IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

W. E. WHITE, APPELLANT

VS. NO. 2007-CA-01511

GLENN COOKE, DENNIS MASSEY,
STEVE WEEKS, ROBERTA JAMISON-ROSS,
AND SENATOBIA BANK (NOW SYCAMORE BANK), APPELLEES

BRIEF FOR APPELLEES

APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF TATE COUNTY, MISSISSIPPPI

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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 the case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

W. E. White	Appellant
Glenn Cooke, Dennis Massey, Steve Weeks, Roberta Jamison-Ross, and Senatobia Bank (Now Sycamore Bank)	Appellee
James W. Amos	Attorney of Record for Appellant
John T. Lamar, Jr., David M. Slocum, Jr. & law firm of Lamar & Hannaford, P.A.	Attorneys of Record for Appellees, Cooke, Massey, and Weeks
Honorable Mitchell M. Lundy, Jr.	Chancellor

Respectfully submitted,

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STATEMENT OF ISSUES

The issues presented by the Appellee in this Appeal are:

ISSUE # 1: WHETHER A VALID AND ENFORCEABLE CONTRACT EXISTED THAT WOULD ENTITLE THE APPELLANT TO SPECIFIC PERFORMANCE.

ISSUE # 2: WHETHER EXTRINSIC EVIDENCE SHOULD HAVE BEEN CONSIDERED TO INTERPRET THE CONTRACT AND DETERMINE THAT APPELLANT BREACHED THE CONTRACT.

ISSUE # 3: WHETHER APPELLEES, COOKE, MASSEY, AND WEEKS, RELATED TO THE APPELLANT IN ALL MATTERS CONCERNING THE CONTRACT IN GOOD FAITH AND WITH FAIR DEALING.

ISSUE # 4: WHETHER THE CHANCELLOR WAS CORRECT IN AWARDING ATTORNEY'S FEES TO APPELLEES, COOKE, MASSEY, AND WEEKS.

STATEMENT OF CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

This appeal arises from an order entered on July 3, 2007 in the Chancery Court of Tate County, Mississippi which dismissed the Appellant's Amended Complaint, awarded attorney's fees to the Appellees, and cancelled and released the lis pendens on the property in question. (Appellant's R. 9-14). The aforementioned order was amended on July 16, 2007 to instruct the court to pay the remaining interpled funds to the Appellant, W. E. White (hereinafter "White"). (Appellant's R. 17-18). A Request for a New Trial was duly filed, answered by counsel for the Appellees, and an Order denying the Request for New Trial and setting the Supersedeas Bond was entered on August 30, 2007. (Appellant's R. 15-16). The Notice of Appeal along with the Designation of Record was filed on August 30, 2007. (Appellees' R. 1-4).

On September 20, 2004, a Complaint for Specific Performance and Other Relief was filed by White against Glen Cooke (hereinafter "Cooke"), Dennis Massey (hereinafter "Massey"), Steve Weeks (hereinafter "Weeks") and John Roebuck & Associates, Inc. (hereinafter "Roebuck"), that sought specific performance of a real estate contract and in the alternative requested actual and compensatory damages against the aforementioned Defendants as well as attorney's fees incurred in said action. (Appellees' R. 5-15). Cooke, Massey, and Weeks answered the Complaint on November 30,

2004 and Counter-claimed for specific performance or in the alternative damages and attorney's fees and costs in the event that the court determined that no valid, enforceable contract existed. (Appellees' R. 16-31).

On December 8, 2005, the parties, by and through their respective solicitors of records, entered into an Agreed Order that interpled $13,674.38 into the court, which represented White's buyer's premium and which was being held by Defendant, Roebuck, and discharged Roebuck from any further liability in this cause. (Appellees' R. 32). On September 15, 2006, White filed an Amended Complaint for Specific Performance and Other Relief that added Roberta Jamison-Ross (hereinafter "Jamison-Ross"), Wells Fargo Bank, and Senatobia Bank (now known as Sycamore Bank) as Defendants. (Appellees' R. 33-41). Wells Fargo Bank was dismissed on December 11, 2006. (Appellees' R. 42).

