IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2010-CA-00446

GRAND LEGACY, LLP and
GRAND LEGACY OF MISSISSIPPI, LP — APPELLANTS

VS.

CHARLES M. GANT, Individually;
STEPHEN L. SHIVERS, SR., Individually;
and GANT & SHIVERS, LLC — APPELLEES

BRIEF OF APPELLEES

Appealed from the Circuit Court of Harrison County, Mississippi
Cause No. A2401-08-117

ORAL ARGUMENT REQUESTED

DONALD C. DORNAN, JR. (MS BAR NO [redacted]
JOHN M. HERKE (MS Bar No [redacted]
Spyridon, Palermo & Dornan, L.L.C.
P.O. Box 154
Biloxi, MS 39533
228-374-2013
228-374-2250 - Fax

TIM C. HOLLEMAN, ESQ. (MS BAR NO [redacted]
Boyce Holleman & Associates
P.O. Drawer 1030
Gulfport, MS 39502

Attorneys for Appellees

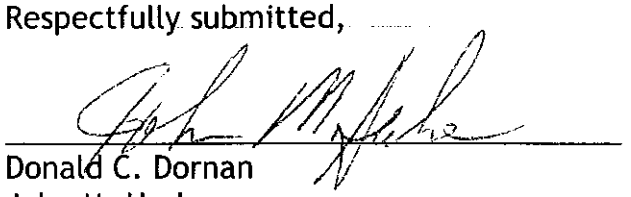
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have any interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. Grand Legacy, LLP, *Appellant*
2. Grand Legacy of Mississippi, L.P., *Appellant*
3. J. Scott Sanders, *Managing Member of Grand Legacy, LLP*
4. Dr. Duane Pankratz, *Member of Grand Legacy, LLP*
5. Charles M. Gant, *Appellee*
6. Stephen Shivers, Sr., *Appellee*
7. Gant & Shivers, LLC, *Appellee*
8. Schwartz, Orgler and Jordan, PLLC, *Defendant in underlying case*
9. Robert Schwartz, Esq. *Defendant in underlying case*
10. Jay Jordan, Esq. *Defendant in underlying case*
11. David C. Dunbar, Esq., *Attorney for Appellant*
12. G. Clark Monroe II, Esq., *Attorney for Appellant*
13. Tim C. Holleman, Esq., *Attorney for Appellees*
14. Donald C. Dornan, Esq., *Attorney for Appellees*
15. John M. Herke, Esq., *Attorney for Appellees*

16. The Honorable Lawrence P. Bourgeois, *Judge, Circuit Court of Harrison County.*

Respectfully submitted,



Donald C. Dornan
John M. Herke
Tim C. Holleman
Counsel for Appellees

Of Counsel:
DONALD C. DORNAN, JR. (MS BAR NO[redacted]
JOHN M. HERKE (MS Bar No[redacted]
Spyridon, Palermo & Dornan, L.L.C.
P.O. Box 154
Biloxi, MS 39533
228-374-2013
228-374-2250 - Fax

TIM C. HOLLEMAN, ESQ. (MS BAR NO[redacted]
Boyce Holleman & Associates
P.O. Drawer 1030
Gulfport, MS 39502

Attorneys for Appellees

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STATEMENT OF THE ISSUES

1. Whether a claim for an alleged oral misrepresentation may be maintained where the claiming party signed but failed to read documents which would have plainly disclosed the alleged misrepresentation therefore the trial court correctly applied long-standing Mississippi precedent in finding that Appellants were legally charged with knowledge that Appellees made a profit from the sale of the Bernard Bayou property when Appellants signed the Acknowledgment Agreement stating exactly such.

2. Whether the trial court correctly refused to consider parol evidence seeking to dispute the clear and unambiguous language of the Agreement for Purchase and Sale and the Acknowledgment Agreement, both of which were signed by Appellants.

3. Whether the trial court correctly granted summary judgment to Stephen Shivers individually in light of the undisputed evidence that Shivers "never made any representations at all regarding the property or the purchase price" to the Appellants.

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition in the court below

On April 15, 2005, Grand Legacy of Mississippi, LP purchased from Gant & Shivers, LLC approximately one hundred four (104) acres of waterfront property on Bernard Bayou near Biloxi, Mississippi (the "Bernard Bayou property").[1] The agreed-upon purchase price for the property was one hundred forty-four thousand two hundred thirty-one dollars ($144,231.00) per acre, or approximately fifteen million dollars ($15 million).[2] Nearly three (3) years later, on April 11, 2008, Grand Legacy, LLP and Grand Legacy of Mississippi, LP (collectively "Appellants")[3] filed a Complaint in Harrison County Circuit Court against Charles M. Gant, Stephen L. Shivers, Sr., and Gant & Shivers, LLC (collectively "Appellees").[4] The Complaint contained numerous allegations including fraud, fraud in the inducement, breach of fiduciary duties, negligent misrepresentation, and gross negligence. The Complaint sought disgorgement of the profit realized by Gant & Shivers, LLC in the sale of the Bernard Bayou property, as well as punitive damages.

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1 See Record at 2185 - 2186; Second Amendment to Agreement for Purchase and Sale.

2 See Record at 2168, Agreement for Purchase and Sale, paragraph 2.

3 Appellees are cognizant of this Court's preference for avoiding the generalized terms "Appellant" and "Appellee" where possible. M.R.A.P. 28(d). In this particular instance, however, it is felt that were actions taken or arguments made apply to all the appealing or responding parties collectively, it will actually promote clarity to refer collectively to the "Appellants" or "Appellees," as appropriate. Where actions taken or arguments made apply only to select individuals or entities, ever effort has been made to make the appropriate distinction.

4 Also named in the Complaint were Robert T. Schwartz, Jay K. Jordan, Schwartz Orgler & Jordan PLLC, and SOJ Properties LLC (the "Attorney Defendants"). Those persons and/or entities settled before the trial court granted summary judgment to the Appellees. Accordingly, all references herein to "Appellees" do not include those persons or entities.

Appellants filed an Amended Complaint on September 19, 2008 which re-stated the initial claims and added others.[5]

Appellees filed a Motion For Summary Judgment on November 16, 2009.[6] Stephen L. Shivers, Sr. also filed a separate Motion For Summary Judgment in his individual capacity on November 16, 2009.[7] Appellants timely filed their responses, and the trial court heard oral argument on both motions on January 20, 2010.[8] On February 19, 2010, Judge Lawrence P. Bourgeois entered an Order granting both the Appellees' Motion For Summary Judgment and the separate Motion For Summary Judgment of Stephen L. Shivers, Sr.[9] By this appeal, Appellants seek to overturn the trial court's Order granting summary judgment.

B. Statement of the facts

As the Court reviews these facts, it is important to note that the essential claims of the Appellants are not supported by a single written document in this case involving a real estate transaction. In fact, there are two written documents signed by the Appellants' agent which were either "skimmed" or not read at all and which totally refute

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5 Record at 37.

6 Record at 168.

7 Record at 264.

8 See Record at 3069.

9 Record at 3069.

Appellants' claims: The Agreement for Purchase and Sale[10] and the Acknowledgment Agreement. [11]

This case involves the purchase and re-sale of approximately 104 acres of water front property on Bernard Bayou in Harrison County, Mississippi ("the subject property"). In October 2004, Charles Gant negotiated with Orange Grove Utilities, LLC, which owned the subject property at the time, to purchase all 104 acres.[12] On October 25, 2004, Gant entered into a Letter of Intent with Orange Grove Utilities (OGU) for the purchase of the subject property.[13] While the final contract of sale was being prepared, Gant was contacted by J. Scott Sanders, the managing partner of Appellant Grand Legacy, LLP, who had expressed an interest in looking at the property.[14] Sanders and his partner, Dr. Duane Pankratz, accompanied Gant, on Gant's boat, to view the property.[15]

Sanders and Pankratz were experienced real estate businessmen who had purchased and developed other properties in Florida and in Mississippi.[16] Both Pankratz and Sanders were excited about the property when they viewed it, and Pankratz asked Gant what price he wanted for the property. Gant replied that he would like to get $15

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10 See Record at 2168-2186.

11 See Record at 2211-2213.

12 See Record at 2138 - 2166; Agreement for Purchase & Sale; see also Record at 1065; Deposition of Charles Gant (page 79:19 to 80:17).

13 Record at 2133 - 2136.

14 See Record at 1089, Deposition of Charles Gant page 174:21 - 175:5.

15 Record at 1094; Deposition of Charles Gant page 195:8-18.

16 See, e.g., Record at 545; Deposition of J. Scott Sanders, page 382 lines 10 to 22; see also Record at 2598; Deposition of Duane Pankratz, page 115:24 - 116:14.

million.[17] Pankratz and Sanders went to the back of Gant's boat and had a discussion, then came back to Gant, and Pankratz shook hands with Gant, agreeing to the deal.[18] Pankratz or Sanders then asked Gant to help them move forward with development of the property, and told Gant he would be paid thirty percent (30%) of the profits from any development or sale.[19] During these negotiations, neither Sanders nor Pankratz ever asked Gant about the price Gant would be paying to Orange Grove Utilities.[20] This was the deal that was made for the property, and that was ultimately incorporated into the written, signed Purchase Agreement between the parties.[21] Furthermore, Gant never represented to Pankratz or Sanders that he (Gant) was either (1) buying the property for $15 million or (2) selling the property at the same price for which he was purchasing it.[22]

A sale contract was drafted and subsequently signed on November 12, 2004.[23] The Agreement for Purchase And Sale has no contingency stating that Gant was not making a profit on the sale, nor does it state that the Appellants were purchasing the property for the same price that Gant was buying it.[24] Anyone, but particularly individuals with substantial real estate experience, reading the Agreement for Purchase And Sale could

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17 See Record at 1094; Deposition of Charles Gant page 193:19- 194:10.

