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

NORMA CLAIRE MOORE Appellant		
vs.		Case No. 2008-[illegible]-00853
[illegible] INDIVIDUALLY AND [illegible] [illegible] Appellee		

Appeal from the Circuit Court of [illegible] County, Mississippi

BRIEF FOR APPELLANT

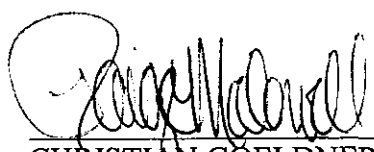
Oral Argument Not Requested

[illegible]
[illegible]
Attorney for Appellant
P.O. Box [illegible]
[illegible], MS [illegible]
Tel. [illegible]
Bar No. [illegible]

CERTIFICATE OF INTERESTED PERSONS

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

Name	Connection and Interest
Norma Slater Moore	Appellant
Robert M. Bailey	Appellee and Officer and Director of Appellee DeSoto Land Corporation
DeSoto Land Corporation	Appellee
Annice Kyle	Appellee
Honorable Robert P. Chamberlin	Circuit Court Judge
Goeldner, Porter, & McDowell	Attorneys for Norma Slater-Moore
Myers Law Firm	Attorneys for Robert M. Bailey and DeSoto Land Corporation
Glassman, Edwards, Wade, & Wyatt	Attorneys for Annice Kyle



CHRISTIAN GOELDNER (#[redacted]
PAIGE McDOWELL (#[redacted]
Goeldner Porter & McDowell
Attorneys for Appellant
P.O. Box 1468
Southaven, MS 38671-1468
Tel. (662) 342-7700
Fax (662) 342-7707

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether the trial court erred in ruling that there is no private cause of action under Miss. Code Ann. §§ 73-35-1 et. Seq.

2. Whether the trial court erred in holding that Bailey is not personally liable for torts committed by him on behalf of DLC

3. Whether the trial court erred in determining that rescission was not an appropriate remedy for Moore's fraud claims

4. Whether the trial court erred in holding that Moore was required to present more than circumstantial evidence of Kyle's knowledge with regard to fraud

5. Whether the trial court erred in holding that the disclaimer in the contract absolved Kyle of all liability.

6. Whether the trial court erred in considering Kyle's motion for summary judgment without requiring strict compliance with Miss. R. Civ. P. 56(c).

7. Whether the trial court erred in granting summary judgment when Moore presented sufficient evidence to establish triable issues of fact

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the purchase of a home in which a dispute arose between the seller, Appellee DeSoto Land Corporation ("DLC"), the seller's "primary officer," Appellee Robert M. Bailey, the Vice-President, Treasurer, Secretary, Director and Shareholder of Appellee DLC ("Bailey"), the seller's real estate agent, Appellee Annice Kyle ("Kyle"), and the buyer, Appellant Norma Slater-Moore ("Moore"). Moore claims that, prior to entering into the contract to purchase the home, DLC, Bailey, and Kyle made various representations regarding the nature, quality and history of the home's construction and the identity of the home's builder. After Moore took possession of the property, she discovered that the representations were false and that Bailey, Kyle and DLC made these representations fraudulently in order to induce her into purchasing the property in question.

II. Course of Proceedings and Disposition in Court Below

Moore sued DLC, Bailey, and Kyle for rescission of the contract or, in the alternative, to recover damages. R. 12, 103-104. Subsequently, Kyle filed a motion for summary judgment and DLC and Bailey filed a joint motion for partial summary judgment as to the following issues: (1) Bailey's individual liability, (2) applicability of rescission as a remedy, and (3) that DLC deserved summary judgment on all of Moore's claims involving misrepresentations. R. 376-384 and 406-411. After conducting a hearing, the Circuit Court granted both motions. R. 577. Moore appealed. R. 660.

III. Statement of Facts Relevant to Issues Presented for Review

In 2004, Lot 31, Legends Subdivision (the lot on which Moore's home currently sits) belonged to Steve Hooker, a licensed builder. (Documents Referred to by Plaintiff in Opposition to the Motion for Summary Judgment by Defendant Kyle, attached as a trial exhibit to the Record, 135.)[1] Around January, 2004, Hooker began construction of Moore's home. *Id.* Under Hooker, the construction passed the first two inspections required by the DeSoto County Planning Commission: foundation on January 23, 2004, and framing (including electrical, plumbing and mechanical) on April 5, 2004. *Id.* Hooker made no further progress on the construction.[2] The house was a mere shell when Hooker abandoned it. R. 471.

Nearly a year later, on February 25, 2005, DLC purchased the unfinished home from Hooker's lender. Pl. Ex. 128-29. A week later, Kyle became the exclusive listing agent for the property. *Id.* at 138.[3] From the time construction was abandoned by Hooker until DLC purchased the property, the home sat vacant, unfinished and open to rain, snow, sun, insects, animals, mold, etc. (Judge's Copy of Defendant Annice Kyle's Itemization of Facts Relied Upon and Not Genuinely Disputed with Exhibits, attached as a trial exhibit to the Record, at Ex. F., p. 139.)[4] DLC hired Richard Brewer, a builder who was unlicensed at the time, to complete construction of the home. Pl. Ex. 135.

On March 10, 2005, the DeSoto County Planning Commission told DLC that it would need another building permit to continue construction of the home. *Id.*, K's Item. at Ex. F, p. 139. Because Brewer was not licensed, he could not obtain the required permit. Pl. Ex. 135-36. Bailey, acting on behalf of DLC,[5] requested that Witt Long, a licensed builder, pull the necessary

---

[1] Hereinafter referred to as "Pl. Ex."
[2] Hooker filed bankruptcy and surrendered the property to the mortgage holder.
[3] This is a document submitted by Kyle to Board of Contractors in response to Moore's complaint
[4] Hereinafter referred to as "K's Item."
[5] Bailey has admitted that he was acting on behalf of DLC, as an officer, at all relevant times. R. 112.

permits so the home could be completed. Pl. Ex. 136; K's Item. at Ex. F, p. 139. Witt Long never participated in the construction. Pl. Ex. 136. Bailey also requested that Hale Electric pull permits to complete the home because no member of the construction crew was a licensed electrician. K's Item. at Ex. F, p. 139.

Bailey and/or DLC spent $75,837.49 on the construction of the house. Pl. Ex.136. The house passed the DeSoto County Planning Commission's final inspection on May 4, 2006, over two years after construction began. *Id.*

Moore initially expressed interest in the house on May 25, 2006. K's Item. at Ex. E, p. 17. Kyle drafted the initial disclosure statement, which is mandated by statute, on behalf of Bailey and DLC. *Id.* at 18.

In this disclosure statement, Kyle wrote "new" in the blank for "age of property," and told Moore the home was new construction. R. 27. She filled in same for age of roof. *Id.* She marked through the age of all major appliances and wrote "new construction." R. 28. Kyle told Moore that Bailey and/or DLC would provide a one-year builder's warranty. K's Item. at Ex. E, p. 17. Moore understood that she was buying a new home built by Bailey. *Id.*

Kyle also marked "yes," that the home was "built in conformity with an approved building code." R. 27. She did not mark that this information was unknown. *Id.* K's Item. at Ex. F, p. 140. Kyle also marked that there were no violations of local, state or federal laws related to the house. R. 28. Kyle also marked in the disclosure statement that there was no evidence of rot, mildew, vermin, rodents, etc. R. 27. She marked that the house had never been treated for infestation. *Id.*

Kyle also marked that there had been no additions, remodeling, structural changes, or other alterations to the property during DLC's ownership. *Id.* Had she marked "yes," she would have been required by statute to disclose whether all work was done with the necessary permits

and approvals and in compliance with the local building code. *Id.* She also would have had to name who performed the work or explained why the work was not done in compliance with the code. *Id.* Bailey initialed and signed the disclosure statement on behalf of DLC. *Id.* at 27-28.

Moore had a professional home inspection done on June 8, 2006. R. at 424-38. Moore believed getting an inspection would protect her financial interest in the house. *Id.* at 496. The inspector was under the impression that the home had been completed over a year ago and had been on the market the whole time. *Id.* at 425, 439. Moore's real estate agent, "Duck" Hawkins, was also under that impression. *Id.* at 477, K's Item. at Ex. F, p.138-39. The inspector did not find that any repairs were necessary, but he found some areas of concern. R. 424-38.

These concerns included, among others: two trees in the back of the lot that needed to be cut down; several small cracks in the mortar; leaning mailbox; paint and weather-stripping need to be replaced; air conditioner is noisy and needs to be sealed with tape to avoid losing air into attic; several light fixtures need to be tightened; light fixtures were full of dead bugs and numerous insects and spiders were in the home, which led the inspector to recommend having the home treated for insects; locks needed to be tightened; etc. *Id.* Moore was diligent in securing or attempting to secure the repair of every item of concern noted by the home inspector. *Id.* at 25, 26, 418, 483-85. At one point, she even withdrew her offer and looked at other houses because DLC refused to make certain repairs. *Id.* at 385; K's Item. st Ex. E, pp. 18-19. She insisted on the house being cleaned and exterminated by DLC as terms of the contract. R. 25-26.

Kyle later amended the disclosure statement as to the property's age by marking out "new" and replacing it with "9-12 months." *Id.* at 27, K's Item. at Ex. E, pp. 17-18. Moore and Bailey initialed the change. *Id.* She also changed the age of appliances on the disclosure statement from "new construction" to "one year," indicating that the appliances had been in the

house for one year. R. 28. She did not change the age of the roof in the copy of the disclosure she gave to Moore. *Id.* at 27.

Kyle then told Moore that Bailey could not give her a builder's warranty after all because he was only an investor and was not a builder. K's Item. at Ex. E, p. 19; R. 499. Moore was offered a Warrantech warranty instead. R. 499. Kyle changed the relevant contract provisions and wrote in "not a builder" next to where the builder's warranty had been crossed off. R. 22, 499. She asked Moore to initial this change. R. 499.

