IN THE MISSISSIPPI SUPREME COURT

JAMES BARTON WILLIAMS and PAMELA ANN TALBOT WILLIAMS — **APPELLANTS**

VS. — **NO. 2006-CA-01085**

C. E. MORRISON and CARLA J. MORRISON — **APPELLEES**

BRIEF OF APPELLANTS

ON APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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IN THE MISSISSIPPI SUPREME COURT

JOHN MICKALOWSKI AND
JAMIE MICKALOWSKI **APPELLANTS**

VS. **NO. 2005-CA-01864**

AMERICAN FLOORING, INC. **APPELLEE**

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. Honorable Robert L. Lancaster
   Chancery Court Judge
   P. O. Drawer 884
   Columbus, MS 39703

2. James Barton Williams, Appellant

3. Pamela Ann Talbot Williams, Appellant

4. C. E. Morrison, Appellee

5. Carla J. Morrison, Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not be helpful in this case, as it would not aid in offering additional facts, law or argument in support of these issues. The issues before the Court are straightforward issues of law applied to the facts of this case. As such, oral argument would not be of benefit and is not requested.

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1. Whether the Chancellor erred in granting Summary Judgment.

STATEMENT OF THE CASE

On January 20, 2005, Appellants filed their Amended Complaint against Appellees, alleging fraud, intentional and/or negligent misrepresentation and breach of contract in relation to the sale of a home located at 428 Bent Tree Trail, Columbus, Mississippi. (V.1, 139-144).

On January 25, 2006, Appellees filed their Motion for Summary Judgment as to all claims (V. 1, 2-8). After a hearing on the matter, the Chancellor issued his "SUMMARY JUDGEMENT" on May 1, 2006, dismissing all claims filed against Appellees herein. (V.3, 328-331).

Appellants appeal the granting of summary judgment by the lower court by their notice of June 27, 2006. (V.3, 332).

FACTS

The instant litigation concerns the sale of property at 428 Bent Tree Trail, Columbus, Mississippi, and certain representations made in the "Property Condition Disclosure Statement" that was part of the transaction.(V.1, 139-144). Specifically, Appellants' Amended Complaint states the following complaints as relates to the Appellees:

> Subsequent to purchase of the subject property, Plaintiffs became aware of numerous structural problems, alterations, and/or renovations/remodels, as well as prior "concealed" flooding damage to the garage, and numerous other problems which should have been disclosed. Specifically, in December, 2003, Plaintiffs discovered the garage was wet when Tim Flora, of Professional Pest Management, re-drilled the home to treat for termites. In February, 2004, after experiencing problems with rainwater standing in the subject garage, as well as noticing movement in the home's chimney, Plaintiffs employed and/or discussed correcting such problems with Mr. Ed White d/b/a All About Your House. During their discussions, Mr. White informed Plaintiffs that he had been retained, by both C. E. and Carla Morrison, to correct "sagging flooring" in the main area of the subject home, as well as remove and replace certain sheet rock and molding in the garage prior to the sale of the subject home, as same had been flooded and sustained severe water damage. Upon follow-up examination, Plaintiffs became aware of structural alterations to

the dwelling in the form of PVC pipe piers being used as foundation footers across much of the main span of the home. Additionally, it became apparent that the garage had experienced numerous flooding occurrences prior to the sale and within the time frame in which Defendants Morrison owned the home. In fact, Mr. White advised the Plaintiffs that the Morrisons had contracted with him to stop the leaking from the garage wall and to conceal the signs of standing water by replacing and repainting the baseboards and sheet rock in the garage. Thus, not only were Defendants Morrison aware of these problems, but they had, in fact, employed a contractor to conceal same.

Both C. E. Morrison and Carla J. Morrison, in failing to disclose, on their disclosure statement, such structural problems, repairs, alterations and/or renovations/remodels and water damage, either intentionally or negligently misrepresented/concealed material information concerning the condition of the home. Not only was this information omitted from the disclosure statement prior to the sale, but during an inspection by Plaintiffs of the home, Mrs. Carla Morrison affirmatively stated to Plaintiff, Pam Williams, that, other than the matters addressed in the disclosure statement, Defendants had not experienced any other problems with the home. Plaintiffs relied upon these representations of Defendants C. E. and Carla Morrison prior to purchase (as could reasonably be intended, anticipated and/or expected by both C. E. and Carla Morrison) and, had Plaintiffs been aware of the numerous material defects or problems that should have been disclosed, they would not have purchased the subject home.

