
**IN THE SUPREME COURT AND
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

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED (Miss.R.App.Pro. 34(b))

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I. Certificate of Interested Persons

Green Realty Management Corporation vs. Mississippi Transportation Commission

Cause No. 2007-CA-01797

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:

Green Realty Management Corporation

John G. Green

Karen Green

Mississippi Transportation Commission

Mississippi Department of Transportation

T.H. Freeland, III

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IV. Statement of 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 ¹) 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?

¹ Both the Mississippi Transportation Commission (MTC) and its subsidiary, the Mississippi Department of Transportation (MDOT) were involved in the negotiations for the purchase of a small part of the property belonging to Green Realty Management Corporation (GRM) and its affiliate, West Grenada Industrial Park (WGIP). For convenience, both entities MDOT and MTC are referred to, collectively, as "MTC" and the Green family corporations, GRM and WGIP, are referred to, collectively, as "GRM" in this brief.

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. Oral Argument Requested

This appeal of an inverse condemnation suit is a case of first impression in that it deals with the effect of MTC’s providing a misleading plat and using statutorily deficient and misleading offer documents in negotiating a purchase of two small tracts of undeveloped property for a road-widening project. MTC’s actual plans for the project involved a significant diversion of Howard Creek, endangering valuable improvements on adjoining tracts without compensation. Oral argument should assist the reviewing court in dealing with these issues.

VI. Statement of the Case

The inverse condemnation action was filed pursuant to Article Three Section Seventeen of the Mississippi Constitution of 1890 by Appellant GRM. The action has been pending since June 19, 2006, in the Circuit Court of Grenada County, Mississippi after being transferred to that court from the Chancery Court of Grenada County on a motion by MTC. A motion to amend the Complaint was filed by GRM to specifically address negligent or fraudulent misrepresentations by MTC in negotiating the purchase and obtaining warranty deeds from GRM.²

² The trial court took the motion to amend under advisement but did not rule on it prior to considering MTC’s motion for summary judgment. The motion to amend, which the trial court

John Green, President of the grantors of the two deeds involved, made and filed an affidavit verifying under oath all of GRM's factual allegations in the proposed amendment. See Affidavit of John Green, RE Tab 3, R 294³ (hereinafter the "Green Affidavit").

MTC answered GRM's complaint asserting multiple defenses, including that releases in the two deeds signed by GRM (RE Tab 6, R 234, and RE Tab 7, R 229) barred GRM's claim. Counsel for MTC also asserted in argument that MTC could not be sued for fraud, because its employees who negotiated the purchase of the tracts involved in this case were not authorized to commit fraud. RE Tab 8, Tr 11. There is no basis for either contention.

MTC also asserted that it would adequately deal with all water that would flow through a 32 by 6 foot box culvert it was constructing on the property it had acquired from GRM (but which was not shown on the plat provided to Mr. Green during negotiations of the purchase). MTC has not done so. See Green Affidavit, RE Tab 3, R 294.

MTC filed a Motion for Summary Judgment on September 11, 2006, asserting that that the deeds transferring Tracts H and N to MTC contained releases conceding any right GRM might have had for further compensation. In support of its motion, MTC denied the existence of any genuine issue of material fact.

GRM responded to MTC's Motion for Summary Judgment with a brief supported by copies of the various documents involved in the negotiated purchase (the offers, warranty deeds, and a detail of the plat shown to John Green) and supported by the Green Affidavit.

apparently overlooked, should have been sustained per Rule 15 of the Mississippi Rules of Civil Procedure.

³ The record of the proceedings below will be referred to as "R ____." The transcript of the two hearings will be referred to as "Tr ____". The Record Excerpts will be referred to as "RE Tab ____".

At a March 13, 2007, hearing on MTC's Motion for Summary Judgment, the trial court raised the issue of whether MTC's plans and specifications were available to GRM at MTC's Batesville and Jackson offices prior to GRM's execution of the deeds. RE Tab 8, Tr 34. The court was of the opinion that John Green had a duty to make a further investigation to inspect the actual plans before signing the deeds. The Trial Court asked for briefs on that issue and its effect on GRM's inverse condemnation suit. RE Tab 8, Tr 34.

MTC filed a "supplemental" motion for summary judgment on May 11, 2007, asserting that MTC's plans for the modification of the Howard Creek drainage system were on file and available for inspection by the public at Batesville, Mississippi, prior to the execution of the deeds by GRM to MTC. GRM responded to MTC's "supplemental" motion for summary judgment, again pointing out genuine issues of disputed fact based on matters in the Green Affidavit and MTC's response to the disputed and undisputed issues of fact earlier identified by GRM.

On September 6, 2007, the trial court filed its opinion granting MTC a summary judgment "as a matter of law." RE Tab 12, R 469.

The trial court based its decision primarily on the fact that the plans and specifications for the modification of the discharge of the waters of Howard Creek were available for inspection by John Green at the MTC offices at Batesville and Jackson, Mississippi, at all times prior to the execution of the deeds involved herein.

The trial court noted in its opinion that "Green claims that MTC either fraudulently or negligently misrepresented or omitted facts to induce GRM to execute the deeds" but found that there were "no facts in the record" of fraud in fact or fraud in law and "no

proof” of fraudulent misrepresentation. See Trial Court’s Opinion, RE Tab 12 at 2, 4-5, R 469, 471, 472-473.

