IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-TS-01325

LINDA GRANDQUEST — APPELLANT

VERSUS

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

# BRIEF OF APPELLEE, TOMMY ROBERTSON

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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 an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Linda Grandquest, Appellant;

2. Tommy Robertson, Appellee;

3. Stephen W. Mullins of the law firm of Luckey & Mullins, PLLC counsel for Plaintiff/Appellant;

4. Edward Gibson of the law firm of Hawkins, Stracener and Gibson, PLLC, counsel for Plaintiff/Appellant;

5. James H. Heidelberg, Esq., Attorney for Appellee, Tommy Robertson;

6. Jessica M. Dupont, Esq., Attorney for Appellee, Tommy Robertson;

7. Hon. Robert B. Helfrich, George County Circuit Court Judge.

This the 26th day of February, 2009.

JAMES H. HEIDELBERG

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## STATEMENT REGARDING ORAL ARGUMENT

Appellee, Tommy Robertson, believes oral argument will be helpful to the Court because this appeal addresses the relationship between an attorney for the seller of real estate and a purchaser of real estate. In some respects this is an issue of first impression, and the Court's decision will have an important effect on the existence of an attorney-client relationship during real estate transactions in which an attorney acts as a mere scrivener. This issue can best be decided with the assistance of oral argument before the Court.

## STATEMENT OF THE ISSUES

The trial court was correct in granting Robertson's Motion for Summary Judgment regarding Plaintiff's claims of legal malpractice, "conflict of interest" and fraud.

Because no attorney-client relationship existed between Plaintiff and Robertson, a claim for legal malpractice was properly dismissed. Robertson's office merely acted as a scrivener to prepare a Warranty Deed and Authority to Cancel at the request of a third party. As such this Court should uphold the trial court's grant of summary judgment regarding legal malpractice to the Defendant.

Plaintiff has no proof of any wrongdoing, much less "fraud", by Robertson and likewise the fraud claim was properly dismissed. As such this Court should uphold the trial court's grant of summary judgment regarding fraud.

## STATEMENT OF THE CASE

(A) Nature of the case.

This lawsuit arises from a September 13, 2002 property sale between purchaser, Plaintiff Linda Grandquest, and seller Rebecca Williams.[1] The property was described as Lot 12, Dunn Place, located in George County, Mississippi. Approximately a month before the sale Plaintiff Grandquest paid Rebecca Williams the first $8,000.00 of the purchase price of the property.

Robertson is a licensed Mississippi attorney and his legal assistant prepared a Warranty Deed and Authority to Cancel Deed of Trust at the request of Robertson's client, Rebecca Williams. The purpose of the Warranty Deed was to convey the property from Rebecca Williams to Plaintiff Grandquest, and the Authority to Cancel was for the purpose of satisfying a Deed of Trust on the same property previously executed by Rebecca Williams in favor of Hershel McFarland. Mr. McFarland[2] held a Deed of Trust on the property until the property was foreclosed on May 12, 2003.

The Warranty Deed included the type-written disclaimer noted in bold capital letters the following: "**TITLE TO SAID LAND NOT EXAMINED.**"

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[1]Rebecca Williams is not a party to this appeal but is a defendant in the trial court.

[2]Hershel McFarland is now deceased and his estate is a defendant in the trial court. The estate is not a party to this appeal.

Robertson had been appointed Trustee in the Williams-McFarland Deed of Trust recorded in Book 292, Page 29-31 of the Land Deed Records of George County, Mississippi. As of May 12, 2003, long after the Williams-Grandquest sale, the lien created by the Deed of Trust had not been satisfied. Robertson, acting as Trustee for the lien-holder, Hershel McFarland, foreclosed on the property secured by the Deed of Trust.

(B) Procedural history.

On May 11, 2006, Grandquest filed the Complaint in the Circuit Court of George County against Tommy Robertson, *inter alia*, alleging legal malpractice, fraud, and "conflict of interest", seeking compensatory and punitive damages. (R. at 8-18.) Robertson answered on August 10, 2006 (R. at 28-33) after having propounded written discovery to the Plaintiff on August 3, 2006. (R. at 25-26.) The Plaintiff never propounded any written discovery to Robertson or took any depositions from any party or witness.

