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

CASE NO. 2008-CA-00077

WALTER F. GANDY and
CHARLES H. GANDY — APPELLANTS

VERSUS

GEORGE E. FORD,
DAVID EISWORTH, CHRIS HITT
and FIRST FEDERAL BANK FOR SAVINGS,
SOUTH PARK — APPELLEES

APPEAL FROM THE CHANCERY COURT
MARION COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

SUBMITTED BY:

FRANK P. WITTMANN, III
WITTMANN & WITTMANN
Post Office Box 1648
1820 22nd Avenue
Gulfport, MS 39502
Tel. 228- 864-1600
Fax 228- 868-1194
MS Bar [redacted]

WILLIAM W. DREHER, JR.
DREHER LAW FIRM
Post Office Box 968
2224-24th Avenue
Gulfport, Mississippi 39502
Tel. 228-822-2222
Fax 228-822-2626
MSB# [redacted]

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that all listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Walter F. Gandy and Charles H. Gandy, Appellants
Frank P. Wittmann, III, Attorney for Appellants
Renee Porter, Attorney for Appellees
George E. Ford, Appellee
David Eisworth, Appellee
Chris Hitt, Appellee
First Federal Bank for Savings, South Park, Appellee
Honorable James H.C. Thomas, Jr., Chancellor

RESPECTFULLY SUBMITTED this the 16th day of September, 2008.

WALTER F. GANDY
AND CHARLES H. GANDY

BY: Frank P. Wittmann III
FRANK P. WITTMANN, III
WILLIAM W. DREHER, JR.
ATTORNEYS FOR APPELLANTS

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WHETHER THE COURT COMMITTED MANIFEST ERROR AND ABUSED ITS DISCRETION IN SETTING ASIDE A BILL OF SALE THAT IS CLEAR AND UNAMBIGUOUS.

STATEMENT OF THE CASE

Walter Gandy and George Ford[1] were related by marriage. Walt's wife was George's first cousin. George, being a bit eccentric, needed help throughout his life that Walt provided. Walt allowed him to stay in his hunting cabin when he had no place to go. Walt and Charlie Gandy built a house for him when he again needed a place to live. When George became paralyzed, Walt and Charlie repaired his porch and built him a wheelchair ramp.

In 1992, George sold his land and personal property to Walt and retained a life estate on both. Included in the personal property was a certain tractor, which is referred hereafter as the "old tractor." In 1993, George wanted to buy a "new tractor" using the "old tractor" as a trade-in. Walt agreed. Instead of trading in the "old tractor", Walt gave George the trade-in value of the "old tractor" to use as the down payment on the "new tractor". The parties agreed that George would retain a life estate in the "new tractor" with Walt having the remainder interest. Walt kept the "old tractor".

In August 2000, George sold the "new tractor" to Chris Hitt. When Walt noticed the tractor was missing from George's home, Walt investigated and learned what George had done. Walt and Charlie then filed a complaint for Equitable Lien and Waste against George Ford, David Eisworth, Chris Hitt and First Federal Bank for Savings South Park.

After a hearing on the merits, the Chancellor enter a judgment declaring the land transaction to be valid, but setting aside the bill of sale for the "new tractor". Feeling aggrieved

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[1]George Ford passed away after this case was heard.

at the court's decision setting aside the bill of sale and feeling that the court had exceeded its authority, Walt and Charlie filed this appeal.

STATEMENT OF THE FACTS

This dispute revolves around a family, the Fords, who live in and around the City of Columbia in Marion County, Mississippi. Walter Gandy (Walt) and his son, Charles H. Gandy (Charlie) are residents of Pearl River County, Mississippi. (Tr. 3) Walt is related to the Defendant, George Ford (George) by marriage. (Tr. 3) George is Walt's wife's first cousin. George and the Gandy's had a long and friendly relationship being approximately 40 years. (Tr. 3) George Ford was not married and lived on Ford Family property in Columbia for most of his life. (Tr. 3) George is also a bit eccentric. For example, he refused to have a bathroom in the house. (Tr. 17)

