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January 6, 2009

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RE: Derr Plantation, Inc. v. Thomas L. Swarek, et al
Case No. 2007-IA-02031-SCT

Dear Ms. Sephton:

Enclosed please find the following:

1. Original and three copies of Reply Brief of Appellant
2. Electronic disk containing the Brief

Sincerely,

KENNETH B. RECTOR

KBR/jhg
cc: Charles W. Pickering, Sr., Esq.
Eric W. Hospodor, Esq.
William M. Bost, Jr., Esq.
Diane M. Smith, Esq
Hon. Vicki R. Barnes
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IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-IA-02031-SCT

DERR PLANTATION, INC. **APPELLANT**

V.

THOMAS L. SWAREK and
THOMAS A. SWAREK **APPELLEES**

ON INTERLOCUTORY APPEAL FROM THE
CHANCERY COURT OF WARREN COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

REPLY BRIEF OF APPELLANT

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REBUTTAL ARGUMENT

Contrary to statements by Appellee (hereinafter "Swarek") in his brief, Appellant (hereinafter "DPI") understands that specific performance is one of the two remedies available when one party to a contract is aggrieved as a result of an alleged breach by the other contracting party. DPI also understands that an action at law for damages is an alternative remedy to which the non-defaulting party may resort for relief. Swarek, however, continues to argue, despite overwhelming contrary authority, that he is entitled to have ***both remedies*** at the same time as a result of DPI's alleged breach. In his response brief, Swarek reiterates his position that his complaint seeks both equitable relief by way of specific performance ***and*** damages at law.

Plowing ahead with the notion that he is entitled to both remedies, Swarek says in his response brief that his "complaint is based entirely on allegations of breach of contract and seeks damages at law and specific performance as remedies for that breach of contract." (Swarek's response brief, Page 3) (emphasis added). Swarek therefore persists in his contention that he is entitled to have his case transferred to Circuit Court since, according to Swarek's theory, he is entitled to have a jury consider his claims at law for damages. DPI counters with the argument that Swarek can not recover damages in an action at law and also obtain equitable relief through specific performance. Since any claim for money in a specific performance suit may only be categorized as equitable compensation (to adjust the equities between the parties) and not an action at law for damages, there is no basis to transfer the case to the Circuit Court.

Swarek has managed to unearth only one case that seems to support his position. In *Berryhill v. Hatt*, 428 N.W. 2d 647 (Iowa 1988), the plaintiff filed a suit at law for damages

arising out of the refusal of the defendant to convey certain real property.[1] Subsequently, plaintiff filed an action in equity for specific performance of the real estate contract. The two cases were consolidated for trial and the jury awarded damages to the plaintiff on the breach of contract claim. Subsequently, the trial judge dismissed the specific performance claim. On appeal, the Iowa Supreme Court reversed the trial court and found "specific performance to be an appropriate, supplemental remedy to serve justice in this case." Id. at 658.

We are able to find no other case in Iowa or any other jurisdiction that cites *Berryhill* for the proposition argued by Swarek. Further, Swarek cites us to no case that relies on *Berryhill* for the proposition that a plaintiff can have specific performance of a contract together with damages at law for its breach. This decision clearly is not consistent with the general rule discussed at length in DPI's initial brief and has little or no precedential value on the issue before this Court. Although Swarek says in his brief that "other courts have reached similar conclusions", he cites no other case holding that a plaintiff can have specific performance of a contract and damages at law for the breach of the same contract (Swarek's brief, page 6).

Without discussion, Swarek mentions *Camperlino and Fatti Builders, Inc. v. Dimovich Construction Corporation*, 175 A. D. 2d 595, 572 N. Y. S. 2d 255 (1991). However, *Camperlino* is an "election of remedies" case and is, therefore, not applicable here. Swarek has not assisted with the resolution of this appeal by confusing this case with irrelevant jurisprudence related to the "election of remedies" doctrine. The case at bar does not involve the "election of

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Berryhill v. Hatt is incorrectly cited as *Berryhill v. Berryhill* in Swarek's brief. Although Swarek took a different position in the trial court, he apparently now has decided to embrace cases from other jurisdictions in support of his legal theories.

remedies" doctrine at this juncture and DPI has not sought to invoke the doctrine in this case. The election of remedies doctrine applies only where the elected remedy has proceeded to some conclusion and the Plaintiff attempts to recover by a subsequent action based on an inconsistent theory.

