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

W. E. WHITE, APPELLANT

VS. CAUSE NO. 2007-CA-01511

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

# APPELLANT'S REPLY BRIEF
ORAL ARGUMENT REQUESTED

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### CASES



### STATUTES

None

### OTHER AUTHORITIES

None

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# APPELLANT'S REPLY BRIEF

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## I.
## APPELLANT'S REPLY TO PORTIONS OF APPELLEES' STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

On page 4 of Appellees' Brief they said,

> "The flyer from the auction identified forty (40) feet of road frontage to the 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. However, it is now crystal clear that this description was incorrect, inaccurate and impossible."

According to the contract (Exh. 4) Appellant agreed to purchase Tracts 6, 7, 8 and 9 of the farm land located north of Magnolia Lane. The two houses purchased by Roberta Jamison Ross are shown on the flyer as Tracts 10 and 11 of the same farm land located north of Magnolia Lane. All of the land involved in these proceedings were a part of the same farm land. Only Tracts 6, 7, 8 and 9, the property that was being sold to W. E. White, were sold at the auction on June 5th, 2004. The flyer was prepared by Appellees' auctioneer for use at the

auction. Lots 10 and 11 were not sold at the auction. They were sold at a later date, after Appellant had already contracted with Appellees to purchase the 179 acres, more or less, comprised by Tracts 6, 7, 8 and 9. Further, the flyer may identify a driveway as being on Tract 10, but it reveals nothing about it being an asphalt drive. According to the surveyor, Mr. Wages, there was sufficient road frontage for the use of Tracts 10 and 11 and also for Mr. White to have the ownership of the forty (40) feet of land as frontage for the land he was buying (R.E. 7, Tr. 28).

The real problem confronting Appellees was that after contracting with Mr. White to sell him 179 acres, more or less, with that land having forty (40) feet of road frontage east of Tract 10, the Appellees contracted with Roberta Jamison Ross and gave her an easement over the forty (40) foot strip of frontage Mr. White was buying. Admittedly, there was an asphalt drive located partially on the property Mr. White was buying but, there was sufficient road frontage available for Mr. White's land and Mrs. Jamison-Ross's land. There are no adverse possession issues involved in this case. Appellees could have built a driveway for Mrs. Jamison-Ross and avoided this conflict.

Appellees point out in their brief at page 5 that Roberta Jamison-Ross was conveyed fifty (50) feet of road frontage in compliance with the description in the flyer and a forty (40) foot wide easement for ingress to her property that runs over the forty (40) feet of road frontage in question. Appellees want to say that the easement conveyed to Roberta Jamison-Ross was the right thing to do in light of the circumstances. Appellant contends this was done to allow Appellees to sell Roberta Jamison-Ross her property and obtain $225,000.00 in cash and a $55,000.00 promissory note and deed of trust they could assign to their bank to help reduce the

real reason was they wanted to make a sale

debt they owed to the bank.

Appellees contend that Mr. White and his attorney threatened Mrs. Jamison-Ross on the day of the trial by telling her they intended to take up the road so she could not get to her house. She said she was told that Mr. White was going to demolish the road and cut down pear trees and cut down a large tree that had been there forever. (Appellees' Record Excerpts, P. 103). But, under redirect examination the testimony was that she was told that she needed to tell Appellees they needed to build her a road. She admitted that Mr. White told her he was supposed to own the forty (40) foot strip. She went on to say that Mr. White told her he planned to take up the old road and build a new road because the farm equipment would destroy the existing drive. She also said he told her he did not want the easement there. He told her that the trees would have to go. (Appellant's Record Excerpts p. 106-107).

On page 6 of Appellees' Brief they state that Mr. White made it clear that he did not intend to purchase the real property subject to the easement. Because of this, Appellees accused Mr. White of refusing to operate in good faith and with fair dealings in regard to the contract. Appellees blamed Mr. White for failing to close the sale of the property.

Mr. White contends that his refusal to accept the property with the easement is what the lawsuit is about. It is his position that the only parties to the contract refusing to act in good faith and fair dealings were Appellees when they sold an easement over the land he contracted to buy to another party. He was ready, willing and able to close the contract he had entered into and Appellees knew it.

Also, on page 6 of their Brief, Appellees refer to the description of the property to be conveyed as being incorrect, inaccurate and clearly ambiguous, requiring the Court to consider

parol or extrinsic evidence. The record does not reflect Appellees' contention. James Wages, the land surveyor, verifies that the description on the survey plat he prepared was in accordance with the auction brochure for the property Mr. White was purchasing. (Appellees' Record Excerpts, p. 84).

