IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01173

BEAUMONT HOMES, LLC — **APPELLANT**

V.

COLONIAL/JORDAN PROPERTIES, LLC, SMCDC, INC., MARK S. JORDAN, AND DEE DENTON — **APPELLEES**

Consolidated with 2010-CA-00810

BEAUMONT HOMES, LLC — **APPELLANT**

V.

COLONIAL/JORDAN PROPERTIES, LLC, SMCDC, INC., MARK S. JORDAN, AND DEE DENTON — **APPELLEES**

REPLY BRIEF OF APPELLANT

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I. CERTIFICATE OF INTERESTED PERSONS

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

1. Honorable Cynthia L. Brewer - Madison County Chancery Judge;
2. Beaumont Homes, LLC - Plaintiff/Appellant;
3. Colonial/Jordan Properties, LLC - Defendant/Appellee;
4. SMCDC, Inc. - Defendant/Appellee
5. Mark S. Jordan - Defendant/Appellee
6. Dee C. Denton - Defendant/Appellee
7. Ken R. Adcock - counsel for Plaintiff/Appellant;
8. Clyde X. Copeland, III - counsel for Defendants/Appellees; and
9. Matthew W. Vanderloo - counsel for Defendants/Appellees.

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IV. SUMMARY OF THE ARGUMENT

The well established common law in Mississippi is that a property seller has a duty to disclose any and all material facts to a property buyer which adversely affects the property regardless of whether the buyer makes inquiry on the subject. The Mississippi Supreme Court has expanded this common law to specifically include flooding on property as a material fact that necessitates disclosure by the seller. Furthermore, in cases where misrepresentation and fraud have been alleged, the Court has held that omission or concealment of such a material fact is tantamount to an express misrepresentation of the same. Herein, it cannot be disputed that Colonial/Jordan had pre-existing knowledge of flooding prior to the signing of the subject contract and the subsequent closing on the property. Nonetheless, prior to the closing, none of the Appellees disclosed this fact to Beaumont Homes who relied on this concealed misrepresentation to his detriment and suffered damages. Appellees cannot now stand behind its boiler-plate "as is" clause in the sale of the subject lot when it knowingly omitted this material fact that Beaumont relied on. Because there is substantial evidence within the record that Colonial/Jordan was aware of the flooding and purposefully concealed this fact from Beaumont, genuine issues of material fact exist which require reversal of summary judgment.

Furthermore, it is likewise well established that a moratorium prohibiting building on a lot would constitute a cloud on the title of property and materially affect the value and use of the property. In this case, a moratorium was placed on building permits governing the Audubon Woods subdivision, and specifically, Lot 127 (the lot at issue), a month before the contract between Colonial/Jordan and Beaumont was entered into and three months before the closing on the property. Because Colonial/Jordan, through its agent, Mark

Jordan, has asserted that he was unaware of this moratorium prior to the sale, circumstantial evidence is an allowable avenue to prove that he and Colonial/Jordan were aware of and on notice of the moratorium. Three separate people who were present at a November 1, 2005 meeting with Jordan have all testified that Jordan was either aware of the moratorium prior to the meeting or that the moratorium was discussed at some point during the meeting. Jordan has denied that the knew about the moratorium, but agrees that if he had known about it, he had a duty to disclose this material fact to Beaumont Homes. As there are genuine issues of material fact as to notice to Jordan, the granting of summary judgment on this issue must be reversed.

Beaumont Homes submitted proof of its damages in the underlying proceedings and discovery. Because rescission of the contract is unavailable due to the foreclosure of the property, Mississippi case law permits an award for all damages that flow from the proximate cause of the damages, i.e., the breach of contract by Colonial/Jordan, the negligent misrepresentation, and fraud. In this respect, Appellees repeated assertion that Beaumont's remedies be limited to a benefit of the bargain analysis is misplaced and without merit. Beaumont, through its sworn answers to discovery and by deposition testimony of its owner, Michael Oakes, set out the following damages as having resulted from the purchase of Lot 127:

a. Purchase price of the property: $55,000.00

b. Out-of-pocket expenses for site preparation to build a house on the lot:

    1. Appraisal: $250.00

    2. Survey: $200.00

    3. House plans: $925.00

4. Homeowner's dues: $500.00

5. Dirt and preparation dirt for house construction: $7,000.00

c. Interest on loan: $7,500.00 plus amount incurred since April, 2007

d. Lost profits: The house which was to be built on the property was appraised at $300,000.00. Plaintiff's profit in selling this house would have been fifteen percent (15%), or $45,000.00.

