

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' Brief

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REQUEST FOR ORAL ARGUMENT

Appellants request oral argument.

CERTIFICATE OF INTERESTED PERSONS

I, Robert Homes, Attorney for Appellants, certify that the following persons or entities have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or refusal.

Gail & Darris Varnado, Appellants

Alfonso Realty, Inc., Appellee

Carlene Alfonso, Alfonso Realty owner

Walter Ketchings, Alfonso Realty owner

Brenda McFall, Alfonso Realty agent

Diane Albrecht, Alfonso Realty agent

Patti Schankin, Alfonso Realty agent

Robert Homes Jr., Attorney for Plaintiff-Appellants

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STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal from a summary judgment rendered by the Circuit Court of the First Judicial District of Harrison County, Mississippi. under Mississippi Code §9-3-9, and Rules 3 & 4 of the Mississippi Rules of Appellate Procedure (hereinafter MRAP).

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REFERENCES

"Plaintiffs" or "the Varnados" means the Appellants
"Defendant" or "Alfonso Realty" or "Alfonso" means the Appellee
"R-#" refers to a page of the Appeal Record
"SR-#" refers to a page of the Supplemental Record
"S-#" refers to a page of the Stipulation to Supplement Record
"RE-#" refers to a page of the Record Excerpts
"MRCP" means the Mississippi Rules of Civil Procedure
"MRE" means the Mississippi Rules of Evidence

STATEMENT OF ISSUES AND ASSIGNMENT OF ERRORS

1. Whether Alfonso Realty was Plaintiffs' fiduciary.
2. Whether Alfonso Realty breached its fiduciary duty.
3. Whether Alfonso Realty met the test for summary judgment under MRCP Rule 56 (i.e., whether there was "no genuine issue of material fact" and whether Alfonso Realty was "entitled to judgment as a matter of law").
4. Whether the Circuit Court erroneously rendered summary judgment in favor of Alfonso Realty.

STATEMENT OF THE CASE

This is a suit by Plaintiffs, Gail and Darris Varnado, against Defendant, Alfonso Realty, Inc., for damages resulting from Alfonso Realty's breach of fiduciary obligations owed to Plaintiffs as their real estate broker/agency.

After discovery was taken, and before trial, Alfonso Realty filed a Motion for Summary Judgment, which the Circuit Judge granted. This appeal is taken from the order and judgment granting that motion.

1. Underlying facts

The Plaintiff-Appellants, Mr. and Mrs. Varnado, purchased a residence from Thomas Brown on August 30, 2000. A few days later, during the first rainstorm, water began coming down from ceilings in several rooms of the house. An inspection revealed old termite damage throughout the home and a dilapidated and leaky roof.

The Varnados purchased the home in large part in reliance on a Disclosure Statement submitted by the seller, Brown, in which he denied any prior termite infestation or termite treatment to the structure, statements which were obviously false.

During the negotiations for and purchase of the home, Brown was represented by Brenda McFall and Diane Albrecht, agents for Defendant-Appellee, Alfonso Realty, while the Varnados were represented by Patti Shankin, another Alfonso agent.

When the leaks were discovered during that first storm, the Plaintiffs called Alfonso, and three of its agents came to the home to inspect the situation. While they were there, a termite inspector secured by the Varnados was also conducting his own inspection of the home; he pointed out a series of holes drilled around the exterior perimeter of the home, which he said indicated, contrary to Brown's Disclosure Statement, previous termite treatment(s) to the home. (Gail Varnado's deposition, S-Exhibit C, pp. 76-78, 129-130, 162, 220-221; RE-032-045) The inspection also showed old termite damage throughout the structure, all of which had been missed by Brown's own termite inspector prior to the sale.