18 Record at 1095; Deposition of Charles Gant page 199:9- 200:10.

19 Record at 1094; Deposition of Charles Gant page 194:14- 195:3.

20 See Record at 1094; Deposition of Charles Gant page 194:3 to 195:3.

21 See Record at 2168 to 2186, Agreement for Purchase and Sale.

22 See, e.g., Record at 1097; Deposition of Charles Gant, page 205:5-15.

23 See Record at 2168 to 2186; Agreement For Purchase And Sale.

24 See Record at 2168 to 2186; Agreement for Purchase and Sale.

readily see that it contained no such statement. The principal owner of Appellant, GRAND LEGACY, LLP, Dr. Duane Pankratz, admitted this under oath.[25] Appellants' own expert also admitted such.[26]

Significantly, the Agreement for Purchase and Sale also contains the following language:

> This Agreement constitutes the entire agreement between the parties hereto and, unless specified otherwise herein, no representation, inducement, promises, or prior agreements, oral or written, between the parties, or made by any agent on behalf of the parties or otherwise, shall be of any force and effect.[27] (emphasis added).

J. Scott Sanders signed the sale contract on behalf of the Appellants.[28]

Over the succeeding six months, the parties extended the sale date for the property several times, and also revised some of the closing documents. Additionally, Sanders and Pankratz submitted various purchase and sale documents to their own attorneys in Florida for review, comment, and revision.

On April 15, 2005, simultaneous closings were performed wherein Gant & Shivers, LLC bought the Bernard Bayou property from Orange Grove Utilities, and then re-sold it to Appellants in the name of a newly formed entity entitled Grand Legacy of Mississippi,

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25 Record at 2604; Deposition of Duane Pankratz, page 139:25 - 140:15.

26 Record at 1919; Deposition of K.F. Boackle, page 141:15 - 142:2.

27 Record at 2168 to 2186, Agreement for Purchase and Sale, at paragraph 18(b) (emphasis added).

28 See Record at 2185-86.

LLP.[29] The entity was officially formed shortly before the sale,[30] due to Sanders and Pankratz requesting Gant and his business partner, Steven Shivers, to assist Sanders and Pankratz with development of the property in the future.[31]

Importantly, Sanders also signed on behalf of the Appellants an "Acknowledgment Agreement" which clearly advised Appellants:

> WHEREAS, Grand Legacy, LLP, General Partner, and Gant & Shivers, LLC, limited Partner of Grand Legacy of Mississippi, LP, acknowledge that . . . the ***difference*** **in the initial Purchase Price** paid by Gant & Shivers, LLC, **and the purchase price paid for by Grand Legacy of Mississippi, LP,** *shall be disbursed to Gant & Shivers, LLC.*[32]

Sanders signed this Acknowledgment Agreement on behalf of the Appellants,[33] but now claims he did not read it.[34]

> Q. Mr. Sanders, if you believe you were paying the same price that Gant & Shivers were paying Orange Grove Utilities when you read and signed that document would that sentence not have raised a flag to you?
>
> MR. DUNBAR: Objection.

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29 See Record at 2211 - 2213 (Acknowledgment Agreement stating that simultaneous closing would occur).

30 See Record at 2088 - 2120; Limited Partnership Agreement of Grand Legacy of Mississippi, LP dated March 23, 2005.

31 See Record at 1094; Deposition of Charles Gant, page 193:22 - 195:3.

32 See Record at 2211 - 2213; Acknowledgment Agreement, at page 2.

33 See Record at 2213; Acknowledgment Agreement, at page 3.

34 See id.; see also Record at 500; Deposition of J. Scott Sanders, page 211:14 - 24.

A. I did not read the document at closing. The document was handed to me in a stack of other documents and I did not read this document.[35]

Q. If you had wanted to or chosen to you could have read all the documents in that closing package, couldn't you?

A. Which closing package?

Q. The stack of documents that you referred to that you signed on April 15, 2005?

A. I could have.

Q. There is no doubt is there that Jay Jordan would have given you all the time you needed to review those documents?

A. That's correct.[36]

Q. But if you had read this document on April 15th you would have seen a reference to a difference in the purchase price paid by Gant & Shivers and the purchase price paid by Grand Legacy of Mississippi, wouldn't you?

A. I would have.[37]

Dr. Pankratz also admitted that anyone reading the Acknowledgment Agreement would know there was a difference in the purchase prices.[38] Appellants' own expert likewise admitted such.[39]

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35 See Record at 500; Deposition of J. Scott Sanders, page 211:14-24.

36 See Record at 551; Deposition of J. Scott Sanders, page 404:19 - 405:6.

37 See Record at 552; Deposition of J. Scott Sanders, page 409:25 - 410:6.

38 See Record at 2609; Deposition of Duane Pankratz, page 159:9 -17.

39 See Record at 1921; Deposition of K.F. Boackle, page 148:1-12.

Despite the parties having met and conferred multiple times over several months (during which time the parties exchanged and revised the draft purchase and sale agreement on at least two occasions), and despite Sanders having signed both the "Agreement for Purchase and Sale" (which states that no verbal "side agreements" were made), and the "Acknowledgment Agreement" (which specifically sets out the fact that there was a difference in the purchase prices), Appellants amazingly claim that they had no knowledge there was a difference in the purchase price paid by Gant & Shivers, LLC for the property and the price for which they were sold the property.[40]

In other words, Appellants now claim that the deal was to make no profit on the transaction. There was to be no "difference in the initial Purchase Price paid by Gant & Shivers, LLC, and the purchase price paid for by Grand Legacy of Mississippi, LP" and nothing was to be "disbursed to Gant & Shivers, LLC". The signed Acknowledgment Agreement, however, specifically negates this claim.[41]

Appellees submit that the Appellants' claims were simply not supportable under clear Mississippi law where the Appellants had signed documents which, if read, show the exact opposite of what Appellants now claim. Davis v. Paepke, 3 So.3d 131 (Miss. App. 2009). Accordingly, the trial court correctly granted summary judgment, and it should be affirmed.

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40 See Record at 46 - 47; First Amended Complaint, paragraph 46.

41 See Record at 2211 - 2213; Acknowledgment Agreement.

SUMMARY OF THE ARGUMENT

Stripped of the smoke and mirrors suffusing their brief to this Court, Appellants make only two essential arguments: First, Appellants contend that Charles Gant verbally told Scott Sanders he would sell the Bayou Bernard property to Appellants for the **same price** for which he bought it from Orange Grove Utilities and/or that Gant was not going to make a **profit** on the sale (i.e. there was no "difference in the initial Purchase Price paid by Gant & Shivers, LLC, and the purchase price paid for by Grand Legacy of Mississippi, LP"). Second, Appellants claim that Gant, Shivers and/or Gant & Shivers, LLC failed to disclose to Appellants the fact that they did make a profit on the sale of the Bernard Bayou property. Both arguments are plainly refuted by documentary evidence in the record signed by the Appellants' representative, and the trial court correctly found that the undisputed material facts demanded that summary judgment be granted in favor of these Appellees. Specifically, three undisputed material facts cannot be ignored, and this Court should find (as did the trial court) that these undisputed material facts are dispositive of this appeal. See, e. g., Davis v. Paepke, 3 So.3d 131 (Miss. App. 2009).

First, at the closing for the property in question, Appellants undisputedly signed an "Acknowledgment Agreement" that specifically disclosed that there was a "difference in the initial Purchase Price paid by" Appellee, Gant & Shivers, LLC, and "the purchase price paid for by" Appellant, Grand Legacy of Mississippi, LP" and that difference was to be disbursed to Appellee, Gant & Shivers, LLC. Thus, Appellants' argument that they "did not know" there was to be a difference in the purchase prices is irrelevant because, under a long line of clear and consistent Mississippi law, Appellants should have known,

and were legally charged with knowledge of, the contents of the Acknowledgment Agreement that Sanders signed but did not read. See Davis v. Paepke, 3 So.3d 131 (Miss. App. 2009).

Second, it is undisputed that Charles Gant disclosed to Scott Sanders from the outset that he personally had an option to buy the Bernard Bayou property from Orange Grove Utilities ("OGU"). Nevertheless, Appellants ask the Court to conclude that just because the parties discussed the possible formation of a limited partnership to develop the property in the future, Gant was somehow obligated to "donate" the deal he had already negotiated with OGU to a "to be formed" partnership that might never come into being. Naturally, Appellants do not cite the Court to any case law in support of such a far-fetched notion. Instead, Appellants contend that a plethora of fiduciary duties arose between and among the parties long before any partnership ever existed. This argument is fashioned from whole cloth and illustrates the lengths to which Appellants ask this Court to stretch in seeking to overturn the trial court's proper grant of summary judgment.

Moreover, even assuming a partnership had come into being during the parties' negotiations, nothing in the law of partnerships precludes a partner from making a profit in dealing with the partnership. Appellants clearly and unabashedly misstate the law in claiming otherwise. Additionally, the Acknowledgment Agreement unequivocally disclosed that there was a "difference in the initial Purchase Price paid by Gant & Shivers, LLC, and the purchase price paid for by Grand Legacy of Mississippi, LP" and that "difference" was being "disbursed to Gant & Shivers, LLC". It could not have been clearer

and no written contract would ever be safe if the Appellants' position were sustained. Finally, even assuming the existence of a partnership, the Statute of Frauds still bars any alleged agreements not contained in the written agreement between the parties when transferring real property to or between partners.

Third, it is undisputed that Appellants paid a fair price for the property in question. When Sanders was specifically asked whether the price Appellants actually paid for the property was a fair one, he testified -- under oath -- that it was.[42] Accordingly, Appellants can hardly complain that they were taken advantage of when they agree that they paid a fair price for the Bernard Bayou property. Therefore, the Appellees submit that the Appellants cannot meet their burden of proof for overturning the trial court's grant of summary judgment, and the trial court should be affirmed.