B. STATEMENT OF THE FACTS

On June 5, 2004, an auction was held for several tracts of real property owned by Cooke, Massey, and Weeks. (Appellant's R. 9,23, 31, 35). White was the highest bidder at the auction for several tracts of real property owned by Cooke, Massey, and Weeks and a Real Estate Sales Contract was executed on the same date immediately following the auction. (Appellant's R. 37). The contract identified four tracts from the auction flier and explicitly stated that the property shall be conveyed in "As Is" condition. (Appellant's R. 37). Additionally, the contract

specifically stated that it was subject to a survey to determine the accuracy of the acreage and boundaries of the tracts. (Appellant's R. 37). White, being a very intelligent and educated man, understood the consequences of a legal contest in which he lost at trial. (Appellees' R. 51, 53-54). More specifically, the contract contained the following provisions:

> "9. The property SHALL BE CONVEYED AND ACCEPTED in "As Is" condition. Except as expressly set for in this CONTRACT, neither Seller, nor Seller's agent, nor JRA, has or will make any warranties or representations of any kind or character, expressed or implied, with respect to the Property, including, without limitation, any warranty or representations to the HABITABILITY, DESIGN, QUALITY, MERCHANTABILITY, CONDITION, ENVIRONMENTAL STATUS, MATTERS OF SURVEY OR FITNESS for any particular purpose, all of which are expressly disclaimed. Except for the warranties and representations expressly set forth in this Contract, Buyer is relying solely on its own expertise and information. Buyer has conducted such investigation and inspections of the Property as it deemed necessary and/or appropriate and shall rely upon the same.
>
> 11. Should any party to this Contract bring an action against any other party to enforce any claim hereunder, the prevailing party or parties shall be entitled to recover all costs of said action and reasonable attorney fees. The term "prevailing party or parties" as used in this paragraph shall be defined as the party or parties in whose favor a court shall rule or against whom no relief is granted, provided such ruling becomes final and non-appealable." (Appellant's R. 37).

Further, the Auction Catalog contained the following terms and conditions:

> "7. All property is being sold today "As Is/Where Is". The only guarantee from the seller is a valid title to the property...The real estate is being sold

subject to easements, covenants, conditions, zoning, and any other existing matters." (Appellant's R. 24).

The auction also involved two (2) houses which are located in the middle of the tracts for which White was the highest bidder. (Appellant's R. 31, 34). These two (2) houses were on two (2) separate tracts that were offered at auction, but did not sell at auction. (Appellees' R. 43-44). During the week subsequent to the auction, Jamison-Ross contracted with Cooke, Massey, and Weeks, to purchase the two (2) houses. (Appellees' R. 43-45). It is important to note that the actual auction took place inside the larger of the two houses and that White drove down the driveway which is flanked by Bradford Pears to get to the house. (Appellees' R. 74-76, 103, 108-112.) However, White took the position at trial that he would not give Jamison-Ross access to the existing driveway, that she did not need access to the existing driveway, and that the brochure did not give her the right to the existing driveway. (Appellees' R. 59-64, 66-69, 103-107).

The flier from the auction identified forty (40) feet of road frontage to the east of the existing driveway that allowed access to the two houses and identified the existing driveway as being on the tracts for the houses. (Appellant's R. 31, 34). However, it is now crystal clear that this description was incorrect, inaccurate, and impossible. (Appellees' R. 56-69, 79-87). In reality, the existing driveway was within the east (40) feet of road frontage along the easternmost portion of the property being

sold at auction. (Appellees' R. 80, 87).

A survey was performed by surveyor, James William Wages, subsequent to the auction of the property which revealed that the real property for which White was the highest bidder at the auction did not contain forty (40) feet of road frontage east of the driveway which served the two (2) houses. (Appellees' R. 87). This fact was immediately presented to White by Wages and a meeting set up between White and Wages in an attempt to determine White's wishes in regards to dividing the property as accurately as humanly possible to the description in the flier. (Appellees' R. 89-90, 93).

