IN THE 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

BRIEF OF APPELLANT TOMMY MORGAN

William M. Beasley (MB [redacted]
Rachel M. Pierce (MB #[redacted]
PHELPS DUNBAR LLP
Seventh Floor, One Mississippi Plaza
201 South Spring Street
Tupelo, Mississippi 38804
Post Office Box 1220
Tupelo, Mississippi 38802-1220
Telephone: (662) 842-7907

Fred L. Banks, Jr. (MB #[redacted]
Rebecca Hawkins (MB #[redacted]
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300

Attorneys for Appellant Tommy Morgan

CERTIFICATE OF INTERESTED PERSONS

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

1. 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, formerly of Soper & Dent, P.A., Tupelo, Mississippi, and now of 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 30th day of March, 2007.

REBECCA HAWKINS

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INTRODUCTION

Plaintiffs in this case sued the defendant Tommy Morgan claiming that Morgan committed fraud by not telling them that a portion of the undeveloped two acres of land they purchased from him for $32,100 was in a flood plain. Without checking flood plain information which was readily available, plaintiffs had a building constructed on the property which, as a net result of excavation and grading, was one inch lower than it should have been in order to avoid the purchase of flood insurance. Although the Circuit Court conceded that the evidence did not show that Morgan even knew the property was in the flood plain when he sold it, the Court allowed the jury to consider whether Morgan had committed fraud by failing to disclose that fact.

Throughout the trial, the plaintiffs, the plaintiffs' lawyer, and the Court represented that if the jury awarded an amount that would replace the property, that Morgan would get the property back. The jury even sent out a question to the judge asking him to confirm that this was true. Yet, after the jury awarded $325,000 in compensatory damages, the Court refused to order the return of the property. The result is a double recovery: the plaintiffs continue to own the land that they purchased and the building they constructed at a total cost of $274,100, and, in addition, now have a judgment for $325,000.

Because of these and other errors, Morgan has appealed the judgment entered against him to this Court.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court erred in refusing Morgan's motion for a judgment notwithstanding the verdict when plaintiffs failed to prove their fraud claims.

2. Alternatively, whether the Circuit Court should have granted a new trial because the verdict was against the substantial weight of the evidence, improper evidence was admitted, and the jury was improperly instructed on the issues.

3. Alternatively, whether the judgment should have been remitted to an amount consistent with Mississippi law on damages or otherwise amended so as to prevent the double recovery resulting from the jury's award.

STATEMENT OF THE CASE

I. Course of Proceedings.

A. Parties and claims.

Morgan, a real estate developer in the Tupelo area, was sued by plaintiffs Green-Save, Inc., and Walter Fleishhacker for fraud. 1:5-10, 1:67-71, 3:74. Fleishhacker is the owner of Green-Save, a corporation that manufactures repair tools for the golf industry. 4:221-22. Green-Save owns the land, purchased from Morgan, which is at issue in this case, but Fleishhacker owns the building that was constructed on the land. 5:377. Plaintiffs contended that Morgan at the time of purchase knowingly failed to disclose that the property was in a flood plain and falsely represented that natural gas would be available to the property. 1:6-8, 4:228-29, 4:232-37, 5:378. The case was submitted to the jury on claims of fraud and fraudulent misrepresentation.[1] 2:123-25, 2:128-29, 2:131-32, 6:531-39.

B. Discussions of Court and plaintiffs regarding return of property to Morgan.

Throughout the trial, over defendants' objections, 4:252-53, R.E. 4, 5:306-31, 5:382-83, 5:415-16, 6:577, the plaintiffs asserted that the jury should award them the costs it would take to purchase another lot, build a new building, and move their business, and that they would then give back the land and the building that they had built to Morgan. In their opening statement, plaintiffs' counsel told the jury that plaintiffs wanted the jury to tell Morgan, "Have your

[1] The jury was also instructed on how to find whether a confidential relationship existed between Morgan and the plaintiffs. 2:133, 6:539. However, none of the other instructions made any reference to such a relationship so there was no guidance to the jury as to the significance of such a finding if it were made. Notably, nowhere in the complaint is there any allegation of a fiduciary or confidential relationship. 1:5-10, 1:70-71. It was not until trial that plaintiffs suddenly announced that they were pursuing such a claim. 5:318. Defendants objected because such a claim had not been pled. 5:322.

building back,[2] have your property back. Make [plaintiffs] whole by letting [them] get property that's out of the flood plain and building [their] building and going on with [their] lives." 3:65 (emphasis deleted). Fleishhacker testified that he wanted "a piece of property out of a flood plain that I can put a building on that is exactly the same as the building I have presently ... [a]nd then I will give Mr. Morgan back his piece of property." 4:251, R.E. 4.

When defense counsel argued that rescission had not been pled and was not a proper remedy in this lawsuit, and that Fleishhacker was asking "to actually be made better off than he would have been had" he not entered into the sale, the Circuit Court stated, "That won't happen," and overruled Morgan's objection to Fleishhacker's testimony. 4:252-53, R.E. 4. Plaintiffs' counsel subsequently asked Fleishhacker, "So as I understand it, you are saying that you don't want that property, Mr. Morgan can have that property and the building on it, and you want the same building on property elsewhere?" and Fleishhacker said, "Yes, sir." 4:253, R.E. 4. *See also* 4:285 ("I don't want any money. I want Mr. Morgan to put up a building. If he can replace it exactly the way it is for $200,000, fine. If he can replace it and it costs him more than that, that's fine too. I just want it replaced.").

When Morgan objected to a witness testifying as to the costs to rebuild the building on another lot, a discussion of damages ensued. The Court referred to a case where the plaintiff asked for rescission and for "everybody [to be] put back in their place," 5:308, after which the following exchange between the Court and plaintiffs' counsel occurred:

> [Court:] I'm not certain that's the posture we're in here; though I heard Mr. Fleishhacker testify that that would be his desire. That's what he would like to do about this thing. This was at the bench and counsel for the defendant stated that it would in effect be a windfall for Mr. Fleishhacker, and I assured him that wasn't going to happen. *I don't think he can recover damages here in the nature of what you're attempting to prove and retain the property.*
>
> MR. WICKER [plaintiffs' counsel]: *Correct.*

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[2] As discussed below, the building was never Morgan's, because it was built by Fleishhacker after Green-Save purchased the property from Morgan.

THE COURT: One or the other.

5:308 (emphasis added).

When arguing the issue of damages the next day, plaintiffs' counsel again referred to returning the property if plaintiff was awarded the money to relocate: "...[M]ake these people whole by putting them someplace else. And this Court, as a matter of equity, can then say, You're not going to keep a double recovery by retaining the property you have." 5:321. *See also* 5:323-24 (plaintiffs' counsel argues that "it would not make them whole to give them the cost of replicating their building from a 2003 standpoint when they're going to have to do it in 2006, especially if this court is going to return this property to Mr. Morgan, who in all likelihood may find a buyer for it").

Plaintiffs thereafter submitted a jury instruction, rejected by the Court in favor of another damages instruction, which listed the elements to be considered for awarding moving costs which included the statement, "The Court further instructs the jury that if you award such damages, the Plaintiffs will be ordered to convey the subject property and building to the Defendant." 2:143.

In their closing argument to the jury, plaintiffs sought damages in the amount to move their facility to another location. 6:551-52. After discussing various figures, plaintiffs' counsel stated, "That would [be what] it would cost to move. That probably has a value. Let Tommy Morgan sell it, and he can have it. Give Mr. Fleishhacker what it would take to move." 6:552.

During jury deliberations, the jury sent a note to the Court stating, "If damages of $374,000.00 to relocate were awarded, does the property lot and building of Green-Save go back to Morgan?" 2:166. In discussing the situation with counsel for the parties, the Court stated as follows:

> THE COURT: I have received from the jury, who is outside the courtroom considering a verdict in this case, a note which I have had the court reporter mark as Court's 1. I have provided each of you a copy of this. And

while I am – the answer is obviously yes. However, I'm not certain that's the proper response to the jury.

6:583.

After a discussion with counsel for the parties as to an appropriate response to the jury's question, the Court again indicated its intent that if the plaintiffs were awarded relocation damages, the property and building would need to be deeded to Morgan.

> THE COURT: Well, and as I indicated early on, in the event of something like this, that's exactly what would happen. It would be resolved. As a matter of fact, if this was the verdict of the jury, on payment of that amount of money I would not disperse it. I would have it paid to the court. I wouldn't disburse it until such time as it would be a closing circumstance where a deed would be delivered and the money released.

6:584.

