CERTIFICATE OF INTERESTED PERSONS

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MONTY C. FLETCHER AND SANDRA L. FLETCHER **APPELLANTS**

VS. **CASE NO. 2007-CA-00949**

JIMMIE L. LYLES, LEONEZE C. LYLES AND KELLY DABBS REALTY, INC. **APPELLEES**

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.

Monty C. Fletcher, Plaintiff below, Appellant here.

Sandra L. Fletcher, Plaintiff below, Appellant here.

Jimmie L. Lyles, Defendant below, Appellee here.

Leoneze C. Lyles, Deceased, Defendant below, Appellee here.

Kelly Dabbs Realty, Inc., Defendant below, Appellee here.

K. F. Buckle, MS Bar No. [redacted]
Attorney for Appellants

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BRIEF OF APPELLANTS

COME NOW, Monty C. Fletcher and Sandra L. Fletcher, Appellants, by and through the undersigned counsel, and file this their brief in support of their appeal of two rulings by the Circuit Court of Madison County, Mississippi and in support thereof would say and show unto this Honorable Court the following, to wit:

STATEMENT OF ISSUES

ISSUE NUMBER 1:

Does a cause of action regarding a real estate agency's failure to disclose a previous home inspection and a structural engineer's report on the same property listed with the same real estate agency approximately fourteen months earlier accrue on the date of the contract, the date of transfer of title, or the date the inspection reports are discovered?

ISSUE NUMBER 2:

Did the trial court commit reversible error when it granted Dabbs' Motion for Summary Judgment?

ISSUE NUMBER 3:

Does a cause of action regarding a seller's failure to disclose a previous home inspection report on the property, and multiple misrepresentations as to the condition of the property made by the seller in a Seller's Disclosure Statement accrue on the date of the contract, the date of transfer of title, or the date the misrepresentation and inspection reports are discovered?

ISSUE NUMBER 4:

Did the trial court commit reversible error when it granted Lyles' Motion for Summary Judgment?

ISSUE NUMBER 5:

Did the trial court commit reversible error when it denied the Fletchers' Motion To Amend?

ISSUE NUMBER 6:

Does the word "consummate" as it appears in the *Mississippi Real Estate Commission (hereinafter "MREC") Rules and Regulations IV. B. 7.* require that there be a closing and a transfer of title before a real estate broker is required to keep complete records relating to that real estate transaction for three years? In other words, does this Rule require real estate brokers to keep complete records only when a transaction is closed and a transfer of title occurs? (Note: In the July, 1998 and the November, 1999 "License Law" pamphlet published by the MREC this Rule was numbered IV. B. 6. A new number 3 was thereafter added, thus causing the renumbering of all paragraphs that followed.)

STATEMENT OF THE CASE

This case involves real property known as 136 Bridge Water Drive, Madison, Mississippi, (hereinafter referred to as the "house", "property" or "subject property") which was sold by Jimmie L. Lyles and Leoneze C. Lyles, (hereinafter "Lyles") through Kelly Dabbs Realty, Inc. (hereinafter "Dabbs") to Monty C. Fletcher and Sandra L. Fletcher (hereinafter "Fletchers").

The property was sold by Lyles to the Fletchers on October 30, 2000. This suit was filed on October 29, 2003 by Monty and Sandra Fletcher. Dabbs and Lyles filed their Answers and Counterclaims on December 4 and December 5, 2003, respectively. The Fletchers filed their Reply to each Counterclaim on December 29, 2003.

The deposition of Kenny Simmons (hereinafter "Simmons"), the property owner prior to Lyles, was taken on March 22, 2004, along with the deposition of a home inspector, Don Walker (hereinafter "Walker"). On June 23, 2004, the defendants deposed Sandra Fletcher. In August, 2004, the inspection report of Walker dated June 8, 1999 and addressed to Mr. Alfredo and Mary Rodriguez was retrieved from Walker's old computer hard drive and produced.

In November, 2004, Leoneze C. Lyles passed away. On February 22, 2005, Jesse M. Harrington, the Lyles' first attorney, passed away and on May 19, 2005, Eddie Abdeen was substituted as Lyles' attorney. James E. Lambert, the first attorney for Kelly Dabbs Realty, Inc. withdrew from the case for medical reasons.

In December, 2005, the depositions of Monty Fletcher, Kelly Dabbs Realty, Inc., Jimmie Lyles, and Mary Rodriguez were conducted. In January, 2006, the report of Advanced Engineering Resources, Inc. dated July 14, 1999 and addressed to Dr. And Mrs. Alfredo Rodriguez was received in response to a subpoena. On January 26, 2006, based on the newly discovered evidence, the Fletchers filed their Motion To Amend. On July 7, 2006, Dabbs filed its Response to the Motion

to Amend and its own Motion for Summary Judgment. On July 14, 2006, the Fletchers filed their Response to Dabbs' Motion for Summary Judgment. Also on July 14, 2006, Lyles filed his joinder in Dabbs' Response and Motion for Summary Judgment.

On July 17, 2006, a hearing was held on the Fletchers' Motion to Amend and Defendants' Motions for Summary Judgment. The trial court denied all motions. On October 5, 2006, Dabbs filed a Motion to Reconsider its Motion For Summary Judgment. On March 12, 2007 a hearing was conducted and the trial court granted the defendants' Motions for Summary Judgment. It is from the denial of the Fletchers' Motion To Amend, (Rec., pages 0316-0317) and the granting of the defendants' Motions For Summary Judgment (Rec., pages 0363-0364) that this appeal is taken.

