SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2006-CA-641

JAMES C. P. HARTMAN — **APPELLANT**

VERSUS

NED G. McINNIS, JR. AND
MARY DEANE McINNIS — **APPELLEES**

ON APPEAL FROM THE CHANCERY COURT
OF FORREST COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEES

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

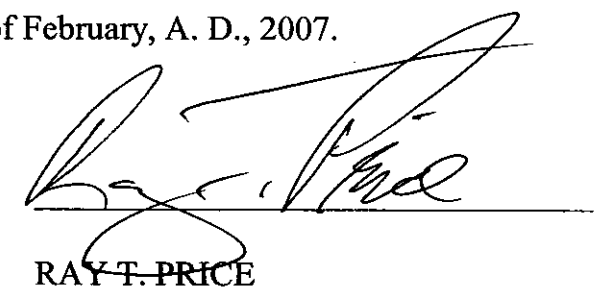
Appellees assert that oral argument in this matter would be beneficial to the Justices to adequately allow Appellees' counsel to explain the numerous errors committed at the trial court level.

CERTIFICATE OF INTERESTED PERSONS

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

1. Ned G. McInnis
2. Mary Deane McInnis
3. James C. P. Hartman
4. Amanda Hartman
5. Ray T. Price
6. Hon. Sebe Dale, Jr.
7. Clarence Webster, III, Esq.
8. Joe D. Stevens, Esq.
9. Jack W Land, Esq.
10. Ron Nelson
11. Robin L. Roberts

Respectfully submitted on this the 2nd of February, A. D., 2007.



RAY T. PRICE
Attorney for Appellees

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STATEMENT OF THE FACTS

Ned and Mary Deane McInnis (hereinafter referred to jointly as the McInnises) owned and rented a total of sixty-seven apartment units in Hattiesburg and Laurel for over twenty years. Ned functioned as the maintenance man keeping the properties in rentable condition and Mary Deane collected rent, a full time job on these mostly low-income housing units. (Tr. 204, 277) When the units were all in good repair and rented, the McInnises made a very good living at this business. (Tr. 205) Ned took responsibility for day to day maintenance on the units, while Mary Deane collected rent, a full-time job on these mostly older properties. However, Ned sustained an injury to his shoulder which affected his ability to do the heavy work required in maintaining the units. That, along with general aging of both Ned and the units, resulted in the number of vacant units steadily increasing over the last several years of the McInnises' ownership of the properties. (Tr. 206) Of course, this resulted in steadily diminished income to the point where the McInnises began losing money on the apartments and having difficulty making payments on notes to Bancorp South secured by the apartments. Because the McInnises were in default on their notes with Bancorp and without other assets to use to fix the vacant properties in order to return them to profitability, they began seeking to find a buyer for the properties.

The McInnises had known Jim Hartman for several years since his arrival in Hattiesburg and entry into the rental housing business in some of the same neighborhoods where the McInnises owned property. (Tr. 83) Hartman had in the past expressed interest in buying certain of the properties and when he approached the McInnises in October of 2003 and expressed interest again, the McInnises told him that they wanted to sell all of their rental property not just the one house in which Hartman was interested. (Tr. 208) Hartman researched the properties and

eventually had his attorney prepare a contract for him to purchase all of the McInnises' rental property, along with some vacant lots in Petal, for the total of $970,000.00. (Ex. 18). This agreement was twice amended and then at the ultimate closing, a fourth agreement was signed among the parties to this litigation, which agreement was prepared by the attorney for Bancorp. The terms of that agreement had basically been hashed out between Hartman and Joe Anthony, President for Bancorp, Lamar County. Instead of a cash salé as originally called for, this Agreement created a fairly complex transaction whereby Hartman (through another entity, Coolhart Properties, LLC) would purchase the more desirable of the properties and have another entity purchase the less desirable and most run-down properties, that being Ronson Construction Systems, Inc, owned wholly by Ron Nelson. (Tr. 139)

Instead of paying cash as initially contracted for, Hartman paid $270,037.95 in cash at the closing and had Ronson, to which he simultaneously sold forty-one of the properties, give a note secured by a deed of trust to the McInnises for $664,683.90. Monthly payments of $8,498.82 on the note would be made by Ronson to Bancorp (Tr. 14), which would then apply the payment to outstanding notes owed to it by the McInnises and credit the McInnises' checking account with the surplus of about $800.00. (Tr. 25) At the end of five years, a balloon payment of $320,216.24 would be paid to the McInnises. Both Hartman and Nelson personally guaranteed the note. (Ex. 20). The cash paid into the closing was used by Hartman to pay off notes owed on those properties purchased by Coolhart and those were released and no longer available for security for the new Ronson note to the McInnises. Hartman also sold one of the houses the same day to a third party and pocketed $33,000.00, unbeknownst to either the McInnises or to Ron Nelson. (Tr. 416) The McInnises could not have known they were losing security, as they

transferred their interest directly to Hartman, who then immediately transferred his interests as he desired (and as the Bank allowed) at a "simultaneous closing".

This agreement further required that the McInnises assign all of their interest in the note and the deed of trust from Ronson to Bancorp and that Bancorp would continue to hold first lien on the property under the old McInnis notes and deeds of trust and that the new Ronson note and deed of trust would be subordinate to the McInnises' notes and deeds of trust. This is referred to in banking as a "wrap-around mortgage". (Tr. 313) Notably, by requiring that the arrangement be handled in this manner, the bank forced the McInnises to give up any rights to enforce their legal (but not equitable) rights under the note and the deed of trust from Ronson. (Tr. 292)

Hartman recruited Ron Nelson, owner of Ronson Construction, to purchase the McInnises' property in which he was not interested. He promised Ron Nelson that he would assist him and guaranteed the note to the McInnises for Ronson, and he also made a paper profit on the sale to Ronson of over forty thousand dollars. The success or failure of the project, Hartman knew from the outset, was contingent upon Ronson very quickly getting needed maintenance work performed and the vacant apartments rented in order to generate enough rental income to cover the note. Ron Nelson very quickly proved that he was not up to the task, as illustrated by the e-mails introduced at trial as Exhibit 36. Perhaps Nelson really didn't know what he had gotten himself into, as he clearly relied solely on Hartman's advice that the deal would be favorable to him. Nelson signed off on the agreement without ever having seen the inside of the properties, relying entirely on Hartman's assurances as to the condition of the property. (Tr. 170-173) Hartman himself, a sophisticated real estate investor, testified that he never personally inspected all of the properties, nor did he inspect the interior of any, admitting that he was aware that would be part of due diligence before entering into such a transaction. (Tr.

