IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00793

ROBERT COOPER, ET AL — APPELLANTS

V.

WINNIE GILDER, ET AL — APPELLEES

ON APPEAL FROM THE WASHINGTON COUNTY

CHANCERY COURT, MISSISSIPPI (No.(s) 05-344 and 05-0345)

APPELLEES' REPLY BRIEF IN CROSS APPEAL

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The Appellees filed a cross appeal, claiming error in the granting of a directed verdict in the insurance policy case. The Appellants have filed a brief titled "Brief of Cross Appellees and Reply Brief of Appellants". The Appellees file this, their reply brief in their cross appeal.

The Chancellor found the actions of the Cooper heirs and their well paid ally, Connie Burford, to be secretive and suspicious. In other words, the Chancellor believed our evidence and disbelieved the Cooper heirs' evidence. Nevertheless, the Chancellor found that the Buy Sell Agreement was unambiguous and that it did not provide a right for the surviving partner to acquire the life insurance policies on his own life upon the death of the other partner. If the Chancellor was right on this issue, then our claim on the insurance case must fail. If the Chancellor erred on this issue, then the evidence and inescapable inferences derived from the evidence are so overwhelmingly in favor of Winnie Gilder, that she must win.

All of our insurance proceeds eggs are in the ambiguity basket.

THE LAW ON AMBIGUITY

CJS Contracts, § 304. Determination of existence of ambiguity

The question of whether or not a contract is ambiguous is one of construction and interpretation; contractual language is ambiguous when it is fairly susceptible to more than one interpretation, when viewed in the context of the contract as a whole and the circumstances of the case.

A contract may or may not be ambiguous, uncertain, or obscure, depending on the proved facts. A contract may be ambiguous because it is obscure in its meaning due to an indefiniteness of expression or because a double meaning is present. The question of whether or not a contract is ambiguous is one of construction and interpretation. In deciding whether an agreement is ambiguous, form should not prevail over substance, and a sensible meaning of words should be sought.

Contractual language is ambiguous when it is susceptible to more than one interpretation and reasonably intelligent persons could come to different conclusions as to the meaning of the contract. However, an ambiguity arises in a contract only when contractual terms are susceptible to fair and honest differences, and when both of the interpretations advanced are reasonable.

Williston on Contracts, § 30:5. Ambiguity as prerequisite to interpretation and construction—Determination of ambiguity

The determination of whether a contract is ambiguous is a question of law for the court, the burden being upon the party claiming that ambiguity exists to show the necessary indefiniteness of meaning. In determining whether a contract is ambiguous, the court begins with its plain language, construed in harmony with the plain and generally accepted meaning of the words used, with reference to all of the agreement's provisions. While there is authority that the court is limited in its consideration solely to the face of the written agreement, it is also held that a court may provisionally receive (without actually admitting) all credible evidence concerning the parties' intentions to determine whether the language of the contract is reasonably susceptible to the interpretation urged by the party claiming ambiguity. Under the prevailing, more expansive view of what the court may consider, the court does not simply determine whether, from its perspective, the contractual language is clear; rather, the court hears the proffer of the parties and determines if there are objective indicia that, from the parties' linguistic reference point, the contract's terms are susceptible of different meanings. The court must consider the words of the agreement, including writings made a part of the contract by

annexation or reference, the alternative meanings suggested by counsel, and any extrinsic evidence offered in support of those meanings. Extrinsic evidence properly considered in deciding whether the contract is ambiguous may include the structure of the contract, the parties' relative positions and bargaining power, the bargaining history, whether one of the parties prepared the instrument, so that the language should be construed most strongly against it, and any conduct of the parties which reflects their understanding of the contract's meaning.

Only after a careful and painstaking search of all the factors shedding light on the intent of the parties will the court conclude that the language in any given case is "clear and unambiguous."