Isofar as the statement made by Appellees on pages 6 and 7 of their Brief that the "testimony resolved that there was a mutual mistake by both parties in regard to the location of the existing driveway", that is just not the case. A portion of the driveway, admittedly, is on the land Mr. White is buying but its existence does not amount to a mutual mistake in the contract that would have required a "meeting of the minds" before the sale of the property could close. Mr. White had entered into a valid and binding contract (Exh. 4) that clearly obligated the Appellees to sell and Appellant to buy Tracts 6, 7, 8 and 9 as shown on the brochure. There were no conflicting matters to deal with until the Appellees decided to sell an easement over Mr. White's property to Roberta Jamison-Ross.

## II.
## APPELLANT'S REPLY TO APPELLEES' ARGUMENT

### A. STANDARD OF REVIEW

Appellant takes no issue with the proposition set forth by Appellees that 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 he applied an erroneous legal standard. Sanderson v. Sanderson, 824 So.2d. 623, 625 (Miss. 2002).

Appellant does believe, however, that the Chancellor did abuse his discretion, was manifestly wrong, clearly erroneous, and applied an erroneous legal standard when he denied the

relief Mr. White was seeking and awarded Appellees their attorney fees.

## B. APPELLEES' ISSUE NO. 1: WHETHER A VALID AND ENFORCEABLE CONTRACT EXISTED THAT WOULD ENTITLE THE APPELLANT TO SPECIFIC PERFORMANCE

All parties and the Chancellor all refer to the case of Rotenberry v. Hooker, 864 So. 2d. 266, 270 (Miss. 2003) to determine the elements of a valid and binding contract. There we find the six (6) elements to a binding contract:

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.

Appellees go on in their argument at Page 8 of their Brief to say 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", citing 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). Appellees went on at page 9 of their Brief to further quote from Estate of Smith by saying,

> "A contract is sufficiently definite if it contains matters 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. 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."

Insofar as Estate of Smith deals with contracts it is right on point and is not inconsistent with Appellant's position. The contract in this case (Exh. 4) meets all of the criteria of Rotenberry, supra. But, Appellees' analogy of the easement referred to in Estate of Smith to the easement in the case at bar is not valid. Apparently, there was an easement necessary to the property which Samuels had optioned to purchase that the parties to the option had agreed upon. The location of the easement was to be agreed upon at a later time. The Court of Appeals affirmed the Judgment of the lower court ordering specific performance.

In the case at bar, the Appellant believes the Chancellor's findings were manifestly wrong and clearly erroneous. There was no easement involved in Appellant's contract with Appellees.

Mr. White believes the Supreme Court had the right idea in Busching, supra, at pages 865 and 866. There, Margree Griffin executed an option to purchase granting Harold Busching an option to purchase certain land for $50,000.00. Busching said that he wished to exercise that option and that he "stood ready, wiling and able to pay Griffin $50,000.00 in cash at the time of closing...." The Chancery Court issued its ruling denying Bushing's claim for specific performance. The Court held that the option was too vague and uncertain. The Supreme Court found that option was entitled to specific performance. The Court also said,

> "If we were to allow Griffin to escape her obligations under this option, the precedent would imperil all contracts where, before performance, one party smelled a sweeter deal. We have established in our law that the mere fact that the defendant (Griffin here) made a bad trade or bargain is not sufficient to defeat an obligation for specific performance."

Glenn Cooke smelled a sweeter deal when Roberta Jamison-Ross offered to purchase (after the contract with White had been made) the 5 acres of land and two houses if the seller

would give her an easement over the forty (40) foot strip of Mr. White's property. To allow Appellees to escape their obligations under the terms of their contract with Mr. White would imperil other contracts when the selling party believed they could ignore their contractual obligations. In Busching the Supreme Court reversed the Chancellor's dismissal of Busching's suit for specific performance and rendered a decision in favor of Busching granting him specific performance.

At page 9 of Appellees' Brief they go on to say that Mr. White would not accept the property with a portion of his land being servient to an easement. They rely on the facts being that the property was being sold "as is, where is" and the contract was subject to a survey. It has already been stated that the survey introduced into evidence (R.E. 11, Exh. 9) was accurate as to the brochure except for the forty (40) foot easement shown thereon. We must not lose sight of the fact that Mr. White's complaint for specific performance was based upon a contract that was entered into before the Appellees began negotiating with Roberta Jamison –Ross and there was no requirement that Mr. White accept his land with an easement over a portion of it.