Further, as stated in the contract attached as Exhibit "A" hereto, both C. E. and Carla Morrison, in executing same, certified that they were not aware of any hidden defects not disclosed in the seller's disclosure statement attached as Exhibit "B." In intentionally or negligently misrepresenting the condition of the premises, as outlined above, both C. E. and Carla Morrison also breached the contract entered into with Plaintiffs concerning the sale of the subject home, as well as breaching the disclosure statement which provides, in part: "To the extent of the Seller's knowledge as a property owner, the Seller(s) acknowledges that the information contained above is true and accurate for those areas of the property listed." Further, such conduct breached their fiduciary obligation to act in "good faith" and deal fairly with Plaintiffs. As a result, Plaintiffs have incurred significant repair costs, as well as experiencing emotional distress and grief related to this incident.

> As a result of C. E. and Carla Morrison's misconduct, Plaintiffs have suffered actual damages, all of which will be more thoroughly outlined at the trial of this cause. Plaintiffs seek any and all available damages, including though not limited to, those resulting from C. E. and Carla Morrison's fraud and/or intentional or negligent misrepresentations, breach of contract, punitive damages as allowed for the intentional or fraudulent conduct exhibited by C. E. and Carla Morrison, attorneys' fees, court costs and other expenses incurred herein, either directly or indirectly, as allowed by the subject contract or existing law.

Id.

The subject disclosure statement contains several misrepresentations concerning the condition of the home. Had Appellees made truthful representations concerning the condition of their home, Appellants would not have purchased same. (V.2, 266). In the lower court, the issues have been referenced as"the Flood" and "the Sag." As such, Appellants will use such terminology in an effort to simplify the issues.

A. "The Flood."

The subject disclosure statement provides the following representations:

> Section E. Land and Site Data:
>
> Are you aware of the existence of any of the following, to-wit:
>
> Standing Water?
>
> Has the property ever flooded?

The Appellees answered "no" to each question. (V. 2, 184). However, during his deposition, Dr. Morrison described a flood event in November of 2002, at which time he concluded that water had gushed over the threshold of the garage and flooded same. (V.2, 190). Shortly after this event, the Appellees employed Ed White, a general contractor, to remedy the situation. *Id.* Mr. White undertook a course of action to divert the water flow and installed a so-called "moisture barrier"

around the exterior of the garage walls. (V.2, 211-212). Mrs. Morrison testified that her husband informed her that Mr. White had been hired because there had been some water going up to the garage. (V.2, 223).

At this point, it is imperative to note that the garage in question is built into the side of a hill, whereby three walls of the garage had dirt/earth resting against the cinder block walls – approximately four feet, according to Dr. Morrison, at the highest point. (V. 2, 197). James Taylor, a former defendant in this action and the individual who was hired to inspect the home prior to closing, estimated dirt to be six feet at its highest point above the garage floor. (V. 2, 236).

In their disclosure statement, the Appellees failed to mention this "flood," but readily admitted same occurred subsequent to suit being filed and discovery being taken and, in fact, have disclosed that Mr. White was specifically retained to divert rainwater from the garage and to install a moisture barrier to shed rainwater and keep it from entering the garage. (V.2, 211-212). Unfortunately, what else has been discovered (since the home was purchased) is that the garage appears to have suffered water penetration issues since construction.

Appellants' first notice of any potential water problems came almost immediately after the Appellants moved into the residence, when Tim Flora, a licensed and certified termite inspector, noted same and provides an affidavit stating the following:

> 3. On or about December 2, 2003, I inspected the residence of Dr. Bart Williams and Mrs. Pam Williams, which is located at 428 Bent Tree Trail, Columbus, Mississippi 39701, and issued an official wood destroying inspect report (a copy of which is attached hereto as Exhibit "A").
>
> 4. During my inspection, and as referenced on the report attached hereto as Exhibit "A," I noted moisture damage and/or areas of old water penetration/seepage to the interior wall of the garage. The moisture damage was not caused by a recent water episode.

