IN THE COURT OF APPEALS OF
THE STATE OF MISSISSIPPI

No. 2007-CA-01797

GREEN REALTY MANAGEMENT CORPORATION — APPELLANT

vs.

MISSISSIPPI TRANSPORTATION COMMISSION — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
GRENADA COUNTY, MISSISSIPPI

APPELLEE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Green Realty Management Corporation vs. Mississippi Transportation Commission

Cause No. 2007-CA-0197

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

1. Green Realty Management Corporation, Appellant;
2. T.H. Freeland, III, Attorney for the Appellant;
3. T. H. Freeland, IV., Attorney for Appellant;
4. Joyce Freeland., Attorney for Appellant;
5. Mississippi Transportation Commission, Appellee
6. James T. Metz, Esq., Attorney for Appellee;
7. Josh Freeman, Esq., Attorney for Appellee;

8. Purdie & Metz, PLLC, Attorneys for Appellee;

9. John G. Green, Shareholder in Green Realty Management Corporation

10. Karen Green, Shareholder in Green Realty Management Corporation

11. Phil R. Hinton

This the 24th day of April, 2008.

James T. Metz, MSB # 2905
Attorney of Record for Appellee
Mississippi Transportation Commission

II.

TABLE OF CONTENTS

III.

TABLE OF AUTHORITIES

IV.

STATEMENT OF THE ISSUES

1. Did the trial court err in granting summary judgment to the Mississippi Transportation Commission (hereinafter, MTC), since genuine issues of material fact exist concerning whether MTC's agents (a) provided a plat to John Green of Green Realty Management (hereinafter GRM) which misrepresented the nature and foreseeable damages of the road project in question and (b) omitted, suppressed or failed to disclose material facts that resulted in a fraud in the purchase transaction?

2. Did the standard forms for fair market value offers as completed and used by MTC in this situation also contain misrepresentations concerning the nature and foreseeable damages of the road project in question?

3. Did the trial court err in basing its grant of summary judgment on release provisions in the warranty deeds used by MTC, since any negligent or intentional misrepresentations by MTC in obtaining those releases would render them void?

4. Did the trial court err in applying **King v Mississippi Transportation Comm'n,** 609 So.2d 1251 (Miss. 1992), since (a) **King** dealt with a variant of res judicata that is inapplicable here; and (b) it was undisputed in **King** that the construction was completed as shown on all the MTC plans available to the property owners?

5. Did the trial court, which noted that "there were no facts in the record" concerning negligent or intentional misrepresentation by MTC's agents, despite an affidavit to the contrary supplied by the non-moving party, err in applying the standard for summary judgment under Rule 56 of the Mississippi Rules of Civil Procedure?

V.

STATEMENT REGARDING ORAL ARGUMENT

The issue is well briefed and oral argument is not requested.

VI.

STATEMENT OF THE CASE

Green Realty Management Corporation (GRM) filed an amended complaint on February 25, 2005 against Mississippi Transportation Commission (MTC) in the Chancery Court in Grenada County, Mississippi. The complaint alleged violations of Article 3, Section 17 of the Mississippi Constitution of 1890 by diversion of surface waters onto the property of Green Realty. (R. 12-22).

Mississippi Transportation Commission timely filed a Rule 12(b)(1) Motion to Dismiss or, in the Alternative, to Transfer to Circuit Court. (R. 23-67). The cause was transferred to Circuit Court by order dated April 17, 2006. (R. 120-121).

On September 6, 2006, MTC filed a motion for summary judgment based, in part, on releases contained in deeds executed by plaintiff. (R. 151-209). Plaintiff filed his response in opposition to the motion for summary judgment. (R. 217-327). The trial court granted MTC's motion for summary judgment by order dated September 6, 2007. The Court acknowledged that MTC was entitled to summary judgment based on the releases in the deeds. (R. 470-474). Plaintiff timely filed a notice of appeal.

VII.

STATEMENT OF FACTS

MTC instituted a project to construct improvements to Miss. Hwy 7 and 8 just west of Grenada, Mississippi. The project was assigned project no. STP-0016-020630. (R. 183, appellee R.E. p.1). In order to complete the project, it was necessary for MTC to acquire and purchase by warranty deed real property as follows:

(1) Green Realty Management Corp. .387 acres. (R. 281-284; appellant R.E. tab 4);

(2) West Grenada Industrial Park, Inc. .192 acres. (R. 166-170; appellee R.E. pp. 2-6) ;

(3) Green Realty Management Corp. .39 acres. (R. 155-160; appellee R.E. pp. 7-12);

(4) West Grenada Industrial Park, Inc. .137 acres. (R. 161-165; appellee R.E. pp. 13-17);

(5) West Grenada Industrial Park, Inc. .24 acres. (R. 171-174; appellee R.E. pp. 18-21).

