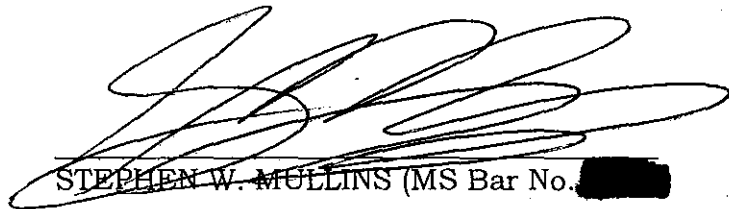


CERTIFICATE OF INTERESTED PERSONS

1. Linda Grandquest, Plaintiff/Appellant.
2. Stephen W. Mullins of the Law Firm of Luckey and Mullins, PLLC, counsel for Plaintiff/Appellant.
3. Edward Gibson of the Law Firm of Hawkins, Stracener and Gibson, PLLC, counsel for Plaintiff/Appellant.
4. Tommy Robertson, Defendant/Appellee
5. James H. Heidelberg, counsel for Defendant/Appellee
6. The Honorable Robert B. Helfrich, George County Circuit Court Judge



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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii, iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
A. Nature of the Case.....	2
B. Facts.....	3
STANDARD OF REVIEW.....	4
ARGUMENT.....	5
Argument #1 (Legal Malpractice).....	5
Argument #2 (Fraud).....	12
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	17

TABLE OF AUTHORITIES

Primary Sources Cases

<i>Massey v. Tingle</i> , 867 So.2 nd 235 (Miss. 2004).....	4
<i>Hardy v. Brock</i> , 826 So.2d 71, 74 (Miss.2002).....	4
<i>Heirs and Wrongful Death Beneficiaries of Branning ex rel. Tucker v. Hinds Cnty. Coll. Dist.</i> ,743 So.2d 311, 314 (Miss.1999).....	4
<i>Robinson v. Singing River Hosp. Sys.</i> , 732 So.2d 204, 207 (Miss.1999).....	4
<i>Richmond v. Benchmark Constr. Corp.</i> , 692 So.2d 60, 61 (Miss.1997).....	4
<i>Rice Researchers, Inc. v. Hiter</i> , 512 So.2d 1259, 1265 (Miss. 1987).....	4
<i>Robinson v. Southern Farm Bureau Casualty Company,</i> et al., 912 So.2d 5165 (Miss. 2005).....	4
<i>Pitts v. Watkins</i> , 905 So.2d 553, 555 (Miss. 2005).....	4
<i>Aetna Cas. & Sur. Co. v. Berry</i> , 669 So.2d 56, 70 (Miss. 1996).....	4
<i>Erby v. North Mississippi Med. Center</i> , 654 So.2d 495, 499 (Miss. 1995).....	5
<i>Victory Lane Productions, LLC v. Paul, Hastings, Janofsky, & Walker, LLP</i> , 409 F.Supp.2d 773 (S.D. Miss., 2006).....	5,11
<i>Winstead v. Berry</i> , 556 So.2d 321 (Miss., 1990).....	5, 7
<i>Singleton v. Stegall</i> , 580 So.2d 1242 (Miss. 1991).....	6, 10, 11
<i>Mississippi Bar v. Gail Thompson</i> , 2008 WL 2447364 (Miss., 2008).....	8,9
<i>Christian Methodist Episcopal Church v. S & S Constr. Co, Inc.</i> , 615 So. 2d 568, 573 (Miss. 1990)	9
<i>Hutchinson v. Smith</i> , 417 So.2d 926 (Miss., 1982).....	10

<i>Spann v. Shuqualak Lumber Co., Inc.</i> , 990 So.2d 186, 190 (Miss., 2007).....	12
<i>Hernandez v. Vickery Chevrolet Oldsmobile, Co., Inc.</i> , 652 So.2d. 179, 183 (Miss., 1995).....	13
<i>Baker v. Humphrey</i> , 101 U.S. 494 (Oct. 1879).....	14, 15

Secondary Sources

Restatement (Third) of The Law Governing Lawyers [REST 3d LGOVL § 14 (2000)]	7
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LINDA GRANDQUEST

APPELLANT

VERSUS

CIVIL ACTION NO.: 2008-TS-01325

**HERSHEL L. McFARLAND, an individual
REBECCA WILLIAMS, an individual, and
TOMMY ROBERTSON, an individual**

APPELLEE

BRIEF OF APPELLANT

COMES NOW the Appellant, LINDA GRANDQUEST, by and through undersigned counsel, and file this, her Brief, and in support thereof would show unto this Honorable Court the following, to-wit:

STATEMENT OF THE ISSUES

A. Whether the trial court's memorandum and order granting the Appellee's Motion for Summary Judgment regarding the legal malpractice claim constitute reversible error.

