IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-IA-02031-SCT

DERR PLANTATION, INC. **APPELLANT**

V.

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

Thomas L. Swarek, Appellee

Thomas A. Swarek, Appellee

Walker W. Jones, III, attorney for Appellee

Barry W. Ford, attorney for Appellee

Charles W. Pickering, Sr., attorney for Appellee

Eric W. Hospodor, attorney for Appellee

William M. Bost, attorney for Appellee

Diane M. Smith, attorney for Appellee

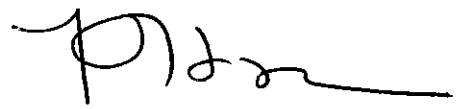
Derr Plantation, Inc., Appellant

Hermann P. Derr, (deceased)

Robert R. Bailess, attorney for Appellant

Wohnbau-Gesellschaft H. Derr mbH & Co. KG, sole shareholder of Derr Plantation, Inc.

Kenneth B. Rector, attorney for Appellant



KENNETH B. RECTOR
BAR NO. [redacted]

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STATEMENT OF ISSUES

Did the trial court err by transferring this suit for specific performance and injunction to the Circuit Court?

STATEMENT OF THE CASE

Thomas L. Swarek and Thomas A. Swarek (hereinafter "Swarek") filed suit in the Chancery Court of Issaquena County, Mississippi on March 1, 2005 against Derr Plantation, Inc. (hereinafter "DPI"). Swarek's complaint alleges that Swarek entered into a contract to purchase certain farm land, equipment and livestock from DPI (RE 4, R 4). Swarek requests the Court to require DPI to specifically perform the alleged contract. In response, DPI claims that a contract was not made. Approximately one week prior to filing his suit, Swarek filed a lis pendens notice against DPI's property in the Issaquena County land records (R 71).

Over one year after the complaint was filed and after extensive discovery, Swarek filed a motion for partial summary judgment asking the chancellor to determine, as a matter of law, that a valid contract exists between Swarek and DPI (R 73 - 188). In response, DPI filed a motion for summary judgment on August 25, 2006 asking the Court to determine as a matter of law that no binding contract exists between Swarek and DPI (R 203 - 430). On December 4, 2006, the chancellor entered a judgment overruling Swarek's motion to establish that a valid contract existed (R 448). Swarek unsuccessfully petitioned this Court for an interlocutory appeal of the chancellor's denial of Swarek's motion.

After this Court denied Swarek's Petition for Interlocutory Appeal, Swarek moved to transfer this case to circuit court (R 451). After hearing on the motion (TR 1 - 40), the Chancellor granted Swarek's motion to transfer this case to circuit court (RE 8, R 546). Since the court's order transferring the case to circuit court did not state the basis upon which the court determined to transfer the case, DPI filed a motion pursuant to MRCP 52(a) and Uniform Chancery Court Rule 4.01 requesting the chancellor to find facts specially and state separately conclusions of law supporting the order transferring the case to circuit court (R 547). In response, the court requested that the parties file proposed findings of fact and conclusions of law (R 549). Both parties filed proposed findings of fact and conclusions of law as requested by the court (R 551, 560). On December 21, 2007 the court entered its Memorandum Opinion and Final Judgment (RE 9, R 564). DPI's petition for interlocutory appeal of the chancellor's decision to transfer the case to circuit court was granted.

SUMMARY OF THE ARGUMENT

Swarek contends that he can sue in equity for specific performance of the alleged contract to buy DPI's property and simultaneously sue at law for damages arising out of the breach of the same alleged contract. Swarek takes this novel position because he now wants to transfer his three and a half year old complaint from chancery court where the Chancellor ruled against Swarek on his dispositive motion. To accomplish this objective, Swarek must contend that his complaint includes a claim at law for which he is entitled to a jury trial in the circuit court.

Swarek's belated strategy, however, stumbles in two respects. First, Mississippi established long ago, consistent with many other jurisdictions, that a plaintiff may either sue in equity to have

his alleged contract to purchase land upheld and enforced ***or*** he may forego enforcement of the contract and seek damages at law arising out of the breach. Since these remedies are mutually exclusive, it is elementary that a plaintiff cannot have both remedies for the same breach. Thus, it was incumbent upon Swarek to select the remedy he intended to pursue as a result of any breach of the alleged contract in this case.

