Moore's failure to maintain the structures led George to terminate the lease and the purchase option granted therein. (V. 1: C.P. 32, 35, 40)

Moore is a practicing lawyer in Oktibbeha County and as is customary the local chancellors recused themselves. (V. 1: C.P. 52) The Supreme Court appointed Michael Malski as Special chancellor.[1] (V. 1: C.P. 80)

The hearing was conducted on November 15, 2002, and Judge Malski rendered a written opinion on December 16, 2002, concluding that Moore had not breached the lease and was entitled to specific performance. (V. 1: C.P. 88-93) In the middle of 2004 Judge Malski responded to concerns raised by the Parties' lawyers with a letter giving further instructions. A final judgment was entered on September 2, 2004. (V. 1: C.P. 99)

The Henry nephews timely filed post-judgment motions. (V. 1: C.P. 105, 112) For reasons not appearing on the face of the record, no order was entered on these motions until February 8, 2007, when relief was denied. (V. 3: C.P. 398) The notice of appeal was filed on March 8, 2007. (V. 3: C.P. 401)

B. Facts

Preliminarily, unbeknownst to the Moores at the time they filed their

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[1]Since the time of these proceedings in District 14, Chancellor Malski has been elected to the bench in neighboring District 1.

complaint, George Henry's spouse, Geraldine, a named party, had died. (V. 1: C.P. 31, 44) For reasons the Record does not reflect, Geraldine's estate, if she had one, was never joined. Nor is there any evidentiary showing that her interest in the land went to her husband either by operation of law or by will.

The final judgment was entered on September 2, 2004. (V. 1: C.P. 99-100) Some two months after post-judgment motions were filed, and more than two years before the post-judgment motions were ruled upon, George F. Henry, Jr., died. (See Exhibit 1 to Motion to Dismiss Deceased Parties) The Record does not reflect why George Henry's death was not suggested on the record and his estate substituted as a party.

Turning to the facts, the document the Parties contend over is titled, "LAND LEASE FOR HUNTING, FISHING & RENTALS ALONG WITH AN OPTION TO PURCHASE." (V. 1: C.P. 13) The lease was entered into between the title owners, George and Geraldine Henry, and the lessees John and Karen Moore on October 1, 1989. The lease stated that "in consideration of the price of . . . $320.00 per year; and the Vendees assuming the responsibility of one (1) log cabin, one (1) law office, and one (1) barn . . . we the undersigned Vendors . . . lease the following described land . . .." A copy of the instrument is located in an Appendix to this brief.

The purchase option in the lease gave Moore the right to buy the rights in the land ten years later: "[Moore is] here granted an option to purchase said land via a warranty deed on or after October 1, 1999 at a price of Fifteen thousand and

no/100 dollars ($15,000.00). . . . [A]nd vendors here agree that they will sell said property to no other entity or persons before October 1, 1999." (V. 1: C.P. 13)

Prior to trial on November 15, 2002, the Parties entered into a written stipulation of the "sole issue to be resolved by the Court." (V. 1: C.P. 87) The stipulation noted that the Parties had opposing interpretations of certain language in the lease. The Parties differed over the interpretation of part of the consideration provision: "For and in consideration of . . . the Vendees assuming the responsibility of one (1) log cabin, one (1) law office, and one (1) barn . . .." (V. 1: C.P. 87)

The stipulation recited the Parties' opposing contentions: Moore's position was that the provision meant George no longer wished to be responsible for maintaining the buildings. The Henrys contended these words meant that Moore had agreed to maintain the buildings. (V. 1: C.P. 87) A copy of the stipulation is also included in the Appendix.

At he hearing Moore explained the background of his dealings with George Henry. In 1989 he had been looking to buy land near his aunt's place near Bradley, Mississippi, where the subject real property is located. (V. 4: T. 32, 33) He said he looked at properties with absentee owners who might be willing to sell and that a search of the records turned up George Henry's name. (V. 4: T. 33, 34) Moore's call to George – occurring sometime before October of 1989 – revealed that they were distantly related. (V. 4: T. 34, 35)

Moore said they discussed a long-term lease with an option to buy. (V. 4: T.

