IN THE SUPREME COURT OF MISSISSIPPI

MONTY C. FLETCHER and
SANDRA L. FLETCHER — APPELLANTS

V. — CAUSE NO. 2007-CA-00949

JIMMIE L. LYLES, LEONEZE C.
LYLES and KELLY DABBS REALTY, INC. — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY
Civil Action No. 2003-00278

BRIEF OF APPELLEE KELLY DABBS REALTY, INC.

ORAL ARGUMENT IS NOT REQUESTED

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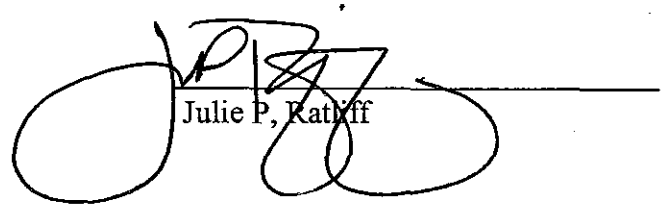
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defendant Kelly Dabbs Realty, Inc. certifies that the following listed persons have an interest in the outcome of this case. This representation is made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal:

1. Kelly Dabbs Realty, Inc, whose sole owner is H. Kelly Dabbs;
2. G. Todd Burwell and Julie P. Ratliff of Latham & Burwell, PLLC, counsel for Kelly Dabbs Realty, Inc.;
3. Monty C. Fletcher and Sandra L. Fletcher;
4. K.F. Boackle, counsel for Monty C. Fletcher and Sandra L. Fletcher;
5. Jimmie L. Lyles and Leoneze C. Lyles, Deceased;
6. Eddie J. Abdeen, counsel for Jimmie L. Lyles and Leoneze C. Lyles, Deceased; and
7. Hon. Samac S. Richardson, Circuit Court Judge, Madison County, Mississippi.

So certified, this the 11th day of March, 2008.



Julie P. Ratliff

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I. SUMMARY OF THE ARGUMENT

The lower court did not err in granting summary judgment as to Kelly Dabbs Real Estate, Inc. ("Dabbs"). Plaintiffs' claims arise out of their contract for purchase of real property located at 136 Bridgewater Drive, Madison, Mississippi ("Subject Property'). The trial court held the statute of limitations as to Plaintiffs' claims began to run September 16, 2000, the date Plaintiffs entered into, and were bound by, the contract for the sale and purchase of the Subject Property. The trial court further found, even if the date of the contract didn't start the running of the statute of limitations, Plaintiffs' receipt of their own, independent home inspection report did. Plaintiffs received their own, independent home inspection report from AmeriSpec on or about September 29, 2000. Plaintiffs' Complaint was filed on October 29, 2003. Accordingly, the trial court found Plaintiffs' claims were time-barred and granted summary judgment to all Defendants.

The focus of Plaintiffs' argument on appeal is misplaced, and is an attempt to divert this Court's attention from the fact, summary judgment is still appropriate, even if there are contested issues of fact, where such issues are not material. Summary judgment was granted because there was a mutually binding contract as of September 16, 2000, and any claim relating to a misrepresentation accrued on that date. Or, at the latest, any claims relating to a misrepresentation accrued on September 29, 2000, when Plaintiffs received their own individual home inspection report. Plaintiffs' statute of limitations expired on either September 16, 2003 or September 23, 2003, both of which were prior to Plaintiffs' Complaint. Additionally, Plaintiffs' argument raises issues not on appeal and/or not properly before this Court.

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of the Madison County Circuit Court's granting of summary judgment in favor of both Dabbs and Jimmie L. Lyles and Leoneze C. Lyles, Deceased ("Lyles"). Plaintiffs

sought relief concerning alleged foundation problems and non-disclosure and/or misrepresentation of same by Lyles through their Sellers Disclosure Statement completed as to the Subject Property.

B. Statement of Facts, Course of Proceedings, and Disposition of Case

Kenny Simmons ("Simmons") owned the Subject Property, and listed it for sale with Dabbs on or about May 20, 1999. (Rec., Page 315). Alfredo and Mary Rodriguez ("Rodriguez") were interested in the Subject Property, and made an offer. (Rec., Page 185).

Rodriguez employed Don Walker ("Walker") to conduct a home inspection of the Subject Property and issue a report ("Walker Report"). (Rec., Pages 185, 187-212). The Walker Report was mailed directly to Rodriguez at their home address and specified it was not to be used by any third party. (Rec., Page 192). The Walker Report indicated no evidence in exterior walls indicating differential movement in the Subject Property's foundation. (Rec., Pages 196 and 200). The Walker Report did not indicate foundation repairs had been made in the past. (Rec., Page 218). The Walker Report did not indicate foundation repairs were necessary. (Rec., Pages 187-212). The Walker Report did indicate some conditions were observed, suggesting the home leaned or settled to the rear. (Rec., Page 191). Rodriguez also had Advanced Engineering inspect the property and issue a report ("Advanced Engineering Report"). (Rec., Pages185 and 299-301). Mrs. Rodriguez did not recall to whom she gave a copy of the Walker Report. (Rec., Page 186). Rodriguez did not purchase the Subject Property. (Rec., Page 186).

Lyles purchased the Subject Property from Simmons and later listed it for sale through Dabbs. Plaintiffs, Lyles and Dabbs executed a Dual Agency Confirmation on August 8, 2000. (Rec., Page 18). Lyles completed a Seller's Disclosure Statement, and same was exchanged with, and executed by, Plaintiffs on or about August 8, 2000. (Rec., Pages 16-17). Plaintiffs and Lyles entered into a Real Estate Contract on September 16, 2000 ("Fletcher Contract"). (Rec., Pages 14-15). The Fletcher Contract was contingent upon an acceptable home inspection report and appraisal. (Rec.,

Pages 14-15). The Fletcher Contract provided Plaintiffs could cancel the contract should Lyles not "make repairs as set forth in the inspection." (Rec., Pages 14-15). Sandra Fletcher acknowledged herself as a licensed real estate agent in the Fletcher Contract. (Rec., Page 221). Dabbs' execution of the Fletcher Contract was only to re-acknowledge its dual agency status pursuant to Mississippi law. (Rec., Pages 14-15).

Plaintiffs procured their own, independent home inspection of the Subject Property by AmeriSpec on or about September 28, 2000. (Rec., Page 222). One of the Plaintiffs was present for AmeriSpec's inspection, along with their agent, which lasted over two (2) hours. (Rec., Page 244). AmeriSpec issued its report to Plaintiffs on or about September 29, 2000 ("AmeriSpec Report"). (Rec., Pages 241-255).

The AmeriSpec Report defined "serviceable" as being "acceptable and in generally satisfactory condition." (Rec., Page 243). The AmeriSpec Report listed items in **bold print** that "represente[d] concerns or recommendations." (Rec., Page 243). The AmeriSpec Report noted cracks in the garage floor/slab. (Rec., Page 247). The AmeriSpec Report noted, in **bold print**, the following: bathroom "**[d]oor will not latch**"(Rec., Page 253); bathroom "**[d]oor will not latch**" (Rec., Page 254); and bedroom "**[d]oor will not latch**"(Rec., Page 255).

Plaintiffs did not have any questions about the Subject Property after review of the AmeriSpec Report. (Rec., Page 224). Other than an electrical component issue being addressed by Lyles, Plaintiffs were satisfied with the condition of the Subject Property after receipt and review of the AmeriSpec Report. (Rec., Page 224). Plaintiffs inspected the Subject Property on three (3) separate occasions, two (2) of which were made while furniture was still in the house, and one (1) without. (Rec., Page 244). Plaintiffs closed on their purchase of the Subject Property on October 30, 2000. (Rec., Pages 12-13). Monty Fletcher testified Plaintiffs would have purchased the Subject Property despite the Walker Report. (Rec., Pages 213-214).

Plaintiffs filed their Complaint on October 29, 2003. (Rec., Pages 7-19). Plaintiffs filed their Motion to Amend Complaint on or about January 24, 2006. (Rec., Page 136-151). On July 17, 2006, the circuit court held a hearing on Dabbs' Motion for Summary Judgment and Plaintiffs' Motion to Amend the Complaint. (Rec., Volume 4 of 4). Dabbs filed its Rebuttal to Plaintiffs' Response to its Motion for Summary Judgment ("Dabbs' Rebuttal") prior to the July 17, 2006, hearing, same being documented in the transcript.[1]

On September 25, 2006, the circuit court denied Dabbs' Motion for Summary Judgment. (Rec., Page 322). On September 25, 2006, the circuit court denied Plaintiffs' Motion to Amend Complaint. (Rec., Pages 316-317). On October 5, 2006, Dabbs filed its Motion to Reconsider Order Denying Motion for Summary Judgment. (Rec., Pages 323-348). On or about October 16, 2006, Plaintiffs filed a Petition for Interlocutory Appeal seeking leave to appeal the Order Denying Motion to Amend Complaint dated September 19, 2006.[2] On November 21, 2006, this Court denied Plaintiffs' Petition for Interlocutory Appeal. (Rec., Page 358).