65) Hartman likewise neither had the properties professionally inspected nor appraised. Hartman failed to advise Nelson that he was purchasing the McInnises' more desirable properties for himself and another partner and selling some for a thirty-three thousand dollar profit at closing. Contrary to the assertions made in Hartman's brief, he did not reasonably rely on any incorrect information provided to him by the McInnises prior to the closing.

Hartman admitted this at trial. While during trial and again on appeal Hartman makes this argument, it simply is not true and the Chancellor so found as a matter of fact. The documents provided to Hartman by the McInnises prior to closing do not show, as argued by Hartman, that the McInnises represented to him over ten thousand dollars in rent collected (as opposed to rent owed) on the Ronson properties. Instead, what they in fact showed was that the apartments which were rented had, as of the time of closing, only eight thousand seven hundred sixty dollars owed (as opposed to collected) per month. (Tr. 122) After he made this claim at trial, Hartman was cross-examined with his previous deposition testimony where he stated:

> "I was given information in the beginning that put the gross rent for those 14 units [the Ronson units] in excess of ten thousand dollars per month. By the time we actually closed the transaction information had been given to me that dropped that down slightly just below ten thousand dollars - below the ten thousand dollar mark. Maybe in the nine thousand dollar something range. So that the aggregrate rents coming from those fourteen parcels and forty-one units within those fourteen parcels was in excess of nine thousand dollars."

(Tr. 98)

However, Hartman further admitted that he knew that Mary Deane's full-time job was to collect rent on the properties and that there was a difference between rent due and rent received. (Tr. 83, 84, 96) He admitted that he asked the McInnises for bank statements prior to the closing, which were stolen from one of the vacant properties so that he never saw them, but closed anyway. (Tr. 97) He admitted Ned gave his banker full authority to discuss the McInnises'

monthly receipts with Hartman. He admitted that he had no idea how much time Ron Nelson spent trying to collect the rent. He admitted that he was provided prior to closing by the McInnises with an updated document which downwardly adjusted the monthly amount owed on the units to $8,710.00. (Hartman R. E. 89 [not including final two properties which were not purchased by Ronson].) Looking at what the trial court saw and heard in Mr. Nelson's e-mails to Hartman and in his own testimony, Nelson obviously was not able to spend enough time collecting rent to collect all of the rent the McInnises had been collecting. (Tr. 93) After default, the McInnises sought the authority to go out and collect the rent, not only to keep their notes current but also to show that Nelson simply was not diligently collecting the rent. (Tr. 230) Unfortunately, Bancorp would not agree, nor did it attempt to exercise this right under the deed of trust. (Tr. 242)

The truth of the matter is that it appears from an overall analysis of the evidence that Hartman relied more on Bancorp's loan balances to the McInnises than anything in making his determination that value being paid was reasonable. He testified clearly that he did not ask for a property inspection, nor personally inspect the inside of the properties <u>because</u> he relied on the fact that Bancorp had loaned somewhere around $440,000.00 on the properties. Hartman knew that banks typically will loan 80% of the value on a property, so he thought this property must be worth around $700,000.00. He <u>assumed</u> that they must be worth more than owed on them. He admitted that he thought it important that someone inspect the property, but everything seemed to be in order, so he didn't. (Tr. 79-81)

Hartman was a sophisticated businessman, with degrees in Economics and Accounting. He knew what due diligence was and that it included seeking out information on one's own behalf, not just relying on information provided to you. (Tr. 61) In truth, with the $7,000.00 rent

received each month, the Ronson properties were a very good deal, as once the sixteen vacant units were repaired and rented, the rents would greatly exceed the note payments to the McInnises.

However, Nelson made very little effort to do the tremendous amount of work necessary to fix up and rent the properties that Hartman well knew was necessary to make them profitable. As is shown by a review of the e-mails back and forth between Hartman and Nelson (Ex. 36), despite Hartman's urging, Nelson always had an excuse or something more important to do than work on this project. After only three months, Nelson simply abandoned the project altogether. Hartman, who had inserted himself as Ronson's bookkeeper, then simply informed the Bancorp officer involved, Joe Anthony, that he would not be making any more payments (Tr. 146) and did not intend to honor his personal guaranty, now beginning to claim that he had been misled by the McInnises as to the amount of rents being collected and the condition of the units which he had full opportunity to but failed to inspect. (Tr. 63) He informed Ned that they had "squatters" not renters. (Tr. 218)

Hartman had long before the closing known of the difficulty of collecting rent on some of this rental property and knew that collection was Mary Deane's full time job. Nelson simply would not or could not put the time in necessary to collect the rent and therefore was not receiving the amounts the McInnises had been able to collect. When the McInnises were notified that Hartman would not honor his personal guaranty and that collection of rents was contended to be a problem, they requested that the bank exercise its right to collect rent as allowed under the deed of trust from Ronson and allow them to collect the rent so that it could be applied to the notes due to them and those still due from them to the bank. The bank failed to reply for many

months and then refused and made no attempt to exercise its rights to collect the rents. As a result, the rental income continued to remain diminished.

