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

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 the Court of Appeals may evaluate possible disqualification or recusal:

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,

LAWRENCE E. ABERNATHY, III
ATTORNEY OF RECORD FOR APPELLANTS

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TABLE OF CASES

STATUTES AND AUTHORITIES

STATEMENT OF THE ISSUES

The issues before this Court are:

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.
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 .
3. Whether the lower court erred in failing to rule that Parker McCurley violated Mississippi Code § 75-17-1(4).
4. Whether the lower court erred in granting relief which was not requested by Mr. McCurley.
5. Whether the lower court erred in failing to award the Millers: [1] insurance benefits; [2] finance charges and [3] attorney's fees.

STATEMENT OF THE CASE

This case involves the purchase of a home by Joe and Alice Miller (the Millers) from Parker McCurley (Mr. McCurley). The Complaint was filed in the Chancery Court of the Second Judicial District of Jones County, Mississippi. The Millers filed a Motion for Summary judgment requesting Mississippi Code § 75-17-25, penalties for violations of Mississippi Code § § 75-17-27, and 75-17-1(4). The lower court denied the Miller's Motion for Summary Judgment and Motion to Reconsider. Subsequently, this Court declined to hear the Miller's Petition for Interlocutory Appeal, and this case proceeded to trial. Many of the facts were submitted to the lower court as stipulations (R-70). At trial the Miller's Motion to Reconsider their Motion for Summary Judgement was again denied.

Following the trial, the lower court issued its Opinion, granting the Millers all money paid to Mr. McCurley for the purchase of the residence. The lower court then, all but, negated that award by giving Mr. McCurley a set off representing the fair rental value of the property for the period of time that the Millers lived in their home. The lower court also granted title in the property to Mr. McCurley and stated that he could keep the $35,000.00 in insurance proceeds paid by Shelter for the loss of the property. It is from the Chancery Court's rulings that this appeal is taken.

FACTS

On September 12, 2002, Mr. Parker McCurley bought a house on 1119 North 8th Avenue, Laurel, Mississippi for $5,500.00. (T. p. 20, lines 21-27). Fifty-one days later he sold it to Joe and Alice Miller for $39,000.00. (T. p. 21, lines 10-19).

Mr. McCurley's home purchase contract required the Millers to pay $3000.00 down and 300 monthly house payments of $575.00, at a 19% rate of interest. This amortizes at $175,500.00, not including land taxes, insurance premiums and late fees. In addition to the monthly house note, the contract also required the Millers to pay yearly land taxes, obtain homeowners insurance and stated that the bank, the seller and the buyers would be named as loss payees on the home insurance policy. (Exhibit 1).

The Millers and Mr. McCurley agreed that the Millers would pay the insurance premiums directly to Mr. McCurley and that he would purchase the insurance with the money given him by the Millers. (T. p. 46, lines 24-29, T. p.). In a clear violation of Mr. McCurley's contract, the policy on the home named only Mr. McCurley as a loss payee. (T. p. 47, lines 6-9).

On August 29, 2005, Hurricane Katrina destroyed the home. The Millers were ahead on all amounts required by the contract, including all monthly house notes, all land taxes and all insurance premiums. (Exhibits 2, 17 and ,19) (The Millers had even paid an extra $440.91, this amount takes into consideration the 2005 pro-rated land taxes that were not then due when Hurricane Katrina hit. It appears Mr. McCurley charged the Millers twice for 2003 insurance and 2004 land taxes). (Exhibit 2-21, 2-22 and 2-36).

By August 5, 2005, before Hurricane Katrina hit, the Millers had paid Mr. McCurley $25,415.77. (R. 71, Stipulation 19). The parties stipulated that between the inception of the contract and the date Hurricane Katrina destroyed the home, the Millers owed Mr. McCurley:

$19,550.00	Principal and Interest (R. 71, Stipulation 18)
3,000.00	Down-payment (R. 71, Stipulation 10)
1,014.50	Insurance from 2002-2005 (R. 71, Stip. 11, 13, 15 and 17)
1,508.27	Taxes for 2002-2004 (R. 71, Stip. 12, 14 and 16)
$25,072.77	

The parties stipulated that by August 5, 2005, the Millers had paid Mr. McCurley $25,415.77. (R. 71, stipulation 19). The Millers also made another $575.00 house payment, on the property located on 1119 North 8th Avenue, on September 30, 2009, after Hurricane Katrina destroyed the residence. (Exhibit 2-43). Adding these amounts together shows the Millers actually paid a total of $25,990.77 to Mr. McCurley.