Secondly, Swarek clearly elected his equitable remedy of specific performance in his complaint and, therefore, there is no jurisdictional basis to transfer his claim for equitable relief to circuit court. The fact that Swarek also asked for monetary compensation is of no consequence in this jurisdictional decision. It is plain that the substance of Swarek's complaint is equitable and any monetary relief that he seeks supplementary to a judgment of specific performance is likewise equitable in nature and does not constitute damages at law. As we have stated previously, damages at law is a remedy inconsistent with a suit for specific performance to enforce an alleged contract to sell land.

Therefore, contrary to Swarek's unsupported contentions, the complaint as drafted and filed by Swarek in this case is not an action at law for breach of contract and damages arising therefrom. Thus, there was no basis for the chancellor's decision to transfer this case to the circuit court. Rather, in this case the complaint as drafted and filed by Swarek elects the equitable remedy of specific performance which is within the original jurisdiction of the chancery court. After three years of litigation, Swarek should not be allowed to now elect a different remedy simply because he has received an adverse ruling in his chosen forum. The decision of the chancellor should be reversed and the chancery court should retain jurisdiction of this suit since all of Swarek's claims are clearly equitable.

ARGUMENT

Suits for specific performance are within the original equity jurisdiction of the Chancery Court. *City of Starkville v. 4-County Electric Power Association*, 909 So.2d 1094, 1102 (Miss. 2005). Nevertheless, Swarek says that a suit to compel specific performance of an alleged contract to sell land should be transferred to circuit court if the plaintiff also asks to be compensated for money losses that are a consequence of the defendant's delay in performance of the alleged contract. Swarek bases this contention on the argument that the money he seeks (in addition to specific performance) constitutes ***damages at law*** which requires the case to be in circuit court. Therefore, in order to get this case to circuit court, Swarek claims that he can enforce the contract by specific performance ***and simultaneously*** sue for breach of the alleged contract at law. Swarek cites no authority for this proposition. Nonetheless, this Court is now faced with the following issue for resolution:

> Can a plaintiff sue in equity for specific performance of an alleged contract to purchase real property and simultaneously seek to recover damages at law for the breach of the same contract?

Before addressing this issue, we must first parse the remedies sought by Swarek's three count complaint. *Id.* at p. 1101. Count One asks the Court to order specific performance of the documents attached to the complaint which are alleged to be a contract to purchase land and other property. Count Two asks the Court to put Swarek in possession of the real property "within the next thirty days" by way of preliminary injunctive relief.[1] Count Three seeks a large money award claiming certain monetary losses that the plaintiffs allegedly will suffer even if "the defendants go ahead and deliver the property according to the contract" (RE 6, R 6). Specifically, Count Three of the

[1]Swarek did not pursue his request for preliminary injunction.

complaint claims that Swarek's interest costs have increased as a result of the delay. It is important to note that the relief sought in Count Three is in ***addition to*** the relief prayed for in Counts One and Two.

At the outset, we will agree that a plaintiff that is entitled to compel specific performance of a land contract may also ask, as a part of his equitable remedy, to recover money for any loss that he has suffered as a result of the delay in performance. An increase in the cost of financing is only one example of the type of compensation to which a plaintiff might be entitled in addition to an award of specific performance. However, contrary to Swarek's position, it was established long ago in Mississippi that a claim for a money award in a suit for specific performance is not a claim for damages ***at law*** arising out of a breach of contract. This is so because a damage claim at law for breach of contract and a claim for specific performance are mutually exclusive remedies.

> The appellant's complaint in the suit for specific performance, and here, is that the appellee breached his contract by which he agreed to convey the land to the appellant. When this breach occurred, the appellant could have pursued one of two courses: (1) Waive his right to specific performance and sue at law for the damages sustained by him because of the breach of the contract; or (2) sue at equity for specific performance of the contract, and if he claimed such, for the damages which he had sustained or would sustain because of the appellee's delay in conveying the land to him.
>
> The equity court had full power, not only to specifically enforce the performance of the appellee's contract, but to award the appellant damages for the appellee's delay in performing it (citations omitted). *McVay v. Castenara*, 152 Miss. 106, 119 So. 155, 156 (1928).

