

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**ARTHUR LEE BROWN and
LINDA JACKSON BROWN**

APPELLANTS

v.

No. 2010-CA-01827

**JAMES ANDERSON, JR. and
LAURA ANDERSON**

APPELLEES

**REPLY BRIEF OF
APPELLANTS**

ORAL ARGUMENT REQUESTED

On Appeal from the
Circuit Court of Hinds County, Miss., First Judicial District
No. 251-03-155

Attorneys for Appellants

David Neil McCarty
Miss. Bar No. [REDACTED]
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721
E: dnmlaw@gmail.com
W: McCartyAppeals.com

Brandi Denton Gatewood
Miss. Bar No. [REDACTED]
THE GATEWOOD LAW FIRM, PLLC
Post Office Box 828
Ocean Springs, Miss. 39566
T: 228.327.7776
E: brandi.gatewood@gmail.com

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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. Arthur Lee Brown and Linda Jackson Brown, *Appellants*
2. David Neil McCarty, *Trial & Appellate Counsel for Appellants*
3. Brandi Gatewood, *Appellate Counsel for Appellants*
4. Drew McLemore Martin, *Trial Counsel for Appellants*
5. James Anderson, Jr., and Laura Anderson, *Appellees*
6. Pieter Teeuwissen and Lara Gill, *Trial Counsel for Appellees*
7. The Honorable S. Malcolm O. Harrison, *Former Circuit Judge, Hinds County*

So CERTIFIED, this the 24th day of August, 2011.

Respectfully submitted,



David Neil McCarty
Miss. Bar No. [REDACTED]
Attorney for Appellants

Table of Contents

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Argument	1
I. The Andersons' "As Is" Argument Is Procedurally Barred	1
II. The Brown Family Did Not Release the Andersons	2
III. The Andersons' Breaches of Contract Were Intentional	3
Conclusion	4
Certificate of Service	5

TABLE OF AUTHORITIES

Cases

<i>Frye v. Southern Farm Bureau Cas. Ins. Co.</i> , 915 So. 2d 486, 492 (Miss. Ct. App. 2005).....	3
<i>Gale v. Thomas</i> , 759 So. 2d 1150, 1159 (Miss. 1999).....	1
<i>Luse v. Luse</i> , 992 So. 2d 659, 663 (Miss. Ct. App. 2008)	1
<i>Smith v. Falke</i> , 474 So. 2d 1044, 1047 (Miss. 1985).....	2
<i>Whitaker v. T & M Foods, Ltd.</i> , 7 So. 3d 893, 900 (Miss. 2009)	2

Reply Brief of the Brown Family

This is a case where a family sought to recover losses they suffered after purchasing a poorly maintained and repaired home. At trial, the court granted a directed verdict that the family had released the sellers from liability, and prevented the case from reaching the jury.

For three reasons the that verdict must be reversed and this case remanded for a new trial. First, the Brown Family did not release the Andersons from their breaches of contract by virtue of the Release. Second, the Brown Family presented abundant testimony to support a claim of tortious breach of contract. Last, because the Andersons did not raise their “as is” argument at trial, and it was not a component of the trial court’s directed verdict.

Argument

I. The Andersons’ “As Is” Argument Is Procedurally Barred.

Because the Andersons did not raise their “as is” argument at trial, and it was not a component of the trial court’s directed verdict, this argument is barred and must be disregarded by the Court.

The Mississippi Supreme Court has held that “an issue not raised before the lower court is deemed waived and is procedurally barred.” *Gale v. Thomas*, 759 So. 2d 1150, 1159 (Miss. 1999); see *Luse v. Luse*, 992 So. 2d 659, 663 (Miss. Ct. App. 2008) (when arguments “were raised subsequent to his appeal and never previously presented to the chancery court,” Court would disregard argument).

The “as is” argument was not ruled upon by the trial court, nor was it present in any fashion in the court’s “Final Judgment,” which is the sole matter before this Court on appeal. See R.E. 11-13. The trial court only ruled on the applicability of the “Walk-Thru Inspection Release,” and did not reach any questions of the “as-is” provision in the Contract.

The Andersons are precluded from raising the issues of whether the “as is” clause prohibits the Brown Family’s recovery and whether the Brown Family breached a contractual obligation by their alleged neglect. Because this issue was never presented to the trial court, and was absolutely not ruled upon, it is procedurally barred.

II. The Brown Family Did Not Release the Andersons.

Because the Brown Family did not and legally could not have released the Andersons from breaches of contract, the directed verdict must be reversed and this case remanded for a new trial.