The Court then issued another instruction to the jury which stated in part, "In the event the Jury returns a verdict as indicated in your note, the Court would enter an appropriate order concerning the property which is the subject of this cause." 2:138, 6:586.

C. The verdict, judgment, and post-trial proceedings.

The jury ultimately returned a verdict against Morgan in the amount of $325,000.00, and a final judgment was entered in accordance with that verdict. 2:159, 2:161, R.E. 2. Morgan then moved for a judgment notwithstanding the verdict, or alternatively a new trial, and also requested that the judgment be amended by either reducing the amount of the judgment or having the plaintiffs convey the subject property to Morgan as the Court and plaintiffs had stated they would do to avoid an unjust enrichment to the plaintiffs. 2:162-68.[3] In their response, plaintiffs suddenly argued against returning the property because the jury had awarded $325,000 instead of

[3] The copy of this motion included in the appeal record at pages 162-168 is missing the third page. A true and correct copy of the full motion, stamped "filed" by the Circuit Clerk, was attached as Exhibit B to the Motion for Remand to Circuit Court filed herein on January 30, 2007, and its contents are not contested by appellees. Should any dispute arise as to Morgan's description of the motion herein, Morgan will move to supplement the record to include this one additional page.

the $374,000 referenced in the jury's note and requested in plaintiffs' closing. 2:169-75; *see also* 2:166, 6:551-52. Plaintiffs also filed a Motion for Additur and Attorney's Fees in which they requested punitive damages and attorneys' fees. 2:176-79. The Circuit Court entered an order denying Morgan's motion and stating the judgment was to remain in effect, 2:202, R.E. 3, and Morgan filed his Notice of Appeal. 2:303-04. Plaintiffs thereafter cross-appealed. 2:210-11.

II. Statement of the Facts.

A. Morgan's purchase and development of property.

In 1998, Tommy Morgan purchased over 300 acres of undeveloped land in Lee County, Mississippi. 3:82, Ex. P-1. The property consisted of rolling hills and undeveloped farm land with a mixture of topography. 3:86, 6:458-59, Ex. 3 at pg. 8 of 11. The seller made no mention of any portion of the property being in a flood plain. 6:493.

To finance the purchase of the property, Morgan borrowed funds from BancorpSouth. 3:83, 3:85. A condition of the loan was an independent appraisal by a bank approved appraiser. Mike Guyton appraised the property for the bank and turned his report over to the bank. 3:86, 3:90, Ex. P-3. At page 6 of the report, in the Site Description, there is a notation that "[a]pproximately 20% of the property lies in the F.E.M.M.A. flood map area." Ex. P-3. There is no explanation as to what portion of the 300 acres might be in the flood plain. *Id.* Morgan testified that he did not receive a copy of the appraisal, and Guyton testified that he gave the report to the bank and never discussed the flood plain information with Morgan. 3:86-87, 3:90, 5:436-40. There is no evidence that Morgan saw this report or that the information regarding the flood plain was relayed to him.

Morgan began developing the property. A residential subdivision called The Summit was planned on about 140 acres, with a commercial area referred to as South Ridge Commons on the remainder. 3:84-85, 3:92-93. The development necessitated additional financing which Morgan obtained from Farmers and Merchants Bank. 3:85. Another appraisal report was

prepared by Guyton. 3:439-40, Ex. P-6. Guyton updated his earlier report, and this report also contains a reference that "approximately 20% is in the flood plain area." Ex. P-6 at pg. 8 of 17.

However, the testimony of Morgan, Guyton, and John Haynes, president of Farmers and Merchants Bank, was that Morgan was not given a copy of this appraisal report, nor was he told that any part of the property was in the flood zone. 3:86-87, 3:90, 5:436-40, 5:447-50, 6:451. Indeed, Haynes admitted that he himself had been unaware of the flood plain notation. 6:451. However, he considered it to be inconsequential since the land was undeveloped. 5:450. Development and construction is common in flood plain designated areas of Lee County, as evidenced by testimony that the mall and hospital are both constructed in a flood plain. 6:474-75, 6:477-78, 6:508. Flood plain property can be filled or, if necessary, flood insurance can be purchased. 4:198-99, 5:364-65, 6:475, 6:477.

B. Sale of lot to Green-Save.

Although Morgan and Fleishhacker had played golf a couple of times, 3:98, 4:233, they had never transacted any business nor were they associated in any way. 4:233. Fleishhacker was looking for a location where he could construct a building for his manufacturing business. 4:224. Having seen a sign referencing South Ridge Commons, he contacted Morgan. 5:371. At that time, there were no streets or other development. 4:225, 4:227. Morgan had sold only one piece of property in the commercial area. 3:94, 6:491. Morgan showed Fleishhacker an adjacent lot which consisted of approximately 2 acres. 3:94, 4:163, 4:226, 4:230. Fleishhacker and Morgan agreed on a price of $32,100.00 ($15,000/acre x 2.14 acres) for the property and "shook hands and had a deal." 3:110-11, 4:230, 5:388. No written contract was entered, and no earnest money was paid. 4:262-63. There was no discussion about whether the property was in a flood plain. 4:229.

There was a dispute in the testimony as to whether Fleishhacker mentioned to Morgan that he was wanting to convert Green-Save's operations over to natural gas instead of electricity.

Morgan said he did not, but Fleishhacker and the manager of Green-Save, Les Ellis, testified that Fleishhacker did mention this. 3:117, 4:226, 4:228, 5:372-73, 6:485-86. Regardless, the gas company ultimately decided not to run a line to the area and Green-Save continued to operate with electricity which, due to an increase in gas prices, was actually more cost efficient. 4:214, 4:268, 5:394.

Morgan and Green-Save closed on the property in April, 2002, one or two years after the the handshake agreement.[4] 4:234, 5:333-34, Ex. P-19. Green-Save did not borrow any money to pay for the property. 4:234. In late summer of that year, Fleishhacker began construction. 4:234. Gerald Warfield was hired to build the building. 4:235, 5:301. Neither Warfield nor Fleishhacker made any effort to ascertain the relevant flood plain elevations. 4:270, 5:342-47, 5:350, 5:395-96. The property was partially situated on the side of a sloping hill. 5:304, 5:343. Fleishhacker told Warfield exactly where he wanted to locate the building. 5:302-04. Warfield graded the property to situate the building as instructed, cutting down a portion of the knoll upon which the building was constructed. 5:343, 6:463. No one checked on the flood plain during this excavation and grading. 5:347-48, 5:350.

C. Plaintiff Fleishhacker learns of flood plain.

In November, 2002, Fleishhacker first contacted a bank to obtain financing for the ongoing construction. 4:234. In early December, he was told by the bank that the property was in a flood zone and that the bank could not finance the construction without his purchasing flood insurance at an annual cost of $2500. 4:234, 4:291-93.[5] He immediately contacted Morgan.

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[4] It is uncertain whether a year or two passed from the time of the initial agreement due to a dispute as to whether the initial meeting occurred in the spring of 2000 or 2001. 4:227, 4:270, 5:374, 6:482.

[5] Fleishhacker testified that he would have paid approximately $30,000 over the life of the loan for flood insurance, but that he felt this would have been "a very silly expenditure." 4:294.

4:234. Morgan testified that this was the first time that he had any knowledge of this property being in a flood zone. 3:92-93, 6:493-94.

David Moore, an engineer, was then asked to prepare a flood certificate for the property. 4:181-82, Ex. P-46. He was the same engineer who had designed Morgan's development and was generally familiar with the property. 4:157. Moore testified that he had no knowledge that the property purchased by Green-Save was situated in a flood plain until after he completed the certification. 4:193. Moore testified that it was the responsibility of the person siting the building to obtain information regarding elevations and flood plains. 4:194-95. He noted that flood insurance was not required even if you build in a flood plain as long as the floor of the structure is at least one foot above the designated flood plain elevation. 4:198. He found that the plaintiff's building constructed by Warfield was eleven inches above the flood plain, one inch short of the requirement. 4:198. The building could easily have been constructed one inch higher had Warfield not cut down the knoll where the building was sited, and insurance would not even have been required. 6:463. Moreover, FEMA might have issued a slight map revision or amendment to accommodate for the small disparity, 4:198-99, but Fleishhacker did not pursue this option.[6] 4:295, 4:238. Moore's office manager testified that their office routinely fills out the necessary forms to request such action from FEMA, and that "[i]t's generally not a large problem," and is "generally done." 5:426, 5:432.