Plaintiff responded to Robertson's discovery on October 2, 2006 (R. at 44) and she was deposed on November 8, 2006. (R. at 48.) Shortly thereafter, on December 6, 2006, Mr. Robertson filed his Motion for Partial Summary Judgment on the issues of punitive damages. (R. at 51-81.) On January 9, 2007, Mr. Robertson moved for summary judgment on the entire claim. (R. at 135-175.)

Plaintiff responded to the Motion for Partial Summary Judgment on punitive damages on December 19, 2006 (R. at 86-109) and responded to the Motion for Summary Judgment on February 2, 2007. (R. at 182-195.) Robertson filed a rebuttal to both (R. at 123-130; R. at 197-205) and the motion for summary judgment was heard by Special Judge Robert Helfrich[3] on March 20, 2007. (R. at 207-208.) At the time of the summary judgment hearing this lawsuit had been on file for nearly eleven months yet the Plaintiff took no steps whatsoever to conduct any discovery despite the fact that Plaintiff had every opportunity to do so.

The matter was taken under advisement until January 31, 2008, when the trial court issued its Order and Opinion granting Robertson's motion for summary judgment. (R. at 244-249.) On March 12, 2008, Plaintiff filed her Motion for Reconsideration which was denied on June 30, 2008. (R. at 280.) This appeal is from the trial court's grant of summary judgment.

## SUMMARY OF THE ARGUMENT

Plaintiff asserts legal malpractice by Robertson relating to the real property sale. Mississippi law regarding legal malpractice is well-established, and to prevail

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[3]On December 28, 2006, this Court issued an Order appointing the Honorable Robert Helfrich as Special Judge to preside over this cause since all of the judges of the Nineteenth Circuit Court District recused themselves. (R. at 110.) It is customary for Judges in the 19th Circuit Court District to do so when one of the parties is a member of the local bar.

on such a claim, the Plaintiff must prove of all the four following elements: (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney; (3) proximate cause; and (4) injury. In this case, the Plaintiff did not and cannot show any proof of even one element, let alone all four.

Robertson's office acted merely as a scrivener to prepare the deed at the request of Ms. Williams.[4] The Plaintiff does not contest and in fact concedes this. Through her own testimony, the Plaintiff admitted the lack of any attorney-client relationship with Robertson. During her deposition, Plaintiff repeatedly testified she had no interactions with Robertson, did not seek him out, never met him, nor ever even talked to him. She freely admitted Robertson was Williams' attorney, not hers. There is no better evidence than the sworn testimony of the Plaintiff. Because the first element, the existence of an attorney-client relationship, fails, the remaining three elements are moot.

In order to establish a claim of fraud, the burden is on the Plaintiff to prove the following elements by clear and convincing evidence: (1) a 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 hearer and in the manner

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[4]As will be shown in detail, Grandquest has never met or even talked to Robertson. She has never requested he do any legal work for her at any time.

reasonably contemplated, (6) the 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.

Robertson did not misrepresent or conceal any facts or defects in the title from Plaintiff and in fact the Plaintiff was provided with a Warranty Deed which displayed clearly on its face "**TITLE TO SAID LAND NOT EXAMINED**".

Plaintiff produced no proof, testified she has no proof, and she cannot produce any proof of any "fraud" by Robertson whose office merely was a scrivener and prepared two documents at the request of seller, Williams.

## STANDARD OF REVIEW

When the issues presented on appeal are questions of law, this Court reviews those issues de novo. *Cooper v. Crabb*, 587 So. 2d 236, 239 (Miss. 1991). A denial or grant of summary judgment is a question of law and as such, is subject to de novo review. *Id.*

A motion for summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). The evidence must be viewed in the light most favorable to the non-movant. *Leslie v. City of Biloxi,* 758 So. 2d 430, 431 (Miss. 2000). But, the non-movant may not remain silent. He must rebut

the motion by producing significant probative evidence showing that there are genuine issues of material fact. *Henderson v. Unnamed Emergency Room, Madison County Medical Center*, 758 So. 2d 422, 425 (Miss. 2000). Where the non-movant bears the burden of proof at trial, the moving party need not produce evidence negating the non-movant's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2554 (1986). The moving party only needs to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 106 S.Ct. at 2554. "The moving party is entitled to 'judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which he has the burden of proof [at trial]." *Id.* at 2552.

