

**BEFORE THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI  
CAUSE NO. 2010-CA-01827**

**ARTHUR LEE BROWN AND LINDA JACKSON BROWN**

**APPELLANTS**

**v.**

**JAMES ANDERSON, JR. AND LAURA ANDERSON**

**APPELLEES**

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**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case, and makes these representations in order that the Justices of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Arthur Lee Brown and Linda Jackson Brown, Appellants
2. David Neil McCarty, Esq., Attorney for the Appellants
3. James Anderson, Jr. and Laura Anderson, Appellees
4. Pieter Teeuwissen, Esq. and Lara E. Gill, Esq., Attorneys for the Appellees

By: \_\_\_\_\_



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## **STATEMENT OF THE ISSUES**

The sole issue for disposition by this Court on appeal is whether the Hinds County Circuit Court properly granted a directed verdict in favor of the Appellees, James and Laura Anderson. Specifically, the Hinds County Circuit Court properly granted the Appellees' Motion for Directed Verdict finding that the Appellants' claims for breach of contract and tortious breach of contract were without merit. Because the decision of the Hinds County Circuit Court in favor of the Appellees was based on substantial evidence, it should be affirmed.

## **STATEMENT OF THE CASE**

A. **Course of Proceedings.** This matter arises out of the sale of a home owned by James and Laura Anderson ("Appellees" or "Andersons"), located at 207 Glen Court Drive, Jackson, Mississippi, to the Appellants, Arthur and Linda Brown ("Appellants" or "Browns"). The original Complaint was filed by the Browns on or about December 31, 2002, and against at least eight other defendants besides the Andersons. [R. 11-32]. The Appellants subsequently amended their Complaint two more times, the first being on March 18, 2003 [R. at 39], and the second being on September 16, 2003 [R. at 204]. In other words, the subject litigation has been ongoing for more than ten (10) years.<sup>1</sup> In said ten (10) year time, all of the named Defendants, other than the Appellees, the Andersons, have been dismissed from suit, the result of trial court rulings on dispositive pleadings [R. at 91; 372; 382; 394;396; 404;427;433;607;691;705;707] or by voluntary dismissal by the Appellants themselves [Transcript, p. 4].

Thus, prior to trial, the Andersons were the only Defendants remaining. The trial in this matter was conducted on August 23-24, 2010 [Transcript, p.1]. At trial, the Appellants stipulated

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<sup>1</sup>In sum, the Browns filed suit at the trial court level alleging that the subject home had defects that which should have been disclosed to them, but were not, and asserted eighteen claims against the Andersons and the other previous party-Defendants, for alleged acts arising out of this real estate transaction. *See also* R. at 693.

that only two causes of action remained against the Andersons, which were (1) breach of contract and (2) tortious breach of contract. [Transcript, pp. 4-5]. The Final Judgment of the Hinds County Circuit in favor of the Andersons was entered on October 6, 2010. [R. 855-857], wherein the Hinds County Circuit Judge entered a directed verdict in favor of the Andersons on both the remaining claims of breach of contract and tortious breach of contract. [R. 855-857; Transcript, pp. 335-337].

**B. Statement of Facts.** As set forth above, this matter arises from the Appellants' purchase of a home from the Andersons. Originally, the Appellants had a realtor, John Simpson ("Simpson"), who showed them the house at least two times in June and July of 2002. [R. at 691]. Arthur Brown, Linda Brown's husband, testified, through deposition and at trial, that he, like his wife, Linda, considered Simpson to have represented them and worked for them during the transactional time period in question. [R. at 691; Transcript, pp. 183-184].<sup>2</sup>

The Appellants, either as signatories for one another and/or on one another's behalf, signed a contract for the purchase of the home on or about June 27, 2002 [R. at 692; Appellants' R.E. pp. 16-21].<sup>3</sup> The pre-closing inspection clause contained in the contract provided that the plumbing, electric, heating and air conditioning systems and appliances conveyed would be in good working order at the time of closing<sup>4</sup>. *See also* Transcript, pp. 197-198. There was also an "as is" clause contained in the subject contract. [R. at 692; Transcript, pp. 192-193;198]. The Appellants were

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<sup>2</sup>John Simpson and the Appellants' realty company, were dismissed from this matter pursuant to an award of summary judgment in their favor.