Of course, since Ron Nelson was to have personally done repairs necessary to rent additional units and abandoned his responsibility to improve the properties, the income stream never increased to allow the planned increase above the amount of the notes to take place. Hartman, having gotten the better property and the money from the closing, then took the risky position of saying he had been defrauded by the McInnises and therefore would not honor his personal guaranty, nor step up and hire contractors to perform the necessary repairs. Instead, he maintained control and let the balance owed on the note increase month after month, as the Ronson units sat empty and further deteriorating.

The McInnises' attempts to have the bank enforce its and their rights having failed, they filed suit against all of the parties to the "agreement" in the Chancery Court of Forrest County. Subsequent thereto, the bank failed to do anything it could have done to protect its own and the McInnises' interests. They also simply allowed the properties to further depreciate and increase in vacancies as valuable time passed and the McInnises' loan balances became more and more delinquent. None of the three bank officers who testified could explain why the bank failed to exercise its rights to collect rents, perform repairs, etc., which it could have done to lessen the bank's and the McInnises' losses. (Tr. 352, 401) Hartman likewise did nothing but hire a property manager who, like Nelson, merely collected what rent came easy and did not rehabilitate any of the properties that could be rehabilitated to increase the monthly rental income, as contemplated as necessary by Hartman when planning the entire transaction with the McInnises. (Tr. 515, 134)

Mr. Hartman's brief attempts to play fast and loose with the actual facts in this case, using numerous methods of deception that appear calculated to mislead this Court as to the facts upon which the learned chancellor based his opinion. While unusual for the undersigned, we would like to proceed through Mr. Hartman's statement of the facts and show numerous incidences of attempts to mislead this Court.

At page 5 of his brief, it is stated "Hartman was never interested in the Ronson properties . . . ." (citing his own testimony in the record). While that may be true, his actions certainly belied that fact. Hartman signed three agreements to purchase all of the properties involved in this transaction and it was not until the final "agreement" was signed on the date of the closing that anyone else was ever specifically mentioned as a buyer of the properties. (Ex. 18, Ex. 19) In fact, he did purchase those properties directly from the McInnises at the closing, and then turned around and sold them to Ronson Construction Systems at a mark-up. (Tr. 173) He did not, as stated at page 6 of his brief, "broker a transaction that would allow Nelson to purchase the Ronson properties from the McInnises without a down payment," as he in fact purchased the properties himself. (Tr. 62) In fact, the McInnises did not know that Ronson would be involved whatsoever until after the closing occurred.

At page 6 of his brief, Hartman states "Hartman and Nelson rely on the McInnises' representations about the condition of the Ronson properties and the rental income they produced." Nelson testified unequivocally at court that he did not rely on any representations made to him by the McInnises, as the McInnises in fact did not make any representations to him and he had no conversations with them prior to the closing whatsoever. (Tr.170) Hartman then claims he was provided with "a description of <u>all</u> repairs needed to make the unrentable units marketable" (emphasis added) and a matrix which is reproduced in Hartman's record excerpts ,

pages 86 through 96 which stated that rents collected on the Ronson properties totaled $8,760.00 to $9,000.00. In fact, if the Court would review the documents along with the testimony, Hartman quite candidly admitted that he understood that these properties were not the type on which rent was easily collected and that he had previously been the owner of a trailer park and knew what it was like trying to collect rents from low income tenants. (Tr. 97) Additionally, the matrix with occupancy information referred to by Hartman shows that, as of the last date of the matrix provided to Hartman on November 14, 2003, when excluding property Hartman did not purchase (Second Avenue and Richburg Road), the total rent owed, not collected, on all of the Ronson units was in fact only $8,710.00 per month. (Tr. 96-97; Hartman R.E. 0089) Hartman admitted he knew the difference between rent owed and collected and that rent was difficult to collect on these properties and finally, that collecting rent was Mary Deane's full-time job. As to the condition of the properties, the documents provided by the McInnises to Hartman as to the condition of the properties were not asked for nor intended to be a full and complete itemization, but merely an "overview". (Tr. 183-184, 197)

Hartman, who contends that he was misled and misdirected in this venture by the McInnises, simply tried to be too shrewd for his own good. The true facts show that Hartman was a sophisticated real estate investor with degrees in accounting and economics and simply made a bad choice of a business partner in Ron Nelson and Ronson Construction Systems. The proof at trial actually showed Nelson was misled by Hartman, not the McInnises. Hartman understood what due diligence was, what it meant to him, taking information that is given, processing it, making an educated decision, verifying that information as best as possible, and making a business decision whether or not you want to pursue the business deal. Contrary to Hartman's assertion and made by his attorney again here on appeal, Hartman agreed that due

diligence means to seek out information on your own, not simply accept what is provided by a seller to a prospective purchaser. (Tr. 61-62)

In spite of his understanding of due diligence and despite the fact that he had been provided with a key, Hartman did not ever go and perform a full inspection of the Ronson properties he was purchasing, other than driving by and looking at some from the outside. He claimed he took Ron Nelson and they viewed some of the properties from the outside, but Nelson confirmed that he had never been inside any of the properties until after the closing. (Tr. 66) Contrary to the assertions that Ned McInnis misled Hartman and Nelson, Nelson's decision was based solely on what Hartman told him about the feasibility of the project. (Tr. 170) Despite the fact that they could have entered any of the apartments to conduct an interior inspection, Hartman and Nelson did not do so. (Tr. 172) Contrary to Hartman's claim that the McInnises had assured him that there would be $10,000.00 rent collectible every month, Nelson testified that Hartman instead told him that it would be close in the beginning with whether or not it would be profitable at first. (Tr. 178) Since the note was $8,800.00, one can reasonably infer from this that Hartman, by making this statement to Nelson, understood that the rent collected, as opposed to owed, might not be sufficient to cover the $8,800.00 due and payable on the note on a monthly basis.