The trial court relied heavily in its opinion on the decision of the Mississippi Supreme Court in King v. Mississippi Transportation Comm’n, 609 So.2d 1251 (Miss. 1992), although the use of misleading documents or fraudulent conduct by MTC were not factors in King.

GRM filed a timely Notice of Appeal and has fully complied with the requirements of the Mississippi Rules of Civil Procedure for this appeal.

VII. Statement of Facts

John Green, the President of GRM, has been the owner and manager of a heavy construction company most of his adult life. See Green Affidavit 1, RE Tab 3, R294. He has bid on and supervised the construction of projects involving highways, box culverts, levees, dams, land improvements, and large drainage projects and is familiar with designs concerning the type of drainage facilities at issue here. Id.

During the period from 2001 through 2003, GRM owned several tracts of property in an industrial park in Grenada located near a highway that MTC had plans to widen. Two of the tracts owned by GRM, Tracts H and N, were small and undeveloped; Tract H was 0.39 acres and Tract N was 0.192 acres.

GRM owned other much larger tracts near Tract H and Tract N at a further distance from the highway that included substantial improvements, including industrial buildings and

GRM's offices. Four of the seven buildings on the adjoining property owned by GRM are under long-term leases which produce an annual income of more than \$54,000.⁴

In 2003, MTC negotiated the purchase of the two small tracts of undeveloped land from GRM, Tracts H and N, for the road widening project, offering and paying GRM \$8,595 as the "fair market value" of Tract H and \$5,775 as the "fair market value" of Tract N.⁵

During the negotiations, MTC showed a plat or map to Mr. Green that misleadingly indicated that an existing 48-inch culvert for Howard Creek would remain in place. See Green Affidavit ¶¶ 8-10, RE Tab 3, R 294, 296-297. During the negotiations, MTC also presented its "fair market value" offers for Tracts H and N to Mr. Green on forms which had been completed in a way that misleadingly indicated that no damages other than the "land value" of Tracts H and N, and, in particular, no damage to any "improvements" were expected in connection with the road widening project. See "Fair Market Value" Offers, RE Tabs 4 and 5, R 280 and 285.

The purchases of Tracts H and N were completed using a form of warranty deed that included release language in which GRM as grantor was required to acknowledge and agree as follows:

⁴ GRM has long-term leases for four of the buildings with substantial tenants, including RSC, Bowater Paper Company, Action Motorcycles, and Motion Industries. These leases produce an annual net income of \$54,590.00. Green Affidavit ¶19, RE Tab 3, R 294, 299-300.

⁵ There was some confusion at the hearings on MTC's Motion for Summary Judgment concerning whether the deeds in question here were executed in settlement of eminent domain actions filed by MTC for Tracts H and N. As pointed out by Mr. Green at the second hearing, MTC's counsel was apparently confusing the purchase of these tracts with another tract owned by MTC approximately a mile away for which a condemnation suit was filed. On the record below, there is no evidence that any eminent domain action or other litigation had been filed in connection with Tracts H or N and the damage to adjoining properties prior to the filing of the inverse condemnation suit by GRM; Mr. Green confirmed otherwise at the second hearing. See RE Tab 6, Tr. 60.

[T]he 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 . . . 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.

See Warranty Deeds for Tracts H and N, RE Tabs 6 and 7, R 234 and 229.

As the road-widening project began, Mr. Green noticed significant work near Howard Creek that was inconsistent with the plat or map shown to him by MTC prior to the purchase. See Green Affidavit ¶¶ 9 and 11, RE Tab 3, R 294, 297-298. MTC, in fact, had long-standing plans to replace the existing 48-inch culvert with a 32 by 6 foot culvert⁶ that would divert Howard Creek, increasing the drainage from the creek toward GRM's remaining property from 7% to 44%, increasing water flow by 733%, and, endangering four or five of the seven buildings on the adjoining, improved property owned by GRM.⁷ See MTC Hydrology Analysis and Plans for New Bridge and Box Culvert, RE Tabs 9-11, R 292, 290, and 470. See also Green Affidavit ¶¶ 13-17, RE Tab 3, R 294, 298-299.

In completing the project, MTC left a substantial wall of dirt at the end of the new box culvert and did nothing to increase the size of the existing ditch beyond that point.

⁶ According to the interoffice memo on hydrology issues subsequently provided to John Green by MTC, RE Tab 9, R292, MTC had planned to replace the existing box culvert at station 26 + 584 feet then carrying the main flow of Howard Creek with a bridge and to place a "relief box at Station 26 + 296" which was then the location of the existing 48-inch pipe.

⁷ According to the hydrology analysis prepared for MTC, exhibit 10 to GRM's response to the MTC Summary Judgment motion RE Tab 11, R260 and their analysis RE Tab 24, R374, copies of which were provided to John Green by MTC's in-house counsel after Mr. Green learned of the construction of the 32 by 6 foot box culvert, the previously existing 48 inch pipe at station 26 + 296 had a cross sectional area of 12.56 square feet which allows for a maximum flow of water or a discharge capacity of 1.7 cubic meters per second. Based on the discharge capacity of the 32 by 6 foot box culvert, the annual rainfall in Grenada County, and its effect on Howard Creek, the 32 by 6 foot box culvert at station 26 + 584 feet will carry 44% of the water of the Howard Creek drainage area at its full capacity while the 48" pipe carried only 7% of the water of the Howard Creek drainage area at its full capacity. Green Affidavit ¶ 13, RE Tab 15, R 294, 298.