## ARGUMENT

### (A) No attorney-client relationship existed because Robertson's office merely acted as a scrivener to prepare a Warranty Deed and Authority to Cancel at the request of a third party.

The trial court correctly granted summary judgment as to Plaintiff's legal malpractice claim. In Mississippi, to prevail on such a claim, the Plaintiff must prove by a preponderance of the evidence all four elements: (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney; (3) proximate cause; and (4) injury. *Hickox v. Holleman*, 502 So.2d 626, 634 (Miss. 1987). Plaintiff asserts that because Robertson prepared a Warranty Deed for a real estate

transaction to which she was a party, an attorney-client relationship was formed with her. However, there is no evidence to support this assertion, and in fact, all the evidence is to the contrary. The Plaintiff herself proved the non-existence of an attorney/client relationship. Without such a relationship, Robertson cannot be held liable for legal malpractice.

*Plaintiff's claim for legal malpractice fails because she was* ***never*** *Tommy Robertson's client for this transaction or for any other legal matter whatsoever.*

Plaintiff did not contact Robertson's office, did not contact Robertson, and has never met, seen or spoken to Robertson. In fact, Plaintiff affirmed several times under oath that Robertson was not her attorney during this transaction nor has he ever been her attorney:

. . .

Q. You never met Mr. Robertson, have you?

A. No, sir.

Q. Have you ever talked to Mr. Robertson?

A. No, sir.

Q. **Did you select Mr. Robertson to prepare this deed to convey this property to you?**

A. **No, sir.**

Q. **Who did that for you?**

A. **Ms. Williams, Rebecca Williams.**

Q. Did you ever use Mr. Robertson as your lawyer before or after this?

A. No, sir.

. . .

Q. Never heard of Mr. Robertson before then, did you?

A. No, sir.

Q. Never talked to him before or after?

A. No, sir.

Q. He's never done any legal work for you before or after?

A. Only on this.

. . .

Q. Did you ask anybody at Mr. - did you ask Jennifer to check the title and see if the title was okay?

A. **No, sir. I was told that all the paperwork for me purchasing the property was being taken care of by Mr. Robertson, Ms. Williams' attorney.**

Q. **And Ms. Williams told you that?**

A. **Yes.**

. . .

Q. . . . As a matter of fact, you didn't seek [Mr. Robertson] out. It was Ms. Williams that sought him out, right?

A. **Yes, sir. She had told me that he was the attorney that did all the other paperwork for her and Mr. McFarland, and that was her attorney.**

Q. **So, you didn't seek him out. That was her attorney?**

A. **Yes.** (R. at 151-160.)

Mississippi case law is sparse regarding the formation and existence of the attorney-client relationship, however, the Fifth Circuit has addressed a case with facts closely paralleling those presented here. That Court held no attorney/client relationship existed between a seller and the purchasers' attorney in a transaction, even though the attorney had drafted all of the purchase documents and had arranged to share in any of the fees paid by the seller. *Bergman v. New England Ins. Co.*, 872 F.2d 672 (5th Cir. 1989). Of note, *Bergman* was determined applying Louisiana law which, unlike the law in Mississippi, requires an express contractual agreement between the attorney and client. The Court does not place much reliance upon that law in forming its conclusion. Instead, the Court relies on the policy reasons underlying its decision, which are applicable here:

> It is not unusual for the attorney representing one party to prepare the instruments which are to be signed by all parties. It would stun the practicing bar to learn that when an attorney did so, he or she became accountable as the attorney for all parties-signatory. *Id.* at 675.

