IN THE SUPREME COURT OF MISSISSIPPI
NO. 2005-IA-00311-SCT

CITIFINANCIAL MORTGAGE COMPANY, INC., FORMERLY KNOWN AS ASSOCIATES HOME EQUITY SERVICES, INC., FORMERLY KNOWN AS FORD CONSUMER FINANCE COMPANY, INC., HARE MORTGAGE, INC. AND JOHN DOES A-Z — APPELLANTS

VS.

ROSIE WASHINGTON AND CATHERLEAN CRAFT — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT,
SECOND JUDICIAL DISTRICT, JASPER COUNTY, MISSISSIPPI

BRIEF OF APPELLEES ROSIE WASHINGTON AND CATHERLEAN CRAFT
(ORAL ARGUMENT REQUESTED)

W. Lewis Garrison, Jr.
GARRISON SCOTT, P. C.
2224 1st Avenue North
Birmingham, Alabama 35203
Telephone: (205) 326-3336
Facsimile: (205) 326-3332

Christopher E. Fitzgerald (MS BAR [redacted]
FITZGERALD & ASSOCIATES, PLLC
Post Office Box 1500
Ocean Spring, Mississippi 39566-1500
Telephone: (228) 875-9072
Facsimile: (228) 818-2877

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. CitiFinancial Mortgage Company, Inc.
2. Rhonda Hare
3. Hare Mortgage Company
4. Rosie Washington
5. Catherlean Craft
6. H. Mitchell Cowan, Esq.
7. Laura Limerick Gibbes, Esq.
8. Watkins, Ludlam, Winter & Stennis, P.A.
9. Christopher E. Fitzgerald, Esq.
10. W. Lewis Garrison, Esq.
11. Garrison, Scott, Gamble & Rosenthal, P.C.
12. Fitzgerald & Associates, PLLC

Respectfully submitted, this the 18 day of January, 2007.

CHRISTOPHER E. FITZGERALD

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STATEMENT OF THE ISSUES

1. Whether or not the trial court correctly found that genuine issues of fact existed which prevented Summary Judgment.

2. Whether or not the trial court correctly found that there were genuine issues of fact that the Plaintiffs, after discovering their claims, filed suit within the statutory time period.

3. Whether or not the trial court correctly found that there were genuine issues of fact concerning whether or not the Plaintiffs were explained and understood that by signing the releases for their "Kentucky" flipping/packing claim, that they were releasing their claims for the separate action at bar.

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VS.

ROSIE WASHINGTON AND CATHERLEAN CRAFT — **APPELLEES**

BRIEF OF APPELLEE ROSIE WASHINGTON AND CATHERLEAN CRAFT

STATEMENT OF THE CASE

I. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIBUNAL BELOW:

The Plaintiffs essentially agree with the Defendant's assessment of the course of proceedings and disposition in the lower court. However, as will be shown below, the Plaintiffs disagree that the depositions of Plaintiffs "revealed significant facts that were directly contrary to the allegations contained in their complaint." (Appellant Brief, p. 3.). In fact, Plaintiffs' deposition testimony directly supports their claims. Further, Plaintiffs disagree that they "abandoned their theory" of fraudulent misrepresentation or any theory for that matter. CitiFinancial's predatory loan practices include non-disclosure of relevant loan information which supports Plaintiffs' claims of negligence, fraudulent misrepresentation, breach of good faith and fair dealing and equitable relief.

II. RELEVANT FACTS:

Between October and November of 1995, Plaintiff Rosie Washington obtained a

$31,480.00 loan from Hare and CitiFinancial for the purpose of consolidating debt. Rhonda Hare was the President of Hare, and the mortgage broker for the Plaintiffs' loan. (R. 1086-87). Plaintiff, Catherlean Craft, the daughter of Rosie Washington, co-signed the loan with her mother. Not only did the Defendants secure their loan by obtaining a first mortgage lien on Ms. Washington's home, they also placed her in a loan package which provided abundant financial profit to CitiFinancial and its agent that required Ms. Washington to pay $400.57 for 180 months (15 years). This "loan" would ensure that the Defendants receive $100,580.23 in payments from Ms. Washington, of which $69,100.23 would be *interest*. In addition, at the end of this 15 year payment period, the "loan" by the Defendants required Ms. Washington to pay a lump sum "balloon" payment of $28,878.20. The "loan" was specifically designed to require Ms. Washington to pay the Defendants ***$400.57 for 15 years, knowing full well that the principle balance would be reduced by only $2,601.80***.

