IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-00641

JAMES C. P. HARTMAN, Deceased **APPELLANT**

V.

NED G. MCINNIS, JR. **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI
HONORABLE SEBE DALE, JR., CHANCERY JUDGE

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

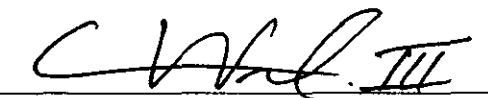
The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. W. Wayne Drinkwater; Clarence Webster, III; and the firm of Bradley Arant Rose & White, LLP, counsel for Appellant James C.P. Hartman.
2. Robin L. Roberts, counsel for Appellant James C.P. Hartman.
3. Ray T. Price, counsel for Appellees Ned G. McInnis, Jr. and Mary Deane McInnis.
4. Joe Stevens, counsel for Appellant BancorpSouth Bank.
5. Jack Land, counsel for Appellant BancorpSouth Bank.
6. Bryan Nelson, counsel for Appellant BancorpSouth Bank.
7. Ron Nelson, *pro se* defendant at trial.

8. Ronson Construction Systems, Inc., *pro se* defendant at trial.

9. The Honorable Sebe Dale, Jr., Chancellor, the trial judge in this action.

RESPECTFULLY SUBMITTED, this the 28th day of November, 2006.



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STATEMENT OF THE ISSUES

1. Whether appellees Ned and Mary Deane McInnis have standing to sue on a note and deed of trust they unconditionally assigned to BancorpSouth.

2. As the holder of two mortgages on properties, whether BancorpSouth's purchase of the properties at a foreclosure sale on the second mortgage extinguished the mortgagor's liability under the first mortgage.

3. Whether BancorpSouth's failure to prove the fair market value of the properties it purchased at its own foreclosure sale defeats its claim for a deficiency allegedly arising out of that foreclosure.

4. Whether the McInnises may nevertheless recover a judgment from Hartman to compensate them for liabilities that have been extinguished.

5. Whether the McInnises are entitled to an attorney's fee award of $112,500.00 where the only evidence was that they incurred $22,074.00 in attorney's fees and expenses, and where the McInnises presented no evidence concerning the reasonableness of any such award.

6. Whether the McInnises may avoid liability for material misrepresentations they made to Hartman by claiming that Hartman negligently failed to discover those misrepresentations.

STATEMENT OF THE CASE[1]

A. Introduction

In November 2003, appellees Ned and Mary Deane McInnis (the "McInnises") sold low income rental properties to appellant James C. P. Hartman[2] ("Hartman") and Ronson Construction Systems, Inc. ("Ronson Construction"), taking back a wrap-around promissory note and deed of trust which the McInnises assigned to BancorpSouth ("the Bank"). Hartman personally guaranteed the note.

After closing, Ronson Construction and Hartman learned that the McInnises had misrepresented both the condition of the properties and the rental income that they produced. Ronson Construction ceased payment on the note after four months of failed attempts to generate enough rental income from the properties to pay the note's monthly payments. The Bank then foreclosed, buying and retaining the properties at the foreclosure sale. The McInnises brought this action against Hartman, Ronson Construction, and the Bank in the Chancery Court of Forrest County (Dale, J.), seeking recovery for nonpayment of the note and various torts.

Even though the McInnises had assigned the note to the Bank and therefore had no right to sue for its nonpayment, the chancery court awarded the McInnises a judgment of $582,218.49 on the note against Hartman and Ronson Construction, which included $112,500.00 in attorney's fees. The chancery court rejected Hartman's misrepresentation defenses, even though the uncontradicted evidence showed that Hartman had entered into the transaction in reliance on the McInnises' materially false representations. The chancery court held that Hartman should have discovered the true condition of the properties and their rental income prior to closing.

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[1] The Clerk's Papers are cited as "R.___." The Trial Transcript is cited as "Tr.___." The Record Excerpts are cited as "R.E. ___." Trial Exhibits are cited as "Ex. ___."

[2] After entry of the judgment below, Hartman died in an airplane crash on July 19, 2006. His widow, Amanda Hartman, pursues this appeal on his behalf.

The undisputed proof also showed that there was no deficiency after foreclosure to support a judgment against Hartman in any amount. Moreover, the only evidence on attorney's fees was that the McInnises incurred $22,074.00 in fees and expenses, not $112,500.00.

In sum, the chancery court awarded the McInnises $582,218.49 on a claim they did not own, in compensation for losses they did not sustain, on a contract which the McInnises induced Hartman to enter through material misrepresentations. The judgment below must be reversed.

B. Proceedings Below

The McInnises brought this action against Ronson Construction and Ronson Properties, LLC (collectively "Ronson"), Ron Nelson, Hartman, and the Bank, alleging claims of breach of contract, intentional interference with business relations, breach of the duty of good faith and fair dealing, and fraudulent inducement. R. 33-44.

The Bank counterclaimed, seeking judicial foreclosure on the McInnises' senior deeds of trust securing fourteen parcels of land (the "Ronson Properties"). The Bank also cross-claimed against Ronson, Nelson, and Hartman on the November 14, 2003 wrap-around note (the "Note") and accompanying junior deed of trust which secured the Ronson Properties. R. 80-112.

During the litigation, the Bank foreclosed. But rather than foreclosing on the *senior* deeds of trust that the McInnises had given on the Ronson Properties, the Bank chose to foreclose on the wrap-around Note and junior deed of trust, thus making any purchase at the foreclosure sale subject to the senior deeds of trust. This stratagem made bids by others practically impossible, and the Bank purchased the Ronson Properties at foreclosure at a price that had no demonstrable relation to their value.

After foreclosure, the Bank sued the McInnises for an alleged deficiency on the senior notes and deeds of trust, and cross-claimed against Ronson, Nelson, and Hartman for an alleged deficiency on the Note. R.119-130.

Hartman counterclaimed against the McInnises for fraudulent and negligent misrepresentations, and cross-claimed against the Bank, alleging fraudulent inducement, misrepresentation, and breach of the duty of good faith and fair dealing claims. R.273-302. Hartman defended the McInnises' suit by asserting that the McInnises did not own the Note on which they sued, that their claims were barred by their own intentional or negligent misrepresentations, and that the McInnises had suffered no losses.

On January 6, 2006, after a three-day bench trial, the chancery court issued its Memorandum Opinion. R.E. 28-38. In it, the court awarded the McInnises judgment against Ronson, Nelson, and Hartman for $582,218.49, which consisted of $450,209.49 on the Note, accrued interest of $19,509.00, and $112,500.00 in attorney's fees. *Id.* at 33. The chancery court rejected all of Hartman's defenses against the McInnises, holding that Hartman had failed to exercise due diligence to discover the underlying facts. *Id.* at 34. Finally, the chancery court denied all parties' claims for tort damages. *Id.* at 37.

Considering the Bank's deficiency claim, the chancery court held that settled Mississippi law provided that the Bank's foreclosure of the subordinate wrap-around deed of trust had merged and extinguished the McInnises' debt to the Bank under the senior deeds of trust. R.E. 31. The chancery court also held that the low bid price and the Bank's retention of the Ronson Properties without appraisal made it impossible to determine the fair market value of the properties, and therefore whether any deficiency existed after foreclosure. R.E. 32. The chancery court found that "as a matter of equity [the Bank] should be precluded by the Court from . . . obtaining judgment against McInnis for a deficiency not determined with certainty and for attorneys fees and costs." *Id.* at 33. For the same reason, the court dismissed the Bank's cross-claim against Ronson, Nelson, and Hartman, holding that the Bank "cannot be permitted to escape the consequence of having been barred as to [the makers of that claimed debt] and yet

collect it from the guarantors, i.e., the bar as to the makers inures to the benefit of the guarantors." *Id.* at 35.