As Mrs. Varnado later testified in her deposition, when the evidence of prior termite treatment was demonstrated to the Alfonso agents, one of them told her then and there that Brown (who was elderly and about to move into a nursing home in Texas) had a "memory problem." (Gail Varnado deposition, p. 163, RE-041)

Brown's son, who also testified in deposition, claimed that his father did *not* have a "memory problem." (SR-36)

The three Alfonso agents, in their own depositions, denied the "memory problem" statement, but two of them admitted they knew of several personal problems Brown had which would have affected his memory, including his advanced age, the recent deaths of both his wife and daughter, and his anticipated move into an "assisted living" center. (McFall, p. 7, RE-054, Albrecht, p. 12, RE-065)

During the depositions of the Alfonso agents, it was disclosed that Brown had originally listed his home for sale through another agency, and had given that agent an earlier Disclosure Statement in which he listed prior termite treatment to the home. (RE-029) When his first agent failed to secure a sale quickly, he recommended Alfonso Realty and referred Brown to them. A comparison of Brown's two Disclosure Statements (the first, secured by the first agent, the second by Alfonso) shows that Brown disclosed the prior termite treatment on the first, but omitted it in the second. (RE-027, 029)

As a result of Brown's false Disclosure Statement (the second one, given by Brown to Alfonso Realty), which was presented to the Plaintiffs by Alfonso Realty as an inducement for the sale, the Varnados paid a substantial sum for a home which was represented to be free of any termite damage and lacking any prior termite treatment, but which in fact had prior termite treatment, and extensive termite damage seriously devaluing the value of the property.

Brown's false Disclosure Statement was only one of several negligent omissions which contributed to Plaintiffs' loss. (See

Plaintiffs' First Amended Complaint, R-23) As mentioned above, Brown had obtained his own termite inspection report prior to the sale which failed to note the old termite damage and prior termite treatment. Also, the Varnados had secured a home inspection (by an inspector recommended by Alfonso Realty) which failed to report the dilapidated condition of the roof.

~~— Although four separate Defendants were at fault for this~~ unfortunate situation, the major fault lay with Brown's false Disclosure Statement in failing to report the termite damage and treatments; had Brown's Disclosure Statement properly reported those things -- or had Alfonso Realty notified the Varnados of the reasons for its unreliability and falsity -- the home inspector and the termite inspection company would have looked further before reporting no termite or roof problems, thus avoiding the resulting damage. Brown (who had owned the home for 27 or 28 years, RE-038) didn't need to inspect his own property to know it had extensive termite damage, prior termite infestation, and substantial prior termite treatment.

Alfonso Realty, knowing Brown's memory was unreliable -- either directly (because he had a "memory problem") or indirectly (because his memory was affected by the personal problems his agents testified to) -- contributed substantially to the resulting injury by presenting Brown's false Disclosure Statement as reliable, and saying nothing to the Plaintiffs to alert them to its unreliable character.

In addition, even apart from their knowledge of Brown's faulty memory, Alfonso Realty had good reason to know that

Brown's Disclosure Statement was false simply because its report of no prior termite treatment was at odds with the holes around the exterior of the home which alerted any realtor familiar with termite treatment issues to the fact that the home had in fact received prior termite treatment(s).

2. Proceedings in Circuit Court

The Plaintiffs named several Defendants in their Complaint and Amended Complaint (R-23) -- Terminator, the original termite inspection company retained by Brown which had failed to report the prior termite damage and treatment, the home inspector retained by the Varnados on Alfonso Realty's recommendation, who had failed to report the dilapidated and leaky roof, Vic Porter, the appraiser who had done Brown's appraisal without reporting on the damage, Brown himself, for providing the false Disclosure Statement, and Alfonso Realty, for presenting Brown's false Disclosure Statement to Plaintiffs without disclosing their knowledge of its unreliability and/or outright falsity.

During the litigation, Brown died, and his Estate (and its administrator, Brown's son) were substituted as Defendants in his place. (R-23)

Eventually the Plaintiffs dismissed all the Defendants except for Alfonso Realty, after settling with most of them. (The settlements with other Defendants did not directly affect Plaintiffs' claims against Alfonso; Alfonso simply had a right under Miss. Code §85-5-7 to raise "apportionment of fault" as an issue at trial with respect to any other party, whether

originally sued or not, and if originally sued whether dismissed by way of settlement or not.)

Alfonso Realty is the only Defendant who did not reach a settlement with the Varnados, but obtained a summary judgment dismissing themselves from the suit. The summary judgment (RE-020), issued on September 1, 2006, became final and appealable on January 18, 2008, pursuant to MRCP Rule 54(b), once all of the other Defendants had been dismissed. The last settling Defendant (Brown's Estate) was dismissed by agreed Order of January 18, 2008. (R-145) Plaintiff's Notice of Appeal (R-146) from the summary judgment dismissing Alfonso was filed on January 29, 2008 within 11 days of that last Order.