Kyle told Moore and Hawkins that Steve Hooker had completed the entire house before DLC bought it from the bank, but had not been able to sell it. R. 500, K's Item. at Ex. F, pp. 138-39. Kyle told Moore that Bailey had nothing to do with the construction of the house. R. 500.

Kyle did not explain why she had originally characterized the house as new or Bailey as the builder. Instead she repeatedly told Moore, "Steve Hooker built the home and then filed bankruptcy, Mr. Bailey bought the house from the bank." R. 499; K's Item. at Ex. F, p. 143.

Later, Kyle changed the age of the roof on the disclosure statement and wrote in the margin of the disclosure, "Seller has never lived in this house. Holds it as investment property." (Judge's Copy of Defendant Annice Kyle's Memorandum of Authorities in Support of Motion for Summary Judgment at Exhibit "B.")[6] Moore was never provided a copy of this version. K's Item. at Ex. F, p. 147.

Moore signed the "final" contract on June 26, 2006. R. 24, 519, 521. Bailey reviewed, initialed and signed the contract on behalf of DLC. *Id.* He also initialed and/or signed the addendums to the contract on behalf of DLC. R. 24-32, 34. He also signed the Buyer/Seller Certification on behalf of DLC. R. 44. Bailey was so involved in the transaction that Kyle felt it necessary to disclose to Moore that Bailey is a licensed real estate agent. R. 31.

[6] Hereinafter "K's Mem. Auth."

The transaction between the parties closed on June 30, 2006. R. 93. Moore paid $258,000.00 for the property. R. 42. Moore sunk her life savings into the house, making a cash down payment of over $51,000.00 and taking out a mortgage on the balance. *Id.* Kyle received a commission in the amount of $7,740.00. R. 381. On her Commission Disbursement Form, completed on or after June 30, 2006, Kyle marked in two places that the house was "new construction." R. 220-21.

When Moore took possession of the property, it was infested with insects. K's Item. at Ex. B, p. 154, Ex. F, p. 144; R. 432. Moore could not move in on the closing date because Kyle informed her that the home was infested with fleas. K's Item. at Ex. B, p. 154, Ex. F, p. 144. Kyle later testified that she did not tell Moore the home was infested with fleas. R. 378. The infestation was so serious that the person who had been sent to clean the house used the most powerful pesticide he could find, a chemical so powerful it had been banned by the Environmental Protection Agency. R. 616-21. The floor had to be vacuumed five times to get it move-in ready. R. 618.

After a short time in the house, mold began to show through the paint on the walls where someone had painted over the mold to conceal it. K's Item. at Ex. B, p. 26. The house was in horrible condition and needed many repairs. *Id.* at 31., K's Item. at Ex. F, p. 145. Plumbing and electrical issues arose. K's Item. at Ex. B, p.70; K's Item. at Ex. F, p. 146, Pl. Ex. 122. Moore noticed water lines from past flooding incidents. K's Item. at Ex. B, pp. 35-36. She discovered that someone had made an effort to conceal that the hardwood floors were damaged. *Id* at 38. She experienced problems with drainage, standing water and flooding. Pl. Ex. 120-21, incorporated into Moore's affidavit.

When Moore attempted to review the building permits for her house, she found that the builder was listed as "Witt Long," not Steve Hooker or Bailey. K's Item. at Ex. F, p. 145. Moore

called Witt Long, who she thought built her home, in order to complain about the construction. Long told her to complain to Bailey. *Id.* at 139. Moore discovered that Bailey had illegally used Long's license to pull permits so Bailey and DLC could complete construction without a licensed builder. R. 605. [7]

DLC and Bailey's failure to have the construction completed by licensed professionals resulted in substandard workmanship. R. 520-521, 446-453. DLC and Bailey's actions and substandard workmanship led to Moore purchasing a defective home, which contained construction defects, mold problems and was infested with various pests. Pl. Ex. 119-123.

Moore hired an engineer, Russell Kruchten, who conducted a brief, precursory viewing of the property approximately two months after Moore took possession. R. 50-55. From his brief viewing, he noticed the following problems: the driveway and patio slabs were too thin; poor soil compaction; use of poor-grade concrete; excessive fiberglass in the driveway; cracks in garage and patio; rust on lintels over garage doors; major deficiencies in workmanship and materials in brick veneer; cracks in facade; shrinkage and cracking which will cause moisture and insects to migrate into the home; weepholes clogged; instead of bricks being cut to properly fit gaps, gaps have just been filled with mortar (including gaps the size of entire bricks) in violation of sound construction protocol; water entering the garage through walls; additional investigation and repair was necessary as to issues with flooding and drainage; electrical problems evidencing poor and faulty workmanship; problems with plumbing system evidencing poor and faulty workmanship; problems with cooling systems evidencing improper installation; ineffective and poorly designed and implemented drainage system; standing water turning the property into a mosquito breeding ground. R. 50-55. Moore hired another expert, Tom Hudgens, to make his

[7] Moore filed a complaint with the Mississippi State Board of Contractors on November 11, 2006. Pl. Ex. 131. Witt Long responded to that complaint through his attorney. *Id.* at 135-137. At a hearing before the Board of Contractors, which Bailey attended, Witt Long was found to have violated Miss. Code Ann. § 73-59-13(1)(e) by loaning his license to an unlicensed builder. *Id.* at 131-133.

own inspection and to estimate the cost to make the repairs Kruchten indicated were necessary. R. 56-68. Hudgens estimated that the house needed $72,819.51 worth of repairs. R. 68.

On June 26, 2007, Moore filed suit against DLC, Bailey, and Kyle seeking rescission or, in the alternative, compensatory damages and punitive damages. R. 6, 12-70, 103-104.

During the course of litigation, Kruchten, the engineer who initially advised Moore of problems, became seriously ill and Moore had to substitute another engineer, Robert Aymett. R. 256-66. Aymett inspected the house on July 2, 2008, in preparation for trial. R. 440. He found the following: excessive amounts of fiberglass mixed with concrete that weakened the driveway; improper windows; exposed wiring; holes in patio slab; cracks in the walls, porch and patio; veneer not being flush in several places; mismatched brick and mortar; mortar used to file large spaces instead of bricks; numerous mismatched mortar patches; numerous nail/screw pops in the drywall; one toilet was loose and leaked; water stains on front door or improper staining; piping not properly anchored. R. 446-453. He also said that the landscaping and mistakes in the grading of the lot, as well as holes in the veneer, could lead to flooding and the development of fungus in the house. R. 453. Aymett noted that the quality of workmanship was surprisingly poor relative to the price Moore paid for the home. R. 454.

SUMMARY OF THE ARGUMENT

The trial court's Order appealed from contains a number of erroneous conclusions. The trial court ruled that Kyle was entitled to judgment as a matter of law on Moore's statutory claims because there is no private right of action under Miss. Code Ann. §§ 73-35-1, et seq. This is incorrect because Miss. Code Ann. § 73-35-31 explicitly creates such a private cause of action.

The trial court also ruled that Bailey has no individual liability for fraudulent misrepresentations authorized by him on behalf of DLC. It was incorrect to use "piercing the corporate veil" analysis when Bailey, an officer of DLC, directly participated in, authorized, directed and consented to tortious conduct. Further, the *Gray* factors for "corporate veil" analysis apply only to contract claims.

Rescission is an appropriate remedy for fraud claims and the trial court misapplied the law on this topic when it found that rescission was not an appropriate remedy. The court focused only on case law pertaining to contract claims. The rule that rescission is appropriate for fraud cases has not been altered by these contract cases.

Circumstantial evidence is an appropriate way to establish fraud for purposes of surviving summary judgment. The trial court erred in refusing to consider circumstantial evidence of Kyle's knowledge and in placing an impossible evidentiary burden on Moore.

The trial court's ruling that a disclaimer clause in a contract which was induced by fraud (1) was enforceable and (2) absolved Kyle of all liability for fraud was incorrect. Disclaimers in contracts induced by fraud are not enforceable. Furthermore, Mississippi law does not allow a party to a contract to waive or disclaim liability for tortious acts. In addition, the language of the disclaimer on its face appears to be inapplicable to Moore's claims against Kyle.

Finally, the trial court should not have heard or considered Kyle's motion for summary judgment because Kyle failed to comply with Miss. R. Civ. P. 56(c)'s ten-day notice provision.

Even without these errors, the trial court erred in granting summary judgment because Moore established a prima facie case of fraud, negligent misrepresentation, and grossly negligent misrepresentation, and neither Kyle, DLC nor Bailey presented any evidence that resolved any of the issues beyond a reasonable doubt or that demonstrated that Kyle, DLC or Bailey was entitled to judgment as a matter of law.

STANDARD OF REVIEW

> This Court conducts a de novo review of orders granting or denying summary judgment and "looks at all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant would be given the benefit of the doubt."

Yowell v. James Harkins Builder, Inc., 645 So.2d 1340, 1343 (Miss. 1994) (emphasis in original) (citations omitted in original) (*quoting Mantachie Natural Gas District v. Mississippi Valley Gas Co.*, 594 So.2d 1170, 1172 (Miss. 1992)).

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

The summary judgment process focuses the parties and the court on whether there are disputes of relevant fact that need to be tried, or only disputes of relevant law for which there need be no trial. *Cook v. Stringer*, 764 So.2d 481, (¶ 6) (Miss. Ct. App. 2000). A motion for summary judgment lies only when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Miss. R. Civ. P. 56(c).

> [A] motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim. "[T]he Court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried."

Yowell, 645 So.2d at 1343-1344 (*quoting Brown v. Credit Center Inc.*, 444 So.2d 358, 362 (Miss.1983)).