> 5. As part of my education and training, as well as my experience in home inspections, I am qualified and required to note issues, concerns and damage relating to moisture problems.
>
> 6. After my inspection, I informed Ms. Williams that, in my opinion, moisture penetration was and would continue to be an ongoing problem due to the fact that the garage was constructed into a hillside and if there was not an adequate moisture barrier separating the earth from the garage walls, the porous cinder block construction could leak.

(V.2, 244-247).

Thereafter, Appellants contacted Mr. Taylor to re-inspect the garage and the damage Mr. Flora noted. Mr. Taylor returned to the home, at which time he observed water damage that he concluded was penetrating from outside. (V.2, 235-236). Subsequent to Mr. Flora informing Appellants of potential water problems in the subject garage and Mr. Taylor confirming same, they retained the services of Joey Henderson, an architect, who has provided an affidavit, attesting the following:

> 3. During the spring of 2004, I was retained by Dr. James Barton Williams and Mrs. Pamela Williams concerning certain problems they were experiencing at their residence, which is located at 428 Bent Tree Trail, Columbus, Mississippi 39701.
>
> 4. Specifically, the Williams requested that I evaluate the garage situated on the subject property, as they related to me that they were having problems controlling water from penetrating the garage walls. Upon observation, it became apparent that the garage had been improperly constructed, as dirt was built up several feet on the exterior of the walls. There are two main problems: (1) The type of construction (wood frame with brick veneer) is inadequate to retain soil. The few CMU blocks that exist were without proper reinforcement; and (2) The wall system did not have a proper moisture barrier. In my opinion, both of these problems persisted, as relates to the garage.
>
> 5. My observation of the garage revealed that, at some point, someone attempted to remedy problems associated with moisture penetration, as there existed a moisture barrier horizontal across the

ground and glued to the exterior walls of the garage. This was uncovered in digging around in the flowerbed located around the garage. This was an ineffective measure, especially considering that the barrier was applied horizontally across the ground and not vertically attached to the garage walls.

6. My observation of the interior of the garage revealed old water damage that exhibited mold and mildew growth. Additionally, during one occasion, I observed standing water on the garage floor that apparently seeped through the garage walls.

7. In speaking with Dr. and Mrs. Williams, I was informed that water penetration in the garage was a continuing problem since they had purchased and moved into the home. In my opinion, these problems had existed since the garage was constructed, as there was no adequate moisture barrier employed to prevent same. My opinion that such problems pre-dated the Williams' purchase of the home in late November of 2003 was verified by the existence of the moisture barrier sheet that was, apparently, applied (although incorrectly) in an effort to remedy such problems. I was informed by Dr. and Mrs. Williams that they had not performed any such work to the exterior of the garage.

8. As part of my education, experience and training, I am qualified to address such concerns and issues as was apparent at the Williams' residence. In fact, I was retained and specifically employed to remedy this problem. After observing the premises and evaluating the available options, a plan was formulated and ultimately implemented by Conn Construction to remedy these concerns. The charge for my services was $3,606.25. Conn Construction charged $61,197.16 to complete the site work. It was and is my opinion that these charges were/are reasonable and necessary to correct the aforementioned problems and consistent with those fees normally charged by entities engaged in such services.

(V.2, 248-250).

Although Mr. Taylor was under an obligation to inspect the garage for such matters, he failed to note any such problems. According to Mr. Taylor's testimony, any such evidence of water damage was obscured due to items placed in front of the garage walls in the areas where the damage was visible. (V.2, 235). However, after moving in, at which time the obstructions had been

removed[1], Appellants noticed water problems with the garage. (V.1 10, V.2, 264-265). This was an ongoing problem that was only remedied by removing the dirt from the garage and installing a perimeter retaining wall.

Interestingly, the Appellees also failed to indicate under "Section F. Additions/Remodels" that the November 2002 alteration to the garage was performed by Mr. White. (V.2, 185). Similarly, Appellees failed to indicate, under "Section K. Miscellaneous" that the garage contained such a defect and needed repairs. *Id.*

Ultimately, Appellants have expended a substantial sum of money ($3,606.25 for architectural services and $61,197.16 in construction costs) to complete the site work necessary to correct a condition which should have been disclosed by the Appellees. Had Appellees disclosed same, a proper inspection could have been made concerning the construction of the garage and existing problems. Had such a disclosure been made, Appellants would have been afforded the opportunity to factor in such problems and corrective measures to their decision to purchase the home.