West Grenada Industrial Park, Inc. conveyed its remaining real property to Green Realty Management Corporation by deed dated February 16, 2005, which was immediately prior to filing of the action subject of this appeal. The two corporations had common ownership. (R. 181-182).

The property conveyed to MTC was a part and parcel of the lands owned by West Grenada Industrial, Inc. and Green Realty Management Corporation, which was later consolidated in GRM, immediately prior to filing of the suit subject of appeal. (R. 183, appellee R.E. p.1).

The "Fair Market Value Offers" which were presented to GRM and its predecessor in title West Grenada Industrial, Inc. had in each offer for each separate tract the following statement.

> The value of the real property interests being acquired is based on the fair market value of the property and is not less than the approved appraised value/value determination disregarding any decrease or increase in the fair market value caused by the project. This fair market value offer includes all damages and is based on our approved appraisal value determination in the amount of $ 8,595.00.

(R. 280, appellant R.E. tab 4)

The deeds from GRM and West Grenada conveying the various tracts all contained the release language as follows:

> It is further understood and agreed that the consideration herein named is in full, complete and final payment and settlement of any claims or demands for damage accrued, accruing, or to accrue to the grantors herein, their heirs, assigns, or legal representatives, for or on account of the construction of the proposed highway, change of grade, water damage, and/or any other damage, right or claim whatsoever.

(R. 157, 162, 167, 172, 230, 236, 240, 276, Appellee R.E. pp. 3, 9, 14, 19)

Acquisition of the various properties then belonging to GRM and West Grenada was negotiated, then deeded to MTC by the two corporations through John Green. (R. 218).

MTC filed its motion for summary judgment based, in part, on the terms set-forth in the deeds. The deeds contained a release for any claims for damage accrued, accruing, or to accrue for or on account of the construction including any damage on account of water. (R. 151-209).

GRM filed a response to MTC's motion and admitted that it executed the warranty deeds with the release. In defense of the motion, GRM alleged mutual mistake, unilateral mistake, material misrepresentation, or actual fraud in the inducement of the execution of the deeds. (R. 261).

The trial court granted MTC's motion and noted as follows:

1. Specifications showing alterations to water flow were on file and subject to inspection by any interested party;

2. The parties agreed that the specifications were not altered after the conveyance from Green;

3. The parties agreed that the construction was performed according to the specifications;

4. MTC did what it said it would do so there was no misrepresentation;

5. In granting summary judgment, the trial court found that appellant failed to respond to the motion for summary judgment with specific facts that establish any fraud or misrepresentation by MTC that would prevent summary judgment.

(R. 470-474; appellant R.E. tab 12)

VIII.
SUMMARY OF THE ARGUMENT

GRM's argument that MTC can be guilty of negligence or fraud is not a issue in the appeal. The trial court did not grant summary judgment because MTC could not be responsible for its employee's conduct. Summary judgment was granted because GRM did not respond with a genuine issue of material fact that would prevent summary judgment on its claims.

GRM contends that MTC did not follow Miss. Code Ann. § 43-37-(3) by providing a written statement which separately addresses foreseeable damages to remaining property. Contrary to this argument, MTC submitted a "fair market value" offer which stated that it included "all damages". The statute requires, "**Where appropriate** the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. Obviously, MTC does not think their hydraulics will cause any damage to any remainder; thus, there was no failure to follow the statute. The release in the statutory offer is clear and unambiguous and states that the consideration includes all damages.

GRM's claim that it understood that no part of the proposed payment was for "damages" to the remaining property is without merit. The only damage possible to GRM after the conveyance would be to land it owned after the conveyance.

The facts do not support a claim of ambiguity of the language in the release. The release stated, "all damages on account of the construction of the proposed highway, change of grade, water damage, and/or any other damage, right or claim whatsoever". It is hard to imagine any release that would be any more straight forward.

"The question of law/question of fact dichotomy requires a two-step inquiry in contract

law." **Royer Homes of Mississippi v. Chandeleur Homes, Inc.**, 857 So.2d 748, 751 (Miss. 2003). "First of all, it is a question of law for the court to determine whether a contract is ambiguous, and, if not, enforce the contract as written." Id. Contracts are solemn obligations and the Court must give them effect as they are written. **Koury v. Ready**, 911 So.2d 441, 446 (Miss. 2005).

The trial court accepted its responsibility and properly determined that the contract was not ambiguous and the release was binding.

The claims of fraud and misrepresentation were not supported by the facts. The first element necessary to prove fraud and/or misrepresentation, is to prove a misrepresentation. Mr. Green testified that it was after the releases were signed that he asked and was given the plans for hydraulics. MTC did not make any representation as to hydraulics because there were no inquiries: thus, the trial court properly granted summary judgment on those theories of recovery.

Appellant argues that a full understanding is an issue of material fact precluding summary judgment. The release clearly stated that it was a release of a multitude of possible damages including all damages on account of construction, including water damage. GRM does not state for the Court the confusing language, simply because the language is exceedingly clear. Further, the argument is not plausible considering its grantor is an attorney, contractor, and businessman.

