IN THE SUPREME COURT OF MISSISSIPPI

JOE MILLER AND ALICE MILLER	PLAINTIFFS
VS.	CAUSE NO. 2009-CA-00435
PARKER MCCURLEY PROPERTIES, L.L.C. AND PARKER MCCURLEY, INDIVIDUALLY	DEFENDANTS

APPEAL FROM THE CHANCERY COURT
OF THE SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

COMBINED BRIEF OF APPELLEES AND BRIEF OF CROSS-APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellees certifies that the following listed persons have an interest in the outcome of this case.

Joe Miller and Alice Miller, Appellants

Lawrence E. Abernathy, III, Counsel for Appellants

Leslie D. Roussell, Counsel for Appellants

Parker McCurley Properties, L.L.C., Appellee

Parker McCurley, Appellee

W. Dal Williamson, Counsel for Appellees

Honorable Franklin C. McKenzie, Chancellor

Respectfully submitted,

W. Dal Williamson

W. DAL WILLIAMSON,
ATTORNEY OF RECORD FOR APPELLEES/
CROSS APPELLANT

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STATEMENT OF THE CASE

On November 1, 2002, Joe and Alice Miller, as buyers, entered into a written land sale contract with Parker McCurley, as seller, regarding the purchase of a house and lot at 1119 North 8th Avenue, Laurel, Mississippi. The written Agreement provided that if the buyers made all payments and performed the covenants of the Agreement, then the seller would convey the property in fee simple, clear of all encumbrances, by Warranty Deed (Record Excerpt tab 9). Joe Miller testified at trial that he became aware that day (at trial) that he wouldn't get a deed until all payments were made. (T. 119, Line 25–T. 120, Line 2). At that point the Chancellor reminded him that he knew that at least as early as when he went to secure the insurance. (T. 120, Lines 4-26).

The parties stipulated that the purchase price was $39,000.00 including a down payment of $3,000.00 that was to be paid by payment of $1,000.00 by November 4, 2002 and $2,000.00 by February 1, 2003. The remaining part of the purchase price ($36,000.00) would be paid together with nineteen percent (19%) interest to be paid monthly over the course of twenty-five (25) years. Monthly payments of $575.00 were due on the first day of each month. The Agreement further provided for a late charge of $50.00 if monthly payment were not made by 5 p.m. on the 6th day of each month. (R.E. tab 7). The Agreement referenced a Deed of Trust to Union Planters Bank, and obligated the buyers to pay the taxes assessed on the property. The Agreement also provided that the buyers agree to purchase and maintain, at their expense, a policy of insurance protecting the property against damage from wind, storm, lightning, fire or other damages. It further provided that the bank and the seller shall be named as loss payee "along with the Buyer(s) as their interest may appear..." (R.E. tab 9). According to their Complaint, the Millers "elected to fulfill this requirement by paying insurance premiums to the Defendants and allowing the Defendants to purchase property insurance on the home." (R. 9)

Mr. Miller was not able to secure insurance on the property since he did not have a deed to the property, so the parties agreed for McCurley to obtain a policy and the Millers would pay him for the premium. (T. 42, Line 27–T. 43, Line 1; T. 105, Line 15– T. 106, Line 2; T. 121, Lines 17-20). The insurance policy secured by McCurley, however, named only the bank and McCurley as insureds since the Millers were not considered to have an insurable interest at that point. (T. 47, Lines 6-13; T. 71, Lines 8-11).

On August 29, 2005, Hurricane Katrina rendered the house uninhabitable. The Millers lived briefly in other places before going back to McCurley and asking for another place (T. 68, Lines 6-22; T. 107, Line 17–T. 108, Line 25; T. 125, Lines 18-20). While residing in the other house on Meadow Lane, the Millers made a payment of $575.00 on September 30, 2005 and a partial payment of $441.00 in October. (Exh. 21). McCurley and the Millers did enter into some initial discussions regarding the sale/purchase of the Meadow Lane house. However, after the Millers learned that the monthly payments on the Meadow Lane property would be higher, they moved out of the Meadow Lane property without notice to McCurley. (T. 68, Lines 15-22; T. 109, Lines 4-15; T. 125, Lines 9-13). By October 17, 2005, the Millers, apparently unhappy that they had not received part of the insurance proceeds, had decided to file a lawsuit against

McCurley and requested that he write a letter stating that the insurance at 1119 North 8^{th} Avenue was not in their name. (T. 125, Lines 23–T. 127, Line 6; T. 127, Lines 15-18).

The Stipulation of the parties set forth the amounts the Millers owed McCurley for insurance for the years 2002, 2003, 2004, and 2005; and also stipulated the amounts for taxes on the property for the years 2002, 2003, and 2004. (R.E. tab 7). No stipulation was made for the 2005 taxes but the pro rata part of the 2005 taxes on the property through August 2005 was $477.09. (R.E. tab 5).

The policy in effect at the time of the loss on August 29, 2005 was with Shelter Insurance. The Shelter Insurance damage estimate totaled $69,584.37 (Exh. 9) and after deductions for non-recoverable depreciation and a $1,000.00 deductible, Shelter paid McCurley and Union Planters Bank $35,000.00 for the loss. The loan amortization schedule (Exh. 11) reflected a principal balance of $35,760.67 owed as of September 1, 2005. The Chancellor concluded from the testimony that McCurley never advised the Millers that if they tendered the remaining part of the principal balance after application of the proceeds then they would receive a deed to the property. However, the Chancellor also determined that it did not appear from the testimony that the Millers ever inquired as to any remaining amounts owed nor did they offer to pay the remaining balance to receive a deed. (R. E. tab 5)

The Millers, over the course of occupying the house for thirty-four (34) months through August 29, 2005 (date of Hurricane Katrina), paid a total of $25,425.77. Exhibit 19 reflects all of the Millers' payments, and regardless of any error in notations on the receipts (Appellants' Brief notes that 2 different receipts mention 2003 insurance and

2004 taxes), all of the Millers' payments are accounted for in Exhibit 19. Taking into consideration the $477.09 of prorated taxes for 2005 through August, the total amount owed by the Millers as of the end of August 2005 $25,549.86. Applying the Millers' payments to the total owed leaves a shortfall of $134.09. The Millers, however, contended that since the taxes for 2005 were not payable as of the date Katrina hit, then the Millers were actually overpaid by $343.00.