Incredibly, the following material fact was concealed from the Plaintiffs: ***for an additional $42.18 per month, which would have made the monthly payment $442.75, the loan would have been paid in full at the end of 15 years, and no balloon payment would have existed.*** (R. 1089). The fact that the Plaintiffs could have paid their loan in full at the end of 15 years for a mere $42.18 more per month is ***not*** reflected on any documents provided to Plaintiffs at the loan closing. The fact that the Plaintiffs could have paid the loan in full at the end of 15 years for an additional $42.18 per month was never disclosed to the Plaintiffs by ***anyone***, including representatives of Ford, CitiFinancial, Hare Mortgage, or the attorney who handled the closing. (R. 1088-89). There were no amortization schedules made available to the Plaintiffs at any time. (R. 1088). The Plaintiffs were not provided with an amortization schedule showing a

monthly breakdown of the loan which carried the balloon payment. Nor were Plaintiffs provided with an amortization schedule which would have reflected that the loan could have been paid in full at the end of 15 years for an additional $42.18 per month. There were no loan documents of any type which Plaintiffs could have reviewed which would have alerted them to the fact that the loan could have been paid in full at the end of 15 years for an additional $42.18 per month. This Court should note that Defendant Hare ***admits*** that the Plaintiffs ***should have been told*** of the availability of other loan programs, and more importantly, ***Hare places the blame for such omission on CitiFinancial***. (R. 1088-89). CitiFinancial, revealing a genuine issue of material fact between the individual *Defendants* as well as the Plaintiffs, claims that ***Hare*** was responsible for choosing the loan offered to the Plaintiffs. (R. 1092). Further, CitiFinancial admits that it never ran an amortization schedule for the loan in question. (R. 1092). Finally, CitiFinancial agrees, assuming Plaintiffs' counsel's amortization computer program is accurate, that for a mere $42 and some change, the Plaintiffs could have paid the loan in full at the end of the 15 year loan period. (R. 1094-95). It cannot be disputed that the Plaintiffs were never informed or counseled about the availability of an alternative loan without a balloon payment. (R. 1107, 1112).

Defendants acted in an egregious manner by withholding this information from the Plaintiffs. Structuring a loan program, such as the loan in question, can only be described as predatory. The evidence in this case is without dispute and shows that CitiFinancial had a 15 year fixed loan program that could, and should have been available to the Plaintiffs. Further, the Plaintiffs would have qualified for a loan with a monthly payment of $442.75, which would have paid the loan in full at the end of 15 years. Only the Defendants knew these facts. Defendants consciously chose to conceal them. Indeed, Plaintiffs have provided the Defendants with expert

information pursuant to Rule 26 wherein Professor Gene Marsh of the University of Alabama Law School has been designated to render expert and objective opinions regarding the predatory nature of this loan. (R. 1114-17). Professor Marsh testified in his deposition that Rosie Washington should never have been offered the loan in question, and that she would have qualified for a 15 year fixed term loan with no balloon payment. (R. 1120-21, 1123). In any good faith relationship, CitiFinancial should have sought approval for the 15 year fixed term with no balloon because the loan offered to Plaintiffs was blatantly one sided and transparently predatory. To use Professor Marsh's exact words, it was truly a "train wreck." (R. 1123) Determining what loan should have been offered to the Plaintiffs was the Defendant's chore. The decision on what loan should be accepted was of course the Plaintiffs' chore, but that decision hinged on Plaintiffs' knowledge and understanding of the alternatives that were available to them. That knowledge was deliberately withheld because of the financial advantage afforded Defendant in so doing. (R.1124)

SUMMARY OF THE ARGUMENT

ARGUMENT

I. The trial court correctly found that genuine issues of fact existed which prevented Summary Judgment

The Defendant asks this Honorable Court to ignore the fact that Defendant, Hare Mortgage Company, unequivocally states that the Plaintiffs should have been informed of other loan packages available. (R. 1088-89). Further, the Defendant asks this Court to give lending companies a blank check to write any type of contract whether usury, unconscionable, or otherwise, with impunity.