D. Plaintiffs' evidence regarding damages.

Damages in cases such as this should be based on the difference in value between the property as sold and the property as represented. *See* Section II.B, *infra*. The lot was purchased

[6] Fleishhacker placed one phone call to FEMA and was told that property three or four feet below the flood plain elevation would not "have had a chance to come out on an exception." 4:238, 4:295. In discussing property a few feet below the flood plain, Fleishhacker was presumably referring to that part of his property that did not contain the Green-Save facility. Apparently that portion of the property is at a lower grade, but could have been filled in so as to raise it above the one-foot above the flood plain elevation. 6:464-65.

for $32,100.00. 3:110-11, 4:230, 5:388, Ex. P-18. There was no proof as to the actual value of the lot.

Plaintiffs' expert, Janice Holley, testified that she was unable to testify as to what the value of the property was. Although she could state that the property had some value, she had no evidence, or criteria, upon which to base an opinion as to how much that value would be. 5:360-61. Ms. Holley also testified that if the property were "raised up enough so that it was one foot above the base level elevation, that the property probably would have been worth the price that was paid for it."[7] 5:362-63. She agreed that if the building were above the flood plain, it would have more value, 5:364, and agreed that the cost of flood insurance over the life of the loan ($30,000) would be a figure used to diminish the value of the property as a penalty for its being in a flood plain. 5:364. *See also* 5:366-67 (agrees to general statement that if someone has a new building and is operating their business normally, the cost of the building is not depreciated other than by the additional cost of the flood insurance).

Plaintiffs, over the objection of defendants, introduced into evidence the costs to buy another lot and build another building. Warfield "guestimated" that the total cost to build the Green-Save facility was around $242,000. 5:331. In closing, plaintiffs presented their requested costs as follows: $59,000 to purchase another lot they had located,[8] $269,000 to build another building,[9] another $24,000 for landscaping costs, $5000 for floor coverings, and $6000 for

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[7] In her written report, Holley had stated that she could not determine the value because the building was below the flood plain. 5:363. On redirect, she stated that her opinion would change if the building were up above the flood plain itself but not up to the foot that is required by FEMA. 5:367.

[8] *See* 4:250.

[9] This was based on a figure of $249,000 as being paid to Warfield for the first building, plus another $20,000 that Warfield had not charged back to plaintiffs. 6:550-51, R.E. 4. However, the evidence regarding these figures was very sketchy or non-existent. Warfield had prepared an estimate as to what it would cost to rebuild around the time of trial. Ex. 39(ID). As to how that estimate was prepared, Warfield testified that he had gone to his job cost ledger for building the original building in 2002, a copy of which is included in Ex. 39(ID), and, for each item, had added six percent per year except *(continued on next page)*

lights,[10] $8500 to move Green-Save's equipment, and another $2500 to move the office equipment,[11] for a total of $374,000.00. 6:550-52, R.E. 4.

SUMMARY OF THE ARGUMENT

Judgment notwithstanding the verdict should have been entered in Morgan's favor. There was no evidence that Morgan knew that the property that he sold the plaintiffs was in a flood plain. The plaintiffs must rely on impermissible inferences and unproven assumptions that

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for 2005, for which he added either ten or twelve percent, "because stuff just about doubled last year." 5:306. Page 3 of that exhibit, part of the job cost ledger referenced, shows a typed total of $190,537.39, and a handwritten note of "cost 200,446."

After the court limited Warfield's testimony to 2002 costs, 5:329-30, R.E. 4, plaintiffs' counsel inquired as to whether Warfield had calculated "what the amount of the actual cost was for the building in the time it was completed in late 2002, early 2003," and Warfield stated that he had "[a] guestimate." 5:331. Instead of either of the figures listed on page 3 of Ex. 39(ID), he stated that "[i]t was about 240, 242,000, somewhere in there." *Id.* There is then some confusing testimony as to whether this amount included the costs Fleishhacker had spent on the landscaping, light fixtures, and ceramic tile and carpet, over and above Warfield's contracting costs. Warfield first testified that, no, "[t]hose figures aren't in that figure [he] just gave us," 5:332. However, he was then asked, "And the figure that you just gave us in the budget that you did, did you get figures, once again, just as you did back then in that budget, did that include the figure for the floor coverings and tile and lights and landscaping that you obtained from the folks who paid that, which will be Walter [Fleishhacker] and Green-Save?" *Id.* At which point, Warfield stated, "Yes, sir. They gave me those figure [*sic*] to add into mine." *Id.* He then repeated the amount of $242,000. *Id.* For some reason, plaintiffs' counsel began referring to this amount as $249,000. *See* 5:353 (on redirect, asks Warfield, "You said that the 249,000 was your best guestimate [*sic*], but that's based on your recollection of actual figures that Mr. Fleishhacker paid; is that not right?").

The $20,000 figure came from Warfield's testimony that $249,000 was what Fleishhacker had paid under the contract, but that it had actually cost about $20,000 more to complete as a result of having to do some things over due to mistakes having been made by Warfield. 5:353-54. When Morgan objected to this figure, plaintiffs' counsel argued that it should be included as actual cost, and the Court overruled Morgan's objection. 6:551, R.E. 4. But presumably Warfield would not make the same mistakes in building the building a second time. In other words, it was not that he had underestimated the costs by this amount in entering into the original contract, but that his company "had to do several things over" because "[i]t was our mistakes." 5:354. This amount should not have been included in plaintiffs' damages.

[10] These figures for landscaping, floor coverings, and lights, were based on Les Ellis's testimony that these amounts had been paid separately from the amount paid to Warfield for construction of the building. 5:377-78. However, as noted in the preceding footnote, it would appear that these figures were already included in the $242,000 "guestimate" given by Warfield as total costs for the building and should not have been allowed to be added again to a damages total.

[11] The moving expenses were based on Exhibits P-36 and P-37.

are directly contradicted by the evidence and are insufficient to meet the clear and convincing evidence standard applicable to this fraud case. Nor did plaintiffs prove any damages resulting from the alleged fraud regarding the availability of natural gas to the property. Moreover, plaintiffs failed to prove an affirmative act of concealment, a necessary component in a fraud case based on a defendant's failure to disclose information. Because plaintiffs failed to prove their claim of fraud, judgment in Morgan's favor should have been entered.

Alternatively, a new trial should be ordered. Because the verdict was against the substantial weight of the evidence, a new trial is proper. In addition, jury confusion resulted from the improper admission of evidence related to the costs for Green-Save to relocate. Moreover, the jury was improperly instructed that they could hold Morgan liable for fraudulent concealment merely because of his silence. The jury was also instructed on how to determine whether a confidential relationship existed between the parties when there was no proof of such a relationship. These erroneous instructions provided a confusing backdrop for an inflammatory jury argument. All of these errors support the granting of a new trial.

Alternatively, the judgment should be amended. Plaintiffs did not put on any evidence of the value of the property. The only evidence of damages having any bearing under Mississippi case law was that of the cost of flood insurance, $30,000, and the judgment should be remitted to that amount. The Circuit Court also erroneously allowed the plaintiffs to prove the cost of purchasing and constructing a new building with the explicit understanding that if this measure of damages was awarded, the property would be returned to Morgan to prevent a double recovery. Yet the plaintiffs and the Court refused to include this requirement in the judgment entered. Should the amount of the judgment not be remitted, the judgment should be amended to require the plaintiffs to return the property to Morgan upon payment of the judgment.

ARGUMENT

I. Based on the evidence presented in this case, Morgan was entitled to a judgment in his favor as a matter of law.

Standard of review. In considering an appeal from the denial of a motion for judgment notwithstanding the verdict, the Court is to "consider the evidence in light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence." *Coho Resources, Inc. v. Chapman*, 913 So.2d 899, 904 (Miss. 2005) (quoting *Coho Resources, Inc. v. McCarthy*, 829 So.2d 1, 8 (Miss. 2002)). "[I]f there is substantial evidence in support of the verdict, that is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required." *Id.* But testimony as to a mere possibility, as opposed to probability, is not substantial evidence upon which a verdict can be based and a judgment upheld. *White v. Yellow Freight System, Inc.*, 905 So.2d 506, 512 (Miss. 2004); *Equitable Life Assur. Soc. of United States v. Mitchell*, 201 Miss. 696, 720, 29 So.2d 88, 93 (1947); *Mutual Ben. Health & Accid. Ass'n v. Johnson*, 186 So. 297, 298 (Miss. 1939). This is especially true where, as in this case, the plaintiffs' burden was to prove their case by clear and convincing evidence. If the facts viewed in appellee's favor, however, "point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict," then this Court is "required to reverse and render." *Coho Resources*, 913 So.2d at 904.