The Chancellor found that even though the 2005 property taxes were not payable as of August 29, 2005, the prorata portion of the 2005 taxes would nevertheless have been owed by the Millers and is to be taken into consideration in the final resolution of the parties. (R. E. tab 5). The Millers made another $575.00 payment on September 30, 2009 after they had moved into the Meadow Lane property, but the parties disputed whether this payment was for occupancy of the Meadow Lane property or another payment toward the North 8th Avenue property (T. 70, Lines 8-12; T. 109, Lines 23–T. 110, Line 2).

McCurley assessed four late fees of $50.00 each during the thirty-four (34) months that the Millers occupied the property. The late charges were assessed on March 15, 2003; June 14, 2003; February 6, 2004; and April 15, 2005. Exhibit 19 reflects that prior to the March 15, 2003 late charge, an arrearage of $959.46 had existed since February 13, 2003. So in this instance the delinquency had existed for more than fifteen (15) days. McCurley's late penalty of $50.00 assessed on March 15, 2003 exceeded the 4% allowed by law by $11.63 ($50.00 less $38.37).

The next late fee was assessed on June 14, 2003 on an arrearage of $799.46 which had existed since May 2, 2003 (more than 15 days). (Exh. 19). The $50.00 late fee exceeded the amount permitted by statute by $18.03 ($50.00 less $31.97). The third late fee assessed on February 6, 2004 was assessed on an arrearage of $1,548.64 which had existed since January 9, 2004 (more than 15 days). The $50.00 late fee assessed was $11.94 less than what would have been permitted by statute ($61.94 less $50.00). The last late fee assessed on April 15, 2005 was assessed based on a $28.00 arrearage that had existed since March 5, 2005 (again more than 15 days). This late fee of $50.00 exceeded that permissible by statute by $48.88 ($50.00 less $1.12). Therefore, the three late penalties that exceeded the statutory limit, exceeded that limit by a total of $78.54.

The Chancellor determined that the exact amounts of the delinquencies owed at the time of the late fee assessments were subject to debate depending upon the date when the insurance premiums were added into the ongoing balances reflected by Exhibit 19. However, he determined that in each instance there appeared to have been some delinquency for more than 15 days prior to the assessment of a late fee. (R.E. tab 5).

SUMMARY OF THE ARGUMENT

In Section 1. of the Appellants' Summary of the Argument, the contention is that the Millers paid the insurance premium and therefore should receive the insurance proceeds. They complain that McCurley did not make repairs; did not pay the lienholder; and did not credit their account. The Agreement entered into between the parties provided that the buyers agreed to purchase and maintain at their expense a policy of insurance providing protection on the property. However, when the Millers were unable to secure insurance because they would not obtain an insurable interest under the land sale contract until all payments were complete, the parties by agreement allowed McCurley to secure the insurance and then McCurley would get reimbursed by the Millers.

While the Agreement provided that the bank and the seller be named as loss payees along with the buyers "as their interest may appear", the insurance McCurley obtained named only the bank and the seller as loss payees. (T. 45, Lines 25-27). The inclusion of the phrase "as their interest may appear" in the Agreement has legal significance as will be discussed in the Argument of the Appellee hereafter.

The Agreement did not require McCurley to pay the lienholder and did not require him to make repairs, and the Chancellor determined that from the evidence it appeared that McCurley never advised the Millers that if they tendered the remaining part of the principal, they would receive a deed; nor did it appear from the testimony that the Millers ever inquired as to the remaining amounts owed or offer the payment thereof. In the chaos that followed the first weeks after Hurricane Katrina, McCurley relocated the

Millers into another house. There were some discussions about the sale/purchase of the other house and the crediting of some amounts paid by the Millers. But when McCurley advised that the monthly payment would be higher, the Millers moved out and decided to file suit.

The inclusion of the provision in the Agreement that the buyers would purchase insurance did not entitle them to the insurance proceeds in the event of the destruction of the property. The contract was silent as to a duty to repair. The Appellants' allegation in their Brief of waste is the first time this theory has been pled or sought.

In Sections 2, 3 and 5 of the Appellants' Summary of the Argument, the Millers contend that the four late fees violated MISS. CODE ANN. §75-17-27. As the Appellee has conceded, three of the four payments did in fact exceed the late fee amounts allowed by §75-17-27. The late fees were not, however, charged before they could be charged since in each of the four instances some delinquency had existed for more than fifteen days. This statute provides that no such late payment charge shall be made "unless such deficiency is more than fifteen (15) days past due". It does not provide that a seller may not charge a late fee until after the 15^{th} day of the month.

Neither were any of the four late fees charged on the same specific installment. In each instance that a late fee was charged, there had been several interceding monthly payments that became due between the different assessments of the late fees, and none of the late fees represented back to back late payment charges on the same specific installment.

MISS. CODE ANN. §75-17-27 provides for the maximum amount that may be charged for a late fee and provides that when the late payment charged does not exceed that maximum, then it is not to be considered a "finance charge". It follows then that any parts of the late payment charge which exceed that maximum become part of the "finance charges" defined in MISS. CODE ANN. §75-17-25. The term "**finance charge,**" according to §75-17-25, means "the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including, but not limited to, interest, brokerage fees, finance charges, loan fees, discount points, service charges, activity charges, carrying charges…."