B. Whether the trial court's memorandum and order granting the Appellee's Motion for Summary Judgment regarding the fraud claim constitute reversible error.

STATEMENT OF THE CASE

A. Nature of the case

The Complaint in this matter was filed on May 11, 2006, alleging legal malpractice, fraud and punitive damages. (Grandquest R. 8-13). The Court granted Plaintiff extensions for service of process as one of the Defendants was very difficult to locate and the other Defendant was now deceased, and the Estate had to be substituted and process had to be reissued. (Grandquest R. 35-37, 38, 39, 112-114, 116-117, 177, 227, 236-238, 239).

The Defendant, Rebecca Williams, was finally served on June 11, 2007, and the Estate of Hershel McFarland on May 10, 2007. The Defendant, Robertson, filed an Answer and served discovery requests to the Plaintiff in August, 2006. (Grandquest R. 28-33 and 25-26). The Defendant, McFarland Estate, filed its Answer on or about July 20, 2007. (Grandquest R. 241-243). Plaintiff responded to Robertson's discovery requests, and her deposition was taken on or about November 8, 2006, prior to the other two (2) Defendants making their appearance. (Grandquest R. 44-45 and 48).

The Judge that was initially assigned to this case, as well as all other Judges in this Judicial District, recused themselves by Order dated October 4, 2006, and a special Judge was appointed by Order dated December 28, 2006. (Grandquest R. 46 and 110).

On or about January 9, 2007, Robertson filed a Motion for Summary Judgment as to all counts. (Grandquest R. 135-138). That Motion was granted on or about January 31, 2008. (Grandquest R. 244-248). Plaintiff, Linda Grandquest, filed a Motion for Reconsideration on March 12, 2008.

(Grandquest R. 257-260). Said Motion was denied on June 30, 2008. (Grandquest R. 280). Plaintiff now appeals to this Honorable Court and will show that the trial Judge erred in granting Defendant Robertson's Motion for Summary Judgment. (Grandquest R. 282-283).

B. Facts

On or about September of 2002, the Plaintiff Linda Grandquest contracted with the Defendant Rebecca Williams to purchase real property in George County, Mississippi, described as Section 6, Township 3 South, Range 4 West. Defendant Rebecca Williams represented that she owned said property. For the consideration of \$8,500.00, Williams agreed to deed the property to Grandquest.

To aid in the transaction, Grandquest and Williams employed the attorney Thomas "Tommy" Robertson. On or about September 13, 2002, Mr. Robertson prepared a warranty deed and an Authority to Cancel Deed of Trust Executed by Rebecca Williams and Nelson Madison to H.L. McFarland and Jeffrey McFarland. For her share of the legal work, Grandquest paid Robertson in the form of a check, made payable to Tommy Robertson.

It is clear from the Deed of Trust that Robertson had actual knowledge of the encumbrance upon the property as well as the transaction between Williams and Grandquest. This is further evidenced by Robertson's preparation of the Authority to Cancel Deed of Trust. Robertson, with the actual knowledge that Grandquest had paid valuable consideration for the property, and with actual knowledge that his office had been retained for the express purpose of preparing an Authority to Cancel Deed of Trust, foreclosed upon the property.

As a result of Robertson's legal malpractice, Plaintiff, Linda Grandquest, lost the land she paid valuable consideration for.

STANDARD OF REVIEW

A Motion for Summary Judgment is decided under *de novo* review. *Massey v. Tingle*, 867 So.2d 235 (Miss. 2004). This Court's standard of review regarding motions for summary judgment is well established. We review summary judgments *de novo*. *Hardy v. Brock*, 826 So.2d 71, 74 (Miss.2002) (citing *Heirs and Wrongful Death Beneficiaries of Branning ex rel. Tucker v. Hinds Cmty. Coll. Dist.*, 743 So.2d 311, 314 (Miss.1999). The facts are viewed in light most favorable to the nonmoving party. *Id.* (citing *Robinson v. Singing River Hosp. Sys.*, 732 So.2d 204, 207 (Miss.1999). The existence of a genuine issue of material fact will preclude summary judgment. *Id.* The non-moving party may not rest upon allegations or denials in the pleadings but must set forth specific facts showing that there are genuine issues for trial. *Id.* (citing *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss.1997).