Based on *McVay*, Swarek is required to choose either his equitable remedy or his legal remedy. We think it is clear from Swarek's complaint that he did, in fact, choose to sue for specific performance rather than to sue for damages at law for breach of contract. This conclusion is strongly

reinforced by the fact that Swarek filed a lis pendens notice (which has not been released) against DPI's land (R 71). Rather than seeking to enforce the alleged contract in equity, Swarek could have elected to exercise his remedy at law for damages that he allegedly incurred as a result of not receiving the benefit of his alleged bargain. This, however, he plainly did not do.

Notwithstanding the clear election made in his complaint, Swarek now, in order to get his case transferred to circuit court, says that his claim for money in Count Three is a damages claim at law. Ignoring *McVay* completely, Swarek admits in his filings with the chancery court that he is attempting to weld together a claim for specific performance with a claim for damages at law:

> The agreement at issue in this case involves a contract for the lease of land, equipment, and cattle and a contract for the sale of the land, equipment and cattle. . . . Accordingly, in their complaint, ***plaintiffs seek damages for the breach of each of these agreements.*** Specifically, plaintiffs request "actual and consequential damages of not less than $500,000" for breach of the agreement to lease; "actual and consequential damages of not less than $175,000" for breach of the agreement to convey the equipment and cattle; and "actual and consequential damages of not less than $1,000,000" for the breach of the agreement to sell the real estate. . . . ***While the complaint contains a request for the equitable remedy of specific performance, the claims at issue are primarily legal and arise from a breach of contract*** (R 473)(emphasis added).

At oral argument on the motion, counsel for Swarek confirmed that it is the intention of Swarek to attempt to get both specific performance and damages at law (TR 4). Consistently, in proposed conclusions of law filed in the trial court, Swarek again says that he is seeking "the equitable remedy of specific performance" while also pursuing "an action at law for breach of contract" (R 554). The chancellor also believed that Swarek can have both legal and equitable remedies in this case, and further concluded that circuit court is the more appropriate forum when a plaintiff is looking for both remedies (R 564, RE 9). However, we have not located any

Mississippi case wherein a plaintiff obtained specific performance of a contract to buy land and also received damages at law for breach of the same contract. None of the cases relied upon by the chancellor support the conclusion that Swarek can have specific performance and damages at law for the same alleged breach.

Regardless of the manner in which Swarek attempts to characterize his claim for money, it is axiomatic that an order of specific performance "erases the breach and precludes damages at law." *UFG, LLC v. Southwest Corp.,* 848 NE2d 353, 365 (Ind. App. 2006).[2] Therefore, any monetary award in connection with a judgment of specific performance is "equitable compensation to adjust the equities of the parties" and not damages at law. *Id.*

> A court of equity may award pecuniary compensation in addition to specific performance if necessary to restore the injured party to the position but for breach. While this pecuniary compensation is often referred to by the courts as "damages," it should be more properly considered as ***equitable compensation in the nature of an accounting*** between the parties rather than legal damages, since the court in awarding specific performance is confirming the contract and erasing the breach. 71 Am.Jur.2d, Specific Performance, §235.
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> Undoubtedly, where a purchaser of land is awarded the specific performance of his or her purchase contract, he or she is entitled to an allowance for what he or she has lost by reason of the vendor's delay in conveying the property. In some cases, this allowance is referred to, loosely or otherwise, as "damages." According to most courts, this is not an accurate statement of the principle on which the court acts. ***The compensation awarded as incident to a decree for specific performance is not for breach of contract and is therefore not legal damages.*** The complainant affirms the contract as being still in force

[2]Swarek criticizes us in the court below for relying on cases from other jurisdictions in opposition to Swarek's novel and disingenuous arguments. (R 472, TR 29) However, Mississippi appellate courts regularly look to cases in other jurisdictions for guidance on questions not heretofore precisely presented in this state. *Stidham v. State*, 750 So.2d 1238, 1241 (Miss. 1999).

> and asks that it be performed. He or she can not have it both ways, performed and broken. 71 Am.Jur.2d., Specific Performance, §236.

The chancellor clearly erred by concluding that Swarek's claim for money in this case is a claim at law which should be transferred to circuit court. Numerous cases can be found in other jurisdictions holding that monetary compensation, if any, to which Swarek may be entitled in connection with a specific performance judgment is not damages at law.

