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

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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Appellant alleges that the Appellees knowingly or negligently failed to disclose to the Appellant the long history of rampant flooding on the property to be purchased and the existence of a moratorium against building on the two lots that Appellant purchased. Appellant brought suit alleging the following causes of action: rescission of the sales contract and remedy of the Appellee's breach of contract, negligence, misrepresentation/negligent misrepresentation, fraudulent concealment and breach of fiduciary duties. Appellant seeks damages, including, but not limited to, the purchase price of the property, out of pocket expenses for the developing of the lot before the moratorium was discovered, interest on the Appellant's loan, lost profits, attorney's fees, and any other damages the Court may find necessary.

The first issue addressed in this appeal is whether there is a genuine issue of material fact as to the Appellee's duty to disclose the following material issues which adversely affected the two lots at Deerfield III, purchased by the Appellant prior to the sale: (1) That the two lots were located in a subdivision developed by Appellees which had severe drainage problems and flooded the subject lots during periods of heavy rainfall; and (2) That the Madison County Board of Supervisors had placed a moratorium on building on those two lots. It is undisputed that Appellees were aware that the Appellant was a homebuilder and intended to build homes for sale on these two lots. Though Appellee, Jordan, admitted knowing of the drainage problem with the lots and his development, Appellee contended that the drainage system was previously dedicated to Madison County and as such, was not his problem and that Appellees had no duty to disclose this fact to the Appellant. Although it is undisputed that the Madison County Board of Supervisors issued the moratorium two months before the sale on the two lots for the sole purpose of using the moratorium as leverage to

attempt to get Appellee, Jordan, to pay half the cost of repairing the defective drainage system that he and his companies previously installed, Appellee, Jordan, claimed that he had no knowledge of the moratorium and therefore had no duty to disclose to the Appellant. It is Appellant's position that the Defendant, Jordan, knew about the moratorium and failed to disclose it to the Appellant. It is the Appellant's position that had he known about either adverse condition before the sale, he would not have purchased the two lots.

The second issue before the Court is whether the Chancellor erred in granting the Appellee's post-judgment motion for attorney's fees based upon a clause in the subject sales contract. The sales contract stated under the terms for breach of contract, in pertinent part, as follows:

> "If it becomes necessary to insure the performance of the conditions 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."

It is undisputed that Appellees did not seek attorney's fees or allege fault or a breach of contract on the part of the Appellant in their answers and that Appellees never filed a counter-claim and raised the issue for the first time after the Order Granting Summary Judgment was entered. It is undisputed that Appellant paid for the two lots and performed his part of the sales contract in all respects, so that Appellant was not at fault and could not have breached the sales contract. It is the position of the Appellant that the Court erred in considering this motion filed post-judgment alleging fault and breach of contract against the Appellant for the first time. It is also the position of Appellant that assuming, *arguendo,* Appellee could raise the motion for attorney's fees post-judgment, which is denied, the Judge's finding that a provision for attorney's fees within a breach of contract paragraph when the party bringing the action was undisputedly not at fault was applicable and that an adverse

ruling on a motion of summary judgment is equivalent to a determination of fault of the Appellant on which she based her decision is clearly erroneous.

Appellant requests a reversal of the Order Granting Summary Judgment and remand to the lower court for trial on the merits. Further, Appellant requests a reversal and rendering of the Order granting attorney's fees.

V. STATEMENT OF THE CASE

The Appellant, Beaumont Homes, entered into a contract to purchase two lots, #127 and #130, in the Deerfield III subdivision from the Appellee, Colonial/Jordan Properties, LLC, on September 16, 2005 for the sole purpose of building homes on these pieces of property. (R-1674 through 1675). Appellee, Mark Jordan, is the President and majority shareholder of Colonial/Jordan Properties, LLC. (R-1671). Appellee, SMCDC, Inc., is solely owned by Jordan and is its President and sole stockholder. *Id.* SMCDC, Inc. is also the managing member of Colonial/Jordan Properties, LLC. *Id.* And Appellee, Dee Denton, was acting as the agent for the other Appellees at the time the sales contract was entered into and at the closing. *Id.* The Appellant, through its agent, Michael Oakes, closed on these two properties with the Appellee on November 15, 2005. (R-245, R-1676). Prior to the closing on the lots, it is undisputed that the Appellee the Appellee did not inform the Appellant that the two lots had a long history of severe drainage problems or that the Madison County Board of Supervisors had issued a moratorium prohibiting any building on the two lots purchased. *Id.*