See Green Affidavit ¶¶ 20-22, RE Tab 3, R 294, 300. Representatives of MTC told John Green that nothing whatsoever would be done or was planned to be done by MTC to properly drain the additional volume of water, which would be discharged from the new box culvert into the existing ditch and then would have run into the middle of GRM's remaining 40 acres, but for the extensive mitigation efforts undertaken by GRM. Id.

In order to remedy or reduce the inevitability of flooding of the adjoining GRM property, the construction of a drainage ditch of sufficient size to carry and control the diverted surface water was necessary. GRM has been forced to construct such a ditch at great expense, and has done so. See Green Affidavit ¶ 23, RE Tab 3, R 294, 300.

VIII. Summary of the Argument

The trial court granted summary judgment based on MTC's contention that there were no disputed issues of material fact as to whether the "release clauses" contained in the two warranty deeds barred recovery by GRM for damage to its adjoining tracts.

The trial court's opinion granting summary judgment to MTC also assumed that GRM's suit was barred under King v. Mississippi Transportation Comm'n, 609 So.2d 1251 (Miss. 1992), if plans and specifications for the new culvert and bridge were "available" to GRM in Batesville or Jackson, Mississippi, at the time the conveyances occurred.

Because of the negligent or fraudulent misrepresentations made to GRM by MTC concerning its true intentions, there are genuine issues of disputed fact concerning (1) whether the releases are effective to bar GRM's suit; and (2) whether the King case is controlling here.

Under the well-established standard for summary judgment motions under Rule 56, all evidence in affidavits submitted by the non-moving party must be taken as true. In the

Green Affidavit, John Green clearly describes MTC's providing a plat or map to him during the negotiations that falsely indicated that the 48-inch culvert on Howard Creek would not be changed. The "fair market value" offers as completed and used by MTC (which were also in evidence before the court) were also misleading concerning foreseeable damages to improvements on adjoining tracts. As a result, it is clear that there are disputed issues of material fact concerning whether MTC negligently or fraudulently misrepresented its intentions to GRM.

Since disputed issues of material fact exist, summary judgment should not have been granted to MTC in this case.

IX. Argument

- 1. The Green Affidavit establishes 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; and (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 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.

Green's sworn affidavit sets forth that MTC's agents provided a plat to John Green that either negligently or intentionally misrepresented the nature of the road project. The Green Affidavit also establishes that, having been misled as to the nature of the project, Mr. Green was also misled about the foreseeable damages to neighboring tracts owned by his company.

MTC took the position in the court below that it could not be liable for the misconduct of its agents. MTC imposed on GRM either a negligent misrepresentation (fraud in law) or a deliberate misrepresentation (fraud in fact) in its negotiations with John

Green regarding the purchase of Tracts H and N. As confirmed by a recent decision of the Mississippi Supreme Court, there is no doubt that a state institution (in this recent case, Jackson State University) can be guilty of negligence through the acts of its employees and agents. Glover v. Jackson State University, 968 So.2d 1267 (Miss. 2007), No. 2005-CA-02328-5 ¶ 28 (Dec. 6, 2007). Nor is there any doubt that MTC can be guilty of common law fraud in law or fraud in fact based on the actions of its agents, the persons negotiating the deeds involved in this case. Undoubtedly, MTC is responsible for the actions of its agents. Id.

GRM had the right to rely on representations made by MTC to procure the contract for the sale of the property involved and had no duty or obligation to make any further investigation to see whether the representations made were true. See, e.g., Reed v. Charing, 207 Miss. 1, 41 So.2d 11 (Miss. 1949) (misrepresentation of numbers of cultivatable acres in a plantation). Thus, in this case John Green was not obliged to look beyond the verbal representations made by MTC, the plat MTC gave to him showing what MTC intended to do, and the words and the omissions in the two “fair market value” offers. John Green had absolutely no duty to make a further investigation as to what modifications, if any, of the drainage of Howard Creek MTC intended to make in the process of widening the highway. Id. See also Nash Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 163, 125 So. 708, 709 (Miss. 1930); H.D. Sojourner & Co. v. Joseph, 186 Miss. 755, 191 So. 418 (Miss. 1939). The trial court imposed this obligation on Mr. Green and GRM by holding as a matter of law that they had such duties. There is no legal authority to support that holding given the genuine issues of material fact in this case concerning MTC’s misrepresentations and suppression of information concerning its intentions.

MTC was required as a matter of law to reveal to John Green what it actually intended to do – to build a 32 by 6 foot culvert between Tracts H and N, divert Howard Creek, and increase water flow by more than 700% onto adjoining tracts owned by GRM. This is a matter both of statute and case law.

By statute, MTC's representatives were required to determine "just compensation" in a reasonable way before initiating their negotiations of the purchase of Tracts H and N from GRM with public funds. See Miss. Code Ann. § 43-37-3(c), a copy of which is provided as Appendix A to this brief. That statute, which is discussed in more length in Section 3 below, requires that MTC's negotiators provide a written statement (the "fair market value" offers used here) which separately addresses foreseeable damages to remaining property. Id.

The failure of MTC's agents to address this issue in their written statements was inherently misleading in this situation.

