IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2009-CA-00660

MICHAEL WHALEN — **APPELLANT**

V.

GREGORY BISTES, JR. AND GAY BISTES PALMISANO — **APPELLEES**

BRIEF OF APPELLEES

On appeal from the Chancery Court of Harrison County, Mississippi, First District

EDWARD O. MILLER (MSB [redacted]
ATTORNEY OF RECORD FOR APPELLEES
MILLER & SMITH
1922 23rd Avenue
Gulfport, Mississippi 39501
Telephone (228) 864-2515
Facsimile (228) 868-7702

HOLLIE MILLER (MSB [redacted]
ATTORNEY ON BRIEF
1739 University Avenue, #230
Oxford, Mississippi 38655
Telephone (662) 816-1003
Facsimile (662) 915-7617

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2009-CA-00660

MICHAEL WHALEN **APPELLANT**

V.

GREGORY BISTES, JR. AND **APPELLEES**
GAY BISTES PALMISANO

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1) Michael Whalen, Appellant;
2) Gregory Bistes, Jr., Appellee;
3) Gay Bistes Palmisano, Appellee;
4) Honorable James Persons, Chancellor, Eighth Chancery Court District of Mississippi in Gulfport, Harrison County, Mississippi;
5) Edward O. Miller, Miller & Smith, Gulfport, Mississippi, Attorney for Appellees;
6) Hollie Miller, Oxford, MS, Attorney on Brief for Appellees
7) Walter ("Wes") Teel, former attorney for Appellees;
8) D. Scott Gibson, Gulfport, Mississippi, Attorney for Appellant.

Respectfully submitted,

EDWARD O. MILLER (MSB [redacted])
ATTORNEY OF RECORD FOR APPELLEES
MILLER & SMITH
1922 23rd Avenue
Gulfport, Mississippi 39501
Telephone (228) 864-2515
Facsimile (228) 868-7702

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

I. STATEMENT OF THE ISSUES

A. **The Chancellor Correctly Determined that Appellant Acted Illegally, Came into Court with Unclean Hands, and is Not Entitled to Relief.**

B. **The Chancellor Correctly Determined That There Was No Contract Because of Appellant's Undisclosed Dual Agency.**

C. **Another Reason That There is No Contract is Because the Alleged Purchaser, Appellant Whalen, Has Not Deposited Earnest Money, and any Alleged Contract Fails For Lack of Consideration.**

D. **The Appellant's Appeal is Frivolous and Appellant Should Be Required to Reimburse Appellees' for their Attorney's Fees and Costs.**

II. STATEMENT OF THE CASE

A. Procedural History

Appellant/ Plaintiff sued for specific performance of an alleged contract to purchase and sell land and for breach of contract. *Complaint for Specific Performance,* R. at 1. Appellees own the land, which is a commercial lot in Long Beach, Mississippi. Appellees answered the Complaint denying that a contract to sell the land existed because no promissory note for $5,000.00 was ever delivered to Appellees, and further, the Purchaser did not respond to the Appellees' offer to sell by the offer's deadline of May 1, 2003, time being of the essence. *Answer and Counterclaim*, R. at 23-27.

By letter dated July 1, 2003, Appellant, who was acting as a real estate agent between the parties (though not licensed to do so), notified Appellees that he had accepted an assignment of the Purchaser's rights and now he wanted to purchase their property. *Complaint,* R. at 2-3. On July 8, 2005, Appellant – who claims to be the real estate agent for the Appellees as well as the purchaser of their property through an assignment – sues the Appellees for specific performance and breach of contract. *Complaint*, R. at 1-5.

Appellees answered and filed a counterclaim against Appellant alleging fraud, illegality and lack of a contract. *Answer and Counter-Claim,* R. At 23-27. The Appellees asked the Court to remove the cloud of title caused by Appellant filing a *lis pendens* claim on the property, recording a false instrument in the Chancery Court's land deed records, and filing this lawsuit. *Id.* at 25-26. Appellees seek compensatory and punitive damages from the Appellant for the time period since 2003 that Appellant's frivolous contract claim has prevented Appellees from selling their property, using it as collateral, or otherwise enjoying their property, and Appellant's actions have interfered with Appellees' business. *Id.* at 26.

Chancellor Persons correctly granted summary judgment to Appellees finding that the Appellant had no claim for specific performance or breach of contract because there was no contract to sell the land for the following two reasons: (1) a signed contract with tender of a $5,000.00 promissory note constituting earnest money had not been delivered to the Appellees by the contract deadline of May 1, 2003; and (2) Appellant was not a licensed real estate agent in Mississippi as he represented himself to be to Appellees; he was not permitted under the laws of the state of Mississippi to transact business while on inactive status as a realtor, and therefore he came into Court with unclean hands and is not entitled to relief. *Order Granting Defendants' Supplemental Motion for Summary Judgment*, R. at 215-216.