35) They talked about hunting rights at $4.00 per acre and Moore's taking up payment of the property taxes. (V. 4: T. 35) According to Moore, they did not discuss or negotiate any other terms but George said he would prepare a proposal and send it to Moore. (V. 4: T. 36)

At this point Moore went to look at the 80 acre parcel and viewed the structures. (V. 4: T. 37) He said he never completely entered the law office but just looked inside. (V. 4: T. 39) Moore thought the law office at one time had had a solid door but at the time he "poked" his head in there was only a screen door. (V. 4: T. 39) He noted rot on the exterior shingles, saw a sagging roof and water stains on the ceiling. (V. 4: T. 39) Moore described the area with the structures as unlandscaped with pine trees and undergrowth; it was not visible from the road. (V. 4: T. 44)

According to Moore he and George never discussed the lease provision relating to the structures. (V. 4: T. 47) Moore signed the lease he received from George and later had it recorded. (V. 4: T. 46-47) Moore regularly paid the rent and taxes and had an unremarkable business relationship with George. (V. 4: T. 48) Then, in September of 1997, Moore received a letter from George revoking the lease. (V. 4: T. 58)

As with other documents and photographs referred to during the hearing, this September, 1997, note from George was admitted into evidence. A request by the undersigned for these exhibits has resulted in finger-pointing between the Clerk of the trial court and the Court Reporter. Suffice it to say the exhibits are

lost but that the salient documents appear elsewhere in the Record. George's note to Moore revoking the lease appears in Volume 1 at page 40.

The reason given in George's note for revoking the lease was that Moore had failed to care for the structures. (V. 1: C.P. 40) Moore, however, offered that George's nephew, defendant Michael Henry, had threatened Moore over a year earlier. (V. 4: T. 52) A timber sale Mike was handling for George had turned up the recorded lease and option. (V. 4: T. 52) Moore said he was told by Mike Henry that he, Moore, would get nothing if he did not either sell the option or trade for it. (V. 4: T. 52)

After receiving the revocation letter Moore continued to send checks, but they were returned. (V. 4: T. 61) He later learned of the deed out from George and Geraldine to the Henry nephews and shortly thereafter filed suit. (V. 4: T. 62)

On cross-examination, Moore agreed that part of the stated consideration to George and Geraldine was his taking "responsibility" for the structures. (V. 4: T. 69) Moore said he knew "exactly" what George meant by that phrase because the building was beyond repair and George was not going to pay anything to repair it. (V. 4: T. 69) There is no evidence in the Record that George or Geraldine were contemporaneously aware of the allegedly dilapidated condition of the law office. As stated *infra*, the opposite is true.

Moore admits that he never attempted to repair or maintain any of the structures and contends that the condition of the property was no concern of the Henrys because it had no affect on the option price. (V. 4: T. 76, 81-82)

At the close of Moore's case, the Defendant Henrys moved to dismiss, asking the trial court to rule on the issue of law: what does "assume responsibility for" the structures mean? (V. 4: T. 88-90) The Special chancellor deferred ruling. (V. 4: T. 92)

David Henry testified that he and his brothers were nephews to George and Geraldine Henry. (V. 4: T. 93-94) He related that Geraldine had died on April 11, 2000, and that George had been paralyzed in an automobile accident in 1995 and was in a nursing home at the time of the hearing. (V. 4: T. 95)