Upon a motion for summary judgment, as with any motion, the initial burden lies with the moving party. The moving party has the burden of demonstrating that no genuine issue of

material fact exists. *Duckworth v. Warren*, 2007-CA-01299-SCT, (¶ 9) (Miss.2009); *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So. 2d 374, 383 (Miss.1992) (overruled on other grounds by *Rains v. Gardner*, 731 So. 2d 1192 (Miss. 1999)).

Unless and until the moving party demonstrates that no genuine issue of material fact exists, there is no burden of rebuttal upon the non-moving party. *Hurst*, 610 So. 2d at 383. Further, where none of the exhibits attached to a party's motion for summary judgment show that the party is entitled to prevail as a matter of law, the burden of rebuttal does not shift to the non-movant. *Id.* at 384. Only when the moving party has resolved all factual issues and established that it is entitled to judgment as a matter of law does the burden shift to the non-movant to demonstrate that triable issues of fact exist. *Yowell*, 645 So. 2d at 343.

The non-moving party receives the benefit of every reasonable doubt. *Harper v. Cal-Maine Foods, Inc.*, 2008-CA-00529-COA (¶ 6) (Miss. Ct. App. 2009) (quoting *Spartan Foods Systems, Inc. v. American National Insurance Co.*, 582 So.2d 399, 402 (Miss. 1991)).

Thus, the non-moving party must demonstrate, at a minimum, that reasonable doubt exists as to at least one factual allegation that is essential to the non-moving party's claim. A motion for summary judgment "should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim." *Duckworth*, 2007-CA-01299-SCT (¶ 22) (*quoting Calvert v. Griggs*, 992 So. 2d 627, 632 (Miss. 2008).

II. SPECIFIC ASSIGNMENTS OF ERROR

A. THE TRIAL COURT ERRED IN RULING THAT NO PRIVATE RIGHT OF ACTION EXISTS UNDER MISS. CODE ANN. §§ 73-35-1 ET. SEQ.

The trial court erred in ruling that Moore is not entitled to bring a claim against Kyle

under Miss. Code Ann. § 73-35-21 or § 73-35-31.[8] This is contrary to both the statutes and to established Mississippi precedent.

Miss. Code Ann. § 73-35-21 "enumerates various grounds upon which the Real Estate Commission may refuse, suspend or revoke a license to engage in the real estate business." *Taylor v. Crye-Leike, Inc.*, 2000 WL 991652, 1 (N.D. Miss. 2000). Moore alleged that Kyle violated three subsections of § 73-35-21, specifically § 73-35-21(a) ("Making any substantial misrepresentation in connection with a real estate transaction"); § 73-35-21(b) ("Making any false promises of a character likely to influence, persuade or induce"); and § 73-35-21(m) ("Any act or conduct, whether of the same or a different character than hereinabove specified, which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing"). Moore presented evidence sufficient to establish a prima facie case of misrepresentation and other conduct that would violate the sections cited above.

Miss. Code Ann. § 73-35-31 "provides a damages remedy to those persons damaged by a real estate broker's violation of the foregoing provisions." *Taylor*, 2000 WL 991652, 2.

§ 73-35-31(2) states:

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

Thus, the statute unambiguously allows for a private cause of action under these statutes. Civil actions under these statutes are not novel in Mississippi. *See, e.g.*, *Taylor*, 2000 WL

[8] Although the proposition was not raised or argued by any party, the trial court appears to have ruled *sua sponte* that these statutes may be enforced by the Mississippi Real Estate Commission exclusively. *See Peavey Electronics Corp. v. Baan U.S.A., Inc.*, CA-00341-COA (Miss. Ct. App. 2009) (holding that it is error for a trial court to grant summary judgment on any issue for grounds not raised in the moving party's motion).

991652; *Fletcher v. Lyles*, 999 So. 2d 1271 (Miss. 2009); *Crase v. Hahn*, 754 So. 2d 471 (Miss. Ct. App. 1999). The trial court erred in holding that Moore cannot bring a civil action under these statutes as a matter of law.

B. THE TRIAL COURT ERRED IN HOLDING THAT BAILEY IS NOT PERSONALLY LIABLE FOR TORTS HE COMMITTED ON BEHALF OF DLC

The trial court erroneously held that Bailey is not individually liable for the misrepresentations he made on behalf of DLC. The trial court relied heavily on *Rosson v. McFarland*, 962 So. 2d 1279 (Miss. 2007). The trial court held that Bailey was not individually liable because Moore failed to meet the standard for piercing the corporate veil articulated in *Rosson* and in *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044 (Miss. 1989).

The trial court's application of *Rosson* and *Gray* to the present case is incorrect.

> [I]ndividual liability of corporate officers or directors may not be predicated merely on their connection to the corporation but must have as their foundation individual wrongdoing. [...] When a corporate officer directly participates in or authorizes the commission of a tort, even on behalf of the corporation, he may be held personally liable.

Hardy v. Brock, 826 So.2d 71 (¶ 18) (Miss. 2002) (*quoting Turner v. Wilson,* 620 So.2d 545, 548 (Miss.1993)) (alteration in *Hardy*).

> The rule [is] that directors, officers, or agents of a corporation are liable for their torts to a person injured thereby.... This is true even though they act in behalf of the corporation and although the corporation may also be liable...and it is also true even though the directors, officers, or agents act in good faith, and do not personally benefit or profit from the conversion. All who are concerned or participate in the wrong are personally liable.
> ...
> A director, officer, or agent is liable for the torts of the corporation or of other directors, officers, or agents <u>when, and only when,</u> he has participated in the tortious act, or has authorized or directed it, or has acted in his own behalf, or has had any knowledge of, or given any consent to, the act or transaction, or has acquiesced in it when he either knew or by the exercise of reasonable care should have known of it and should have objected and taken steps to prevent it.
>
> <u>What is required is some showing of direct personal involvement by the corporate officer in some decision or action which is causally related to plaintiff's injury.</u>

Turner, 620 So.2d at 548-49 (citations omitted) (emphasis in original).

In the present case, Moore alleged the following causes of action against DLC and against Bailey individually: fraudulent misrepresentation, negligent misrepresentation, and grossly negligent misrepresentation.[9] The misrepresentations were made to Moore in the contract for the purchase of her home ("the contract") and in the property disclosure statement furnished to her by Kyle on behalf of DLC ("the disclosure statement").

For Bailey to be personally liable for these misrepresentations, whether negligent, grossly negligent and/or fraudulent, Moore must submit some evidence of Bailey's direct personal involvement - that he either participated in, authorized, directed, had knowledge of, or consented to the misrepresentations, or that he acquiesced in the misrepresentations when he either knew or by the exercise of reasonable care should have known of them and should have objected and taken steps to prevent them.

Bailey personally reviewed and signed the contract, which stated that DLC was not the builder of the home. Bailey personally initialed every change to the disclosure statement. Bailey personally accepted the offer and signed the closing documents. Bailey was so involved in the transaction that Kyle felt it necessary to disclose to Moore that Bailey is a licensed real estate agent. R. 31. No other member of DLC had any part in the subject transaction. It does not matter whether Bailey signed in an individual capacity, as his signature sometimes implies, or whether he signed on behalf of DLC. *Hardy*, 826 So. 2d at (¶ 18); *Turner*, 620 So. 2d at 548. Bailey, personally, knew that various representations in the contract and disclosure statement were false or misleading. He knew that the information presented to Moore painted a very different picture than the true history of the house. But he signed anyway, and thus authorized,

[9] Moore also alleged breach of contract, breach of implied warranty of habitability and breach of implied covenant of good faith against these defendants, but these claims have since been dismissed, so any argument as to these claims is now moot.

had knowledge of, and consented to the misrepresentations in the contract. Under Mississippi law, he is personally liable for the consequences of his misrepresentations.

Similarly, the property disclosure statement contained representations that Bailey knew, or at the very least should have known, were false.[10] Bailey completed all the information contained in the Property Disclosure Statement. Any misrepresentations therein were made by him. Bailey reviewed and signed the Property Disclosure Statement. He authorized, had knowledge of, and consented to the misrepresentations therein. It is irrelevant whether he completed and/or signed the form on behalf of DLC. Due to his participation, authorization, and individual wrongdoing, under Mississippi law, Bailey is personally liable.

Because there is evidence that Bailey authorized, participated in, had knowledge of and consented to the misrepresentations made by DLC, the doctrine of "piercing the corporate veil" does not apply to this case.

"Corporate veil" analysis is only appropriate where there is no evidence that the officer or director directly participated in, authorized, or consented to the wrongdoing. In *Hardy*, the Court first looked to see whether there was evidence of direct participation, authorization or consent. *Hardy*, 826 So. 2d at (¶ 18). The Court found that "[t]he homeowners presented no proof evidencing Brock directly participated in the alleged misfeasance in the development." *Id.* at (¶ 19). Only after making this determination did the Court look to "corporate veil" analysis. *Id.* at (¶ 20).

In *L.C.L. Theaters, Inc. v. Columbia Pictures Industries*, 619 F.2d 455, 457 (5th Cir. 1980), the Court found that "the record indicates that "[the corporation]'s misfeasance was done with [the officer's] authorization, participation and approval." The Court held that "[i]n these circumstances, it is not necessary that the corporate 'veil' be pierced or even discussed. An

[10] His knowledge of falsity, and whether the misrepresentations were made fraudulently or negligently, are questions for the jury.

officer or any other agent of a corporation may be personally as responsible as the corporation itself for tortious acts when participating in the wrongdoing." *Id.* (citations omitted) (emphasis added).

