

**SUPREME COURT OF MISSISSIPPI**

**NO. 2006-CA-01174**

**TOMMY MORGAN**

**APPELLANT/  
CROSS-APPELLEE**

**v.**

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

**APPELLEES/  
CROSS-APPELLANTS**

**APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI**

---

**REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS,  
GREEN-SAVE, INC., and WALTER J. FLEISHHACKER**

**ORAL ARGUMENT REQUESTED**

---

THOMAS A. WICKER (MSB: [REDACTED])  
HOLLAND, RAY, UPCHURCH & HILLEN, P.A.  
322 JEFFERSON STREET  
POST OFFICE DRAWER 409  
TUPELO, MS 39902-0409  
TELEPHONE: (662) 842-1721

*Attorney of Record for Appellees/Cross Appellants  
Green-Save, Inc., and Walter J. Fleishhacker*

## TABLE OF CONTENTS

|  |     |
|--|-----|
| TABLE OF CONTENTS .....                                    | II  |
| TABLE OF AUTHORITIES .....                                 | III |
| <u>STATEMENT REGARDING ORAL ARGUMENT</u> .....             | 1   |
| <u>ARGUMENT</u> .....                                      | 3   |
| THE ISSUE OF PUNITIVE DAMAGES WAS PROPERLY PRESERVED ..... | 3   |
| PUNITIVE DAMAGES IN THIS CASE WOULD BE JUSTIFIED .....     | 3   |
| ATTORNEY'S FEES .....                                      | 7   |
| <u>CONCLUSION</u> .....                                    | 8   |
| <u>CERTIFICATE OF FILING AND SERVICE</u> .....             | 9   |

## TABLE OF AUTHORITIES

### CASES

|  |      |
|--|------|
| <i>Bradfield v. Schwartz</i> , 936 So.2d 931 (Miss. 2006) .....  | 4    |
| <i>Mississippi Fire Insurance Company v. Dixon</i> , 98 So. 101, 133 Miss. 570 (1923) .....            | 4    |
| <i>Mitchell v. Mitchell</i> , 767 So.2d 1037 (Miss. App. 2000) .....                                   | 4    |
| <i>Sessem v. North Town Limosines, Inc.</i> , 664 So.2d 164 (Miss. 1995) .....                         | 4    |
| <i>Spence v. Spence</i> , 930 So.2d 415 (Miss. App. 2005) .....  | 4    |
| <i>United American Insurance Company v. Merrill</i> ,<br>_ So.2d _, 2007 WL 2493905 (Miss. 2007) ..... | 3, 4 |
| <i>Valley Forge Insurance Company v. Strickland</i> , 620 So.2d 535, 542 (Miss. 1993) .....            | 7    |

### STATUTES

|   |   |
|---|---|
| § 11-1-65 Mississippi Code of 1972 as Amended ..... | 4 |
|---|---|

**SUPREME COURT OF MISSISSIPPI**

**NO. 2006-CA-01174**

**TOMMY MORGAN**

**APPELLANT/  
CROSS-APPELLEE**

**v.**

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

**APPELLEES/  
CROSS-APPELLANTS**

**STATEMENT REGARDING ORAL ARGUMENT**

The Appellees/Cross-Appellants, Green-Save, Inc., and Walter J. Fleishhacker, submit that oral argument in this case may be of assistance to the Court. While the law with regard to fraud is fairly well settled, the facts in this case, as were determined by the jury, will be central to this Court's decision. The primary thrust of the *Appellant's* argument is that the jury got it wrong: that there was insufficient evidence for the jury to conclude that fraud occurred. Should the Court have questions with regard to the relationship of the parties and the proof with regard to the *Appellant's* knowledge, those questions can be answered in the context of oral arguments.

  
THOMAS A. WICKER

## **INTRODUCTION**

Under both statutory and case law, given the facts of this case as determined by the jury, the issue of punitive damages and attorney's fees should have been presented and the jury should have been allowed to return a verdict on those issues.

## **ARGUMENT**

### **The Issue Of Punitive Damages Was Properly Preserved**

The Cross-Appellants have moved to supplement the trial transcript in this matter so as to accurately reflect that the Cross-Appellants did request that the issue of punitive damages be submitted to the jury, and that that request was denied. The Cross-Appellee concedes that an instruction on punitive damages was tendered and that the question of punitive damages was argued in the post-trial motions. Indeed, the Cross-Appellee requested that this Court remand the case for further findings on the issue of the trial court's disposition of punitive damages. Accordingly, any procedural objection relative to punitive damages was waived by the Cross-Appellee's own conduct.

