

**COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CODY WATERS AND KAYCEE WATERS**

**APPELLANTS**

**VERSUS**

**CASE NO: 2006-CA-01975**

**ALBERT ALLEGUE D/B/A REMAX  
BY THE GULF**

**APPELLEE**

**Appeal from The Circuit Court of Jackson County, Mississippi**

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**BRIEF OF APPELLEE**

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*Oral Argument Requested*

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**CERTIFICATE OF INTERESTED PARTIES**

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

1. Cody Waters
2. Kaycee Waters
3. Manuel Pina
4. Lisa Pina
5. Albert Allegue
6. Remax by the Gulf

1. Calvin Taylor
2. Patrick R. Buchanan
3. W. F. Hornsby III
4. E. Foley Ranson
5. Brown•Buchanan•Sessoms, P.A.



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## **STATEMENT OF THE ISSUES**

### **I.**

The duty of a real estate agent, representing a seller, to a purchaser is prescribed and mandated by *Miss. Code Ann. § 89-1-505(1)*.

### **II.**

The facts taken as presented by Plaintiffs' did not present a genuine issue of material fact for a jury, therefore the Circuit Court correctly granted summary judgment.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This lawsuit arises out of the sale of property located at 8000 Fountainbleau Road, Ocean Springs, Mississippi, which this Defendant represented the sellers of said property and marketed the same based upon the disclosure statement drafted by the sellers. (*See Complaint - Rec. pgs. 6 - 29*). Plaintiffs' Complaint alleges that this Defendant knew or should have known that there was a discrepancy between statements relative to approximate square footage and the actual square footage. (*See Complaint - Rec. pg. 8*). Plaintiffs knew the actual square footage of the subject property and the existence of a discrepancy prior to the closing/purchase of the subject property. (*See Plaintiffs' Response to Request for Admissions - Rec. pgs. 89 - 91*). Plaintiffs' brief incorrectly and without citation asserts as if it is fact that this Defendant had actual knowledge that the property was being represented incorrectly. (*See Appellant Brief - pg. 2*). In fact, this Defendant, Mr. Allegue, represents sellers exclusively and is involved in the marketing

aspects of the real estate business, while his associate/ wife represents prospective purchasers. While Mr. Allegue's real estate firm did represent the Pina's in the purchase of the home at question here some years prior to its being offered for sale, it was his associate/ wife who handled the purchase entirely. Mr. Allegue had no actual or constructive notice that the disclosure filled out by the Pina's was erroneous or mistaken in any way.

The trial court correctly determined that regardless of all the allegations of fraud and misrepresentation, Plaintiff could not meet an essential element of any claim, damages and could not show a reliance upon any alleged misrepresentation as based upon the evidence the Circuit Court determined that Plaintiffs had ample knowledge well prior to closing on the property.

**B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT  
BELOW**

The Course of the Proceedings presented in the Appellants Brief is not controverted.

**SUMMARY OF THE ARGUMENT**

Plaintiffs failed to present a genuine issue of material fact to the trial court and as so the entry of summary judgment should be affirmed. Plaintiffs attempts to characterize their knowledge of the actual square footage as knowledge of a discrepancy in an effort to argue a factual issue is without merit and does not present a true issue for a jury. Plaintiffs cannot show that they relied upon the alleged misrepresentation and therefore fail to meet an essential element of their claim.

## STATEMENT OF THE FACTS

Plaintiffs' complaint alleges they entered into a contract to purchase the subject house and property in question based, at least in part, upon the representations, disclosures and reports of the numerous Defendants named in this lawsuit. (*See Complaint-Rec. pgs. 6 -29*). Plaintiffs allege that they hired a professional to perform an appraisal of the subject property. (*See Complaint - Rec. pg. 8*). The appraisal obtained by and for Plaintiffs reported the square footage represented by the Multiple Listing Service and property disclosure statement was incorrectly listed at 3000 square feet; and the actual square feet was 2500 square feet. Plaintiffs' knowledge of this discrepancy was obtained prior to the closing of the property and transfer of ownership. (*See Affidavits of Camille Thomas and Jack Thomas - Rec. pgs. 192-193*). This fact has been conclusively established by Plaintiffs' own admissions. (*See Plaintiffs' Response to Request for Admissions - Rec. pgs 89-91*). Plaintiffs with full knowledge of the actual square footage of the property attempted to re-negotiate the sales price of the property to which the sellers allowed for rescission or continuation under the contract. Plaintiffs' chose to continue under the contract.