On March 12, 2007, the circuit court held a hearing on Dabbs' Motion to Reconsider Order Denying Motion for Summary Judgment (Rec., Supplemental Vol. 1 of 1). Following a hearing by the circuit court on April 16, 2007, of Dabbs' Motion to Reconsider Order Denying Motion for Summary Judgment, the court held the controlling date for the accrual of Plaintiffs' claims was either the date of the execution of the Fletcher Contract (September 16, 2000) or, at the latest, the date of

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Dabbs' Rebuttal was filed on July 17, 2006. It was, however, omitted from the record submitted by the circuit court. Dabbs' counsel notified the circuit court of this. A true and correct copy of Dabbs' Rebuttal is attached hereto and incorporated herein as Exhibit "A."

2

Plaintiffs' Petition for Interlocutory Appeal ("Petition"), which was attached to Dabbs' Rule 10(b)(5) Certificate of Examination of the Record filed with the circuit court on August 8, 2007, but not forwarded to this Court. A true and correct copy of Plaintiffs' Petition is attached hereto and incorporated herein as Exhibit "B."

the Fletcher Contract did not control, the date Plaintiffs received their own, independent home inspection report on the Subject Property (September 29, 2000), since Plaintiffs should have known of any defects by the date of the report. (Rec., Suppl. Vol. 1, Pages 16-17, Lines 11-13, 29 and 1-9). The trial court held Plaintiffs should have filed their claim by no later than three (3) years from the time they received the AmeriSpec report, and as Plaintiffs' Complaint was not, their claims were therefore barred by the statute of limitations. Plaintiffs filed their Notice of Appeal with this Court on or about May 14, 2007, appealing the final Judgment entered on April 16, 2007. (Rec., Page 365).

III. ARGUMENT

A. Standard of Review and Legal Standard

A *de novo* standard of review is applied to a trial court's grant of summary judgment. *Moss v. Batesville Casket Co.*, 925 So.2d 393, 398 (Miss. 2006). *See also Stuckey v. Provident Bank*, 912 So.2d 859, 864 (Miss. 2005); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So.2d 228, 232 (Miss. 2001); *Russell v. Orr*, 700 So.2d 619, 622 (Miss. 1997); *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss. 1997); *Northern Elec. Co. v. Phillips*, 660 So.2d 1278, 1281 (Miss. 1995). "This Court employs a factual review tantamount to that of the trial court when considering evidentiary matters in the record." *Id.* (quoting *Williams v. Bennett*, 921 So.2d 1269, 1272 (Miss. 2006)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *MISS. R. CIV. P. 56(c).* The party seeking summary judgment carries the burden of demonstrating there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). *See McCullough v. Cook*, 679 So.2d 627, 630 (Miss. 1996). The non-moving party must be diligent in opposing the motion for summary judgment and

"...may not rest upon allegations or denials in the pleadings." *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss. 1997). *See Johnson & Sons Constr., Inc. v. The State of Mississippi, et al*, 877 So.2d 360, 365 (Miss. 2004) (citing *Smith v. H.C. Bailey Companies*, 477 So.2d 224, 233 (Miss. 1985)); *Bourn v. Tomlinson Interest, Inc.*, 456 So.2d 747, 749 (Miss. 1984). The non-moving party must then go beyond the pleadings and designate "specific facts showing . . . a genuine issue for trial." *Celotex, 477 U.S.* at 324. *See also Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 683 (Miss. 1987); *Brown v. Credit Center*, 444 So.2d 358, 364 (Miss. 1984).

For "...summary judgment to be inappropriate, there must be genuine issues of *material* fact; the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material." *Johnson,* 877 So.2d at 365 (emphasis in original) (citing *Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss. 1985)). Mere conclusory allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment. *Ellis v. Powe*, 645 So.2d 947, 952 (Miss. 1994) (quoting *Brown*, 444 So.2d 362).

B. Lower Court's April 16, 2007, Judgment Was Correct

Plaintiffs argue the trial court erred in *two* rulings. First, Plaintiffs allege the trial court erred in granting both Dabbs' and Lyles' Motions for Summary Judgment. In their brief, Plaintiffs argue their cause of action could not have possibly accrued before October 30, 2000, because the close of the sale for the Subject Property did not occur until that day, and genuine issues of material fact exist which prevent summary judgment. However, Plaintiffs overlook two simple, yet important, facts: (a) as of September 16, 2000, both Plaintiffs and the Lyles were contractually bound to, and had rights upon which they could sue, each other; and (b) Plaintiffs procured and received their own, independent home inspection of the Subject Property on or about September 29, 2000, and, therefore, should have known of the alleged defects as of that date.

Dabbs based its summary judgment motion on the following: (1) Plaintiffs provided no proof

Dabbs had possession of the Walker Report or Advanced Engineering Report, and Dabbs cannot be liable for information of which it had no knowledge; (2) all of Plaintiffs' claims are barred by the statute of limitations; (3) Plaintiffs are unable to establish essential elements regarding a claim of negligent or fraudulent misrepresentation, and, as such, the closing date is not the applicable date to begin the running of the statute of limitations; and/or (4) Dabbs did not have a duty to require, obtain, or maintain either the Walker Report or Advanced Engineering Report, and it complied with Miss. Code Ann. § 73-35-21(1)(a) and the Real Estate License Law. The trial court's Judgment, and ruling in connection therewith, are well supported by both case law and statute and was correct in granting summary judgment as to Dabbs.

Second, Plaintiffs argue the trial court's denial of Plaintiffs' Motion to Amend Complaint is being appealed. This argument is referenced in Plaintiffs' introductory paragraph and then listed as Issue 5 in the brief and argument. Plaintiffs overlook the fact that their appeal was "from the final Judgment entered in this case on April 16, 2007." (Rec., Pages 365-366). The trial court's April 16, 2007, Judgment pertained only to summary judgment, and not to Plaintiffs' Motion to Amend Complaint. As such, Plaintiffs' Motion to Amend Complaint and/or the trial court's denial of same are neither timely nor properly before this Court.

1. Summary of Orders Appealed and Issues Presented by Plaintiffs.

Plaintiffs' Brief separates their appeal into six (6) issues: (1) when did Plaintiffs' cause of action against Dabbs accrue; (2) did the trial court err by granting summary judgment to Dabbs; (3) when did Plaintiffs' cause of action against Lyles accrue; (4) did the trial court err by granting summary judgment to Lyles; (5) did the trial court err by denying Plaintiffs' Motion to Amend their original Complaint; and (6) what does the word "consummate" as it appears in the Mississippi Real Estate Commission's ("MREC") Rules and Regulations mean and require. Plaintiffs' argument, however, can be summarized into three (3) issues: (1) is the trial court's denial of Plaintiffs' Motion

to Amend properly before this Court; (2) are Plaintiffs' claims barred by the statute of limitations; and (3) did Dabbs comply with MREC rules and regulations. Accordingly, Dabbs will address these three (3) comprehensive issues.

2. Plaintiffs' Appeal of the Trial Court's Denial of their Motion to Amend is Not Properly Before this Court.

Plaintiffs filed their Motion to Amend the Complaint on or about January 24, 2006. (Rec., Pages 7-19). The hearing on both Plaintiffs' Motion to Amend and Dabbs' Motion for Summary Judgment was held on July 17, 2006. (Rec., Volume 4 of 4). On September 25, 2006, the trial court entered an order denying Dabbs' Motion for Summary Judgment. (Rec., Page 322). By separate order on September 25, 2006, the trial court denied Plaintiffs' Motion to Amend Complaint. (Rec., Pages 316-317). Dabbs' Motion to Reconsider Order Denying Motion for Summary Judgment was only as to its Motion for Summary Judgment. (Rec., Pages 323-348). On or about October 16, 2006, Plaintiffs filed a Petition for Interlocutory Appeal specifically seeking permission to appeal the trial court's September 19, 2006, Order Denying Motion to Amend Complaint. (See Exhibit "A"). This Court denied Plaintiffs' Petition for Interlocutory Appeal on November 21, 2006. (Rec., Page 358). Plaintiffs' next pleading was their Response to Dabbs' Motion to Reconsider Order Denying Motion for Summary Judgement, filed on or about March 8, 2007. (Rec., Pages 349-351). Following a hearing on Dabbs' Motion to Reconsider Order Denying Motion for Summary Judgment, the trial court entered a Judgment as to same. (Rec., Pages 363-364). The trial court's April 16, 2007, Judgment was not issued with regard to, and did not reference, Plaintiffs' Motion to Amend or the Order Denying Motion to Amend. Plaintiffs filed their Notice of Appeal with this Court on or about May 14, 2007, appealing the final Judgment entered on April 16, 2007.