A heightened standard of review should be applied when considering a trial court's findings of fact and conclusions of law that is essentially a verbatim acceptance of a proposed finding submitted by the prevailing party. *Rice Researchers, Inc. v. Hiter*, 512 So.2d 1259, 1265 (Miss. 1987). The Supreme Court also held in *Robinson v. Southern Farm Bureau Casualty Company, et al.*, 912 So.2d 5165 (Miss. 2005): "summary judgment orders are reviewed *de novo*. *Pitts v. Watkins*, 905 So.2d 553, 555 (Miss. 2005); (citing *Aetna Cas. & Sur. Co. v. Berry*, 669 So.2d 56, 70 (Miss. 1996). This Court examines all evidentiary matters presented to the court below in the light most favorable to the party

against whom the motion is made.” Id. The trial judge’s decision will be reversed if a triable issue of fact exists; otherwise, the decision of the lower court will be affirmed.’ *Erby v. North Mississippi Med. Center*, 654 So.2d 495, 499 (Miss. 1995).

ARGUMENT

A. Whether the trial court’s memorandum and order granting the Appellee’s Motion for Summary Judgment regarding the legal malpractice claim constitute reversible error.

Under Mississippi Law, four (4) elements must be proven to prevail in a legal malpractice claim: (1) an attorney – client relationship between the Plaintiff and the Defendant, (2) failure of the attorney to represent the client in a reasonable manner, (3) proximate causation and (4) damages. *Victory Lane Productions, LLC v. Paul, Hastings, Janofsky, & Walker, LLP*, 409 F.Supp.2d 773, 778 (S.D. Miss., 2006).

A.1. Attorney-Client Relationship

In Mississippi, there are no specific guidelines to determine if an attorney-client relationship exists. Rather, the determination depends on the facts of each case and it is, therefore, done on a case by case basis.

For instance, in *Winstead v. Berry*, the Mississippi Supreme Court held that if the non-movant’s evidence as to the question of an existing attorney-client relationship is such to allow reasonable jurors to reach differing conclusions, the motion for direct verdict must be overruled. *Winstead v. Berry*, 556 So.2d 321, 323 (Miss., 1990). The same standard should apply to a Motion

for Summary Judgment where the movant party is asking the judge to hold , as a matter of law, that the evidence presented by the non-movant party is insufficient to support a decision in favor of the non-movant Plaintiff. Plaintiff believes that if the question of an attorney-client relationship is presented to a juror in the case at hand, a reasonable juror would reach different conclusions.

It is clear from the record that Plaintiff understood that Robertson was going to represent her in the preparation of some legal papers in order to finalize the sale of the property. If the Plaintiff had not been under this impression, she would not have paid Robertson money as satisfaction for attorney's fees. In addition, the transaction took place at Robertson's office, and a member of his staff prepare the legal forms. Furthermore, Plaintiff declared in her deposition that when she paid Robertson, "she was under the understanding that he was supposed to be doing what he could do to make everything right in me purchasing that piece of property". Deposition of Linda Grandquest, page 14, lines 10-13. Therefore, Plaintiff was under the conviction that Robertson was assisting her in this matter, as any reasonable person would be.

Plaintiff acknowledges that payment to Robertson is not by itself sufficient to create an attorney-client relationship in Mississippi. The Mississippi Supreme Court has held that the client's payment of a lawyer's fee cinches the point although we have never held it a *sine qua non* the relationship has arisen. *Singleton v. Stegall*, 580 So.2d 1242, 1244 (Miss. 1991). It may not be a *sine qua non* element, but it is without a doubt a factor to be taken into account.

In *Winstead v. Berry* the Mississippi Supreme Court was faced with the question of what kind of evidence is sufficient to establish an attorney-client relationship. The Court listed as one of the elements the Plaintiff's believe that the attorney was representing her and overruled the trial judge's decision. *Winstead v. Berry*, 556 So.2d 321, 323 (Miss., 1990).

In the case at hand, we have at least two (2) of the elements that have been recognized under Mississippi Law to form an attorney-client relationship: payment for attorney's fees, and understanding by Plaintiff of attorney's representation. Therefore, Plaintiff believes that if the case at bar is presented to a reasonable juror; they will arrive to different conclusions allowing this Court to reverse the trial judge's decision.