Williams engaged Robertson to prepare a Warranty Deed to facilitate the sale of the property to the Plaintiff and an Authority to Cancel for Williams to use to cancel the existing Deed of Trust. By drafting the deed and the Authority to Cancel Robertson was merely complying with the request of his client, the seller, Williams.

During this transaction, Robertson did not offer any legal advice to Grandquest (he was not even present), Plaintiff did not request Robertson's guidance and Robertson never represented to the Plaintiff that he was her attorney. Plaintiff never even met, saw or spoke to Robertson.

*Plaintiff testified she **knew** Robertson was **not** her attorney and to impose a duty upon Robertson to inform Plaintiff of what she already knew is nonsensical.*

Plaintiff's brief argues that Robertson had a duty to inform Ms. Grandquest that he was not her attorney. (Appellant Br. at 7-8) By Plaintiff's own admission she acknowledges she was aware Robertson was not her attorney, yet she now argues to this court she should have been told what she admits she already knew! The imposition of such a "duty" in this situation is simply absurd.

An attorney/client relationship is determined by the circumstances and arises

when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person and either (1) the lawyer manifests to the person consent to do so or (2) 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." *The Mississippi Bar v. Thompson*, 2008 Miss. LEXIS 324 at p. 24 (emphasis added). One may logically conclude, however, that absent any evidence that the attorney knew a party had assumed he was representing her in a matter, an attorney has no affirmative duty to inform the party that he is not her attorney. This is especially true when Plaintiff, through her own sworn testimony, made it abundantly clear that she was aware Robertson was not her attorney, had no interactions with Robertson and that he was in fact Williams' attorney.

*Plaintiff testified she knew Robertson was not her attorney and cannot now abandon that testimony before this court in order to "create an issue of fact".*

The Plaintiff cannot make an about-face change from her sworn testimony without offering some explanation. *Ware v. Franz*, 87 F.Supp.2d 643, 646-47 (S.D. Miss. 1999). The non-moving party "cannot manufacture a disputed material fact where none exists" to survive summary judgment. *Albertson v. T.J. Stevenson & Co.,*

*Inc.*, 749 F.2d 223, 228 (5th Cir. 1984).[5] In *Albertson*, the Fifth Circuit determined that the non-moving party cannot defeat a motion for summary judgment by offering an affidavit that contradicts its own previous testimony.

By the same token, Plaintiff cannot simply argue on appeal Robertson was her attorney to "create an issue of fact", especially in the face of her testimony where she unequivocally testified he was not. The law in this state clearly precludes such attempts. *See, Magee v. Transcontinental Gas Pipe Line, Corp.*, 551 So.2d 182, 186 (Miss. 1989)(the party opposing summary judgment cannot create an issue of fact by arguments and assertions in briefs or legal memoranda).

In attempting to rebut Robertson's summary judgment motion, Plaintiff did not present an affidavit or any sworn testimony, but instead merely presented a check tendered to Robertson as her only "proof" that an attorney-client relationship existed. (R. at 182-87.) Obviously, if a party cannot present a contradicting sworn affidavit as was done in *Albertson, supra,* to create a genuine issue of fact to survive summary judgment, Plaintiff cannot simply present a check as proof without further explanation. Because the Plaintiff has consistently and adamantly denied Robertson was her attorney, she cannot now simply offer an argument on appeal that contradicts

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[5]This principle is even more forceful when a party seeks to "create" an issue of fact on appeal rather than in the trial court.

her testimony to create an issue of fact.

*Even if, arguendo, an attorney-client relationship existed, the representation was limited to preparing legal papers for a real estate transaction.*

Even if, *arguendo*, this Court somehow finds an attorney-client relationship existed, the representation was limited to a very specific, defined scope – to prepare a deed to transfer title to a piece of property. In her brief Plaintiff states she "understood that Robertson was going to represent her in the preparation of some legal papers in order to finalize the sale of the property." (Appellant Br. at 6.) If the "representation" was for the preparation of a deed to transfer property, then this was done, and done properly by Robertson's office which prepared a valid and adequate deed which conveyed title to the property from Williams to Grandquest.

