IN THE SUPREME COURT OF THE STATE 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

APPELLANT/ DEFENDANT

V.

ROSIE WASHINGTON AND CATHERLEAN CRAFT

APPELLEES/ PLAINTIFFS

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

BRIEF OF APPELLANT CITIFINANCIAL MORTGAGE COMPANY, INC. (ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

CitiFinancial Mortgage Company, Inc.
Rhonda Hare
Hare Mortgage Company, Inc.
Rosie Washington
Catherlean Craft

H. Mitchell Cowan, Esq.
Laura Limerick Gibbes,Esq.
Watkins, Ludlam, Winter & Stennis, P.A.
Christopher E. Fitzgerald, Esq.
W. Lewis Garson, Esq.
Garrison Scott Gamble & Rosenthal, P.C.

Respectfully submitted, this the 9th day of June, 2006.

Laura Limerick Gibbes

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V.

ROSIE WASHINGTON AND CATHERLEAN CRAFT — **APPELLEES/ PLAINTIFFS**

STATEMENT OF ISSUES

1. The trial court erred in denying Citifinancial Mortgage Company, Inc.'s Motion for Summary Judgment. Mississippi law does not recognize a cause of action against a lender for failing to offer a borrower the "best" loan available, nor does it recognize a cause of action for failure to advise the borrower of alternative payment scenario outside of the loan terms. Plaintiffs have failed, as a matter of law, to raise any genuine issue of material fact as to the claims asserted in their Complaint and summary judgment should have been granted in favor of CitiFinancial.

2. The trial court erred in its determination that Plaintiffs' claims are not barred by the statute of limitations.

3. The trial court erred in its determination that Plaintiffs' claims were not previously settled and released.

IN THE SUPREME COURT OF THE STATE 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 — **APPELLANT/ DEFENDANT**

V.

ROSIE WASHINGTON AND CATHERLEAN CRAFT — **APPELLEES/ PLAINTIFFS**

BRIEF OF APPELLANT CITIFINANCIAL MORTGAGE COMPANY, INC.

STATEMENT OF THE CASE

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

This action was filed on November 19, 2001 by Plaintiffs Rosie Washington and Catherlean Craft, asserting various claims arising from a loan Plaintiffs obtained from Ford Consumer Finance ("Ford") on November 29, 1995. (R. 5-13; R.E. 27-35). Named as defendants were CitiFinancial Mortgage Company, Inc., a successor in interest to Ford; Hare Mortgage Company, Inc. ("Hare Mortgage"), the mortgage broker through which Plaintiffs obtained the loan at issue; and John Does A-Z. (R. 5-13; R.E. 27-35).

In their Complaint, Plaintiffs allege that they obtained a loan from Ford in the principal amount of $31,480.00. (R. 5-6; R.E. 27-28). Plaintiffs allege that Rhonda Hare, the Hare Mortgage employee with whom Plaintiffs dealt, represented to them "that the loan being made to them only required them to make monthly payments of $400.57 for 180 months to completely satisfy the obligation." (R. 6; R.E. 28). Plaintiffs contend that none of

the Defendants disclosed to them that, after making these monthly payments, Plaintiffs would still owe a balloon payment of $28,878.20 at the end of the loan term. (R. 6; R.E. 28). Finally, Plaintiffs assert that they filed suit "withing [sic] the requisite statute of limitations since first coming to know in October of 1999 that their payment of $400.57 per month for 180 months would not fully satisfy this obligation and would still require them to pay and [sic] additional [$]28,878.20 after making these payments for 15 years." (R. 6; R.E. 28).

Based on these factual allegations, Plaintiffs asserted claims against CitiFinancial and Hare Mortgage for breach of the covenant of good faith and fair dealing (Count I); economic duress (Count II); negligence (Count III); intentional and negligent infliction of emotional distress (Count IV); constructive fraud (Count V); rescission and cancellation (Count VI); and violation of the Mississippi Unfair or Deceptive Acts and Practices Act (Count VII). (R. 7-12; R.E. 29-34). Although not set forth in separate counts of the Complaint, Plaintiffs generally assert that Defendants breached fiduciary duties to the Plaintiffs and committed various forms of fraud. (R. 5-13; R.E. 27-35).

On February 21, 2002, CitiFinancial answered the Complaint, asserting among other defenses that Plaintiffs' claims were barred by the statute of limitations. (R. 33-42; R.E. 36-45). CitiFinancial also asserted that Plaintiffs' claims had been compromised and released as a result of settlements Plaintiffs had reached in earlier consumer finance litigation. (R. 38; R.E. 41).

Subsequently, discovery was conducted in this case. When Plaintiffs were deposed, they revealed significant facts that were directly contrary to the allegations contained in their Complaint. Plaintiffs did not testify to any alleged misrepresentations made to them by Hare Mortgage concerning the terms of the loan. Instead, Plaintiffs testified that Hare Mortgage made no misrepresentations at all.

Deposition of Rosie Washington

Q. Is there anything that you think that the lady at Hare ever told you that was not the truth?
A. Anything I think she told me wasn't the truth?
Q. Yes, ma'am. Do you think she ever told you something that was a lie or something that was not the truth?
A. No, because I didn't have that much dealing with her after she got the application filled out.