STATEMENT OF FACTS

In 1999, the subject property was owned by Kenny Simmons (hereinafter "Simmons"). He listed the property for sale through Dabbs for $225,000.00. (Rec., page 0315). Prospective purchasers Alfredo and Mary Rodriguez (hereinafter "Rodriguez") entered into a contract to purchase the property conditioned upon a favorable home inspection. The home inspector stated that "Some conditions were observed that would suggest the entire home has leaned or settled to the rear." (Rec., page 0191). Because of the home inspector's comments, the Rodriguez engaged Advanced Engineering Resources, Inc. (hereinafter "Advanced Engineering") to inspect the property. Based on the home inspection report and the engineer's report, Rodriguez decided not to purchase the property, cancelled their contract, and secured the return of their earnest money. (Rec., pages 0304 -0309). A day or two later, (Rec., page 0314, lines 11-12) Lyles looked at the property and was given a copy of the home inspection report by Simmons. (Rec., page 0313, lines 17-19). Lyles purchased the property for $200,000.00.

About a year later, Lyles placed the property on the market for sale through Dabbs. Lyles,

through Dabbs, provided the Fletchers with a Seller's Disclosure Statement (hereinafter "Disclosure Statement"). In that Disclosure Statement, Lyles represented that no foundation repairs were needed (Part B), no evidence of termite infestation (Part C), the property had not flooded (Part E), and that Lyles was not aware of any defects or needed repairs about which the purchaser should be informed (second page part A., fourth line). (Rec., pages 0016-0017).

Dabbs was a dual agent in the transaction and thus represented both Lyles and the Fletchers. (Rec., page 0018).

The Fletchers and Lyles entered into a Real Estate Contract on September 16, 2000. (Rec., page 0014). This was fourteen (14) months after Dabbs had a previous contract on the subject property which was terminated by Rodriguez because of negative reports from a home inspector and a structural engineer.

The contract between Lyles and the Fletchers contained a specific representation in paragraph 13, that, "Seller furthermore specifically covenants and represents that he has no actual knowledge of any defects in the condition of the property . . . ." Paragraph 12 of that contract provides that, "All express representations, warranties and covenants contained herein shall survive closing . . . ."(Rec., page 0015).

The Fletchers purchased the subject property from Lyles on October 30, 2000 for $245,000.00. (Rec., pages 0012-0013). Fletcher filed the present action on October 29, 2003. (Rec., page 0007).

Neither Dabbs nor Lyles gave the Fletchers a copy of either the home inspection report or the engineer's report. Neither Dabbs nor Lyles disclosed to the Fletchers the fact that one or more inspections had been previously performed on the property and reports had been prepared. Dabbs had knowledge of the two reports and what they contained through its agent(s). One of Dabbs'

agents was Joan Thomas. (Rec., page 0315). Lyles had been given a copy of the home inspection report by Simmons and therefore knew that the house was not level. (Rec., page 0313, lines 17-19).

After the Fletchers learned that Don Walker had inspected the property, a *subpoena duces tecum* was issued for Walker's report. Walker responded that this report was on an old computer hard drive that he could not access. The Fletchers hired a computer expert to retrieve the report from Walker's old hard drive. Once the report was retrieved, it disclosed the identity of Dr. and Mrs. Rodriguez. (Rec., page 0187). Mary Rodriguez was deposed in December, 2005. (Rec., pages 304-309). She testified that the structural engineer she and her husband hired was Advanced Engineering Resources, Inc. Through subpoena, a copy of the engineer's report was obtained on January 3, 2006. (Rec., pages 0299-0302). The report showed that there was over four inches difference between the highest and lowest points in the house. On January 26, 2006, based on the newly discovered evidence, the Fletchers filed their Motion To Amend. (Rec., pages 0136-0151).

Dabbs did not disclose to the Fletchers the existence of Walker's report or Advanced Engineering's report. Dabbs did not disclose the contents of those reports, which were negative to the subject property. Dabbs did not disclose the fact that a previous buyer under contract cancelled the contract because of the condition of the subject property.

VII. SUMMARY OF THE ARGUMENT

ISSUE NUMBER 1:

Does a cause of action regarding a real estate agency's failure to disclose a previous home inspection and a structural engineer's report on the same property listed with the same real estate agency approximately fourteen months earlier accrue on the date of the contract, the date of transfer of title, or the date the inspection reports are discovered?

There is no Mississippi case on point dealing with the statute of limitations applied to a real estate contract where the transaction was closed. A good analogy is the purchase of an insurance policy. If one looks at the cases involving insurance policies, real estate contract cases can, and should, be decided in an identical manner. Once the policy (property) is purchased, a cause of action accrues, unless (in property cases) there is a latent defect that was kept from the purchasers.

In Mississippi, numerous insurance contract cases have held that the statute of limitations accrues upon the purchase of the insurance policy, or in some cases, the date of the actual injury. See *Robinson v. S. Farm Bureau Cas. Co.*, 2003-CA-02797-COA (Miss. App. 2005), *Citifinancial Mortg. Co. Inc. v. Washington*, 2005-IA-00311-SCT (Miss. 2007).

ISSUE NUMBER 2:

Did the trial court commit reversible error when it granted Dabbs' Motion for Summary Judgment?

Many facts are in dispute between the parties. There have been depositions taken that support and prove most of the Fletchers' claims. There has been little beyond mere allegations to support Dabbs' defenses.

Because there are many genuine factual issues, Dabbs' Motion For Summary Judgment should not have been granted. The trial court did not rule correctly on this issue.

ISSUE NUMBER 3:

Does a cause of action regarding a seller's failure to disclose a previous home inspection report on the property, and multiple misrepresentations as to the condition of the property made by the seller in a Seller's Disclosure Statement accrue on the date of the contract, the date of transfer of title, or the date the misrepresentation and inspection reports are discovered?

Previously, Lyles had a copy of the home inspection report and used it to negotiate a

$25,000.00 discount on this waterfront home in Lake Caroline. When Lyles sold the property to the Fletchers, Lyles not only failed to produce the inspection report, but also made numerous other misrepresentations, including the representation that the adjoining lots would always be vacant. (Rec., page 0019, third paragraph). Lyles also failed to disclose the fact that the garage floods. (Rec., page 0019, second paragraph). These facts were not known to the Fletchers at the time they signed the contract.

