IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2006-CA-01085

JAMES BARTON WILLIAMS and
PAMELA ANN TALBOT WILLIAMS — **APPELLANTS**

VS.

ESTATE OF C.E. (Ed) MORRISON, Deceased,
and CARLA J. MORRISON — **APPELLEES**

BRIEF OF APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

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ESTATE OF C.E. (Ed) MORRISON, Deceased,
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Robert L. Lancaster
   Chancery Court Judge
   Post Office Drawer 884
   Columbus, MS 39703

2. James Barton Williams, Appellant

3. Pamela Ann Talbot Williams, Appellant

4. C.E. Morrison, Appellee (Deceased)

5. Carla J. Morrison, Appellee

6. Jim Morrison, Executor of the Estate of C.E. Morrison

7. M. Lee Dulaney, Esq.
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STATEMENT

Oral argument will not be helpful in this case. Appellant's Brief does not take an issue with the application of the law used by the Trial Court but with the factual record.

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STATEMENT OF THE ISSUES

ISSUE NO. 1: Whether the Chancellor erred in granting summary judgment.

STATEMENT OF THE CASE

Dr. Bart Williams and his wife, Pamela Ann Talbot Williams, as Appellants/Plaintiffs appeal summary judgment against them on their allegations of misrepresentation relative to the sale of a home at 428 Bent Tree Trail, Columbus, Mississippi from C.E. Morrison and Carla J. Morrison. The parties signed a listing agreement for the real estate on August 4, 2003. The Morrisons had earlier filled out the Seller's Disclosure Statement. The unrefuted testimony provided by C.E. Morrison (hereinafter referred to as "Dr. Morrison") is that he dictated the answers provided in the form but it was written in by Mrs. Morrison. This was due to the onset of physical disability of Dr. Morrison, who could no longer write. Mrs. Morrison testified she simply wrote in what was provided by her husband. Dr. Morrison was suffering from the onset of a severe physical disability due to a neurological disease, similar to Parkinsons, and he is recently deceased. *See* R.V. 1, p. 2.

Dr. Bart and Pam Williams made an offer to purchase on October 17, 2003, and the offer was accepted by the Morrisons. An agreed addendum to the contract, dated October 17, 2003, gave the Williams the right to have the home inspected within seven days of acceptance of the contract. The addendum also gave the Williams the option to render the contract null and void if the inspection results were not acceptable. James Taylor, a licensed home inspector, was hired by the Williams to perform the inspection. Upon completion of the inspection, Mr. Taylor provided a Home Inspection Report to the Williams. As a result of the inspection, the Williams requested the Morrisons correct some, but not all, items listed on the inspection report. The Williams signed a removal of contingencies on November 3, 2003 and a declaration of acceptance was signed by them on November 24, 2003 at the time of closing. *See* R.V. 1, p.3.

Dr. and Mrs. Williams filed suit September 29, 2004, and the Morrisons filed a motion for

more definite statement. The Williams then filed an amended complaint on January 20, 2005, which alleged that the Morrisons breached the contract by either intentionally or negligently certifying and misrepresenting the condition of the premises or by breach due to the terms of the Sellers Disclosure Statement. The Williams alleged information in the statement was not true and not accurate for those areas of the property listed. The Williams also claimed the Morrisons breached their fiduciary obligations to act in good faith and deal fairly.

Dr. Bart Williams testified he solely relied on the Seller's Disclosure Statement as a basis for his lawsuit and admitted in his deposition that he had completely forgotten about the Declaration of Acceptance before he sued the Morrisons. Dr. Williams testified he had even forgotten to provide the Declaration of Acceptance to his attorney before filing suit. Dr. Williams testified he had no personal knowledge that either of the Morrisons had personal knowledge of the problems that he complains of in his lawsuit. Dr. Williams also confirmed he did not read all the documents he signed at closing. Mrs. Williams sat through her husband's deposition and then testified she agreed with her husband. *See* R.V. 1, p. 4.