Shelter Insurance paid the policy limits of $35,000.00 to Mr. McCurley, on or about September 27, 2005. (T. p. 50, lines 1-6). Mr. McCurley brokered the insurance policy and he had either forgotten or decided not to list the Millers as a loss payee. Either way, McCurley's home purchase agreement required that Mr. McCurley, the bank and the Millers be listed as loss payees. (Exhibit 1)

Mr. McCurley put the $35,000.00, in his checking account. (T. p. 49, lines 2-9). He did not repair the home. (T. p. 55, lines 7-8). He did not credit the $35,000.00 against any principal the Millers owed on the home. (T. p. 52, lines 21-29). He did not give the $35,000,00 to the Millers. (T. p. 49, lines 1-9). He did not pay off the lienholder. (T. p. 55, lines 9-12). He put it in his pocket and went on with his life. The property at 1119 North 8th avenue has never been repaired and four years later the Millers still have no home.

During the course of the contract, Mr. McCurley charged the Millers four separate late fees. These late fees violated § 75-17-27 in that they were (1) charged too early, (2) charged in excessive amounts (which the defendant admitted on the

record (T. p. 141, lines 22-29; p159, lines 7-9). and (3) charged on a single alleged installment more than once. Further, the contract violated § 75-17-1(4), because the rate of interest charged by Mr. McCurley was 19% when the statute forbids an amount over 10% on residential real estate.

From the contract's inception, the Millers paid every payment to Mr. McCurley in cash. (T. p. 32, lines 10-13). Mr. McCurley made the determination as to how each payment was applied. (T. p. 32, lines 6-9). Each receipt issued to the Millers by Mr. McCurley from April of 2005, through August of 2005, showed that there was no balance remaining due after the monthly payment. (Exhibits 2-28 through 2-42). The total amount represented by the receipts from the inception of the contract until Hurricane Katrina destroyed the home, August 29, 2005, was $25,415.77. The last receipt dated September 30, 2005 (Exhibit 2-43) is a $575.00 payment made after the home was destroyed, and is in addition to the $25,415.77 mentioned above. This payment was for the house note on 1119 North 8th Avenue, Laurel, Mississippi, and tends to establish the fact that the Millers, even though they could no longer live in the home, were still paying their house note.

Mr. McCurley purchased a home, in a depressed market, for $5,500.00, primarily due to "white flight." Within a few weeks, he sold the home to the Millers, for $39,000.00. Within about three years he collected over $25,000.00, from the Millers, including taxes, excessive late fees and insurance premiums. When the Miller's home was destroyed by Hurricane Katrina, he pocketed an additional $35,000.00 in insurance proceeds which left the Millers with nothing, not even a deed.

SUMMARY OF THE ARGUMENT

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

1. A The Millers paid every penny of the insurance premiums to Mr. McCurley. (T. p. 82, lines 21-26). In spite of this fact, when Shelter paid the insurance proceeds for the total loss of their home to Mr. McCurley, he put the money in his pocket. He did not credit the Millers' account. He did not pay the lienholder. He did not repair the home. When the Millers paid the premium to Mr. McCurley he became either the insurance agent or the insurer according to Mississippi Code § 83-17-1 and supporting Mississippi case law.

1. B. By failing to repair the home, or give the Millers the insurance money so that they could make the home liveable. Mr. McCurley has committed waste by letting the home deteriorate for which he should be required to cure.

2. Each late fee charged Violated Mississippi Code § 75-17-27

Mr. McCurley charged the Millers a $50.00 late fee on four separate occasions. Each late fee was: [1] contracted for [2] collected before it was due; [3] in an excessive amount and [4] charged on the same alleged delinquent amount more that once. These are four separate violations of Mississippi Code § 75-17-27. The contract between the parties provided for a $575.00 that payment that was due on the 1st day of each month, and if a payment was not received prior to 5:00 p.m. on the 6th day of the month, a $50.00 late fee would be assessed. Further, three

of the four late fees were charged using the same alleged delinquent installment. This contractual provision violates **Mississippi Code § 75-17-27**, which provides that a **4%** late fee may be assessed only if a payment is **more than 15 days past due** and that a late fee may only be assessed **once on a delinquent amount.**

3. Mississippi Code § 75-17-25 establishes penalties for improper assessment of late fees

If an improper late fee is stipulated for or received, the penalty states that, "all interest and finance charges shall be forfeited, and may be recovered back."

