SUPREME COURT OF MISSISSIPPI

NO. 2006-A-01174

TOMMY MORGAN — **APPELLANT/ CROSS-APPELLEE**

v.

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

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEES AND CROSS-APPELLANTS, GREEN-SAVE, INC., and WALTER J. FLEISHHACKER

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SUPREME COURT OF MISSISSIPPI

NO. 2006-A-01174

TOMMY MORGAN **APPELLANT**

v.

GREEN-SAVE, INC., and
WALTER J. FLEISHHACKER **APPELLEES**

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 may evaluate possible disqualification or recusal.

1. Tommy Morgan, Defendant/Appellant/Cross-Appellee;
2. Walter J. Fleishhacker, Plaintiff/Appellee/Cross-Appellant;
3. Green-Save, Inc., Plaintiff/Appellee/Cross-Appellant;
4. Thomas A. Wicker, Holland, Ray, Upchurch & Hillen, P.A., Tupelo Mississippi, counsel for Plaintiffs/Appellees/Cross-Appellants, Walter J. Fleishhacker and Green-Save, Inc.
5. George E. Dent, Greer, Pipkin, Russell, Dent & Leathers, Tupelo, Mississippi, former counsel for Plaintiffs' Appellees/Cross-Appellants, Walter J. Fleishhacker and Green-Save, Inc.;
6. William M. Beasley and Rachel M. Pierce, Phelps Dunbar LLP, Tupelo, Mississippi, appellate counsel for Defendant/Appellant/Cross-Appellee, Tommy Morgan;
7. Fred L. Banks, Jr., and Rebecca Hawkins, Phelps Dunbar LLP, Jackson, Mississippi, appellate counsel for Defendant/Appellant/Cross-Appellee, Tommy Morgan;
8. J. Patrick Caldwell, Riley, Caldwell, Cork Alvis, P.A., Tupelo, Mississippi, former counsel for Defendant/Appellant/Cross-Appellee, Tommy Morgan; and
9. Robert Q. Whitwell, Farese, Farese and Farese, P.A., Ashland, Mississippi, trial counsel for Defendant/Appellant/Cross-Appellee, Tommy Morgan.

SO CERTIFIED, this the ___ day of June, 2007.

THOMAS A. WICKER
Counsel of Record for Appellant

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INTRODUCTION

This is a case in which Walter Fleishhacker and his corporation, Green-Save, Inc., desired to purchase property for the purpose of constructing a manufacturing facility for their business (4:224), which involves a process of using heavy presses to create golf green repair tools (4:221). To that end, Fleishhacker contacted Tommy Morgan, a real estate broker and developer with more than thirty years experience in Northeast Mississippi (4:224). According to Fleishhacker's testimony, which the jury accepted, he told Morgan of his needs, and asked him if he knew of a suitable piece of property (*Id.*). As a real estate broker, Morgan could have directed Fleishhacker and Green-Save to property which he did not own, but Morgan chose instead to direct Fleishhacker and Green-Save to a specific piece of property owned and in the process of being developed by Morgan (4:98-99; 4:225; 4:231:27-29).

According to Fleishhacker, Morgan was aware that Green-Save desired to convert its manufacturing process from electricity to natural gas (4:233:5-13), and Morgan responded that the site would have all utilities available to it (4:226-230). Morgan also represented that the parcel of property being offered for purchase to Green-Save was a part of a commercial subdivision (4:227, Lines 15-26; 4:100:14-27, 4:104:6-26). In other words, the representations made by Morgan to Fleishhacker were that a particular lot would be suitable for Fleishhacker's proposed manufacturing facility, which would be located within a commercial subdivision that Morgan was developing.

In fact, as the evidence at trial revealed, Morgan chose not to develop the commercial subdivision (4:146:22-26; 4:164:7-18), but sold the lot to Fleishhacker anyway. As a result of Morgan's decision not to develop the commercial subdivision, the supplier of natural gas chose not to extend the gas line to Green-Save's facility (4:211:3-21). Further, in reliance on

Morgan's representations that the lot offered for purchase was part of an overall development, Fleishhacker and Green-Save constructed their building on the lot and, toward the end of construction, when Green-Save attempted to arrange for permanent financing on the building, Fleishhacker and Green-Save discovered that the property was in a flood plain, and that the building itself was not sufficiently above the flood plain to qualify for permanent financing (4:234:16-29). At approximately the same time, Green-Save and Fleishhacker discovered, for the first time, that natural gas would not be available as a utility (4:235:24 – 4:236:13).

Fleishhacker and Green-Save brought suit against Morgan for fraudulently representing that natural gas would be available, that the lot in question was suitable for the purposes that had been discussed by Green-Save and Fleishhacker, and for failing to disclose that the property was in a flood plain (1:5). Based upon the evidence at trial, the jury concluded by a vote of eleven to one that Morgan had engaged in misrepresentation (6:587-589), that he did know the property was in a flood plain and that he failed to disclose this fact at the time the property was sold.

The jury awarded damages in the amount of $325,000.00 (6:587), which apparently resulted from the jury deducting $50,000.00 as the approximate value of the improved property from the total costs associated with the purchase of the lot, the construction of the building, and additional costs associated with landscaping, etc., incurred by Green-Save and Fleishhacker.

STATEMENT OF THE ISSUES

Fleishhacker and Green-Save contend that sufficient direct and circumstantial evidence was presented to support a finding by the jury that Morgan had committed fraud, that the jury was properly instructed, and that the actual damages awarded were reasonable

given the instructions by the Court and the limitations placed by the Court on the evidence that the Plaintiffs were prepared to present regarding damages.

The issues presented by Fleishhacker and Green-Save in connection with their cross-appeal are as follows:

1. The Court erred in not allowing the jury to consider the issue of punitive damages, particularly given the egregious nature of the fraud committed by Morgan, as well as his continued attempted to conceal the fraudulent nature of his activities; and

2. The Court erred in failing to award attorney's fees to the Plaintiffs, as the prevailing parties in a case involving fraud.

It is the position of Fleishhacker and Green-Save, as Appellees, that the jury's verdict in the amount of $325,000.00 should be affirmed, but that the case should be remanded for consideration of the issues of punitive damages and attorney's fees alone.

STATEMENT OF THE CASE

I. Course of Proceedings.

A. The Parties:

Walter Fleishhacker is a businessman with more than thirty years experience in business dealings in Lee County, Mississippi. In addition to other business interests, he began a company, Green-Save, Inc., for the purpose of manufacturing repair tools for golf greens. Initially, this business was conducted on leased premises in the city of Tupelo, but as the business developed, Fleishhacker and the management of Green-Save desired to acquire property and build a permanent facility for the manufacturing process and to covert from electricity to natural gas for both reasons of economy and safety (4:226:7-17; 5:372:12 – 5:373:8).

Tommy Morgan is a real estate broker and developer with more than thirty years experience in North Mississippi, particularly in the Lee County area (3:74). Morgan has developed between twenty and thirty residential and commercial properties, including subdivisions (3:77:18-29).

Morgan and Fleishhacker, while not close friends, were acquainted with one another socially (4:223:14-25). Fleishhacker, as most people in Lee County, was certainly aware of Morgan's reputation as a real estate developer, which was why he approached Morgan concerning his and Green-Save's desire to acquire property for the purpose of building permanent manufacturing facilities.

B. The claims against Morgan.

When Green-Save and Fleishhacker discovered that natural gas was not going to be available for the facilities they had constructed, that the property they had purchased was in a flood plain and the building was not sufficiently out of the flood plain to permit permanent financing, and that the remaining portion of the property could not be developed, they brought suit against Morgan based on Morgan's representations that the property in question was suitable for the purposes that they had communicated to him, that the property was not, in fact, suitable, and that Morgan had failed to disclose that the property was in a flood plain and that natural gas utilities would not be available (1:54).