Dr. Morrison testified he had no knowledge of any of the conditions either Plaintiff complained of and denied any such problems existed in the decades he lived in the home. He described that a temporarily mulch blocked garden drain during one rain blocked up briefly one time and seemed to have allowed water in the garage. This happened once in the two decades he lived there for a sum total one time of about five gallons of rain water that apparently seeped under a door that he vacuumed up within 24 hours and which left no water damage and no standing water. Dr. Morrison also testified that the old den floor vibrated some when walked across but that a workman did "something" to stiffen the boards years ago. He testified that the garage interior had the same

original coat of paint on it when he moved out of the house from the time that he moved into the already built house. *See* R.V. 1, p. 5. Mrs. Morrison testified she had no knowledge of any of the conditions Plaintiffs complain of. She never saw the garage flood. She confirmed that the Seller's Disclosure Statement was and remains true to her knowledge. *See* R.V. 1, p. 5. Dr. and Mrs. Williams both signed the Removal of Contingencies and later, at the closing, both signed the Declaration of Acceptance and they were represented by legal counsel.

The Morrisons requested earlier of the Trial Court an expedited hearing due to the untreatable terminal illness of Dr. Morrison reflected earlier in the court record by separate motion for an expedited scheduling order and trial date. *See* R.V. 1, p. 7. The untreatable terminal illness of Dr. Morrison was in the nature of a debilitating neurological condition, like Parkinsons, which rendered him, at age 55, unable to move around or climb stairs thereby necessitating the sale of the house, subject of the lawsuit, which contained stairs to the second floor as well as stairs from the driveway and garage to the main floor of the house. Dr. Morrison passed away on Sunday, February 11, 2007. Mrs. Morrison is a widow and the Estate of Dr. Morrison has been substituted as a party of record for the late Dr. Morrison.

SUMMARY OF THE ARGUMENT

Dr. and Mrs. Williams misquote the record in their attempt to create the illusion of a material fact in dispute. The disclosure form was accurate. The Seller's Disclosure Statement, given pursuant to statute of MISS. CODE ANN. § 89-1-501, preceded a home inspection report by a licensed professional, which is an intervening cause even if a claim exists, as a matter of law. There was a full release of all claims by Dr. and Mrs. Williams of Dr. and Mrs. Morrison by the Declaration of Acceptance.

ARGUMENT AND AUTHORITIES

Appellants' brief represents argument and cites legal authority defining the elements of various causes of action as well as the standard for summary judgment. Appellants never address however, the case law found in the Chancellor's summary judgment or on the controlling legal issues in this case or cite any law to say that there was a misapplication of law.

R.V. 2, p. 184 contains the Seller's Condition Disclosure Statement which, by its own text in the opening sentence, provides:

> The following is a Seller's Disclosure Statement, required by Sections 89-1-507 through 89-1-525 of the Mississippi Real Estate Brokers Act of 1954, as Amended, and made by the seller, concerning the condition of the residential property located at: 428 Bent Tree Trail . . .
>
> * * *
>
> This Disclosure is not a warranty of any kind by the Seller or any Agent of the Seller in this transaction and is not a substitute for any inspections or warranties the Purchaser may wish to obtain.

It contains instructions to the seller: "Please complete the following form, including any past history of problems, if known."

Under E "Land and Site Data" is the question, "Has the property every flooded?" and the "No" square is marked. In paragraph F titled "Additions/Remodels", the question is, "Have there been any additions, remodeling, structural changes or other alterations to the property?" The "Yes" block is checked. The form question concludes, "If yes, please explain." Written in is "Remodel-kitchen, added family room-two car garage." Dr. Morrison testified at R.V. 2, p. 190, (p. 14 of his deposition, lines 24-25) that Mr. White was not hired to fix up the place before it sold because there was no intention of selling at the time, but because they were living there. Also Dr. Morrison testified (at pp. 15-16 of his deposition) that in the decades he lived there that he had seen water in the garage on one occasion when a drain in an outside garden flower bed, that was meant to run rainwater off, stopped up from mulch blockage and water had piled up outside the garage door bottom and apparently seeped inside the garage from under the door at that time. He said,

> It was a particularly heavy rain we had within a couple of months about November of '02 . . . I noticed that the strainer on the drain had stopped up. And I, you know, took the strainer off the drain and it immediately drained out and I didn't see any--you know, didn't look for anything in the garage at that time. The next day I noted that there was probably about five gallons in the garage, and apparently, I thought, that had come from the water backing up outside the garage and running under the threshold to the doorway into the garage.