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42 See Record at 549; Deposition of J. Scott Sanders at p. 397 line 18 to p. 398 line 7. Notably, the appraisal obtained for sale of the Bernard Bayou property from Gant to Grand Legacy of Mississippi, LP established an appraisal price for the property of $17.3 million - over $2 million more than the sale price. See Record at 2727.

ARGUMENT

1. Whether a claim for an alleged oral misrepresentation may be maintained where the claiming party signed but failed to read documents which plainly disclosed the alleged fact claimed to be misrepresented therefore the trial court correctly applied long-standing Mississippi precedent in finding that Appellants were legally charged with knowledge that Appellees made a profit from the sale of the Bernard Bayou property when Appellants signed the Acknowledgment Agreement stating exactly such.

   A. Mississippi law charges Appellants with knowledge of the contents of the Acknowledgment Agreement

Appellants first claim that they did not know the Appellees would be making a profit from the sale of the Bernard Bayou property.[43] However, at the closing for the sale of the Bernard Bayou property from Gant & Shivers, LLC to the Appellants, J. Scott Sanders (the managing partner for Appellant Grand Legacy, LLP[44]) signed an Acknowledgment Agreement which stated, in pertinent part:

> WHEREAS, Grand Legacy, LLP, General Partner, and Gant & Shivers, LLC, limited Partner of Grand Legacy of Mississippi, LP, acknowledge that . . . the ***difference*** **in the initial Purchase Price** paid by Gant & Shivers, LLC, **and the purchase price paid for by Grand Legacy of Mississippi, LP,** *shall be disbursed to Gant & Shivers, LLC.*[45]

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43 See Appellants' brief at 7 (stating that "Sanders testified that he **did not know** about the profit and believed that none was made") (emphasis added).

44 Also of note is the fact that Grand Legacy, LLP is the general partner of Appellant Grand Legacy of Mississippi, LP. Thus, when Sanders signed the Acknowledgment Agreement, he did so on behalf of both Appellants.

45 See Record at 2211 - 2213; Acknowledgment Agreement, at page 2.

Sanders signed the Acknowledgment Agreement on behalf of the Appellants,[46] but admittedly did not read it.[47] Sanders admitted if he had read the Acknowledgment Agreement he would have seen there was a difference in the purchase prices. Dr. Pankratz also admitted that anyone reading the Acknowledgment Agreement would know there was a difference in the purchase prices.[48] Appellants own expert likewise admitted such.[49]

Faced with the preclusive effect of the Acknowledgment Agreement signed by Sanders, Appellants attempt to flip the Agreement on its head and make the preposterous claim that "[t]he existence of the Acknowledgment Agreement is proof of fraudulent concealment by the Appellees."[50] It would be novel indeed for purported defrauders to go to all the trouble of preparing an entirely separate document detailing what they intended to "hide" from their supposed victim, and then present it to him and have him sign it, on the chance the "victim" would not take the time to read it and see what it said. What is undisputed here, however, is that Appellants were, in fact, provided the Acknowledgment Agreement, given time to read it, and would have seen the reference to a difference in the sales prices had they simply taken the time and effort to read the agreement before signing:

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46 See Record at 2213; Acknowledgment Agreement, at page 3.

47 See Record at 500; Deposition of J. Scott Sanders, page 211 lines 14 to 24.

48 See Record at 2609; Deposition of Duane Pankratz, page 159:9-17.

49 See Record at 1921; Deposition of K.F. Boackle page 148:1-12.

50 Appellants' brief at 25.

Q. Mr. Sanders, if you believe you were paying the same price that Gant & Shivers were paying Orange Grove Utilities when you read and signed that document would that sentence not have raised a flag to you?

A. I did not read the document at closing. The document was handed to me in a stack of other documents and I did not read this document.[51]

. . .

Q. If you had wanted to or chosen to you could have read all the documents in that closing package, couldn't you?

A. Which closing package?

Q. The stack of documents that you referred to that you signed on April 15, 2005?

A. I could have.

Q. There is no doubt is there that [attorney] Jay Jordan would have given you all the time you needed to review those documents?

A. That's correct.[52]

. . .

Q. But if you had read this document on April 15th you would have seen a reference to a difference in the purchase price paid by Gant & Shivers and the purchase price paid by Grand Legacy of Mississippi, wouldn't you?

A. I would have.[53]

Under long-standing Mississippi law, Sanders is presumed to have read and understood each of the documents that he signed, and Appellants cannot now be heard to complain

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51 Record at 500; Deposition of J. Scott Sanders, at page 211:14 - 24.

52 Record at 551; Deposition of J. Scott Sanders, at page 404:19 - 405:6.

53 Record at 552; Deposition of J. Scott Sanders, at page 409:25 - 410:6.

that they did not know the contents of the documents. Johnston v. Palmer, 963 So.2d 586, 596 (Miss. App. 2007); Davis v. Paepke, 3 So.3d 131, 139 (Miss. App. 2009).

Consequently, the trial court properly applied this Court's recent decision in Davis v. Paepke, 3 So.3d 131 (Miss. App. 2009) to the Appellants' claim. In Paepke, the plaintiff filed suit seeking his share of the profit from a real estate transaction. Paepke had an option to purchase real property in Chickasaw County, but lacked the finances to buy the property outright. See id. at 133. He struck a deal with the defendant, Davis, by which Davis would buy the property and split the profit when the land was re-sold. See id. Davis subsequently sold the land himself, but refused to split the profits with Paepke, claiming the deal was contingent on Paepke finding a buyer. Id. at 134. When Paepke filed suit for his share of the profits, Davis filed a counterclaim alleging that Paepke fraudulently induced him to buy the property in the first place by falsely telling Davis he had a buyer already in place. See id. at 138. Similar to what Sanders and Pankratz allege in the present case, Davis contended that he "would not have purchased the property had he known that Paepke did not have a secured buyer in place to purchase the land."[54] Id.

The Court of Appeals noted that the written Paepke-Davis agreement contained no indication that a secured buyer was in place. See id. at 139. Notably, the Paepke court found that:

> [i]f it was truly Davis's understanding that a secured buyer was in place, Davis could have seen from a plain reading of

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54 Similarly, Plaintiffs contend they "would not have purchased the subject property" if the purchase prices were not identical. See Record at 50 - 51, First Amended Complaint, page 14, paragraph 64.

> the contract that the terms of the document he signed contradict this understanding."

Id. at 139. As the trial court in this case correctly found, the same analysis applies here. If Sanders truly believed that the purchase price Gant was to receive would be the same as the price Gant paid to acquire the property, Sanders "could have seen from a plain reading of the [Acknowledgment Agreement] that the terms of the document he signed contradict this understanding." Moreover, just as the Court of Appeals found in Paepke, the trial court in this case rightly noted that "given Sanders's extensive experience in buying and selling real estate, if Sanders was relying on Gant's oral representations in his decision to enter into a $15 million contract, it seems as though Sanders would have made sure that the contract contained a provision referencing such."[55]

Further, in finding Davis's fraudulent inducement claim to be without merit, the Court of Appeals specifically held that "it is well established that 'a person is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract.'" Id. Importantly, the holding in Paepke is in line with both cases from other jurisdictions and with hornbook law on the subject. In particular, the treatise AMERICAN JURISPRUDENCE states that:

> **Fraudulent inducement is not available as a defense** when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation. See also Starr ex rel. Estate of Sampson v. Georgeson Shareholder, Inc., 412 F.3d 103 (2nd Cir. 2005); Exxon-Mobil v. Ford, 187 S.W.3d 154

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55 See Record at 3073; Trial Court Judgment; see also Paepke, 3 So.3d at 139.

(Ct. App. Tex. 2006); King Ind., Inc. v. Worlco Data Systems, Inc., 736 F.Supp. 114 (E.D. Va. 1989).

17A AM. JUR. 2D CONTRACTS § 214 (emphasis added).

Thus, Appellants cannot escape the preclusive effect of either the Agreement for Purchase and Sale which Sanders claims he merely "skimmed," which does not contain any provision that Gant was not making a "profit" or that there was no "***difference* in the initial Purchase Price** paid by Gant & Shivers, LLC, and the **purchase price paid for by Grand Legacy of Mississippi, LP**". And more importantly, the Acknowledgment Agreement Sanders signed but did not read contains a very clear provision that there was a "***difference* in the initial Purchase Price** paid by Gant & Shivers, LLC, and **the purchase price paid for by Grand Legacy of Mississippi, LP**" and the "**difference was being "disbursed to Gant & Shivers, LLC**". Indeed, "'[t]o permit a party . . . to admit that he signed [a contract or other document] but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations **would absolutely destroy the value of all contracts.**'" Johnston, 963 So.2d at 596 (quoting Alliance Trust Co. v. Armstrong, 186 So. 633, 635 (1939)) (emphasis added); see also Busching v. Griffin, 542 So.2d 860, 865 (Miss.1989). This is exactly what the Appellants seek here. Allowing Appellants' claims, however, would completely destroy the purpose of putting agreements in writing. Accordingly, the trial court's summary judgment should be affirmed.

B. Appellants' "fiduciary duty" argument does not save them

Perhaps realizing the absurdity of claiming the Appellees "actively concealed" their profit by giving Appellants a specific document acknowledging that profit,

Appellants ask this Court to conclude that just because the parties discussed the possibility of forming a limited partnership, a plethora of fiduciary duties arose long before any partnership came into existence. This argument is likewise meritless. The Court will note that, at no point in their lengthy construction of how this supposed "partnership" came into being do Appellants ever actually point the Court to who the supposed "partners" were at any given time. The reason is simple. To do so would expose the flaw in their argument: at any given time between November 2004 and April 2005, the purported "partners" in the "partnership" would have been in flux, even by Appellants' account. And, without a definite set of partners, there can be no "partnership." Thus, Appellants' claim that a general partnership was formed at common law[56] holds even less water than their claim that Appellants did not know there was a difference in the purchase price despite documents signed by them specifically stating the opposite.