The mere fact that Mr. McCurley contracted for an excessive late fee entitles the Millers to the penalties set out in § 75-17-25. Additional violations of § 75-17-27 occurred when the late fees were actually collected in an improper manner. In this case, the lower court declined to rule that Mr. McCurley had violated Mississippi Code § 75-17-27 and refused to award the penalties provided for by Mississippi Code § 75-17-25. This is even after Mr. McCurley's counsel stated, on the record, twice, that his client had violated the statute by charging too much in late fees. (T. p. 141, line 22-29, p. 142, lines 1-2; p. 159, lines 7-9). Mr. McCurley also admits that his contract violates the law (§ 75-17-27) concerning the charging of late fees. (T. p. 72, lines 8-11). Either of these admissions should result in the imposition of § 75-17-25, penalties.

4. Interest cap on *RESIDENTIAL* real estate is 10%

Mississippi Code § 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. The discount rate was not over 5% during the time period complained of herein, therefore, the interest rate at issue could not exceed 10%. (Exhibit 13).

Despite the fact that Mississippi Code § 75-17-1(4) limits the interest rate to be charged on *residential real estate* transactions to 10%, Mr. McCurley's contract provided for, and the Millers paid a 19% finance charge.

5. Mississippi Code § 75-17-25 provides penalties for improper assessment of interest and finance charges

Like the penalties for improper late fees, if excessive interest and finance charges are contracted for **or** received, Mississippi Code § 75-17-25 states the all "finance charges shall be forfeited, and may be recovered back whether the contract be executed or executory."

6. The lower court should not grant relief not requested

The lower court, awarded Mr. McCurley unrequested relief against the Millers. Mr. McCurley did not file a counterclaim nor did he request that the court grant him a setoff of any kind. The lower court opined that the Millers should receive the money they had paid Mr. McCurley but then gave Mr. McCurley an unrequested setoff of the rental value of the home, for the time the Millers occupied their residence. In addition, the lower court also granted Mr. McCurley an additional windfall of the $35,000.00 insurance proceeds.

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). Mr. McCurley offered to obtain insurance for the Millers, they just had to pay the premiums (T. p. 106, lines 3-14). The Millers paid the premiums to Mr. McCurley, but he never had them listed as loss payees/beneficiaries under the policy (Exhibit 7). It is important to remember that Mr. McCurley's contract required the Millers to obtain insurance on the property and **stated that: "Bank and Seller shall be named as loss payee(s) along with the Buyer(s)"** (Exhibit 1). However, once the home was destroyed, the Millers got no benefit for their premium payments. The Millers are in the shoes of intended beneficiaries, or at a very minimum, intended third-party beneficiaries under the policy.

Parker McCurley knew the terms and conditions of his Agreement. He also knew no insurance company would issue a policy in the name of the Millers. (T. p. 43, lines 11-29, p. 46, lines 24 -29, p. 47, lines 1-22). Mr. McCurley has purchased approximately 125 such properties. Of those 125 properties, approximately 20% are homes sold to individuals, like the Millers, under similar contracts. The others are

rentals (T. p. 19, lines 17-27). Renters do not pay taxes nor insurance premiums. (T. p. 48, lines 12-21).

The Millers were approximately three years into their twenty-five year note when, on August 29, 2005, Hurricane Katrina, for all practical purposes, totally destroyed their 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. He did, however, offer the Millers a new home that they could purchase for a higher price. (T. p. 109, lines 4-15). But, he was not going to give them any credit for the $25,415.77 they had paid him in the previous 34 months, nor was he going to apply any of the Shelter insurance money. Except, he did offer to sell the Millers a new home, giving them the equity earned during the purchase of the 1119 North 8th Avenue residence. Discounting the "new home" down payment by $230.51.