Rule 3 and Rule 4 of the Mississippi Rules of Appellate Procedure combine to establish the procedures and deadlines for perfecting an appeal. M.R.A.P. 3(c) states, in relevant part, as follows:

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal and the party or parties against whom the appeal is taken, and shall designate as a whole or in part the judgment or order appealed from.

And, "[e]xcept as provided in Rules 4(d) and 4(e)....the notice of appeal...shall be filed within 30 days after the date of entry of the judgment or order appealed from." M.R.A.P. 4(a).

There is "...one (and only one) method of appeal" to this Court. *Moran v. Necaise*, 437 So.2d 1222, 1225 (Miss. 1983). This Court's appeal procedure is simple, and is "...in the form of a hard-edged, mandatory rule" that is to be enforced as written. *Tandy Electronics v. Fletcher*, 554 So.2d 308, 310 (Miss. 1989). Plaintiffs' Notice of Appeal stated they appealed "...from the final Judgment entered in this case on April 16, 2007." Accordingly, Plaintiffs' Motion to Amend Complaint and/or the trial court's denial of same were not timely appealed, and are not properly before this Court.

Even if, *arguendo*, appeal of the trial court's denial of Plaintiffs' Motion to Amend is properly before this Court, the trial court's ruling should be affirmed. This Court reviews a trial court's denial of a motion to amend under an abuse of discretion standard. *Webb v. Braswell*, 930 So.2d 387, 393 (Miss. 2006) (citing *Church v. Massey*, 697 So.2d 407, 413 (Miss. 1997)). And, although leave to amend should be "freely given when justice so requires," such leave should not be granted when the proposed amendment is futile. *Id.*

Plaintiffs' Brief alleges they "did not know of the report from Advanced Engineering until January 3, 2006," and "this disclosure was possible only after the deposition of Mary Rodriguez." Plaintiffs' Brief, Page 24. Plaintiffs' Brief further alleges "Walker's identity was not known with certainty until after Simmons was deposed." *Id.* These assertions are simply not true.

Plaintiffs' Complaint, filed on October 29, 2003, alleged: a prospective buyer had an engineer inspect the property; said buyer did not buy the property based upon the engineer's report; that same, or another, prospective buyer had an inspection performed by Don Walker of Home Inspection

Service; and said buyer did not purchase the property based upon Walker's report. (Rec., Pages 008-009). Plaintiffs' Complaint also alleged Dabbs failed to disclose the existence of the engineer's and the home inspector's reports from its previous listing. (Rec., Page 009).

As such, Plaintiffs clearly had full knowledge of an engineer's report, Walker himself, and Walker's home inspection of the Subject Property before their Complaint was filed in 2003. Plaintiffs should not be allowed to amend their Complaint more than three (3) years after it was filed to add claims they knew about when the original Complaint was filed. Accordingly, even if Plaintiffs' appeal of the trial court's denial of their Motion to Amend Complaint is found to be properly before this Court, the trial court's denial was not an abuse of discretion and should be affirmed.

3. Plaintiffs' Claims are Barred by the Statute of Limitations.

Plaintiffs argue their cause of action against Dabbs for alleged failure to disclose the Walker Report and the Advanced Engineering Report accrued upon either closing or the date said reports were actually discovered. The Dual Agency Confirmation and Seller's Disclosure Statement relating to Plaintiffs' purchase of the Subject Property were executed on August 8, 2000. (Rec., Pages 18 and 16-17). The Fletcher Contract was executed on September 16, 2000. (Rec., Pages 14-15). Plaintiffs' alleged claims against Dabbs arise from these three (3) documents, and the applicable statute of limitations for said claims is, at most, three (3) years pursuant to Miss. Code Ann. § 15-1-49. *Stephens v. Equitable Life Assurance Society of the United States*, 850 So.2d 78, 82 (Miss.Ct.App. 2003). *See also Carter v. Citigroup, Inc.*, 938 So.2d 809, 817 (Miss. 2006); *Frye, et al. v. American General Finance, Inc.*, 307 F.Supp2d 836, 841 (Miss. 2004). The length of time of the applicable statute of limitations is not in dispute on appeal. All representations made regarding the Subject Property were made through the aforementioned documents, and all obligations and/or rights amongst the parties attached on or before September 16, 2000, the date the

Fletcher Contract was executed. Plaintiffs did not file suit until October 29, 2003. Accordingly, Plaintiffs' claims are barred by the statute of limitations.

Plaintiffs utilize the purchase of an insurance contract as an analogy for application of the statute of limitations with regard to the case at bar. The statute of limitations, with regard to an insured's claims, does run from the purchase of the insurance policy. *Robinson v. Southern Farm Bureau Casualty Co.*, 915 So.2d 516, 519 (Miss.Ct.App.2005). Plaintiffs, however, are incorrect in their application of the cited case law. Plaintiffs cite *CitiFinancial Mortgage Company, Inc. v Washington*, 967 So.2d 16, 19 (Miss.2007) in support of their claim that some insurance contract cases have held the statute of limitations does not run until the date of the actual injury. See Plaintiffs' Brief, Pages 7 and 10. *CitiFinancial*, however, was not an insurance contract case, it was a balloon-payment mortgage case. The *CitiFinancial* Court found the claims regarding the mortgage contract accrued on the date the contract was executed and the Plaintiff received a copy of the contract. Accordingly, *CitiFinancial* supports Dabbs' argument, as Plaintiffs executed and obtained copies of the aforementioned three (3) documents on or before September 16, 2000.

The statute of limitations on Plaintiffs' causes of action began to run when the aforementioned documents were signed. *See Andrus v. Ellis*, 887 So.2d 175, 180 (Miss. 2004). The *Andrus* court held that because the plaintiffs signed and received the loan documents, they were charged with notice of their claims and, therefore, all claims accrued at the time the loan agreements were executed. *Id.* at 180 and 182. Additionally, any liability imposed through statutory provisions and/or the Sellers' Disclosure Statement, would have accrued when the representation and/or disclosure was made. See *Arbor Village Condominium Association v. Arbor Village, Ltd.*, 642 N.E.2d 1124 (Ohio Ct. App. 1996) (holding claims under disclosure statutes accrued, for limitation purposes, when the disclosure statements were given to purchasers, rather than when purchasers discovered undisclosed defects). Again, all representations made regarding the Subject Property

were made through the three (3) aforementioned documents, and all obligations and/or rights amongst the parties attached on or before September 16, 2000. Plaintiffs had signed and received the aforementioned documents, and were charged with notice of their claims as of September 16, 2000. Plaintiffs did not file suit until October 29, 2003. Accordingly, all causes of action asserted by Plaintiffs against Dabbs are barred by the statute of limitations.

Plaintiffs argue their statute of limitations should be tolled, alleging Dabbs concealed the causes of action from them. "The statute of limitations may be tolled under circumstances where the underlying cause of action has been fraudulently concealed by the defendant[]." *Frye*, 307 F.Supp.2d at 841. *See also Parker v. Horace Mann Life Ins. Co.*, 949 So.2d 57, 59 (Miss.Ct.App. 2006) (citing *Robinson v. Cobb*, 763 So.2d 883, 887 (¶ 18) (Miss. 2000)). Miss. Code Ann. § 15-1-67 establishes guidelines that toll the statute of limitations in cases of fraudulent concealment. The burden of proof to prove a statute of limitations was tolled rests with the plaintiff. *Carter,* 938 So.2d at 819 (citing *Stephens*, 850 So.2d at 84 and *Andrus*, 887 So.2d at 181)). *See also Brumfield v. Pioneer Credit Co.*, 291 F.Supp.2d 462, 469 (S.D.Miss. 2003).

Plaintiffs have failed to offer any admissible evidence that Dabbs ever actually received or had possession of either the Walker Report or the Advanced Engineering Report. Rodriguez, as the prospective buyers of the Subject Property in 1999, ordered and paid for the Walker Report and the Advanced Engineering Report. (Rec., Pages 192 and 305-306). As such, the Rodriguez were the lawful owners of the reports and, according to the evidence in this case, were the only people who could have given either of them to another person.

The trial court specifically asked Plaintiffs what proof they had, be it a document or something, showing Dabbs had knowledge or possession of either the Walker Report or the Advanced Engineering Report. (Rec., Page 340). In response, Plaintiffs could only offer that the deposition transcripts of either Mrs. Rodriguez or Simmons indicated Joan Thomas had the reports.

Id. There has been no evidence of Rodriguez or Simmons giving either the Walker Report or the Advanced Report to Dabbs.