A. Plaintiffs failed to prove by clear and convincing evidence that Morgan knew the land was in a flood plain.

Mississippi law on fraud requires clear and convincing proof of each of the following elements:

> (1) a representation, (2) its falsity, (3) its materiality, (4) *the speaker's knowledge of its falsity* or ignorance of its truth, (5) his intent that it should be acted upon 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.

Ezell v. Robbins, 533 So.2d 457, 461 (Miss. 1988) (quoting *Franklin v. Lovitt Equip. Co., Inc.*, 420 So.2d 1370, 1373 (Miss. 1982)) (emphasis added).

Of course, in this case, there is no allegation that any express representation was made regarding whether the property was or was not within the flood plain. Rather, the allegation is that Morgan fraudulently failed to disclose such information. Under Mississippi law, "in order for there to be liability for nondisclosure, silence must relate to a material fact or matter *known to the party* and as to which it is his legal duty to communicate to the other contracting party." *Mabus v. St. James Episcopal Church*, 884 So.2d 747, 762 (Miss. 2004) (emphasis added). Because plaintiffs failed to prove that Morgan knew the property was in a flood plain when he sold the lot to Green-Save, their fraud claims should never have been submitted to the jury.[12]

Stated simply, a seller is under no duty to disclose that which he does not know. *See generally* 37 AM.JUR.2D *Fraud and Deceit* § 212 (2001) ("seller has no duty to disclose facts the seller does not know"); *id.* at § 218 ("general rule is that when latent defects, or hidden conditions not discoverable on a reasonable examination of the property, exist *of which the seller has knowledge*, the seller is bound to disclose such latent defects or conditions to the buyer"; "[i]t is only where a defect in a property is peculiarly *within the knowledge of the vendor*, and it is not likely to be discovered by a reasonably prudent purchaser, that the duty to disclose will be imposed") (emphasis added).

In this case, there was simply no evidence that Morgan knew that any of the lot sold to Green-Save was in the flood zone. Plaintiffs' argument to the jury on this issue was based on

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[12] Knowledge is also required when the duty to disclose is based on an alleged confidential or fiduciary relationship. *See, e.g., Memphis Hardwood Flooring Co. v. Daniel*, 771 So.2d 924, 931 (Miss. 2000) ("it is the duty of a person in whom confidence is reposed by virtue of the situation of trust arising out of a confidential or fiduciary relationship to make a full disclosure of any and all material facts *within his knowledge* relating to a contemplated transaction with the other party to such a relationship") (quoting 37 AM.JUR.2D *Fraud & Deceit* § 149 (1968)) (emphasis added).

nothing more than speculation.[13] The Circuit Court itself, in discussions regarding jury instructions after the close of all the evidence, summarized the evidence as follows:

> **THE COURT:** . . . . The testimony is *nobody knew about it until December of '02* at which time a certificate was required for financing, as I recall, at which time Mr. Whatever-His-Name-Is, the surveyor, the engineer reported to the plaintiffs in the case that he lacked a tenth of an inch from being outside the or above the flood plain. And *no one knew about it. According to the testimony of both sides, nobody knew about it.*

6:523, R.E. 4 (emphasis added).

Plaintiffs indeed acknowledge this[14] but argue that Morgan must have known because (i) the appraisals for Morgan's loans reflected that a portion of the overall 300 acres owned by Morgan was in the flood plain, and (ii) the engineer working on the streets and sewer systems, David Moore, knew that part of the overall property was in a flood zone.[15] Neither inference proves that Morgan knew that the two acres in issue was in the flood plain, and certainly neither theory rises to the level of clear and convincing proof as required to prove Morgan committed fraud. *See Ezell*, 533 So.2d at 461 (fraud requires proof "by clear and convincing evidence").

Plaintiffs' arguments are based on assumptions—they assume Morgan saw the appraisals and they assume that Moore relayed his knowledge to Morgan—that are in direct contrast with

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[13] For example, plaintiffs' counsel speculated that Morgan would have asked to see the appraisals because plaintiffs' counsel did when he purchased his home because he wanted to know what his property was worth. 6:544.

Plaintiffs' counsel also argued that Morgan himself had looked at the flood plain information when drawing out the streets in the residential and commercial areas, 6:542-43, but there was no evidence as to that. As noted even by counsel in closing, Morgan would draw out where he wanted streets to be and would then turn it over to the engineer to get it finalized. *Id.* There was no evidence that Morgan participated in details such as sewer elevations.

[14] Fleishhacker admitted he had no direct evidence that Morgan knew the property was in a flood plain, and that he did not "have any statements from anybody stating that Tommy Morgan knew." 4:278. It was simply his position that Morgan "could have known," but admitted that this did not mean that Morgan had actual knowledge of this information. *Id.*

[15] This was based in part on the fact that he needed elevations to design the sewer system for the residential area. 4:157-60; 4:169-71. There is no evidence that any of the sewer elevations were located in the vicinity of plaintiffs' property.

the actual evidence. In *Madden v. Rhodes*, 626 So.2d 608, 622 (Miss. 1993), the Court stated that "[a]ssumptions fall far short of the clear and convincing evidence required." *See also id.* at 624 ("evidentiary standard required is clear and convincing evidence–not suppositions and assumptions"; "[i]nstead of relying on clear and convincing evidence, to find in Madden's favor on this point, the chancellor would have had to rely on insinuations, speculations, and assumptions"); *Dean v. Kavanaugh*, 920 So.2d 528, 536 (Miss. App. 2006) (same).[16]

As in *Madden* and *Dean*, plaintiffs here speculate and assume that Morgan must have seen the appraisals, 6:544, but all *evidence* was to the contrary. 3:86-87, 3:90, 5:436-40, 5:447-50, 6:451. David Moore, the engineer, testified that he never relayed any flood plain information to Morgan. 4:170, 4:193-94, 4:206. Moore stated that he never discussed the construction process with Morgan. 4:170. Indeed, because buildings can be built on property in a flood plain, 4:199, 6:464, 6:477, and because it is generally the contractor preparing the site for construction that would check for such information, 4:195, 6:463, Moore might not have found the information to be significant at that point. He testified that had Green-Save requested him to do the site plan for the construction, he would have made a determination as to whether the property was in a flood plain at that time. 4:194-96. In fact, the evidence showed that Moore himself, while aware that some portion of the overall 300 acres had been designated as flood plain areas, was not aware that any of plaintiffs' two acres was within the flood plain until he prepared the flood certificate in December 2002 after plaintiffs had received this information from the bank. 4:193.

Simply put, the plaintiffs failed to prove by clear and convincing evidence that Morgan knew that the property was in a flood plain. Accordingly, the jury should never have been

[16] In both *Madden* and *Dean*, it was argued that individuals must have known the consequences of their actions in opening a joint account with rights of survivorship because they had experience with ownership with rights of survivorship in the past. But the Court held that this did not prove knowledge by clear and convincing evidence.

allowed to consider whether Morgan committed fraud in failing to disclose information of which he was unaware, and the Circuit Court erred in overruling Morgan's motion for a judgment notwithstanding the verdict on this issue.

B. Plaintiffs failed to prove damages as to any alleged misrepresentation regarding the availability of natural gas.

Plaintiffs also alleged that Morgan committed fraud by falsely representing that natural gas would be supplied to the property. Even assuming solely for the purpose of argument that some sort of misrepresentation was made on which plaintiffs relied,[17] plaintiffs must also prove that they were damaged as a result in order to prevail on a fraud claim. *Ezell*, 533 So.2d at 461 ("to establish fraud, the plaintiff must prove ... his consequent and proximate injury"). *See also Koury v. Ready*, 911 So.2d 441, 445-46 (Miss. 2005) ("Koury's alleged failure to disclose does not automatically result in a finding of fraud, as all other elements of fraud must be satisfied in order to support a finding of fraud"; "[a]ssuming arguendo that Koury did misrepresent certain accounts receivable, Ready must have suffered damages as the consequences thereof"; "[a]bsent injury, there can be no fraud"; because plaintiff was not injured, clear and convincing evidence of fraud did not exist); *Salter v. Aviation Salvage Co.*, 129 Miss. 217, 226, 91 So. 340, 342 (1922) ("Concede, for argument's sake, that they were led into that state of mind through the fraud of appellant. The question is: How were they hurt by such conduct on the part of the appellant? We are unable to see."). This plaintiffs failed to do.