David, who was on an extension line at the time of the alleged threat made by Mike to Moore, denied any threatening language was used. (V. 4: T. 95-96) He related that George's property near Bradley was something of an annual family gathering spot for Memorial Day festivities. (V. 4: T. 96) When Mike Henry visited the property in 1997, he found that the law office's roof had caved in. (V. 4: T. 97) Photographs were taken and sent to George. (V. 4: T. 97) When David spoke with George about the condition of the structure, George said he had no idea how such a thing had happened. (V. 4: T. 98) After seeing the pictures, George was very upset. (V. 4: T. 98)

David recalled having been at the law office[2] in 1992 or 1993 and it contained pictures of his grandfather and similar family memorabilia. (V. 4: T. 99) At that time, he said the law books were not mildewed, nor were there holes in the

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[2]George F. Henry, Jr., had been a lawyer but, according to William Henry, had "lost" his license at some point due to alcoholism. (V. 4: T. 119)

roof, and the building had a door. (V. 4: T. 99-100)

On cross-examination, Moore's lawyer explored with David why he, or any family member attending the family reunions, had never sought to remove or protect any of the memorabilia they were now complaining of Moore's lack of maintenance having damaged. The following exchange occurred:

> Q. [B]ut you didn't want to *assume the responsibility* then of, well, I'm going to save daddy's picture, or I'm going to save Uncle Henry's law degree, or I'm going to save Uncle Henry's tax – 1950 tax code books? You didn't want to *assume any of that responsibility*?
>
> A. No.

(V. 4: T. 107)(emphasis supplied) David explained that the land and its contents belonged to George and he did not think he had any authority to remove anything since Moore had leased the property. (V. 4: T. 105, 109, 110)

David's brothers James and William testified similarly concerning the condition of the structures. James lived in Bradley about a mile from the property between 1989 and 1992. (V. 4: T. 111-12) He had a horse that he exercised by riding the horse to George's place. (V. 4: T. 112) When he last saw the law office before leaving the area in 1992, it was in good condition with an intact and locked door. (V. 4: T. 113) From looking in through the windows, he noticed no roof or water damage. (V. 4: T. 113-14)

George had last been in Bradley in 1990 or 1991, prior to his accident. (V.

4: T. 114) He never mentioned to James that the structure was in poor repair or had any problems. (V. 4: T. 114) William explained that George was fond of the place and had put his tombstone there. (V. 4: T. 122) Prior to visiting the law office shortly before the trial, William had last been there in May of 1995 – he remembered specifically because he had just married and was showing his wife where he had grown up. (V. 4: T. 120) He related that the law office had a door but that he was surprised to find it unlocked. (V. 4: T. 120-21) He did not see mold or mildew on the books or pictures and did not see holes in the roof. (V. 4: T. 121-22)

George and Geraldine deeded the land to the Henry brothers in 2000 and did not pay George and Geraldine anything for it. (V. 4: T. 124) At the close of the hearing the Defendants again moved to dismiss which was again deferred by the judge. (V. 4: T. 124)

The trial judge filed his opinion on December 16, 2002. (V.1: C.P. 88) After reciting some facts, procedural history and the Parties' contentions, the chancellor phrased the case's issue this way: "Was [George] requiring [Moore] to maintain structures or was he requiring [Moore] to provide for the structures in an abstract manner thereby relieving [George] of further responsibility of repairs for the structures?" (V. 1: C.P. 91)

The chancellor concluded that George was trying to free himself of responsibility without placing any affirmative obligations on Moore: "[George's] intent was that the Moores would purchase the property." (V. 1: C.P. 91)

Ruling that the phrase "assuming responsibility for" was ambiguous, the chancellor observed that the lease never refers to Moore as the lessee but as the vendee, "i.e., the ones to whom the property was being sold." (V. 1: C.P. 92) The chancellor reasoned that "[i]t would be illogical to require the purchaser to maintain buildings which they had the option to purchase and in which the buyers might have little or no interest." (V. 1: C.P. 92)

Stating the ruling differently, the chancellor interpreted the lease to mean that "the Moores were to have the responsibility for the buildings. If they chose to repair them, they could. If they chose not to repair [the buildings], they did not have to. [But] George Henry no longer had any responsibility with regard to the buildings on the land he intended to sell to the Moores." (V. 1: C.P. 93)