***Lamb Const. Co. v. Town of Renova*, 573 So.2d 1378 (Miss.,1990)**

Several general rules of construction should be noted:

In interpreting the writing at issue, the cardinal rule of construction is to give effect to the mutual intentions of the parties. Where, as here, the writing is ambiguous, courts are obligated to pursue the intent of the parties by resort to parol evidence. In addition, the construction which the parties have placed upon the contract, or what the parties to the contract do thereunder, is relevant extrinsic evidence, and often the best evidence, of what the contract requires them to do. Finally, the vagueness and ambiguity found in the writing at issue is construed more strongly against the party preparing it. As regards our standard of appellate review, the interpretation of an ambiguous writing by resort to extrinsic evidence presents a question of fact. *Kight v. Sheppard Building Supply,* 537 So.2d 1355, 1358 (Miss.1989) (citations omitted). If one of two conflicting clauses in a contract seems dominant, that clause should be enforced. *Nicholas Acoustics & Specialty Co. v. H & M Construction Co.,* 695 F.2d 839, 843 (5th Cir.1983).

The initial question of whether the contract is ambiguous is a matter of law. The contract in question is patently ambiguous. The subsequent interpretation of the ambiguous contract presents a finding of fact, which is reviewed under the familiar substantial evidence/manifest error standard. *Bryant v. Cameron,* 473 So.2d 174, 179 (Miss.1985).

THE COOPER GILDER BUY SELL AGREEMENT

The critical issue in the life insurance case is; did the Cooper Gilder Buy Sell Agreement provide a right to Mr. Gilder to obtain the insurance policy on his own life after the death of Mr. Cooper? Our understanding of the agreement differs from the

Chancellor's understanding of the agreement, and also differs from Robin Cooper's present understanding of the agreement. Interestingly, at one time, Robin's understanding of the agreement was the same as ours; that the surviving shareholder had thirty days to acquire the policy! Also, the evidence is that both Mr. Cooper and Mr. Gilder believed that the survivor could acquire the policy on his own life. They gave their insurance agent, Mr. Garrett, the same impression. Does the language of the agreement, fairly interpreted, support such an understanding? For the convenience of the reader, the language is reproduced, again, here:

> 7.4 **Right to Purchase Policy(ies).** If any Stockholder shall cease to be a Stockholder during his lifetime or if this Agreement terminates before the death of a Stockholder, then such Stockholder shall have the right to purchase any life insurance policy which insures his life and is owned by the Owner. For each life insurance policy to be purchased, the Stockholder shall pay the Owner an amount equal to the cash surrender value of the life insurance policy plus the unearned premium on the date the Owner received the notice from the Stockholder to transfer ownership of the life insurance policy. A Stockholder's right to purchase a life insurance policy shall lapse if not exercised within 30 days after the expiration of the option of termination of this Agreement. In the event that a Stockholder elects to acquire any life insurance policy, then after receipt of the required payments, the Owner shall execute and deliver to the Stockholder all documents which are required to transfer ownership of the life insurance policy or policies.

To make our position clear, we rely upon the following language:

> ...if this Agreement terminates before the death of a Stockholder, then such Stockholder shall have the right to purchase any life insurance policy which insures his life and is owned by the Owner...

Both the Chancellor, and now Mr. Robin Cooper, find the following language to be critical:

> "..if this Agreement terminates before the death of a Stockholder, then..."

Their reasoning is that since Mr. Cooper, "a Stockholder", died before the

Agreement terminated, then Mr. Gilder's right to acquire his policy was not activated. We admit that, taking this phrase in isolation, this is a fair reading of these words. However, if you read a text out of context, you may be left with a con. The very next phrase of the agreement says;

> "...then such Stockholder shall have the right to purchase any life insurance policy which insures his life..."

"Such Stockholder" is language that is critical to our understanding of the Agreement. Such Stockholder refers to "a Stockholder" in the previous phrase. Both terms are singular. There were only two stockholders when the Agreement was executed. If the Agreement terminates before the death of "a Stockholder", not "any Stockholder", then "such Stockholder", a Stockholder who has not died, has the right to purchase the insurance policies on his own life. A dead Stockholder can not purchase the policy on his own life.