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. In that case, a bank agreed to keep cotton which was covered by trust deeds insured up

to the aggregate amounts of the loans. The bank failed in its duty and the Court ruled that the bank's obligation to the borrower regarding the procurement of insurance was that of an agent.

The case of *Sullivan v. Riley*, 558 So.2d 830, dealt with an Administratrix who purchased an insurance policy on a home owned by herself and her brothers and sisters, after the death of their parents. When the home was destroyed by fire, the Administratrix took the position that she had purchased the policy and was entitled to the insurance proceeds.

The *Sullivan* Court affirmed the Chancellor's ruling that the co-tenants were entitled to division of the insurance proceeds. The Administratrix had insured the property for its full value. The Administratrix held funds belonging to the estate, though she could not testify what funds were used to pay the premium, and the co-tenants were led to believe that the home was insured, even though they may not have been told that the insurance was for the benefit of all heirs.

Here, there is no question that the Millers paid the entire insurance premium to Parker McCurley. When Parker McCurley accepted premiums from the Millers, he became their agent for the procurement of insurance.

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. In the *Hancock Bank* case, the bank did not even collect the premium. Nevertheless, it agreed to procure insurance for Mr. Travis and the Court held that because it failed to procure such insurance, it became the insurer.

In the case of *Prince v. Louisville Municipal School District*, 741 So.2d 207, the Louisville School District purchased a medical policy to cover students who might be injured during school sponsored activities. It is important to note that in the *Prince* case, the school district paid the premium. This Court ruled that even though the school district was not liable for the injuries, Prince was an intended third party beneficiary under the policy. This Court allowed the case against the school district's insurer to proceed. While the facts of this case are different, the concept is the same. In this case, the Millers did not sue the insurer, simply because the insurer paid the amount it owed.

The Millers were ahead on their house note. At the time of the hurricane, the amortization schedule shows that the balance due on the Millers mortgage was $35,769.49. (Exhibit 11). Parker McCurley could have taken the entire $35,000.00, applied it to the house note, and delivered clear title to the property to the Millers, free of any lien. That did not happen.

Parker McCurley did not give the Millers credit for the amount collected from the insurer. Nor did he pay the lienholder, nor did he repair the home. Now the home has been exposed to the elements for four years and has deteriorated due to water, rain, insects, mold and rot.

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 home was woefully under insured. If anyone should be required to bear the burden of Mr. McCurley's negligence, it should be Mr. McCurley, not the Millers. The home was only insured for $35,000.00. This amount is obviously insufficient in that Shelter's own internal estimate listed the complete cost of home repairs at over $55,000.00 (Exhibit 9).

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

Mr. McCurley's actions have 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, Mr. McCurley should be required to pay the difference between the actual cost of repair and the original estimate to repair, subject to the payment of the balance of the note. Mr. McCurley should be required to forfeit his option to retain the insurance benefits and should be required to deliver the insurance proceeds to the Millers.

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

2A. Each late fee charged Violated Mississippi Code § 75-17-27

A late fee may be charged only if it is "more than 15 days past due." A late fee may not exceed the greater of 4% of the delinquency or $5.00, and it may only be charged one (1) time on a specific delinquency. A payment, due on the first day of the month, cannot be past due until the second day of the month and will not be more than (15) days past due until the seventeenth day of the month. Mr. McCurley charged four separate late fees, all four late fees were excessive (exceeding 4% of the delinquency) and were charged before they were "more than 15 days past due."

Mr. McCurley's contract provided that the house payment would be due on the first day of each month and, "Any payment not received in full by 5:00 o'clock P.M. on the 6th of each month shall be subject to a late charge of $50.00" (Exhibit 1). **The late fee provision is an executory clause that calls for illegal late fees.** McCurley conceded at trial on two separate occasion that he charged excessive late fees. (T.p. 141, lines 22-29; p. 141, lines 1-2)

The contract was further violated in that § 75-17-27, provides in part that, ". . . such late payment charge may be collected only one (1) time on a specific installment . . . ". Mr. McCurley charged repeated late fees on the same alleged delinquent installment. There is no dispute that the Millers owed a $3,000.00 down-payment. They paid $1,000.00 of the down-payment on November 4, 2002 and the $2,000.00

balance was to be paid by February 1, 2003. On February 13, 2003, the Millers paid $1,500.00 of the $2,000.00 remaining due. This left a $500.00 balance due from the down-payment. The arrearage upon which the first three late fees were calculated included this same $500.00 balance from the down-payment (Exhibits 2-1 through 2-43). According to the statute, Mr. McCurley was only allowed to include the $500.00 arrearage on the down-payment for the purposes of calculating the first late fee. Mississippi Code § 75-17-27 states in part:

> 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 such 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. (Emphasis added).