### **Punitive Damages In This Case Would Be Justified**

It is for the trial court to determine whether the issue of punitive damages should be submitted to the trier of fact. In reviewing whether or not punitive damages should be considered, this Court considers the elements of such a claim. *United American Insurance Company v. Merrill*, \_\_\_\_\_ So.2d \_\_\_\_\_, 2007 WL 2493905 (Miss. 2007). The factors to be considered by a jury in awarding punitive damages include the following:

- The Defendant's financial condition and net worth;
- Nature and reprehensibility of the Defendant's wrongdoing (for example, the impact of the Defendant's conduct on the Plaintiff or the relationship of the Defendant to the Plaintiff);
- The Defendant's awareness of the amount of harm being caused and his motivation in causing such harm;

- The duration of the Defendant's conduct and whether the Defendant attempted to conceal such misconduct; and
- The amount of damages necessary to punish the wrongdoer and deter similar misconduct in the future.

See, § 11-1-65 Mississippi Code of 1972 as Amended. See, also, *Sessem v. North Town Limosines, Inc.*, 664 So.2d 164 (Miss. 1995); *United American Insurance Company v. Merrill*, *Supra*; and *Bradfield v. Schwartz*, 936 So.2d 931 (Miss. 2006).

First, the trial court should have allowed the jury to consider the reprehensibility of the Defendant's wrongdoing. Although Tommy Morgan argues that the proof was insufficient to establish fraud, it is well settled that fraud may be proven using circumstantial evidence. *Mississippi Fire Insurance Company v. Dixon*, 98 So. 101, 133 Miss. 570 (1923); See, also, *Spence v. Spence*, 930 So.2d 415 (Miss. App. 2005); and *Mitchell v. Mitchell*, 767 So.2d 1037 (Miss. App. 2000).

It is not necessary to review *ad nauseum* the evidence supporting the jury's finding that Tommy Morgan committed fraud. Suffice it to say that the evidence was found by the jury to be clear and convincing. The questions presented in this Brief relates to the reprehensible nature of his conduct as found by the jury.

First, the evidence established clearly that Tommy Morgan is the pre-eminent real estate developer in Northeast Mississippi. This fact not only places him in a position to inflict similar harm on others, it imposes on him a heightened level of responsibility. His standing in his profession and his years of experience are such that a breach of those standards coupled with a misuse of that experience merit punishment.

In examining the nature and reprehensibility of the Defendant's wrongdoing, this Court should also allow a jury to consider the impact of his conduct on Green-Save and Walter Fleishhacker. If the Cross-Appellants had been made aware that the subject property was in a flood plain, they would have had several options available to them: they could have declined to purchase the property; they could have bargained for a lower purchase price; they could have chosen to import sufficient soil to raise the site above the flood plain. Because the information was not disclosed to them these options were foreclosed. As a consequence, they now have a building which is essentially unmarketable, and which can not be raised above the flood plain without incurring costs far exceeding the original cost of construction. Most significantly, however, the vast majority of the 2.14 acre site can not be developed because of the topography of the lot. To import soil sufficient to raise any other building site on the property above the flood plain would be to essentially construct a damn or dyke around the existing building, virtually guaranteeing that it would flood.

Another factor to consider in connection with the nature and reprehensibility of Tommy Morgan's wrongdoing is his relationship with Walter Fleishhacker and Green-Save. Walter Fleishhacker testified that he knew of Tommy Morgan's reputation, advised him of why he needed to purchase property and of the use to which he was going to put the property, and that Tommy Morgan is the person who selected the property in question based on those communications. Again, the evidence in this case is that Tommy Morgan has more than thirty years in the real estate and real estate development profession. The Cross-Appellants relied on this expertise and they were justified in doing so. Where a person takes unfair advantage of another based on superior knowledge and experience, punitive damages are warranted.



A second factor to be considered by a jury is the Defendant's awareness of the amount of harm being caused and the Defendant's motivation in causing such harm. In this case, Walter Fleishhacker testified that he told Tommy Morgan that he not only desired to place Green-Save's manufacturing facility on the site, but that he also desired to construct climate controlled storage facilities. At trial, Tommy Morgan denied any recollection of that particular conversation, although he did admit that he was in the storage building business himself. It is impossible to know what Tommy Morgan's intent was, but we do know that Walter Fleishhacker is not going to be able to construct storage buildings on this site and that he can't compete with the Cross-Appellee as a consequence.