Throughout the Defendant's lengthy treatise in support of its Motion for Summary Judgment, there is a constant reliance on the alleged lack of any fiduciary relationship between the Plaintiffs and the Defendants. To wax eloquent for a moment, this premise is the wall Defendant hides behind to allow deliberate and selective predatory practice.

Plaintiffs recognize this ploy and offer the following simple premise to thwart the erroneous contention the Defendant tries to force the Court to accept by constant referral to the legal tenants involved. Simply stated, there is a fiduciary duty owed to the Plaintiffs because the Defendants ***say*** there is a duty owed. Hare ***admits*** that the Plaintiffs ***should have been told*** of the availability of other loan programs, and more importantly, ***Hare places the blame for such omission on CitiFinancial***. (R. 1088-89). However, CitiFinancial claims that ***Hare*** was responsible for choosing the loan offered to the Plaintiffs. (R. 1092). It is apparent, however, that both agree it was ***somebody's*** duty. There is no need to argue about the creation of a fiduciary relationship, when the Defendants themselves allege that somebody breached a duty owed to the Plaintiffs. The learned trial court judge agreed and found that a jury should address the genuine issues of fact and determine where this duty lies. The Defendant disliked the trial Court's ruling, and by filing an interlocutory appeal, seeks to use this Court as a "super trial court judge" to obtain a summary judgement.

(1) There are genuine issues of fact concerning breach of covenant of good faith and Fair Dealing and/or Negligence:

"All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement." *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992). "Good faith is the faithfulness of an agreed purpose which is consistent with justified expectations of the other

party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness. *Id.* The *Cenac* court explained the covenant as follows:

> In recent years, courts have often supplied a term requiring both parties to a contract to exercise what is called 'good faith' or sometimes 'good faith and fair dealing.' This duty is based on fundamental notions of fairness, and its scope necessarily varies according to the nature of the agreement. ***Some conduct, such as subterfuge and evasion, clearly violates the duty.*** However, the duty may not only proscribe undesirable conduct, ***but may require affirmative action as well.***

Id. (citing Farnsworth, *Contracts*, § 7.17. 526-27 (1982))(emphasis added). There is ample evidence and testimony establishing a genuine issue of material fact concerning the breach of Good Faith and Fair Dealing. As noted above, Defendant CitiFinancial and Defendant Hare admit that the Plaintiffs were never told about or offered the loan program which would have allowed the loan to be paid in full without the exorbitant balloon payment. (R. 1088-89, 1092-95, 1107, 1112). More importantly, Defendant Hare testified that CitiFinancial should have told the Plaintiffs about the 15 year fixed term with no balloon. (R. 1088-89). Plaintiffs' expert, Professor Marsh, has clearly characterized the lending practice associated with the loan in question as predatory which he defines as a loan where the predominate interest is self interest rather than the interest of the Plaintiffs. (R. 1125). Finally, the Mississippi Legislature has held that negligence is a question of fact for the jury. *Miss. Code Ann.* § 11-7-17.

P's evidence

(2) <u>There are genuine issues of fact concerning unconscionability, rescission and cancellation</u>:

Plaintiffs' claim of rescission and cancellation necessarily incorporate all legal mechanisms for rescinding or canceling a contract, namely unconscionability. In the lower Court, Defendant failed to seek Summary Judgment on this issue. The trial Court correctly found

that genuine issues of material fact were present on the above equitable claims and denied summary judgement.