The only circumstance under which Parker McCurley would not be required to comply with this § 75-17-27, would be if he were licensed as a small loan company or if he were a national bank. He is not a small loan licensee and he is certainly not a national bank. *See Smiley v. Citibank*, 517 U.S. 735, 116 S.Ct. 1730.

2B. Mr. McCurley and his Counsel admitted on the record, that McCurley violated the late-payment statute, § 75-17-27.

In the first admission counsel opposite said, "It is obvious that the amounts charged three of the four times were in excess of what the statute permits." (T. p. 141, line 22-29; p. 142, lines 1-2;). The second admission, counsel opposite said, "Granted, Your Honor, the late penalties - - three of the late penalties were for more that what the

statute allows." (T. p. 159 lines 7-9). Mr. McCurley also admits that his contract violates the law (§ 75-17-27) concerning the charging of late fees. (T. p. 72, lines 8-11). When Mr. McCurley and his counsel, admit violations of § 75-17-27, § 75-17-25 penalties demand that, **"all interest and finance charges shall be forfeited, and may be recovered back,".**

2C. Mississippi Code § 75-17-25 establishes penalties for improper assessment of § 75-17-27 late fees

If an improper late fee is stipulated for or received, the penalty states that, "all interest and finance charges shall be forfeited, and may be recovered back." The mere fact that Mr. McCurley contracted for an excessive late fee entitles the Millers to the penalties set out in § 75-17-25. Further, the improper late fees were actually collected in an improper manner, as admitted by Counsel opposite. (T. p. 141, lines 22-29; T. p. 159 lines 7-9). Mr. McCurley also admits that his contract violates the law (§ 75-17-27) concerning the charging of late fees. (T. p. 72, lines 8-11). Even after these admissions by Counsel and Mr. McCurley, the lower court declined to rule that Mr. McCurley had violated Mississippi Code § 75-17-27 and refused to award the penalties provided for by Mississippi Code § 75-17-25. The words **"all interest and finance charges shall be forfeited**," stated in § 75-17-25, do not leave the lower court with any discretion once a violation of § 75-17-27 is proven in open court and there were numerous violations of Code § § 75-17-27 and 75-17-1(4).

2D. The penalties for violating the provisions of Mississippi Code § 75-17-27 are set out in Mississippi Code § 75-17-25, which states in pertinent part:

> **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, and may be recovered back,* whether the contract be executed or executory.** If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit. (Emphasis added).

When Counsel opposite admits, twice, on the record that his client, Parker McCurley, has charged too much in late fees (T. p. 141, lines 22-29; p. 141, lines 1-2) and Mr. McCurley also admits that his contract violates the law (§ 75-17-27) concerning the charging of late fees. (T. p. 72, lines 8-11), it would seem, that the question of whether § 75-17-25 penalties should be assessed for a violation of § 75-17-27, is settled and Mr. McCurley forfeits all interest and finance charges to the Millers.

2E. Mississippi case law addressing §§ 75-17-25 and 75-17-27

In the case of *Rea v. Breakers*, 674 So.2d 496, which was a case of first impression for this Court, the Court stated:

> This Court concludes that the 20% late payment charge for a delinquent carrying charge is usurious and violates Section 75-17-27 which expressly states "[a] late payment charge, not exceeding Five Dollars $5.00), or four percent (4%) of the amount of any delinquency, whichever is greater, if contacted for in writing shall not be considered a finance charge ..." Miss. Code Ann. § 75-17-27 (1972).
>
> Section 75-17-25 expressly states:
>
> "[t]he term "finance charge" as used in this section ... [and] Section 75-17-27 ... means the amount or rate paid or payable, directly or indirectly, by a debtor ... incident to or as a condition of the extension of credit, including but not limited to ... carrying charges ... or any other cost or expense of the debtor for services rendered or to be rendered to the debtor in making, arranging or negotiating ...

an extension of credit ..."