GRM alleges that the release was not freely and voluntarily given. In support of its argument, GRM relies on **Smith v. Sneed,** 638 So.2d 1252 (Miss. 1994). Reliance on this case is misplaced, since Mr. Smith was in prison and signed a release agreeing not to sue his attorney in order to secure his release from prison. Mr. Green could have refused to sign the release and

simply walked away. Alternatively, as stated by the trial court, he had three options: a) take the initial offer; b) negotiate a better deal; or c) proceed to Court. GRM took the original offer and granted MTC a release which was binding.

In order to survive summary judgment, GRM was required to demonstrate a genuine issue of a material fact. Appellant, at best, showed a genuine issue of a fact; however, it failed to show a material fact of which resolution at trial would result in a judgment in it's favor. The failure to show a genuine issue of material fact properly resulted in summary judgment in favor of MTC.

IX.

ARGUMENT

1. **Response to the allegation that the Green Affidavit did not establish for purposes of MTC'S Motion for Summary Judgment (a) that MTC's agents, whether negligently or intentionally, provided a plat which misrepresented the nature of the road project and misled Mr. Green concerning foreseeable damages on neighboring tracts owned by GRM; or (b) that MTC's agents omitted, suppressed, or concealed a material fact which they were required to disclose, resulting in fraud in the purchase transaction.**

The appellant contents that the trial court granted summary judgment on the theory that the releases signed by John Green are not subject to defenses of intentional or negligent misrepresentation. (Appellant's brief, p. 9). Contrary to the contention of appellant, the court found that (1) specifications showing alterations to water flow were on file and subject to inspection by any interested party; (2) the parties agreed that the specifications were not altered after the conveyance from Green; (3) the parties agreed that the construction was performed according to the specifications; (4) MTC did what it said it would do so there was no misrepresentation; and (5) appellant failed to respond to the motion for summary judgment with specific facts that establish any fraud or misrepresentation by MTC that would prevent summary judgment. (R. 470-474; appellant R.E. tab 12).

Remarkably, GRM argues that MTC is responsible for the misconduct of its agents. GRM argues with supporting case law that MTC can be guilty of negligence and fraud based on the actions of its employees.

Apparently, GRM is arguing an issue in which the trial court does not necessarily disagree. The trial court did not rule that MTC cannot be guilty of negligence or fraud based on

the actions of its employees. The parties can save that argument for another day.

The court found that MTC did what it said it would do; thus, there was no misrepresentation. Further, GRM failed to respond to the motion for summary judgment with specific facts that establish any fraud or misrepresentation by MTC that would prevent summary judgment.

GRM's argument is misplaced; the court did not say that MTC could not be guilty of negligence or fraud. The trial court found that Appellant did not show any facts that would support misrepresentation or fraud.

As explained by the Court of Appeals citing **McMillan v. Rodriguez**, 823 So. 2d 1173, 1177(¶ 9) (Miss. 2002), "If, after examining all evidentiary matters within the record in a light most favorable to the non-movant, no genuine issue of material fact exists, then summary judgment is proper." **Nelson v. Sanderson Farms, Inc.** 969 So. 2d 45, ¶ 6, (Miss. Ct. App. 2006). However, summary judgment should not be granted when a complete presentation of the evidence would lead to a triable issue. **Hall v. Cagle**, 773 So.2d 928 (Miss. 2000) (citing **Great Southern [National] Bank v. Minter**, 590 So.2d 129, 135 (Miss.1991)).

Obviously, when faced with a motion for summary judgment, the trial court must determine the existence of a triable issue. If applying the law to the facts, no triable issue exists, then summary judgment is appropriate.

GRM argues that it had a right to rely on representations made by MTC to procure the contract for the sale of the property and had no duty or obligation to make any further investigation to see whether the representations made were true. (Appellant's brief, p.10). In support of its argument, GRM contends that MTC's negotiators are required by statute to provide

a written statement ("fair market value" offers) which separately addresses foreseeable damages to remaining property. Appellant relies on Miss. Code Ann. §43-37-3 (c) in support of its position.

The pertinent part of Miss. Code Ann. §43-37-3 (c) states:

> The owner of the real property to be acquired shall be provided with a written statement of, and summary of the basis for, the amount established as just compensation. **Where appropriate** the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. (Emphasis added)

GRM, in making it's argument, conveniently ignores the term "where appropriate". The answer is obvious, MTC did not and does not acknowledge any damage to any remainder. Stated another way, damages to remaining property are not appropriate; thus, MTC did not violate the statute.

In support of its position, Green Realty relies on MTC's "Fair Market Value Offer". (R. 280-288, appellant R.E. tab 5 and 6). The Offer clearly states as follows:

> The value of the real property interests being acquired is based on the fair market value of the property and is not less than the approved appraised value/value determination disregarding any decrease or increase in the fair market value caused by the project. The fair market value offer **includes all damages** and is based on our approved appraisal/value determination in the amount of $8,595.00. (emphasis added)

As is evident, the "Fair Market Value Offer" states that the offer includes all damages. This statement, obviously, does not support GRM's claim of fraud in consummating the transaction.

