

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

**BILLY G. AUSTIN and
AGNES H. AUSTIN**

APPELLANTS

VS.

NO. 2007-CA-01779

**THURMAN L. CARPENTER
and GLADYS L. CARPENTER**

APPELLEES

ORAL ARGUMENT NOT REQUESTED

**APPEAL FROM THE CHANCERY COURT OF
TISHOMINGO COUNTY, MISSISSIPPI**

BRIEF OF APPELLEES

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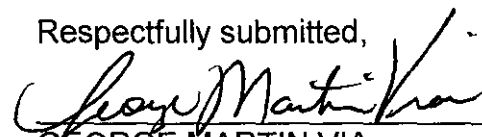
APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Billy G. Austin and Agnes H. Austin, Appellants
2. Richard D. Bowen, attorney for Appellants
3. Thurman L. Carpenter and Gladys L. Carpenter, Appellees
4. George Martin Via, Attorney for Appellees
5. Honorable Michael Malski, Chancellor

Respectfully submitted,



GEORGE MARTIN VIA,
Attorney for Appellees

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	ii.
TABLE OF CONTENTS.....	iii.
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT	9
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

<u>Crisler v. Crisler</u> 2007, MSCA 2006-CA099833 (Miss.2005) (¶)	11
<u>Crocker, et al. v. Farmers & Merchants Bank,</u> 293 So.2d 483 (Miss. 1974)	12
<u>Duke v. Whatley,</u> 580 So.2d 1267 (Miss. 1991)	13
<u>Etheridge v. Ramzy</u> 276 So.2d 451 (Miss. 1973)	12
<u>Fowler v. Nunnery,</u> 126 Miss. 510, 89 So. 156, (1921)	11
<u>Frazier v. Northeast Mississippi Shopping Ctr. Inc.</u> 458 So.2d 1051, 1054 (Miss. 1984)	11
<u>Lanier v. State,</u> 635 So.2d 813, (Miss. 1994)	9
<u>Leach v. Tingle,</u> 586 So.2d 799, (Miss. 1991)	9, 14
<u>McCarty v. Lawrence,</u> 231 So.2d 775 (Miss. 1970)	10
<u>Rotenberry v. Hooker,</u> 2002-CA-0096-SCT(Miss. 2003)	9
<u>Stampley v. Gilbert,</u> 332 So.2d 61, (Miss. 1976)	14
<u>Webster v. Gunter,</u> 293 Ala.282,302 So.2d 97 (1974)	12
<u>Welch v. Williams,</u> 85 Miss. 301, 37 So. 561, (1904)	12

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STATEMENT OF ISSUES

The issues presented for review on this appeal are as follows:

1. Did the parties enter into a binding contract for the sale of real property?
2. If the parties did in fact enter into a binding contract for the sale of real property are the terms thereof such that specific performance could be ordered.

STATEMENT OF THE CASE

A. Nature of the Case.

Billy G. Austin and wife, Agnes H. Austin, Appellants, (hereinafter referred to as "the Austins") appeal the decision of the Chancellor finding that a valid contract for the sale and purchase of real property never existed and denying the Austins specific performance on the alleged contract.

B. Course of Proceedings and Disposition in the Court Below

The Austins brought suit against the Carpenters in the Chancery Court of Tishomingo County by the filing of a complaint (R. pp 2-5).¹ The complaint sought specific performance of an alleged contract, entitled "Agreement for Purchase of Real Estate" (Exhibit 2). A trial was held before the Chancery Court on February 20, 2007, and following the submission of briefs by the parties, the Chancellor rendered his Memorandum Opinion and Judgment dated August 23, 2007 (R. pp 28-35). The Opinion and Judgment found that a valid contract never existed and denied the relief requested by the Austins.

¹Pursuant to M.R.A.P. 28(e) references herein shall be made to the record. The record was submitted as "Clerk's Papers" Volume 1 which includes pages 1 through 41 which included the pleadings. Trial exhibits No. 1 through 19 shall be referenced herein by the Exhibit No. The Transcript of trial testimony was submitted as "Transcript" Volumes I and II pages 1 through 157.

The following abbreviations will be used throughout this brief: (R.p) denotes references to page(s) in the volume of the record entitled "Clerk's Papers": (T.p) denotes references to page(s) in the record entitled "Transcript". References to exhibits will be to the exhibit number.