At R.V. 2, p. 191, Dr. Morrison testified that from the time the garage was built in 1998 to the time that he testified on April 18, 2005, that was the only time water was ever in the garage. *Webster's Unabridged Dictionary*, Second Edition defines flood to "overflow; to inundate; to deluge; as to flood a meadow; the river rose and flooded the surrounding country." Five (5) gallons is not a flood.

The affidavit of Mark Watson, an expert hired by Dr. and Mrs. Williams after the sale, appears at R.V. 2, pp. 290-95. Mr. Watson notes at p. 293 under Conclusions and Recommendations, "Overall, the home appears to be in good condition." At the beginning of

paragraph two, he states:

> The installation of PVC piers throughout the crawl space area by the previous homeowner was not an attempt to correct or improve the home's foundation. Instead, its installation was intended to simply stiffen the floor framing, since the floor joists' span lengths are somewhat excessive. We suspect that prior to your purchase of the home, the floors suffered from considerable vibration, even with normal foot traffic and these individual PVC piers with their associated beams removed much of the vibrations tendencies by simply reducing the floor joists' spans in half. While this is a common procedure for homes with conventional floor framing, the use of PVC pipe and threaded rods was a poor choice of piers by the previous owner's contractor.

Mr. Watson also states in his attached report that the use of PVC piers was not an attempt to correct or improve the foundation of the home, but simply to stiffen the floor framing–which it did–although he recommended an alternate approach.

RV 2, p. 185 reflects there was remodeling in the kitchen and the addition of a family room and garage. The only questions posed on the Seller's Disclosure Statement about foundation repairs is not whether there an alteration of same but whether the sellers were aware of any foundation repairs made in the past and whether any currently were needed. No, was the honest and accurate answer given to both questions.

The disclosure form is required by MISS. CODE ANN. § 89-1-501 and contains within its text at subsection (1) that the only information within it is information which is within the personal knowledge of the transferror. MISS. CODE ANN. § 89-1-501 requires delivery of the disclosure and provides a time frame as the remedy to escape the contract for non-compliance. MISS. CODE ANN. § 89-1-505(3) reflects that in the event the purchaser should elect to obtain a house inspection that the obtaining and procurement of that inspection takes the place of the provision of a disclosure form by the seller so it is a statutory safe harbor. The professional house inspection absolves the transferrors completely of any liability for any inaccuracy, omission, or error as a matter of law.

MISS. CODE ANN. 89-1-505.

In accord also is the *Mississippi Law of Torts* § 5.12. Chapter 5, Owners and Occupiers of Land, Section 12, Liability of Real Estate Vendors, by Professor Robert Weems, who notes that the absence of precedent in this area for liability purposes is because it is rarely a basis for liability. The only case that reflects an application of this type issue as the basis for liability is *Browder v. Williams*, 765 So.2d 1281 (Miss. 2000), which evolved from the sale of a house where a husband/wife were the contractors for their own self-built home. The homeowner seller built it, lived in it, and sold it yet it did not have a significantly functional septic system. In fact, the homeowner seller had an open sewer pipe into a neighbor's property with clear actions of covering up the sewer pipe.

The Mississippi Supreme Court in *Stonecipher v. Kornhaus*, 623 So.2d 955 (Miss. 1993), cited an Alabama case, *Fennell Realty Co., Inc. v. Martin*, 529 So.2d 1003 (Ala. 1988), which is similar to the present case. The *Fennell* case involved an allegation of defects with a cover up but caveat emptor was held to remain the law. The Williams signed a property acceptance letter which stated specifically that the sellers have no further responsibility for liabilities for conditions of the property. The parties are bound by the terms of the agreement they signed.