Mississippi courts have long recognized that a cause of action cannot logically accrue until the cause of action is known or damages have been suffered.

ISSUE NUMBER 4:

Did the trial court commit reversible error when it granted Lyles' Motion for Summary Judgment?

Mississippi Code Ann. § 89-1-501, et seq. requires complete disclosure by Lyles of the true condition of the property being transferred. Lyles misrepresented the condition of the home. Lyles falsely stated in their Disclosure Statement that there were no foundation problems with the subject property, that there was no evidence of termite infestation, that the subject property had never flooded, there was no standing water and that they were not aware of any defects or needed repairs about which the purchaser should be informed.

The previous owner testified that Lyles had a copy of the home inspection report.

ISSUE NUMBER 5:

Did the trial court commit reversible error when it denied the Fletchers' Motion To Amend?

The Fletchers' Motion to Amend was filed within a few weeks after the engineer's report was discovered. The motion involved the same defendants in the same series of events as the original complaint. Neither Dabbs, nor Lyles showed the trial court any undue prejudice that they would

suffer if the motion had been granted. The defendants had full knowledge of the facts that give rise to the additional claims. There was no trial date set at the time the motion was filed. Therefore, the Motion to Amend should have been granted by the trial court.

Miss. R. Civ. P. 15(a) states,

> A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

ISSUE NUMBER 6:

Does the word "consummate" as it appears in the *MREC Rules and Regulations IV. B. 7.* require that there be a closing and a transfer of title before a real estate broker is required to keep complete records relating to that real estate transaction for three years? In other words, does this Rule require real estate brokers to keep complete records only when a transaction is closed and a transfer of title occurs? (Note: In the July, 1998 and the November, 1999 "License Law" pamphlet published by the MREC this Rule was number IV. B. 6. A new number 3 was thereafter added, thus causing the renumbering of all paragraphs that followed.)

Mississippi Real Estate Commission Rules & Regulations IV. B. 6. (http://www.mrec.ms.gov/docs/mrec_lic_law_form_rec.pdf; November 1999; July 1, 1998), states:

> 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.

The ruling of the trial court is against public policy and clearly a misinterpretation of the MREC Rule.

VIII. ARGUMENT

ISSUE NUMBER 1:

Does a cause of action regarding a real estate agency's failure to disclose a previous home inspection and a structural engineer's report on the same property listed with the same real estate agency approximately fourteen months earlier accrue on the date of the contract, the date of transfer of title, or the date the inspection reports are discovered?

Miss. Code Ann. § 15-1-49 (1972, as amended) states:

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.
> (3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

"In a contractual claim, a cause of action accrues on the date of actual injury, the date the facts occurred which enable the Plaintiffs to bring a cause of action." *Citifinancial Mortg. Co. Inc. v. Washington*, 2005-IA-00311-SCT (¶7) (Miss. 2007); *Oaks v. Sellers*, 2006-IA-00005-SCT (¶13) (Miss. 2007).

The statute of limitations begins to run as soon as there is a cause of action, and the cause of action accrues when it comes into existence as an enforceable claim. *Joiner Ins. Agency, Inc. v. Principal Cas. Ins. Co.*, 684 So. 2d 1242, 1244 (Miss. 1996) (quoting *City of Mound Bayou v.*

Johnson, 562 So. 2d 1212 (Miss. 1990)).

"Because a component of the contract remains to be fulfilled, the statute of limitations has not begun to run." In contracts, it is the general rule "that the statute of limitations begins to run as soon as there is a cause of action." *Bailey v. Estate of Kemp*, No. 2005-CA-01468-SCT, (¶33) (Miss. 2007) (citing *Old Ladies Home Ass'n v. Hall*, 52 So. 2d 650, 655 (Miss. 1951) (limitations period does not begin to run upon nonperformance of contractual duty until cause of action accrues)).

ISSUE NUMBER 2:

Did the trial court commit reversible error when it granted Dabbs' Motion for Summary Judgment?

The standard of review for a trial court's grant of summary judgement is a de novo standard and looks to all evidentiary matters before it, including "admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *City of Jackson v. Sutton*, 1999-IA-02110-SCT (¶7) (Miss. 2001) (quoting *Heigle v. Heigle*, 1999-CA-00007-SCT (¶8) (Miss. 2000); *McCullough v. Cook*, 679 So. 2d 627, 630 (Miss. 1996)).

Evidence is viewed in the light most favorable to the non-moving party. "If, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt." *Id.*

Miss. R. Civ. P. 56 requires that the party opposing the motion for summary judgment be diligent in presenting his opposition to the trial court. *Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d

747, 749 (Miss. 1984) (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 (Miss. 1983)).

Where doubt exists as to whether there is a genuine issue of material fact, the trial judge should err on the side of denying the motion and permitting a full trial on the merits. Where the record is incomplete regarding any material fact, the summary judgment motion should generally be denied. *Prescott v. Leaf River Forest Prod., Inc.*, 96-CA-00942-SCT, 96-CA-00977-SCT, 96-CA-00978-SCT (¶15) (Miss. 1999); *Am. Legion Ladnier Post [Number] 42, Inc. v. City of Ocean Springs*, 562 So. 2d 103, 106 (Miss. 1990).

"As the Roebucks failed to present any evidence to defeat that evidence submitted by McDade with her motion for summary judgment and given the language from Form 427-10 cited above, the trial judge had no choice but to grant McDade's motion and to enter summary judgment against the Roebucks." *Roebuck v. McDade*, 98-CP-00561-COA (¶14) (Miss. App. 1999).

Under *Miss. R. Civ. P. 56*, Dabbs had the burden to prove that there were no genuine issues of material fact. *Simmons v. Thompson Mach.*, 631 So. 2d 798, 801 (Miss. 1994); *Walker v. Skiwski*, 529 So. 2d 184, 186 (Miss. 1988).