C. Statement of Facts

Appellees, Thurman L. Carpenter and Gladys L. Carpenter, (hereinafter referred to as "the Carpenters") purchased a tract of real property in Tishomingo County, Mississippi in 1977 consisting of approximately 2.35 acres. (T. p 89) The Carpenters' deed (Exhibit 10) describes four tracts of real property, all of which are contiguous and all four are located in separate sections. This property is bounded on the east by Pickwick Lake and the tract is located in four separate sections, Section 33 and Section 34 of Township 1, Range 10 and in Section 3 and Section 4 of Township 2, Range 10. An understanding of the geography of the property is essential to a clear understanding of the issues involved. The property is accurately depicted in survey plats which were introduced as Exhibit 1 and Exhibit 8. At the time the Carpenters purchased the property there was already a cabin located on the property and the Carpenters thereafter constructed a vacation home. (T. pp 89-90).

Billy G. Austin and Agnes H. Austin, Appellants, (hereinafter referred to as "the Austins"), have relatives who own property in the near vicinity of the Carpenter's property; and they became familiar with the Carpenters' property while visiting their relatives. Two or three years prior to the alleged contract which forms the basis of this litigation, Mr. Carpenter and Mr. Austin spoke to each other, in general terms, and at some point, began to discuss the sale of all, or a part of, the Carpenter property. Mr. Carpenter and Mr. Austin spoke several times about the possible sale of the property. Both the Carpenters and the Austins are residents of the State of Tennessee and most of their negotiations took place at the Carpenters' home in Tennessee (T. p 40, 103-108). In fact, Mr. Carpenter and Mr.

Austin never met together on the property during their negotiations. (T. p 40-41,106).

The parties began more serious discussions about the sale of the property in the spring of 2005. At some point throughout the parties' discussions, the Carpenters verbally assented to sell a portion of the property they owned to the Austins and the parties agreed on a price of \$287,500.00. The Carpenters, throughout all negotiations and discussions, desired to retain the part of the property where their vacation home was located, as well as the garage and the cabin. Also, the Carpenters desired to retain the driveway to access the cabin which is depicted in Tract 2 on the survey (Exhibit 8). Also the Carpenters insisted that they keep the property that they referred to as the "backyard" of the cabin. There were other provisions that the Carpenters desired including access to the water front on Pickwick Lake and other provisions that are not important to the present proceedings. (T. p 103-112). The Carpenters contended that Mr. Austin only requested their signature on the alleged contract so he could go forward with a survey of the property and that Mr. Austin promised to prepare a final contract with all relevant provisions after a survey had been completed. (T. p 111). The original alleged contract (Exhibit 2) contained a provision under the description of property as follows: "To be more particularly described in a survey to be furnished prior to closing as hereinafter set out". The alleged contract further stated as follows: "7. SPECIAL PROVISIONS: This sale is contingent upon Buyer obtaining an acceptable survey of the property and the Sellers are to convey access to the public road which runs along the north side of the property."

The Carpenters further contend that they never received a copy of the survey prepared at Mr. Austin's request prior to the time Mr. Austin summonsed them to come to

the lawyer's office to finally close the transaction. Mr. Carpenter testified that he never saw the survey depicting the property to be conveyed until he received it from his attorney after litigation was imminent. (T. p 114).

As the parties' negotiations moved forward, Mr. Austin felt it necessary to prepare a written contract which was ultimately prepared by a lawyer of Mr. Austin's choosing. (T.p 18). This contract was later presented to the Carpenters. (Exhibit 2) (R. p 110-111). Mr. Austin delivered the written document to the Carpenters and left it with them for their review. Mr. Carpenter later presented to Mr. Austin a handwritten document (Exhibit 3) which contained a provision to be added to their ultimate written agreement which would allow the Carpenters and their family continued access to the waterfront. The contract (Exhibit 2). bears the purported signatures of both Thurman L. Carpenter and Gladys L. Carpenter, although Mrs. Carpenter denies that she signed it. After the document was returned to Mr. Austin, he added the language requested by Mr. Carpenter as set out in the hand written note (Exhibit 3) as an additional paragraph 3 to the agreement. (The document actually has two paragraphs numbered "3").

The fifth paragraph of the document contains a description of the property to be conveyed. A close examination of the legal description contained in the contract is essential to an understanding of the issues involved. The legal description of the real property as contained in the document is as follows:

Approximately _____ acres located in the Southeast Quarter of Section 33, Township 1, Range 10; the Southwest Quarter of Section 34, Township 1, Range 10; the Northeast Quarter of Section 4, Township 2, Range 10 and the Northwest Quarter of Section 3, Township 2, Range 10; all in Tishomingo County, Mississippi.