ARGUMENT

Appellants' argument will be in four parts: (1) Review of pertinent summary judgment principles, (2) Overview of the fiduciary duties of Alfonso Realty, (3) Alfonso's knowledge of Brown's "memory problem", and (4) Discussion of disputed and undisputed facts. A brief Conclusion follows the Argument.

Summary

On a Defendant's motion for summary judgment, all facts must be viewed by the Court in the light most favorable to the Plaintiffs, and all available inferences drawn in their favor.

Thus, the Circuit Court should have assumed (for purposes of Alfonso's motion) that Brown's second Disclosure Statement was false, that its falsity was due to Brown's faulty memory, that Brown had a "memory problem" or at the very least labored under

circumstances making his memory faulty, that Alfonso Realty was both Brown's agent and the Plaintiffs' agent, that Alfonso Realty presented Brown's false Disclosure Statement to the Plaintiffs as reliable (at least by implication if not expressly), that Alfonso Realty, in presenting the false Disclosure Statement to Plaintiffs, knew that it was generally unreliable but failed to disclose that unreliability to the Plaintiffs, that Alfonso also knew or should have known that the Disclosure Statement's denial of prior termite treatment was false, and finally, that the false Disclosure Statement, and the failure to inform Plaintiffs that it was generally unreliable and specifically false as to the prior termite treatment, was a substantial contributing factor to the damages suffered by Plaintiffs in purchasing a home at full value that had serious termite damage.

Alfonso Realty, as the Plaintiffs' real estate agent, had the fiduciary duty to guard and protect their interests in the subject real estate transaction as if those interests were its own. Failing to report to Plaintiffs facts known to Alfonso that made Brown's Disclosure Statement unreliable and/or false was an obvious violation of that fiduciary duty. Due to the foregoing, Alfonso Realty was not entitled to summary judgment dismissing itself as a Defendant.

1. Summary Judgment Principles

The granting of summary judgment by the trial court is reviewed *de novo* on appeal. *Delahoussaye v. Mary Mahoney's, Inc.*, 696 So. 2d 689, 690 (Miss. 1997); *Germany v. Denbury Onshore, LLC*, 984 So.2d 270 (Miss. 2008).

Summary judgments deny the right to jury trial to the litigants and therefore are reserved only for cases where there is clearly no fact issued to be tried:

"Trial judges 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)." **Mississippi Moving & Storage Co. v. Western Electric Co., Inc.**, 498 So.2d at 342, second column.

Summary judgment may be granted only where there is absolutely no issue of material fact to be decided, in which all parties agree on all material facts, and the moving party is entitled to a judgment "as a matter of law". MRCP Rule 56(c). The official comment to Rule 56, often quoted with approval by this Court, states:

"A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence . . . simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. [The summary judgment procedure] cannot be used to deprive a litigant of a full trial of genuine fact issues." (emphasis supplied)

Cf. Mississippi Moving & Storage Co. v. Western Electric Co., Inc., 498 So.2d 340, 342 (Miss. 1986); **New Orleans Great Northern RR. Co. v. Hathorn**, 503 So.2d 1201, 1202 (Miss. 1987); **Lowery v. Guaranty Bank & Trust Co.**, 592 So.2d 79, 81 (Miss. 1991).

A heavy burden rests on the moving party to prove, not just that his version of each and every material fact is "true", but that the opposing party cannot even reasonably dispute any one of them.

On a motion for summary judgment, just as with a motion for directed verdict, the party opposing the motion is entitled to the benefit of any and all doubts regarding the facts, and all favorable inferences to be drawn therefrom; all evidence must be viewed in the light most favorable to him and against the moving party. **Collins v. Tallahatchie County**, 876 So. 2d 284, 286-87 (Miss. 2004); cf. **Lowery** and **Mississippi Moving & Storage, supra**.

For all these reasons, in dealing with Alfonso's Motion for Summary Judgment, this Court must start out by assuming the truth of the facts as we have stated them under the heading "Underlying Facts" above. Those facts are not only established by the depositions and other pleadings on file, but any doubts regarding them must be resolved in Plaintiffs' favor.