In the early 1972, Walt allowed George to live in his hunting and fishing cabin for about a year when George had no place to live. (Tr. 4-5) In 1987 or 1988, Walt built a small house for George on 26 acres of property George inherited from his father. (Tr. 5-6) In 1992, George sold Walt and Charlie the aforesaid 26 acres for the sum of $14,000. (Ex. 2) George retained a life estate to the property. (Tr. 7-11; Ex. 2) At the same time, George sold Walt numerous personal items listed on a Bill of Sale and retained a life estate and maintained possession of all items. (Tr. 7-1; Ex. 3) Ford also included on the bill of sale for the personal items was a tractor which he owned at the time. (Tr. 7-11; Ex. 3) The deed and bill of sale were prepared by Walt's attorney. (Tr. 31) However, both deed and bill of sale were notarized by the Hon. Garland Upton. (Tr. 31 & 40-44) Mr. Upton ensured that George understood that he was signing a deed, retaining a life estate and deeding all his personal property. (Tr. 43)

In 1993, George wanted to purchase a new tractor. (Tr. 12) Walt agreed to give George the trade-in value for the "old tractor". (Tr. 12-13) This "old tractor", as we will call it, is the same tractor that Walt already owned at George's death. (Tr. 12-13) George then took the money that Walt gave him and purchased the "new tractor". (Tr. 13) George and Walt agreed that George would transfer the "new tractor" to Walt with George maintaining a life estate in the "new tractor". (Tr. 13; Ex 4)

In 2000, George suffered an illness that left him paralyzed. (Tr. 14) Walt and Charlie replaced his front porch and built him a wheelchair ramp. (Tr. 14) A few months later, Walt noticed that the "new tractor" was missing from George's home where it was normally kept. (Tr. 14) Walt learned that another cousin, David Eisworth, removed the tractor from George's house. (Tr. 16) The tractor had been purchased by another cousin, Chris Hitt, (Tr. 136; Ex. 8)

Walt and Charlie then filed a complaint for Equitable Lien and Waste against George Ford, David Eisworth, Chris Hitt and First Federal Bank for Savings South Park. (R.E. 3)

Defendants claimed, throughout the trial, that George Ford was an 80 year old who was mentally impaired. Defendants promised to put on proof of a doctor's testimony of his impairment. However, after being granted 15 days to produce the doctor, no proof was forthcoming. (Tr. 186) The only proof of any impairment by George was his testimony at trial, which at best showed a man in his 80's who was confused as to the questions which were asked him by the court and both parties. (Tr. 91-105)

At trial, George testified that he did not intend to sell the tractor. (Tr. 91-105) When questioned, George rambled and was non-responsive on several occasions. (Tr. 91-105)

The Chancellor questioned George to determine his mental capacity. (Tr. 103-105) George was non-responsive, and the Chancellor had to ask George the same questions several times before he responded. (Tr. 103-105) There was no proof presented of any mental incapacity on George's part in 1993 when the deal was struck.

On December 4, 2007, the Chancellor entered his decision and set aside the bill of sale for the "new tractor" stating that it was not George's intent nor did the bill of sale have adequate consideration for the "new tractor".

SUMMARY OF THE ARGUMENT

On December 4, 2007, the Chancery Court of Marion County entered a judgment setting aside the bill of sale, Exhibit 4, for the "new tractor" and cancelled the agreement in part between George Ford and Walter and Charles Gandy.

It is respectfully submitted that the learned chancellor committed manifest and reversible error in setting aside the aforesaid bill of sale and canceling the agreement between George Ford and Walter Gandy. Walter Gandy and Charles Gandy respectfully submit that setting aside the bill of sale and canceling the agreement between the parties is contradictory to the overwhelming weight of the evidence and the case law of the State of Mississippi. Walter Gandy and Charles Gandy respectfully submit that the Chancellor does not have the authority to modify or to cancel a binding contract between two consenting parties.

ARGUMENT

WHETHER THE COURT COMMITTED MANIFEST ERROR AND ABUSED ITS DISCRETION IN SETTING ASIDE A BILL OF SALE THAT IS CLEAR AND UNAMBIGUOUS.

Walter and Charles Gandy, as Appellants in this case, accept the well-established law concerning this court's role in reviewing a decision of a Chancellor. In cases involving alimony, the court will afford the chancellor considerable discretion. "The chancellor's findings will not be reversed unless manifestly in error or an abuse of discretion." *Tanner v. Roland*, 598 So.2d 783, 786 (Miss. 1992). "Our familiar rule of deference prohibits us from disturbing the factual finding of a chancellor unless it is manifestly wrong or clearly erroneous." *Bowers Window & Door Co. v. Dearman*, 549 So.2d 1309, 1313 (Miss. 1989). "For questions of law, our standard of review is de novo." *Harrison County v. City of Gulfport*, 557 So.2d 780, 784 (Miss. 1990).

