

IN THE MISSISSIPPI SUPREME COURT

APPEAL NO. 2008-CA-00280

GAIL & DARRIS VARNADO,

Plaintiff-Appellants

VERSUS

ALFONSO REALTY, INC.

Defendant-Appellee

Appeal from the Circuit Court
for Harrison County,
First Judicial District
Hon. Jerry O. Terry, Circuit Judge

Appellants' Reply Brief

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REFERENCES

"Plaintiffs" or "the Varnados" means the Appellants
"Defendant" or "Alfonso Realty" or "Alfonso" means the Appellee

ARGUMENT

Appellants' argument in this Reply Brief will be in two parts: (1) Review of Alfonso Realty's status as the Varnados' fiduciary; and (2) Reply to the three arguments presented in Alfonso Realty's Appellee's Brief.

1. **Alfonso Realty was the Plaintiffs' Fiduciary**

We initially pointed out in part 2 of our Argument in Appellant's Brief that Alfonso Realty was the Varnados' fiduciary. That point was admitted by Alfonso Realty in its Appellee's Brief, and it cannot be stressed enough. The fact that Alfonso Realty was a fiduciary placed on its shoulders the duty to attend to and protect the Varnados' interest in the subject transaction as if that interest were Alfonso's own. As summarized by this Court:

"Appellee's relation with complainant was that of a fiduciary requiring full disclosures, frankness and honesty in the dealings between them." (emphasis added) **Blanks v. Sadka**, 133 So.2d 291, 293 (Miss. 1961)

Because of their status as fiduciaries, Alfonso and its agents were required to exercise a very high degree of care toward the Plaintiffs, providing them with "full disclosure, frankness and honesty". **Blanks**, supra. This means that if Alfonso had any reason whatsoever to believe that Brown's Disclosure Statement was not correct, or might be tainted by a "memory problem" -- or was suspect due to anything else -- then Alfonso should have warned Plaintiffs of such. By failing to do so, they breached their fiduciary duty.

2. Reply to Alfonso Realty's arguments

Part A of Alfonso Realty's Appellee's Brief lists two arguments. The first is that "there was no evidence of knowledge on the part of Alfonso Realty of Brown's alleged memory problem." (Appellee's Brief, p. 5). This argument really presents two separate arguments, i.e., (1) the argument that there was no evidence of Brown's memory problem, and (2) the argument that Alfonso Realty lacked knowledge of the problem. We will reply to these two arguments separately, and then deal with Alfonso's "second" argument as a third issue.

(a) The argument that there was no evidence of Brown's memory problem

The burden on one seeking summary judgment is to establish that there is no genuine dispute about any material fact. The issue of whether Brown had a memory problem is certainly a material fact related to Alfonso's Motion for Summary Judgment, and Alfonso's burden must include a showing that Brown had no memory problem and that there is *no genuine dispute about that*. In making such a showing, it would seem to be vital to cover not just Alfonso's own evidence, but the contrary evidence presented by the Varnados in opposing Alfonso's motion. However, Alfonso's Brief only deals with its own evidence, and omits discussion of the opposing evidence.

It is true, as Alfonso argues, that its own agents testified in their depositions that they had no knowledge of Brown's memory problem, and Brown's son testified to that effect as well. But

there was other evidence to the contrary, which Alfonso is intent on disregarding.

There are three things which, contrary to the self-serving claims of Alfonso's agents and Brown's son, show that Brown did indeed have a memory problem.

First, Brown's home was riddled with termite damage, and there were termite treatment holes all around the perimeter of the home establishing that the home had prior termite treatment. Brown had owned the home for more than 25 years. Yet, in his second disclosure statement Brown said there was no prior termite treatment. That alone indicates Brown had a serious memory problem.

Second, in Brown's first disclosure statement (given to his initial agent before he retained Alfonso Realty) Brown says the home had prior termite treatment; yet later, in his second disclosure statement, Brown claims there was no prior treatment. Again, this indicates a serious, and active, memory problem.

Third, Alfonso's own agents specifically told Mrs. Varnado that they knew Brown had a memory problem.

Alfonso Realty's Brief, in quoting statements from Mrs. Varnado's deposition, implies that the first two factors mentioned above don't necessarily indicate a "memory problem", but could just as well indicate intentional fraud on Brown's part. This implied argument doesn't help Alfonso, however, for four reasons.

First, intentional fraud must be proved by "clear and convincing evidence." *Hobbs Automotive Inc. v. Dorsey*, 914 So.2d

148, ¶61 (Miss. 2005). As between the possibility that Brown had a memory problem, and the possibility that Brown lied intentionally in his second disclosure statement, the first possibility is more likely, simply because of the heightened burden of proof required to establish the second possibility.

Second, it would be up to the jury at trial, in any case, to make the determination of which possibility to believe, based on all the evidence in the case. There is certainly sufficient evidence to conclude that Brown had a memory problem to support a jury finding of such.

Third, the statements which the Alfonso agents themselves made to Mrs. Varnado, when they told her they knew Brown had a memory problem, indicate that it was a memory problem, not intentional fraud, that resulted in the erroneous second disclosure statement.