Appellants claim that a supposed partnership "formed" when Gant shook hands with Sanders on Gant's boat and "continued until the filing of the Certificate of Limited partnership."[57] However, the common law rule directly refutes Appellants' argument. It is axiomatic that at common law "the addition of a partner to, or the removal of a partner from, a partnership dissolves the partnership that existed prior to the addition or removal." In re Taylor & Associates, L.P., 249 B.R. 448 (E.D.Tenn. 1998); see also Weeks v. McMillan, 353 S.E.2d 289 (S.C.App. 1987); 60 AM.JUR.2D Partnership Sections 177

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56 See Appellants' brief at 14.

57 Appellants' brief at 14.

and 178 (1972); 68 C.J.S. Partnership Section 347 (1950). In the case at bar, Appellants' own brief describes no fewer than four (4) supposed "partnerships" they contend were formed between "the Fall of 2004" and the April 15, 2005 real estate closing. Each time the supposed "partners" changed, however, the previous "partnership" - if it ever existed - was dissolved. See id.

Appellants would have the Court believe that a partnership was formed on Gant's boat after reaching an agreement on the purchase of the property when Pankratz first offered Gant thirty percent (30%) of any profits from development of the property. If this were true, who would have been the partners? Clearly, neither Stephen Shivers nor Gant & Shivers, LLC were a "partner," because Appellants freely admit that the initial "Purchase and Sale Agreement" showed only Gant as seller of the property.[58] And, if Appellants are claiming the "partnership" was between Gant and Grand Legacy, LLP, that argument is directly refuted in their own brief to this Court:

> The November 12th Agreement identified the 'purchaser' as 'a Limited Partnership to be formed between Grand Legacy Limited Partnership [sic] and Charles M. Gant. Grand Legacy, LLP was not a party to the Agreement.[59]

If Grand Legacy, LLP was not a party to the agreement, then it, too, could not have been a partner in Appellants' fanciful "partnership by implication." Perhaps the "partnership" was between Gant and Sanders? Again, no - according to Appellants, "Sanders signed

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58 See Appellants' brief at 31 (stating that the Agreement was between "'Charles Gant (the 'Seller') and Grand Legacy Limited Partnership [sic] (the 'Purchaser')"); see also Record at 88 (signature of Charles Gant individually as "seller").

59 Appellants' brief at 31. Interestingly, if Grand Legacy was not a party to the Agreement For Purchase And Sale, it also has no standing to bring an action claiming to have been fraudulently induced to enter into the agreement.

[the Agreement for Purchase and Sale] . . . on behalf of the to-be-formed limited partnership," not on behalf of Sanders individually.[60] And what is to be done with the "Attorney Defendants"? Indisputably, no one from Schwartz, Orgler & Jordan was aboard Gant's boat when the alleged "partnership" is supposed to have been formed. Yet, Appellants claim that Schwartz, Orgler & Jordan "participated in the closing as both the closing attorneys and partners in the venture."[61] If all these people and/or entities "ultimately"[62] agreed to form a limited partnership, then no partnership was formed on Gant's boat. In fact, Appellants themselves allude to this fact when they state that, even after the Agreement for Purchase and Sale was drafted and signed, "the business relationship had yet to be completed and was still in formative stages."[63] Quite simply, if there was no completed business relationship, there was no partnership.

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60 See Appellants' brief at 31. Appellants also contend in the same sentence that Sanders did not sign the Agreement For Purchase And Sale on behalf of Grand Legacy, LP. See id. However, Sanders is the managing partner of Grand Legacy, LP, which in turn was to be the general partner of the "to be formed partnership" on whose behalf Sanders undisputedly signed. Here again, then, Appellants' argument is nothing but a shell game in which they attempt to hide or avoid the fact that they signed multiple documents acknowledging that they knew exactly how the entire transaction at issue was being implemented.

61 Appellants' brief at 5 (emphasis in original).

62 See Appellants' brief at 4 (stating that "[u]ltimately, the parties agreed that Gant and Grand Legacy would be partners in GLMS"). Of course, even if that statement were true, any such "partnership" that might have been formed on Gant's boat (which is denied) was dissolved upon addition of either Schwartz, Orgler & Jordan, or Gant & Shivers, LLC as new "partners." See, e.g., 60 AM.JUR.2D Partnership Sections 177 and 178 (1972); 68 C.J.S. Partnership Section 347 (1950).

63 Appellants' brief at 29.

1. There Is No Such Entity As A "Partnership In Its Formative Stages"

To attempt a solution to this glaring flaw in their "partnership" argument, Appellants repeatedly contend there was a "partnership in its formative stages,"[64] and that such an incomplete, tentative arrangement "carr[ies] with it all the attendant duties that parties agreeing to go into business together owe to one another."[65] Crucially, Appellants do not point the Court to a single statute or case which imposes upon tentative, or "intending" partners the duties of actual partners. Even the briefest of glances at the Mississippi Uniform Partnership Act, for example, shows that all of those statutes speak in terms of the duties of actual partners, not "partners in their formative stages."[66] If it were otherwise, many a person who shook hands and agreed to see whether a profitable venture could be confected would unknowingly find himself a "partner" whether he meant to be or not. The simple, undeniable fact is that Appellants' complex, carefully crafted argument is really no more than a house of cards. There was no partnership formed on board Gant's boat.

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64 See, e.g. Appellants' brief at 13.

65 See id.

66 See, e.g., Miss. Code Ann. § 79-13-404:

> (a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).
>
> (b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:
>
> Id. (emphasis added).

2. *Davis v. Paepke* directly refutes Appellants' "fiduciary duties" argument.

Appellants then attempt to excuse their failure to read the Acknowledgment Agreement by claiming, after the fact, that they relied on the fiduciary duties of actual partners to protect their "expectations" as to "prospective partners." The Court of Appeals plainly rejected this exact argument in Davis v. Paepke. Paepke's "duties" as a partner to Davis were no less than those claimed to be present here. Further, in Paepke there was a written, signed partnership agreement. See Paepke, Id. at ¶ 14. Yet, against the undisputed "partnership" backdrop found in Paepke, the Mississippi Court of Appeals nevertheless invoked the well-established rule that a person is under a duty to read and understand documents that he signs. In doing so, the Court of Appeals flatly rejected Davis's "fraud in the inducement" claim, holding that Davis's purported "expectations" of his partner could have been confirmed or refuted by simply reading the contract before signing it. See id. at 139. The same must be said for Appellants in this case.

No doubt realizing the fatal wound inflicted by the Paepke case, Appellants vainly attempt to distinguish it from the case now before the Court. Yet, Appellants misperceive the full import of the holding in Paepke by attempting to characterize it as "factually dissimilar." Paepke, however, dealt with the question of one partner claiming he was defrauded by another partner's alleged oral statements, which statements were directly contradicted by a written, signed document. In this regard, Paepke is not "distinguishable;" it is directly on point.

Still not satisfied, Appellants claim that the Appellees' "theory ignores the fiduciary obligations that existed between the Appellees and their partner, Grand Legacy."[67] For this claim to be true, though, it would also have to be true that the Mississippi Court of Appeals ignored any fiduciary duties that arose out of the partnership between Davis and Paepke. But, in fact, the very first sentence of Paepke states that

> Plaintiff, a purported partner in real estate purchase and sale arrangement, brought action against defendant partner, alleging breach of contract, unjust enrichment, and imposition of a constructive trust after defendant partner sold land without splitting profits with plaintiff partner.

Paepke, 3 So.3d at 131 (emphasis added). And, just as the Appellants do here, the "defendant partner" in Paepke claimed that he was fraudulently induced to enter into the contract in the first place by Paepke's oral statements that Paepke already had a buyer in place. See id.[68] The appellate court, in summarily disposing of the fraudulent inducement claim, stated quite plainly that

> If it was truly Davis's understanding that a secured buyer was in place, **Davis could have seen from a plain reading of the contract that the terms of the document he signed contradict this understanding**. Further, as the trial court

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67 Appellants' brief at 26.

68 Whether intentionally or not, Appellants clearly mis-state the court's holding in Paepke when they claim that "the jury believed that the alleged fraudulent statements by Paepke were opinions ('the Mossy Oak People [sic] are paying up to $1,000.00 per acre on some good hunting grounds')." The Paepke court was unmistakably dealing with Davis's claim that he was "fraudulently induced" to buy the property by Paepke's alleged representation that he already had a buyer in place when he approached Davis with the deal. See, e.g., Paepke, 3 So.3d at 138-39 (stating that "Davis contends that he would not have purchased the property had he known that Paepke did not have a secured buyer in place. . . . the agreement . . . contains no indication that the parties contemplated that a secured buyer was in place. . . . If it was truly Davis's understanding that a secured buyer was in place, Davis could have seen from a plain reading of the contract that the terms of the document he signed contradict this understanding").

> noted, Davis was a well-known and respected businessman who negotiated and entered into contracts on a regular basis.

Paepke, 3 So.3d at 139. Undoubtedly, the appellate court was well aware of any fiduciary duties Paepke may have had to Davis as his partner in their real estate deal. Nevertheless, the court summarily disposed of any complaints that Davis was "defrauded" by Paepke's alleged oral statements by noting that Davis - through the simple expedient of reading the documents he signed - could have discovered any alleged "fraud" on Paepke's part. The same holds true here and is even clearer.

Additionally, Sanders - like Davis - is an experienced businessman who admittedly negotiates and enters into real estate contracts on a regular basis:

> Q. Honestly, I quit counting after about 30 minutes worth of your testimony because it looked like to me you had been involved in many, many real estate transactions where there have been real estate sales contracts.
>
> A. I have been involved in several real estate transactions.
>
> Q. Would you consider yourself to be experienced when it comes to the sale of real estate and the purchase of real estate?
>
> A. I would. [69]
>
> Q. Have you been involved in the actual, I guess, negotiations of real estate and sale and purchase contracts?
>
> A. I have. [70]

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69 Record at 545; Deposition of J. Scott Sanders, page 382:10 - 22.