Hartman timely appealed the final judgment and subsequent post-trial orders. R. 731-72.

C. Factual Background

1. The McInnises are desperate to sell; Hartman and Ronson are interested in buying.

The McInnises became involved in rental property in the 1990s. Tr. 204. At one point, they owned 67 rental units, *id.*, many of which were purchased through loans with the Bank. Tr. 49. As time passed, Mr. McInnis failed to maintain the properties, which fell into disrepair, Tr. 206, and the McInnises' financial condition worsened to the point that they were unable to make timely payments to the Bank on their loans. Tr. 219; 22-23.

By November 2003, all of the McInnises' loans to the Bank were delinquent. Tr. 251. In addition, the McInnises had failed to pay *ad valorem* taxes on the properties, and the Bank had purchased them (subject to redemption) at an August 2003 tax sale. *Id.* The McInnises were desperate to sell these properties so that they could reduce or eliminate their debt to the Bank. *See* Tr. 140-141.

Hartman gave the McInnises that opportunity. After moving to Mississippi in 1998 from California where he had been involved in a number of business enterprises and real estate transactions, Hartman entered the Hattiesburg real estate market. Tr. 58-60. Hartman bought property on Dabbs Street, a street on which the McInnises also owned property. Tr. 99-101. The McInnises' property was substandard for the neighborhood, and Hartman thought that it depressed the value of his nearby properties. Tr. 77. Hartman wanted to buy and improve the McInnises' Dabbs Street property, thereby increasing the value of surrounding properties. Tr. 77; 99-101. Hartman was never interested in the Ronson Properties, which were fourteen of the eighteen rental properties that the McInnises owned. Tr. 108. For their part, the McInnises did

not wish to sell Hartman the Dabbs Street property unless Hartman also relieved the McInnises of the Ronson Properties, *see* Tr. 152-53, which were a source of their insupportable debts to the Bank.

About this time, Nelson expressed an interest that brought him into the discussions. Nelson, who had been in the drywall and painting business and had helped Hartman repair older homes, Tr. 165; 167, asked Hartman to locate rental property that Nelson could buy without making a down payment. Tr. 168. Nelson's financial condition was poor: he had few assets and a tax lien was pending against him. Tr. 167. He was looking for rental property that would give him an income stream.

Hartman brokered a transaction that would allow Nelson to purchase the Ronson Properties from the McInnises without a down payment. Tr. 16. Hartman knew that Nelson's financial condition was poor, and that no seller or lender would approve a transaction that depended on Nelson's credit. Hartman also knew that if there was to be a deal, Hartman would have to assume the entire financial risk; Nelson had nothing to contribute except his own physical effort and management. Tr. 172; 199. It was therefore obvious to everyone that any sale would work only if the Ronson Properties generated sufficient rental income to allow Nelson to make loan payments on the property, with some funds left over for cash flow purposes.

2. Hartman and Nelson rely on the McInnises' representations about the condition of the Ronson Properties and the rental income they produced.

In evaluating the Ronson Properties, Hartman asked the McInnises for relevant documents. In response, Ned McInnis gave Hartman a schedule of all rented, vacant, and rentable units within the Ronson Properties, a description of all repairs needed to make the unrentable units marketable, a typed overview of the McInnises' prospects for the Ronson

Properties, and a list of the outstanding loans on the properties. Tr. 82; 115; 183; 210. This information was memorialized in a matrix. R.E. 86-96.

Mr. McInnis also represented to Hartman that the monthly rents collected on the Ronson Properties totaled at least $8,760.00-$9,000.00. Tr. 98; 99; 122-23. Mr. McInnis's representations were critical to Hartman's decision to go forward with the transaction. *See* Tr. 137; 191; 197; 78. Instead of seeking an independent appraisal and inspection of the Ronson properties, Hartman and Nelson looked at the exterior of some of the properties, *see* Tr. 65-57, relying entirely on the information provided by the McInnises. Tr. 78; 201.

On November 6, 2003, Hartman and the McInnises reached an agreement for the sale of eighteen parcels. Tr. 142. The parties agreed that four of the properties would be sold for cash to finance the sale of the remaining fourteen. *Id.* These fourteen – the Ronson Properties – were purchased by Ronson Construction, *id;* R.E. 44-50, Nelson's wholly-owned corporation. Tr. 180.

3. On the Bank's suggestion, Hartman and Ronson Construction use a wrap-around note and deed of trust to purchase the Ronson Properties.

Under the November 6 agreement, Hartman bought eighteen properties for a total price of $960,000.00.[3] At closing, Hartman tendered $270,037.95 to the McInnises in partial payment.

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[3] The Ronson Properties included the following Parcels 1-14:

Parcel 1:	806 Arledge (Units A-D), Hattiesburg, Forrest County, Mississippi
Parcel 2:	525 Bushman (Units A-B), Hattiesburg, Forrest County, Mississippi
Parcel 3:	209 Mable, Hattiesburg, Forrest County, Mississippi
Parcel 4:	107 E. 4th Street (Units A-D + Shop), Hattiesburg, Forrest County, Mississippi
Parcel 5:	325 W. 4th St (Units A-D), Hattiesburg, Forrest County, Mississippi
Parcel 6:	1005 Mamie, Hattiesburg, Forrest County, Mississippi
Parcel 7:	1012 Elizabeth Ave., Hattiesburg, Forrest County, Mississippi
Parcel 8:	120 Saucier, Hattiesburg, Forrest County, Mississippi
Parcel 9:	316 Florence (Units 1-4), Hattiesburg, Forrest County, Mississippi
Parcel 10:	318 Florence (Units 1-4), Hattiesburg, Forrest County, Mississippi
Parcel 11:	425 MLK Ave. (Units A-D), Hattiesburg, Forrest County, Mississippi
Parcel 12:	1413 Julian (Units A-D + ¼ city block lot), Laurel, Jones County, Mississippi
Parcel 13:	122 Kingston (Units A-C + vacant lot), Laurel, Jones County, Mississippi

Tr. 110. This cash was produced by Hartman's simultaneous sale of parcels 17 and 18 to Coolhart Properties, a company that he owned jointly with Ken Cooley; and the sale of Parcels 15 and 16 to Dave Ware. Tr. 110-11. These four properties were sold free and clear of all debts. Tr. 76.

The fourteen Ronson Properties were conveyed to Ronson Construction. Tr. 145. There were existing deeds of trust on all of these properties executed by the McInnises in favor of the Bank, with an aggregate outstanding balance of approximately $460,000.00. R.E. 97. Rather than having these deeds of trust satisfied, and new mortgages issued, the Bank requested that the parties use a "wrap-around" deed of trust and note. These wrap-around instruments were subordinate to the McInnises' existing deeds of trust to the Bank. Tr. 12-14; 50. Because the wrap-around feature was critical to the transaction, and is essential to understanding important issues on the appeal, a brief explanation about this device is in order.

A "wrap-around" mortgage is a second or junior mortgage that has a face amount that reflects *both* the amount it secures *and* the balance due under the first mortgage. The mortgagee under the wrap-around collects payments based on the wrap-around's face amount, then pays the first mortgage out of those payments. As our Court of Appeals has described it, "[a] 'wrap-around' mortgage involves an existing loan and a new one. 'The wrap-around borrower [Ronson Construction here] must make payments on the first mortgage debt to the wrap-around lender [the McInnises], who, as required by the wrap-around agreement, must in turn make payments to

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The four properties that were to be sold separately included Parcels 15-18:

Parcel 15:	416 Dabbs St. (Units A-B), Hattiesburg, Forrest County, Mississippi
Parcel 16:	402 Southern Ave, Hattiesburg, Forrest County, Mississippi
Parcel 17:	112 2nd Ave. (Units 1-8), Hattiesburg, Forrest County, Mississippi (also known as "The Maynard")
Parcel 18:	Gadsby Rd Property (Lots 1-5), Petal, Forrest County, Mississippi (also known as "Oak Tara").