When taken in context with the language and purpose of the entire Agreement this language could not logically or rationally be construed to limit a living Stockholder's ability to acquire the policies insuring his own life. The dead Stockholder can not acquire insurance policies and has no need for an insurance policy on the life of the living Stockholder.

The very next phrase provides further evidence that the intent of the Agreement was to provide a living Stockholder with the ability to acquire the policies on his own life upon the death of the other Stockholder. Consider this language, in context with the other phrases:

> "...and is owned by the Owner."

Significantly, the word Owner, rather than Stockholder, is used. The "Owner" of the policies in question at the time the Agreement was entered was Mr. Cooper. He was also the other Stockholder. The Agreement contemplates that ownership of the policies can become separated from ownership of the corporate stock, which is exactly what occurred here. When Mr. Cooper died, his estate became owner of both his stock and the policies. Mr. Gilder purchased the stock from the estate on December 17, 2003. Then, the "Owner" of the policies was the Cooper estate, not "a Stockholder."

If the right to transfer ownership of the policies was intended to be limited in such a way that both stockholders had to be living, a requirement that is patently illogical, then the appropriate, clear language would have been;

> ...if this Agreement terminates before the death of **any (or either)** Stockholder, then **each** Stockholder shall have the right to purchase any life insurance policy which insures his life and is owned by the **other Stockholder**...

The very fact that the term "Owner" is used demonstrates that the writer contemplates the possibility that one stockholder may cease being a stockholder by any one of several means, including death, and, in the event of death, the policy formerly owned by him would then be owned by his estate. What use would there be for a phrase that contemplates purchase from an estate, if the previous phrase was intended to limit the right to purchase only from a living person?

Another question is; why would the right to purchase be granted only if both stockholders are living, and denied if one stockholder was dead? The Coopers attempt to answer this by saying that a broader agreement existed in which one family would get $1.3 million in life insurance proceeds and the other family would get the business.

But, the Buy Sell Agreement only refers to a single payment of $650,000 for the stock of the first to die and says nothing about a second payment of $650,000. The Coopers explain that the second $650,000 payment is made when the survivor dies, and, to guarantee that this payment is made to the heirs of the first to die, the right to transfer ownership of the policies is denied to the survivor.[1]

But, the clear reading of the Agreement is that the survivor is to purchase the stock of the first to die for $650,000. There is no second payment of $650,000 mentioned anywhere in the Agreement. To consider the Cooper's explanation, we would have to go outside this Agreement, and take parole evidence concerning the intent of the parties, and perhaps consider certain real estate transactions relevant to the related business in order to justify doubling the price clearly stated in the Agreement. These issues are fully discussed in our previous brief.

We are aware that a third interpretation can be imposed upon the language of the Agreement. It can be argued that the phrase beginning with "...then..." relates not to the immediately preceding phrase, but to the earlier phrase, which reads;

"If any Stockholder shall cease to be a Stockholder during his lifetime or..."

But, this only proves our point. The language is subject to more than one

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The Coopers claim that the Agreement denies to the survivor the right to purchase the insurance policies on his own life, so that the mythical second payment of $650,000 was guaranteed. But, when he became the sole stockholder, Mr. Gilder could have dissolved the corporation, a terminating event under the Agreement, and demanded that the policies be transferred to him, thereby avoiding their supposed guarantee of the second payment. He did not do this, because he believed he had a right to obtain his own policies.

interpretation. It is, therefore, ambiguous. The evidence is that the parties who entered the Agreement intended that the survivor would have the right to purchase the policies insuring his own life upon the death of the other stockholder. A fair reading of the language supports the intent and understanding of the parties. Therefore, we win. Case over.

But wait, say the Coopers, justice must still be denied to Ms. Gilder unless she clears two more hurdles. One being the definition of termination in the Agreement and the other being the failure of Mr. Gilder to purchase the policies within thirty days of a terminating event. Ms. Gilder easily clears both hurdles.