Although Morgan wants to focus solely on the cost of the building constructed on the property, Fleishhacker and Green-Save take the position that their damages include the total loss of the value of their investment in the property as represented to them. As will be discussed more particularly below, Fleishhacker and Green-Save, when presented with the property by Morgan, communicated their intention to not only construct the

manufacturing facilities, but to utilize the eastern part of the 2.14 acre lot for storage buildings (4:238:17 – 4:239:14). Because of the elevation of the property, construction of the storage facilities is not possible, because to construct the facilities above the flood plain would essentially create a dam on the property so as to result in flooding the manufacturing facility to the West (4:240:14-18; 4:248:21-29; 4:207:9-15 5:380-381). In addition, Fleishhacker and Green-Save hoped that the property acquired in Morgan's South Ridge Commons commercial subdivision would be a long term investment which would appreciate in value (4:236:14-29; 4:253:5-18). Instead, as confirmed by the testimony of Janis Holley, the plaintiff's real estate appraisal expert, the property as currently improved, is unmarketable (5:361).

The trial court limited the evidence concerning damages which the Plaintiffs' sought to present to the jury (5:329-330). Rather than permitting the Plaintiffs to demonstrate what the current cost of relocating the business would be, combined with the cost of acquiring new property and the current costs of recreating the manufacturing facilities, the court limited the damage testimony to the cost which were incurred by Green-Save and Walter Fleishhacker at the time of construction (*Id.*).

As shown at trial, although not admitted in evidence, the true cost of acquiring another piece of property, relocating the business and constructing new facilities would have exceeded $425,000.00 (See, Exhibit 39, construction cost in 2006 of $348,274; Exhibit 37, cost of moving manufacturing equipment of $8,500; Exhibit 36, cost of moving office equipment and furnishings of $2,478; Transcript at 4:250, cost of acquiring real property of $59,000; Transcript at 4:240 and 251, loss of net profits from not having room on the new property for the planned storage buildings; the entire amount not including the loss that would be sustained in halting production at Green-Save during the relocation process). Due to the limitation on

the damage evidence, the jury was only allowed to consider a total of approximately $374,000.00 in possible damage incurred by the Plaintiffs. In arriving at their verdict, it is apparent that the jury concluded that, to avoid any double recovery on the part of the Plaintiffs, $49,000.00 should be deducted as the approximate value of the property in its current state.

C. The proof of fraud.

Although Morgan would have this Court believe otherwise, this case does not involve a situation in which prospective purchasers of real property approached an owner, such as Morgan did when he acquired the property from Arthur Cenac in 1998 (3:84). In 2001, at the time that Morgan and the Plaintiffs discussed the possible purchase of the lot in question, Morgan was the person who selected the specific parcel of property to show to the Plaintiffs, having been told what their needs were (4:321:27 – 4:232:3). He was the developer, and represented to the Plaintiffs that the property in question was a part of a commercial and light industrial subdivision that he was developing. He admitted himself that he represented to the Plaintiffs that commercial and retail establishments were going to be developed to the West of the subject property, and that light industrial development would take place to the East (4:227, Lines 15-26; 4:100:14-27, 4:104:6-26).

This is significant for several reasons. First, these representations entitled the Plaintiffs to rely on Tommy Morgan with regard to the suitability of the premises for the purposes for which they had communicated to Morgan; i.e. the construction of the manufacturing facility and the ultimate development of climate controlled storage facilities on the East side of the 2.14 acre lot. Second, his representations with regard to the future development of the surrounding property ultimately impact the provision of utilities such as

natural gas. The testimony of the representative of the natural gas company revealed that the deciding factor in not extending the natural gas line as originally planned was due to Morgan's decision to suspend development of the commercial subdivision (4:211:3-21). While Morgan would have this Court believe that the provision of natural gas was out of his hands, as the developer of the property, he had control over the factor which determined whether or not natural gas would be available. Finally, his representations that he was going to develop lots for light industrial use to the East of the property in question entitled the Plaintiffs to rely on his expertise as a developer that the property to the East was suitable to the represented development, and was not in a flood plain.

At trial, as in the Complaint filed against Morgan, the Plaintiffs did not simply allege that he was negligent in making the representations that he made as a developer, but that he engaged in fraud. He engaged in fraud because he actively represented to the Plaintiffs that he intended to develop the surrounding property, entitling them to rely, to their detriment, on those representations when, in fact, Tommy Morgan did not intend to develop the property, or at least to delay that development in such a manner as to preclude the provision of natural gas to the site. Further, it was the Plaintiffs' position at trial that Tommy Morgan knew that the subject property was in a flood plain and failed to disclose that fact to the Plaintiffs knowing full well that they were relying on his representations that this was a part of a planned commercial subdivision.

The evidence at trial, both direct and circumstantial, was overwhelming that Morgan did know that the property was in a flood plain.

A key factor for consideration by the jury in finding that Morgan did know the property was in a flood plain was not simply that appraisals performed in connection with the

financing of the property revealed this, but that Morgan was in the process of developing the adjoining residential part of the subdivision, as well as laying out streets for the future development of the commercial property (3:78:17 – 3:79:8). A critical issue at trial was the blatant attempt by Morgan to push back his meetings with Fleishhacker and Les Ellis, the representative of Green-Save, from the Spring of 2001 to the Spring of 2000. If the meeting took place in 2001, as all of the parties had testified to during discovery prior to trial, and as the Plaintiffs' testified at trial, then the evidence demonstrated that the layout of the roads in the commercial development and the lots and streets in the residential development had already taken place, demonstrating that Morgan, as the key decision maker, was involved in that process and clearly would have had knowledge of the contours of the flood plain (4:175-176). If the meeting occurred in 2000, however, Morgan could argue (as he does on this appeal) that the only evidence he could have known about relative to the flood plain would have been from the appraisals.

Morgan, therefore, made a decision, during the course of the trial, to attempt to introduce "newly discovered evidence" consisting of his suddenly discovered calendar notations that the meetings with Fleishhacker and Ellis occurred in the Spring of the year 2000. There is no other way to categorize this action on the part of Morgan other than as an attempted fraud on the Court. It is simply incredible to believe that Morgan did not "discover" his calendar until the evening on the second day of trial. It is noteworthy that he did not bring the original of the calendar, but photocopies of the same. Despite the fact that the purported "proof" did not comply with the Best Evidence Rule and had never been disclosed in discovery, Morgan was allowed to testify, based upon the calendar entries, that the meeting actually occurred in 2000, prior to the design and engineering work involved in

the layout of the roads and streets in the commercial and residential developments and the platting of the lots in the residential development (4:163:8-28). It was Morgan's transparent intent to argue thereby that he was not aware of the location of the flood plain.

This attempt to radically alter the timeline of the events failed, however, because Morgan had already testified, when called adversely, that the road leading to the subject property was partially constructed at the time that he met with Fleishhacker and Ellis (3:106:9-18). As demonstrated beyond doubt by the engineering drawings and construction records of Morgan's own construction contractor, the work involved in the partial construction of that street could not have occurred in the Spring of 2000 (See, Exhibit 7, the sewer data sheets prepared by Morgan Whitfield, the contractor and Tommy Morgan's partner in The Summit, the residential subdivision), effectively piercing Morgan's transparent attempt to manufacture evidence to the contrary.

There can be little doubt that this attempt was probably a persuading factor when the time came for the jury to weigh the evidence regarding his knowledge and fraudulent concealment of facts from the Plaintiffs. It is respectfully submitted that it should be a substantial factor in this Court's consideration of the case as well.

STATEMENT OF THE FACTS

When Walter Fleishhacker and Les Ellis decided to relocate Green-Save's manufacturing facilities to property which would be owned by Green-Save and more suitable for long term development of the company, Fleishhacker approached Tommy Morgan who he knew to be an experienced real estate broker and developer in Lee County. Fleishhacker did not approach Morgan with regard to any particular piece of property, but explained to Morgan the purposes that he intended for the property and asked him if he knew of a suitable piece of

property for such purposes (4:225:6-9). At that juncture, Morgan became more than a mere seller of property, but acted in his role as the developer of property by selecting a site for Fleishhacker and Green-Save to consider. By doing so, he placed Fleishhacker and Green-Save in the position of justifiably relying on the selection made by Morgan. He further justified their reliance by representing to the Plaintiffs that the property in question was part of a commercial development, by representing that utilities would be provided (particularly in light of the testimony of Fleishhacker that he disclosed to Morgan the express intent to switch to natural gas in the manufacturing process), by further representing that light industrial manufacturing was going to be developed to the East of the subject property, which was at a lower elevation than the subject property, and by providing the Plaintiffs with a copy of Restrictive Covenants that would apply to the property. All of these representations entitled the Plaintiffs to rely on Morgan's expertise as the developer of a commercial subdivision. In essence, the Plaintiffs were not purchasing raw property, but a parcel in an upscale commercial subdivision adjacent to a high end residential subdivision.