Miss. R. Civ. P. 56(c) states:

> The judgment sought shall be rendered forthwith 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

Miss. R. Civ. P. 56(e) states in part: Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein.

". . . [T]he burden of demonstrating that no genuine issue of fact exists is on the moving

party. That is, the non-movant would be given the benefit of the doubt." *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993) (citing *Mantachie Nat. Gas Dist. v. Miss. Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992)).

"Accordingly, ***the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried.***" *Daniels*, 629 So. 2d at 599 (Miss. 1993) (citing *Brown v. Credit Ctr., Inc.*, 444 So.2d 358, 362 (Miss.1983)) (Emphasis in original).

"In the context of summary judgment when the party has alleged fraud this Court has alluded to the notion that the cases which involve allegations of fraud or misrepresentation generally are inappropriate for disposition at a summary-judgment stage. *Great S. Nat'l Bank v. McCullough Envtl. Servs., Inc.*, 595 So.2d 1282, 1289 (Miss. 1992); *Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 354 (Miss. 1990). Thus, concluded by our jurisprudence is the understanding that triable issues of fact do exist when the facts or evidence support the allegation that fraud and misrepresentation were involved. *Great S. Nat'l Bank*, 595 So.2d at 1289. It is well established that fraud is never assumed but is essentially a question of facts which clear and convincing evidence must prove. *Parker v. Howarth*, 340 So.2d 434, 437 (Miss. 1976). Fraud is essentially a question of fact best left for the jury." *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 642-43 (Miss. 1996).

Summary judgment was inappropriate in case involving a contract dispute and allegations of fraudulent concealment. *Yowell v. James Harkins Builder, Inc.*, 645 So. 2d 1340, 1344 (Miss. 1994).

Dabbs was a dual agent in the transaction between Lyles and Fletcher. As a dual agent, Dabbs owed Fletcher all the fiduciary duties of a real estate agent to his client, except certain information dealing with price, motivation and financing terms of the parties. (Rec., page 0018). As a Dual Agent in the transaction between Lyles and Fletcher, Dabbs was under a statutory and

fiduciary duty to disclose all information concerning the condition of the property. *Miss. Code Ann. § 73-35-21(1)(a)* (1972, as amended).

Dabbs did not disclose to Fletcher the existence of Walker's report or Advanced Engineering's report from its previous listing just fourteen (14) months earlier. Dabbs did not disclose the fact that a previous buyer under contract cancelled the contract because of the condition of the subject property. Dabbs' actions constitute negligent non-disclosure of material facts. 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)* (1972, as amended). Dabbs' silence represents a substantial misrepresentation.

Dabbs failed to maintain the Rodriguez offer to purchase and all related reports and documents for three years in its files. Under *Miss. Code Ann. § 73-35-35* (1972, as amended), the MREC has the power to adopt such rules and regulations as it deems appropriate to enforce and administer The Real Estate Brokers License Law of 1954. Dabbs was required under the *MREC Rules and Regulations IV. B. 7.* to maintain " . . . on file for three years following its consummation, complete records relating to any real estate transaction."

Dabbs convinced the trial court that the only documents required to be kept by a broker are those from a closed sale. If that were the case the law would not require the retention of complete records relating to any real estate transaction. Offers to purchase, terminated contracts and the related documents that caused the termination of a contract are very valuable to the next prospective purchaser. This is the age of consumer protection and most laws are designed to protect the public. In this case, because the contract was terminated just 14 months earlier because of the negative inspection reports, and because Rodriguez had to provide the reports to the real estate agents to be released from the contract, Dabbs should have had maintained those reports in its files. It is common

custom and procedure to require a complete copy of any such report before earnest money is released. Dabbs did require or should have required copies of those reports before releasing the earnest money. Simmons testified that Joan Thomas with Dabbs was the listing agent as shown on the listing agreement. (Rec., page 0315). Mr. Dabbs testified that the engineering report gave rise to the cancellation of the contract by Rodriguez. Simmons testified that Joan Thomas received a copy of the report. (Rec., pages 0310-0314). Therefore Dabbs, through its agent Joan Thomas, had knowledge of at least one of the two reports. Under the laws governing real estate brokers in Mississippi, Dabbs should have maintained copies of those reports with the cancelled contract and should have provided those reports, or at least the information contained therein to the Fletchers. The public interest is served by these regulations and no broker should be allowed to claim ignorance for that which he is required to maintain.

Dabbs had a statutory and fiduciary duty to inform Fletcher of the reports. The fact is that Dabbs did know of these reports and at one time had a copy of at least one of them. The Fletchers did not learn all of the facts regarding the foundation problems with the subject property until January 3, 2006, when the Advanced Engineering report was produced. The report dated July 14, 1999 showed that the property had a difference in elevation from the highest measured point to the lowest measured point of approximately 4-1/4 inches. The engineer concluded that, "The difference in relative elevations is higher than considered acceptable by this engineer."

In Mississippi, summary judgment is not a substitute for the trial of disputed facts as supported by the comments under *Miss. R. Civ. P. 56.*

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 Motion for Summary Judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that Plaintiff would be unable to prove any facts to support his claim." *Yowell v. James Harkins Builder, Inc.* 645 So. 2d 1340, 1343 (Miss. 1994) (citing *McFadden v. State,* 580 So. 2d 1210 (Miss. 1991)). "A Motion for Summary Judgment lies only where there is no genuine issue of material fact; Summary Judgment is not a substitute for the trial of disputed fact issues. Accordingly, the Court cannot try issues of fact on a Rule 56 Motion; it may only determine whether there are issues to be tried." *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983). When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the Summary Judgment has been sought should be given the benefit of every reasonable doubt. *Id.* (quoting *Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F. 2d 1013, 1015 (5th Cir. 1967)). If there is to be error at the trial level, it should be in denying Summary Judgment and in favor of a full live trial. The problem of over-crowded calendars is not to be solved by summary disposition of issues of fact fairly presented in an action. *Id.* at 363 (quoting 6 *Moore's Federal Practice* § 56-15 [1-2] p. 56-435 (1982)).