*No attorney/client relationship existed in this case, therefore, there is no deviation of a standard of care and thus no conflict of interest.*

Mississippi law recognizes a legal malpractice claim based upon deviation by one's attorney from either a standard of care or a standard of conduct. Expanding on the legal malpractice argument set forth above, since there was no attorney/client relationship, there can be no deviation and/or breach of any standard. Under Mississippi law, an attorney owes no duty to those with whom no attorney/client relationship exists. *James v. Chase Manhattan Bank*, 173 F.Supp.2d 544, 550-51 (N.D. Miss. 2001). Put simply, for an attorney to owe a duty there must first exist an

attorney-client relationship.

Plaintiff alleges Robertson owed her "a duty consistent with the level of expertise the lawyer holds himself out as possessing and consistent with the circumstances of the case." (Appellant Br. at 10.) Robertson denies any duty to the Plaintiff because no attorney/client relationship existed, but assuming, *arguendo*, Plaintiff was his "client"[6], Robertson's office prepared the deed which in fact transferred the property from Ms. Williams to Plaintiff. By undertaking this "representation"[7], Robertson owed Plaintiff only a duty to prepare a deed that would transfer title to Lot 12, Dunn Place, George County, Mississippi, which was done.

Furthermore, at the bottom of the Warranty Deed which Robertson's office prepared was a type-written disclaimer noted in bolded all capital letters: "**TITLE TO SAID LAND NOT EXAMINED.**" Plaintiff did not request a title examination and Robertson undertook no duty to examine the title to the land involved in the transaction. In fact, Mr. Robertson disclosed to the Plaintiff that the title was not examined.

In *Randel v. Yates*, 48 Miss. 685 (Miss. 1873), the Court was faced with a

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[6]Robertson uses this term loosely, and in no way concedes or implies an attorney-client relationship existed.

[7]Robertson again uses this term loosely, and in no way concedes or implies an attorney-client relationship existed.

similar issue regarding the standard of conduct owed to a "client"[8]: whether to allow an attorney who was employed as a mere scrivener to testify as to the facts of a transaction. In holding that the communications made were not confidential, the court stated:

> As a general rule, every communication which the client makes to his legal adviser, for the purpose of professional advice or aid upon the subject of his rights or liabilities, is to be deemed confidential. But privileged communications do not extend to one acting as a mere scrivener, although of the legal profession.
>
> An attorney who is requested to prepare a deed or mortgage, no legal advice being required, is not privileged, and may testify as to what comes to his knowledge in connection with such transaction. *Randel*, 48 Miss. at *4. (internal citations omitted).

Paralleling this logic, if an attorney employed only as a scrivener owes no duty of confidentiality, it only follows that an attorney who is employed only as a scrivener to draft an instrument of a particular description, and for which no advice is sought, owes no duty.

*There was no "conflict of interest".*

Plaintiff argues by foreclosing on the property at the request of the Deed of Trust holder, McFarland, some time later, Robertson committed some legal wrong she describes as a "conflict of interest". (Appellant Br. at 11.) Robertson never undertook

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[8]Robertson uses this term loosely, as he does not concede that Plaintiff is, or was at any time, his client, nor does the case cited refer to the person in question as a client.

any representation which created a conflict of interest in the legal work performed in this transaction. In support of this fact, Plaintiff herself testified she never told anyone at Robertson's office what she wanted prepared regarding the paperwork done by Robertson's office for this transaction:

. . .

Q. What did you tell them you wanted prepared?

A. I didn't.

Q. You didn't tell Mr. Robertson or anybody in his office anything about what you wanted prepared, did you?

A. No, sir. (R. at 155-156.)

. . .

The duties of care and loyalty that an attorney owes to his client do not arise until an attorney-client relationship has been established, *Singleton v. Stegall*, 580 So.2d 1242, 1245 (Miss. 1991), and an attorney-client relationship is a condition precedent to the existence of a conflict of interest. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So.2d 1206, 1222 (Miss. 2001). No attorney/client relationship existed in this case, therefore, there is no deviation of a standard of care and thus no conflict of interest.