B. Facts

On April 25, 2003, Appellant Michael Whalen approached Appellee Gregory Bistes, Jr. and stated that he was a real estate agent for the Bradshaw Family Limited Partnership, and the partnership was interested in purchasing the Appellees' lot in Long Beach. *Defendant's Supplemental Motion for Summary Judgment*, R. at 70. Appellant Whalen presented Appellee Gregory Bistes with a real estate contract for the lot that had been prepared by Whalen which proposed that the Appellees sell the land to the Bradshaw Family Limited Partnership for $84,800.00 plus a six percent realtor's commission. *Agreement to Purchase and Sell*, R. at 6; *Deposition of Whalen*, R. at 86. The document prepared by Appellant Whalen clearly states: **"If this offer is accepted, Purchaser must deposit a Five Thousand ($5000.00) Dollar Promissory Note with the Seller (Seller's agent)."** The document also states that the offer "**remains binding and irrevocable through 5/1/03"** and **"Time is of the essence."** *Id.*, R. at 6,8 (emphasis added). Appellant handwrote into the instrument: "If sale is consumated [sic] seller will pay a 6% real estate commission to Michael Whalen Realty Investments. *Agreement to Purchase and Sell*, R. at 9.

On April 25, 2003, Appellee Greg Bistes signed the document offering to sell the land to the Bradshaw Family Limited Partnership. *Agreement to Purchase and Sell,* pg. 9-10. Appellee Greg Bistes agreed to pay Appellant Whalen a commission, not because he thought Whalen was his agent, but because he thought Whalen was a licensed realtor and because he suggested a buyer. *See Stockstill v. Gammill,* 943 So.2d 35, 44 (Miss. 2006). There was no express agreement that Appellant Whalen was Appellees' agent for the potential deal. Greg's sister, Appellee Gay Bistes Palmisano, co-owns the property. *Deposition of Whalen,* R. at 96. She was not present to sign the document, but Appellee Gregory Bistes told Appellant Whalen that he had authority to act on her behalf. *Deposition of Greg Bistes*, R. at 199-201.

The contract deadline of May 1, 2003 came and went without Appellees hearing anything more about the potential sale and without Appellees receiving a $5,000.00 promissory note in earnest money or a signed contract. *Deposition of Greg Bistes*, R. at 99, 101. It was not until May 10, 2003 that Appellant Whalen approached Appellee Greg Bistes at his workplace. *Id.; Affidavit of Nicole Boyce Tonglet*, R. at 97; *Affidavit of Julie Boyce Autin*, R. at 98. Appellee Greg Bistes told Appellant Whalen that the offer to sell the property had expired on May 1, 2003. *Id.* He explained that he had not heard from Appellant and that the offer was null and void. *Deposition of Greg Bistes*, R. at 100. Appellee Greg Bistes testified that he had had "enough of the bull" with Appellant Whalen and asked him to leave. *Id.* Appellant Whalen became visibly upset and told Appellee Greg Bistes, "I'll show you," as he stormed out of the business. *Affidavits of Tonglet and Autin*, R. at 97-98.

Appellant Whalen testified that after the confrontation with Appellee Greg Bistes, he [Whalen] met with Tom Bradshaw of the Bradshaw Family Limited Partnership. *Deposition of Whalen*, R. at 91. Bradshaw and Appellant Whalen decided to record the instrument that had been

signed by Appellee Greg Bistes, despite Whalen's and Bradshaw's clear knowledge that it was the Bisteses' position that the offer had expired. *Id.* This instrument clearly was intended to slander the Appellees' title. The instrument showed a signature by Bradshaw allegedly signed April 30, 2003. *Agreement to Purchase and Sell,* R. at 9-10. Appellant Whalen recorded the instrument in the Chancery Court of Harrison County on May 12, 2003, with the only notarized signature on the instrument being **his own**, which was notarized by **himself**, when he was not even a party to the alleged contract! *Answer and Counter-Claim,* R. at 25; *Deposition of Whalen*, R. at 91. A suit was instituted by Joe Meadows, the attorney for the Board of Supervisors for Harrison County, to remove the wrongly recorded instrument from the land records. *Answer and Counter-Claim*, R. at 25. Appellee Greg Bistes testified that as soon as the title on the Bistes land was cleared up due to the suit filed by Meadows, Appellant Whalen went even further to tie up the land by filing a *lis pendens* claim on the property and by filing this suit for specific performance and breach of contract. *Deposition of Greg Bistes, R. at 104.* Appellant Whalen also had Gulf Title Company, Inc. write a letter to the Appellees stating that the Bradshaw Family Limited Partnership was ready to close and that closing would be on June 27, 2003. *Letter from Gulf Title Company, Inc.*, R. at 19.

Then, Appellant Whalen secured an alleged assignment of the Bradshaw Family Limited Partnership's rights to the alleged deal. Tom Bradshaw, on behalf of the partnership, sent a letter dated July 1, 2003 signed by him and Appellant Whalen stating that Bradshaw Family Limited Partnership was assigning its rights under the alleged contract to Appellant Whalen. *Letter from Bradshaw to Greg Bistes,* R. at 108.

Appellant Whalen's position is that he is not only the real estate agent for both parties in the deal, he is also the buyer. In other words, Appellant Whalen — who claims to be the agent of the Appellees — is now suing them! — and he wants the property plus six percent commission.

Deposition of Whalen, R. at 92. Appellant Whalen stated in his deposition:

> Q: When Bradshaw assigned his rights as purchaser in the contract to you, do you still consider yourself an agent and seller.
> A: I don't know. I don't know.
> . . . .
> Q: At what point in time did you tell Greg Bistes that you were the new purchaser, that you were assigned the rights?
> A: I never did.

Deposition of Whalen, R. at 92-93.