70 Record at 545; Deposition of J. Scott Sanders, page 383:7 - 10.

Thus, as the trial court rightly observed, "given Sanders's extensive experience in buying and selling real estate, if Sanders was relying on Gant's oral representations in his decision to enter into a $15 Million contract, it seems as though Sanders would have made sure that the contract contained a provision referencing such."[71] Furthermore, if Sanders - again, like Davis in the Paepke case - had simply read the Agreement for Purchase and Sale signed by him, he would have seen no provision stating Appellees were not making a profit. And more importantly had Sanders simply read the Acknowledgment Agreement, the document itself would have plainly and unequivocally refuted what Sanders now claims was his "understanding" of the deal. See Paepke, 3 So.3d at 138-39. Appellants claims are so far fetched as to border on being frivolous. Thus, unless this Court is prepared to "ignore[ ] the fiduciary obligations that existed" in the Paepke case and the Acknowledgment Agreement signed but not read by Sanders, Appellants' claims fail.

3. *Corley v. Ott* does not apply

Undaunted by the raft of Mississippi case law holding that parties are presumed to know and understand the documents they sign, Appellants point the Court to the South Carolina case of Corley v. Ott, 485 S.E.2d 97 (S.Car. 1997), as a case they consider "very similar to the case at hand."[72] However, one need read no further than the first paragraph of the case to see why it is entirely inconsistent with the facts here:

> Appellant Ott held an option to purchase a tract of land known as Lakewood Estates. **Without disclosing his option**,

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71 See Record at 3073; Trial Court Judgment, at page 5.

72 Appellants' brief at 15.

> Ott approached respondent Corley about providing the capital to purchase the land and "making some money on it." Corley agreed. On March 30, 1979, Ott signed a contract to individually purchase Lakewood Estates including 128 lots, a 34.68 acre lot called the "pond tract," and a water plant, for a purchase price of $171,200. **Ott had the property transferred to a third party as trustee in order to conceal this purchase from Corley.** That same day, the trustee contracted to convey the property to Ott and Corley "trading as Lakewood Associates of South Carolina, a general partnership."

Corley, 485 S.E.2d at 97. In the case at bar, it is undisputed that Gant disclosed up front to Sanders the fact that he had an agreement with Orange Grove Utilities to purchase the Bernard Bayou property himself.[73] It is also undisputed that all parties knew the property would be purchased by Gant from Orange Grove Utilities, and re-sold to a "to be formed partnership" by Gant & Shivers, LLC.[74] The Acknowledgment Agreement signed by Sanders on behalf of Appellants clearly disclosed there was a difference in the purchase prices and that difference was being disbursed to Gant & Shiver, LLC. These facts are a far cry from the "active concealment" in Corley, wherein "Ott had the property transferred to a third party as trustee in order to conceal [his own] purchase from Corley." Id. at 97. Indeed, Appellants should be ashamed of themselves for even suggesting to the Court that the two cases are similar.

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73 See Record at 480, Deposition of J. Scott Sanders, at page 131:18 - 132:5. For the same reason, the Appellees cannot have "appropriat[ed] a partnership opportunity" as alleged by the Appellants. See Appellants' brief at 19 et seq. Quite simply, it is undisputed that the opportunity to buy the Bernard Bayou property from Orange Grove Utilities belonged to Charles Gant individually before he ever showed the property to Sanders. See id.

74 See, e.g., Record at 2211; Acknowledgment Agreement, stating that "both the initial purchase by Gant & Shivers, LLC, from the initial seller; and the purchase by Grand Legacy of Mississippi, LP from Gant & Shivers, LLC will be simultaneous closings ...."

C. Find The Pea Under The "Shell Game"

In a final attempt to explain away the signed Acknowledgment Agreement clearly disclosing the difference in the two purchase prices, Appellants have changed their story between their defeat in the trial court and their appeal to this Court. Appellants claimed in the trial court that they did not know there was any difference in the price to be paid for the Bernard Bayou property in the OGU-Gant contract, and the price to be paid for that same property in the G&S-Grand Legacy contract.[75] Having lost this argument in the trial court, Appellants now reverse course before this Court and claim that "[i]n reality," they did know there was a difference in the sale prices, they just believed the difference was meant "to reimburse Gant and Shivers for their out-of-pocket expenses related to the initial contract with Orange Grove."[76] This contrived argument is self-contradictory in several respects.

First, Sanders has testified multiple times, under oath, that Gant supposedly told him the sale prices would be exactly **the same** - in other words, there would be **no** difference in price:

> Q. Do you remember when you reached the deal? Time? Month?
>
> A. We negotiated the percentage-of-profits split it would have been in early November or very late October.
>
> Q. And, at that time, what did you understand you were paying for the property?

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75 Notably, Appellants only obliquely reiterate this claim in their brief before this Court. See Appellants' brief at 7 (stating that "Sanders testified that he **did not know** about the profit and believed that none was made") (emphasis added).

76 Appellants' brief at 23.

A. **The same** thing Charlie was paying for the property.[77]

. . .

Q. Tell me what you and Mr. Williams have discussed about this litigation?

A. We discussed that they were aware that I was supposed to be paying **the same** purchase price as Gant & Shivers.[78]

. . .

Q. You have also alleged that one of the material facts to the Grand Legacy decision to buy this property was that it was going to be for **the same price** Mr. Gant was paying?

A. **Correct.**[79]

By its very definition, the term "the same" means that there is no difference. The Acknowledgment Agreement, however, clearly sets for the fact that there is a "difference." And the difference was to be disbursed to Gant & Shivers, LLC. [80]

Second, Sanders admitted under oath that he never even read the document setting out the fact that there was a difference in the prices:

Q. Mr. Sanders, if you believe you were paying the same price that Gant & Shivers were paying Orange Grove Utilities when you read and signed that document would that sentence not have raised a flag to you?

A. I did not read the document at closing. The document was handed to me in a stack of other documents and **I did not read this document.**[81]

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77 Record at 485; Deposition of J. Scott Sanders at page 150:22 to page 151:7.

78 Record at 526; Deposition of J. Scott Sanders at page 304:23 to page 304:4.

79 Record at 538; Deposition of J. Scott Sanders at page 353:12-18.

80 See Record at 2211 - 2213; Acknowledgment Agreement at page 2.

81 Record at 500; Deposition of J. Scott Sanders, at page 211:14-24.

If, as Sanders testified under oath, he did not read the Acknowledgment Agreement, he could not have known of any language in it setting forth a "difference" from which he could have believed reimbursements could be made. Clearly, Appellants concocted their claim that they thought this language in the Acknowledgment Agreement referred to "out-of-pocket expenses" in a belated attempt to "explain away" the preclusive effect of having signed but not read the Acknowledgment Agreement.

Third, such an argument makes no sense, even if it were supportable on the facts. Appellants claim they were to pay $15 million for the property, and to "reimburse" Gant for his "out-of-pocket expenses" out of the $15 million sales price. But, "reimbursement" has no effect on the "price." If A sells property to B for $10, requiring a $2 deposit from B; then B immediately sells the property to C for **the same** $10, paying $8 of C's sale price to A and keeping $2 to reimburse his "out-of-pocket" deposit, the **sale prices** of the property are **the same** ($10 each); there is no "difference." Simply put, Appellants' reimbursement of Gant's "out of pocket" expenses, even if true, would have had no effect whatsoever on the "sale price," and never could.

Thus, regardless of the criticism Appellants now wish to level at the Acknowledgment Agreement, the plain language of the document discloses to any prudent reader the fact that a profit was being made by Gant & Shivers, LLC on the initial sale. Based on the undisputed evidence in the record, the trial court correctly charged the Appellants with knowledge of the contents of the Agreement for Purchase and Sale, which clearly contained no limitation on "profit," and more importantly the Acknowledgment Agreement which clearly disclosed there was a difference in the

purchase prices and that the difference (the profit) was to be disbursed to Gant & Shivers, LLC. Summary judgment was appropriate.

2. The trial court correctly refused to consider parol evidence seeking to dispute the clear and unambiguous language of the Agreement For Purchase And Sale and the Acknowledgment Agreement, both of which were signed by Appellants.

Appellants' "backup" argument regarding the preclusive effects of the Acknowledgment Agreement and the Agreement For Purchase And Sale is the claim that the trial court should have allowed them to introduce parol evidence in order to argue that these documents did not really mean what they specifically say. The trial court correctly refused to consider any parol evidence, because:

a) The parol evidence rule prohibits admission of extrinsic evidence to vary the terms of the written agreements signed by the Appellants, which unambiguously acknowledge the difference in purchase prices in this matter; and

b) The merger clause in the Agreement For Purchase And Sale completely invalidates Appellants' claims of verbal side agreements with the Appellees, which are not part of the Agreement.

A. <u>The parol evidence rule prohibits admission of extrinsic evidence to vary the terms of the written agreements signed by the Appellants, which unambiguously acknowledge the difference in purchase prices in this matter</u>.

1. <u>The Statute Of Frauds Prohibits Introduction Of Parol Evidence</u>.

It is beyond dispute that the parol evidence rule prohibits admission of extrinsic evidence to vary the terms of a written agreement. Hence, the trial court correctly refused to allow the Appellants to attempt to revise the unambiguous Agreement For Purchase And Sale and the Acknowledgment Agreement signed by all parties in this case.