The Chancery Court's granting of Appellee's Motion for Attorneys' Fees based upon the sales contract or otherwise was clearly erroneous. Appellees failed to raise the issue of attorneys' fees by counter-claim for the more than three years of litigation before the Chancery Court and instead relied on a post-judgment motion to attempt to recoup fees under the language of the sales contract. Appellees thereby waived any right to seek contractual damages. Further, Rule 59(e) of the *Mississippi Rules of Civil Procedure* deals with the altering and amending of judgment in cases where there is a change in controlling law, newly discovered evidence, or to prevent manifest justice. Attorneys' fees do not fit into any of these three categories and thus the granting of the motion was improper and in error. Furthermore, the plain terms of the contract state that attorneys' fees are only to be awarded "when suit is brought to insure performance of the contract and the breaching party is adjudged at fault." It cannot be disputed that Beaumont fully performed the terms of the contract by purchasing Lot 127 and in no way can be found at fault under this provision. Additionally, Appellees never filed a counter claim for performance under the contract and thereby waived any right to do so. Accordingly, the Chancellor's granting of attorneys' fees to Appellees was clear error and this judgment should be reversed and rendered.

V. ARGUMENT

A. There exists genuine issues of material fact which require reversal and remand as to Defendants' knowledge of flooding on Lot 127, Defendants' knowledge of the moratorium on building permits affecting Lot 127, and Defendants' failure to disclose these facts to the Plaintiff.

1. It is undisputed that Defendants had knowledge of flooding and the defective drainage system on the street and lot at issue and as such, fraudulently misrepresented, concealed, or otherwise negligently failed to disclose this material fact to the Plaintiff.

It is undisputed that the developer, Mark Jordan, and consequently, Colonial/Jordan, was aware that there was flooding in the Audubon Woods subdivision, including Lot 127, in 2003, at the least, two years prior to the sale of Lot 127 to Plaintiff. (R-1776). The flooding of the subject subdivision was the result of an insufficient drainage system installed by the developer, Jordan, and was so bad and the complaints of homeowners so great that the Madison County Board of Supervisors were forced to undergo the additional expense of hiring a hydrologic engineering firm, Aqua Engineering, to conduct a comprehensive study to determine the cause and extent of the flooding and method for repair. *Id.* Jordan has confirmed that he was in receipt of Aqua's report sometime in 2003 and the report confirmed that Jordan's defective drainage system was the cause of the flooding. *Id.* Furthermore, according to testimony from Doug Jones, the Madison County Board of Supervisors met with Jordan on several occasions between 2003 and 2005 to discuss an equitable split of costs between the County and Jordan for repairing the drainage system. (R-1722-23). In fact, two weeks prior to the closing of Lot 127 with the Plaintiff, Jordan met with Doug Jones, Donnie Caughman, and Ed Brunini on November 1, 2005 and discussed Jordan's contribution of up to $25,000.00 with Madison County to make the necessary repairs to prevent the flooding. (R-1675-76).