As further evidence that the MTC employees did not commit fraud, one need only look closer at the offer. The offer identifies the real property and interests being acquired by attachment. The attachment (proposed deed) to the offer identifies the property by "metes" and

"bounds" and states a further understanding.

The attachment to the "Fair Market Value Offer" states:

> It is further understood and agreed that the consideration herein named is in full, complete and final payment and settlement of any claims or demands for damage accrued, accruing, or to accrue to the grantors herein, their heirs, assigns, or legal representatives, for or on account of the construction of the proposed highway, change of grade, **water damage**, and/or any other damage, right or claim what soever. (Emphasis added).

The attachment to the "Fair Market Value Offer" of which appellant complains of fraud, is a copy of the same deed that was ultimately signed. MTC is clear about what it is buying and specifically states all damages including water damage. (R. 280-288, appellant R.E. tab 5 and 6).

GRM appears to complain that MTC negotiators are required to separately address foreseeable damages to remaining property. (Appellant's brief, p.11). Once again, one need only to look at the "Fair Market Value Offer". The offer lists consideration under Land Value and under damages states N/A. A simple reading of the offer shows that MTC takes the position that there are no damages to the remainder; however, if there are damages, they are included in the compensation. The offer's attachment specifically states all damages including water damage. The documents do not support the appellant's position. In fact, the documentation supports the trial court's decision granting summary judgment.

As stated by the trial court in its order, "In the present case, Green had three options: a) take the initial offer; b) negotiate a better deal; or c) proceed to Court."(R. 472, appellant R.E. tab 12). Indeed, no one knew his rights better than Mr. Green. Mr. Green is a stockholder of the corporation and an attorney. (R. Vol. 5, p.61).

The property conveyed by warranty deed to MTC from GRM and West Grenada Industrial Park Company, LLC was a part of the tract of land that is described in the complaint.

(R. 183). Stated a different way, the land subject to this action is a remainder interest of the land conveyed to MTC.

Mr. Green admits that he did notice that both of the deeds contained a "release clause". In explanation, he states that he thought that the release clauses only applied to the property being sought by the state. He further states that he was never told otherwise by anyone involved. (R. 219, appellant R.E. tab 11).

It is elementary that MTC would not negotiate a release of all damages, including water damage, for the property it was purchasing. Indeed, the warranty deed containing the release conveyed the property to the MTC. An entity does not need a release from possible damages that it might inflict on its own property.

Appellant states that he understood that no part of the proposed payment was for "damages" to the GRM land remaining after the taking. (R. 219, Appellant R.E. tab 11). Obviously, the only damage possible to GRM would be to land it owned after the taking. Damage to the property taken under the deed would be damage to property owned by MTC.

Appellant complains that the "Fair Market Value Offer" stated consideration for land value and has no amount for damages. However, he overlooks the clause in the offer that states, "This fair market value offer includes all damages. . .". (R. 280-288, appellant R.E. tab 5 and 6). Further, the resulting deed specifically states payment is for all damages on account of construction, including water damage.

In support of its position, Green Realty relies on **Holman v. Howard Wilson Chrysler Jeep, Inc.**, 972 So.2d 564, 568, ¶ 9 (Miss. 2008). The Court states:

The duty to disclose is based upon a theory of fraud that recognizes

that the failure of a party to a business transaction to speak may amount to the suppression of a material fact which should have been disclosed and is, in effect, fraud. *Welsh v. Mounger*, 883 So.2d 46, 49 (Miss.2004) (discussing *Guastella v. Wardell*, 198 So.2d 227 (Miss. 1967)). According to the Restatement (2d) of Torts:

> 3(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated...
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading...
>
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.
>
> Restatement (Second) of Torts § 551 (1977). See also *Welsh,* 883 So.2d at 50 (discussing *Guastella*, 198 So.2d 227, and Restatement (Second) of Torts § 551).

Appellant's reliance on **Holman** is misplaced. In **Holman**, a buyer purchased a vehicle as a new vehicle, when in fact it was a demonstrator that had been in a wreck. The fact that the vehicle had been in a wreck was not common knowledge or public record; thus, it was concealed.

GRM attempts to show fraud through the Affidavit of John Green. He states as follows:

1) I was not given either actual or constructive notice by MTC that the state agency has such intentions.

2) No representations as to the intentions of MTC to place a 32 by 6 foot box culvert were made by MTC to me, GRM, or WGIP prior to the conveyances.

3) I, GRM, or WGIP did not have access to any other source or sources of information as to the intentions of MTC to create a 32 by 6 foot box culvert prior to the conveyance.