The truth was revealed in Hartman's own testimony and the truth is that in spite of his sophistication, he failed to have appraisals or inspections done on the properties. His testimony revealed that he assumed the properties he purchased and sold to Ronson were worth $700,000.00, because Bancorp South had loaned the McInnises $450,000.00. If the bank had loaned that amount of money, he assumed everything would be in order and the value would be there. He did not ask for an inspection because everything seemed in order with the transaction.

(Tr. 79-81) Hartman and Nelson claimed that they were not able to collect the amount of rent the McInnises had told them they collected, which actually was more in the area of $7,000.00 as Hartman admitted at one point during his testimony. (Tr. 124-25)

Hartman knew that both Ned and Mary Deane worked full time and that Mary Deane's sole job was collecting rent and Ned did the maintenance. He knew that the tenants of the Ronson properties did not send in their rent checks every month, that someone had to personally go out and knock on doors to collect the rents. Interestingly, Hartman testified that he made Ron Nelson aware of that. (Tr. 84-85) Nelson, however, testified that he was completely astonished with the problems collecting rent and that no one had advised him that it would be so hard to collect the rents. (Tr. 287) When entering into the transaction, Hartman expected Nelson to go out and collect the rent money, as well as to fix up the properties so that more units could be rented to increase the cash flow to be sufficient in order to be able to pay the note, maintenance, and to return a profit. Hartman knew it took both Ned and Mary Deane to perform this work, so Nelson was expected to do two jobs. Contrary to his current attorney's assertion that Hartman totally relied upon the McInnises for repairs needed to the property, in response to his own attorney's question at trial, he stated that he <u>partially</u> relied on the list provided by the McInnises, that he understood it was not a complete list and that he also relied on his and Ron's exterior inspection. (Tr. 118)

Ron Nelson's testimony was very illuminating. Nelson testified that his decision to enter into this transaction was based <u>on what Hartman told him</u> and <u>not</u> anything he had learned from the McInnises. (Tr. 170) He did not go into any of the properties and that he and Hartman went around and looked at the outside of some of the properties. (Tr. 171) Contrary to Hartman's testimony that he had advised Nelson that he would be splitting off other of the McInnises'

properties to another company in which he was interested, Nelson testified that he was not aware that Hartman would be separately purchasing any of the McInnises' property. According to Nelson, Hartman told him that he would help him get the project together and that he did not want the Ronson properties or to be stuck going around trying to collect rent. (Tr. 172-173) He was advised by Hartman that the property would bring in approximately $11,000.00 per month in rent, but was unaware whether or not Hartman had deducted the rent for the Maynard apartments of over $4,000.00, which Hartman had divided out of the transaction to the company in which he owned one-half interest, Coolhart, LLC. (Tr. 174) Nelson had believed it would take ten to fifteen hours a week to collect rent and ten to fifteen hours to do repairs, in spite of the fact that he had not inspected any of the properties.

In three months that he worked on the Ronson properties, he did not even get three apartments up and running. He testified that he had other repair jobs that he had to finish during the time he was supposed to be collecting rent and working on the properties. (Tr. 175-176) From the email correspondence which Hartman's attorneys call "eloquent and moving" at page 11, footnote 6 of their brief, it is apparent that Nelson was simply not up to the task at hand, which required much more effort than he was able to put into the project with all the other problems he had going on at the time. The Ronson properties required immediate full time effort which Nelson was not able to provide. The truth is, this caused the failure of the endeavor because, as Hartman recognized and told Nelson, fixing and renting more apartments was critical to assuring adequate cash flow to cover the notes, make a profit and be able to refinance the notes on more favorable terms later as Hartman had intended. (Tr. 87)

On the issue of rents, Nelson claimed he never was able to collect in excess of the $5,000.00 he collected in the first month of attempting to collect rent. When the McInnises

learned that this was an issue, they sought that the bank exercise its right to collect rent because they knew from experience that they could collect the $7,000.00 which they had been collecting on the Ronson properties. (Tr. 271) Of course, had they been allowed the chance to do so, we would have known for sure whether or not the rent was collectible to the extent they had collected it, but the bank refused to exercise its right and Ron Nelson eventually exited the project entirely and his meager efforts to collect rent therefore could not be disproved after the fact as being insufficient by the McInnises.

The most deceptive statement made by Hartman's brief is the claim, at page 9, that "the transaction benefits the bank and the McInnises, while Hartman takes all the risk."

In this most comical, but for the absurdity of it, statement made by Hartman, he claims that he took all the risk and did not receive any benefit for guaranteeing the loan. A close analysis of the transaction belies this statement and shows Hartman's true cunning. The Chancellor reviewed Exhibit 35, a compilation of all the closing statements prepared by Robin Roberts, Esq., the attorney for Hartman who closed the simultaneous transactions which occurred herein. Hartman's counsel claims that he "only" received $33,000.00 for "brokering" the transaction. We have already demonstrated that he did not broker this transaction, but he bought this property and then split it up as he decided and in his best interest. A thorough review of all of the HUD-1's demonstrates that, quite to the contrary of Hartman's claim, he in fact pocketed the whopping sum of $319,388.07 from this transaction, quite a nice "brokers fee" especially considering Hartman was not and has never claimed to be a real estate broker. Hartman, as previously indicated, in fact bought all of the property from the McInnises and then turned around and sold it to various entities in a series of "simultaneous" closings. An analysis of all of the HUD-1's reveals that Hartman received a total consideration of $1,027,159.21 with the

aforementioned $319,388.07 being in cash. The remainder of over $700,000.00 in value received by Hartman at this transaction was in the form of notes from Ronson, Ware, and Coolhart and, as far as the Ronson property, secured by a deed of trust on the property in the amount of $664,683.90 which, while it may not have given him an "ownership interest" as claimed on Page 10 of Hartman's brief, certainly gave him a legal and equitable interest and protection for his investment in Ronson. Also conveniently ignored by Hartman in his brief but demonstrated by the HUD-1, his good friend Ron Nelson, owner of Ronson Construction who thought Hartman was doing him such a big favor, paid a premium over what the McInnises sold the Ronson properties for to Hartman. While the total purchase price of the Ronson properties as shown by the HUD-1 from McInnis to Hartman was $664,683.90, Hartman marked up the property when he sold it to Ronson for a total sales price of $715,000.00, again a nice little profit for his trouble.

