IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

JOE MILLER and
ALICE MILLER — PLAINTIFFS

VERSUS — 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

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

LAWRENCE E. ABERNATHY, III
ATTORNEY AT LAW
P. O. BOX 4177
LAUREL, MISSISSIPPI 39441
TELEPHONE (601) 649-5000
MSB [redacted]

LESLIE D. ROUSSELL
ATTORNEY AT LAW
P. O. BOX 2940
LAUREL, MISSISSIPPI 39442
TELEPHONE (601) 426-2345
MSB [redacted]

INDEX

TABLE OF CASES

STATUTES AND AUTHORITIES

REPLY TO APPELLEE'S ARGUMENT

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.

1. A. The Millers paid their premium and should receive the insurance proceeds

The Millers, by agreement with Mr. McCurley, paid the insurance premiums to Mr. McCurley prior to the destruction of their home (T. p. 46, lines 24-26). Hurricane Katrina, for all practical purposes, totally destroyed the Miller's home. The Shelter policy, purchased by Mr. McCurley, with the Miller's money, was for only $35,000.00. (Exhibit 7). Shortly after the hurricane, Shelter insurance paid a total of $35,000.00 to Mr. McCurley (T. P. 50, lines 16-19). Mr. McCurley did not give the insurance proceeds to the Millers. (T. p. 106, lines 9-16; p. 107, lines 3-5). He did not apply the insurance proceeds to the Millers' indebtedness. (T. p. 54, line 29, p. 55, lines 1-6). He did not repair the home. (T. p. 49, lines 1-9). He did not pay the lienholder. (T. p. 55, lines 9-12). He put the money in his pocket and walked away.

Mr. McCurley argues that the Millers cite no authority for the proposition that they are entitled to the insurance proceeds at question in this case. To the contrary, The Miller's brief cites *Citizens Bank v. Frazier*, 127 So. 716, *Sullivan v. Riley*, 558 So.2d 830, *Hancock Bank v. Travis*, 580 So.2d 727, and *Prince v. Louisville Municipal School District*, 741 So.2d 207, which when read together establish that because of his acceptance of insurance premiums from the Millers, McCurley became the agent for the procurement of adequate insurance and/or the actual insurer of the Miller's property.

McCurley's contract required the Millers to pay for the insurance and they did. This is undisputed. The contract likewise required that the Bank and McCurley, along with the Millers shall be named as loss payees. Mr. McCurley obtained the insurance and caused the Millers not to be named as loss payees under the insurance policy. Mr. McCurley should not profit from his wrongful breach of the contract.

Mr. McCurley asserts, without any proof whatsoever, that the contract is a "land sale contract." (Had he wanted his contract to be a "land sale contract", he should have resolved the ambiguity by using those words in his contract. His contract does not use the terms "land sale contract", "contract for deed" nor "installment land contract").

Mr. McCurley then cites Tennessee law addressing land sale contracts, and uses it to argue that all insurance proceeds, in cases such as this, should be paid first to the seller, up to the amount of the debt, and then any overage to the purchaser along with a deed to the property. The Plaintiffs have asserted that Mr. McCurley could have offered this very remedy to the Millers when he received the insurance proceeds for the destruction of their home. However, by his own admission, Mr. McCurley never offered to reduce the debt of the Millers nor apply any of the insurance proceeds to the Miller's indebtedness. (T. p. 54, line 29, p. 55, lines 1-6). It is the fact that Mr. McCurley never offered to apply the insurance proceeds to the indebtedness of the Millers that gives rise to the Millers current claim for the insurance proceeds.

This home has been sitting out in the elements for four years now. It has suffered from rain, rot, bugs, mold and other elemental exposure. This "waste" is the fault of Mr. McCurley. Had Mr. McCurley originally offered to apply the insurance proceeds to the Millers indebtedness and allowed them to pay $ 760.67 in exchange for

a deed, then this "waste" would not have occurred. The Millers would have had the opportunity to repair the home and make it livable again. (Had that occurred, the Millers still would have had an under-insured claim against Mr. McCurley, but they would not have an argument over the proceeds being applied to the indebtedness).