> *Fletcher's Cyclopedia of Corporations,* at 202-203 (1975), explains the rule as follows:
>
> "It is thoroughly well settled that a man is personally liable for all torts committed by him, consisting in misfeasance--as fraud, conversion, acts done negligently, etc.--notwithstanding he may have acted as the agent or under directions of another. And this is true to the full extent as to torts committed by the officers or agents of a corporation in the management of its affairs. The fact that the circumstances are such as to render the corporation liable is altogether immaterial .... Corporate officers ... cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval." This rule does not depend on the same grounds as "piercing the corporate veil," that is, inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with the formalities of corporate organization.
>
> [...]
>
> [I]ndividual liability in tort is not dependent upon the same grounds as piercing the corporate veil. The corporate veil is pierced to prevent a shareholder, who is not normally liable for corporate debts or liabilities, from hiding behind the corporate shield when the shareholder is operating the corporation as an alter ego. However, where a tort action is brought against an officer of the corporation, there is no need to pierce the corporate veil, and the officer will be held liable if the elements of the tort are satisfied.

Consolidated Construction Co. of Alabama v. Metal Building Components, L.P., 961 So. 2d 820, 824-25 (Ala. 2007) (*quoting Fletcher's Cyclopedia of Corporations,* at 202-203 (1975)) (internal citations omitted).

The trial court erred in its application of *Rosson*, 962 So. 2d 1279, to Moore's tort claims against Bailey and DLC. The *Rosson* Court conducted "corporate veil" analysis using the factors enunciated in *Gray v. Edgewater Landing, Inc.*. As stated above, "corporate veil" analysis is not relevant where there is evidence that the officer or director authorized, participated in or

consented to the misconduct.

The *Gray* factors for "corporate veil" analysis are further limited in that they are only applicable to contract claims.

> Where, in the context of an action for breach of a lease or other consensual undertaking, a party seeks to pierce the veil of the corporation with whom he has contracted and to hold the shareholders personally liable, our focus is fixed upon the expectations of the parties in concluding the bargain. Since contract liability arises from an essentially consensual relationship, courts generally decline to disregard the corporate entity, choosing instead to enforce the contract as written.

Rosson, 962 So.2d at (¶ 22) (*quoting Gray*, 541 So. 2d at 1046) (emphasis added).

> The attempt to hold another party liable where the claim asserted is of contractual origins presents difficulties. The question which must be met and answered is why one who contracted with a selected party and received the promise he bargained for should be allowed to look to another merely because he is disappointed in the selected party's performance. The answer under contract law is that he may not hold the other liable without additional compelling facts.

Rosson, 962 So.2d at (¶ 27) (*quoting Gray*, 541 So. 2d at 1047) (emphasis added).

Although misrepresentation was one of the issues in *Rosson*, the only issue before the Court in that case was whether the officer was individually liable for the failure of the corporation to perform its contractual obligations. *Rosson*, 962 So. 2d at ¶ 36. Unlike the present case, where the tort claims involve misrepresentation of facts known to Bailey at the time of the contract (such as when and by whom the home had been built), the *Rosson* case involved only claims related to post-contractual performance (e.g., Rosson represented that the home would be constructed in accordance with building codes).[11] Thus, the *Rosson* Court properly applied the *Gray* factors as to the breach of contract claims.

Because the *Gray* factors apply only to contract claims, the trial court erred in applying them to the tort claims in the present case. Because Moore's contract claims have been

[11] In other words, in the present case, the parties entered into a contract after the home was built, and all the misrepresentations involved pre-contractual facts. In *Rosson*, on the other hand, the parties entered into a contract prior to the home being built, and the plaintiff was induced to enter the contract by representations regarding Rosson's ability to perform the contract.

dismissed, this Court need not consider whether the trial court correctly applied the *Gray* factors to the contract claims.

C. THE TRIAL COURT ERRED IN DETERMINING THAT RESCISSION WAS NOT AN APPROPRIATE REMEDY FOR MOORE'S FRAUD CLAIMS

The trial court relied on *Cenac v. Murry*, 609 So. 2d 1257 (Miss. 1992) for its ruling that rescission was too drastic a remedy for Moore's fraud claims and that damages would be more appropriate. The trial court's reliance on *Cenac* is misplaced. The *Cenac* Court's discussion of rescission was limited to the question of whether rescission is appropriate for a breach of the implied contractual covenant of good faith and fair dealing. *Id.* at 1273. The Court noted that, in contract claims, "the focus is upon the materiality of the breach with the understanding that such a drastic remedy is reserved for 'extreme cases' and should be 'sparsely granted.'" *Id.* (citations omitted).

The *Cenac* Court did not hold that rescission is a drastic remedy with regard to fraud. In fact, the Court stated the opposite: "In the early development of the common law of this state, rescission as a remedy was allowed only in instances of fraud or mistake." *Id.* In its historical analysis of rescission, the Court also noted that "it was soon recognized that depending upon the character of the case, damages may be an inadequate remedy and rescission an appropriate remedy for a breach "going to the very substance of the contract." *Id.* (internal quotes omitted). Thus, the Court recognized that rescission may be appropriate in cases dealing with fraud or material breached of contract, but found that rescission was an extreme remedy for a breach of the duty of good faith and fair dealing inherent in any contract.

Cenac does not apply to Moore's claims for fraud and misrepresentation. Mississippi law has consistently held that "rescission is an appropriate remedy for fraud." *Browder v. Williams*, 765 So. 2d 1281 (¶ 16) (Miss. 2000). "[A] buyer who has been deceived by material false representations in the procurement of a contract may elect to rescind and to be restored to the

position he occupied at the time of sale." *Id.*

Furthermore, the trial court's decision that rescission is not available is inappropriate at the summary judgment stage. In this case, such a determination without a trial is premature at best. "The law is clearly established that the jury's finding of fraudulent misrepresentation allows [plaintiff] to make a choice to either rescind the contract and be restored to its' former position before the store was purchased or to elect to keep the business and bring an action for damages." *Garris v. Smith's C&G, LLC*, 941 So. 2d 228 (¶ 8) (Miss. Ct. App. 2006).

Admittedly, the trial court could have determined that rescission was inappropriate based upon the demands of a third-party lien holder or because the parties could not be returned to the status quo. The trial court, however, did not make such findings and could not make such findings based upon the facts of this case. Therefore, the trial court's ruling that rescission is inappropriate in this case is erroneous.[12]

D. THE TRIAL COURT ERRED IN REQUIRING MOORE TO PRESENT MORE THAN CIRCUMSTANTIAL EVIDENCE OF KYLE'S KNOWLEDGE WITH REGARD TO FRAUD

The trial court ruled that Moore failed to make a showing sufficient to survive summary judgment on her misrepresentation claims against Kyle. The trial court found that Moore failed to make a sufficient showing of Kyle's personal knowledge of the falsity of the representations at the time they were made – that is, that Kyle had knowledge that was not disclosed on the property disclosure statement.

This personal knowledge is a necessary element of fraud, and is necessary for all misrepresentation claims against Kyle which are based on representations in the property disclosure statement. Miss. Code Ann. § 89-1-505(1) provides that neither the transferor nor any

[12] This ruling is also inconsistent with the trial court's oral ruling several weeks prior to granting the motions for summary judgment, in which the court found that this was "a case where a jury could decide if rescission is appropriate." Tr. Of Proceedings Vol. I p. 15.

listing or selling agent shall be liable for any error, inaccuracy or omission of any information in the property disclosure statement so long as (a) the error, inaccuracy or omission was not within the personal knowledge of the transferor or that listing or selling agent, and (b) the transferor or listing or selling agent exercised ordinary care in obtaining and transmitting the information disclosed. Miss. Code Ann. § 89-1-523 states that "any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of sections 89-1-501 through 89-1-523 shall be liable in the amount of actual damages suffered by a transferee."

Thus, for Kyle to be liable for the misrepresentations in the property disclosure statement, Moore is required to show either Kyle's personal knowledge that the information on the disclosure statement was false, or personal knowledge of information that was not disclosed in the disclosure statement, or ignorance of the truth coupled with a failure to exercise ordinary care in obtaining the information on the disclosure statement.

> [C]ases which involve allegations of fraud or misrepresentation generally are inappropriate for disposition at a summary-judgment stage. ... [T]riable issues of fact do exist when the facts or evidence support the allegation that fraud and misrepresentation were involved. It is well established that fraud is never assumed but is essentially a question of facts which clear and convincing evidence must prove. Fraud is essentially a question of fact best left for the jury.

Allen v. Mac Tools, Inc., 671 So.2d 636, 642 -643 (Miss. 1996).

The trial court in the present case had before it circumstantial evidence sufficient to create a genuinely disputed factual issue as to whether Kyle, at the time the property disclosure statement was presented to Moore, had personal knowledge that information contained in that statement was false and had knowledge of facts that were not disclosed in that statement. Circumstantial evidence is sufficient to show the existence of triable issues of material fact in a summary judgment context. *Daniels v. GNB, Inc.*, 629 So. 2d 595 (Miss. 1993). To the extent that the trial court required Moore to submit more than circumstantial evidence of Kyle's personal knowledge, the trial court erred by requiring Moore to meet a higher burden of proof

than she would bear at trial. *See Matter of Estate of Vick*, 557 So.2d 760, 766 (Miss. 1989) (stating that fraud "can only be proved by circumstantial evidence."); *Parkhurst v. McGraw*, 24 Miss. 134, 134 (1852) (holding that "positive and express proof [of fraud] is not required. Circumstances affording strong presumption will be deemed sufficient.").

In *Quay v. Archie L. Crawford and Shippers Exp., Inc.*, 788 So. 2d 76 (Miss. Ct. App. 2001), the defendants presented direct evidence in the form of affidavits that defendant's taillights had been working at the relevant time, while the plaintiff presented circumstantial evidence in the form of repair bills and parts receipts from defendants' mechanic. The Court noted that "we are not aware of any case law which holds that circumstantial evidence is insufficient to raise a question of fact in the summary judgment context." *Id.* at (¶ 18). The Court found that once circumstantial evidence placed facts in dispute, affidavit testimony could not negate the dispute and the question was one of fact for the jury. *Id.* at (¶ 20).

