

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

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

APPELLANTS

V.

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 APPELLANTS

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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 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,



RICHARD D. BOWEN, MSB
ATTORNEY FOR APPELLANTS

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STATEMENT OF THE ISSUE

Did the Chancellor err in denying specific performance and finding no enforceable contract due to lack of mutual assent caused by vagueness and uncertainty in the property description?

STATEMENT OF THE CASE

A. Nature of the Case

This appeal stems from a contract dispute over real property in Tishomingo County, Mississippi. Billy G. Austin and wife, Agnes H. Austin (the Austins), contend that they have an enforceable contract to buy real property from Thurman L. Carpenter and wife, Gladys L. Carpenter (the Carpenters), which contention the Carpenters deny.

B. Course of Proceedings and Disposition in the Court Below

The parties in this case entered into a contract for the purchase of certain tract of land located in Tishomingo County, Mississippi. Subsequent to that agreement, the Carpenters refused to consummate the agreement and litigation ensued (R. pp. 2-5)¹. A trial commenced in Tishomingo County Chancery Court on February 20, 2007. Following testimony and the submission of post trial briefs, the Chancellor, Honorable Michael Malski, rendered an opinion that no meeting of the minds existed between the parties and denied the Austins' request for specific performance contract (R. pp 28-35).

¹Pursuant to M.R.A.P. 28(e), references herein are keyed to the record excerpt and to the record. The record consists of pleadings labeled as "Clerk's Papers," Volume 1, pages 1 through 41, including Exhibit Nos. 1-19; and Transcript Volumes I and II, pages 1 through 100.

The following abbreviations are used throughout this brief: (R. p#) denotes references to page(s) in the Record / Clerk's Papers; (T. p#) denotes references to page(s) in the Transcript. References to Exhibits will be to the page referenced in the Transcript and the exhibit number.

C. Statement of Facts

Appellants, Billy G. Austin and Agnes H. Austin, are residents of the state of Tennessee (T. p 6). They have relatives in Tishomingo County who live adjacent to the property owned by Appellees, Thurman L. Carpenter and Gladys L. Carpenter, who are also residents of Tennessee (T. pp 7-9, 13). The Austins often admired the property of the Carpenters and eventually negotiated the purchase most of the property with the Carpenters retaining a portion. A price was agreed upon, and it was further agreed that the Carpenters and their family would retain waterfront privileges as long as they owned the adjoining land.² (T. pp 9-24.) This agreement was memorialized by a written contract signed by the parties (T. p 18, Ex. 2). The Austins elected to have the property surveyed in order to more particularly pinpoint the boundaries (T. p 25). Following the survey the Austins hired an attorney to handle the closing of the transaction and notified the Carpenters accordingly. The Carpenters failed to respond to the notification and failed to appear at closing. (T. pp 31-32.) The Carpenters refused to communicate with the Austins in any way, compelling Mr. and Mrs. Austin to obtain counsel to enforce the agreement of the parties (T. pp 32-34).

Litigation ensued, and a trial commenced in the Tishomingo County Chancery Court February 20, 2007. Billy Austin testified, as did the Thurman L. Carpenter and Gladys L. Carpenter. The Carpenters offered the testimony of surveyor Stewart

²The property fronts on the Yellow Creek Embayment area of Pickwick Lake.

Moore. (T. pp 5-152.) Twelve exhibits were received, including two photographs, the deed in which the Carpenters acquired the property, four surveys of the property, the written agreement for purchase of real estate, a handwritten note, a demand letter of the Austins and separate letter to Mr. and Mrs. Carpenter demanding performance of the agreement (Exs. 1-13).

Billy Austin testified that he and his wife entered into the contract to buy the subject property from the Carpenters after negotiations between him and Thurman Carpenter. The contract between the parties contained the signatures of Billy Austin and his wife, Agnes Austin, and Thurman Carpenter and his wife, Gladys Carpenter. However, the negotiations were handled primarily by the gentlemen with little or no input from their wives. (T. pp 14-15.)

The Carpenters' property may be divided into four separate tracts, each tract being located in separate sections: Sections 33-1, 34-1, 4-2, and 3-2, all in Range 10 of Tishomingo County. This is reflected by the Carpenters' deed as well as the surveys received as evidence in court below (Exs. 1, 4, 8, 9, 10). The Austins agreed to buy and the Carpenters agreed to sell the parcels located in Sections 34-1, 4-2 and 3-2. The agreement allowed the Carpenters to retain Section 33-1-10, which is the site of their residence, a garage and a cabin. (T. pp 11-16.) Subsequent surveys show that the southernmost wall of the cabin is located on, and part of it is slightly across, the section line dividing Sections 33-1 and 4-2 (Exs. 8, 9).