The $760.67 figure, required to payoff the note, is based on McCurley's statement that the indebtedness, at the time Katrina destroyed the home, was $35,760.67. The proof at trial shows the Millers were actually ahead on their house note.) (See Appellee's brief at pg. 3),

Further, in response to McCurley's arguments, it is important to remember:

1B. Case law addressing § 83-17-1, makes McCurley the agent

Case law addressing § 83-17-1 has held, since at least 1930, that if one other than an insurance agent agrees to purchase insurance for another, he becomes the agent for the procurement of insurance. *See Citizens Bank v. Frazier*, 127 So. 716.

1C. Case law construing § 83-17-1, alternatively makes Mr. McCurley the insurer

In the alternative, when Mr. McCurley accepted insurance premiums from the Millers, he became their insurer. In the case of *Hancock Bank v. Travis*, 580 So.2d 727, this Court held that a mortgage lender which agreed to procure credit disability insurance for a borrower and failed to do so assumed the position of insurer and thus the risk of loss.

1D. As the agent or insurer for the Millers, Mr. McCurley owed a duty of good faith and fair dealing to the Millers.

Mr. McCurley breached this duty by failing to adequately insure the home, failing to live up to his part of the contract and by failing to deal fairly and in economic good faith with Millers.

The only argument the McCurley makes to refute the Miller's argument that McCurley failed to obtain adequate insurance, is that the Millers failed to produce any evidence at trial to suggest that Mr. McCurley could have obtained more than $35,000.00 in insurance coverage. Then in his very next sentence, McCurley shows this Court the proof that was offered. He admits that "It is true that the estimate as to the cost of repairs to the house far exceed the amount of coverage. . ." (See Appellee's Brief at pg. 12). The estimate was $55,031.98 (Exhibit 9).

Mr. McCurley then appears to argue the clause "as their interest may appear" simply means that a mortgagee gets paid all insurance proceeds up to the amount of the mortgage and that the purchaser gets the remainder. For this proposition the McCurley cites *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).

McCurley uses the above to claim there is no mortgage between the Millers and Mr. McCurley which leaves only a mortgage between Mr. McCurley and Union Planters Bank. Therefore, the term "as their interest may appear" is meant that only the bank and the seller were entitled to receive the insurance proceeds up to the principal balance owed to McCurley by the Millers. This is a smoke and mirrors argument.

First, Mr. McCurley admitted that he did not pay his lien to Union Planters Bank. (T. p. 55, lines 9-12). Second, McCurley argues that this contract is not a mortgage. If that is true, then why are the Millers, the Bank and the Seller named in the same sentence of McCurley's contract, along with the phrase "as their interest may appear" (Exhibit 1) a phrase that McCurley now uses as a sword to try and defeat the claims of the Millers. The specific line in the contract states that "(Bank) and Seller shall be named as the loss payee along with the Buyer(s) as their interest may appear and the Buyer(s) shall furnish proof of insurance." (Exhibit 1). This must mean that the Millers shall be named as loss payees "as their interest may appear". It is at least ambiguous.

It seems that McCurley is trying to argue that the term "as their interest may appear" is a term that has legal meaning. According to the non Mississippi cases McCurley cites, that legal meaning is that the purchaser of property and the mortgagee have certain legal rights when the insured property is damaged. Those rights allow the mortgagee to collect the insurance proceeds up to the amount of the mortgage with all overage, if any, going to the purchaser of the property. It appears he is referring to the contract as a mortgage by using the term 'as their interest may appear". That term, as Mr. McCurley points out in his brief, applies to mortgage situations.