In addition to the above mentioned jurisprudence, the Restatement (Third) of The Law Governing Lawyers states that a relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
 - a. the lawyer manifests to the person the consent to do so; or
 - b. the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
- (2) a tribunal with power to do so appoints the lawyer to provide the services.

REST 3d LGOVL § 14 (2000).

Applying this definition to the case at hand, it is unequivocally that an attorney-client relationship existed. Plaintiff manifested her intent to be

represented by the Robertson when she paid the amount of \$57.00. Robertson manifest the consent to represent Plaintiff when he cashed the check for \$57.00 issued directly to him. Even if Defendant Robertson were to argue that he never consented to the representation, as he has contended in his Motion for Summary Judgment, it is unarguable that by cashing the Plaintiff's check, Plaintiff reasonably relied on Robertson to provide legal services. At this point, when reliance has been created, the attorney bears the burden to manifest the lack of consent to represent the client. There is no indication in the record of any action taken by Robertson to communicate to the Plaintiff that, even though she had paid him to provide legal services, he was not her attorney.

The trial judge based his decision on the fact that the Plaintiff never communicated personally or verbally with the attorney. However, the Plaintiff believes that even when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so. When Robertson's staff drafted the documents, and allowed Plaintiff to meet at Robertson's office in order to finalize the paperwork, a reasonable reliance was created, and Robertson never took the necessary steps to make clear to the Plaintiff that he was not her attorney.

Moreover, in *Mississippi Bar v. Gail Thompson* the Mississippi Supreme Court acknowledged the attorney-client relationship definition contained in the Restatement Third of the Law Governing Lawyers, and further stated that "a lawyer's consent to represent a client need not be made by the lawyer himself. An agent for the lawyer may communicate consent, for example, a secretary or

paralegal with express, implied or apparent authority to act for the lawyer in undertaking a representation.” *Mississippi Bar v. Gail Thompson*, 2008 WL 2447364 (Miss., 2008).

Therefore, the fact that Plaintiff did not personally or verbally communicated with the attorney does not necessarily implied that an attorney-client relationship does not exist. Plaintiff declared in her deposition that she went to Robertson’s office in order to sign the paperwork and that a lady by the name of Jennifer, who worked at Robertson’s office, delivered the documents and asked her to sign them. At this time, Plaintiff had the right to believe that Jennifer was an agent of Robertson and was acting within the authority conferred to her.

In *Christian Methodist Episcopal Church v. S & S Constr. Co, Inc.*, the court held that a principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with agent might rightfully believe the agent to have the power he assumes to have. *Christian Methodist Episcopal Church v. S & S Constr. Co, Inc.*, 615 So. 2d 568, 573 (Miss. 1990). Robertson is bound by his agent’s conduct as Plaintiff rightfully believe that when the documents were delivered to her, they had been prepared by Robertson’s office according to the attorney’s fees she had paid in advance. Therefore, it is readily clear that Jennifer was acting as Robertson’s agent.

For the above mentioned reasons, it is undisputable that a client-attorney relationship exists.

A.2 Failure of the Attorney to Represent the Client in a Reasonable Manner

The first step to prove a negligence claim is to determine the duty owed to the Plaintiff and the manner in which the Defendant breached that duty. This Court has long recognized that a lawyer owes his clients duties falling into three (3) broad categories: duty of care, duty of loyalty, and duties provided by contract. *Singleton v. Stegall*, 580 So.2d 1242, 1244 (Miss. 1991). Plaintiff believes that Robertson breached the duty of care and the duty of loyalty.

Duty of care has been defined as a duty consistent with the level of expertise the lawyer holds himself out as possessing and consistent with the circumstances of the case. *Hutchinson v. Smith*, 417 So.2d 926, 928 (Miss., 1982). The lawyer's duty of care imports not only skill or expertise but diligence as well. The lawyer shall act with reasonable diligence and promptness in representing a client. *Singleton v. Stegall*, 580 So.2d 1242, 1244-1245 (Miss. 1991). When Robertson decided to represent Plaintiff and Ms. Williams in their land transaction, he held himself out to have the level of expertise necessary to assist in real estate transactions. Defendant Robertson knowing of the existence of an encumbrance on the subject property, failed to inform the Plaintiff of the mortgage on the property she was about to buy, and therefore breached his duty of care.