In Mississippi, it has long since been established that a property seller has a legal duty to disclose any and all material facts to a property buyer which may adversely affect the property. Since the 1800s, the Mississippi Supreme Court has found that when a vendor misrepresents or conceals the issue of flooding on property, then the sale constitutes a fraud and rescission of the contract and/or damages should be awarded regardless of whether the buyer made inquiry on the subject. *Alexander v. Beresford*, 27 Miss. 747 (Miss. 1854); *Estell v. Myers*, 54 Miss. 174 (Miss. 1876); *Reed v. Charping*, 41 So.2d 11 (Miss. 1949); *Cole v. Lovett*, 672 F.Supp. 947 (S.D. Miss. 1987). Defendants' attempts to distinguish these cases on the grounds that Colonial/Jordan did not make any representation about the property are without merit. As this Court is well aware, silence or the omission or concealment of a material fact is sufficient to satisfy the elements required of both negligent misrepresentation and fraud. *Horace Mann Life Ins. Co. v. Nunnaley*, 960 So.2d 455 (Miss. 2007)(citing the elements of negligent misrepresentation); *Rankin v. Brokman*, 502 So.2d 644, 646 (Miss. 1987). Furthermore, a failure to disclose a fact that the seller knows will induce the buyer to act or refrain from acting in a business transaction creates liability for the seller to the same extent as though he had represented the non-existence of said fact. *Holman v. Howard Wilson Chrysler Jeep, Inc.*, 972 So.2d 564 (Miss. 2008)(citing the Restatement 2d of Torts § 551 and 46 ALR 4th 546 for the premise of liability for non-disclosure).

As established *supra*, the Defendants were well aware that there was flooding in the Audubon Woods subdivision and Lot 127 for at least two years prior to the sale of this property that required substantial repairs. Defendants were under a common law legal duty to provide disclosure of the flooding to the Plaintiff prior to the closing of the property. In

fact, Colonial/Jordan's own agent, Dee Denton testified that if she had known about it, she had a duty to disclose. (Ex. 1 Denton Depo, p. 49). However, though Jordan testified that he knew about the flooding problem, he felt he had no responsibility to make any disclosures relating to flooding or drainage to Beaumont Homes even though he knew that it intended to build a home on the lot at issue. (R-1782).

For Beaumont to succeed on a claim of negligent misrepresentation, it must show that there has been: (1) a misrepresentation or omission of a fact; (2) that the misrepresentation or omission is material or significant; (3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities; (4) that the plaintiff reasonably relied upon the misrepresentation or omission; and (5) that the plaintiff suffered damages as a direct and proximate result of such reasonable reliance. *Holland v. Peoples Bank & Trust, Co.*, 3 So.3d 94 (Miss. 2008)(citing the elements for negligent misrepresentation). It cannot be disputed that Beaumont satisfied every single element for this cause of action. Colonial/Jordan and its co-Appellees were well aware of the rampant flooding afflicting Lot 127 and Audubon Woods and omitted, whether negligently or intentionally, this fact in its dealing with Beaumont, and this Court has long since held flooding to be a material fact that not only requires disclosure but is expected from real estate sellers. Because Beaumont was not informed of the flooding, it believed that it was purchasing a lot which no problems which it could build a home on. And as a result of the concealment, omission, and misrepresentation as to the flooding issue, Beaumont suffered substantial damages by way of out-of-pocket expenses in preparing the property for building, losses resulting from the moratorium and the prohibition on building, and resulting foreclosure.

Appellees also point correctly point out the elements of fraud in Mississippi cited by this court in *Levens v. Campbell*, 733 So.2d 671-62 (Miss. 1999).[1] As cited above, an omission or concealment of a material fact can constitute fraud. *Rankin* at 646; *see also Davidson v. Rogers*, 431 So.2d 483, 485 (Miss. 1983). This silence must relate to a material fact or matter known to the party as to which it his legal duty to communicate to the other contracting party. *Mabus v. St James Episcopal Church*, 884 So.2d 747, 762-63 (Miss. 2004). Just as with Beaumont's negligent misrepresentation claim, it cannot be disputed that Colonial/Jordan was well aware of the flooding issue, a fact long held to be material in real estate transactions, and that it made a false representation to Beaumont regarding this issue by concealing it. Beaumont, as a good faith purchaser, had no knowledge of the flooding and relied on Colonial/Jordan's non-disclosure that Lot 127 had no drainage issues and as a result suffered damages as a result. If Beaumont had known the truth, i.e., a defective drainage system in need of substantial repairs, it would not have purchased the lot at issue.