Understanding the full financial windfall to Hartman which occurred as a result of these transactions, it is quite easy to understand the findings of the Chancery Court cited in footnote 5 at page 10 of Hartman's brief. When it is properly understood that Hartman in fact pocketed $319,388.07, the Chancery Court's characterization of a "juicy plum" becomes understandable, along with the other complained of findings of the Chancery Court.

To conclude the matter of the misleading statements as to the facts in this case, we wish to point to a glaring omission in Hartman's brief at page 27, footnote 14. Hartman attacks the Chancery Court's opinion as failing to make meaningful findings and therefore impossible for this Court to decide whether the trial judge was in error. However, by omitting the final sentence of the ruling, Hartman attempts to mislead the Court on a matter of substantial importance as to the Chancellor's findings. The Court's final finding was omitted, perhaps unintentionally, but

nevertheless is extremely important to Hartman's claim. After finding that Hartman had failed to meet his burden of proof and citing all of the evidence being considered, the Court went on to find that not only did Hartman not meet his obligation to prove by clear and convincing evidence that he had been defrauded by any misstatements by the McInnises, but also that, relevant to the claim of negligent misrepresentation, "indeed, all that proof [of misrepresentation] fails to reach the level of simple preponderance." Thus, the Court specifically found that Hartman had not presented facts sufficient to support his claim of misrepresentation, whether intentional or negligent. We would also like to point out that, were Hartman not satisfied with the Court's findings of fact, he was free to request that the Court issue specific findings of fact and conclusions of law and did not do so. Having failed to do so, he cannot present a claim on this issue to this Court, as he failed to ask the trial court for any relief on this basis.

ARGUMENT

STANDARD OF REVIEW

This Court has articulated the standard of review as follows:

> This Court will reverse a chancellor only where he is manifestly wrong. Hans v. Hans, 482 So. 2d 1117, 1119 (Miss. 1986); Dwayne v. Saltaformaggio, 455 So. 2d 753, 757 (Miss. 1984). A chancellor's findings will not be disturbed unless he was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Tinnon v. First United Bank of Miss., 577 So. 2d 1193, 1194 (Miss. 1990); Bell v. Parker, 563 So. 2d 594, 596-97 (Miss. 1990). Where there is substantial evidence to support his findings, this Court is without the authority to disturb his conclusion, although it might have found otherwise as an original matter. In Re: Estate of Harris, 539 So. 2d 1040, 1043 (Miss. 1989). Additionally, where the chancellor has made no specific findings, we will proceed on the assumption that he resolved all such facts and issues in favor of the appellee. Newsome v. Newsome, 557 So. 2d 511, 514 (Miss. 1990). The chancellor's decision must be upheld unless it is found to be contrary to the weight of the evidence or it is manifestly wrong. O. J. Stanton & Co. v. Miss. State Highway Comm., 370 So. 2d 909, 911 (Miss. 1979).

Ferrara v. Walters, etal, 2002-CA-02052-SCT (S. Ct. 2005), Paragraph 8.

1. THE McINNISES HAD STANDING TO SUE UNDER THE AGREEMENT BETWEEN THE PARTIES.

Hartman is simply wrong when he contends that he has no obligations to the McInnises after they assigned their rights under the note and the deed of trust to the bank. First of all, the assignment to the bank was to be effective only until such time as the McInnises' lesser obligation on their note to the bank was retired, at which time the bank was to re-assign the note and the deed of trust to the McInnises. Second, the McInnises have rights as well under the "Agreement" dated November 14, 2003 and in equity. Third, the McInnises are clearly third party beneficiaries who are entitled to sue to enforce their rights.

As correctly pointed out in Hartman's Motion for Summary Judgment and in Burns v. Washington Savings & Great Southern Savings & Loan Asso., 251 Miss. 789, 171 So. 2nd 322 (Miss. 1965), "it is ordinarily a necessary prerequisite that the relationship of privity of contract exists between the party damaged and the party sought to be held liable for breach of the contract." *Id.* at ¶42. However, Burns noted:

> An exception has been engrafted on this rule and stated succinctly, it is as follows: a third person may sue on a contract made for his benefit between others to the consideration of which he is a stranger. Or stated differently, a third person may in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and the consideration. *Id.* at ¶43 (other citations omitted).

In this case, the Court must also recognize that the McInnises are actually a party to the contract which was called an "agreement" among all the parties to this litigation. Therefore, the McInnises have standing to sue both as parties to the "agreement" and as parties to whom the note and deed of trust were to be re-assigned once their notes to Bancorp were extinguished. Finally, they have standing as third party beneficiaries. To further clarify the applicable law, the Court in Burns stated:

> . . . . .We think it will be found that the best considered of these cases reason the matter down to this: (1) when the terms of the contract are expressly broad enough to include the third party either by name as one of a specified class, and (2) the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits, if (3) the promisee had, in fact, a substantial or articulate interest in the welfare of the said third party in respect to the subject of the contract. Cf. 17 Am. Jur. 2nd Contracts 308 (1964).

The terms of the agreement make it abundantly clear that the overriding purpose of the assignment was to benefit the McInnises by allowing them to sell their property, extinguish their debt to the bank by allowing the bank to collect all sums due under the note and deed of trust and apply those proceeds to the notes previously owed by the McInnises to the bank and to credit the McInnises' account with the excess monthly giving them over $800.00.