Fletcher has produced several issues of disputed material facts in its response to Dabbs' Motion (Rec., pages 0288-0314): (1) Did Dabbs ever have copies of the Walker report and the Advanced Engineering Report? The excerpts from Mary Rodriguez' deposition show that the reports were given to the real estate agents to secure the return of Rodriguez' earnest money. Simmons' testimony also indicates that Dabbs had copies of the reports. Dabbs will deny this. (2) If Dabbs did not keep copies of those reports, Dabbs should have, in accordance with the Rules and Regulations of the MREC. Dabbs will deny this because its interpretation of the MREC Rule is that it must keep records only when a transaction is closed. The words "but not limited to" in the Rule of the MREC indicate any material document which would be required to be disclosed to future

prospective buyers. (3) Dabbs claims the original filing of the Complaint was past the statute of limitations. In the undisputed facts of Dabbs, it admits that Fletcher closed on the purchase of the subject property on October 30, 2000. A claim accrues when it comes into existence as an enforceable claim. *Joiner Ins. Agency, Inc. v. Principal Casualty Ins. Co.*, 684 So. 2d 1242, 1244 (Miss. 1996); *Estate of Kidd*, 435 So. 2d 632, 635 (Miss.1983). No cause of action could possibly have accrued before October 30, 2000, because the house was not purchased until that date. If Dabbs had produced the reports to the Fletchers on the day of the closing, the Fletchers would not have closed.

Sandra Fletcher, by way of sworn affidavit stated that she would not have purchased the property had she been aware of the contents of the engineering report. (Rec., page 297, paragraph number 4).

The Fletchers did not know of the report from Advanced Engineering until January 3, 2006. This disclosure was possible only after the deposition of Mary Rodriguez, which occurred on December 9, 2005. Her deposition was not possible until she was located, which could not occur prior to the retrieval of the Don Walker report from an old hard drive. Walker's identity was not known with certainty until after Simmons was deposed. Dabbs also stated that Fletcher filed the Complaint on October 29, 2003, clearly within the three year statute. The two inspection reports were ignored. The cases cited by Dabbs in its brief in support of its Motion for Summary Judgment with regard to a broker's liability were all cases that were tried, not decided by summary judgment.

Under *Miss. R. Civ. P. 56*, Dabbs had the burden to prove that there were no genuine issues of material fact. *Simmons v. Thompson Mach.*, 631 So. 2d 798 (Miss. 1994); *Walker v. Skiwski*, 529 So. 2d 184 (Miss. 1988). Dabbs did not meet that burden of proof. Dabbs had no counter-affidavits or testimony at the hearing to counter Ms. Fletcher's Affidavit. *Roebuck v. McDade*, 98-CP-00561-

COA (¶11-12) (Miss. 1999). In fact, no witness for Dabbs attended the hearing or testified at the hearing. The Fletchers produced several issues of disputed material facts in their response to Dabbs' Motion for Summary Judgment, which were supported by affidavit and deposition transcripts. (Rec., pages 0288-0314).

This Court may find the first paragraph of Dabbs' Motion to Reconsider interesting and telling. (Rec., page 0323). "Plaintiffs Monty C. And Sandra L. Fletcher's ('Fletchers') alleged **claims arise from their purchase** of real property located at 136 Bridgewater Drive, Madison, Mississippi (the 'subject property')." (Emphasis added). It is thus clearly stated by Dabbs in its own pleading that a claim arising from the purchase of this property or any property does not, and can not, arise until the property is purchased. In this case the property was purchased on October 30, 2000. Therefore, in Dabbs' own words, the statute of limitations did not begin until October 30, 2000.

The trial court's ruling was prepared by Lyles and was not reviewed by the Fletchers. The trial court's ruling should be reversed and this matter should be remanded to the trial court to allow an Amended Complaint to be filed by the Fletchers, and then the case should be tried.

ISSUE NUMBER 3:

Does a cause of action regarding a seller's failure to disclose a previous home inspection report on the property, and multiple misrepresentations as to the condition of the property made by the seller in a Seller's Disclosure Statement accrue on the date of the contract, the date of transfer of title, or the date the misrepresentation and inspection reports are discovered?

"Any claims against the defendants accrued at the time of the execution of the loan documents." *Carter v. Citigroup Inc.*, 2005-CA-00039-SCT (¶42) (Miss. 2006); *Sanderson Farms Inc. v. Ballard*, 2002-IA-01938-SCT, 2003-IA-02490-SCT (¶30) (Miss. 2005); *Andrus v. Ellis*, 2003-

IA-01842-SCT (¶29) (Miss. 2004); *Stephens v. Eq. Life Assur. Socy. of U.S.*, 2002-CA-00498-SCT (¶15) (Miss. 2003).

Under Mississippi law, the "right of action for such deceit accrues upon the completion of the sale induced by such false representation, or upon the consummation of the fraud, . . . unless the grantor 'fraudulently conceal the cause of action from the knowledge of the person entitled thereto'." *Dunn v. Dent*, 169 Miss. 574, 574, 153 So. 798, 798 (Miss. 1934) (quoting Section 2312, Code 1930; 37 C. J. 935). See also *Bullard v. Guardian Life Ins. Co. of Am.*, 2005-CA-00849-SCT (¶21-24) (Miss. 2006) (Easley, J., dissenting).

"If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered." *Miss. Code Ann. § 15-1-67* (1972, as amended).

"The cause of action for fraudulent concealment accrues when the person, with reasonable diligence, first knew or first should have known of the fraud." *Sanderson Farms Inc. v. Ballard*, 2002-IA-01938-SCT, 2003-IA-02490-SCT (¶33) (Miss. 2005).