> The buyer's cross-appeal challenges the trial court's decision not to award damages. The buyer elected the remedy of specific performance rather than breach of contract, and contends that along with this remedy, he is entitled to *all* costs he has incurred due to the sellers' breach of contract.
>
> The damages awarded incident to a decree of specific performance of a real estate contract are different from those awarded for breach of the same contract. (citations omitted) Damages that flow from the grant of specific performance are limited to those which will return the parties to status quo at the time of the breach. (citations omitted) Thus, damages awarded in specific performance are a way of compensation to adjust the equities between the parties to place them in a position that they would have occupied had the contract been timely performed . . . "The court is really requiring an accounting in its attempt to adjust the equities between both parties in order to return them to their relative position at the time of closing" (citations omitted). *Kissman v. Panizzi*, 891 So.2d 1147, 1150-1151 (Fla. App. 2005)(emphasis by the court).
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> **********
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> It is within the sound judicial discretion of the trial judge to make findings regarding incidental damages when balancing the equities between the parties in specific performance cases. (citations omitted) Absent a clear abuse of that discretion, or palpable error, such findings will not be disturbed on appeal . . . the Andersons finally contend that the trial court erred in refusing their demand for a jury trial on the issue of damages. In exercising its equitable powers, the trial court awards such incidental damages in an attempt to balance the equities in order to protect the rights of all the parties and to do complete justice between them. (citations omitted) A balancing of

the equities, by awarding incidental damages to do complete justice between the parties, ***falls within the equity jurisdiction of the trial court. A jury trial is inappropriate in an equitable action*** (citations omitted). *Anderson v. Wooten*, 549 So.2d 40, 44 (Ala. 1989) (emphasis added).

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Manifest in its repeated references to "damages" is appellant's basic misconception of what this credit actually consists. It is true, as plaintiff argues, that where a vendee is entitled to a decree of specific performance of a contract for the purchase or exchange of land, he is entitled to a judgment for the rents and profits thereon from the time conveyance should have been made (citations omitted) and that under this rule no "damages" as such are awarded, the amount in reality being a form of compensation due the buyer for loss incurred because of the delay in receiving title, which amount may be ordered instant to the judgment of specific performance. This is awarded upon the theory that a court of equity, once it obtains jurisdiction of an action for specific performance, should adjust the rights of the parties and equalize any losses occasioned by the delay by offsetting them with money payments. Confusion in this area has existed because of the informal use of the term "damages" in connection with such an award, but it is settled that such compensation neither constitutes damages as contemplated in an action for breach of contract, nor implies legal damages. *Greenstone v. Claretian Theological Seminary*, 173 Cal. App. 2d 21, 29, 343 P.2d 161, 165 (1959) (overruled on other grounds).

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Consideration of the complaint, in the light of the brief, makes clear the nature of the damages sought by respondent and demonstrates that they are not the *general* damages, so characterized by appellant, which are recoverable at law for breach of a contract which instead might have been specifically enforced in equity. The latter is respondent's choice of remedy and he is undoubtedly, under all of the authorities, entitled to so select and pursue it. Rather, the damages claimed are called special and are ancillary to the equitable remedy of specific performance and recoverable in the court of equity, complementary to its decree in personam for conveyance, and makes complete its remedy for the wrongs done by the breach of a specifically enforceable contract. *Taylor v. Highland Park*

Corporation, 210 S.C. 254, 42 S.E. 2d 335, 339 (1947) (emphasis by the court).

We understand why Swarek is attempting to take the untenable position that his complaint seeks both specific performance and damages at law. Unquestionably, Swarek does not want to give up his claim to have his alleged contract specifically performed. However, he knows that he has no basis to have his suit moved to circuit court unless he simultaneously characterizes it as one for damages at law. Desperate litigants sometimes concoct absurd positions and clearly Swarek is desperate to get a second bite at the apple in a different forum. Having failed to convince the chancellor that a contract exists between these parties on motion for summary judgment, Swarek now wants to get a second, and hopefully more favorable, opinion from the circuit judge. After the chancellor ordered this case transferred, Swarek filed a renewed motion for summary judgment on April 29, 2008 (R 3) in the hope that the circuit judge will give him a more favorable result.

Despite Swarek's thinly disguised maneuvering, it is clear that he must elect the remedy that he intends to pursue. At this point, the remedy he has elected is the equitable remedy of specific performance. By asking the court to cure the breach of the alleged contract through a judgment of specific performance, Swarek has chosen to forego his claim for damages for breach of the alleged contract because there will be no breach if the contract is required to be performed.