B. "The Sag."

The next misrepresentation comes with regard to alterations to the property and Appellees failure to disclose same on the subject disclosure statement, which provides, in pertinent part, as follows:

> Section F. Additions/Remodels:
>
> Have there been any additions, remodeling, structural changes, or other alterations to property?

---

[1] Coincidentally, the Appelees moved the cabinets to the side of the garage where the water damage was observed in September or October of 2003, just in time for the inspection on October 28, 2003.(V.2, 207, 211-212).

The Appellees responded "yes" to this question and explained that they had remodeled the kitchen and added a family room and three-car garage. (V.2, 185). What the Appellees failed to disclose was that they had installed PVC piers under a substantial portion of the living area (in the crawl space) in an effort to correct "vibration" problems. (V.2, 193-194). These piers were installed, in 1998, at Appellees request. *Id.*

Shortly after moving into the residence, Appellants began to notice that the floor in the areas above the piers were sagging. (V.2, 266, 272, 285-286). Accordingly, they retained Mark Watson, a professional engineer, to inspect the home. (V.2, 290-295). Upon inspection, Mr. Watson opined that the installation of these piers were intended to stiffen the floor framing, as the joists' span lengths were somewhat excessive. *Id.* Mr. Watson has provided an affidavit which states as follows:

> 3. On August 23, 2004, I examined the premises located at 428 Bent Tree Trail, Columbus, Mississippi 39701, and owned by Dr. and Mrs. James Barton Williams. The purpose of my evaluation, the nature of same and my findings are enumerated in my report of August 26, 2004, a copy of which is attached hereto as Exhibit "A."
>
> 4. With regard to the installation of PVC piers throughout the crawlspace area of the home, it is my professional opinion that same is an alteration/change to the original structure of the home.
>
> 5. Consistent with my report, I recommend that the PVC piers and associated 4x4 beams be removed and replaced with a properly installed beam and pier system. Attached to my report is a sketch sheet providing illustration as to the proper manner in which to install intermediate floor beams with individual piers.
>
> 6. It is my opinion that the amount necessary for a contractor to correct such deficiencies is approximately $15,000.00. As part of my education, training and experience, I am familiar with the work required to correct same and the charges for such services and, in my opinion, such charges are reasonable and necessary to correct the aforementioned problems and consistent with those fees normally charged by entities engaged in such services.

Id.

Mr. Watson noted significant sag in the floors stemming from the position of the wall in relation to the floor framing. *Id.* Correcting same will require the lifting of the sub-floor back into position and installing solid blocking underneath to properly brace the underside. (V.2, 292-295). To date, these measures have not been implemented.

The available evidence indicates that the Appellees not only knew of such alterations, but specifically employed Mr. Ed White to perform same. (V.2, 217). Thus, the Appellees had actual knowledge of a structural alteration to the premises which was not disclosed. Appellants relied on such statements in making their decision to purchase the subject home. Had such disclosure been made, Appellants would have had the opportunity to have the particular matter investigated by someone with sufficient knowledge and training (i.e., Mark Watson) prior to purchasing the home. As it stands, to correct the problem, the Appellants will have to spend somewhere around $15,000.00. (V.2, 291-291).

The facts clearly demonstrate that the Appellees are guilty of intentional and/or negligent misrepresentation in association with the representations they made concerning the condition of the subject home, not to mention breach of the sales contract, which provides a certification that the Appellees were not aware of an hidden defects in the property. (V. 3, 43). Had Appellants been aware of these problems, they would not have bought the home (V. 2, 266). Appellees were under a duty to disclose these material facts, of which they had knowledge, but they failed to do so.

