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**

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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Phone: 662-429-7873

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6. THE COURT ERRED IN AWARDING ATTORNEY FEES TO DEFENDANTS COOKE, MASSEY AND WEEKS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant 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 disqualifications or recusals:

1. Appellant: W. E. White
   3650 Looxahoma-Tyre Road
   Senatobia, MS 38668

2. Appellees: Glenn Cooke
   86 Pamela Dr.
   Senatobia, MS 38668

   Dennis Massey
   P. O. Box 556
   Senatobia, MS 38668

   Steve Weeks
   P.O. Box 302
   Senatobia, MS 38668

Roberta Jamison-Ross
385 Magnolia Dr.
Senatobia, MS 38668

Senatobia Bank
(now Sycamore Bank)
301 E. Main St.
Senatobia, MS 38668

3. Attorney for Appellant: James W. Amos
2430 Caffey St.
Hernando, MS 38632

4. Attorneys for Appellees: John T. Lamar, Jr.
214 South Ward St.
Senatobia, MS 38668

David Slocum
214 South Ward St.
Senatobia, MS 38668

Respectfully submitted,

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2430 CAFFEY ST.
HERNANDO, MS 38632
PHONE: 662-429-7873

CERTIFICATE OF SERVICE

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 CERTIFICATE OF INTERESTED PERSONS to the following:

1- Honorable Mitchell M. Lundy, Jr.
Chancellor
Third Judicial District
P.O. Box 471
Grenada, MS 38901

2- John T. Lamar, Jr., Esq.
David Slocum
Attorneys for Appellees
214 South Ward St.
Senatobia, MS 38668

3- W. E. White
3650 Looxahoma-Tyre Road
Senatobia, MS 38668

Dated this 5th day of March, 2008.

JAMES W. AMOS
Certifying Attorney

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

None

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BRIEF OF APPELLANT

I.
STATEMENT OF ISSUES

A. THE DECISION OF THE COURT WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS IN THE FOLLOWING RESPECTS:

1. THE COURT ERRED IN CONCLUDING THAT PARAGRAPH 9 OF THE CONTRACT GAVE THE SELLERS AN "ESCAPE CLAUSE" NOT TO CLOSE THE SALE IN ACCORDANCE WITH THE CONTRACT

2. THE COURT ERRED IN FINDING THAT IT WAS THE FAIR AND REASONABLE THING TO DO FOR COOKE, ET AL, TO GO AHEAD WITH THE SALE OF TRACTS 10 AND 11 TO ROBERTA JAMISON-ROSS

3. THE COURT ERRED IN CONCLUDING THAT THE DEFENDANTS COOKE, MASSEY AND WEEKS HAD AN ESCAPE CLAUSE IN THE SAID CONTRACT, AND THAT THE MISTAKE THE COURT FOUND REQUIRED THE PARTIES TO "RELATE TO ONE ANOTHER' IN ALL MATTERS CONCERNING THE CONTRACT, IN GOOD FAITH AND WITH FAIR DEALINGS"

4. THE COURT ERRED IN CONCLUDING THAT DEFENDANTS COOKE, MASSEY AND WEEKS DID NOT HAVE THE FORTY FEET OF LAND TO CONVEY TO WHITE AS SET FORTH IN THE BROCHURE AND TO BE CONVEYED TO WHITE PURSUANT TO THE CONTRACT

5. THE COURT ERRED IN CONCLUDING THAT BECAUSE THE CLOSING OF THE CONTRACT DID NOT TAKE PLACE WITHIN THIRTY DAYS, UNDER THE FACTS OF THIS CASE, PLAINTIFF WAS NOT ENTITLED TO SPECIFIC PERFORMANCE

6. THE COURT ERRED IN AWARDING ATTORNEY FEES TO DEFENDANTS COOKE, MASSEY AND WEEKS

II.
STATEMENT OF THE CASE

The nature of the case, and the course of the proceedings, and its disposition in the Court below are as follows. This case comes as a result of Appellant entering into a contract to purchase land of which he was the highest bidder at an auction held by John Roebuck and Company, Inc. as agent of Glenn Cooke, Dennis Massey and Steve Weeks. The closing was to be held within thirty (30) days from the date of the auction but was delayed through no fault of Appellant. Subsequent to the auction, Defendants Cooke, Massey and Weeks, contracted to sell and did in fact close sales of 3.5 acres of land and a big house and 1.5 acres and a small house to Roberta Jamison-Ross. There was no provision in the auction catalog or the auction brochure indicating there would be an easement of any sort over the land Mr. White agreed to purchase. Defendants Cooke, Massey and Weeks, however, agreed to give Roberta Jamison-Ross a forty (40) foot easement over the real property Mr. White was purchasing. Mr. White was not

agreeable so he had prepared and filed a Complaint For Specific Performance against the Sellers and also filed a Lis Pendens Notice regarding the land involved in the Chancery Court Complaint.

