IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-01174

TOMMY MORGAN — APPELLANT/ CROSS-APPELLEE

v.

GREEN-SAVE, INC., and WALTER J. FLEISHHACKER — APPELLEES/ CROSS-APPELLANTS

Appeal from the Circuit Court of Lee County, Mississippi

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

William M. Beasley (MB #[redacted])
Rachel M. Pierce (MB #[redacted])
PHELPS DUNBAR LLP
Seventh Floor, One Mississippi Plaza
201 South Spring Street
Tupelo, Mississippi 38804
Post Office Box 1220
Tupelo, Mississippi 38802-1220
Telephone: (662) 842-7907

Fred L. Banks, Jr. (MB #[redacted])
Rebecca Hawkins (MB #[redacted])
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300

Attorneys for Appellant/Cross-Appellee Tommy Morgan

ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellant/Cross-Appellee Tommy Morgan submits that oral argument may be helpful. Although the case law regarding both fraud and damages in property sales involving fraud is well settled, the judgment entered in this case is somewhat novel. Morgan was held liable for fraud based on circumstantial evidence and impermissible inferences, contrary to Mississippi law. The plaintiffs were awarded damages in an amount sufficient to essentially replace the lot purchased from Morgan and the facility they built on that lot, yet the trial court refused to transfer the property to Morgan as the jury had repeatedly been told. In light of the unusual posture of this case, oral argument would allow the parties and the Court to address more fully the unique result of this case within the context of Mississippi law.

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INTRODUCTION

While conceding that they must prove by clear and convincing evidence that Tommy Morgan knew that the lot he sold was in the flood plain, Plaintiffs' Brief at 21, plaintiffs attempt in their brief to divert the Court's attention from the fundamental lack of evidence in the heart of their case. They argue that Morgan misrepresented that the property was suitable for commercial development and that Morgan tried to perpetrate a fraud on the Court. As will be shown, there is no evidence that the property was not suitable for the plaintiffs' use or for commercial development. In fact, it is uncontested that the plaintiffs have continuously operated their business without interruption or flooding. All of the evidence supports the proposition that commercial development commonly occurs in flood plains and, more importantly, this was not an issue that was submitted to the jury in the trial.

The contrived and convoluted contention that Morgan attempted to perpetrate a fraud on the Court through the belated discovery of his calendar is an irrelevant "red herring." The exact timing of the initial meeting has always been inconsequential because it is undisputed that the parties later met on the property, shortly before the closing, to confirm their previous discussions. Plaintiffs mischaracterize their efforts to discredit Morgan in cross-examination as an admission of when he knew that the lot was in the flood plain. Plaintiffs also turn to alternative theories—confidential relationship and imputed knowledge—for which there was no evidence nor instructions upon which a jury could have made such findings.

As for damages, plaintiffs speculate that somehow, despite the lack of any evidence to support such a finding, the jury decided that the market value of this lot and building is $49,000. Since the jury deducted that amount from the total requested by the plaintiffs, they contend that they should not have to return the property to Morgan. Essentially, they argue that the damage award is fair. The reality is that the plaintiffs continue to operate their successful business in a building that they constructed for less than $300,000, and in addition, have a judgment for

$325,000. It is a double recovery, pure and simple. Plaintiffs ignore the law discussed in Morgan's brief and repeat the "flexible rule" argument, despite Morgan's having quoted from a Supreme Court decision as to what exactly the "flexible rule" encompasses. It is not the "anything goes" argument presented by plaintiffs here.

Finally, in their cross-appeal, plaintiffs argue that this Court should remand to allow punitive damages and fees to be awarded against Morgan. Of course, this argument is based on the erroneous belief that the evidence in this case was sufficient to prove fraud against Morgan. Regardless, plaintiffs waived their right to punitive damages by not requesting a punitive damages phase to proceed after the compensatory damages verdict was handed down. Moreover, punitive damages are not automatically assessed even where there is a finding of fraud. Because this is not a proper case for punitive damages, it follows that an award of attorneys' fees would also be improper.

Because, as set forth in Morgan's initial brief, there was no clear and convincing proof that Morgan knew the property he sold to plaintiffs was in a flood zone, plaintiffs proved no damages as to their assertions regarding the lack of natural gas, and no affirmative act of concealment was proved, the judgment in this case based on a claim of fraud should be vacated. At the very least, a new trial should be granted, or, alternatively, the damages should be remitted because of the confusing mishmash of instructions and communication to the jury regarding the return of the building. If reached, the order at issue in plaintiffs' cross-appeal denying their request for punitive damages and fees should be affirmed.

ARGUMENT

I. The judgment against Morgan should be reversed and rendered.

This case was submitted to the jury on two very narrow claims: (i) alleged concealment of the fact that a portion of the property was in a flood zone, and (ii) alleged misrepresentations as to whether natural gas would be available on the property.[1] In their appellate brief, however, plaintiffs attempt to expand beyond the issues presented to the jury.

Throughout their brief, plaintiffs refer to whether Morgan represented that the property was "suitable" for commercial purposes and refer to the lack of other commercial development in the vicinity.[2] However, not only was this not an issue presented to the jury,[3] but there was no evidence that the property is unsuitable for commercial development. Indeed, as set forth in Morgan's initial brief, it is undisputed that several commercial buildings in the Tupelo area are

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[1] See 2:123 (to recover for fraud, plaintiffs "must prove by clear and convincing evidence ... [t]hat the Defendant knew that the subject property was in a flood plain and/or that he was not going to provide natural gas to the property; and ... [t]hat the Defendant made false statements concerning the flood plain and/or natural gas or failed to disclose what he knew to the Plaintiffs"); 2:124 (discussing whether "Defendant knew that the subject property was in a flood plain and/or that he would not be providing natural gas"); 2:129 (discussing fraudulent concealment "that the property was located in a flood plain, and ... that he would provide natural gas to the property"); 2:132 (same).