As a consequence, the Plaintiffs had every right to rely on the representations that natural gas would be provided to the site, the site was suitable for the construction of their manufacturing facility, and was not in a flood plain.

During the initial meetings which took place in the Spring of 2001, the Plaintiffs further communicated their intent to develop climate controlled storage facilities on the East side of the subject property (4:231:14-18). The jury believed the testimony of Les Ellis and Walter Fleishhacker in this regard, finding that they did, in fact, communicate their desire to utilize natural gas in the manufacturing process, as well as their intent to construct not only the manufacturing facilities but climate controlled storage facilities.

The Plaintiffs did not retain the services of an independent engineer or surveyor, but relied on the survey plat provided to them by Tommy Morgan, the developer (4:231:24; 4:232:26 – 4:233:4). For the same reason, the Plaintiff's builder, Southland Construction, Inc., was entitled to rely on the fact that the subject property was part of a commercial development, never imagining that a developer with the expertise and experience of Tommy Morgan would develop a commercial and light industrial subdivision within a flood plain (5:302; 5:344).

As the construction neared completion, the Plaintiffs and Gerald Warfield, the principal of Southland Construction, Inc., repeatedly asked about the provision of natural gas to the facility (5:305). It was not until construction was almost complete that it was finally disclosed that natural gas lines were not going to be extended past the residential subdivision (5:378:15-22). As shown at trial, the ultimate reason for the natural gas company's decision not to extend the lines past the residential subdivision was Tommy Morgan's decision to postpone indefinitely the commercial development (4:211).

In or about December, 2002, as the manufacturing facilities neared final completion, Walter Fleishhacker began making inquiries relative to permanent financing for the building. It was at this point that his banker informed him that a flood certificate would be required for permanent financing and when Fleishhacker asked the engineer who had worked with Tommy Morgan in developing the property for such a certificate, he was advised that the property was in a flood zone. Both David Moore, the engineer, and Tommy Morgan claimed that they had no knowledge that the property was in the flood plain prior to December of 2002.[1]

[1] Counsel for the Appellant makes much of the trial court's comment at Page 523 of the Record that no one "knew about it until December of '02". The implication is that the trial court was finding, as a matter of fact, that no one knew about the property being within the flood plain. That is simply a misrepresentation of the context in which the trial court's statement was made. That context was in connection with consideration of a

As a consequence of the misrepresentations made by Tommy Morgan, Walter Fleishhacker and Green-Save found themselves in possession of 2.14 acres that was the site of a building that would not qualify for permanent financing and was unmarketable, and of 2.14 acres that could not be developed further and was not going to appreciate in value as an investment. The benefit of the bargain lost to the Plaintiffs was the entire piece of property including not only the manufacturing facility that had been constructed thereon but, because of the construction of the manufacturing facilities, the Plaintiffs were stuck with the entire 2.14 acres that was now unmarketable and which could not be the subject of any further development, construction or improvements such as the planned storage buildings.

As will be addressed more fully below, this presented a unique set of circumstances in connection with determining and quantifying the damages that were clearly sustained by the Plaintiffs. The return of the purchase price paid to Tommy Morgan would certainly not make the Plaintiffs whole. In this appeal, Tommy Morgan contends that he should be permitted to pay $325,000.00 and take possession of the property. That contention is ludicrous, and Tommy Morgan can not possibly believe that this Court would allow such an unjust result to occur in the face of overwhelming fraud.

If his argument were to prevail, then the Plaintiffs would have to cease production, close their business, find a suitable site and construct new manufacturing facilities, and absorb the costs attendant to the interruption of their manufacturing business and the relocation of their manufacturing processes all at a cost far in excess of $325,000.00. In addition, the Plaintiffs would receive no compensation whatsoever for the loss of what should have been an

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jury instruction pertaining to contributory negligence not being available as a defense to a claim of fraud. The trial court's comments related to lack of knowledge by the Plaintiffs and their builder – that the building was not constructed sufficiently out of the flood plain to qualify for permanent financing. It is simply incorrect to state that the trial court found that the Defendant did not know the subject property was in the flood plain until December of 2002.

asset which should have appreciated and a business opportunity involving the development of the climate controlled storage buildings. Even setting aside the latter considerations, the Plaintiffs, having prevailed against the Defendant in establishing fraud, would incur further damage and loss as a consequence. The Defendant, on the other hand, as a real estate broker and developer, would likely be in a position to immediately rent the vacated premises or possibly sell the property which, even if he were to sell it as a substantial loss, would permit him to escape from the consequences of his wrong doing virtually unscathed. While the concepts of justice and common sense do not always coincide with any measure of exactitude, such a result would simply be untenable.

The Appellant argues that returning the property to him was agreeable to the Plaintiffs at trial (4:250-251). Again, as with much of the Appellant's arguments, this is simply not an accurate representation of what the Plaintiffs stated at trial. What the Plaintiffs did suggest, within the constraints of the evidentiary rulings of the trial court on the subject of damages, is found in the proffered jury instruction P-20A. That proffered instruction, which was refused, was that the property would be conveyed to the Appellant in the event that the jury awarded damages consisting of:

1. The reasonable value of replacement property not located in a flood plain and which had natural gas available to it;

2. The reasonable cost of building a facility on the replacement property;

3. The reasonable costs of moving the equipment, office furnishing, and other property to the new location;

4. Lost profits from the proposed storage building business; and

5. The loss of appreciation of the property.

(2:143).

Instead of the proffered jury instruction, the Court gave its own instruction C-9 (2:126) which instructed the jury to award damages as would be necessary to place the Plaintiffs in the economic position they would have enjoyed had they received the property as represented. It is apparent that the jury struggled with this issue in the same manner that counsel for the parties and the Court struggled with the issue, ultimately sending a question to the Court that asked the Court what would happen if the jury awarded $374,000.00 for purposes of relocating the business.

In response to the Court's inquiry of counsel upon receipt of the jury's question, counsel for the Plaintiffs responded that the correct response was to give the jury that instruction which had been previously proffered: Plaintiffs' Proposed Instruction P-20A. As has been stated heretofore, the damages for those elements set forth in proffered instruction P-20A would have far exceeded $374,000.00 (indeed would have exceeded $425,000), but that instruction was simply not given.

The Court's response to the jury's question was that, in the event the jury returned a verdict as indicated in the note, an appropriate order concerning the property would be entered. (2:138)

Within minutes thereafter, the jury returned from further consideration with their verdict of $325,000.00, not $374,000.00. While it may be reasonable to assume that the jury was considering the possibility of awarding $374,000.00 under circumstances which the Court might order the property to be conveyed to Tommy Morgan, is just as reasonable to assume that they were considering an award of $374,000.00 with the Plaintiffs to retain possession of and title to the property.

It is unreasonable, however, to believe that the jury would have reduced their specific figure of $374,000.00 to $325,000.00 with the view in mind that the property would be conveyed to Tommy Morgan upon payment of that reduced amount. To do so, one would have to assume that the jury, having determined that the defendant had committed fraud, decided to punish the plaintiffs. The only reasonable conclusion that can be made is that the jury determined that the property would be retained by the Plaintiffs, and adjusted the amount of the verdict that they were considering by an amount they considered to be appropriate – in this case $49,000.

Given the proof of the damages actually sustained by the Plaintiffs as a result of Tommy Morgan's fraud in this case, the jury's verdict can not be said to be unreasonable, and the judgment of the Court in that regard should be affirmed.