The trial court in this case held that affidavits are "properly considered on summary judgment motions as long as they are based on personal knowledge...." (emphasis in original). The court also ruled that Moore's claims against Kyle failed because she "has put on no affidavits of anyone with firsthand knowledge" of Kyle's personal knowledge. Absent some extraordinary "smoking gun" scenario, the only person who would have firsthand knowledge of what Kyle personally knew would be Kyle herself.

To require a party, in responding to a motion for summary judgment, to acquire and submit an affidavit from the opposing party admitting to one of the elements of the claim against her is to saddle that party with an impossible burden, one which precludes any claim from surviving summary judgment which involves personal knowledge of the defendant.

> In an allegation of fraud ... the precise facts which would establish the fraud will often be known only by the party or parties alleged to have committed the fraud. [...] The best way and perhaps the only way for Allen to prove fraudulent representations amounting to fraud would be at a trial in which he could test the

> credibility of the DSMs whom he claims made the fraudulent representations to him.

Allen, 671 So. 2d at 643.

In fact, the trial court's Order acknowledges that "the claim against Kyle rests on the disputed issue of what Kyle personally knew about the property." The fact that a disputed issue of fact exists as to a necessary element of Moore's claims should have precluded the trial court from granting summary judgment as to those claims. "[T]he court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue." (Miss. R. Civ. P. 56, Cmt.) Thus, the trial court erred when it exceeded its authority under Rule 56 and decided a genuinely disputed issue of material fact in favor of Kyle.

In addition to whether Kyle had personal knowledge of facts that were misrepresented or omitted from the property disclosure statement, the trial court also found dispositive the question of whether Kyle had a duty to disclose these facts as a matter of law. The trial court did not find that no such duty existed. On the contrary, the trial court specifically noted that Miss. Code Ann. § 89-1-505 imposes a duty on the seller and seller's agent to disclose information of which he or she has personal knowledge. Rather, the trial court seemed to find that Kyle was entitled to judgment as a matter of law because of perceived weaknesses in the circumstantial nature of Moore's evidence and because Kyle had paid for expert testimony regarding duty while Moore had not. This is incorrect. Even if Moore had filed no response and submitted no evidence whatsoever to contest the motion, summary judgment would still not be appropriate unless Kyle was entitled to judgment as a matter of law. *Allen v. Mayer*, 587 So. 2d 255, 259 (Miss. 1991). The trial court recognized that Kyle had a duty to disclose known facts, and there existed a genuine factual dispute as to what facts were known. Summary judgment was clearly inappropriate under these circumstances.

E. THE TRIAL COURT ERRED IN HOLDING THAT THE DISCLAIMER IN THE CONTRACT ABSOLVED KYLE OF ALL LIABILITY.

The trial court ruled that "Moore also signed a contract which contained a disclaimer which absolved Kyle of liability." This is not a correct application of Mississippi law. The disclaimer in question reads:

> It is understood and agreed that the real estate firms and real estate licensee(s) representing or assisting the seller or buyer are not parties to this agreement and do not have or assume liability for the performance or non-performance of seller or buyer. Buyer or seller acknowledge that they have not relied upon any advice, representations or statements of brokers and waive and shall not assert any claims against Brokers involving the same, Buyer and Seller agree that Brokers shall be responsible to advise Buyer and Seller . . . .

The disclaimer is contained in a document that Moore signed in reliance upon Kyle and Bailey's misrepresentations in the disclosure agreement. Thus, equity dictates that Kyle should not receive the benefit of this disclaimer provision. The Mississippi Supreme Court recognized this concept by stating:

> I assume there is no authority that we are required to follow in support of the proposition that a party who has [p]erpetrated a fraud upon his neighbor may, nevertheless, contract with him in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule but the exception.

Brown v. Ohman, 42 So.2d 209, 213-14 (Miss.1949) (emphasis added).

In this case, Kyle fraudulently induced Moore to sign the contract containing the disclaimer provision. This Court, like the *Brown* Court, should not allow Kyle to profit from her malfeasance by giving her the benefits of a contract that she induced Moore to enter.

As a matter of public policy, this Court should not allow real estate agents to disclaim the duties imposed on them by law. The Mississippi Court of Appeals has stated, "the duty owed by agents to act for the benefit of their principals does not insulate them from liability for knowing

participation in misrepresentations. . . . An agent . . . is liable to third parties for, among other acts, deceitful conduct." *Lee Hawkins Realty, Inc. v. Moss*, 724 So.2d 1116, 1118 (Miss. Ct. App.1998).

The Mississippi Supreme Court "has held on more than one occasion that a party may not use an anticipatory release as a means to escape liability for tortious acts." *Farragut v. Massey*, 612 So.2d 325, 330 (Miss.1992) (emphasis added). Although *Farragut* dealt with an anticipatory release instead of a disclaimer, the same policy principles apply to disclaimers. In addition, the disclaimer in this case appears to contain a form of release in that it states, "Buyer and Seller . . . waive and shall not assert any claims against Broker . . . ."

Such language is not favored in Mississippi contracts. In *Rigby v. Sugar's Fitness & Activity Center*, 803 So.2d 497, 499 (Miss. Ct. App. 2002), the defendant supported its motion for summary judgment with the assertion that the plaintiff had signed a provision releasing defendant from liability for injury. The Court of Appeals held that "'contracts attempting to limit the liabilities of one of the parties [will] not be enforced unless the limitation is fairly and honestly negotiated and understood by both parties.'" *Id.* at (¶ 8) (quoting *Quinn v. Mississippi State Univ.*, 720 So.2d 843, 851 (¶ 34) (Miss.1998)); *see also Turnbough v. Ladner,* 754 So.2d 467, 470 (Miss.1999).

In this case, Kyle has introduced nothing that establishes that the disclaimer clause was honestly negotiated and understood by both parties. The disclaimer is an affirmative defense, which Kyle would have the burden of proving at trial, and thus Moore is not required to show that the clause was not negotiated.

Under the Mississippi Real Estate Brokers License Act of 1954, "Licenses shall be granted only to persons who present . . . satisfactory proof to the commission that they are trustworthy and competent to transact the business of a real estate broker or real estate

salesperson in such manner as to safeguard the interests of the public." Miss. Code Ann. § 73-35-7 (2009) (emphasis added).

Mississippi courts should not allow real estate agents to disclaim or contract away their fiduciary duties to the public. This would be akin to allowing a contractor to disclaim the licensing requirements found in the Mississippi Code, or allowing an attorney to disclaim the Mississippi licensing requirement, or to even disclaim the duty to perform their profession without committing malpractice.

Further, the disclaimer in the instant case seems to state on its face that it disclaims liability only for statements and representations involving performance or nonperformance by the seller or buyer.

Thus, the trial court's finding that Kyle's liability is absolved by the disclaimer she induced Moore to sign is contrary to law and public policy and should be reversed.

F. THE TRIAL COURT ERRED IN CONSIDERING KYLE'S MOTION FOR SUMMARY JUDGMENT DESPITE NONCOMPLIANCE WITH MISS. R. CIV. P. 56(C).

Miss. R. Civ. P. 56(c) requires that a notice of hearing on a motion for summary judgment be served at least ten days prior to the date of the hearing. In the present case, a scheduling order was agreed to by all parties and entered on November 2, 2007. R. 186-87. That scheduling order required all dispositive motions to be "filed on or before August 22, 2008, and noticed for hearing at a date and time certain, no later than September 5, 2008." *Id.* The scheduling order also mandated that any motions not heard by September 5, 2008, would be deemed abandoned. *Id.*

Kyle filed her Motion for Summary Judgment on August 22, 2008. R. 341. Pursuant to Rule 56(c), in order to have her motion heard by September 5, and thus not abandoned, Kyle must have served notice of a fixed hearing date on or before August 26, 2008. Kyle did not do

this. Rather, at a hearing on another matter on August 29, 2008, her attorneys orally declared to the Court that Kyle would like to have her motion heard at the same time as Bailey and DLC's Motion for Partial Summary Judgment, which was to be heard on September 4, 2008. Tr. of Proceedings, pp. 17-18. The trial court acquiesced and set Kyle's motion to be heard on September 4, over the objection of Moore's counsel, who had not yet responded to Kyle's motion on the belief that it had been deemed abandoned.[13] *Id.* at 19-24. On September 2, 2008, Kyle filed notice that her motion for summary judgment would be heard on September 4, 2008. R. 524. Moore filed her response to Kyle's motion on September 2, 2008. R. 503.

Under Mississippi law, Kyle's motion for summary judgment was deemed abandoned on August 27, 2008, because she failed to timely serve notice of a hearing by August 26. The trial court did not address this argument in its order, other than to note that "Moore did not make this argument at hearing." R. 578. In Moore's response to Kyle's motion for summary judgment, she emphasized that "[b]y responding to the instant Motion, Plaintiff in NO WAY waives her right to the ten-day notice requirement of MRCP 56(c), nor does she waive the defense that this Motion has been deemed abandoned and should not be heard." R. 505 (emphasis in original). Obviously, the trial court allowed the hearing, so there would have been little point in re-arguing this issue at the hearing when the issue had already been decided by the trial court.

---

[13] Bailey/DLC's counsel had contacted Moore's counsel in advance of the filing deadline and requested an extension because Bailey/DLC's counsel's child had become seriously ill. Tr. Of Proceedings, p. 23. Under the circumstances, Moore's counsel agreed to the extension as to Bailey/DLC's counsel only, but informed Bailey/DLC's counsel that she could not waive the September 5 deadline when doing so would cause her client the time and expense of having to respond to Kyle's motion. *Id.* at 23, 18-19. Bailey/DLC's counsel contacted the trial court administrator and made diligent efforts to get a hearing set before the September 5 deadline. *Id.* at 19. Kyle's counsel, on the other hand, made no effort to comply with the scheduling order's hearing deadline. *Id.* at 20. It was only during a recess that Kyle's counsel overheard Bailey/DLC's counsel and Moore's counsel discussing the issue and realized the deadline had been missed. *Id.* at 17. Kyle's counsel raised the issue after the recess and succeeded in using Moore's counsel's extension of professional courtesy to Bailey/DLC's counsel, to the detriment of Moore's counsel, as a means to escape the consequences of failure to comply with the scheduling order. *Id.* at 17-24. This Court should not allow one party to profit from another's good faith professional civility to the detriment of the latter. To do so discourages counsel from pursuing the "aspirational ideals" recently adopted by the Mississippi Bar.