As a result of this meeting, two plats were prepared in an attempt to satisfy White. (Appellees' R. 89, 96-97). These surveys were subsequently rejected by White. (Appellees' R. 47-48, 96-97). During this same period in time, the defendants moved forward with the sale of the two (2) houses to Jamison-Ross. (Appellees' R. 43-44, 49-50, 104-105). Jamison-Ross was conveyed fifty (50) feet of road frontage in compliance with the description in the flier and a forty (40) foot wide easement for ingress and egress to her property that runs over the forty (40) feet of road frontage in question. (Appellees' R. 47-48). This easement was conveyed to Jamison-Ross because is was the right thing to do in light of the circumstances, and it was the most accurate division in regards to the flier description. (Appellees' R. 50).

Moreover, on the day of trial, White threatened Jamison-Ross

with his intent to destroy the driveway, remove the trees along the drive, and further limit Jamison-Ross' access to her home. (Appellees' R. 102-103, 106-107). Moreover, White made it clear that he does not intend to purchase real property that is subject to an easement similar to the easement in this case. (Appellees' R. 67-68). Clearly, White has refused to operate in good faith and with fair dealings in regards to his contract with the Appellees even after contracting to do so, which is indicated by his statement at the conclusion of the trial that he would accept one of the previously proposed surveys even after rejecting the prior survey and filing suit. (Appellees' R. 78-79). Finally, White has failed to close on the property in question even after ample time.

SUMMARY OF ARGUMENT

The subject property was being sold "as is, where is", and the contract executed by the parties was subject to a survey. As a result of this contract, the parties assumed the duty to act in good faith and with fair dealing. Cooke, Massey, and Weeks fulfilled their duty of good faith and fair dealing by immediately notifying White of the problems revealed by the subsequent survey and worked diligently to uncover a solution. Since the description of the property to be conveyed was incorrect, inaccurate and clearly ambiguous, the court was forced to consider parol or extrinsic evidence.

While the majority of the contract in question is clear based on its four corners, the testimony revealed that there was a mutual

mutual mistake

mistake by both parties in regards to the location of the existing driveway and this mistake was confirmed by the resulting surveys. Counter-offers were rejected, and the parties never had a "meeting of minds" in regards to any of the subsequent surveys and a modified contract was never formed. As a result, specific performance cannot be accomplished.

Finally the contract itself entitled the prevailing party or parties in a civil action to recover all costs of said action and reasonable attorney fees. White's own testimony indicates that he understood the consequences of bringing an unsuccessful legal action. Clearly, Cooke, Massey, and Weeks are entitled to all costs of said action and reasonable attorney fees.

ARGUMENT

A. STANDARD OF REVIEW

Mississippi appellate courts consider the decisions of chancellors under a limited standard of review. *McNeil v. Hester*, 753 So.2d 1057, 1063 (Miss. 2000). The Court will not disturb the findings of a chancellor when supported by substantial credible evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard. *Sanderson v. Sanderson*, 824 So.2d 623, 625 (Miss. 2002). The chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony. *Volmer v. Volmer*, 832 So.2d 615, 621 (Miss.Ct.App. 2002). As well as being the fact-

finder, the chancellor is the sole judge of the credibility of witnesses when resolving discrepancies in a witness' testimony. *Murphy v. Murphy*, 631 So.2d 812, 815 (Miss. 1994). Even if the appellate court disagrees with the lower court on the finding of fact and might have arrived at a different conclusion, it is bound by the chancellor's findings unless manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Richardson v. Riley*, 355 So.2d 667, 668 (Miss. 1987). The chancellor is best able to determine the veracity of the testimony, and the Appellate Court will not undermine the chancellor's authority by replacing his judgment with its own. *Madden v. Rhodes*, 626 So.2d 608, 616 (Miss. 1993).