(R. 389; R.E. 84).

Deposition of Catherlean Craft

Q. I'm going to hand you, Ms. Craft, what was marked as Exhibit 10, that's a copy of the Complaint that was filed in this lawsuit. If you will look at the top of page 2 it says, "The defendants' employee/agent, Rhonda Hare, told and represented to Rosie Washington and Catherlean Craft that the loan being made to them only required them to make monthly payments of $400.57 for 180 months to completely satisfy the obligation". Did Ms. Hare ever tell you that?
MR. FITZGERALD: Again, objection. The complaint speaks for itself. You can answer.
A. No.

(R. 1006-1007; R.E. 146-147).

Based on Plaintiffs' testimony as well as other undisputed facts in the case, CitiFinancial filed a Motion for Summary Judgment on December 13, 2004. (R. 921-1053; R.E. 150-157). In its Motion, CitiFinancial demonstrated that Plaintiffs' claims were time-barred or had otherwise been released as part of earlier settlement agreements. (R. 921-1053; R.E. 150-157). Further, CitiFinancial also demonstrated that, as a matter of both fact and law, Plaintiffs had failed to establish any viable claim against it. (R. 921-1053; R.E. 150-157).

In response to the Motion for Summary Judgment, Plaintiffs abandoned their theory that the terms of the loan had been misrepresented to them. Instead, Plaintiffs argued that CitiFinancial was now liable to them for not offering them a "better" loan and not disclosing

that an increase in their monthly payments would have eliminated the balloon payment at the end of the loan term. (R. 1064-1133; R.E. 158-178). Plaintiffs advanced their new theory of recovery despite the fact that it was never pled in their Complaint and despite the fact that they did not even qualify for the loan they now say CitiFinancial should have offered to them. (R.E. 181-184).

A hearing on CitiFinancial's Motion for Summary Judgment was conducted on January 7, 2005. The Court took the Motion under advisement and subsequently entered an Order on February 10, 2005, denying it in nearly all respects. (Tr. 1-18, R. 1222-1223; R.E. 24, 5-6) In its Order, the Court granted the Motion for Summary Judgment as to Plaintiffs' claims for economic duress and violation of the Mississippi Unfair or Deceptive Acts & Practices Act. (R. 1222-1223; R.E.5-6). However, the Court denied summary judgment as to all remaining claims and on the statute of limitations and release defenses CitiFinancial had raised as a bar to Plaintiffs' claims. (R. 1222-1223; R.E. 5-6). The Court also denied CitiFinancial's request for an interlocutory appeal of the Order denying summary judgment. (R. 1223; R.E. 6).

On February 11, 2005, CitiFinancial filed a Petition for Interlocutory Appeal with this Court. (R.E. 185-201). The Court granted CitiFinancial's Petition and entered a stay of all further proceedings in the trial court until this Interlocutory Appeal is decided. (R. 1304-1305; R.E. 202-203).

II. STATEMENT OF THE FACTS

On November 29, 1995, Plaintiffs obtained a loan from Ford, a predecessor in interest to CitiFinancial. The loan was obtained through Hare Mortgage, which served as Plaintiffs' mortgage broker. (R. 1008-1009; R.E. 204-205). The loan was in the principal amount of $31,480.00, carried an interest rate of 15.1%, and required Plaintiffs to make 180 monthly

payments of $400.57 and a final balloon payment of $28,878.20. (R. 1008-1009; R.E. 204-205). Plaintiffs did not qualify for any other loan offered by Ford. (R.E. 181-184).

Although Plaintiffs' Complaint alleges that Hare Mortgage misrepresented the terms of the loan to them, Plaintiffs testified in their depositions that no misrepresentations were made to them about the loan.

Deposition of Rosie Washington:

Q. You just said that she called and told you that the loan went through?
A. That's what she told me.
Q. Being as specific as you can, Ms. Washington, I want you to tell me everything you remember that she said to you?
A. She just told me my loan went through. I forgot what date she said I could go complete it. I forgot what date it was.
Q. Is that the only thing that she said to you?
A. Yeah.
Q. Did you ask her any questions about the loan?
A. No.
Q. Did you ask her how much money you were borrowing?
A. No.
Q. Did you ask her about the terms of the loan?
A. No.
Q. Did you ask her how much your monthly payment was going to be?
A. No.
Q. Did you ask her how many months you were going to have to pay?
A. No.
Q. You never asked any questions about what your monthly payment was going to be?
A. No, I didn't know until we signed the last business thing from the loan.
Q. So before you went to the loan closing you didn't have any idea how much money you had borrowed?
A. No.
Q. You didn't know what your monthly payment was going to be?
A. No.
Q. Did you know what the term of your loan was going to be?
A. No.
Q. Did you know how many months you would have to pay?
A. No.
Q. Did you know whether there would be a balloon feature for the note?

A. No.
Q. Did you know what the interest rate was going to be?
A. No.
Q. And nobody at Hare ever discussed any of those things with you?
A. Nobody else?
Q. At Hare Mortgage?
A. No.