SUMMARY OF THE ARGUMENT

The Appellant seeks to set aside the jury's verdict on the issue of liability by claiming that there is insufficient evidence to support a finding of fraud. However, an attack on the sufficiency of the evidence supporting the verdict in this case must fail unless the Appellant can demonstrate that, as a matter of law, the jury's verdict fails to support liability. In the instant case, the jury had available to it evidence which, while circumstantial, was undisputed relative to the Appellant's access to appraisals going back as far as 1998, from which he would have known, as an experienced real estate developer, that the property in question was located in a flood plain. The jury also had available to it evidence that the Appellant's engineer did know that the property was in a flood plain, and that the Appellant himself had given instructions to his engineer as to the location of the lot in question some time prior to September of the year 2000, at least six months prior to first meeting with the Plaintiff's.

Such circumstantial evidence, standing alone, would support a finding that the Plaintiff knew the property was in a flood plain prior to his meetings with the Plaintiffs. In addition, however, the Plaintiff was impeached with his deposition testimony at trial in which he stated that either prior to or following the initial meeting in 2001, he learned from his engineer, David Moore, that the property was in a flood plain. At trial, the Appellant attempted to equate his deposition testimony with his position at trial that he did not learn of the property being in a flood plain until December of 2002, some fifteen months following his initial meeting with the Plaintiffs.

Combined with the Appellant's blatant attempt to manufacture evidence during the course of the trial, in effect attempting to perpetrate a fraud on the Court, the jury was more than justified in concluding that the circumstantial evidence was clear and convincing relative to the Appellant's knowledge of the flood plain.

With regard to misrepresentations relative to the provision of natural gas, the jury simply chose to believe the testimony of Les Ellis and Walter Fleishhacker rather than that of Tommy Morgan. Resolution by the jury of such factual disputes should rarely, if ever, be disturbed on appeal.

With regard to the issue of the Appellant's duty to the Plaintiffs, particularly with regard to remaining silent regarding his knowledge of the location of the subject property in a flood plain, it should be noted that he was more than a mere seller, but was the developer of a purported commercial subdivision, that he made specific representations with regard to the proposed character of the surrounding area, including the development of light industrial facilities to the East, at a lower elevation than the subject property, and provided the Plaintiffs with Restrictive Covenants and a sufficient common interest in the property that the Appellant

exercised a degree of control over the manner in which the Plaintiffs' building was ultimately situated on the subject property.

Because the evidence supports a finding of liability, the only remaining claim by the Appellant on appeal would relate to damages. In this regard, the Appellant seeks in this appeal to either obtain a new trial on remand, or a reduction or modification of the judgment. As will be demonstrated more particularly below, granting the reduction or modification suggested by the Appellant would result in aggravating the loss already sustained by the Plaintiffs to such an extent so as to constitute a true miscarriage of justice. Because the award in favor of the Plaintiffs can arguably be shown to fail in making them whole, the Appellant's contention that they have been awarded a double recovery is simply without merit.

Finally, on cross appeal, the Plaintiffs' urge that the fraud committed by the Appellant, exacerbated by his attempted fraud on the Court in the midst of the trial in this cause, warranted submission of the case to the jury on the issue of punitive damages. Because the nature of the Appellant's fraud also justifies an award of attorney's fees, it is respectfully submitted that, if the case is to be remanded to the Circuit Court, it should be for the sole purpose of consideration of punitive damages and an award of attorney's fees.

ARGUMENT

Standard of Review

The Plaintiff appeals from a denial of his Motion for Judgment Notwithstanding the Verdict, and also appeals the Trial Court's denial of his Alternative Motion for a New Trial or for Remittitur.

A Motion for Judgment Notwithstanding the Verdict tests the legal sufficiency of the evidence supporting the verdict, not the weight or credibility of the evidence. *Tharp v. Bunge*

Corp., 641 So.2d 20, 23 (Miss. 1994). Such a Motion asks the Court to hold, as a matter of law, that the verdict may not stand. *Goodwin v. Derryberry Co.* 553 So.2d 40, 42 (Miss. 1989); *Stubblefield v. JESCO, Inc.*, 464 So.2d 47, 54 (Miss. 1984). When considering a Motion for Judgment Notwithstanding the Verdict, the Trial Court must consider all of the evidence – not just the evidence which supports the non-movant's case – in the light most favorable to the party opposed to the Motion. *White v. Yellow Freight System, Inc.*, 905 So.2d 506, 510 (Miss. 2004). Accordingly, the evidence is to be construed in the light most favorable to Walter Fleishhacker and Green-Save, giving them the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Janssen Pharmaceutica, Inc. v. Bailey,* 878 So. 2d 31, 54 (¶105) (Miss. 2004).

As will be shown more particularly below, the jury was correctly instructed on the issue of fraud and on the burden of clear and convincing evidence necessary to establish fraud, and the record discloses evidence which supports the jury's finding that Tommy Morgan in fact committed fraud.

With regard to the Motion for New Trial, the Trial Court will not be reversed absent a showing of abuse of discretion. *JESCO, Inc., v. Whitehead,* 451 So.2d 706, 714 (Miss. 1984). As will be discussed more particularly below, the Trial Court did not abuse it's discretion in denying a new trial because the jury's verdict was supported by the evidence and there has been no showing that the judgment in this case is a miscarriage of justice.

Finally, the standard of review relative to granting a remittitur is also one involving an "abuse of discretion" threshold. *Entergy Mississippi, Inc., v. Bolden,* 854 So.2d 1051, 1058 (¶20) (Miss. 2003). There is no basis for a holding that the Trial Court abused its discretion in denying the Motion for Remittitur.

I. The Evidence Established That Tommy Morgan Committed A Fraud.

The elements of fraud are as follows:

> "(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."

Hobbs Auto, Inc., v. Dorsey, 914 So.2d 148, 153 (¶18) (Miss. 2005).

The elements of intentional misrepresentation are identical to the elements of fraud. *Southeastern Medical Supply v. Boyles, Moak & Brickell Ins.,* 822 So.2d 323, 331 (¶29) (Miss. Ct. App. 2002).

The evidence establishes that Tommy Morgan fraudulently concealed knowledge that the property in question was in a flood plain.

It is true that Tommy Morgan did not affirmatively state to either Walter Fleishhacker or Les Ellis that the subject property was not in a flood plain. He did, however, affirmatively state that the lot which he was showing to them was a part of South Ridge Commons, a commercial subdivision that he was developing adjacent to The Summit, a residential subdivision that he was also developing. He affirmatively stated that commercial and retail businesses would be the subject of lot sales to the West of the Green-Save lot (which was in the direction of higher elevations) and that lots to the East of Green-Save would be developed for light industrial business purposes (the property to the East of the Green-Save lot being at a lower elevation). Tommy Morgan knew that the property was in a flood zone at the time he made those statements, and he had an affirmative duty to disclose that information to the Plaintiffs. *Mabus v. St. James Episcopal Church,* 884 So.2d 747, 762 (¶32) (Miss. 2004);

Guastella v. Wardell, 198 So.2d 227, 230 (Miss. 1967); and *Davidson v. Rogers,* 431 So.2d 483, 485 (Miss. 1983).

The evidence is undisputed that Tommy Morgan represented that the property in question was part of a commercial subdivision being developed by him and that the property to the East of the Green-Save lot was going to be developed for light industrial purposes. No further affirmative act on his part was required with regard to an allegation of fraudulent concealment. *Id.*

Tommy Morgan also provided Les Ellis and Walter Fleishhacker with a copy of the Restrictive Covenants which would apply to the commercial subdivision prior to the agreement by Green-Save to purchase the property in question. In doing so, Tommy Morgan, as the developer of the commercial subdivision, was retaining a degree of interest and control over the future development and use of the property. As the developer, he had an interest as expressed in the Restrictive Covenants as to the character of the commercial subdivision. As purchasers and future occupants of the property, Green-Save and Walter Fleishhacker had a common interest with Tommy Morgan in the establishment and enforcement of those Restrictive Covenants.