Plaintiffs attempt to divert this Court's attention away from the lack of evidence by their submission of Sandra Fletcher's Affidavit. (Rec., Pages 297-298). Sandra Fletcher's Affidavit alleges Mrs. Rodriguez "indicated [during her deposition] that she and her husband had turned over the engineering report to the real estate agents to get out of the contract." *Id.* However, Mrs. Rodriguez's final testimony was that she could not recall to whom she had given copies of the reports. (Rec., Page 308). Mrs. Rodriguez's deposition testimony regarding the reports, in relevant part, is as follows:

> Q. Let me ask you this question: When you got out of the contract, when you told your real estate agent that you wanted to get out of the contract, did you give your real estate agent a copy of this report?
> *A. I – you know, I gave – I was talking to my husband about that because I could not find that paperwork. I think – I don't know who I gave it to. I gave someone a copy of everything and I – but I don't know who it was. So I don't know if it was the real estate agent we were working with or if it was –*
> Q. The other real estate agent maybe.
> *A. The other – it may – no, I don't recall. I just remember that I did give copies to someone.*
>
> (Rec., Page 308).

As such, Plaintiffs have not provided any evidence of any person giving either the Walker Report or the Advanced Engineering Report to Dabbs.

Plaintiffs' Brief alleges that Simmons testified Joan Thomas received a copy of the Walker Report. (See Plaintiffs' Brief, Page 15). Plaintiffs' reference directs us to Pages 310-314 of the Record on Appeal. Plaintiffs' reference, however, fails to acknowledge Simmons later clarified his testimony as follows:

> Q. How many copies did you have?
> *A. It was just one there.*
> Q. And now who gave you that copy?

A. I can't remember that, if they left it. I believe Joan brought it and left it there or Don Walker may have give it to her. I really don't know, or if he left it there. He came with these people when they came back to inspect the house, so I don't know. I don't know who left it, but I remember the report laying on the table.

Q. And now it's your testimony that Mr. Lyles picked that report up and took it with him?

A. Yes, sir. To the best of my recollection, yes, sir.

Q. And did you give that report to anybody else?

A. Nobody else asked for it. Nobody came through.

(See Exhibit A, Page 4, Lines 6-23).

Dabbs has denied that he ever received or had possession of the Walker Report. (Rec., Page 257). Additionally, Plaintiffs failed to produce any evidence that Dabbs *had* to have either the Walker Report or the Advanced Engineering Report in order to release the Rodriguez's earnest money.

Plaintiffs' argument Dabbs either withheld or failed to provide the two (2) prior reports is, therefore, based upon mere conjecture and speculation. As a general rule, "...damages which are uncertain, contingent or speculative are not recoverable." *Finkelberg v. Luckett*, 608 So.2d 1214, 1222 (Miss. 1992). And, "...no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether or not the damages resulted from the act of which complaint is made, or some other cause." *Id.* (citing *Hudson v. Farrish Gravel Co., Inc.*, 270 So.2d 630, 636 (Miss. 1973)). Plaintiffs have no evidence of any kind to show Dabbs received the reports at issue. Accordingly, Plaintiffs have no claim against Dabbs concerning misrepresentation or nondisclosure of any matters contained in either the Walker Report or the Advanced Engineering Report.

Compare the case of *Lane v. Oustalet*, 873 So.2d 92 (Miss. 2004). In *Lane*, as in the case at bar, the agent was a dual agent. *Lane,* 873 So.2d at 96. The *Lane* court held that the dual agent had actual knowledge and possession of a termite inspection report [indicating unrepaired termite damage] which she had received from the sellers, but repeatedly failed to disclose to the buyers. *Id.*

at 97. Accordingly, the *Lane* court found the agent liable for breach of fiduciary duty. *Id.* There is no such evidence in the case at bar.

"Under Mississippi law, to toll the limitations period, a plaintiff must prove (1) that the defendant 'engaged in affirmative acts of concealment' and (2) that 'though [the plaintiff] acted with due diligence in attempting to discover [the claim, the plaintiff] was unable to do so.'" *Frye*, 307 F.Supp.2d at 841-842 (quoting *Robinson v. Cobb*, 763 So.2d 883, 887 (Miss. 2000)). *See Brumfield,* 291 F.Supp.2d at 469. Fraudulent concealment requires "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." *White, et al v. City Finance Company, et al*, 277 F.Supp.2d 646, (Miss. 2003). A plaintiff must first demonstrate he exercised due diligence to discover the alleged fraud before he can claim tolling for fraudulent concealment. *Lady v. Jefferson Pilot Life Ins. Co.,* 241 F.Supp.2d 655, 661(Miss. 2001) (citing *Cunningham v. Mass. Mutual Life Ins. Co.*, 972 F.Supp. 1053, 1054 (N.D. Miss. 1997)).

Plaintiffs have failed to plead or offer any evidence of an affirmative act of fraudulent concealment by Dabbs after they either (1) executed the Dual Agency Agreement and/or receipt of Sellers Disclosure Statement on August 8, 2000, or the Fletcher Contract on September 16, 2000, or (2) after they received the AmeriSpec Report on or about September 29, 2000. Omission of information in loan documentation has been held not to amount to an "act or conduct of an affirmative nature." *Id.* (citing *Vaughn v. Citifinancial, Inc.*, Civ. Action No. 4:02CV452LN, (S.D. Miss. May 16, 2003)). Additionally, Plaintiffs' allegations overlook the fact "the duty of good faith attaches to the performance of the contract, not to the negotiation of terms leading to the agreement." *Davis v. General Motors Acceptance Corp., et al*, 406 F.Supp.2d 698, (N.D.Miss. 2005) (citing *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 899 (S.D.Miss. 1998)). Plaintiffs argue their claims are not for breach of contract. Plaintiffs' claims, however, are based upon, and arise out of, the Dual Agency Agreement, Sellers' Disclosure Statement, and/or the Fletcher

Contract. No further representations were made by Lyles or Dabbs beyond these documents. See *Ferrone v. Resnich,* 2002 WL 442314 (Conn.Super.Ct.Feb. 25, 2002) (holding that, with regard to a real estate purchase contract, claims for misrepresentation accrued at the time of execution of the purchase contract).

Under Mississippi law, "the statute of limitations commences to run in any event at the time the fraud is discovered, or at such time as the fraudulent concealment 'with reasonable diligence might have been first known or discovered.'" *Brumfield*, 291 F.Supp.2d at 469 (quoting *Rainwater v. Lamar Life Ins. Co.*, 207 F.Supp.2d 561, 568 (S.D.Miss. 2002)). Plaintiffs inspected the property three (3) times, and one (1) of Plaintiffs' inspections occurred while there was no furniture and/or other "obstacles" in the home. (Rec., Page 224). Additionally, Plaintiffs chose to procure and purchase their own, independent home inspection from AmeriSpec. (Rec., Page 222).

AmeriSpec inspected the Subject Property and produced a report of same on September 29, 2000. (Rec., Pages 241-255). AmeriSpec thoroughly reviewed the Subject Property for over two (2) hours, and reported several negative (unserviceable) items. *Id.* AmeriSpec did not, however, report any problems with the Subject Property's foundation and/or exterior. *Id.* AmeriSpec reported the following:

> General Conditions:
> Exterior:
> Lot Type: Home is built on a flat lot
> Lot/Grade Drainage: Serviceable and flat lot
> Exposed Foundation: Serviceable and concrete slab
> (Rec., Pages 244-245).
> Garage:
> Floor/Slab: Serviceable and concrete
> Common cracks noted
> (Rec., Page 247).

The term "serviceable" is defined, in relevant part, in the AmeriSpec Report as meaning "[t]he materials and workmanship are acceptable and in generally satisfactory condition." (Rec., Page 243).

AmeriSpec specifies in its report that it does "a complete overview of the condition of the property." *Id.* Plaintiffs were placed on notice of the "condition of the property" upon receipt of the AmeriSpec Report. Further, after the electrical component was addressed, Plaintiffs were satisfied with the condition of the Subject Property. (Rec., Page 224).

Sandra Fletcher's Affidavit stated that "Mr. Walker's report revealed that several doors were out of alignment and did not latch" and had she known this fact, she would have secured an inspection of the Subject Property by a structural engineer. (Rec., Page 261). The AmeriSpec Report noted that there were cracks in the garage floor/slab. (Rec., Page 247). The AmeriSpec Report noted, in **bold print**, the following: bathroom "**[d]oor will not latch**"(Rec., Page 253); bathroom "**[d]oor will not latch**" (Rec., Page 254); and bedroom "**[d]oor will not latch**"(Rec., Page 255). Accordingly, Plaintiffs had actual knowledge and notice of the doors of the Subject Property not latching as of the date they received the AmeriSpec Report, September 29, 2000.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be state with particularity." Miss. R. Civ. P. 9(b). These circumstances include the time, place, and contents of the fraudulent representation. *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 642 (Miss. 1996). "A claim of negligent misrepresentation requires proof that: (1) defendant failed to exercise reasonable care in making (2) a misrepresentation or omission of a fact that was (3) material or significant, and that plaintiff reasonably relied on the misrepresentation or omission and was (4) damaged as a result." *Brumfield v. Pioneer Credit Co., et al*, 291 F.Supp.2d 462 468 (S.D.Miss. 2003) (citing *Levens v. Campbell*, 733 So.2d 753, 762 (Miss. 1999)). Plaintiffs must prove their negligent misrepresentation claim by a preponderance of the evidence. *Levens v. Campbell*, 733 So.2d at 75. And, a "failure to present sufficient proof as to any one of these elements requires that the entire claim be denied." *Little v. Miller*, 909 So.2d 1256, 1259 (Miss. 2005). Plaintiffs failed to meet the evidentiary burden for such a claim.