§75-17-25 further provides:

> Nothing in Section 75-17-1 or Sections 75-17-19, 75-17-21, 75-17-23, 75-17-27, 75-17-29, or 75-17-33 shall limit or restrict the manner of contracting for such financial charge, whether by way of add-on, discount or otherwise **so long as the annual percentage rate does not exceed that permitted by law.** If a greater finance charge than that authorized by applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. (emphasis added)

The "finance charge" by definition of §75-17-25 means the amount or rate paid or payable by debtor for receiving a loan or extension of credit, and the "finance charge" includes the multiple items referenced above including "carrying charges." The forfeiture provision applies when the "finance charge," in an amount greater than that authorized by applicable law, is stipulated for or received. An excessive late fee or late payment charge becomes part of the total "finance charges." The excessive part of the late charge is computed as a part of the total "finance charge" in determining whether the "finance charge" is greater than that authorized under the applicable law. Contrary to this logic, the Millers argue that the assessment or even the stipulation of one excessive late fee results in automatic forfeiture of all interest and finance charges.

In Section 4 of the Appellants' Summary of the Argument, the Millers contend that MISS. CODE ANN. §75-17-1(4) provides that the interest rate for "any residential real estate financing will be limited to 10% per annum, or 5% above the discount rate." A reference was made to Exhibit 13 concerning the discount rate. However, Exhibit 13 was marked for identification only and was never admitted into evidence. MISS. CODE ANN. §75-17-1(4) does not apply to the instant land sale contract for obvious reasons since there was no "loan, mortgage or advance which is secured by a lien on residential real property."

Section 6 of the Appellants' Summary of the Argument contends that the Court awarded McCurley unrequested relief. Based on equity and breach of contract, the Court in its Judgment awarded the Millers all of their payments back due to McCurley's failure to provide adequate insurance and failure to provide against contingencies in certain events. The Chancellor determined that McCurley had in essence breached his contract, and in order to do equity and avoid a forfeiture the Chancellor ordered that all of the Millers' payments be refunded to them less the reasonable fair rental rate of the property. In making the award, the Court invoked his equitable powers but determined that in fairness the value of the Millers' occupancy of the home for thirty-four months should be deducted from the damages. As will be discussed in the Argument, this was not a "set-off" within the meaning of that term, but rather a determination by the Court as to the Millers' true measure of damages.

ARGUMENT

APPELLANTS' ISSUE 1: WHETHER THE LOWER COURT ERRED IN FAILING TO AWARD THE INSURANCE PROCEEDS TO THE MILLERS BASED ON THE FACT THAT THE MILLERS PAID ALL OF THE INSURANCE PREMIUMS AND SHOULD, THEREFORE, BE ENTITLED TO THE BENEFITS OF THE INSURANCE PROCEEDS.

In Section 1.A. of their Argument on this issue, the Millers contend that because they paid the insurance premiums, they were entitled to the proceeds. Appellants cite no authority in support of this contention. They merely assert under this argument that McCurley did not give them the insurance proceeds; did not apply the insurance proceeds to their debt; did not repair the home; and did not pay off the lien of the bank.

In Section 1.B. and Section 1.C., they allege that under MISS. CODE ANN. §83-17-1 McCurley became the Millers' agent when McCurley secured the policy on the property, or in the alternative McCurley became the insurer when he accepted the insurance premiums from the Millers.

In Section 1.D., they argued McCurley breached his alleged duty of good faith and fair dealing by failing to adequately insure the home and instead causing the home to be woefully underinsured.

In support of these contentions they cite *Citizens Bank v. Frazier* (where a bank agreed to keep cotton insured up to the aggregate amounts of the loans); *Sullivan v. Riley* (where an Administratrix who secured an insurance on estate property claimed that she was entitled to all the proceeds after the house was destroyed by fire); *Hancock Bank v.*

Travis (where a mortgage lender had agreed to procure credit disability insurance but failed to do so); and *Prince v. Louisville Municipal School District* (where a school purchased a medical policy to cover students injured during school sponsored activities). These cases have little application to the facts of the instant case, and the Millers cite no authority for the contention that McCurley breached a duty of good faith and fair dealing by failing to adequately insure the home.

During the trial, the Millers failed to produce any evidence whatsoever that McCurley would have been able to procure more insurance on this property than that provided in the Shelter Insurance policy in effect at the time of Hurricane Katrina. It is true that the estimate as to the cost of repairs to the house far exceeded the amount of coverage, but there was no proof whatsoever that McCurley could have secured more insurance coverage on the house, given its age and condition, than the $35,000.00 limit of liability provided in the Shelter Insurance policy in effect at the time of the loss.

The clause "as their interest may appear" has legal significance. In *Necaise v. Oaktree Savings Bank*, 645 So.2d 1311(Miss. 1994) citing *Weems v. American Security Insurance Company*, 486 So.2d 1222, 1228 (Miss. 1986), this Court noted that in a standard mortgage arrangement, the clause "as his interest may appear" has reference to debts, the phrase meaning merely that the insurer will pay the mortgagee to the extent of the mortgage. 645 So.2d at 1316. In that case there was a mortgage, and since the outstanding balance on the mortgage was greater than the amount of insurance, the court ruled that the mortgagee was entitled to the insurance proceeds to the extent of the debt.

Although there is no mortgage between the Millers and McCurley since their Agreement was a land sale contract, McCurley did have a mortgage with Union Planters Bank. The inclusion in the Agreement of the clause "as their interest may appear" indicates that the bank and seller were entitled to receive the insurance proceeds up to the principal balance owed to McCurley by the Millers.

McCurley secured insurance coverage for the subject house when the Millers were unable to secure such coverage. He retained the insurance proceeds since the amount of the proceeds was less than the remaining unpaid principal balance. In the chaos of the couple of months that followed Hurricane Katrina, McCurley placed the Millers in another home on Meadow Lane and there were some initial discussions regarding credit of some amounts paid by the Millers toward a purchase price on the Meadow Lane property. But by October 17th, the Millers had decided to sue since they had not received part of the insurance proceeds.