The contract at issue here is one for the sale of real estate, which by definition subjects it to the operation of the Statute of Frauds. Miss. Code Ann. § 15-3-1.[82] As such, the "promise" allegedly made by Gant to Sanders must have been in writing, or no action for its enforcement will lie. Id. "The principal purpose of the Statute of Frauds ... is to require the contracting parties to reduce to writing the specific terms of their contract, especially an agreement affecting lands for more than one year, and thus to avoid dependence on the imperfect memory of the contracting parties, after the passage of time, as to what they actually agreed to some time in the past." Sharpsburg Farms, Inc. v. Williams, 363 So.2d 1350, 1354 (Miss.1978). Plainly, the situation at hand is exactly the type envisioned by the legislature in enacting the statute.

Appellants contend that at some unspecified time "in the Fall of 2004" Gant allegedly promised to buy the Bernard Bayou property and re-sell it to them for the same price. Is this what the parties "actually agreed to some time in the past," or did the Appellants' "imperfect memor[ies]" interfere over the intervening years to cloud the issue? Plainly, the best evidence of the parties' agreement is the written documentation of that agreement, which all parties could review, revise and become satisfied with before signing. This is the very reason for the existence of the Statute of Frauds. Sharpsburg Farms, Inc., 363 So.2d at 1354. Appellants should not be allowed, long after the deal has been made and the papers signed, to contend that there was some "verbal

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82 Mississippi's Statute of Frauds states, in pertinent part, that "[a]n action shall not be brought whereby to charge a defendant or other party: (c) upon any contract for the sale of lands, . . . unless . . . the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing." Miss. Code Ann. § 15-3-1 (emphasis added).

side agreement" not disclosed in - and, in fact, specifically refuted by - both the written, signed Agreement for Purchase and Sale and the written, signed Acknowledgment Agreement. This is precisely the type of claim that the Statute of Frauds was enacted to prevent.

a. The Statute Of Frauds Applies To This Alleged "Partnership Transaction"

Appellees anticipate that the Appellants will claim the Statute of Frauds does not apply to the alleged "partnership" supposedly formed aboard Gant's boat "in the Fall of 2004." However, assuming solely for purposes of Appellants' argument in this appeal that such a partnership was formed, numerous courts have found that the Statute of Frauds does apply between partners where one partner is transferring real estate to another partner or to the partnership.

For example, in E. Piedmont 120 Assoc., L.P. v. Sheppard, 434 S.E.2d 101 (Ga.App. 1993), the plaintiff sued for breach of an alleged oral agreement to form a joint venture to develop the defendant's real property into a shopping center. The plaintiff in Sheppard claimed the defendant was to contribute his land to a joint venture and the plaintiff would contribute its expertise in developing the property. The Georgia Court of Appeals affirmed the trial court's summary judgment in favor of the defendant. While recognizing that partnership agreements need not be in writing as a general matter, the court held that the Statute of Frauds applied in actions to enforce promises to contribute real property to a partnership or joint venture set up for the purpose of developing and marketing that property. Id. at 102. As the court stated, this holding furthered the goals of the Statute of Frauds:

> **The evidentiary and cautionary purposes of the statute**-to prevent fraud and perjury on the one hand and to ensure that parties are aware of the serious consequences of their actions on the other-**are implicated when a promise to convey an interest in land is made in the context of a partnership** or joint venture agreement just as they are when such a promise is made in any other context."

Id. at 666, 434 S.E.2d at 103. In the case at bar, of course, Appellants allege that Gant and Sanders formed a partnership on Gant's boat, after which Gant supposedly orally promised to convey the Bernard Bayou property to another "to be formed partnership," taking no profit for himself in the conveyance. As noted in Sheppard, this is exactly the sort of situation in which the Statute of Frauds requires such a promise to be in writing, or it will not be enforced. See id.

Similarly, in Johnson v. Gilbert, 621 P.2d 916 (Ariz. App.1980), the plaintiff, a building contractor, and defendant, an owner of real property, allegedly entered into an oral agreement to develop the property as a joint venture. Under the terms of the alleged oral agreement, defendant agreed to convey his real property to the partnership at an agreed price per acre as development progressed. When the defendant later refused to transfer the land to the partnership, the plaintiff filed suit. The court of appeals held that the alleged oral agreement was unenforceable under the Statute of Frauds. Id. at 919. In so doing, the court rejected the plaintiff's contention that oral joint venture agreements for the acquisition, development, and sale of real property are not within the Statute of Frauds. Id. The court distinguished between oral partnership agreements concerning distribution of profits or compensation derived from the sale of land--which do not implicate the statute of frauds--and those which require the transfer

of land from one partner to another. Id. Implicitly finding that the agreement in Johnson involved the transfer of real property from one partner to another (through a partnership entity owned and controlled by the parties), the court held that the Statute of Frauds applied. Id.

Further, in Lewis v. Williams, 191 So. 479 (Miss. 1939), this Court confronted a situation in which the plaintiff contended there was an oral promise given by the defendants to buy certain lands from the State of Mississippi and then later convey the lands to the plaintiff for the same price paid by the defendants to the State. As here, the defendants denied ever having made such a promise. The Court, reversing and rendering the trial court's holding in favor of the plaintiff, held that "[i]f we hold that the oral agreement . . . alleged to have been made by [the defendants] constituted a constructive trust, then, we shall have practically abolished the statute of frauds." Id. at 481. The same holds true in the case at bar. Appellees submit, therefore, that this Court should also find unenforceable the alleged oral agreement for Gant to transfer the Bernard Bayou property to a "to be formed partnership" as being in violation of Mississippi's Statute of Frauds.

B. The real estate contract's merger clause precludes Plaintiffs' claim that the parties orally agreed to identical sales prices on the two transactions

The real estate contract signed by the Appellants contains a merger clause which explicitly states that the written document contains the entire agreement of the parties, and that "no representation, inducement, promises, or **prior agreements, oral or**

written, between the parties . . . **shall be of any force and effect.**"[83] Thus, not only is there no writing memorializing the alleged "promise" made by Gant to Sanders, but the actual contract for the purchase of the subject property, which was signed by Sanders on behalf of the Appellants, states that it contains the parties' entire agreement, and that "no representation, inducement, promises as alleged, or prior agreements, oral or written, between the parties . . . shall be of any force and effect."[84] "By its very definition, an integration or merger clause negates the legal introduction of parol evidence." Condrey v. SunTrust Bank of Georgia, 429 F.3d 556, 564 (5th Cir.2005). Even assuming Gant had made such a promise, then, its effect is negated by both the Statute of Frauds, Miss. Code Ann. § 15-3-1, and the merger clause in the contract itself. See Condrey, 429 F.3d at 564.

In Condrey, the Fifth Circuit explained that "an integration or merger clause . . . is a 'provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document.'" Id. at 564 (quoting BLACK'S LAW DICTIONARY 683 (6th ed.1983)). Further, in B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So.2d 483 (Miss. 2005), this Court emphasized the purpose of a merger clause:

> Merger clauses are routinely incorporated in agreements in order to signal to the courts that the parties agree that the contract is to be considered completely integrated. A completely integrated agreement must be interpreted on its

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83 Record at 2168 - 2186; Agreement for Purchase and Sale,, at paragraph 18(b) (emphasis added).

84 Record at 2168 - 2186; Agreement for Purchase and Sale, at paragraph 18(b) (emphasis added).

> face, and thus the purpose and effect of including a merger clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of **side agreements** in a proceeding in which a court interprets the document. See 2 FARNSWORTH ON CONTRACTS § 7.3 at 215-25.

Id. at 490 (emphasis added) (quoting Security Watch, Inc. v. Sentinel Systems, Inc., 176 F.3d 369, 372 (6th Cir. 1999)). The merger clause in the real estate contract signed by Sanders specifically states that "no representation, inducement, promises, or prior agreements, oral or written, between the parties . . . shall be of any force and effect."[85] Importantly, both Sanders and Pankratz testified that they understood the meaning of the merger clause:

> Q. What does it mean to you to say the following: This agreement constitutes the entire agreement between the parties; what does that mean to you?
>
> A. That this is the entire agreement.[86]
>
> . . .
>
> Q. Yes, sir. In fact, if you would, have you ever see this sort of provision? Let me just read it on Page SOJ 1225, for the record, Paragraph 18b., "This agreement constitutes the entire agreement between the parties hereto and, unless specified otherwise herein, no representation, inducement, promises, or prior agreements, oral or written, between the parties, or made by any agent on behalf of the parties or otherwise, shall be of any force and effect."
> Do you understand what I just read to you?
>
> A. I understand what you read to me.
>
> Q. Do you understand what that means?

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85 Record at 2168 - 2186; Agreement for Purchase and Sale, at paragraph 18(b) (emphasis added).

86 Record at 558, Deposition of J. Scott Sanders, at page 435:14-19.

A. I understand it's boilerplate in every contract.

Q. What it really means is if it's not in this agreement, then it's not binding. You understand that, don't you?

A. **Yes, that's what it's intended to mean.** But I think our situation was different.[87]

Furthermore, Pankratz's observation that he believes the quoted language is "boilerplate" does not negate Appellants' duty to read and understand it, nor does it negate the enforceability of the language. As this Court has stated, "we hardly accept the notion that 'boilerplate' contract language is unenforceable." Titan Indemnity Co. v. Hood, 895 So.2d 138, 147 (Miss. 2004). Thus, the merger clause in the real estate contract clearly negates the Appellants' claim that the parties agreed there would be no "***difference* in the initial Purchase Price** paid by Gant & Shivers, LLC, and the **purchase price paid for by Grand Legacy of Mississippi, LP**" - a provision which is indisputably not contained in the purchase and sale agreement.

C. The "Fraud Exception" Does Not Apply To Defeat The Statute Of Frauds And The Parol Evidence Rule

Appellants assert that their fraud allegations create an exception to the Statute of Frauds. In certain circumstances, a party alleging that fraud has been committed may avoid the absolute bar of the Statute of Frauds and the parol evidence rule. See, e.g., Paepke, 3 So.3d at 138: "'Parol evidence is admissible to show that the making of a written contract was procured by fraudulent representations. Evidence of this kind does

87 Record at 2605; Deposition of Duane Pankratz, at page 141:11 - 142:21 (emphasis added).

not vary the written contract; it destroys and avoids it."[88] Id. (quoting Turner v. Terry, 799 So.2d 25, 33-34 (Miss. 2001). However, the exception simply does not apply where, as here, Appellants could have discovered the alleged fraud merely by reading the document sought to be modified by the alleged fraudulent representation. See id.