* * * * * *

Q. Is there anything that you think that the lady at Hare ever told you that was not the truth?
A. Anything I think she told me wasn't the truth?
Q. Yes, ma'am. Do you think she ever told you something that was a lie or something that was not the truth?
A. No, because I didn't have that much dealing with her after she got the application filled out.

(R. 948-952, 389, 981-982; R.E. 68-72, 84, 111-112).

Deposition of Catherlean Craft:

Q. Tell me what happened when you went into Hare?
A. She just said, asked me was I going to be the co-signer. I say, yeah, and she asked for my name and address and all the credit I had, like that.
Q. Was this the same woman that your mother had met with?
A. Uh-huh (Affirmative).
Q. Do you remember her name?
A. All I know it Hare.
Q. Other than that one visit with Hare did you have any other communication with Hare at all about the loan?
A. No.
Q. No telephone conversations?
A. Uh-uh (Negative).
Q. And you never went back into the office?
A. No.

* * * * * *

Q. I'm going to hand you, Ms. Craft, what was marked as Exhibit 10, that's a copy of the Complaint that was filed in this lawsuit. If you will look at the top of page 2 it says, "The defendants' employee/agent, Rhonda Hare, told and represented to Rosie Washington and Catherlean Craft that the loan being made to them only required them to make monthly payments of $400.57 for 180 months to completely satisfy the obligation". Did Ms. Hare ever tell you that?

MR. FITZGERALD: Again, objection. The complaint speaks for itself. You can answer.

A. No.

(R. 987-988, 990, 1003, 1006-1007; R.E. 117-118, 120, 146-147).

Plaintiffs' loan was closed on November 29, 2005 at the law offices of Frank Youngblood. Plaintiffs concede they were provided with all of their loan documents at the time of the loan closing, including but not limited to a copy of the Note and a Truth In Lending Statement, both of which clearly disclosed the terms of Plaintiffs' loan, including the balloon payment. (R. 1008-1010; R.E. 204-206). Plaintiffs had an opportunity to ask Mr. Youngblood any questions they had about the loan. (R. 381-382, 955-957, 994-1002; R.E. 76-80, 133-141). At the conclusion of the loan closing, Plaintiffs were provided with a complete set of their loan documents, which remained in their possession at all times thereafter.

Deposition of Rosie Washington:

Q. Now, after you left Mr. Youngblood's office that day did he give you any documents to take with you?
A. He give me the copies.
Q. Copies of the documents that you had signed?
A. Yeah.
Q. And what did you do with those documents?
A. Carried them home.
Q. And did you keep them in a particular place?
A. Yeah.
Q. Where did you keep them in your house?
A. In my chest drawer.
Q. And did you at any point after the loan closing ever take the documents out and look at them?
A. No.
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.

(R. 971-972; R.E. 100-101). Plaintiffs concede, however, that a review of the loan documents would have been sufficient to place them on notice of the claims asserted in their Complaint. Indeed, Plaintiffs contend that they finally did become aware of their claims when the loan documents were reviewed by a sales representative from another lender, who purportedly informed Plaintiffs that the Ford loan contained a balloon payment at the end of the loan term. (R. 972-973; R.E. 101-102). Plaintiffs, however, cannot recall when that alleged conversation occurred and specifically could not testify that it had occurred in October of 1999 or at any other time within three years of the filing of the Complaint. (R. 972-976; R.E. 101-105).

Plaintiffs' claims that they were misled about the terms of this loan are not unique. Prior to filing this lawsuit, each of the Plaintiffs had filed and then settled other lawsuits in which they alleged they had been misled about the terms of other loans they had obtained. Those cases involved loans Plaintiffs made through First Family Financial Services, Inc., an affiliate corporation of CitiFinancial. On November 9, 2001, Plaintiff Washington, upon the advice and consent of her attorney, signed a Settlement Agreement and Release that provided she was releasing all claims she had against

> (a) First Family, (b) its **present, former and future parent, subsidiary, and affiliated companies (including without limitation . . . CitiFinancial Corporation; CitiFinancial, Inc.; CitiGroup, Inc.;** . . . and (d) each of the foregoing insurers, reinsurers, predecessors in interest, and successors, and these companies' past, present and future officers, directors, employees, servants, attorneys, legal and beneficial shareholders, partners, privies, representatives, assigns and agents (collectively, the "Releasees") **of and from all manner of actions, cause of action, lawsuits, claims, damages,** debts, obligations, liabilities, promises, defenses, agreements, costs, expenses (including attorneys' fees), and demands of whatever kind or nature, **whether known or unknown, that [Rosie Washington] now has, had, or may hereinafter claim to have,** in law or equity, whether based on statute, tort, contract, or other theory or recovery, as of the date of the Agreement,

> including without limitation those which . . . (ii) **arise from, are related to, are based upon, or are connected with any loan, note, extension of credit, refinancing, purchase of credit insurance, or other dealings between [Rosie Washington] and First Family and/or any other of the Releasees**; (iii) arise from, are related to, are based upon or are connected with claims of . . . ; misrepresentation of loan amounts; . . . .

(R. 1011-1018; R.E. 207-214) (emphasis added).