B. ISSUE # 1: WHETHER A VALID AND ENFORCEABLE CONTRACT EXISTED THAT WOULD ENTITLE THE APPELLANT TO SPECIFIC PERFORMANCE.

The elements of a valid contract are: (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with the legal capacity to make a contract; (5) mutual assent; and (6) no legal prohibition precluding contract formation. *Rotenberry v. Hooker*, 864 So.2d 266, 270 (Miss. 2003). The Mississippi Supreme Court has stated that determination that an agreement is sufficiently definite is favored by the courts, so as to carry out the reasonable intention of the parties if it can be ascertained. *Estate of Smith v.*

Samuels, 822 So.2d 366, 369 (Miss. Ct. App. 2002); *citing Busching v. Griffin*, 542 So.2d 860, 863 (Miss. 1989). A contract is sufficiently definite if it contains matter which would enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence. *Id.* at 369-370; *Id.* Having found a contract to have been made, an agreement should not be frustrated where it is possible to reach a reasonable and fair result. *Id.*

In *Estate of Smith,* the Court of Appeals found that the determination of the exact location of the easement was not essential to the formation of the contract. However, in the case at bar, Plaintiff testified under oath that he would not accept the property with a portion of his land being servient to an easement. (Appellees' R. 67-68). The facts of this case indicate that the property was being sold "as is, where is" and that the contract executed by the parties was subject to a survey. (Appellant's R. 24, 37). The subsequent survey indicated that the drawing presented to the bidders on the day of the auction was inaccurate, incorrect and impossible. (Appellees' R. 87). As a result, a contract subject to a later survey for an accurate description was formed. The subsequent survey indicated that the parties needed to modify the description in order to enforce their contract.

The parties did not mutually assent or have a "meeting of the

minds" in regards to the counter-offers on the description. Black's Law Dictionary defines the term mutual assent as meaning a meeting of the minds of both parties to a contract; the fact that each agrees to all the terms and conditions, in the same sense and with the same meaning as the others. Black's Law Dictionary, 6th ed. 1991. The Mississippi Supreme Court has previously held that there could have been no meeting of the minds of the parties resulting in a mutual agreement, when all of the parties were acting under the mutually erroneous belief that the property was a part of the assets to be conveyed when, in fact, it was not. *Thomas v. Bailey*, 375 So.2d 1049, 1052 (Miss. 1979). In *Thomas*, the Mississippi Supreme Court expressly stated that a party cannot convey something that they do not own. *Id.*

White relies solely on *Estate of Pickett,* 879 So.2d 497 (Miss.Ct.App. 2004) to support his argument that he is entitled to specific performance. *Pickett* involved a real estate contract with specifically defined property that clearly existed and the contracting seller clearly owned, possessed and controlled. *Id.* at 468. However, the seller died prior to closing and there were some delays in setting up the estate. *Id.* at 469. This created a "temporary impossibility". *Id.* at 471. The court ruled that the temporary impossibility extended the time of performance until the impossibility ceased to exist. *Id.*

The current case is distinguishable from *Pickett* because it

involves a permanent impossibility that will not cease to exist. In the case at bar, White wants Cooke, White, and Weeks to convey him property that they do not own, possess, or control. The testimony reveals that there was a mutual mistake by both parties in regards to the location of the driveway, which the surveys revealed to be inaccurate and incorrect. (Appellees' R. 56-69, 79-87). Due to this fact, the parties never had a "meeting of minds" in regards to the counter-offers proposed by the surveys and a modified contract was never formed. As a result, specific performance cannot be accomplished because Cooke, Massey, and Weeks cannot convey White something that they do not own.

C. ISSUE # 2: WHETHER EXTRINSIC EVIDENCE SHOULD HAVE BEEN CONSIDERED TO INTERPRET THE CONTRACT AND DETERMINE THAT APPELLANT BREACHED THE CONTRACT.