In addition, MTC was required under Mississippi case law to disclose its actual plans to replace the existing culvert and divert Howard Creek, since not disclosing its plans would amount to suppression of a material fact -- a fraud in consummating the transaction. In Holman v. Howard Wilson Chrysler Jeep Inc. 972 So.2d 564 (Miss. 2008)(No. 2005-ct-01154 Jan. 10, 2008) ¶ 9, 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).

This issue was squarely before the trial court. See Green Affidavit, RE Tab 3 ¶¶ 10 and 11, R 294, 297. The trial court erred by failing to follow the rules just stated in this recent decision by the Mississippi Supreme Court, by awarding summary judgment to MTC on the premise that John Green had a duty to investigate and by further investigation would have had access to MTC's actual plans. Mississippi law on this issue, the right to rely on representations made in purchase transactions, has been clear for at least seventy-eight years.

In Nash v. Mississippi Valley Motors, 156 Miss. 157, 163, 125 So. 708, 709 (1930), 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.

As stated in 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.

What forms the basis for the action for fraud in this case? According to **Brown**, 42 So.2d 209 at 215:

[A] representation of an existing fact, such as shown in the instant case, is the very basis upon which all actions of fraud are founded.

The trial court erred in finding that there was no evidence of negligent or intentional misrepresentation in this case. In granting summary judgment to MTC, the trial court failed to apply the well-established rules of law as to what constitutes fraud. The elements of a negligent misrepresentation claim (fraud in law) and of a fraudulent misrepresentation claim (fraud in fact) are set out in **Levens v. Campbell**, 733 So.2d 753 (Miss. 1999), No. 97-CA-01508-SCT.

The elements of a fraudulent misrepresentation under **Levens** and the existence of disputed facts concerning MTC's use of misleading documents which preclude the grant of a summary judgment in this case are:

- (a) **A representation**: Here 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. See Green Affidavit ¶¶ 1, 8 and 9, RE Tab 3, R 294, 296-297. MTC also represented to GRM in providing misleading and incomplete offer documents that there would be no damage to improvements on adjoining property. See Green Affidavit ¶¶ 6 - 7, RE Tab 3, R 294, 295-296.
- (b) Its falsity: MTC built the 32 by 6 foot culvert and diverted the drainage of Howard Creek, having failed to reveal its intentions to do so to John Green. See Green Affidavit ¶¶ 6 - 11, RE Tab 3, R 294, 295-297.
- (c) Its materiality: GRM was forced to enlarge the ditch through its property to preclude water damage to its rental buildings so the diverted Howard Creek water would drain; GRM will be forced to rip-rap the ditches with stone at considerable additional expense to prevent erosion. See Green Affidavit ¶¶ 12 - 25, RE Tab 3, R 294, 297-301.
- (d) Knowledge of the representation's falsity or ignorance of its truth: Work by MTC engineers dating back to 2001 confirm that MTC had studied hydrology issues for the project site, intended to divert Howard Creek, and planned to build a structure similar to the 32 by 6 foot culvert despite its failure to notify John Green of these material facts in the process of negotiating the two deeds involved here. See MTC Hydrology Analysis and Plans for New Bridge and Box Culvert, RE Tabs 9-11, R 292, 290, and 470.
- (e) An intent that the representation should be relied upon: The misleading plat and misleading "fair market value offers" were made to induce GRM to convey to MTC the property it wanted and MTC succeeded in having

GRM do so. See Green Affidavit, RE Tab 3, R 294, and Warranty Deeds for Tracts H and N, RE Tabs 6 and 7, R 234, R 229.

(f) Ignorance of the falsity of the misrepresentation: John Green stated in his affidavit that had he known the representations were untrue, he would not have signed the two deeds. Green Affidavit RE Tab 15 R294 paragraph 12.

(g) Reliance on the truth of the misrepresentations: John Green stated in his affidavit that he signed the two deeds in reliance on the truth of MTC's representations. See Green Affidavit ¶ 12, RE Tab 3, R 294, 297-298.

(h) Right to rely: Based on the Mississippi precedent discussed above, John Green had no reason to foresee or anticipate that MTC would make false representations and fail to reveal its actual plans in order to induce him to make the conveyances involved in this case.

(i) Proximate and consequent injury: The substantial alteration of the drainage of Howard Creek would have damaged the improved properties of GRM had no mitigation efforts been made by GRM at significant expense. See Green Affidavit ¶¶ 23 - 26, RE Tab 3, R 294, 300-301.

Levens, 733 So.2d 753, 761-62 (Miss. 1999), No. 97-CA-01508-SCT, ¶ 35 (setting out the elements of fraud).

The elements of negligent misrepresentation under the Levens decision and the disputed issues of fact which also preclude the grant of a summary judgment in this case are:

(a) Misrepresentation or omission of a fact: See (a) above.

(b) Materiality of misrepresentation: See (c) above.

- (c) Failure to exercise reasonable care on the part of the individual making the representation: The MTC representative was chargeable with knowledge of what the MTC actually intended to do but failed to inform John Green of MTC's intentions. MTC was chargeable with knowledge of those omissions by its agents.
- (d) Reasonable reliance on the misrepresentation: See (g) above.
- (e) Damages as result of the misrepresentation: See (i) above.
- (f) Proof by a preponderance of the evidence: The matters set out in the Green Affidavit concerning the misleading nature of the plat and offer documents given to Mr. Green must be taken as true for summary judgment purposes (see discussion in Section 5 below on the standard for granting or denying summary judgment motions under Rule 56).