Mississippi law clearly recognizes that contracts can be procedurally and substantively unconscionable. *East Ford, Inc. v. Taylor*, 826 So.2d 709, 714 (Miss. 2002). (citing *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F.Supp.2d 655 (S.D. Miss. 2000). "Procedural unconscionability may be proven by showing '***a lack of knowledge***, lack of voluntariness, inconspicious print, ***the use of complex legalistic language***, ***disparity and sophistication or bargaining power of the parties*** and/or a ***lack of opportunity to study the contract*** and inquire about the contract terms.'" *Id.* (emphasis added). Additionally, the Mississippi Supreme Court stated that substantive unconscionability "may be proven by showing the **terms** of the. . . agreement to be ***oppressive***." *Id.* (citing *York v. Georgia-Pac. Corp*, 585 F.Supp. 1265, 1278 (N.D. Miss. 1984)(emphasis added). The Mississippi Supreme Court has examined unconscionability and stated the following:

> Unconscionability has been defined as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." To show that a provision is unconscionable, the party seeking to uphold the provision must show that the provision bears some reasonable relationship to the risk and needs of business.

East Ford, Inc. v. Taylor, 826 So.2d at 715. (citing *Entergy Miss. Inc. v. Burdette Gin Co.*, 726 So.2d 1202 (Miss. 1998); *Bank of Indiana, Nat'l Ass'n v. Holyfield*, 476 F.Supp. 104, 109 (S.D. Miss. 1979)). Further the Mississippi Supreme Court has defined an unconscionable contract as "***one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other***. . ." *In re Will of Johnson*, 351 So.2d 1339, 1341 (Miss. 1977)(emphasis added). In the *Holyfield* case, the Court discussed procedural

unconscionability as follows:

> The indicators of procedurally unconscionability generally fall into two areas: (1) ***lack of knowledge***, and (2) lack of voluntariness. A lack of knowledge is demonstrated by a ***lack of understanding of the contract terms arising from*** inconspicuous print or ***the use of complex, legalistic language***, ***disparity in sophistication of parties***, and ***lack of opportunity to study the contract*** and inquire about contract terms. ***A lack of voluntariness is demonstrated in contract of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all***.

Holyfield, 476 F. Supp. at 109-10. (citations omitted)(emphasis added). Finally, the Mississippi Supreme Court has defined a contract of adhesion "as one that is 'drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms.'" *East Ford, Inc. v. Taylor*, 826 So.2d at 716. (citing *Bank of Indiana, Nat'l Ass'n v. Holyfield*, 476 F. Supp. 104, 108 (S.D. Miss. 1979)(quoting Restatement 2d, Conflicts § 203, Comment b).

It cannot be denied that the loan contract Plaintiffs entered into was a contract of adhesion and was both procedurally and substantively unconscionable. At the very least, there is a genuine issue of material fact concerning these issues which should be presented to a jury.

On the face of Plaintiffs' pleadings, this loan is procedurally and substantively unconscionable. This "loan" would ensure that the Defendants receive $100,580.23 in payments from Ms. Washington, of which $69,100.23 would be *interest*. In addition, at the end of this 15 year payment period, the "loan" by the Defendants required Ms. Washington to pay a lump sum "balloon" payment of $28,878.20. Keep in mind the original loan was for $31,480.00. The "loan" was specifically tailored to require Ms. Washington to pay the Defendants ***$400.57 for 15***

years, knowing full well that the principle balance would be reduced by only $2,601.80. It was apparent that the Plaintiffs were poor, uneducated Mississippi citizens who were in a weaker bargaining position both in sophistication and financial resources. This is precisely the type of contract which the Supreme Court of Mississippi described as an unconscionable contract "***such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other***. . ." *In re Will of Johnson*, 351 So.2d at 1341.

Plaintiffs' expert has described this loan as a "train wreck." (R. 1122). Plaintiffs' expert has described this loan as predatory. (R. 1125). Additionally, a borrower is only able to make decisions concerning a loan contract based on what "contract" is presented. (R. 1124). The Plaintiffs were never presented any other contract options, although reasonable options were available, so there actually was "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *East Ford, Inc. v. Taylor*, 826 So.2d at 715. (citing *Entergy Miss. Inc. v. Burdette Gin Co.*, 726 So.2d 1202 (Miss. 1998); *Bank of Indiana, Nat'l Ass'n v. Holyfield*, 476 F.Supp. 104, 109 (S.D. Miss. 1979)). The Plaintiffs have clearly shown that there is a genuine issue concerning the elements necessary to show procedural and substantive unconscionability. Plaintiff, Rosie Washington, had no financial understanding of what a "balloon payment" was let alone how it effected principal and interest.