Appellees would have the Court to believe that there was not a "meeting of the minds" between Appellant as a buyer and Appellees as sellers. They cite Thomas v. Bailey , 375 So.2d. 1049, 1052 (Miss. 1979) in support of their position by saying that a party can not convey something they do not own (Appellees' Brief, p. 10). While Mr. White accepts the validity of this statement, he does not believe it is applicable to the facts of this case. In Thomas the property in question had been conveyed during the life time of the decedent to two individuals and was not owned by the decedent at the time of his death. Therefore, it truly was property that was not a part of the estate. Since all of the parties to the contract were under the mistaken belief

that the property was a part of C. Evans Thomas's estate, when, in fact, it was not, there was no meeting of the minds. In the case at bar the property in question was owned by the Appellees. There was sufficient land that would require the Appellees to convey the property to Appellant, and the contract was based upon these facts. There was a meeting of the minds between Appellant and Appellees on the date the contract was signed. The contract was fully capable of being performed and the lower Court should have ordered specific performance.

Appellant believes the case of VanEtten v. Johnson (in re:Estate of Pickett), 879 So.2d. 467, 469-472 (Miss. Ct. App. 2004) is applicable to the present case. Mr. White was ready, willing and able to close the sale within the time of the contract. Any delays in closing the sale in accordance with the contract were not caused by Mr. White.

## C. APPELLEES' ISSUE NO. 2: WHETHER EXTRINSIC EVIDENCE SHOULD HAVE BEEN CONSIDERED TO INTERPRET THE CONTRACT AND DETERMINE THAT APPELLANT BREACHED THE CONTRACT.

Appellees rely on Tupelo Redevelopment Agency v. Abernathy, 913 So.2d. 278, 284 (Miss. 2005) to support their position that the court should look outside the four corners of the contract. They say that the only area that is ambiguous is the description of the property to be conveyed which they attempted to resolve through a series of plats (Appellant's Brief, p. 12).

According to the Contract (Exh. 4) the actual acreage was to be determined by survey. There were no issues in the contract regarding a driveway. Mr. Wages testified that the survey described the land shown in the brochure (Tr. 28). The easement across Mr. White's property only became an issue because of agreements entered into by and between Appellees and Roberta Jamison-Ross. Those issues did not exist at the time of the execution of the contract between

Mr. White and Cooke, et al. Appellees position is similar to a situation in which a person contracts to sell property for a specific price and subsequently finds out he can sell adjoining property if he will give an easement over the property he first agreed to sell. The granting of such an easement would be a breach of the first contract without the consent of the purchaser to the first contract.

The case of Jones v. Metzger, 132 Miss. 247, 96 So. 161 (1923) cited by Appellees did deal with a situation involving ignorant Negroes dealing with a party whom they trusted. They understood and thought they were buying land that included a residence and a barn located thereon. The case involved a mutual mistake that all parties believed the Negroes were buying the land and the residence and the barn. Such was not the case here. There was no mistake even remotely similar to the mistake in Jones. Further, there were no ignorant parties being taken advantage of by Mr. White.

Appellees state, at pages 13-14 of their Brief that the Appellant had three choices in regard to the property in question.

(a) Accept the property "as is" with an easement for ingress and egress across the existing driveway;

(b) Rescind the contract, or

(c) Breach the contract by refusing to operate in good faith and fair dealings with Cooke, Massey and Weeks. Appellees contend Mr. White elected to breach the contract.

Appellant contends that he was willing to accept the property "as is". He testified that it did not bother him that the asphalt driveway was on a portion of the property he contracted to buy (Tr. 102-103). Mr. White does not believe there were sufficient grounds for him or

Appellees to rescind the contract. Further, the delay in closing the contract was not caused by Mr. White. He was ready, willing and able to close the sale within thirty (30) days of signing the contract. The delays were the result of the Appellees' actions. Appellees were seeking the approval of the Tate County Planning Commission (Tr. 21), and preparation of surveys by Mr. Wages to try to persuade Mr. White to accept an easement over the land he was buying so Appellees could honor their subsequent agreements with Roberta Jamison-Ross.

Mr. White believes that Appellees did, in fact, breach their agreement with him by conveying the forty (40) foot easement to Roberta Jamison-Ross. Any lack of good faith and fair dealings was on their part, not his.