Other courts have considered the issue of the division of insurance proceeds when the property is destroyed in the midst of payments under the terms of a land sale contract. In *Martin v. Coleman*, 2001 WL 673701 (Tenn. Ct. App. 2001) there was a dispute over real property that was the subject of an installment land sale contract between the parties and over the proceeds of an insurance policy after the dwelling on the property burned. The insurance company had paid the full amount of the policy to the seller, and the question at issue was whether the proceeds received by the seller must be applied toward the purchase price. The Court of Appeals of Tennessee cited *Hillard v. Franklin*, 41 S.W.3d 106, 114 (Tenn. Ct. App. 2000):

> [W]here the insured vendor has sold the property and vendee has gone into possession and paid a portion of the purchase price, but title is still held by the insured, as between the insured and the insurer, the insurer is the owner of both the legal and equitable titles to the property and entitled to recover the full amount of the policy. However, as between the vendor and the vendee, the insured takes the proceeds of insurance which exceed the amounts owed to the vendor as trustee for the vendee.

41 S.W.3d at 114.

Applying the authority cited, the Court of Appeals of Tennessee held that the proceeds collected by the seller must be applied to the purchase price in the buyer's favor. The court cited *Hillard* where it had concluded "a seller must apply insurance proceeds to the purchase price, at least where the risk of loss falls on the purchaser. The risk of loss during the period between execution of a contract from the conveyance of real property and the closing generally falls on the purchaser." 41 S.W.3d at 115.

The *Martin v. Coleman* court went on to say:

> In this case, the contract provided that the Buyer was to maintain insurance, confirming the risk of loss would fall on her. The parties agree, as their course of conduct shows, that the Buyer would reimburse the Seller for insurance premiums. Thus, the continued acceptance of the reimbursement of payment for the insurance premiums supports the trial court's conclusion that the parties agreed Seller would maintain the policy and Buyer would pay the premiums. Therefore, any proceeds from the policy were held in trust by Seller for Buyer's benefit, and may, in the first instance be applied to the remaining balance owed to Seller under the contract. Any excess belongs to Buyer, absent other obligations owed to Seller by Buyer. If the insurance proceeds pay off the balance of the loan, the Buyer is entitled to conveyance of the real property under the contract.

2001 WL 673701 *5 (Tenn. Ct. App. 2001).

Here, there was nothing improper about the inclusion of a clause requiring insurance at the buyers' expense, and the inclusion of the phrase "as their interest may appear" entitled McCurley to retain the insurance proceeds up to the amount necessary to pay off the debt.

The Millers have cited no authority in support of Section 1.E. of their Argument, and this Section appears to request relief that was never pled by the Plaintiffs.

APPELLANTS' ISSUE 2: WHETHER THE LOWER COURT ERRED IN FAILING TO AWARD PENALTIES DEMANDED BY MISSISSIPPI CODE §75-17-25, FOR THE COLLECTION OF LATE FEES, WHICH VIOLATE THE PROVISIONS OF MISSISSIPPI CODE §75-17-27

MISS. CODE ANN. §75-17-25 provides:

> A late payment charge, not exceeding Five Dollars ($5.00) or four percent (4%) of the amount of any delinquency, whichever is greater, if contracted for in writing, shall not be considered a finance charge, but no charge shall be made unless such delinquency is more than fifteen (15) days past due; provided, however, that such late payment charge may be collected only one (1) time on a specific installment and no late payment charge may be collected on a partial payment resulting from the deduction of a late payment charge from a regular scheduled payment....

In Section 2.A., the Millers contend that a payment due on the first day of the month will not be more than 15 days past due until the 17th day of the month. They contend that McCurley's four separate late charges were charged before they were more than 15 days past due. However, §75-17-27 permits a late charge where a delinquency is more than 15 days past due. It does not require that a late charge be assessed only after the 15th day of a given month. The late charges were assessed on March 15, 2003, June 14, 2003, February 6, 2004 and April 15, 2005. The Chancellor did determine that in each instance there appeared to have been some delinquency for more than 15 days prior to the assessment of each late fee. (R. E. tab 5).

The Millers further contend that the four late fees violated §75-17-27 because a late fee can only be collected one time on a specific installment. Their contention is based upon the fact that even though the Agreement called for a $3,000 down payment to be paid $1,000 by November 4, 2002 and $2,000 by February 1, 2003, on February 13, 2003 the Millers paid only $1,500 of the $2,000 due on February 1, 2003. They contend that this left an arrearage of $500 and that this same arrearage continued through February 2004. In essence they claim that the first three assessments of late fees were based upon the delinquency which resulted when the Millers' second installment on the down payment was $500 short back on February 13, 2003.

This argument ignores the fact that there were many interceding monthly payments of $575.00 between the late fee assessments and that each time a payment was made it was applied to whatever arrearage there remained from the preceding payment.

McCurley has acknowledged that three of the four late charges were for more than 4% of the delinquency upon which the late charges were assessed. As previously mentioned, the three late charges that were greater than the statutory amount exceeded that permitted by $78.54. In Section 2.B. of their Argument, the Millers contend that this automatically means that all interest and finance charges are forfeited.

Section 75-17-27 provides that a late payment charge not exceeding four percent (4%) of a delinquency shall not be considered a finance charge. It follows that the part of any late fee that exceeds the four percent (4%) is a part of the finance charge. It does not follow, however, the excessive late fees make the entire transaction usurious under current Mississippi law. In *Rea v. Breakers Association, Inc.*, 674 So.2d 496, 500 (Miss. 1996), this Court held:

> Pursuant to Section 75-17-27, late charges are not included in computing the total amount of a finance charge, provided, the late charge does not exceed the maximum amount set forth herein. Here, the late charge exceeds the $5.00 or 4% limits, pertaining to the maximum amount, and must be computed **as a part of the total finance charge**. (emphasis supplied)

The term "finance charge," according to §75-17-25, means "the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including, but not limited to, interest, brokerage fees, finance charges, loan fees, discount points, service charges, activity charges, carrying charges…."