Was it in terms of contract?

Q. Did you have an understanding of what a balloon payment is?
A. No.
Q. If you were told that you would still owe $28,000 after paying over $100,000 on your loan would you have entered into this loan?
A. No.
Q. If you were given the opportunity to pay $42 more and pay the loan off at the end of the period would you have done that?

A. Yes.

(R. 1112).

Q. Now, you were asked if you just looked at this document, you were asked by defense counsel that if you just looked at this [loan] document could you tell that there was a balloon payment?
A. No.
Q. Because you didn't know what a balloon payment was at that time did you?
A. No.
Q. So when she asked you do you understand it now, is it because you are familiar with this lawsuit now and what happened?
A. Yeah.
Q. But back at the time when you signed defense Exhibit 3, and you signed it because you trusted them, right?
A. Right.
Q. You didn't know what a balloon payment was did you?

* * *

A. No.

(R. 1181). The Defendants were able to succeed in their predatory practices by presenting themselves as a trustworthy company dedicated to lending a helping hand to clients like Ms. Washington. They created a friendly environment, took advantage of the Plaintiffs' lack of financial savvy and education, and pushed loan documents in front of them stating, "sign here." (R. 1100-03, 1128-31, 1133).

(3) <u>There are genuine issues of fact concerning predatory lending which is negligent, a breach of good faith and fair dealing and fraudulent</u>:

It cannot be over stressed that the objective observations of Plaintiffs' expert, Professor Gene Marsh, clearly indicates that a reasonably prudent company acting fairly should never have offered this loan package to individuals such as the Plaintiffs. Professor Marsh went as far as to say that, faced with the option of providing the loan package presented to the Plaintiffs or not providing a loan at all, the Defendant, in good conscience and prudence, should not have given

the loan at all. (R. 1171-72). Plaintiffs' expert has described this loan as predatory. (R. 1121). Further, Plaintiffs' expert opined that the Defendant was not prudent in providing this loan to Plaintiffs based on their age and financial status. (R. 1121). It cannot be denied that the State of Mississippi requires the Defendant to act as a reasonably prudent lending company. The expert testimony presented to this honorable Court by the Plaintiffs establishes that there is a genuine issue of material fact that the Defendants failed to act as a fair and reasonably prudent lending company, but rather consciously took advantage of Plaintiffs' lack of understanding in order to set in place an oppressive agreement. The blatant imbalance associated with the amount of money borrowed, compared to the money required to be paid back by the Plaintiffs, is apparent and speaks for itself.

Additionally, the Plaintiffs obtained an Affidavit executed by Professor Gene Marsh wherein Professor Marsh references a recent study performed by The University of North Carolina (UNC) at Chapel Hill. This study addresses CitiFinancial Mortgage Company, Inc.'s subprime home loans **with balloon payments**, and supports Plaintiffs' expert's opinions. This Honorable Court should note the opening statement in the UNC study which defines predatory loan terms as "prepayment penalties and balloon payments." (R. 1200). Finding that "loans with balloon payments, . . . face a 46 percent greater odds of entering foreclosure than loans without such terms", the authors of the study implore this Court to take note of "the significant financial and emotional costs associated with foreclosure on families and neighborhoods." (R. 1201). Companies like the Defendant are willing to engage in this type of practice to reap the huge interests and profits at the expenses of Mississippi's poor citizens. If not held accountable, companies like CitiFinancial will continue to engage in predatory lending practices in complete

disregard of the financial and emotional destruction of Mississippi citizens.

