IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-02076

QUARTER DEVELOPMENT, LLC

PLAINTIFF-APPELLANT

versus

SHERRY HOLLOWELL, BONNIE URBANEK SCOTT
and THE ESTATE OF JAMES E. URBANEK

DEFENDANTS-APPELLEES

ON APPEAL FROM THE
CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

BRIEF OF SHERRY HOLLOWELL, BONNIE URBANEK SCOTT and THE ESTATE OF JAMES E. URBANEK APPELLEES

ORAL ARGUMENT NOT REQUESTED

TIMOTHY M. PEEPLES - BAR [redacted]
DANIEL, COKER, HORTON & BELL, P.A.
OXFORD SQUARE NORTH
265 SOUTH LAMAR BOULEVARD
SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

IN THE SUPREME COURT OF MISSISSIPPI

QUARTER DEVELOPMENT, LLC — APPELLANT

VS. — NO. 2005-TS-02271

SHERRY HOLLOWELL, BONNIE URBANEK SCOTT and THE ESTATE OF JAMES E. URBANEK — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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. Quarter Development, LLC — Plaintiff/Appellant.
2. Sherry Hollowell, Bonnie Scott Urbanek and the Estate of James E. Urbanek — Defendants/Appellees.
3. David E. Rozier, Jr., Esq., and Janessa Carter Hicks, Esq., Rozier Hayes, PLLC, 2091 Old Taylor Road, Suite 102, Oxford, MS 38655 — Counsel for Plaintiff/Appellant.
4. Timothy M. Peeples, Esq., Daniel Coker Horton & Bell, P.A., 265 North Lamar Boulevard, Post Office Box 1396, Oxford, MS 38655 — Counsel for Defendants/Appellees.
5. Amanda M. Urbanek, Esq., 604 Audobon Lane, Oxford, MS 38655 — Former Counsel for Defendants/Appellees.
6. Honorable Robert W. Elliott, Lafayette County Circuit Court Judge, 102 North Main Street, Ripley, MS 38663 — Trial Judge in the above-styled litigation.

THIS the 22nd day of June, 2011.

TIMOTHY M. PEEPLES
ATTORNEYS FOR APPELLEES

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I. STATEMENT OF THE ISSUES

A. The trial court properly granted summary judgment to the Appellees, Sherry Hollowell, Bonnie Scott Urbanek and the Estate of James E. Urbanek.

B. In the alternative, Quarter's claims should be dismissed under the mutual mistake of fact doctrine.

C. The trial court's grant of summary judgment must be upheld, and the case should be remanded solely for a determination of the Urbaneks' right to recover attorney's fees.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

Plaintiff/Appellant Quarter Development ("Quarter") filed suit in the Circuit Court of Lafayette County, Mississippi, against Sherry Hollowell, Bonnie Scott Urbanek[1] and James E. Urbanek[2] (all Appellees will be referred to as "the Urbaneks" in the Appellees' Brief) on July 28, 2009, alleging breach of contract, bad faith and negligent misrepresentation by the Urbaneks and seeking recovery of attorney's fees, court costs, specific performance and other damages. (Clerk's Papers ("C.P.") 1-6). Quarter contended in its Complaint that the Urbaneks refused to close on the sale of a parcel of property and demanded that the Urbaneks be forced to do so. (C.P. 1-6).

Quarter and the Urbaneks each filed Motions for Summary Judgment. (C.P. 107-26; C.P. 71-104). The Honorable Robert W. Elliott entered an Opinion and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Counter-Motion for Summary Judgment

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[1]Sherry Hollowell and Bonnie Scott Urbanek responded to Quarter's Complaint by moving for dismissal on the basis that neither of them were parties to the subject Contract. (C.P. 11-14, 39-42). The trial court did not rule on their Motions to Dismiss prior to granting the Appellees' Motion for Summary Judgment.

[2]During the pendency of the litigation, James E. Urbanek died. His estate was substituted as a defendant by Agreed Order dated February, 5, 2010. (C.P. 105-06).

on June 7, 2010. (C.P. 179-82). Judge Elliott subsequently entered an Order Denying Plaintiff's Motion for Reconsideration or, in the Alternative, for Amendment to Opinion and Order on December 1, 2010. (C.P. 192). Quarter has now appealed the dismissal of its claims.