4) Because neither I, GRM or WGIP was provided the facts as to the intentions of MTC to alter the drainage as it did, the so-called release contained in the deeds as

construed by the MTC and as described herein was not entered into freely and voluntarily.

(R. 218-24, Appellant R.E. tab 11).

It is apparent that the intention of the affidavit is to lift the burden to make inquiry to the specifics of the plans from GRM and shift it to MTC.

The law does not support GRM's position. The Mississippi Supreme Court has stated on several occasions that contract language, when unambiguous, will be upheld. "The question of law/question of fact dichotomy requires a two-step inquiry in contract law. **Royer Homes of Mississippi v. Chandeleur Homes, Inc.**, 857 So.2d 748, 751 (Miss. 2003). "First of all, it is question of law for the court to determine whether a contract is ambiguous, and, if not, enforce the contract as written." **Id**. Contracts are solemn obligations and the Court must give them effect as they are written. **Koury v. Ready**, 911 So.2d 441, 446 (Miss. 2005).

There is nothing ambiguous about the release of liability clause in the contract. The Supreme Court has seen such language on several occasions and has never found the clause to be ambiguous. See **Simmons v. Miss. Transportation Comm'n**, 717 So.2d 300 (Miss. 1998); **Muse v. Miss. State Hwy Comm'n** 233 Miss. 694 (Miss. 1958). Indeed, "all damages on account of the construction of the proposed highway, change of grade, water damage, and/or any other damage, right or claim whatsoever" is not ambiguous. The trial court was correct when it enforced the contract as written.

A hearing was conducted on August 1, 2007; wherein, the questions of "alterations of plans" and "false representations " were answered.

BY THE COURT: They said the specs that existed are the same specs that existed at the time of the conveyance. They weren't–I asked y'all to go see if there were any changes or alterations. There were not–

BY MR. FREELAND: –There weren't any.

BY MR. METZ: Your Honor, we have an affidavit we have submitted saying there was nothing–

BY THE COURT: –He could have, but why would that now–you have answered my question. The question I asked I don't think is relevant any more. If it had changed, if they had changed the specs on him after the settlement and they had changed some other things, they might have, that might be a relevant question. But apparently the specs at the time of the sale never changed.

(R. Vol. 5, p 49, appellee R.E. p. 23)

This testimony dispelled the claim of change of plans after the signing of the settlement agreement of which appellant relies in support of the claim of fraud and/or misrepresentation.

As far as misrepresenting the specifications, the following testimony was presented to the Court.

BY THE COURT: Okay. When they give you the specs of what they are going to do on this thing, when they spread that in front of you, do they show you that they are going to take those out, build a bridge, and put this larger box culvert in there?

BY MR. GREEN: No, Sir.

BY MR. FREELAND: No.

BY THE COURT: That wasn't on there?

BY MR. GREEN: No, sir. And it's part–

BY THE COURT: - -What did they say they were going to, what did the specs show that they were going to do?

BY MR. GREEN: No specs were shown, It is simply a plat that shows the existing drain, It shows exactly what was there in dimensions that would make, that would lead you to believe that there would be no significant change there.

BY THE COURT: Okay. So what they presented you was a land transaction, not an engineering transaction. I mean they didn't, you didn't see the engineer? You just- -

BY MR. GREEN: - -no. No.

BY THE COURT: - -saw a plat of the land.

BY MR. GREEN: And as soon as I- -

BY THE COURT: - - So the question does go back as to whether or not you had a duty to check on the specs.

BY MR. GREEN: Yes, sir. Now as soon as I raised the question, they sent me a whole packet of hydraulic information that answered, that that's what I freaked out. I said, you know, I understand now. I see exactly what you are doing.

BY THE COURT: Did they do that before or after?

BY MR. FREELAND: After.

BY MR. GREEN: Oh, this was after. This was after construction.

BY THE COURT: You got the hydraulics after you signed the deed?

BY MR. GREEN: After construction began; yes, sir. They provided me all of that after construction began, and I called them and asked the question: what are you going to do? And the exact answer- -

BY THE COURT: - - Did they have the hydraulics before the deal?

BY MR. GREEN: Absolutely. I think the date in this is, it is dated, and the entire project was built around the hydrologist's report. Now let me repeat that. The entire project was built around the hydrologist's report.

(R. Vol. 5, p 69-71, appellee R.E. pp. 24-26)

The testimony showed that the plans were not changed after the signing of the release. Further, there was no misrepresentation of hydraulics, since clearly there was no representation either way as to the hydraulics.