The two lots, #127 and #130, as well as the surrounding lots, had at least a five year history of serious drainage issues going back to the year 2000. (R-284). This flooding has led to a series

of complaints from the residents of Deerfield to the Madison County Board of Supervisors, specifically, the homeowners on Audubon Drive, the street where these two lots are located, that the drainage system originally installed by the Jordan Appellees in 1995 was totally inadequate and needed immediate repair. (R-1672). In response to these complaints, the Madison County Board of Supervisors hired an engineering firm, Aqua Engineering, to do a comprehensive study of the drainage problems on Audubon Drive on August 11, 2003. (R-284, R-1672). Bill Colson, the engineer for Aqua Engineering, testified by deposition that his study concluded that the drainage system designed and installed by the Appellees was wholly inadequate and was causing the flooding and drainage problems on Audubon Drive and the two lots later purchased by the Appellant. *Id.* In response to this study, the Madison County Board of Supervisors obtained an estimate of repair cost based on Colson's recommendations and approached the original developer, Appellee, Mark Jordan, in an effort to split the cost of repairs up to $25,000.00 numerous times between 2003 and 2005.[1] (R-1674, R-1722 through R-1723). After these unsuccessful attempts, the Board of Supervisors sent its county engineer, Rudy Warnock, on July 18, 2005, to the Deerfield III properties in order to inspect the drainage system and formulate a plan of repairs. (R-1673). Any repairs suggested by Warnock at this time were not followed through upon as the Board of Supervisors was still seeking financial assistance from the Appellee, Jordan. *Id.*

On August 25, 2005, the Madison County Board of Supervisors, at the suggestion of Doug Jones, placed a moratorium on any new building permits on the properties on Audubon Drive, including lots #127 and #130. (R-285, R-1673, R-1723). Jones also testified that the purpose of the

[1] Madison County had approved the plat and drainage system pursuant to Colonial's petition in 1995 and subsequently assumed control of the system in regards to the maintenance of it. (R-284)

moratorium to use it as leverage to get Appellee, Jordan, to agree to split the cost of the repairs needed to repair the drainage system with the county. (R-1723). Madison County's attorney, Ed Brunini, agreed that it would be a reasonable assumption that the purpose of the moratorium was to persuade Appellee, Jordan, to contribute to the repair of the drainage system by prohibiting any building on the lots that he owned. (R-1742). County Administrator, Donnie Caughman, testified that probably the primary reason the moratorium was issued was to get Jordan to come to the table and contribute to the repair. (R-1815). This moratorium was recorded in the Board of Supervisors' minutes in the County Administrator's office on August 22, 2005. (R-285, R-1673). As a long time developer and home builder in Madison County, Appellee, Mark Jordan, regularly kept up with the actions of the Madison County Board of Supervisors and was personally acquainted with all of them. (R-1721, R-1744). Following the moratorium, issued on August 25, 2005, the Appellant, with zero notice of the drainage problems or that a moratorium was placed on the two lots prohibiting any building, entered into its contract on September 16, 2005 with the Appellee, and purchased lots #127 and #130 on November 15, 2005. (R-1674 through 1675).

After the moratorium was in place, Brunini arranged a meeting on November 1, 2005 (before the closing on November 15, 2005) between Supervisor Jones, County Administrator Caughman, and Appellee, Jordan, to try to come to a financial agreement for the repair of the drainage system that Jordan installed on the lots in question. (R-1675 through 1676). According to Brunini and Caughman, it was agreed that Jordan would share the costs of repairs on a 50-50 basis and to contribute up to $25,000.00 to repair the drainage system. (R-1675 through R-1676). The County Administrator, Caughman, testified that since the moratorium was passed to put pressure on Jordan to split the cost of the repairs, the moratorium would have had to be discussed in the November 1,

2005 meeting with Jordan, thus providing Jordan with notice of the moratorium. (R-1812, R-1817). Supervisor Jones and County Attorney, Brunini, also testified that the issue of the moratorium would have been brought up at this meeting with Mark Jordan, Appellee. (R-1724, R-1740, R-1742, R-1817). Furthermore, Brunini testified that it was "probable or likely that the moratorium was as known fact" to Jordan at the time of the meeting. (R-1740 through R-1742). Because Appellee, Jordan, regularly kept up with the actions of the Madison County Board, Caughman testified that Jordan knew about the moratorium prior to the November 1, 2005 meeting so that he would have known not to build on the vacant lots or sell them to someone without telling them about the moratorium. (R-1675, R-1817). As such, Appellee, Jordan, knew about the moratorium a minimum of two weeks before the closing and sale on November 15, 2005 of the two lots to the Appellant and did not disclose it. R-1816).

Jordan has denied that the moratorium was discussed at the November 1, 2005 meeting and that he never agreed to partner with the County to financially contribute to the repairs but led the Madison County Board of Supervisors and board attorney to think that he would when in actuality, he was just "going on to get along." (R-1676, R-1785). When Brunini later forwarded a contract for Jordan to sign in January, 2006, he refused to sign it or make any financial contribution for the repairs. (R-1744). Jordan knew that in Mississippi the moratorium would have been a cloud on the title of the two lots he was selling to the homebuilder, Appellant, Beaumont, and admitted that had he known about it, he had a duty to disclose it. (R-1676, R-1772, R-1774). Jordan testified that he had no responsibility to disclose the drainage problem on the lots, contending that it was solely Madison County's duty to disclose the drainage problems to the Appellant since Madison County owned the drainage system and easements. (R-1676, R-1774).