(4) **There are Genuine Issues of Fact Concerning Fraud, Fraudulent Concealment and Misrepresentation:**

omission = affirmative act of concealm

An "***omission*** or concealment of material facts can constitute a misrepresentation, just as can a positive, direct assertion." *Davidson v. Rogers*, 431 So.2d 483, 485 (Miss. 1983)(emphasis added). "In order to recover damages for fraudulent concealment, appellant must demonstrate that appellee took some action, affirmative in nature, which was designed or intended to prevent and which did prevent, the discovery of the facts giving rise to the fraud claim." *Id.* In *Davidson*, the act of concealment through repairs to a residence, and the omission of disclosing those repairs, were the affirmative act sufficient to prove fraud/fraudulent concealment. It is apparent that the Defendants intentionally and fraudulently concealed, by omission, the availability of an alternative loan. As noted above, a simple amortization report would have revealed that for a meager $42.18 more per month, the Plaintiffs could have paid the loan off at the end of the loan period and could have avoided the exorbitant balloon payment. No amortization report was ever run. Further, the Defendants never ***informed*** the Plaintiffs that for $42.18 more per month they could have paid the loan off without having a balloon payment. Contrary to the Defendants claim, Plaintiffs' expert, Professor Gene Marsh, testified in his deposition that Rosie Washington should have never been offered the loan in question and she would have qualified for the 15 (fifteen) year fixed term loan with no balloon payment. (R. 1120-21, 1123). Clearly there is a genuine issue of material fact concerning fraudulent concealment/misrepresentation.

II. The trial court correctly found that there were genuine issues of fact that the Plaintiffs, after discovering their claims, filed suit within the statutory time period.

Assuming, without conceding, that at the time of the closing, terms of the loan were completely disclosed, without any oral misrepresentations, in the loan documents, the Plaintiffs claims are not barred by the Statute of Limitations. The Defendant's failure to address the following issue of fact highlights its importance in determining whether or not the statute was tolled: ***no document, contract, or written disclosure, signed or unsigned by the Plaintiffs, exists appraising the Plaintiffs that they qualified for a 15 year fixed term loan with no balloon payment***. There is ***absolutely nothing*** in the loan closing documents signed by, and provided to, the Plaintiffs that discloses that for a mere $42 more per month the Plaintiffs could have paid the loan in full at the end of the 15 year period with no balloon payment; the Defendant's corporate representative admits this material fact.

Q. Did you see any document anywhere which would have told or revealed to Ms. Craft and Ms. Washington what they could have paid this loan of in 15 years for? What monthly payments they could have had over 15 years which would have paid the loan in full?
A. There's not a document that I saw nor would I expect to see one.

(R. 1094).

Q. Let me show you a document marked a Plaintiff's Exhibit No. 3.
Q. Does that appear to be an amortization schedule?
A. Yes, sir, it does.
Q. Does it have the loan amount of $31,480 on it?
A. Yes, sir, it does.
Q. Does it have the interest rate of 15.1 percent?
A. It says nominal annual rate, 15.1, yes.
Q. And it has the starting date on there of October 1 - - October 2nd, 2001, doesn't it?
A. Yes, sir.
Q. And do you see, according to that amortization schedule which we ran, what it would have taken to pay this loan in full at the end of 15 years?

A. I see the payment of 442.75, yes, sir.
Q. Have you run any of your own schedules in order to determine – well, first let me ask you: Do you agree or disagree with this amortization or do you just not know?
A. I would have to have a computer program to do that. I can't do that off of top of my head, no, sir.
Q. Well, if you assume, again, our computer program was correct, we plugged in this information. And in order to fully amortize this loan, in other words, pay it off in full at the end of 15 years, Ms. Craft and Ms. Washington could have paid $442.75.

(R. 1094-95).

It is clear that the Plaintiffs had nothing in their possession to put them on notice about the claims raised in the case at bar because the claim was concealed from them. Defendant Hare has testified that CitiFinancial should have disclosed the availability of other loan programs. (R. 1088). Defendant CitiFinancial claims it was Hare's duty to disclose the available loan programs. (R. 1092).

It is more than apparent that the availability of Plaintiffs to pay an additional $42 per month in order to pay the $31,000 loan off in full at the end of 15 year term, as opposed to owing a balloon payment of more than $28,000 at the end of the loan period (especially after already paying $100,000), was fraudulently concealed from the Plaintiffs. Only after contacting this law firm shortly before filing the present action on November 19, 2001, and extensive discovery was conducted, did Plaintiffs discover this cause of action.