GRM attempts to relieve itself of the unambiguous release by claiming a shifting burden to investigate argument. The facts in the present case are similar to the facts in **Swett v.**

Mississippi State Highway Commission, 193 So.2d 596 (Miss. 1967), the plaintiff filed a complaint against Mississippi State Highway Commission to recover damages for injury to his realty caused by the alteration of a creek's flow. Swett argued that he should be allowed to recover because he had no reason to anticipate damages to the remainder at the time he executed the conveyance and release. In **Swett**, the Supreme Court stated as follows:

> If the Highway Commission had condemned the right-of-way and easement over Swett's land, he could have recovered damages based on the before and after rule and could have shown all specific items of injury affecting the depreciated value of the remaining property, including that in section 17. Severance damages would have been an item affecting the depreciated value of the remaining land. All questions of drainage resulting from the proper use of the lands would have been considered if supported by competent evidence. If the court should entertain suits for specific items of damage that developed after the taking, the basis of the before and after rule would be undermined.

In support of its position, GRM relies on **Nash v Mississippi Valley Motors**, 156 Miss. 157, 163, 125 So. 708, 709 (1930), when the Mississippi Supreme Court stated:

> A purchaser has the right to rely on the representations of a seller as to the facts within the latter's knowledge, and the seller cannot escape responsibility by showing that the purchaser, upon inquiry, might have ascertained that such representations were not true. Contributory negligence is not a defense to an action based on fraud.

Appellant also calls on a 1949 decision by the Mississippi Supreme Court:

> [I]f the writing is procured by false representations, or fraud, committed by one of the parties to the writing on the other, on which he might reasonably rely, the court will permit the facts to be shown, and if fraud was committed in the procurement of the contract, it will be avoided, in other words, no contract exists in legal contemplation if it was procured by fraud.

Brown v. Ohman, 42 So.2d 209, 212 (Miss. 1949) suggestion of error overruled, 43 So.2d 727.

GRM represents that based on the above cases, the trial court erred in finding there was no evidence of negligent or intentional misrepresentation in this case. This conclusion is without basis. The basis of the trial court's finding is obvious. The Court asked, "You got the hydraulics

after you signed the deed? Mr. Green responded, "After construction began; yes, sir. They provided me all of that after construction began." (R. Vol. 5, p 69-71, appellee R.E. pp. 24-26)

The trial court based its decision on the testimony of Mr. Green. Indeed, the trial court determined there was no misrepresentation, negligent or intentional. Based on the plaintiff's own testimony, there was no representation at all. Mr. Green failed to look at the hydraulics until after the deed was signed and the construction had begun. Obviously, the trial court was safe in making the determination that there was no misrepresentation as to hydraulics, because the appellant admitted it.

GRM relies on **Levens v. Campbell**, 733 So.2d 753 (Miss. 1999), No. 97-CA-01508-SCT and its elements of fraudulent misrepresentation in further support of its appeal.

Levens describes the elements of fraud to 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. In **Levens**, the Court while citing **Spragins v. Sunburst Bank**, 605 So.2d 777,780 (Miss. 1992), acknowledged that in order to establish fraudulent misrepresentation, the elements of fraud must be proven.

In order to dispel appellant's argument and at the risk of sounding redundant, MTC needs only to look at the first element. The testimony of Mr. Green demonstrated to the trial court that MTC made no representation. The trial court fully understood that if no representation was made, there was no need to go further. Thus, summary judgment was proper on this allegation of the complaint, since no representation on hydraulics was made, it could not be false.

GRM, in pages 13-18 of its brief, applies facts to the various elements to prove its claim of fraudulent misrepresentation. Obviously, before discussing the numerous elements required to prove fraud, an appellant must get past the first element which is a misrepresentation.

GRM, in its brief and in support of its claim of a representation, states as follows:

> MTC by showing a plat to Mr. Green (who was experienced in reviewing plats in connection with highway and other projects) represented to GRM that the existing 48-inch culvert would remain and further represented that no other changes were proposed for the drainage of Howard Creek in connection with the road-widening project. MTC also represented to GRM in providing misleading and incomplete offer documents that there would be no damage to improvements on adjoining property.

(Appellant's brief 13-14)

It must be noted that in its effort to show a representation, GRM does not explain the testimony of Mr. Green to the Court. As previously discussed, Mr. Green testified to the Court that he only saw a land transaction and not an engineering transaction. He stated that prior to signing the deed, all he had was a deed.

Mr. Green, as described by appellant, was experienced in reviewing plats in connection with road projects. Obviously, he knew what he had at his disposal, when he testified in response to a question of the court that he only had a land deed at the time he signed the deed. It is strikingly obvious that Mr. Green knew to seek and review the plans prior to granting a release, if he were curious.

Mr. Green, a lawyer and contractor, seeks to grant a release for all damages, including water damage and then recover for water damage. As alleged by Mr. Green, "This diversion of water together with the sixteen fold increase in discharge capacity in all probability will, in the absence of a provision for adequate drainage from the new box culvert across the remaining GRM property, cause severe and irreparable water damage . . ." (R. 222)

Of course, there has been no water damage and MTC does not agree that there will be water damage. MTC's hydrologists do not design to cause flooding. We will never know if there would have been flooding, since GRM has constructed a drainage ditch and altered its drainage.