At a November 7, 2005 meeting, the Madison County Board of Supervisors and Doug Jones reported in the Board minutes that Jordan had agreed to the 50-50 contribution up to $25,000.00 to repair the Deerfield III drainage problem. (R-1677).

It was not until December, 2005 that Jordan and his agent, Dee Denton, claimed they received notice of the moratorium when the mother of Oakes (Norma Thiel) called him. (R-1677, R-1780). After receipt of notice, neither Jordan, individually, his corporations, Colonial, LLC or SMCDC, Inc., or his agent, Denton, made any attempt to contact or help the Appellant, Beaumont, in having the moratorium withdrawn or repair or contribute to the repair of the drainage problems because he felt he had no responsibility. (R-1677, R-1782, R-1834 through R-1836). Denton was under the belief at the time that Jordan planned on doing what he could to help Beaumont get the moratorium withdrawn but testified he made no attempt to refund the money or swap the lots that Beaumont purchased for numerous other unencumbered lots in numerous developments in Madison County that Jordan owned. (R-1835).

On January 13, 2006, the board attorney, Ed Brunini, wrote a letter to Jordan requesting an acknowledgment of the agreement to contribute financially with the County on a 50-50 basis up to the agreed to limit of $25,000.00 mentioned above at the November 7, 2005 meeting. (R-1677, R-1744 through R-1745). It was at this point that Jordan let the Board of Supervisors know that he was reneging on his agreement with them and backed out of the deal. (R-1677, R-1727).

Madison County chose not to sue the Appellees to enforce the agreement and authorized County Engineer, Rudy Warnock, on October 23, 2006 to accept bids on behalf of the county for contract to correct the drainage by increasing the flow of water into the lake on Hole #16 at Deerfield Country Club by adding a culvert across the street from Lot #127 and increasing the capacity of the

outflow from the lake. (R-1677, R-1706, R-1725, R-1745). The reason for this was that, according to Jones, the pipes originally installed by Jordan were not large enough and installed at 45° angles thus slowing the water flow. (R-1677). These plans were still contingent upon the Board entering into a memorandum of understanding with Jordan to contribute toward the repairs, despite Jordan's prior reneging on the deal. (R-1706). It was not until November 27, 2006 that this contingency upon Jordan's financial contributions as a condition to begin repairs was lifted. (R-1678). The repairs were completed approximately four months later on March 19, 2007. *Id.* At this time, the moratorium on building permits on all properties affected (including Lot #127 that Beaumont had purchased a year and a half prior) was lifted. *Id.* However, the real estate market had collapsed by this point and the Appellant was unable to sell Lot #127 nor was he financially capable of building a home on it. *Id.* Lot #127 was later foreclosed on by the lender, BankFirst, on February 19, 2008, who then bought it at the foreclosure sale. The moratorium on Lot #130 was lifted in early 2006 because it sat at a higher elevation and had much less exposure to flooding, and as such, is not a part of this litigation.

Appellant, Beaumont Homes, filed suit against the Appellees prior to the lifting of the moratorium on October 2, 2006 for rescission of contract, breach of contract, negligence, misrepresentation/negligent misrepresentation, fraudulent concealment, and breach of fiduciary duties. (R-1). The Chancellor, having overlooked all genuine issues of material fact concerning the duties to disclose referenced above, erroneously granted summary judgment to the Appellees on June 23, 2009. (R-2060). Appellant then filed its Notice of Appeal on the Order of Summary Judgment on July 16, 2009.

On June 29, 2009, the Appellees first filed their Motion for Attorney's Fees after the Chancery Court issued its final Order on June 23, 2009.[2] (SR-1). This was the first time that the Appellee had raised the issue of attorney's fees, and was in fact, a new issue brought by the Appellee's after the fact. (SR-32). Over the Appellant's well-researched motion showing that the court had already divested its jurisdiction, the Chancellor found at a January 4, 2010 hearing that Rule 4(d) of the Mississippi Rules of Appellate Procedure were applicable. (SR-1, SR-67). Furthermore, the Chancellor found that the initiation of a Motion for Summary Judgment was tantamount to an action to ensure performance of a contract, and that losing said Motion was tantamount to a judgment of fault against the Appellant, Beaumont, even when the Chancellor's Order found no fault on behalf of the Appellant. (SR-34). The Chancellor refused to state whether the covered fees were for the entire case or just the Motion for Summary Judgment filed by Colonial/Jordan, LLC. *Id.* The Chancellor erroneously ordered on May 6, 2010 that the Appellee, Colonial/Jordan, be awarded attorney's fees in the amount of $5,000.00 to be assessed against the Appellant, Beaumont Homes. The Appellant filed its Notice of Appeal on these issues on May 17, 2010. (SR-101).