Levens, 733 So.2d 753, 762 (Miss. 1999), No. 97-CA-01508-SCT, ¶ 40 (setting out the elements of negligent misrepresentation).

Disputed issues of fact as to each of these elements as set out in Levens exist in this case. Misrepresentations were made to GRM in the plat, RE Tab 2 R289, in the offers, RE Tabs 4 and 5, R 280 and 285, and in the proposed deeds attached to the offers, RE Tabs 6 and 7, R 234 and 229, on all of which GRM had a right to rely. According to Mr. Green's affidavit, GRM relied on the representations in the plat, offers, and deeds taking them to mean that only the land described in the deeds was being purchased and only that land would experience foreseeable damage. See Green Affidavit ¶ 7, RE Tab 3, R 294, 296.

As previously noted, the law is clear that GRM had a right to rely on these representations. The law is also clear that MTC is guilty of fraud if it failed to disclose its

intention to replace the existing 48-inch pipe with a 32 by foot culvert. Memphis Hardwood Lumber Co. v. Daniel, 771 So.2d 924, 931(Miss. 2000) (representation by purchaser of timber that document was a timber contract covering 274 acres when, in fact, the instrument was a timber deed to 800 acres of the seller's timberland) and Holman v. Howard Wilson Chrysler Jeep, Inc. No. 2005-CT-01154-SCT (Jan. 10, 2008).

In Holman an automobile dealer was sued for fraud for having failed to disclose to the purchaser of an automobile represented as new that the automobile was previously involved in an accident requiring extensive repairs. The dealer defended, asserting that regulations promulgated by the Mississippi Motor Vehicle Commission absolved it of a duty to disclose, that it had disclosed the possibility of damage to the vehicle within the terms of the contract, and that the purchaser of the car had suffered no damages in any event.

Holman ¶ 7.

The trial court granted the dealer a summary judgment.

The court of appeals affirmed, holding that no disclosure was required, that the dealer had fulfilled its duty to disclose had there been one, and that the Holmans had "failed to show any connection with the prior damage to the damages they had suffered" Holman ¶ 8.

The Mississippi Supreme Court granted certiorari and, in an en banc opinion, reversed and remanded. In conclusion, the Supreme Court held: "After reviewing the trial court's grant of summary judgment, we find that there existed genuine issues of material fact in this case that should be presented to a jury Therefore, we reverse the judgments of the court of appeals and the trial court and remand the matter to the trial court for further proceedings consistent with this opinion." Holman ¶ 20

Holman and Daniel control the outcome in this case.

2. **The standard offer forms as used (or misused) by MTC in this situation further misrepresented the nature of the road project and whether damages to neighboring, improved tracts owned by GRM were foreseeable.**

Miss. Code Ann. § 43-37-3(c), a copy of which is attached as Appendix A, requires that any person, agency, or other entity acquiring real property for any project or program using public funds, should determine “just compensation” before initiating negotiations for purchase of the real property. This statute also requires that the agency or entity acquiring the real property provide a written statement to the owner of the real property summarizing the basis for the amount established as “just compensation.” The statute specifically requires that “where appropriate” the written statement (here, the “fair market value” offers used by MTC) should separately state the just compensation for the property being acquired (here, Tracts H and N) and just compensation for damages to the remaining real property (here, GRM’s adjoining property with valuable improvements). MTC’s offer documents were statutorily 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.

MTC would similarly be required to separately address compensation for damages to remaining property if it had filed a condemnation suit for these tracts. See, e.g., Sarphie v. Mississippi Transportation Commission, 275 So.2d 381, 384 (Miss.1973) (citing Section 2749-04 of the Mississippi Code of 1842, presently Miss. Code Ann. § 11-27-7 (1972))

Here the standard “fair market value” offer forms used by MTC were completed in a way that indicated that the road project would not involve any damages to the improvements

on the property remaining in the hands of GRM. The offer forms as completed by MTC and provided to GRM clearly do not comply with Miss. Code Ann. § 43-37-3(c).

The offer documents used by MTC for Tracts H and N are essentially identical. The written offer for Tract H states in pertinent part:

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**.

This value determination was made based upon recent market data in this area.

This acquisition does not include oil, gas, or mineral rights but includes all other interests.

Unless noted otherwise, this acquisition does not include any items which are considered personal property under Mississippi State Law. Examples of such items are household and office furniture and appliances, machinery, business and farm inventory, etc.

The real property improvements being acquired are: NONE

The following real property and improvements are being acquired but not owned by you: N/A

Separately held interest(s) in the real property are valued at \$ N/A. These interests are not included in the above fair market value offer.

Land Value: \$8,595.00
Improvements: \$ _____
Damages: \$ _____
Total Fair Market Value Offer \$8,595.00

In the context of the negotiations between MTC and Mr. Green, the offer documents as completed and used by MTC's agents reinforce the misleading information on

the plat shown to Mr. Green which presented MTC's plans as a road-widening project only with the existing culvert to remain in place. As a result, there are material issues of disputed fact concerning whether the offer documents misrepresented foreseeable damages to GRM's adjoining property. See discussion in Section 1 above.