Appellant's argument that it was misled because in the offer, the space for damage was left blank, is without merit. MTC paid consideration, and the offer and deed specifically included a release. Mr. Green on behalf of GRM knew or should have known that the corporation was granting a release.

The trial court was correct in granting summary judgment, since by Mr. Green's testimony, no representations were made regarding hydraulics.

2. The standard forms

Miss. Code Ann. § 43-37-3 (c) states as follows:

> Before the initiation of negotiations for real property, an amount shall be established which it is reasonably believed is just compensation therefore and such amount shall be offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determinating the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of, and summary of the basis for, the amount established as just compensation. **Where appropriate** the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. (Emphasis added)

GRM contends that MTC's offer documents were deficient, since MTC's appraisers put nothing in the offer documents concerning damages to the remaining real property, leaving the applicable sections of the forms blank.

The damages part of the document does not have a figure in it for the obvious reason, MTC's position was that there was no damage to the remainder. Obviously, the statute recognizes that possibility; thus, the words "Where appropriate". MTC paid just compensation as required by the statute. If GRM had chosen, it could have negotiated for any damage that it deemed appropriate. As stated by the trial judge, GRM could have (1)signed the deed with the release, (2) negotiated a better deal, or (3) proceeded to court and had a trial on the damages. Appellant chose to sign the deed and grant the release for the tendered consideration. The statute was not breached, MTC did not recognize any damage to the property; thus, "where appropriate" in the statute was implemented.

Appellant would represent to this Court that it was misled. Contrary to that representation, the deed had a release consisting of some 8 or 10 lines which was obvious to all. Further, the "offer" typed in its entirety in appellant's brief states, "This fair market value offer **includes all damages** and is based on our approved appraisal/ value determination in the amount of **$8,595.00**. (Emphasis added).

What could be misleading about "includes all damages"? MTC could not have been more obvious; thus, the trial court granted summary judgment.

3. Allegations of genuine issue of material fact concerning releases.

GRM contends that neither John Green nor any other representative of GRM were provided the facts as to the intentions of MTC to alter the drainage of Howard Creek as it did; therefore, the releases were not entered into freely and voluntarily.

Appellant argues that an individual signing a release must have a full understanding of what was being given up by signing the release. Appellant alleges that a full understanding is an

issue of material fact precluding summary judgment.

The release clearly stated that it was a release of a multitude of possible damages including all damages on account of construction, including water damage. What exists to confuse a grantor of a release that clearly states **all damages on account of construction, including water damage .** Understandably, GRM does not state for the Court the confusing language, simply because the language is exceedingly clear. Further, the argument is not plausible considering its grantor is an attorney, contractor and businessman.

In support of its argument, GRM relies on **Smith v. Sneed,** 638 So.2d 1252 (Miss. 1994). The facts of the case reveal that Smith filed suit against attorney Sneed. It was alleged that Sneed had committed malpractice during his representation of Smith. Smith had plead guilty to manslaughter and was sentenced to twenty (20) years in the state penitentiary. It came to light that the victim had died of natural causes and a new trial was ordered. Smith signed a release and the charge of manslaughter was dismissed and he was released from prison. The Court had ordered Smith released from prison; however, in order to obtain his release, he was required to sign a release. The release stated in part as follows:

> Therefore, in order to induce the State of Mississippi and all prosecuting witnesses to request a dismissal of the charge of manslaughter, and in consideration of a dismissal of the charge against me, I, Albert Ray Smith, do, hereby, forever release and finally discharge the following persons, to wit:
> All defense counsel, including the Honorable William L. Sneed and the Honorable W.A. Grist.

The Supreme Court acknowledged that at the time Smith entered onto the release he was in prison. Further, Smith presented facts which could lead a reasonable juror to conclude that the release was not entered into voluntarily.

In other words, Smith signed a release to get out of prison, and the Court acknowledged that the release may not have been voluntarily given.

Obviously, the facts in **Sneed** are not even remotely similar to the present case. Mr. Green could have refused to sign the release and simply walked away.

This fact did not go unnoticed by the trial court as follows:

> **BY THE COURT:** - - Well, that would be the ultimate damage issue as to him suing his own lawyer. The reason they threw the release out, which is what you are asking me to do, is because that he was in jail, and they said we will let you go as soon as you sign this release. That is not what we have here.

(R. Vol. 5, p. 23, appellee R.E. p. 27)

In furtherance of its argument, GRM relies on **Franklin v. Lovett Equipment Co.**, 420 So.2d 1370 (Miss. 1982). Appellant argues that this case stands for the fact that material issues as to whether fraud renders void the releases in the two deeds.

Fraud may in fact render a release void; however, as thoroughly argued above ,the Court found no fraud to apply to the releases.