In the case of *Little v. Miller,* Miller purchased a corner lot in a subdivision with the intention of building a house upon it and selling same. *Id.* at 1257. The Littles were interested in purchasing the finished home from Miller. *Id.* A caveat to the property, however, was that the topical landscaping was not finished due to inadequate water drainage and excessive rain at that time. *Id.* As a result, the Littles contracted with a landscape contractor to inspect the property for an estimate including remedying the drainage problem as well as completing the topical landscaping. *Id.* The Littles closed on the property based upon the landscape contractor's estimate and received a $2,000.00 drainage and landscaping allowance due to same. *Id.* at 1258. Miller's sellers' disclosure statement also included a declaration that the property was free of sub-soil defects and standing water. *Id.* The Littles later discovered that there was a natural drainage feature running through the property, and repair would cost approximately $17,000.00. *Id.* The court found the Littles had inspected the property before purchasing it, discovered some drainage and erosion problems, and hired a contractor for an estimate for necessary repairs. *Id.* at 1260. The court held the Littles "...completed the purchase after making their own observations and having White inspect the lot" and had failed to "...prove by a preponderance of the evidence that they acted in reliance of a misrepresentation by Miller." *Id.*

As in *Little*, Plaintiffs inspected the property themselves on three (3) separate occasions. (Rec., Page 224). Plaintiffs elected to employ a professional, AmeriSpec, for an inspection of the Subject Property, and relied upon the results of the professional's report. The trial court specifically noted Plaintiffs should have known of any defects as of the date of the AmeriSpec Report. (Rec., Suppl. Vol. 1, Page 17, Lines 1-5). Accordingly, Plaintiffs have not proven by a preponderance of the evidence that they relied upon any alleged misrepresentation by Dabbs.

To establish a claim of fraudulent misrepresentation, Plaintiffs must prove the elements of fraud by clear and convincing evidence. *Powell v. Cohen Realty*, 803 So.2d 1186, 1190 (Miss. 1999)

(citing *Levens v. Campbell*, 733 So.2d 753, ¶ 35 (Miss. 1999)). Elements include: (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 person 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. *Id.* Plaintiffs also fail to meet the evidentiary burden for a fraudulent misrepresentation claim.

In *Powell v. Cohen Realty*, the buyer brought suit against the sellers and the agency alleging misrepresentation and fraud. *Id.* at 1189. The buyer alleged problems with the property that were not disclosed to her prior to purchase or that were not discovered in the pre-purchase inspection. *Id.* at 1188. The buyer's complaints included settlement of the house, water drainage under the house, mold, defective electrical system, roof damage plumbing problems, and cracks and peeling of the walls. *Id.* at 1188-1189. The court found that the buyer had possession of the disclosure statement provided by sellers pursuant to applicable law, had inspected the home herself, and, therefore, failed to meet her burden of proof. *Id.* at 1190-1191.

Plaintiffs also argue their statute of limitations did not begin to run as of September 16, 2000, because a component of the contract remained to be fulfilled. In support of their argument, Plaintiffs cite *Bailey v. Estate of Kemp*, 955 So.2d 777 (Miss. 2007). The *Bailey* case, however, is not applicable to the case at bar. In *Bailey*, the parties entered into a contract and a memorandum of understanding ("MOU") wherein several pieces of real property were to be sold, the existing promissory note paid, and then the remaining monies would be split equally among the parties. The contract and the MOU repeatedly used the term "contingent," and the contract required that "when all properties have been in fact liquidated and all proceeds of sale received." *Bailey*, 955 So.2d at 785-786. The *Bailey* court found "the use of the term 'contingent,' and the express and plain language of the contract requiring the sale of all the properties, indicate[d] that two events [were]

conditions precedent" to payment of any further fees. *Id.* In other words, the property *had* to be *sold* for payment to become due.

In the Fletcher Contract, the "contingency" was that Plaintiffs receive a satisfactory home inspection report. (Rec., Pages 14-15). This contingency was met, as Plaintiffs procured the AmeriSpec Report, and were satisfied with the condition of the Subject Property. (Rec., Page 224). No further conditions precedent had to be met after Plaintiffs received the AmeriSpec Report. Accordingly, *Bailey* does not apply to the Fletcher Contract or the case at bar.

Plaintiffs failed to prove that they were damaged as a result of any action, or inaction, by Dabbs. Sandra Fletcher was a licensed real estate professional at the time of this transaction. (Rec., Page 221). Sandra Fletcher admitted that both the Redd Pest Control and All Metro reports (indicating termite damage) were provided to them prior to closing. (Rec., Pages 227 and 233). Sandra Fletcher admitted the Subject Property was under a transferrable termite account at the time of their purchase. (Rec., Page 237). Monty Fletcher reviewed the Walker Report during his deposition, and testified there was nothing in it indicating previous repairs to the Subject Property's foundation had ever been made. (Rec., Page 218). In fact, the only detail Monty Fletcher could even try to identify as a foundation problem in the Walker Report was the installation of gutters with under piping. (Rec., Pages 216-219). Further, Monty Fletcher admitted he would have bought the property, period, because his wife liked it so much. (Rec., Pages 213-214).

This Court has held "...where [a] plaintiff in a negligence action has only presented proof that the actual cause was one of a number of possibilities, to enable an inference to be drawn that any particular cause is probable, the other causes must be eliminated." *Lee Hawkins Realty, Inc. v. Moss and Williams*, 724 So.2d 1116, 1120 (Miss. 1998) (quoting *Miss. Valley Gas Co. v. Estate of Walker*, 1998 Miss. LEXIS 367, 95-CA-00907-SCT (P21) (Miss. 1998) (quoting 57A AM. JUR. 2d *Negligence* § 462 (1989)). Again, Plaintiffs have failed to produce any proof of consequent and

proximate damages. Plaintiffs' Complaint, in fact, is based only on conjecture and speculation, as there have never been any professional estimates regarding damage or work to repair, much less to maintain the Subject Property. Plaintiffs must "...offer something beyond pure speculation that there was negligence" and that Dabbs' actions, or inactions, caused the injury. *Id.*

Plaintiffs present a latent defect argument for the first time on appeal to this Court. "A trial judge cannot be put in error on a matter not presented to him." *Chantey Music Publishing, Inc. v. Malabo,* Inc., 915 So.2d 1052, 1060 (Miss. 2005) (citing *Southern v. Mississippi State Hosp.*, 853 So.2d 1212, 1214-1215 (Miss. 2003) (quoting *Mills v. Nichols*, 467 So.2d 924, 931 (Miss. 1985)). And, "[p]recedent mandates that this Court not entertain arguments made for the first time on appeal as the case must be decided on the facts contained in the record and not on assertions in the briefs." *Id.* (citing *Parker v. Miss. Game & Fish Comm'n*, 555 So.2d 1377, 1379 (Miss. 1988)). Accordingly, Plaintiffs' latent defect argument is improperly before this Court.

4. Dabbs Complied with the Requirements of Miss. Code Ann. § 73-35-21(1)(a) and the Real Estate License Law.

Plaintiffs argue Dabbs had a duty to, and failed to, maintain a copy of both the Rodriguez's home inspection reports in its file. Specifically, Plaintiffs allege Dabbs failed to adhere to Rule IV (B)(7), which deals with "Documents." Plaintiffs, however, fail to correctly address when the document retention requirements come into effect. The full language of (B)(7) is as follows:

> A real estate broker must keep on file for three years **following its consummation**, complete records relating to any real estate **transaction**. This includes, but is not limited to: listings, options, leases, offers to purchase, contracts of sale, escrow records, and copies of closing statements." (emphasis added).

The noun "consummation" is derived from the verb "consummate" which means "complete" or "perfect." See Webster's New World Dictionary, Revised Edition, Page 135 (1987). The term "transaction" is a noun identifying "...something transacted; specif., a) a business deal, b) a record

of the proceedings of a society, etc..." *Id.* at Page 634. As such, Rule IV(B)(7) does not apply unless the real estate "deal" is "completed." The Rodriguez contract was never completed. (Rec., Page 185). As such, the document retention requirements cited by Plaintiffs never came into effect.