3. **Since there are genuine issue of material fact concerning whether the releases were obtained by negligent or intentional misrepresentations by MTC's agents, the releases may be void or otherwise ineffective, and summary judgment should not have been granted.**

Because 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, the so-called releases contained in the deeds to MTC were not entered into freely and voluntarily, were fraudulently obtained, and are voidable. See Green Affidavit ¶ 11, RE Tab 3, R 294, 297.

Whether an individual or entity signing a release had a full understanding of that individual's or entity's legal rights and the nature of the release, including what was being given up by signing the release, are material issues of fact precluding summary judgment. See, e.g., Smith v. Sneed, 638 So.2d 1252, 1260-1261 (Miss. 1994)(reversing and remanding for a jury trial).

In Sneed, a malpractice case, the trial court granted summary judgment to the defendant Sneed, an attorney, based upon a release signed by Smith, a criminal defendant and former client. Attorney Sneed had been appointed to represent Smith in a murder case. The claim of malpractice was based on the fact that Mr. Sneed had not obtained a copy of the victim's autopsy prior to advising Smith to plead guilty to the charge. The autopsy

revealed that the victim had died of natural causes. The release was said by Sneed's attorney to bar the malpractice suit subsequently filed against Sneed. The trial court granted summary judgment to Sneed. Smith appealed. The Supreme Court reversed and remanded, holding that there were jury issues as to whether the release was freely and voluntarily given.

There are material issues as to whether fraud renders void the releases in the two deeds. See RE Tabs 6 and 7, R 234 and R 229. See, e.g., Franklin v. Lovett Equipment Co., 420 So.2d 1370, 1372 (Miss. 1982) (involving misrepresentation in negotiation of a contract for the sale of farm equipment), Brown v. Ohman, 42 So.2d 209 (Miss. 1949), suggestion of error overruled, 43 So.2d 727 (1949) (false representation by seller's agent in the negotiation for the sale of land), Nash Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 125 So. 708 (1930) (failure by seller to disclose the actual mileage in the sale of an automobile). See also Memphis Hardwood Lumber Co. v. Daniel, 771 So.2d 924 (Miss. 2000) (duty to disclose that instrument was a timber deed, not a timber contract, and other misrepresentations by purchaser in sale of timberland).

MTC asked the trial court to disregard these basic rules of law concerning the effect of negligent or fraudulent misrepresentations on the validity of the release language in the deeds. Unfortunately, the trial court did so.

4. ***King v. Mississippi Transportation Commission* is not controlling here, because *King* (a) dealt with res judicata principles that are not applicable here; and (b) did not involve any negligent or fraudulent misrepresentations by MTC that affected the "foreseeability" of damages to adjoining tracts.**

In granting summary judgment to MTC, the trial court relied heavily on *King v. Mississippi Transportation Commission*, 609 So.2d 1251 (Miss. 1992). *King* includes

strong language concerning a “special variant” of res judicata that applies in eminent domain actions. This “special variant” creates a “conclusive presumption” that evidence of all potential damage, no matter how speculative, to the tract being condemned and to remaining property of the condemnee was considered and awarded in the initial condemnation action brought by MTC. The presumption bars recovery in a second suit for damages, even if those damages were not reasonably foreseeable or discoverable at the time of the original trial. Id.

The Kings owned a 3.35 acre tract, approximately 1/3 of which MTC condemned for construction of a “massive” overpass at the conjunction of two highways within a few hundred feet of the Kings’ home on the remaining portion of their property. The construction of the overpass, by necessity, required extensive excavation and changes in the land. In the eminent domain litigation filed by MTC, the Kings were awarded \$9,500 in damages for the 1.21 acres of their homestead and an easement condemned by MTC.

Unlike the situation here, it was undisputed in King that the construction work was done according to the MTC plans and specifications that were available to the Kings during the initial litigation. King, 609 So.2d at 1252.

The changes in grade and use of a pile-driver during the construction, however, resulted in serious vibrations, affecting the foundation of the Kings’ home and, perhaps, destroying its value. Id. When the Kings attempted to bring a second suit for unforeseen damages, the Mississippi Supreme Court held that the second suit was barred by res judicata and that the final judgment of the court in the first action was conclusive. King, 609 So.2d at 1252.

This holding of King is inapplicable here, because MTC did not file an initial eminent domain action in this case. The inverse condemnation suit filed by GRM is the first litigation filed concerning this matter, and there is no judgment in a prior suit to be given res judicata effect.

The court in King mentions in passing that a landowner's negotiated settlement with a condemning authority "is just as preclusive as a final judgment after an eminent domain trial," citing its earlier decision in Swett v. Mississippi State Highway Commission, 193 So.2d 596 (Miss. 1967).

Counsel for MTC argued, in error, to the trial court that the release language in the deeds in question here included the "same language" as the release in Swett, assuring the Court unequivocally that: "It's the same release that has been to the Supreme Court." See RE Tab 8, Tr. 57.

In fact, the release in Swett differed in two very significant ways from the "release clauses" in the two deeds in question here. In Swett, the "preclusive effect" of the negotiated conveyance document turned on the fact that "by the terms thereof" it included an express provision that it was to have "the same effect as if the Highway Commission had condemned the right-of-way and easement in condemnation proceedings." Swett, 193 So.2d at 598. The deeds used by MTC for Tracts H and N do not include any provision of this type.