§75-17-25 further provides:

> Nothing in Section 75-17-1or Sections 75-17-19, 75-17-21, 75-17-23, 75-17-27, 75-17-29, or 75-17-33 shall limit or restrict the manner of contracting for such financial charge, whether by way of add-on, discount or otherwise **so long as the annual percentage rate does not exceed that permitted by law.** If a greater finance charge than that authorized by applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. (emphasis added)

The "finance charge" by definition of §75-17-25 means the amount or rate paid or payable by debtor for receiving a loan or extension of credit, and the "finance charge" includes the multiple items referenced above including "carrying charges." The forfeiture provision applies when the "finance charge" in an amount greater than that allowed by applicable law, is stipulated for or received. An excessive late fee or late payment charge becomes part of the total "finance charges." The excessive part of the late charge is computed as a part of the total "finance charge" in determining whether the "finance charge" is greater than that authorized under the applicable law.

In *Kelso v. Breakers Association, Inc.*, 741 So.2d 1016, 1019 (Miss. Ct. App. 1999), the Mississippi Court of Appeals stated:

> Therefore, what an accountant would have had to do to the charges against Kelso after ***Rea*** was calculate how much of the late payment charge was actually a finance charge.

The Court of Appeals thus concluded that a determination would have to be made as to whether the excessive late charges when added to all other finance charges, including charges given a different name but which the statute declares to be finance charges, exceed the maximum authorized by applicable law. 741 So.2d at 1018.

The Chancellor determined that even with the addition of the excessive late fees to the "finance charge," he was unable to rule that the "finance charge" was usurious under current Mississippi law.

In Section 2.F. of their Brief, the Millers argue that the receipts do not match the accounting provided by McCurley and accepted into evidence as Exhibit 19. However, the stipulations reflect that parties agreed on the total amounts paid by the Millers, and the argument between the parties regarding the total amount due from the Millers centered around the amount of the pro-rated taxes for 2005. The Chancellor determined that even though not due at the time Hurricane Katrina hit on August 29, 2005, the pro-rated amount of the 2005 taxes should nevertheless be considered in a resolution of the issues between the parties. The only other disagreement regarding the payments and amounts due involved the payment made on September 30, 2005 by the Millers after they had moved into a separate property owned by McCurley on Meadow Lane. As discussed previously, the Millers contend that this was another payment toward the North 8th Avenue property, while McCurley contended that it was for the rent on the Meadow Lane property where McCurley was able to relocate the Millers after Hurricane Katrina.

APPELLANTS' ISSUE 3: WHETHER THE LOWER COURT ERRED IN FAILING TO RULE THAT PARKER MCCURLEY VIOLATED MISSISSIPPI CODE §75-17-1(4)

In Section 3. of the Appellants' Brief, the Millers argue that the interest rate of 19% set forth in the Agreement between the parties was in conflict with MISS. CODE ANN. §75-17-1(4) which provides for a maximum interest rate of ten percent (10%). MISS. CODE ANN. §75-17-1(4) provides:

> Notwithstanding the foregoing and any other provision of law to the contrary, any borrower or debtor may contract for and agree to pay a finance charge which will result in a yield not to exceed the greater of ten percent (10%) per annum or five percent (5%) per annum above the index of market yields of the Monthly Twenty-Year Constant Maturity Index of Long-Term United States Government Bond Yields, as compiled by the United States Treasury Department, each calculated according to the actuarial method, **on any loan, mortgage or advance which is secured by a lien on residential real property** or by a lien on stock in a residential cooperative housing corporation where the loan, mortgage or advance is used to finance the acquisition of such stock. The term "residential real property," as used in this subsection, means real estate upon which there is located or to be located a structure or structures designed in whole or in part for residential use, or which comprises or includes one or more apartments, condominium units or other dwelling units. (emphasis added)

MISS. CODE ANN. §75-17-1(5), which of course follows immediately thereafter, provides:

> **Not withstanding the foregoing and any other provision of law to the contrary**, any borrower or debtor may contract for and agree to pay and any lender or extender of credit may contract for and receive **any finance charge agreed to in writing by the parties**, notwithstanding that such charge is in excess of that otherwise allowed on any contract, credit sale, obligation or other extension of credit, regardless of the security taken or the purpose of the extension of credit, under which the principal balance to be repaid originally exceeds Two-Thousand Dollars ($2,000.00), or any other series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced exceeds Two-Thousand Dollars ($2,000.00), or any extension or renewal thereof; and **as to any such agreement, the claim or defense of usury or violation of any law prescribing, limiting or regulating the rate of finance charge by any borrower or debtor, or his successors, guarantors, assigns or anyone on his behalf is prohibited.** (emphasis added)

The Agreement between these parties provided that if the buyers first made the payments and performed the covenants on their part to be performed, then the seller would convey by a Warranty Deed to the buyers in fee simple, clear of all encumbrances, the subject property at 1119 North 8th Avenue. In this transaction, McCurley had not executed a deed to the buyers to convey any ownership interest in regard to the subject property nor had the Millers executed a deed of trust or any other document pledging the property as security. There was no "loan, mortgage or advance which is secured by a lien on residential property." Rather, this was a land sale contract pursuant to which the legal title would not be transferred to the buyers until all payments were made.