It is undisputed that Mr. Brown signed a Release prior to closing on the Home. However, the Release is of no legal consequence or effect to the Andersons because that document pertained only to the Andersons’ *realtor*, and not the Andersons personally. *See Smith v. Falke*, 474 So. 2d 1044, 1047 (Miss. 1985) (“[I]n a release contract[,] a party releases only those parties whom he intends to release”). Moreover, the Mississippi Supreme Court recently has held that where a party had “released only one specific party to the litigation” through a release, it did not release the other two parties. *Whitaker v. T & M Foods, Ltd.*, 7 So. 3d 893, 900 (Miss. 2009). Consequently, the Court held that the party releasing one of its opponents could continue to maintain suit against the non-released parties. *Id.*

In this case, Mr. Brown signed a Release that released only Ruth Epps Realty. The Release did not address the Andersons. Nor at any point did Mrs. Brown release any party or person—and therefore the Release cannot effect her claims against the Andersons.

Accordingly, the Andersons were not been released from suit, and the directed verdict must be reversed, and this case remanded for a full trial on the merits.

III. The Andersons' Breaches of Contract Were Intentional.

Because the evidence presented at trial was sufficient to show that the Andersons' breaches of contract were intentional and knowing, the directed verdict must be reversed and this case remanded for a new trial.

"Tortious breach of contract requires, in addition to a breach of contract, some intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort." *Frye v. Southern Farm Bureau Cas. Ins. Co.*, 915 So. 2d 486, 492 (Miss. Ct. App. 2005) (internal quotations omitted).

The Andersons argue that the Brown Family was unable to provide evidence demonstrating that the Andersons' breach was the result of intentional wrong or that the Andersons acted maliciously or with reckless disregard of the rights of the Brown Family. However, the testimony of four separate witnesses and voluminous information contained in the record clearly demonstrate that the Andersons' actions were intentional and that they had tortiously breached their contract with the Brown Family.

The four witnesses were Mr. and Mrs. Brown, their son Michael Jackson, and licensed home inspector Eric Eades, who had previously inspected the home. Each witness repeatedly testified regarding the frightfully poor conditions of the home. Mr. Eades testified that the home had been in terrible disrepair for some time, indicating that the Andersons knew about the damage to the house—indeed, that there was no way the flaws in the home were recent. There was uncontradicted testimony that the hot water in the house did not work, that the house was unsafe, and that electrical fires could start with the flick of a light switch.

In contrast with the condition of the house, Mrs. Brown testified that, at the closing for the house, Mr. Anderson told her "congratulations, you just bought you a good house, that everything in the kitchen was brand new." R. 7:77. Mr. Anderson made that statement at the

very same time that he provided a seller's disclosure statement and contract for the sale of the home that the house was under repair and was being sold subject to the repair of the damaged house. The disclosure statement and contract for the house clearly demonstrate that the Andersons had prior knowledge of the condition of the house, and that they made misrepresentations to the Brown Family regarding the condition of the house. It is clear from the undisputed testimony of the home inspector and the Brown Family that the house had not been repaired, as was evident by the well-documented dangerous condition of the home when the Browns moved into the home.

As the non-moving party in the motion for a directed verdict, the trial court was bound to consider the evidence in the light most favorable to the Brown Family. It is clear that this time-honored standard was not obeyed. The order granting the Andersons' *ore tenus* motion for directed verdict must be reversed and this case remanded for a new trial on the merits of the intentional breach of contract claim.

CONCLUSION

For three reasons the directed verdict must be reversed and this case remanded for a new trial. First, the Andersons' arguments in its response brief are procedurally barred, as they were neither presented to the trial court nor ruled upon at trial. Second, the Brown Family did not release the Andersons from their breaches of contract by virtue of the Release. The Release pertained only to the realty company. The Release did not address the Andersons. Finally, the Brown Family presented substantial testimony and evidence that supported their claim of tortious breach of contract.

Accordingly, the directed verdict must be REVERSED and this case REMANDED for a jury trial on the breach of contract and intentional breach of contract claims.

Filed this the 24th day of August, 2011,

Respectfully Submitted,

Attorneys for Appellants



David Neil McCarty

Miss. Bar No. [REDACTED]

DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721

Brandi Denton Gatewood
Miss. Bar No. [REDACTED]
THE GATEWOOD LAW FIRM, PLLC
Post Office Box 828
Ocean Springs, Miss. 39566
T: 228.327.7776
E: brandi.gatewood@gmail.com

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery if specified, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

Ms. Kathy Gillis, Clerk
(via Hand Delivery)
MISSISSIPPI SUPREME COURT
P.O. Box 117
Jackson, Miss. 39205

Attorneys for Appellees
Pieter Teeuwissen
P O Box 16787
Jackson, MS 39236-6787

Lara E. Gill
P O Box 2779
Jackson, MS 39207-2779

Chambers of the Hinds County
Circuit Court Judge
P.O. Box 22711
Jackson, MS 39225-2711

THIS, the 24th day of August, 2011.



DAVID NEIL McCARTY, ESQ.