VI. SUMMARY OF THE ARGUMENT

It has been well established in Mississippi since the 1800s that a property seller has a duty to disclose material facts to a property buyer which adversely affects the property. In Alexander v. Beresford, 27 Miss. 747 (Miss. 1854), the Court held that when a property seller fails to disclose or

[2] Because a second notice of appeal was consolidated in with the first, a supplemental volume consisting of the second proceedings is included within the record. This supplemental volume will be hereafter cited as (SR-).

conceals the known material fact of flooding, that the sale can constitute a fraud so as to justify rescission of the contract and/or an award of damages even if the complainant does not make any inquiries on the subject. The Court's position on this has not changed to this day as this Court has most recently that a real estate agent and/or seller should disclose all material adverse conditions affecting the property to a potential purchase prior to closing. Lane v. Oustalet, 873 So.2d 92 (Miss. 2004).

It is also well established that a filing of a Notice of Appeal divests the trial court of any jurisdiction to rule on an award of costs under Rule 56(h) of the Mississippi Rules of Civil Procedure. Wright v. White, 693 So.2d 898 (Miss. 1997); Tandy Electronics, Inc v. Felcher, 554 So.2d 308 (Miss. 1989); and Martin v. State of Mississippi, 732 So.2d 847 (Miss. 1998). These cases all state the filing of a Notice of Appeal divests the trial court of jurisdiction unless a specific statute or Rule of Procedure specifically allows the trial court to do so. One of these is Rule 59 of the Mississippi Rules of Civil Procedure which allows for the amendment or alteration of a judgment when a party files under this Rule when there has been a change in controlling law, newfound evidence, or to prevent manifest justice. Journeay v. Berry, 953 So.2d 1145 (Miss. App. 2007).

It is the position of the Appellant, in the present case, that the Appellees violated its common law duties to disclose material facts by a willful and negligent misrepresentation and fraudulent concealment by failing to disclose material facts of flooding and the existence of a moratorium on the subject lots purchased by the Appellant from the Appellees. The Appellees knew that the properties in question were subject to rampant flooding due to negligent drainage design on the part of the Appellee and knew, or should have known, that a moratorium had been placed on the two properties purchased. The Chancellor disregarded these genuine issues of material fact in her ruling

of summary judgment for the Appellees without issuing any opinion as to what her findings of fact and conclusions of law were, justifying the Judgment rendered.

Furthermore, counsel for the Appellees raised, for the first time, the issue of attorney's fees in a post-trial motion. Appellees did not raise the issue of attorney's fees in its Answers to the Complaint, nor did it file a counter-claim for breach of contract to bring the provision of the contract into effect. Even then, Appellees had nearly three years to properly raise the issue before the trial court's ruling but instead waited until they received a decision in their favor to raise the issue and proceeded to argue that it fit under Rule 59(e) when they could have requested attorney's fees as the prevailing party under Rule 56(h) of the Mississippi Rules of Civil Procedure in one of their three duplicate Motions for Summary Judgment filed before the court. The Chancellor allowed this improper motion to be heard and awarded "contractual" attorney's fees to the Appellant under the breach of contract provision of the sales contract despite undisputed full performance by the Appellant. The Chancellor committed clear error in both the allowance of the motion and then granting of fees on the basis that a granting of summary judgment is tantamount to a finding of fault on a non-breaching party.

As such, it is only proper that summary judgment for the Appellees was improper as genuine issues of material fact exist to be decided upon by the trier of fact and that this Court should reverse and remand this action for trial on the merits. Also, the trial court's ruling on attorney's fees was in violation of precedential case law, the Mississippi Rules of Civil Procedure, and clearly erroneous based upon the facts of the case and should be reversed and rendered.

VII. ARGUMENT

A. The Chancellor's Order granting summary judgment to Appellees was erroneous because there were genuine issues of material fact as to Appellees' failure to disclose material adverse conditions on the lot being sold to Appellant which requires reversal of the Order and remand.

The Appellees, Colonial/Jordan Properties, LLC, SMCDC, Inc., Mark S. Jordan, and Dee C. Denton, all played a part in the misrepresentation and concealment of material adverse conditions in order to sell two lots in the Deerfield III subdivision to the Appellant, Beaumont Homes, LLC. In doing so, they were able to unload two pieces of property that had no current value. Any homebuilder in his right mind would not have purchased the lots with knowledge of the drainage problem and prohibition on building.

1. The Appellees misrepresented, concealed, or were negligent in their failure to disclose flooding problems and a moratorium on the two lots in question which is also tantamount to a breach of contract and breach of fiduciary duty.

(a.) Appellees misrepresented and negligently failed to disclose any flooding and drainage problems.