Likewise, on June 18, 2001, Plaintiff Craft, upon the advice and consent of her attorney, entered into a settlement agreement releasing First Family Financial Services, Inc., First Family Financial Services Management Corporation, Associates Financial Services Company, Inc., Associates Investment Corporation, Associates Corporation of North America, and Associates First Capital Corporation, as well as

> their **present, former, and future parent, subsidiary, and affiliated companies (including without limitation . . . CitiFinancial, Inc. and CitiGroup, Inc.),** . . . and . . . each of the foregoing's . . . predecessors in interest, and successors, and these companies' past, present, and future . . . agents . . . **of and from all manner of actions, causes of actions, lawsuits, claims, damages,** debts, obligations, liabilities, promises, defenses, agreements, costs, expenses (including attorneys' fees) and demands of whatever kind or nature, **whether known or unknown, that [Catherlean Craft] has, had, or may hereinafter claim to have, in law or equity . . ., as of the date of this Agreement, including without limitation those which . . . arise from, are related to, are based upon, or connected with *any* loan, note, extension of credit, refinancing, purchase of credit insurance, or other dealings between [Catherlean Craft] and Defendants and/or any other of the releasees.**

(R. 1019-1023; R.E. 215-219) (emphasis added). Because CitiFinancial is within the group of entities defined as a "Releasee" in both agreements, Plaintiffs released all claims they are attempting to assert against CitiFinancial in this lawsuit.

SUMMARY OF THE ARGUMENT

This interlocutory appeal raises important issues that have serious implications for lenders in Mississippi. Despite the absence of any such claim in their Complaint, Plaintiffs contend that CitiFinancial should be liable to them because it failed to offer them a "better" loan than the one to which they agreed and failed to disclose to them that an increase in their monthly payments would have eliminated the balloon payment at the end of the loan term.

Plaintiffs' latest theory should not be allowed to defeat CitiFinancial's Motion for Summary Judgment. Mississippi law does not recognize a duty to offer a borrower the "best" loan available. In any event, Plaintiffs did not even qualify for the loan they now contend they should have been offered. Moreover, CitiFinancial did not have any duty to disclose to Plaintiffs that a higher monthly payment would have satisfied the loan after 180 monthly installments and eliminated the balloon payment on the note. Mississippi law does not recognize a legal duty, fiduciary or otherwise, to disclose such information to a borrower under the circumstances presented here.

Plaintiffs' claims are meritless for other reasons as well. Plaintiffs' claims are barred by the statute of limitations as a matter of well-established Mississippi law. The loan terms were clearly disclosed to Plaintiffs in writing in November 1995. It is undisputed that Plaintiffs have possessed signed copies of their loan documents since 1995. As a matter of law, Plaintiffs knew in 1995 that their loan contained a balloon payment at the end of the loan term. Nevertheless, they did not file suit until November of 2001, six years later. Mississippi's three-year statute of limitations clearly bars their claims.

This case also should be summarily dismissed because Plaintiffs settled and released their claims against CitiFinancial prior to filing this lawsuit. CitiFinancial is one of numerous subsidiaries and affiliates of Citigroup, Inc. and is included within the group of

"Releasees" named in settlement agreements signed by Plaintiffs prior to filing this litigation. The claims asserted here all fall within the scope of those settlement agreements. Under these facts, Plaintiffs should not be allowed to breach the terms of those settlement agreements and continue to pursue the claims asserted here.

ARGUMENT

I. The trial court erred in denying CitiFinancial's Motion for Summary Judgment. Mississippi law does not recognize a cause of action against a lender for failing to offer the "best" loan available.

In their Complaint, Plaintiffs asserted numerous claims against CitiFinancial based on their contention that Hare Mortgage[1] misrepresented the terms of Plaintiffs' loan and told them that the loan would be paid in full after 180 monthly payments of $400.57. The facts, and more particularly Plaintiffs' own testimony, failed to support any such assertions, and Plaintiffs have now conceded that Hare Mortgage made no misrepresentations to them. Thus, in the midst of this legal quandary, Plaintiffs' new allegations arose – that CitiFinancial had a duty to offer them a "better" loan, even if they did not qualify for it, in order to eliminate the balloon payment on the note which they agreed to and accepted. For many reasons, Plaintiffs' newest theory of liability is meritless.

First, Mississippi law does not recognize any duty on the part of a lender to offer a borrower a "better" or the "best" loan available. For example, in *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.* 32 F. Supp. 2d 894 (S.D. Miss. 1998), the court considered whether the plaintiff had stated any viable claim against an automobile dealership that had arranged financing for a car where the plaintiff alleged that the dealership had not offered her the best

[1] Plaintiffs contend that Hare Mortgage was acting as an agent of Ford (and now CitiFinancial) at the time these misrepresentations were made. (R. 5-13; R.E. 27-35). CitiFinancial denies that any such agency relationship existed. For purposes of its Motion for Summary Judgment, however, CitiFinancial assumed, *arguendo*, that such a relationship did exist. The presence or absence of an agency relationship is not material to the issues raised by CitiFinancial in its Motion.

financing terms that were available. The court concluded that these facts failed to sustain any viable theory of recovery under Mississippi law. In reaching its conclusion, the court noted that there is "no authority for the proposition that under Mississippi law the defendants had a duty to provide [the plaintiff] with the best terms available." *See Baldwin,* 32 F. Supp. 2d at 899. The court further noted that, "as a consumer, [the plaintiff] could not reasonably be expected to assume that the resulting deal would be 'the best possible' arrangement without doing her homework." *Id.* at 898.