B. STATEMENT OF FACTS

The instant litigation centers on a Contract for the Sale and Purchase of Real Estate Lots and Land ("Contract"). (C.P. 7-10). The Contract was signed by Mike Harris on behalf of Quarter, the seller, and by James Urbanek, the buyer. (C.P. 7-10). The Contract provided that the parties would close on or before April 30, 2009, although the Contract added that "Seller agrees to grant purchasers an extension of this purchase agreement a period of 45 days if the purchaser so requests." (C.P. 7-10). The 45-day extension, if requested, would have made June 14, 2009, the last date on which the deal could be closed under the Contract.[3] The Contract called for Quarter to deliver a warranty deed to the Urbaneks at closing and noted that time was "of the essence" under the agreement. (C.P. 7-10).

There was no closing, either on April 30, 2009, or June 14, 2009, nor on any other date. There is no evidence in the Record that the parties set a time and place for a closing meeting. Even if Quarter had attempted to close on the subject property on June 14, 2009, Quarter could not have performed its end of the bargain. There is simply no basis for Quarter's lawsuit since Quarter could not have performed under the Contract on June 14, 2009, nor did it seek to enforce its rights under the Contract *prior to* the expiration of the Contract on June 14, 2009. The Contract contains no provision that would have extended its enforceability beyond June 14, 2009.

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[3]Despite the assertions made in Quarter's Brief, there is no indication in the Record that the Urbaneks specifically requested the 45-day extension. Regardless, whether closing had to occur on April 30, 2009, or June 14, 2009, the simple fact is that closing never occurred and that at no point prior to June 14, 2009, did Quarter ever have marketable title to the subject property.

Even had Quarter attempted to close under the Contract before June 14, 2009, Quarter would not have been able to provide the Urbaneks with a valid warranty deed because Quarter did not own the two parcels of land to be sold at the time the Contract was signed in February 2009, or on either closing date, April 30, 2009, or June 14, 2009. Instead, Northpointe Development, LLC ("Northpointe"), owned both parcels until September 4, 2009, as is evidenced by the real property tax records for Lafayette County, Mississippi. (C.P. 91-92). On September 4, 2009, the two parcels were sold to Avatar, LLC, and Intrepid Group, LLC, respectively, due to unpaid taxes by Northpointe. (C.P. 91-92). It was not until September 9, 2009, that Quarter actually acquired ownership of and marketable title to the two parcels of land from Avatar, LLC, and Intrepid Group, LLC, respectively, and Northpointe Development, LLC. (C.P. 93-104). None of these entities are related to Quarter. Interestingly, Quarter filed suit against the Urbaneks on July 28, 2009, over six (6) full weeks before it ever had ownership of this property. (C.P. 1-6). As Quarter notes in its Brief, "[n]one of the parties were aware of any title 'defects' at any point during the term of the contract." (Appellant's Brief, p. 5). While lack of ownership in property is clearly something well beyond a mere title "defect," the parties agree that at no point in time did Quarter ever have ownership of the two parcels of land to be sold under the Contract during the Contract's pendency.

III. SUMMARY OF THE ARGUMENT

The trial court correctly applied applicable Mississippi law and held that Quarter "did not have marketable title to the two parcels contemplated by the Contract by the closing date and extended closing date of the Contract and, therefore, was not ready, willing, and able to perform during the contract period." (C.P. 179-82). Northpointe Development, not Quarter, owned the

two parcels of land at the time the Contract was entered into in February 2009, on the original closing date of April 30, 2009, and on the extended closing date of June 14, 2009. Northpointe and Quarter are separate, unrelated entities, and there are simply no questions of material fact in dispute as the issue of ownership of this property can be determined by reviewing the appropriate documents from the Lafayette County Chancery Clerk's Office. (C.P. 91-92, 93-104).

The trial court also correctly found that "[b]y the end of the contract extension period [of June 14, 2009], neither party performed or tendered performance. The Contract terminated as of the close of business on June 14, 2009." (C.P. 179-82). Quarter has no response whatsoever to the Court's finding on this point in its Brief. While Quarter contends, without support in the Record, that the Urbaneks "simply refused to close on the contract without justification and in violation of the terms governing sale," Quarter does not argue or suggest that a closing meeting was ever set up by the parties on or before June 14, 2009. As the Court noted, the Contract expired on June 14, 2009. Quarter has no right to complain about the Urbaneks' purported noncompliance since even if closing had been set, Quarter could not have met its obligations under the Contract.