As set out in the above case summary, it is undisputed that Appellee, Mark Jordan, and his companies, Colonial/Jordan Properties, LLC and SMCDC, Inc., by and through Jordan as sole stockholder and president, knew about the severe flooding and drainage problems that existed on Audubon Woods Drive where Lots #127 and #130 resided at least three (3) years prior to selling the aforementioned lots to the Appellant, Beaumont Homes, LLC. Furthermore, Appellee, Dee Denton, having resided in the Deerfield subdivision on the street next to Audubon Woods for several years, as well as being the agent of Colonial/Jordan Properties, LLC knew or is charged with the knowledge of her principal of the severe drainage and flooding problems that plagued Audubon Woods. None of the Appellees disclosed any of the severe flooding and drainage problems that had been ongoing

for at least five years prior to the sale of the subject lots. As laid out above, the ongoing flooding and drainage problems caused by the inadequate installation by Appellee, Jordan, led to complaint after complaint from the residents of the Deerfield subdivision forcing the Madison County Board of Supervisors to ultimately issue a moratorium against building in order to obtain leverage on Appellee, Jordan, to split the cost of repairing the drainage system with the County after three years of failed negotiations.

Since the 1800s, it has been Mississippi common law that if a vendor knows of a material fact such as flooding which adversely affects the property being sold, and he conceals this fact from the purchaser or misrepresents it to the purchaser, then the sale can be considered a fraud such that rescission of the contract and/or an award of damages for that which was proximately caused by the fraud. Alexander v. Beresford, 27 Miss. 747 (Miss. 1854). This is the case even if the complainant does not make any inquiries on the subject. *Id.*

On point is Estell v. Myers, 54 Miss. 174 (Miss. 1876) where the Mississippi Supreme Court affirmed a judgment against a property seller for his fraudulent misrepresentation of flooding on farm property. The property purchaser had improved the land for his crops, and thus rescission was not an option, but instead the court awarded him an abatement in payment on the purchase price and any and all damages proximately caused by the purchase of the property, which included, depreciation to the property and the cost to remove debris. *Id.* The Court stated that:

> "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 been 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 within expectation of the parties."

In Reed v. Charping, 41 So.2d 11 (Miss. 1949), a land purchaser sued the seller for the fraudulent misrepresentation of acreage. The seller asserted a defense that he could not be liable because the buyer could have found that the property in question was subject to flooding. *Id.* However, the Mississippi Supreme Court rejected this approach and set out that:

"A purchaser has a right to rely upon the representations of a seller as to facts within the latter's knowledge, and the seller cannot escape responsibility by showing that the purchaser upon inquiry might have ascertained that such representations were not true."

Additionally, the Appellant asserts that the Appellee breached its contract with the Appellant by failing to provide clear title and was also negligent in failing to make the proper disclosures which were required as a reasonable and prudent man acting under the same circumstances would have. Donald v. Amoco Production, 735 So.2d 161 (Miss. 1999); Horace Mann v. Nunnaley, 960 So.2d 455 (Miss. 2007). Also, Mississippi has adopted the Restatement 2d of the Law of Torts, § 551: Liability for Non-Disclosure which states that:

> "One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question." 46 ALR 4th 546; Holman v. Howard Wilson Chrysler Jeep, Inc., 972 So.2d 564 (Miss. 2008)

In the present case, the Appellee, Mark Jordan, and through him, his companies, knew of the flooding and drainage issues that on Audubon Woods Drive where Lots #127 and #130 were located for at least three (3) years prior to his sale of the properties to the Appellant. Furthermore, Jordan was aware of expert engineering reports stating that the cause of the issues and how to fix the issues

and was approached by the Madison County Board of Supervisors about correcting the flooding issues well before the sale to the Appellant. However, Jordan failed to disclose any knowledge of flooding and drainage problems to Beaumont Homes. Jordan's own agent, Dee Denton, testified that she was unaware of the flooding and drainage problems despite living in the same subdivision only one street over for the six (6) years prior to the sale of Lots #127 and #130. Denton did know, as an agent, that if she did have knowledge of an adverse condition that she should have and was required to disclose it. However, because Denton was an agent of Appellee, Jordan, and his companies, his knowledge is imputed unto her under the laws of agency and thus she is not only responsible for Jordan's knowledge of the flooding but is also responsible for failing to disclose it. It was not until a month after the November 15, 2005 closing that the Appellant learned of the severe flooding and drainage issues such that a moratorium on building was issued to get Appellee, Jordan, to financially assist the County in repairing the drainage system. If the Appellant had known that there were severe flooding and drainage problems, he would not have purchased the property and would not have suffered any damages.

As such, there is no dispute that Appellees knew about the severe drainage problem and failed to disclose this adverse condition prior to the sale. As such, there is a genuine issue of material fact as to Appellant's cause of actions in regards to the Appellees failure to disclose the severe drainage and flooding problems which precluded the Order Granting Summary Judgment. It is the Appellant's position that the Chancellor clearly erred in overlooking this contested issue and the Order Granting Summary Judgment should be reversed and the case remanded for trial.

(b.) Appellee misrepresented, concealed and otherwise negligently failed to disclose the fact that a moratorium had been placed on the subject lot which prohibited any building on the lot prior to the sale.