To support his motion to transfer, Swarek relied on several cases in the court below that are irrelevant to any issue here. All of the cases cited by Swarek merely uphold the rule that claims at law ***for breach of contract*** should be heard in circuit court where a jury can decide the legal relief (damages) to which a plaintiff may be entitled. As we have seen, however, in the case at bar, Swarek did not opt for his remedy at law and the cases cited by Swarek are therefore inapplicable. For

example, in the court below Swarek relied heavily upon *ERA Franchise Systems, Inc. v. Mathis*, 931 So.2d 1278 (Miss. 2006). *Mathis* involved a squabble between the owners of a real estate agency known as Real Estate Professionals, LLC ("REP"). Mathis, one of the members of REP, filed suit in chancery court against the other members of REP along with several other defendants including REP's franchisor. The suit sought damages based on "numerous breach of contract allegations" along with a number of other claims at law. *Id* at p. 1280. Mathis contended that his breach of contract claims and other claims at law should be tried in the chancery court because he asserted these claims derivatively on behalf of REP. *Id* at p. 1282. On interlocutory appeal, the Supreme Court disagreed "with Mathis's assertion that a true stockholder derivative action is a suit in equity which confers jurisdiction on the chancery court." *Id* at p. 1282. However, the court concluded that the chancery court did not have jurisdiction of these claims because Mathis was, in fact, "pursuing a direct legal action rather than a true shareholder's derivative action." *Id.*

Holding that Mathis' complaint was not a derivative claim has no bearing on our facts. However, Swarek apparently relies on *Mathis* since the opinion also says that Mathis' complaint should be transferred to circuit court because "breach of contract issues are best heard in circuit court." *Id* at p. 1283. This statement in *Mathis* might have some relevance here if Swarek, like Mathis, had elected to sue for ***breach of contract.*** Of course, as we have demonstrated above, Swarek did not elect to sue for breach of contract, but rather Swarek sues to have the alleged contract upheld and enforced. Since the case at bar is not a breach of contract action, *Mathis* has no relevance here.

Undoubtedly, Swarek will be quick to point out that Mathis, in addition to his claims at law for breach of contract, also made equitable claims for a constructive trust and specific performance.

Although it is unclear from the opinion, it appears that the specific performance claim and the breach of contract claims related to different subject matter, different dealings and even different defendants. It seems clear from the majority opinion as well as from the dissent that there was a variety of different relationships and claims in play among the various parties to the *Mathis* case. Justice Graves explains in his dissent that, apart from the breach of contract claims against some or all of the defendants, the plaintiff alleged a specific performance claim against one of the defendants. Specifically, "Mathis alleged that Chip Hill breached an agreement to convey real property to him, and he brought a specific performance claim to require Hill to convey the subject property to him." *Id* at p. 1287. Our conclusion that the specific performance claim against Hill involved subject matter separate from the other breach of contract claims seems to be confirmed by the chancellor's decision to bifurcate the case and to take up the specific performance and other equitable claims separately.

More to the point, however, we find no evidence in the *Mathis* opinion that the plaintiff was trying to sue Chip Hill for specific performance and for breach of the contract in the same suit which is the issue here. Nor do we see any indication that the specific performance claim was transferred because Mathis sought damages at law from Hill in addition to specific performance. Rather, we think *Mathis* stands only for the proposition that a case involving a large number of claims ***at law*** against multiple defendants should be tried in the circuit court, being a court of general jurisdiction, even though there may be some isolated equitable claims involved as well. The *Mathis* court merely decided that a case involving a multitude of legal claims against numerous defendants should not be retained in chancery court simply because the case also included equitable claims, including a claim for specific performance against only one of the defendants. We do not comprehend that

Mathis has any relevance to the case at bar where there are no claims at law, and where Swarek's only claim is one for specific performance of an alleged real estate contract and an equitable claim for compensation ancillary thereto.