Defendants Cooke, Massey and Weeks proceeded to close the sale of the two tracts of land to Roberta Jamison-Ross conveying to her the 3.5 acre tract, the 1.5 acre tract, and a forty (40) foot easement over a portion of the property Mr. White had agreed to purchase.

After a trial on the issues involved, the Chancellor, Mitchell Lundy, Jr., denied Appellant was entitled to the relief prayed for and lifted the Lis Pendens Notice and awarded attorney fees to Defendants Cooke, Massey and Weeks.

The facts of this case insofar as pertinent to this matter are as follows:

On June 5th, 2004, Glenn Cooke, Dennis Massey and Steve Weeks held an auction of approximately 179 acres of real property that is the subject matter of this case (Tr. 7). They were the owners of the property (Tr. 8) (R.E. 5). The auctioneer was John Roebuck And Company out of Memphis (Tr. 8-9). An auction catalog was prepared by Mr. Roebuck for the auction (Tr. 9) (R.E. 6). A brochure was also prepared for the auction (Tr. 9-10) (R.E. 7).

Mr. White testified that he attended the auction on June 5th, 2004 (Tr.62). The contract was signed by Glenn Cooke as seller and W. E. White as buyer (R.E. 8). According to the contract introduced as Exhibit #4 and included in the Record Excerpts as #8, Mr. White was purchasing 178.75 acres of land for the sum of One Hundred Fifty Thousand Four Hundred Eighteen and 13/100 ($150,418.13) with the final price to be determined by the actual surveyed acreage. Earnest money of Thirteen Thousand Six Hundred Seventy-Four and 38/100 ($13,684.38) was deposited with the auctioneer as consideration for the contract. The closing

was to take place within thirty (30) days from the date after the execution of the contract by the last party to sign at the office of Barry Bridgforth, of Bridgforth & Buntin, in Southaven, Mississippi. The contract provided,

> "If the title is not good and cannot be made good within sixty (60) days after written notice has been given to Seller that the title is defective, specifically pointing out the defects, then the Deposit shall be returned to Buyer and this Contract shall become null and void unless Buyer elects to accept the defective title. In the event the time needed to correct said defaults extends beyond the aforesaid time to close, the time to close shall be extended as reasonably necessary. If this Contract is otherwise breached by Seller, Buyer shall have the right to affirm this Contract and enforce its specific performance or require the immediate return of the Deposit and recover full damages for its breach. In any event, if title is not so made good or Seller otherwise breaches this Contract, Seller shall pay the Buyers Premium to JRA and any amounts due pursuant to any other agreement between JRA and Seller, plus all costs of collection, including attorney fees."

The contract further states at Paragraph 7 thereof:

> "If Buyer breaches this Contract, Seller shall have the right to declare this Contract canceled and recover full damages for its breach or to elect to affirm this Contract and enforce its specific performance. In either event, the Deposit shall be retained by JRA to the extent of the Buyer's Premium with any excess to be paid to Seller".

The contract (R.E. 8) was on a printed form apparently prepared by Defendants Cooke, Massey and Weeks' agent at the auction, John Roebuck And Associates, Inc.

Roberta Jamison-Ross attended the auction on June 5th, 2004, and was the successful bidder on Tracts 4 and 5 as set forth in the auction brochure. However, she never closed on these transactions (Tr. 14). Mr. Cooke testified that she came to see him a few days after the auction and told him that she did not want to purchase Tracts 4 and 5, but wanted to buy the two houses shown in the brochure (Tr. 14-15).