R.E. 56-59

the first mortgage to the third party, the first mortgagee [the Bank]." *Brown v. Thomas*, 757. So. 2d 1091, 1095 (Miss. Ct. App. 2000) (citing GEORGE E. OSBORNE, GRANT S. NELSON, AND DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 5, 16 (1979). Thus, a critical feature of the Note and wrap-around deed of trust is that its face amount included the balance of deeds of trust already in place on the Ronson Properties.

The Note was executed by Ronson Construction in favor of the McInnises. It had an 8.5 year amortization, with a balloon after five years. R.E. 51-61. Hartman was required to personally guarantee the Note. On its face, the Note was in the amount of $664,683.90, but since approximately $460,000.00 of this sum was devoted to retiring the existing debt owed by the McInnises on the Ronson properties, the Note constituted only about $204,000.00 in additional debt.

4. The transaction benefits the Bank and the McInnises, while Hartman takes all the risk.

After closing on November 14, 2003, and as the Bank required, the McInnises assigned their interest in the Note and wrap-around deed of trust to the Bank. This assignment gave the Bank full ownership of everything: the Note and wrap-around mortgage, as well as the first deeds of trust and notes signed by the McInnises. Tr. 19; 24; R.E. 60-61.

Thus, when the transaction closed, the Bank held a first mortgage on the Ronson Properties on which the McInnises were personally indebted and, through assignment, the Note and wrap-around deed of trust on which Hartman, Nelson, and Ronson Construction were liable. Also at closing, the Bank received cash which paid off existing loans on Parcels 16 and 18 and brought current the McInnises' other loans. Ex. 31; R.E. 46-48. Still other funds generated by the closing were used to pay *ad valorem* taxes on the properties, R.E. 4-6, which also benefited the Bank.

The use of the wrap-around thus allowed the Bank to bring current all of its loans to the McInnises, and paid past-due taxes on the properties. Importantly, the transaction added Hartman as a personal guarantor of $664,000.00 in debt to the Bank.

The McInnises got what they wanted. Their indebtedness to the Bank was satisfied, and they received $35,000.00 in cash. Tr. 140. Hartman, who became personally liable for the entire risk of this transaction, received $33,000.00 for his work in brokering the transaction. Tr. 157-58. Hartman had no ownership interest in any of the Ronson Properties. Although he had guaranteed the debt, he did not stand to profit from their management or income. Any profit Hartman was to earn would have to come from Parcels 17 and 18.

After closing, Hartman formed Ronson Properties, LLC, for Nelson. Tr. 70. Ronson Constructions then transferred the Ronson Properties to Ronson Properties, LLC.[4] *Id.* Hartman was the registered agent for Ronson Properties, LLC, but had no ownership interest in either the LLC or in Ronson Construction. Tr. 72.[5]

5. The McInnises' representations prove false.

Once the transaction closed, Nelson began managing the Ronson Properties, collecting rent, improving vacant units, and seeking new tenants. He soon learned that the properties had

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[4] Hartman testified that he formed the LLC because "[when] I started doing Nelson's books, I realized that I'm trying to do books for a corporation that I don't know what this corporation owns other than these fourteen properties that it just bought. I asked if we could do something and form a separate entity and put those fourteen properties in there and it would be a wholly owned entity of Ronson Construction Systems, Inc." Tr. 70.

[5] In light of these undisputed facts, and Hartman's substantial potential liability, the chancery court's description of this transaction is impossible to understand. For example, the chancery court believed that "Hartman had maneuvered himself in the position of maximum authority and benefit with minimum responsibility . . ." R.E. 30. The chancery court characterized Hartman's conduct as follows: "[He] simply chose to move ahead with a transaction that he evaluated as a 'juicy plum,' utilizing a somewhat inexperienced 'straw man,' Nelson who he, Hartman, sold a 'bill of goods' and left 'holding the bag' while he, Hartman reaped a substantial personal benefit." Finally, according to the chancery court, "Hartman saw an opportunity for quick turn of a profit without undertaking the financial and physical burden of collecting rents, repairing and maintaining rental properties, and without personal obligation for the payment of debts already existing and assumed plus that created by his somewhat convoluted plan." R.E. 36-37.

These statements reflect a complete misunderstanding of the economic reality of the situation. Hartman certainly sought a profit, but only at an enormous risk, which he took in reliance on the McInnises' representations.

significant structural, plumbing, and appliance defects that the McInnises had not disclosed. Tr. 213. Stoves and refrigerators did not work. Tr. 123. Numerous electrical, plumbing and gas problems were discovered, Tr. 184, most of which the McInnises had not included in their complete listing of property defects. Tr. 186; 189.[6]

As a result of these and other problems, many tenants were angry. They demanded that repairs be made. Some refused to pay rent, complaining about unaddressed problems with the units. Tr. 185-86; 188.

The issues with the properties did not suddenly arise at closing; they were problems of which the McInnises were aware. In large part, these were problems that Mr. McInnis chose not to include in the documents provided to Hartman and Nelson. Tr. 85; 188; 189.[7] Mr. McInnis failed to disclose both the poor condition of the properties and the shortfall in rental payments, because he knew that if he did, the transaction would fail. The condition of the units made it virtually impossible for Nelson to find new tenants. Tr. 187. Most prospective tenants were put off by the properties' condition. *Id.*

At closing, Hartman loaned Ronson $40,000.00 to assist in the management and repair of the Ronson Properties. Tr.87.[8] Nelson did his best, working hard to make repairs, rent vacant units, and collect rent. *See* Tr. 175. He spent more than forty hours each week simply trying to collect rent from dissatisfied tenants. Tr. 190; *see also* 91; Tr. 93; Ex. 36. Despite his best efforts, Nelson was able to improve only three vacant apartments and acquire three new tenants. Tr. 175-77. During the same period, he lost two or three tenants. Tr. 177.

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[6] For an eloquent and moving description of the unexpected difficulties that Nelson and Hartman encountered with the properties, see Ex. 36, which is a chronological collection of emails detailing the almost unbelievable problems the properties presented.

[7] The problems themselves were a result of Mr. McInnis's failure to maintain the properties and meet his obligations to the Bank. He was in a desperate financial condition in part because his tenants had refused to pay him, just as they later refused to pay Ronson.

[8] Hartman's loan investment thus exceeded the $33,000.00 he made on the transaction as a brokerage fee. *See* Tr. 157-58.

Not only were the Ronson Properties in deplorable condition; they never generated the rents that the McInnises had promised. Rather than the $9,000.00 per month represented by the McInnises, Nelson collected less than $5,000.00 in rent each month. Tr. 132. Hartman continued to invest personal funds into the venture, making other loans to help Nelson manage and improve the properties. Tr. 190. Nevertheless, Nelson was unable to manage the Ronson Properties successfully. He abandoned the effort in March 2004. Tr. 87; 95.

After Nelson left, Hartman was faced with the reality of his personal guaranty. Hartman contributed even more money, hired a property manager, and tried to meet with Mr. McInnis to discuss rent collection efforts; however, Hartman was not able to raise enough money to make payments on the wrap-around note. Tr. 134; 146.

The proof at trial was uncontradicted that neither Hartman nor Nelson would have participated in this transaction had either known the actual condition of the Ronson Properties or the rental income that the properties produced. Tr. 137; 191. The information provided by the McInnises – on which both Hartman and Nelson relied – was materially and knowingly inaccurate. Tr. 191; 63.