As purchasers and future occupants of the property, Green-Save and Walter Fleishhacker had a right to repose trust in the developer of the subdivision relative to their common interest in the nature and character of the subdivision. Les Ellis testified that, prior to finalizing their decision to purchase the property, he disclosed to Tommy Morgan the nature of the proposed manufacturing facilities and the fact that the company employed heavy presses, because he wanted to be sure that the proposed use of the property would fit in with Tommy Morgan's vision of the commercial subdivision development. Walter Fleishhacker

also testified that Tommy Morgan had a say in the siting and landscaping of Green-Save's facility (4:248). The evidence disclosed that, when questions arose about the provision of natural gas, copies of the survey plat, questions pertaining to contour drawings, Green-Save repeatedly turned to Tommy Morgan, who did not refuse to deal with these issues, but referred them to his engineer, David Moore, or to his partner, Morgan Whitfield, for answers to the questions. Tommy Morgan knew, as the developer, that the Plaintiffs were looking to him in this regard. In short, the evidence is more than clear and convincing that a confidential relationship was established between the Plaintiffs and the Defendant in this case. *Memphis Hardwood Flooring Co. v. Daniel,* 771 So.2d 924, 931 (¶21) (Miss. 2000). In addition to Tommy Morgan's liability for fraud, he would therefore also be liable for breach of the fiduciary duty arising out of that confidential relationship. *Id.*

In both scenarios, the Plaintiffs are required to demonstrate that Tommy Morgan had knowledge that the property was in a flood plain. This knowledge can be established by either direct evidence, or by circumstantial evidence.

Tommy Morgan contends on appeal that there was no evidence that he had knowledge that the property was in a flood plain prior to December of 2002, when Walter Fleishhacker first learned of the flood plain problem. According to Tommy Morgan's argument on appeal, the only evidence which would suffice to demonstrate his knowledge beyond the realm of speculation would be a frank admission on his part or a witness who could come and testify that Tommy Morgan was affirmatively told that the property was in a flood plain. As this Court is aware, such direct evidence of fraud is rarely available.

The circumstantial evidence, however, is compelling in this case.

First, when Tommy Morgan testified as an adverse witness in the Plaintiffs' case, he was questioned about his deposition testimony in which he stated:

> "I learned [about the flood plain] a little prior to - - I don't know if it was prior to the contract, our agreeing to sell the lot, but I was informed by David - - by Moore Engineering who did the engineering on The Summit, and they informed me part of that was. And it was the same bottom [as South Ridge Commons]."

(2:136, Lines 14-19.)

Now, the testimony of the Plaintiffs (and Tommy Morgan up until the third day of the trial) was that they reached a verbal agreement relative to purchasing the property in the Spring of 2001.

The survey plat of the property ultimately purchased by Green-Save, was prepared, according to the plat, in March of 2000. Even assuming that this plat was incorrectly dated, David Moore faxed a copy in September of 2000. (See, Exhibits 8 & 44, 4:163:8-28). In his cross examination testimony on the third day of trial, Morgan was again asked about his deposition testimony, at Page 10 of his deposition, wherein he testified that he believed that Fleishhacker was correct that the conversations regarding the sale occurred in the Spring of 2001 with a handshake, with the property being closed the following year (6:517:1-6).

So, Morgan initially testified in his deposition that he learned that part of the property was in a flood plain "prior to", but he's not certain that it was prior to the agreement, but that he learned of it from his engineer who was doing the engineering on The Summit, which adjoined South Ridge Commons and shared the same bottom land. At the time of his deposition, in other words, Tommy Morgan wasn't certain whether he learned of the flood plain prior to his agreement with Walter Fleishhacker in 2001 or subsequent to this agreement with Walter Fleishhacker. It would require a stretch of the imagination to the breaking point

for a jury to believe – given this testimony – that Tommy Morgan didn't learn of the flood plain until some year and a half after the agreement in 2001.

Second, the Plaintiffs' assert that two appraisals available to Tommy Morgan that both stated that approximately twenty percent of the property that he bought in 1998 from Arthur Cenac was in a flood plain. Morgan bought the property from Arthur Cenac in April, 1998 for $540,000.00. (3:82:11-28). The total cost of acquiring the property equated to a purchase price of approximately $1,700.00 per acre. (3:107:6-12). That same month, the property was appraised for BancorpSouth by Mike Guyton as being worth $7,500.00 per acre. (3:109, Exhibit 3). It would certainly not be unreasonable to conclude from this evidence that Tommy Morgan would have been aware, as a developer with more than thirty-five years experience, that he had purchased property for $1,700.00 per acre that, even before it was developed, was being valued at $7,500.00 per acre. What would be unreasonable would be to assume that Tommy Morgan was *not* aware of that appraisal.

The same could be said about the appraisal prepared by Mike Guyton for Farmers and Merchants Bank in August of 2001.

Third, as the developer of both The Summit and South Ridge Commons, Tommy Morgan was involved in the layout of the streets and lots in the subdivision (see, David Moore's testimony at 4:202 and 203). He testified that he had knowledge, as a developer with thirty years experience regarding the Mississippi Department of Environmental Quality and that agency's requirement that street manholes and sewer layout be submitted for approval. He testified that "my engineer" would have done that, referring to David Moore of Moore Engineering (3:130).

David Moore testified that the manholes were submitted by DEQ in April, 2002, necessitating that the work with regard to establishing flood plain levels in regard to the manholes would have necessarily been accomplished before that date (4:157; 4:203). It is the Plaintiffs' position that David Moore's knowledge, as Tommy Morgan's engineer, would be imputed to Tommy Morgan. *Lane v. Oustalet,* 873 So.2d 92, 96-97 (¶15-¶17) (Miss. 2004); and *First Baptist Church of Corinth v. McElroy,* 78 So.2d 138 (Miss. 1955). The Trial Court disagreed, and did not allow the jury to consider imputing Mr. Moore's knowledge to Tommy Morgan. Be that as it may, Tommy Morgan himself testified that he was the one who decided where the lots would be (3:78:17 – 3:79:8). He didn't just make a lucky guess that the residential lots and streets in The Summit were not in a flood plain. Again, it would require conjecture and speculation beyond that which would be reasonable to assume that Tommy Morgan would not be aware of the boundaries of the flood plain when he was engaged in the process of laying out the streets and lots. More importantly, the jury was not speculating with regard to this information being available to Tommy Morgan prior to the sale of the Green-Save lot. It was available, and such circumstantial evidence can be considered by the jury in determining whether or not Tommy Morgan was telling the truth when testified that he did not learn of the existence of the flood plain until December of 2002.

Even more unbelievable was Tommy Morgan's blatant attempt to manufacture evidence on the third day of trial. Throughout the course of the litigation, all of the parties appeared to be in agreement on at least some basic facts concerning the case, which included the fact that Tommy Morgan met with Walter Fleishhacker in March or April of 2001, and had a second meeting with Walter Fleishhacker and Les Ellis a few days later, both meeting having occurred at the site of the subject property. A "handshake" deal was struck with

regard to the purchase of the property consisting of 2.14 acres for a purchase price of $32,000.00, and the sale of the property was closed in April, 2002, approximately one year later. Tommy Morgan testified to essentially these same facts when called as an adverse witness on the first day of trial (3:115:9-13). However, after David Moore had testified concerning the fact that he worked on the layout, survey and platting of the Green-Save lot during the year 2000, which would have been prior to the first meeting between Morgan and Fleishhacker in the Spring of 2001, it was difficult for Tommy Morgan to deny, particularly in the face of his prior deposition testimony, that he must have learned from David Moore about the flood plain prior to the agreement he reached with Walter Fleishhacker in 2001.

It is respectfully submitted that it was no mere coincidence, therefore, that on the third day of trial, Tommy Morgan revealed that he had "discovered" for the first time hand written entries on a year 2000 calendar that the initial meeting with Walter Fleishhacker took place in March of that year, which would have meant that at the time of the handshake agreement David Moore had not yet completed his initial plat sketch of the Green-Save lot. [2] Aside from Tommy Morgan's "discovery" of this calendar in the midst of trial, a discovery that added a year between the initial meeting and the closing of the sale, being patently unbelievable in and of itself, his attempt to revise the timeline ran head on into the incontrovertible evidence of Morgan's own partner in the development, Morgan Whitfield. Tommy Morgan had previously testified that when he and Walter Fleishhacker drove to the site of the Green-Save lot, the road or street leading to that lot had already been partially constructed (3:106). The sewer data sheets prepared by Morgan Whitfield, and introduced as

[2] In fact, there was still some question that the plat may have been completed as early as March 10, 2000. David Moore's testimony in this regard was less than certain, but the fax line on Exhibit 44, where Moore sent the plat to Tommy Morgan, indicating a date of September, 2000, demonstrated beyond doubt that the 2.14 acres had been platted prior to the year 2001.