At all times, Appellant Whalen represented himself to Appellee Greg Bistes as being a licensed real estate broker in the State of Mississippi in good standing and on active duty status. *Deposition of Whalen*, R. at 85. Appellant Whalen wrote into the instrument entitled Agreement to Purchase and Sell: "If sale is consumated [sic] seller will pay a 6% real estate commission to Michael Whalen Realty Investments." *Agreement to Purchase and Sell,* R. at 9.

The truth of the matter, however, is that Appellant Whalen was not licensed as a real estate agent in Mississippi when he approached Appellee Greg Bistes on April 25, 2003 about selling the Long Beach lot to Bradshaw Family Limited Partnership. The Administrator of the Mississippi Real Estate Commission, Robert E. Praytor, supplied an affidavit for this matter testifying that Appellant Whalen was placed on "inactive status" from "March 21, 2002 until May 20, 2008." *Affidavit of Robert E. Praytor,* R. at 105-06. Praytor also testified that "all persons conducting real estate transactions in the State of Mississippi have to be licensed and on active status to receive any compensation or a valuable consideration from a real estate license as required by Sections 73-35-1 and 73-35-2 of the Mississippi Code." *Id.*

Appellant Whalen claims that he is a dual agent – the agent of Bradshaw Family Limited Partnership and the agent of Appellees. However, he does not deny that he did not have any of the parties to alleged deal sign a dual agency agreement as required by the Mississippi law. *Deposition*

of Whalen, R. at 87-88, 95; MREC Dual Agency Form, R. at 177. And nowhere on the alleged contract is there a statement over the signatures of the parties to the contract stating who the broker, Appellant Whalen, represents, which is a violation of the MREC Rules. *Mississippi Real Estate Commission regulations,* Rule IV.B.5, R. at 140.

However, Appellant Whalen contends that his failure to follow the rules of real estate law in Mississippi does not negate the common law of dual agency. Appellant points to the language in the instrument signed by Appellee Greg Bistes which states: "If this offer is accepted, Purchaser must deposit a Five Thousand Dollars ($5,000.00) Promissory Note with the Seller (Seller's agent)." *Agreement to Purchase and Sell*, R. at 6. Appellant Whalen argues that he is the agent of the Appellees — which he contends is a separate issue from the fact that he was not licensed as a real estate agent and despite the fact that he was not complying with the State's real estate transaction laws:

> Q: So you've had this promissory note in your possession since it's been recorded, I assume?
> A: Yes?
> Q: Okay.
> A: I was supposed to hold it per the agreement.
> Q: What part of the agreement says you were supposed to hold it?
> A: Can I see the agreement. Okay. "If this offer is accepted, Purchaser must deposit a 5,000 note – promissory note with the Seller's agent. **I'm the Seller's agent. It was deposited with me.**

Deposition of Whalen, R. at 207 (emphasis added). The Chancellor correctly rejected this argument, finding: "Regardless of the law of dual agency agreement of the Mississippi Real Estate Commission, a party dealing with an agent is entitled to know all of the principals that that agent represents in that particular transaction." *Transcript of Summary Judgment Hearing,* pg. 54, ln. 18-24. It is undisputed that Appellant Whalen did not make a full disclosure. At deposition, Appellant Whalen testified:

Q: Were you representing both of these parties in this transaction?
A: Yes.
Q: Did you disclose that to them?
A: I told them that the commission, you know, was going to be added to the deal. I didn't go into detail who's paying this commission. But when you added it on, the – you know, I've got it written there the word. It says "Seller," and then it says that the Seller will agree.
Q: And you prepared this contract?
A: Yes.

Deposition of Whalen, R. at 89. The Chancellor correctly found "[t]hat a dual agency existed between Plaintiff Whalen and the buyer and Plaintiff Whalen and the Sellers/Defendants and Plaintiff failed to disclose that fact. Therefore, there was no delivery of the contract to the buyer. That no enforceable contract existed between the parties, and Plaintiff Whalen, as assignee of the buyer, has no cause of action against Sellers/Defendants." *Order,* R. at 216.

III. SUMMARY OF ARGUMENT

Appellant Whalen acted unlawfully and fraudulently by engaging in and acting in the capacity of a real estate agent within this state when he did not have an active license to do so, and, in this suit, Appellant is trying to profit from his misconduct. The Chancellor correctly found that no contract existed where the unlicensed Appellant attempted to broker a real estate deal for sale of Appellees' property. Appellee did not have the parties sign a dual agency disclosure form as required in Mississippi, the alleged contract does not state who Appellant represents in the deal as is also required in Mississippi, and the Appellant does not dispute that he did not follow the laws of real estate in Mississippi during this attempted transaction.

The offer was signed by Appellee Greg Bistes on April 25, 2003, but the offer expired on its face on May 1, 2003. There is no dispute that a promissory note and signed contract were not physically given to the Appellees by the offer's expiration. Appellant asks this Court to find that there is a contract anyway because he alleges that the buyers deposited the contract and note with him before the offer's expiration, and since he is the Appellees' agent, delivery to him is imputed to Appellees.

Appellant would like for the Court to ignore the fact that he acted illegally, fraudulently, and with unclean hands when he secured the offer from Appellee Greg Bistes. All of a sudden, the alleged "real estate agent" who approached Appellee Greg Bistes is now the purchaser. He is wearing two hats. He claims to be Appellees' agent, but now he is suing his alleged principals and has tied up their property since 2003. Appellant asks the Court to give him the benefits of being an agent under the common law without requiring him to uphold the fiduciary duties that common law agency involves. There simply was never a contract to sale Appellees' property for the following reasons:

1. The contract would be illegal and in violation of the real estate laws and regulations of Mississippi;
2. The offer was secured by Appellant through illegality, fraud, and unclean hands;
3. The offer was not accepted by its expiration date of May 1, 2003;
4. The Appellees' received no $5,000.00 promissory note before the offer expired; and
5. Appellant's alleged assignment contradicts any argument that he was an agent of Appellees.