Walter and Charles Gandy respectfully submit that the Honorable Chancellor was manifestly incorrect in setting aside the agreement between Walter Gandy and George Ford. In *Union Planter Nat'l Bank, N.A. v. Jetton,* the Court stated the authority that a court has relating to a contract when it stated:

> Under Mississippi law, where the contract is not ambiguous, the intention of the contracting parties should be gleaned solely from the wording of the contract. *Heritage Cablevision v. New Albany Elec. Power Sys.*, 646 So.2d 1305, 1312 (Miss. 1994). Parol evidence will not be received to vary or alter the terms of a written agreement that is intended to express the entire agreement of the parties on the subject matter at hand. *Turner v. Terry*, 799 So.2d 25, 32 (P 16) (Miss. 2001); *Grenada Auto Co. v. Waldrop*, 188 Miss. 468, 195 So. 491, 492 (1940). A "court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous." *Merchants & Farmers Bank v. State ex rel. Moore*, 651 So.2d 1060, 1061

> (Miss. 1995). As stated in *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss. 1997), the parties are bound by the language of the contract where a contract is unambiguous. We are "concerned with what the contracting parties have said to each other, not some secret thought of one [that was] not communicated to the other." *Mississippi State Highway Com'n v. Patterson Enterprises Ltd.*, 627 So.2d 261, 263 (Miss. 1993). "While a valid contract may be reformed where a mistake has been made, the general rule is that reformation is justified only if the mistake is a mutual one, or where one party made a mistake and the other party committed fraud or inequitable conduct." *Palmere v. Curtis*, 789 So.2d 126, 131 (P12) (Miss. Ct. App. 2001) (*citing Ivison v. Ivison*, 762 So.2d 329, 335-36 (P21) (Miss. 2000)). However, "the mistake that will justify a reformation must be in the drafting of the instrument, not in the making of the contract." *Id.* (*quoting Johnson v. Consolidated Am. Life Ins. Co.*, 244 So.2d 400, 402 (Miss. 1971)).

Union Planter Nat'l Bank, N.A. v. Jetton, 856 So.2d 674 (Miss. App. 2003).

When a contract is clear and unambiguous, this Court "is not concerned with what the parties may have meant or intended but rather what they said, for the language employed in a contract is the surest guide to what was intended." *Palmere v. Curtis*, 789 So.2d 126, 131 (*quoting Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985)). When this Court interprets a contract, we "look to the contract for its meaning, not what a party thereto may have thought it meant. The standard is objective, measured by the language of the contract, not by the subjective intent or belief of a party which conflicts with meaning ascertained by the objective standard." *Id.* (*quoting Landry v. Moody Grishman Agency, Inc.*, 254 Miss. 363, 375, 181 So. 2d 134, 139 (1965)). We are "concerned with what the contracting parties have said to each other, not some secret thought of one [that was] not communicated to the other." *Id.* (*quoting Mississippi State Highway Com'n v. Patterson Enterprises Ltd.*, 627 So. 2d 261, 263 (Miss. 1993).

In this case, the bills of sale are clear and unambiguous. No one has raised the issue of vagueness or ambiguity. Both documents were notarized by an independent party. Thus, the court is obligated to enforce such a contract. *See Merchants & Farmers Bank v. State ex rel. Moore*, supra. The chancellor based his decision on what he perceived to be the intent of George Ford. However, the intent of the parties or what they meant has not been of concern to this court, but what they said in their contract. See *Shaw,* at 481 So. 2d 252. The best indication of the intention of the parties has been the language of the contract. *Id.* The language in the agreement between Walt and George is clear. George intended to sell his tractor to Walt and retain the tractor until the day he died at which time the tractor would belong to Walt. George dictated the terms and the price. He is estopped from asking the court to set aside the agreement.

As to the issue of lack of *adequate* consideration, that term is most often used with a constitutional attach on a lease, most often a lease of sixteenth section property, or a fraudulent transfer. This case does not address either. In *Daniel v. The Snowdoun Association*, this court addressed the issue of lack of consideration when it stated:

> "Lack of consideration is an affirmative defense. The party advancing it must plead it in his answer, as Daniel did here. Where the instrument in controversy contains a statement or recital of consideration, it creates a rebuttable presumption that consideration actually existed. 17 C.J.S. Contracts § 73. *See also, Dabbs v. International Minerals and Chemical Corp.*, 339 F. Supp. 654, 664 (N. D. Miss. 1972). The general rule is that this presumption is established even by such expressions as "for value", "for good and sufficient consideration", "for value received" or, as in the present case, "for valuable consideration." *Frank v. Irgens*, 27 Minn. 43, 6 N. W. 380, 380 (1880); *Estate of Weinsaft*, 647 S. W. 2d 179, 183 (Mo. App. 1983); *Gover v. Empire Bank*, 574 S. W. 2d 464, 468-64 (Mo. App. 1978). This presumption, however, does not disable the defendant from putting on proof designed to show that the consideration was