Exhibit P-7, revealed that the road could not have possibly existed, even in partially constructed form, earlier than March of 2001, which just happened to be the time that Walter Fleishhacker recalled meeting with Tommy Morgan. Morgan's calendar evidence was thereby revealed to the jury and the Trial Court to be a blatant attempt to perpetrate a fraud on the Court. There is simply no other way to view the undisputed hard evidence to the contrary[3].

In a trial that centered on the credibility of Tommy Morgan's denial that he had never looked at appraisals to him, that he had never discussed with "his" engineer the flood plain, and that he had never considered the flood plain when laying out the lots and streets in the adjoining residential subdivision, it was Tommy Morgan who ultimately destroyed that credibility beyond any hope of repair.

The destruction of his credibility doubtless affected the jury's determination with regard to the other misrepresentation claimed by the Plaintiffs, to wit: the provision of natural gas to the site.

In this instance, the misrepresentation was of a more affirmative character. Walter Fleishhacker testified that he discussed natural gas with Tommy Morgan and his desire and that of Green-Save to switch from electricity to natural gas for the manufacturing process. Tommy Morgan denied this, but the jury chose not to believe him, as evidenced by the jury's verdict.

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[3] There is additional reason to doubt Tommy Morgan's sworn testimony regarding the "discovery" of his calendar. He testified on the third day of trial that he only "discovered" his calendar and learned that the first meeting occurred in 2000 the evening *following* the second day of trial (6:515:24-26). Yet on the second day of trial, his counsel suggested to both David Moore (4:191:10-15) and Walter Fleishhacker (4:270:4-11) that the initial meeting between Fleishhacker and Tommy Morgan occurred in 2000, not in 2001. Morgan's counsel also appeared to question the recollection of Les Ellis that the first meeting occurred in 2001 (5:386:15 – 5:387:5). Tommy Morgan had no explanation for why the year 2000 suddenly became so important even *before* he "discovered" his calendar later that night. (6:515:27 – 6:516:12).

It is likely that the jury also considered the credibility of Tommy Morgan's position that the phrase "utilities" did not include natural gas. Tommy Morgan had to adopt this rather unique position with regard to categorizing natural gas as being excluded from the term "utilities", because he had testified that he did tell the Plaintiffs that all utilities would be available in South Ridge Commons (3:102). His claim that the term "utilities" did not include natural gas was further complicated by the Restrictive Covenants (Exhibit 15) which provided on Page 2, in Section 7, the statements "utilities, such as telephone, *gas,* water, storm and sanitary shall be underground." (emphasis added).

Contrary to the Appellant's argument, the Plaintiffs have never asserted that the Restrictive Covenants, in Section 7, constituted a promise or warranty that gas would be present or available. The Plaintiffs' position in that regard was that Tommy Morgan had promised that "all utilities" would be provided in the commercial subdivision. The only reason for citing the Restrictive Covenants in this regard was to demonstrate that Tommy Morgan's contention that "all utilities" did not include "gas" was contrary to his own references in the Restrictive Covenants (4:265:3 – 4:266:3). Obviously, the jury chose not credit Morgan's testimony that Walter Fleishhacker had not mentioned natural gas, or his testimony that the phrase "all utilities" did not include gas.

Morgan's other argument relative to natural gas is that he did not have control over the provision or supply of natural gas to the subdivision because that was in the sole power of the natural gas provider. However, as John Wilson, the representative of the gas company, testified, the decision whether or not to extend the gas line beyond the residential subdivision into South Ridge Commons was based upon whether or not South Ridge Commons was going to be developed by Tommy Morgan. That decision, whether to develop South Ridge

Commons or postpone that development, was in the sole discretion of Tommy Morgan. When he met with Les Ellis and Walter Fleishhacker and, according to his own testimony, indicated that commercial and retail development was going to take place to the West and light industrial development to the East, Tommy Morgan failed to mention: (a) that he did not intend to develop those commercial, retail and light industrial establishments for years, and (b) that natural gas wasn't likely to be provided until he did.

The availability of natural gas, for both economic and safety concerns, was material to Green-Save and Walter Fleishhacker's decision to purchase the subject property (4:226). Yet natural gas is not available and is not likely to be available for the foreseeable future. This fact was affirmatively concealed from them by Tommy Morgan.

The omission or concealment of material facts constitutes a misrepresentation, just as can a positive, direct assertion. *Davidson v. Rogers,* 431 So.2d 483, 485 (Miss. 1983).

Fraud consists of anything which is calculated to deceive, whether it is a single act or a combination of circumstances, or acts or words which amount to a suppression of the truth or merely silence or other artifice by which a person is deceived. *Salter v. Aviation Salvage Co.,* 91 So. 340, 342 (Miss. 1922). It is no defense, despite the contention of Morgan, that the truth concerning the existence of the flood plain or the availability of natural gas could have been ascertained even by an examination of public records. *Guastella v. Wardell,* supra, at 230. See, also, 23 Am. Jur. Fraud and Deceit Section 163.

Because there was ample evidence by which a jury could determine that Tommy Morgan lied about the availability of natural gas and knew that the subject property was in a flood plain and failed to disclose it to the Plaintiffs, the Trial Court properly refused to grant the Appellant's Motion for Judgment Notwithstanding the Verdict.

The only other ground advanced by the Appellant in support of his contention that the verdict was against the overwhelming weight of the evidence involves the question of damages. The Trial Court was correct in stating that this case presented an unusual set of facts and circumstances to deal with in the conventional framework of a case of fraud. This was because the Plaintiffs had, in reliance on Tommy Morgan as the developer, proceeded to construct and building on the property that he had developed, that this engineer had surveyed and platted, and on a site for which Tommy Morgan's engineer had supplied contour elevations. In *Browder v. Williams,* 765 So.2d 1281, 1286 (¶27) (Miss. 2000), the Court set forth four different measures of recovery with regard to fraud in a property sale: (1) "benefit of the bargain", (2) "reasonable cost of repair", (3) "out of pocket recovery", and (4) "the flexible or equitable rule, which adopts one or the other of the two foregoing rules as is best adapted to the particular case". See, also, *Wall v. Swilley,* 562 So.2d 1252, 1257 (Miss. 1990), and *Hurt v. Sheryl,* 195 Miss. 688, 699, 15 So.2d 426, 429 (1943). See, also, *Estell v. Myers,* 54 Miss. 174, (1876).

In this case, the Plaintiffs' advocated that the fourth measure of recovery, being the flexible or equitable rule, was the one to adopt. In making that argument, the Plaintiffs were not calling for recision of the sale, in suggesting the return of the property, but were asserting that the only way to make the Plaintiffs whole was to award them the cost of relocating to a piece of property that could be developed, that had available to it natural gas, that was not in a flood plain, and that would be marketable, and in addition to award to lost potential of the proposed storage buildings.

Tommy Morgan contends that the Court should apply the measures set forth in *Browder* in such a manner as to defeat the fundamental aim of any measure of damages: to

make the Plaintiffs whole. Morgan argues that all that would be required to make the Plaintiffs whole, would be to award approximately $30,000.00, which was the estimated cost of flood insurance. The problem with this argument is that it does not make the Plaintiffs whole. No amount of flood insurance is going to make natural gas available to the subject property. More importantly, the acquisition of flood insurance would not make the property marketable nor would it address any problem other than insuring the manufacturing facility so as to obtain financing for the building. It would do absolutely nothing with regard to the use of the remaining 2.14 acres which constitutes at least seventy percent of the property purchased by Green-Save.