A year and a half later, Judge Malski responded by letter to concerns raised by the Parties. He explained that he was not implying in his memorandum opinion that the lease was a contract for sale. (V. 1: C.P. 97) Rather, he believed that the Henrys were nearly certain that the Moores would exercise the option. (V. 1: C.P. 97) Since that was the case, then it made little sense for Moore to be required to keep up buildings he might not want and in which the Henrys had no real concern since Moore was almost certain to purchase the property. (V. 1: C.P. 97)

While Judge Malski made clear that Moore had no obligation to exercise the option, he believed that the Henrys had no interest in the buildings since they thought the Moores would buy the land. (V. 1: C.P. 98)

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law by ruling that the phrase "assume responsibility" was ambiguous. The phrase is commonly understood to mean that one promising to assume responsibility is undertaking an obligation or task. Moore breached the agreement by failing to assume responsibility for the structures on the real property.

Moore's breach was material inasmuch as the maintenance of the structures was part of the consideration flowing to the Henrys. Because the breach was a material repudiation of the contract's terms, George and Geraldine Henry were relieved of any obligation of further performance.

Even if the trial judge is due to be affirmed and the land conveyed to the Moores, the final judgment provides a remedy not requested by any party and must be vacated due to the deaths of George and Geraldine Henry.

ARGUMENT

I. The trial court erred as a matter of law in ruling that the contract was ambiguous.

A. Standard of Review

Contract construction generally involves questions of law. Because the Henry nephews call into question the chancellor's ruling respecting the nature of the consideration promised to George and Geraldine Henry by the Moores, the Court reviews the ruling *de novo*. *Ferrara v. Walters*, 919 So.2d 876, 881 (Miss. 2006). The initial determination of whether a contract is ambiguous is a question of law. *Rotenberry v. Hooker*, 864 So.2d 266, 269 (Miss. 2003). Only if a contract

is ambiguous will fact issues be present. *Id.* And, of course, factual determinations by the chancellor are accorded deferential review under the usual manifest error/substantial evidence rule. *Ferrara*, 919 So.2d at 881.

B. Under Mississippi's "four corners" test, Moore's promise to "assume responsibility for" the structures is not reasonably subject to any other interpretation than that he was promising to care for them.

Mississippi courts accept the plain meaning of a contract as the exclusive expression of the intent of the parties if no ambiguity exists in the words selected to express that intent. *Ferrara*, 919 So.2d at 882. At least since *Pursue Energy Corp. v. Perkins,* 558 So.2d 349 (Miss.1990), Mississippi courts have adhered to a three-tiered process of contract construction. If examining the words used within the "four corners" of the contract yields a clear understanding of the parties' intent, then courts enforce the document as written. Second, if the document is ambiguous, then canons of construction will be used to interpret the instrument. *Id.* at 352. Third, "if intent remains unascertainable (i.e., the instrument is still considered ambiguous), then the court may resort to [the] ... consideration of extrinsic or parol evidence." *Id.* at 353.

Two other supporting rules are relevant to the three-tier process. First, unless the words used are terms of art, the words selected by the parties in their contract are afforded their ordinary meaning. *Anglin v. Gulf Guaranty Life Ins. Co.*, No. 2005-CA-02082-SCT, ¶ 15 (April 19, 2007). Mississippi's appellate courts consult leading dictionaries to determine a word's "ordinary meaning." *Id.*

at ¶ 18. And second, "ambiguity" in a contract is found where there are at least two reasonable meanings to be derived from the words chosen. *Mississippi Farm Bureau Cas. Ins. Co. v. Britt*, 826 So.2d 1261, 1265, ¶ 14 (Miss. 2002).