"In *Sanderson Farms*, this Court held that fraudulent inducement and fraudulent concealment claims have a three-year statute of limitations and fraud claims accrue at the time of the completion of a sale induced by false representations or consummation of the alleged fraud." *Bullard v. Guardian Life Ins. Co. of Am.*, 2005-CA-00849-SCT (¶23) (Miss. 2006) (Easley, J., dissenting) (emphasis added).

"In order to recover damages for fraudulent concealment, a plaintiff need only show that a 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'." *Peters v. Metro. Life*

Ins. Co., 164 F. Supp. 2d 830, 835 (S.D. Miss. 2001) (quoting *Davidson v. Rogers*, 431 So. 2d 483, 485 (Miss. 1983)). Plaintiff must also demonstrate that even though they acted with due diligence . . . , they were unable to discover the fraud. *Robinson v. Cobb*,1999-CA-01010-SCT, 1999-CA-01012-SCT (¶19) (Miss. 2000). The statute of limitations does not begin to run until fraud is discovered. *J. K. Orr Shoe Co. v. Edwards*, 111 Miss. 542, 71 So. 816, 817 (Miss. 1916).

"In a contractual claim, a cause of action accrues on the date of actual injury, the date the facts occurred which enable the Plaintiffs to bring a cause of action." *Citifinancial Mortg. Co. Inc. v. Washington*, 2005-IA-00311-SCT (¶7) (Miss. 2007); *Oaks v. Sellers*, 2006-IA-00005-SCT (¶13) (Miss. 2007).

The statute of limitations begins to run as soon as there is a cause of action, and the cause of action accrues when it comes into existence as an enforceable claim. *Joiner Ins. Agency, Inc. v. Principal Cas. Ins. Co.*, 684 So. 2d 1242, 1244 (Miss. 1996) (quoting *City of Mound Bayou v. Johnson*, 562 So. 2d 1212 (Miss. 1990)).

Stephens v. Eq. Life Assur. Socy. of U.S., 2002-CA-00498-SCT (¶18) (Miss. 2003), states, "This Court has recently addressed the issue of the tolling of statutes of limitation for fraudulent concealment pursuant to *Miss. Code Ann. § 15-1-67* and the evidence required to prove such a claim. In *Robinson v. Cobb,* 1999-CA-01010-SCT, 1999-CA-01012-SCT (¶18-19) (Miss. 2000), this Court held:

> [F]raudulent concealment of a cause of action tolls its statute of limitations. *Myers v. Guardian Life Ins. Co. of Am., Inc.*, 5 F. Supp. 2d 423, 431 (N.D. Miss. 1998). The fraudulent concealment doctrine 'applies to any cause of action.' *Id.* In order to establish fraudulent concealment, 'there must be shown some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim.' *Reich v. Jesco, Inc.*, 526 So. 2d 550, 552 (Miss. 1988).
>
> "[T]his Court has applied the discovery exception where the plaintiff will be precluded from

discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question." *Donald v. Amoco Production Co.*, 97-CA-01178-SCT (¶18) (Miss. 1999); *Staheli v. Smith*, 548 So. 2d 1299, 1303 (Miss. 1989) (applying discovery rule in libel action).

A latent injury is defined as one where the "plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question . . . [or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." *PPG Architectural Finishes, Inc. v. Lowery*, 2004-IA-01091-SCT (¶12) (Miss. 2005) (applying discovery rule to medical malpractice action); See also *Donald v. Amoco Prod. Co.*, 97-CA-01178-SCT (¶18) (Miss. 1999); *Smith v. Sneed,* 638 So. 2d 1252, 1257 (Miss. 1994). For an injury to be latent it must be undiscoverable by reasonable methods. *PPG Architectural Finishes, Inc. v. Lowery*, 2004-IA-01091-SCT (¶14) (Miss. 2005).

"The three year statute of limitations for fraud begins to accrue upon the purchase of an insurance policy." *Robinson v. S. Farm Bureau Cas. Co.*, 2003-CA-02797-COA (¶8) (Miss. App. 2005).

Miss. Code Ann. § 15-1-49 (1972, as amended), states:

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
>
> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.
>
> (3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

ISSUE NUMBER 4:

Did the trial court commit reversible error when it granted Lyles' Motion for Summary Judgment?

Lyles did not disclose the fact that a previous prospective purchaser, Rodriguez had hired a home inspector to inspect the property and based upon his advice, the prospects hired a structural engineer to inspect the property and based on his advice Rodriguez cancelled the contract. Mr. Lyles did not provide the Fletchers with a copy of the home inspection report he received from Simmons, nor did he inform the Fletchers that it had been inspected for a previous prospective purchaser.

Lyles sold the home only one year after their purchase to the Fletchers' for $45,000 more than they had paid. After only two months, Fletchers' found that the foundation had a four inch slope from the front to the back of the house, that termite damage was extensive throughout the home, the garage flooded, and that there was evidence of removed platforms in the garage where Lyles had kept his personal property elevated so it would not get wet from the water that flooded the garage.

Simmons testified at his deposition took the home inspection report from the house when he left. This appears on page 18 of Simmons' deposition, lines 16-19. "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." This was attached as Exhibit "G" to Kelly Dabbs Realty, Inc.'s Rebuttal To Plaintiffs' Response to Kelly Dabbs Realty, Inc.'s Motion For Summary Judgment. This was filed on July 17, 2006, but was omitted from the record.

The Fletchers refer the Court to the legal (not factual) arguments following Issue number 2 above.

ISSUE NUMBER 5:

Did the trial court commit reversible error when it denied the Fletchers' Motion to Amend?