In the alternative, Quarter's claims should be dismissed under the doctrine of mutual mistake of fact. Although not addressed in the lower court's Opinion and Order, the Urbaneks were entitled to summary judgment since Quarter and the Urbaneks were operating under the mistaken belief that Quarter owned the subject property (1) at the time the Contract was entered into, (2) on April 30, 2009, and (3) on June 14, 2009. Even were this Court to find that there are questions of fact as to the other issue raised in Quarter's Appeal, which the Urbaneks expressly deny, this Court should uphold the dismissal of Quarter's claims under this doctrine.

For all of those reasons, the trial court's grant of summary judgment to the Urbaneks must be upheld. The trial court's ruling should be affirmed, and this matter should be remanded for the sole purpose of determining the Urbaneks' right to recover attorney's fees.

IV. ARGUMENT

A. STANDARD OF REVIEW

Mississippi's appellate courts utilize a *de novo* standard of review for grants and denials of summary judgment motions. *Simmons v. Thompson Machinery of Miss., Inc.*, 631 So. 2d 798, 801 (Miss. 1994). Summary judgment must be granted under Rule 56(c) of the Mississippi Rules of Civil Procedure by the trial court where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As the Mississippi Supreme Court has noted, "[t]he focal point of our standard for summary judgment is on material facts." *Simmons*, 631 So. 2d at 801. To defeat a motion for summary judgment, the opposing party must rebut the motion "by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues." *Id.* The Court has added that "[t]he presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense." *Id.* The Court operates under the basic principle that "the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact." *Id.* Especially important for this case, summary judgment cannot be overcome by "mere allegations or denials;" instead, the party seeking to avoid summary judgment "must set forth specific facts showing that there is a genuine issue for trial." *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 483 (Miss. 2006). Rule 56 "mandates that the party opposing the motion be

diligent. Mere general allegations which do not reveal detailed and precise facts will not preclude the award of summary judgment." *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 364 (Miss. 1983).

B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE APPELLEES, SHERRY HOLLOWELL, BONNIE SCOTT URBANEK AND THE ESTATE OF JAMES E. URBANEK

Mississippi law prohibits an award of specific performance unless the party seeking that relief performs his or her part of the Contract within the time allotted for his or her performance. *Gunn v. Heggins*, 964 So. 2d 586, 591-92 (Miss. Ct. App. 2007). In *Gunn*, the Mississippi Court of Appeals observed that:

> [w]here all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duties to render such performance that the other party either tendered or, with manifested ability to do so, offer performance on his part of the simultaneous exchange.

Id. at 591. In other words, "[o]ne cannot maintain an action [for specific performance] against the other without showing performance or a tender of performance on his part." *Id.* at 592; *see also Marshall County v. Callahan*, 94 So. 5, 6 (Miss. 1922) (stating that "[o]ne party cannot maintain an action [for specific performance] against the other without showing performance or a tender of performance on his part"). The party seeking specific performance must show that he or she "tendered" or "offered" performance before the expiration of the subject agreement. *Gunn*, 964 So. 2d at 591-93. As the Court of Appeals declared, "when it is too late for either party to make an offer to perform, both parties are discharged by the non-occurrence of a condition." *Id.* at 591. It is almost elementary to say that "[a] contract which specifies the period of its duration terminates on the expiration of such period." *Id.* at 593.

When both parties cannot or do not perform under a contract, neither party is in breach of the agreement. *Point South Land Trust v. Gutierrez*, 997 So. 2d 967, 979 (Miss. Ct. App. 2008). Mississippi's appellate courts have long held that "specific performance [is] not an appropriate remedy when neither party is ready, willing, and able to perform his or her duties under the terms of a contract at the time performance is due." *Id.*

The *Gunn* case is directly on point to the case at bar. In *Gunn*, Sandra Gunn contracted to buy certain real estate from Miyo Heggins, with a closing date set on or before March 7, 2005. *Gunn*, 964 So. 2d at 589. The property to be purchased was titled in the name of Ms. Heggins' deceased husband. *Id.* On March 7, 2005, Ms. Gunn had not secured financing, so closing was moved to March 23, 2005. *Id.* While Ms. Gunn ultimately obtained financing for the purchase, she did not do so before March 23, 2005. *Id.* In addition, Ms. Heggins did not begin probate proceedings regarding her deceased husband's will (and the subject property) until after March 23, 2005, passed. *Id.* at 589-90. When Ms. Gunn learned that Ms. Heggins intended to sell the property to another buyer after March 23, 2005, she filed suit, seeking, among other relief, specific performance by Ms. Heggins. *Id.* at 590.