6. The Bank performs a creative foreclosure.

In the spring of 2004, the Note went into default. The McInnises brought the present action against Ronson, Nelson, Hartman, and the Bank. Although the Bank counterclaimed, seeking judicial foreclosure on the McInnises' deeds of trust and the Note, foreclosure did not occurred until May 3, 2005, almost 15 months later. R. 318-21;[9] *see* R.E. 62-65 (foreclosing on the McInnises' senior deed of trust); R.E. 66-81 (foreclosing on the Note); *see also* Tr. 361-63. As the owner of both instruments, the Bank had complete control over this decision.

[9] Because one purpose of a wrap-around is to provide funds with which to pay a senior deed of trust, a default on the wrap-around can be expected to trigger a default on the first mortgage to which the wrap-around is subordinate. That was the case here.

At the foreclosure sale, the Bank announced that it was foreclosing on the wrap-around mortgage, not on the McInnises' deeds of trust, Tr. 328-29, and that any purchase of the Ronson Properties would be subject to those senior deeds of trust. Tr. 328-29; 362-63. This announcement made it virtually impossible for any third party to make a competitive bid, and there were no other bidders. The Bank purchased the Ronson Properties for an aggregate bid of $199,900.00. R.E. 97.

At the time of foreclosure, the aggregate balance on the McInnises' deeds of trust was $456,169.05. R.E. 97; Tr. 367. The total balance on the subordinate, wrap-around deed of trust was $650,109.49, a sum which of course *included* the outstanding debt on the first deeds of trust. R.E. 102-03. On May 4, 2005, after foreclosure had occurred, Hartman mailed two checks to the Bank, one for $2,200.00, representing rents received from tenants, and the other for $2,099.16, representing the remainder of Ronson's operating account. Tr. 392. These funds were applied to the outstanding balance on the Ronson account.

SUMMARY OF THE ARGUMENT

A. Immediately after closing, the McInnises unconditionally assigned their entire interest in the Note and wrap-around deed of trust to the Bank.

The assignment divested the McInnises of their legal interest in these instruments. After the assignment, they possessed nothing on which to sue, and accordingly, they have no right to bring an action on the Note.

The parties honored the assignment, which was enforceable according to its terms. Payments on the Note were made to the Bank. When payments stopped, the Bank foreclosed, not the McInnises. The McInnises admit they made a valid assignment. Their lawyer admits that the McInnises have no power to sue on the Note or deed of trust.

Because the sole basis for the judgment is the Note, that judgment must be reversed.

B. The debt on which the McInnises sued was extinguished by operation of law.

1. The Bank owed both mortgages on the Ronson Properties, but foreclosed only on the junior mortgage executed by Ronson Construction and guaranteed by Hartman. The Bank then bought the property at foreclosure. These actions extinguished the McInnises' liability as mortgagors. This is so because a mortgagor has an equitable right to have the land pay the mortgage before he may be called on personally. Where the purchaser of property at foreclosure also owns the mortgage, he owns the asset which ought to discharge the debt. As between himself and the mortgagor, he cannot retain the property and at the same time say it is insufficient to satisfy the debt.

The economic basis for this rule is that it is presumed that the purchaser of land subject to a first mortgage has deducted the amount of that mortgage from the value of the property when he bid at foreclosure. Having acquired the property at a price that was reduced by the amount of the first mortgage, he cannot retain that property and simultaneously sue the mortgagor for the debt. The property stands in place of the debt and extinguishes it.

This principle applies here. At foreclosure, the Bank held both the McInnises' senior deeds of trust and, through assignment, the Note and wrap-around deed of trust. When the Bank foreclosed on the Note, and then bought the underlying properties at the sale, that purchase extinguished the McInnises' liability under their first notes and deeds of trust on the properties. The chancery court so ruled, discharging the McInnises from liability to the Bank.

2. The Bank's claims against the McInnises and Hartman are also barred by the Bank's failure to prove that a deficiency existed after the foreclosure. Prior to foreclosure, the Bank did not obtain an appraisal of the properties, nor did it conduct a commercially reasonable sale at which the Ronson Properties' value could be determined. Instead, the Bank retained the properties.

The Bank may not assert a deficiency without proof that a deficiency has occurred. Mississippi requires the mortgagee to prove a deficiency through proof of the fair market value of the property purchased at foreclosure. Here, the Bank offered no such proof. Without it, the Bank has no right to recover.

The chancery court properly dismissed the Bank's claims against the McInnises and Hartman for these reasons, relieving the McInnises of liability to the Bank. This result bars the McInnises' claims against Hartman for nonpayment of the Note, because this ruling has placed the McInnises in the position they would have occupied had the Note been paid by Ronson Construction. As such, the McInnises have suffered no losses for which they are entitled to recovery from Hartman.

The final judgment entered by the chancery court placed the McInnises in a far better position than they would have occupied had the Note been paid. Today, they are discharged from liability to the Bank *and* they have a judgment of $582,218.49 from Hartman. This is a windfall to which they are not entitled.

C. In the alternative, the chancery court miscalculated the McInnises' damages.

1. The parties stipulated that the balance on the McInnises' senior deeds of trust was $456,169.05. The balance on the Note was $650,109.49. The foreclosure sale yielded $199,900, which reduced the Note to $450,209.49. Because the wrap-around Note *includes* the amount of the first deeds of trust, which were extinguished by the chancery court, the balance on those deeds of trust ($456,169.05) must be subtracted from the balance on the Note ($450,209.49) to determine the amount that Hartman and Ronson Construction actually owe under the Note. This calculation produces a surplus of $5,959.56; thus, Ronson Construction and Hartman owe nothing under the Note. The McInnises have no losses.

2. The chancery court also erred in awarding the McInnises $112,500.00 in attorney's fees. The only proof on this issue came through an invoice which showed that the McInnises had incurred attorneys' fees and expenses of $22,074.00. No evidence was introduced as to the reasonableness of any attorney's fee award, according to the factors contained in Rule 1.5 of the Mississippi Rules of Professional Conduct, and the chancery court made no such findings. The award was based on no evidence and was accompanied by no findings or analysis. The award amounted to a fee of $821.00 per hour for the McInnises' counsel. This was clearly an abuse of discretion.

D. The McInnises misrepresented to Hartman both the condition of the properties and the rental income those properties produced.

Hartman relied on these representations, which were material to the transaction. Without them, the sale would not have occurred.

The McInnises argued that Hartman's intentional and negligent misrepresentation claims were barred, because Hartman negligently failed to discover the McInnises' misrepresentations before closing. The chancery court agreed. This is clear error. In Mississippi, no party may make false representations that induce another party to enter into a contract, then raise the negligence of the second party as a defense to relief from those misrepresentations. No party may profit from his own wrongs by claiming that the party he has duped should have been more vigilant in detecting those misdeeds.

The evidence supporting the intentional and negligent misrepresentations defenses was overwhelming and virtually uncontradicted. The chancery court denied these claims by applying an improper legal standard.

ARGUMENT[10]

A. The McInnises Do Not Own the Note and Deed of Trust, and May Not Sue Under Them.

As a condition of the Bank's approval of the transaction, the McInnises unconditionally assigned their entire interest in the Note and wrap-around deed of trust to the Bank. Tr. 30; R.E. 60-61. The assignment divested the McInnises of all legal interest in the Note and deed of trust.