Plaintiffs' Brief itself actually supports Dabbs' argument regarding document retention requirements. Plaintiffs define "consummate" as "to bring to completion," "completion," and "to end, finish, conclude." Plaintiffs' Brief, Pages 28-29 (citing *Black's Law Dictionary*, Seventh Ed., Page 312 and *Webster's New World Dictionary*, Second College Ed., Page 290). Plaintiffs then attempt to circumvent their own definitions of "consummate" by relying upon the words "but not limited to" in (B)(7). Plaintiffs' Brief, Pages 16-17. Plaintiffs' argument, however, is circular, and does not change the fact that (B)(7) uses the word "consummated" or the definitions for same.

Plaintiffs provide no evidence or testimony to support their allegation that (B)(7) includes incomplete transactions or that the trial court's interpretation of "consummate" is contrary to public policy or in any way contrary to the public interest. Plaintiffs provide no evidence or testimony Dabbs in any way strayed from industry standards. As such, Plaintiffs' allegations regarding public policy and alleged big, bad business are simply posturing and an attempt to divert this Court's attention away from the fact that Dabbs was under no requirement to keep either the Walker Report or the Advanced Engineering Report if it ever, in fact, received same.

This Court held

> in considering a statute passed by the Legislature,....the first question a court should decide is whether the statute is ambiguous. If it is not ambiguous, the court should simply apply the statute according to its plain meaning and should not use principles of statutory construction. [Citations omitted]. Whether the statute is ambiguous or not, the ultimate goal is to discern and give effect to the legislative intent.

Barber v. State ex rel. Hood, — So.2d. —, 2008 WL 316085 (Miss. 2008) (citing *Mississippi Dept. of Transportation v. Allred*, 928 So.2d 152, 154 (quoting *City of Natchez v. Sullivan*, 612 So.2d

1087, 1089 (Miss. 1992)). And, a statute is accorded its plain meaning when it is unambiguous. *Id.* (citing *Mississippi Ins. Guar. Ass'n. v. Cole*, 954 So.2d 407, 412-413 (Miss. 2007)). The meaning of "consummated" is unambiguous, even under the Plaintiffs' own definitions. As the meaning of "consummated" is unambiguous, then (B)(7) and the statutory use of "consummated" should be afforded the plain meaning. The Rodriguez contract was never completed and, therefore, not consummated. As such, the document retention requirements cited by Plaintiffs never came into effect and Dabbs was not required to retain either the Walker Report or the Advanced Engineering Report if it ever, in fact, received same. The trial court held that if Dabbs breached the duty to keep documents, there was no notice of it, and it did not mean Dabbs actually got either of the reports. (Rec., Page 343).

Even if, *arguendo*, Dabbs was required to retain documents on unfinished transactions, the documents required under (B)(7) are documents that are essential and/or required portions of a real estate transaction. They are documents that memorialize the agreement(s) between the parties. They are documents that contain the complete terms of the completed sale between the parties.

A home inspection report, however, is not such a document. A home inspection report is not required by law for a real estate transaction to be completed. A home inspection report is purely at the election of the buyer, and one can purchase real property with or without obtaining home inspection. Further, the buyer is the owner of the home inspection report, should he choose to obtain one. The buyer contracts with the home inspection company and pays for the home inspection. The buyer has a right, if reserved, to cancel the real estate contract should the home inspection report come back unacceptable. The Fletcher Contract illustrates the elective nature of a home inspection report and to whom it belongs. The relevant part of the Fletcher Contract regarding the home inspection is found in Paragraph 13:

> Buyer reserves the right to inspect property or to engage a qualified

> home inspector of Buyer's choice, and at Buyer's expense to inspect property prior to closing for the purpose of evaluating...If inspection report(s) is(are) not acceptable to Buyer, Buyer may terminate this transaction by written notice delivered to Seller or Seller's agent...

(Rec., Pages 14-15). Accordingly, even if, *arguendo*, Dabbs did have a duty to retain documents from the incomplete Rodriguez contract, a home inspection report is not the type of document required to be retained. It is not a document specifically mentioned by the Rule and is not the same type document as the other documents mentioned in such Rule.

Further, Plaintiffs' interpretation of Rule IV(B)(7), § 73-35-21(1)(a) and § 73-35-31 would have us expand the regulation of real estate far beyond the controlling agency's purpose for the same. This Court has charged certain agencies with regulating activities because they know best how to "police" their own. *Miss. Real Estate Comm. v. McCaughan*, 900 So.2d 1169, 1174 (Miss. 2004). In *McCaughan,* this Court stated it felt this "policing" ability was especially true for the Mississippi Real Estate Commission, as it is "...an agency commission comprised of fellow practitioners...[that] sits in judgment of one of its own." *Id.* "Administrative proceedings deal with people who have specialized knowledge or have earned licenses based on specific knowledge." *McCaughan*, 900 So.2d at 1174. Had the Mississippi Real Estate Commission felt documents from incomplete dealings should be kept, it would have so specified. It did not. The Mississippi Real Estate Commission only mandated essential and required documents from completed real estate transactions be maintained for three years. And, again, an elective home inspection report belonging to a prospective buyer in an incomplete transaction does not qualify as a document to be so retained.

There is no case from Mississippi where a court has held an elective home inspection report is required to be maintained by a broker. The most closely related case to the one at bar is *Miss. Real Estate Comm. v. Ruby Hennessee*, 672 So.2d 1209, 1996 Miss. LEXIS 142 (Miss. 1996). The *Hennessee* case dealt with an inspection certificate. *Id.* at 1210. The agent promised the certificate

before the sale, on the date of the sale and after the sale. *Id.* at 1218. The certificate was then lost in an office fire at the agent's office. *Id.* The court upheld the Commission's suspension, but not on the grounds she violated any of the rules. The agent's suspension was upheld because she had not complied with the actual terms of the contract for the sale and purchase of real estate itself. *Id.* at 1212-1214. There is no such evidence in the case at bar.

Even if, *arguendo*, Dabbs did receive and did have a duty to maintain the home inspection report, it would not have mattered. As previously stated, Monty Fletcher reviewed the Walker Report during his deposition, and testified there was nothing in it that would have placed them on notice of any foundation problems. (Rec., Pages 213-214). Further, Monty Fletcher also admitted that he would have bought the property, period, because his wife liked it so much. *Id.* As such, Dabbs' alleged failure to maintain the home inspection report is irrelevant.

Plaintiffs' claims with regard to Dabbs' alleged responsibility to provide them with copies of the Walker Report and the Advanced Engineering Report are contrary to the unambiguous rules and are without merit.

IV. CONCLUSION

For the foregoing reasons, the trial court's April 16, 2007, Judgment should be affirmed, and Plaintiffs' Complaint against Dabbs dismissed with prejudice.

RESPECTFULLY SUBMITTED, on this 11th day of March, 2008.

KELLY DABBS REALTY, INC.

By: _____
Julie P. Ratliff

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Julie P. Ratliff, one of the attorneys for Defendant Kelly Dabbs Realty, Inc., do hereby certify that I have this day served a true and correct copy of the above and foregoing document by United States mail, postage prepaid, to the following:

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THIS, the 11th day of March, 2008.

Julie P. Ratliff

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Appendix 1

IN THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

FILED
THIS DAY
JUL 17 2006
LEE WESTBROOK
CIRCUIT CLERK

MONTY C. FLETCHER AND SANDRA L. FLETCHER — PLAINTIFFS

V. — CIVIL ACTION NO. 2003-00278

JIMMIE L. LYLES AND LEONEZE C. LYLES AND
KELLY DABBS REALTY, INC. — DEFENDANTS

KELLY DABBS REALTY, INC'S REBUTTAL TO PLAINTIFFS' RESPONSE TO KELLY DABBS REALTY, INC'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Kelly Dabbs Realty, Inc. ("Dabbs") and files this its Rebuttal to Plaintiffs Monty C. and Sandra L. Fletcher's ("Fletcher") Response to Dabbs' Motion for Summary Judgment, and in support thereof would respectfully show unto the Court the following:

1. In rebuttal to Plaintiffs' Response to Dabbs' Motion for Summary Judgment, Dabbs relies on the following supplemental exhibit attached hereto and incorporated herein by reference:

Exhibit G: Deposition Excerpts of Kenneth W. Simmons

WHEREFORE PREMISES CONSIDERED, Defendant Dabbs Realty, Inc respectfully requests that the Court grant its Motion for Summary Judgment and enter an Order dismissing Fletcher's claims against it as there are no genuine issues of material fact in dispute and Dabbs is entitled to judgment as a matter of law. Dabbs also prays for any other, further relief this Court deems appropriate and just.

Respectfully submitted,
DABBS REALTY, INC.

By: _____
G. Todd Burwell
Its Attorney

EXHIBIT A

Of Counsel:
G. Todd Burwell, MSB No. 8832
Julie P. Ratliff, MSB No. 10185
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618 Crescent Blvd., Suite 200
Ridgeland, Mississippi 39157
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CERTIFICATE OF SERVICE

I, G. Todd Burwell, Attorney for Dabbs, do hereby certify that I have this day hand-delivered a true and correct copy of the above and foregoing Motion for Summary Judgment to the following:

K.F. Boackle, Esq.
Boackle Law Firm, PLLC
1020 Northpark Drive, Suite B
Ridgeland, MS 39157-5299

Eddie J. Abdeen, Esq.
P.O. Box 2134
Madison, MS 39130-2134

This the 17th day of July, 2006.