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. *Poindexter v. S. United Fire Ins. Co.*, 2001-CA-01512-SCT (¶23-24) (Miss. 2003); See *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) (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)). In other cases, the Court has said: The "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, 801 (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." *Coleman v. Smith*, 2002-CA-00618-COA (¶5) (Miss. App. 2003); *Moeller v. Am. Guar. and Liab. Ins. Co.*, 92-CA-00829-SCT, 2000-CA-01678-SCT (¶29) (Miss. 2002); *Par Indus., Inc. v. Target Container Co.*, 96-CA-00568-SCT (¶21) (Miss. 1998); *TXG Intrastate Pipeline Co. v. Grossnickle*, 94-CA-00507-SCT (¶59) (Miss. 1997). Trial court did not abuse its discretion in granting leave to file an amended complaint, where opposing party did not assert nor did record contain a hint of prejudice. *Rector v. Miss. State Hwy. Comm'n*, 623 So. 2d

975, 978 (Miss. 1993) (overruled on other grounds).

Amendment of defendant's answer and counterclaim should have been allowed, where amendment would have merely formally pled those issues of which plaintiff already had full knowledge. *TXG Intrastate Pipeline Co. v. Grossnickle*, 94-CA-00507-SCT (¶59-65) (Miss. 1997).

". . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.-the leave sought should, as the rules require, be 'freely given'." *Webb v. Braswell*, 2004-CA-01438-SCT, 2004-IA-01566-SCT (¶9) (Miss. 2006); *Moeller v. Am. Guar. and Liab. Ins. Co.*, 92-CA-00829-SCT, 2000-CA-01678-SCT (¶28) (Miss. 2002).

The Fletchers did not know of the report from Advanced Engineering until January 3, 2006. This disclosure was possible only after the deposition of Mary Rodriguez, which occurred on December 9, 2005. Her deposition was not possible until she was located, which could not occur prior to the retrieval of the Don Walker report from an old hard drive. Walker's identity was not known with certainty until after Simmons was deposed. Dabbs also stated that Fletcher filed the Complaint on October 29, 2003, clearly within the three year statute. The two inspection reports were ignored. The cases cited by Dabbs in its brief in support of its Motion For Summary Judgment with regard to a broker's liability were all cases that were tried, not decided by summary judgment.

Dabbs was under a statutory and fiduciary duty to disclose information concerning the condition of the property to the Fletchers. *Miss. Code Ann. § 73-35-21(1)(a)* (1972, as amended).

Dabbs did not disclose to the Fletchers the existence of the engineer's report or Don Walker's report. Dabbs' actions constitute negligent non-disclosure of material facts. 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)* (1972, as amended). Dabbs' silence represented a substantial misrepresentation.

Dabbs failed to disclose the existence of Walker's report and Advanced Engineering'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. Under *Miss. Code Ann. § 73-35-35* (1972, as amended), the MREC has the power to adopt such rules and regulations as it deems appropriate to enforce and administer *The Real Estate Brokers License Law of 1954*. Dabbs was required under the *MREC Rules And Regulations IV. B. 7.* to maintain " . . . on file for three years following its consummation, complete records relating to any real estate transaction. This includes, **but is not limited to,** listings, . . . and offers to purchase . . . ." (Emphasis added).

Dabbs and Simmons required copies of those reports before releasing the earnest money. Simmons testified that Joan Thomas with Dabbs was the listing agent as shown on the listing agreement, which is Exhibit 2 to his deposition. He testified that the engineering report gave rise to the cancellation of the contract by Rodriguez. Simmons testified that Joan Thomas received a copy of the report. (See transcript pages 6 through 10 and Exhibit 2 of the March 22, 2004 deposition of Simmons labeled Exhibit "D" attached hereto and made a part hereof by this reference.) Therefore Dabbs, through its agent Joan Thomas, had knowledge of the two reports. Under the laws governing real estate brokers in Mississippi, Dabbs should have maintained copies of those reports with the cancelled contract and should have provided those reports, or at least the information contained therein to Fletcher. The public interest is served by these regulations and no

broker should be allowed to claim ignorance for that which he is required to maintain.

Dabbs convinced the trial court that the only documents required to be kept by a broker are those for a completed transaction. If that were the case, the law would not require the retention of rejected offers to purchase, expired listings, options and leases. Offers to purchase, terminated contracts and the related documents that cause the termination of a contract could be very valuable to the next prospective purchaser. This is the age of consumer protection and most laws are designed to protect the public. In this case, because the contract was terminated just 14 months earlier because of the negative inspection reports, and because Rodriguez had to provide the reports to the real estate agents to be released from the contract, Dabbs should have had those reports in its files.

Miss. Code Ann. § 73-35-21(1)(a) (1972, as amended):

> (1) The commission may, upon its own motion and shall upon the verified complaint in writing of any person, hold a hearing for the refusal of license or for the suspension or revocation of a license previously issued, or for such other action as the commission deems appropriate. The commission shall have full power to refuse a license for cause or to revoke or suspend a license where it has been obtained by false or fraudulent representation, or where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of: (a) Making any substantial misrepresentation in connection with a real estate transaction; . . . .

Miss. Code Ann. § 73-35-31(2) (1972, as amended):

> In case any person, partnership, association or corporation shall have received any sum of money, or the equivalent thereto, as commission, compensation or profit by or in consequence of his violation of any provision of this chapter, such person, partnership, association or corporation shall also be liable to a penalty of not less than the amount of the sum of money so received and not more than four (4) times the sum so received, as may be determined by the court, which penalty may be sued for and recovered by any person aggrieved and for his use and benefit, in any court of competent jurisdiction.

"The standard of review for determining whether to allow a motion to leave to amend a complaint is abuse of discretion." *Whitaker v. T & M Foods, Ltd.*, 2006-CA-01365-COA (¶28) (Miss. Ct. App. 2007) (quoting *Pratt v. City of Greenville*, 2000-CA-01028-SCT (¶9) (Miss. 2001)); *Church v. Massey*, 697 So. 2d 407, 412-13 (Miss. 1997); *Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss. 1984).