> not actually paid or bargained for. Restatement 2d of Contracts § 71, Comment (b) (1979). *See also, e.g., Upper Avenue National Bank of Chicago v. First Arlington National Bank of Arlington Heights*, 81 Ill. App. 3rd 208, 400 N. E. 2d 1105, 1107, 36 Ill. Dec. 525 (1980); *Presbyterian Church of Albany v. Cooper*, 112 N.Y. 517, 20 N. E. 352, 353 (1889). The rebuttal must be made by a clear preponderance of the evidence. *Gershon v. Ashkanazie*, 239 Mo. App. 1012, 199 S. W. 2d 38, 40 (1947). The resolution of any conflict in the testimony is for the trier of fact."

Thompson G. Daniel v. The Snowdoun Association, 513 So.2d 946 (Miss. 1987).

The bills of sale clearly show that consideration was given. Therefore, a rebuttal presumption is created that can only be overcome by clear and convincing evidence. *See Id.* The Chancellor's decision was based upon the preponderance of the evidence standard.

Again, George set the terms and the price. He cannot raise the issue of lack of consideration or lack of adequate consideration. The Chancellor's decision in essence puts a burden on the purchaser to object to the price if he believes it to be too low. That is just not real life.

When George sold his personal property and retained a life estate, he split the ownership of that property into a present interest and a future interest. In 1992, Walt paid for the future interest in the "old tractor". Later when George wanted to buy another tractor, Walt paid George for the present interest in the "old tractor". George and Walt transferred ownership of the future interest in the "old tractor" to the "new tractor".

There has been no evidence as to the value of the future interest of either tractor at the time of George's death. How could anyone estimate the value of the future interest in either tractor in 1992 or 1993? Walt took a gamble that the tractor would have some value at the

time of George's death. In 1992, no one could tell when George would die. He could have outlived Walt for that matter. In 1992 Walt paid George for a future interest in a tractor that he had to wait over twelve years before his future interest matured. If George were alive today, Walt would still be waiting for that future interest to mature.

No one could predict George's death nor could they predict the condition of the tractor at the time of George's death. The tractor could have been worn out or in pristine shape. In 1992 and 1993, no one could foretell the condition of the tractors and certainly could not foresee this lawsuit. Once George passed away, he had no use for either tractor and could not really care what happened to them. Therefore, the only thing that we know for sure is that the future interest to the tractor is worth noting to George at his death. What is adequate consideration to George for ownership of a tractor after his death? Walt and Charlie suggest to the court that it is very little indeed.

One must wonder, what if George sold the "old tractor" to Chris Hitt? The Chancellor only ruled that the second bill of sale for the "new tractor" was void. Therefore, without some testimony as to the value of the future interest, the Chancellor's decision that consideration was inadequate must fail.

CONCLUSION

For the reasons stated above, Walt and Charlie respectfully submit that the trial court committed manifest and reversible error in finding that George did not intend to sell a future interest in the "new tractor", which directly contradicts the written agreement between the Walt and George. Therefore, it is respectfully submitted that this case be remanded to the Chancery Court of Marion County, Mississippi with instructions that bill of sale be reinstated

CERTIFICATE OF SERVICE

I, Frank P. Wittmann, III, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Renee Porter; Attorney for Appellees
Attorney at Law
P.O. Box 982
Columbia, Mississippi 39429

Honorable James H.C. Thomas, Jr.: Chancellor Marion County, Mississippi
P.O. Box 807
Hattiesburg, Mississippi 39403

SO CERTIFIED this the 16th day of September, 2008.

Frank P. Wittmann III

FRANK P. WITTMANN, III
WILLIAM W. DREHER, JR.
Attorneys for the Appellant

FRANK P. WITTMANN, III
WITTMANN & WITTMANN
1820 22nd Avenue
Post Office Box 1648
Gulfport, MS 39502
Tel. 228- 864-1600
Fax 228- 868-1194
MS Bar [redacted]

WILLIAM W. DREHER, JR.
DREHER LAW FIRM
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Tel. 228-822-2222
Fax 228-822-2626
MSB# [redacted]