In Swett, in contrast to the situation here, the highway authority specifically disclosed in the conveyance document that drainage features would be changed. In the lawsuit filed several years after the negotiated sale, Mr. Swett sought damages for changes by MTC to the channel of a creek on the easement acquired by MTC, contending that those

changes destabilized the creek bed on the remainder of his property. The court noted, in holding his claim for such damages precluded, that the deed used in purchasing the easement in Swett expressly disclosed that it was being purchased “for the purpose of constructing channel changes.”

There were no issues in King or Swett of misleading representations, conduct, or fraud by MTC representatives. Instead, it is undisputed that the Kings and Mr. Swett had accurate information concerning the nature of the project planned.

Here, as discussed above, the plat provided by MTC and its “fair market value” offers significantly misrepresented the nature of project and misled the property owner concerning foreseeable damage to neighboring property.

King did not involve any issues of this type and is not controlling here.

5. **Under the well-recognized standard for granting or denying a summary judgment, the trial court was required to accept as true all evidence in the Green Affidavit concerning the misleading nature of the plat and offer documentation used by MTC. As a result, the trial court erred in holding that there was “no facts in the record” concerning negligent or intentional misrepresentation by MTC’s agents and, as a result, erred in granting summary judgment to MTC.**

The rules governing the grant or denial of a summary judgment have been clearly established in numerous decisions by the Mississippi Supreme Court.

In Holman v. Howard Wilson Chrysler Jeep, Inc. -- So.2d --, No. 2005-ct-01154

¶ 6 (Jan 10, 2008), the Supreme Court explained:

We apply a de novo standard of review to a trial court’s grant of summary judgment. *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398 (Miss.2006). “The moving party has the burden of demonstrating that no genuine issue of material fact exists,

and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact.” *Howard v. City of Biloxi*, 943 So.2d 751, 754 (Miss.Ct.App. 2006) (citing *City of Jackson v. Sutton*, 797 So.2d 977, 979 (Miss. 2001)). If any triable issues of material fact exist, this Court will reverse the trial court’s decision to grant summary judgment. *Price v. Purdue Pharma Co.*, 920 So.2d 479, 483 (Miss. 2006).

As further explained in **Simmons v. Thompson Machinery**, 631 So.2d 798 (Miss. 1994), the standard for entry of summary judgment in this case is as follows:

Mississippi’s summary judgment rule provides, inter alia, that summary judgment shall be entered by a trial judge “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 burden of showing that no triable genuine issue of material fact exists is on the moving party . . . and the non-movant . . . is given the benefit of the doubt. *Tucker v. Hinds County*, 558 So.2d 869, 879 (Miss. 1990). “All that is required of a non-movant to survive a motion for summary judgment is to establish a genuine issue of material fact by the means available under the rule.” *Lyle v. Mladinich*, 584 So.2d 397, 398 (Miss. 1991). Furthermore, it is a standard practice that “(a)ll motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion.” *Claiborne County Board of Education v. Martin*, 500 So.2d 981, 981 (Miss. 1986).

The focal point of the Court in applying the standard for summary judgment is on material facts. In **Glover v. Jackson State University**, 968 So.2d 1267 (Miss. 2007), No. 2005-CA-02328-5 (Dec. 6, 2007), Glover, a youth sports program participant, accused Jackson State University (“JSU”) of responsibility for her injuries as well as other defendants, including the school bus driver who let the plaintiff girl off at the wrong destination on the JSU campus where she was raped by two youths known to be trouble-makers. The trial

court granted summary judgment in favor of JSU. The case was reversed on appeal. A second trial court granted a summary judgment to JSU. Glover again appealed. The Supreme Court reversed. After JSU filed a motion for a rehearing, the Supreme Court held *en banc* that the rape was foreseeable by JSU and was not the result of an independent intervening cause.

In reversing, the Court explained:

Pursuant to an Order of this Court, Rule 56 went into effect in substantially its current form on January 1, 1981. Two years later, writing for a unanimous Court at its “first opportunity to consider the office of the motion for summary judgment under Rule 56 . . .,” Justice Robertson provided an excellent and often-cited analysis. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 360 (Miss.1983). “The argument that there exists no genuine triable issue of material fact is the functional equivalent of a request for a peremptory instruction.” *Id* at 362. Furthermore courts must be sensitive to the notion that summary judgment may never be granted in derogation of a party’s constitutional right to trial by jury. Miss. Const. art. 3, § 31(1890). On the other hand, there is no violation of the right of trial by jury when judgment is entered summarily in cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. There is no right to trial by jury in such cases. *Id*. Furthermore, “[w]hen doubt exists whether there is a fact issue, the non-moving party gets its benefit.” *Id*. And finally, the *Brown* Court cited with approval a “leading commentary on Federal Rule 56”: “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. And the problem of over-crowded calendars is not to be solved by summary disposition of issues of fact fairly presented in an action.” 6 Moore’s Federal Practice § 56-15[1-2] p. 56-435 (1982).

Glover, 968 So.2d at 1275, No. 2005-CA-02328-5 ¶ 22 (Dec. 6, 2007)

“A fact is material if it ‘tends to resolve any of the issues, properly raised by the parties.’ ” Webb v. Jackson, 583 So. 2d 946, 949 (Miss. 1991) (quoting Mink v. Andrew

Jackson Cas. Ins. Co., 537 So. 2d 431, 433 (Miss. 1988)” (quoting Mississippi Rd. Supply Co. Inc. v. Zurich-American Ins. Co., 501 So. 2d 412, 414 (Miss. 1987)).