> Where a party with knowledge of his rights and without imposition or fraud on the part of his adversary carries his case to a conclusion and obtains a decision on the issues involved, it is generally held that such action constitutes a conclusive election, so that an adverse judgment or decree will bar later resort to an inconsistent remedy, even though the mere bringing of a suit or the mere bringing of some procedural step in a suit which is abandoned or dismissed without a pronouncement on the merits is not considered to be an election. Where the remedies are inconsistent, the failure to secure satisfaction by means of the remedy adopted does not, it has been held, take the case out of the doctrine of election. Compromise and settlement of a suit may constitute such an election as will preclude the plaintiff from thereafter prosecuting an action based upon a theory inconsistent with that upon which the former action was maintained, but the provisions of the settlement must be carried out. *O'Briant v. Hull*, 208 So. 2d 784, 786 (Miss. 1968).

In *Camperlino*, the plaintiff obtained an order directing specific performance. However, the Court found that "judgment was never entered upon that order, specific performance never occurred, and specific performance is now impossible because a judgment foreclosing a mortgage has been entered and defendants no longer own the property." 572 N. Y. S. 2d at 256. Subsequently, the plaintiff obtained a judgment for money damages arising out of the same breach and the court affirmed in a one paragraph opinion finding that the doctrine of election of remedies did not preclude the second judgment for money damages. Clearly, *Camperlino* is factually irrelevant to the case at bar. Plaintiff in *Camperlino* was not trying to obtain **both** specific performance and money damages. Rather, he was found to be alternatively entitled to

money damages since specific performance was not available. Contrary to Swarek's contention, the opinion in *Camperlino* actually supports DPI's contentions here.

Lastly, for reasons unclear to us, Swarek relies upon *Medcom Holding Company v. Baxter Travenol Laboratories, Inc.*, 984 F. 2d 223 (7th Cir. 1993). The *Medcom* case is also an "election of remedies" case. Plaintiffs sought both compensatory damages and specific performance for breach of a stock purchase agreement. The compensatory damage claim was tried to a jury and the plaintiff received a verdict. However, the trial judge determined the award to be excessive and ordered a new trial on compensatory damages. After a second trial, the jury again awarded a substantial compensatory damage verdict. The trial court likewise vacated the second verdict. In the interim, the specific performance claim was referred to a magistrate and the trial court adopted the magistrate's recommendation that specific performance be awarded. The defendant appealed the specific performance award and the Court of Appeals ordered the trial court to delay the third trial on damages until determination of the appeal of the specific performance judgment.

On appeal the defendant attempted to invoke the election of remedies doctrine suggesting that specific performance was no longer available because the plaintiff had submitted its damage claim to a jury. The court found that "the remedies of specific performance and damages on a contract are not inconsistent ***for purposes of the doctrine"*** of election of remedies. Id. at 228 (emphasis added). Swarek's reliance upon excerpts from the *Medcom* case is misplaced. Whether the remedies of specific performance and damages at law are consistent for the purposes of the election of remedies doctrine is wholly inconsequential to determination of this case. As stated above, the case at bar does not involve the election of remedies doctrine. Stated differently, our case does not involve a situation where Swarek sought unsuccessfully to recover

damages and thereafter pursued the alternative remedy of specific performance. *Medcom* stands only for the proposition that the election of remedies doctrine does not prevent a plaintiff from seeking specific performance of a contract as an alternative to a prior unsuccessful effort to obtain damages at law. The fact that a suit at law for damages is not inconsistent with an equitable claim for specific performance for purposes of the election of remedies doctrine does not mean that a plaintiff can have both remedies. In fact, the court in *Medcom* makes absolutely clear that a plaintiff may ***not*** have ***both*** remedies.

> When either party to a contract for the sale of land has failed in his obligation, the other is entitled to the ***alternative*** remedy of specific performance in equity ***or*** damages at law. Id. at 228 (Emphasis added).