Hartman's brief misses the mark entirely, Hartman apparently still does not understand the case made at trial. During the trial, Hartman is correct that the McInnises had admitted they had assigned the note and deed of trust. However, Hartman conveniently ignores the "agreement" entered into evidence at page 19 which is the underlying basis for this suit, as Ned McInnis testified to at trial. (Tr.245-246)

At the conclusion of presentation of the McInnises' case, counsel moved to amend the pleadings to conform to the evidence and their motion was granted without opposition. (Tr. 289) While Hartman is correct that the McInnises had assigned the note and deed of trust, Hartman entered into an independent obligation under the agreement and is bound thereby, both at law and in equity. Hartman's legal argument totally ignores both the terms of the agreement and the Chancery Court's equity jurisdiction. The familiar maxim "equity will not suffer a wrong to be without a remedy" has never seen a more appropriate case for application than the one at bar. Talbert v. South Gate Timber Co., 2005-CA-002293-COA (2005)

The Chancellor clearly used the agreement of November 14, 2003, as the basis of its ruling, citing it in Paragraph 3 of its memorandum opinion. (Hartman's R. E. 28) The Chancery Court also noted that Hartman profited greatly, finding specifically in foundational facts as follows:

> Virtually simultaneous with closing of the "wrap-around" deal, Hartman separately sold two of the four separate parcels to an independent party for cash, and almost simultaneously conveyed two other of the four separate parcels to himself and a new partner. All those sales generated cash and profit to Hartman and deleted from the properties remaining, which were vested in RCSI, substantial cash income potential for use by RCSI in meeting the monthly note requirements of the wrap-around balloon note in the hands of BCS by McInnis assignment. The settlement statement issued at the formal closing reveals that Hartman received by check almost $34,000.00, received two promissory notes from RCSI totaling $32,859.29, and that McInnis received by check $12,863.84. RCSI wound up with title to the fourteen rental units, no cash, notes to Hartman totaling $32,859.29, and the balloon note to McInnis, assigned to BCS, for $664,683.90 with a monthly payment obligation of $8,498.82. (C.P. 568-569)

Although the Chancery Court did not specifically note it, no doubt the Chancellor was well aware that Hartman's total immediate cash benefit was over $300,000.00 as previously set forth in our statement of facts.

Hartman would have this Court hold that he, having agreed to pay the McInnises $960,000.00 for their property, is entitled to be absolved of that debt by payment to the McInnises of $12,863.84 for the culmination of their life's work and planned retirement. He would have the Court ignore the agreement he entered into voluntarily (Ex. 19) as well as the basic fundamentals of equity. His request shocks the conscience.

Hartman's merger argument, which was combined with his argument that the McInnises have no damages, is likewise ludicrous. In addition to also totally ignoring the November 14, 2003, agreement and principles of equity, Hartman attempts to continue the slight of hand which would make the McInnises' equity in the property Hartman purchased vanish.

Hartman agreed and purchased the property for $960,000.00 from the McInnises. The proof at trial showed that as of the date of the agreement, the McInnises owed approximately $700,000.00 on those properties, as noted by Hartman in his testimony related to his valuation of the properties. (Tr. 78) Thus, by Hartman's own calculation, the McInnises had $260,000.00 in equity in the property which Hartman purchased and he would now have this Court find that the McInnises have no damages, having received only $12,000.00 for that $260,000.00 in equity. However, the terms of the agreement of November 14, 2003, and the principles of equity cannot allow him to do so.

Hartman's argument that the McInnises have no damages would ignore the reality of the transaction which actually did occur based upon Hartman's astute manipulation of the transaction to his favor.

2. THE CHANCERY COURT PROPERLY RULED AGAINST HARTMAN ON HIS CLAIMS OF INTENTIONAL OR NEGLIGENT MISREPRESENTATION.

Hartman's brief extensively attempts to persuade this Court to re-examine the Chancellor's factual and legal conclusions regarding alleged misrepresentations made by the McInnises regarding rent received and the condition of the properties. He again claims that both he and Nelson were misled, ignoring the fact of Nelson's trial testimony that no assertions whatsoever were made to him by the McInnises and that he relied on Hartman for all of his information. (Tr. 170) Hartman's brief also ignores the fact that Hartman himself admitted that he did not believe that all of the rent would be collected on the Ronson properties and the dismal efforts made by Nelson to collect rents and improve the properties and the lack of any effort whatsoever on Hartman's part to either collect rents or to inspect the properties. Hartman

repeatedly refers to Ex. 30, a composite exhibit of several different documents provided to him by the McInnises. As noted, as to the rents, the document in Ex. 30 which bears "Friday, November 14, 2003," at the bottom, is the last document provided to Hartman regarding rents. It should be noted that the Second Avenue and Richburg Road properties on this document were not involved in the Ronson transaction. When viewing this document, referred to at trial as a "matrix", Ned McInnis stated that the blacked in squares showed units which were rented and the squares which were not blacked in showed units which were vacant. Adding up the rent as of the date of the closing, the document, on its face, shows a total potential rental income for the occupied units of $8,710.00. Nowhere on the face of this document does it assert that every penny of rent owed on these apartments was collected, and the McInnises vehemently denied that they ever asserted that to Hartman, and we submit anyone who believed such an assertion would be foolhardy. Hartman himself admitted at trial that he knew Mary Deane spent a great deal of time collecting rent on the properties and that these were the type of properties where you would have to go out and knock on doors to collect the rent. This was buttressed by Nelson's testimony when he stated that one reason Hartman did not want to be involved in purchasing these properties was that he did not want to be involved in going out and trying to collect the rent on the properties. (Tr. 173)