On appeal, the Mississippi Court of Appeals found that Ms. Gunn was not ready, willing and able to perform her part of the contract on March 23, 2005, since she had no financing and no ability to pay for the property. *Id.* at 590-91. Even though Ms. Gunn eventually obtained financing, she did not do so before the contract expired and was not allowed to enforce its terms after the contract period passed. *Id.* The Court notably also ruled that Ms. Heggins was unable to perform on the closing date. *Id.* at 591. Under the contract, Ms. Heggins was required to provide Ms. Gunn a warranty deed at closing. *Id.* at 591. The Court of Appeals explained that:

> [a] contract to sell and convey real estate ordinarily requires a conveyance of the fee simple title which is free and clear of all liens and encumbrances, unless restricted by other provisions of the contract. . . . When a seller agrees to convey property by warranty deed, he warrants that the title conveyed is without defect, i.e., the title is clear and marketable. The burden of proof is upon a seller to show beyond a reasonable doubt that there is no defect in title that would render the title unmerchantable.

Id. Because Mr. Heggins' will had not been admitted to probate prior to the closing date, Ms. Heggins did not have marketable title to the property and could not convey title to the land free and clear of all encumbrances. *Id.* As the Court put it, "neither party [including Ms. Heggins] was able to perform on the closing date, although Heggins disputes this in her brief." *Id.*

Similarly to Quarter in the instant case, Ms. Heggins took the position, through her attorney, that "it was not unusual to admit a will to probate and a petition to approve the sale of assets of the estate simultaneously." *Id.* As such, Ms. Heggins argued that "had Gunn obtained the financing, the petition to probate the will and obtain clear and marketable title was a simple judicial procedure which could have easily been taken care of prior to closing." *Id.* The Court disagreed, finding that until the will had been probated, Ms. Heggins did not possess "marketable title" to the land and could not transfer the property by warranty deed until the probate process was completed. *Id.* at 591-92. While "it may have been a simple judicial procedure to probate and cure title to the property, the fact remains that Heggins never did so during the contractual period. This failure constituted a defect in the title." *Id.* at 592. As the Court observed, "[g]ood title is not merely a title valid in fact, but a marketable title, which may be sold or mortgaged." *Id.* Ms. Gunn could not perform on March 23, 2005, because she had no money with which to buy the property at closing, and Ms. Heggins, likewise, could not perform at closing because she did not have marketable title such that she could have conveyed a valid warranty deed. The Court

of Appeals determined that "neither party was ready to perform under the contract and, therefore, neither is entitled to damages." *Id.* at 593. A contract breach "gives the injured party a right to damages against the party in breach, unless the contract is not enforceable against that party." *Id.*

The *Point South* decision also offers guidance in the case at hand. In that case, the Court of Appeals stated that:

> [i]n the present case, as in *Gunn*, the purchaser never tendered performance until after the 30-day extension had expired. After this date, to the extent there was a genuine issue as to whether Sellers were ready, willing, and able to perform their contractual duties, both parties would be discharged from performing their parts of the exchange because it was "too late for either party to make an offer to perform."

Id. The *Point South* case differs from *Gunn* and the present matter only in that the sellers in *Point South were* ready, willing, and able to tender performance on the closing date. *Id.* at 978. *Point South*, however, explicitly provides that once the contract term passes, there is no longer a contract that can be enforced. *Id.* at 979-80. The Court in *Point South* explained that when a contract provides, as it does in the instant litigation, that (1) time is of the essence and (2) the seller is provided a reasonable time to examine title and obligated to cure any title defects expeditiously so as to tender a warranty deed, the seller is obligated to cure title defects and tender a warranty deed within the time frame set forth in the contract. *Id.* Absent language to the contrary, the contract is not extended until the title defects or deficiencies can be resolved. *Id.* In other words, any "deficiencies" must be fixed before the contract is set to expire, not whenever the seller finds the time to fix them later on.