[2] *See, e.g.,* Plaintiffs' Brief at 1 ("representations made by Morgan to Fleishhacker were that a particular lot would be suitable for Fleishhacker's proposed manufacturing facility, which would be located within a commercial subdivision that Morgan was developing"); *id.* at 2 ("Morgan's representations that the lot offered for purchase was part of an overall development"); *id.* at 6 ("represented to the Plaintiffs that the property in question was a part of a commercial and light industrial subdivision"; "suitability of the premises"; "future development of the surrounding property"); *id.* at 7 ("representations that he was going to develop lots for light industrial use"; "actively represented to the Plaintiffs that he intended to develop the surrounding property"; "representations that this was a part of a planned commercial subdivision"); *id.* at 10 ("representing to the Plaintiffs that the property in question was part of a commercial development"; "representing that light industrial manufacturing was going to be developed to the East"; "representations that ... the site was suitable for the construction of their manufacturing facility"); *id.* at 11 ("entitled to rely on the fact that the subject property was part of a commercial development"); *id.* at 19 ("affirmatively state[d] that the lot ... was a part of ... a commercial subdivision"; "stated that commercial and retail businesses would be the subject of lot sales to the West ... and that lots to the East ... would be developed for light industrial purposes"); *id.* at 20 ("represented that the property in question was part of a commercial subdivision").

[3] *See Ezell v. Robbins*, 533 So.2d 457, 461 (Miss. 1988) (plaintiffs failed to prove fraud by builder; "may have been able to prevail under an implied warranty theory for damages" but did not make such a claim).

on property originally designated as within a flood plain. Brief of Appellant at 7 (hereinafter "Morgan Brief").

Moreover, any claims based on statements concerning future development of the area cannot be the basis for any fraud unless there was evidence of a present intent not to perform which was not shown in this case. *Spragins v. Sunburst Bank*, 605 So.2d 777, 781 (Miss. 1992) ("claim of fraudulent representation cannot be predicated on a promise relating to future actions"; "[f]raudulent misrepresentations must be related to past or presently existing facts"; "[f]raud cannot be predicated upon statements which are promissory in nature"); *Bank of Shaw v. Posey*, 573 So.2d 1355, 1360 (Miss. 1990) ("in cases where fraud is alleged, a promise of future conduct does not meet the requirement of a 'representation' unless the promise was made with the present intent not to perform"); *Salitan v. Horn*, 212 Miss. 794, 801, 55 So.2d 444, 446 (1951) (same and noting that "mere fact that a promise was broken is not in itself sufficient proof that the promisor so intended at the time made, for this would be, in practical effect, to convert the exception into the general rule"); *Moran v. Fairley*, 919 So.2d 969, 976 (Miss. App. 2005) ("successful claim for fraudulent representation must relate to past or present existing facts, and cannot be based on a promise, except where a contractual promise is made with the present undisclosed intention of non-performance").

As for the actual allegations considered by the jury in this case, plaintiffs' brief fails to show that the evidence met the clear and convincing standard needed to prove plaintiffs' fraud claims against Morgan.

A. Plaintiffs failed to prove by clear and convincing evidence that Morgan knew the lot was in a flood plain.

Plaintiffs acknowledge that they were required to prove that Morgan knew that the property at issue was in a flood zone. Plaintiffs' Brief at 21. As anticipated in Morgan's brief, plaintiffs argue that Morgan must have known about the flood plain because of two appraisals for the bank referencing same and because of knowledge by the engineer working on sewer

elevations in the residential subdivision. *See* Morgan Brief at 15. However, as discussed in Morgan's brief, the evidence was that Morgan never saw those appraisals and the engineer never discussed the flood plain with Morgan. Indeed, the engineer himself did not know that plaintiffs' land was in the flood plain until he prepared the flood certificate in December 2002 after plaintiffs received this information from the bank. Morgan Brief at 16.

Plaintiffs ignore the case law discussed in Morgan's brief about how the assumptions that would have to be made to get to knowledge on Morgan's part from this evidence is insufficient to meet the clear and convincing standard. *Madden v. Rhodes*, 626 So.2d 608, 622 (Miss. 1993); *Dean v. Kavanaugh*, 920 So.2d 528, 536 (Miss. App. 2006). As noted in *Welsh v. Mounger*, 883 So.2d 46, 49 (Miss. 2004), "[p]roving fraud is difficult, as it ought to be." Indeed, "[c]lear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level." *Moran*, 919 So.2d at 975.

Plaintiffs basically concede that their arguments with regard to this evidence are based on assumptions when they argue that it is unreasonable to "assume" that Morgan was not aware of the appraisals and that he was not aware of the flood plain when laying out streets and lots. Plaintiffs' Brief at 23, 24. This argument impermissibly shifts the burden of proof. In essence, their argument comes down to saying that their assumptions that certain things must have occurred are more reasonable than assuming that those things did not occur. That is not the appropriate standard.

1. Plaintiffs' ludicrous argument regarding an alleged "fraud upon the court" is unavailing.

In fact, plaintiffs' outrageous assertion that Morgan somehow attempted a fraud upon the court when he placed into evidence a copy of his calendar showing that the initial meetings between Fleishhacker and himself occurred in late March, 2000, 6:482-85, 6:506-07, Exhibit D-7, is itself based on the erroneous assumption that Morgan must have known about the flood plain in order to tell his engineer where he wanted streets and lots to be placed. It is their theory

that Morgan wanted to push back the date of his first meeting with Fleishhacker because Exhibits 8 and 44 showed roads and the lot sold to Fleishhacker being drawn out in 2000, possibly as early as March but no later than September.[4] This, of course, is entirely insignificant unless one assumes that Morgan had to have known about the flood plain in order to say where he wanted the roads and lot to be, and that this occurred before his initial meeting with Fleishhacker.

But all evidence in the case was to the contrary. Morgan testified that he laid out the roads by using a topography map from the engineer. 3:79. Plaintiffs' own counsel noted that such a map "doesn't tell you about the flood plain." 3:80. When he asked Morgan how he determined whether or not the lots and roads were within the flood plain or not, Morgan stated the he did not consider the flood plain when doing that. 3:80-81. Counsel inquired further as follows:

> Q. Mr. Morgan, how do you determine whether it's in a flood plain or not?
>
> A. I don't. There are resources for that. Generally speaking, an engineer would determine that.

3:81. *See also* 3:92 (laid out The Summit residential area from "topo map"; did not check flood plain before doing so).

Even with regard to Exhibit P-8 itself, Morgan agreed that, although he had not seen that particular plat before, he had laid out the roads and the lot shown on that exhibit, 3:95-97, but stated that he did not consider the flood plain when doing so. 3:98.