However, the lower court found that the undisputed facts established that Appellees were not liable for any claims, as they made "no misrepresentation in the disclosure statements and that Appellants did not rely upon the disclosure statement." (V. 3, 330) Thus, the lower court found that there had been no fraud, misrepresentation and/or breach of contract. *Id.*

SUMMARY OF THE ARGUMENT

The lower court's granting of summary judgment was improper, as there exists numerous material issues of fact that warrant resolution by a trier-of-fact in this matter. Specifically, the facts outlined above clearly indicate that the appellees violated the dictates of Miss. Code Ann. §89-1-501, et seq., in failing to disclose the previous water problems and structural alterations. Appellants relied on the representations of Appellees in purchasing the home and, as a result of their untruthfulness, have been damaged. The record before this Court contains sufficient evidence to strike the Motion for Summary Judgment filed by the Appellees. Thus, this Court must reverse the trial court's granting of same.

ARGUMENT AND AUTHORITIES

I. THE LOWER COURT'S GRANTING OF SUMMARY JUDGMENT WAS ERRONEOUS.

STANDARD OF REVIEW

This Court's standard for reviewing the granting of summary judgment is best defined as follows:

> The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court under Rule 56(c). This Court conducts *de novo* review of orders granting or denying summary judgment and looks at all the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. The burden of showing that no genuine issue of material fact exists lies with the moving party, and we give the benefit of every reasonable doubt to the party against whom summary judgment is sought. We do not try issues. Rather, we only determine whether there are issues to be tried. Furthermore, it is well-settled that motions for summary judgment are to be view with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion. The focal point of our *de novo* review is on material facts. In defining a "material" fact in the context of summary judgments, the Mississippi Supreme Court has stated that "[t]he presence of fact issues in the record

> does not *per se* entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense." *Roebuck v McDade*, 760 So.2d 12 (Miss. Ct. App. 1999).

Evans v. Jackson Coca-Cola Bottling Company, 771 So.2d 1006, 1008 (Miss. Ct. App. 2000).

ARGUMENT

Miss. Code Ann. § 89-1-501 requires submission of the subject disclosure statement in connection with the sale which is the subject of this claim. Section 89-1-511 requires that the sellers, the Appellees, make such disclosures in "good faith," meaning honesty in fact. In that vein, the Appellees, in the sales contract, certified that they were not aware of any hidden defects of the property that were not disclosed. (V. 3, 43). By executing the subject disclosure statement, the Appellees acknowledged that the information contained therein were true and accurate. Unfortunately, the representations were neither true nor accurate.

To survive summary judgment on a claim of negligent misrepresentation, a genuine issue of material fact must exist regarding each of the following elements:

(1) that the defendant has misrepresented or omitted a material or significant fact;

(2) the defendant failed to exercise reasonable care;

(3) the plaintiff reasonably relied on the misrepresentation or omission; and

(4) the plaintiff suffered damages as a direct result of such reasonable reliance.

Donald v. Amoco Prod. Co., 735 So.2d 161, 179-180 (Miss.1999); *R.C. Constr. Co. v. National Office Sys., Inc.*, 622 So.2d 1253, 1256 (Miss.1993).

In order to establish fraudulent misrepresentation, Appellants must prove, by clear and convincing evidence, the following elements:

(1) a representation;

(2) its falsity;

(3) its materiality;

(4) the speaker's knowledge of its falsity or ignorance of the truth;

(5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated;

(6) the hearer's ignorance of its falsity;

(7) his reliance on its truth;

(8) his right to rely thereon; and

(9) his consequent and proximate injury.

Bank of Shaw, 573 So.2d at 1362; *Ezell v. Robbins*, 533 So.2d 457, 461 (Miss.1988); *Martin v. Winfield*, 455 So.2d 762, 764 (Miss.1984); *Franklin v. Lovitt Equipment Company, Inc.*, 420 So.2d 1370, 1373 (Miss.1982).

The evidence establishing fraud and/or negligent misrepresentation on behalf of the Appellees is well documented by the facts recited above. Both Appellees readily admit that they failed to disclose the alterations performed to correct "the sag" and "the flood" situations, even though required by the property condition disclosure statement to do so. As the disclosure statement required disclosure of such items, it is abundantly clear that the Appellees have breached their contractual and/or fiduciary obligations to Appellants, who were ignorant of the true facts and relied upon these representations.