We find that the late charges in question violate the usury statutes. 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 amounts set forth therein. Here, the late charge exceeds the amount, and must be computed as a part of the total finance charge.

The late charges in this case exceed the statutory limit. The penalty is set out by Section 75-17-25 which provides in part:

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. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit.

The 20% late charge is usurious. We therefore reverse and render the chancellor's decision and remand this case for a computation of the excess finance charge collected by the Association, the amount of refund due the Reas and reasonable attorneys fees owed the Reas.

In this case, the Millers paid finance charges that should be refunded to the Millers in accordance with the statute.

2F. Mr. McCurley's two accountings

Mr. McCurley's accountings do not match the receipts McCurley gave the Millers at the time they made their house payments. In fact, the Millers objected to the introduction of Mr. McCurley's second accounting for this very reason (T. P 63, lines 15-29, and p. 64 line 1).

Mr. McCurley's practice was to issue receipts to the Millers when they paid their house note, insurance payments and taxes. The Millers maintained these receipts and the same are in evidence as Exhibits 2-1 through 2-43. The receipts clearly establish

the fact that when a payment, of any kind was made, a receipt showing the "Account", the "Payment:" and "Bal. Due" was given to the Millers. Those receipts, as of the date Katrina destroyed the home on August 29, 2005, show that the Millers had paid Mr. McCurley $25,415.77 (Ex. 2-1 - 2-43). The total amount for house notes and related payments stipulated to were:

$19,550.00	Principal and Interest (R. 71, Stipulation 18)
3,000.00	Down-payment (R. 71, Stipulation 10)
1,014.50	Insurance from 2002-2005 (R. 71, Stip. 11, 13, 15 and 17)
1,508.27	Taxes for 2002-2004 (R. 71, Stip. 12, 14 and 16)
$25,072.77	

There is a dispute of whether the land taxes, which were not then due when Hurricane Katrina hit, August 29, 2005, should be calculated into the amount owed by the Millers on their house note, at the time of the hurricane. Mr. McCurley's calculates this pro-rated amount to be $477.09. If Mr. McCurley is allowed to apply the pro-rated land taxes to the amount owed by the Millers, then the Millers should, in all fairness, be allowed to add all of the house and related payments made on their residence, located on 1119 North 8th Avenue. The house note and related payments owed by the Millers would be:

$19,550.00	Principal and Interest (R. 71, Stipulation 18)
3,000.00	Down-payment (R. 71, Stipulation 10)
1,014.50	Insurance from 2002-2005 (R. 71, Stip. 11, 13, 15 and 17)
1,508.27	Taxes for 2002-2004 (R. 71, Stip. 12, 14 and 16)
$25,072.77	
+ 477.09	Pro-rated land taxes of 2005, not stipulate to.
$25,549.86	Total claimed owed by Mr. McCurley.

The last house note, paid by the Millers, on their residence, located on 1119 North 8th Avenue was made on September 30, 2005, in the amount of $575.00. (Exhibit 2-43). The parties have stipulated that the total amount paid by the Millers, when

Hurricane Katrina his was, $25,415.77, (Exhibit 15, stipulation 19).

Adding the September 30, 2005 payment to the total amount paid by the Millers, the figures are as follows:

$25,415.77	Total paid by Millers before hurricane (R. 71, Stipulation 19)
+ 575.00	Amount paid by Millers after hurricane (Exhibit 2-43)
$25,990.77	Total amount paid by Millers to McCurley.

The proof shows the
$25,990.77
-25,549.86
$ 440.91

The Millers were ahead by $440.91 when Mr. McCurley received the $35,000.00 insurance check from Shelter Insurance. He could have credited the $35,000.00 to the amount owed by the Millers, as represented on the amortization schedule as of August 1, 2005, in the amount of $35,769,49. (Exhibit 11).

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

3A. Mr. McCurley violated Mississippi Code § 75-17-1(4)

Mr. McCurley violated Mississippi Code § 75-17-1(4) by charging a finance charge in excess of 10 % on residential real estate. Mississippi Code § 75-17-1(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. The discount rate was never over 5% during the time period complained of herein, therefore, the finance charge at issue could not exceed 10%. (Exhibit 13).