*Plaintiff has produced **no** evidence, nor does any exist, to fulfill her burden of proving any elements for a claim of legal malpractice.*

Instead of producing evidence to fulfill her burden of proving each element of the claim for legal malpractice, Plaintiff makes sweeping and unsupported assertions, hoping to fill the place of actual proof. For example, Plaintiff alleges throughout her argument that Robertson knew an encumbrance or lien existed on the property, but presented no proof as to the relevance. On page 12 of Appellant's Brief, Plaintiff claims she "would not have bought the subject home" if "Defendant would have advised Plaintiff of the existence of the mortgage of the property" and that "[b]ut for the Defendant's negligence, Plaintiff would not have suffered injuries included [*sic*] but not limited to the lost [*sic*] of her land." Plaintiff wants this Court to believe that these statements are conclusive proof of proximate causation and damages. There is absolutely nothing in the record to support such a statement. Once again, Plaintiff argues Robertson was required to tell the Plaintiff something she already "knew". The Authority to Cancel was for the purpose of satisfying the Deed of Trust on the property and was presented with the Deed to Williams and Grandquest.

(B) **The trial court was correct in granting summary judgment on the claim of fraud.**

In order to establish fraud, the burden is on a Plaintiff to prove the following elements by clear and convincing evidence: "(1) a 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 hearer and in the manner reasonably contemplated, (6) the 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." *Koury v. Ready*, 911 So. 2d 441, 445 (Miss. 2005) (*citing Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 762 (Miss. 2004)).

As to her fraud claim, Plaintiff again sidesteps the issue presented: no proof or evidence of fraud. "[F]raud is never presumed and must be proved with clear and convincing evidence." *Hamilton v. McGill*, 352 So. 2d 825, 831 (Miss. 1977) (emphasis added). "Clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level." *Moran v. Fairley*, 919 So. 2d 969, 975 (Miss. Ct. App. 2005). Even if Robertson concedes that fraud was properly pled in Plaintiff's Complaint[9], the Plaintiff admitted several times in her deposition that she has no evidence of any fraud:

...

Q. ...Why is that a fake legal description or a fraudulent legal document?

A. At one time in – I was seeing where I think it was called like Lot

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[9]By stating such, Robertson does not concede that Plaintiff even properly pled fraud.

29 instead of Lot 12.

Q. What proof do you have that that property wasn't Lot 12 on September the 13th when it was conveyed to you?

A. I don't know.

Q. **You don't have any [proof], do you?**

A. **No.**

Q. Did the description in this deed have anything to do with you not owning that property, as we sit here today, or was it all because Mr. McFarland foreclosed on it?

A. I believe it was because of Mr. McFarland foreclosing on it.

Q. **Didn't have anything to do with the legal description, did it?**

A. **I don't know.** (R. at 158-159.)

...

Q. **And you don't have any proof that that was a fraudulent deed or a fake description, do you?**

A. Only except what showed up in the land.

Q. What showed up? You keep saying that. **Tell me what you have that shows that this property is fraudulent or fake by its description.**

A. **I don't have anything actually.** (R. at 159.)

...

Plaintiff has produced no proof, testified that she has no proof and cannot produce any proof whatsoever – especially not by clear and convincing evidence – of any "fraud" by Robertson.

*Robertson did not misrepresent or conceal anything from Plaintiff during the real estate transaction, nor at any other time.*

As with her argument regarding the legal malpractice claim, Plaintiff again makes unsupported allegations hoping to pass them off as proof. Plaintiff alleges her fraud claim arises because "[Mr. Robertson] prepared Ms. Williams' Authority to Cancel Deed of Trust" which "proves that Defendant was aware at all times during the preparation of Plaintiff's warranty deed, that a mortgage existed on the property," and "Plaintiff did not want to buy a lot with a mortgage on it." (Appellant Br. at 13.) There is nothing in the Record to support these statements, and certainly no proof of such.