Also the document contained a provision under paragraph VII "Special Provisions" making the sale of the property contingent upon the Buyer obtaining an acceptable survey of the property. Mr. Austin admits that the legal description as contained in the document was in error in that it described property in all four separate sections owned by the Carpenters, when Mr. Austin knew that the Carpenters did not intend to sell any of the property where their vacation home is located. (T. p 46-48). The legal description contained in the alleged contract describes "the Southeast Quarter of Section 33, Township 1, Range 10..." The parties never contemplated that any property in the Southeast Quarter of Section 33 was a part of the transaction, even though it is described in the alleged contract.

After the document was signed, Mr. Austin obtained a survey from Scott Engineering Company of Corinth, Mississippi. (Exhibit 4). The Austin survey does not depict the location of the structures on the plat. There is a dispute in the testimony as to whether or not the Carpenters received a copy of this survey prior to the closing date which was scheduled by Mr. Austin. The Carpenters deny that they ever saw the survey prepared by Mr. Austin until they retained the services of an attorney after litigation was eminent. (T. p 114).

At some point after the survey commissioned by the Austins was completed, Mr. Austin wrote a letter to the Carpenters, (Exhibit 5). The letter advised the Carpenters that a closing date had been set for November 10, 2005, at the offices of Sharp and Fisher, a law firm in Corinth, Mississippi. The letter addressed to the Carpenters is undated but it is believed to have been received around the end of October or the first of November of 2005. The Carpenters did not appear for the closing because they contend they have

never been furnished a copy of a survey and insisted that they wanted to see a plat depicting the exact boundaries of the property they contemplated selling. Also, the Carpenters contend that Mr. Austin was to furnish a final contract prior to closing which had never been furnished. (T. p 118). After the Carpenters refused to attend the closing, the Austins retained an attorney who wrote a letter to the Carpenters dated January 18, 2006. (Exhibit 7). Thereafter, the Carpenters retained the services of an attorney and the current litigation was begun.

The survey commissioned by the Austins contains a description of much more property than the Carpenters ever desired to sell. Had the Carpenters executed a deed to the Austins conveying to them the property depicted on the Austins' survey, they would have, in effect sold to the Austins the south wall of their cabin and would have sold their access to the cabin along an old county road which served as a driveway to the cabin. The Carpenters never intended to sell a portion of an existing structure, nor the "backyard of the cabin" nor their access to Tishomingo County Road, No. 341, which is necessary for the use of the cabin.

SUMMARY OF THE ARGUMENT

The Carpenters contend that there was never a clear meeting of the minds as to the sale of a portion of their property. The Carpenters only desired to sell a portion of their 2.35 acre tract. They desired to retain their vacation home, the cabin, the back yard of the cabin including the water well, the garage, and a drive way to access the cabin. The Carpenters assert that an essential and necessary term of the contract for the sale of real property, where the seller desires to sell only a portion of the real property owned, would be a clear and definite understanding as to the property to be conveyed and the property to be retained by the Seller. There was never a clear understanding nor a meeting of the minds between the parties as to this essential term. The survey prepared by the Austins describes far more real property than the Carpenters ever intended to convey.

Also, the Carpenters contend that the contract contained an escape clause if an acceptable survey was not obtained. A survey acceptable to the Carpenters has never been obtained.

Further, the Carpenters assert that if the Court finds that a contract did in fact exist between the parties, even though Mrs. Carpenter denies signing it, then the contract is so vague and ambiguous that it is not enforceable by a decree of specific performance.

ARGUMENT

The Carpenters contend that a valid and enforceable contract was never made between the parties, and certainly not a contract that could be enforced by a decree of specific performance. As can be seen from the legal description of the property to be conveyed contained in the alleged contract, the description describes real property in all four of the sections in which the Carpenters' original property lay. It was never the intention of the Carpenters to convey all of the property that is described in the alleged contract. The legal description in the alleged contract says "approximately _____ acres". Such vagueness in the terms of the contract make it of insufficient specificity to justify 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 legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation. Rotenberry v. Hooker, 2002-CA-00096-SCT (Miss. 2003), citing Lanier v. State, 635 So.2d 813, 826 (Miss. 1994). A contract is unenforceable if the material terms are not sufficiently definite. Leach v. Tingle, 586 So.2d 799, 802 (Miss. 1991). Price is an essential term that must be stated with specificity. The contract fails when the price has not be stated with specificity. *id.* 803. If when a seller of real property sells a portion of a tract , less than the whole, an essential term of that contract would be a specific and accurate description of the portion to be conveyed. Leach, *id.* at 802 states as follows:

In ascertaining whether a contract is sufficiently definite to be enforceable, we have accepted that the court may employ a standard of reasonableness. The court should supply incidental terms, consistent with the structure of the agreement but, conversely, essential or core terms may not be judicially

added.