The manufacturing facility was constructed on the western portion of the property. Walter Fleishhacker and Les Ellis testified that the reason for purchasing 2.14 acres, which was more than was required for the manufacturing facility, was because they intended to construct climate controlled storage buildings along the eastern side of the property. In order to utilize the eastern side of the property for climate controlled storage buildings or any other purpose (including leasing the property to some other business) would require that the property be elevated through the addition of fill dirt to a level out of the flood plain. The problem with doing this would be that the Plaintiffs' would thereby create a dyke that would inevitably flood the building, which would then be at a lower elevation than all of the surrounding area. Accordingly, the purchase of flood insurance does not cure the problem.

The only other solution, short of abandoning the property, which would make the Plaintiffs whole, would be to raise the entire building so that it was out of the flood plain and the rest of the property could then be filled so that it was also out of the flood plain. To do this would involve not only unbolting the building from the concrete foundation, but the

complete removal and reconstruction of the floating foundations for the presses used in the manufacturing process, and then pouring additional concrete on top of the remaining concrete slab, removing and repositioning the presses themselves, and then reconnecting the building to the foundation. It does not take an expert witness to realize that raising the building alone would require an amount of money far in excess of that awarded by the jury in this case. And that is to say nothing of the cost of reconfiguring the landscaping, adding fill dirt so that the rest of the 2.14 acres could be used, including the cost of raising the parking lot area. It simply is not practical to adopt this means of curing the problem created by Tommy Morgan's fraud.

The only remaining way to make the Plaintiffs whole is that which was suggested by the Plaintiffs at trial, but only partially allowed by the Trial Court. The Plaintiffs could be made whole if they were awarded sufficient money damages to acquire another piece of property, together with the costs of business interruption incurred in moving the manufacturing business, the cost of the actual physical move of the manufacturing equipment and office furnishings, the construction of a new building on the site which was out of the flood plain and had available to it natural gas, and some compensation for the loss of the investment potential of the property as represented by Tommy Morgan to the Plaintiffs.[4] The Court permitted the current value of some of those elements, but restricted the Plaintiffs to putting on evidence of the cost of construction of the building in 2002. In so ruling, the Trial Court ignored the fact that the cost of construction has risen dramatically in Mississippi, as in other jurisdictions, during the past several years since 2002.

[4] An investment potential that, due to the location of the site near the up-scale residential subdivision and the proposed commercial, retail and light industrial development, made it ideal for adding climate controlled storage facilities.

The estimated cost of recreating the manufacturing facility in January, 2006, alone exceeded $340,000.00, exclusive of landscaping, relocation costs, and the acquisition costs of new property. All together, these costs would have exceeded $425,000.00, an amount which would probably be even greater now.

It was under those circumstances that the Plaintiffs' were willing to abandon their current location. The Trial Court, however, refused to grant proffered instruction P-20A which would have permitted consideration of all of those factors by the jury, and instead instructed the jury in general terms on the subject of damages.

After some consideration, the jury sent a note inquiring as to what would happen if they awarded $374,000.00, the entire amount which had been suggested to them in closing arguments on behalf of the Plaintiffs. Specifically, the jury wanted to know what would happen to the lot and building that was currently being occupied by the Plaintiffs. The response delivered by the Court to that question was, in essence, for the jury to award such damages as they deemed appropriate, and the Court would then enter an order as might be required.

Within thirty minutes the jury returned their verdict for $325,000.00, obviously deducting an amount which they either calculated as being the present value of the Green-Save lot, or their estimate of acquiring a new lot elsewhere. Regardless, it is apparent that the jury concluded that their award would not take into account a return of the property to Tommy Morgan.[5]

[5] If this were a simple case, the difference in value between a lot and building in the flood plain with no natural gas available versus a lot where natural gas was available and the entire property was not within the flood plain would be the measure of damages. However, as testified by Janis Holley, an expert appraiser, there is simply no way to obtain data which would permit that difference in value to be calculated.

In summary, the jury obviously came as close as any reasonable person could come to making a calculation as to a sum that would compensate the Plaintiffs for the injuries sustained by them resulting from the fraudulent misrepresentations of the Appellant, thereby making them whole. Their verdict in this regard is not against the overwhelming weight of the evidence, nor does it result in a double recovery for the Plaintiffs, and the Trial Court was correct in denying the Motion for Judgment Notwithstanding the Verdict.

II. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For New Trial.

A Motion for new trial simply challenges the weight of the evidence. The lower Court's denial of a Motion for New Trial will only be reversed upon a finding that the Trial Court abused its discretion. *Janssen Pharmaceutica, Inc., v. Bailey,* 878 So. 2d 31, 54 (¶105) (Miss. 2004). The Appellate Court "will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice". *Id.*

As demonstrated above, the jury's verdict, both with regard to liability and damages, is supported by credible evidence and legal precedent.

The Appellant's argument that the jury was not properly instructed as to the law is without merit. Even to the extent that there may be some deficiency in a particular instruction of law, the instructions, when considered as a whole, properly instructed the jury as to the issues of liability and damages. Only if the instructions in their entirety fail to adequately instruct the jury, should the Trial Court's judgment be reversed. *Richardson v. Norfolk Southern Railway Co.,* 923 So. 2d 1002, 1010 (¶19) (Miss. 2006); *Burr v. Mississippi Baptist Medical Center,* 909 So.2d 721, 726 (¶12) (Miss. 2005); and *HWCC- Tunica, Inc., v. Jenkins,*

907 So.2d 941, 944 (¶7) (Miss. 2005). "Imperfections in particular instructions do not require reversal where all seen together fairly announce the primary rules applicable to the case." *Barrett v. Parker,* 757 So.2d 182, 187 (¶13) (Miss. 2000); See, also, *Flightline, Inc., v. Tanksley,* 608 So.2d 1149, 1157 (¶7) (Miss. 1992).

Because the Trial Court correctly concluded that no substantial injustice resulted from the jury's verdict, and because the jury was property instructed as to the law, a new trial should not be granted.

III. The Motion For Remittitur Or To Require Transfer Of The Property Was Properly Denied.

The decision to grant a remittitur is committed to the sound discretion of the Trial Court, and the Trial Court's decision will not be overturned except upon an abuse of discretion. *Entergy Mississippi, Inc., v. Hayes,* Supra. The Appellate Court's focus, in considering the Trial Court's ruling on the issue of remittitur, is on the Judge, not the jury. *McNair Transport, Inc., v. Crosby,* 375 So.2d 985, 986 (Miss. 1979). Unless a remittitur is required to avoid a clear miscarriage of justice, the Trial Court should not be reversed for denying a Motion requesting a remittitur. *Moody v. RPM Pizza, Inc.,* 659 So.2d 877, 881 (Miss. 1995).

The Trial Court is required to review the damage evidence at trial in the light most favorable to the party opposing a Motion for Remittitur. *Maddox v. Muirhead,* 738 So.2d 742, 743 (Miss. 1999) *Jack Gray Transport, Inc., v. Taylor,* 725 So.2d 898, 899 (Miss. 1998). Unless the jury's verdict shocks the conscience of the Court, it should not be altered as to amount. *Community Bank, Ellisville, Mississippi v. Courtney,* 884 So.2d 767, 776 (¶31) (Miss. 2004); *Andrew Jackson Life Insurance Company v. Williams,* 566 So.2d 1172 (Miss.

1990). Absent a specific finding that a jury verdict is so shocking that it must have been influenced by bias, prejudice or passion, or that it is against the overwhelming weight of the credible evidence it should not be altered. *State Highway Commission of Mississippi v. Warren,* 530 So.2d 704, 707 (Miss. 1988). The verdict in this case does not warrant such modification. See, *Odom v. Roberts,* 606 So2d 114 (Miss. 1992); *Stubblefield v. Walker,* 566 So.2d 709 (Miss. 1990). In viewing the request for remittitur or for transfer of the property in the light most favorable to Walter Fleishhacker and Green-Save, as required by precedent, the question should be asked whether the relief requested would itself result in a miscarriage of justice.