In order for Dr. and Mrs. Williams to establish a claim on fraudulent misrepresentation, the elements of fraud must be proven by clear and convincing evidence. *Levens v. Campbell*, 733 So.2d 753, 761-62 (Miss. 1999); *Powell v. Cohen Realty, Inc.*, 803 So.2d 1186, 1190 (Miss. App. 1999). Similarly a claim for misrepresentation essentially requires a showing of the elements of fraud. To show fraud, each of the following elements must be shown; a representation, its falsity, its materiality, speaker's knowledge of its falsity or ignorance of its truth, his intent that it should be

acted upon by the person and in the manner reasonably contemplated, the hearer's ignorance of its falsity, his reliance on its truth, his right to rely thereon, and his consequent and proximate injury. In *re Estate of Law*, 869 So.2d 1027, 1029 (Miss. 2004); *Martin v. Winfield*, 455 So.2d 762, 764 (Miss. 1984). These elements must be proven by clear and convincing evidence. *Levens v. Campbell*, 733 So.2d 753 (Miss. 1999). *Powell v. Cohen Realty, Inc.*, 803 So.2d 1186, 1190 (Miss. App. 1999). *Crase v. Hahn*, 754 So.2d 471 (Miss. App. 1999).

The evidence of negligent misrepresentation must be proven by a preponderance of the evidence and each element must be proved and include (1) a misrepresentation or omission of facts; (2) the representation or omission must be material or significant; (3) a failure by the defendant to exercise reasonable care, (4) reasonable reliance upon the misrepresentation or omission; and (5) that damages were suffered as a direct or proximate cause of such reasonable reliance. *Skrmetta v. Bayview Yacht Club, Inc.*, 806 So.2d 1120, 1124 (Miss. 2002); *Spragins v. Sunburst Bank*, 605 So.2d 777, 780 (Miss. 1992).

In *Little v. Miller*, 909 So.2d 1256 (Miss. App. 2005), the Court of Appeals considered a claim of negligent misrepresentation involving the sale of property with drainage problems. The purchasers inspected the property, had work estimates prepared and negotiated a landscaping allowance from the purchaser prior to closing. Following the purchase, the extent of the subsurface draining problems proved far worse than originally believed. Even though the seller had provided a disclosure statement declaring the property be free from subsoil defects, the appellate court upheld dismissal stating:

> Apparent from the evidence, however, is that the Littles were well aware of the problems associated with the property and only completed the purchase after making their own observations and having White inspect the lot. We, therefore, cannot

> impose liability on Miller because the evidence presented by the Littles is insufficient to prove by a preponderance of the evidence that they acted in reliance of a misrepresentation by Miller.

Id. at 1260.

R.V. 1 of the record herein reflects, beginning at page 42, the contract for purchase and sale. At page 43, paragraph 19, under Special Provisions, it indicates "See Attached Addendum". The addendum, which is attached at R.V. 1, p. 44, specifically says it is an addendum to the contract for the sale and purchase of real estate dated October 17, 2003 at 428 Bent Tree Trail, Columbus, MS 39705. The first bullet point in the addendum provides:

> AT PURCHASER'S CHOICE AND EXPENSE, A HOME INSPECTION MAY BE PERFORMED WITHIN 7 BUSINESS DAYS OF ACCEPTANCE OF CONTRACT. THE PURCHASER SHALL HAVE THE OPTION TO RENDER THE CONTRACT NULL AND VOID IF INSPECTION RESULTS ARE NOT ACCEPTABLE AS DEFINED BY THE PURCHASER.

R.V. 1, p. 46 reflects a document entitled "Removal of Contingencies" which states it is part of the contract for the sale and purchase of real estate dated October 21, 2003. The Morrisons agreed to the Williams' demands on 15 separate contingencies and had same repaired at the direction of the Williams. This document has written in, at the top of R.V. 1, p. 46, the following statement: "Performed walk thru with inspector 11/19/03. Pam walked thru and approved all repairs." This document was signed on November 3, 2003, and the above notation was added on 11/19/03 at 10:00 a.m.