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[4] Exhibit P-8 shows a date of March 10, 2000, but the parties were uncertain as to whether that could be the correct date or was the date when the other aspects of the overall area were laid out and the plaintiffs' lot was added at a later date. 4:161-62, 6:513. Exhibit P-44, however, shows a fax date of September 2000, so the lot had been plotted out at least by that date. It was the date on this exhibit that led to the questions on the second day of trial as to whether the date was 2000 instead of 2001 that are addressed in note 3 of Plaintiffs' Brief at 26. All of those questions occurred after the introduction of this exhibit. Of course, if, as plaintiffs contend, Morgan were attempting to somehow manufacture evidence to show that the meeting occurred before he laid out the parameters of the lot, then it made no sense to show that the meeting occurred in late March after the date on Exhibit 8.

This was all confirmed by the engineer on the project, David Moore. Moore testified that Morgan gave him the design for the layout of the roads and lot lines, and then his office "took it and put it on the computer and laid it out and then put it on the ground." 4:157. Moore also confirmed that a topography map does not provide any information that would allow someone to know property was in a flood zone. 4:173.

Moore testified that he considered the flood plain with regard to where sewer manholes were to be located within the residential area of the overall property owned by Morgan, 4:158-60, but that he did not discuss it with Morgan. Specifically, he stated, "I never told him about the construction process. We built the water and sewer where we needed to and the roads, and we went from there. I never told him that." 4:170.[5] Further, the road in the commercial area had no sewer manholes for which flood plain elevations would have been needed. 4:175.

All of plaintiffs' discussion about the alleged "fraud" on the court is simply unfounded and of no significance. Whether the lot sold to plaintiffs was laid out by Morgan in 2000 or 2001 does not matter because simply drawing off a lot does not require knowledge of whether the lot is in the flood plain. Additionally, Morgan met with Fleishhacker again in February or March of 2002 before the closing and "struck a deal for the second time." 3:115-16. Unquestionably, Morgan had laid out the roads and streets at the time of this meeting. If such actions prove knowledge that this lot was in the flood plain, then Morgan would have known before finalizing the deal, and plaintiffs' fraud allegations would be unchanged. Clearly, there is no significance to the contrived controversy over whether the initial meeting was in 2000 or 2001.

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[5] *See also* 4:170-71 (when doing street, water, and sewer layout, Moore did not tell Morgan about the location of flood plain); 4:187 ("Q. Did you tell Tommy Morgan that this property was in the flood plain? A. No."); 4:193-94 (never advised Morgan that property was in flood plain); 4:206 (in gathering information needed for placement of sewer manholes on any subdivision he may have worked on, Moore would not tell developer laying out lots not to place lot in certain area because it is in a flood plain); 6:498-99 (Morgan testifies that grades were shot for sewers in residential area, and that he had nothing to do with sewer grades; has been involved in several developments and that has never been a role of his).

Finally, it is not surprising that Morgan would have noticed this information when looking through his calendar in light of plaintiffs' counsel asking him whether he kept "a journal or log entries or anything like that where [Morgan] could go back and look" as to his meetings with Fleishhacker and Les Ellis. 3:111. Morgan replied, "I can – as far as a date, I could tell you when. I mean I'll have appointments." *Id.* This testimony then was an effort to fully respond to the question raised in Morgan's initial testimony; it was not an attempt to deceive the Court about an insignificant issue.

2. The Circuit Court properly excluded from jury consideration plaintiffs' theory that Moore's knowledge should be imputed to Morgan.

Plaintiffs also reference in their brief their argument, properly rejected by the trial court, 2:141, 6:523, that Moore's knowledge should be imputed to Morgan. Plaintiffs' Brief at 24. That argument cannot be used to support the judgment because it was not presented to the jury. Moreover, it is unsound. This argument failed because Moore was not Morgan's agent. Moore was an independent contractor hired by Morgan to do certain projects on this development. 4:190. He did all of his own drawings and platting with his own tools and equipment. 4:195. Indeed, Morgan's testimony indicated a very hands-off approach when it came to Moore's gathering information regarding sewer manhole levels for presentation to the DEQ. 3:130-31 (engineer would handle those matters so Morgan was not familiar with information as to manhole elevations); 6:498 (Morgan had nothing to do with sewer grades). Accordingly, there was no proof that Morgan maintained the sort of control over Moore's actions that would establish an agency relationship under Mississippi law. *Heirs and Wrongful Death Beneficiaries of Branning ex rel. Tucker v. Hinds Community College*, 743 So.2d 311, 316 (Miss. 1999) ("independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor is subject to the other's rights to control with respect to his physical conduct in the performance of the undertaking"); *Miller v. Shell Oil Co.*, 783 So.2d 724,

727 (Miss. App. 2001) (discussing tests to consider in determining whether party "was an independent contractor or an agent" of another party).

Plaintiffs cite to *Lane v. Oustalet*, 873 So.2d 92 (Miss. 2004), for the general principle that knowledge of an agent may be imputed to a principal, but in that case there was no question of agency. *Id.* at 94 ("parties agreed to have Alfonso act in a dual agency capacity and executed a sales contract"). Plaintiffs also cite *Trustees of the First Baptist Church of Corinth v. McElroy*, 223 Miss. 327, 78 So.2d 138 (Miss. 1955), presumably for its reference to an architect as being the owner's "agent and representative," but that case dealt with an owner trying to sue the installer of a steam generator when the installer specifically followed the plans and specifications of the architect hired by the church as required in the contract with the installer. The court discussed "[t]he majority of the cases" addressing the lack of liability under such circumstances as being based on "an implied warranty by the owner that the plans or specifications are suitable for the particular purpose coupled with an absence of express warranty by the contractor in regard to the sufficiency of the plans or specifications." *Id.* at 334-35, 141. The issues present in that case simply have no bearing here.

Of course, as discussed in Morgan's initial brief at page 16, Moore himself, although aware that a part of the overall 300+ acres was in the flood zone, was unaware that plaintiffs' two acres was in the flood zone until he prepared the flood certificate in December 2002. 4:193.