In *Pope v. Schroeder,* 512 So.2d 905, 908 (Miss. 1987), the Mississippi Supreme Court held that this ten-day notice provision requires strict compliance and that allowing a motion which does not comply to be heard constitutes reversible error. In *Pope*, the movant filed neither a motion for summary judgment nor a notice of hearing prior to the day on which summary judgment was granted. The *Pope* Court stated: "[W]e cannot stress too strongly that a trial court should require compliance with Rule 56(c) before entertaining a motion for summary judgment. The failure to do so here was error which requires reversal." *Id.* (emphasis added).

The Court reiterated this rule in *Hurst,* 610 So.2d at. 385. In that case, the defendant filed its motion for summary judgment several months before it was heard, but never filed nor served notice of a fixed hearing date. The Court stated: "The ten-day notice provision of Rule 56 is not an unimportant technicality, but serves substantial interests of litigants before federal courts." *Id.* (citations omitted). In a concurring, separate opinion, three of the Justices noted that strict compliance with the ten-day provision was proper even though it was difficult to see how the lack of notice actually harmed the plaintiff in that case. *Id.* at 388 (Banks, J., concurring).

In *Partin*, the Court of Appeals noted the development of an exception to the strict compliance rule: "the error in granting a summary judgment motion without a hearing may be harmless error if there are, indeed, no triable issues of fact. ...[A] summary judgment motion may be decided upon written briefs, if it appears that there are no genuine issues of material fact." *Partin v. North Mississippi Medical Center, Inc.*, 929 So.2d 924 (¶ 38) (Miss. Ct. App. 2005). This exception appears to be limited to situations where there is no hearing at all, and not to situations where a hearing was untimely noticed.

After considering the exception, the *Partin* court concluded that reversible error had occurred in the case before it.

> [W]e find that the trial court erred in granting Dr. Oakes's motion for summary judgment without the proper ten days notice and without a hearing, pursuant to

> M.R.C.P. 56. Regarding the holdings of *Adams* and *Croke,* we cannot say that the granting of summary judgment to Dr. Oakes was harmless error, because the record does not contain enough information regarding the claim against Dr. Oakes to say with certainty that there is no issue of fact regarding Dr. Oakes. Thus, we reverse the granting of summary judgment to Dr. Oakes....

Id. at 935 (¶ 40).

The Court of Appeals very recently noted:

> Considerations underlying the ten-day notice requirement of Rule 56 make it clear why this notice requirement is enforced so strictly. A successful summary judgment motion results in a final adjudication of the merits of a case.

Peavey Electronics Corp., CA-00341-COA 8 at (¶ 26).

In this case, pursuant to the scheduling order, Kyle's motion was abandoned because it was not properly noticed for hearing pursuant to Rule 56 and the terms of the scheduling order. Kyle agreed to the scheduling order in this case with full knowledge of the Rules and the notice requirements therein. Kyle would not have been unfairly prejudiced if her motion were deemed abandoned as she would have retained her unfettered right to defend herself at trial. Moore, on the other hand, was unfairly prejudiced by the trial court allowing the motion to be heard without demanding strict compliance with Rule 56, because Moore lost her right to a jury trial as a result.

By considering Kyle's motion for summary judgment rather than deeming it abandoned, the trial court committed reversible error.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN MOORE PRESENTED SUFFICIENT EVIDENCE TO SHOW THAT TRIABLE ISSUES OF FACT EXIST.

A genuine issue of material fact is created when the non-movant presents circumstantial evidence which tends, however slightly, to contradict testimony on the other side. See *Quay*, 788 So. 2d at 81 (¶18) (stating that "We fully realize that Quay offered only circumstantial evidence to contradict the direct testimony offered by Crawford and Shippers Express that the lights on the rear trailer were functioning properly, but we are not aware of any case law which

holds that circumstantial evidence is insufficient to raise a question of fact in the summary judgment context.").

The non-moving party need not rebut anything which is evidenced solely by the moving party's self-serving affidavit. *Quay*, 788 So. 2d at 81 (¶ 20); *Hurst,* 610 So. 2d at 383. A self-serving affidavit by the moving party (or someone being paid by the moving party) cannot serve as evidence to support a motion for summary judgment, and thus does not operate to shift the burden of rebuttal to the non-moving party. *Quay*, 788 So. 2d at 81 (¶ 20); *Hurst,* 610 So. 2d at 383. In the present case, consequently, the trial court should not have considered any affidavit other than Moore's (as the non-moving party) to support a finding of summary judgment. The trial court committed clear error to the extent that the trial court stated it considers affidavit testimony to be entitled to greater weight than circumstantial evidence.

It is not the place of the trial court, at the summary judgment stage, to weigh the amount or credibility of evidence. "It is the duty of the jury to consider all of the evidence, including matters presented that tend to impeach a witness's credibility, and then to decide what weight and worth to give to any particular witness's testimony." *Jenkins v. State*, 913 So.2d 1044 (¶ 31) (Miss. Ct. App. 2005) (citations omitted) (emphasis added). It is clearly reversible error for a trial court to give more weight to direct evidence than to circumstantial evidence. *Quay*, 788 So. 2d at 81-84.

A. FRAUDULENT MISREPRESENTATION

The elements of fraud include: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. *Martin v. Winfield*, 455 So. 2d 762, 764 (Miss. 1984).

"[O]mission or concealment of a material fact can constitute fraud. However, in order to create liability for nondisclosure, the defendant's silence must relate to a material fact or matter known to the party and as to which it is his legal duty to communicate to the other contracting party." *Morgan v. Green-Save, Inc.*, 2 So.3d 648 (¶ 12) (Miss. Ct. App. 2008) (internal citations omitted).

Fraud must be proven by clear and convincing evidence. *Id.* "This burden ... is a function of the degree of confidence we should have in the correctness of a factual determination that one has perpetrated a fraud." *Great Southern National Bank v. McCullogh Environmental Services, Inc.,* 595 So.2d 1282, 1289 (Miss. 1992) (*quoting Anderson v. Burt,* 507 So.2d 32, 38 (Miss.1987)) (emphasis in original). To survive summary judgment, the non-moving party need only show that a triable issue exists. This burden does not shift to the non-moving party unless evidence presented by the moving party resolves all material questions of fact and demonstrates that the moving party is entitled to judgment as a matter of law. *Hurst*, 610 So. 2d at 383-84.

1. Representations

Moore submitted her sworn affidavit testimony that Kyle, on behalf of DLC and Bailey, made the following representations about the home through the contract and the addendums thereto: (1) the home had been completed by Hooker prior to DLC purchasing it but had not sold in over a year; (2) DLC/Bailey had nothing to do with the construction of the home and merely held it as investment property; (3) no additions, renovations, or alterations had been made to the home during DLC's ownership; (4) all work on the home had been done by licensed professionals in compliance with the building code and state law; and (5) there was not, nor had there ever been, a problem with insects inside the home. R. 119-23, incorporated into Moore's affidavit (R. 519). The representations were made by Bailey, on behalf of DLC, and presented to (and discussed with) Moore by Kyle. *Id.* Moore also submitted copies of the property disclosure

statement and the contract containing the representations. R. 20-41.

"[T]he clear and convincing standard required of the evidence to sustain a claim of fraud is certainly met in a summary judgment posture when one witness specifically claims a representation was in fact made." *Allen*, 671 So. 2d at 643 (emphasis added). Thus, under Mississippi law, Moore has met her entire burden to sustain her fraud claims and need show nothing further; however, she wishes to err on the side of caution.

2. Falsity

The first representation listed above is that the home had been completed by Hooker prior to DLC purchasing it but had not sold in over a year. The evidence demonstrates that this is false: (a) Kyle testified in her affidavit that the home had some structural features when it was purchased by DLC, but was not complete (R. 380); (b) DLC and/or Bailey spent approximately $75,000 to complete the home (Pl. Ex. 136); (c) the DeSoto County Planning Commission required DLC and/or Bailey to get a building permit to continue the construction (*Id.* at 135); and (d) the home did not pass the DeSoto County Planning Commission's final inspection until May 4, 2006, over a year after DLC purchased the home (*Id.* at 136). Further, the trial court found that "it is undisputed that the house was purchased unfinished by DLC and finished to be sold." R. 589. Moore does not appeal this ruling.

The second representation listed above is that DLC/Bailey had nothing to do with the construction of the home and merely held it as investment property. The evidence demonstrates that this is false: (a) DLC hired Richard Brewer, a builder who was unlicensed at the time, to complete construction of the home; (b) the DeSoto County Planning Board told DLC that it would need another building permit to continue construction of the home. Because Mr. Brewer did not have a license, he could not obtain the required permit. Bailey, acting on behalf of DLC, requested a licensed builder, pull the necessary permits so the home could be completed; (c)

Bailey and/or DLC spent $75,837.49 on the construction of the home, not including the purchase price; (d) the Mississippi State Board of Contractors, after a hearing that Bailey attended, found that, at Bailey's request, Witt Long had loaned his license to Bailey so Bailey could complete construction of the home.

The evidence shows a genuine issue of material fact as to whether Bailey and/or DLC were involved in the construction/completion of the home. Neither Bailey nor DLC presented any evidence that resolved this issue beyond a reasonable doubt.

