IN THE MISSISSIPPI SUPREME COURT

JAMES BARTON WILLIAMS and
PAMELA ANN TALBOT WILLIAMS — APPELLANTS

VS.

NO. 2006-CA-01085

ESTATE of C. E. MORRISON and
CARLA J. MORRISON — APPELLEES

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

M. LEE DULANEY
M. LEE DULANEY, P.L.L.C.
117 North Broadway Street
Post Office Box 7357
Tupelo, Ms 38802-7357
Telephone: (662) 620-1669
Facsimile: (662) 620-1679

MISS. BAR NO. [redacted]
Attorney for Appellants

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It appears that counsel for the Morrisons wish to rely upon two grounds in contesting the instant appeal. First, they claim that having the home inspected by a home inspector absolves them from any liability in this instance, regardless of whether a valid claim exists. The second defense is that the Williams are precluded from bringing this action due to signing a declaration of acceptance for the subject home. Both ideas are preposterous.

It is uncontested that James Taylor, a licensed home inspector and former defendant in this action, was hired by the Williams and did in fact perform a generic inspection of the subject home prior to closing. It is also uncontested that Mr. Taylor failed to note the deficiencies associated with the home, which are the subject of this litigation. However, the mere fact that Mr. Taylor performed such an inspection does not relieve the Morrisons from liability in this instance.

Mississippi Code Annotated Section 89-1-505(3) states that "[t]he delivery of a report or opinion prepared by a licensed engineer . . . or other expert, dealing with matters within the scope of the professional's license or expertise, shall be sufficient compliance for application of the exemption provided by subsection (1) . . . ." The exemption referenced is found in § 89-1-505(1), and provides that "[n]either the transferor nor any listing agent shall be liable for any error, inaccuracy or omission of any information delivered pursuant to sections 89-1-501 through 89-1-523 if the error, inaccuracy or omission was not within the personal knowledge of the transferor . . . ."

There are two reasons why the above referenced exemption does not apply in this instance. First, there has been no report of a licensed engineer or other expert concerning either "the Flood" or "the Sag." The only report issued is that of Mr. Taylor, a home inspector. There has been no

showing and there is no record that Mr. Taylor is an expert as contemplated by § 89-1-505(1). Further, Mr. Taylor's report does not concern itself with the structural aspects of the home, or any issues concerning prior, undisclosed water damage and flooding, as can easily be ascertained by perusing same (V.1, 54-89). The report clearly states what areas are covered and what issues are addressed in same. These two issues do not appear as topics covered by the report. Clearly, there is no report or opinion as contemplated by § 89-1-505(3). Accordingly, the Morrisons' defense must fail as relates to this issue.

Second, even if there was a report complying with the referenced statute, the dictates of same would be inapplicable since the Morrissons had personal knowledge of the problems associated with the subject residence. Even though the Morrissons failed to include the problems currently disputed on the subject disclosure statement, they have admitted to knowledge of same throughout this proceeding and actually took steps to remedy the problems. (V.2, 190, 193-194, 211-212, 223). As the record clearly reflects, and as outlined more thoroughly in the "Facts" portion of our Appellants' previous brief, the Morrisons were not only aware of both the water and structural problems associated with the home, but actually hired a contractor to remedy and/or conceal same. It is clear that the defects at issue were within the personal knowledge of the Morrisons and, as such, the exemption does not apply. The plain wording of § 89-1-505(1) provides that the error, inaccuracy or omission must not be within the personal knowledge of he Morrisons. As such was within the personal knowledge of both transferors, this defense must fail.

Next, the Morrisons attempt to argue that the Williams' signature on the Declaration of Acceptance, which was executed at closing, somehow alleviates their responsibility to be honest in the sale transaction. Such declaration is worded as follows:

> All warranties and statements, expressed or implied, as to the 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 representation of buyers and sellers and cooperating brokers, and any other statements or representations contained in the contract or any addendum attached hereto.
>
> . . .
>
> 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.

(V.1, 49).

Counsel for the Morrisons argues that the signatures of the Plaintiffs on the declaration of acceptance alleviates her clients from their duty to fully and adequately submit the property disclosure statement and, in fact, claims that execution of such document is an unequivocal waiver of any possible claims. If that is the state of the law then, so long as a declaration of acceptance is signed, the Morrisons can lie, cheat and deceive – with immunity. Of course, there has been no authority submitted in support of this proposition. That is because there is none. Such a claim is ludicrous.

The "acceptance" we are discussing was based solely on the representations of the Morrisons, as is clearly stated in the first paragraph of the "acceptance." Unfortunately, their

representations were false. The Williams had no knowledge of the problems associated with the subject residence, did not negotiate any such waiver and, therefore, could not waive any liability of the Morrisons as relates to same. *Quinn v. Mississippi State Univ.,* 720 So.2d 843, 851 (Miss.1998)(holding that contracts attempting to limit the liabilities of one of the parties are not enforceable unless the limitation is fairly and honestly negotiated and understood by both parties); see also, *Turnbough v. Ladner,* 754 So.2d 467 (Miss.1999). Giving credence to the doctrine of waiver, in this instance, would be fundamentally unfair, absurd and contrary to existing law.