In pertinent part, the Assignment provides:

> FOR AND IN CONSIDERATION OF BancorpSouth Bank's agreement not to exercise its option to accelerate the entire indebtedness due and owing it on property serving as collateral security for loans made by BancorpSouth Bank to the undersigned . . . we the undersigned NED G. MCINNIS, JR., and wife, MARY DEANE MCINNIS, do hereby assign, transfer and grant unto BANCORPSOUTH BANK . . . all of our interest and right and title in and to that certain Promissory Note dated November 14, 2003, executed by Ronson Construction Systems, Inc., in favor of Ned G. McInnis Jr., and wife, Mary Deane McInnis . . . and for the same consideration, the undersigned does also hereby grant, bargain, sell, transfer and assign over unto BancorpSouth Bank all right, title and interest in and to that certain Deed of Trust dated November 14, 2003, executed by Ronson Construction Systems, Inc., in favor of Ned G. McInnis, Jr., and wife, Mary Deane McInnis, which serves as security for the above referenced Promissory Note being assigned hereunder and which Deed of Trust has been filed of record in the office of the Chancery Court of Forrest County, Mississippi.

R.E. 60-61.

The parties performed on the assignment after it was made. All payments on the Note were made directly to the Bank, not to the McInnises. *E.g.*, Tr. 41; 219; R.E. 98-99; R.E. 100-101. The McInnises approved these payments and never objected that they were not being paid directly. When Ronson stopped making payment on the Note, it was the Bank, not the

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[10] This Court reviews findings of the chancery court under the clearly erroneous or abuse of discretion standard. But where the chancery court has applied the wrong legal standard, no judicial deference should be shown, and review is *de novo*. *In re Estate of Carter*, 912 So. 2d 138, 143 (Miss. 2005); *Am. Funeral Assurance v. Hubbs*, 700 So. 2d 283 (Miss. 1997). Where the chancery court fails to make proper findings and conclusions, that failure itself may be viewed as an abuse of discretion requiring reversal. *Tricon Metal Services, Inc. v. Topp*, 516 So.2d 236, 239 (Miss. 1987).

McInnises, which foreclosed on the Note and the wrap-around deed of trust. The McInnises made no protest.

The McInnises understood what they had done. At trial, Mr. McGinnis admitted that he assigned to the Bank all of his "rights, title, and interest in the promissory note and deed of trust." Tr. 242-43. Shortly before this suit was brought, the McInnises' counsel wrote Hartman, making the following admission:

> Due to your default, you are in breach of both the deed of trust and the note secured by the deed of trust. *As the promissory note and deed of trust had been assigned by Mr. and Mrs. McInnis to BankcorpSouth, we are not in a position at this time to directly begin proceedings against you.* However, if the note and deed of trust are not brought into a current status immediately, my clients are going to begin suffering damages and will immediately file suit against each of you for damages for breach of contract, breach of the promissory note, and breach under the deed of trust.

R.E. 41. Shortly thereafter, and without obtaining any further legal interest in the Note or wrap-around deed of trust, the McInnises commenced this action, seeking recovery on a Note they knew they did not own. R. 15-22.

The assignment was legally effective according to its terms. In Mississippi, an assignment of a debt "conveys the entire interest of the assignor to the assignee, and thereafter the assignor has no interest therein." *EB, Inc. v. Allen*, 722 So. 2d 555, 564 (Miss. 1998). An unqualified assignment of the kind the McInnises made here operates "to transfer to the assignee all the right, title, or interest of the assignor in the thing assigned." *Id.*; *see also McKinley v. Lamar Bank*, 919 So. 2d 918, 928 (Miss. 2005). Rights in promissory notes, as "[t]he right to receive money due or to become due under an existing contract," are among the rights that may be assigned. *S. Miss. Planning & Dev. Dist. v. Alfa Gen. Ins. Corp.*, 790 So. 2d 818, 821 (Miss. 2001); *see also Wilson v. State Farm & Cas.*, 761 So. 2d 913, 917 (Miss. App. Ct. 2000).

A valid assignment requires no special forms to be effective; it is required only that "the intent to vest the assignee with a present right in the thing assigned [be] manifest," and the assignor's rights are transferred as to "deprive the assignor of his control over the subject of the assignment." *Serv. Fire Ins. Co. of N.Y. v. Reed*, 72 So. 2d 197, 199 (Miss. 1954). That test was clearly met here. The assignment is a perfected and unqualified agreement between the McInnises and the Bank in which the intent of the parties appears on the face of the document.

This Court has considered substantially identical assignment language in two prior cases. In both instances, the Court found the assignments to be valid and unqualified, and held that the assignors retained no interest in the assigned notes.

In *EB, Inc. v. Allen*, Richard A. Nicholls assigned a note issued by Paul M. Allen to Paul T. Benton in an assignment that stated, in pertinent part:

> In consideration of Paul T. Benton agreeing to defend Richard A. Nicholls . . . Nicholls hereby assigns, conveys and delivers to Paul T. Benton that certain Deed of Trust and Contract for Sale dated February 15, 1985 . . .

Allen, 722 So. 2d at 563. Notwithstanding this assignment, Nicholls later sued Allen for nonpayment of the note and deed of trust. The chancery court found that because Nicholls had assigned his interest to Benton, Nicholls had no rights under the instrument. This Court affirmed, holding that the language of assignment effectively "assigned all [Nicholls's] right and interest in the Allen note and deed of trust to Benton," because "[a] valid assignment of a debt or contract conveys the entire interest of the assignor to the assignee, and thereafter the assignor has no interest therein." *Id.* at 564 (quoting *Int'l Harvester Co. v. Peoples Bank & Trust Co.*, 402 So. 2d 856, 861 (Miss. 1981)).

McKinley v. Lamar Bank involved Jerald McKinley's claims of wrongful foreclosure on a note that McKinley had executed in favor of James Welch. Welch assigned the note to Lamar Bank under an assignment which stated that

> JAMES S. WELCH, JR., does hereby convey, transfer, set-over and assign with recourse to THE LAMAR BANK, all her or her (sic) right, title and interest in and to that certain promissory note indebtedness and deed of trust securing same executed on May 25, 1990 by Jerald D. McKinley, Sr. and wife, Minnie F. McKinley, to Penny Jones Alexander, Trustee in favor of James S. Welch, Jr.

McKinley, 919 So. 2d at 928. After making the assignment, Welch purported to cancel the note. McKinley claimed that the cancellation extinguished the debt, invalidating the Bank's subsequent foreclosure.

This Court disagreed, finding that Welch's assignment to the Bank was "general and unqualified," and that "once Welch executed the assignment . . . Welch had no further interest whatsoever in the promissory note and deed of trust . . . and Welch's 'cancellation' of the deed of trust . . . *was thus invalid and of no effect* – Welch possessed nothing on which to act." *Id.* at 928-29 (emphasis supplied).[11]

As in those cases, once the McInnises assigned their interest in the Note to the Bank, they "possessed nothing on which to act." *McKinley*, 919 So. 2d at 929. The McInnises have no right to sue under the Note. Because the sole basis for the judgment against Hartman was the McInnises' suit on the Note, R.E. 572-73, this Court should reverse the judgment below.

B. In Any Event, the McInnises Have No Damages.

Even had the McInnises not assigned their rights under the Note, their judgment against Hartman would be unsupported. The uncontradicted proof at trial was that the debt underlying the Note had been satisfied, and there was simply no unpaid balance on which the McInnises (or

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[11] *Allen* and *McKinley* are consistent with the accepted law throughout the United States. *E.g., Bank One v. Dillon*, No. 04CA008571, 2005 WL 95699, at *2 (Ohio Ct. App. Apr. 27, 2005) (holding that "once the mortgage is assigned, all interest in the mortgage passes to the assignee, while the assignor . . . has no further interest to be affected); *In re Stralem*, 303 A.D. 2d 120, 122 (N.Y. App. Div. 2003) (holding that "[a]n assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate."); *Foster v. Foster*, 703 So. 2d 1107, 1109 (Fla. Dist. Ct. App. 1997) (holding that "the law is clear that an assignee of a mortgage has the same status and rights as if he or she had been named in the mortgage); *Second Nat. Bank of New Haven v. Dyer*, 184. A. 386, 387 (Conn. 1936) (holding that the "assignment of a mortgage passes to the assignee all the title the mortgage had in the land); 6 AM. JUR. 2D *Assignment* § 173 (2006).

the Bank) could sue. In short, the McInnises suffered no loss here. Their judgment against Hartman, intended to compensate them for their liability to the Bank, has resulted in a windfall to the McInnises.