Ultimately, Mr. McCurley concludes by saying that it was perfectly fine for him to keep the $ 35,000.00 in insurance proceeds because that is what the Tennessee law allows him to do. He gets to keep the insurance proceeds up to the amount of the mortgage debt of $35,760.67. And, since there was only $ 35,000.00 available, he was entitled to keep it all. The fatal flaw with this argument is that he never applied that $35,000.00 to the debt of the Millers. Had he done that, the Millers would not have an

argument for this $ 35,000.00. We still contend they would have had an argument for the failure to adequately ensure the property. Remember, the insurance companies cost of repair estimate was $55,031.98 (Exhibit 9), and this was before the four years of elemental exposure.

1E. Mr. McCurley has caused waste to the property which he should be required to cure

Mr. McCurley's failure to credit the Miller's account and offer them a deed has caused this home to deteriorate so that now it will cost much more than the estimated $55,031.98, to repair. Should this Court award the property and insurance proceeds to the Millers, and determine that Mr. McCurley failed to adequately insure the property, or committed waste, then Mr. McCurley should be required to not only give the Millers the insurance proceeds, but also pay the difference between the actual cost of repair and the $35,000.00 which was paid by Shelter, subject to the payment of the balance of the note, if any.

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

Mr. McCurley makes several arguments about the timing of late fees and the arrearage that existed in relation to the timing of those late fees and then concludes that all late fees were charged only after the arrearage was more than 15 days past due. There is no need to address this issue at length here as it was sufficiently covered

in the Appellant's brief and it would be mere regurgitation and a waste of time to reproduce those arguments here.

What is important, however, is the admission by Mr. McCurley that he violated Mississippi Code Annotated § 75-17-27 on at least three occasions. This is an admission Mr. McCurley can neither argue against nor hide from. That admission alone requires this Court to go no farther. Once § 75-17-27 is violated, the remedies provided for in M.C.A. § 75-17-25, follow. Those remedies clearly state that **"all interest and finance charges shall be forfeited, and may be recovered back."**

In his brief, Mr. McCurley attempts to circumvent the penalty by inserting the wording of the statute which states: "so long as the annual percentage rate does not exceed that permitted by law." If the reader stops here, the preceding sentence may carry weight but a continued reading of the statute's next sentence reveals:

> If a greater finance charge is **stipulated for or received** in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract is executed or executory. (Emphasis added).

Mr. McCurley, both, stipulated for and received late fee of $50.00 when only $23.00 was permitted by law. He also, both, stipulated for and received for a late fee to be collected prior the lapse of more than 15 days past the due date. He also, both, stipulated for and received a finance charge of 19 % when only 10% was permitted by law.

In his brief, Mr. McCurley seems to be begging this Court overlook this arguably minor infraction since it only totaled $78.54. (See Appellee's Brief at pg. 16). The Mississippi legislature saw fit to make §75-17-25 punitive to prohibit abuses. Sure, one may cheat people out of only $10.00 here or $25.00 there, but do it to enough

people and the amounts of illegally collected money can easily rise into the millions. The statute's purpose is to punish wrongdoers for cheating the public a little bit at a time. The penalty is assessed to warn potential wrongdoers.

One other very important note is that the legislature apparently felt this type of illegal collection practice was so pervasive and evil that they made it a violation not only to collect excessive late fees, but to merely contractually stipulate for them. That means it does not matter whether the excessive late fees are actually charged to a borrower. The statutory violation is completed when the contract simply calls for a fee that would be excessive if it were charged. In this event the perpetrator has violated §75-17-27 and according to §75-17-25 **"all interest and finance charges shall be forfeited, and may be recovered back."**

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

The contract between Mr. McCurley and the Millers, is for the purchase of a home on 8th Avenue. This is undisputed. Mr. McCurley argues the contract is a "land sale contract." Unfortunately for Mr. McCurley, his contract does not use the terms "land sale contract", "contract for deed" nor "installment land contract". It names Mr. McCurley as "Seller" and the Millers as "Buyers" of property on "1119 N. 8th Ave.", at a purchase price of "$39,000.00, plus interest at 19%." The Millers were buying "residential real property."