In the case at bar, the parties noted that time was of the essence in the Contract, and the last possible date for performance was June 14, 2009. First, Quarter did not have marketable title to the property on June 14, 2009, and could not have performed on that date. As such, Quarter

is not entitled to specific performance from the Urbaneks. As a matter of law, Quarter did not own or have marketable title to the parcels to be sold, just like Ms. Heggins did not have marketable title to the land in her husband's name in *Gunn*. It is elementary and longstanding Mississippi law that "[a] break in the chain of title renders the title to the realty unmarketable." *Ferrara v. Walters*, 919 So. 2d 876, 883 (Miss. 2005). When a real estate contract calls for the transfer of a warranty deed, "nothing less can be given in satisfaction of the seller's contractual obligations." *Id.* A warranty deed "warrants that the *title conveyed is without defect*, i.e., clear and marketable." *Id.* (emphasis added). A warranty deed is intended to convey five covenants -- seizin, power to sell, freedom from encumbrances, quiet enjoyment and warranty of title." *Id.* How Quarter can claim with a straight face that it could have conveyed a valid warranty deed without owning the subject property strains all reasoning. If the Urbaneks had received a warranty deed from Quarter, who did not own the property, the Urbaneks would not have been entitled to possession of the property, nor would they have had valid title to it (seizin), they would not have had the power to sell something that third parties owned, they would have had issues with the land being encumbered by third parties' ownership rights in the property, they would not have enjoyed quiet title to the land as the true owners would have rebuffed the Urbaneks' attempts to use or occupy the land and they would not have received a valid title (warranty of title).

Quarter can claim that it was "ready, willing and able" to convey a "valid" warranty deed and close on June 14, 2009, all it wants; the fact of the matter is that Quarter's assertion is just wrong. Quarter cannot meet its burden of proof "to show beyond a reasonable doubt that there [was] no defect in title that would render title unmerchantable." Quarter, by its own admission, did not even know it did not own the property until after it filed suit against the Urbaneks. To

claim that one can close without owning the property contracted to be sold flies directly in the face of all common sense and clear Mississippi law. Any warranty deed offered by Quarter on June 14, 2009, would have been wholly worthless. Quarter references the Affidavit of George Haymans several times in its Brief and suggests to this Court that there are factual issues to be decided by the trier of fact because Mr. Haymans says, more or less, that "this is just how things are done in the world of real estate closings." First, the Affidavit directly conflicts with the case law discussed in detail above. Second, it is worth noting that Mr. Haymans has a significant financial interest in the outcome of this litigation as it was Mr. Haymans who prepared the deeds that purported to transfer ownership of the subject property to Quarter prior to the February 2009 Contract with the Urbaneks. Those deeds, however, did not correctly transfer title to Quarter because the named sellers on the deeds Mr. Haymans drafted did not actually own the property purportedly conveyed. Mr. Haymans' Affidavit is, thus, self-serving and is intended to perpetuate the title problems he himself created.

Second, even if this Court finds that Quarter was "ready, willing and able" to close on June 14, 2009, the parties never scheduled a closing on or before that date. Mississippi law is clear that a party to a contract must take some action consistent with attempting to enforce its rights under a contract before it may recover damages for the other party's alleged breach thereunder. Quarter claims that the Urbaneks refused to close,[4] but Quarter omits a vital step in the analysis by failing to show that a closing meeting was scheduled and the Urbaneks refused to

[4]Again, no closing was ever scheduled by the parties. It is one thing to make an unsupported allegation that a party has "refused to close" and quite another to prove, with evidence, that a party did or did not take certain action. Quarter has presented no evidence in its Brief that a closing meeting was ever set or that the Urbaneks refused to participate in said closing meeting.

show up to close.[5] No closing was ever set, and June 14, 2009, came and went without a closing occurring. The Contract expired and cannot now be enforced after-the-fact.

Finally, Quarter's subsequent acquisition of title to the subject property is irrelevant because the Contract was not extended beyond June 14, 2009. Quarter had until June 14, 2009, to "cure" any title "deficiencies" (including obtaining actual ownership and marketable title to the property) but failed to do so. Quarter cannot now force the Urbaneks to buy the property since the Contract's term expired. Counsel for Quarter argued that it was a simple matter to transfer several Quitclaim Deeds and, as such, Quarter is entitled to specific performance by the Urbaneks. (Transcript ("T") 28). Counsel for Quarter noted that "from what I can tell from the record probably about a 20 to 30 minute deal, just to straighten all this out. Easily curing defects in this title that are expressly contemplated by this contract." (T. 28). Just as in *Gunn*, "it may have been a relatively simple judicial procedure" to prepare and transfer these quitclaim deeds, but the work, by Quarter's own admission, was not done before the Contract expired, which "constitute[s] a defect in the title." *Gunn*, 964 So. 2d at 592.