All the declaration provides is that the Williams accept the property as described by the Morrisons. The acceptance is based on their representations. How could the Williams accept what the Morrisons omitted? The whole point of this litigation and the gist of the claims against the Morrisons is that they failed to disclose material facts in association with the sale of the subject home. Had these been disclosed and the Morrisons completed the transaction, then, yes, the Declaration of Acceptance would preclude these claims. If that were the case, there would be no claim for negligent misrepresentation or fraud either. Unfortunately, the true facts indicate otherwise.

These irrelevant and erroneous arguments must not cause us to lose sight of the facts associated with this case and the matter at hand. The issue before the Court concerns the granting of summary judgment by the lower court. This Court employs a *de novo* standard of review in analyzing a lower court's grant of a summary judgment. *Baptiste v. Jitney Jungle Stores of America, Inc.,* 651 So.2d 1063, 1065 (Miss.1995) (citing *Short v. Columbus Rubber & Gasket Co.,* 535 So.2d 61, 63 (Miss.1988)). A motion for summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

M.R.C.P. 56(c). To prevent summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the rule. *Baptiste,* 651 So.2d at 1065 (citing *Lyle v. Mladinich* 584 So.2d 397, 398 (Miss.1991)). "The Court cannot try issues of fact on a Rule 56 motion; it may only determine if there are issues to be tried." *Id.* (citing *Brown v. Credit Ctr., Inc.,* 444 So.2d 358, 362 (Miss.1983)).

Applying the facts at hand, there is no dispute that the subject home was purchased based on the representations made by the Morrisons, which did not include the disclosure of the flooding/water problems and the structural alteration. Unlike the buyers in the *Little* case cited in the Morrison brief, there is not one shred of evidence in the record suggesting that the Williams had actual knowledge of these problems prior to closing, or that they should have been aware of same. *Little v. Miller*, 909 So.2d 1256 (Miss. App. 2005). The Morrisons were under a duty to disclose these matters and did not. Clearly, there exists, at a minimum, a material issue of fact as to whether the Morrisons omitted material facts by failing to note such alterations and/or problems; whether same was material; whether Plaintiffs reasonably relied on same; whether the Morrisons failed to exercise reasonable care in omitting same; and whether the damages outlined by Plaintiffs are a direct and proximate result of such reliance. *In re Estate of Law*, 869 So.2d 1027, 1029 (Miss. 2004); *Martin v. Winfield*, 455 So.2d 762, 764 (Miss. 1984); *Skrmetta v. Bayview Yacht Club, Inc.*, 806 So.2d 1120 (Miss. 1992). Plaintiffs submit that the proof is clear that not only is the standard for negligent misrepresentation met, but the heightened standard of fraud, insomuch as the record indicates that the Morrisons knew their assertions were false. At this time, there exists not just material issues of fact, but sufficient evidence to reasonably conclude that the Morrisons subjectively intended to deceive the Williams in the sale of the subject home.

In its ruling, the lower court found that:

> The undisputed facts establish as a matter of law that the Sellers are not liable to the Plaintiffs on these claims. The Sellers made no misrepresentations and the Plainiffs did not rely upon the disclosure statement. There is no fraud or misrepresentation as a matter of law. There is no breach of contract as a matter of law.

(V.3, 330). Unfortunately, the lower court did not recite any facts supporting these conclusions. That is because there are no such facts. As argued herein and throughout, there is a *prima facia* showing of misrepresentation, including intentional deceit. Further, any claim that the Morrisons did not breach the contract entered with the Williams is patently erroneous, as the disclosure statement certifies that same is a true and accurate statement of the condition of the property. (V.1, 41)

There is little dispute that the Morrisons omitted this crucial information. It is obvious that they wanted to sell there home with the least amount of complications, even if that meant failing to disclose problems associated with the subject home. These were not minor faults either. "The flood" cost the Williams approximately $65,000.00 to correct. "The Sag" will cost an estimated $15,000.00 to correct.

The Williams have been seriously damaged by the misconduct of the Morrisons in this instance. Based upon all these facts and authority, the granting of summary judgment was erroneous and must be reversed.

CONCLUSION

As is thoroughly outlined in Appellants' brief and reply, there exists numerous issues of material fact warranting a determination by a trier-of-fact in this instance. This Court must not allow the Morrisons to lie, cheat and deceive in such a manner as was displayed in this transaction, which is what they are attempting to do. There is no merit to the argument that Mississippi Code Annotated Section 89-1-505 precludes recovery in this instance. Further, execution of the Declaration of Acceptance has no bearing on this issue. According, the summary judgment entered by the lower court must be reversed.

Respectfully submitted, this the 15th day of June, 2007.

M. LEE DULANEY, P.L.L.C.
117 NORTH BROADWAY STREET
POST OFFICE BOX 7357
TUPELO, MS 38802-7357
TELEPHONE: (662) 620-1669
FACSIMILE: (662) 620-1679
ATTORNEY FOR APPELLANT

BY: _____
M. LEE DULANEY, MSB [redacted]

CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for has this date delivered a true and correct copy of the above and foregoing *Reply Brief of Appellant* to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Katherine S. Kerby, Esq.
Gholson, Hicks & Nichols
P. O. Box 1111
Columbus, MS 39703

THIS, the 12th day of June 2007.

M. LEE DULANEY