### D. APPELLEES' ISSUE NO. 3: WHETHER THE APPELLEES, COOKE, MASSEY AND WEEKS, RELATED TO THE APPELLANT IN ALL MATTERS CONCERNING THE CONTRACT IN GOOD FAITH AND WITH FAIR DEALINGS.

Appellees would have the court believe that W. E. White acted in bad faith in his dealings with Cooke, Massey and Weeks. Citing Cenac v. Murray, 609 So.2d. 1257, 1272 (Miss. 1992), they apparently want the Court to believe Mr. White's conduct in this case violated standards of decency, fairness and reasonableness; that his actions amounted to conscious wrong doing because of a dishonest purpose or moral obliquity (Appellees' Brief, p. 14).

Although Cenac, 1272, is a case dealing with good faith and fair dealings, it does not appear to Appellant to be pertinent to the present case.

Appellees state at page 15 of their Brief, that "Appellant relies upon an auction catalog and flyer which contained an inaccurate and impossible description." The facts of the situation are that the Appellees, at an auction held on June 5th, 2004, contracted to sell to Mr. White 179

acres, more or less, with the exact amount of land to be determined by a survey, for the price set forth in the contract. The contract was an enforceable contract. Glenn Cooke, et al, subsequently entered into agreements with Roberta Jamison-Ross to sell her five (5) acres of land in two tracts, a 1.5 acre tract and 3.5 acre tract. The problem arose that there was an asphalt driveway partially on the property Mr. White had contracted to buy. When faced with the opportunity to sell Roberta Jamison-Ross her property for $280,000.00 if they would give her an easement over Mr. White's property, Mr. Cooke could not pass up the opportunity. He breached Mr. White's contract, sold Roberta Jamison-Ross her property with the forty (40) foot easement, and took his chances in Chancery Court with Mr. White.

Appellant believes Buckley v. Garner, 935 So.2d. 1030 (Miss. 2005) is on point with the facts of this case. In Buckley a judgment granting specific performance of a contract was affirmed by the Mississippi Court of Appeals and rehearing denied by the Mississippi Supreme Court. As set forth in Appellant's Brief at page 15, Modena Buckley and William Garner entered into an agreement whereby Modena agreed to lease Buckley 27 acres of land for five (5) years with an option to purchase at the end of the five (5) years. During the five (5) year period, she sold the land to Keith Buckley. The Chancellor granted Garner's request for specific performance and that decision was upheld on appeal.

In the instant case, Appellant filed a lis pendens notice and filed suit for specific performance prior to the time the documents between Appellees and Roberta Jamison-Ross were recorded. The Court should follow the ruling in Buckley and find in favor of Mr. White, reverse the decision of the Chancellor and render a ruling in favor of the Appellant.

## E. APPELLEES' ISSUE NO. 4: WHETHER THE CHANCELLOR WAS CORRECT IN AWARDING ATTORNEY FEES TO APPELLEES COOKE, MASSEY AND WEEKS.

As stated in his Brief at page 19, Mr. White cites the contract (Exh. 4) which allows the prevailing party to recover all costs of the action and reasonable attorney fees. The Court of Appeals should reverse the decision of the Chancellor and find in favor of Appellant. That action would then allow the Court to determine that Mr. White would be entitled to his attorney fees and costs in the lower Court as well as costs and attorney fees for the resulting appeal.

## CONCLUSION

Mr. White would show that this Court should, as set forth in his conclusion at pages 20-21 of the Brief Of Appellant:

(a) Grant Appellant specific performance of the contract without the forty (40) foot easement being granted to Roberta Jamison-Ross;

(b) Order Defendants, Roberta Jamison-Ross and Sycamore Bank, to execute Quitclaim Deeds to W. E. White conveying all of their right, title and interest in and to the forty (40) foot easement reflected in their respective deeds and deeds of trust;

(c) Order that the attorney fee ordered to be paid to Appellees Cooke, et al, be paid back to W. E. White or credit given towards the sales price of the land at closing; and,

(d) That Appellant be awarded attorney fees and expenses of $6,726.05 for the proceedings in the lower court along with a reasonable attorney fee for handling of the appeal

along with all costs of court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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I, James W. Amos, Attorney for Appellant, W. E. White, do hereby certify that I have mailed by U. S. Mail, postage prepaid, a true and correct copy of the Appellant's Reply Brief to the following:

(1) Honorable Mitchell M. Lundy, Jr.
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Dated this 23rd day of May, 2008.

JAMES W. AMOS