Appellees' reliance on *Natchez Pecan Marketing Ass'n v. Bramlett*, 143 So. 429 (Miss. 1932) to argue that the "as is" clause in the contract absolved them of any breach of contract claim is likewise without merit. In *Natchez Pecan*, the defendant, Natchez Pecan Marketing Association, was allowed the benefit of the contract clause prohibiting reliance on oral representation not contained in the contract because it was unaware that its agent

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[1]In order to prove fraud, one must show: (1) a false representation; (2) its materiality; (3) the speaker's knowledge or ignorance of its truth; (4) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (5) the hearer's ignorance of its falsity; (6) his reliance on the truth; (7) his right to rely thereon; and (8) his consequent and proximate injury.

had ever made any such representations to the buyer. *Id.* at 430. That is simply not the case in the issue before the Court today. In fact, if anything, *Natchez Pecan* stands to bolster the case for Beaumont. Colonial/Jordan was well aware of the flooding prior to entry into contract with Beaumont and knowingly refused to disclose to Beaumont the existence of the flooding.

What Colonial/Jordan and its co-Appellees seek to do now is shield their own negligent misrepresentation and fraud behind the auspices of an "as is" clause in a form contract and forego its common law duty to disclose the issue of flooding that has been established by this Court since the mid-1800s. If the Appellees' position is taken by this Court, real estate vendors could simply refuse to supply any disclosures of known adverse conditions or defects on unimproved land in every sale. This result is not only contrary to existing common law but is also contrary to public policy and good faith dealing in contracts. At the minimum, there exist genuine issues of material fact as to whether Colonial/Jordan had pre-existing knowledge of the flooding and in turn, whether they breached their common law duty to disclose any such material fact to the buyer, Beaumont Homes, which requires reversal and remand on this issue.

2. There is a genuine issue of material fact as to whether Defendant, Mark Jordan, and vicariously his corporations, had knowledge of the moratorium and fraudulently misrepresented, concealed, or otherwise negligently failed to disclose this material fact to the Plaintiff prior to closing.

There exist genuine issues of material fact as to whether Colonial/Jordan or its co-Appellees had knowledge of the moratorium that was placed on the Audubon Woods subdivision and Lot 127 on August 22, 2005, nearly a month before Colonial/Jordan entered into its sales contract with Beaumont. At this meeting, the Board of Supervisors

instructed the Board Attorney, Ed Brunini, to arrange a meeting with Jordan so that they could discuss the flooding problem on the subject property, the Board's issuance of the moratorium, and use of the moratorium as leverage against Jordan to get him to pay half of the cost to repair the drainage. This meeting took place on November 1, 2005 in the Madison County Courthouse and was attended by Brunini, Doug Jones, Donnie Caughman, John Grandberry, and Mark Jordan. Every party, minus Jordan, stated in their deposition testimony that the moratorium would have had to be discussed at this meeting with Jordan because the whole purpose of issuing the moratorium was to put pressure on Jordan to come to the table and contribute to the drainage repair. (emphasis added) (R-1724, 1740, 1742, 1812, 1817). Furthermore, Board Attorney, Brunini, succinctly states that it was "probable or likely that the moratorium was a "known fact" to Jordan at the time of the meeting." (emphasis added) (R-1740-42). Caughman further testified that there was no question that Jordan knew about the moratorium at the meeting. (R-1817).

If a person is put on notice of a matter affecting his interest, he is charged with notice of all further relevant facts which inquiry, if pursued, would have disclosed. *Wicker v. Harvey*, 937 So.2d 983 (Miss. Ct. App. 2006)(citing the current standard for notice). Circumstantial evidence may be used to show that a defendant had notice. *Higginbotham v. Hill Brothers Construction Co.*, 962 So.2d 46 (Miss. 2006)(citing the standard for the application of circumstantial evidence); *Herrington v. Leaf River Products*, 733 So.2d 774, 777 (Miss. 1999).