As in *Baldwin,* Plaintiffs in this case were furnished with the necessary information to evaluate the terms of their loan and were free to accept or reject such terms. Plaintiffs "had no right to assume that [they] were getting the best deal possible or receiving the lowest rates charged by [the Defendants]." *See id.* at 900. Because the loan terms "were properly disclosed in the contract, [the Plaintiffs], not the [D]efendants, retained the duty to take independent steps to assure that [they were] getting the best terms possible." *See id.* at 900. Here, Plaintiffs were offered the only loan for which they qualified with Ford and it was their decision to accept or decline the loan. Plaintiffs' newly found belief that a "better" loan should have been offered to them, even if they did not qualify for the loan, simply does not state a valid claim under Mississippi law.

Moreover, to the extent that Plaintiffs' theory is based on a contention that CitiFinancial had a duty to disclose to Plaintiffs that a $42 increase in their monthly payment would have satisfied the principal balance after 180 monthly installments and eliminated their balloon payment, such claims fail as a matter of law as well. CitiFinancial had no legal duty to disclose information to Plaintiffs other than that disclosed in the loan documents themselves. Under the circumstances presented, Mississippi law does not recognize a legal duty, fiduciary or otherwise, to disclose information outside of the loan terms for the loan

that was offered. This is clearly the case where, as here, there is nothing unique about a loan transaction that created duties beyond those associated with a routine commercial loan. Plaintiffs had no history of doing business with Ford prior to this transaction, (R. 942, R.E. 48), and there is no evidence to suggest any special arrangements existed between the parties with regard to this loan. (R. 944-946, 992-993; R.E. 51, 54-55, 126-127). Plaintiffs' testimony simply fails to establish any evidence that their relationship with Ford went beyond the ordinary course of business. *See Booker v. American General Life and Accident Ins. Co.*, 257 F. Supp. 2d 850, 861 (S.D. Miss. 2003); *Conner v. First Family Fin. Serv., Inc.*, 2002 WL 31056778 at *7 (N.D. Miss. Aug. 28, 2002).

Numerous cases applying Mississippi law have found that facts similar to those presented here are insufficient as a matter of law to establish any fiduciary relationship or other duty to disclose information beyond the terms of the contract at issue. *See, e.g.,* *AmSouth Bank v. Gupta*, 838 So.2d 205, 216 (Miss. 2002) ("[c]ontract and debt amount to a business and not to a fiduciary relationship"); *see also, Brumfield v. Pioneer Credit Co.*, 291 F. Supp. 2d 462, 468 (S.D. Miss. 2003); *Booker*, 257 F. Supp. 2d at 855-862; *Walden v. American Gen. Life*, 244 F. Supp. 2d 689, 696-97 (S.D. Miss. 2003); *Strong, et al. v. First Family Fin. Serv., Inc.*, 202 F. Supp. 2d 536, 540 (S.D. Miss. 2002). Thus, Plaintiffs' theory fails to establish any viable claim-whether it is termed a breach of fiduciary duty or otherwise.

Because no misrepresentations were made to Plaintiffs, and Mississippi law does not recognize any duty to offer Plaintiffs a different loan or to disclose information regarding theoretical payment scenarios, none of Plaintiffs' legal theories support any cognizable claim for recovery here. Consequently, the trial court erred in denying CitiFinancial's Motion for Summary Judgment.

II. The trial court erred in its determination that Plaintiffs' claims are not barred by the statute of limitations.

Although Plaintiffs' loan was obtained in 1995, they did not file a lawsuit until 2001, six years after their purported claims accrued. Thus, Plaintiffs' claims are barred by the statute of limitations, and no factual basis exists to allow tolling of the limitations period.

Mississippi's general statute of limitations provides:

> All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

Miss. Code Ann. § 15-1-49(1). In the absence of specific limitations provisions for the causes of action asserted in Plaintiffs' Complaint, the three-year general statute of limitations applies. *See Nichols v. Tri-State Brick & Tile Co., Inc.*, 608 So. 2d 324, 333 (Miss. 1992).

Under Mississippi law, a cause of action accrues when the wrongful conduct occurs and the right to sue becomes vested. *See, e.g., Vidrine v. Enger*, 752 F.2d 107, 108 (5th Cir. 1984); *Wilson v. Retail Credit Co.*, 325 F. Supp. 460, 465 (S.D. Miss. 1971), *aff'd*, 457 F.2d 1406 (5th Cir. 1972); *Cannon v. Mid-South X-Ray Co.*, 738 So. 2d 274, 276 (Miss. Ct. App. 1999) (cause of action accrues when it becomes an enforceable and vested claim); *Estate of Kidd v. Kidd*, 435 So. 2d 632, 635 (Miss. 1983) (cause of action accrues for statute of limitations purposes when the right to sue becomes vested).

what if you are unaware of the fraud at that time?