R.V. 1, p. 49 reflects the "Declaration of Acceptance" for 428 Bent Tree Trail that was signed by all parties on November 24, 2003. The declaration of acceptance provides specifically,

> All warranties and statements, expressed or implied, as to property condition, financing terms, and all representations of all parties, including seller, buyer, and cooperating brokers, contained in the Contract for Sale and Purchase of Real Estate, dated 10/21/2003, and signed by C.E. Morrison and C.J. Morrison and Pamela T. Williams and Bart Williams, on the property located at 428 Bent Tree Trail, Columbus, have been complied with to our satisfaction.

> We, the undersigned, do hereby declare that without any reservations we hereby accept the property as to the condition of the house, other improvements, fixtures and equipment, decoration, suitability and readiness for use as our home, as well as financing terms, and all other representations of buyers and sellers and cooperating brokers, and any other statements or representations contained in the contract or any addendum attached hereto.

In conclusion, the document provides:

> We understand that with the acceptance of the Deed, the Sellers will have no further responsibility or liability for any repairs to the property. Buyers and Sellers hold harmless the cooperating brokers for any representations, both expressed and implied, in the aforementioned contract or in any other form, thus merged in the Deed.

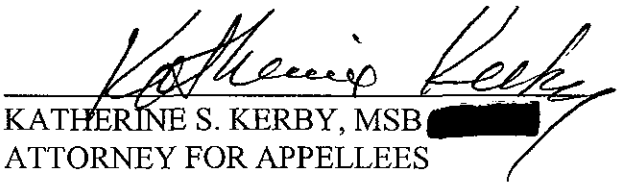
The Home Inspection Report found at R.V. 1, p. 53 is dated 10/28/2003. There was no restriction whatsoever on Bart and Pam Williams as to how frequently they could inspect the property themselves, the manner in which they could inspect the property, or who they may want to engage at any time prior to the closing to inspect the property. The signed agreement and should be bound by it. Also in support are *Lane v. Oustalet*, 873 So.2d 93 (Miss. 2004) and *Davidson v. Rogers*, 431 So.2d 483 (Miss. 1983). There were no damages related the so-called cause of action. *Eagle Management, LLC v. Parks*, 938 So.2d 899 (Miss. App. 2006).

The Estate of Dr. Morrison and Mrs. Morrison respectfully submit that the use of a professionally licensed home inspector by the Appellants and purchasers Williams, as a matter of law, is a complete superceding cause relative to any claimed reliance on the disclosure form under MISS. CODE ANN. § 89-1-505(3). The noted code section states the use of a professional report "takes the place of a disclosure form" and "shall be sufficient compliance for the application of the exemption provided by subsection (1)." Subsection (1) states that "no transferor . . . shall be liable for any error, inaccuracy, or omission." So the Estate of Dr. and Mrs. Morrison are exempt from

liability as a matter of law.

Dr. Bart and Pam Williams testified they sued Dr. and Mrs. Morrison without bothering to read all documents they signed at closing. The Williams testified they "forgot" about the Declaration of Acceptance and did not tell their attorney about it prior to filing suit or even the Amended Complaint filed in response to the Morrisons' Motion for More Definite Statement. The undisputed bad faith on the record is that of Dr. and Mrs. Williams. They should be compelled to reimburse the Estate of Dr. Morrison for all costs and attorney's fees in this case.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, KATHERINE S. KERBY, Attorney for the Estate of C.E. (Ed) Morrison, Deceased, and Carla J. Morrison, Appellees, do hereby certify that I have this day caused to be delivered via U.S. Mail postage prepaid, a true and correct copy of the above and foregoing to:

M. Lee Dulaney, Esq.
Dulaney & Tharp, PLLC
Post Office Box 7357
Tupelo, MS 38802-7357
Attorney for Appellee

SO CERTIFIED on this the 5th day of April, 2007.

KATHERINE S. KERBY, MSB[redacted]

ac\27615-001\Brief of Appellees