The Agreement says the following about termination:

ARTICLE XVI
TERMINATION OF AGREEMENT

16.1 Terminating Events. This Agreement shall terminate upon the occurrence of any of the following events:

(a) The written agreement of all of the Parties;

(b) The dissolution, bankruptcy or insolvency of the Corporation; or

(c) The death or adjudication as incompetent or insane of all Stockholders within a period of 90 days.

The enumeration of ways in which an agreement may terminate does not limit the ways in which an agreement may actually terminate. Humans are not able to anticipate all the ways that an agreement may terminate. No such enumeration can be either complete or exclusive. Indeed, the language cited above does not even attempt to lay claim to exclusivity. It does not say that the enumerated methods of termination are the only ways the Agreement can terminate.

When does a promissory note terminate? When does a deed of trust terminate? When does an employment contract terminate? When does any contract terminate? An agreement can terminate when an expressed precondition of termination occurs; it can terminate when its purpose has been fulfilled; it can terminate when the parties to the agreement have fulfilled their obligations; it can terminate by operation of law; it can terminate as a result of a court order; or it can terminate by other means. Here, a terminating event occurred under the Buy Sell Agreement when Mr. Gilder fulfilled his obligation to purchase the stock of Mr. Cooper from the Cooper estate, using all of the insurance proceeds he obtained on the life of Mr. Cooper, as required by the Agreement. The absence of specific language defining this as a terminating event is simply evidence that the contract, as written, has ambiguities.

We have already demonstrated that, under section 7.4 of this same Agreement, the survivor has the right to purchase the policy on his own life. It would be illogical, then, to construe section 16.1 in manner that would deny the right granted in section 7.4. Likewise, since it has been proven that both Mr. Gilder and Mr. Cooper believed that the Agreement provided to the survivor the right to purchase the policies on his own life from the estate of the first to die, it would be illogical and unjust to limit the construction of section 16.1 in such a way as to deny to the survivor that very right.

MUST PURCHASE WITHIN THIRTY DAYS

Lastly, the Coopers point out that Mr. Gilder had only thirty days after the terminating event to purchase the policies on his own life, and he has not yet done that. Thirty days from when? Under their interpretation of the contract, it has not yet terminated!

Obviously, what the parties actually intended, and what the Agreement provides, is that the surviving stockholder has thirty days to acquire the policies after he fulfills his obligation to purchase the stock of the deceased stockholder.

Indeed, Robin Cooper had the same understanding, as shown by the following transcripts, the first from his deposition, and the second from the trial:

> Q. Have you ever read the buy/sell agreement?
>
> A. Yes.
>
> Q. Did you understand from the buy/sell agreement that upon the termination of the buy/sell agreement that the insured would have the right to own his own policy?
>
> A. Yes, I did.
>
> Q. Okay.
>
> A. For thirty days, I think.
>
> By Mr. Daniels: Object to the form of the question.
>
> Q. And this buy/sell agreement terminated with the death of Mr. Cooper and the purchase by Mr. Gilder of Mr. Cooper's shares? Is that a fair statement?
>
> A. Well, one-half of it did at least, you know.
>
> Q. Okay.
>
> By Mr. Daniels: Let me make an objection. It calls for a legal conclusion. Those last two questions and answers. (R 643 L 6-23)

> Q. All right. And you know, because you looked at the Buy/Sell Agreement, you know that Mr. Gilder had a right to transfer the policy to himself, don't you?
>
> **By Mr. Daniels:** Objection. If Your Honor, please. That is not what the Buy/Sell Agreement - -
>
> **By Mr. Bell:** Judge, I object to the speaking objection.
>
> **By Mr. Daniels:** Okay, my apologies. My apology to counsel and the court. Objection.
>
> **By the Court:** Overruled.
>
> **By Mr. Daniels:** Mam?

By the Court: Overruled.

By Mr. Daniels: May I make my objection?

By the Court: Overruled.