The third misrepresentation listed above is that no additions, renovations, or alterations had been made to the home during DLC's ownership. Evidence has been set out above which demonstrates that the home was not complete when DLC purchased it. It is not disputed that the home was complete when DLC sold it to Moore. Thus, logic dictates that alterations, namely, all those necessary to complete the home, took place while DLC owned the home.

The trial court erred in finding that Moore presented no evidence that there were any alterations made to the house while DLC owned it, especially when the trial court, in the same order, found that "it is undisputed that the house was purchased unfinished by DLC and finished to be sold." R. at 589. Obviously, alterations were performed on the home to convert it from an unfinished home to a finished home.

The fourth misrepresentation listed above is that all work on the home had been done by licensed professionals in compliance with the building code and state law. The evidence demonstrates that this is false: (a) Witt Long had to pull permits to complete construction because no member of the construction crew had a builders license; (b) Hale Electric had to pull permits to complete the construction because no member of the construction crew had an electrician's license. There is a genuine issue as to whether anyone who worked to complete the home while it was owned by DLC had the proper licensure to perform the work. Neither Bailey

nor DLC submitted any evidence that resolved this issue beyond a reasonable doubt.

The trial court erred when it found that Moore presented no evidence indicating that unlicensed persons built the house. The trial court further erred when it weighed the evidence and made a finding of fact that a licensed builder named Brewer built the home. Evidence in the record demonstrates that Brewer was unlicensed when he built the home. Pl. Ex. 135. The trial court erred in finding that Moore presented no proof that the construction of the home violated building codes. The trial court likewise erred in finding that Moore presented no evidence indicating that the home was constructed in violation of local, state or federal laws. Miss. Code Ann. §§ 73-59-1 and 79-59-3 require anyone who undertakes a residential construction project costing more than $10,000.00 to be licensed by the Mississippi State Board of Contractors. Miss. Code Ann. § 31-3-15 prohibits hiring an unlicensed contractor to undertake any construction project.

The fifth misrepresentation listed above is that there was not, nor had there ever been, mold, mildew or rot present in the home. The evidence shows that this is false: (a) Moore testified that there is mold growing on the walls of the house that had been concealed by paint; (b) Moore testified that she observed water lines on the interior of the house where water had intruded; (c) Moore's expert, Robert Aymett, testified that there was evidence in the home of water intrusion or damage; (d) evidence submitted by Kyle states that some drywall had already been hung when DLC bought the house. R. 380. Evidence submitted by Kyle also states that this drywall rotted due to the home's exposure to the elements for so long, and that instead of removing the rotten drywall, Bailey and/or DLC hired three different paint crews to conceal the mold, mildew and water damage on the walls. K's Item. at Ex. F, p. 143. There is a genuine issue of fact as to whether, at any time, there was mold, mildew or rot present inside the home. Neither Kyle, Bailey nor DLC presented any evidence that resolves this issue beyond a

reasonable doubt. The trial court erred in finding that Moore presented no evidence that mildew or mold was present on the interior walls but concealed with paint.

3. Materiality

"Materiality should be judged at the time of the misrepresentation, not at the time of the trial." *Edmiston v. Schellenger*, 343 So.2d 465, 467 (Miss. 1977). Here, the representations made by Kyle, Bailey and DLC were material to the transaction because, had Moore been furnished with the truth, instead of misrepresentations, Moore would not have purchased the house, or at the very least not at the price she paid. R. 606. Moore also submitted her sworn affidavit testimony to this effect.

Further, all of the misrepresentations involve items required under Miss. Code Ann. § 89-1-501, et seq. to be disclosed on the property disclosure statement. Miss. Code Ann. § 89-1-527 specifically identifies facts which are not material as including, but not limited to, such things as the fact that the previous occupant had HIV, or the fact that someone died in the house. Id. It logically follows from a reading of the statute and from the fact that the disclosures are statutorily mandated, that all required disclosures are, as a matter of law, material to the transaction.

4. Knowledge of Falsity or Ignorance of Truth

As discussed earlier in this brief, this circumstantial evidence is sufficient to put into dispute the question of whether Kyle, Bailey and/or DLC knew that the contract, as furnished to Moore, painted a false picture of the property. Fair-minded jurors could have reasonable doubts as to whether Kyle, Bailey and/or DLC knew the representations to be true at the time they were made (if they did not know them to be true, then logically they either knew they were false or were ignorant as to their truth or falsity).

The first misrepresentation listed above is that the home had been completed by Hooker

prior to DLC purchasing it but had not sold in over a year. Kyle knew that this was false. Her testimony and behavior regarding this issue is riddled with contradiction and ambiguity.

First, Kyle testified that she was familiar with the property's condition at the time it belonged to Steve Hooker. R. at 379. She stated that she had personal knowledge that cabinets had been installed in the home but repossessed prior to DLC purchasing the property. *Id.* She testified that "the property was vacant for several months prior to my client purchasing it and was vacant for some time thereafter." R. at 380.

Kyle also testified that she was very familiar with the home and its condition as of February, 2005. She testified that when DLC bought the house in February, 2005, "the house had already been framed, bricks were laid, roof and shingles installed, concrete driveway and patio poured, sheetrock hung, windows installed, doors leading from the exterior to interior installed, walls separated [sic] rooms, some fixtures installed, some flooring laid, and plumbing installed." *Id.* Obviously Kyle was, at the very least, aware that the home was not complete at the time DLC bought it.

Kyle then explained why she changed the age of the property on the disclosure to "9 to 12 months." She testified that "9-12 months" represented the "approximate length of time the house had been framed, bricked, had a roof and shingles, and other structural and cosmetic elements." R. at 381. This contradicts Kyle's earlier testimony that she did not know the approximate length of time the house had been framed, bricked, etc. because all those things were completed when DLC bought the house. R. at 380.

Kyle amended the age on the disclosure statement in late June, 2006. R. at 27. If 9-12 months was an accurate estimate at that time, that would mean the house had been framed, bricked, and had a roof and shingles installed in late June, 2005 to late September, 2005, well after the property was purchased by DLC. (This would not be inconsistent with the Planning

Commission requiring another building permit on the property in March, 2005. Pl. Ex. 135.) Kyle never discussed with Moore why she had changed the age to "9-12 months" or what that age represented. R. at 381.

The fact that Kyle originally listed the property as "new" is further evidence that she was aware that the home had only passed final inspection a few weeks before she filled out the disclosure statement. The fact that she initially marked the roof as "new," however, is inconsistent with her statements that the home had a roof when DLC purchased it. Kyle allegedly "realized her mistake" prior to closing and amended the age of the home to "9-12 months." However, on her Commission Disbursement Form, filled out after closing, Kyle apparently forgot about the 9-12 months again, because she marked in two places that the home was "new construction." R. 220-21.

Kyle's inconsistency and contradiction demonstrates that, at the very least, there is a genuine issue as to whether Kyle knew that the home was not complete when DLC purchased it. Kyle has submitted no evidence to resolve this issue. Kyle's self-serving affidavit cannot be the basis for resolving this issue in her favor.

Bailey was aware that this was false because: (a) Bailey hired Richard Brewer, a builder who was unlicensed at the time, to complete construction of the home (b) Bailey and/or DLC spent $75,837.49 on the construction of the home, not including the purchase price; (c) the DeSoto County Planning Board told Bailey and/or DLC that it would need another building permit to continue construction of the home; and (d) Bailey, acting on behalf of DLC, requested a licensed builder, pull the necessary permits so the home could be completed. Neither DLC nor Bailey has presented any evidence to show that the house was in fact complete when DLC purchased it.

Further, the trial court found that "it is undisputed that the house was purchased

unfinished by DLC and finished to be sold." R. at 589. Moore does not appeal this ruling.

The second misrepresentation listed above is that DLC/Bailey had nothing to do with the construction of the home and merely held it as investment property. The third misrepresentation listed above is that no additions, renovations, or alterations had been made to the home during DLC's ownership. These misrepresentations are so interrelated with the first that the evidence showing knowledge of falsity or ignorance of truth would be the same; thus, Moore does not discuss them again here.

The fourth misrepresentation listed above is that all work on the home had been done by licensed professionals in compliance with the building code and state law.

Bailey knew this was false. The evidence demonstrates that: (a) Bailey knew that neither he nor Brewer held a builder's license; (b) the DeSoto County Planning Commission required DLC and/or Bailey to get a building permit to continue the construction; (c) Bailey asked Witt Long to pull permits needed to complete construction because no member of the construction crew had a builders license; (d) Bailey asked Hale Electric to pull permits needed to complete construction because no member of the construction crew had an electrician's license.

Kyle also knew this was false. The evidence shows that: (a) Kyle knew the home was not complete when DLC bought it and that it had been completed by someone other than Steve Hooker; (b) Kyle knew Bailey wasn't licensed, and she explained that to Moore in reference to why Bailey could not give Moore a builder's warranty; and (c) Kyle had been the listing agent for the home the entire time and had been involved in its completion, including selecting paint colors, etc. Because of Kyle's involvement with the property, she must have known the true identity of the builder, or at least, there is a reasonable doubt that she might have known the identity of the builder.

Kyle initially represented to Moore that the home was built by Bailey. When she

amended this representation, she was careful not to say who the builder was. She did not say Bailey was not the builder. She said that Bailey was not a builder. In addition, earlier argument has established Kyle was lying when she told Moore that the home was built by Hooker and was complete when DLC purchased it. There would be no reason for Kyle to lie to Moore about when the home was built and by whom if Kyle believed the work had been done by a licensed builder.

In addition, Kyle initially represented that the home was new construction, which was closest to the truth. At some point she realized Moore might wonder who had recently completed this "new" home, so she changed the age of the property to cover the fact that the home was built by unlicensed workers and imply that Hooker, a licensed builder, had finished the home. A reasonable juror could infer from all the evidence presented that Kyle knew that the work was not being performed by licensed builders.