3. Morgan's deposition testimony does not show knowledge that plaintiffs' lot was in the flood plain.

Plaintiffs also try to argue that their cross-examination of Morgan regarding his deposition testimony proved that he admitted knowing that the two-acre lot was in the flood plain. This inference is totally unfounded. The deposition testimony has nothing to do with when Morgan learned that the two-acre plot was in the flood plain. Morgan's deposition testimony is exactly the same as his trial testimony. He testified that he did not know the lot was in the flood plain when he sold the lot to Fleishhacker. 3:135-36 (discussing deposition

testimony regarding initial meeting with Fleishhacker where Morgan testified, "At that time I didn't know if this property was in a flood plain.") (italics omitted).

The only potential inconsistency between the deposition testimony and trial testimony related to when Morgan learned that part of the overall 300+ acres was in the flood plain. At his deposition, Morgan testified that he did not know when he learned this particular information. 3:136 (Quoting from deposition: "You knew that part of the 317 acres .... Right. I learned a little prior to – I don't know if it was prior to the contract, our agreeing to sell the lot, but I was informed by David – Moore Engineering who did the engineering on The Summit, and they informed me part of that was.") (italics omitted). As Morgan noted at trial, all he stated at the time of his deposition was that he did not know when he learned this particular information. 3:136-37 ("I don't know the exact time in relation to this I'm saying here.") At trial, however, Morgan testified that he did not learn about this until "after the fact." 3:138.

Deposition testimony that Morgan did not know whether he learned about other portions of this overall property being in a flood plain before or after entering into the agreement with Fleishhacker does not prove that Morgan knew that the lot was in the flood plain and simply does not rise to the level of proof needed for plaintiffs to succeed on a claim of fraud. *Moran*, 919 So.2d at 975.

B. Plaintiffs did not prove any affirmative act of concealment as required to prevail on a fraudulent concealment claim.

In his initial brief, Morgan discussed the law in Mississippi requiring more than mere silence, but also an affirmative act of concealment, in order to prevail on a fraudulent concealment claim such as asserted by plaintiffs in this case. Morgan Brief at 18-21 (citing *Mabus v. St. James Episcopal Church*, 884 So.2d 747, 762 (Miss. 2004); *Ezell v. Robbins*, 533 So.2d 457, 461 (Miss. 1988); *Rankin v. Brokman*, 502 So.2d 644, 646 (Miss. 1987); *Davidson v. Rogers*, 431 So.2d 483, 485 (Miss. 1983)).

Plaintiffs' entire response to this argument (other than citing *Mabus* and *Davidson* to argue that Morgan had an "affirmative" duty to disclose the flood zone information if he knew about it,[6] Plaintiffs' Brief at 19-20), is a confusing two-sentence paragraph that states that "Morgan represented that the property in question was part of a commercial subdivision being developed by him and that the property to the East of the Green-Save lot was going to be developed for light industrial purposes," and that "[n]o further affirmative act on his part was required with regard to an allegation of fraudulent concealment." Plaintiffs' Brief at 20.

It is not clear how such statements satisfy the affirmative act requirement. Stating intentions to develop property in the area does not show "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." *Ezell*, 533 So.2d at 461 (quoting *Davidson*, 431 So.2d at 485)). As noted above, many commercial sites in the Tupelo area are located on property designated as being in a flood plain, Morgan Brief at 7, so stating that you intend to develop the area has no bearing one way or the other on whether or not the property is in a flood zone.

C. There was no confidential relationship between plaintiffs and Morgan.

Plaintiffs also argue that there was a confidential relationship between them and Morgan.[7] As Morgan noted in his brief, although the jury was erroneously instructed on how to determine whether a confidential relationship existed between Morgan and plaintiffs, 2:133, 6:539,[8] the jury was not instructed on the consequences of such a finding nor on any sort of

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[6] *But see Taylor v. Southern Farm Bureau Cas. Co.*, 954 So.2d 1045, 1048 (Miss. App. 2007) ("duty to disclose material facts only arises where there is a fiduciary relationship between the parties").

[7] An affirmative act of concealment is not required to prove fraudulent concealment if a fiduciary relationship exists between the parties. Morgan Brief at 19 n.19 (citing *Mabus*, 884 So.2d at 761 n.8, and *Van Zandt v. Van Zandt*, 227 Miss. 528, 538-39, 86 So.2d 466, 470 (1956)).

[8] Although the complaint makes no reference whatsoever to any claim regarding a fiduciary or confidential relationship, 1:5-20, 1:70-71, the Circuit Court allowed the plaintiffs to proceed with such a claim over Morgan's objections and overruled the directed verdict motions of Morgan on this issue, *(continued on next page)*

breach of fiduciary duty. Morgan Brief at 19 n.19 and 27-28. Moreover, the evidence presented at trial simply did not meet the clear and convincing proof required under Mississippi law for finding such a relationship. *AmSouth Bank v. Gupta*, 838 So.2d 205, 216 (Miss. 2002). And, of course, even plaintiffs admit that this does not overcome the hurdle of having to prove knowledge on Morgan's part. Plaintiffs' Brief at 21.

Plaintiffs cite to *Memphis Hardwood Flooring Co. v. Daniel*, 771 So.2d 924 (Miss. 2000), but that case involved an elderly lady entering into a contract with a gentleman with whom she had dealt before and who pled guilty to the crime of embezzlement. In contrast, plaintiff Fleishhacker "is a businessman with more than thirty years experience." Plaintiffs' Brief at 3.

Plaintiffs basically argue that a confidential or fiduciary relationship existed because Fleishhacker trusted Morgan because of his good reputation. *See* Plaintiffs' Brief at 4 (Fleishhacker was "aware of Morgan's reputation as a real estate developer, which was why he approached Morgan"); *id.* at 9 ("Fleishhacker approached Tommy Morgan who he knew to be an experienced real estate broker and developer in Lee County").[9] If that were the case, then every businessman with a good reputation would be subject to fiduciary duties in nearly every transaction. That is simply not the law. As noted in *Robley v. Blue Cross/Blue Shield of Mississippi*, 935 So.2d 990, 995 (Miss. 2006), "[a]lthough one does not typically enter into a contract with another person unless he or she has a degree of trust or confidence in that person,

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5:318, 5:322-23, 5:415, 5:421, 5:423-24, 6:520, and instructed the jury as to how to find a confidential relationship, 2:133, 6:539.