The small house was located on a 1.5 acre tract of land and was conveyed by

Defendants Cooke, Massey and Weeks by deed dated July 20th, 2004, but not recorded until October 12th, 2004 (Tr. 16) (R.E. 9). The description to this property contains a 40 foot ingress easement which, according to Mr. Cooke, he and his partners had to give to Roberta Jamison-Ross because the existing driveway was there and already asphalted. Cooke admitted that the driveway was part of the property Mr. White was buying (Tr. 15-16). The small house and 1.5 acres was to be owner financed and the loan was assigned to Defendant, Senatobia Bank (now Sycamore Bank) (Tr. 17). Mr. Cooke admitted he had been a banker and was familiar with real estate dealings (Tr. 16-17) (R.E. 9) (Exh. 6 and 7). Mr. Cooke also testified that he and his partners sold the 3.5 acre tract and house (the big house) to Roberta Jamison-Ross for Two Hundred Twenty-Five Thousand and 00/100 ($225,000.00) cash which she got through a mortgage (Tr. 18-19) (R.E. 10). The deeds involved in the sale to Roberta Jamison-Ross were both recorded after the Complaint For Specific Performance and the Lis Pendens Notice were filed.

Mr. Cooke said that when he and Mr. White signed the contract (R.E. 8) the property described therein was Tracts 6, 7, 8 and 9 as shown on the brochure (R.E. 7) (Tr. 18-19). He also said he would not have been able to put together a sale with Roberta Jamison-Ross without giving her an easement over the 40 foot strip. Mr. Cooke admitted that he gave Roberta Jamison-Ross an easement across the property Mr. White was buying. He admitted he needed the money for his debt (Tr. 20).

Mr. Cooke testified that the closing of the contract (R.E. 8) was supposed to take place within thirty (30) days from the date of the auction but they had to get different tracts approved by the Tate County Planning Commission (Tr. 21).

On September 20th, 2004, at 3:57 p.m. a Lis Pendens Notice was filed in the Office of the Chancery Clerk of Tate County, Mississippi, identifying the 179.25 acre tract of land Mr. White was purchasing from Defendants Cooke, Massey and Weeks (R.E. 15)(Exh. 17).

As previously stated, Mr. White signed the contract (R.E. 8) on the date of the auction, June 5th, 2004. Roberta Jamison-Ross contracted to purchase the small house and the big house a few days after the auction. The deed to the small house was recorded on October 12th, 2004, and the deed to the big house was recorded on September 27th, 2004. The Lis Pendens Notice put any purchaser, including Roberta Jamison-Ross, on notice of the land Mr. White was purchasing which included the 40 foot strip where the easement was located.

James William Wages was employed by the auctioneers office to survey the property according to the auction brochure (Tr. 23-24). He said he found a discrepancy between the brochure and the physical features on the ground in that the driveway was on the East 40 feet of the property (Tr. 24-25). Mr. Wages told the Court that there were fifty (50) feet of frontage along Magnolia Dr. for Tract 10 and 11 as shown on the brochure (R.E. 7) which would have allowed sufficient room to construct a road from Magnolia Dr. to the house in the back (Tr. 26).

Mr. Wages testified that he prepared a survey of the property (R.E. 11)(Ex. 9). The survey was of 179.2, plus or minus, acres that was being purchased by Mr. White, and that it included the forty (40) foot strip that fronts on Magnolia Dr. He said the only thing keeping the description on the survey from being a description in accordance with the brochure (R.E. 7) would be to remove the easement from the forty (40) foot strip. Then, without the said easement, the survey would represent Tract 9 of the brochure as it should be (Tr. 28). Later, on cross-examination, Mr. Wages was asked by Mr. Lamar if it were factually impossible, from his work

on the ground, that there were forty (40) feet to the East of Tract 10 that Roberta Jamison-Ross purchased. His answer was that,

> "There was not forty (40) feet between the driveway and the East property line. There was not room to put a forty (40) foot strip between the driveway and the property line." (Tr. 31-32).

As previously stated, Mr. Wages said the discrepancy was that the driveway was not shown properly on the brochure, but Mrs. Ross had fifty (50) feet of frontage which was more than enough land to allow for a driveway to be built.

Roberta Jamison-Ross confirmed by her testimony that she purchased the two tracts with the houses located thereon. The 1.5 acre tract deed was recorded October 12th, 2004 and the 3.5 acre tract deed was recorded September 27th, 2004 (Tr. 50-52). She acknowledged that she accessed her house from the same driveway but she had no idea as to how much road frontage she had purchased. She only thought she had an easement road or driveway (Tr. 52-53).

Mr. White, the Plaintiff in the proceedings, testified that he ended up being the highest bidder of four (4) tracts as identified on the sale brochure as Tracts 6, 7, 8 and 9. It was his understanding that he was to have access to Tract 9 by a forty (40) foot piece of property he was buying that would connect at Magnolia Dr. (Tr. 63). He testified that the contract said the closing was to be within thirty (30) days but they were delays to the closing -- there were plat issues and Planning Commission's approval necessary from the Seller's standpoint (Tr. 64).