The Austins engaged an attorney to prepare a written contract which was executed by all parties (T. p 18). The Carpenters requested an addendum to the contract – specifically that their family be allowed access to the property’s waterfront so long as they owned the adjacent land. (T. pp. 22-25.)

There was no misunderstanding concerning the agreement to buy and sell. The Austins sought an additional survey of the property (T. p 25); the Carpenters were content with a survey performed in 2002 (T. pp 134, 145). Once the survey was complete and a closing was sought, the Carpenters refused to honor the contract (T. p 34). This refusal was unjustified and in bad faith. Prior to this time, the Carpenters never expressed or indicated that their agreement to sell was conditioned upon the Austins furnishing an acceptable survey to the Carpenters. (Ex. 2.)

SUMMARY OF THE ARGUMENT

A clear and unambiguous contract should be enforced as written. *South Carolina Ins. Co. v. Keymon*, 974 So. 2d 226 (Miss. 2008). The contract in the present case is clear and unambiguous as to the intent to convey certain property from the Carpenters to the Austins. The agreement is very detailed and contains all the essential elements of a valid, written contract. There is no mistaking the intent of the parties. The Chancellor clearly erred in finding that no meeting of the minds existed.

The only ambiguity in the agreement concerns the description of the property – it is not completely accurate. But this ambiguity can and was cured by extrinsic evidence, parol evidence being admissible in such instances.

The Chancellor should therefore have found the contract enforceable and revised the description of the property to effect the true intent of the parties.

ARGUMENT

Although the finding of the Chancellor will not be disturbed on appeal unless it is clearly erroneous or contrary to law, in this case the finding was clearly erroneous. The Austins are entitled to specific performance.

The general rule of construing contracts is to give effect to the mutual intentions of the parties contracting. *Kight v. Sheppard Building Supply, Inc.*, 537 So2d 1355, 1358 (Miss. 1989); *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 2005-IA-00125-SCT (Feb. 22, 2007). Even if the parties disagree as to a particular clause of the contract, that does not make the contract ambiguous as a matter of law. *Farm Services, Inc. V. Oktibbeha County Bd. of Sup'rs*, 860 So. 2d 804 (Miss. 2003) (quoting *Gulfside Casino P'ship v. Miss. State Port Auth. At Gulfport*, 757 So. 2d 250 (Miss. 2000)). The fact that the parties reduced their agreement to writing and signed the agreement is evidence that there was a meeting of the minds, or mutual assent, and a clear understanding that certain property was to be sold and bought. Furthermore, the testimony of Thurman L. Carpenter clearly shows an agreement between the parties:

Q. (Attorney for Austins):	All right, sir. Now, Mr. Carpenter, there is no question that you and Mr. Austin entered into an agreement to buy and sell something, didn't you?
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A. (Thurman L. Carpenter):	No question at all, sir.
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Q.

All right. So y'all had an agreement, but what we are in dispute about, would you say, is just exactly what it is, as far as perhaps quantity of land or where the lines were, but you had an agreement to sell a tract or tracts of land to Mr. Austin; did you not?

A.

Yes, sir.

(T. p. 121.)

There is no question that the Carpenters intended to sell a portion of their land to the Austins. The Carpenters didn't require a survey, instead relying on a 2002 survey of the property (T. pp 134, 145). The Austins required a survey for their own benefit (T. p 25). The requirement of the survey in no way affects the intent of the Carpenters in agreeing to transfer the property to the Austins.