[9] Importantly, although plaintiffs in their brief discuss Morgan's status as a real estate broker, *see, e.g.*, Plaintiffs' Brief at 1, there was no brokerage agreement between plaintiffs and Morgan, and plaintiffs did not sue Morgan in his capacity as a broker or agent, a fact recognized by the Circuit Court. *See* 1:5-10 (no reference in complaint to Morgan's being a real estate broker or agent; discusses only "purchase by Plaintiff from Defendant"); 5:423, R.E. 4 (Court: "... it's been very clear that he was not acting as a real estate agent. This was person to person transaction. I don't think there's any issue about that."). Nor do any of the jury instructions refer to Morgan as a broker, agent, or developer. 2:115-38.

without more, such a transaction amounts to merely a business relationship and not a fiduciary relationship."

Plaintiffs' argument that the restrictive covenants applicable to the lot purchased provides the "shared goals in each other's commercial activities," *AmSouth Bank*, 838 So.2d at 216, must also fail. Plaintiffs' Brief at 20 (discussing "common interest in the nature and character of the subdivision"). Plaintiffs did not work with Morgan in adopting the covenants. They were simply an element in the overall arms' length transaction between these two businessmen in which Fleishhacker could decide to purchase the lot or not.[10]

D. Plaintiffs make no effort to address their failure to prove any damages resulting from any alleged misrepresentation regarding the availability of natural gas to the site.

Plaintiffs completely ignore the section of Morgan's initial brief regarding their failure to prove damages regarding any alleged misrepresentation as to the availability of natural gas to the lot. Morgan Brief at 17-18 (citing *Ezell*, 533 So.2d at 461; *Koury v. Ready*, 911 So.2d 441, 445-46 (Miss. 2005); *Salter v. Aviation Salvage Co.*, 129 Miss. 217, 226, 91 So. 340, 342 (1922)). Because plaintiffs failed to prove any injury resulting from this alleged fraud, any claim based on this alleged misrepresentation must fail.

II. Alternatively, a new trial should be ordered.

In his initial brief, Morgan argued that, if the judgment against him were not reversed and rendered, then a new trial should be ordered because (i) the verdict was against the substantial weight of the evidence, Morgan Brief at 22, (ii) jury confusion resulted from the lower court's error in allowing evidence of "replacement" costs to allow plaintiffs to locate elsewhere, Morgan

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[10] It is apparently the existence of these restrictive covenants that is the basis for plaintiffs' claim that "Morgan had a say in the siting and landscaping of Green-Save's facility." Plaintiffs' Brief at 21. Plaintiffs cite to page 248 of the transcript, but Fleishhacker simply testified that the building was turned so that the metal side would not face the road in order to comply with the restrictive covenants, not that Morgan assisted in deciding where to site the building. Fleishhacker's contractor testified that Fleishhacker determined where on the lot he wanted to put the building. 5:302-04.

Brief at 22-27, and (iii) the jury was not properly instructed on the law because they were not instructed on the affirmative act of concealment requirement, they were instructed on how to find a confidential relationship when the evidence did not support such an instruction, and they were allowed to enter a general verdict if they found against Morgan under either of two theories even if one of the theories was later found to have been improperly submitted for consideration, Morgan Brief at 27-29.

With regard to Morgan's alternative request for a new trial, plaintiffs rather perfunctorily state that the verdict is supported by the evidence and legal precedent, and that the jury instructions, when read as a whole, properly instructed the jury as to the issues. Plaintiffs' Brief at 33-34. But that is precisely the problem here. Nowhere, in the "entirety" of the jury instructions, *id.* at 33, is there an instruction telling the jury that it is not enough to show mere silence, but that there must also be evidence of an affirmative act of concealment in order to hold Morgan liable for fraudulent concealment. Thus, the "primary rules applicable to the case" were not "fairly announc[ed]." *Id.* at 34 (quoting *Barrett v. Parker*, 757 So.2d 182, 187 (Miss. 2000)).

Moreover, despite the lack of adequate evidence to support such a claim, the jury was instructed on how to find a confidential relationship which in turn led to closing arguments discussing trust and reliance in general terms rather than in the context as required by law. In addition, a general verdict was allowed to be returned against Morgan if the jury found either of plaintiffs' theories valid—the alleged misrepresentations as to the flood plain or as to natural gas availability.[11] As discussed above, however, neither theory was adequately proved by the plaintiffs. If either theory should not have been presented to the jury, then the entire instruction is erroneous, and a new trial should be ordered. *Estate of Hunter v. General Motors Corp.*, 729

[11] For this reason, plaintiffs' statement that "the jury chose not to believe" Morgan with regard to the natural gas issue "as evidenced by the jury's verdict," Plaintiffs' Brief at 26, has no basis. It is not possible to know from the general verdict whether the jury found fraud based on the flood zone issue or the natural gas issue.

So.2d 1264, 1270-71 (Miss. 1999); *J. W. Sanders Cotton Mill, Inc. v. Moody*, 189 Miss. 284, 298, 195 So. 683, 687 (1940), *quoted in Rex Nitrogen & Gas Co. v. Hill*, 213 Miss. 698, 704, 57 So.2d 173, 174, *suggestion of error overruled*, 213 Miss. 698, 57 So.2d 569 (1952).

Finally, the jury confusion wrought by the evidence, instructions, and arguments regarding damages, discussed in more detail below, also necessitates a new trial of this matter. Morgan Brief at 22-29.

III. Alternatively, either the damages should be remitted or plaintiffs should be ordered to return the property to Morgan.

Although Morgan explained in detail the damages allowed under Mississippi law for disputes involving property such as this, Morgan Brief at 22-32, including what the so-called "flexible or equitable rule" relied on by plaintiffs at trial stands for, plaintiffs nevertheless in their brief argue that the "flexible rule" allows recovery for a wide array of damages, including some for which they put on no proof. Plaintiffs' Brief at 29.