In Paepke, "Davis contend[ed] that he would not have purchased the property had he known that Paepke did not have a secured buyer in place." Id. at 138. Similarly, the Appellants in this case contend they "would not have purchased the subject property" had they known that the purchase prices were not identical.[89] Regarding this contention, the Court of Appeals in Paepke noted that "[i]f Davis felt the purchase of the property was based on Paepke's statements regarding a potential buyer, it seems that Davis would have instructed his attorney to include that information in the agreement." Id. at 139. Just as in Paepke, Sanders on behalf of Appellants certainly could have insisted that a clause be inserted in the purchase agreement with Gant & Shivers to the effect that the purchase price was to be identical to the purchase price paid by Gant to Orange Grove Utilities.

In fact, Sanders testified that if he felt a certain type of provision needed to be in a contract, he would not hesitate to make certain that the provision was included:

> Q. Has there ever been an occasion where you felt there needed to be a particular type provision in the

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88 Notably, the Appellants in this case do not seek to "avoid" the contract. Instead, they apparently wish to have their cake and also eat it, in that they seek to keep the property they bought, while at the same time lowering the price they agreed was fair. See Record at 549; Deposition of J. Scott Sanders at page 398:3-7.

89 See Record at 50 - 51; First Amended Complaint, page 14, paragraph 64.

contract and you instructed your attorney to be sure that appeared in the contract?

A. Yes.

Q. You would not hesitate to do that if you felt like it was necessary?

A. If I felt it was necessary I would not. [90]

However, he did not do so. Instead, the Agreement For Purchase And Sale contains no such provision. Moreover, the Agreement specifically states that no such side agreements "oral or written, between the parties . . . shall be of any force and effect."[91] In Paepke, the court noted that the written agreement "contain[ed] no indication that the parties contemplated that a secured buyer was in place," and that Davis "could have seen from a plain reading of the contract" that no secured buyer was in place. See id. at 139. Here, a plain reading of the contract also contained no indication there was to be no "difference" in the prices. But more importantly, the "difference" in the two prices was clearly revealed by a plain reading of the Acknowledgment Agreement, which states that "the ***difference*** **in the initial Purchase Price** paid by Gant & Shivers, LLC, **and the purchase price paid for by Grand Legacy of Mississippi, LP**, shall be disbursed to Gant & Shivers, LLC."[92]

Therefore, even assuming the truth of Sanders's claim that he was "induced" to buy the Bernard Bayou property because he thought he was paying the same price Gant

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90 Record at 545 - 46; Deposition of J. Scott Sanders, at page 383:19 - 384:3.

91 Record at 2168 - 2186; Agreement for Purchase and Sale, at paragraph 18(b) (emphasis added).

92 See Record at 2211 - 2213; Acknowledgment Agreement, at page 2.

paid for it, Appellants cannot now "be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract.'" Paepke, 3 So.3d at 139. Even more so than in Paepke, then, the Appellants in this case could not rely on the "fraud exception" to negate the clear language of the signed documents, and the trial court correctly refused to consider any of their alleged parol evidence.

D. Appellants' "fraud exception" cannot be established by clear and convincing evidence

"Fraud is never presumed." Metropolitan Life Ins. Co. v. Hall, 118 So. 826, 827 (Miss. 1928). Rather, Plaintiffs must prove their claims of fraud by **clear and convincing evidence**. Holland v. Peoples Bank & Trust Co., 3 So.3d 94 (Miss. 2008). Clear and convincing evidence is

> that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

Travelhost, Inc. v. Blandford, 68 F.3d 958, 960 (5th Cir.1995). Clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the level of "clear and convincing." In re C.B., 574 So.2d 1369, 1375 (Miss.1990). Measured against this standard, there simply is no "clear and convincing evidence" of any fraud in this case.

There is no dispute that Gant & Shivers, LLC made a profit on the sale of the Bernard Bayou property. Plaintiffs' sole claim is that Gant falsely represented that he would sell the property to them for the same price as he purchased it, thereby not

making any profit on the sale. The evidence for and against this proposition consists exclusively of the testimony of Gant and Sanders. Sanders says Gant told him no profit would be made;[93] Gant denies having made any such representation.[94] However, "[t]he hope that a jury might disbelieve a witness . . . is too slender a reed for avoiding summary judgment, especially where, as here, the burden is clear and convincing evidence. Even if a jury were to find that the testimony of [a witness] lacked credibility, no reasonable jury could find that this lack of credibility constituted 'clear, cogent, and convincing evidence' of fraud." Petra Intern. Banking Corp. v. First American Bank of Virginia, 758 F.Supp. 1120, 1141 (E.D.Va. 1991) (quoting Patrick v. Summers, 369 S.E.2d 162, 164 (Va. 1988)).

In Aponaug Mfg. Co. v. Collins, 42 So.2d 431 (Miss. 1949), the Plaintiff, Mrs. Collins, contended that she was tricked into signing a release of her claims for an on-the-job injury by the defendant's statement to her that the papers she was signing were simply a recitation of how the accident occurred. Aponaug Mfg. Co., 42 So.2d at 434-35. Like the claims by Sanders in this case, Collins claimed she never read the papers, but signed them based on what she was allegedly told by the defendant. See id. According to the appellate court, "[s]he had no corroboration of her evidence." Id. at 435. The defendant denied Collins's version of events and contended that the content and effect of the release was fully explained to Collins. See id. at 436. The Mississippi Supreme

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93 Record at 480; Deposition of J. Scott Sanders, page 132 lines 8 to 21. The Agreement for Purchase and Sale and the Acknowledgment Agreement refute such.

94 Record at 1097; Deposition of Charles Gant, page 205 lines 5 to 15.

Court, stated "[t]o say the least, [Collins] failed to establish her claim of fraud . . . by clear and convincing proof." Id.

Furthermore, in Hall, supra, the Mississippi Supreme Court held that the Plaintiff's evidence of fraud was insufficient to submit to the jury when the plaintiff testified to one version of events, and the defendant testified to a contrary version. In Hall, the plaintiff bought an insurance policy from an agent of the defendant, and claimed she told the agent she was 69 years old at the time of her application. The policy application, however, indicated the plaintiff was only 62 years old at that time. Hall, 118 So. at 826-27. Moreover, "the agent of appellant, who induced appellee to apply for the insurance and filled out her application therefor, testified that he filled out the blanks in the application in accordance with the facts as stated to him at the time by appellee. In other words, that appellee stated at the time the application was made that her age was 62 instead of 69." Id. at 827. Faced with the two witnesses' conflicting testimony, the Supreme Court found the evidence insufficient to submit to the jury on the question of fraud and therefor, reversed and rendered the trial court judgment. Id. at 827.

1. The evidence before the trial court was ripe for summary judgment

"[W]hether evidence of fraud charged in a civil case is clear and convincing is ordinarily for the jury, but where it manifestly falls below that standard . . . the judge should direct a verdict for the opposing party." Aponaug Mfg. Co., 42 So.2d at 436-37. Here, the Appellants' "proof" that Gant promised to sell the Bernard Bayou property for no profit consisted solely of the uncorroborated testimony of Scott Sanders. That "proof" is directly refuted by both the testimony of Charles Gant **and more importantly by the**

Agreement for Purchase and Sale and the Acknowledgment Agreement Sanders himself signed. Thus, the Appellants' evidence "manifestly [fell] below" the standard of "clear and convincing evidence," and summary judgment was appropriate. See id.

E. Gant's alleged promise to sell the Bernard Bayou property for the same price he paid, even if true, would be a non-actionable promise of future conduct

The evidence before the Court clearly fails to establish any fraud, misrepresentation, or mis-statement of fact on the part of the Appellees. The crux of Appellants' argument is that Gant allegedly told Sanders "in the Fall of 2004" that Gant would not make a profit on the sale of the Bernard Bayou property, but would sell it to Sanders for the same price he (Gant) paid to acquire the property from Orange Grove Utilities.[95] Gant's alleged promise occurred "in the Fall of 2004."[96] Gant & Shivers, LLC sold the property to the Plaintiffs in April 2005.[97] Even if true, then, Gant's alleged promise to sell the Bernard Bayou property to Grand Legacy for the same price he paid would be a promise of future conduct which would not support a claim of fraud or misrepresentation. "[A] claim of fraudulent representation cannot be predicated on a promise relating to future actions. Fraudulent misrepresentations must be related to past or presently existing facts." Spragins v. Sunburst Bank, 605 So.2d 777, 781 (Miss.1990).

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95 See, e.g., Record at 41; First Amended Complaint, page 5 paragraph 24.

96 See, e.g., Record at 41; First Amended Complaint, page 5 paragraph 24.

97 See Record at 2168 - 2186; Agreement for Purchase and Sale.

In Spragins, the plaintiff was the long-time manager of Refuge Plantation, a 1975 acre farm in Washington County, Mississippi. Id. at 778. When the farm fell on hard times, Spragins negotiated with Sunburst Bank for a Prospective Right of First Refusal to buy the property from Sunburst Bank after foreclosure. See id. at 779. However, a third party outbid Sunburst Bank at the foreclosure sale. Spragins subsequently filed suit against Sunburst Bank, alleging the bank fraudulently represented that they would be the successful bidder at the foreclosure sale. See id. at 779. In affirming the trial court's grant of summary judgment, the Mississippi Supreme Court held that "Sunburst Bank allegedly made promises to buy Refuge Plantation. This is a promise of future conduct and clearly excluded from recovery under an intentional misrepresentation claim." Id. at 781.