The duty of loyalty is fiduciary in nature and may take one of these two (2) forms. The first involves situations in which the attorney obtains an unfair personal advantage, such as acquiring property from the client; the second involves situations in which the attorney or other clients have interests adverse

to the client in question. *Victory Lane Productions, LLC v. Paul, Hastings, Janofsky, & Walker, LLP*, 409 F.Supp.2d 773, 780 (S.D. Miss., 2006). In *Singleton v. Stegall* the Mississippi Supreme Court defined the lawyer's duty of loyalty to include a duty to safeguard the client's confidences and property, avoid conflicting interest that might impair the representation, and not employ adversely to the client's powers conferred by the client-lawyer relationship. *Singleton v. Stegall*, 580 So.2d 1242, 1244-1245 (Miss. 1991).

In the case at hand, Ms. Williams as well as the McFarlands, were clients of Robertson and had interests adverse to the Plaintiff, as the seller knew that the property that she was about to sell had a lien on it. Robertson knew of these interests and yet proceeded to represent both parties, seller and buyer. Robertson breached his duty of loyalty inasmuch as he failed to protect Plaintiff's property, and failed to avoid the conflict of interest that impaired the legal representation of the Plaintiff.

This fiduciary duty is breached also when an attorney helps a third party to succeed in an action that impairs the interests of one of the attorney's clients. In the present case, once Robertson had aid the Plaintiff in obtaining the property, Robertson assisted Mr. and Mrs. McFarland with the foreclosure of that same property. This is clearly a breach of the fiduciary duty owed to the Plaintiff.

For the above mentioned reasons, Robertson breached the standard of care expected of an attorney under Mississippi Law, and therefore, failed to represent the client in a reasonable manner.

A.3. Proximate Causation and Damages

Under Mississippi Law, a Defendant's negligence is the "cause-in-fact" when the fact finder concludes that, but for the Defendant's negligence, the injury would not have occurred. *Spann v. Shuqualak Lumber Co., Inc.*, 990 So.2d 186, 190 (Miss., 2007).

In the case at bar, if Defendant would have advised Plaintiff of the existence of the mortgage on the property, Plaintiff would not have bought the subject home. But for the Defendant's negligence, Plaintiff would not have suffered injuries included but not limited to the lost of her land.

A.4. Conclusion

Plaintiff has proven all the elements of a legal malpractice claim. Therefore, Defendant's Motion for Summary Judgment should be denied.

B. Whether the trial court's memorandum and order granting the Appellee's Motion for Summary Judgment regarding the fraud claim constitute reversible error.

In order to prevail in a claim for fraud, the Plaintiff must prove the following elements: (1) representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated,

(6) hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. *Hernandez v. Vickery Chevrolet Oldsmobile, Co., Inc.*, 652 So.2d. 179, 183 (Miss., 1995). The trial judge correctly stated that when one of the elements of the claim for fraud fails, the Defendant is entitled to summary judgment besides any factual disputes regarding the remaining elements of the claim. Plaintiff will prove to this Court that all the elements are present in this case and therefore, the Defendant is not entitled to summary judgment.

Defendant Robertson, prepared the warranty deed from Ms. Williams to Plaintiff. That same day, he also prepared Ms. Williams' Authority to Cancel Deed of Trust to H.L. McFarland and Jeffrey McFarland. This proves that Defendant was aware at all times during the preparation of Plaintiff's warranty deed, that a mortgage existed on the property. The trial judge correctly stated that Plaintiff wanted to buy Lot 12, and that she in fact received the piece of land her deed was referring too, Lot 12. However, Plaintiff did not want to buy a lot with a mortgage on it. This is where the fraud claim arises from. Not from the actual warranty deed but rather from the **false representation** of the attorney preparing the document conveying the subject lot. When Plaintiff alleges in her complaint that the property contained a false description of the property, she is not referring to metes and bounds descriptions, but to the fact that the land was conveyed to her with an encumbrance, and none of the parties involved in the transaction, including Robertson, advised her of this **material fact**.

Ms. Grandquest was at all times completely unaware that any lien existed, and indeed had every right to rely on her attorney's representations, as she had hired him expressly to provide over the sale and provide legal services

regarding same. Ms. Grandquest was proximately damaged by Mr. Robertson's acts, as she lost her purchase money and land when it was subsequently foreclosed upon.