Appellant's reliance on **Brown v. Ohman**, 42 So.2d 209 (Miss. 1949), is misplaced. Mr. Green's testimony failed to show any representation, much less, a false representation. In order to bolster its argument, GRM cites **Nash Mississippi Valley Motor Co. v. Childress**, 125 So.708 (1930). Appellant represents this case to say that failure to disclose the actual mileage in the sale of an automobile has been held to be false representation. The facts in **Nash** are not in concert with the present case. In, **Nash**, the defendant sold a car with 8,000 miles showing on the odometer. In fact, the miles had been rolled back; thus, the false representation. The representation of 8,000 miles was false representation. MTC in the present case did not represent

anything, thus, the difference. Finally, GRM cites **Memphis Hardwood Lumber Co. v. Daniel**, 771 So.2d 924 (Miss. 2000) stating a duty to disclose that an instrument was a timber deed and not a timber contract. In the case *sub judice*, the deed was represented as a deed and the release was stated as a release as acknowledged by Appellant. There was no misrepresentation on the behalf of MTC; thus, the ruling is discernable.

The trial court properly granted summary judgment on the negligent or fraudulent misrepresentation claim.

4. ***King v. Mississippi Transportation Commission* is applicable.**

GRM alleges that the trial court heavily relied on **King v. Mississippi Transportation Commission**, 609 So.2d 1251 (Miss. 1992). On the contrary, MTC contends that the trial court relied heavily upon the facts presented to it by the testimony of Mr. Green. Indeed, Mr. Green requested that the trial court allow him to testify and the court granted his request.

The facts in **King** were that the Kings were paid compensation as the result of an eminent domain action with the highway commission. A few years later, their home suffered special damages, which they attributed to the highway construction. The homeowners filed suit claiming that their property had been taken and damaged for public use over and above the amount of compensation received and in a manner not reasonably foreseeable at the time of the eminent domain proceeding. The Court held that the compensation awarded in the eminent domain proceeding was conclusively presumed to include all damages.

The importance of **King** cannot be overlooked, when the Supreme Court stated, "Because our constitution requires 'due compensation', the presumption is that the construction will be of such character as to do the most injury to the remaining property of the landowner".

As stated by GRM in its brief, the Supreme Court in **King** stated that a landowner's negotiated settlement with a condemning authority"is just as preclusive as a final judgment after an eminent domain trial".

The release at issue in the present case is much more inclusive than the release as discussed in **King**. The subject release, which is set-forth in full above, specifically states all damages on account of construction including water damages.

GRM attempts to make a distinction between its release and the Kings condemnation proceeding. The statement in **King** that the presumption that the construction will be of such character as to do the most injury to the remaining property of the landowner, surely applies to a release that specifically states for all damages on account of construction.

5. Standard for granting summary judgment.

GRM argues the familiar standard of review to a trial court's granting of summary judgment. In reliance of the standard, GRM cites **Glover v. Jackson State University**, 968 So.2d 1267 (Miss. 2007), and **Simmons v. Thompson,** 631 So.2d 798 (Miss. 1994).

In **Glover** at 174, ¶ 12, the Supreme Court thoroughly discussed summary judgment and recalling its ruling in **Simmons**, the Court stated:

> Of importance here is the language of the rule authorizing summary judgment"where there is not genuine issue of material fact." The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense...the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact.

The Court further noted:

> We often hear parties argue that summary judgment should be defeated where there is a genuine issue as to an *important* fact. This is not so. There may exist many important

> factual issues, the resolution of which will not determine the prevailing party. A genuine issue as to a *material* fact is one which, absent its resolution at trial in favor of the non-moving party, will result in a judgment for the moving party.
>
> **Glover** at 1274, ¶ 13.

In order to survive summary judgment, GRM was required to demonstrate a genuine issue of a material fact and not just an important fact.

GRM argues that the lower court's opinion granting summary judgment does not take into account matters set forth clearly in the Green Affidavit and does not give GRM as the non-moving party the required benefit of the doubt on all issues of disputed fact. (Appellant's brief, p.28)

Appellant criticizes the trial court for not giving the benefit of the doubt on all issues of disputed fact. As so aptly discussed by the Supreme Court, issues of disputed fact do not overcome summary judgment. An appellant must show a genuine issue of *material* fact, which GRM has failed to do.

Mr. Green testified that he signed the deed and release before he even received the hydraulics. After receiving the hydraulics plan, he complained of fraud and misrepresentation. Both fraud and misrepresentation of the hydraulics require some representation as to the hydraulics. Thus, in the absence of any representation, the trial court properly granted summary judgment. (R. Vol. 5, p.70, appellee R.E. p.28)

X.

CONCLUSION

GRM has failed to respond to MTC's motion for summary judgment with material facts that would prevent summary judgment; thus, MTC is entitled to summary judgment as a matter of law.

MTC, accordingly, respectfully requests that this Court affirm the lower court's order granting summary judgment.

Respectfully submitted,

MISSISSIPPI TRANSPORTATION COMMISSION

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CERTIFICATE OF SERVICE

I, James T. Metz, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee to:

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This the 24th day of April, 2008.

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