Q. Did you ever ask anybody to review the documents for you?
A. Let me go back to that question you just asked me before you asked that one.
Q. Okay. I had asked, after the loan closing did you ever read your loan documents?
A. No, I didn't.
Q. Did you ever have anybody read them to you?
A. Yes.
Q. When was that?
A. ***It was before I put in for this lawsuit.***
Q. Do you remember when that was?

A. No.
Q. Who did you have read them to you?
A. Well, it was a lady come back I know real well. She was going from door to door with applications for people to take out a loan, so I showed her my papers, and that's when she told me it was a balloon on it. I asked her what was a balloon, and she told me.

* * *

Q. What's the lady's name?
A. Vera Keys.

(R. 1104-05)(emphasis added).

Q. What did you do after Vera Keyes had that discussion with you that day?
A. What did I do?

* * *

A. I didn't do nothing that day.

(R. 1105).

Q. Did you discuss with anybody in your family the conversation you had with Ms. Keyes?
A. Uh-huh (Affirmative).
Q. Who did you talk with?
A. My daughters.
Q. Which daughters?
A. Both of them.
Q. Joyce and Catherlean?
A. Uh-huh (Affirmative).

(R. 1105).

Q. When did you have this conversation with Ms. Keyes? What year was it?
A. I don't know.
Q. It is important for purposes of the lawsuit?
Mr. Fitzgerald: Well, it's asked and answered. She said right before this lawsuit.

* * *

Q. How long after you talked with Ms. Keyes did you talk with your daughters?
A. That evening.
Q. And then what did you do after you talked to your daughters?
A. I just told them what she said, and worried the rest of the time.

* * *

Q. How long was it between the time you had the conversation with Ms. Keyes and your daughters and the time you went and saw a lawyer?

A. I don't know. It wasn't long. I got a clipping out of the newspaper.

(R. 1105-06).

Even after contacting the undersigned law firm, it was not until the depositions of Hare and CitiFinancial were taken that it was truly discovered that the Defendants engaged in predatory lending practices and/or were negligent concerning the loan in question. It stands to reason that the information could not have been discovered before this time. *See*, e.g., *Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co.*, 554 So.2d 884 (Miss. 1989)(stating that facts required to prove fraud are generally only known by the party committing the fraud).

To toll the statute, Defendant claims that Plaintiffs must show an affirmative act by the Defendants to conceal the information in question, and show that in the exercise of reasonable diligence, Plaintiffs could not have discovered the information. What the Defendants failed to acknowledge is that the act of concealing the alternative loan discussed above ***is the affirmative act*** necessary to toll the Statute of Limitation, and the question concerning "reasonable diligence" is not whether the Plaintiffs have the necessary information in loan documents to put them on notice of the balloon payment, but rather were the Plaintiffs on notice that for an additional $42 per month the loan could have been paid in full with no balloon payment. *See, e.g., Phillips v. New England Mutual Life Ins. Co., et al.*, 36 F. Supp.2d 345, 349-50 (S.D. Miss. 1998)(stating that there is a question of whether subsequent affirmative acts of concealment are required, and determining that the issue is not whether plaintiffs had notice that premiums were not guaranteed [in the contract] to vanish, but rather were plaintiffs on notice of "inflated dividend assumptions"

and "artificial actuarial computations"). Considering the evidence and testimony in the light most favorable to the Plaintiffs, there is a genuine issue of fact concerning the Defendants' fraudulent concealment, and the Plaintiffs' diligence in discovering their cause of action. Accordingly, the trial Court correctly found that summary judgment on the issue of statute limitations was not warranted.

III. The trial court correctly found that there were genuine issues of fact concerning whether or not the Plaintiffs were explained and understood that by signing the releases for their "Kentucky" flipping/packing claim, that they were releasing their claims for the separate action at bar.