1. The foreclosure merged the McInnises' deeds of trust into the Note, extinguishing any deficiency.

Property is sometimes subject to two mortgages, one senior and superior, the other junior and subordinate. A purchaser at a foreclosure sale of the second mortgage takes the property subject to the first mortgage. Sometimes, the same mortgage creditor holds both mortgages. When that mortgage creditor forecloses on the junior mortgage and buys it in at the foreclosure sale, questions arise as to the effect of the foreclosure and subsequent purchase on the rights of the mortgagor and mortgagee under the first mortgage.

American courts have generally resolved these issues by holding that, where the holder of both mortgages forecloses on the junior mortgage, "the mortgagor's personal liability for the debt secured by the first mortgage is extinguished. The reason given is that on foreclosure under a junior mortgage the purchase is subject to the payment of the prior lien with the result that the mortgagor has an equitable right to have the land pay the mortgage before his personal liability is called upon,' and the purchaser, if he owns or acquires the mortgage, will not be permitted to enforce it against the mortgagor personally." OSBORNE ON MORTGAGES § 274 (2d ed. 1970); *see also* 55 AM. JUR. 2D *Mortgages* § 1347 (2006).

The economic basis of the rule is plain. When the mortgagor buys the subject of his foreclosure sale,

> it is presumed that the purchaser of land subject to a mortgage deducted the amount of the [first mortgage] from the market value of the land when he bought. The mortgagor therefore has an equitable right to have the land pay the mortgage before his personal liability is called upon and the purchaser will not be permitted to retain the land, go out and acquire the mortgage, and enforce the same against the mortgagor personally . . . It follows therefore that when the purchaser, retaining the land, acquires the

> prior debt, although he is not personally liable thereon, he is the owner of the res which ought to discharge the debt as between himself and the mortgagor and he will not be permitted to retain the res and at the same time to say it is insufficient to satisfy the debt.

Wright v. Anderson, 253 N.W. 484, 487 (S.D. 1935); *accord* 95 A.L.R. 89, 103-04 (The "purchase of the mortgaged property by the holder of junior and senior mortgages, on foreclosure of the junior mortgage held by him, extinguishes the mortgagor's personal liability for the debt secured by the first mortgage in the absence of an agreement to the contrary."); *Bd. of Tr. of Gen. Ret. Sys. v. Ren-Cen Indoor Tennis & Raquet Club*, 377 N.W. 2d. 432, 434-35 (Mich. Ct. App. 1985) (holding that if the holder of junior and senior mortgage forecloses on junior and buys at the foreclosure sale, the mortgagor's personal liability on first mortgage is extinguished.).

In short, where the mortgagee has acquired the property at a price that is reduced by the amount of the first mortgage, he cannot both retain the property, with the equity it contains, and simultaneously sue the mortgagor for the debt. The property stands in place of the debt and extinguishes it. *Ren-Cen Indoor Tennis & Raquet Club*, 377 N.W. 2d at 435; *Belleville Savings Bank v. Reis*, 26 N.E. 646, 647 (Ill. 1891).

Mississippi recognizes and applies the merger principle. *E.g.*, *Merchants Nat'l Bank v. Stewart*, 523 So. 2d 961, 965 (Miss. 1988) (citing *Ren-Cen Indoor Tennis & Racquet Club*, 377 N.W.2d 432); *Santa Cruz v. State*, 78 So. 2d 900, 902 (Miss. 1955); (holding that in order for merger of title to take place, two separate interests in real property must "unite in the same person in the same right, and the interest acquired must be the entire estate"); *Conn. Gen. Life Ins. Co. v. Planters Trust & Sav. Bank*, 181 So. 724, 726 (Miss. 1938) (acknowledging the principle of merger). *See generally In re Kreisler*, 331 B.R. 364, 378 (Bankr. N.D. Ill. 2005) (holding that, under Illinois law, "when a mortgagor takes title and acquires the mortgagee's interest in the property securing the mortgage indebtedness . . . a merger of the lesser and greater

estates is deemed to occur and the underlying debt is extinguished"); *Dibert, Bancroft & Ross Co., Ltd. v. Marrero*, 117 F.3d 160, 170-71 (5th Cir. 1997) (noting that, under Louisiana law, "when the qualities of the obligee and obligor are united in the same person, the obligation is extinguished"); *Farmers Coop. Exch., Inc. v. Holder*, 139 S.E.2d 726, 728 (N.C. 1965) (citing this Court's opinion in *Santa Cruz*, 78 So. 2d 900).

These principles apply here. At the foreclosure sale, the Bank held the McInnises' senior deeds of trust on the Ronson Properties. Through assignment, the Bank also owned the junior Note and wrap-around deed of trust. At foreclosure, the Bank announced that it was foreclosing *on the junior Note*. Tr. 362-63. This foreclosure and the subsequent purchase by the Bank, as holder of both mortgages, extinguished the McInnises' personal liability under the first notes and deeds of trust, placing the McInnises in precisely the financial position they would have occupied had the Note been satisfied by direct payment: the McInnises were free of liability to the Bank and without ownership of the Ronson Properties. Because the purpose of the Note and wrap-around deed of trust was to satisfy the McInnises' obligations under the senior notes and deeds of trust, the extinguishment of the McInnises' liability to the Bank means that the McInnises have suffered no losses for which they are entitled to recovery from Hartman.

The chancery court properly applied this doctrine in its final judgment, discharging the McInnises from personal liability to the Bank and extinguishing the Bank's deficiency claim against the McInnises on the first deeds of trust. R.E. 33. Accordingly, the McInnises can suffer no harm from any nonpayment to the Bank arising out of Ronson and Hartman's failure to pay the Note.

No judgment here should place the McInnises in a better position than they would have occupied had the contract been fully performed by all parties. *McDaniel Bros. Constr. Co. v. Jordy*, 195 So. 2d 922 (Miss. 1967). Inexplicably, the chancery court left the McInnises in a

much improved condition. As a result of the judgment below, not only have the McInnises' debts been extinguished, they have received a windfall damage award of $582,218.49, a result which would not have occurred had Ronson Construction paid the Note.

2. The Bank's failure to determine the fair market value of the Ronson Properties defeats its ability to pursue the McInnises or Hartman for any deficiency.

After the Bank bought the Ronson Properties at the foreclosure sale, the Bank made no effort to obtain an appraisal of the properties, nor did it conduct a commercially reasonable sale of these properties at which their value could be determined. Instead, the Bank simply retained the properties through trial, seeking through that stratagem to create an apparent deficiency.

The chancery court correctly saw through these machinations, and held that the Bank may not assert a deficiency under the Note or under the McInnises' notes or deeds of trust. R.E. 32-33; 35. As the chancery court held, "the Court finds and concludes as a matter of fact and of law that no deficiency which may be asserted with certainty has been determined. The bid price by [the Bank] was without any prior proper determination of fair market value by appraisal or otherwise." R.E. 32.