Mr. White said he was not made aware at the time he signed the contract on June 5th, 2004 (R.E. 8) there would be an easement across the property he was buying (Tr. 68). Mr. White said upon his observation of Exhibit 9 (R.E. 11), the final plat prepared by Mr. Wages, the land surveyor, that it looked like the property he was purchasing except for the right of way shown

thereon (Tr. 69).

The Lis Pendens Notice referred to as Exhibit 17 (R.E. 15) was introduced into evidence through Mr. White's testimony (Tr.73).

Mr. White went on to testify that he was not told that the driveway leading up to the property purchased by Roberta Jamison-Ross was not on the property he bought (Tr. 73).

Mr. White testified that he was in court asking the court to require Defendants Cooke, Massey and Weeks to sell him the property indicated in the said brochure without the forty (40) foot easement shown on the survey of July 28th (Tr. 36) (R.E. 11).

Mr. White further testified that he incurred attorney fees of $6,726.05 of which he had paid $4,057.00 to go to court to enforce the contract (Tr. 87-88). Said attorney's report of fees was introduced as Exhibit #24.

Appellant further testified that he was ready, willing and able to close the sale of the contract. He has been holding his money to close with since June 25th, 2004 (Tr. 88-89).

To summarize the statement of the case, Mr. White after being the successful bidder, contracted to purchase approximately 179 acres of land from Cooke, Massey and Weeks on June 5th, 2004. After the contract was executed by all parties, the sellers decided to grant a 40 foot easement across a portion of the land being purchased by Mr. White so they could close a deal on two houses and 5 acres of land to Robert Jamison-Ross. The Complaint For Specific Performance filed by Mr. White and a Lis Pendens Notice filed on his behalf were filed prior to Cooke, Massey and Weeks completing the closing regarding property sold to Roberta Jamison-Ross. Yet, because of the money involved, the sellers handed her an easement across the property Mr. White was purchasing anyway. Appellant believes he is entitled to specific

performance without the forty (40) foot easement across the property he contracted to buy.

III.
SUMMARY OF THE ARGUMENT

W. E. White is entitled to specific performance of the contract he entered into with Glenn Cooke, et al. At the June 5th, 2004 auction held by John Roebuck And Associates, Inc. He was the successful bidder at the pubic sale of 179 acres of land, more or less, in Tate County, Mississippi. Upon signing the contract he paid the required deposit as set forth in the contract. He was ready, willing and able to pay the balance of One Hundred Fifty Thousand Four Hundred Eighteen and 13/100 ($150,418.13) within the thirty (30) day time for closing as stated in the contract.

Shortly after Mr. White contracted with Mr. Cooke, et al, to purchase the land, Mr. Cooke and his partners negotiated with Roberta Jamison-Ross for the sale of a 3.5 acre tract of land and house and the sale of a 1.5 acre tract of land and a house. The 3.5 acre tract and the large house located thereon sold for the enticing sum of Two Hundred Twenty-Five Thousand and 00/100 ($225,000.00) cash. This was too good to pass up according to Glenn Cooke. He and his partners could use the money to pay down their bank loan. They then sold the 1.5 acre tract and smaller house to Roberta Jamison-Ross for the sum of Fifty-Five Thousand and 00/100 ($55,000.00). They owner financed this property and assigned the paper to Senatobia Bank (now Sycamore Bank) as security for their loan at the bank. There was one problem in attaining the sale of the 3.5 acre and 1.5 acre tracts to Roberta Jamison-Ross. She would not buy them unless Mr. Cooke and his partners granted her a forty (40) foot ingress easement from Magnolia Dr. across the land Mr. White had contracted to purchase. As it turned out, the asphalt drive used to

access Roberta Jamison-Ross's property was partially located on the property Mr. White had already contracted to buy. Torn between contractual rights and greed, Glenn Cooke opted to go for the money offered by Roberta Jamison-Ross. Therefore, it became necessary for Mr. Cooke to convince Mr. White to accept the land he was buying with a forty (40) foot easement across it to satisfy Roberta Jamison-Ross in the purchase of her two houses.

According to Mr. Wages, the professional land surveyor hired by Cooke, et al, that although the auction brochure incorrectly showed the actual location of the asphalt drive, there was sufficient road frontage for Mr. White to have his land unencumbered by an easement and Roberta Jamison-Ross to have room to build a driveway to her houses. Mr. Wages said that except for the easement he had drawn on the survey which was Exhibit 9 at trial, the survey would have been in accordance with the drawing on the auction brochure.