For all of these reasons, the trial court's award of summary judgment must be upheld.

C. IN THE ALTERNATIVE, QUARTER'S CLAIMS SHOULD BE DISMISSED UNDER THE MUTUAL MISTAKE OF FACT DOCTRINE

The Mississippi Supreme Court has declared that parties to a contract may be relieved of performance and the contract can be set aside if both parties operated under a mutual mistake of fact. *Greer v. Higgins*, 338 So. 2d 1233, 1236 (Miss. 1976). In order for a party to be relieved

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[5]If Quarter is correct and the Urbaneks "breached" the Contract by not showing up for a closing and/or not scheduling one before June 14, 2009, then Quarter breached the Contract just the same by not scheduling or appearing at this mythical "closing" on that date.

from performance and/or liability for non-performance, "the mistake must relate to a material fact, past or present." *Id.* The Court in *Greer* stated that:

> [a] mutual mistake [of fact] is one common to both parties to a contract, each laboring under the same misconception; more precisely, it is one common to both or all parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement. The mistake may apply to the nature of the contract, the identity of the person with whom it is made, or the identity or existence of the subject matter; but in order to relieve a party from liability on the contract, the mistake must relate to a material fact, past or present. Misrepresentation or fraud is not essential to proof of a mutual mistake.

Id. When parties contract while operating under a mutual mistake of fact, the subject contract should be set aside. *White v. Cooke*, 4 So. 3d 330, 331 (Miss. 2009). In *Greer*, the parties to a contract all believed that Mr. Greer died without a will. *Greer*, 338 So. 2d at 1236. Such was not the case, and as a result, the Court held that "the facts of this case present a clear case for the application of the doctrine of mutual mistake of fact and that, accordingly, the deed executed by the appellants and their mother to the appellees should be canceled and set aside." *Id.*

In 2009, the Mississippi Court of Appeals upheld a chancellor's denial of specific performance to a buyer under the doctrine of mutual mistake of fact. *White*, 4 So. 3d at 334. The Court determined that there was not a "meeting of the minds" between the buyer and seller. *Id.* As the Court explained, "[a]t the time of the contract, both parties were operating under the mistaken belief that the [subject] driveway . . . did not intrude onto" one of the other tracts to be sold when, in fact, it did. *Id.* Because of this mutual mistake about a material fact, neither party was entitled to specific performance. *Id.*

In the instant action, Quarter admits in its Brief that "[n]one of the parties were aware of any title 'defects' at any point during the term of the contract." (Appellant's Brief, p. 5). At the

time the Contract was signed, both Quarter and the Urbaneks were operating under the mistaken belief that Quarter owned the two parcels of land to be sold, just as Mr. White and Mr. Cooke were operating under a mistaken belief about the presence of the driveway in *White*. The appropriate remedy in such a situation is to set aside the contract. While the trial court in the instant matter did not address the issue of mutual mistake of fact in its Opinion and Order, it is clear that the Urbaneks were entitled to dismissal of Quarter's claims against them under this doctrine. There are no questions of unresolved fact for a jury to decide - - all parties to the Contract believed that Quarter owned the subject property when, in fact, it did not. Neither Quarter nor the Urbaneks knew of the lack of ownership "at any point during the term of the contract." Mr. Haymans' Affidavit further supports the lack of knowledge by Quarter about the true ownership of the property, stating that the so-called "title defects . . . were unknown at the time of the closing concerning this parcel." (C.P. 149-51). It goes without saying that ownership of land by the seller is a material term to any real estate contract. Because of this mutual mistake about a material fact underlying the subject Contract, the Contract should be set aside.

The Urbaneks respectfully move this Court to uphold the trial judge's dismissal of Quarter's claims against them on the basis of mutual mistake of fact even if this Court finds that there are disputed questions of fact on the issue of whether Quarter was "ready, willing and able" to close on June 14, 2009.

D. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT MUST BE UPHELD, AND THE CASE SHOULD BE REMANDED SOLELY FOR A DETERMINATION OF THE URBANEKS' RIGHT TO RECOVER ATTORNEY'S FEES

Summary judgment must be upheld, and the case should be remanded solely for a determination of the Urbaneks' right to recover attorney's fees. Typically, "Mississippi follows

the American rule regarding attorneys fees: unless a statute or contract provides for the imposition of attorneys fees, they are not recoverable." *Huggins v. Wright*, 774 So. 2d 408, 412 (Miss. 2000). In the instant action, the Contract specifically provides for recovery of attorney's fees and costs in Paragraph 15, Breach of Contract, to the prevailing party in any suit filed to enforce the rights of either party under the Contract. (C.P. 7-10). Quarter filed suit against the Urbaneks, and the trial court granted summary judgment to the defendants, denied Quarter's Motion for Summary Judgment and denied Quarter's Motion for Reconsideration. (C.P. 179-82, 192). The Urbaneks are the prevailing party in this litigation and are clearly entitled to recovery of attorney's fees and costs under the Contract. As such, the Urbaneks move this Court for remand of this matter for the sole purpose of determining an appropriate award of attorney's fees to the Urbaneks.

V. CONCLUSION

Quarter is not entitled to specific performance or any other relief against the Urbaneks. Quarter continues to insist that it "in no uncertain terms, has, at all times during the pleadings, put forth evidence that it could have completed the sale as provided under the contract because it held marketable title." (Appellant's Brief, P. 5). A party cannot create a question of material fact simply by taking an outlandish position that has no factual or legal support and continuously arguing that it is right. That is all that Quarter has done here. Quarter suggests that a complete lack of ownership of property which a seller contracts to convey is merely a title "deficiency" that is "typical in real estate transactions." (Appellant's Brief, p. 5). Lack of ownership is something significantly worse than a mere title "defect." Quarter did not own the two parcels of land it contracted to sell to the Urbaneks on the date the Contract was executed by either party or on the

date(s) specified for closing. Quarter, therefore, was not ready, willing, and able to perform on June 14, 2009. Furthermore, there was no closing scheduled on or before June 14, 2009, and no closing ever occurred. As such, Quarter is not entitled to enforce the Contract against the Urbaneks. It is simply too late. Finally, the fact that Quarter subsequently arranged for the transfer of several quitclaim deeds to convey ownership to it in September 2009 is of no importance since the subject Contract had already expired and could not be enforced by Quarter. Specific performance is not an appropriate remedy under these circumstances, and the trial judge's decision must be affirmed.

In the alternative, Quarter and the Urbaneks, at the time of contracting, were operating under a mutual mistake of fact - - that Quarter owned the property it contracted to transfer. Quarter admits as much in its Brief, stating that "[n]one of the parties were aware of any title 'defects' at any point during the term of the contract." (Appellant's Brief, p. 5). Should the Court find that there are questions of unresolved material fact as to whether Quarter was ready, willing and able to close on June 14, 2009, this Court must still uphold the trial court's decision under the doctrine of mutual mistake of fact.

Finally, this matter should be remanded for the sole purpose of determining the Urbaneks' right to recover attorney's fees under the subject Contract as the prevailing party in this litigation.

Respectfully submitted,

SHERRY HOLLOWELL, BONNIE SCOTT URBANEK and THE ESTATE OF JAMES E. URBANEK

BY: _____
OF COUNSEL

TIMOTHY M. PEEPLES - BAR # [redacted]
DANIEL COKER HORTON & BELL, P.A.
265 NORTH LAMAR BOULEVARD, SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

CERTIFICATE

I, Timothy M. Peeples, of counsel for the Appellees, pursuant to M.R.A.P. 25, do hereby certify that I have this day mailed, by first class mail, postage prepaid, the original and three (3) copies of the above Appellees' Brief, to the Clerk of the Mississippi Supreme Court and have mailed a true and correct copy of same to the following:

Honorable Robert W. Elliott
Lafayette County Circuit Court Judge
102 North Main Street
Ripley, MS 38663

David E. Rozier, Jr., Esq.
Jenessa Carter Hicks, Esq.
Rozier Hayes, PLLC
2091 Old Taylor Road
Suite 102
Oxford, MS 38655

THIS, the 22nd day of June, 2011.

TIMOTHY M. PEEPLES