Turning to the actual assertions made in Ex. 30 as to needed repairs, both Ned McInnis and Ron Nelson referred to the statements made by McInnis as an "overview" of needed repairs. Turning to the actual statements made in Ex. 30, they are not, on their face, complete statements. On page 6 of Ex. 30, we find the following statement: "Eight of them need considerable work; nine of the vacant ones need just a few hours work." Pages 8 and 9 of the exhibit contain the remaining statements as to repairs and cover only twenty-seven of the forty-one units involved,

clearly indicating that it was not intended as a complete list. Such statements are made as "okay"; "good bit of work required"; "portion of ceiling needs replacement"; "limb hit roof over living room"; "looks horrible, but only needs real cleaning and a couple of window panes replaced"; "roof leaks on flat part of right bedroom"; and "okay" several other times. "Okay" falls glaringly short of meaning a warranty that the property is in perfect condition and needs no repairs. If anything, were Hartman concerned about repairs needed, this list would have alerted him that for a better idea as to how much repairs were needed, he would have to request that a property inspector visit the properties. For example, a "roof leak on flat part of right bedroom" could indicate that a roof needs a patch because of a recent problem or that the problem had been long-term and the roof needed patching, the sheetrock needed replacing in the ceilings and walls, carpet was ruined, the subfloor was warped and needed replacement, and that the foundation had gotten moldy from being wet for a long period of time and was possibly rotten. For Hartman to assert that he could read this as a complete listing of repairs needed to all forty-one properties after reviewing it is simply absurd on its face. A more reasonable conclusion and that which the learned Chancellor in this case obviously reached was that, as Hartman never intended to have anything to do with these properties whatsoever except push them onto Ron Nelson and Ronson Construction, he did not care about the condition of the property and assumed it was worth what he paid for it based on the number of units and the amount of money the bank had loaned on it, as he admitted during his own testimony.

3. THE CHANCELLOR CORRECTLY HELD THAT BANCORP BREACHED ITS FIDUCIARY RELATIONSHIP TO THE McINNISES.

It is true that in the ordinary commercial loan transaction, no fiduciary relationship exists. Union Planters National Bank v. Jetton, 2001-CA-01609-C.O.A. (2003). However, the

transaction which took place as between the McInnises and Bancorp is no ordinary commercial loan transaction.

As to the McInnises' claims against Bancorp, the facts proven at trial show that the bank placed itself into a fiduciary relationship with the McInnises by requiring that the sale to Ronson be by means of a "wrap-around mortgage" and requiring that the McInnises assign all of their rights under the note and deed of trust from Ronson to the bank. (Tr. 315-316) This was required, according to Joe Anthony, because the bank wanted to increase its security. Once the transaction was consummated, Bancorp was to apply the monthly note payment from Ronson to the McInnises' business and personal notes and deposit the remaining funds into their personal account. The McInnises gave up all rights to enforce the provisions of the note, deeds of trust and personal guaranty of Hartman to the bank, placing them totally at the mercy of Bancorp in the event of any default. In March of 2004, Hartman informed Bancorp through its Lamar County President, Joe Anthony, that he would not honor his personal guaranty. At that time, the bank took no action toward Ronson, Nelson or Hartman, instead demanding the McInnises begin making payments due under their underlying notes.

Joe Anthony knew that the McInnises had no ability to make these payments. When the McInnises offered to collect the rents as allowed under the deeds of trust, since Hartman was claiming Nelson could only collect $4,000.00 per month in rent, the bank refused to allow them to do so, resulting in increasing default under both Ronson's and the McInnises' notes to Bancorp. Bancorp in fact took no action whatsoever to attempt to protect itself or the McInnises, despite having several options under the deed of trust, including the right to collect rents, make repairs, and initiate foreclosure proceedings, until well after the McInnises filed this action. Then, the bank only chose to initiate foreclosure and request that the Mississippi Housing

Authority forward rent. The latter was largely ineffectual, since the Housing Authority had ceased paying rent on several properties due to lack of required repairs which the bank could have made and charged to Ronson and Hartman as guarantors. The evidence shows that the bank's actions were unreasonable and a violation of their duty to the McInnises to protect their interests.

Had Bancorp granted to the McInnises the right to collect rents, the damages to the McInnises and to the bank itself could have been largely mitigated, as they had demonstrated the ability to collect $6,000.00 to $7,000.00 per month on the Ronson properties and the proceeds could have been applied to the McInnises' personal and business notes and only resulted in a monthly delinquency of $1,400.00 to $2,400.00 per month instead of the $8,400.00 per month since no payments were being received. (Incidentally, the notes directly related to the Ronson properties were approximately $4,400.00, the additional $4,000.00 paid the McInnises' personal notes. Therefore, the amount collected by Nelson actually was close to enough to pay the note.) Further, had Bancorp initiated foreclosure proceedings immediately instead of waiting for the McInnises to initiate proceedings, several months delay would have been avoided, lessening the McInnises' damages. The Bank also had the right to make repairs to the properties under the deed of trust, another option of which it did not avail itself, resulting in more and more tenants leaving the properties and further deterioration. The properties were worth less than when sold by the McInnises.

Also, Bancorp's actions in handling the foreclosure caused the McInnises to suffer greater damages. At the foreclosure sale in Forrest County, potential buyers of the foreclosed properties appeared and wanted to bid. However, Bancorp announced that the bids would be subject to a first deed of trust and that the balance owed could not be ascertained as to any particular

property, only the initial balance. Because of Bancorp's refusal to provide this information, bidders who were interested in these properties did not bid, as they were not able to ascertain the indebtedness they would be undertaking in order to make an intelligent bid on the property. As a result, Bancorp was the successful bidder on all of the properties, bidding at minimum amounts which did not reflect the true market value of the properties and resulting in the McInnises receiving less credit toward their loan balances than would have otherwise been the case.

This court has provided a test for the existence of a fiduciary relationship :

> "[W]hether (1) the parties have shared goals in each other's commercial activities, (2) one of the parties places justifiable confidence or trust in the other party's fidelity, and (3) the trusted party exercises effective control over the other party. Amsouth Bank v. Gupta, 838 So.2d 205, 216 (Miss. 2002).