Certainly, when a seller is selling a piece of property, less than the whole tract owned by the seller, an "essential or core term" would be an accurate description of the portion of the larger tract to be conveyed. This court, under our jurisprudence, may not judicially determine the boundaries of the tract to be conveyed from the parent tract. The Carpenters assert that the document which the Austins seek to enforce is not an enforceable contract as there was no mutual ascent between the parties as to the property to be conveyed. Further, the document is not sufficiently definite to justify enforcement and is not a valid contract.

The description within the contract was obviously ambiguous and is not subject to enforcement by specific performance. McCarty v. Lawrence, 231 So.2d 775 (Miss. 1970) states as follows:

Contract to sell property described as being that 'portion of land approximately 58' x 110' on U.S. Hiway 82 adjoining Liberty Nat'l Ins. Co. Office on east and Walden Std. Src. Sta. On west' was too vague and uncertain to justify specific performance.

The description contained in the contract in McCarty is much more specific than the description contained in the contract in the present case. The supreme court in the McCarty decision affirmed the decision of the Chancellor in holding that the description was too ambiguous to justify judicial sanction by specific performance.

In the instant case, the Austins' survey (Exhibit 4) depicts the property (including legal description) that the Austins seek to obtain through specific performance. The tracts on the Austin survey (Exhibit 4) are depicted as Tract I, Tract II, and Tract III. When the

Austin survey, (Exhibit 4) is compared to the Carpenter survey, (Exhibit 8), it can be seen that the property that the Austins seek to be conveyed to them by specific performance includes the south wall of the "cabin", the back yard of the cabin (the boundary comes within approximately 6 feet of the east side of the cabin) and also the driveway leading westerly from the cabin to the public road. No person in their right mind would agree to convey real property upon which the south wall of the structure is located and within six feet from a residential structure. Neither would a person in their right mind agree to convey away their driveway and access from the public road to the cabin. (The vacation home owned by the Carpenters has access from another driveway on the north side of the Carpenter property).

Mr. Austin claimed in his testimony that the driveway was impassable (T. p 50-57) but this is refuted by the testimony of Mr. Carpenter, (T. p 111-112) and Stewart Moore the engineer / surveyor (T. p 94-95).

In the case of Crisler v. Crisler, 2007, MSCA 2006-CA-00933 (Miss. 2005) (§ 9), our court of appeals, citing Frazier v. Northeast Mississippi Shopping Ctr, Inc., 458 So.2d 1051, 1054 (Miss. 1984), stated as follows:

[p]arties are bound by what they promise in writing. But, we are not bound to adopt a construction not compelled by the instrument in which we would have to believe no man in his right mind would have agreed to. A construction leading to an absurd, harsh or unreasonable result in a contract should be avoided, unless the terms are express and free of doubt.

Our supreme court stated in Fowler v. Nunnery, 126 Miss. 510, 89 So.156, 158 (1921) the following standard for specific performance as follows:

Before a court of equity will enforce a specific contract for the sale of lands, the contract must be specific and distinct in its terms and must show with

certainty that the minds of the parties have met and mutually agreed upon all the details. There must be an offer upon the one hand and unqualified acceptance of this offer upon the other; if any of these requisites be lacking, specific performance will not be declared. Citing Welch v. Williams, 85 Miss. 301, 37 So. 561, (1904).

Further, our court stated in the case of Crocker, et al. v. Farmers & Merchants Bank, 293, So.2d. 438, Miss. (1974), P. 442 the following:

We follow the general rule that in order to properly decree specific performance a court must be able to look at the instrument in question and discern what performance is required. (citing Etheridge v. Ramzy, 276 So.2d 451 (Miss. 1973); 49 Am.Jr. Specific Performance section 22 at 34, and section 25 at 38 (1943).

In applying the above stated principle to this case, it would be impossible for the court to discern from the alleged contract in question just exactly what property the Carpenters were to convey to the Austins. A clear and unambiguous description of the property to be conveyed cannot be decreed by the court.

The facts in the case at bar are very similar to the facts of an Alabama case, Webster v. Gunter, 293 Ala.282,302 So.2d 97 (1974). In the Webster case the Plaintiffs sought to enforce a contract by specific performance. The description of land as contained in the written contract in the Alabama case was as follows:

..Approximately 70 acres from Lot #5, in South West Quarter of 25, being in township 17 and range 27 of Russell County, Alabama.

Actually, Lot #5 contained 97 acres. The Alabama Supreme Court in Webster, id at page 286 applied the law of specific performance to the facts as follows:

In order for a complaint (sic) to procure the specific performance of a contract through a court of equity, he must show a contract that is specific, certain and complete. He cannot set up one contract and then procure the performance of another. If he contends for a certain contract as having been made between the parties, but which cannot (sic) be (sic) complied with by the respondent, he cannot procure the court to make a new or different

contract from the one contended for by him, in order to get a specific performance of some contract, regardless of whether or not it was the one contended for by him as the real contract.