This ruling is in accord with settled Mississippi law, which places on the foreclosing mortgage creditor the burden of proving a deficiency through the establishment of the fair market value of the foreclosed property. *See Wansley v. First Nat'l Bank of Vicksburg*, 566 So. 2d 1218 (Miss. 1990) (holding that the legal determination of the adequacy of the proceeds recovered at a foreclosure sale depends upon the establishment of fair market value); *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So. 2d 461, 466 (Miss. 1985) (holding that chancery courts have jurisdiction to determine whether any intervening factor makes a foreclosure sale inequitable; and that a party's right to a deficiency judgment does not vest until after the party has properly demonstrated that the foreclosure sale price was equitable); *Fed. Land Bank of New Orleans v.*

Robinson, 134 So. 180, 185 (Miss. 1931) (holding that where a fraudulent foreclosure sale recovers insufficient funds, the court may set aside the foreclosure sale).

Here, the Bank acquired fourteen parcels of property for an aggregate bid of $199,900.00. What was the fair market value of those parcels? To what extent does that value fall short of – or exceed – the remaining debt of the McInnises or Hartman to the Bank? The Bank offered no proof on these point, and the chancery court properly dismissed the Bank's claims against the McInnises (and Hartman) for this independent reason. This ruling also relieved the McInnises of any liability to the Bank, therefore barring any claim that the McInnises might raise against Hartman for non-payment of the note.

C. In the Alternative, the Chancery Court Miscalculated the McInnises' Damages.

Even had the McInnises been entitled to recover from Hartman on the Note, they were not entitled to the sum the chancery court awarded. The chancery court gave the McInnises judgment against Hartman, Nelson and Ronson in the amount of $582,218.49: $450,209.49 for the balance on the wrap-around Note, $112,500 in attorneys' fees, and $19,509.00 in accrued and unpaid interest. R.E. 33.

1. The chancery court miscalculated the amount due under the Note.

Exhibit 68 demonstrates – and the parties stipulated at trial – that the balance on the McInnises' senior deed of trust on the Ronson Properties was $456,169.05 at foreclosure.[12] Tr. 367; R.E. 97. The outstanding balance on the Note prior to foreclosure was $650,109.49. R.E. 102-03. The foreclosure sale nominally yielded $199,900.00, which the chancery court properly applied to the Note, reducing its balance to $450,209.49.

[12] Exhibit 68 erroneously applied the $199,900.00 paid at foreclosure to the outstanding balance on the McInnises' senior deeds of trust. R.E. 97.The chancery court properly applied the proceeds to the Note.

Because the wrap-around Note *includes* the amount of the first deeds of trust – which was extinguished by the chancery court – the balance on the McInnises' senior deeds of trust must be subtracted from the remaining balance on the Note, leaving a surplus on the Note of $5,959.56 ($450,209.49 minus $456,169.05). The McInnises can claim no damages under the Note, because there is no remaining deficiency. Indeed, there was a $5,959.56 surplus.

2. The chancery court erred in awarding the McInnises $112,500.00 in attorney's fees.

At trial, the sole evidence presented on the issue of attorney's fees was an invoice submitted by Ray Price, Esq., the McInnises' attorney. According to the invoice, the total charge for Mr. Price's time was $20,212.50. R.E. 82-85. With expenses, the total fee claimed was $22,074.00. The McInnises made no supplemental submission after trial.

With no further evidence, and without analysis or discussion, the chancery court awarded the McInnises $112,500.00 in attorney's fees, R.E. 33, an award that pays Mr. Price a breathtaking $821.00 per hour for his time.[13] The award is a clear abuse of discretion.

While "[t]he propriety and quantum of attorney's fees is committed to the sound discretion of the awarding judge," *Theobald v. Nosser*, 784 So. 2d 142, 146 (Miss. 2001), any award must be reasonable and must be supported by credible evidence. *Key Constructors, Inc. v. H & M Gas Co.*, 537 So. 2d 1318, 1325 (Miss. 1989). "The court may not judicially note what is a reasonable fee and it certainly may not merely pull a figure out of thin air. Rather, the party entitled to recover a reasonable fee must furnish an evidentiary predicate therefor." *Key Constructors*, 537 So. 2d at 1325; *accord Powell v. Powell*, 644 So. 2d 269, 276 (Miss. 1994) ("[An award of attorney's fees] must be supported by sufficient evidence, and not merely 'plucked out of the air.'").

[13] According to his invoice, Mr. Price charged $150.00 per hour, a charge that, at a total fee of $20,212.50, indicates a time expenditure of 134.75 hours. R.E. 85. If the chancery court's award included the $1,861.50 in expenses charged by Mr. Price, the fee award was $110,638.50, or $821.00 per hour.

The reasonableness of an attorney's fee award is governed more particularly by the factors contained in Mississippi Rule of Professional Conduct 1.5. *Browder v. Williams*, 765 So. 2d 1281, 1288 (Miss. 2000). Those factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

In order to support an award, the party seeking attorney's fees must present evidence on these factors, and the court's award must reflect consideration of them. Here, none of this has occurred. The McInnises presented no proof, and the chancellor neither weighed or identified the factors set forth in Rule 1.5. Indeed, he did not base the attorney's fee award on *any* evidence.

An unexplained award of $821.00 per hour is clearly unreasonable under Rule 1.5 and is unsupported by any evidence. Even if some award had been appropriate, it should not have exceeded $22,074.00, the only amount supported by any evidence in the case.

D. The Trial Court Erroneously Dismissed Hartman's Intentional and Negligent Misrepresentation Defenses.[14]

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[14] When a trial court makes no proper findings of fact after a bench trial, "it makes it impossible for this Court to do its job in deciding whether . . . the trial judge was in error." *Forsythe v. Akers*, 768 So. 2d 943, 947 (Miss. Ct. App. 2000); *Tricon*, 516 So. 2d at 239 (Miss. 1987); *Pace v. Owens*, 511 So. 2d 489, 491.

Here, the chancery court's Memorandum Opinion lacks meaningful findings. For example, in deciding whether McInnis misrepresented facts concerning the Ronson Properties, the chancery court said only this:

> As a matter of law, one charging fraud bears the burden of proving such averred fraud by clear and convincing proof. The [c]ourt listened attentively to the testimony of Hartman, McInnis and of Nelson, took extensive notes thereof, has reviewed in detail all that is before it in that regard, and has reached the confident finding and conclusion that all of the evidence be it touching on the question of misrepresentation and fraud falls woefully short of meeting the burden upon the ones charging fraud.

R.E. 34.

1. The McInnises made material misrepresentations to Hartman, which he relied on to his detriment.

Overwhelming evidence demonstrates that the McInnises misrepresented material facts to Hartman, on which Hartman relied to his detriment.

Prior to closing, Hartman asked the McInnises to provide him with information on the rental income generated by the Ronson Properties – including a list of the properties, rents collected, property taxes, and insurance. Tr. 115. The McInnises provided the information included in Exhibit 30. This information is in writing; it is objective; there is no factual dispute concerning its content. According to the information provided, the Ronson Properties generated $10,700.00 in monthly rental income. Tr. 96; R.E. 104; R.E. 86-87. Mr. McInnis also represented that eleven of the properties were "generating" $8,335.00 in monthly rental income. R.E. 91. The McInnises provided an updated matrix on the day of the closing, showing that the Ronson Properties generated $9,500.00 in monthly rental income. Tr. 98-99; R.E. 89.

Hartman relied on this information. It was highly material. The transaction would not have gone forward without it. It was false. The Ronson Properties did not generate $10,700.00, $9,500.00, or $8,335.00 in monthly rental income. Ronson never collected over $5,000.00 in monthly rents. Tr. 132. Moreover, even Mr. McInnis admitted at trial that as of closing, the Ronson Properties generated only approximately $7,000.00 in monthly rental income – $2,500.00 less than the amount he had represented in Exhibit 30. Tr. 212 (noting that the Ronson Properties were generating $7,000.00 in monthly rental income).