Mr. White would not accept the changes to the property he had contracted to buy. He would not agree to the easement. By the time Mr. White learned of the easement, Mr. Cooke and his partner had already agreed to sell Roberta Jamison-Ross the 3.5 acre and the 1.5 acre tracts with the easement located thereon. Mr. White filed his Complaint For Specific Performance in Chancery Court on September 20th, 2004, along with the Lis Pendens Notice. Subsequently, the deeds to Roberta Jamison-Ross's property were recorded.

Mr. White contends that when he entered into the contract he was ready, willing and able to close. He contends that he is entitled to the property without there being an easement across it. He further contends the lower Court should have granted him the relief prayed for by ordering specific performance of the contract and requiring the forty (40) foot easement granted to Roberta Jamison-Ross to be set aside and held for naught and any liens or encumbrances thereon

in favor of Sycamore Bank be set aside. Mr. White also believes that all orders granting relief to Defendants Cooke, Massey and Weeks should be reversed and Mr. White believes he should be awarded his attorney fees and expenses requested in the lower Court and would ask for attorney fees and costs for this appeal.

IV.
ARGUMENT

A. STANDARD OF REVIEW

The standard of review for a case tried before a Chancellor as set forth in Moore v. Marathon Asset Management, 2008 MSCA, 2006-CA-01405-012908 (2006) Paragraph 8 is as follows:

> "This court will not reverse the decision of a Chancery Court unless that decision was manifestly wrong, clearly erroneous, or if the Chancellor applied an incorrect legal standard. Nichols v. Funderburk, 883 So.2d. 554, 556 (Miss. 2004)."

B. THE COURT ERRED IN CONCLUDING THAT THE CONTRACT GAVE THE SELLERS AN "ESCAPE CLAUSE" NOT TO CLOSE THE SALE IN ACCORDANCE WITH THE CONTRACT

The contract (R.E. 8) (Exh. 4) described the real estate to be purchased by Appellant as Tract 6, 7, 8 and 9 of the farm located north of Magnolia Lane, Senatobia, Tate County, Mississippi. Paragraph 2 of the contract said,

> "The closing contemplated hereby shall take place on or before thirty (30) days after the execution hereby of the last party to sign."

There are no known defects in the title to the property, but the seller would not, because of reasons of their own choosing, convey the property contracted for to Appellant. Incorporated

into paragraph 6 of the contract we find the following wording:

> "If this Contract is otherwise breached by Seller, Buyer shall have the right to affirm this contract and enforce its specific performance or require the immediate return of the deposit and recover full damages for its breach".

The contract did say, at paragraph 9, that the property shall be conveyed in "as is" condition. Mr. White took the position that there was pavement on the 40 foot strip of land he was buying that is the subject matter of this suit. He said,

> "The fact that there was pavement on that forty foot piece that I bought made it as is so, what if there was pavement on it." (Tr. 102)

Mr. Wages, the land surveyor, testified to the effect that the only thing keeping the description of the land in the survey plat he prepared from properly describing the property in accordance with the auction brochure was the easement (Tr. 28).

Appellant contends that because the contract (R.E. 8)(Exh. 4) was entered into before Cooke, Massey and Weeks entered into negotiations with Defendant, Robert Jamison-Ross, that they had a legal obligation to Mr. White that was paramount to any subsequent obligations they may have owed to Roberta Jamison-Ross. Therefore, we must look to the contract (R.E. 8)(Exh. 4) to determine what rights Mr. White had pertaining to the property he was buying and whether the sellers had the right to impose an easement on it. There were no allegations by any of the parties that adverse possession was ever an issue in this matter.

The Chancellor relied upon the case of Rotenberry v. Hooker, 864 So.2d. 266 (Miss. 2003) when he stated in his Opinion under Conclusions Of Law (R.E. 2) that the elements of a contract are:

"1) Two or more contracting parties;
2) Consideration;
3) An agreement that is sufficiently definite;
4) Parties with legal capacity to make a contract;
5) Mutual assent; and,
6) No legal prohibition precluding contract formation."

The lower court found there was a contract to sell land but determined that it was not enforceable.

In Rotenberry, supra, the Court found the contract was not enforceable because there was never an agreement in regard to the contract price.

In the present case all six of the elements of a contract are present and are satisfied. Appellant believes the Chancellor confused Defendants Cook, Massey and Weeks obligation to Appellant with what their obligations were with Defendant, Roberta Jamison-Ross. Although the obligation to Mr. White conflicted with the obligation to Robert Jamison-Ross, Appellant contends that the obligation to Mr. White must be paramount.