In the context of fraud-based claims, numerous Mississippi cases recognize that such claims accrue upon the completion of the transaction allegedly induced by the fraudulent conduct. *See, e.g., Parker v. Horace Mann Life Ins. Co.*, 2006 WL 1320612, *2 (Miss. App. May 16, 2006); *Sanderson Farms Inc. v. Ballard*, 917 So. 2d 783, 789 (Miss. 2005); *American Bankers' Ins. Co. v. Wells*, 819 So. 2d 1196, 1200-02 (Miss. 2001); *Black v. Carey Canada, Inc.*, 791 F. Supp. 1120, 1123 (S.D. Miss. 1990). Once a cause of action has

cause of action for breach of fid duty occurs when Δ breaches

accrued, the statute of limitations begins to run on that claim. *Greenlee v. Mitchell*, 607 So. 2d 97, 110 (Miss. 1992) (statute of limitations begins to run on a claim as soon as the cause of action exists).

With regard to the claims asserted in this action, the facts clearly establish that the three-year statute of limitations provided by Miss. Code Ann. § 15-1-49(1) expired prior to the date on which Plaintiffs filed their Complaint. All of the claims asserted in the Complaint arise from alleged misrepresentations or other allegedly fraudulent conduct that occurred on or before the November 29, 1995 closing for Plaintiffs' loan. Because the alleged conduct which forms the basis of Plaintiffs' claims occurred on or before November 29, 1995, which is more than three years prior to the November 19, 2001, filing of Plaintiffs' Complaint, all claims are barred as a matter of law pursuant to Miss. Code Ann. § 15-1-49(1).

A. The statute of limitations cannot be tolled under the doctrine of fraudulent concealment.

Plaintiffs cannot avoid their statute of limitations problem by claiming that the limitations period should be tolled. Miss. Code Ann. § 15-1-67 provides:

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

The burden of establishing fraudulent concealment rests with the party seeking to avoid the limitations period, and requires proof that: (1) the defendant acted affirmatively to conceal the conduct complained of; and (2) despite the exercise of due diligence, the plaintiff failed to discover the facts forming the basis of the claims. *See Sanderson Farms, Inc.*, 917 So. 2d at 789, citing *Reich v. Jesco, Inc.*, 526 So.2d 660, 552 (Miss. 1988); *Stephens v. Equitable Life Assur. Society of U.S.*, 850 So. 2d 78, 83-84 (Miss. 2003); *Robinson v. Cobb*,

What did As conceal?

763 So. 2d 883, 887 (Miss. 2000). Mississippi law also requires proof that the defendant engaged in some conduct, subsequent to the acts upon which the cause of action is based, which acted to conceal the claim from the plaintiff. *See Ross v. CitiFinancial, Inc.*, 344 F. 3d 458, 463-64 (5th Cir. 2003); *Stephens*, 850 So. 2d at 83-84; *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144, 147 (Miss. 1998).

The concealment of which the doctrine speaks is concealment of "facts" necessary to support a claim. It is sufficient to defeat application of the fraudulent concealment doctrine to establish that the plaintiff was merely on notice that a careful investigation of the circumstances might suggest that a cause of action could exist. *See First Trust Nat'l Assoc. v. First Nat'l Bank of Commerce*, 220 F.3d 331, 336-37 (5th Cir. 2000). The fact that a plaintiff may be ignorant of his legal right to maintain a claim, despite actual or constructive knowledge of the underlying facts, cannot constitute fraudulent concealment. *See, e.g., Cunningham v. Mass. Mut. Life Ins. Co.*, 972 F. Supp. 1053, 1054 (N.D. Miss. 1997).

Applying this standard here, it is clear that Plaintiffs cannot establish any fraudulent concealment of their claims. It is undisputed that Plaintiffs personally dealt with Hare Mortgage and were aware of what Hare Mortgage did or did not tell them regarding their loan. It is also undisputed that Plaintiffs were provided with numerous documents that contained information about the loan, including the terms of the loan and the balloon payment. (R. 380-382, 386-387, 390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102). Plaintiffs concede that they had an opportunity to review the documents before signing them, to ask any questions about the information provided in the documents, to indicate whether they understood the information or documents and, if necessary, to ask for any explanation they needed. (R. 380-382, 386-387, 390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102). Plaintiffs further concede that they did not make any effort to read or review the