A. Please ask the question again?

Q. Yes, sir. You knew that Mr. Gilder had a right to transfer the policy to himself, didn't you?

A. No.

Q. Well, didn't you tell me that you knew he did?

A. After the deposition , I read a little closer and to my - - and I'm not a lawyer - - but it don't say it. Seven four says that if both parties are alive there can be some transfers. It don't say anything else.

Q. Well, the agreement just says what it says, right? Whatever it says.

A. Whatever it says.

Q. Okay. But it was your understanding then and it was your understanding that Mr. Gilder could transfer the policy to himself. That was your understanding, wasn't it?

By Mr. Daniels: Again, Your Honor, objection.

By the Court: Overruled again.

A. I had roughly read the policy and I thought that's what it said.

Q. Okay. So, when Mr. Gilder got this form, you believed he had a right to transfer the policies to himself?

A. No.

By the Court: Let me see that form. I know I've seen it a hundred times. Let me just see it again.

[BRIEF PAUSE IN THE PROCEEDINGS]

By the Court: All right.

Q. In fact, you thought that he had 30 days to acquire the policy, didn't you?

A. At that point in time, I did, or when we had the deposition I did. That's the first time I had actually read in detail the thing.

By the Court: The what?

A. The Buy/Sell.

By Mr. Daniels: Your Honor, may I have a continuing objection?

By the Court: You have a continuing objection noted for the record.

By Mr. Daniels: Thank you, mam. (T227-228 L23)

The significance of Robin's understanding far surpasses the ambiguity issue described above. It provides Robin with a motive and incentive to intercept the transfer of the policies to Mr. Gilder, so that he and his sisters would obtain the proceeds instead of Mr. Gilder.

In October, 2003, Robin gave an $11,000 gift to his ally, Connie Burford, who Mr. Gilder trusted and relied upon. She was his long time secretary, and an officer and director of his business. She received all of his personal and business mail, paid all of his personal and business bills and wrote all of his personal and business checks. On his death bed, with Connie present, James Gilder told his wife to trust her and rely upon Connie. She filled out the insurance policy transfer of ownership form. Everyone agreed that Connie was his trusted advisor and confidant.

According to Robin, on December 19, 2003, two days after the stock was purchased, both of his sisters, including one who lives in California, came to the office of Cooper Gilder to join him in signing transfer of ownership papers. He and Connie say that this was done, not just in the office building, but in the actual office of James Gilder, with James Gilder present. This would have been shortly after James Gilder told his wife not to worry, because she would be the beneficiary of the policies on his life!

Then, according to the Coopers, Mr. Gilder, who believed he had a right to acquire the policies, was present and watched while the Cooper's transferred the

policies, not to him, but from themselves, to themselves, using the transfer of ownership form sent by New York Life, not to the Coopers, but to James Gilder. He then went on to pay the premiums on the policies for the rest of his life, not for the benefit of his wife, but for the benefit of the Coopers. He did this, the Coopers say, as part of a deal in which he would pay $1.3 million dollars for stock that he and his partner valued at only $650,000.

In their Brief, the Coopers claim that this is entirely reasonable because James Gilder had spent years, "treating John Cooper like a brother and John Cooper's family like his own family." (Appellants Reply Brief at p. 24). Sometimes, people who are trusted like family will breach that trust. Sometimes, they will use their position of trust and influence to take advantage of an elderly, dying person, so that they can steal hundreds of thousands of dollars from his widow.

The Coopers have claimed that some of the evidence against them is circumstantial. This Court has recognized that circumstantial evidence is almost always required to prove a case of abuse of confidence. In *Dabney v. Hataway*, this Court said the following:

> (Paragraph 24) ... It follows, from the very nature of the thing, that evidence to show undue influence must be largely, in effect, circumstantial. It is an intangible thing, which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact, universally recognized, that he who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to that fact. He observes, too, the same precautions if he seeks by cajolery, flattery, or other methods to obtain power and control over the will of another, and directs it improperly to the accomplishment of the purpose which he desires... *Dabney v. Hataway,* 740 So.2d 915 (Miss. 1999).