Swarek also relies upon *Tyson Breeders, Inc. v. Harrison*, 940 So.2d 230 (Miss. 2006). Again, this case involves a motion by the defendant, Tyson, to transfer to circuit court a case filed initially in the chancery court. The plaintiff sought specific performance of a contract with Tyson together with injunctive relief and actual and punitive damages. However, the court concluded that "this case does not involve a unique matter such as real estate where specific performance is a particularly appropriate remedy." *Id.* at p. 234. The court further concluded that "the proper remedy for Harrison's action for breach of contract is at law to recover damages, which is best heard by the circuit court." *Id.* The Court in *Tyson* transferred the case to circuit court because the equitable remedy chosen by the plaintiff was not the correct remedy. Conversely, in the case at bar, the matter at issue is real estate and there certainly has been no determination that specific performance may not be an appropriate remedy.

Swarek cites one additional case that involves a claim for specific performance: *Copiah Medical Associates v. Mississippi Baptist Health Systems,* 898 So.2d 656 (Miss. 2005). However, like *Mathis* and *Tyson* discussed above, the issue in *Copiah Medical* is not the same issue that is before the Court for resolution in the case at bar. Like the decision in *Tyson*, supra, the Court in *Copiah Medical* based its decision to transfer, at least in part, on a determination that the remedy of specific performance was not the appropriate remedy for the enforcement of a fifteen year lease agreement. The Court concluded that the more appropriate remedy was damages in circuit court. *Id* at p. 660. Furthermore, in *Copiah Medical*, there was already a previously filed suit in the circuit

court between the same parties involving "the same evidence and witnesses." *Id* at p. 662. As a result, the Court found the claims made in the chancery case should have been submitted as a compulsory counterclaim in the circuit court action which further necessitated a transfer of the chancery case to circuit court. Lastly, pursuant to the priority of jurisdiction rule, the Court found that the chancery court case should be transferred to circuit court because the circuit court case was filed first. *Id.* at p. 663.

Therefore, in summary, the Court transferred the chancery court case to circuit court in *Copiah Medical* because specific performance was not the proper remedy, because the claim made in chancery should have been filed as a compulsory counterclaim in the previously filed circuit court case, and because the circuit court had priority jurisdiction since the circuit court case was filed first. None of these determinative factors are present in this case.

Swarek also attempts to rely upon *Union National Life Insurance Company v. Crosby*, 870 So.2d 1175 (2004), *Burnette v. Hartford Underwriters Insurance Company*, 770 So.2d 948 (2000) and *Southern Leisure Homes, Inc. v. Hardin*, 742 So.2d 1088 (Miss. 1999). However, none of these cases have any relevance to the issue before the Court today for determination. None of these cases involve a claim for specific performance, and certainly none of these cases involve a situation where the plaintiff has clearly elected the remedy of specific performance as opposed to damages at law for breach of contract. Both the *Burnette* and *Southern Leisure* cases clearly involve claims for damages arising out of a breach of contract. Therefore, it is not surprising that the Court ruled that claims at law for breach of contract are "best heard in circuit court." *Southern Leisure*, supra, at p. 1090. It is also not surprising that the Court in these cases upheld the parties' right to a jury trial on their claims which are clearly legal, as opposed to equitable.

Similarly, in the *Crosby* case, 350 plaintiffs sued for damages arising out of an alleged fraudulent insurance scheme. The plaintiffs stated claims in their suit for "fraud, fraudulent inducement, breach of duty of good faith and fair dealing, tortious breach of contract, breach of fiduciary duty, assumpsit, unjust enrichment, negligence, gross negligence, multiple violations of the Mississippi Consumer Protection Act, and conversion." *Crosby*, at p. 1178. For this collection of wrongs, the plaintiffs made a claim at law for damages and included requests for equitable relief in the nature of a constructive trust and an accounting. It seems clear the Court correctly determined that plaintiffs' "suit sounds in tort and contract law instead of equity" and transferred the case to circuit court. *Id* at p. 1178. *Crosby*, like *Mathis*, seems to stand for the proposition that lawsuits with multiple claims at law for damages arising out of a contractual relationship that are ***properly joined*** with equitable claims will be transferred to circuit court. As we have stated, this holding has no bearing on the completely different set of facts at bar. Specifically, *Crosby* does not involve the improper fusing of a claim at law for damages with a suit to specifically perform a contract for the sale of real property.