In McKee v. McKee, 568 So.2d. 262 (Miss. 1990) at page 226, it was said,

> "Under general principles of contract law, one should look to the 'four corners' of a contract whenever possible to determine how to interpret it."

The four corners of the contract in this case (R.E. 8) are clear and unambiguous. It is only when one starts looking outside of the "four corners" of the contract does it appear otherwise.

This is a case in which the Plaintiff is attempting to have a court grant specific performance of a contract dealing with real estate. In Tyson Breeders v. Harrison, 940 So.2d. 230 (Miss. 2006) at paragraph 12, citing Roberts v. Spence, 209 So.2d. 623, 626 (Miss. 1962), the Court differentiated between a contract not involving a unique matter such as real estate.

Specific performance is a particularly appropriate remedy in a case involving real estate.

Appellant contends that the Court was wrong when the Court did not grant specific performance of the contract to Appellant. There was no escape clause in the contract.

Appellant denies that he violated the contractual requirement of having to "relate to one another in all matters concerning this Contract in good faith and with fair dealings" (R.E. 8)(Exh. 4). There is absolutely no proof in the record that Appellant failed to act in good faith and with fair dealings. All he ever asked of the Defendants, Cooke, Massey and Weeks, was that they act in good faith and fair dealings with him. It was the agreement between Mr. White and Cooke, et al, for him to purchase about 179 acres of land without any easements across the land. It was only after Mr. Cooke became greedy and found it necessary to grant Defendant Jamison-Ross the easement did any party to this matter act in bad faith and with unfair dealings. It was the bad faith of Mr. Cooke and his partners to sell real property to Roberta Jamison-Ross with the forty foot easement across Mr. White's contracted for property that resulted in the Chancery Court action being filed in the court below. Mr. White should not be punished for the actions of Cooke, et al. The contract between White and Cooke meets the requirement of the Rotenberry case as cited by the lower court and should be specifically enforced as requested by Mr. White.

C. THE COURT ERRED IN FINDING THAT IT WAS THE FAIR AND REASONABLE THING TO DO FOR COOKE, ET AL, TO GO AHEAD WITH THE SALE OF TRACTS 10 AND 11 TO ROBERTA JAMISON-ROSS

The testimony in this case is very clear. The contract (R.E. 8)(Exh. 4) between Mr. White and Cooke, et al, was executed and in force prior to any dealings between Cooke, et al, and Roberta Jamison-Ross. In situations such as this the first contract (R.E. 8)(Exh. 4) will

prevail over any subsequent dealings between Cooke, et al, and Jamison-Ross. Consider the case of Buckley v. Garner, 2005 So.2d. There, in 1998, Modena Buckley and William Garner entered into an agreement where Modena agreed to lease Garner 27 acres of land for five years with an option to purchase for $45,000.00 at the end of the five year period. The agreement was never recorded in the Chancery Clerk's Office. On October 9th, 1999, Modena executed a warranty deed conveying the 27 acres of land to Keith Buckley. Three years later when Garner contacted Modena to exercise his option to purchase contained in the prior lease, he was told the property had been conveyed to Keith, who, in turn, informed Garner he had no desire to sell. The Court stated, at page 1032 that,

> "In order to defeat the option, Keith must prove that he was a bona fide purchaser, that is, a purchaser for a valuable consideration without actual or constructive notice of Garner's unrecorded option."

The Chancellor in the Buckley case granted Garner's request for specific performance. The Mississippi Court of Appeals affirmed the decision and rehearing was denied by the Mississippi Supreme Court.

The pertinent facts of the present case are that Roberta Jamison-Ross had constructive notice of the contract and complaint for specific performance filed by Plaintiff. The Lis Pendens Notice and the lawsuit were both filed on September 20th, 2004, several days prior to any recordation of Roberta Jamison-Ross's deeds.

Cooke, et al, knew that Mr. White was entitled to obtain ownership of the land he contracted to buy and that they did not have to, nor should they, grant the 40 foot easement to Roberta Jamison-Ross.

Section 11-47-3, Mississippi Code of 1972, Annotated and Amended, states:

> "When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the clerk of the Chancery Court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the lis pendens record and note on it, and in the record, the hour and day of filing and recording."