<sup>3</sup>For the purposes of this Appellee Brief, the Andersons reference the contract submitted by the Appellants to this Court (R.E. 16-21) as the contract which the Appellees base their appeal. However, the contract submitted by the Appellees is not the final executed contract. As a result, the Appellants never provided the final executed contract to the trial court for consideration or to this Court on appeal.

<sup>4</sup>The real estate closing on the subject home was conducted on or about July 23, 2002. [R. at 692].

advised by Simpson to get a home inspection *prior to* their purchase of the home, according to the Appellants themselves [R. at 692].<sup>5</sup> The Appellants likewise testified at trial that they relied on Simpson to secure a home inspection on the house [Transcript, pp. 191, 195]. Arthur Brown testified through his deposition, that he had viewed the home on a couple of occasions without Simpson present. [R. at 691-692]. In fact, on July 27, 2002 (the time of closing), Arthur Brown executed a “Walk-Thru Inspection Release”<sup>6</sup> [Appellants’ R.E. 22], and admitted that, as part of the closing, he signed the Seller’s Disclosure Statement. [Appellant’s R.E. 14-15; Transcript, pp. 199-200].

For some reason, however, and as admitted by the Appellants, the Appellants never secured a home inspection prior to purchasing the home [R. at 692; Transcript, pp. 192-193], and closed on the subject home, accepting the property in its “as is” condition. [Transcript, pp. 197-198]. Likewise, Arthur Brown admitted at trial that he had never spoke to the Andersons at all and had never met the Andersons until the real estate closing. [Transcript, pp. 202-205]. Ultimately, however, the Appellants sued the Andersons because of their purported dissatisfaction with their purchase of the subject home and alleged defects, and despite the fact that the Appellants themselves (1) never secured or conducted a home inspection prior to closing/purchasing; (2) executed a Release in favor of the Andersons; (3) executed the Seller’s (the Andersons) disclosure statement at closing and (4) failed to make a single mortgage payment following closing, losing the home following Appellants’ purchase to foreclosure. [Transcript, pp. 7-8; 192-200 ; Appellants’ R.E. 14-15; 22]. The

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<sup>5</sup>Linda Brown testified at trial that her and Mr. Brown’s Realtor, Simpson, told her to sign her husband’s name to the contract. [Transcript, p. 118]. Arthur Brown subsequently testified at trial following his wife, stating that Linda Brown had his absolute authority to sign all the contract and other transactional documents related to the purchase of the home. [Transcript, p. 145].

<sup>6</sup>Hereinafter referred to as “Release.” This document was signed by Arthur Brown and the Appellees, and if it had not been executed, the subject real estate closing would not have been consummated.

Appellants appealed this matter to this Court on or about November 2, 2010 [R. 858-859].

### **SUMMARY OF THE ARGUMENT**

The decision of the Hinds County Circuit Court is supported by substantial evidence, and was not arbitrary and capricious. The Andersons submitted substantial, credible evidence to the Hinds County Circuit Court that clearly entitled the Andersons to a directed verdict on the claims presented. The Andersons likewise submitted credible, substantial evidence showing that there was no breach of contract or tortious breach of contract, and that they were entitled to a directed verdict pursuant to Rule 50 of the Mississippi Rules of Civil Procedure. Because the decision of the Hinds County Circuit Court was supported and proper, the judgment must be affirmed. Therefore, the Andersons respectfully request that this Court affirm the decision of the Hinds County Circuit Court.

### **STANDARD OF REVIEW**

As noted hereinabove, a directed verdict was granted by the Hinds County Circuit Court in the Andersons' favor. This Court is aware that there is no difference between the standards employed for summary judgment and that of a directed verdict, as both motions view the evidence in the light most favorable to the non-moving party. *Scaffide v. Bazzone*, 962 So. 2d 585, 597 (Miss. App. 2006). In other words, this Court reviews directed verdict motions *de novo*. However, one practical difference between an award of summary judgment and a directed verdict, and this is the case here, is that typically more information is before the Court at trial than at the summary judgment stage. Thus, the Appellants had their opportunity at trial to present their sufficient evidence supporting their claims and failed, thus entitling the Andersons to a directed verdict. Simply put, the Appellants have not and cannot prevail, despite the fact that both the trial court and this Court on appeal consider the evidence in the light most favorable to them. The Appellants could not and



cannot meet the required standards of proof to succeed on their claims, and do not identify any reasonable inference from the evidence they provided that presents a question of fact for the jury. As a result, the directed verdict in favor of the Andersons is appropriate, and the subject appeal has no merit. Accordingly, the judgment of the Hinds County Circuit Court should be affirmed.