Appellant contends that the Appellees misrepresented and failed to disclose the fact that the Madison County Board of Supervisors had placed a moratorium prohibiting building on Audubon Woods Drive, and more specifically, Lots #127 and #130, prior to the Appellant entering into its contract to purchase the subject lots. This moratorium lasted for over a year and half after the purchase of the properties on Lot #127, the subject of this action. Appellee, Mark Jordan, has admitted to knowing about the severe flooding and draining issues on Audubon Woods and in the Deerfield III subdivision and that the Madison County Board of Supervisors had for three (3) years been requesting his financial assistance to contribute on a 50/50 basis, up to $25,000, with the county to repair the inadequate drainage system he installed. Nevertheless, Jordan has denied having any knowledge of the moratorium until December, 2005 when he, or his agent, Dee Denton, received a phone call from Ms. Norma Thiel, the mother of Michael Oakes, the owner of Beaumont Homes and its representative at the closing. The Madison County board attorney, Ed Brunini, has stated that it Jordan it was "probable or likely that the moratorium was a known fact" by Jordan at the time of the November 1, 2005 meeting. (R-1742). Both Doug Jones and Donnie Caughman, who were present at the November 1, 2005 meeting, agreed with Brunini in that it was likely Jordan knew about the moratorium prior to the meeting, and thus prior to the closing. Jordan himself has acknowledged, if he had known, that he should have absolutely disclosed the existence of the moratorium to Oakes and Beaumont prior to the sale because it constituted a cloud on the title. (R-1772). Jones, Brunini and Caughman all testified that the moratorium had to have been discussed with Jordan at the November 1, 2005 meeting, which was two weeks before closing on the subject property.

It has long since been established in Mississippi that a seller should disclose any and all material facts which adversely affect the property to a buyer prior to the closing of the sales transaction Cole v. Lovett, 672 F.S. 947; Holloman v. Howard Chrysler Jeep, Inc., 972 So.2d 564 (Miss. 2008). The Mississippi Supreme Court has also held that a real estate agent and/or seller should disclose any and all material adverse conditions affecting the property to a potential purchaser prior to closing. Lane v. Oustalet, 873 So.2d 92 (Miss. 2004).

The Mississippi courts have also long since determined the basis for when notice may be charged. Notice is charged when:

> "In respect to a matter in which he has a material interest, a person has knowledge of such facts as to excite the attention of a reasonably prudent man and to put him upon guard and thus to incite him to inquiry, he is chargeable with notice, equivalent in law to knowledge, of all those further relevant facts which such inquiry, if pursued with reasonable diligence, would have disclosed." Wicker v. Harvey, 937 So.2d 983, 993 (Miss. Ct. App. 2006) (quoting Crawford v. Brown, 215 Miss. 489, 503, 61 So.2d 344, 350 (1952).

Further, notice may be either actual or constructive. Higginbotham v. Hill Brothers Construction Co., 962 So.2d 46 (Miss. 2006). Circumstantial evidence may be used to find that the defendant had notice if it is of adequate probative value. *Id.* (citing Mississippi Winn-Dixie Supermarkets v. Hughes, 247 Miss. 575, 584, 156 So.2d 734, 736 (1963). This circumstantial evidence must be such that it creates a legitimate inference that places it beyond conjecture. *Id.* (citing Herrington v. Leaf River Forest Prods., 733 So.2d 774, 777 (Miss. 1999). Constructive notice does not require any direct or circumstantial evidence, but is instead the mechanism by which the consequences of notice are imputed upon the defendant without any proof that he or she had actual notice. *Id.* In particular, it may be asserted in situations in which the defendant had an affirmative duty to stay informed of

the conditions associated with the piece of property. *Id.* (*See also* Hughes, 247 Miss. at 584, 156 So.2d at 736).

Jordan testified that he never knew of the moratorium until he received a call from Norma Thiel in December, 2005. Yet from the above facts, it is clear that multiple board members who were present at the November 1, 2005 board meeting believe that Jordan was well aware of the moratorium at the time of the meeting and that the moratorium was discussed at the meeting since the primary purpose of the moratorium was to motivate Jordan to agree to share the cost of repair with the County. Common sense would dictate that the County's prohibition on building was discussed at this meeting specifically called for between Appellee, Jordan, and representatives of the Madison County Board. The deposition testimony of Supervisor Jones, County Administrator Caughman, and Board Attorney, Brunini, create a genuine issue of material fact as to the failure to disclose the moratorium which precludes summary judgment.

The above issues of the Appellees failure to disclose the moratorium and notice thereof represent genuine issues of material fact which precluded the granting of summary judgment. It is the position of the Appellant that the Chancellor erroneously disregarded these issues in her finding of summary judgment for the Appellees and this Order must be reversed and the case remanded for trial.

(c.) Appellees' failure to disclose the existence of flooding and drainage issues and the existence of the moratorium to the Appellant create genuine issues of material fact as to fraud and misrepresentation.

An omission or concealment of a material fact can constitute fraud. Rankin v. Brokman, 502 So.2d 644, 646 (Miss. 1987); Davidson v. Rogers, 431 So.2d 483, 485 (Miss. 1983). And in order to create liability for non-disclosure, "silence must relate to a material fact or matter known to the

party and as to which it his legal duty to communicate to the other contracting party." Mabus v. St. James Episcopal Church, 884 So.2d 747, 762-763 (Miss. 2004).