Thus, to repeat what we said in the Argument Summary above, the Court must assume that:

1. Brown's second Disclosure Statement was false.
2. Its falsity was due to Brown's faulty memory.
3. Brown had a "memory problem" or at the very least labored under circumstances making his memory faulty.
4. Alfonso Realty was agent for both Brown and Plaintiffs.
5. Alfonso Realty knew of Brown's "memory problem".
6. Alfonso Realty knew Brown labored under circumstances that affected his memory.
7. Alfonso presented Brown's false Disclosure Statement to the Plaintiffs as reliable.
8. Alfonso Realty, in presenting the false Disclosure Statement to Plaintiffs, knew that it was unreliable but failed to disclose that to the Plaintiffs.
9. Alfonso also knew, or should have known, that the Disclosure Statement was false simply because it was contradicted by the numerous termite treatment holes drilled around the exterior of the home, and
10. The false Disclosure Statement, and Alfonso's failure to inform Plaintiffs that it was unreliable and actually

false, was a substantial contributing factor to the damages suffered by Plaintiffs in purchasing a home at full value that had serious termite damage.

Based on the foregoing, this case presents a simple issue to be decided by the jury: did Alfonso Realty breach its fiduciary duty to Plaintiffs in failing to disclose that Brown's Disclosure Statement was (a) unreliable, and (b) false? In truth, because most of the fact issues just listed are actually undisputed in this case, it really appears that it is the Plaintiffs who should have been entitled to Summary Judgment on the undisputed facts rather than Alfonso Realty.

2. Alfonso Realty was the Plaintiffs' Fiduciary

Alfonso Realty was a "dual agent" in connection with Plaintiffs' purchase of Brown's home -- Alfonso was Brown's listing agent, while at the same time acting as the Varnados' personal agent. The dual agency did not relieve Alfonso of its fiduciary duties to each of its clients, i.e., Brown as well as the Varnados. (See Alfonso's Dual Agent Confirmation form, RE-030) As agent for Plaintiffs, Alfonso Realty was a fiduciary, with the highest standard of care owed to the Plaintiffs to protect them and their affairs as if they were Alfonso's own:

"A real estate agent is a special agent of limited powers. . . . Insofar, however, as he is employed, in the course of the transaction, to act as agent for one of the parties, his relationship with such party or customer is essentially fiduciary and confidential in character 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)

Alfonso admitted that its relationship with the Varnados was fiduciary (Ketchings deposition, pp. 52-54, RE-041) and this is also confirmed by the "Dual Agency Confirmation" notice which

Alfonso gave Plaintiffs to establish that status. (RE-030) At least one of the Alfonso agents involved expressly admitted they were Plaintiffs' fiduciaries. (See deposition of Diane Albrecht, RE-059)

Because of their status as fiduciaries, Alfonso and its agents were required to exercise the highest 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 Mr. Brown's Disclosure Statement was not correct, or might be tainted by a "memory problem" -- or was suspect due to anything else for that matter -- then Alfonso should have warned Plaintiffs of such. By failing to do so, they breached their fiduciary duty. *no citation*

3. Alfonso's knowledge of Brown's "memory problem"

Alfonso Realty argued to the Circuit Court that "there is simply no evidence, whatsoever, that Mr. Brown had a memory problem" or that the listing agents "had any reason to believe" that Brown could not or did not properly fill out his disclosure statement." (Alfonso Memo, pp. 7-8, R-120) For at least three separate reasons this is incorrect, or immaterial, especially if you view (as you must) the facts on this issue in the light most favorable to Plaintiffs.

(a) The Plaintiffs' testimony

The first reason for believing that the Alfonso agents knew of Brown's "memory problem" was that they told Plaintiffs exactly that.

Mr. and Mrs. Varnado testified in their depositions that when confronted after the sale with the fact that Brown had failed to disclose massive termite problems in the home and that the home had received termite infestation treatment, Alfonso's agent Brenda McFall specifically told them that Brown had a "memory problem." (Gail Varnado Deposition, pp. 163 & 176, RE-041,043)

McFall's statement is admissible evidence.