### **ARGUMENT AND AUTHORITIES**

This matter, as set forth previously herein, arises from the Appellants' purchase of a home. The controlling facts, as established and when coupled with controlling Mississippi case authority, do not present any a question of fact requiring submission to the jury. This is because the Appellants: (1) failed to obtain a home inspection prior to purchase of the home; (2) purchased the home in its "as is" condition, and (3) executed a release in favor of the Andersons for the purchase of the home. These facts established by evidence that the Appellants could not dispute, when combined with clear and controlling Mississippi law, show that the directed verdict in the Andersons' favor was proper. Thus, this appeal has no merit, and this Court should affirm the decision of the Hinds County Circuit Court.

#### **I. No breach of contract by the Andersons.**

At the onset, substantive Mississippi law provides that sellers of real property, such as the Andersons, should be able to rely on the mutually-agreed upon terms of a contract. Regardless of the Appellants' cries to the contrary, the Andersons' rights, as sellers, are "also entitled to consideration...and deserve equal respect under [Mississippi] laws." *Koch v. H & S Dev. Co.*, 163 So.2d 710, 727 (Miss.1994). Moreover, both the Appellants and the Andersons, under Mississippi law, as parties to the contract, have the inherent duty to read and understand the terms of a contract prior to signing. *Swindle v. Harvey*, 23 So.3d 562, 571 (Miss. App. 2009). Mississippi law clearly

states that a party signing a contract or any document, regardless of whether the party read it or not, is charged with the knowledge of its contents. In this case, the Appellants neglected to become familiar with the terms and conditions of the subject contract which included an “as is” clause, executed a Release in favor of the Andersons, and failed to get a home inspection prior to purchasing the home, seeking relief from the Andersons for purported claims, which, even if had been supported and/or proven, were due to the Appellants’ own omissions. Alternatively stated, the Appellants seek to avoid their own contractual duties and obligations as required when purchasing a home under Mississippi law, and request that the Court reward them for their own gross neglect.

**A. “As is” clause in contract prohibits any recovery by the Appellants.**

First and foremost, this appeal can be easily disposed of because of the “as is” provision contained in the paragraph 14 of the contract. [ *See also* Transcript, pp. 119-120; 192-193]. The Appellants do not contest that they signed the contract for the sale of the subject property, or that they secured a home inspection prior to purchasing [R. at 692; Transcript, pp. 192-193]. Indeed, Arthur Brown testified at trial that he read paragraph 14 of the contract prior to signing, which states that he and his wife were taking the home in its “as is” condition, but had the right to a home inspection prior to purchase. [Transcript, p. 198]. The Appellants also admit that, in addition to signing the subject contract, that they read and signed the Sellers’ Disclosure Statement, conducted a pre-closing walk-through inspection of the home and executed the Release, all prior to closing on the home. [Transcript, pp.97-99;101-104;162;197;21-213]. As a result, the Appellants, with knowledge and notice, closed on and purchased the subject home, accepting the property in its “as is” condition, and after neglecting to have a home inspection prior to consummating the sale.

[Transcript, pp. 197-198].

These facts are fatal to the Appellants' appeal. Mississippi law states clearly that an "as is" clause, such as that contained in the subject contract<sup>7</sup>, forecloses the Appellants' recovery for breach of contract and fraud. See *Cruse v. Hahn*, 754 So. 2d 471 (Miss. App. 1999); *Stonecipher v. Kornhaus*, 623 So. 2d 955 (Miss. 1993) and *Pitre v. Twelve Oaks Trust*, 818 F. Supp. 949 (S.D. Miss., 1993). This precedent is the the bedrock principle utilized by the Courts to govern the sale of real property that is the issue here. Accordingly, clear Mississippi case precedent prohibits the Appellants' recovery against the Andersons, as the Appellants purchased the subject real property in its as-is, existing condition.