Black's Law Dictionary, 6th ed. (1990) states that the term "land sale contract" is a term that "commonly refers to an installment contract for the sale of land whereby purchaser (vendee) receives the deed from the owner (vendor) upon payment of final installment." This type of instrument, according to *Black's Law Dictionary*, may also be called "contract for deed" or "installment land contract". In a contract for deed, the installment vendor maintains "legal title to the property while the vendee holds equitable title and has the right to use and possession of the property." *First Federal Savings & Loan Association of Storm Lake v. Lovett*, 318 N.W.2d 133, 135 (S.D. 1982).

MISS. CODE ANN. §75-17-1(5) begins with the words "Notwithstanding the foregoing and any other provision of law to the contrary" which is a reference to the preceding subsections of 75-17-1. Section 75-17-1(5) has application where any debtor contracts for and agrees to pay an extender of credit any finance charge agreed to in writing by the parties, regardless of the security taken or the purpose of the extension of credit, under which the principal balance to be repaid originally exceeds $2,000. This subsection also provides that as to any such agreement, the claim of usury or violation of any law prescribing, limiting or regulating the rate of finance charge by any debtor is prohibited.

In *Dunlap Acres, Ltd. v. Intervest Development Corporation*, 2006 WL 2474318 (Miss. Ct. App.), the Mississippi Court of Appeals, in both the majority and dissenting opinions, determined that §75-17-1(5) allows parties to contract for interest at a rate greater than fifteen percent. 2006 WL 2474318, *4 and *6.

Basically, the Millers' argument in Section 3 of their Brief is that §75-17-1(4) has application to **all** transactions regarding residential property, regardless of whether the transaction involves a loan, mortgage or advance which is secured by a lien on the property. That interpretation simply does not fit the wording of the statute.

In Section 3.C., the Millers comment that "it is sometimes amazing how, during the heat of battle, the truth will come out. In his testimony, Mr. McCurley refers to the money being paid by the Millers as the 'house note'." Their point is apparently that the McCurley's use of the phrase "house note" indicates a mortgage. However during closing argument, in a discourse between the Court and the Millers' counsel (T. 162), the following exchange occurred:

The Court: I said it was not secured by a lien.

Mr. Abernathy: You say it's not secured by a lien?

The Court: Not secured by a lien, because there's no lien instrument in existence.

Mr. Abernathy: Well, true. But--

The Millers argue that §75-17-1(5) is a general statute that must yield to specific statutes, and yet their interpretation of §75-17-1(4) is a very "generalized" interpretation that ignores the "specific" language of that Section. This is evidenced by their statement in Section 3.A. of their Argument that subsection (4) provides that the finance charge for "any residential real estate financing shall be limited to 10% per annum, or 5% above the discount rate."

As much as the Millers would like to modify the wording of Subsection (4) to fit the Agreement between the parties, there was no "loan, mortgage or advance which was secured by a lien on residential real property."

The Millers' argument that only §75-17-1(4) has application to this case fails given the fact that in this case there was no loan, mortgage or advance secured by a lien on real property. Section §75-17-1(5) is, however, applicable to the agreement in this case since the rate of interest was agreed to in writing by the parties and the principal balance to be paid exceeded the sum of $2,000. Subsection (5) permits such an interest rate if these two criteria are met notwithstanding that such charge is in excess of that otherwise allowed on any contract, credit sale, obligation or other extension of credit regardless of the security taken or the purpose of the extension of credit. The legislature even provided that as to any such agreement, the claim of usury by the debtor is prohibited.

Therefore, §75-17-1(5) is the interest statute applicable to the facts of this case and the interest rate of 19% provided in the Agreement is not usurious under current Mississippi law.

APPELLANTS' ISSUE 4: WHETHER THE LOWER COURT ERRED IN GRANTING RELIEF WHICH WAS NOT REQUESTED BY MR. MCCURLEY.

The Chancellor rejected the Millers' contentions that the financing arrangement was usurious under Mississippi law, but instead determined that McCurley had breached his duty to provide adequate insurance and refused to share the insurance proceeds with the Millers. The Chancellor "[i]n order to do equity and avoid a forfeiture" (R.E. tab 5, page 14 of the Judgment) ordered that all sums paid by the Millers to McCurley be refunded to them less the reasonable rental value of the property for the thirty-four (34) months that the Millers occupied the property.

The Millers argue in Section 4 that this amounted to the granting of a set-off by the Chancellor. Their contention was that this was improper since a set-off was not pled.

They cite no authorities in support of their contentions in Section 4 other than a reference to Rule 8(c) of the Mississippi Rules of Civil Procedure which requires a party to plead "any other matter constituting an avoidance or affirmative defense." In Section 4.B. of their argument, they simply concluded that "[i]t would seem that Set-off clearly is a 'matter constituting an avoidance or affirmative defense.'" But again, no authority is cited.

A set-off is a counter-claim which the defendant has against the plaintiff, but which is **extrinsic** to the plaintiff's claim. *Singing River Mall Company v. Mark Fields, Inc.*, 599 So2d 938, 944 (Miss. 1992) citing *Black's Law Dictionary* 1372 (6th ed. 1990).

In *Consolidated Pipe & Supply Company, Inc. v. Coulter*, 735 So2d 958 (Miss. 1999), this Court held that a garnishee may set off a claim that he has against the principal debtor provided that the claim is due and enforceable at the time process was served. 735 So2d 962.

Here the Millers had paid their monthly payments and McCurley would have had no basis for pleading a set-off against the Millers for any unpaid rent.

The Millers have missed the point. The Chancellor in resorting to an equitable remedy decided to refund the Millers all of their payments, including their payments for taxes and insurance, less the reasonable fair rental value of the property since they had the benefit of living in the house for nearly three (3) years. The Chancellor in fairness determined that since the Millers had received the benefit of the occupancy of the property for 34 months, the fair rental value should be deducted from the funds the Court refunded to the Millers.

APPELLANTS' ISSUE 5: WHETHER THE LOWER COURT ERRED IN FAILING TO AWARD THE MILLERS: [1] INSURANCE BENEFITS; [2] FINANCE CHARGES AND [3] ATTORNEY'S FEES.