Furthermore, after the lot was sold and the warranty deed was delivered to the Plaintiff, Robertson assisted Mr. and Mrs. McFarland, lien holders, with the foreclosure of the property. In *Baker v. Humphrey*, an attorney employed by both parties to an agreement by the purchase of the land for the sum of \$8,000.00, upon discovering a defect in the title, concealed the fact from one of the parties, offer the property to the other party and upon their negative to pursue with the purchase, the attorney himself bought the property. *Baker v. Humphrey*, 101 U.S. 494 (Oct. 1879). Although the facts of the *Baker* case are far more complicated than those in the subject case, both cases underline the same principle: It is always dangerous for a counsel to undertake to act, in regard to the same thing, for parties whose interests are diverse. *Baker v. Humphrey*, 101 U.S. 494, 502 (Oct. 1879) In the *Baker* case, the United States Supreme Court stated that the attorney had the duty to cure the defect and not concealed the facts from the Plaintiff. The Court held the attorney liable for fraud: "Actual fraud in such cases is not necessary to give the client a right to redress. A breach of duty is 'constructive fraud', and is sufficient." *Baker v. Humphrey*, 101 U.S. 494, 502 (Oct. 1879).

Constructive fraud has been defined as a cause of action arising by operation of the law by acts or a course of conduct which, if sanctioned by law, would either in the particular case or in common experience, secure an unconscionable advantage, irrespective of the existence of evidence of actual intent to defraud.

In the present case, Robertson had a duty to inform Plaintiff of the defect. Rather, he chose to conceal the defect at the time of the sale of the

property. Moreover, once the sale was completed, he assisted the McFarlands with the foreclosure of Plaintiff's property, knowing that the property had been sold for good consideration to Ms. Grandquest only two (2) months before said foreclosure took place. Plaintiff believes that like in the *Baker* case, Robertson is liable for fraud inasmuch as he secure an unconscionable advantage by representing parties with clear adverse interests. It is difficult to believe that a jury or a judge will not conclude that Defendant's actions constitute FRAUD.

CONCLUSION

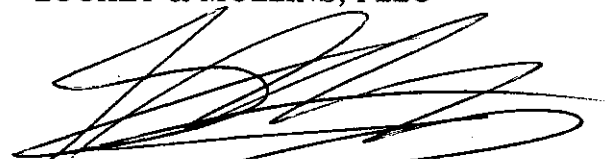
Plaintiff has shown onto this Honorable Court that all the elements of a legal malpractice action as well as a fraud action are present in the case at hand. The trial judge erred in granting Defendant's Motion for Summary Judgment. Plaintiff respectfully requests this Honorable Court to enter an order overruling the trial court's granting of the Defendants' motions for summary judgment and remand this matter back to the trial court level for a full trial on the merits.

RESPECTFULLY SUBMITTED this, the 28th day of January, 2009.

LINDA GRANDQUEST,
Plaintiff/Appellant

By and Through Her Attorneys,
LUCKEY & MULLINS, PLLC

BY:



STEPHEN W. MULLINS

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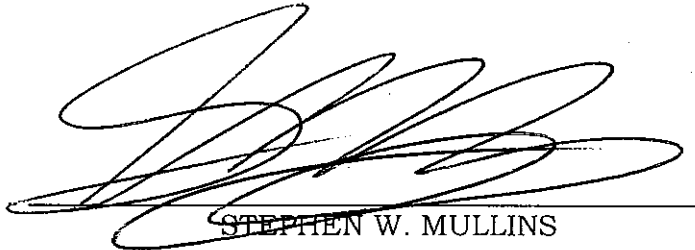
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CERTIFICATE OF SERVICE

I, STEPHEN W. MULLINS, attorney for Plaintiffs/Appellants, certify that I have this day forwarded this Brief to the Clerk of this Court and have served a copy of same by U. S. Mail with postage prepaid on the following counsel of record.

James H. Heidelberg, Esquire
Post Office Box 1407,
Pascagoula, MS 39568

THIS, the 28th day of January, 2009.



STEPHEN W. MULLINS

CERTIFICATE OF SERVICE

I, STEPHEN W. MULLINS, attorney for Plaintiffs/Appellants, certify that I have this day forwarded this Brief to the Clerk of this Court and have served a copy of same by U. S. Mail with postage prepaid on the following persons:

Honorable Robert Helfrich
Special Circuit Court Judge
Post Office Box 309
Hattiesburg, MS 39403

James H. Heidelberg, Esquire
Post Office Box 1407,
Pascagoula, MS 39568

THIS, the 28th day of January, 2009.



STEPHEN W. MULLINS