IV. ARGUMENT

A. The Chancellor correctly determined that the Appellant Acting Illegally, Came to Court with Unclean Hands, and is Not Entitled to Relief.

The Mississippi Supreme Court has long recognized the maxim that "[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Morrissey v. Bologna*, 240 Miss. 284, 300-01, 123 So.2d 537, 545 (1960). Nearly a century ago, this Court laid out the rule in Mississippi: "If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him. . . . The principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or illegal act." *Western Union Telegraph Co. v. McLaurin*, 66 So. 739, 740 (1914). This rule in Mississippi encompasses contract cases as well, preventing relief on a claim based on a contract that is illegal or against our state's public policy. *Price v. Purdue Pharma Co.*, 920 So.2d 479, 484 -485 (Miss. 2006).

Appellant Whalen is barred from any relief from this Court because he is seeking relief on an alleged contract grounded upon his illegal acts and fraud. Appellant Whalen posed in the capacity of a realtor within this State without having an active license to do so and attempted to broker a real estate deal between Appellees and Bradshaw Family Limited Partnership and to recover a six percent commission. *Deposition of Whalen*, R. at 86. When the deal fell through because the offer was not accepted before it expired, Appellant Whalen took an alleged assignment of the purchaser's rights and sued for specific performance and breach of contract. So, the Appellant, who began the transaction alleging to be the real estate agent for both the buyer and seller, is now the purchaser and is suing who he alleges to be his own principals, Appellees.

It is undisputed that Appellant Whalen's license was inactive when he approached Appellee Greg Bistes on April 25, 2003 about the potential sale of the property. The Administrator of the

Mississippi Real Estate Commission, Robert E. Praytor, testified that Appellant Whalen was placed on "inactive status" from "March 21, 2002 until May 20, 2008." *Affidavit of Robert E. Praytor,* R. at 105-06.

Mississippi Code Ann. § 73-35-1 clearly states:

> [I]t shall be unlawful for any person, partnership, association or corporation to engage in or carry on directly or indirectly, or to advertise or to hold himself, itself or themselves out as engaging in or carrying on the business, or act in the capacity of, real estate broker, or a real estate salesperson, within this state, without first obtaining a license as a real estate broker or real estate salesperson as provided for in this chapter.

Because Appellant Whalen was acting unlawfully when he posed as a licensed real estate agent during his dealings with Appellees, Appellant Whalen cannot maintain this suit to profit from his illegal and fraudulent activity. Miss. Code Ann. § 73-35-33 states:

> (1) No person, partnership, association or corporation shall bring or maintain any action in any court of this state for the recovery of a commission, fee or compensation for any act done or services rendered, the doing or rendering of which is prohibited under the provision of this chapter for persons other than licensed real estate brokers, unless such person was duly licensed hereunder as a real estate broker at the time of the doing of such act or the rendering of such service.

Based on Sections 73-35-1 and 73-35-33 alone, Appellant's case should be thrown out of court. Appellant was acting unlawfully by posing as a realtor, and he is statutorily prohibited from maintaining an action in court. It is telling that Appellant only once in his lengthy brief mentions the glaring and undisputed fact that he was not licensed to practice as a real estate agent when he attempted to broker the sale of Appellees' property. *Appellant's Brief,* p. 3. Posing as a licensed real estate agent to Appellee Greg Bistes was both fraudulent and illegal, but Appellant posits that his fraudulent and illegal acts should have no bearing on the issue of whether or not there is a contract. Tellingly, Appellant **cites no case law** to substantiate this argument because there is no

such law. The law of this State is that "if a plaintiff requires essential aid from an illegal transaction to establish his case, he has no case." *Capps v. Postal Telegraph-Cable Co.,* 19 So.2d 491, 493 (Miss. 1944). Even assuming that there was a contract – which Appellees' wholeheartedly deny — the contract would have been voided and nullified by Appellant's fraud and illegality in securing the offer. *See Lutz Homes, Inc. v. Weston,* 19 So.3d 60, 62 (Miss. 2009). The Appellant's case must fail because Appellant **nowhere** in his brief addresses why he should not be barred from recovery by the doctrine of unclean hands. This doctrine bars the Appellant's recovery, and Appellant's appeal should be denied.

"The doctrine of unclean hands provides that 'he who comes into equity must come with clean hands.' " *Pruitt v. Payne,* 14 So.3d 806, 812 (Miss.App. 2009). "[N]o person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by wilful inequity.... In sum, 'whenever a party seeks to employ the judicial machinery in order to obtain some remedy and that party has violated good faith or some other equitable principle, 'the doors of the court will be shut against him' and 'the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.'" *Id.* (internal citations omitted). "The doctrine of unclean hands prevents one, who comes into court with unclean hands, from asserting claims and affirmative defenses." *Id.*

At the summary judgment hearing, the Chancellor correctly found:

> Mr. Whalen was not permitted under the laws of Mississippi to do what he did here. The fact that he's – he was inactive is in effect the same as being without license. Mr. Whalen now comes into court seeking equity in the form of a complaint for specific performance, and the Court finds he's in court without clean hand – with unclean hands. He participated in this transaction, provided for a commission, represented both parties without disclosing that to both parties at least initially and now is in the position of the buyer by virtue of some form of an assignment. And the Court finds that under the long established equitable doctrine of coming into court seeking

> equity with unclean hands he meets that test, and the Court will not grant him equity and therefore enters judgment in favor of the defendants."