The Millers again argue that they should have received the benefit of the insurance proceeds. They contend that they could have paid the $769.49 remaining after the insurance proceeds were applied to the debt and receive title to the home. However, they never offered it, but instead filed suit for the insurance proceeds. The Chancellor found from the testimony that McCurley never advised the Millers that if they tendered the remaining part of the principal balance, after reduction of the balance by the amount of insurance proceeds, then they would receive a deed to the property. But the Chancellor also determined from the testimony that the Millers never inquired as to the remaining amounts owed or offered the payment thereof. Instead, the parties entered into some discussion regarding the Millers' purchase of the Meadow Lane property and discussed some credit toward the purchase price of the Meadow Lane property. But the discussions never got very far and the Millers decided to move out of the Meadow Lane house in October 2005, and by October 17, 2005 they had decided to pursue legal action.

McCurley did testify that he was willing to deed the property if the balance was paid, after the $35,000 of insurance was applied. (T. 73, Lines 25-27)

The only other new argument by the Millers in Section 5 is their contention that they should have received attorney's fees. In their Motion to Conform the Pleadings to the Proof, the Millers requested an award of attorney's fees and attached to the Motion the Contingency Fee Contract entered into on January 6, 2006 with the Law Office of

Leslie Roussell "to represent me in my claim against any and all other persons, firms, corporations and/or any other entity whatsoever liable therefor, resulting from, arising out of and/or connected with damages and/or injuries sustained by me as a result of my automobile accident which occurred on or about December 26, 2005."

Their Rebuttal in Support of Motion to Conform the Pleadings with the Proof included a new Contingency Fee Contract entered into on April 16, 2008, after the first part of the trial had been concluded.

The Chancellor ruled that there was no provision for attorney's fees in the event of breach of contract in the Agreement between the Millers and McCurley. He also determined that there was no statutory basis for awarding attorney's fees for a breach of contract. The Chancellor's ruling on this issue followed well-established law in Mississippi. *Christiansen v. Griffin*, 398 So.2d 213, 216 (Miss. 1981); *Alexander v. Fidelity and Casualty Co.*, 232 Miss. 629, 637, 100 So.2d 347 (Miss. 1958).

CONCLUSION

The land sale contract entered into between the Millers and McCurley was not usurious under current Mississippi law. MISS. CODE ANN. §75-17-1(4) was not applicable since the transaction between the Millers and McCurley involved no "loan, mortgage or advance which was secured by a lien on residential real property." While three of the four late payment charges assessed by McCurley exceeded the 4% cap set by §75-17-27, it does not follow that all "finance charges" of the transaction are forfeited. Rather, the excessive part of the late fees is considered a part of the entire "finance charge" together with the other statutory elements of the finance charge. Even with the addition of the amount of the late fees that were excessive ($78.54), the Chancellor determined that the contract was still not usurious under MISS. CODE ANN. §75-17-1(5).

The lower court's remedy granted to the Millers was based upon breach of contract and equity, and the lower court, in determining actual damages, properly reduced the refund of all of the Millers' payments by the fair market rental value of the property for thirty-four (34) months.

Respectfully submitted,

Parker McCurley Properties, L.L.C. and
Parker McCurley, Individually

By: W. Dal Williamson
W. DAL WILLIAMSON, Attorney
for Appellee/Cross-Appellant

BRIEF OF CROSS-APPELLANT

ARGUMENT

By requirement of insurance on the property, McCurley in essence legally shifted the risk of loss on the property to the Buyers until such time as all payments were made and legal title transferred. The Agreement provided that the bank and the seller be named as loss payees along with the buyers "as their interest may appear." The inclusion of the phrase "as their interest may appear" has reference to the debt owed by the Millers.

In *King v. Dunlap*, 945 S.W.2d 736 (Tenn. Ct. App. 1996), the Dunlaps had entered into a contract by which they agreed to sell King a home and lot in a subdivision. The contract provided for monthly payments, and upon payment of the purchase price for the property, the Dunlaps were to execute a Warranty Deed conveying the property to King. The Dunlaps purchased fire insurance on the property but did not name King as an insured. The property was destroyed by fire a couple of years later. The agreement between the parties provided that in the event any sum of money became payable under a fire insurance policy on the property, the sellers would have the right to receive the money and apply it toward the indebtedness. King contended that less than $5,500 was owed on the property at the time of the loss and that the Dunlaps were entitled only to collect the balance owed on the property out of the insurance proceeds and that he (King) was entitled to collect the balance.

The Dunlaps, on the other hand, contended that King had defaulted in the installment payments under the contract and they declared a forfeiture of the agreement and terminated the purchase contract, claiming that King was not an insured under the policy of insurance. The Dunlaps claimed that King had defaulted in the payments prior to the fire and that they had declared a forfeiture of the contract. The Chancellor held that upon payment of the remaining amounts owed to the Dunlaps, the Dunlaps were ordered to execute a deed to King, and King would be entitled to the balance of the policy proceeds. 945 S.W.2d at 739.

Other courts have held that the seller, under a land sale contract, holds insurance proceeds over and above that necessary to satisfy the remainder of the purchase price as trustee for the purchasers, and that where the insurance proceeds are sufficient to pay the balance of the purchase price, then the purchaser should be entitled to a deed. See *Estus v. Thurman*, 192 S.W.3d 429 (Ky. Ct. App. 2005); *Alabama Farm Bureau Insurance Service, Inc. v. Nixon*, 105 So.2d 643 (Ala. 1958).