In the case of *Cruse v. Hahn*, supra, the Mississippi Court of Appeals ruled that the "as is" provision contained in the contract for the sale of the home foreclosed the purchaser's recovery on breach of contract and breach of warranty claims against the sellers and real estate agents, for the sellers' and agents' failure to disclose the actual age of the house or that the house was cut in half and reassembled at a new location. 754 So.2d at 474-475 (Miss. App. 1999). The Mississippi Court of Appeals unequivocally stated in this case, the following:

The controlling case law in Mississippi on the "as is" clause is *Stonecipher v. Kornhaus*, 623 So.2d 955 (Miss.1993). In *Stonecipher* the purchaser executed a sales contract with an "as is" provision and an "acceptance" provision. *Id.* at 963. The Stoneciphers brought suit on the contract in order to collect damages for injuries caused by a latent defective tree on the property. The appellees argued that the presence of the "as is" clause in the contract exempted them from liability pertaining to the condition of the property. In accepting the appellees argument, the Mississippi Supreme Court concluded that the Stoneciphers were bound by the mutually agreed

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<sup>7</sup>This provision states, in part, that "Seller warrants that all plumbing, heating and air conditioning systems, all equipment, and appliances which convey with the property will be in working order on closing date or upon possession, whichever occurs first...Purchaser has the right and is encouraged to make a pre-closing inspection to determine their working order...Purchaser acknowledges that he has not relied upon any statements or representations by the undersigned Seller..." [¶ 14, Contract - R. at 805].

upon terms of the contract. *Id.* The Stoneciphers, therefore, were precluded from maintaining suit against the vendors. *Id.* at 964.

Just as in *Stonecipher*, Crase signed a contract with an “as is” provision, as well as, an “acceptance” provision; therefore, she is bound by the mutually agreed upon terms of the contract and has thus waived the right to maintain an action on the contract. Moreover, the disclosure form does not warrant the actual age of the house, but rather approximates the age. Further, the disclosure form mentions that the house had been moved. While this statement was not included on the disclosure form when Crase signed it on October 13, 1995, it was, as previously stated, brought to her attention at closing, and she was given an opportunity to back out of the deal which she declined. It is, therefore, clear that no warranties were made by Hahn in the contract or disclosure statement. Crase is bound by the terms of those instruments.

*Crace v. Hahn*, 754 So.2d 471, 474 (Miss. App. 1999). Thus, the Appellants, like the purchasers of property in *Crace v. Hahn* and *Stonecipher v. Kornhaus*, the Appellants had the opportunity, prior to closing, to back out of the home’s purchase, and further executed a Release in the Andersons’ favor prior to purchasing the home. Accordingly, the Appellants cannot maintain any colorable claims against the Andersons for breach of contract, and the directed verdict was proper.

This same conclusion has likewise been recognized and relied upon by the federal courts in Mississippi. One such example is the case of *Pitre v. Twelve Oaks Trust*, 818 F. Supp. 949 (S.D. Miss., 1993)(“*Pitre*”). In *Pitre*, the United States District Court for the Southern District of Mississippi, addressed its award of summary judgment in the sellers’ favor regarding a home purchase where the sale contract contained an “as-is” provision. *Id.* In awarding the summary judgment to the sellers, the U.S. District Court found that the purchasers of 140-year-old house failed to establish any element of fraud in sellers' nondisclosure of alleged structural defects in house, because the sale and purchase agreement sold the house “as is.” *Pitre*, 818 F. Supp. 949, 951-953 (S.D. Miss. 1993). The U.S. District Court likewise noted that the purchasers, Pitre, were free to inspect premises without interference from vendors. *Id.*

Finally, the District Court in *Pitre* recognized the doctrine of *caveat emptor* that is followed in the State of Mississippi, and stated that:

Caveat emptor, in other words, “buyer beware”, is the common law rule which is still applied to purchasers of real property. “[I]n the absence of express agreement or misrepresentation, the purchaser is expected to make his own examination and draw his own conclusions as to the condition of the land; and the vendor is, in general, not liable for any harm resulting to him or others from any defects existing at the time of transfer.” W. Prosser and K.P. Keeton, The Law of Torts, Section 64 at 447 (5th Ed.1984). **This Court finds the plaintiffs had a full and fair opportunity to inspect and formulate their own opinion as to the condition of the improvements on said property and, in fact, did so. Clearly, the plaintiffs assumed the risk involved with buying real property...[and] were on notice that there could be structural defects in the improvements.**

*Pitre v. Twelve Oaks Trust*, 818 F. Supp. At 953 (S.D. Miss., 1993)(emphasis added).