Fourth, the real issue at the heart of the Varnados' case against Alfonso Realty is whether Alfonso had reason to believe Brown's second disclosure statement might be false or at least unreliable. The fact that Alfonso's agents believed Brown had a memory problem would certainly give them reason to think the disclosure statement was unreliable. But Alfonso would also have reason to think the disclosure statement unreliable if its agents had reason to believe Brown might have lied intentionally in the statement. Alfonso should have been alerted to both possibilities if it knew or should have known of the termite treatment holes around the perimeter of Brown's home.

**(b) The argument that there was no evidence
that Alfonso knew of Brown's memory problem**

We covered this issue extensively in Appellant's Brief. There, we showed that there are three separate aspects of the evidence which establish that Alfonso did indeed know of Brown's memory problem, and therefore of the unreliability of Brown's second disclosure.

First and foremost, the Alfonso agents said as much to Mrs. Varnado, as she testified in her own deposition. The statements of Alfonso's own agents that Brown had a memory problem are not hearsay, and are admissible, as we pointed out in our first Brief. Just because the agents chose later to change the story in their depositions doesn't alter the fact of what they told Mrs. Varnado initially.

Note here that what is really important about the statements Alfonso's agents made to Mrs. Varnado is not that Brown actually had a memory problem, but that *they believed he did*. Believing that Brown had a memory problem, and then hiding that belief from the Varnados and failing to disclose it to them was a clear violation of the duties of honesty and full disclosure inherent in Alfonso's status as fiduciary.

Second, the agents had knowledge of other factors which they indicated could have affected Brown's memory, such as the recent deaths in his family and his immanent transfer to a nursing home. As fiduciaries, they should have disclosed these matters just as much as they should have disclosed their belief that Brown had a "memory problem."

Third, the agents knew or should have know by their own observations of Brown's home which they had listed for sale that it had prior termite treatment which conflicted with Brown's second disclosure statement. The termite treatment holes around the perimeter of the home told them as much. As Mrs. Varnado testified in her deposition, she herself noticed those holes, but didn't have enough knowledge of their significance to realize that the disclosure statement denying prior termite treatment was false. As competent, knowledgeable real estate agents, Alfonso Realty did not labor under that shortcoming.

(c) *The argument that Alfonso Realty had no knowledge of Brown's first disclosure statement*

Brown's first disclosure statement was made while he was represented by another agent, not Alfonso Realty. The other agent eventually recommended that Brown use Alfonso Realty, and Brown made a second disclosure statement with Alfonso. The first disclosure mentioned the prior termite treatment to Brown's home, the second did not.

Alfonso claims that there is no evidence that it knew or should have known the contents of the first disclosure statement, which it claims it didn't receive until after the sale of the Brown's home to the Varnados. The Varnados have two points to make about this argument.

First, what Alfonso "knew or should have known" as competent, experienced realtors covers a pretty broad area. Alfonso knew that Brown had been represented by a prior agent, and that the prior agent had recommended Alfonso to Brown. Did

Alfonso obtain the prior agent's file, along with the prior disclosure statement, when it undertook to represent Brown? That would be the normal assumption. Should Alfonso have known of the prior statement? That would be something for the jury to determine at trial.

Second, and more important, is that the issue of whether Alfonso knew of the prior disclosure statement is really immaterial to its Motion for Summary Judgment. As the Court will note in our discussion of Alfonso's first two arguments above, the Varnados don't rely on Alfonso's probable knowledge of the first disclosure statement in showing that Alfonso knew or should have known of the unreliability of the second disclosure statement. Alfonso should have known the second statement was unreliable for the three reasons discussed in part 2(b) of this Reply Brief above -- their belief that Brown had a memory problem, their knowledge that Brown had other concerns affecting his memory, and the fact that they knew or should have known of the prior termite treatment holes around the perimeter of Brown's home.

Brown's first disclosure statement is one factor indicating he had a memory problem (as discussed in part 2(a) of this Reply), but it is not a necessary factor in showing that Alfonso knew or should have known about the problem (as discussed in part 2(b) of this Reply).

If Alfonso did know of the first disclosure statement -- or should have known of it -- then that would, of course, be a fourth factor indicating that Alfonso knew of Brown's memory

problem and of the unreliability of his second disclosure statement. But there are already three other factors that establish Alfonso's knowledge of the memory problem without having to consider the first disclosure statement as additional evidence of such.

CONCLUSION

This is an appeal from the granting of summary judgment to Alfonso Realty. On a motion for summary judgment, all evidence must be viewed in the light most favorable to the Varnados, as opponents of the motion, and all possible inferences should be drawn in their favor. Moreover, Alfonso's heightened burden of "honesty" and "full disclosure" as the Varnados' fiduciaries, makes summary judgment in their favor even less supportable, given the fact situation described above and in our Appellant's Brief.

Accordingly, Plaintiffs request that this Court reverse the summary judgment issued by the Circuit Court below, and remand the case for the trial on the merits, and for the alternative relief requested in our first Brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Brief by first class mail on: Fred Mannino, P. O. Drawer 289, Biloxi, Ms 39533 and Hon. Jerry O. Terry, Circuit Judge, Harrison County Courthouse, Gulfport, MS 39501.

This 16th day of December, 2008.

A handwritten signature in black ink, appearing to read 'R. Homes Jr.', written over a horizontal line.

ROBERT HOMES JR.

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