How else may a genuine issue of material fact be identified? In Short v. Columbus Rubber & Gasket Co., 535 So.2d 61, 63 (Miss. 1988), the Mississippi Supreme Court stated that such things as admissions in pleadings, answers to interrogatories, depositions, and affidavits can all be presented to the trial court to prove or disprove a genuine issue of material fact, provided that this evidence must be viewed in the light most favorable to the party against whom the motions have been made.

How may the non-moving party avoid a summary judgment? To survive a summary judgment motion, all a party must do is to show there is a genuine issue of material fact. Newell v. Hinton, 556 So.2d 1037, 1041 (Miss. 1990)

“In a motion for summary judgment a genuine issue of material fact is obviously present when one party testifies to one account of the matter in interest and the other party swears otherwise.” Simmons v. Thompson Mach. of Mississippi, 631 So.2d 798, 801 (Miss. 1994). See also Green Affidavit, RE Tab 3, R 294, as well as the GRM statement of admitted and disputed issues of fact, R 253.

GRM is in a stronger position than is required in this cause for its claims to survive summary judgment. MTC has provided no affidavit dealing with the issues of fraud, contending instead that the releases in the two deeds and the fact that GRM could have learned of MTC’s plans by further investigation justified the summary judgment.

It must be remembered that it was not up to the trial court in considering a summary judgment motion to disregard the testimony of the non-moving party or to decide whether it believes the testimony, as the trial court has apparently done here. If there are

disputed, material issues of fact they should go to a jury and summary judgment should not be granted. Rule 56 does not contemplate or authorize findings of fact or sifting of evidence by the trial judge.

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. For example, the Court wrote in its opinion that "[t]here are absolutely no facts in the record to support these theories . . . Green offers no proof of any other representation made by MTC. Thus, the inquiry on fraudulent misrepresentation need proceed no further . . ." and "Green in its brief alludes to actual fraud and mutual mistake. There are no facts to support either." See Trial Court Opinion, RE Tab 12, 472 -473 (emphasis supplied).

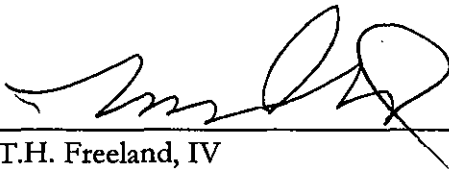
The trial court's conclusion that that "there are absolutely no facts in the record" concerning misrepresentation, despite the existence of the Green Affidavit, demonstrates that the standard for summary judgment was not applied correctly in this case.

X. Conclusion

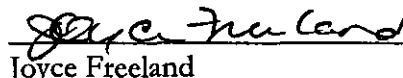
There are genuine issues of material fact here as to whether MTC obtained the releases by misrepresentations to Mr. Green and imposed on GRM acts of fraud, whether intentionally or negligently committed. These genuine issues of material fact preclude the granting of summary judgment to MTC in this case.

GRM, accordingly, respectfully requests that this Court reverse the lower court's grant of summary judgment to MTC and remand this matter to the trial court.

Respectfully submitted, this the 31st day of March, 2008.



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CERTIFICATE OF SERVICE

I, T.H. Freeland, III, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to:

Hon. Clarence E. Morgan, III
P.O. Box 721
Kosciusko, MS 39090-0721

James T. Metz, Special Counsel
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402 Legacy Park Drive/39157
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Telephone: 601-957-1596
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This 3rd day of March, 2008.



T. H. Freeland, IV

Miss. Code Ann. § 43-37-3

West's Annotated Mississippi Code Currentness

Title 43. Public Welfare

Chapter 37. Acquisition of Real Property Using Public Funds

§ 43-37-3. Guidelines for acquisitions

Any person, agency or other entity acquiring real property for any project or program in which public funds are used shall comply with the following policies:

- (a) Every reasonable effort shall be made to acquire expeditiously real property by negotiation.
- (b) Real property shall be appraised before the initiation of negotiations, except that the acquiring person, agency or other entity may adopt a procedure in compliance with federal regulations to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value. For the purposes of this chapter, property with a low fair market value is property with a fair market value of Ten Thousand Dollars (\$10,000.00) or less. The owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.
- (c) Before the initiation of negotiations for real property, an amount shall be established which it is reasonably believed is just compensation therefor 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 determining 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.
- (d) No owner shall be required to surrender possession of real property before the agreed purchase price is paid or there is deposited with the state court, in accordance with applicable law, for the benefit of the owner an amount not less than the approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding of such property.
- (e) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available) or to move his business or farm operation without at least ninety (90) days' written notice from the date by which such move is required.
- (f) If an owner or tenant is permitted to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the acquiring authority on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(g) In no event shall the time of condemnation be advanced, or negotiations or condemnation and the deposit of funds in court for the use of the owner be deferred, or any other coercive action be taken to compel an agreement on the price to be paid for the property.

(h) If an interest in real property is to be acquired by exercise of power of eminent domain, formal condemnation proceedings shall be instituted. The acquiring authority shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(i) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire that remnant shall be made. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the person, agency or other entity acquiring the property determines has little or no value or utility to the owner.

(j) A person whose real property is being acquired in accordance with this chapter may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, any part thereof, any interest therein or any compensation paid therefor to the person, agency or other entity acquiring the property in such manner as he so determines.