Transcript of Summary Judgment Hearing, pg. 55. Illegality, fraud, and the "clean hands doctrine" prevents Appellant Whalen from obtaining equitable relief when he is guilty of willful misconduct in the transaction at issue. *Farrior v. Kittrell,* 12 So.3d 20 (Miss.App. 2009).

B. The Chancellor Correctly Determined That There Was No Contract Because of Appellant's Undisclosed Dual Agency

The Chancellor ruled that "delivery of the contract to Mr. Whalen by the seller was not delivery to the buyers because of Mr. Whalen's undisclosed dual agency." *Letter of Chancellor Persons*, R. at 214; *Order,* R. at 216.

The fact of the matter is that — even aside from the fact that the offer was secured unlawfully, fraudulently, and with unclean hands — the Appellee Greg Bistes's April 25, 2003, offer to sell the property to Bradshaw Family Limited Partnership expired on May 1, 2003, and Bistes was not delivered a signed contract and promissory note prior to expiration. Appellee Greg Bistes did not hear back from the proposed buyer or Appellant Whalen until May 10, 2003 when Whalen approached Bistes at his business. Appellee Greg Bistes then told him that the offer to sell had expired, and the deal was off.

It is fundamental that a contract is formed only upon acceptance of an offer. *Couret v. Conner*, 79 So. 230, 232 (1918). Just as basic is the principle that an offeror is free to limit acceptance to a fixed time period. *Houston Dairy, Inc. v. John Hancock Mut. Life Ins. Co.,* 643 F.2d 1185, 1187 -1188 (5th Cir. 1981) (citing 1 A Corbin, Contracts s 35 (1963); 1 S. Williston, Contracts s 76 (3d ed. W. Jaege, 1957); Restatement of Contracts s 40 (1932)). Once the time period has expired, a belated attempt to accept is ineffective. *Id.*

Appellant Whalen does not dispute that a signed contract and $5,000.00 promissory note was

not given to Appellee Greg Bistes by the contract deadline of May 1, 2003. *Deposition of Whalen,* R. at 210-12. Instead, Appellant claims that the Bradshaw Family Limited Partnership delivered the contract and note to Appellant Whalen by the deadline, and delivery was imputed to the Appellees.

Appellant's **entire** argument relies on his allegation that he was an agent of the Appellees (even though it was illegal for him to act as a real estate agent), and since the contract and promissory note were delivered to him by the contract deadline – the only proof of that allegation being the Appellant's own testimony — the Appellees, as his principals, are presumed to have received the contract and note. *Appellant's Brief,* pg. 4-6. Appellant Whalen testified as follows at his deposition:

> Q: Are you testifying that the seller received a copy of the promissory note b y May 1st?
> A: Whether – no, he didn't receive – I was told that as the broker, the way – that's the way that I read it.
> Q: And you prepared it?
> A: Uh-huh, yes.
> Q: You prepared the agreement, so that's the way you read it as the one having prepared it?
> A: Uh-huh (indicating yes.)
> Q: Did you ever question him as to whether or not what his interpretation of that was?
> A: Nor did he bring it to my attention.
> Q: Well, if you never – if he never saw it, it'd be kind of hard to do, wouldn't it?
> A: As his agent, I just assumed he was trusting that I got a promissory note from Mr. Bradshaw by the 1st of May, which I did.
> Q: Oh, okay. But you didn't give him a copy of it; you just held it?
> A: For about the fourth time, it says that it'd be held with the seller's agent.

Deposition of Whalen, R. at 210-212.

Interestingly enough, Appellant's position that he was the agent of the Appellees at the time of the alleged transaction was not Appellant's initial position in this litigation. Appellant filed requests for admissions in this matter on April 10, 2006, where he stated:

REQUEST NO. 9. By way of Request for Admission, admit that you were acting as the agent for the buyers only.

RESPONSE: Admitted. However an assignment was made to me thereafter.

Whalen's Responses to Request for Admissions, R. at 29. Yet, at the time of his deposition over two years later on April 16, 2008, Appellant had altered his position that he was the agent of the Appellees:

Q: Who were you representing in this transaction?
A: I guess I was representing the seller.
Q: You guess?
A: As far as I was concerned.
Q: Did you not bring the contract to him from Bradshaw?
A: Did I bring – no. Bradshaw was out of town.
Q: But you brought it on Bradshaw's behalf?
A: Yeah. Yes.
. . . .
Q: Okay. So I asked you the question just a minute ago about who you were representing in this transaction, and you said you guess it was who?
A: Well, I was representing both people.
Q: So you were acting in a dual capacity --
A: Uh-huh (indicating yes.)
. . . .
Q: Did you have them sign a dual agency agreement?
A: No, I didn't.

Deposition of Whalen, R. at 87-88.