The interest rate for "residential real property," is specifically governed by Mississippi Code § 75-17-1(4). This statute defines "residential real property," as

follows:

> 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, . . . (Quotations in original)

Residential real property is precisely what McCurley's contract covered. § 75-17-1(4), limits the finance charge on "residential real property," to 10%. The contract, on the other hand, calls for, "the sum of $39,000.00, plus interest at 19%,". For this reason Mr. McCurley argues that the contract is a "land sale contract" governed by the general Code § 17-17-1(5) and not the purchases of "residential real property," governed by the specific Code § 75-17-1(4).

Whether the contract is called a Mortgage, land sale contract or something else, is left to guess work because the contract drafted by McCurley is ambiguous. They law simply does not allow McCurley to use the ambiguity to his advantage. In fact, the law states that the ambiguity shall be construed against him in the light most favorable to the Millers. "Ambiguous contracts are to be construed against the drafter." *Rotenberry v. Hooker*, 846 So.2d 266, 270 (Miss. 2003).

The Plaintiff says this transaction is a mortgage. The defendant wants to characterize it as something different by calling it a land sale contract or some other animal. The one thing that is unquestionable here, is that this is a "contract for the sale of residential real estate".

Mr. McCurley spills much ink on the term "finance charges". This term is defined by Code § 75-17-25 as follows:

The term "finance charge" as used in this section, Sections 75-17-1, . . . 75-17-27. . . 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, transaction charges, activity charges, carrying charges, time price differential, finders fees **or any other cost or expense** to the debtor for services rendered or to be rendered to the debtor in making, arranging or negotiating a loan of money or an extension of credit and the accounting, guaranteeing, endorsing, collection and other actual services rendered by the lender; . . .

Nothing in Section 75-17-1 or Sections . . . 75-17-27. . . shall limit or restrict the manner or contracting for such finance charge, . . . 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 charges shall be forfeited** . . . (emphasis added)

The term "Credit" is defined by Black's Law Dictionary as: "The ability of a business man to borrow money, or obtain goods on time..." **"[T]he extension of credit,"** referred to above in § 75-17-25, was the owner financing of the Miller's residence by Mr. McCurley. The interest rate , **"authorized by applicable law"**, codified in § 75-17-1(4), is 10%, not the 19% interest rate **"stipulated for"** in the contract and **"received"** from the Millers by Mr. McCurley.

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

The lower court, awarded Mr. McCurley an unrequested set-off of rental value together with the $35,000.00 in insurance proceeds as relief against the Millers. He never plead for, nor requested either.

In the Appellant's Brief, the Millers argued that the Chancellor erred by allowing a set off award which Mr. McCurley never requested via pleadings, nor at trial. The only argument McCurley makes in support of this "set off" award is that the Court was

exercising its equity powers and prohibiting a forfeiture.

The Rules of civil procedure are clear.

Mississippi Rules of Civil Procedure

Rule 8, Mississippi Rules of Civil Procedure sets up rules for pleading. The Answer and Affirmative Defenses, filed in this case, did not claim set-off nor any other matter of avoidance. Rule 8(a) requires that a pleading must state a claim for relief and that it must contain a statement or demand for judgment which the party believes himself entitled. Rule 8(c) requires the pleading of **"any other matter constituting an avoidance or affirmative defense."**

Rule 9, Mississippi Rules of Civil Procedure addresses Pleading of Special Matters. Rule 9(g) states in part: "When items of special damage are claimed, they shall be specifically stated." In the Answer and Affirmative Defenses, No relief, whatsoever, was requested by Mr. McCurley. Thus, the special damages, i.e., the setoff granted the defendants by Chancellor, were improper.

Rule 54, Mississippi Rules of Civil Procedure addresses Judgements and states in part: ". . . final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings." Absolutely nothing in the way of a judgment was requested in the pleadings. Therefore, if a pleading requests nothing, the Chancellor cannot award any monetary amount greater than nothing.