As noted above, Fleishhacker testified that Green-Save was operating on electricity as it had in their previous location, and that, due to the increase in gas prices, this was actually more

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[17] Fleishhacker admitted at trial that Morgan had never specifically stated that gas, as opposed to utilities generally, would be available. 4:260-61. *See also* 5:391 (Les Ellis testifies that Morgan never said gas would be provided but that "in [Ellis's] mind," it was included in statement that utilities would be provided). Failure to prove that a false representation was made is a failure to prove fraud. *See Mooneyham v. Progressive Gulf Ins. Co.*, 910 So.2d 1223, 1226 (Miss. App. 2005) (affirming directed verdict for defendant because there was no evidence in record that representation alleged by plaintiff had been made).

cost-efficient. 4:267-68. No other evidence was presented as to any damages resulting from gas not yet being available.

Because plaintiffs' proof failed on this allegation as well, the jury should have never been allowed to consider these claims, and the Circuit Court erred in refusing to enter judgment in Morgan's favor notwithstanding the verdict.

C. Plaintiffs also failed to prove that Morgan committed an affirmative act of concealment as required in a fraudulent concealment case.

In discussing a claim for fraudulent concealment, the Court in *Mabus* stated that "[a]n affirmative act of concealment is necessary." 884 So.2d at 762. *See also Ezell*, 533 So.2d at 461 ("to recover damages for fraudulent concealment, appellant must demonstrate appellee took some action, affirmative in nature, which was designed or intended to prevent and which did prevent, the discovery of the facts giving rise to the fraud claim") (quoting *Davidson v. Rogers*, 431 So.2d 483, 485 (Miss. 1983) (affirmative act shown by seller's having made repairs to conceal foundation defect)); *Rankin v. Brokman*, 502 So.2d 644, 646 (Miss. 1987) (same). No evidence of such an affirmative act was presented in this case.[18]

The Circuit Court erred in refusing Morgan's instruction regarding the necessity of such proof, 2:145-46, 6:525, and in overruling Morgan's objection to the jury instruction submitted by plaintiffs which did not include this as a necessary element of plaintiffs' claims, 6:521-22, R.E. 4. The Circuit Court also erred in denying Morgan's motion for a judgment notwithstanding the verdict as Morgan was entitled to judgment in his favor as a matter of law. 2:202, R.E. 3.

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[18] In *Mabus*, the trial court had found that the defendant had not simply remained silent while the plaintiff's confessions of adultery were being secretly recorded, but that he actively participated in obtaining the confession while failing to disclose that plaintiff was being recorded. 884 So.2d at 762-63 ("trial court further stated that McBride was not just a 'wallflower' and that he participated 'in a charade for [Julie] to believe that the conversation to follow would be just between the two of them' and that McBride 'did the great majority of the wheedling on behalf of Ray Mabus, doggedly cajoling Julie Mabus to talk about her affair, first to him (McBride) and then to Ray'"; "McBride had prior knowledge that Ray was going to tape the conversation on the advice of Ray's attorney" and "was an active participant in obtaining Julie's statements relating to the affair").

The Circuit Court erroneously stated that silence alone was an affirmative act. 6:522, R.E. 4 ("withholding of the information is an affirmative act"). In *Rankin*, the Court stated that "omission or concealment of material facts can constitute a misrepresentation," "*[b]ut in such a case*, this Court has held that . . . [the plaintiff] must demonstrate [that the defendant] took some action, affirmative in nature, which was designed or intended to prevent and which did prevent the discovery of the facts giving rise to the fraud claim." 506 So.2d at 646 (emphasis added) (quoting *Davidson*, 431 So.2d at 485).[19]

In response to Morgan's post-trial motion on this issue, plaintiffs made no effort to argue that such proof had been shown, but instead argued that "it is a fundamental principal of law in this jurisdiction that a seller has a duty to disclose defects in property offered for sale." 2:171.

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[19] Of course, further evidence that silence, or a failure to disclose, cannot alone be the affirmative act required is also indicated by the fact that the law makes a distinction between cases of concealment in which there is a fiduciary duty to disclose information and those in which there is no such duty. Although both sets of cases involve silence, or a failure to disclose information, an affirmative act of concealment is required where no fiduciary duty exists between the parties. *See Mabus*, 761 n.8 ("[i]n the absence of a fiduciary relationship, an affirmative act of concealment is necessary"); *Van Zandt v. Van Zandt*, 227 Miss. 528, 538-39, 86 So.2d 466, 470 (1956) (recognizing "the general rule that in the absence of a fiduciary relationship some affirmative act of concealment is necessary to establish a concealed fraud").

No such duty existed between Morgan and the plaintiffs in this case. Although the Court did erroneously instruct the jury on how to find a confidential relationship, 2:133, 6:539, no instruction was given which would guide the jury on the significance of such a finding and no instruction was given regarding any sort of breach of fiduciary duty. Moreover, the evidence presented at trial simply failed to meet the standards required under Mississippi law for finding such a relationship existed between Morgan and the plaintiffs. *AmSouth Bank v. Gupta*, 838 So.2d 205, 216 (Miss. 2002) (must be proved by clear and convincing evidence). This was an arms' length transaction between two experienced businessmen, and there was nothing to indicate that either Morgan or plaintiffs were looking after anything but their own interests. *See Robley v. Blue Cross/Blue Shield of Mississippi*, 935 So.2d 990, 995 (Miss. 2006) (no fiduciary relationship where there was "an arms'-length relationship" and "no indication from the policy or from the parties' course of dealings that they acted in any way other than for their own best interests"). Nor did Morgan exercise any control over plaintiffs who did not even pay any earnest money but could have walked away from the agreement at any time prior to closing. *See AmSouth Bank*, 838 So.2d at 216 (part of test is whether "trusted party exercises effective control over the other party"). Finally, "there must be evidence that both parties understood that a special trust and confidence was being reposed." *Mabus*, 884 So.2d at 758. Although Fleishhacker testified regarding his own personal feelings of trust in Morgan's good reputation, no evidence was presented that Morgan was aware that this transaction was anything other than an ordinary land sale. *See Robley*, 935 So.2d at 996 ("severity of the burdens and penalties integral to a fiduciary relationship should not apply to ordinary insurance policy transactions"); *AmSouth Bank*, 838 So.2d at 216 ("'severity of the burdens and penalties that are integral to a fiduciary relationship,' should not apply to ordinary commercial loan applications") (citation omitted).

Plaintiffs cite no authority for this broad, and non-responsive, statement. Notably, MISS. CODE ANN. § 89-1-501 (Supp. 2006), addressing disclosure requirements in real estate transfers, specifically excludes "[t]ransfers of real property on which no dwelling is located." MISS. CODE ANN. § 89-1-501(2)(h).

Moreover, such a statement ignores that a seller has no duty to disclose that which he does not know or that which may be discovered by a reasonable inspection. *See generally* 37 AM.JUR.2D *Fraud and Deceit* §§ 212, 218 (2001). *See also Mabus*, 884 So.2d at 762 ("in order for there to be liability for nondisclosure, silence must relate to a material fact or matter known to the party and as to which it is his legal duty to communicate to the other contracting party"); *Mincy v. Crisler*, 132 Miss. 223, 237, 96 So. 162, 163 (1923) ("appellee was under no duty to disclose any fact that an inspection of the premises conducted with reasonable and ordinary diligence would have disclosed").

Indeed, the plaintiffs' ability to ascertain whether the property is located in a flood plain has led some courts to hold that even a seller with knowledge that property is in a flood plain is under no duty to disclose such information. *See, e.g., Brown v. B & D Land Co.*, 823 P.2d 380, 382 (Okla. App. 1991) ("in actions involving real estate purchases, fraud may not be predicated on false statements when the party could ascertain the truth with reasonable diligence"; "plaintiff's assertions of misrepresentation dealt with defendant's failure to disclose the property's flood plain location"; "[h]owever, the means and knowledge of obtaining the truth regarding the property were readily available to plaintiff upon inquiry"); *Clouse v. Gordon*, 445 S.E.2d 428, 432 (N.C. App. 1994) ("fact that the property was located in a flood plain was of public record, thus plaintiffs were not precluded from discovering this fact"; "'purchaser of real estate cannot maintain an action for fraud for misrepresentations concerning the value of the property or its condition and adaptability to particular uses when the purchaser has an opportunity to make full investigation and is not induced to forego investigation by artifice or

fraud on the part of the seller'") (quoting 29 STRONG'S NORTH CAROLINA INDEX 4TH, *Vendor and Purchaser* § 65 (1994)) (emphasis omitted).

Because there was no evidence showing that Morgan committed some affirmative act to ensure that plaintiffs did not learn that the property was in a flood zone or that the gas company would not be running a line to the property,[20] then plaintiffs failed to prove fraud based on a failure to disclose information, and the Circuit Court erred in not granting the judgment notwithstanding the verdict on plaintiffs' claims.