Mississippi Code Sections 73-35-1 et seq., charges the Mississippi Real Estate Commission (MREC) with enforcement and supervisory authority for licensing real estate agents and brokers. The regulations of the MREC provide the following definition of "agency":

(a) "Agency shall mean the relationship created when one person, the Principal (client), delegates to another, the agent, the right to act on his behalf in a real estate transaction and to exercise some degree of discretion while so acting. Agency may be entered into by expressed agreement, implied through the actions of the agent and or ratified after the fact by the principal accepting the benefits of an agent's previously unauthorized act. **An agency gives rise to a fiduciary**

relationship and imposes on the agent, as the fiduciary of principal, certain duties, obligations, and high standards of good faith and loyalty.

MREC Regulations, R. at 142 (emphasis added). The MREC's regulations further provide:

Disclosure Requirements:

a) In a single agency, a broker is required to disclose, in writing, to the party for whom the broker is an agent in a real estate transaction that the broker is the agent of the party. The written disclosure must be made before the time an agreement for representation is entered into between the broker and the party. This shall be on an MREC Agency Disclosure Form.

b) In a single agency, a real estate broker is required to disclose, in writing, to the party for whom the broker is not an agent, that the broker is an agent of another party in the transaction. The written disclosure shall be made at the time of the first substantive meeting with the party for whom the broker is not an agent. This shall be on the MREC Agency Disclosure Form.

c) **Brokers operating in the capacity of disclosed dual agents must obtain the informed written consent of all parties prior to or at the time of formalization of the dual agency.** Informed written consent to disclosed dual agency shall be deemed to have been timely obtained if all of the following occur:

(1) The seller, at the time an agreement for representation is entered into between the broker and seller, gives written consent to dual agency by signing the Consent to Dual Agency portion of MREC Form A.

(2) The buyer, at the time an agreement for representation is entered into between the broker and buyer, bgives written consent to dual agency by signing the Consent to Dual Agency portion of MREC Form A.

(3) **The Broker must confirm that the buyer(s) understands and consents to the consensual dual agency relationship prior to the signing of an offer to purchase.** The buyer shall give his/her consent by signing the MREC Dual Agency Confirmation Form which shall be attached to the purchase. The Broker must confirm that the seller(s) also understands and consents to the consensual dual agency relationship prior

> to presenting the offer to purchase. The seller shall give his/her consent by signing the MREC Dual Agency Confirmation Form attached to the buyer's offer. The form shall remain attached to the offer to purchase regardless of the outcome of the offer to purchase.
>
> d) In the event the agency relationship changes between the parties to a real estate transaction, new disclosure forms will be acknowledged by all parties involved.
>
> . . . .

MREC Regulations, Rule IV.E., R. at 144-45 (emphasis added). The Dual Agency Confirmation Form states:

> As a disclosed dual agent the licensee shall not represent the interests of one party to the exclusion or detriment of the interests of the other party. A disclosed dual agent has all the fiduciary duties to the Seller and Buyer that a Seller's or Buyer's agent has except the duties of full disclosure and undivided loyalty.

MREC Dual Agency Confirmation Form, R. at 177.

Appellant Whalen does not deny that he did not have the Appellees and Bradshaw Family Limited Partnership sign the Dual Agency Confirmation Form required by MREC. *Deposition of Whalen*, R. at 95. Appellant Whalen does not dispute that there is no written agreement authorizing him to act as an agent on behalf of the Appellees. And the instrument that Appellant Whalen claims is a contract in this matter does not state who Appellant Whalen represented in the transaction. The Mississippi Real Estate Commission regulations require that "Every contract must reflect whom the broker represents by a statement over the signature of the parties to the contract." *Mississippi Real Estate Commission Regulations*, R. at 140. "Consumers shall be fully informed of the agency relationships in real estate transactions identified in Section 73-35-3. This rule places specific requirements on Brokers to disclose their agency relationship." *Mississippi Real Estate Commission Regulations*, R. at 141-142. The MREC regulations go even further regarding the requirements of

brokers, providing:

> "Disclosed Dual Agent" shall mean that agent representing both parties to a real estate transaction with the informed consent of both parties, with written understanding of specific duties and representation to be afforded each party. There may be situations where disclosed dual agency presents conflicts of interest that cannot be resolved without breach of duty to one party or another. **Brokers who practice disclosed dual agency should do so with the utmost caution to protect consumers and themselves from inadvertent violation of demanding common law standards of disclosed dual agency.**"

MREC Regulations, Rule IV.E.2(f), R. at 142 (emphasis added).

The Chancellor ruled that "delivery of the contract to Mr. Whalen by the seller was not delivery to the buyers because of Mr. Whalen's undisclosed dual agency. *Letter of Chancellor Persons*, R. at 214; *Order*, R. at 216. This ruling is certainly correct in light of the clear law that a dual agency relationship requires full disclosure. The actions of Appellant Whalen were unknown to Appellees, and mere silence was not operative as an acceptance.

Again, Appellant argues that the issue of whether he followed Mississippi law or MREC rules requiring full **written** disclosure of dual agency ---- is separate from the issue of whether there is a contract:

> Q: And you did not have either party sign this agreement –
> A: No, that's – that's –
> Q: – or one similar to it?
> A: Right. But that's a real estate issue. It's not this contract in my mind.