A Lis Pendens Notice (R.E. 15)(Exh. 17) was duly filed in the Chancery Court Clerk's Office of Tate County, Mississippi. The Lis Pendens Notice complied with Section 11-47-3, Mississippi Code of 1972, Annotated and Amended. The Notice acted as constructive notice of the pending lawsuit against Cooke, et al.

Appellant contends that the Court should have found that the Lis Pendens Notice protected Mr. White's contractual rights against Cooke, et al, from conveying Roberta Jamison-Ross the forty (40) foot easement across a portion of the real property Appellant had contracted to purchase. There is no factual basis for the Court to find it to be the fair and reasonable thing to do to sell Roberta Jamison-Ross land with the 40 feet easement across the property Mr. White was buying.

D. THE COURT ERRED IN CONCLUDING THAT DEFENDANTS COOKE, MASSEY AND WEEKS DID NOT HAVE THE FORTY FEET OF LAND TO CONVEY TO MR. WHITE AS SET FORTH IN THE BROCHURE AND TO BE CONVEYED TO WHITE PURSUANT TO THE CONTRACT

As testified to by James William Wages, the land surveyor for Cooke, et al, the only thing keeping the description on the survey plat he prepared (R.E. 11)(Exh. 9) from being a

description conforming to the auction brochure (R.E. 7)(Exh. 3) was the forty foot easement he had drawn on the survey (Tr. 28). The only real problem arising out the circumstances was that the brochure indicated a driveway that apparently was intended to serve the houses and land Roberta Jamison-Ross later agreed to purchase after Defendants Cooke, et al, had already contracted to sell the property where the driveway was located to Mr. White. Mr. Wages said there was not forty feet of property between the driveway and the east line of the property (Tr. 31-32). But, he had also said the discrepancy was that the driveway was not shown properly on the auction brochure. Roberta Jamison-Ross did have fifty (50) feet of frontage which was sufficient land to allow for a driveway to be built.

The problem faced by Defendants Cooke, et al, was that they would lose a sale to Roberta Jamison-Ross for two hundred eight thousand and 00/100 dollars ($280,000.00) unless they granted her demands to include the use of the existing driveway in her deed. Faced with doing the right thing by honoring their contract with Mr. White and granting Roberta Jamison-Ross what she wanted and was willing to pay two hundred eighty thousand and 00/100 dollars ($280,000.00) for, Cooke, et al, elected to breach their agreement with Mr. White and try to persuade him to accept a change in his contract rights. Mr. White refused to succumb to their demands and elected to seek specific performance of his contractual rights.

E. THE COURT ERRED IN CONCLUDING THAT BECAUSE THE CONTRACT DID NOT TAKE PLACE WITHIN THIRTY DAYS, UNDER THE FACTS OF THIS CASE, PLAINTIFF WAS NOT ENTITLED TO SPECIFIC PERFORMANCE

Glenn Cooke testified that the contract was not able to close within thirty days of the signing thereof because he and his partners had to get approval by the Tate County Planning Commission (Tr. 21). Further, the contract stated as follows,

"Seller shall furnish a title search covering the property as required by Any of the major title companies in Memphis for the issuance of a title Policy." (R.E. 8)(Exh. 4)

The record is void of any attempt on behalf of Cooke, et al, to do so. Instead, all efforts on the part of the Seller of the property seemed to be geared toward convincing the buyer, Mr. White, to accept a change in the terms of the parties' agreement so that Cooke, et al, could satisfy the request of Roberta Jamison-Ross in regard to the easement that would allow her use of the paved driveway. That way she could avoid the expense of having to put in a driveway.

The case VanEtten v. Johnson (in re: Estate of Pickett), 879 So.2d. 467, 469-472 (Miss. Ct. App. 2004), involved a situation whereby a sale of real estate was to take place on or before December 15th, 1999. After the contract was signed, but before the scheduled closing date, the seller died. The buyer was ready, willing and able to close the sale within the time set out in the contract. After the seller's Will was admitted to probate, the buyer petitioned the Chancery Court to require the executor to carry out the provisions of the contract. The real estate in question had been devised to the VanEttens. They opposed the buyer's motion on the grounds that the time for closing the contract had passed and the contract had not closed. In that case, on page 471, the Court found that the buyer was ready, willing and able, but the estate of the seller was not in a position to close the transaction on or before December 15th, 1999. The Court said,

"In that situation, where one party having the right to demand performance stands ready and willing to carry out an executory contract but the other party can not perform due to a temporary impossibility, the passing of the designated date for performance does not result in voiding the contract. rather, that event simply extends the time of performance appropriately

> until the impossibility ceases. Culp v. Tri-County Tractor, Inc., 112 Idaho 894, 736 P.2d. 1348, 1354 (1987) (citing Restatement (Second) of Contracts, Section 269, cmt. a (1981)). If the non-performing party fails to perform after removal of the impossibility, a ready and able purchaser may seek specific performance or such other legal remedy as may appear appropriate in the particular case."