In *Bruce v. Jennings*, 190 Ga. 618, 10 S.E.2d 56, 57 (1940), the Supreme Court of Georgia stated the general rule as follows:

> It is the general rule that, where the purchaser goes into possession under a binding executory contract for the sale of improved realty which the seller is able to convey, but where, before the transfer of the legal title is consummated, the improvements are destroyed by fire without the fault of either party, the loss falls on the purchaser as the owner of the equitable title....If in such a case the property was insured by the seller, he holds the insurance money which he may collect on the bargained property as trustee for the purchaser, subject, however, to his own claims for any unpaid purchase-money plus the insurance premiums.

10 S.E. at 57.

Martin v. Coleman, 2001 WL 673701 (Tenn. Ct. App. 2001) (cited in the brief of Appellee) involved a dispute over real property that was the subject of an installment land sale contract and over the proceeds of an insurance policy after the dwelling on the property was destroyed by fire. In this case, Coleman borrowed the money from a credit union to finance the purchase. Shortly thereafter Coleman agreed to sell the property to Martin under an installment land sales contract. The contract provided that after the receipt of the last payment the seller would convey the property to the buyer by good and valid warranty deed. The contract also provided that the buyers agreed to purchase a fire insurance policy on the said property. One of the terms discussed prior to execution of the contract was the issue of insurance. The buyer testified that she was concerned that because the property was not in her name, she would not be able to obtain insurance. Therefore, the seller agreed that the buyer would simply reimburse her for the premium payments because she had to keep insurance on the property according to her mortgage lender. The seller kept a running ledger of what the annual taxes and insurance premiums were and deducted the payments made by the buyer.

After the property burned, the insurance company paid the full amount of the policy to the seller, and the issue was whether the proceeds received by the seller must be applied toward the purchase price. The Tennessee Court of Appeals found that Tennessee courts had previously addressed the rights of the parties in similar situations, and quoted *Hillard v. Franklin,* 41 S.W.3d 106, 114 (Tenn. Ct. App. 2000):

> [W]here the insured vendor has sold the property and vendee has gone into possession and paid a portion of the purchase price, but title is still held by the insured, as between the insured and the insurer, the insurer is the owner of both the legal and equitable titles to the property and entitled to recover the full amount of the policy. However, as between the vendor and the vendee, the insured takes the proceeds of insurance which exceed the amounts owed to the vendor as trustee for the vendee.

41 S.W.3d at 114.

Applying the authority cited, the Court of Appeals of Tennessee held that the proceeds collected by the seller must be applied to the purchase price in the buyer's favor. The court cited *Hillard* where it had concluded "a seller must apply insurance proceeds to the purchase price, at least where the risk of loss falls on the purchaser. The risk of loss during the period between execution of a contract from the conveyance of real property and the closing generally falls on the purchaser." 41 S.W.3d at 115.

The *Martin v. Coleman* court went on to say:

> In this case, the contract provided that the Buyer was to maintain insurance, confirming the risk of loss would fall on her. The parties agree, as their course of conduct shows, that the Buyer would reimburse the Seller for insurance premiums. Thus, the continued acceptance of the reimbursement of payment for the insurance premiums supports the trial court's conclusion that the parties agreed Seller would maintain the policy and Buyer would pay the premiums. Therefore, any proceeds from the policy were held in trust by Seller for Buyer's benefit, and may, in the first instance be applied to the remaining balance owed to Seller under the contract. Any excess belongs to Buyer, absent other obligations owed to Seller by Buyer. If the insurance proceeds pay off the balance of the loan, the Buyer is entitled to conveyance of the real property under the contract.

2001 WL 673701 *5 (Tenn. Ct. App. 2001).

The reasoning of the Tennessee Courts is persuasive. As of September 1, 2005, the principal balance owed by the Millers was $35,760.67 as per the amortization schedule. After the application of the $35,000.00 of insurance proceeds to the debt, a balance of $760.67 was owed by the Millers.

The Chancellor erred by failing to order that the insurance proceeds be applied to the remaining balance owed by the Millers and ordering McCurley to convey a warranty deed to the Millers upon their payment of the remaining $760.67.

Instead of following the reasoning of the Tennessee and Georgia courts, the Chancellor relied on several cases that examined the issue of impossibility of performance, and the failure of a party to provide against contingencies that could have been anticipated. The Chancellor determined that McCurley had a duty to provide a home for which the Millers signed a contract, but Hurricane Katrina, an act of God, rendered it impossible for McCurley to provide the home to the Millers. However, the Court went on to rule that McCurley had a duty to provide adequate insurance on the home and that agreement was breached when he underinsured the home and then refused to share part of the insurance proceeds with the Millers.

Actually there was no provision of the contract that required McCurley to secure the insurance. Rather the parties, through their course of dealing, after the Millers were unable to secure the insurance, agreed for McCurley to obtain the insurance and then the Millers reimbursed him as the premiums were paid. There was no proof that an insurer, given the age and condition of the house prior to Hurricane Katrina, would have been willing to insure the home for more than the coverage provided in the Shelter Insurance policy.

For these reasons the better approach in this case involving the destruction of the house in the midst of payments under a land sale contract prior to transfer of title, and in any future occurring similar factual circumstances, would be to follow the established law of Tennessee and Georgia. That would be to rule that the proceeds from the policy are held by the seller in trust for the benefit of the buyer, and in the first instance are to be applied to the remaining balance owed to the seller under the contract and any excess tendered to the buyer. If the insurance proceeds payoff the balance of the loan, then the buyer is entitled to conveyance of the real property under the contract.

Again respectfully submitted,

Parker McCurley Properties, L.L.C. and
Parker McCurley, Individually

By: W. Dal Williamson
W. DAL WILLIAMSON, Attorney
for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I, W. DAL WILLIAMSON, attorney for Defendants, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing to Honorable Franklin C. McKenzie, Honorable Leslie D. Roussell and Honorable Lawrence E. Abernathy, III, at their usual and last known mailing addresses, by U.S. Mail, postage prepaid, on this the 2nd day of October, 2009.

W. Dal Williamson

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