Deposition of Whalen, R. at 95. What Appellant Whalen does not appear to understand is that his conduct violated standards of agency law, period, and prevent the finding of a contract. The Mississippi Supreme Court defined the standard of care required of real estate agents as follows:

> The standard of care of an agent has been described as "a duty to use the degree of diligence and care which a reasonably prudent person would ordinarily exercise in the transaction of his own business...." More

> specifically, "a business agent represents that he understands the usages of the business in which he is employed. One undertaking a matter involving special knowledge ordinarily thereby represents that he has the special knowledge required, and undertakes that, so far as it is necessary to keep in touch with events, he will do so." (Citations omitted). Additionally, we have stated that in the situation of a dual agency, "a dual agent . . . must proceed with a heightened sense of duty to assure that he serves both masters' interests fully.

Lane v. Oustalet, 873 So.2d 92, 97 (Miss.2004). Additionally, the Mississippi Supreme Court has stated that an "agent can never act ... to the detriment of the principal." *Lee Hawkins Realty, Inc. v. Moss,* 724 So.2d 1116, 1119 (Miss.App.1998). The agent must exercise "the level of care commensurate with his role as the expert to keep his novice principal informed and protected." *Id.* at 1121. Real estate brokers have a duty to act solely for the benefit of their principals in all matters connected with the agency. *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359, 368 (Miss.1992). To act as agent for one of the parties, his relationship with such party or customer is fiduciary and confidential in character. *Blanks v. Sadka,* 133 So.2d 291, 293 (Miss.1961). Any breach by an agent of his duty of good faith to principal, whereby the principal suffers any disadvantage and the agent reaps any benefit, is **fraud**, for which agent is accountable, either in damages or by judgment precluding agent from taking or retaining benefits so obtained. *Wheat v. Lindsley*, 906 So.2d 782 (Miss. App. 2004), *cert denied*, 904 So.2d 184 (Miss. 2005) (emphasis added).

In this case, Appellant asks the Court to give him the protections of an agent but asks the Court to overlook the fact that he breached his fiduciary duties to Appellees. Such speak is double talk and without merit. The Chancellor was correct in finding: "Regardless of the law of dual agency agreement of the Mississippi Real Estate Commission, a party dealing with an agent is entitled to know all of the principals that agent represents in that particular transaction." *Transcript of Summary Judgment Hearing,* pg. 54, ln. 18-24. The Chancellor found that Appellant did not make this

disclosure to his alleged principals, and as a result, **"there was no delivery of the contract to the buyer. That no enforceable contract existed between the parties, and Plaintiff Whalen, as assignee of the buyer, has no cause of action against Sellers/Defendants."** *Order*, R. at 216 (emphasis added). The Chancellor's finding that Appellant did not make a proper disclosure is a finding of fact and an appellate court in Mississippi "will not disturb the factual findings of a chancellor when supported by substantial evidence unless [we] can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." *Herring Gas Co., Inc. v. Pine Belt Gas, Inc.,* 2 So.3d 636, 638 (Miss. 2009). The Chancellor did not abuse his discretion, and the judgment of the Chancellor should be affirmed.

C. Another Reason That There is No Contract is Because the Alleged Purchaser, Appellant Whalen, Has Not Deposited Earnest Money, and any Alleged Contract Fails For Lack of Consideration.

An additional hurdle to Appellant's contract action is the important fact that Appellant, who alleges he is now the purchaser by an assignment, has not deposited earnest money. A $5,000.00 promissory note was required to be deposited by the contract deadline of May 1, 2003 in order to accept the offer. Appellant alleges that Bradshaw Family Limited Partnership tendered a note to him by the contract deadline of May 1, 2003. *Promissory Note,* R. at 12. But Appellant is now the purchaser. There is no doubt that the promissory note executed by Bradshaw Family Limited Partnership is not enforceable against Appellant. It is only enforceable against Bradshaw Family Limited Partnership, who is no longer a party to the alleged contract. Thus, Appellant has never delivered earnest money to consummate the alleged deal.

Assuming that the five thousand dollar ($5,000.00) promissory note was supposedly tendered by Bradshaw as a deposit, the note having never been produced by Defendants, there was no

obligation on Defendants' part to accept the promissory note which is simply an offer to pay and not legal tender. The case of *Cummings Properties, LLC v. Eaton Corp.*, 13 Mass. L. Rptr. 609, 2001 WL1334206 (Mass. Super. 2001) involved an agreement that provided that a lease might be terminated by written notice and payment of a termination fee prior to a certain date. The lessee faxed written notice and faxed a copy of a check. The appellate court concluded that a faxed copy of a check is not a negotiable instrument. The court held that at best it was evidence of an intention to pay, not payment.

In *Succession v. Miller*, Chief Justice Dixon noted the difference between a contract and a negotiable instrument:

> An authentic copy of a written contract serves the same evidentiary purpose as the original, but it could not be contended that the possession of a facsimile of a check, bond or bank draft would entitle the holder to demand the same rights as the holder of the original instrument.

405 So.2d 812, 824 (La. 1981). As Judge Dixon stated, nobody would argue that a faxed copy of a check would be sufficient as a negotiable instrument. Similarly, in *Cummings*, the court held that faxing a copy of a check could only at best demonstrate an intention to pay.

In this case, Appellant claims that Bradshaw Family Limited Partnership assigned its rights to the alleged contract to Appellant. **Did he also assign the promissory note to Whalen for which he would have been no longer been responsible?** The promissory note was not transferred by virtue of the alleged assignment. *Herring Gas Co.*, 2 So.3d at 639. Any new party as purchaser would have been required to tender a promissory note to the sellers should the sellers decide to accept it upon the same exact terms. In fact, MREC regulations require further disclosure when the agency relationship changes: "In the event the agency relationship changes between the parties to a real estate transaction, new disclosure forms will be acknowledged by all parties involved."