When asked as to whether Mr. White was ready, willing and able to close the transaction he said, "Yes, I've been holding the money since the 25th of June." In other words, within 30 days after the execution of the contract, Mr. White had his money available to close the sale and buy the property. Any delays in closing the sale within the thirty day time period were caused by the seller.

Appellant contends that he was entitled to specific performance of the contract.

F. THE COURT ERRED IN AWARDING ATTORNEY FEES TO DEFENDANT, COOKE, MASSEY AND WEEKS

The Contract between the parties (R.E. 8) (Exh. 4) grants the prevailing party or parties to be entitled to recover all costs of the action and reasonable attorney fees. Mr. White contends that the Chancellor was in error when he found for the Defendants Cooke, et al, and awarded them attorney fees of $7,730.89 (R.E. 3)(Exh. 3). If the underlying reasons for awarding attorney fees is invalid, then those attorney fees should not be due and owing. The trial docket (R.E. 1) reflects that on July 10th, 2007, the Clerk of the Court issued payment to Glenn Cooke, Dennis Massey and Steve Weeks for $7,730.89. Appellant believes this amount should, instead, be applied to the original purchase price of the property.

VI.
CONCLUSION

Appellant White was the successful bidder at the auction held on June 5th, 2004, in Tate County, Mississippi. He appealed the Order denying him the right to specific performance of that contract to this Court. He was ready, willing and able on the original closing date (thirty days from the signing of the contract) to close the sale. Due to delays on the part of the Sellers, the sale could not close within thirty days from the signing of the contract. Further, the Sellers breached the contract by conveying to Defendant, Robert Jamison-Ross, a forty (40) foot easement across a portion of the land Mr. White had already contracted to buy. After Appellant agreed to buy his land, the Sellers, Cooke, et al, began negotiating to sell a 1.5 acre tract and a 3.5 acre tract of land to Defendant, Roberta Jamison-Ross. Roberta Jamison-Ross wanted the use of the paved drive-way as part and parcel of her deal. Glenn Cooke would not say no to her and agreed to sell her the properties, one for two hundred twenty-five thousand and 00/100 ($225,000.00) cash and the other owner financed for fifty-five thousand and 00/100 ($55,000.00) with monthly payments. The note and deed of trust which was given in exchange for the $55,000.00 property were assigned to Senatobia Bank (now Sycamore Bank). Glenn Cooke told the Court that he would not have been able to put together a sale to Roberta Jamison-Ross without giving her an easement over the forty (40) foot strip (Tr. 20).

Before the deeds to the property Cooke, et al, conveyed to Roberta Jamison-Ross were recorded in the Office of the Chancery Clerk of Tate County, Mississippi, Mr. White filed his lawsuit against Cooke, et al, and along with the suit filed a Lis Pendens Notice of the suit and the real property affected thereby, which included that portion of the property over which the forty

(40) foot easement was to go.

Defendants, Cooke, et al, had actual and constructive notice of sale to Mr. White since they were party to the contract. Roberta Jamison-Ross had constructive notice of the pending sale by virtue of the Lis Pendens Notice. Yet, the easement was conveyed to her anyway.

Appellant contends the Chancellor was manifestly wrong when he ordered that the specific performance suit filed by White should be dismissed and that attorney's fees should be awarded to Cooke, et al.

Appellant is asking this Court to reverse the Chancellor's decision in the Court below and render a decision in favor of Appellant, W. E. White, as follows:

A. Grant Appellant specific performance of the Contract between Cooke, Massey & Weeks, without the forty (40) foot easement;

B. Order that Defendant, Roberta Jamison-Ross and Sycamore Bank 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 Defendants, Cooke, et al, be paid back to Appellant or credit given towards the sale's price of the land purchased at closing;

D. That the Appellant be awarded attorney fees and expenses of $6,726.05 for the proceedings in the Court below plus a reasonable attorney fee for handling the appeal

and all costs of the appeal.

Respectfully submitted,

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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**

CERTIFICATE OF SERVICE

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 Brief to the following:

(1) Honorable Mitchell M. Lundy, Jr.
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Dated this 5th day of March, 2008.

JAMES W. AMOS