

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

**CODY WATERS AND KAYCEE WATERS**

**APPELLANTS**

**VERSUS**

**CASE NO:2006-TS-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 APPELLANTS**

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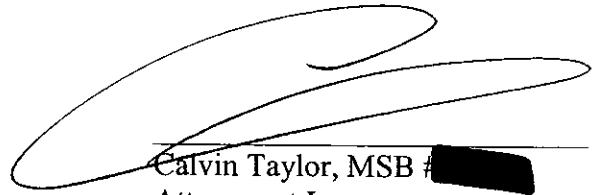
*Oral Argument Requested*

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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;
7. Calvin Taylor;
8. Patrick R. Buchanan;
9. E. Foley Ranson;
10. Brown, Buchanan & Sessoms.



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## **STATEMENT OF THE ISSUES**

### **I.**

Did the defendant owe a duty to the plaintiffs to disclose information within its knowledge that would potentially affect the value of the property?

### **II.**

Did the circuit court commit reversible error when it granted summary judgment to the defendant when there is an issue of fact as to the defendant's misrepresentation and the plaintiffs' reliance on same?

## **STATEMENT OF THE CASE**

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

This is an appeal from a summary judgment ruling in favor of the defendant, Albert Allegue. The defendant, Allegue, acted as a real estate broker for a piece of property located in Ocean Springs, Mississippi. Allegue had actual knowledge that the property in question was only 2500 square feet. Despite this knowledge, Allegue marketed the property as containing 3000 square feet and continued to represent that the property was 3000 square feet even after the plaintiffs questioned this assertion. There are clear jury questions as to Allegue's misrepresentation and plaintiffs' reliance on this misrepresentation, and the circuit court erred in granting summary judgment to the defendant.

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

On March 21, 2006, Cody and Kacee Waters, husband and wife, filed suit against Manual Pina, Lisa Pina, Albert Allegue d/b/a Remax by the Gulf. In this suit, the Waters claimed that they had purchased the property located at 8000 Fountainbleau Road in Ocean Springs, Mississippi, from the Pinas. (RE 2). On July 25, 2006, Albert Allegue filed a motion for

summary judgment. (RE 3). The circuit court granted this motion on October 16, 2006. (RE 4). On November 14, 2006, the plaintiffs timely filed a Notice of Appeal. (RE 5).

### **STATEMENT OF THE FACTS**

The plaintiffs, Cody and Kacee Waters, are husband and wife. Subsequent to Hurricane Katrina, the plaintiffs were in desperate need for a home on the Mississippi Gulf Coast. They surveyed the limited selections on the Gulf Coast and viewed a home being marketed by Albert Allegue, d/b/a ReMax on the Gulf. Allegue marketed this home as containing 3000 square feet. (RE 6). In reliance on this representation, the Waters made an offer on the home and entered into a "Contract for the Sale and Purchase of Real Estate" on December 12, 2005. (RE 7). In this Contract for Sale, the Pinas agreed to sell the home "together with . . . all items in MLS and on Sellers Disclosure." (RE 7). Both the MLS and the Property Disclosure Statement indicated that the property was 3000 square feet. (RE 8, RE 9). The Mississippi Real Estate Commission indicates on its "Working with a Real Estate Broker," that Allegue, as the Seller's Agent, has a duty of honesty and fair dealing and a "duty to disclose all facts known to the Seller's agent materially affecting the value of the property which are not known to, or readily observable by, the parties in a transaction." (RE 10).

Despite this duty, Allegue marketed and represented to the Waters throughout his dealings with the Waters that the property in question was 3000 square feet. Allegue knew that the property was only 2500 square because he had represented the Pinas when they first purchased the home in question. (RE 11).

Prior to closing on the home, the Waters were told that there was a discrepancy in what the Pinas and Allegue were stating with regard to the square footage. The Waters questioned the Pinas and Allegue and were assured that the property was indeed 3000 square feet of living

space. (RE 11). On March 2, 2006, the Waters received conclusive evidence that the home contained less than 3000 square feet. (RE 11).