The special chancellor erred as a matter of law by finding the phrase "assuming responsibility for" three structures to be ambiguous. The ordinary meaning of "responsibility" is that one undertakes or has an obligation to do or perform some duty. The *American Heritage Dictionary* defines "responsibility" as "1. The state, quality, or fact of being responsible. 2. A thing or person that one is answerable for; a duty, obligation, or burden."

The same dictionary defines "responsible" as "1. Legally or ethically accountable for the care or welfare of another." Moore was promising to undertake the obligation, or burden, of being legally accountable for the welfare of the structures. Moore's own lawyer used the phrase "assume responsibility" in his cross-examination of David Henry in just this manner. It is hard to imagine better "evidence" of the ordinary understanding of the phrase when it is used by a lawyer whose case depends on the phrase being understood differently.

The four corners test reveals another aspect of the lease that supports the common understanding of what it means to assume responsibility for something or someone. The "assume responsibility" phrase occurs in the recitation of the consideration flowing from Moore to the Henrys: "For and in consideration of the price of Four Dollars per acre, a total of 80 acres totaling $320.00 per year; and [Moore] assuming the responsibility of one (1) log cabin, one (1) law office, and

one (1) barn lying on the herein after described land, we the undersigned Vendors do hereby and by these evidences lease the following described land . . .."

As all first year law students learn, "consideration" is "'[a]ny benefit resulting to the party promising, by the act of the promisee, is a sufficient consideration. And it is not essential that there should be any adequacy in point of actual value, but a slight benefit will be sufficient. [¶] So also any loss, trouble or inconvenience sustained by the promisee, at the instance of the person making the promise, will be a good consideration, although such trouble, loss or obligation be of a trifling description, provided it be not utterly worthless in law and fact; and although the person making the promise obtain no benefit or advantage from the performance of the stipulated act by the promisee. These principles are to be found in every elementary treatise on the law of contracts.'" *Miller v. Bank of Holly Springs*, 131 Miss. 55, 66, 95 So. 129, 130 (1922), *quoting Byrne* v. *Cummings,* 41 Miss. 192.

Moore's failure to maintain the buildings provided neither benefit to George nor a burden or detriment to Moore. The special chancellor's interpretation then means Moore's promise cannot have been "consideration." The special chancellor's interpretation is refuted by the unambiguous placement of the promise to assume responsibility for the structures within the statement of consideration flowing to the elder Henrys.

The Supreme Court of Mississippi has considered identical language in a case involving a domestic property settlement agreement. In *Owen v. Gerrity*, 422

So.2d 284, 288 (Miss. 1982), the former spouses had each agreed to be "responsible" for certain former marital debts. After first observing that words in a contract are given their ordinary meaning, the Court found nothing ambiguous in the language chosen by the parties to define who would be obligated – that is, "responsible" – to pay which of the parties' debts and bills. *Id.*

The Court of Appeals has also considered identical language in *Benchmark Health Care Center, Inc. v. Cain*, 912 So.2d 175 (Miss.App. 2005). A health care provider outsourced billing and collection services to Benchmark. Their contract called for Benchmark to be "responsible for billing for services, collecting payment from third party payors and/or patient[s]." *Id.* at 182, ¶ 18. Benchmark argued that these terms were ambiguous and that parol evidence of an extrinsic agreement varying these terms should have been admitted. The Court of Appeals concluded that there was nothing uncertain in the obligation Benchmark undertook: "the contract terms are not ambiguous, and parol evidence should not be admitted to alter the terms of the agreement." *Id.* at 182, ¶ 20.

The special chancellor's ruling violates a fundamental rule of contract construction: parol evidence will not be received to vary or alter the terms of a written agreement that is intended to express the entire agreement of the parties.[3] *Id.* at 182, ¶ 18. The law takes care not to allow parol or extrinsic evidence because the Court's "concern is not nearly so much with what the parties may have

[3]Moore has never contended that the lease was not a final expression of the parties' intent, i.e., that it is not a completely integrated instrument.

intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *A & F Prop., LLC v. Madison County Bd. Of Sup'rs*, 933 So.2d 296, 301 (Miss. 2006), *quoting Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 752 (Miss. 2003).