G. Todd Burwell

IN THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

MONTY C. FLETCHER, ET UX. PLAINTIFFS

VS. CIVIL ACTION NO. CI-2003 00278

JIMMIE L. LYLES, ET AL. DEFENDANTS

DEPOSITION OF KENNETH W. SIMMONS

Taken at the instance of the Plaintiffs, at the offices of the Boackle Law Firm, 1020 Northpark Drive, Suite B, Ridgeland, Mississippi, on the date of March 22, 2004.

APPEARANCES:

K. F. BOACKLE, ESQUIRE
Boackle Law Firm, PLLC
1020 Northpark Drive, Suite B
Ridgeland, Mississippi 39157-5299

[REPRESENTING THE PLAINTIFFS]

JESSE HARRINGTON, ESQUIRE
Harrington & Willoughby
573 Highway 51 North, Suite D
Ridgeland, Mississippi 39157

[REPRESENTING THE DEFENDANT, JIMMIE AND LEONEZE LYLES]

JAMES E. LAMBERT, ESQUIRE
Attorney at Law
P. O. Box 12245
Jackson, Mississippi 39236-2245

[REPRESENTING THE DEFENDANTS, KELLY DABBS REALTY AND JOAN THOMAS]

Also present: Mrs. Sandy Fletcher

PAT T. JOHNSON, COURT REPORTER (CSR # 1216)
1104 PETRIFIED FOREST ROAD
FLORA, MISSISSIPPI 39071
(601) 879-9944

EXHIBIT "G"

A. No.

Q. But you had a copy of the report at your house when the Lyles came to your house?

A. It was laying on my table, dining room table.

Q. How many copies did you have?

A. It was just one there.

Q. And now who gave you that copy?

A. I can't remember that, if they left it. I believe Joan brought it and left it there or Don Walker may have give it to her. I really don't know, or if he left it there. He came with these people when they came back to inspect the house, so I don't know. I don't know who left it, but I remember the report laying on the table.

Q. And now it's your testimony that Mr. Lyles picked that report up and took it with him?

A. Yes, sir. To the best of my recollection, yes, sir.

Q. And did you give that report to anybody else?

A. Nobody else asked for it. Nobody else came through.

Q. So Mr. and Mrs. Lyles were the next folks who looked at the house --

Appendix 2

IN THE SUPREME COURT OF MISSISSIPPI

MONTY C. FLETCHER AND
SANDRA L. FLETCHER — PETITIONERS

v. — MISC NO. _____

JIMMIE L. LYLES AND LEONEZE C. LYLES
AND KELLY DABBS REALTY, INC. — RESPONDENTS

PETITION FOR INTERLOCUTORY APPEAL

Petitioners, by counsel, pursuant to Rule 5 of the Mississippi Rules of Appellate Procedure, petition this Court for permission to appeal an interlocutory order of the Circuit Court of Madison County, Mississippi. In support of their Petition, Petitioners would show the following:

1. Petitioners are the plaintiffs in Civil Action No. 2003-00278-R in the Circuit Court of Madison County, Mississippi seeking damages from the defendants related to the condition of certain property purchased from Jimmie L. Lyles and Leoneze C. Lyles (hereinafter "Lyles"). Respondents are the defendants in that same action.

2. In this Petition, Petitioners seek relief from this Court from an order of the Circuit Court of Madison County, Mississippi denying Petitioners' Motion to Amend Complaint on the basis of additional claims that Petitioners learned of through discovery.

3. The facts necessary to an understanding of the questions of law determined by the order of the Circuit Court as to which appeal is sought are as follows:

a. On September 16, 2000, the Petitioners entered into a contract to purchase the property located at 136 Bridge Water Drive, Madison, Mississippi, 39110 from

EXHIBIT B

defendants, Jimmie L. Lyles and Leoneze C. Lyles (hereinafter "Lyles") through defendant Kelly Dabbs Realty, Inc. (hereinafter "Dabbs"). Dabbs was the listing and selling broker, thus a dual agent. A true copy of the contract labeled Exhibit "A" is attached hereto.

b. Lyles, provided Petitioners with a Seller's Disclosure Statement concerning the condition of the property. Lyles stated that they were not aware of any defects or needed repairs to the property about which the Petitioners should be informed. A true copy of the Seller's Disclosure Statement labeled Exhibit "B" is attached hereto.

c. Through the discovery process, it was learned that during June and July of 1999, Dabbs had the subject property listed for one Kenny Simmons, the owner of the property prior to Lyles. It was also learned that during the time of that listing, prospective buyers Alfredo and Mary Rodriguez made an offer on the property that was contingent on a satisfactory home inspection. Because of the home inspection report, they ordered a structural engineer's report. Based on the condition of the property as disclosed by the home inspection report and the engineer's report, Rodriguez decided not to purchase the property and cancelled their contract. Shortly thereafter, Lyles purchased the property with knowledge of at least the home inspection report.

d. Dabbs was a dual agent in the transaction between Lyles and the Petitioners. Dabbs did not disclose to the Petitioners the existence of the home inspection report or the engineer's report, both of which reflected negatively on the property. Dabbs had a duty not to make any substantial misrepresentation in connection with a real

estate transaction under Miss. Code Ann. § 73-35-21(1)(a). Dabbs' silence represented a substantial misrepresentation. A true copy of the Dual Agency Confirmation labeled Exhibit "C" is attached hereto.

e. Dabbs did not disclose the home inspection report or the engineer's report from the previous listing of the property with Simmons. Dabbs had a duty to keep and/or maintain the Rodriguez offer to purchase for three years in its files pursuant to the Mississippi Real Estate Commission Rules and Regulations IV B 6 [7 in the current MREC Rule Book]. This rule states that brokers are required to maintain for three years following its consummation, complete records relating to any real estate transaction. "This includes, but is not limited to: listings, options, leases, offers to purchase, contracts of sale, escrow records, and copies of closing statements." It was learned in discovery that Dabbs did not keep those reports. A true copy of Mississippi Real Estate Commission Rules and Regulations IV B 6 labeled Exhibit "D" is attached hereto. If this list is broken down, it can readily be seen that all of the documents required to be kept on file by real estate brokers do not necessarily lead to a closing. All listings are not sold. All options are not exercised. All offers to purchase are not accepted. All contracts of sale do not close. Escrow records are kept to record earnest money deposits, including those deposits on contracts, that for various reasons, do not lead to a closing, and are refunded, just like in this case with the Rodriguez deposit. Yet the trial court ruled that since the Simmons /Rodriguez sale did not reach the closing table, Dabbs was not required to maintain any documents from that transaction and could not be found to have violated Miss. Code

Ann. § 73-35-21 as a matter of law. A true copy of the trial court's Order labeled Exhibit "E" is attached hereto. In the motion hearing, Dabbs argued that "The wording of the statute is crystal clear, it says, 'consummated'. There's only one definition of 'consummated' in Webster's Dictionary and that is 'completed' perfected'". However, in the MREC Rules, the word that is used is "consummation". In Petitioners' copy of Webster's Dictionary "consummation" is defined as "2. An end; conclusion; outcome." Thus, not all transactions lead to the closing table, yet Mississippi brokers still have a duty to keep all such records. A true copy of the hearing transcript labeled Exhibit "F" is attached hereto. A true copy of page 306 from Webster's New World Dictionary labeled Exhibit "G" is attached hereto.

f. Miss. Code Ann. § 73-35-35 empowers the Mississippi Real Estate Commission (MREC) to " . . . adopt, fix and establish all rules and regulations in its opinion necessary for the conduct of its business, the holdings of hearings before it, and otherwise generally for the enforcement and administration of the provisions of this chapter." Mississippi Real Estate Commission Rules and Regulations IV B 6 is such a rule.

g. Lyles knew of at least the previous home inspection report and failed to disclose the information contained therein to the Petitioners. There were serious problems with the property, including, but not limited to, foundation problems, roof leaks, flooding of the garage, and termite damage. Because Lyles was aware of these various problems, his non-disclosure of them was negligent, or in the alternative,

willful. This negligence and/or willfulness induced the Petitioners to purchase the property.

h. Petitioners filed their Complaint on October 29, 2003 in the Circuit Court of Madison County, Mississippi. A true copy of the Complaint labeled Exhibit "H" is attached hereto.