The Court can grant no equity were none is requested.

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 only item of this issue not discussed herein above is attorney's fees. The McCurley argues that: (1) the Chancellor was correct in not allowing attorney's fees because the Court cannot award attorney's fees for breach of contract cases; and (2) The Chancellor claimed, there was no statutory basis for awarding attorneys fees.

The Millers requested attorneys' fees in their Complaint. In its opinion, the lower Court stated that there was no provision for attorneys' fees in a breach of contract case when there was no award of punitive damages. Generally, attorney's fees are not available in mere breach of contract cases. If there is a breach of contract together with conduct rising to a level justifying punitive measures, then the court may award attorney's fees.

What the lower court failed to recognize is that the penalties, which should have been awarded under Mississippi Code § 75-17-25, are punitive in nature and design. The Court should be directed to award a reasonable sum as attorneys' fees to counsel for the Millers.

REPLY TO CROSS APPELLANT'S BRIEF

The entire Cross-Appellant Brief of Mr. McCurley addresses the proper disposal of insurance proceeds. Mr. McCurley cites several cases: *King v. Dunlap,* 945 S.W.sd 736 (Tenn. Ct. App. 1996); *Bruce v. Jennings*, 190 Ga. 618, 10 S.E.2d 56, 57 (1940); *Martin v. Coleman*, 2001 WL 673701 (Tenn. Ct. App. 2001); among others. Each of

these non Mississippi cases seem to say that in situations such as the case at bar, all insurance proceeds from the destruction of a home should be paid to the mortgagee up to the amount of the mortgage, with all overage being payable to the mortgagor.

Mr. mcCurley then argues that, "The Chancellor erred by failing to order the insurance proceeds to 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". It appears Mr. McCurley is asking this Court to, "Please not throw it into the briar patch". This is simply a disingenuous argument. They want this Court to ignore the fact that Mr. McCurley should have offered this remedy to the Millers four years ago. The only effect such a ruling would have today (without any penalty for McCurley's failure to offer this four years ago) would be to reward Mr. McCurley the $ 35,000.00 in insurance proceeds and drive an additional $ 760.67 dagger into the hearts of the Millers in exchange for a stinky, filthy, molded, rotten and bug infested house that nobody would want.

Additionally, the real life effect of allowing McCurley to keep all the insurance proceeds and giving this home to the Millers in the condition it is in now, also sticks the Millers with the cost of destruction, removal and clean-up once this property is condemned by the City.

CONCLUSION

In conclusion, the Millers paid the insurance premium to Mr. McCurley and they should be entitled to the benefit derived from their payment of the premiums, which amounted to $35,000.00. The Millers should also receive a refund of all finance charges paid to Mr. McCurley for reasons set out herein. In addition, the court should be required to re-visit the issue of attorneys' fees in that the penalties which should have been assessed against Mr. McCurley are in the nature of punitive damages. Further, should the Court award the home to the Millers, then Mr. McCurley should be required to have the home repaired or rebuilt so that it at least meets its pre-Katrina condition.

Respectfully submitted,

JOE MILLER AND ALICE MILLER

BY: _____
LAWRENCE E. ABERNATHY, III

CERTIFICATE

I, LAWRENCE E. ABERNATHY, III, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing to Honorable Franklin C. McKenzie and W. Dal. Williamson, Esq., at their usual and last known mailing addresses, by U. S. Mail, postage prepaid, on this the 12th day of October, A.D., 2009.

L. E. Abernathy III

LAWRENCE E. ABERNATHY, III

LESLIE D. ROUSSELL
ATTORNEY AT LAW
P. O. BOX 2940
LAUREL, MISSISSIPPI 39442
TELEPHONE (601) 426-2345
MSB [redacted]

LAWRENCE E. ABERNATHY, III
ATTORNEY AT LAW
P. O. BOX 4177
LAUREL, MISSISSIPPI 39441
TELEPHONE (601) 649-5000
MSB [redacted]