A third factor to be considered is the duration of a Defendant's misconduct and whether the Defendant attempted to conceal such misconduct. In this case the jury should be allowed consider the fact that Tommy Morgan knew that this property was in a flood plain before he sold it to Walter Fleishhacker and Green-Save, during almost one year of construction by Green-Save (throughout the course of that year Green-Save, through Les Ellis and Walter Fleishhacker, repeatedly communicated with Tommy Morgan concerning the site, including the provision of natural gas to the site), and Tommy Morgan continuously throughout that period concealed his knowledge of the true character of the property.

While the Cross-Appellee seeks to down-play the significance of his attempt at trial to manufacture evidence, that conduct on the part of Tommy Morgan is representative of his dealings throughout this case. The Cross-Appellant devotes four pages of his Reply Brief in attempting to respond to this issue. The attempt is without merit. Throughout the course of this litigation all of the parties discussed a meeting at the site in March, 2001. Approximately one year later the parties closed on the sale. No one ever suggested that two years passed

between the initial handshake deal on the property and the closing until the second day of trial.

Significantly, on the first day of trial it was demonstrated beyond peradventure that the 2.14 acre lot in question had been laid out and finalized sometime prior to September of the year 2000. If the deal concerning this property was struck in 2001, therefore, the jury could reasonably conclude that Tommy Morgan, who was involved in laying out the lots, was aware by March of 2001 that the property was in a flood plain. If the conversation took place in March of that year, Tommy Morgan could argue that the lot had not yet been drawn out or platted. It is incredible to argue that Tommy Morgan suddenly discovered the existence of his calendar so as to push back by a year his initial meeting with Walter Fleishhacker when the central issue in this case was, "what did Tommy Morgan know and when did he know it?"

The reprehensibility of Tommy Morgan's wrongdoing, the impact of his conduct on the Plaintiffs in this case, his relationship with Walter Fleishhacker, his awareness of the amount of harm being caused, his motivation in causing such harm, the duration of his conduct and his attempts to conceal his misconduct are all factors which warrant submission of this issue to the jury for consideration of punitive damages.

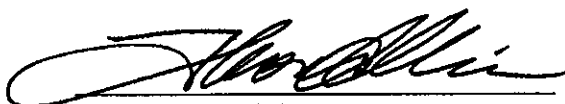
### **Attorney's Fees**

Because punitive damages are warranted in this case, the Cross-Appellants are entitled to the considerable attorney's fees and costs of litigation which they have incurred in bringing the Cross-Appellee to judgment. *Valley Forge Insurance Company v. Strickland*, 620 So.2d 535, 542 (Miss. 1993).

## CONCLUSION

This is a case in which the jury found that Tommy Morgan fraudulently represented that natural gas would be available to a site when he knew that it would not, and in which he fraudulently concealed that the site in question was located in a flood plain. Tommy Morgan has more than thirty years experience as the pre-eminent real estate developer and real estate broker in Northeast Mississippi. As a consequence of the misrepresentations in question, Walter Fleishhacker and Green-Save, Inc., have a building which is not marketable on a site which can not be developed for any further commercial use. To deter further wrongdoing and damage to others, this Court should reverse and remand the instant case for submission on the issue of punitive damages alone. By virtue of his status as the leading developer of real property in Northeast Mississippi, Tommy Morgan is in a position to inflict similar harm unless punishment is meted out by a jury sufficient to deter such conduct in the future. That is what a jury should be allowed to do in this case.

Respectfully submitted, this the 8<sup>th</sup> day of October, 2007.

A handwritten signature in black ink, appearing to read 'Thomas A. Wicker', written over a horizontal line.

Thomas A. Wicker

**CERTIFICATE OF 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:

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

Trial Court Judge

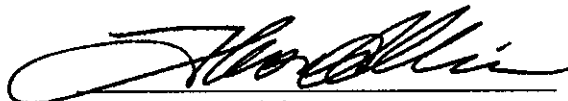
Betty Sephton  
Mississippi Supreme Court Clerk  
P.O. Box 249  
Jackson, Mississippi 39205

Fred L. Banks, Jr.  
Rebecca Hawkins  
PHELPS DUNBAR LLP  
P.O. Box 23066  
Jackson, Mississippi 39225-3066

William M. Beasley  
Rachel M. Pierce  
PHELPS DUNBAR LLP  
Post Office Box 1220  
Tupelo, Mississippi 38802-1220

Counsel for Appellees/Cross-Appellants

This the 8<sup>th</sup> day of October, 2007.



Thomas A. Wicker