A material issue of fact exists concerning whether or not the Plaintiffs settled and released their claims against the Defendant. First, the Releases presented to this Court do not identify Ford Consumer Finance Company. Second, the Releases concern claims for "Flipping" and "Packing" schemes which are not present in the case at bar, and accordingly, no consideration was given for the claims raised in this action. Finally, the releases had nothing to do with the claims raised in this action, and the Plaintiffs were not informed of the legal ramifications of the release alleged by the Defendant in this action.

Q. Now in connection with the lawsuit that you had against Kentucky, let me ask you to look at what she's going to mark as Exhibit 12. If you could look at that, Ms. Washington, and tell me if you know what this document is and if that's your signature at the end of the document?
A. Yes.
Q. Do you remember signing a settlement agreement in that case?
A. A release paper?
Q. Yes, ma'am. Do you remember signing this document?
A. Yes.
Q. And I don't want you to tell me anything that you may have said to your attorney because that's privileged, but my question is, prior to signing this agreement did you discuss it with your attorneys?
Mr. Fitzgerald: Which attorneys are you referring to?

Ms. Gibbes: The ones on the Kentucky case.

A. Did I - -

Q. Yes, ma'am. Before you signed this document did you talk with your attorneys about settlement the case?

A. No, he sent it through mail.

Q. Did he talk to you about it at all?

A. No.

Q. Did you understand what you were signing when you signed it?

A. Well, I thought I was signing the release paper on my air and heat system because it's a different case.

(R. 1111-12).

Q. Did you know that you were signing a settlement agreement?

A. Yes. This from Kentucky?

Q. I don't know, that's what I'm asking?

A. This is from Kentucky.

(R. 1132).

The Mississippi Supreme Court has held that there is a jury question when there are issues concerning the validity of a release due to "'an absence of good faith and full understanding of legal rights [and the] nature and effect of the instrument was misrepresented.'" *Whitehead v. Johnson*, 797 So.2d 317, 321 (Miss.App. 2001)(citing *Willis v. Marlar*, 458 So.2d 722, 724 (Miss. 1984)). The *Whitehead* court cited numerous cases where a jury question is presented when there is evidence that the release was not explained or there was a lack of full understanding of the legal rights being released. *Whitehead*, 797 So.2d at 321 (citing *Samples v. Hall of Mississippi, Inc.*, 673 F.Supp. 1413, 1417 (N.D. Miss. 1987); *Garner v. Hickman*, 733 So.2d 191, 196 (Miss. 1999)(additional cites omitted)). The above testimony establishes that there is a jury question concerning whether or not the Plaintiffs were explained and understood that by signing the releases in question for their "Kentucky" flipping/packing claim, that they were releasing their claims for the subject action. Accordingly, summary judgment was properly

denied on this issue.

CONCLUSION

The Defendant's monetary abuse of the Plaintiffs in the case at bar is evident and blatant. Any objective assessment indicates that a trusting client in need of financial aid was taken advantage of by a predatory lending institution simply because the opportunity existed to do so. The option to provide the financial aid under the terms of a fair and reasonable contract was deliberately ignored by Defendant. The Defendant, CitiFinancial, and co-Defendant, Hare, admits it should have been done, but they point the finger at each other as to whose responsibility it was to do so. The Defendant, CitiFinancial, is counting on this Court to sanction its predatory practices. The Court's decision given in this action will either quell the conduct and protect Mississippi's citizens, or it will open up the floodgates for legal fleecing of the poor, unsuspecting and uneducated.

RESPECTFULLY SUBMITTED, this the 18 day of January, 2007.

ROSIE WASHINGTON AND CATHERLEAN CRAFT

BY: _____
Christopher E. Fitzgerald

W. Lewis Garrison, Jr.
GARRISON SCOTT, P. C.
2224 1st Avenue North
Birmingham, Alabama 35203
Telephone: (205) 326-3336
Facsimile: (205) 326-3332

Christopher E. Fitzgerald (MS BAR #[redacted])
FITZGERALD & ASSOCIATES, PLLC
Post Office Box 1500
Ocean Spring, Mississippi 39566-1500
Telephone: (228) 875-9072
Facsimile: (228) 818-2877