The so-called parol evidence rule is designed to promote the careful crafting of agreements and to prevent malleable – even if honest – human memories from clouding otherwise apparently clear meaning. As the Supreme Court of Mississippi has had occasion to observe before, a "primary function of our law of contracts is 'to deter people from behaving opportunistically toward their contracting parties." *UHS-Qualcare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So.2d 746, 755 (Miss. 1987).

The chancellor opined that it would be "illogical" for George to require on option-holder to maintain structures in which the option-holder might have no interest. An option may or may not be exercised. It is hard to see what is "illogical" about George Henry wanting the property maintained should the option not be exercised. The chancellor's belief that George was all but certain that Moore would buy the rights to the land has no support in the record. And the grant of the option to purchase means that Moore was absolutely certain to buy but only if the option were timely exercised.

The clear meaning of the lease's language creates a burden to care for the buildings on the leased land. This Moore failed to do and the chancellor's ruling

should be reversed.

II. Moore's failure to provide the consideration required by the lease was a material breach justifying George Henry's termination of the agreement.

With a proper reading of the contract it becomes clear that Moore failed to perform his promised maintenance of the buildings. While justifying a reversal of the trial judge's ruling that the contract was ambiguous and placed no affirmative obligation on Moore, a breach does not always justify termination of George's promised return performance – in this case the remaining term of the lease and the option provision.

Mississippi law has long viewed terminating a contract for breach as an extraordinary remedy justified only in cases where the breach is material. *Ferrara*, 919 So.2d at 886, ¶ 29. A breach is "material" where there is a "'failure to perform a substantial part of the contract or one or more of its essential terms or conditions . . .." *Id.*, *quoting Gulf South Capital Corp. v. Brown*, 183 So.2d 802, 805 (Miss. 1966). Generally, whether a breach is material is a question of ultimate fact. *Favre Property Management, LLC v. Cinque Bambini Partnership*, 863 So.2d 1037, 1044, ¶ 20 (Miss.App. 2004), *citing UHS-Qualcare*, 525 So.2d at 756.

Moore repudiated his duty to care for the structures. This failure allowed the law office's roof to cave in. The nature of an option contract means that the option may never be exercised. George's obvious intent was to have the structures maintained during the ten year lease pending Moore's eventual decision whether to exercise the option.

That Moore did not maintain the structures is not disputed. A breach of contract that destroyed part of the consideration required to be paid to George and Geraldine Henry cannot be anything but a material breach as a matter of law. *See, Gulf South Capital Corp.*, 183 So.2d at 805. In *Gulf South* the parties to a hotel sale agreed on a number of terms and prepared a contract. A former owner of the hotel property had filed a materialman's lien. The prospective buyer submitted an earnest money deposit check that had an additional condition typed on it relating to the lien. The Supreme Court held that a manifestation of an intent not to abide by original agreement was a material breach.

Moore's failure to maintain the structures was a manifestation of his intent not to pay the elder Henrys that which he had promised. Like *Gulf South*, where assigning the party obligated to obtain release of the $50,000 materialman's lien was a material part of the consideration, so here the sums or efforts required to maintain the structures was a material part of the consideration as stated in the contract. Moore's failure to live up to his part of the bargain terminated George's obligation to continue performing under the lease.

III. The final judgment must be reversed or vacated in any event because it provides a remedy no party requested and that is inconsistent with Mississippi law.

Moore requested specific performance of an option contract for the sale of real property. A deed out from George and Geraldine Henry to their nephews was sought to be voided as a cloud on title. The chancellor's opinion concluded that Moore had not breached the lease and instructed the lawyers "to develop an Order

which will provide that the land will be deeded to the Moores." (V. 1: C.P. 93)

In other words, the special chancellor was granting the equitable remedy of specific performance. Of logical and legal necessity, this result voids the deed from George and Geraldine to their nephews, inasmuch as the option agreement cannot be specifically enforced if title to the land lies with anyone but George and Geraldine.