I. Dabbs filed its Answer on December 2, 2003. A true copy of that Answer labeled Exhibit "I" is attached hereto.

j. Jimmie L. Lyles filed his Answer, Affirmative Defenses, and Counterclaim on December 3, 2003. A true copy of that Answer labeled Exhibit "J" is attached hereto.

k. Leoneze C. Lyles filed her Answer, Affirmative Defenses, and Counterclaim on December 3, 2003. A true copy of that Answer labeled Exhibit "K" is attached hereto.

l. Lyles' first counsel of record passed away, Dabbs' first counsel of record had to withdraw due to health reasons, one of the defendants has passed away and Petitioners had some health issues in their family.

m. Initial efforts in the discovery phase led to the identity of the home inspector. When deposed, he could not produce his report because of some data being lost on an old hard drive. A computer expert was hired to recover the lost data. The identity of the Rodriguez was learned through the recovery of the data from the old hard drive. Ms. Rodriguez was located and deposed on December 9, 2005. Rodriguez confirmed that she and her husband had hired the home inspector and because of his report hired a structural engineer. Because of the engineer's report, Rodriguez cancelled the

contract on the subject property. The engineer's report was then subpoenaed and received on January 6, 2006. A true copy of Mary Rodriguez' deposition labeled Exhibit "L" is attached hereto. A true copy of Don Walker's summary inspection report labeled Exhibit "M" is attached hereto. A true copy of the engineer's report labeled Exhibit "N" is attached hereto.

n. Dabbs failed to disclose the existence of the home inspector's report and the engineer's report from his previous listing, just fourteen (14) months earlier, even though Dabbs had a duty to maintain the Rodriguez' offer to purchase for three years in its files.

o. Lyles knew of the previous inspection report, and failed to disclose the information contained therein to Fletcher. He may have known of the engineer's report.

p. Petitioners filed their Motion To Amend Complaint on January 24, 2006. A true copy of the Motion with proposed Amended Complaint labeled Exhibit "O" is attached hereto.

q. On September 19, 2006, the Circuit Court of Madison County, Mississippi issued an Order Denying Petitioner's Motion to Amend Complaint. It was filed on September 25, 2006. A true copy of the Order labeled Exhibit "E" is attached hereto.

4. Respondents argued that Petitioners' Motion To Amend was futile, and the trial Court so ruled and denied the motion on that basis. Respondents based their futility argument on their allegation that the statute of limitations in this matter accrued on the date of the contract, not the date of the closing. However, the Court denied Dabbs' summary judgment

motion, in which Lyles joined. If the statute of limitations had accrued on the date of the contract, the trial court would have granted the motion for summary judgment. Respondents argued at the hearing that the case of *Robinson v. Southern Farm Bureau Casualty Company*, 915 So. 2d 516 is controlling as to the date the statute begins to run. However, they quoted the opinion in part as follows: " . . . in regard to an insurance contract, the statute of limitations accrues upon the purchase of the insurance policy." Why should the statute on a real estate transaction not accrue upon the purchase of the property?

5. Petitioners seek interlocutory review of the Circuit Court's September 25, 2006 denial of its Motion to Amend Complaint. This Petition is filed within 21 days of the Order Denying Motion to Amend Complaint.

6. The questions of law decided by the Circuit Court and to be presented on appeal are:

   a. Whether Petitioners' Motion to Amend complies with the requirements of Miss.R.Civ.P.Rule 15(a);

   b. When the statute of limitations begins to run on a real estate sale;

   c. Whether "consummation" under the Rules and Regulations adopted by the Mississippi Real Estate Commission includes those transactions that do not close.

7. The Circuit Court's Order Denying Motion to Amend Complaint was improper and this Court should permit interlocutory appeal because a substantial basis exists for a difference of opinion on these questions of law, and appellate resolution will avoid exceptional expenses to the Petitioners and will also resolve issues of general importance in the administration of justice. It would provide an appellate interpretation of a portion of the

Mississippi Real Estate Commission Rules and Regulations. It would also create Mississippi case law where none presently exists - namely the time the statute of limitations begins to run on a real estate transaction that ends with a closing. It would also promote uniformity and fairness to the litigants. The trial court denied Respondents' motion for summary judgment which was based on a statute of limitations argument, then denied the Petitioners' Motion to Amend on futility grounds, which argument was based on the statute of limitations argument of the Respondents.

8. Lyles' response to Petitioners' Motion to Amend arguments include the following excerpts: "Courts consistently hold that a motion to amend a complaint is futile if the claims sought to be added are barred by the relevant statute of limitations." "All of Fletcher's claims are barred by the statute of limitations." (Dabbs' brief at pp. 6-13). "Wherefore, Premises considered, Lyles respectfully requests the Court to deny Fletcher's motion for leave to file amended complaint on futility grounds and to grant Dabbs' summary judgment motion to which Lyles joins and to award the defendants any further or alternate relief the court deems appropriate."

9. This matter has not been set on the trial calendar.

10. Petitioners' rights in regard to the additional claims initially raised in the proposed Amended Complaint cannot be heard without considerable extra expense caused by a new trial if a trial were held without these issues being tried. The additional amount to be requested from the jury against Dabbs under this breach of the Real Estate Brokers License Act of 1954 in the amended complaint would be a minimum of Five Thousand Dollars ($5,000) and a maximum of Twenty Thousand Dollars ($20,000).

11. Mississippi case law requires trial courts to freely give leave to amend when justice so requires. Amended pleadings have been liberally permitted throughout Mississippi legal history. See Miss. Code Ann. §§ 11-5-45, 11-5-57, 11-5-59, 11-5-61, 11-5-63, 11-7-55, 11-7-59(3), 11-7-115, and 11-17-117 (1972). See also, *Grocery Co. V. Bennett*, 101 Miss. 573, 58 So. 482 (1912) (courts are organized for the purpose of trying cases on their merits and only in exceptional cases should trial courts refuse to permit amendments to pleadings or proceedings); [emphasis added] *Field v. Middlesex Bkg. Co.*, 77 Miss. 180, 26 So. 365 (1899). While truck owner's claim to determine insurance coverage under Miss.R.Civ.P. 57(b)(2) was futile because the insurance company did not deny coverage, and dismissal as to that claim was proper, the trial court abused its discretion in denying the truck owner's motions to compel discovery, and for leave to file a first amended complaint, to add a claim of intentional infliction of emotional distress based on the plain language of Miss.R.Civ.P. 15(a). *Poindexter v. S. United Fire Ins. Co.*, 838 So. 2d 964 (Miss. 2003). In other cases, the Court has said: "His motion to amend was timely, did not alter the gist of his allegations, and neither plaintiff nor trial court identified any undue prejudice that would be suffered by plaintiff if amendment were to be granted." *Simmons v. Thompson Mach.*, 631 So. 2d 798 (Miss. 1994); ". . . arising out of the same series of events as her original complaint . . ." *Frank v. Dore,* 635 So. 2d 1369 (Miss. 1994); "In practice, an amendment should be denied only if the amendment would cause actual prejudice to the opposite party." *TXG Intrastate Pipeline Co. V. Grossnickle,* 716 So. 2d 991 (Miss. 1997); "Trial court did not abuse its discretion in granting leave to file amended complaint, where opposing party did not assert

nor did record contain a hint of prejudice." *Rector v. Mississippi State Hwy. Comm'n*, 623 So. 2d 975 (Miss. 1993).

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray that this Court will grant the following relief:

a. Grant the Petition for Interlocutory Appeal and establish an expedited briefing and argument schedule. All material matters for the record for appeal are attached to this Petition as exhibits.

b. Expedite the hearing of this Petition on the docket of this Court.

c. Grant such other relief as the Court may deem appropriate in the circumstances.

Respectfully submitted this the 16th day of October, 2006.

Monty C. Fletcher and Sandra L. Fletcher

By: _____
K. F. Boackle, their attorney

OF COUNSEL:
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Telephone No.: (601) 957-1557
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CERTIFICATE OF SERVICE

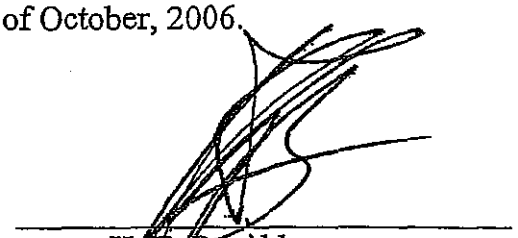
This is to certify that I, K. F. Boackle, have this date served a true and correct copy of the above and foregoing Petition for Interlocutory Appeal by United States Mail, postage fully prepaid to:

Eddie J. Abdeen, Esq.
Post Office Box 2134
Madison, Mississippi 39110
Attorney for Jimmie L. Lyles and Leoneze C. Lyles

G. Todd Burwell, Esq.
618 Crescent Blvd., Suite 200
Ridgeland, MS 39157
Attorney for Kelly Dabbs Realty, Inc.

Honorable Samac S. Richardson
Madison County Circuit Judge
128 West North St.
Canton, MS 39046

Witness my signature, this the 16th day of October, 2006.



K. F. Boackle