Plaintiffs' have and continue to disparage the intelligence of the Court by characterizing Plaintiffs' prior knowledge of the square footage as knowledge of a discrepancy. (*Appellants Brief pg 2*). The only evidence presented to the Court supports a very obvious conclusion of prior knowledge as determined by the Circuit Court. (*See Affidavits of Camille Thomas and Jack Thomas - Rec. pgs. 192-193, Plaintiffs' Response to Request for Admissions - Rec. pgs 89-91, and the Circuit Court Memorandum*

*Decision - Rec. pgs. 194-200*). Appellants brief continues to assert facts not properly cited alleging that Plaintiffs questioned all the Defendants about the square footage and that the Defendants assured Plaintiffs that the square footage was 3000. (*Appellants' Brief pgs. 2-3*). The Brief cites to RE 11 which is the signature page of Plaintiffs' Complaint, hardly admissible or supportive for surviving summary judgment or for supporting a reversal on appeal. Appellants brief continues to assert without proper citation as to when Plaintiffs received conclusive evidence that the home contained less than 3000 sq. feet. (*Appellants' Brief pgs. 2-3*). These blind assertions cannot be addressed without proper citation.

### **ARGUMENT**

#### **I. THE DUTY OF A REAL ESTATE AGENT, REPRESENTING A SELLER, TO A PURCHASER IS PRESCRIBED AND MANDATED BY MISS. CODE ANN. § 89-1-505(1).**

Appellants' brief fails to provide accurate citation to all the statutes cited in this section and fails to pinpoint cite the cases cited making a reply very difficult if not impossible to address accurately the position attempted to be advocated by Appellants' brief. In short there is no such statute as *Miss. Code Ann. § 511 or 523 [sic]*. Further, the case law is devoid of pinpoint citation.

The *Lane v. Oustalet* case cited in Appellants' brief is a case of dual agency whereby one principle was treated differently than another and evidence was presented providing a genuine issue of material fact. That is not the case here. The facts are taken as presented by Plaintiffs and supported by affidavit and not challenged by Plaintiffs.



Further, the failure to disclose in the *Lane* case was a failure of the agent to disclose information provided by the sellers disclosures. *Lane v. Oustalet*, 850 So.2d 1143, 1149 (Miss.App.,2002). Very, very different than the circumstances found in the case at bar where the facts support that this Defendant, real estate agent, represented the property based upon the property disclosure statement of the sellers as mandated by Mississippi Statute. *Miss. Code Ann. § 89-1-505*.

*Mississippi Code Annotated § 89-1-505* (Limit on duties and liabilities with respect to information required or delivered), states in pertinent part:

(1) Neither the transferor nor any listing or selling 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 or that listing or selling agent, was based on information timely provided by public agencies or by other persons providing information as specified in subsection (2) that is required to be disclosed pursuant to Sections 89-1-501 through 89-1-523, and ordinary care was exercised in obtaining and transmitting it.

*Miss. Code Ann. § 89-1-505(1)*. The allegations in Plaintiffs' Complaint are directly addressed by *Miss. Code Ann. § 89-1-505(1)*. (See *Complaint - Rec. pgs. 6 - 29*). The allegations in Plaintiffs' Complaint do not allege actionable facts for any recovery based upon *Miss. Code Ann. § 89-1-505(1)*. This Defendant's only duty was to comply with applicable Mississippi Real Estate requirements including *Miss. Code Ann. §89-1-505*.

Of no matter are the actions of this Defendant as the knowledge of Plaintiffs well prior to close prevents survival of an action for misrepresentation. The elements for any misrepresentation claim are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably

contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the representation's truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Allen v. Mac Tools, Inc.* 671 So.2d 636, 642 (Miss.,1996). As pointed out by the Circuit Court, without reliance, Plaintiffs cannot survive summary judgment.

Appellants' brief fails entirely to apply the attempted citations to the case at bar. The entire section is merely a collection of case cites lacking pinpoints and statements purporting to be statute which are impossible to review as cited. No attempts have been made to link the cites to the case at bar. The Mississippi Supreme Court has frequently held that propositions unsupported by reasons and authority are considered to have been waived. *Thibodeaux v. State*, 652 So.2d 153, 155 (Miss.1995); *Dozier v. State*, 247 Miss. 850, 157 So.2d 798, 799 (1963).

**II THE FACTS TAKEN AS PRESENTED BY PLAINTIFFS' DID NOT PRESENT A GENUINE ISSUE OF MATERIAL FACT FOR A JURY, THEREFORE THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT.**

Appellants' brief cites to numerous cases outlining the standard for summary judgment in Mississippi. The brief fails to address the lack of a genuine issue of material fact in the case at bar. As is pointed out in the Circuit Court's Memorandum Opinion, the only evidence presented supports the fact that a contract to purchase the property was entered into on December 12,2005, which was marketed as 3000 square feet based upon the property disclosure statement. (*See Circuit Court Memorandum Decision - Rec. pgs.*

194-195). Plaintiffs were informed by their appraiser that the actual square footage was 2500, December 28, 2005. (See *Circuit Court Memorandum Decision - Rec. pgs. 194-195*). At the request of Plaintiff, Cody Waters, the square footage was re-measured and yielded the same previously reported results. (See *Circuit Court Memorandum Decision - Rec. pgs. 194-195*). It is at this point that a reduced sales price was argued for at the request of Plaintiffs. (See *Circuit Court Memorandum Decision - Rec. pgs. 194-195*). The requested reduction was declined and instead the sellers offered to release the Plaintiffs from the contract. (See *Circuit Court Memorandum Decision - Rec. pgs. 194-195*). Plaintiffs opted to continue with the sale and the property closed on January 18, 2006. (See *Circuit Court Memorandum Decision - Rec. pgs. 194-195*).