documents or familiarize themselves with the terms of the loan they had obtained. (R. 380-382, 386-387, 390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102). Finally, and perhaps most importantly, Plaintiffs concede that they were provided with a set of loan documents to take home with them after the loan closing and that they could have read the documents at any point after the loan transaction if they had chosen to do so. (R. 971-972; R.E. 100-101). Plaintiffs have testified that they never reviewed those documents, even though they were in Plaintiff Washington's continuous possession. (R. 971-972; R.E. 100-101). If, as Plaintiffs contend, the terms of the loan were misrepresented to them by Hare Mortgage or, through concealment or omission, were not disclosed to Plaintiffs at all, Plaintiffs had constructive knowledge of the information contained in the loan documents more than three years prior to the filing of this lawsuit. "In Mississippi, a person is charged with knowing the contents of any document that he executes." *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002), citing *J.R. Watkins Co. v. Runnels,* 172 So.2d 567, 571 (Miss. 1965). "[A] person is under an obligation to read a contract prior to signing it, and will not be heard to complain of an oral misrepresentation which would have been corrected by reading the contract." *Evans v. Horace Mann Life Ins. Co.*, 2006 WL 1604463 at *2 (Miss. App. June 13, 2006), citing *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Hunnington Lumber & Supply Co., Inc.*, 589 So. 2d 1254, 1257 (Miss. 1991). *See also, Morgan v. Citizens* Bank, 912 So. 2d 1133, 1136 (Miss. App. 2005). Accordingly, Plaintiffs are charged with notice of their loan terms and their claims accrued at the time the loan agreement was executed. Thus, Plaintiffs were well aware of sufficient facts to put them on notice of their purported claims and simply failed to act in a diligent or timely manner.

Plaintiffs cannot establish either of the elements necessary for the application of fraudulent concealment. First, Plaintiffs must establish affirmative conduct by Defendants

that was both designed to prevent and did prevent Plaintiff from discovering the existence of their claims. *See, e.g., Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988). No such conduct can be established here. As noted above, the documents provided to Plaintiffs as part of their loan transaction gave Plaintiffs ample notice of the terms of that transaction. Disclosure of the loan documents to Plaintiffs clearly was not designed to prevent Plaintiffs from discovering their claims, nor did it actually prevent Plaintiffs from discovering their claims, since even Plaintiffs concede that they became aware of their purported claims through a third party's review of these loan documents. (R. 972-973; R.E. 101-102). Thus, any purported failure to discover the alleged claims arises from Plaintiffs' inaction and inattention rather than any conduct by Defendant CitiFinancial or Hare. Under these facts, there is simply no evidence to suggest Defendants attempted to prevent Plaintiffs from discovering their purported claims or that any such attempt at concealment could have been successful.

were on notice at review of documents

Likewise, there is no evidence to establish the second element of fraudulent concealment, *i.e.*, that the Plaintiffs acted with reasonable diligence in attempting to discover their claims, but were unable to do so. *See, e.g., Robinson*, 763 So. 2d at 887; *Wilson*, 325 F. Supp. at 465. In analyzing this element of fraudulent concealment, the relevant inquiry is not when a plaintiff actually learns of the facts supporting his claims, but when he should have learned of those facts in the exercise of reasonable diligence. *See First Trust Nat'l Assoc.*, 220 F.3d at 336-37. It is clear that Plaintiffs failed to act with any diligence in discovering their claims, much less diligence that was reasonable. Despite the facts known by or documents provided to Plaintiffs as part of their loan transaction, Plaintiffs have testified that they made no effort to determine what the terms of their loan were and they never sought any assistance or explanation from anyone regarding that transaction. (R. 380-382, 386-387, 390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102). Plaintiffs further concede that,

although they were provided with documents as part of their loan transaction, they never read them. (R. 380-382, 386-387, 390-404, 955-957, 971-973, 994-1002; R.E. 75-82, 85-102). "A person who fails to read his or her own loan . . . contracts may not be characterized as having been duly diligent." *Boone v. Citigroup, Inc.*, 416 F.3d 382, 391 (5th Cir. 2005), citing *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 726 (Miss. 2002).

On several occasions, the Mississippi Supreme Court has reiterated these principles of law in cases remarkably similar to the instant matter. In *Andrus v. Ellis*, 887 So. 2d 175 (Miss. 2004), the plaintiffs, who had entered into loan transactions from 1988 to 1995, filed suit in 2002 claiming that the defendants fraudulently represented to them certain credit insurance features associated with their loans. In reviewing the circuit court's denial of the defendants' motion for summary judgment, the Mississippi Supreme Court reversed and rendered judgment for the defendants on the basis that the plaintiffs' claims were barred by the statute of limitations. *Id.* at 176. The Court noted that, as in the instant case, all plaintiffs testified they received copies of the loan documents, which contained disclosures informing the borrowers of the loan terms. *Id.* at 180. Furthermore, while the plaintiffs testified that their understanding of the transaction was contrary to the terms contained in the written contracts, the Court reiterated that "'a person is under an obligation to read a contract before signing it and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract.'" *Id.*, citing *Godfrey, Bassett*, 584 So.2d at 1257. The Mississippi Supreme Court concluded that the plaintiffs had failed to prove either the affirmative act or due diligence elements of fraudulent concealment. *Id.* at 181-82. Thus, the *Andrus* plaintiffs were charged with notice of their claims at the time the loan agreements were executed, and the claims were consequently barred by the statute of limitations. *Id.*

Look for SC citations within

In *Morgan v. Citizens Bank*, 912 So. 2d 1133 (Miss. App. 2005), the Court held that the statute of limitations on claims relating to insurance policies that were allegedly force placed as part of a loan agreement were not tolled by fraudulent concealment where documents provided to the plaintiffs at the time of entering into the loan clearly disclosed the terms of the contract which plaintiffs later contended were fraudulently misrepresented. *Morgan*, 912 So. 2d at 1133-1134. Given the plaintiffs' possession of the loan documents, as well as the clear disclosure of the disputed terms on the face of those documents, the Court found that the facts "complete negate[d] any argument . . . that the statutory period should be extended beyond the three year period due to fraudulent concealment." *Id.* at 1138.