II. Having erred in failing to grant a judgment notwithstanding the verdict, the Circuit Court also erred in refusing to order a new trial.

Morgan respectfully submits that, if this Court should deny his request for a judgment as a matter of law on appeal, it should hold that the Circuit Court abused its discretion in not granting a new trial.

Standard of review. An appellate court should grant a new trial where, after viewing all the evidence, it is convinced "that the verdict if allowed to stand would work a miscarriage of justice." *Clark v. Columbus & Greenville Railway Co.*, 473 So.2d 947, 950 (Miss. 1985). As one treatise explains:

> Generally speaking, a new trial is granted [i] where the verdict is against the substantial weight of the evidence, [ii] where an erroneous ruling of law has been made which prejudiced the losing party, [iii] where there was wrongful conduct of a party or other person which affected the outcome of the case, or [iv] for any other reason which would indicate that the trial did not fairly adjudicate the merits of the controversy.

F. Banks, *Trial and Post-Trial Motions*, MISSISSIPPI CIVIL PROCEDURE § 13:7 (J. Jackson ed. 2006). This Court uses an abuse of discretion standard to review contentions that the trial judge

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[20] To the extent that plaintiffs argue that their allegation is not that Morgan said gas would be supplied, but rather that he failed to disclose that gas may not be supplied, *see* 4:260 (Fleishhacker testifies that Morgan never stated that gas would be supplied, "but he did not tell me he would not put it in"), 4:261 (Fleishhacker states that Morgan represented gas would be supplied to the property "[t]hrough his silence and by not saying he would not put it in"), then they have failed to prove an affirmative act as related to such an allegation.

erred in not granting a new trial based on the weight of the evidence. *Jesco, Inc. v. Whitehead*, 451 So.2d 706, 714 (Miss. 1984) (Robertson, J., concurring).

A. A new trial should have been ordered because the verdict was against the substantial weight of the evidence.

For the reasons stated above in the argument in support of judgment as a matter of law, at the very least, the verdict was against the substantial weight of the evidence. *Coho Resources*, 913 So.2d at 910-11 (although upholding denial of motion notwithstanding the verdict, Court reverses and orders a new trial because "[t]he verdict was against the substantial weight of the evidence").

Moreover, the jury verdict wholly ignores the substantial evidence that plaintiffs have suffered no damages at all which could not have been avoided by their own diligence. The true state of affairs regarding the property was readily ascertainable from public records and information readily available to them. Any prudent person in their circumstances would have reviewed the records before starting construction.

B. The jury confusion resulting from the Circuit Court's error in allowing evidence of "replacement" costs warrants a new trial.

The Circuit Court erroneously allowed plaintiffs to present evidence as to the costs of buying another lot, building another building, and moving their equipment to the new facility when such damages are not recoverable in actions for fraud as to property sales. The jury, having received instructions following the law of damages in Mississippi but having been offered no evidence as to such amounts, was obviously confused and even sent a note to the Court making further inquiry. Under such circumstances, a new trial is warranted.

In *Browder v. Williams*, 765 So.2d 1281, 1286 (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.'" *Id.* (citing *Wall v. Swilley*, 562 So.2d 1252, 1256-57 (Miss. 1990), and quoting *Hunt v. Sherrill*, 195 Miss. 688, 699, 15 So.2d 426, 429 (1943)). The Court noted that "benefit of the bargain" recovery "would give the buyer the difference between the value of the property as it was represented to be and the value of what was actually received." *Browder*, 765 So.2d at 1286. *See also* J. F. Rydstrom, *"Out of Pocket" or "Benefit of Bargain" as Proper Rule of Damages for Fraudulent Representations Inducing Contract for the Transfer of Property*, 13 A.L.R.3d 875 (1967) (discussing benefit of bargain rule, out of pocket rule, cost of making property conform to represented condition, and equitable or flexible rule (jurisdictions applying both benefit of bargain rule and out of pocket rule depending on circumstances of case)).

In *Hunt*, the Court gave examples of how the different rules would operate. In that case, the plaintiff had purchased a hotel with fixtures and furnishings for $75,000.00. She later alleged that two refrigerators, some linens, and a couple of beds were not as represented. In discussing the various rules adopted for the recovery of damages in cases alleging fraud in property sales,[21] the Court noted that the benefit of the bargain rule, the majority rule, allows the recovery of the "difference between the real and the represented value of the property." 195 Miss. at 699, 15 So.2d at 429. Thus, had the plaintiff shown that the reasonable value of the hotel as represented was $80,000.00, but the actual value in its condition was only $60,000.00, she could have recovered $20,000.00, even though she had paid only $75,000, *i.e.*, only $15,000.00 over the actual value.

On the other hand, "under the contract, or out-of-pocket rule, her recovery would have been the difference between sixty thousand dollars and the contract price of seventy-five

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[21] In *Hunt*, the Court listed the rules as follows: "(1) [t]he benefit-of-the-bargain rule; (2) the out-of-pocket or contract rule; (3) the flexible or equitable rule, which adopts one or the other of the two foregoing rules as is best adapted to the particular case; and (4) the sum required to make the actual state of facts conform to the representations rule." 195 Miss. at 699, 15 So.2d at 429. This last rule is listed as the "reasonable cost of repair" rule in *Browder*.

thousand dollars." *Id.* "Under the equitable or flexible rule, the amount of her recovery would have depended on whether the court applied the bargain or contract rule," the only difference between the two being that the contract rule establishes the represented value as the contract price. *Id.* "But under the three foregoing rules [benefit of bargain, contract/out-of-pocket, or flexible/equitable] the proof of value, both represented and actual, is of the property as an entirety." *Id.* at 429-30.

Finally, "[u]nder the fourth rule—the replacement or make-good rule—the evidence of damage need be only of the damage resulting from the misrepresentation as to the particular article or articles. No proof is necessary of the actual value of the entire property as a unit." *Id.* at 430. Because the plaintiff in *Hunt* was suing only for some articles contained within the hotel, this was the rule applied in this case. Such damages were also those considered in *Browder*—the cost to replace the defective septic tank system. 765 So.2d at 1286-87. Importantly, repair costs are awarded only if they are less than the difference in value. *Harrison v. McMillan*, 828 So.2d 756, 769 (Miss. 2003).

In this case, the jury was instructed, in accordance with the law set forth in these cases, that they were "to award damages so as to place [plaintiffs] in the economic position they would have enjoyed had they received the property as represented." 2:126, 6:533. This reflects the "benefit of the bargain" rule. The jury was further instructed that they could consider "[t]he difference between the *true market value* of the subject property and the improvements made by Plaintiffs as of the date of the discovery of its location in a flood plain and that natural gas would not be provided and the total *costs* of acquisition and improving the property as of said date ...." *Id.* (emphasis added). This reflects the "out-of-pocket" rule wherein the contract price ("costs") reflects the value of the property as represented.

The problem is that plaintiffs failed to put on any evidence as to "the true market value of the subject property," so as to allow the jury to calculate the difference. Such a failure should

have resulted in judgment for Morgan. The jury was instructed that plaintiffs were "not entitled to damages for the harm that they could have avoided by the use of due care, nor for the harm which proximately resulted from their own conduct." 2:130. *See Travelers Indem. Co. v. Rawson*, 222 So.2d 131, 135 (Miss. 1969) (requiring instruction on "avoidable consequences and damages"); *National Dairy Prods. Corp. v. Jumper*, 241 Miss. 339, 344, 130 So.2d 922, 923 (1961) ("[o]ne seeking to hold another liable for damages must use reasonable efforts to avoid or mitigate them"); *Yazoo & M.V.R. Co. v. Fields*, 188 Miss. 725, 731-33, 195 So. 489, 490 (1940).