The final judgment orders Moore "to tender a check for the full purchase price of $15,000.00 to the Defendants, George F. Henry, Jr., Michael S. Henry, James N. Henry, William S. Henry, Larry H. Henry and David M. Henry, and the Defendants Michael S. Henry, James N. Henry, William S. Henry, Larry H. Henry and David M. Henry, shall execute and deliver a Quit Claim Deed to the Plaintiffs." (V. 1: C.P. 100)

Aside from the fact that the final judgment provides a remedy that no party asked for, it is very hard to see how the Henry nephews have any right or entitlement to any proceeds of a sale between their aunt and uncle and the Moores. Similarly, the option contract cannot be specifically enforced against anyone except George and Geraldine Henry, or their estates. There is no showing in the Record that George and Geraldine owned the fee simple as joint tenants with rights of survivorship or held the land by the entireties. There is no evidence that Geraldine died testate leaving her interest in the land to her husband.

Indeed, there is no evidence in the Record reflecting that Geraldine had any interest in the land at all aside from her having signed the lease/option and the

deed out to her nephews. The Moores' deraignment filed with the complaint recites that one Lawler conveyed an undivided half interest in the property to H.E. Henry and George F. Henry, Jr., in 1941. In 1959, the Lawlers and the H.E. Henrys conveyed their interests to George F. Henry, Jr. (V. 1: C.P. 17)

The Record is silent with respect to why the Parties' former lawyers prepared a final judgment ordering Moore to make the check jointly payable to persons having no interest in the land under the chancellor's ruling. Also, the contract being specifically enforced called for a conveyance by warranty deed. The final judgment ordered George Henry and his nephews to quitclaim the real property to Moore. While Mississippi law does allow the purchaser to compel the seller to convey such estate as the seller may have, *Wilson v. Cox*, 50 Miss. 133 (1874), under the chancellor's ruling the nephews have no interest in the land.

Without more information about why the final judgment was worded in a way seemingly at odds with the chancellor's ruling of specific performance, it is impossible to speculate about why the final judgment is such a botch. It may be useful to recall that intelligent persons make mistakes with discouraging frequency – the undersigned not excepted.

The Moores' action against George and Geraldine Henry was a "personal action" that survived George and Geraldine's deaths. *Beckley v. Beckley*, No. 2005-CT-00580-SCT, ¶ 5 (June 14, 2007)(*en banc*); see also, Miss. Code Ann. § 91-7-237. It is generally true under Mississippi's common law that the "red ball" of seisin is never in abeyance. When the owner of the title to real property dies the

title does not pass to the estate but jumps immediately to devisees or heirs at law. *Tolbert v. Southgate Timber Co.*, 943 So.2d 90, 92-93, ¶ 6 (Miss.App. 2006). The ancient English principle is subject to a variety of exceptions.

Relevant here is Miss. Code Ann. § 91-7-223: "The . . . executor . . . may at any time, by and with the consent of the chancery court . . . execute a deed of conveyance conveying any real property formerly owned by the decedent, where said decedent during his lifetime had executed any . . . *optional contract* . . . where the execution of such conveyance is necessary in order to carry out the terms, provisions, or stipulation of the said . . . optional contract . . .." (Emphasis supplied)

To grant the relief ordered by the special chancellor requires a determination about Geraldine's interest in the land and, if any, where the interest reposed upon her death. If Geraldine actually owned no interest in the land or George succeeded to that interest by operation of law under the descent and distribution statute[4] or a survivorship tenancy, or received it by devise, then George's estate is the proper party to effect the remedy ordered. If Geraldine owned an undivided interest as a tenant in common and devised her interest to anyone but George, then her estate must be joined. None of this has ever been done and the final judgment should be vacated or reversed, and remanded.