The Appellee further argues that the four corner of the contract in question are clear and unambiguous and extrinsic evidence should not have been reviewed. There is a three-tiered approach that courts use in interpreting a contract: (1) the four corners of the document, (2) the canons' of contract construction, and (3) extrinsic or parol evidence. *Tupelo Redevelopment Agency v. Abernathy*, 913 So.2d 278, 284 (Miss. 2005). The four corners approach looks only at the language used in the contract. *Id.* The canons are to be used only if the four corners of the document are insufficient to interpret the contract, and extrinsic or parol

evidence is to be used only if the contract remains ambiguous after application of the four corners and the canons. *Id.*

The majority of the contract in question is clear based on the four corners test. The only area that is ambiguous is the description of the property to be conveyed which the Appellees attempted to resolve through a series of plats. (Appellees' R. 56-69, 79-87). However, White refused to accept the property as described in any of the series of plats, although it is now his sworn testimony that he would accept the second plat in time if he had no other choice. (Appellees' R. 47-48, 67-69, 78-79, 96-97). The inherent problem with that proposition is that White previously rejected that proposal and agreed to the final plat, which caused the defendants to convey a portion of the property necessary to comply with White's request for the second plat in time and thereby made a division of the property in accordance with the second plat in time impossible.

The four corners of the contract clearly indicate that (1) closing would take place by July 5, 2004, (2) the property shall be conveyed and accepted "as is", (3) no representations are made with respect to matters of survey, and (4) both parties covenanted to relate to one another in good faith and with fair dealing. The surveys, which are extrinsic or parol evidence, indicate the only manners in which the Cooke, Massey, and Weeks could possibly convey

the property in an attempt to comply with the flier description. However, White refused to accept any of these surveys, refused to act in good faith and with fair dealing, and breached the initial contract which required modification.

The Supreme Court has recognized a situation where a contract was formed but it was formed on a mutual mistake, and allowed for the contract to be rescinded by the purchaser. *Jones v. Metzger,* 132 Miss. 247, 96 So. 161 (1923). In *Metzger,* the Supreme Court was faced with the situation where ignorant negroes contracted to purchase land under the mutually mistaken belief that certain valuable buildings were located on the land. *Id.* The Court held that the mutual mistake warranted rescission of the contract and a return of the money on the purchase of the land. *Id.* The Supreme Court has since affirmed this holding, and reiterated that mutual mistake by parties to a contract in regards to the seller's right to convey title entitles the purchaser the right of rescission. *Virginia Trust Co., et al v. Catoe,* 134 Miss. 722, 99 So. 261 (1924).

Based on the established law in Mississippi and the mistaken contract, the Appellant had three choices in regards to the property in question: (1) accept the property "as is" with an easement for ingress and egress across the existing driveway, (2) rescind the contract, or (3) breach the contract by refusing to

3 options

operate in good faith and with fair dealing to Cooke, Massey, and Weeks. In this case it is clear that the Appellant chose to breach the contract and refused to act with good faith and fair dealing towards Cooke, Massey, and Weeks in an attempt to correct the mutual mistake. As a result, the plaintiff must suffer the consequences of his actions or omissions.

D. ISSUE # 3: WHETHER THE APPELLEES, COOKE, WHITE, AND WEEKS, RELATED TO THE APPELLANT IN ALL MATTERS CONCERNING THE CONTRACT IN GOOD FAITH AND WITH FAIR DEALING.

All contracts carry an inherent covenant of good faith and fair dealing. *Ferrara v. Walter*, 919 So.2d 876, 883 (Miss. 2005); *citing Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992). In this case, the contract even contained an express warranty to that effect. A breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness. *Cenac*, 609 So.2d at 1272. Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. *Bailey v. Bailey*, 724 So.2d 335, 338 (Miss. 1998). Further, under the duty of good faith and fair dealing, a party has a duty not only to refrain from the occurrence of conditions of his own duty, but also to take some affirmative steps to cooperate in achieving these goals. *Cenac*, 609 So.2d at 1272.