B. Even if tolling applied, Plaintiffs' testimony cannot establish that their lawsuit was filed within three years of their purported discovery of their claims.

Although Plaintiffs' Complaint alleges that they first discovered their claims in October, 1999 and suit was thus filed within three years of discovery of the claims, their deposition testimony offers no factual support for these allegations. While Plaintiff Washington contends that she first "discovered" her claims during a conversation with a woman who was soliciting her for a loan from another lender, she could not testify that this meeting occurred in October of 1999. Indeed, Washington's testimony was that she did not remember at all when this meeting occurred. (R. 972-973; R.E. 101-102). Likewise, Plaintiff Craft could not identify the date on which she alleges she became aware of her claims. (R. 1004-1005; R.E. 144-145). "In the absence of any proof, [a court should not] assume that [a] party could or would prove the necessary facts" to support her claims. *Badon v. R J R Nabisco Inc.*, 224 F.3d 382, 394 (5th Cir. 2000); *see also Anderson v. Equitable Life Assur. Soc'y of U.S.*, 248 F. Supp. 2d 584, 589 (S.D. Miss. 2003); *Howard v. CitiFinancial, Inc.*, 195 F. Supp. 2d 811, 818 (S.D. Miss 2002). Absent any evidence that such a meeting

did in fact occur in October of 1999, or at any other time within three years of the filing of Plaintiffs' Complaint, this Court cannot conclude that Plaintiffs' Complaint was timely filed. *See, e.g., Peters v. Metropolitan Life Ins. Co.*, 164 F. Supp. 2d 830, 838 (S.D. Miss. 2001) (where plaintiff failed to offer sufficient facts regarding the "discovery" of his claims, court concluded that statute of limitations barred claim).

III. The trial court erred in its determination that Plaintiffs' claims were not previously settled and released.

Plaintiffs have clearly released CitiFinancial from any liability for claims asserted in this lawsuit. The releases signed by Plaintiff Washington and Plaintiff Craft release CitiFinancial from any claims which "arise from, are related to, are based upon, or are connected with ***any*** **loan, note, extension of credit, refinancing, purchase of credit insurance, or other dealings between [Plaintiffs] and . . . any . . . of the Releasees."** (R. 1011-1023; R.E. 207-214). The "Releasees" are defined to include CitiFinancial (R. 1011-1023; R.E. 207-219). (emphasis added).

Other courts applying Mississippi law have repeatedly held that this language bars any claims against CitiFinancial under circumstances similar to those presented here. *See* March 1, 2004 Order in *Allen v. Kentucky Finance,* In the United States District Court of Southern District of Mississippi, Case No. 4:02CV36LN (R. 1024-1025; R.E. 220-221); December 8, 2003 Order in *Sands v. CitiFinancial, Inc.,* In the United States District Court of Southern District of Mississippi, Case No. 4:02CV51LN (R. 1026-1029; R.E. 222-225); December 8, 2003 Order in *Ducksworth v. CitiFinancial Corp.,* In the United States District Court of Southern District of Mississippi, Case No. 4:02CV42LN (R. 1030-1032; R.E. 226-228); October 6, 2003 Order in *Dixon v. Commercial Credit Corp.,* In the United States District Court of Southern District of Mississippi, Case No. 4:02CV152LN (R. 1033-1037; R.E. 229-233); October 6, 2003 Order in *Bankhead v. Commercial Credit Corp.,* In the

United States District Court of Southern District of Mississippi, Case No. 4:02CV127LN (R. 1038-1043; R.E. 234-239); October 6, 2003 Order in *Bolden v. Commercial Credit Corp.*, In the United States District Court of Southern District of Mississippi, Case No. 4:02CV98LN (R. 1044-1048; R.E. 240-244); October 6, 2003 Order in *Agnew v. Commercial Credit Corp.*, In the United States District Court of Southern District of Mississippi, Case No. 4:02CV47LN (R. 1049-1053; R.E. 245-249). By the clear and unambiguous terms, these Releases discharge CitiFinancial of all liabilities to Plaintiffs arising out of any loan they obtained from CitiFinancial, including the loan at issue in this case.

CONCLUSION

The trial court erred in denying CitiFinancial's Motion for Summary Judgment. No genuine issue of material fact exists as to any of the claims asserted in Plaintiffs' Complaint, and Plaintiffs' latest theory that a "better" loan should have been offered to them does not state a viable claim under Mississippi law. Moreover, Plaintiffs' claims are barred by the statute of limitations and have otherwise been settled and released. Accordingly, the trial court's Order should be reversed and a judgment rendered in favor of CitiFinancial on all claims asserted against it in this proceeding.

This the 19th day of June, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has this day been served via United States Mail, postage prepaid, to the following:

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