Thus, the aforementioned controlling Mississippi authority, when coupled with the established facts that the Appellants: (1.) signed a contract for the sale of the subject property that contained an “as-is” provision [R. at 692; Transcript, pp. 192-193]; (2.) failed to secure a home inspection prior to purchasing [R. at 692; Transcript, pp. 192-193]; (3.) had their realtor show them the house at least two times prior to purchase [R. at 691]; (4.) conducted their own walk-through inspection of the home prior to purchase [Transcript, p. 77-81; 210-211], and (5.) executed a Release in favor of the Andersons [Transcript, p. 212-213], results in the Appellants’ waiver of their right to maintain an action on the contract.

**B. Appellants breached their contractual obligations under Mississippi law by their own neglect.**

Another established general rule regarding contracts in Mississippi is that a party seeking to avoid a contract may not do so where the mistake of the party avoiding the contract is the result of

that party's own negligence. *See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So.2d 1254, 1258 (Miss.1991). Furthermore, persons signing a document, such as the Appellants here, are charged with knowledge of the contents of any documents that they execute. *Massey v. Tingle*, 867 So.2d 235, 240 (Miss. 2004). In fact, no person in this State can avoid a written contract which he or she entered into on the ground that he or she did not read it or have it read to him or her, and that he or she supposed the terms were different, *unless* he or she was *induced not to read it* or have it read by fraudulent representation made to him by the other party on which he was entitled to rely. *Dunn v. Dunn*, 786 So.2d 1045, 1050 (Miss. 2001)(emphasis added). This is clearly not the case in this instance, as the Appellants testified that they relied on the realtor during the subject transactions, had never spoken to the Andersons until the closing and, as admitted by Arthur Brown, did not "believe the Andersons were lying to them..." [R. at 691; Transcript, pp. 183-184; 186;202-205;217;228].

Furthermore, the Appellants admit that they signed the contract, which contained the "as is" clause and set forth their right to a home inspection prior to closing. [Transcript, pp.97-99;101-104;162;197]. In fact, Arthur Brown testified at trial that he read paragraph 14 of the contract prior to signing, which states that he and his wife were taking the home in its "as is" but had the right to a home inspection before closing. [Transcript, p198]. The Appellants also admit that they read and signed the Sellers' Disclosure Statement, conducted a pre-closing walk through inspection and executed a Walk Through Inspection Release, all prior to closing on the home. [Transcript, pp.97-99;101-104;162;197;21-213]. Accordingly, the Appellants are charged with knowledge of the contents of sale contract, the Seller's disclosure statement and the Walk Thru Inspection Release, as they executed same. With these facts being established then, the Appellants must also show that

they themselves did not breach the contract before recovery can be had. Of course, the Appellants' own neglect bars any recovery by them against the Andersons, in addition to their failure to show a breach of contract by the Andersons.

As set forth above, the Appellants only have themselves to blame, as Mississippi law prohibits parties, such as the Appellants, from complaining of misrepresentations of another party that would have been disclosed by the Appellants' reading and understanding of the subject transactional documents before signing them and/or the Appellants' putting forth minimal effort by to obtain a home inspection prior to closing. Instead, the Appellants seek to recover from the Andersons despite the fact that terms of the transactional documents are laid out clearly. See also *Bailey v. Estate of Kemp*, 955 So. 2d 777 (Miss. 2007). The Appellants' own neglect acts as a waiver and bars them from any recovery from the Andersons.

The Appellants' own neglect is blatant from their own testimony at trial. Linda Brown testified on direct examination, that the subject home was a "beautiful house." [Transcript, p. 76]. But, Mrs. Brown also admitted that, when she went through the house prior to purchasing, she didn't try to use the air conditioning, didn't try to turn on the sinks and see if they worked and "just looked around." [Transcript, p. 76]. Ms. Brown likewise testified contrarily that one the alleged problems with the home was the air conditioning, but then stated that it was actually working when the Appellants moved into the home and that she didn't test anything in the home to make sure it was in good working order on or before the closing. [Transcript, p. 79-81;119-121]. She also testified that she signed [Mr. Brown's signature] to the contract "because during that time I didn't have a job, and if they was going to look at anyone's credit, you know, it would be his." [Transcript, p.98]. More important, however, is the fact that Ms. Brown admitted that she had the opportunity to hire

a home inspector to come in and look at the house for her, but failed to do so prior to closing. [Transcript, pp. 76-77].