First, consider an order directing that the property be conveyed to Tommy Morgan upon payment of $325,000.00. The record reveals that Green-Save could not construct a comparable building for its manufacturing facilities for $325,000.00, much less acquire another piece of property, pay for the costs of moving, or the cost which would be attendant to the business interruption occasioned by the move. By requiring Green-Save to move would have the practical effect of compounding the damage already suffered by Green-Save and Walter Fleishhacker as a result of the fraud committed by Tommy Morgan. That would be a miscarriage of justice.

Similarly, a remittitur is not required in order to avoid a miscarriage of justice. The jury awarded $325,000.00. This amount is all the compensation that Walter Fleishhacker and Green-Save are ever going to receive in exchange for a building sited on a piece of property which has questionable if any market value, a piece of property which will not appreciate as originally represented, and a piece of property which can not be developed any further without flooding the property on which the building stands. Walter Fleishhacker and Green-

Save are stymied with regard to any further development or construction on the 2.14 acres that they bought, which exceeded their needs, and which they only bought because they intended to develop the rest of the property. If anything, $325,000.00 falls far short of making the Plaintiff's whole. And this does not even take into account that natural gas will not be available for years, if ever. To suggest that, for $325,000.00, the Plaintiffs are in the position of obtaining a double recovery in compensation for the fraud committed by Tommy Morgan is simply and absolutely without merit.

It may be that the jury's award of $325,000.00 does not represent a precise calculation of the damages to which Green-Save and Walter Fleishhacker are entitled - - indeed, reasonable jurors could differ as to whether the amount should be higher or lower. However, the amount awarded by the jury, $325,000.00, when considered in the context of the entire circumstances surrounding the fraud and the damage sustained by the Plaintiffs can not be said to be so unconscionable or such a miscarriage of justice as to require a remittitur or other alteration of the judgment.

Accordingly, it is respectfully submitted that this Court should affirm the Trial Court's denial of the Motion for Remittitur or, alternatively, the conveyance of the property to Tommy Morgan.

IV. The Trial Court Should Have Permitted Consideration Of Punitive Damages And Awarded Attorney's Fees.

The Plaintiffs have cross-appealed, submitting that the Trial Court did abuse its discretion in failing to permit consideration of punitive damages and in failing to award attorney's fees as requested in the Complaint and in post-trial Motions.

Punitive damages or exemplary damages are in legal contemplation synonymous terms. *Fowler Butane Gas Co. v. Varner*, 141 So. 2d 226, 233 (Miss. 1962). Punitive damages are

"added damages" and are in addition to the actual or compensatory damages due because of an injury or wrong. *Id.* The kind of wrongs to which punitive damages are applicable are those which, besides the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries but injuries inflicted in a spirit of wanton disregard for the rights of others. *Id.* In punitive or exemplary damages, the award is in the nature of a punishment for wrongdoing and an example, so that others may be deterred from the commission of such wrongs and the public be properly detected. *Id.* "Punitive damages are punishing damages, and are awarded to the injured party as a reward for public service in bringing the wrongdoer to account." *Id.*

Fraud is tortious conduct that will support an award of punitive damages. *Id.* It is generally articulated as an independent basis for a punitive award. *Id.* Punitive damages should be awarded when the fraud is unjustifiable and raises the action to a heightened tort. *Sovereign Camp, W.O.W v. Boykin*, 181 So. 741 (Miss. 1938); *State Farm Fire and Cas. Co. v. Simpson*, 477 So. 2d 242 (Miss. 1985); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1187-1188 (Miss. 1990). Further, the issue of punitive damages in fraud actions is governed by the common law and not the punitive damages statute. *American Funeral Assur. Co. v. Hubbs*, 700 So. 2d 283 (Miss. 1997).

A Plaintiff may be able to recover punitive or exemplary damages if he establishes to the satisfaction of the jury that the circumstances of the fraud were unjustifiably aggravating. *Bryan Const. Co., Inc. v. Thad Ryan Cadillac, Inc.*, 300 So. 2d 444 (Miss. 1974); *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454 (Miss. 1983).

In *Sessums v. Northtown Limousines, Inc.*, 664 So. 2d 164 (Miss. 1995), the buyer of a limousine with a turned-back odometer sued the seller, the original owner, and other parties in the chain of title. The original owner filed a cross-claim against seller for indemnification. *Id.* The Circuit Court confirmed jury's verdict of actual and punitive damages for buyer, and

indemnification for to the original owner. On appeal, the Supreme Court held that: (1) the evidence supported jury's verdict; (2) punitive damages were warranted; and (3) an award of attorney fees was warranted. *Id.* The Court went on to say, "it is apparent that the odometer on the limousine was rolled back...in a successful attempt to defraud future purchasers." *Id.* (emphasis added). "It is just this sort of callous and reckless disregard for the rights of others that our system of punitive damages is intended to punish." *Id.*

With regard to punitive damages, this case involves not only a finding of fraud on the part of the Defendant, but also a case in which that Defendant attempted to perpetrate a fraud on the Trial Court itself. In addition to those circumstances, the following aggravating factors which have been considered by this Court in other cases involving punitive damages were present in this case: oppression, tortious conduct, wanton disregard for the rights of others, unjustifiably aggravating circumstances, and punishable conduct.

While the role of gatekeeper on the issue of punitive damages is generally left to the sound discretion of the Trial Court, it is respectfully submitted that, in this case, the Trial Court erred by not allowing the jury to consider punitive damages.

In addition, it is respectfully submitted that to require the Plaintiffs to bear the costs of this protracted litigation, litigation that required four days to try, and a case in which fraud was proven by clear and convincing evidence, is to compound the injuries sustained by them. Additionally, where punitive damages are proper, attorney fees may be awarded. *Sessums v. Northtown Limousines, Inc.*, 664 So. 2d 164 (Miss. 1995). Attorney fees may be awarded in cases where punitive damages are justified. *Valley Forge Ins. Co. v. Strickland*, 620 So. 2d 535, 542 (Miss. 1993). In *Sessums*, the Mississippi Supreme Court affirmed an award of attorney fees in a fraud action. *Sessums v. Northtown Limousines, Inc.*, 664 So. 2d 164 (Miss. 1995).

Even if the Court does not reverse the case and remand it for a new trial on the issue of punitive damages alone, it is respectfully submitted that the lower Court should be directed to award the Plaintiffs' their reasonable costs of litigation and attorney's fees.

CONCLUSION

Tommy Morgan, between the date on which he reached his "handshake" agreement with Walter Fleishhacker and Green-Save, moved the boundary lines of the subject property by approximately fifty feet toward the East, or lower elevations. At the time that he did this, the jury has found that he knew that he was moving the Plaintiffs further into the flood plain.

At trial, Tommy Morgan attempted to move the date of his first meetings with Walter Fleishhacker and Les Ellis from 2001 to the previous year, 2000. He attempted to do this in order to provide an explanation for how he could not have known that the subject property was in a flood plain when, some six months prior to first meeting with the Plaintiffs in 2001, he had instructed his engineer relative to the location of the subject property and its perimeters at a time when his engineer testified that the flood was known to him.

Now, on appeal, Tommy Morgan attempts once more to move the boundaries of what would constitute an unconscionable injustice by arguing that he should be permitted to evict the Plaintiffs from their premises for far less than the cost of relocating them to property outside of the flood plain, having available to it natural gas.

Throughout his attempts to alter the playing field, he has displayed a complete disregard for the rights of others and for any notion or sense of decency and fair play. This

Court should not only summarily reject his appeal, but should remand this case for consideration of punitive damages and an award of attorney's fees.

Respectfully submitted, this the 2nd day of July, 2007.

Thomas A. Wicker

CERTIFICATE OF FILING AND SERVICE

I, the undersigned counsel of record for the Appellant, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing Brief of Appellant to the following by placing true and correct copies thereof in the sent via United States Mail, postage prepaid, addressed as follows:

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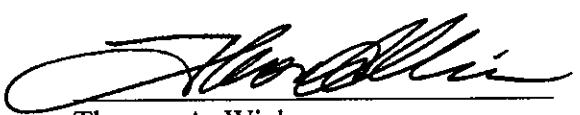
This the 2nd day of July, 2007.



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