MREC regulations, R. at 145. Appellees cannot enforce the promissory note against Appellant that Appellant alleges is the earnest money $5,000.00 promissory note. Indeed, Appellant has not tendered a promissory note to Defendants, and even if he had, it would fail for the reasons mentioned in *Cummings* and *Succession of Miller.*

An agreement to accept a promissory note as earnest money or a down payment is nothing more than an agreement to extend credit. A review of Mississippi cases and those from other jurisdictions revealed no cases that suggest that an agreement to extend credit may be assigned without the consent of the individual extending credit. Contracts involving personal services may simply not be assigned without the consent of the parties. *Shackleford v. Franks*, 25 Miss. 49 (1852). Appellees certainly never consented to an assignment, the promissory was not delivered, and the deal must fail for failure of consideration. *Herring,* 2 So.3d at 640.

D. The Appellant's Appeal is Frivolous and Appellant Should Be Required to Reimburse Appellees' for their Attorney's Fees and Costs

Appellant has filed a frivolous appeal, and Appellees seek reimbursement of their attorney's fees and costs and all of their expenses incurred because of Appellant Whalen's tying up their property since 2003. Rule 38 of the Mississippi Rules of Appellate Procedure allows the supreme court or court of appeals to award damages and costs to the appellee if the court determines that an appeal in a civil case is frivolous. M.R.A.P. 38. The Comment to the Rule states that damages may include attorney's fees and other expenses incurred by an appellee. *Roussel v. Hutton,* 638 So.2d 1305, 1318 (Miss.1994). The court determines whether an action is frivolous under Rule 38 by looking to Rule 11 of the Mississippi Rules of Civil Procedure. *Id.* M.R.C.P. 11 states in part:

> (b) Sanctions. (i)f any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by

their attorneys, including reasonable attorneys' fees.

This Court has stated that "a pleading or motion is frivolous within the meaning of Rule 11 only when, objectively speaking, the pleader or movant has no hope of success." *Roussel,* 638 So.2d at 1317. The Court's inquiry "is an objective one to be exercised from the vantage point of a reasonable party in (the litigant's) position as it filed and pursued its claim." *Id.* This requires that the court consider whether a reasonable person in the appellant's position would have had any hope of success. *Id.*

Here, Appellant had no hope of success because undisputed facts in the record show that Appellant violated the laws of Mississippi, including the common law of agency, when he attempted to broker the subject real estate transaction. There is simply no legitimate question circumventing the principle that a person may not base a lawsuit upon his own unlawful acts. The present lawsuit by Appellant is continued delay and harassment by Appellant, who has tied up Appellees' property since 2003, preventing its sale or use as collateral. The pleadings and motions in this case were frivolous within the meaning of M.R.C.P. 11, and sanctions should be imposed against Appellant, requiring Appellant to reimburse Appellees for their attorneys, costs, and expenses.

Conclusion

It is undisputed that Appellant was violating Miss. Code Ann. § 73-35-1, *et seq.,* and the regulations of the Mississippi Real Estate Commission when he attempted to broker a real estate deal in Mississippi between Appellees and Bradshaw Family Limited Partnership, when Appellant did not have a valid Mississippi realtor's license. It is undisputed that Appellant did not fully disclose and confirm the parties' understandings of his position as an alleged agent, as the MREC regulations and the common law of agency require. Indeed, the Chancellor found that Appellant did not make

the required disclosures required to be a dual agent. Because Appellees did not receive a signed sales contract and $5,000.00 promissory note by the offer deadline of May 1, 2003, the offer expired. Even if Appellant were Appellees' agent, he cannot legally take a position that he is both the seller's agent and the purchaser because an agent can never act to the detriment of the principal. Yet, here, Appellant is certainly acting to the detriment of his alleged principals because he is suing them by virtue of an alleged assignment that allegedly places him in the position of the purchaser. Appellant's claims rests on a series of actions by Appellant that were unlawful, illegal and fraudulent. Appellant cannot be allowed to profit from his illegal acts. To find a contract, here, where Appellant has "unclean hands" would shock the conscience of the Court. This appeal is frivolous, and the Court should impose sanctions on Appellant to reimburse Appellees' attorney fees and costs, and expenses.

This the 15th day of December, 2009.

GREGORY BISTES, JR. AND
GAY BISTES PALMISANO, Appellees

BY: _____

EDWARD O. MILLER (MSB [redacted])
ATTORNEY OF RECORD FOR APPELLEES
MILLER & SMITH
1922 23rd Avenue
Gulfport, Mississippi 39501
Telephone (228) 864-2515
Facsimile (228) 868-7702

HOLLIE MILLER (MSB [redacted])
ATTORNEY ON BRIEF
1739 University Avenue, #230
Oxford, Mississippi 38655
Telephone (662) 816-1003
Facsimile (662) 915-7617

CERTIFICATE OF FILING AND SERVICE

I, EDWARD O. MILLER, of Miller & Smith, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees to:

D. Scott Gibson
Attorney at Law
P.O. Box 208
Gulfport, MS 39502

Honorable James Persons
Chancellor
Harrison County Chancery Court
P. O. Box 457
Gulfport, MS 39502

And, the original and three (3) copies of the same to:

Betty W. Sephton
Mississippi Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, the 15th day of December, 2009.

EDWARD O. MILLER