The Carpenters contend that the description contained in the contract the Austins seek to enforce is vague and ambiguous and not subject to specific performance. Even when considering extrinsic evidence, it is obvious that the minds of the parties never met as to the exact property to be conveyed from the parent tract. Mr. Austin contends that he was to get a deed to all of the property which is depicted as Tract I, Tract II, and Tract III on the Moore Engineering survey (Exhibit 1 and Exhibit 8). This is adamantly disputed by the Carpenters. The Carpenters contend that they always maintained that they were to retain the "back yard of the cabin" and the access to the public road on the west side of the property. The proof makes it abundantly clear that there was never a clear meeting of the minds, and thus no enforceable contract. Even when the court construes the alleged contract by extrinsic evidence it is impossible to discern what was to be conveyed. There is simply no evidence that there was a meeting of the minds of the parties as to the parcel to be conveyed. It would be impossible for this court to discern the intent of the parties and form an enforceable contract.

Also, Mr. Carpenter testified that Mr. Austin was to return later, after his survey was done, with a complete contract that contained all the provisions requested by the Carpenters, and that contract was to contain an accurate legal description of the property. (T. p 110-111). The document that was signed (Exhibit 2) was nothing more than a memorandum of intent to make a future contract. In Duke v. Whatley, 580 So.2d 1267 (Miss. 1991), our Supreme Court stated as follows at page 1274:

However, unless an agreement to make a future contract is definite and certain upon all the subjects to be embraced, it is nugatory. To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. If any essential term is left open to future consideration, there is no binding contract, and an agreement to reach an agreement imposes no obligation on the parties thereto.

The Carpenters contend that there is no enforceable contract. In the alternative, the Carpenters contend that the contract, in its essential terms, is so vague and ambiguous that it is not subject to specific performance. The above cited cases makes this abundantly clear.

Also, the alleged contract (Exhibit 2) was drafted by the Austins. Ambiguous words and terms are to be construed against the party who has drafted them. Leach v. Tingle, 586 So.2d, 799, 801 (Miss. 1991); Stampley v. Gilbert, 332 So.2d 61, 63 (Miss. 1976).

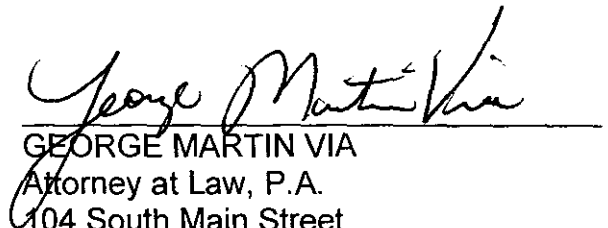
The alleged contract in this case is so crudely drawn, and is beset with ambiguities and uncertainties as to the property to be conveyed. The proof is abundantly clear that the contract was nothing more than a memorandum of intent to make a future contract and it is not enforceable by specific performance. The burden in this case is upon the Austins to establish their right to relief on the facts and the law. The ambiguities and uncertainties of the alleged contract are such that it is impossible to discern the intent of the parties and it is not subject to enforcement by specific performance. The Austins paid no earnest money for the execution of the contract which would lead one to believe that a subsequent contract was to be drawn. Neither the Austins nor the Carpenters have changed their

position in reliance. Both parties have expended money for attorneys' fees and surveyors, but otherwise a rescission of the contract and dismissal of the Austins' complaint would place the parties in the status quo.

CONCLUSION

This Court should render its decision that the document sought to be enforced was never an enforceable contract, there being no mutual ascent nor a meeting of the minds. Further, the court should render its decision that the alleged contract is unenforceable and not subject to specific performance and enter judgment affirming the decision of the Chancellor.

Respectfully submitted,



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ATTORNEY FOR APPELLEES
THURMAN L. CARPENTER
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CERTIFICATE OF SERVICE

I, George Martin Via, attorney for Thurman L. Carpenter and Gladys L. Carpenter, Appellees, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and exact copy of the above and foregoing Brief of the Appellees, along with an electronic disk of same, to Richard D. Bowen, attorney for Billy G. Austin and Agnes H. Austin, Appellants, at his usual mailing address of Post Office Box 690, Iuka, MS 38852, and to the Honorable Michael Malski, at his usual mailing address of Post Office Box 543, Amory, MS 38821.

THIS 27th day of May, 2008.


GEORGE MARTIN VIA