Plaintiff references a generic "false representation of the attorney preparing the document to convey the subject lot" (Appellant Br. at 13) and that this reference somehow satisfies proof by clear and convincing evidence for the "representation" element of fraud, even though, as stated *supra*, Plaintiff never even met, saw or spoke

to Robertson.

She then goes on to assert she "had every right to rely on her attorney's representations, as she had hired him expressly to provide [*sic*] over the sale and provide legal services regarding same." (Appellant Br. at 13.) This is entirely false and Plaintiff's own testimony proves otherwise:

Q. **Did you select Mr. Robertson to prepare this deed to convey this property to you?**

A. **No, sir.**

Q. **Who did that for you?**

A. **Ms. Williams, Rebecca Williams.**

Q. Did you ever use Mr. Robertson as your lawyer before or after this?

A. No, sir. (R. at 152.)

. . .

Q. . . . As a matter of fact, you didn't seek [Mr. Robertson] out. It was Ms. Williams that sought him out, right?

A. **Yes, sir. She had told me that he was the attorney that did all the other paperwork for her and Mr. McFarland, and that was her attorney.**

Q. **So, you didn't seek him out. That was her attorney?**

A. **Yes.** (R. at 160.)

Plaintiff's own testimony proves she did not (1) believe Robertson was her attorney; (2) hire him; (3) expressly to preside over the sale; or (4) to provide legal services.

Mississippi courts have charged the purchaser with a duty to "examine all deeds and conveyances previously executed and placed of record by his grantor ... if such deeds or conveyances in any way affect his title" and "if in any such deed or conveyance there is contained any recital sufficient to put a reasonably prudent man on inquiry as to the sufficiency of the title, then [a purchaser] is charged with notice of all those facts which could and would be disclosed by a diligent and careful inspection." *Dead River Fishing & Hunting Club v. Stovall*, 113 So. 336, 337-38 (Miss. 1927).

Plaintiff suggests to this Court Robertson "chose to conceal the defect at the time of the sale of the property". (Appellant Br. at 14-15.) Robertson concealed nothing. The land records were and are public to Plaintiff, and she was informed by Robertson in writing that title to the property involved was not examined. As this Court so aptly stated in *Deason v. Taylor*, 53 Miss. 697, (Miss. 1876):

> Nothing is better settled than that the purchaser of real estate is bound to take notice of all recitals in the chain of title through which his own title is derived. Not only is he bound by every thing stated in the several

> conveyances constituting that chain, but he is bound fully to investigate and explore everything to which his attention is thereby directed. Where, therefore, he is informed by any of the preceding conveyances, upon which his own deed rests, that the land has been sold on a credit, he is bound to inform himself as to whether the purchase-money has been paid since the execution of the deed.

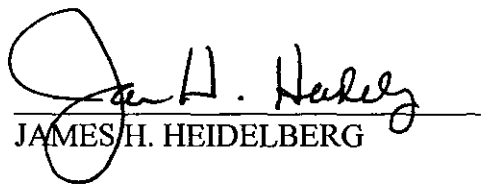
## Conclusion

The trial court properly granted summary judgment based on a total lack of evidence as to the existence of an attorney/client relationship or any fraud. Plaintiff has only unsubstantiated allegations which Plaintiff herself disclaimed upon sworn testimony. Plaintiff has no evidence to show that Robertson's conduct was wrongful in any way, thus there is no evidence in this case to justify a trial on the merits.

Because there is no genuine issue of material fact, and Plaintiff fails to establish any error in the judgment of the Circuit Court of George County, Robertson respectfully requests this Court affirm the judgment granted by the Circuit Court of George County.

Respectfully submitted,

**TOMMY ROBERTSON**

BY: 

JAMES H. HEIDELBERG

## CERTIFICATE

I, JAMES H. HEIDELBERG, of the firm of HEIDELBERG, STEINBERGER, COLMER & BURROW, P.A., do hereby certify that I have served a true and correct copy of Appellee's Brief to:

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*Attorneys for Plaintiff/Appellant*

Honorable Robert B. Helfrich
Circuit Court Judge
Post Office Box 309
Hattiesburg, Mississippi 39403

THIS, the 26th day of February, 2009.

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