Both Mr. and Mrs. Morrison admit that they knew of both issues prior to signing the disclosure statement and, in fact, employed a contractor, Mr. Ed White, to correct the issues they failed to disclose. Actually, Mr. White was retained simultaneous to the Appellees deciding to sell the property to correct the water flow/penetration issues concerning the garage. As such, the

available proof establishes motivation on behalf of the Appellees to conceal the problems associated with the home and, particularly, the garage. Since the Appellees failed to disclose either, one can only conclude that they intended to deceive the Appellants in the purchase of the subject home. Likewise, it stands to reason that the timing of moving the cabinets in front of the damaged garage wall, prior to the sale inspection, indicates an intent to conceal the problems associated with the garage, since the cabinets obstructed the water damage.

Further, the uncontradicted expert proof is that the problems associated with water penetration had been occurring since the garage was constructed. (V. 2, 248-250). Thus, the Appellees had notice, or constructive notice, of the continuing water issues and, in fact, admit to one such "flooding" occurrence. A presumption must be raised concluding that the Appellees were aware of the problems and by attempting to correct same and omitting that fact from the sales transaction, undertook a cause of action to intentionally deceive the Appellants.

As relates to the PVC piers, Mr. Watson, a structural engineer, considers same a structural alteration. (V. 2, 290-291). The Appellees agree that same were not part of the original construction of the home. (V. 2, 195). Thus, it is clear that same should have been disclosed and was required by the language of the subject disclosure statement.

In the lower court, counsel for the Appellees argued that the Appellants' execution of the declaration of acceptance alleviates her clients from their duty to fully and adequately submit the property disclosure statement and, in fact, claims that execution of such document is an unequivocal waiver of any possible claims. Such declaration provides, *inter alia*, that all warranties, statements and representations as to the property have been complied with to the Appellants' satisfaction and that, by accepting the subject deed, the Appellees will have no further responsibility or liability for repairs to the property. (V.1, 49). The lower court also made reference, in its opinion, that the

Appellants had waived any right to bring the instant claims by executing the subject declaration. Thus, it appears that both the lower court and the opposing party are taking the position that, so long as a declaration of acceptance is signed, the Appellees can lie, cheat and deceive – with immunity. However, Appellees submitted no authority supporting this proposition and the lower court did not elaborate as to this issue. Regardless, any claim that said provision prohibits recourse herein is preposterous. As the declaration states, the property was accepted based on the actual representations of Appellees. The declaration does not concern itself with omissions and hidden defects of which Appellees had actual knowledge. Should same apply, then the dictates of Miss. Code Ann. § 89-1-511 would have no bearing. This cannot be the law.

Ultimately, the record is clear that the subject home was purchased based on the representations made by the Appellees and as discussed above. Unfortunately, Appellees omitted, from their disclosures, the water problems associated with the garage and the structural alterations to the sub-flooring. These omissions led to the expenditure of almost $65,000.00 in relation to correcting the water problems associated with the garage and an expected $15,000.00 to repair the home's flooring. Clearly, there exists material issues of fact as to whether the Appellees omitted material facts by failing to note such alterations and/or problems; whether same was material; whether Appellants reasonably relied on same; whether the Appellees failed to exercise reasonable care in omitting same; and whether the damages outlined by Appellants are a direct and proximate result of such reliance. Appellants submit that the proof is clear that not only is the standard for negligent misrepresentation met, but the heightened standard of fraud, insomuch as the record indicates that the Appellees knew their assertions were false. At this time, there exists not just material issues of fact, but sufficient evidence to reasonably conclude that the Appellees subjectively intended to deceive the Appellants in the sale of the subject home.

CONCLUSION

Consistent with the facts outlined above, there exists, at a minimum, material issues of fact concerning whether the Appellees, among other things, committed fraud, misrepresentation or concealment concerning the execution of the subject disclosure statement and sale of the home and whether such actions constituted a breach of the sales contract. These are issues to be resolved by a trier-of-fact in this instance. Thus, summary judgmcnt was improper. The lower court's granting of same should be reversed.

Respectfully submitted, this the 21st day of December, 2006.

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CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Dulaney & Tharp, P.L.L.C., has this date delivered a true and correct copy of the above and foregoing *Brief of Appellant* to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Honorable Robert L. Lancaster
Chancery Court Judge
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THIS, the 21st day of December, 2006.

M. LEE DULANEY