A contract must be considered as a whole and from such examination the intent of the parties must be gathered. Such construction should be given the agreement as will render all the clauses harmonious so as to carry into effect the actual purpose and intent of the parties derived therefrom. *Roberts v. Roberts*, 381 So2d 1333, 1335 (Miss. 1980). In the case at bar, the clear will of the parties was to transfer certain property from the Carpenters to the Austins. This agreement was memorialized into a written agreement between the parties. The agreement is signed

by the Austins as "Buyers" and Carpenters as "Sellers" and is dated September 14, 2005. The property is described as being located in Sections 33-1, 34-1, 4-2 and 3-2 of Range 10, all in Tishomingo County, Mississippi, together with an easement for unencumbered access to the property across a private road which runs along the North side of the property. The contract further provided that the property would be more particularly described in a survey to be furnished prior to closing, such survey to be furnished by the Buyers. The contract reflected that the purchase price for the property was \$287,500.00 payable at closing; that the property was to be conveyed by warranty deed furnished by Sellers conveying the property free and clear of any encumbrances; that any defects in title as shown by an examination would be cured as expeditiously as reasonably possible by the Sellers; that Buyers would pay all closing costs with the exception of the deed; that taxes would be prorated; that Buyers would have the option, in the event damage or destruction by fire or other hazard pending closing, to terminate the contract; and provided that the Sellers and their daughter and family should have waterfront privileges as long as the family owns the adjoining property. The contract is detailed in its terms, and there is nothing ambiguous or vague about the agreement of the Carpenters to sell certain property to the Austins. (Ex. 2.)

The Mississippi Supreme Court has stated "[w]hen construing a contract, we read the contract as a whole, so as to give effect to all of its clauses." *Brown v. Hartford Ins. Co.*, 606 So. 2d 122, 126 (Miss. 1992). "We construe a contract

objectively and determine the parties' intent from 'the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties.'" *Cherry c. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987) (quoting *Hunt v. Triplex Safety Glass Co.*, 60 F.2d 92, 94 (6th Cir. 1932)).

All of the essential terms of a valid and binding contract are present in the written agreement in this case. Granted, the contract did not contain a completely accurate description. However, the lack of a completely accurate description of the property should not defeat the contract as long as extrinsic evidence can identify the property and make ascertainable what parts of the property were to be bought and sold. *Duke v. Whatley*, 580 So2d 1267 (Miss. 1991). All of the parties live in Shelby County, Tennessee, and the subject property is the only property the Carpenters own in Tishomingo County and all they owned in that County at the time of the agreement. There is ample evidence through the testimony and the deed, surveys and plats to completely identify the parcels of property which the Carpenters were selling and the Austins were buying. (Exs. 1, 8, 9, 10.)

The Chancellor was also convinced of the intention of the parties to enter into a binding contract:

It is apparent to the Court that Carpenter intended to sell Austin three of the four tracts described in Exhibit 10.

(R. p 30.)

But the Chancellor apparently relied upon the parties' misunderstanding of the location of the cabin on the premises in finding a lack of mutual assent (R. pp 30-34).

However, indefiniteness or ambiguity in the terms of a contract will not defeat specific performance of the agreement

...if it contains matter which will 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.

Duke, at 1274.

In this case, there is ample extrinsic evidence in the testimony and other evidence not only to show the parties' intent – a meeting of the minds – but also a property description which is not “too vague and uncertain to justify judicial sanction.” *McCarty v. Lawrence*, 231 So.2d 775 (Miss. 1970); see Memorandum Opinion and Judgment (R. p 32).

The mutual misunderstanding concerning the location of the cabin can easily be cured under the authority of *McCarty* by reformation of the description to exclude from it that small portion of the property upon which the cabin and surrounding property sits. This area was clearly delineated by the Carpenters' surveyor during his trial testimony (T. pp 98-101; Exs. 1, 8).

CONCLUSION

The written agreement between the parties was sufficiently complete and definite in its terms to constitute a legally enforceable contract. The only ambiguity was in the description of the property, which was resolved by properly admitted extrinsic or parol evidence. There was therefore a clear intention to buy and sell a tract of land, the description of which was readily ascertainable.

The mutual mistake concerning the location of the cabin in the property could and should have been corrected by reformation of the description to delete the area surrounding the cabin from the property to be conveyed.

The judgment of the Chancellor should therefore be reversed and this case remanded for reformation of the description to delete the cabin area and for specific performance of the contract as reformed.

CERTIFICATE OF SERVICE

I, Richard D. Bowen, attorney for Billy G. Austin and Agnes H. Austin, Appellants, 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 Appellants, along with an electronic disk of same, to George Martin Via, attorney for Thurman L. Carpenter and Gladys L. Carpenter, Appellees, at his usual mailing address of 104 South Main Street, Booneville, MS 38829, and to the Honorable Michael Malski, at his usual mailing address of Post Office Box 543, Amory, MS 38821.

THIS 26th day of March, 2008.



RICHARD D. BOWEN