Rule 801 of the Mississippi Rules of Evidence states:

"(d) Statements Which Are Not Hearsay. A statement is not hearsay if: . . . (2) Admission by Party-Opponent. The statement is offered against a party and is . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

Alfonso claims that its agents, in their own depositions, "both testified that they had no knowledge of a memory problem on the part of Mr. Brown" and that Brown's son said his father had none. (Alfonso Memo, p. 7, R-59) Obviously, this testimony by Defendants is the opposite of Plaintiffs' testimony. But Alfonso Realty overlooks the fact that on a motion for summary judgment, all evidence must be viewed in the light most favorable to the party opposing the motion. Thus, under the principles applicable to summary judgment motions, the Court must accept the Plaintiffs' testimony as true and reject that of the Defendants.

Alfonso points to the deposition testimony of Brown's son stating that his father had no "memory problem." (SR-36) Again, this conflicts with Plaintiffs' testimony of what the Alfonso agents told them, and any such conflict should be resolved in Plaintiffs' favor, on a motion for summary judgment. At the time

Brown's son testified, he was himself a party Defendant, having been substituted as such, along with Brown's Estate of which he was Administrator, upon his father's death.

Obviously if, as Plaintiffs testified, Alfonso's agent told them Brown had a memory problem, then Alfonso Realty certainly "knew or should have known" he had one. Moreover, the statement by Alfonso Realty's agent that "Brown had a memory problem" not only is evidence that Alfonso Realty knew or thought he had one, it is also evidence that he in fact did have one. Lay testimony that a person has a "memory problem", like testimony about intoxication and similar conditions observable by laymen and not based on "scientific, technical, or other specialized knowledge", is admissible and does not require "expert" testimony. Mississippi Rules of Evidence, Rule 701.

Alfonso claims that none of its agents "knew Mr. Brown well enough to determine that he had a memory problem." (Alfonso Memo, p. 8, R-60). This is utterly self-serving, and of dubious rationality anyway. Under MRE Rule 701, lay opinion (such as that regarding Brown's "memory problem") need only be "rationally based on the perception of the witness." The Rule doesn't require that the witness's "perception" be based on knowing someone for any length of time. How well Brown's own listing agents knew him might have a slight bearing on whether their opinion about his memory problem was "rationally based" on their "perception" but that would be for the jury to weigh at trial.

One doesn't have to know someone very well to know that he or she is "intoxicated", or has a "memory problem". The Alfonso

agents working as Brown's own listing agents certainly would have to know him well enough to secure a good deal of information from him, visit with him at his home, and would be in a position to know if he evidenced any "memory problem" during his dealings with them. Also, the testimony of agents McFall and Albrecht about Brown's other personal problems (discussed below) implies that they knew him "well enough" to observe his "memory problem" along with his other problems. Finally, any doubts or disputes between the parties about "how well" the agents knew Brown, or whether their opinions about his memory problem were "rationally based on their perceptions," would have to be resolved in Plaintiffs' favor on the motion for summary judgment.

(b) The Alfonso agents' testimony

The two Alfonso agents who acted as Brown's listing agents and would have known him best, Brenda McFall and Diane Albrecht, testified in their depositions that Brown had reasons, other than an outright "memory problem," for "forgetting" about the massive termite damage to his home and the prior termite infestation and treatment in connection with his second Disclosure Statement. They said "he had lost his wife and daughter within a six-month period" (McFall, p. 7, RE-054), that "he was [80 years] old, getting ready to go into assisted living, and his wife had died." (Albrecht, p. 12, RE-065)

These statements, far from supporting Alfonso's motion, actually rebut it. Preliminarily, it should be noted that such self-serving statements by Defendant's agents may and should be completely disregarded insofar as they conflict with Plaintiffs'

testimony that Brenda McFall specifically told them Brown had a "memory problem." But beyond that obvious issue, the agents' knowledge of Brown's personal problems -- which would have led him to "forget" the prior termite infestation and treatment to his home -- was itself something that made Brown's Disclosure Statement unreliable, and should have been communicated to the Varnados by their fiduciaries.

Thus, even if the agents' testimony about Brown's other problems were accepted to the exclusion of Plaintiffs' testimony, it would not aid Alfonso or make it any less liable for failing to disclose these additional reasons for distrusting Brown's Disclosure Statement. A real estate agent as a fiduciary cannot present to the clients a Disclosure Statement which on its face appears legitimate, when he or she has reason to suspect or distrust that Statement. The agent should at least disclose the potential problems along with the Statement.