In light of the evidence, plaintiffs were not entitled to reimbursement costs for the building. The flood plain is a matter of public record and would have been examined by a prudent builder before grading a site. Had Warfield reviewed this information, the site could have been graded so as to raise the building higher and avoid even the necessity of flood insurance. Plaintiffs' own expert testified that, had the building been built high enough to raise it above the flood plain, then the lot itself would have been worth the price plaintiffs paid for it. 5:362-63. Nevertheless, over Morgan's objections, the Circuit Court allowed plaintiffs to present evidence of the costs to buy another lot, build another building, and move their equipment and office furniture into the new building.[22]

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[22] Importantly, in *Wall*, relied on by the *Browder* Court, the Court noted that the loss must be measured "on the date it occurred, the date [plaintiffs] purchased the misrepresented property, although it seems clear they may push that forward to the date when they first discovered, or with reasonable diligence, should have discovered the [defect]." 562 So.2d at 1255. *See also id.* at 1258 ("[t]he operative date is that on which they discovered the foundation damage or with reasonable diligence should have discovered it, or, in the absence of proof thereat, the date of sale, and the question is what would it have cost on that date to give the [plaintiffs] the benefit of their bargain"). As discussed above, plaintiffs should have discovered the information regarding the flood plain before they ever constructed the building. Regardless, the jury was instructed to consider damages "as of the date of the discovery of [the subject property's] location in a flood plain and that natural gas would not be provided." 2:126; 6:534. But the figures referenced in plaintiffs' closing, totaling $374,000, were not all 2002 figures. They included the costs in 2006 to buy another lot and to move equipment and office furniture to a new location. 4:250; Ex. P-36; Ex. P-37. The costs for building a new building were supposedly based on a "guestimate" of the costs incurred in 2002, but, as discussed above in Section D, the evidence regarding these costs was quite confusing.

The concept of getting all the money needed to relocate their business to another location, of course, is not one of the items referenced above as recoverable damages.[23] The evidence showed that Green-Save had been operating successfully out of its current location, 4:289-90, and indeed, it did not even seek lost profits as damages, 4:289-90.

The plaintiffs, as well as the Court, always coupled the idea of "relocation" damages with the notion of giving the lot, as well as the new building, over to Morgan so as to avoid what they recognized would be a double recovery. Such a request presents some sort of odd combination of both rescinding the contract, *i.e.*, no longer owning a lot purchased from Morgan,[24] as well as recovering damages. But such a combination is not recognized under Mississippi law. *See Browder*, 765 So.2d at 1285 ("'[o]ne induced to purchase land for fraudulent misrepresentation . . . may either affirm the contract, and sue for damages, *or* disaffirm it and be reinstated in the position in which he was before it was consummated") (quoting 8A THOMPSON ON REAL PROPERTY § 4468, at 378-88 (1963)) (emphasis added); *Laurel Auto Supply*, 184 Miss. at 93-94, 186 So. at 567 ("purchaser of property who has been deceived by material false representations in the procurement of the contract, which renders it void, may elect to rescind and to be restored to the position he occupied at the time of the sale . . . [o]r he may retain the property and recover from the seller the difference between the actual value of the property in the condition as it was when delivered to him, and the price paid by him to the seller therefor"); *Garris v. Smith's G&G, LLC*, 941 So.2d 228, 232 (Miss. App. 2006) ("jury's finding of fraudulent misrepresentation allows Smith's to make a choice to either rescind the contract and be restored to its' [*sic*] former

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[23] In making this argument, plaintiffs erroneously relied on the "flexible" rule. 5:321. That rule simply gives a choice between using value as represented or contract price as a basis for determining the difference between that amount and the actual value. *Hunt*, 195 Miss. at 699-700, 15 So.2d at 429-30.

[24] *See, e.g., Laurel Auto Supply Co. v. Sumrall*, 184 Miss. 88, 93, 185 So. 566, 567 (1939) (party electing to rescind contract due to false representations made in procurement of contract must "return to the seller that which he, the buyer, obtained as a part of the sale").

position before the store was purchased or to elect to keep the business and bring an action for damages").[25]

Faced with an instruction for which there was no evidence, and evidence for which there was no instruction,[26] the jury, obviously confused as to what a proper award would be, sent the Court a note asking if the property would be given to Morgan if they awarded the damages requested in plaintiffs' closing. 2:166.

Because the Circuit Court's allowing plaintiffs to present evidence as to damages not allowed under Mississippi law resulted in jury confusion and an unjust reward, a new trial should be ordered.

C. Because the jury was not properly instructed on the law, a new trial is required.

Another basis for a new trial is if the jury was "confused by faulty instructions." *Coho Resources*, 913 So.2d at 908. As noted above, this jury was improperly instructed that they could find fraud for failure to disclose information without being told that an affirmative act of concealment was also required. *See* 2:123-24, 2:131, 6:531-33, 6:537-38. In addition, the jury was instructed with regard to a confidential relationship when the evidence did not support such an instruction.[27] Plaintiffs capitalized on the latter by arguing trust and reliance to the jury.

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[25] Indeed, if plaintiffs truly wanted to rescind the contract and return the property to Morgan, then they would only be entitled to be put in the position they were in before they entered into the contract—operating out of a leased facility in a different location—but no evidence was presented so as to allow that calculation either. But in fact, because plaintiffs had built a building on the property, rescission was not a proper remedy. *See Browder*, 765 So.2d at 1285 (where improvements to land have been made and status quo cannot be restored, rescission is improper remedy); *Garris*, 232-33 (rescission not a remedy where status quo cannot be restored).

[26] Plaintiffs had submitted an instruction outlining damages as the costs to replace the lot and move to another location, 2:143, but the Court properly refused such an instruction. *Id.* The instruction did, at least, include a notation that, if such damages were awarded, "the Plaintiffs will be ordered to convey the subject property and building to the Defendant." *Id.*

[27] The jury instruction given, No. C-16, was submitted by Morgan. *See* 2:133 ("Jury Instruction D-17"). However, as set forth in Morgan's reply to the plaintiffs' response to Morgan's jnov motion, the instruction was only submitted after the Court had allowed the plaintiffs to proceed with such a claim and *(continued on next page)*

6:555. Because no instruction was given as to the significance, if any, of a confidential relationship, it is certainly possible that this instruction, coupled with plaintiffs' testimony and inflammatory closing argument,[28] led to jury confusion.

Moreover, the jury was instructed that they could enter a general verdict against Morgan under either of plaintiffs' theories—flood plain or natural gas. *See, e.g.*, 2:123. That being the case, if either theory, as set forth above, was erroneously tendered to the jury due to a lack of supporting evidence, then this too is a basis for a new trial. Because a general verdict was returned, there is no way to know if the verdict reflects the jury's finding as to both claims or only one. *See, e.g., Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, 1270-71 (Miss. 1999) (impossible for court to determine if jury was influenced by erroneous instruction; new trial ordered); *J. W. Sanders Cotton Mill, Inc. v. Moody*, 189 Miss. 284, 298, 195 So. 683, 687 (1940) ("where an instruction is framed in the alternative and there is no evidence in support of one of them, the entire instruction is erroneous") (quoted in *Rex Nitrogen & Gas Co. v. Hill*, 213

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denied Morgan's directed verdict motion on the issue. 2:186. Plaintiffs submitted another instruction which did not properly state the law, 2:139, so Morgan proffered an alternative which was accepted by the Court. Morgan's submission of the instruction is in accordance with Mississippi law holding that, once a party has objected to a particular claim or defense, "a party does not waive the point for appeal by thereafter respecting the court's ruling and trying to make the best of the predicament in which it has placed him." *Vines v. Windham*, 606 So.2d 128, 130 (Miss. 1992). *See also Jones v. State*, 461 So.2d 686, 702-03 (Miss. 1984) (discussing history of rule in both civil and criminal cases that, "[w]hen the trial judge has made a ruling—be it on an evidentiary question, a proposed jury instruction or whatever—we must allow the party losing the point to 'accept' the trial judge's ruling and 'make the best of the situation' without fear of waiving the point on appeal"); *Home Ins. Co. of New York v. Dahmer*, 167 Miss. 893, 901, 150 So. 650, 652 (1933) ("[i]f a cause is erroneously tried over the objection of one of the parties, such a party by yielding and making the best of the situation waives no right on appeal"; fact that appellant had obtained instruction assuming evidence to which it had objected was properly admitted did not waive right to present admission of evidence as error on appeal) (quoted in *Jones*, 461 So.2d at 702); *Foster v. City of Meridian*, 150 Miss. 715, 728, 116 So. 820, 823 (1928) (no waiver where "[a]ppellant then yielded, as she had to do, to the ruling of the court, and embodied in some of her instructions given by the court the principle to which she had so strenuously objected") (quoted in *Jones*, 461 So.2d at 702).

[28] Plaintiffs' counsel, after noting that Morgan's business employs 28 people, compared him to leaders of Enron and MCI, stating, "There are people in jail right now who had great reputations and employed a lot of people. They worked and headed up places like Enron and MCI. And do you think that they came into court and said, Yep, we knew those numbers were fudged, we knew those documents weren't right? No, they didn't say that. It was determined from circumstantial evidence." 6:549.