The record likewise shows that the Appellants were advised by their realtor to get a home inspection prior to their purchase of the home [R. at 692]. In fact, the Appellants testified at trial that they relied on their realtor to secure a home inspection on the house prior to closing, but failed to do so, proceeding forward with purchase of the home. [Transcript, pp. 191;195]. At trial, and after admitting that he executed a Walk Thru Inspection Release, Arthur Brown further admitted he conducted no investigation into the attic of the “spots” on the ceiling that he allegedly observed when walking through. [Transcript, pp. 210-211]. Arthur Brown also admitted that, during his walk through, he did not turn the air conditioner off and on. [Transcript, pp. 210-211]. What Arthur Brown did admit was that he “didn’t do a thorough check of all the things” although he checked off and signed in the Release. [Transcript, p. 212-213].

The Appellants’ own neglect as set forth above, and which includes, but is not limited to, their failure to make mortgage payments on the home<sup>8</sup> prohibit them from recovery against the Andersons under Mississippi law. *See Bailey v. Estate of Kemp*, 955 So.2d 777, 782 (Miss. 2007)(“*Estate of Kemp*”). This is due to the fact that the Appellants cannot gain benefit under a contract and then avoid their obligations of that same contract. As stated by the Mississippi Supreme Court in *Estate of Kemp*, supra, “a party cannot claim benefit under a transaction or instrument and at the same time repudiate their obligations.” *Id.* at 782; *see also Wood Naval Stores Export Assn. v. Gulf Naval Stores Co.*, 71 So. 2d 425 (Miss. 1954). This quasi-estoppel doctrine precludes the

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<sup>8</sup>The Appellants lost the home to foreclosure as a result of failing to make mortgage payments [Transcript, p.7-9].



Appellants from asserting, to the Andersons' disadvantage, a position of which the Appellants' acquiesced. Thus, the Appellants cannot complain that breach of contract occurred under the contract itself or a breach of the Sellers' Disclosure Statement, when they executed a Release in favor of the Andersons, all while living and benefitting from the purchase of the home and never making a mortgage payment, never paying property taxes, never paying insurance on the home, and living there debt free for a time between two and four years. [Transcript, pp. 7-10;77;184-189].

## **II. No tortious breach of contract by Andersons.**

As set forth above, there must be a breach of contract in order for an award of exemplary damages for tortious breach of contract. *Cain v. Cain*, 967 So.2d 654, 668 (Miss. App. 2007). For entitlement to punitive damages in a breach of contract case, the Appellants must show by a preponderance of the evidence that the Andersons' breach was the result of an intentional wrong or that the Andersons acted maliciously or with reckless disregard of the rights of the Appellants. The fact is, the Appellants submitted no evidence of either at trial, and waived any such claim by execution of the Release. Finally, there is no breach of contract as the Appellants admitted that they relied on their realtor, Simpson, not the Andersons, to represent their interests in the purchase of the home. *See also Hamilton v. Hopkins*, 834 So.2d 695 (Miss. 2003).

Each Appellant, and even the Appellant's adopted son, testified at trial that the only communication between the Appellants and the Andersons, with or without real estate agents or other transactional representatives present, occurred on the single day of closing. [R. at 691; Transcript, pp. 183-184; 186;202-205;217;228]. There is nothing contained in the record that shows any intent whatsoever on the part of the Andersons, or that the single communication on the date of

closing by James Anderson congratulating the Appellants on their purchase, even if true, constitutes malice or reckless disregard for the Appellants' rights. In fact, Mississippi Courts have already reached the same conclusion.

For example, in the case of *Hamilton v. Hopkins*, the Mississippi Supreme Court held that the purchaser, who failed to close on a house sale, was *not* entitled to a return of his earnest money deposit and attorneys' fees, despite the purchaser's dissatisfaction with the state of the house's heating and air conditioning units and a contract provision entitling purchaser to refund if the inspection was unsatisfactory. *Hamilton v. Hopkins*, 834 So.2d 695,702-703 (Miss. 2003). The Court also held that the purchaser, Hamilton, **did not act maliciously or recklessly when he refused to close on the sale**, thus voiding the sellers' claim for punitive damages. *Id.* at 703-704 (emphasis supplied).