The elements for any misrepresentation claim are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the representation's truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Allen v. Mac Tools, Inc.* 671 So.2d 636, 642 (Miss.,1996). The above must be proven by clear and convincing evidence. *Levens v. Campbell*, 733 So. 2d 753, 762 (Miss. 1999). As opined by the Circuit Court, based upon the facts presented by Plaintiffs and supported by affidavits, Plaintiffs failed to establish the essential reliance element and therefore, summary judgment was proper. (See *Circuit Court Memorandum Decision - Rec. pg. 197*).

Appellants brief asserts that it is undisputed that Defendant/ Allegue was aware of the actual square footage of the home at the time he marketed it. (*Appellant Brief pg. 4*). This is absolutely disputed and the same lacks citation. The brief immediately continues with more baseless, citeless allegations immaterial for this appeal. The Circuit Court opined that regardless of the actions alleged, though unsupported in response to summary judgment, Plaintiffs lack the essential element of reliance. (*See Circuit Court Memorandum Decision - Rec. pgs. 194 - 200*).

Plaintiffs continued assertion that though the actual measured square footage of the house was reported to them twice on December 28, 2005, and though they used this knowledge to attempt to reduce the price of the home, they still did not have knowledge of the actual square footage of the house. (*See Circuit Court Memorandum Decision - Rec. pgs. 194-195 and Plaintiffs' Complaint - Rec. pgs. 6 - 29*). The brief asserts that there is a jury question as to Plaintiffs knowledge. (*Appellant's Brief pg. 5*). The very notion of such flies in the face of logic and reason and is at best insulting to the intelligence of the Court system.

Appellant's brief continues, asserting that even if the Plaintiffs had knowledge of the square footage, they are still entitled to a remedy. (*Appellant's Brief pg. 5*). Plaintiffs assert this without authority or citation to even secondary authority. The Mississippi Supreme Court has frequently held that propositions unsupported by reasons and authority are considered to have been waived. *Thibodeaux v. State*, 652 So.2d 153, 155 (Miss.1995); *Dozier v. State*, 247 Miss. 850, 157 So.2d 798, 799 (1963). The circumstances argued here do not provide for compensation under the law. The law on

the subject is the only pertinent factor to consider and Plaintiffs have failed to present authority to support their argument.

Plaintiffs argue that because the contract allows for the filing of a lawsuit then the suit should survive summary judgment. (*Appellants' Brief* pgs. 5 - 6). The Plaintiffs were allowed to seek redress through the courts, they simply failed to meet the essential elements of the claims made against the Defendants and therefore could not survive summary judgment.

Plaintiffs argue in the conclusion that a jury must be allowed to decide Defendants' knowledge of the square footage of the subject property. (*Appellants' Brief* pg. 6). The memorandum decision of the Circuit Court outlines the findings of fact as to Plaintiffs' knowledge which were not controverted by Plaintiffs: An appraisal was performed which reported the square footage on the house as 2500 sq. ft. (*Circuit Court Memorandum Decision - Rec. pgs. 194 - 200*). Upon receiving such information, Plaintiff Cody Waters, requested the appraisers to re-measure the square footage, which it was and the same was verified as 2500 sq. ft. *Id.* Plaintiff, Cody Waters then requested that his real estate agent use this information to renegotiate the price. *Id.* In response, the Pinas would not reduce the price but in light of the information would release the Waters, Plaintiffs, from the contract. *Id.* Plaintiffs' opted to continue with the contract and close on the property some three weeks later. What is there for a jury to decide? Plaintiffs' characterize their knowledge as knowledge of a discrepancy, as if this characterization creates a jury issue. Jury issues are based upon factual disputes of which there are none in the present action. Plaintiffs presented no affidavits to the Circuit Court

which would contradict the facts supported by this Defendant's Brief and supporting Affidavits. The facts are undeniable and Plaintiffs mere difference in characterization of their knowledge does not present an issue for a jury. The very notion of the same defies logic and if applied would render summary judgment obsolete entirely for all cases.

### CONCLUSION

Based upon the facts presented by Plaintiffs and supported by affidavit the judgment of the Circuit Court should be affirmed. Plaintiffs have wholly failed to present facts which support survival of summary judgment. Plaintiffs' knowledge of the actual square footage is obvious and to argue otherwise flies in the face of reason. The Circuit Court's grant of summary judgment should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing document to the following counsel of record:

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Dated, this the 19<sup>th</sup> day of July, 2007.

  
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