Every person present at the November 1, 2005 meeting except Jordan has testified that the moratorium had to have been discussed at this meeting as the moratorium was to be used as leverage to attempt to get Jordan to agree to pay for one-half of the cost of

repairing a defective drainage system, or at the minimum, that Jordan was probably aware of the moratorium prior to the meeting. The August 22, 2005 minutes clearly show that this meeting with Jordan was arranged by the Madison County Board of Supervisors through their attorney, Brunini, in order to discuss the moratorium that was placed on the Audubon Woods subdivision and Lot 127. This November 1, 2005 meeting was two weeks before the closing on the property. As such, there is a genuine issue of material fact as whether Jordan was aware of the moratorium prior to this November 1, 2005 meeting and/or whether he was made aware of the moratorium at the November 1, 2005 meeting referenced above. Based upon Jordan's own testimony, he had a duty to disclose if he had notice. This issue of notice is a genuine issue of material fact which renders the granting of summary judgment erroneous, necessitating reversal and remand.

B. Plaintiff established proof of damages throughout the discovery process and in its Response to Defendants' Motion for Summary Judgment.

Appellees' repeated contentions and reliance on *Theobald v. Nosser*, 752 So.2d 1036 (Miss. 1999) that a benefit of the bargain analysis is the sole method of determining damages in this case is contrary to law. In cases such as this, damages may be awarded for all which is proximately caused by the fraud or misrepresentation. *Alexander v. Beresford*, 27 Miss. 747 (Miss. 1854); *Estell v. Myers*, 54 Miss. 174 (Miss. 1876). Furthermore, as stated in *Estell:*

> "The aggrieved party must be compensated, first for those consequences that, according to the ordinary course of things, flow from the injuries; secondly, for those effects so intimately connected with the nature and subject-matter of the contract has fairly to be deemed have in the contemplation of the parties; and, thirdly, damages which may not naturally and necessarily issue from the breach or fraudulent acts, but which,

> by the terms of the agreement or direct notice, were brought without expectation of the parties."

It cannot be disputed that the damages claimed by Beaumont were proximately caused by the misrepresentation and fraudulent acts of the Appellees. And contrary to the assertions of the Appellees, Beaumont has repeatedly provided non-speculative amounts for the damages it incurred as a result of these acts. Beaumont clearly established the purchase price of Lot 127, which had no value as a result of the moratorium, its numerous out-of-pocket expenses for site preparation of Lot 127, and the incurred interest on the loan that it took out to purchase the lot. Beaumont had the lot appraised by a neutral party as to what a house of the planned specifications would sell for ($300,000.00) and then determined the costs of the project to come to a net profit figure of $45,000.00. Should this have proceeded beyond summary judgment, like it should have, then this figure would have been further confirmed by the testimony of Michael Oakes, owner of Beaumont, whose deposition is in the record. As such, Beaumont clearly established proof of damages throughout the underlying proceedings, up until the summary judgment hearing, and any argument that no cause of action exists on this basis has no merit.

C. The Chancellor's Order awarding attorneys' fees to Appellees was improper as the plain language of the contract does not allow fees in the present action.

The chancery court's allowance of attorney's fees to Appellees was clear error. Not once, throughout the entirety of the proceedings, did Appellees raise the issue of contractual attorneys' fees in the form of a counter-claim or otherwise despite the case being before the chancery court for almost four years. In failing to assert their claim pre-judgment, any claim was waived. Appellees waited to file its motion for contractual attorney's fees post

judgment and following a hearing on the matter, the chancery court erroneously found that the motion was appropriate under Rule 59(e) of the *Mississippi Rules of Civil Procedure.*

A motion under Rule 59(e) is one that seeks to alter or amend the judgment. This Mississippi Court of Appeals has limited these motions to cases where there is an "intervening change in controlling law, new evidence previously unavailable, or a need to correct clear error of law or prevent manifest justice." *Journeay v. Berry*, 953 So.2d 1145 (Miss. Ct. App. 2007). Though Appellees couched their motion under Rule 59, it cannot be disputed that a motion for attorneys' fees in no way fits within any of these three categories prescribed by the Court in *Journeay*. If anything, the Appellees waived any claim to attorneys' fees under the provisions of the contract by waiting until after judgment was rendered by the chancellor. As stated, Appellees had four years to present this issue to the court and failed to do so. Accordingly, the chancery court's granting of Appellee's motion for attorneys' fees is clear error violating the established meaning of Rule 59(e) and should be reversed and rendered.