## **ARGUMENT**

### **I.**

#### **THE DEFENDANT OWED A DUTY TO THE PLAINTIFFS TO DISCLOSE ALL MATERIAL FACTS THAT ADVERSLY AFFECTS THE PROPERTY VALUE.**

Mississippi law recognizes that a broker has a duty to make disclosures of any information that adversely affects the value of property that the broker is listing. Miss. Code Ann. §511. All disclosures are required to be made in “good faith.” “[G]ood faith means honest in fact in the conduct of the transaction.” *Id.* Mississippi law also provides that “any person who willfully or negligently violates or fails to perform any duty . . . shall be liable in the amount of actual damages suffered by a transferee.” Miss. Code Ann. §523. *See also Lane v. Oustalet*, 850 So.2d 1143 (Miss. App. 2002) (finding that a broker may be held liable to a purchaser of real property for failing to disclose that the property had suffered damage due to termite infestation); *Lee Hawkins Realty, Inc. v. Moss*, 724 So.2d 1116 (Miss. App. 1998) (finding that broker has duty to deal honestly in its dealings with the purchasers of real property).

### **II.**

#### **THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT.**

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that a party is entitled to summary judgment:

[I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

“The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.” Comments to M.R.C.P. 56. “Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried.” Comment to M.R.C.P. 56. “If the claim or defense of the non-moving party fails as a matter of law, it does not matter that there are disputes about non-material facts. *Vickers v. First Mississippi National Bank*, 458 So.2d 1055 (Miss. 1984).

Once the moving party presents a basis for summary judgment, the non-moving party must present sufficient evidence to create a factual dispute on material issues. Factual disputes must be both genuine and material and “if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

When the moving party meets its burden of demonstrating the absence of a genuine issue of material fact due to the complete failure of proof on an essential element of the claim, the burden shifts to the opposing party to demonstrate that a genuine issue of material fact exists for trial. Summary judgment is inappropriate if plaintiffs set forth specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d. 538 (1986).

Under this standard, the circuit court erred in granting summary judgment to the defendant. It is undisputed that the property purchased by the Waters was marketed at 3000 square feet despite the fact that it was only 2500 square feet. It is also undisputed that Allegue was aware of this fact at the time he marketed the property and in his dealings with the Waters. It is equally undisputed that Allegue failed to disclose this information within his knowledge



despite being asked a direct question by the Waters concerning the square footage of the property in question.

Yet, the circuit court granted summary judgment to the defendant finding that plaintiffs' knowledge of the discrepancy prior to closing meant that plaintiffs could not seek damages for Allegue's misrepresentation. The record does not support this finding. The circuit court relied heavily on a response of the plaintiffs to a Request for Admission filed by the defendant. The Request for Admission and the response to same is:

**REQUEST FOR ADMISSION NO. 1:** Admit that prior to the closing/purchase of the subject residence you had knowledge that the square footage of the subject home was not as previously advertised or communicated.

**RESPONSE TO REQUEST FOR ADMISSION NO. 1:** Admit that prior to the closing/purchase of the subject residence a potential square footage discrepancy had been communicated to Plaintiffs by the home appraiser. The rest of the request is denied.

(RE 12). There is a clear jury question as to the plaintiffs knowledge of the actual square footage of the subject home. Despite plaintiffs' knowledge that a discrepancy existed does not equate to knowledge of the actual square footage.

Even if the plaintiffs had knowledge of the actual square footage, they are still entitled to a remedy. Plaintiffs were in desperate need for a home after Hurricane Katrina, and homes were difficult to find. Although the contract allowed plaintiffs to cancel the contract in the event of a breach (RE 13), the plaintiffs were not in a position to do so. They had already expended substantial time and effort in locating this home. If plaintiffs had cancelled the contract, they could conceivably have been in the position of not being able to find a home for some time. The plaintiffs, being the parents of three small children, did not have this luxury.

In addition to giving the plaintiffs the right to cancel the contract for a breach, the contract also provided plaintiffs with the right to enter a suit for damages. (RE 13). The contract

specifically refers to the MLS listing that states that the property was 3000 square feet and to the property disclosure statement that likewise states that the property was 3000 square feet. (RE 14).


### CONCLUSION

The circuit court erred in granting summary judgment to the defendant in that there were clear issues of fact that only a jury can decide. A jury must be allowed to decide defendant's knowledge of the square footage of the subject property and plaintiffs' reliance on same.

Respectfully submitted, this, the 18 day of June, 2006.

CODY AND KACEE WATERS  
Appellants

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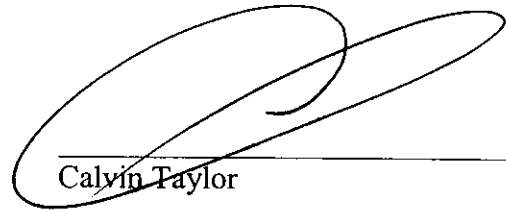
**CERTIFICATE OF SERVICE**

I, Calvin Taylor, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the foregoing to the following:

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So certified this the 18 day of June.

  
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