The Coopers' explanation for the transfer of the policies is too incredible for belief. Indeed, their claim that they were all present with Mr. Gilder when the transfer of ownership from themselves to themselves occurred proves that they acted in concert with one another to steal his insurance proceeds.

The Coopers complain that there is no evidence of payment of the cash value of the policies, which is a pre-requisite to transfer of ownership of the policies. The evidence of payment was in their possession. Whether it was by promissory note, or by some other method, is within their knowledge alone. They state in their Brief that another promissory note, covering other debt, was contemplated at the time of the transfer of stock. (Appellants Reply Brief, p 4) The proof, the reasonable inferences from the proof, and logic dictate that Mr. Gilder believed he was obtaining the transfer of the policies. The Coopers can not escape liability merely because of the absence of proof of payment, when they are the only persons who would have that proof.

The Chancellor found that the Appellants in the business tort case admitted that they were in a fiduciary or confidential relationship with Ms. Gilder. (T 436) The Coopers (Cross Appellees in the insurance proceeds case) admit that James Gilder treated them like family and thought of them as family. There is no question but that their ally, Connie Burford, had a fiduciary and confidential relationship with James Gilder. The Coopers abused James Gilder's trust of Connie and of them to transfer the policies to themselves.

CLEAR AND CONVINCING EVIDENCE

The Cooper's claim that Winnie Gilder failed to meet her burden of proving her case by clear and convincing evidence, and complain that some of the evidence was

circumstantial. However, as noted above, cases such as this are almost always proven by circumstances. This also overlooks the fact that the Chancellor found that Winnie Gilder proved her business tort case by clear and convincing evidence. (T 436) Likewise, the insurance case was proven by clear and convincing evidence. Even so, this is not the standard. The Coopers have the burden backwards. Once Winnie Gilder proves that there was a confidential or fiduciary relationship, and proves that the Coopers received something of value from Mr. Gilder while they were in a confidential or fiduciary relationship with him, then the burden of proof shifts to the Coopers! There is no question but that the Coopers' ally Connie had a confidential and fiduciary relationship with Mr. Gilder. The Coopers' brief admits that Mr. Gilder treated the Coopers like family. He never dreamed that Connie would cut his name off of the transfer form, and paste the Coopers' names on the form. It is obvious that the Coopers benefitted from the relationship, to the tune of $650,000! Indeed, the Coopers say that it was only natural for Mr. Gilder to help them get the insurance proceeds because of their family like relationship!

Once the confidential or fiduciary relationship was established, together with proof that the Coopers benefitted from the relationship, the burden of proof then shifted to the Coopers to prove, by clear and convincing evidence, that they did not abuse their confidential or fiduciary responsibilities. *Will of McCaffrey v. Fortenberry*, 592 So.2d 52 (Miss.,1991); *Wright v. Roberts*, 797 So.2d 992 (Miss. 2001) *In re Estate of Hood*, 955 So.2d 943 (Miss. App.,2007). The Appellants wholly failed to meet this burden.

CONCLUSION

Robin Cooper, Marilyn Dunaway and Mildred Watson, with the help of Connie Burford, stole insurance proceeds from James Gilder's widow. Verdict should be awarded against them in the amount of $652,281.86. Likewise, the judgment in the business tort case against Robin Cooper, Connie Burford and Don Dunaway should be affirmed for the reasons stated in the Appellees' Brief.

Respectfully submitted,

WINNIE GILDER, INDIVIDUALLY, and as ADMINISTRATRIX OF THE ESTATE OF JAMES A. GILDER, AND COOPER GILDER, INC.

BY: _____
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CERTIFICATE OF SERVICE

I, James D. Bell, certify that I have caused to be mailed a true and correct copy of the foregoing instrument to:

John H. Daniels, Esquire
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Honorable Marie Washington
Washington County Chancery Court
Post Office Box 1762
Greenville, Mississippi 38702-1762

SO CERTIFIED, this, the 1 day of ~~June~~ July, 2008.

JAMES D. BELL