(cited in Union Planters, *supra*, at ¶10).

In this case, this three-part test is clearly met. On the first prong, both the McInnises and the Bank had a shared goal in entering the agreement that the loans of the McInnises to Bancorp would be paid. On the second, the McInnises clearly relied on Bancorp to enforce all of the rights they had under the note and deed of trust when they assigned it to Bancorp, giving up their own rights to do so in favor of the presumably more able bank. On the third, Bancorp had not just effective, but total control over the McInnises' rights under the assignment which it required as part of the November 14th, 2003 agreement.

Thus, the Chancellor here correctly found that there existed a fiduciary relationship and that Bancorp's failure to properly protect its own and the McInnises' interests precluded it from collecting any sum from the McInnises.

4. THE CHANCELLOR'S AWARD OF ATTORNEYS FEES WAS CORRECT.

Hartman next attacks the Chancery Court's award of attorneys fees in the amount of $112,000.00 as excessive. He asserts that no proof was put forth at trial as to the reasonableness of the fees.

To the contrary, both Ned and Mary Deane testified at trial that they were unable to pay attorneys fees in this matter due to the loss of their retirement, which was the proceeds of the transaction at issue here and increasing credit card debt due to default on the note and Hartman's guaranty. Hartman cites the Rules of Professional Conduct in claiming that the fees are excessive. The Rules of Professional Conduct, however, do not apply to courts setting awards of attorneys fees. Indeed, this matter is governed by statute in Mississippi. The applicable statute is Miss. Code Ann. §9-1-41, which provides that a court may set attorneys fees in a matter based upon evidence presented and upon factors of which the court is aware. The statute reads as follows:

> In any action in which a court is authorized to award reasonable attorneys fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation; provided however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award and the court may consider such evidence in making the award.

In this case, the McInnises were unable to pay attorneys fees. Their undersigned counsel presented an itemized bill for illustration purposes which was placed into evidence and reviewed by the Court. The Court was clearly aware that this case was not accepted by the undersigned counsel as an hourly rate case, but as a contingency case based solely upon the outcome and for which counsel would not be paid at all unless achieving a successful outcome. (Tr. 283) The Court was further aware that the McInnises had filed for bankruptcy and dismissed it and had run

up credit card debt of $100,000.00 after Hartman's refusal to honor his personal guaranty and that Mary Deane McInnis had sought psychological help as a result.

Considering that undersigned counsel undertook representation of the McInnises without any guarantee of payment and that the bill submitted was for a bare minimum of time, that the case was complex, protracted, highly contentious, involved several parties, an interlocutory appeal and the fee was only approximately twenty-five percent of the recovery, we submit that the Chancellor was certainly within his discretion in making the award of the attorneys fees. To the contrary of Hartman's assertion that "the sole evidence presented on the issue of attorneys fees was an invoice submitted by Ray Price, Esq., the McInnises' attorney", the record contains ample evidence upon which the Chancellor made his decision. This assignment of error has no merit.

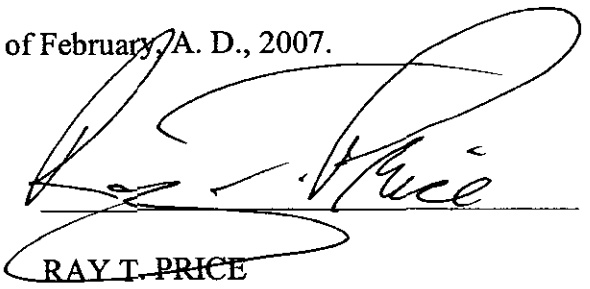
Hartman makes other assertions of error which are simply rehashes of previous arguments regarding alleged misstatements. These add nothing and while we deny each assignment of error and each allegation of error made by Hartman, as well as dispute much of the factual information submitted by Hartman, we stand on the record and on the Chancellor's learned decision in this matter.

CONCLUSION

Because the Chancellor's decision in this case is supported by substantial, credible evidence and his legal conclusions were correct, this Court, under the proper standard of review,

should uphold the Chancellor's decision in full and find in favor of the McInnises, affirming the Chancellor's decision, with all costs taxed to the Appellants.

Respectfully submitted on this the 2nd day of February, A. D., 2007.



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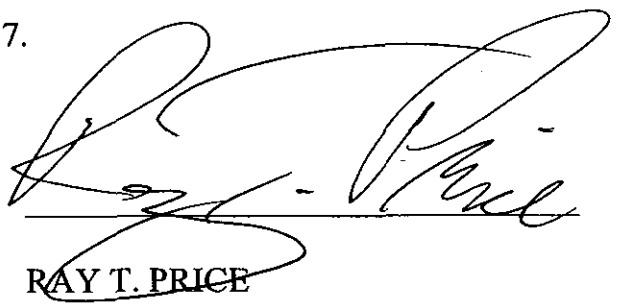
CERTIFICATE OF SERVICE AS TO FILING

I, Ray T. Price, of counsel for Appellees, certify that I have this date mailed, postage prepaid, the original and three copies of the foregoing Brief of the Appellees to the Clerk of the Supreme Court, Supreme Court of Mississippi, P. O. Box 249, Jackson, MS 39205.

This the 2nd day of February, A. D., 2007.



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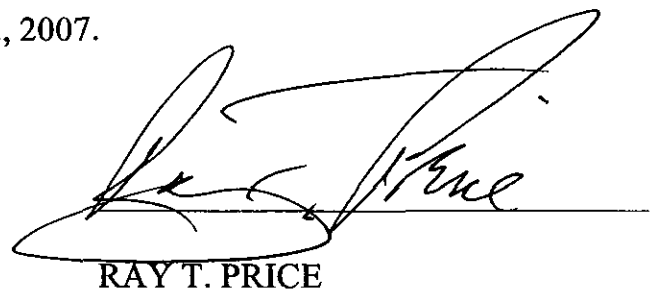

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