Simply put, the "flexible rule" is one of four measures of recovery in cases in which fraud in a property sale has been proved. *Browder v. Williams*, 765 So.2d 1281, 1286 (Miss. 2000). The "flexible rule" applies either the "benefit of the bargain" rule or the "out of pocket" rule "as is best adapted to the particular case." *Hunt v. Sherrill*, 195 Miss. 688, 699, 15 So.2d 426, 429 (1943). In other words, the "flexible rule" gives a choice between using the value as represented or the contract price as a basis for determining the difference between that amount and the actual value of the property as the measure of damages. *Id.*[12]

Plaintiffs, however, apparently want the rule to mean that any amount of damages is acceptable as long as it is deemed to be "fair." Rather than recovering the difference between the

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[12] *See also* J. F. Rydstrom, *"Out of Pocket" or "Benefit of Bargain" as Proper Rule of Damages for Fraudulent Representations Inducing Contract for the Transfer of Property*, 13 A.L.R.3d 875 (1967) (discussing equitable or flexible rule as to those jurisdictions applying either benefit of bargain rule or out of pocket rule depending on circumstances of case).

value of the lot as allegedly represented and its actual value—which, even if its actual value were zero, would be in the neighborhood of $32,100, the amount paid for the lot—plaintiffs want to keep the property and building and, in addition, recover the costs in today's dollars of purchasing another lot, building another building, and moving all of their equipment and furniture into the new building. Consistent with *Wall v. Swilley*, 562 So.2d 1252, 1255, 1258 (Miss. 1990), the Circuit Court limited some of plaintiffs' damages to the costs as of the date of discovery of the alleged fraud. 2:126, 6:534. The Court nevertheless erred in allowing plaintiffs to recover $325,000 in addition to keeping the property purchased from Morgan.

In their brief, plaintiffs assert that all of the times they expressed their willingness to return the property in exchange for being awarded "relocation" costs, they were making that concession only if they were allowed to recover a panoply of damages, some of which were never even requested at the trial court. Specifically, they state that the only "circumstances" under which they were "willing to abandon their current location," was if they had been awarded $425,000 or more. Plaintiffs' Brief at 32. Although they filed no cross-appeal as to the amount of compensatory damages awarded, they argue that they should have been awarded the current value of the costs "to acquire another piece of property, together with the costs of business interruption incurred in moving the manufacturing business [an amount for which no proof was presented at trial[13]], the cost of the actual physical move of the manufacturing equipment and office furnishings, the construction of a new building on the site which was out of the flood plain and had available to it natural gas, and some compensation for the loss of the investment

[13] Plaintiffs' proposed jury instruction, No. P-20A, refers to the "reasonable costs of moving the equipment, office furnishings and other property to a new location." 2:143. In their brief, they decide to break this down into both the costs of business interruption as well as the costs of the physical move. Plaintiffs' Brief at 31. However, over Morgan's objection, they presented evidence regarding the costs of moving and only had Leslie Ellis testify as to the estimated costs for the physical move. 5:382-83; Exhibits P-36 and P-37. Nor did they present any figure regarding the business interruption loss when listing damages totaling $374,000 in closing argument. 6:550-52.

potential of the property as represented by Tommy Morgan to the Plaintiffs [also an amount for which little to no evidence was presented at trial and which was not requested in closing argument detailing damages requested[14]]." Plaintiffs' Brief at 31.

First of all, this listing of damages goes far and beyond that contemplated in *Browder*. Secondly, plaintiffs' statements as to the return of the property were not tied to their recovery of over $400,000, and, as discussed in Morgan's initial brief at 31-32, plaintiffs should be judicially estopped from changing their position. In their closing argument, plaintiffs listed out damages totaling $374,000, and their counsel then stated, "Let Tommy Morgan sell it, and he can have it. Give Mr. Fleishhacker what it would take to move." 6:551-52. Plaintiffs also stated in response to Morgan's post-trial motion that they "would have been willing to accept $374,000 and, upon receipt of the same, conveyed the subject property to the Defendant," "despite the fact that this would have fallen short of making them whole." 2:172.

Although the plaintiffs were awarded $325,000, as opposed to the $374,000 they requested in closing, that requested total included items which the jury could have decided were not supported by the evidence. Morgan Brief at 10-11 n.9, 11 n.10, 31 n.31. First, plaintiffs' builder, Gerald Warfield, testified that the 2002 costs for the building were about $242,000. 5:331-32. Nevertheless, plaintiffs' counsel inexplicably began to use the figure of $249,000, and that is what was set forth in his closing argument. 5:353, 6:550. Second, over Morgan's objection, plaintiffs were also allowed to include in their requested damages in closing argument

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[14] Plaintiffs specifically tie this loss of investment potential to the storage buildings they said they had wanted to build on the lot. Plaintiffs' Brief at 31 n.4. However, the only evidence related to this is an incoherent colloquy in which Fleishhacker, in response to a question about whether he had done any calculations as to what he thought his net gain or profit would be on an annual basis for the storage facilities stated that he had been willing to borrow $400,000 or more to build them and that "the min. side would be somewhere in the ten to twelve percent range." 4:239-40. He was then asked "what does [that] translate into cost?" and replied, "Probably anywhere from 40 to 50,000 more dollars a year, plus building the asset base." 4:240. Fleishhacker said that Morgan would likely be able to "confirm" his estimates, *id.*, but Morgan testified that his son's storage business had actually been losing $25,000 to $30,000 a year thus far. 6:504-05.

an additional $20,000 which Warfield had not charged plaintiffs because they were costs resulting from his own mistakes—mistakes he presumably would not make in building their facility a second time. 5:353-54; 6:551, R.E. 4. Third, plaintiffs listed a total of $35,000 for landscaping, floor coverings, and lights, 6:551, R.E. 4, even though Warfield's testimony indicated that his figure of $242,000 included those costs, 5:332. All of this provided more than sufficient basis for the jury to not give plaintiffs the total amount of damages they requested.

Plaintiffs, however, speculate that the jury decided, after asking whether the property and building would be deeded over to Morgan if $374,000 were awarded to plaintiffs and being told that "an appropriate order concerning the property" would be entered in such a case, 1:138, 2:166, 6:586, that the property would not be returned to Morgan and thus reduced the award by $49,000 which plaintiffs assert must be the value the jury gave the lot and building. Plaintiffs' Brief at 32.[15] But if that were the case, there is simply no basis whatsoever for the jury's valuing the lot and building at $49,000. Such a figure would have had to have been pulled from thin air. Even if the lot itself had no value, a fact not accepted even by plaintiffs' own expert,[16] 5:361-63,

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[15] Plaintiffs actually state in their brief that this amount of $49,000 was the amount the jury "calculated as being the present value of the Green-Save lot, *or* their estimate of acquiring a new lot elsewhere." Plaintiffs' Brief at 32 (emphasis added). They then state that, "[r]egardless, it is apparent that the jury concluded that their award would not take into account a return of the property to Tommy Morgan." *Id.* However, it is not "apparent" how the jury's reducing the amount requested because they thought another lot could be purchased for less money than requested would result in their having decided that Morgan would not be getting the property back. In their response to Morgan's post-trial motion, plaintiffs argued only their first theory—that the jury had evidently valued the property at $49,000 and taken this from the amount rewarded after deciding that plaintiffs were going to be allowed to keep the property. 2:172-73.