The Appellant relies solely on *Buckley v. Garner*, 935 So.2d 1030 (Miss.Ct.App. 2005) to support his argument that Cooke, Massey and Weeks failed to act in good faith and with fair dealing. However, *Buckley* concerned a clearly defined piece of property with no ambiguities in its description and dealt with the legal concept of a good faith purchaser for value and not the duty of good faith and fair dealing. In the case at bar, the Appellant relies upon an auction catalog and flier which contained an inaccurate and impossible description. (Appellees' R. 56-69, 79-87). The Appellant encourages the court to cast a blind eye toward portions of the auction catalog and flier that deal with the location of the existing driveway while placing the road frontage estimate for one of the four tracts contained in his contract under a microscope.

Based on the testimony of the surveyor of the subject property, it is impossible to comply with the auction catalog and flier. (Appellees' R. 79-87). The surveyor, Wages, brought this fact to Cooke's attention following his survey. (Appellees' R. 79-87). Cooke instructed the surveyor to meet with White and discuss some options for dividing the property. (Appellees' R. 79-87). As a result of this meeting, the surveyor drafted two (2) surveys which were later rejected by White. (Appellees' R. 79-87). After years of disagreement and extensive litigation, White indicated that he would reluctantly accept the survey that gave the

moved the fifty (50) feet of road frontage for the houses to the far east of the subject road frontage. (Appellees' R. 78-79). However, this is currently impossible because Cooke, Massey, and Weeks executed the Deed to Jamison-Ross based on White's rejection of this survey. In his brief, White accuses Cooke of becoming greedy and punishing the Appellant because of Cooke's greed. Clearly, White is the greedy party and Cooke, Massey, and Weeks have done everything within their power to accommodate White. Cooke, Massey, and Weeks have fulfilled their duty of good faith and fair dealing while White has been uncooperative and clearly in breach of his duty of good faith and fair dealing.

E. ISSUE # 4: WHETHER THE CHANCELLOR WAS CORRECT IN AWARDING ATTORNEY'S FEES TO APPELLEES, COOKE, MASSEY, AND WEEKS.

Parties may contractually provide that in the event of a dispute, the losing party will be charged with paying attorney's fees. *Hamilton v. Hopkins*, 834 So.2d 695, 700 (Miss. 2003); *citing Theobald v. Nosser*, 752 So.2d 1036, 1042 (Miss. 1999). The court is obligated to enforce a contract when its terms are clear and unambiguous. *Hamilton,* 834 So.2d at 1042; *citing Ivison v. Ivison*, 762 So.2d 329, 334 (Miss. 2000).

In the case at bar, a contract with an inaccurate and impossible description existed between the two parties. Within the contract, the parties agreed that "should any party to this

Contract bring an action against any other party to enforce any claim hereunder, the prevailing party or parties shall be entitled to recover all costs of said action and reasonable attorney fees." (Appellant's R. 37). Further, White understood the consequences of bringing an unsuccessful legal action. (Appellees' R. 51). Cooke, Massey, and Weeks are clearly entitled to all costs of said action and reasonable attorney fee since they prevailed at trial.

CONCLUSION

The parties entered into a contract on real property that was subject to a survey to determine the actual description. The parties assumed the duty to act in good faith and with fair dealing, and Cooke, Massey, and Weeks fulfilled this duty. However, the description of the property to be conveyed was incorrect and inaccurate and clearly ambiguous, and the court considered parol or extrinsic evidence to determine the terms of the contract.

The extrinsic evidence revealed that there was a mutual mistake by both parties in regards to the location of the existing driveway. Counter-offers were made and rejected, and the parties never entered into a modified contract that would allow for specific performance. Yet, the executed contract entitled the prevailing party or parties in a civil action to recover all costs of said action and reasonable attorney fees. White brought suit on

the executed contract and lost. As a result, Cooke, Massey, and Weeks are entitled to all costs of said action and reasonable attorney fees. For these reasons, the decision of the Chancellor should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, David M. Slocum, Jr., attorney for Appellees, Glenn Cooke, Dennis Massey, and Steve Weeks, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief for Appellees to:

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So certified, this the 8th day of April, 2008.

DAVID M. SLOCUM, JR.