Mr. McCurley's contract provided for, and the Millers paid a 19% finance charge.

(Exhibit 1). Despite the fact that Mississippi Code § 75-17-1(4) limits the finance charge to be charged on *residential real estate* transactions to 10%.

The only circumstance under which Parker McCurley would not be required to comply with 75-17-1(4), would be if he were licensed as a small loan company or if he were a national bank. He is not a small loan licensee and he is certainly not a national bank. *See Smiley v. Citibank*, 517 U.S. 735, 116 S.Ct. 1730.

3B. McCurley charged a finance charge of 19%

The contract signed by the parties for the purchase of this home provided for a 19% finance charge. (Exhibit 1). Because Mr. McCurley's contract called for an interest rate over the 10% authorized by statute, all finance charges must be returned to the Millers. Mississippi Code § 75-17-1(4) states:

> **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.

3C. Mr. McCurley financed the purchase of the residential real estate.

The contract between the parties provides for owner financing of property. (T. 78 , lines 16-21). Mr. McCurley admits that he also has rental property and that his rental agreements do not provide for the payment of taxes or insurance, and that the renters are not responsible for repairs (T. p. 48, lines 12-21). The agreement between the parties refers to Parker McCurley as the "Seller" and Joe and Alice Miller as the "Buyers" (Exhibit 1). It provides for a down-payment, and 300 monthly installments of $575.00 per month (Exhibit 1). It further provides that the Buyers are responsible for the payment of taxes, insurance and repairs (Exhibit 1).

The Miller's payment of the house note may not be a traditional mortgage with a Deed and Deed of Trust, but it is the financing of the purchase of residential real property. It is, at the very least, a loan or advance on residential real property or a house note.

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". (T. p. 18, line 22, T. p. 28, line 10, T. p. 32, line 25 and T. p. 65, line 17.) Another bit of information which is very telling in this situation is Exhibit 11, which is an amortization schedule provided to the Millers when they signed the Agreement to purchase the property. Quite simply, if this were anything other than a loan, mortgage or advance, there would be no amortization schedule. Amortization schedules are provided to help borrowers understand loans, mortgages and advances.

In the lower court's ruling on the Miller's Motion for Summary Judgment, the court mentioned the case of *Dunlap Acres, Ltd. V. Intervest Development Corporation*,

2006 WL 2474318 (Miss. App.). In that case, the Appeals Court discussed § 75-17-1(5) and basically mentioned in dicta that this code section permitted parties to contract for an interest rate higher than 15%.

This case is easily distinguishable from *Dunlap,* which dealt with two corporations that had a contract to convey title to some apartment buildings which were being purchased as an investment. § 75-17-1(4) is specific to the purchase of residential real estate. *Dunlap* does not apply here.

3D. Though not controlling Attorney General Opinions can be persuasive

It is an established principle of statutory construction that statutes having specific and special application will take precedence over a general "catch-all" statutes. This established principle of statutory construction stands for the proposition that statutes having specific and special application will take precedence over general statutes covering a broader or wider range of subject matter of the same nature of the more specific statute.

In 1994, the Attorney General addressed the question of § 75-17-1(5) directly and opined that § 75-17-1(5) was a general statute and that specific statutes such as § 63-19-43 (motor vehicle interest rates) and § 75-17-23 (mobile home interest rates) were specific and controlled over § 75-17-1(5) when the collateral for the loan was a motor vehicle or mobile home. The same principle applies here. Attorney General Opinion, 1994 WL 410631, Miss. A.G., states in part:

It is an established principle of statutory construction that statutes having

> specific and special application will take precedence over a general statute covering a broader or wider range in subject matter of the same nature of the more specific statute.

This principle mandates that the more specific statutory provisions of § 75-17-1(4) control over the "catch all" provisions of § 75-17-1(5). If § 75-17-1(5) were the be all end all provision of § 75-17-1, then sections (1) through (4) would have been repealed and there would have been no reason for the legislature to enact § 75-17-1(6), which addresses the caps for interest rates on leased motor vehicles and trade-ins. § 75-17-1(6) was added to the code section after the passage of § 75-17-1(5), and clearly shows the legislatures intent to address interest rate limitations on a specific classes of property.