[16] Plaintiffs claim their expert testified the property was "unmarketable." Plaintiffs' Brief at 5. In actuality, she testified "that the property has value," but that she could not determine that value because she had no evidence on which to base an opinion. 5:361. *See also* 5:363 ("property probably has a value, but I cannot tell you what that value is"; denies she said that property had no market value.). Her testimony was based on the understanding that the building was lower than the flood plain. 5:367. She stated that her opinion as to not being able to establish a value would change if, as was the case here, the building was "up [above flood plain] but not the foot up that's required by FEMA." *Id.* Indeed, she stated that if the building were raised up enough so that it was one foot above the flood plain, then the property "probably would have been worth the price that was paid for it." 5:362-63.

the building had been built at a cost of over $200,000, 5:331-32, had been assessed for taxes at a value of over $150,000, 4:287-88, and had been insured for over $280,000, 4:283-84; thus, even if some of those values included equipment that would be moved to another facility, the value would not be as low as $49,000.

Ironically, plaintiffs on the one hand want to argue that the lot and building they seek to abandon has little to no value, but on the other hand, they want to argue that it would be unfair for Morgan to have the property deeded over to him because he "would likely be in a position to immediately rent the vacated premises or possibly sell the property which, even if he were to sell it as a substantial loss, would permit him to escape from the consequences of his wrong doing virtually unscathed." Plaintiffs' Brief at 13. Unless plaintiffs believe that Morgan can sell the property for something close to $325,000, it is difficult to see how Morgan would go "unscathed" in paying them a judgment in that amount. On the other hand, if plaintiffs do believe that the property has potential for such a sale, then that is even further proof that this judgment has resulted in a double recovery—plaintiffs will have both the money as well as the lot and building which they too can sell.

RESPONSE TO CROSS-APPEAL

IV. If reached, the denial of plaintiffs' request for punitive damages and attorneys' fees should be affirmed.

Plaintiffs have cross-appealed the Circuit Court's denial of their post-trial Motion for Additur and Attorney's Fees, 2:176-79, in which they asked the court to add in an amount to the judgment for punitive damages and attorneys' fees or to hold a new trial as to punitive damages only. Because this case is not one of those "extreme cases" in which punitive damages are proper and because plaintiffs waived their right to request punitive damages, the motion was properly denied, and this Court should affirm.

Of course, as discussed above and in Morgan's initial brief, the jury's finding of fraud in this case is not supported by the evidence with regard to either theory of plaintiffs, and this issue

need not even be addressed if this Court determines that the judgment should be reversed and rendered or that a new trial is in order.

A. Plaintiffs waived any error as to punitive damages.

The Court also need not address this issue because it was waived by the plaintiffs at trial. During the initial jury instructions conference, when the judge got to the punitive damages instruction, he set the issue aside. 6:524. After the jury returned its verdict of compensatory damages, plaintiffs made no request to the Court to proceed to a punitive damages phase, effectively waiving their claim.[17] 6:587-89. In accordance with *Wilson v. General Motors Acceptance Corp.*, 883 So.2d 56, 73-74 (Miss. 2004), and *Brown v. North Jackson Nissan, Inc.*, 856 So.2d 692, 696 (Miss. App. 2003), plaintiffs have waived "any right to later complain of the trial court's failure to undertake a punitive damages inquiry." *Id.* at 696.[18]

As noted in *Brown*, "[e]ven assuming for sake of argument that the court erred when it failed to take up punitive damages without any further prompting from Brown, it is a fundamental concept that errors committed in the conduct of the trial must be timely raised."[19]

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[17] MISS. CODE ANN. § 11-1-65(1)(b),(c) provides for bifurcated proceedings between compensatory and punitive damages claims. In their brief, plaintiffs argue that their punitive damages claims are governed by common law rather than § 11-1-65. Plaintiffs' Brief at 37. But the case they cite for support, *American Funeral Assur. Co. v. Hubbs*, 700 So.2d 283, *reh'g denied*, 700 So.2d 331 (Miss. 1997), applies common law because of the statute's exception at that time to contract actions. *Id.* at 285-86. Punitive damages were sought in that case for the tortious breach of an insurance contract. In contrast, plaintiffs' claims in this case were based solely on fraud; the jury was not instructed as to any breach of contract theory. Even if plaintiffs' claims here were governed by common law as opposed to the statute that requires bifurcated proceedings, the law addressing waiver set forth in this section would still apply. Nothing in the record indicates that plaintiffs brought the alleged error of not instructing the jury on punitive damages to the court's attention before filing their post-trial motion for additur. The judge stated in the instruction conference that he was "going to lay that [punitive damages instruction] aside," 6:524, and punitive damages are not mentioned again until plaintiffs' additur motion.

[18] In *Wilson*, the plaintiff had not even filed a post-trial motion requesting punitive damages. 883 So.2d at 73. However, the plaintiff in *Brown*, as in this case, had not requested any action from the court following the return of the jury's verdict but had then filed a post-trial motion arguing that punitive damages should have been awarded. 856 So.2d at 696.