In the case of *Little v. John*, 909 So.2d 1256 (Miss. App. 2005), the Mississippi Court of Appeals held that the purchasers of house, which had drainage problems, did not establish claims against vendor for negligent and fraudulent misrepresentation, because the evidence was insufficient to prove by a preponderance of the evidence that purchasers acted in reliance on a misrepresentation by vendor. *Id.* In that case, the purchasers inspected the property before buying it and discovered some erosion and drainage problems. *Id.* The Court of Appeals found that the purchasers were well aware of problems associated with property and only completed purchase after making their own observations and having property inspected. *Id.* at 1260. The *Little* Court noted that it was apparent from the evidence, that the Littles were well aware of the problems associated with the property and only completed the purchase after making their own observations and having and inspection. *Id.* at 1260. The Mississippi Court of Appeals therefore would impose liability on Miller, the seller,

because the evidence presented by the purchasers, the Littles was insufficient to prove by a preponderance of the evidence that the Littles acted in reliance of a misrepresentation by Miller. *Little v. John*, 909 So.2d 1256,1260 (Miss. App. 2005). As a result, the Court found that the Littles, like that Appellants here, failed to meet the lower evidentiary burden of a negligent misrepresentation claim, and further that the Appellants “clearly failed to meet the higher clear and convincing evidentiary burden associated with fraudulent misrepresentation.” *Id.*

Appellants submit that “there was ample testimony showing that the Anderson [sic] tortiously breached the contract” [Appellants’ Brief at 11]. This statement does not identify which contract the Appellants’ are relying, and assumes a contract<sup>9</sup>, when the truth is that Linda Brown signed her husband’s name to the contract, and that Arthur Brown signed his name on behalf of himself and his wife, each with one another’s permission and authority. [Transcript, pp. 77;98-99; 114; 117]. These facts explain why the Appellants assert the contrary positions that (1.) Linda Brown did not release the Andersons because she did not sign the subject Release [ Appellants’ Brief at 10] and (2.) that single communication from Mr. Anderson to the Appellants, following closing, of “congratulations” can somehow support an independent, reckless tort justifying exemplary damages. None of the Appellants’ arguments are valid.

In this instance, and there was no communication of between the Andersons and the Appellees giving rise to any misrepresentation whatsoever, much less of a malicious or reckless nature. The record of the Appellants’ own testimony shows this to be true, and, at trial, the Appellants never sought to call either one of the Andersons to testify. As a result, the Appellants

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<sup>9</sup>In the event this Court questions the existence of a contract, the Andersons would request and are prepared to brief and/or argue this issue as well. However, either way, the Appellants cannot succeed.

relied on unsupported allegations and failed to meet their burden of proof for both breach of contract and tortious breach of contract. Accordingly, there is no inference that could be made that was supported by any credible evidence that could lead a jury to conclude anything in the Appellants' favor. Ultimately, therefore, a directed verdict in the Andersons' favor on the Appellants' tortious breach of contract claim was proper.

### CONCLUSION

Based on the foregoing, including, but not limited to, controlling Mississippi and Federal statutory and case authority, the judgment of the Circuit Court for the First Judicial District of Hinds County, Mississippi, must be affirmed. The Hinds County Circuit Court's decision in the Andersons' favor is supported by credible evidence and controlling Mississippi case authority. Accordingly, the Andersons respectfully request that this Court affirm the Hinds County Circuit Court's judgment in their favor. Finally, the Andersons requests any and all other relief that this Court deems fit.

THIS the 7<sup>th</sup> day of July, 2011.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

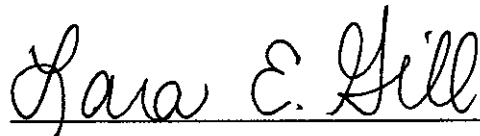
I, Lara E. Gill, one of the attorneys for the Appellees, do hereby certify that I have this day delivered, via hand delivery and/or United States Mail, postage prepaid, a true and correct copy of the foregoing Appellees' Brief to the following:

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THIS the 7<sup>th</sup> day of July, 2011.

  
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Lara E. Gill