Braddock Law Firm, PLLC v. Becnel, 2004-CA-01237-COA (¶17) (Miss. Ct. App. 2006), states: "When a party moves to amend the complaint, 'leave shall be freely given when justice so requires.' *Miss. R. Civ. P. 15(a)*. The Supreme Court has cautioned:

> [T]his mandate is to be heeded . . . if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice . . . futility . . . , etc.- the leave sought should, as the rules require, be 'freely given.' . . . [O]utright refusal to grant the leave without any justifying reason . . . is . . . abuse of . . . discretion." *Red Enters., Inc. v. Peashooter, Inc.*, 455 So. 2d 793, 795 (Miss. 1984); *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

Miss. Code Ann. § 89-1-501 (1972, as amended):

> (1) The provisions of Sections 89-1-501 through 89-1-523 apply only with respect to transfers by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase or ground lease coupled with improvements, of real property on which a dwelling unit is located, or residential stock cooperative improved with or consisting of not less than one (1) nor more than four (4) dwelling units, when the execution of such transfers is by, or with the aid of, a duly licensed real estate broker or salesperson.

Miss. Code Ann. § 89-1-523 (1972, as amended):

> No transfer subject to sections 89-1-501 through 89-1-523 shall be invalidated solely because of the failure of any person to comply with any

> provision of sections 89-1-501 through 89-1-523. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of sections 89-1-501 through 89-1-523 shall be liable in the amount of actual damages suffered by a transferee.

The trial court's ruling was prepared by Lyles and was not approved by the Fletchers. (Rec., page 0321) The trial court's ruling should be reversed and this matter should be remanded to the trial court to allow an Amended Complaint to be filed by the Fletchers.

ISSUE NUMBER 6:

Does the word "consummate" as it appears in the *MREC Rules and Regulations IV. B. 7.* require that there be a transfer of title before a real estate broker is required to keep complete records relating to that real estate transaction for three years? In other words, does this Rule require real estate brokers to keep complete records only when a transaction is closed and a transfer of title occurs?

This Rule clearly includes transactions that have come to an end without a closing, by (1) the passage of time such as an expired listing, option or lease; or (2) the rejection of an offer to purchase by a seller, or (3) any other efforts of a real estate broker or his agents that create or result in the creation of documents or records? If it did not, why would the MREC include the language following the words: "This includes . . . ."?

The trial court ruled that since the contract between Simmons and Rodriguez did not close, the transaction was not consummated and therefore Dabbs was not required to keep the cancelled contract, or the report(s) upon which it was cancelled by Rodriguez.

Black's Law Dictionary, Seventh Ed., page 312, defines "Consummate" as "To bring to completion." *Webster's New World Dictionary, Second College Ed.*, page 290, defines

"Completion" as "To end, finish, conclude."

The trial court's interpretation of this MREC Rule is contrary to the spirit of the *Real Estate Brokers License Law of 1954, Mississippi Code §§ 73-35-1, et seq.* and contrary to the public's interest. The trial court's interpretation does not further anyone's interests except those brokers who fail to operate their businesses in such a manner as to instill confidence in the public. Real estate brokers are required by this Rule to keep complete records of all transactions they participate in as a broker, regardless of whether the transaction closes.

IX. CONCLUSION

The trial court's rulings on each of these motions should be reversed. Dabbs and Lyles' motions for summary judgment should have been denied because there are genuine issues of material facts to be tried in regard to each of these defendants. Fletcher's motion to amend should have been granted because the matters discovered in January, 2006 justify an amended complaint. Therefore, the Fletchers respectfully request that this Court reverse and set aside the Order denying the Motion To Amend and the Judgment of the trial court granting Dabbs and Lyles Motions for Summary Judgment, and allow the Fletchers to file an amended complaint and ordering that the case move forward to trial.

Respectfully submitted,

K. V. Boackle
Attorney for Appellants'

K. F. Boackle, MSB. 3601
BOACKLE LAW FIRM, PLLC
1020 Northpark Drive, Suite B
Ridgeland, Mississippi 39157-5299
Telephone 601-957-1557
Facsimile 601-957-1448

CERTIFICATE OF SERVICE

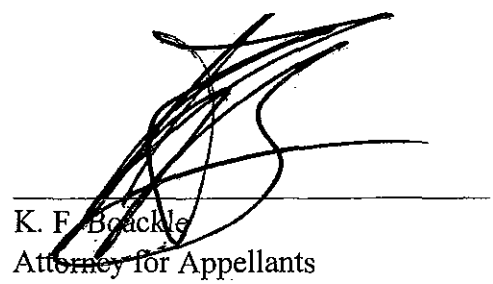
I, K. F. Boackle, do hereby certify that I have, this day served, by U.S. Mail, first class postage prepaid, a true and correct copy of the above and forgoing BRIEF OF APPELLANTS', and RECORD EXCERPTS OF APPELLANTS' to:

Betty Sephton, Supreme Court Clerk (Original & Three Copies)
Post Office Box 249
Jackson, Mississippi 39205

G. Todd Burwell, Esq.
Julie Ratliff, Esq.
618 Crescent Blvd., Suite 200
Ridgeland, MS 39157

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

This the 26th day of November, 2007.



K. F. Boackle
Attorney for Appellants

CERTIFICATE OF SERVICE

I, K. F. Boackle, do hereby certify that I have, this day served, by U.S. Mail, first class postage prepaid, a true and correct copy of the above and forgoing BRIEF OF APPELLANTS, and RECORD EXCERPTS OF APPELLANTS to:

Honorable Judge Samac S. Richardson
Madison County Circuit Court
Post Office Box 1626
Canton, Mississippi 39046

This the 28th day of November, 2007.

K. F. Boackle
Attorney for Appellants

K. F. Boackle, MS Bar [redacted]
BOACKLE LAW FIRM, PLLC
1020 Northpark Drive, Suite B
Ridgeland, Mississippi 39157-5299
Telephone 601.957.1557
Facsimile 601.957.1448