The evidence creates a genuine issue of fact as to whether Kyle and/or Bailey knew that the home was completed using unlicensed workers in violation of the building code and state law. Neither Kyle, Bailey nor DLC presented any evidence that resolves this issue beyond a reasonable doubt.

The fifth misrepresentation listed above is that there was not, nor had there ever been, mold, mildew or rot present in the home. Bailey knew that this was false. Moore gave sworn testimony that a short time after she moved into the house, mold began to show through the paint on the walls where someone had painted over to the mold to conceal it. K's Item. at Ex. B, p. 26. Bailey hired three different paint crews to conceal the mold, mildew and water damage on the walls. K's Item. at Ex. F, p. 143.

Kyle testified that when DLC bought the house in February, 2005, "the house had already been framed, bricks were laid, roof and shingles installed, concrete driveway and patio

poured, sheetrock hung, windows installed, doors leading from the exterior to interior installed, walls separated [sic] rooms, some fixtures installed, some flooring laid, and plumbing installed." R. at 380. Kyle was thus very familiar with the house and its condition as of February, 2005. Kyle was aware of the condition of the property at the time DLC purchased it and earlier, when Steve Hooker owned it. R. at 379-80. She would have seen the mold on the walls before the walls were repainted.

The evidence creates a genuine issue of fact as to whether Kyle and/or Bailey were aware of mold, mildew or rot in the home. Neither Kyle, Bailey nor DLC has presented any evidence that resolves this issue beyond a reasonable doubt.

5. Intent That it Should Be Acted Upon By the Person and in the Manner Reasonably Contemplated

There is no dispute that, at all relevant times, Kyle, Bailey and DLC intended for the negotiations with Moore to result in her purchase of the home. The parties referred to themselves and to one another throughout their correspondence and agreements as "buyer," "seller," and "seller's agent."

In addition, "[b]ecause the factor of intent which is necessary to establish fraud requires knowledge of the perpetrator's state of mind, it may not be possible for an opponent to reveal detailed precise facts in support of his claim." *Allen*, 671 So. 2d at 643.

6. Hearer's Ignorance of Falsity

Kyle and Bailey, through their misrepresentations and omissions detailed above, painted a picture for Moore of the home and its history. In their picture, the home had been built in early 2005 by Steve Hooker, a licensed and reputable builder who had come upon financial hard times. Hooker had completed the home, including installing appliances, but had not been able to sell it before filing bankruptcy. The home sat vacant but locked up airtight, waiting for a buyer. DLC purchased the property as an investment but otherwise had nothing to do with it.

This "picture" is comprised of the totality of all the representations that Kyle and Bailey made and all of the facts that they did not did not disclose, all of which added to the total picture although some may not have, on their own, been of much legal significance. Therefore, for purposes of reliance and the like, it does not make much sense to continue to itemize every fact and omission. It was the "big picture," the totality of all the parts, that induced Moore to buy the house and upon which she relied as true. It was based upon this image of the home that Moore agreed to sink her life savings into the home. Unfortunately, the "picture" painted by Kyle and Bailey was just a deception. The truth was that Steve Hooker framed a house and was financially forced to abandon it. It sat, open for four seasons to all the elements Mississippi has to offer, and was just a damp, moldy, rotting, buggy shell when Bailey, on behalf of DLC, snatched it up as an investment property that he could complete cheaply with his own unlicensed crew and sell for top dollar as if it had been completed by Hooker. Bailey and Kyle were aware of the ugly truth, but they stood to profit from it.

Moore presented her sworn affidavit testimony that she did not know the picture of the home painted by Kyle and Bailey was untrue. She also presented sworn testimony that she had no reason to believe otherwise. In fact, Moore did everything she could to make sure she was not being tricked. She hired a home inspector to inspect the home prior to purchase. The record shows that she was diligent in securing or attempting to secure the repair of every concern noted by the home inspector. She had no way of knowing the truth about the house.

There is no Mississippi law under which an untrained buyer will be charged with knowledge of defects which are not obvious to a licensed home inspector in his first encounter with a home. Further, Kyle, Bailey and DLC allege that they were not aware of any defects. It is illogical for Kyle, Bailey or DLC to claim that Moore, after visiting the home only one or two times, was aware of conditions in the home that had supposedly eluded Kyle, Bailey and DLC in

the 16 months that DLC owned, Bailey improved and Kyle marketed that home.

The contract provided various options regarding the right to an inspection. R. at 22. One of these options, which was not marked by any party, provided: "Buyer waives having above property inspected by a professional home inspector against the strong recommendation of REALTOR agent, I have elected not to fully inspect this property by obtaining a home inspection by a qualified home inspector. Therefore I assume all for [sic] liability for any property flaws discovered after the transaction closes that such an inspection would have revealed." *Id.* (emphasis added). Kyle, Bailey and DLC have all presented argument that, because Moore had a home inspection performed, Moore is now responsible for defects in her home that were not revealed by her home inspection. It seems ludicrous to think that by playing it safe and getting a home inspection, Moore subjects herself to more liability under the contract than if she had not gotten an inspection at all.

7. Hearer's Reliance on Truth

Moore presented her sworn affidavit testimony that she relied on the information provided by Bailey, DLC and Kyle. No one but Moore could possibly have knowledge of whether she subjectively relied on those statements as true. Evidence is sufficient to create a question of fact where a plaintiff contends that she relied on misrepresentations to her detriment. *Trosclair v. Mississippi Dept. of Transp.*, 757 So.2d 178 (¶ 13) (Miss.2000).

The trial court erred in finding that Moore presented insufficient evidence that she acted in reliance on any misrepresentation. Moore has presented evidence sufficient to demonstrate that she relied on Kyle, Bailey and DLC's misrepresentations. She has sworn in her affidavit that she relied thereon, and this is enough evidence, and indeed the only possible evidence, that Moore did rely on the misrepresentations. That is, no one but Moore could possibly have knowledge of whether she subjectively relied on those statements as true.

8. Hearer's Right to Rely

With regard to the representations in the disclosure statement, "[e]ach disclosure required...and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of sections 89-1-501 through 89-1-523, 'good faith' means honesty in fact in the conduct of the transaction." Miss. Code Ann. § 89-1-511. This duty of honesty in fact applies to DLC, as the transferor, to Bailey for all acts done on behalf of DLC relating to the disclosure statement, and to Kyle as DLC's listing agent for any actions relating to the disclosure statement.

Moore was furnished an addendum to the contract entitled "Working With a Real Estate Broker." R. at 33. This Addendum states that the Seller's agent owes to the Buyer and Seller "a duty of honesty and fair dealing," and "a duty to disclose all facts known to the Seller's agent materially affecting the value of the property, which are not known to, or readily observable by, the parties to the transaction." *Id.* Moore was thus aware that Kyle had a duty to disclose anything Kyle knew that was not readily observable by Moore and that would materially affect the value of the property.

The current state of Mississippi law regarding liability of agents for misrepresentation holds that:

> "An agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal."
> ...
> [A]n agent who assists in a transaction with a buyer "knowing that the buyer is relying upon the previous misrepresentations by the principal or another agent is liable to the same extent as if he had made the previous misrepresentations."
> ...
> To the extent the agent assists in the deceit there can be liability imposed on the agent.

Lee Hawkins, 724 So. 2d 1116, ¶¶ 10-11 (*quoting* Restatement Of Agency § 348 (2d ed.1958)).

Moore thus had a right to believe that Bailey, Kyle and DLC had made only honest representations in the disclosure statement and had a right to rely on these representations.

9. Consequent and Proximate Injury

Kyle, Bailey and DLC misrepresented the condition of the property to Moore to induce her to purchase the house. It was foreseeable to them that Moore would, in fact, buy the house. Moore thought she was getting a home that was either new or 9-12 months old, in like-new condition, free from defect. She accordingly agreed to a purchase price based on these misrepresentations and took out a mortgage on the property. Further, Kyle, Bailey and DLC were all aware at the time the transaction closed that the contract they furnished Moore painted a false picture of the condition of the house. Their knowledge of the true history and condition of the house made it foreseeable that the value of the house was far less than what Moore had paid. It was also foreseeable that Moore would, at some point, discover the defects that were not readily observable to a home inspector and be faced with the cost of repair. Moore submitted sworn testimony that she had been tricked into entering the contract and did not get the benefit of her bargain.

Moore also submitted sworn testimony that, shortly after she occupied the house, mold began to show through the paint on the walls where someone had painted over the mold to conceal it. She also submitted evidence that insects were present in the home at and before closing.[14] These things are circumstantial evidence, in hindsight, of the home's long exposure to the elements; however, Moore could not be expected to deduct the truth from this evidence. These things are also circumstantial evidence that the home is damaged to an unknown extent as a result of the home being exposed to the elements for so long.

[14] A tenant had rented the house for a period of a few weeks in June, 2006. R. 380. The tenant had at least one extremely messy pet. K's Item. at Ex. E, p. 19. At the time, Moore believed that the fleas and other insects were a result of the tenant's pet(s). She had no reason to suspect that the extermination and cleaning she contracted for would not take care of the pest problem.

Moore submitted expert reports demonstrating that the failure to use licensed, trained contractors and subcontractors, plus the exposure of the home to the elements over such a long period of time, caused serious defects in the home which resulted in its having a value which is substantially less than what Moore paid for her home. She is entitled to rescission of the contract, or, in the alternative, compensatory damages, plus punitive damages, costs, and attorneys fees.

B. NEGLIGENT AND GROSSLY NEGLIGENT MISREPRESENTATION

The elements of negligent misrepresentation and grossly misrepresentation are subsumed by the elements of fraudulent misrepresentation; they are essentially "lesser included offenses" and it is thus not necessary to re-analyze these elements.

CONCLUSION

The trial court erred in granting summary judgment in this case. Accordingly, Moore respectfully requests that the order of the trial court be reversed and the case be remanded for trial.