[19] Although the Supreme Court recently ruled in *Bradfield v. Schwartz*, 936 So.2d 931, 940 (Miss. 2006), that the second phase regarding punitives "should have automatically proceeded" once a *(continued on next page)*

856 So.2d at 696. The court noted that "[o]ne of the beneficial purposes of the rule is that it affords the trial court an opportunity to correct the error at a time when it can yet be dealt with and thereby avoid the unnecessary waste of limited judicial resources that would be required to retry the matter." *Id.* Thus, "the price a litigant pays for failing to promptly raise a perceived error affecting the conduct of the trial at a time when corrective action remains a possibility is that the error is deemed to have been waived." *Id.*

When plaintiffs failed to raise the issue of punitive damages before the dismissal of the jury, 6:587-89, "thereby ending the legal existence of the very fact-finding body charged by statute with determining the issues necessary to resolve a punitive damages claim," *Brown*, 856 So.2d at 696, "[t]hat failure to affirmatively raise the issue at this critical juncture constituted ... a waiver of any right to later complain of the trial court's failure to undertake a punitive damages inquiry." *Id.*

B. Punitive damages are not appropriate in this case.

Moreover, the fact that the jury entered a verdict against Morgan on plaintiffs' fraud claim does not necessarily mean that punitive damages are warranted. "Punitive damages do not follow as the day the night every finding that a defendant has been guilty of fraud." *Gardner v. Jones*, 464 So.2d 1144, 1148 (Miss. 1985). In that case, Jones had sued Gardner for leasing him some property from which to sell and repair mobile homes. Although Gardner had told Jones that the property was suitable for such a purpose, in fact, zoning restrictions prohibited this sort

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compensatory damages verdict was returned, in that case, "[a]fter the jury returned a verdict for compensatory damages in his favor, Bradfield requested the trial judge to allow the parties to proceed to the punitive damages phase of the trial." *Id.* at 935. That case did not address the situation in *Brown* and *Wilson* in which the parties attempted to fault the lower court for an error not brought to the court's attention within a reasonable time. Of course, under plaintiffs' theory that their claims are not governed by the punitive damages statute, the holding in *Bradfield*, which is specifically based on statutory language, would be inapplicable.

of business on the property, and the evidence "clearly established that Gardner was aware of the zoning restrictions before he leased the property to Jones." *Id.* at 1147.

Even assuming that Jones had proved every element of fraud, the Supreme Court nevertheless held that "more is required," and vacated the punitive damages award. *Id.* at 1148. The Court stated that determination of whether punitive damages should be assessed "turn[ed] on whether Gardner maliciously or intentionally set out to defraud Jones by enticing him to enter a lease of the premises for a use which Gardner knew was illegal and would always remain illegal." *Id.* at 1147. Gardner had testified that at the time the lease agreement was negotiated, the zoning requirements were simply not on his mind. *Id.* at 1149. As with the flood plain information in this case, the issue of zoning restrictions simply did not come up and the plaintiff made no inquiries about it. *Id.* at 1147, 1149.

In addition, the Court took into account "that Gardner made his deal with Jones in a setting where the terms of the applicable zoning classification and any restrictive covenants were of public record and readily available to all." *Id.* at 1149 n.3. Likewise, in this case, the evidence was that flood plain information was available for inspection and that it was usually the person doing the grading on the property, in this case the plaintiffs' builder Gerald Warfield, who would look up such information.[20] 4:194-96.

There is simply no evidence in this case that Morgan set out to intentionally deceive plaintiffs when he sold this lot. Unlike the defendant in *Sessums v. Northtown Limousines, Inc.*,

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[20] The Court did note in *Gardner* that the information being available as public record was no defense to the merits. *Id.* at 1149 n.3 (citing *Guastella v. Wardell*, 198 So.2d 227, 230-31 (Miss. 1967)). Plaintiffs also cite *Guastella* and state that the availability of the information in the public records is no defense here. Plaintiffs' Brief at 28. But Morgan, although noting that other courts have held that even a seller with knowledge has no duty to disclose publicly available information, Morgan Brief at 20-21, discussed the availability of public records in this case within the context of damages being affected by Warfield's having lowered the elevation so plaintiffs' building is one inch below the level needed to be exempt from flood insurance requirements and plaintiffs having failed to pursue an exception from FEMA. Morgan Brief at 22, 25. Moreover, in *Gardner*, the Court considered the availability of public records in determining whether punitive damages were proper.

664 So.2d 164 (Miss. 1995), who deliberately rolled back the odometer on a vehicle in order to mislead buyers, there was no affirmative act by Morgan to conceal any information from plaintiffs in this case. And despite plaintiffs' exaggerated and imagined characterizations for Morgan's having placed his calendar into evidence, after being asked by plaintiffs' counsel earlier in the case whether he could locate such information, there was absolutely no attempt to defraud the court in this case.

C. An award of fees is not proper in this case.

Other than those cases stating that attorneys' fees may be awarded where punitive damages are proper, plaintiffs offer no authority as to why the general rule prohibiting the award of attorneys' fees should not apply to their case. *See Turner v. Terry*, 799 So.2d 25, 38 (Miss. 2001) ("general rule prohibits an award of attorney's fees absent a relevant contractual provision or statutory authority, or unless punitive damages are granted"); *Sentinel Indus. Cont. v. Kimmins Indus.*, 743 So.2d 954, 971 (Miss. 1999) (award of attorneys' fees must flow from a "statute or other authority"; because plaintiff could point to no authority supporting the award of attorney's fees, none should have been awarded). As discussed above, punitive damages are not proper in this case, and plaintiffs' request for an award of fees must also fail. *See Gardner*, 464 So.2d at 1150.

CONCLUSION

The evidence in this case was insufficient to hold Morgan liable for fraud. The judgment against him should be reversed and rendered. Alternatively, a new trial should be held in which the jury is properly instructed. At the very least, the Court should either remit the amount of damages awarded or order plaintiffs to deed the property back to Morgan in exchange for payment of the judgment. This is certainly not the "extreme" case in which punitive damages and attorneys' fees should be awarded, so the order denying plaintiffs' request for same should be affirmed.

Respectfully submitted,

Fred L. Banks, Jr. (MB [redacted]
Rebecca Hawkins (MB # [redacted]
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300

William M. Beasley (MB [redacted]
Rachel M. Pierce (MB # [redacted]
PHELPS DUNBAR LLP
Seventh Floor, One Mississippi Plaza
201 South Spring Street
Tupelo, Mississippi 38804
Post Office Box 1220
Tupelo, Mississippi 38802-1220
Telephone: (662) 842-7907

Counsel for Appellant/Cross-Appellee Tommy Morgan

CERTIFICATE OF SERVICE

The undersigned attorney of record for Appellant/Cross-Appellee Tommy Morgan does hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following persons at the addresses indicated:

Thomas A. Wicker
HOLLAND RAY UPCHURCH & HILLEN
P. O. Drawer 409
Tupelo, Mississippi 38802-0409

Counsel for Appellees

Hon. Thomas J. Gardner, III
Circuit Court Judge
P. O. Drawer 1100
Tupelo, Mississippi 38802-1100

Trial court judge

This the 25th day of September, 2007.

REBECCA HAWKINS