In summary, we think all of the cases cited by Swarek consistently stand for the following legal propositions: (a) ***claims at law for breach of contract*** should be tried in the circuit court, and (b) where a plaintiff can ***consistently*** make claims at law and claims for equitable relief in the same suit, those suits should be litigated in the circuit court because the circuit court is a court of general jurisdiction and because the plaintiff is entitled to have his claims at law determined by a jury. Unfortunately, neither of these concepts help determine today's case, and therefore all of the cases relied upon by Swarek are irrelevant. None of the cases depended upon by Swarek hold that a suit for specific performance of a land sale contract should be transferred to circuit court where the

plaintiff improperly and inconsistently asserts that he is also entitled to damages at law for breach of the same contract.

Swarek's complaint also seeks punitive damages. If Swarek had elected his legal remedy and had opted to sue DPI for breach of contract, rather than specific performance, then clearly he would be entitled to make a claim for punitive damages. Stated another way, if Swarek had elected to sue at law for breach of contract, his claim that Derr's breach was attended by "egregious misconduct and fraud" could be considered by a circuit court jury in connection with a punitive damages instruction. (R 5). However, Swarek unquestionably cannot recover punitive damages for an alleged breach of contract when he has elected the remedy of specific performance. As we have demonstrated above, the only monetary relief to which Swarek may be entitled in connection with his suit for specific performance is equitable compensation for losses allegedly suffered due to DPI's alleged delay in performance. We have been directed to no case where punitive damages have been awarded as an element of the equitable compensation awarded in connection with specific performance relief. Therefore, Swarek's claim for punitive damages is further evidence of Swarek's improper attempt to make a claim for specific performance in equity simultaneously with a claim for damages at law.

Throughout this jurisdictional dispute, Swarek has pointed out this Court's holding in *Southern Leisure*, supra, that "in cases in which some doubt exists as to whether a complaint is legal or equitable in nature, the better practice is to try the case in circuit court" (R 479). Swarek also points out holdings of this Court to the effect that, where doubts exist as to whether claims are legal or equitable, the case should be sent to circuit court "in order to preserve the right to a jury trial" (R 479). In this appeal, we will undoubtedly again hear that these holdings of this Court in various

cases have some relevance here. However, according to *McVay*, supra, this is not and cannot be a case where there is any doubt about whether the claims are legal or equitable in nature. Rather, the plaintiff is required to make a clear election of the remedy he seeks, either equitable or legal. Therefore, we believe it is incumbent upon the court on this appeal to determine what remedy has been elected and based on that election to determine the court with jurisdictional power to award the elected remedy. Cases that have been transferred to the circuit court because the remedies sought are unclear or otherwise in doubt have no relevance in the determination of this case.

CONCLUSION

In a suit arising out of a breach of an alleged contract to sell land, it is incumbent upon the plaintiff to select the remedy that he desires - - either equitable or legal. *McVay*, 119 So. at 156. In this case, the plaintiffs filed suit in the chancery court seeking specific performance and specifically requested to be compensated for any increase in the plaintiffs' financing cost as a result of the defendant's alleged delay in performance. Not only did Swarek elect to bring his case in a court of equity initially, he prosecuted his case there through extensive discovery and motion practice for a period of twenty-seven months before he indicated an intention to elect anything other than his equitable remedies in the chancery court. Based on all the foregoing, it is submitted that this Court should determine, as a matter of law, that Swarek has elected his equitable remedies of specific performance and equitable compensation for any delay in performance by the defendants of the alleged contract. The fact that Swarek may have improperly attempted to join inconsistent legal claims with his claim for specific performance should not, after three years of litigation, allow him to avoid the clear election of equitable remedies.

As a result of Swarek's choice of equitable remedies, this case should be remanded to the chancery court for determination of whether a valid contract exists and, if so, whether Swarek is entitled to the equitable relief requested. Furthermore, in the event Swarek is deemed by this court to have elected his equitable remedies for the breach of the alleged land contract, the chancellor should be directed to deny in this regard any purported claims at law for damages, including punitive damages. In the unlikely event the chancellor determines that a contract exists and that specific performance is to be ordered, it is clear that the only monetary award to be considered is that compensation which is required "to adjust the equities between the parties to place them in a position that they would have occupied had the contract been timely performed". *Kissman*, supra, at p. 1151.

Respectfully submitted,

DERR PLANTATION, INC.

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

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

WHEELESS, SHAPPLEY, BAILESS
& RECTOR, LLP
POST OFFICE BOX 991
VICKSBURG, MS 39181-0991
TELEPHONE: 601-636-8451
FACSIMILE: 601-636-8481

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 15th day of September, 2008.

KENNETH B. RECTOR