It is clear from the above stated facts that the Appellee, Mark Jordan, and his companies, were very well aware of the flooding and drainage problems well before the November 15, 2005 closing date with the Appellant. It is also clear that Jordan's real estate agent, Dee Denton, knew that this was a material fact that they had a duty to disclose prior to selling the aforementioned properties. Jordan also had notice of the fact that a moratorium was placed on both properties and testified that such a cloud on title gives rise to an affirmative duty to disclose to the buyer. However, knowing this, and that the Appellant would not purchase the property if it knew of either the severe flooding and drainage issues or the moratorium, Jordan took the affirmative act of concealing these two material facts to ensure the sale of the subject lots which were worthless at the time of sale.

As such, Appellant contends that there exists a genuine issue of material fact as to fraud and misrepresentation in his intentional failure to disclose the facts of either the flooding and drainage defects or the moratorium to Appellant which preclude summary judgment.

B. The court's ruling on the Appellee's untimely and improperly brought motion for attorneys' fees based upon the contractual provision in the sales contract and declaration of fault on the part of the Appellant was clearly erroneous, which requires this ruling to be reversed and remanded.

The Appellees raised for the first time in a post-trial motion, post-entry of the Chancellor's Order for Summary Judgment, that it should be awarded attorney's fees as the prevailing party. Counsel for the appellees never raised such an issue in its Answers and defenses nor as a counter-claim, but instead waited until the Chancellor had entered her Order in their favor. At the January

4, 2010 hearing on these fees, the Chancellor found that she maintained jurisdiction under Rule 4(d) of the Mississippi Rules of Appellate Procedure after hearing the arguments of Appellee's counsel on how its motion was seemingly appropriate under Rule 59(e) of the Mississippi Rules of Civil Procedure.

Rule 4(d) of the Mississippi Rules of Appellate Procedure divests a trial court or jurisdiction upon the filing of a Notice of Appeal. Wright v. White, 693 So.2d 898 (Miss. 1997); Tandy Electronics, Inc. v. Felcher, 554 So.2d 308 (Miss. 1989); and Martin v. State of Mississippi, 732 So.2d 847 (Miss. 1998). These cases are specific in that the filing of the Notice of Appeal divests the jurisdiction of the trial court unless otherwise authorized under a specific statute of Rule of Procedure. Rule 59(e) deals exclusively with the power of the Court to grant new trials either by motion of the parties or on its own initiative or amending judgments in cases where there is an intervening change in controlling law, new evidence previously unavailable, or a need to correct a clear error of law or prevent manifest justice. Journeay v. Berry, 953 So.2d 1145 (Miss. App. 2007). If counsel for the Appellee was concerned about prevailing party status under a motion for summary judgment, it should have requested such relief in its motion under Rule 56(h) or at the least, cited to Rule 56(h) in its Motion for Attorney's Fees.

At the January 4, 2010 hearing, Appellees argued in the hearing that Rule 59(e), a rule which allows the amendment of the judgment of the Chancellor, allows its untimely motion for attorney's fees to be allowed. Appellees do this despite not filing its motion for attorney's fees under this Rule, or any other Rule. It is hardly believable that, under the decision in Journeay and Rule 59(e), that a motion for attorney's fees is necessary to prevent manifest justice or any of the other categories specified in the decision. Because this motion is improper under Rule 59(e) and Appellees' counsel

made no request for attorney's fees under Rule 56, the appeal is not tolled under Rule 4(d) and Capital One Services, Inc. v. J.C. Rawls, 904 So.2d 1010 (Miss. 2004) as cited by the Appellees at the hearing and the Court's ruling on the matter was error.

Furthermore, it is well established that attorney's fees are only recoverable if allowed in contractual or statutory provision or when punitive damages are proper. Cain v. Cain, 967 So.2d 654 (Miss.App. 2007) (citing Jackson Cty. Sch. Bd. v. Osborn, 605, So.2d 731 (Miss. 1992); Miss. Power Co. v. Hanson, 905 So.2d 547 (Miss. 2005)). And when a contract provision has come into question, the contract is to be interpreted objectively and terms given their plain meaning. *Id.*

The sales contract only permits the recovery of attorney's fees, as stated in the pertinent language above, when it becomes necessary for a party to initiate litigation in order to ensure performance of the contract and only against the party adjudged at fault. Here, it is undisputed that the contract was performed in full as the Appellant tendered the contract price of $55,000.00 to the Appellee, Colonial/Jordan Properties, LLC, in full satisfaction of the transfer of Lot #127. Appellant fully performed his side of the contract and cannot be at fault for any breach. As discussed in Cain, when a contract provision comes into question, terms are to be given their plain meaning. It is the clear, plain meaning of the terms that this provision was meant to be enforced against the party who has breached the contract, which in this case is the Appellees, not the Appellant. Because the Appellant, in no way, breached performance of the contract, it is the position of the Appellant that the chancellor erred in using this provision to place fault on the Appellant and award attorney's fees to the Appellee.