The *Medcom* case also specifically holds "that the Plaintiff ***cannot recover both damages and specific performance.***" Id at 229 (emphasis added). The *Medcom* decision is clearly consistent with the cases relied upon by DPI in its initial brief, including *McVay v. Castenara,* 152 Miss. 106, 119 So. 155, 156 (1928) [2]. Since Swarek can not have both specific performance and damages, there is only one way to interpret his complaint. We must conclude that the only relief thereby requested is equitable in nature. Since the prayer for money in a suit for specific performance can not include damages at law, a prayer for money can not convert the suit to an action at law over which the circuit court has jurisdiction. Swarek devotes a substantial part of his brief to cases that he relied upon in the lower court and that he contends support the exercise of jurisdiction by the circuit courts over cases involving legal and equitable issues[3]. No one is

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[2] In his brief, Swarek incorrectly refers to this case as *McKay v. Castenara.*

[3]We have discussed, and distinguished, these cases cited by Swarek in DPI's initial brief.

disputing this general concept and Swarek's arguments might make sense if any case cited by him allowed a plaintiff to recover damages at law and also receive judgement of specific performance in the circuit court. However, as stated above, Swarek cites us to no case in Mississippi or elsewhere (except, perhaps, *Berryhill*) wherein any court has said that a plaintiffs' claim for money in a specific performance suit is an action at law for damages over which the circuit court has jurisdiction. Since there are no cognizable claims at law in Swarek's complaint, the cases relied upon by Swarek for the proposition that circuit courts can hear both legal and equitable claims are irrelevant.

Lastly, in DPI's initial brief, we stated that we had been directed to no case where punitive damages have been allowed as an element of the equitable compensation awarded with specific performance relief. Swarek contests this contention by citing *American Funeral Assurance Co. v. Hubbs,* 700 So. 2d 283, 285 (Miss. 1997). The *Hubbs* case involved a dispute over a life insurance policy which was litigated in the chancery court. The chancellor found for the plaintiff and awarded $4,000.00 in compensatory damages and $200,000.00 in punitive damages. The defendant appealed and the case was initially heard by the Court of Appeals which affirmed the chancellor's decision. After granting the defendant's petition for a writ of certiorari, the Supreme Court stated that "after due consideration we affirm the award of compensatory damages, but reverse and render the punitive damages award." Id. Later in the opinion, the court reiterated that "the award of compensatory damages is affirmed." Id. Therefore, contrary to Swarek's misrepresentation in his brief, there is no indication in the *Hubbs* case that the punitive damages awarded by the chancellor was an element of equitable compensation awarded in connection with specific performance relief. Rather, it appears that the chancellor accorded to

the plaintiff legal relief only in the form of compensatory damages (which award was affirmed) and punitive damages (which award was reversed). We find nothing in the *Hubbs* opinion to indicate that the chancellor awarded any equitable relief to the plaintiff or that the issue presented in the case at bar was presented to the courts in the *Hubbs* case.

CONCLUSION

Count One of Swarek's complaint seeks equitable relief by way of specific performance of the alleged contract to buy DPI's land. Unquestionably, the chancery court has subject matter jurisdiction of Swarek's claim for specific performance. If he succeeds in convincing the chancellor to award him a judgment of specific performance, he may also be entitled to a monetary award under multiple authorities cited in DPI's initial brief. However, according to those authorities, any such money award does not constitute damages at law but rather is in the nature of equitable compensation awarded "to balance the equities in order to protect the rights of all the parties, and to do complete justice between them." *Anderson v. Wooten,* 549 So. 2d 40, 44 (Ala. 1989). Since the monetary relief sought by Swarek in connection with his claim for specific performance is equitable compensation rather than damages at law, there is no basis for circuit court jurisdiction. The chancellor clearly erred by transferring this case to the circuit court simply because Swarek has now determined to label his money claim as a claim for damages at law. In addition, even if Swarek is entitled to specific performance and equitable compensation complementary thereto, we find no authority for the assertion that he can have punitive damages as a part of said equitable compensation. Since punitive damages cannot co-exist with the claim for equitable compensation in a specific performance suit, the punitive damage claim likewise does not create circuit court jurisdiction in this case.

It is, therefore, respectfully submitted that this case should be reversed and remanded to the chancery court with instructions that claims for compensatory and punitive damages at law should not be allowed or considered in connection with Swarek's equitable claims for specific performance.

Respectfully submitted,

DERR PLANTATION, INC.

BY: _____
Kenneth B. Rector
Bar No. [redacted]

BY: _____
Robert R. Bailess
Bar No. [redacted]

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CERTIFICATE

I, Kenneth B. Rector, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing to Charles W. Pickering, Sr., Esq., Eric W. Hospodor, Esq., Baker, Donelson, 4268 I-55 North, Meadowbrook Office Park, Jackson, MS 39211, William M. Bost, Jr., Esq. and Diane M. Smith, Esq., 1221 Grove St., Vicksburg, MS 39183 and Hon. Vicki R. Barnes, Chancellor, P. O. Box 351, Vicksburg, MS 39181.

THIS 6 day of January, 2009.

KENNETH B. RECTOR