Miss. 698, 704, 57 So.2d 173, 174 (1952), *suggestion of error overruled*, 213 Miss. 698, 57 So.2d 569 (1952)).[29] Under the circumstances of this case, a new trial should be ordered if judgment notwithstanding the verdict is not entered.

III. The Circuit Court erred in refusing to amend the judgment by either remitting the amount of the judgment or requiring the plaintiffs to return the property to Morgan.

Standard of review. Although review of a court's denial of a request for a remittitur of damages is normally subject to an abuse of discretion standard, *see, e.g., Entergy Mississippi, Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003), such standards are based on the assumption "that the trial judge applied the correct law." *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 53 (Miss. 2004). If the trial court applied an incorrect legal standard, then the error becomes one of law, and deference to the trial court is pretermitted. *Id.*

A. Damages should be remitted to the amount required to purchase flood insurance.

As noted above, plaintiffs presented no proof regarding the difference in value between the property as sold and the property as represented, so, as noted in *Hunt*, three of the rules cannot even be applied here.[30] The remaining option under *Hunt* is to award "the sum required

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[29] *See also Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577 (5th Cir. 2001) ("if a jury could find liability according to multiple theories, and one of them is erroneous, we reverse unless we can tell that the jury came to its decision using only correct legal theories"); *Rutherford v. Harris County, Texas*, 197 F.3d 173, 185 (5th Cir. 1999) ("'failure of evidence or a legal mistake under one theory of the case generally requires reversal for a new trial because the reviewing court cannot determine whether the jury based its [general] verdict on a sound or unsound theory'") (quoting *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266, 271 (5th Cir. 1989), *reh'g denied*, 892 F.2d 78 (5th Cir. 1989)); *Shay v. St. Raphael Hosp.*, 210 A.2d 664, 667 (Conn. 1965) ("when the verdict is general, the judgment cannot stand if the charge was erroneous as to any of the three grounds of negligence alleged"); 75B AM.JUR.2D *Trial* § 1751 (1992) ("general verdict must be set aside ... if the jury was instructed that it would rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground").

[30] *Hunt*, 195 Miss. at 699-700, 15 So.2d at 429-30 (discussing three rules requiring proof of value of property as represented and as existed). There was evidence that plaintiffs had insured their building for $286,000 in replacement costs. 4:284. This coupled with the $32,100 paid for the lot totals $318,000. The difference between that amount and the amount requested by plaintiffs to be "made whole," $374,000 (some of which is questionable, *see* n.9, *supra*), is $55,900.

to make the actual state of facts conform to the representations rule." 195 Miss. at 699, 15 So.2d at 429. *See also Browder*, 765 So.2d at 1286 ("reasonable cost of repair"). This amount could have been as simple as the amount needed to bring in dirt to raise those portions of the lot as needed to bring it above the flood plain. However, plaintiffs constructed their building without an engineer's assistance as to elevations.

Although plaintiffs stated that the costs to rebuild Green-Save's facility to raise it the inch or so needed to bring it above the required foot over the flood plain and to fill in the remainder of the lot would be greater than the costs to move their facility elsewhere, 5:319-20, they failed to recognize that the $30,000 cost of flood insurance would also be a way to "make good" on the contract, and indeed, their own expert testified that such an amount would be a way to establish the difference in value between the property as sold and as represented.

Because plaintiffs put on no proof in which to determine the value of the property, they should have been limited to recovering that amount needed to alleviate their complaints about the property being in a flood zone—$30,000.00 to cover the cost of flood insurance. The Circuit Court erred in refusing to remit the amount of the judgment entered against Morgan to this amount.

B. The Court's refusal to amend the judgment to require the return of the property has resulted in a double recovery to the plaintiffs.

Having allowed the plaintiffs to seek damages in an amount to allow them to build another facility elsewhere, and having told the jury that a proper order would be entered concerning the property itself if such damages were awarded, the Circuit Court clearly erred in not entering an order requiring the return of the property with its improvements to Morgan once it refused to remit the amount awarded by the jury. The judgment entered in this case has resulted in a double recovery and unjust enrichment to the plaintiffs which is improper under Mississippi law.

There can be no dispute that the property and the building owned by plaintiffs have substantial value. Plaintiffs insured the building for $286,000.00. 4:284. Yet plaintiffs have been allowed to keep this property as well as obtain a judgment in an amount to allow them to purchase another lot and build yet another building.[31] Such an award is comparable to the recent judgment struck down by the Court of Appeals in *Garris*, 941 So.2d at 232-33. There, the Court noted as follows:

> If this Court were to allow the lower court's judgment to stand, which we cannot, Smith's would be able to keep the property at issue, retain the award of damages, and forgo further payments on the promissory note held by Garris. This remedy, stated conservatively, would be unjust. A party is not entitled to a recovery of damages if it would constitute a windfall or "double recovery."

Id. at 232.

Indeed, the judgment as entered is directly contrary to plaintiffs' trial position that, if awarded an amount to buy another lot and build another facility elsewhere, they did not want, and in fact were not legally entitled, to keep the property at issue. Plaintiffs' counsel agreed that plaintiffs could not recover damages to allow them to move to another facility and keep the property. 5:308. Fleishhacker specifically testified that he wanted "a piece of property out of a flood plain that I can put a building on that is exactly the same as the building I have presently ... [a]nd then I will give Mr. Morgan back his piece of property." 4:251, R.E. 4. *See also* 4:253, R.E. 4, 4:285. In their closing argument, plaintiffs told the jury to let Morgan have the property at issue to sell to someone else and give the plaintiffs the costs to move. 6:552. In light of these prior statements, plaintiffs should be judicially estopped from claiming that they are not required

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[31] As noted above, the $374,000 requested by plaintiffs was inflated. Seven thousand was added without basis to the contractor's $242,000 "guestimate" to result in a base figure for building costs of $249,000. Another $20,000 to cover expenses incurred due to mistakes of the contractor's crew was also erroneously added in. Furthermore, it appears that the $35,000 for landscaping, floor coverings, and lighting was included in the $242,000 amount and should not have been counted twice. When these amounts are subtracted, only $312,000 remains of the $374,000 requested ($59,000 for new lot; $242,000 as 2002 costs for building; and $11,000 for moving machinery and office equipment to new location). The jury awarded $325,000.

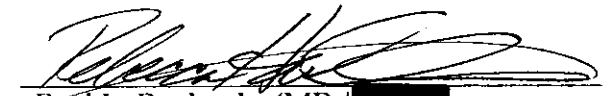
to return the property if receiving an award of over $300,000. *See Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003) ("[b]ecause of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation"; "[j]udicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation").

As noted by the Supreme Court in *Wall*, "The [plaintiffs] are limited to recovering the reasonable losses they necessarily incurred by reason of the [defendants'] actionable conduct. *They are not entitled to be placed in a better position than they would have been if the house delivered had been what the Swilleys had represented it to be.*" 562 So.2d at 1258 (emphasis added). That is precisely the result of the judgment entered in this case. If the $325,000.00 judgment is not reversed and rendered in Morgan's favor or remitted to a more reasonable amount in conformity with Mississippi law on damages in such cases, at the very least, the Circuit Court and the plaintiffs should be required to abide by the position taken at trial and deed the lot and building over to Morgan before obtaining $325,000.00 in damages.

CONCLUSION

For the foregoing reasons, Morgan requests the Court to reverse and render the judgment entered against him in this case. Alternatively, Morgan requests a new trial in which improper evidence is excluded and the jury is properly instructed on the law. Alternatively, Morgan asks this Court to order a remittitur of the judgment or order that the judgment be amended to require plaintiffs to deed over the subject property to Morgan before the judgment is paid.

Respectfully submitted,



Fred L. Banks, Jr. (MB #[redacted]
Rebecca Hawkins (MB #[redacted]
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300

William M. Beasley (MB[redacted]
Rachel M. Pierce (MB #[redacted]
PHELPS DUNBAR LLP
Seventh Floor, One Mississippi Plaza
201 South Spring Street
Tupelo, Mississippi 38804
Post Office Box 1220
Tupelo, Mississippi 38802-1220
Telephone: (662) 842-7907

Counsel for Appellant/Cross-Appellee Tommy Morgan

CERTIFICATE OF SERVICE

The undersigned attorney of record for Appellant Tommy Morgan does hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following persons at the addresses indicated:

Thomas A. Wicker
HOLLAND RAY UPCHURCH & HILLEN
P. O. Drawer 409
Tupelo, Mississippi 38802-0409

Counsel for Appellees

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

Trial court judge

This the 30th day of March, 2007.

REBECCA HAWKINS