(c) Alfonso knew the Disclosure Statement was false

Brown's Disclosure Statement was not just "unreliable" due to his faulty memory, it was false, and that falsity was known, or should have been known, to Alfonso as Brown's real estate agent. The termite treatment holes around the exterior of the house gave a clear signal to a knowledgeable realtor that the Disclosure Statement's denial of prior termite treatment was false. You didn't need to know Brown had a "memory problem" to recognize that!

There is certainly no question that the termite treatment hole around the perimeter of the house were quite visible and

were seen, or should have been seen by the Alfonso agents, especially since they were both the selling and listing agents. Mrs. Varnado herself, on only a couple of visits to the property, had observed the holes. Brown told her they were "weep" holes and she simply accepted that, not realizing their true nature as related to termite treatment. (Gail Varnado deposition, pp. 77-78, RE-033-034) But Alfonso Realty, as experienced realtors, should have recognized them for what they were; on Alfonso's Motion for Summary Judgment, that inference is not only obvious, but must be drawn against Alfonso and in Plaintiff's favor.

Alfonso Realty is one of the most prominent of the realators on the Mississippi Coast. They would certainly have to be considered "knowledgable real estate agents." The Court is bound to adopt the clear inference that Alfonso was "knowledgable" about termite treatment holes, which are commonly encountered in the real estate business -- along with all other available inferences favorable to Plaintiffs on Alfonso's Motion for Summary judgment.

Thus, the issue of whether Brown had a "memory problem," or labored under circumstances making his memory faulty, is immaterial. Since Alfonso had other evidence, both physical and obvious, of the falsity of the Disclosure Statement, it makes no difference whether they knew the Statement was "unreliable." Its outright falsity was, or should have been, recognized by Alfonso and either the Disclosure Statement should have been withdrawn, or Alfonso should have advised Plaintiffs that its denial of prior termite treatment was false.

4. Disputed and undisputed facts

In considering whether to grant summary judgment a court usually looks at facts that are disputed, or which are at least claimed to be disputed by those opposing the motion. If the court finds that there is even one material disputed fact, the motion must be denied. In judging whether a fact is disputed, the Court must view it in the light most favorable to the opponent of the motion and apply all available inferences from it in favor of the opponent.

The foregoing is quite obvious and well recognized. What is not so obvious is that sometimes the Court needs to look, not just at the alleged *disputed* facts, but also at facts which everyone admits are undisputed. If an *undisputed* fact is material, and favors those opposing the motion, then it alone would prevent summary judgment regardless of what other facts may be allegedly in dispute.

In this case, there are a number of facts which everyone agrees on and are undisputed. Some of those facts, by themselves, would seem to negate any summary judgment for Alfonso Realty.

For example, taking our list of material facts as presented in part 1 of this Argument above, eliminating those arguably in dispute, and revising others accordingly, you still have the following facts which appear to be completely undisputed:

1. Brown's second Disclosure Statement was false
3. Brown labored under circumstances affecting his memory
4. Alfonso Realty was a dual agent for both Brown and the Plaintiffs

6. Alfonso Realty knew Brown labored under circumstances that affected his memory
7. Alfonso presented Brown's false Disclosure Statement to the Plaintiffs, implying that it was reliable and truthful
9. Alfonso Realty as an experienced realtor knew or should have known that the Disclosure Statement was false because it was contradicted by numerous termite treatment holes around the exterior of the home
10. The false Disclosure Statement was a substantial contributing factor to the damages suffered by Plaintiffs

Given these undisputed facts -- and not even considering the disputed ones -- it certainly appears that it was the Plaintiffs who were entitled to a summary judgment, not Alfonso Realty. When you add in the disputed facts, along with all available inferences, and view everything -- both disputed facts as well as inferences to be drawn therefrom -- as you must, in the light most favorable to the Plaintiffs, we submit that there is no way that Alfonso's summary judgment can stand, and every reason to think that Plaintiffs should be entitled to one.

CONCLUSION

This case presents a situation that demands reversal of the Circuit Court's summary judgment for Alfonso Realty. Moreover, the situation is one in which a partial summary judgment in the Plaintiffs' favor on Alfonso's liability ought to be seriously considered. 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 to which all parties are entitled. Alternatively, we request that the Court consider issuing judgment against Alfonso on liability and remanding this case to Circuit Court for a trial on damages only.

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 October, 2008.

17th



ROBERT HOMES JR.

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