According to Sanders, Gant allegedly promised to sell the Bernard Bayou property on some future date, for the same price he paid to acquire it. Just as the promise to buy property allegedly made in Spragins was a "promise of future conduct," so too would be the promise to sell property allegedly made by Gant. See Spragins, 605 So.2d at 781. And, just as in Spragins, even assuming Gant made a promise to later sell the subject property at the same price, such a promise would be "a promise of future conduct and clearly excluded from recovery under an intentional misrepresentation claim." Id. at 781.

3. The trial court correctly granted summary judgment to Stephen Shivers individually.

As the trial court correctly found, "[t]he basis of the Plaintiffs' Complaint involve[d] alleged misrepresentations by Gant to the Plaintiffs."[98] The trial court further noted the undisputed facts that "Shivers was not present during the conversations in which Plaintiffs claim that Gant promised them he would not make a profit on the sale of the Bernard Bayou property [; and] . . . Shivers never made any representations at all regarding the property or the purchase price to either [Sanders or Pankratz]."[99] Accordingly, "[t]here is no evidence to support that Shivers acted as an individual in any aspect of the transaction,"[100] and summary judgment as to Stephen Shivers individually should be affirmed.

A. Appellants' argument does not establish any wrongdoing by Stephen Shivers in his individual capacity[101]

Appellants contend on appeal that Shivers should be held "personally liable for his conduct in signing a false document and affirmatively concealing material information from his partners."[102] Appellants' argument lacks merit. The record clearly shows that Shivers signed all of the closing documents in his capacity as managing member of Gant

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98 Record at 3073; Trial Court Judgment at 5.

99 Record at 3073; Trial Court Judgment at 5.

100 Record at 3073; Trial Court Judgment at 5.

101 As noted in prior sections, there was no evidence presented in the trial court that Charles Gant or Gant & Shivers, LLC did anything wrong either, and Appellees do not intend by the language of this section to indicate otherwise.

102 Appellants' brief at 40.

& Shivers, LLC, not in his individual capacity.[103] Furthermore, Stephen Shivers individually was never a partner in any aspect of the matter before this Court. The "to be formed partnership" to which Appellants continually allude envisioned Grand Legacy, LLP and Gant & Shivers, LLC as a proposed partnership.[104] Grand Legacy of Mississippi, LP, when it was eventually formed in March 2005, was comprised of Grand Legacy, LLP and Gant & Shivers, LLC.[105] Finally, even assuming (which is denied and disproven by the documentary evidence in the case) that Gant ever told Sanders he would sell the Bernard Bayou property for no profit, Appellants' own brief to this Court notes that Shivers was never aware of any such alleged statement:

> Q. Did Mr. Gant, to your knowledge, tell Mr. Sanders, regarding any property, that Gant was going to sell it to Sanders or Grand Legacy for the same price that Gant was acquiring it for?
>
> A. **No, sir.** I would never have participated if we were going to do that.[106]

Thus, Shivers expected to make a profit on the sale and the Acknowledgment Agreement signed by the Appellants establishes that, in fact, a profit was made. There was simply nothing more for Shivers to "disclose" to the Appellants. And, as the trial court pointed out, "[t]he **sworn testimony** of both Sanders and Pankratz establishes that Shivers never

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103 See Record at 129 (Limited Partnership Agreement); Record at 141(Orange Grove HUD-1 settlement statement); Record at 143 (GLMS HUD-1 settlement statement); Record at 2189 (Assignment of Purchase and Sales Agreement); Record at 2185 (Second Amendment to Purchase and Sale Agreement).

104 See, e.g., Record at 2168 - 2186; Agreement for Purchase and Sale.

105 See Record at 2088 - 2120; Limited Partnership Agreement, at page 2088.

106 Record at 2037; see also Appellants' brief at 45(emphasis added).

made any representations at all regarding the property or the purchase price to either of them."[107] On the undisputed facts, therefore, there is nothing in the evidence before this Court that would remove Stephen Shivers' actions from his capacity as a member of Gant & Shivers, LLC, and summary judgment as to Shivers personally should be affirmed.

CONCLUSION

Appellants claim that they made a deal to buy the Bernard Bayou property from the Appellees wherein there would be no "difference in the initial Purchase Price paid by Gant & Shivers, LLC, and the purchase price paid for by Grand Legacy of Mississippi, LP." That claim is directly refuted by the signed Acknowledgment Agreement which states that there is a "difference in the initial Purchase Price paid by Gant & Shivers, LLC, and the purchase price paid for by Grand Legacy of Mississippi, LP" and that difference *"shall be disbursed to Gant & Shivers, LLC"*. The Agreement for Purchase and Sale which the Appellants signed, contains absolutely no indication that there was to be no "difference in the price;" however, the Agreement for Purchase and Sale does state that it contains the entire agreement of the parties, and that there are no agreements between the parties that are not contained in the Agreement for Purchase and Sale. Anyone reading the Agreement for Purchase and Sale could readily see it had no provision for identical prices, and certainly anyone reading the "Acknowledge Agreement" would absolutely know there was a difference in the prices.

Accordingly, this case is not about fiduciary duties, fraudulent inducement, or the relationship between partners. Those issues are simply red herrings raised by the

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107 Record at 3073; Trial court judgment at 5 (emphasis added).

Appellants in a desperate attempt to avoid the effect of the Statute of Frauds and long-standing Mississippi precedent holding parties to be responsible for knowing the contents of contracts that they sign. At its core, this case involves nothing more than a sale of real estate, and the question of whether this Court is willing to overturn decades of settled precedent enforcing the Statute of Frauds and imposing upon parties the requirement that they be deemed to know and understand the contents of contracts when they choose to sign them.

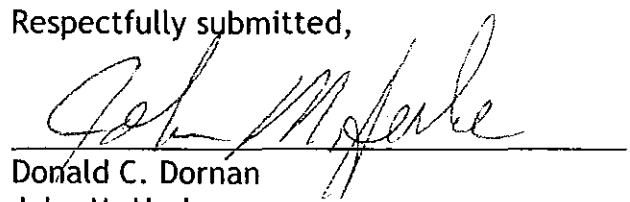
Courts across the country have consistently applied the Statute of Frauds to bar claims of fraud such as those made by the Appellants here with respect to real estate contracts, even when the real estate transfer took place in the context of a partnership. See, e.g., Davis v. Paepke, 3 So.3d 131 (Miss. App. 2009); E. Piedmont 120 Assoc., L.P. v. Sheppard, 434 S.E.2d 101 (Ga.App. 1993); Johnson v. Gilbert, 621 P.2d 916 (Ariz. App.1980). Yet, years after the documents were signed and the deal for the Bernard Bayou property had been made, the Appellants come to this Court claiming that the deal they made to buy the Bernard Bayou property from the Appellees is not the same deal that is specifically set out in the documents that they voluntarily signed.

Long-standing Mississippi precedent does not allow such claims to proceed in the face of clear, unambiguous, and signed documents detailing precisely the opposite of what the Appellants now claim. This is so even if, as the Appellants claim, the Bernard Bayou property was transferred from Gant & Shivers, LLC to the Appellants in the context of a partnership arrangement. Davis v. Paepke, 3 So.3d 131 (Miss. App. 2009); E. Piedmont 120 Assoc., L.P. v. Sheppard, 434 S.E.2d 101 (Ga.App. 1993); Johnson v.

Gilbert, 621 P.2d 916 (Ariz. App.1980). Quite simply, real estate and/or contract law as we know it would be completely obliterated if the Appellants' claims were allowed to proceed. Indeed, this is the precise reason for the enactment of Mississippi's Statute of Frauds. Thus, regardless of whether the Court ultimately finds that a partnership was created when the Appellants claim it was, the Statute of Frauds applies to completely negate the Appellants' claims because there is no writing setting forth the purported deal the Appellants now claim that they made for the Bernard Bayou property. Furthermore, the Appellants' claim of "fraudulent inducement" is simply not viable because they could have seen and corrected the alleged fraud merely by reading the documents that they voluntarily signed and which specifically state the opposite of what the Appellants now claim. Davis v. Paepke, 3 So.3d 131 (Miss. App. 2009); 17A AM. JUR. 2D CONTRACTS § 214.

As set forth more fully above, no partnership was created during the meeting aboard Charles Gant's boat in the Fall of 2004. However, based on the Agreement For Purchase And Sale, and the Acknowledgment Agreement - both of which the Appellants signed - this Court should apply the Statute of Frauds and Mississippi case law regarding the binding effect of contracts to find that the trial court judgment in favor of the Appellees should be affirmed, regardless of whether the sale of the Bernard Bayou property took place within the context of a partnership or not.

Respectfully submitted,



Donald C. Dornan
John M. Herke
Tim C. Holleman
Counsel for Appellees

Of Counsel:

DONALD C. DORNAN, JR. (MS BAR NO [redacted]
JOHN M. HERKE (MS Bar No. [redacted]
Spyridon, Palermo & Dornan, L.L.C.
P.O. Box 154
Biloxi, MS 39533
228-374-2013
228-374-2250 - Fax

TIM C. HOLLEMAN, ESQ. (MS BAR NO [redacted]
Boyce Holleman & Associates
P.O. Drawer 1030
Gulfport, MS 39502
Attorneys for Appellees

CERTIFICATE OF SERVICE

I, **JOHN M. HERKE**, one of the attorneys for the Appellees Charles M. Gant, Stephen L. Shivers, Sr., Individually, and Gant & Shivers, LLC, do hereby certify that I this date served by FedEx overnight delivery a copy of the foregoing Brief of Appellees to all counsel at their regular mailing addresses as follows:

David Dunbar, Esquire
G. Clark Monroe, II., Esquire
Dunbar Monroe, PLLC.
270 Trace Colony Park, Ste. A
Ridgeland, MS 39157

This, the 29th day of September, 2010.

John M. Herke