3E. Mississippi Code § 75-17-25 provides penalties for improper assessment of interest and finance charges

Like the penalties for improper late fees, if excessive interest and finance charges are contracted for or received, the Code § 75-17-25 states the all "finance charges shall be forfeited, and may be recovered back whether the contract be executed or executory." Again, the Millers are not asking that the penalty be assessed twice, but rather that the penalty should be assessed once for two reasons.

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

4A. The lower court erred by granting Mr. McCurley relief he never requested

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.

The lower court opined that the Millers should receive all money they had paid Mr. McCurley. The lower court then all but negated the Miller's award by granting Mr. McCurley an unrequested setoff of the reasonable rental value for the time the Millers occupied the residence. Then, the lower court granted Mr. McCurley an additional windfall of the $35,000.00 insurance proceeds paid by Shelter Insurance Company for the loss of the home. Mr. McCurley did not request a set-off nor file a counterclaim of any kind.

4B. Rule 8, 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."** It would seem that Set-off clearly is a "matter constituting an avoidance or affirmative defense."

Thus, the Chancellor may not apply an unrequested set-off of reasonable rental value when no set-off was claimed. Set-off requires affirmative pleadings. There was no pleading in this case putting a "set-off" at issue. *See* Mississippi Rules of Civil Procedure Rule 8(c), Affirmative Defenses.

4C. Rule 9, Mississippi Rules of Civil Procedure

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.

4D. Rule 54, Mississippi Rules of Civil Procedure

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.

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

5A. Because the Millers paid the insurance premiums, they should have received the benefit of the insurance proceeds. At the time the proceeds were paid to Mr. McCurley, he should have credited this amount to the Millers' account. They then could have paid $769.49, the remaining balance after payoff, and received title to the home. Mr. McCurley did not credit the Millers' account and allow them this option. At this point, the house has not been properly protected from the elements and it has continued to deteriorate and as a result it is now almost worthless. The Millers should be awarded the $35,000 in insurance benefits for which they paid the premium. At the very least, the Millers should be given the option of whether they wish to accept the $35,000.00 in cash or pay the $769.49 and receive title to the property and Mr. McCurley should be held responsible for the waste he cause. The option should not be Mr. McCurley's.

5B. Mr. McCurley should be required to forfeit and the Millers should recover back the finance charges. There are two bases for recovery of finance charges. The first basis is supported by four reasons: [1] Mr. McCurley contracted for excessive late fees; [2] later received excessive late fees from the Millers; [3] charged those late fees prematurely and [4] more that one late fee was charged on the same claimed delinquency. The second basis for recovery of finance charges is supported by two reasons: [1] Mr. McCurley contracted for and [2] later received finance charges at a rate of 19%, in violation of Code 75-17-1(4) which limits the interest rate at 10%.

The Millers hasten to point out that they are not asking for a refund of twice the amount of the finance charges that they have paid. The Millers are asking for a refund of the finance charges for two legitimate bases supported by five separate reasons.

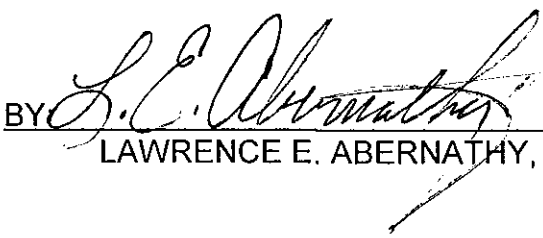
5C. The Millers requested attorneys' fees in their Complaint. In its opinion, the lower Court stated that there was no provision for attorneys' fees in a breach of contract case when there was no award of punitive damages. What the lower court failed to recognize is that the penalties which should have 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.

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. They should be allowed to choose whether to receive this $35,000.00 in cash, or receive title to the property. The Millers should also receive a refund of all finance charges paid to Mr. McCurley for two reasons (1) the late fees charged were excessive and did not comply with the timing set out by the statute and (2) the interest fee exceeded that provided for by Mississippi Code § 75-17-1(4). 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.

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 4th day of September, A.D., 2009.

L. E. Abernathy III

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