Therefore, it is the position of the Appellant that the Appellee's Motion for Attorney's Fees was an improper motion before the court because Appellees never once alleged breach of contract

or claimed attorney's fees until after summary judgment was entered in their favor. Further, it is the position of the Appellant that even if the motion was proper, which is denied, the Chancellor's finding that the losing party to a summary judgment motion is tantamount to a finding of fault is clearly erroneous. As such, the award of attorney's fees must be reversed and rendered.

VIII. CONCLUSION

In the present case, it is undisputed that the Appellees were well aware of the flooding and drainage problems that existed on Audubon Woods Drive and affected Lot #127 subject to this case for at least three (3) years prior to Appellee, Colonial/Jordan Properties, LLC, selling the lots to Appellant, Beaumont Homes, LLC. Appellee, Dee Denton, has testified that these flooding and drainage issues should have been disclosed to the Appellant prior to closing. It is also undisputed that a moratorium prohibiting all building was placed on all undeveloped lots on Audubon Woods Drive as a result of defective drainage system designed and constructed by Appellee, Mark Jordan. Both Jordan and Denton testified that such a moratorium places a cloud on the title of the property and that had they known about the moratorium, they had a duty to disclose prior to selling the property to Appellant. The attorney for the Madison County Board of Supervisors, Ed Brunini, Jr., as well as, Supervisor Doug Jones, and county administrator, Donnie Caughman, have all testified that the moratorium was a "known fact" by Jordan prior to the closing and that the moratorium had to have been discussed at their meeting with Jordan on November 1, 2005, two weeks before the closing on Lot #127. It is clear through over a century of Mississippi court cases that sellers have a duty to disclose the adverse material facts which affect property to a buyer prior to any sale and failing to do so may result in rescission, abatement, or an award of damages. It is undisputed that

the drainage problem was a condition which adversely affected the lot at issue, that Appellees knew about this condition and failed to disclose, and that there was a duty to disclose to Appellant. Jordan cannot escape this duty because he previously conveyed the faulty drainage system to the County. Additionally, there is a genuine issue of material fact as to Appellee's knowledge of the moratorium and failure to disclose which also requires reversal of the order granting summary judgment.

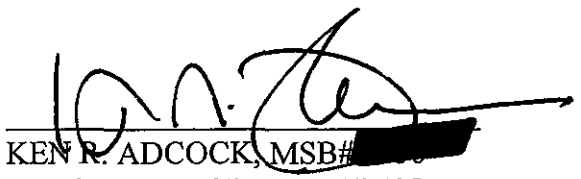
It is also undisputed that the Appellees did not raise the issue of attorney's fees in their Answers or as a counterclaim at any point prior to the trial court's entry of the subject order granting summary judgment and therefore was precluded from bringing this motion post judgment. The Appellees' post-judgment motion requested an award of attorney's fees based upon contractual language in the sales contract which allows attorney's fees when it becomes necessary for a party to initiate litigation in order to ensure performance of the contract against the breaching party who failed to perform. However, it is clear that the contract was performed in full as Appellant tendered payment to Colonial/Jordan and Colonial/Jordan transferred the two lots to Appellant. The Court's finding that the loss of this summary judgment motion is tantamount to a judgment of fault against Appellant is clearly erroneous. Furthermore, the Appellees contended at the January 4, 2010 hearing that amendment or alteration of the judgment is proper as the trial court maintains jurisdiction under Rule 4(d) of the Mississippi Rules of Appellate Procedure. However, Rule 4(d) only applies when there is specific statutory authority or a rule of procedure that allows the court to maintain jurisdiction. Appellee contention that Rule 59(e) of the Mississippi Rules of Civil Procedure allows an amendment of judgment to allow attorney's fees for breach of contract raised first in a post-judgment motion is contrary to Mississippi law. It is the position of the Appellant that the Chancellor erred in allowing post-judgment motion for attorney's fees to be heard under Rule 4(d)

and Rule 59(e) and assuming *arguendo*, that the motion was in fact proper, that the Chancellor was clearly committed error in finding that Appellant was adjudicated at fault for breaching the contract and awarding attorney's fees on that basis.

Appellant requests a reversal of the Order Granting Summary Judgment and remand to the lower court for trial on the merits. Further, Appellant requests a reversal and rendering of the Order granting attorney's fees.

Respectfully submitted,

BEAUMONT HOMES, LLC

BY: 

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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
Ridgeland, Mississippi 39158

SO CERTIFIED, this the 13th day of October, 2010.

Ken R. Adcock

CERTIFICATE OF FILING

I, KEN R. ADCOCK, do hereby certify that I have the day hand-delivered the original and three copies of the Brief of Appellant and an electronic diskette containing the same on October 13, 2010, addressed to Ms. Kathy Gillis, Clerk of the Mississippi Supreme Court, 450 High Street, Gartin Justice Building, Jackson, Mississippi 39201.

KEN R. ADCOCK