Assuming, *arguendo*, that the awarding of attorneys' fees under Rule 59(e) was somehow procedurally proper, which is denied, the awarding of fees to Appellees was nonetheless improper and clear error. Attorneys' fees are only permitted in cases where there are applicable contractual or statutory provisions or when punitive damages are proper. *Cain v. Cain*, 967 So.2d 654 (Miss. Ct. App. 2007). Furthermore, when such a contractual provision comes into question, it must be interpreted objectively and its terms given their plain meaning. *Id.* Here, the contract between Colonial/Jordan and Beaumont contained a provision which stated:

> (c) If it becomes necessary to insure the performance of this Contract for either party to initiate litigation, then the party adjudged at fault agrees to pay reasonable attorney's fees, court costs, and other expenses incident to such litigation.

The contract specifically requires, by its plain meaning, that the lawsuit must be brought to insure performance of the contract and that there must be an adjudication of fault before attorneys' fees are awarded. It is undisputed that Beaumont tendered the full purchase price of $55,000.00 to Colonial/Jordan in full satisfaction for the transfer of Lot 127, and therefore fully performed under the contract. There was no action by Appellee to insure performance of the contract, and no finding of fault against Appellee. Accordingly, any such award offers based upon the contractual provision is clear error and must be reversed.

V. CONCLUSION

In this case, there are genuine issues of material fact as to the Appellees' knowledge of flooding and the moratorium placed on Lot 127 that preclude the chancery court's granting of summary judgment and require reversal. It is undisputed that Colonial/Jordan and its co-Appellees were aware of the flooding for at least three years prior to the entry into contract for the sale of Lot 127 to Beaumont Homes. Furthermore, the Appellee Jordan can be charged with notice, be it actual or constructive, of the moratorium placed on the Audubon Woods subdivision and Lot 127 by the circumstantial evidence provided in the deposition testimony provided by Doug Jones, Donnie Caughman, and Ed Brunini prior to closing on the property. The Appellees were under a common law duty to disclose both the existence of flooding and the moratorium as both adversely affected the marketability and value of the property and Appellee knowingly failed to inform Beaumont of these materially adverse conditions. The Appellees cannot now stand behind an "as is" clause found in the

contract when they knowingly concealed and omitted disclosure of these material facts from Beaumont. Beaumont Homes has shown that it was damaged and the Chancellor had no basis to award contractual attorneys fees. Beaumont Homes thereby respectfully requests that this Honorable Court enter an Order reversing the Chancery Court's Order Granting Summary Judgment and remand the case back to the Chancery Court for a full trial on the merits. In addition, Appellant requests that this Honorable Court reverse and render the Chancery Court's Order granting contractual attorneys' fees to the Appellees.

Respectfully submitted,

BEAUMONT HOMES, LLC

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CERTIFICATE OF SERVICE

I, KEN R. ADCOCK, do hereby certify that I have this day delivered by United States mail, properly addressed and postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant to:

Honorable Cynthia L. Brewer
Madison County Chancery Judge
Post Office Box 404
Canton, Mississippi 39046

Clyde X. Copeland, III, Esq.
Post Office Box 3380
Ridge land, Mississippi 39158

SO CERTIFIED, this the 25th day of March, 2011.

Bradley A. Applewhite

CERTIFICATE OF FILING

I, KEN R. ADCOCK, do hereby certify that I have the day hand-delivered the original and three copies of the Reply Brief of Appellant and an electronic diskette containing the same on March 16, 2011, addressed to Ms. Kathy Gillis, Clerk of the Mississippi Supreme Court, 450 High Street, Gartin Justice Building, Jackson, Mississippi 39201.

Bradley A. Applewhite