These are not findings; they are conclusions. Because the chancery court made **no** findings of facts to justify these conclusions, the judgment below may be reversed for this independent reason. In any event, the Court should review the judgment *de novo*.

Hartman and Nelson relied on these misrepresentations. Hartman projected the financial feasibility of the transaction based on the McInnises' representations. *See* R.E. 104-06. The McInnises failed to provide Hartman with any other information. Tr. 128-129. The McInnises admit that they provided no other facts to Hartman. Tr. 211.

To make matters worse, the McInnises also misrepresented the condition of the Ronson Properties. Mr. McInnis provided Hartman a "Repair list: Looking ahead 5 years as well as immediate needs." R.E. 93-94. The list identified needed repairs ranging from roofing needs to sheetrock repair to flooring replacement to painting needs. *Id.* However, the Ronson Properties had many electrical, plumbing, and gas problems that were not disclosed in Exhibit 30, or any other documents. Tr. 184. These defects were then known to the McInnises. In fact, Mr. McInnis *admits* that he did not disclose all of the Ronson property defects to Hartman. *Id.* He stated at trial that, in creating the repair list, "if somebody was living there, I said, it's fine." Tr. 213. As noted above, these known but undisclosed problems were highly material to Hartman's decision to personally guarantee the purchase of the Ronson Properties.

As a result of these misrepresentations, Ronson was hampered in its efforts to collect rents and make repairs to the Ronson Properties. Nelson testified without contradiction that the Ronson tenants often did not pay their rent, in part because of defects not disclosed prior to closing. Tr. 186. In part a result of the extensive, undisclosed defects, Nelson was able to improve only three of the unrentable units within the Ronson Properties. Tr. 175; 183-188. The transaction would not have closed had Hartman known the truth. Tr. 136.

2. The McInnises cannot escape responsibility for their misrepresentations by claiming that Hartman should have discovered them.

The chancery court denied Hartman's misrepresentation defense based on its view that Hartman should have discovered the false statements before closing occurred. R.E. 34. This

holding misses the point. No party may profit from his own misrepresentations by claiming that the party he has duped should have been more vigilant in detecting them.

This is not a case in which a seller sold property without making representations concerning it. In such cases, where the asset is available for inspection by the prospective purchaser, a seller may later be justified if he excuses defects in the property by pointing to the buyer's failure to inquire.

But where, as here, a seller makes specific, written representations concerning property and the income it produces, and where the representations are false, the seller cannot avoid liability by claiming that the purchaser's failure to discover those misrepresentations was negligent. Even more, no seller can press a claim in which he seeks to profit by his own misrepresentations, then defend the falsity of his promises by contending that the person to whom the statements were made was negligent in not discovering them. *Serv. Elec. Supply Co., Inc. v. Hazlehurst Lumber Co., Inc.*, 932 So. 2d 863, 870 (Miss. Ct. App. 2006) (noting that under Mississippi law an individual is forbidden to speak against his own representations vis-à-vis any injury said representations caused another who reasonably relied thereon); *Hinson v. N & W Constr. Co., Inc.*, 890 So.2d 65, 67 (Miss. Ct. App. 2004) (holding that an individual may not deny a promise if it was intended that another party reasonably relied on said promise, where the denial "would be virtually to sanction the perpetuation of fraud or would result in other injustice").

This Court explicitly has held that "[w]here one party's false representations induce another party to contract, the negligence of the second party cannot be raised to bar relief from him." *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So. 2d 1254, 1259 (Miss. 1991). In *Godfrey*, this Court held that "failure to read a contract before signing it, although it may constitute negligence, will not bar equitable relief to one who

has executed a contract in reliance upon false representations made to him by the other contracting party." *Id.*

Hartman and Nelson were innocent purchasers who relied on the McInnises' misrepresentations. At trial, Mr. McInnis argued that Hartman and Nelson should have been more thorough in discovering them. The chancery court agreed. R.E. 34. As a result, the McInnises were able to recover $582,218.49 from Hartman based on these false statements. Mississippi does not permit this result.

Hartman was an experienced businessman who relied on the integrity of the people with whom he was dealing. Nelson and Hartman *did* inspect the exterior of the Ronson Properties prior to closing; however, their inspection did not take into consideration defects that could not be seen from the outside. Tr. 192. They relied on the representations made in Exhibit 30. Tr. 201. These representations were material. Neither Hartman nor Ronson would have agreed to buy the properties had they known their true condition. Tr.137; 191.

Some of the McInnises' misrepresentations were not visually apparent. They concerned income produced by the properties. These false statements concerned a subject that could not have been discovered by Hartman's physical inspection.

The chancery court's finding that "Hartman had ample opportunity to apprise himself of everything pertinent to the transactions he undertook with McInnis," R.E. 34, is therefore both factually incorrect and legally beside the point.

3. The trial court erroneously denied Hartman's negligent misrepresentation defense.

Likewise, the chancery court erroneously dismissed Hartman's *negligent* misrepresentation defense. Negligent misrepresentation differs from fraudulent misrepresentation in that "the basis for damages resulting from negligent misrepresentation is lack of care, while the basis for damages resulting from fraud is the want of honesty." *Hobbs*

Auto., Inc. v. Dorsey, 914 So. 2d 148, 161 (Miss. 2005). Negligent misrepresentation may be proved by a preponderance of the evidence, and does not require proof that is clear and convincing. *Little v. Miller*, 909 So. 2d 1256, 1260 (Miss. Ct. App. 2005). In order to prove negligent misrepresentation, Hartman had to demonstrate only that the McInnises did not exercise the diligence and expertise he was entitled to expect in reporting the income generated by the Ronson Properties and the extent of repairs needed on them. *See Berkline Corp. v. Bank of Mississippi*, 453 So. 2d 699, 702 (Miss. 1984).

The proof on this issue is virtually uncontradicted; a finding of negligent misrepresentation cannot be avoided. The record clearly indicates that, at best, the McInnises were negligent in preparing Exhibit 30. Although Mr. McInnis represented to Hartman that the List of Repairs included repairs needed on the Ronson Properties for the next five years, he admits that he did not inspect the properties before preparing the list. As he stated at trial, "if somebody was living there, I said, it's fine." Tr. 213. Mr. McInnis did not disclose this fact to Hartman prior to closing.

Moreover, Mr. McInnis negligently misrepresented the information included in the schedule of monthly rents collected on the Ronson Properties. *See* R.E. 86-89; 91. At trial, he admitted that "[t]hese figures indicate what these apartments were rented for, but not necessarily the amounts collected. And we did not talk about that." Tr. 211. This is not what he told Hartman, and, on its face, Exhibit 30 belies Mr. McInnis' convenient and fanciful statements.

It is undisputed that Hartman relied on the McInnises to provide an accurate representation of "the income levels and the amount of maintenance that was required" to improve the Ronson Properties. Tr. 63. Exhibit 30 represented all of the information that the McInnises gave Hartman on this subject. It was false. Tr. 64. The evidence shows that the

McInnises were, at least, negligent in preparing the document. The chancery court's denial of Hartman's negligent misrepresentation defense was clearly erroneous.

CONCLUSION

For all these reasons, the judgment of the Chancery Court of Forrest County should be reversed.

RESPECTFULLY SUBMITTED, this the 28th day of November, 2006.

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CERTIFICATE OF SERVICE

I, Clarence Webster, III, certify that I have this day caused to be served a true and correct copy of this document by United States mail, postage prepaid, on the following:

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