IV. Conclusion

[4]Under Mississippi's descent and distribution scheme, if Geraldine died intestate and without children either by George or a previous marriage, then George would receive her interest under Miss. Code Ann. § 91-1-7.

The special chancellor erred as a matter of law in concluding that the lease was ambiguous. The unambiguous terms of the agreement required, as part of the payment to George and Geraldine Henry, that three structures be maintained. This was not done and constitutes a material breach of the lease justifying the lease's early termination. The trial court's ruling should be reversed and judgment rendered by the Court in the Henry nephews' favor. Alternatively, the final order must be vacated and remanded with instructions relating to a proper remedy.

Respectfully submitted,

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

By: _____
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[redacted]

CERTIFICATE OF SERVICE AND FILING

The undersigned counsel of record to the Appellants hereby certifies that the above and foregoing Appellants' Principal 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:

Hon. C. Michael Malski
Chancellor, District 1
P.O. Box 543
Amory, Mississippi 38821

Mr. Dolton W. McAlpin
Dolton W. McAlpin, P.A.
P.O. Box 867
Starkville, Mississippi 39760-0867
Attorney of Record to the Moores

SO CERTIFIED this the 27th day of September, 2007.

T. Jackson Lyons

Vendee

George F. Henry, Jr.
Vendor

Vendee

Geraldine P. Henry
Vendor

State of Tennessee
County of Putnam

Personally came before me Bill Ripley, a Notary Public in and for the foregoing State and County, George F. Henry, Jr. and wife, Geraldine P. Henry, with each of whom I am personally acquainted, and each being sworn according to law, acknowledged their respective signatures to the foregoing lease to be for the purposes therein contained.

This 11th day of ~~October~~ December, 1989.

My Commission Expires: 1-30-91

Bill Ripley
Notary Public

State of Mississippi
County of Oktibbeha

Personally came before me, Rebecca W. Porter, a Notary Public in and for the foregoing State and County, John ~~Paul~~ Stuart Moore and wife, Karen S. Moore, with each of whom I am personally acquainted, and each being sworn according to law, acknowledged that they executed the foregoing lease for the purposes therein contained, this 21st day of ~~October~~ November, 1989.

OKTIBBEHA COUNTY
FILED
DEC 15 2002
Marion W Sanders
CHANCERY CLERK

John Clyde Moore

95

IN THE CHANCERY COURT OF OKTIBBEHA COUNTY, MISSISSIPPI

JOHN STUART MOORE & KAREN J. MOORE — PLAINTIFFS

VERSUS — CIVIL ACTION FILE NUMBER:00-0188

GEORGE F. HENRY, JR., GERALDINE P. HENRY, MICHAEL S. HENRY, JAMES N. HENRY, WILLIAM S. HENRY, LARRY H. HENRY AND DAVID M. HENRY — DEFENDANTS

OKTIBBEHA COUNTY FILED NOV 15 2002 CHANCERY CLERK

STIPULATION

The parties, by and through counsel, do hereby agree to stipulate to the sole issue to be resolved by the Court. In the "Land Lease for Hunting, Fishing and Rentals Along with an Option to Purchase" it states in part;

For and in consideration of ... and the Vendees assuming the responsibility of one (1) log cabin, one (1) law office, and one (1) barn ...

The Plaintiffs contend that this provision means that George F. Henry, Jr. and Geraldine P. Henry did not want to be responsible for repairing and maintaining these buildings.

The Defendants contend that this provision means that the Plaintiffs were to maintain and repair these buildings.

The Court is to interpret the meaning of this provision. Neither party shall restrict or limit the other from introducing whatever evidence each feels is relevant to their position.

AGREED:

MARK G. WILLIAMSON,
Attorney for Plaintiffs

ERNEST LANE, III,
Attorney for Defendants